PROPOSED GUIDELINE FOR DETERMINING WHO IS A SUPERVISOR UNDER THE *OCCUPATIONAL HEALTH AND SAFETY ACT*

COMMENTS TO THE MINISTRY OF LABOUR

BY

THE ONTARIO FEDERATION OF LABOUR

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INTRODUCTION

The Ontario Federation of Labour (OFL) is the central labour organization in the province of Ontario. It has an affiliated union membership of 1,000,000 members and 54 unions from all regions of the province. With most unions in Ontario affiliated, membership includes nearly every job category and occupation.

As a province-wide central labour body, the OFL works to develop and coordinate policy as passed at our conventions and by our executive bodies. One of the key roles of the OFL is to try to influence public policies that affect all working people, their families and their communities. One of the most important areas of public policy that we try to influence is the prevention of work-related injuries and illnesses.

We welcome the opportunity to comment on the Ministry's proposed guide.

BACKGROUND

> *"Ontario's Occupational Health and Safety Act is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided."*

This quote or variations of it have appeared in court decisions dealing with prosecutions under the *Occupational Health and Safety Act* (*OHSA*).[1]

The courts were following section 10 of Ontario's *Interpretation Act* which reads:

> *"Every act shall be deemed to be remedial, whether its immediate purport to is to direct the doing of anything that the legislature deems to be for the public good or to prevent or punish the doing of anything that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will ensure the attainment of the object of the act according to its true intent, meaning and spirit."*

[1] Corporation of the City of Hamilton, 588 O.R. (3d) 37; Campbell, [2004], ONCJ; Walters, [2004] O.J. No. 5032 (S.C.J); Lockyer, 2009 ONCJ 73.

This *Act* was revoked and replaced with the *Legislation Act* of 2006. The wording of section 10 was shortened and became section 64 of the new *Act*. This reads as follows:

> **Rule of liberal interpretation**
>
> 64**.** (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.
>
> (2) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act.

Labour supports a broad interpretation of the *OHSA* and the regulations when it comes to protecting the health and safety of workers. Unfortunately for workers, the Ministry of Labour (MOL) and the courts have also broadly interpreted the definition of "supervisor" under the *OHSA*.

Section 1 of the *OHSA* states,

> "**supervisor**" means a person who has charge of a workplace or authority over a worker

To an average person a "supervisor" would be someone who is part of the management team in the organization. Unfortunately, for some workers, with the rule of liberal interpretation, this has been expanded to possibly include workers who have some additional duties which give them either charge of a workplace or some authority over other workers. This can make them a "supervisor" for the purposes of the *OHSA*. The courts have also decided that even if an individual does not believe they are a supervisor, if the facts show they had sufficient charge of a workplace **or** sufficient authority over a worker, they can still be a supervisor. What they believe is not relevant according to the court decisions which will be discussed below.

Also not relevant is the job title. Even if the employer appoints someone as a supervisor and gives them the job title as a supervisor, even if the employer does not give them sufficient duties to have charge of a workplace or authority over a worker, the courts can determine that the individual is **not** a supervisor for the purposes of the *OHSA*.

There are two cases worth noting here - (R. v. Walters and R. v. Adomako).

In the Walters case the appeals judge stated,

> *"A supervisor must be someone who has hands-on authority. The test is objective, based on the individual's actual powers and responsibilities. Whether or not Mr. Walters considered himself to be a supervisor is not relevant."*

The Adomako case was cited as part of the reasoning behind this decision. The judge further stated,

> *“There was certainly ample evidence of Mr. Walters’ authority. He was the lead hand in charge of his crew. He assigned work and answered questions. He had influence over who was assigned to him and was expected to address safety issues in the workplace.*
>
> *I disagree with Mr. Walters’ argument that he had no enforcement powers and therefore was not a supervisor. First, the definition provided a supervisor has charge of a workplace or authority over a worker the test is disjunctive. Even if Mr. Walters had no authority, there was ample evidence to support the finding that he had charge of the workplace.”*

The judge also had this to say,

> *"Moreover, coming to a conclusion that a lead hand with the job characteristics enjoyed by Mr. Walters is a supervisor within the meaning of the OHSA, furthers the purpose of the Act in the sense that a broad interpretation of the meaning of "supervisor" increases responsibility over worker safety, thereby focusing more attention and resources on such safety."*

In the Adomako case the owner/president of the company had appointed a supervisor, given him the job title of plant supervisor but provided him with very little in the way of duties what would give him charge of the workplace or authority over the workers. In this case, it was the president who was prosecuted as a supervisor when a worker was killed. The court decided that the president was the real supervisor and that despite the job title, the plant supervisor was a supervisor in name only and was not a supervisor for the purposes of the *OHSA*.

A similar decision was made in the case of R. v. Jetters Roofing and Wall Cladding Inc. The site foreman had little authority in the workplace and with the workforce. The court found the company’s vice-president to be the supervisor for purposes of the *OHSA*.

