



2012 Essential Guide Article



What To Do When the OHS Inspector Arrives

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One of the most challenging circumstances that an employer may find itself in is dealing with the OHS regulator through its Inspector. While some provinces call the Inspectors "Officers" the primary role of an OHS Field Regulatory Representative is that of an Inspector. This article will review the role of OHS Inspectors, their powers, and the rights and responsibilities that employers and senior management have with respect to the attendance of an OHS Inspector at their workplace.

In 2009, the most recent year for which national statistics are available, there were over 260,000 accepted lost time claims by Workers' Compensation Boards across Canada. There were also 939 fatalities reported for which compensation was paid under the Workers' Compensation system. That is an average of 18 work-related deaths per week, a staggering statistic.

Virtually every time there is a workplace incident, accident or death, OHS regulators become engaged investigating possible legal contraventions. However, it is not just the role of the OHS Inspector as an investigator that may bring them to your workplace. They may also respond because of a complaint, because of a work refusal, or simply as an unannounced inspection.

The following are a number of steps that we recommend you consider taking when dealing with an OHS Inspector who arrives at your workplace. This list is not necessarily exhaustive, and is not to be taken as definitive or specific legal advice. Merely, these are some guidelines to consider in dealing with an OHS Inspector.

1. Verify the credentials of the OHS Inspector.

Although this is self-evident, if you are not familiar with or have no prior experience with the OHS Inspector, it is

only appropriate for the government OHS Inspector to provide proof of who they are and their credentials. OHS Inspectors do not normally wear distinctive uniforms, or have marked vehicles, so it is always wise to politely request to see their credentials.

2. Ask the reason for the OHS Inspector's attendance. This is a very important but often overlooked second step in your dealing with the OHS Inspector in your workplace. If an OHS Inspector indicates that they are there on a routine inspection, then they have broader rights than if they are there for an investigation of a potential offence under the applicable health and safety legislation. Therefore, politely and specifically ask the reason for the visit by the OHS Inspector to your workplace.
3. Notify members of the Joint Health and Safety Committee, if any, and in particular worker members.

The Joint Health and Safety Committees is an integral part of the internal responsibility system under Canadian OHS law. Virtually every Canadian jurisdiction provides for the establishment of Joint Health and Safety Committee's and their engagement with the OHS Inspector at the time of the visit. However, if an OHS Inspector is simply following up on a complaint, it may deal directly with management initially. However, the role of the Joint Health and Safety Committee, and its right to be informed of Ministry of Labour visits is an important step to remember when an OHS Inspector attends at your worksite. Be aware of the OHS Inspector's legal authority.

The powers of OHS Inspectors, when it is an inspection, are very broad and compliance based. Section 54 of the *Occupational Health and Safety Act* of Ontario, illustrates the breadth of the authority that an Inspector

may wield on an inspection. They may pick up or use equipment or machinery, they may conduct testing, they may require production of drawings and documents, and they may be assisted by a person with technical or professional knowledge. During an inspection, the focus is on compliance, not enforcement of the OHS legislation.

4. Determine if the Inspection becomes an investigation:

This is a rather problematic area of the law, and is difficult for an employer, without the benefit of legal advice, to assess when an inspection becomes an investigation. The Supreme Court of Canada in the *Jarvis* case made it clear that there is an important distinction between an inspection and an investigation. An inspection is a routine regulator visit by an OHS Inspector for the purpose of general compliance. An investigation by an OHS Regulator triggers an adversarial relationship between the state and the corporate employer and invokes various rights both at common law and under the *Charter of Rights and Freedoms*. The *Charter of Rights and Freedoms* generally provides the right to retain and instruct legal counsel, the right to be free from unreasonable search and seizure, the freedom from unlawful detention and the right of an individual suspect to remain silent in the face of a request for a statement or confession. In short, it is important for an employer representative to have initial and ongoing dialogue with the OHS Inspector to determine if and when the investigation becomes an investigation.

