

# Does right to silence apply in labour probes?

## J R Property case shows limits of ministry investigators' powers

BY KENNETH JACKSON  
For Law Times

It's pretty well known that suspects in criminal investigations have the right to remain silent, but does the same apply to Ministry of Labour probes?

It does, but exactly how or when it comes into play leads to another question: when does a potential accused have the right to remain silent and ask for a lawyer?

According to Ryan Conlin of Stringer Brisbin Humphrey Management Lawyers in Toronto, the issue is a confusing one. He believes it's one of the most baffling issues that occur in occupational health and safety investigations.

It's not as black and white as, for example, the rights of a murder suspect are even though inspectors in labour investigations have to caution or read the potential accused their rights when they have reasonable and probable grounds that an offence has happened, according to Conlin.

"The difficult legal question which arises is at what point does the inspector form the 'reasonable and probable grounds' which trigger the obligation to



**'Because corporations do not have a Charter right to silence, they are compellable at trial,' says Jeffrey Percival.**

read a potential accused his or her rights," said Conlin in a recent blog post on his firm's web site.

In an interview with *Law Times*, Conlin explains the problem further. "It's been my experience [that] the Ministry of Labour takes the position in the early stages of an accident investigation that none of the parties really have a right to remain silent and they typically proceed . . . to rely upon their mandatory inspection powers that include this obligation to co-operate with them and provide information to them," says Conlin.

It's not uncommon for the ministry to then turn around and use that information against an individual later in the investigation, he notes.

The problem is that if people refuse to meet with an inspector, authorities can charge them with obstruction.

That was the case in *Ontario (Ministry of Labour) v. J R Contracting Property Services*.

Teisha Lootawan was the alleged supervisor of a worker injured at a construction site. The worker claimed Lootawan was his supervisor, but other people interviewed by ministry inspector Jeff Lomer said she wasn't.

Lomer contacted Lootawan for a statement. She said she was only willing to meet with him if he provided a list of prepared questions she could review with her lawyer.

During this time, he uncovered evidence to suggest Lootawan was in fact more involved than he first thought. He then issued a written order requiring her to meet with him.

There was a catch. If she didn't meet with him, she could be found guilty of refusing to comply, a scenario that could leave her with a fine of up to \$25,000 and send her to jail for up to a year.

"He basically said, 'If you don't

answer these questions, we're going to charge you with obstruction,'" says Conlin.

But Lomer didn't caution Lootawan. She met with him even though he had strong evidence against her. The courts found he should have cautioned her and threw out her statement.

"Lootawan was compelled to attend and provide a statement after she had asserted her right to silence," wrote Justice of the Peace Mary Ross Hendriks in her June 8, 2011 decision. "Her right against self-incrimination was violated by the state. The fruits of this interview constituted a warrantless search. She was not provided with a caution, although objectively, Mr. Lomer had reasonable and probable grounds to charge her."

Conlin notes Lomer had some pretty clear information that Lootawan at least appeared to have misrepresented her role with the employer to him.

"That was the issue with the case, as to whether she was actually a part of the employer or not," says Conlin. "They had found evidence she had been placing help wanted ads in the newspapers. I guess any contention that she wasn't involved with the employer was a somewhat dubious one."

Still, he wasn't surprised that the court excluded the statement. "Frankly, if it hadn't been excluded, I would have a difficult time imagining the right to remain silent exists in these cases," he says.

Labour and employment lawyer Jeffrey Percival of Pallett Valo LLP says it's a different story when the corporation is charged. Corporations, he notes, have no right to silence.

"Because corporations do not have a Charter right to silence, they are compellable at trial. So if it's the corporation that is being charged, they have no right to silence."

Someone has to speak for the corporation at trial, but unless that individual is facing charges as well, he or she has no right to silence.

According to Conlin, the Lootawan matter was a rare case. He believes the law is still developing and says employers and individuals should seek the advice of counsel immediately after an accident happens.

While he thinks the Lootawan case will see inspectors cease issuing compliance orders late in an investigation, he says the case still doesn't address their ability to compel a statement at the early stages. The questions, then, remain. **LI**