In another case, R. v. Lockyer, a working foreman on a construction site was convicted of failing in his duties as a supervisor under the *OHSA.* In convicting Mr. Lockyer, the judge stated,

> *“I find that it is not relevant that the defendant does not consider himself a "supervisor", nor is it relevant whether his title is "supervisor".*

In sentencing Mr. Lockyer, the judge had this to say to him,

> *"I've given, as you can see, a lot of time and analysis to try not only to render a judgment, but to give you insights, perhaps a little bit beyond those that you might have had before with respect to how the law works and what your legal responsibilities are by taking on the responsibilities that you did, whether it's called a working foreman or supervising or whatever, titles are not important. As they say, a rose by any other name is still a rose."*

These decisions have created a significant grey area for workers and employers. It has also created legal liabilities for some workers that they may not be aware of.

It is also worth noting that a decision of whether an individual is a supervisor is not dependent on the employer providing them with training to be a competent supervisor.

An employer is required under the *OHSA* that when appointing a supervisor they appoint a competent person. Section 25(2)(c) requires that an employer shall, "when appointing a supervisor, appoint a competent person".

The term "competent person" is defined by the *OHSA* as,

> "**competent person**" means a person who
>
> (a) is qualified because of knowledge, training and experience to organize the work and its performance;
>
> (b) is familiar with this *Act* and the regulations that apply to the work, and
>
> (c) has knowledge of any potential or actual danger to health or safety in the workplace.

An employer's failure to carry out this duty will not be a factor in deciding who is a supervisor. The courts have made it clear they consider the duties of employers, supervisors and workers separate and distinct, operating independently but at the same time.

In 2001, workers were clearing brush under a hydro right-of-way when a tree fell on the wires breaking them. A worker was struck by the live wire and was badly burned. The worker who was cutting the trees did so in a manner that was an ongoing practice for that employer but which was also in violation of the *OHSA*. The owner of the company was convicted as a supervisor but the worker doing the cutting was also prosecuted by the MOL. In what is known as the Campbell case, the defence made arguments that since the employer had failed in their duties, such as to establish safe work practices for the removal of trees, that the worker should not be convicted under the *OHSA*. Simply put, the employer must be in compliance with their duties before a worker can be charged with not following their duties. This argument is known as condition precedent.

The judge disagreed and convicted the worker of violating his duties under section 28 of the *OHSA*.

The trial judge stated,

> *"The Act defines the responsibilities of several participants in the workplace by including those responsibilities and duties in separate and distinct sections. There is nothing in the Act indicating any condition precedent in dealing with charges against workers. When reviewing the Act as a whole, not just those sections defining the various responsibilities and duties, there is nothing either explicit or implicit that would suggest a condition precedent defense."*

The judge went on to state,

> *"If the conduct of employers and supervisors relieves workers of their duties and responsibilities under the Act, then the intent of section 28 (the worker's duties) would be rendered meaningless. In effect, workers would not have responsibilities to other workers in circumstances wherein a defective and unsafe standard has been established by an employer."*

The worker appealed his conviction but it was upheld by the appeal judge. The appeal judge supported the trial judge's conclusions on the condition precedent issue. He stated,

> *"I particularly agree with the trial judge that workers of the province would be ill-served if they were sheltered from liability because of the employer's failure. To be sure, the employer bears primary responsibility to develop and maintain adequate safety measures at its work sites, because it has the greatest control over circumstances there. However, the worker also bears responsibility commensurate with the degree of control he may reasonably exercise in the context of his own experience, the nature of the work and the circumstances of the workplace. These are separate obligations placed on employers and workers, and they operate independently but at the same time."*

The appeal judge went on to say,

> *"The Act itself does not specifically provide for the precondition urged, and in my view it is impossible to read one in for the reasons explained by the trial judge. Nor are there any authorities upon which a precondition could be founded. Again, I am in entire agreement with the learned trial judge's analysis and conclusions on this question. I see no error in law or in the application of the law as he interpreted it."*

The Campbell case discussed above dealt with the employer duties and worker duties under the *OHSA*. By extension, the same would hold true for the employer duties under sections 25 and 26 of the *OHSA* and the supervisor duties under section 27 under the *OHSA*.

Workers today are facing situations where they may have been given sufficient additional duties that could give them "charge of a workplace" or "authority over a worker"; have no idea that they could be considered a supervisor; receive no training from their employer in occupational health and safety or their responsibilities/liabilities as a "supervisor" and still be prosecuted by the MOL and convicted by the courts for failing to comply with section 27 of the *OHSA*.

EXPERT PANEL

In the spring of 2010, the Ontario government appointed an Expert Panel on Occupational Health and Safety. The Panel was asked to conduct a review of Ontario's occupational health and safety system. In December of that year, the Panel issued a report with 46 recommendations. The Panel identified gaps in supervisors' knowledge of their legal responsibilities which could create liabilities for them and result in risks to workers. As a result, the Panel made a recommendation for supervisor awareness training.

