

# Obligations Under the Occupation Health & Safety Act



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**AIRD BERLIS**



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*“It is worse than a crime, – it is a blunder!”*

Joseph Fouché 1759-1820

# Overview

## *The Occupational Health & Safety Act, 1990*

- The legal structure of the Act
- The overlapping responsibilities that the Act creates
- The duties that the Act imposes, and on whom
- Routes of enforcement under the Act (Inspections & Orders / Investigations & Prosecutions)

## Workplace Health & Safety under the Criminal Code

- The elements of criminal negligence
- How corporations are held liable under the criminal law
- The penalties on conviction

# Overview continued

## The Defences

- What does due diligence mean?
- What is a mistake of fact?

## How you can protect yourself, and your company

- Compliance in five steps
- Compliance and subcontractors
- Preparing for inspections



# *The Occupational Health & Safety Act, R.S.O.* 1990, c.O1

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- The Act sets out general requirements that are supplemented by specific regulations
  - Creates overlapping responsibilities for all workplace parties (ss.22-32)
  - Appoints Inspectors, and gives them inspection & investigation powers (s.6, s.54, and s.56)
  - Empowers Inspectors to issue Orders requiring compliance (s. 55, ss. 55.1-55.3, and s.57)
  - Establishes a procedure for appealing Orders, and staying Orders pending appeal (s.61)
  - Creates offences for non-compliance, and provides for penalties (s.66)
- The Act's regulations prescribe particular requirements related to specific industry sectors, operations, substances and basic training
  - These regulations work in tandem with the more general provisions of the Act, to particularize and define the scope of the duties imposed by the Act.
    - i.e. construction, industrial, noise, designated substances, confined spaces, WHMIS, etc.

# The Internal Responsibility System

## *Everyone has a say...*

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- Everybody has a stake in the individual and collective safety of the workplace
- **Workers** have a say through **Joint Health and Safety Committees** and through the **right to refuse work**
- **JHSC**
  - JHSCs are required if more than 20 workers regularly employed at workplace
  - Half the members are to be non-management
  - One worker member and one management member must be certified
  - JHSCs are to identify dangers and make recommendations, and they have the right to be consulted and to receive tests that are undertaken
  - JHSCs must inspect the workplace once a month, and convene meetings every three months

# Workers and the Internal Responsibility System

- **The Right to Refuse Work**

- Workers can refuse work where the conditions are likely to endanger them
- If they do refuse, they must report that to the employer, and the employer must investigate with the worker in the presence of a worker JHSC member
- If the investigation doesn't resolve the matter, the worker can continue to refuse, and an inspector shall be notified
- The inspector will investigate the concern with the employer, the worker, and the worker JHSC member, and issue a written decision
- Other routes are available to certified JHSC members to stop work (ss. 45 and 47)

# Employers and the Internal Responsibility System

- Who is an employer?
  - Employer is a defined term (s.1(1))
  - Employer includes subcontractors' employees (**Wyssen**)
  - There can be multiple employers at a site, each with liability (**Enbridge Gas**)
- What are an employer's obligations?
  - Employers have broad obligations under ss. 25, 25.1, and 26 of the Act.
    - S.25(1) requires that prescribed equipment, procedures and materials be provided, and used
    - S.25(2) contains much broader requirements, including providing information, instruction and supervision, ensuring that all reasonable precautions are taken, and that workers are acquainted with hazards
    - Other obligations arise with respect to (i) the development and implementation of workplace violence and harassment policies (s.32.01), (ii) notifications of accidents (s.51-53), and (iii) compliance with inspections (s.62)

# Harassment – Municipal Context

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## ***Calgary (City) v. Canadian Union of Public Employees, Local 38 (MP Grievance), [2013] A.G.A.A. No. 47***

- **Facts:**

- The employee, a unionized clerk, was sexually assaulted (fondled at her desk) on multiple occasions by a senior foreman
- The employee told her Manager of the assaults without naming the perpetrator, but gave sufficient information to suggest who it was
- The Manager responded by installing an extension to the employee's desk to make it more difficult for the perpetrator to approach her
- The Manager then left for vacation, leaving the senior foreman in charge
- The assaults continued. The employee captured pictures using a spy-cam, which she took to the Director
- The Manager suspended the senior foreman but determined the pictures were "inconclusive"