5. Individuals have a right to be cautioned and advised of their right to legal counsel by the OHS Inspector.

Subsection 10(b) of the *Charter of Rights and Freedoms* states that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right. Since OHS inspectors do not have the power of arrest under Canadian OHS laws, the only issue to focus on is whether an individual has been detained by the OHS Inspector. The Supreme Court of Canada in the *Therens* case held that this right was engaged not only on arrest but also detention. Detention is defined as any restraint of liberty other than an arrest where the OHS Inspector assumes control over a person's movement by some command that may have legal significance. In such a case, the

OHS Inspector must advise the individual of their right to retain and instruct legal counsel.

6. When legal counsel request presence during the taking of a statement.

If an OHS Inspector requires a formal statement from an individual, there must be a determination of whether or not that individual is at risk of being charged personally with an offence under the applicable OHS legislation. Inquiries should be made of the OHS Inspector to determine if they have reasonable and probable grounds to believe that the individual has committed the offence. If they will not give a strong assurance that the individual is merely a witness, and not a subject of possible charges, then the individual should obtain legal advice and determine whether or not they should give a statement. The statement given by the corporate representative, either management or supervisory level, may have an impact on the corporation, as well as personally impact the potential witness. The statement given by such a witness, to a person in authority, and voluntarily, can be admitted as evidence of the proof of the facts of the statement at a later OHS prosecution of that individual.

7. What to do when a search warrant is being executed by an OHS Inspector.

OHS Inspector's rarely use the power of search warrants to obtain evidence. However, if they have reasonable and probable grounds to believe that a offence has been committed, they are obliged to seek the authority of a search warrant under applicable OHS legislation, to secure documents, and other physical evidence from the corporate employer. Legal counsel should be contacted immediately if OHS Regulators, often with police in accompaniment, engaged in contravention of applicable OHS legislation.

8. The power of OHS Inspectors to issue Orders/Directions.

One of the two primary means by which OHS legislation is enforced is by way of orders or, as they refer to them in federally regulated workplaces, under the *Canada Labour Code Part II*, directions. Orders are a clear and serious statement that the recipient of the Order, often the employer, has contravened or broken the applicable OHS legislation or regulations. The OHS Inspector must

reasonably believe that there has been a contravention before they can issue such an Order. Therefore, such Orders should be very seriously reviewed, by legal counsel, to determine if they potentially impact future liability of the corporation or other recipient of the Order.

9. Appealing an OHS Inspector's Order.

Every jurisdiction in Canada provides for the appeal or review of Orders issued by OHS Inspectors. Inspectors are clearly human and not infallible. They make mistakes, from time to time. Therefore, if an OHS Inspector has issued an Order, that the corporate employer or other recipient of the Order disagrees with, they should appeal the Order. In Ontario, an appeal is made to the Ontario Labour Relations Board, and has a strict time limitation of 30 days. Therefore, if the appeal is received after the expiration of the 30 day limitation, it will be rejected as "out of time" by the Ontario Labour Relations Board. Therefore, it is important to commence an appeal within the prescribed time limits by the applicable OHS legislation. One of the advantages of appealing OHS Inspector's Orders, is that the mediation process allows for a frank dialogue and possible settlement and restoration of your relationship with the OHS Inspector, other than simply having the Inspector recommend charges under the applicable OHS legislation.

10. How can legal counsel assist during an OHS Inspector's attendance at your workplace.

The role of legal counsel can be three-fold. First, your lawyer can help advise you of your rights and obligations under applicable OHS legislation.

Second, legal counsel may sit in on the interview of supervisory managerial staff on behalf of the corporate employer, to ameliorate the anxiety and tactics of an OHS Inspector with those individuals.

Third, legal counsel can advise on the appeal of Orders, follow up initiatives from the OHS Inspector's visit and provide strategic advice with respect to potential legal liability.

In closing, it is important to know your rights and responsibilities when an OHS Inspector arrives. If you have in-house legal counsel or an OHS director, they should be lead contact with the OHS Inspector. However, often outside counsel can quickly assess situations and from their experience, provide insight and expert advice on how to deal with the OHS Inspector when they arrive.

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