



# For Cause and For Prosecution Investigations – How Proof of Due Diligence is Your Friend

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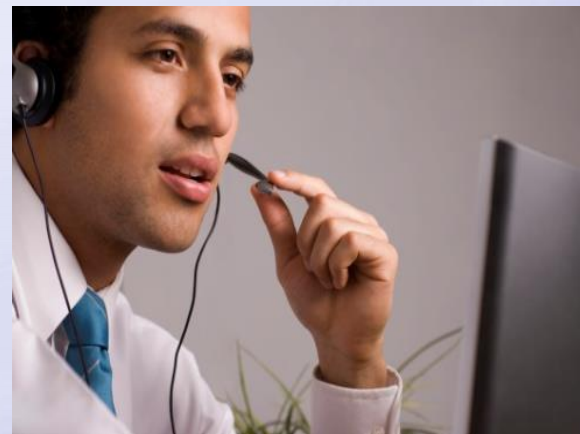
[www.gov.bc.ca/employersadvisers](http://www.gov.bc.ca/employersadvisers)

September 18, 2018



# Employers' Advisers Office

- Authority under S.94 (3) of the *Workers Compensation Act*
- Provides advice, assistance and representation
- Independent from WorkSafeBC
- No charge for service





# WorkSafeBC Investigations

## What Triggers an Investigation?

- Serious injury or death
- Major structural failure
- Major release of a hazardous substance
- Fire or explosion that had potential for causing serious injury
- An incident required by regulation
- Near miss



# Fatal and Serious Injury Investigations

Two types of investigations for incidents that resulted in or had the potential to cause death or serious injury:

- For Cause
- For Prosecution



# What's the Difference?

- “for cause”: when evidence is compelled
- “for prosecution”: when *Charter* applies





# Why Should We Care?

So you know

- Your rights and obligations
- The enforcement or penal consequences



# How Did We Get Here?





# WorkSafeBC's Broad Powers – Finding Cause

- Enter and seize documents or other evidence
- Compel testimony
- Employer must facilitate the investigation
- Employers, supervisors, workers must cooperate





# Possible Outcomes of a WorkSafeBC Investigation

Include:

- S. 187 – Order
- S. 191 – Stop Work Order
- S. 196 – Administrative Penalty
- S. 73 – Claims Cost Levy
- Recommend prosecution in court



# Provincial Prosecutions

## Finding Fault – *Charter* Applies

- Quasi-Criminal
- *Offence Act*
- Strict liability – due diligence defense
- Fine and/or imprisonment up to 6 months



# Criminal Prosecutions

## Finding Fault – *Charter* Applies

- Federal
- *Criminal Code*; Westray Bill C-45
- Criminal Negligence – wanton/reckless disregard
- No due diligence defense
- Bodily harm - 10 years; death - life imprisonment



# Back to the Sawmill Cases

WorkSafeBC referred the results of their investigation to Criminal Justice Branch (CJB) for provincial prosecution

CJB refused to prosecute based on inadmissibility of evidence arising from *Charter* violations, and strong due diligence arguments