# Harassment – Municipal Context

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## ***Calgary (City) v. Canadian Union of Public Employees, Local 38 (MP Grievance), [2013] A.G.A.A. No. 47***

- **Facts (cont.):**

- After the senior foreman was suspended, someone left rat poison on the employee's keyboard. An investigation was launched but never completed
- The employee was essentially rebuked her for causing trouble and management threatened to discipline her
- Following a course of intimidating and harassing behavior from her superiors, the employee was diagnosed with acute stress and was twice admitted to hospital with suicide ideation
- Her grievance claimed general and punitive damages in addition to loss of past and future income. The employer argued that the union's claims were excessive and that she was entitled to receive only general damages

# Harassment – Municipal Context

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## ***Calgary (City) v. Canadian Union of Public Employees, Local 38 (MP Grievance), [2013] A.G.A.A. No. 47***

- **Decision:**

- Grievance allowed. The City was required to pay approximately \$800,000 in damages for its failure to respond to the persistent workplace harassment
- The arbitrator stated that the City's response was "largely flawed... at all levels"
- The City was order to pay general damages of \$125,000; loss of past income of \$135,630; loss of future income of \$512,150; pension loss of \$68,243; and special damages of 28,000. Punitive damages were not ordered because the compensatory damages were sufficient to accomplish the purpose of retribution, deterrence and denunciation

# OHSA – Workplace Violence and Harassment

## Overview

- Part III.0.I of the OHSA creates specific duties regarding workplace violence and workplace harassment for employers
- The general duties under the OHSA for employers [s. 25] also continue to apply with respect to workplace violence [s. 32.0.5]



# OHSA – Workplace Violence and Harassment

- **Policies**

- Employers must prepare policies with respect to workplace violence and workplace harassment and review as often as is necessary, but at least annually [subs. 32.0.1(1)]
- If six or more regularly employed workers, policies must be in writing and posted where workers will likely see them [subss. 32.0.1(2) and (3)]

- **Programs**

- Employers must develop and maintain programs to implement the policies in accordance with the particular requirements [ss. 32.0.2 and 32.0.6]

- **Information and instruction**

- Employers must provide appropriate information and instruction to workers on the contents of the policies and programs, and any other prescribed information [subs. 32.0.5(2) and s. 32.0.8]

# OHSA – Workplace Violence and Harassment

- **Assessment of risks for workplace violence**

- Employers must assess the risk of workplace violence that may arise from the nature of the workplace, type of work or conditions of work [subs. 32.0.3(1)]
- The assessment must take into account the circumstances of the workplace, circumstances common to similar workplaces, and any other elements prescribed by regulation [subsection 32.0.3(2)]
- Once the assessment is concluded, the employer must advise the joint health and safety committee, health and safety representative, or the workers and provide copies as stipulated [cls. 32.0.3(3)(a) and (b)]
- Employers must repeat the assessment as often as necessary to ensure the workplace violence policy and related program continue to protect workers from workplace violence and inform the joint health and safety committee, health and safety representative, or workers of the results of the reassessment [subss. 32.0.3(4) and (5)].

# OHSA – Workplace Violence and Harassment

- **Disclosure of risk of workplace violence**

- Employers must, in stipulated circumstances, provide reasonably necessary information about a risk of workplace violence from a person with a history of violent behavior [subss. 32.0.5(3)-(4)]

- **Domestic violence**

- Employers who are aware of, or who ought reasonably to be aware of, domestic violence that would likely expose a worker to physical injury in the workplace must take every precaution reasonable in the circumstances to protect the worker [s. 32.0.4]

- **Additional duties regarding harassment**

- Employers must conduct an investigation in appropriate circumstances, convey the results of any investigation to the parties stipulated and in the manner stipulated, review the harassment program at least annually to ensure it adequately implements the harassment policy, and any other duties prescribed by regulation [s. 32.0.7]