Recommendation 15 reads,

> *"The Ministry of Labour should require mandatory health and safety awareness training for all supervisors who are responsible for frontline workers."*

There is a similar recommendation regarding awareness training for workers.

In 2013, the Ontario government approved regulation 297/13 which mandates the awareness training for supervisors and workers. This regulation takes effect July 1, 2014.

The OFL is aware that there has been an employer lobby to hold up the supervisor awareness training until the issue of who is a supervisor is resolved to their satisfaction. The OFL appreciates that the MOL is moving forward on this issue despite the employer lobby.

Labour also has concerns regarding "who is a supervisor", how it is applied by the Ministry and what the courts have been saying about the issue. Unless the definition is changed in the *OHSA,* the case law prevails. We feel that it is important to ensure those who may be deemed a supervisor under the *OHSA* receive the supervisor awareness training so they will be aware of what they have consented to and what the potential liabilities are. Also, in keeping with the spirit of informed consent the legislation should be revised to make it clear that the individual is to be informed that they have been appointed as a supervisor.

Guidance to assist the labour and employer communities to figure out who is a supervisor for the purposes of the *OHSA* is sorely needed. It is needed for more than just the awareness training. It is important for the sake of transparency. It is also important for providing informed consent so that workers who accept additional responsibilities will understand what it is they are accepting along with those responsibilities.

The MOL's draft guide has a broad application and it is a step in the right direction.

The OFL offers the following comments and suggestions.

COMMENTS

Under "who is a supervisor", the word "objective" should be explained and clarified. Also, according to the courts, **it is an objective test** so the wording should be changed to reflect this.

The list of primary indicators provided in the guide is clearly based on the Jetter's case; more specifically, the list provided to the court by the MOL prosecutor. The judge did not accept the list as presented but gave more weight to some points and felt some were "of less importance".

We have provided a table in the appendix which provides the list as presented by the Crown, the list as accepted by the judge and the current list as proposed by the MOL. We have shaded in grey the points the judge applied as most important. Those that he felt were of lesser importance are not shaded.

The MOL should be basing the guide on the case law. To do otherwise will create confusion. The MOL should not be giving equal weight to points the courts have decided are of lesser importance. This could greatly expand who could be considered a supervisor under the *OHSA*. Labour would not support such an expansion.

The list of primary indicators should be broken into part a and part b. The way the primary indicators as found in the case law would be in 1(a) and those that may also be considered in 1(b).

The guide provides three examples for additional guidance. There is no public sector example. We would suggest a health care example such as a charge nurse in a hospital.

In the section providing some court decision examples, we would suggest adding the Walter's case. The Walter's decision deals with a lead hand in the public sector, who was a member of the bargaining unit and did not consider himself a supervisor. This is exactly the kind of situation labour is concerned with.

Also, in this section, in the third example is an explanation of why the general superintendant was acquitted for exercising due diligence. This does not add to the issue of who is a supervisor, it starts a discussion on due diligence and should be removed. The paragraph on training responsibilities, in this example, is also not relevant for helping to decide who is a supervisor.

It would also be useful to provide information on who is not a supervisor based on some court decisions. In the Adomako case, the plant supervisor was determined by the court to be a supervisor in name only. In the Jetter's case, the site foreman was determined not to be a supervisor. Finally, in the Inco case of 2006, the team leader was found not to be a supervisor.

In the "Notes" section includes a reference to the supervisor awareness training and web link to materials.

Respectfully submitted by:

THE ONTARIO FEDERATION OF LABOUR

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APPENDIX

Table 1:

Jetters Crown Suggested	Jetters Judge Applied	MOL New List
ability to hire	ability to fire	hire, fire, discipline
ability to fire	ability to discipline without assistance	recommend hiring, firing, discipline
ability to exercise discipline	decide make-up of crew	promote, demote or transfer
controlling rates of pay	decide what equipment could be brought onto the site	decide rates of pay
ability to give awards or bonuses	ability to rent equipment without authorization	award bonuses
deciding hours of work	meeting with workers at a new site to review job details and safety issues	approve vacation time
ability to approve vacation time	ability to promote or demote	grant leaves of absence
deciding makeup of a work crew	hold the position on a regular basis	enforce procedures established to protect safety
deciding which equipment is to be brought on to the job site	ability to hire	determine tasks to be done and by whom
controlling what equipment can be rented	control over rate of pay	direct and monitor work
placing tenders		manage resources -- staff, equipment, budget
meeting with workers to go over details of a job		decide and arrange equipment to be used
meeting with workers to review issues of safety		decide make-up of work crew
hold a position on a permanent basis		decide scheduling of work
ability to promote or demote		dealing directly with workers' complaints
		directing staff and resources to address health and safety