# Gordon Macatee Report



## WorkSafeBC Review and Action Plan

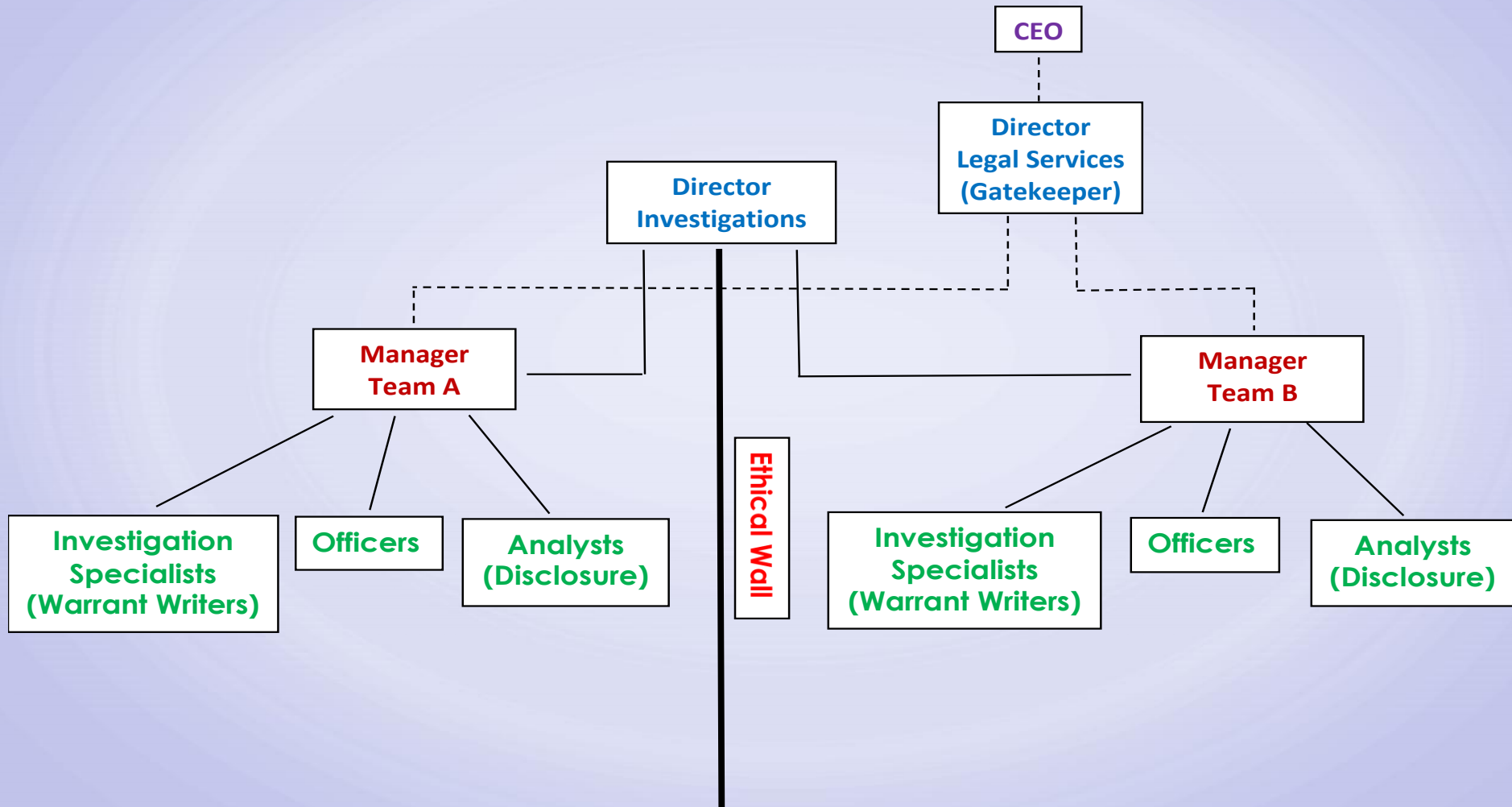
Gordon Macatee  
Administrator

July 1, 2014





# Fatal & Serious Investigations





Employers'  
Advisers

# Other Investigation Changes

## Memorandums of Understanding:

- Criminal Justice Branch
- Police Services



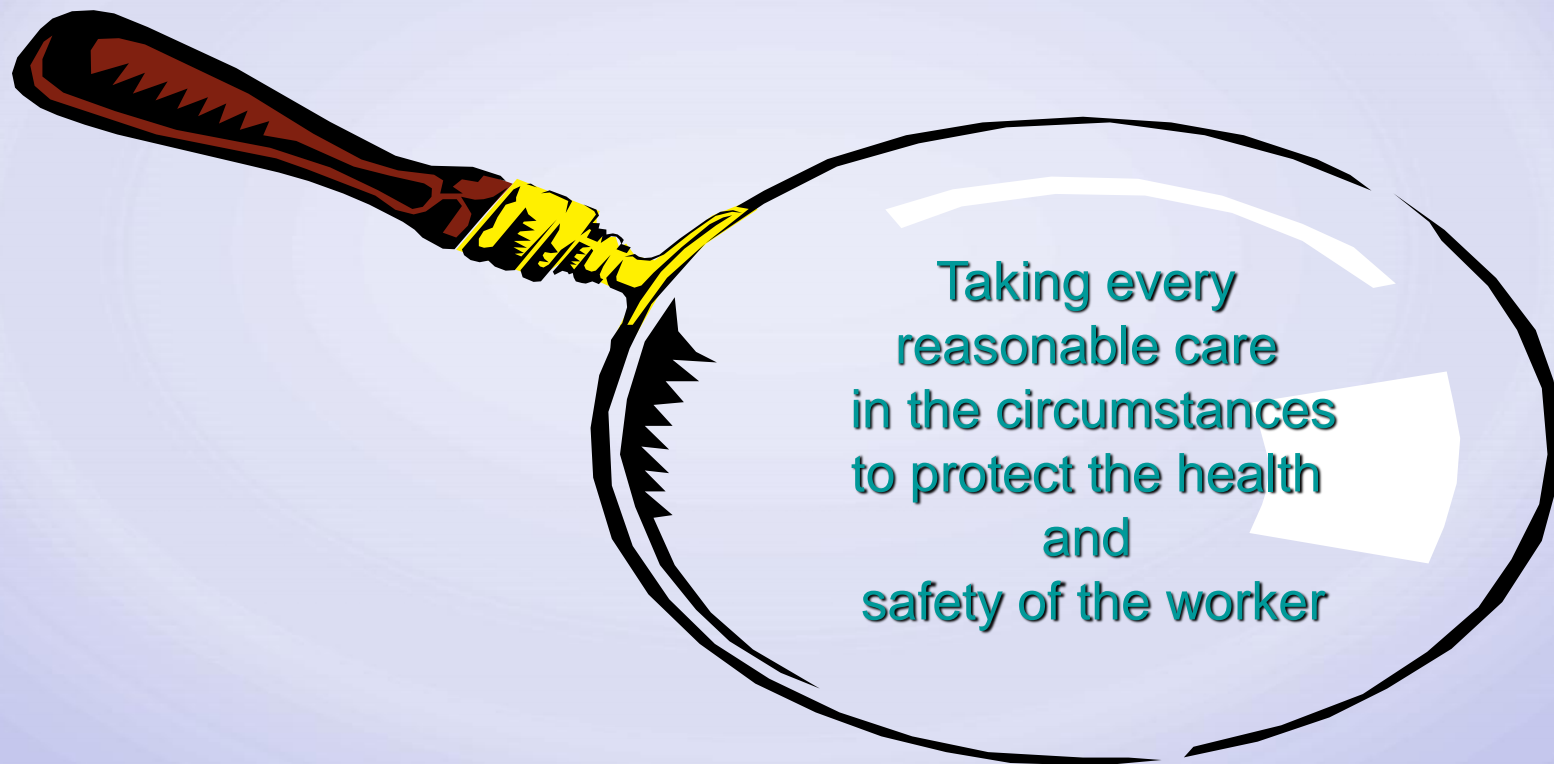


# What This Means For You

- Have a plan: leadership and expertise
- Instruct your workers
- Know when to seek legal counsel
- Conduct thorough investigations
- Have documentation to show due diligence



# What is Due Diligence?







# Due diligence doesn't look like this:







# Sawmill Cases

## Criminal Justice Branch

- Explosion not foreseeable
- No WSBC standards
- Reasonable measures taken

## Review Division (WSBC)

- Fire hazard known
- Excessive dust accumulation known
- Insufficient cleaning staff for increased production



# Familiarize Yourself with the Law

A pyramid diagram with four horizontal layers, each containing text. The layers are stacked from top to bottom: WC Act Part 3, OHS Regulation, OHS Policies, and OHS Guidelines.

**WC Act  
Part 3**

OHS Regulation

OHS Policies

OHS Guidelines



# The Cornerstones of Due Diligence

**Information**

**Instruction**

**Training**

**Supervision**



# Supervisors are Key

A person who instructs, directs, and controls workers in the performance of their duties

## Duties:

- Ensure worker health and safety
- KNOW law and regulations
- Communicate hazards
- Ensure compliance





# Questions to Ask Yourself

- Have I “taken every reasonable care in the circumstances to protect the health and safety of workers”?
- How serious would the consequences be if an issue is not addressed?
- Do I have authority and control?





# AND, Document or Record Everything!

- Orientation records
- Worker/supervisor training records
- Safety meetings and crew talks
- Supervisors notes and logs – or recordings
- Copies of your inspection reports
- Investigations and corrective actions
- Records of progressive discipline



# Continuous Improvement

*The road to success is always under construction.*

*James C Miller, US economist, politician (b. 1942)*



# Resources

- [www.gov.bc.ca/employersadvisers](http://www.gov.bc.ca/employersadvisers)
- [www.worksafebc.com](http://www.worksafebc.com)
  - OHS Regulation Mobile App
  - Due Diligence Checklist
  - Supervising for Health and Safety
  - FSI Investigations Brochure
- Workers Compensation Act
- OHS Regulation & Guidelines
- Prevention Policies

# Questions?