# Supervisors and the Internal Responsibility System

- Who is a Supervisor?
  - Supervisor is a defined term (s.1(1))
  - Includes those with broad authority, in high-level positions (**Bartram**)
  - There can be multiple supervisors at sites, each with liability (**Bellai Bros**)
  - Supervisor status arises however only where there is authority akin to an employment relationship (**Abarquez**)
- What are supervisors' obligations?
  - Supervisors are required to (i) take all reasonable precautions to protect workers, and (ii) acquaint workers with hazards (s.27)

# Constructors and the Internal Responsibility System

- Who is a Constructor?
  - Constructor is a defined term (s.1(1))
  - Constructor is the party with functional control over the project and health and safety at the project. (**Reid & Deleye**)
- What is a Project?
  - A project includes any construction work or undertaking, and construction includes the erection, alteration, repair, or the installation of any machinery or plant. (s.1(1))
- What are a constructor's obligations?
  - Constructors have a broad duty to ensure that (i) the prescribed measures and procedures are carried out on a project; (ii) all employers, and every worker performing work on the project complies with the Act, and; (iii) the health and safety of workers on the project is protected (s.23(1))

# Owners and the Internal Responsibility System

- Owner is a defined term under the Act (s.1(1))
  - They include parties that hold an interest in, or occupy, lands that are to be used as workplaces, and the definition includes those acting on behalf of owners as agents or delegates
- What are an owner's obligations?
  - An owner of a workplace that is not a project is required to ensure that the facilities and workplace comply and are maintained in accordance with the regulations (s.29)
  - An owner of a workplace that is a project is required to determine whether any designated substances are present at the workplace, and if so they must provide that list to any constructors before entering into a contract with the constructor (s.30)

# Enforcement: Inspections & Orders

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- Inspectors have the authority to
  - Enter onto workplaces without warrants,
  - Require the production of material or information, and
  - Conduct tests, or require that they be conducted (s.54)
- Inspectors can issue Orders requiring that
  - Contraventions be rectified (s.57(1)), and
  - Work be stopped where the work poses a danger (s.57(6))

Note: Contraventions of stop work Orders can be restrained by injunction (s.60)

- Orders can be appealed to the OLRB within 30 days (s.61(1)), and the hearing is *de novo* (s.61(4)).

Note: Stays are available at the OLRB's discretion, pending appeal (s.61(7))

# Enforcement: Investigations & Prosecutions

- Investigation powers are different from Inspection Powers (*Jarvis*; and s.56 OHSA)
- Any contravention of the Act is a Provincial Offence (s.66)
- Strict Liability Offences are different from Criminal Offences
- Process is dictated by OHSA and Provincial Offences Act
- Penalties for individuals are \$100,000 max per count and/or 12 months jail
- Penalties for corporations are \$1.5 million max per count
- Probation (POA s.72)



# The Criminalization of Workplace Negligence

- *Westray* (May 1992), and the failed criminal prosecution of owners, and the subsequent public inquiry.
- Bill C-45 became law in 2004, and criminalizes workplace negligence
  - New duty to protect workers and others from work (s.217.1 Criminal Code)
  - Criminal negligence (s.219 Criminal Code)
  - New routes to attach criminal liability to corporations (s.22.1 Criminal Code)
  - New sentencing provisions for corporations, including
    - s.718.21 (factors to be considered)
    - s.735(1) (fine amounts)
    - s.732.1(3.1) (Probation Orders)

# Criminal Negligence – The Offence

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Every one is criminally negligent who:

- (a) in doing anything, or
- (b) in omitting to do anything that it is his **duty to do**,

shows **wanton or reckless disregard** for the lives or safety of other persons.

**Section 219(1)** *Criminal Code of Canada*

# Actus Reus (Criminal Negligence)

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Did you fail to do something you had a duty to do?

