

Is the MOL Naming and Shaming of Contractors Illegal?

(Response to April 7, 2020 DCN article) By Norm Keith¹

It strikes me that the Ministry of Labour, Training and Skills Development (“MOL”) strategy of “naming and shaming” various contractors in the Ontario construction industry deserves a thoughtful, legal response.² The COVID-19 pandemic is a serious issue for all stakeholders in the construction industry. However, the report: “Ministry of Labour identifies three COVID-19 site shutdowns”, raises serious concerns about the conduct of MOL inspectors that may be not only be unfair but also illegal.

During the COVID-19 pandemic, very restrictive government measures have been imposed on the private sector under the *Emergency Management and Civil Protection Act* (“EMCPA”). Many construction projects in Ontario have been designated by regulation an “essential business/workplace” and continue to lawfully work. Construction sites that are still open have their worker safety still governed by the *Occupational Health and Safety Act* (“OHS”).

Under the *OHS*, the workplace stakeholders share responsibility for safety under the Internal Responsibility System (“IRS”). That includes constructors, employers, supervisors, and yes, workers. The fundamental IRS principle in the *OHS* is that workplace stakeholders must do their best to resolve OHS issues internally at the workplace. During the COVID-19 pandemic none of this has changed.

MOL inspectors must respect the IRS and encourage workplace stakeholders to resolve safety issues internally. MOL inspectors may also issue compliance Orders and Stop Work Orders related to COVID-19 specific issues. However, a Stop Work Order may only be issued if, and only if, the MOL inspector determines that there is a contravention of the *OHS*, or applicable regulations, *and* there is a real and present danger to the health and safety of a worker.³

MOL inspectors are expressly prohibited from the publication or “naming and shaming” of contractors who have been inspected, investigated, issued Orders under the *OHS*. MOL inspectors are required by the Section 63(1)(a) of the *OHS* to keep all information gathered in the course of their activities to be kept confidential. That legal requirement states: “*an inspector ... shall not publish, disclose or communicate to any person any information, material, statement, report or result of any examination, test or inquiry acquired, furnished, obtained, made or received under the powers conferred under this Act or the regulations*”.

Further, this legal prohibition applies to MOL supervisors, managers and yes, even politicians, in the COVID-19 pandemic. This is by force of law under sections 77 and 78 of the *Provincial*

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² These comments and opinions are those of the author only, and do not necessarily represent the views of his firm.

³ Occupational Health and Safety Act, R.S.O. 1990, c O.1, S.5(6)

Offences Act, which makes it an offence to be a party to an offence and aiding and abetting a violation of a provincial law like the *OHS*A.

The only provisions in the *OHS*A that expressly permits the publication and “naming and shaming” of contractors is when they have been convicted of an offence under the *OHS*A⁴ after a fair trial. To do otherwise would be violate the terms of the *OHS*A to undermine the construction industry’s confidence in the MOL inspectors and the IRS, the foundation of the *OHS*A.

If the rule of law is not respected during a period of COVID-19 pandemic anxiety, then MOL inspectors will undermine the construction industries confidence and important decisions being made by the government and the MOL during this difficult and unprecedented period of time. It may also expose MOL inspectors, their managers and the Ontario government to legal action by construction companies who suffer a damage to their reputation and related business losses. Surely that is not in the public interest in a time when we all need to be supporting and working together.

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⁴ *Supra.*, s. 68.1(1)