Ministry of Labour Investigations

The Ministry of Labour, pursuant to the *Occupational Health and Safety Act*, investigated the SARS deaths of nurses Tecla Lin and Nelia Laroza and of physician Nestor Yanga[863] and conducted occupational illness and critical injury investigations into the illness from SARS of 146 health workers. Although these investigations and the legal decisions arising from them are not at the core of the Commission's mandate, they do come within its outer margins and warrant brief comment here.

Investigations into the deaths of Ms. Laroza and Ms. Lin recommended the laying of charges under the *Occupational Health and Safety Act*. In the case of Dr. Yanga no such recommendation was made.

To guard against potential conflict of interest, the charge screening process was conducted outside the Ministry of Labour, by Crown counsel at the Ministry of the Environment. Following these reviews, decisions were made not to lay charges in connection with either the death of Ms. Laroza or the death of Ms. Lin.

The decision whether to lay charges as a result of any Labour investigation, including these investigations, is made in the end by Ministry legal advisors on the basis of investigation reports and of legal and quasi-judicial considerations, for example: Are there in law reasonable and probable grounds to believe that there has been a violation of the *Occupational Health and Safety Act*? Is there a reasonable prospect of conviction if charges are laid? Are defences open to the potential accused, such as due diligence or necessity? Is it in the public interest to proceed with charges in particular case? The basis of the legal decision not to lay charges in these cases is beyond the reach of the Commission because the legal opinions that underpin those decisions are the subject of a claim of solicitor-client privilege asserted by the Ministry of the Attorney General.

863. The names of Ms. Lin, Ms. Laroza and Dr. Yanga are used here because the circumstances of their illnesses and deaths are in the public domain.

None of the critical injury[864] and occupational illness[865] investigations into how 146 health workers contracted SARS recommended the laying of charges.

These investigations were seriously hampered by the fact that they did not begin until February 2004, leaving insufficient time for a full and thorough investigation before the expiry in March 2004 of the time for laying charges imposed by the one-year limitation period under the *Occupational Health and Safety Act*.

In all, the Ministry received 146 occupational illness and critical injury notifications and three fatality notifications.[866] Under the *Occupational Health and Safety Act*, employers must notify the Ministry in writing of a critical injury within 48 hours of the occurrence[867] and of an occupational illness within four days.[868] This timely notification allows the Ministry the opportunity to quickly investigate the events that led to the critical injury or occupational illness and to prevent its recurrence.

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864. A probable case of SARS was considered a critical injury.

865. A suspect case of SARS was considered an occupational illness.

866. There were major problems with the notification process. The Ministry told the Commission:

> The majority of these notifications were received after employers were ordered to do so by MOL inspectors. (Ministry of Labour, submission to SARS Commission, March 15, 2006, p. 19)

867. Section 51. (1) of the Act states:

> Where a person is killed or critically injured from any cause at a workplace, the constructor, if any, and the employer shall notify an inspector, and the committee, health and safety representative and trade union, if any, immediately of the occurrence by telephone, telegram or other direct means and the employer shall, within forty-eight hours after the occurrence, send to a Director a written report of the circumstances of the occurrence containing such information and particulars as the regulations prescribe.

868. Section 52. (2) of the Act states:

> If an employer is advised by or on behalf of a worker that the worker has an occupational illness or that a claim in respect of an occupational illness has been filed with the Workplace Safety and Insurance Board by or on behalf of the worker, the employer shall give notice in writing, within four days of being so advised, to a Director, to the committee or a health and safety representative and to the trade union, if any, containing such information and particulars as are prescribed. R.S.O. 1990, c. O.1, s. 52 (2); 1997, c. 16, s. 2 (12).

Note that the Act defines "Director" as follows: "Director means an inspector under this Act who is appointed as a Director for the purposes of this Act; ('directeur')."

On February 24, 2004, teams of inspectors were assigned to begin investigations at Toronto Emergency Services, St. John's Rehabilitation Centre, North York General Hospital, the Scarborough Grace and Scarborough General Division hospitals, and Mount Sinai Hospital. On March 3, 2004, another team was assigned to begin an investigation at Sunnybrook.

The investigations faced a time constraint because section 69 of the *Occupational Health and Safety Act* states that charges must be laid within a year of the event under investigation:

> Limitation on prosecutions
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> 69. No prosecution under this Act shall be instituted more than one year after the last act or default upon which the prosecution is based occurred. R.S.O. 1990, c. O.1, s. 69.

The delay in starting the investigations meant that Ministry inspectors were pressed for time. Observers familiar with the investigation said the late start date did not leave the investigators enough time to do a proper investigation, that they basically ran out of time.

The problem was not the competence of the investigators or the quality of their investigation, both of which appeared to the Commission to be high, but the delay in giving the investigators the go-ahead to proceed.

In explaining why these investigations were not begun earlier, the Ministry said:

> Investigations of the fatalities and preparation for the investigations into the occupational illnesses and critical injuries began prior to the receipt of the reports. The reports were received by MOL in early February 2004, and the MOL was then able to continue its investigations into all 146 occupational illness and critical injury notifications and the 3 fatality notifications.
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> The MOL carries out a significant number of highly complex investigations such as structural collapses, geological stability, and asbestos removal each year involving input from various experts and information from a wide variety of sources. For the most part, these investigations involve long standing generally accepted scientific, engineering and/or medical standards.