- Recall that duties arise through various routes:
- Section 217.1 Criminal Code: Every one who **undertakes**, or **has the authority, to direct** how another person does work or performs a task is under a **legal duty** to take reasonable steps **to prevent bodily harm to that person, or any other person**, arising from that work or task.
- Section 25(2)(h) OHSA: ...an employer shall ... **take every precaution reasonable in the circumstances** for the protection of a worker
- Section 27(2)(c) OHSA: ...a supervisor shall ... **take every precaution reasonable in the circumstances** for the protection of a worker
- Section 32(a) OHSA: ...Every director and every officer of a corporation shall **take all reasonable care to ensure that the corporation complies with this Act** and the regulations

# Mens Rea (Criminal Negligence)

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- Intention is not required. Indifference is sufficient
- If the accused recognized the risk and failed to act, gave no thought to the risk, that will be sufficient
- What is required is a marked and substantial departure from reasonable standards
- The standard is objective, but an accused's subjective understanding may be relevant, if objectively reasonably held



# The Routes of Corporate Criminal Liability

## ***The Identification Theory, and Party Liability***

*In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if*

- (a) acting within the scope of their authority*
  - (i) one of its representatives is a party to the offence, or*
  - (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and*
- (b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.*

**Section 22.1** *Criminal Code of Canada*

# Criminal Penalties

## Individuals

- Cause death - life in prison (max)
- Cause bodily harm - 10 yrs (max)

## Corporations

- No maximum fine amount

## Probation

The Court can Order the following optional terms:

- (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
- (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
- (c) communicate those policies, standards and procedures to its representatives;
- (d) report to the court on the implementation of those policies, standards and procedures;
- (e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
- (f) provide, in the manner specified by the court, the following information to the public, namely,
  - (i) the offence of which the organization was convicted,
  - (ii) the sentence imposed by the court, and
  - (iii) any measures that the organization is taking — including any policies, standards and procedures established under paragraph (b) — to reduce the likelihood of it committing a subsequent offence; and
- (g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

## *Detour Gold Corporation 2017 (OCJ)*

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- Cyanide extraction used to extract gold in production process
- Worker sent into cyanide chamber to repair leak. No PPE. Cyanide absorption occurred through skin
- No training by corporation. Medical personnel not properly trained. Facilities (i.e. antidote, identification of issue etc.) not provided
- Worker succumbed to injuries
- Company pleaded guilty to criminal negligence causing death
- \$1.4M fine; 25% Victim Fine Surcharge; \$805k restitution Order

Note: Prior to conviction/sentence, the company had implemented changes to address all gaps that existed prior to the incident

## *R. v. Kazenelson* 2018 (Ont CA)

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- Swing stage collapse.
- Supervisor had the authority to direct how work was to be done.
- Supervisor had six people on a swing stage, knowing, that there were only two lifelines.
- Supervisor permitted six people to go on swing stage with their tools, in circumstances where he had no information as to the weight capacity of the swing stage.
- Swing stage collapsed. Four people died. One was seriously injured. The other, who was tied off, escaped unharmed.
- Kazenelson was convicted of four counts of criminal negligence causing death, and one of criminal negligence causing bodily harm.
- Sentence was 3 ½ years on each count, concurrent.

## *R. v. Fournier* 2018 (Que CQ)

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- Sylvain Fournier was president of S. Fournier Excavation Inc.
- Engaged in sewer conduit replacement.
- Walls of excavation were not shored (contrary to Que statute)
- Trench collapsed, worker buried, and succumbed to injuries.
- Mr. Fournier was also buried (partially), sustained fractures to both legs, and was in a coma for two days.
- Mr. Fournier was charged with criminal negligence and manslaughter.
- He was convicted of manslaughter because his conduct was an illegal act (failure to comply with duty) and it caused a death.
- The Kienapple principle precluded a conviction on criminal negligence.

# Defences – Due Diligence

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- What is due diligence?
  - A demonstration by a defendant that it has exercised all reasonable precaution to avoid a bad thing from happening.
  - To successfully mount the defence, one has to demonstrate on a balance of probabilities that foreseeable concerns were identified and addressed responsibly.
- What is mistake of fact?
  - An honestly, and reasonably, held belief in a set of facts which, if they had been true, would have rendered the act or omission innocent.
  - To successfully mount the defence, one has to demonstrate on a balance of probabilities that it held the belief, and that there wasn't a reason to doubt it.
- What is or is not reasonable, will depend on the gravity of the potential harm. As the gravity of the harm increases, so too will the efforts to which a defendant must go.

## *Rio Algom, 1988 (Ont. CA)*

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- A gate in a uranium mine had developed an over swing. It wasn't repaired, and a car on a parallel track collided with it. The collision pushed the gate into a worker, and the worker was crushed between the gate and cars on the first path.
- All witnesses testified that they wouldn't have foreseen that the over swing could have resulted in this type of accident.
- Rio was charged with failing to maintain the equipment in good condition.
- A trial Rio was acquitted because it wasn't foreseeable that an accident like this could have happened.
- On Appeal, the Court said that was the wrong way to look at diligence. The issue is not whether the particular accident was foreseeable, but rather whether it was foreseeable that the problem could be dangerous.
- In this case, there was an over swing. The failure to repair it was the actus. Rio knew of it, and therefore **it was incumbent on Rio to determine the extent of the danger it posed**. By failing to take that step, it couldn't claim the benefit of due diligence, even though the harm that did result may not have been foreseeable.

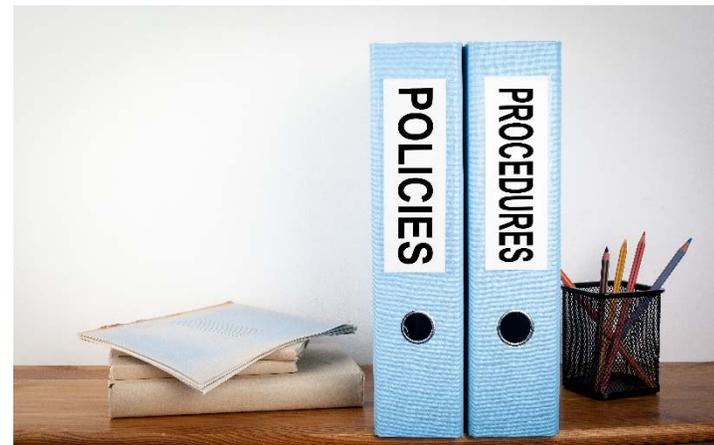
## *D'Orazio Excavating Contractors, 1999 (OCJ)*

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- Water pipeline construction job. Dump trucks were moving soil, and one backed up and killed a worker.
- There was a policy in place (ostensibly) on the project prohibiting backing up, however this was not followed in practice.
- Approximately 75% of the time, someone directed trucks that were backing up, but they did not act as spotters (formally).
- No meaningful safety meetings, no communicated instructions, no traffic signs, barriers, lane controls etc.
- No mistake of fact or due diligence, because even though the supervisor may have believed that the policy was being followed, any reasonable person would have known that it wasn't – had they checked.

## *Inco* 2001 (SCJ)

- Mine blasting protocols were in place, and properly training on radio communications had been provided.
- However, evidence raised a question of whether workers had a habit of not following protocols and instead used nick names.
- The Court said the test was whether the company had done everything reasonable to remove the potential for miscommunication, and it noted that a defendant doesn't have to take every precaution, just reasonable precautions.
- Here the company didn't ensure strict compliance through monitoring etc., and given the gravity of the harm – what was reasonable required more.



## *London Excavators & Trucking Ltd. 1998 (Ont C.A.)*

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- A subcontractor excavation company was told by a general contractor that it could commence excavations in an area that the GC had identified as being clear (i.e. free of utility services).
- As the excavation proceeded, the excavator struck concrete. The subcontractor brought the GC to the site and was told that the concrete was a footing for an old nursing station, and the GC directed the contractor to continue excavation.
- The concrete was a hydro vault, and when it was broken, there was an explosion.
- The excavator was charged with failing to comply with s.228(1) Reg 213/91, and he asserted a due diligence/mistake of fact defence.
- The Court found that once the GC's initial advice had been proved wrong, it was not reasonable for the excavator to continue to rely on his advice without asking to see site plans or locates.
- While the belief in the mistaken set of facts may have been subjectively held, it wasn't objectively reasonable to hold it without making further inquiries. As a result, the excavator was convicted.