> The SARS investigations, however, presented an even higher level of complexity. Information with respect to SARS continued to evolve from day one of the outbreak until well after the emergency was declared over. The criteria for a diagnosis of SARS changed during and after the outbreak as did the information with respect to its transmission. As a result, the MOL was required to analyse all of the POC [Provincial Operations Centre] directives issued during the outbreak as well as the evolving information from the WHO and other organizations involved in the ongoing monitoring of SARS.
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> Unlike the overwhelming majority of workplace hazards, SARS was not a hazard localized to one particular workplace or even one area within a workplace. Contact tracing with respect to each worker, as reported by Toronto Public Health, had to be followed up by the MOL to attempt to determine where a worker had contracted SARS (i.e., a workplace, a public gathering or location other than a workplace). The movement of workers diagnosed with SARS was tracked within hospitals as well as from one facility to another to determine what precautions had been taken to ensure the disease was not spread within a facility, to the public at large and to the facility where a worker may ultimately have ended up. Details such as where and in which order personal protective equipment was put on and removed was analyzed.[869]

The investigations were begun very late into the one-year window for the laying of charges. No matter what difficulties faced the Ministry, and whatever the validity may be of its reasons for starting the investigations so late, it does not generally enhance the reputation of any regulatory and enforcement body if investigations are launched so late that investigators do not have sufficient time to do their work properly.

Public confidence is vital for any regulatory and enforcement ministry. In the case of the Ministry of Labour, this means that investigations into critical injuries and occupational illnesses arising from a disaster of the magnitude of SARS must be commenced expeditiously.

869. Ministry of Labour, submission to the SARS Commission, March 15, 2006, p. 20.

Public confidence in the process of investigation and in the decision to prosecute also requires an element of openness. The system under which the SARS labour investigations proceeded, and under which the decision was made not to prosecute, lacks the degree of openness necessary to secure public confidence.

Whenever a worker safety charge is laid and then proceeds to court, the principle of open justice requires that the proceedings and any decision to terminate proceedings short of a trial take place in public.

The difficulty occurs in cases like this, where the investigation recommended that charges be laid in certain cases and not others, where there have been no court proceedings, and where the public and the families of the deceased and the affected health workers are left completely in the dark.

Public accountability and openness require a better system to inform the public and those affected by these important decisions.

Because this issue is at the outer margin of the Commission's terms of reference, the Commission has no mandate to propose prescriptive solutions. Any prescriptive solution to this problem requires extensive consultation with health worker unions, the Ministry of Labour and the Crown law officers who bear the ultimate responsibility to decide whether charges of this nature will proceed. The solution is tangled up in a knot of laws that govern worker safety, privacy and freedom of information, and Crown privilege.[870] It is time to cut that knot.

The Commission therefore recommends legislative amendments and policies in relation to the waiver of potential Crown privilege claims, that in such cases where charges do not result from Ministry of Labour and other investigations of deaths and critical injuries in health workplaces, the results of the investigation and the reasons for the decision not to prosecute be made public.

Another problem arose during the course of the worker safety investigations, and also in the investigation by the North York General Joint Health and Safety Committee, that requires comment. That problem has to do with the amenability of

870. These problems are not insurmountable even within the current state of the law, as seen by the extensive reasons given publicly by Attorney General Roy McMurtry for a number of decisions not to prosecute high-profile cases, including those of Dr. Henry Morgentaler and the Honourable Francis Fox.

doctors to the system that protects worker safety and investigates workplace deaths and injuries.

Difficulties arose during the Ministry of Labour death and critical injury investigations and the North York General Joint Health and Safety Committee investigation in respect of the status and obligations of hospital doctors under worker safety legislation. Doctors, by the nature of their work, are often obliged to give orders and directions to nurses and others that could affect their safety in the workplace. But every doctor is not an "employer" within the meaning of current safety legislation. Many doctors whose work has a profound effect on worker safety have arguably no obligations under safety legislation and arguably no obligation to cooperate with investigators who try to find out what happened in a worker's death or critical injury.

The problem is clear; the solution, less so. Independent doctors will be concerned about any legislation or regulation that makes them look like hospital employees or employers of hospital staff. Any solution must take account of these legitimate concerns about physician independence.

But those concerns should not frustrate the ability of our worker safety systems to get to the bottom of what has happened in the death or critical injury of a health worker. It makes no sense that two doctors work side by side, a hospital administrator and an independent physician in the hospital, each of them with a profound effect on the safety of hospital employees – one of them within the worker safety regime and the other completely exempt from that protective framework.

Worker safety in hospitals and in other health care institutions requires reasonable legislative measures to include all physicians within the worker safety regime without interfering with the essential independence of the physician and without making her a hospital employee.

Such legislative measures may need to include not only the *Occupational Health and Safety Act* but also those statutes which govern the administration of health care institutions and the medical profession.

It would be presumptuous for the Commission to recommend a prescriptive solution at this time. That task will require a good measure of consultation and a thorough analysis of the complex professional and statutory framework within which doctors work in health care institutions.

The Commission recommends the amendment of worker safety, health care and professional legislation to ensure that physicians who affect health worker safety are not excluded from the legislative regime that protects health workers. Because the prescriptive solution will require consultation and analysis and time and patience, it is essential to start now.