## *EllisDon and CanForm 2006 (OCJ)*

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- Inspector observed a worker installing guardrails on the 6<sup>th</sup> floor of a project without wearing fall protection.
- Worker was direct employee of CanForm, a sub to Ellis Don.
- CanForm had a safety manual that addressed working at heights. All workers had to read and acknowledge it.
- EllisDon conducted safety talks on site. They dealt with fall protection.
- Worker had been using fall protection that day, and he was wearing his harness. It just wasn't tied off.
- Both mistake of fact and due diligence made out.
- Both companies had developed departments, hired safety experts, and developed and implemented appropriate practices. All supervisors and workers were trained, manuals were prepared, and audits and onsite monitoring were in place.

# How to Protect Yourself and the Company

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1. Identify the applicable standards, and assess the hazards
2. Create and implement contextually appropriate policies and procedures
3. Train your workers on the policies, and provided updated information
4. Monitor your workplace and enforce the policies and procedures
5. Start over

# Step 1: Identify and Assess

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- Determine what regulations apply to your operation
  - Are your operations governed by statute (i.e. Noise/Asbestos/Fire Code)?
  - Are there industry organizations that have produced best practices / codes?
- Ensure that appropriate departments are in place
  - Are the departments staffed with personnel who are knowledgeable about
    - (i) workplace operations, and
    - (ii) applicable health and safety standards
- Assess hazards associated with operations to identify any gaps in processes

## Step 2: Create and Implement

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- Develop appropriate safety procedures, building off of
  - (i) The regulatory/industry standards
  - (ii) Operations (including worker/supervisor observation/experience)
  - (iii) Gap analyses
- Consider having an external expert involved in procedure development to assist in identifying any 'blind spots'
- Review the written procedures to ensure that they are written in clear, straight forward language, and that they cover off all procedures

## Step 3: Training

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- Ensure supervisors are properly trained on Act, regulations, and procedures.
- Ensure that training is standardized with simple language, and consistent delivery (reduce training to written form)
- Deliver training to workers on procedures
- Develop ongoing training sessions (i.e. tool talks), mechanism for feedback to be considered in evaluation and revision of training, and mechanism for ongoing collection and delivery of information.
- **Document, document, document...**

## Step 4: Monitor and Enforce

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- Require delivery of scheduled reports by supervisors appropriate departments for review (scheduled audits)
- Perform unscheduled audits of workers and supervisors
- Develop policies for enforcement (gradual increase in severity)
- Communicate and enforce policies
- **Document, document, document...**

## Step 5: Start Over

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- Health and safety, is constantly developing and advancing
- Lessons learned from audits, inspections, near misses, need to be implemented
- Regulations and best practices need to be followed, and implemented
- Streamlined communications internally are critical

# Compliance and Subcontractors

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- Subcontractors are your employees (**Wyssen**). You must therefore:
  - i. Understand their expertise before engaging them (i.e. operator qualification) which includes understanding their health and safety obligations, plans and procedures
  - ii. Understand any inconsistencies between their health and safety plan(s) and yours, identify reasons for same, and reconcile as may be appropriate
  - iii. They may have expertise that you don't (i.e. construction, etc.) but you still need appropriate assurances as to their qualifications, safety history, and training
  - iv. Ensure that the subcontractor has all of the information it needs from you regarding any work they are doing on your behalf (open and effective lines of communication)

**While you can delegate work, you cannot delegate your direct health and safety obligations**

# Getting Ready for Inspections

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- Understand the inspection schedule, for example:

- New and young workers' health and safety

May 1 - August 31, 2018

- Machine Guarding

February 1 - March 29, 2019

- <https://www.ontario.ca/page/workplace-inspection-blitzes-and-initiatives#section-1>

- Ensure up to date policy, clear workable retrievable procedures, training, supervision, monitoring, and enforcement is in place
- Appoint a designated point person
- Ensure all records (training, PSRs, etc) are readily available
- Professional attitude (Inspectors have a job to do)

*Do or do not. There is no try.*

Yoda, The Empire Strikes Back

Presented by:

**AIRD BERLIS**