

“Mitigating OHS Legal Risk by Legislative Auditing”

By Norm Keith, LL.M., CRSP

May 9, 2017



**FASKEN
MARTINEAU** 

VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

QUÉBEC CITY

LONDON

JOHANNESBURG

OHS Facts & Costs



National Statistics



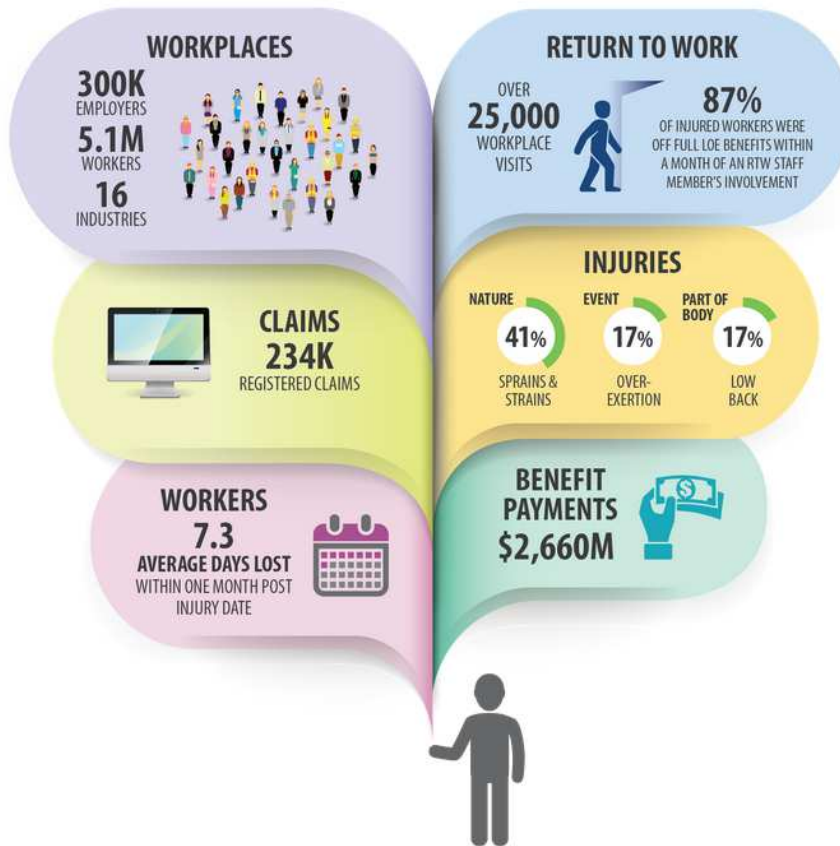
In Canada in 2015:

- 232,629 accepted lost time claims
 - Majority of claims: Health & social services, manufacturing, construction
- 852 fatalities
 - Majority of claims in construction and manufacturing

(Source: Association of Workers Compensation Boards of Canada)



Ontario Statistics



- In Ontario in 2015:
 - 51,570 accepted lost time claims
 - Sprain/strain
 - Low back
 - 281 fatalities
 - Occupational diseases
 - Traumatic incidents (i.e. MVA's)

(Source: Association of Workers Compensation Boards of Canada & WSIB)

Accident Costs



- **Human:** personal injury, pain & suffering, diminished lifestyle, disability
- **Economic:** lost production, accident investigation time, re-training costs, overtime payments, workers' compensation premiums and penalties
- **Legal:** investigations, stop work/compliance orders, quasi-criminal prosecution, director & officer liability, high fines & jail terms

Introduction to OHS Legal Risk



**FASKEN
MARTINEAU** 

VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

QUÉBEC CITY

LONDON

JOHANNESBURG

Workplace Parties: Legal Liability



- Workplace parties with duties in the *OHSA* may be subject to charges and legal liability
 - PART III: Duties of Employers and Other Parties - sections 23 to 32: constructors, owners, employers, supervisors, workers, directors, officers, etc.

Workplace Parties: Legal Liability



- 1 year limitation period on charges being sworn
- MOL will likely commence prosecution of a workplace party because of:
 - fatal or critical injuries
 - failing to report critical injuries
 - non-compliance with Orders
 - obstruction of MOL inspector
 - poor health and safety record

Legal Liability: Penalties



- Section 66, *OHSA*:
 - Individuals:
 - \$25,000, and/or
 - 12 months imprisonment
 - Corporations:
 - \$500,000

* Plus 25% victim surcharge

Overview of Bill C-45: OHS Criminal Negligence



OHS Duty in Criminal Code



- OHS legal duty – s. 217.1:
 - “Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task”.

OHS Criminal Negligence for Individuals



- OHS Criminal Negligence ...
is established where the individual, in undertaking to direct how another person does work, [1] contravenes his or her duty to take “reasonable steps” to prevent bodily harm, and [2] shows wanton or reckless disregard for the lives or safety of others

OHS Criminal Negligence for Individuals



- Penalties for criminal negligence:
 - Injury - 10 years in prison
 - Death - life imprisonment

OHS Criminal Negligence for Organizations



- Penalties for criminal negligence:
 - \$ UNLIMITED
 - Non-tax deductible

R. v. Metron Construction & Swartz



- Facts:
 - 4 workers died when the swing stage they were using to repair balconies at a Kipling Ave. apartment building came apart, leaving them to fall 13 stories. A 5th worker was critically injured
 - 61 *OHSA* charges against Metron, the company supervisor, and scaffold supplier, Swing “N” Scaff were also laid by the Ministry of Labour
 - Joel Swartz (President) and Metron Construction Inc. each charged with 4 counts of criminal negligence causing death and 1 count of criminal negligence causing bodily harm

R. v. Metron Construction & Swartz



- June 2012 – Guilty Plea
- Fines were imposed on Metron Construction and its President, Joel Swartz following guilty pleas by both parties.
 - \$90,000 plus \$22,500 victim surcharge for 4 convictions under the *OHSA* for Swartz
 - \$200,000 for Metron (Crown sought \$1M)
 - Court of Appeal increased fine to \$750,000
 - Reasons include employer’s failure to prevent worker drug use

Project Manager – V. Kazenelson



- Facts:

- June 2015 – Project Manager Vadim Kazenelson convicted of 4 counts of criminal negligence causing death & 1 count of criminal negligence causing bodily harm
- January 2016 - 3½ years in prison for each count (served concurrently) - appealing conviction

Due Diligence, Management Systems and Legislative Auditing



Due Diligence



- Legal defense to *OHSA* charges
- An effective occupational health and safety management system

Due Diligence



- Concepts
 - Ensuring reasonable care was exercised regarding worker health and safety
 - Proving there was no negligence with respect to circumstances that caused accident
 - Not ignoring workers' concerns about health and safety
 - Due diligence requires a standard of reasonableness NOT of perfection

Due Diligence

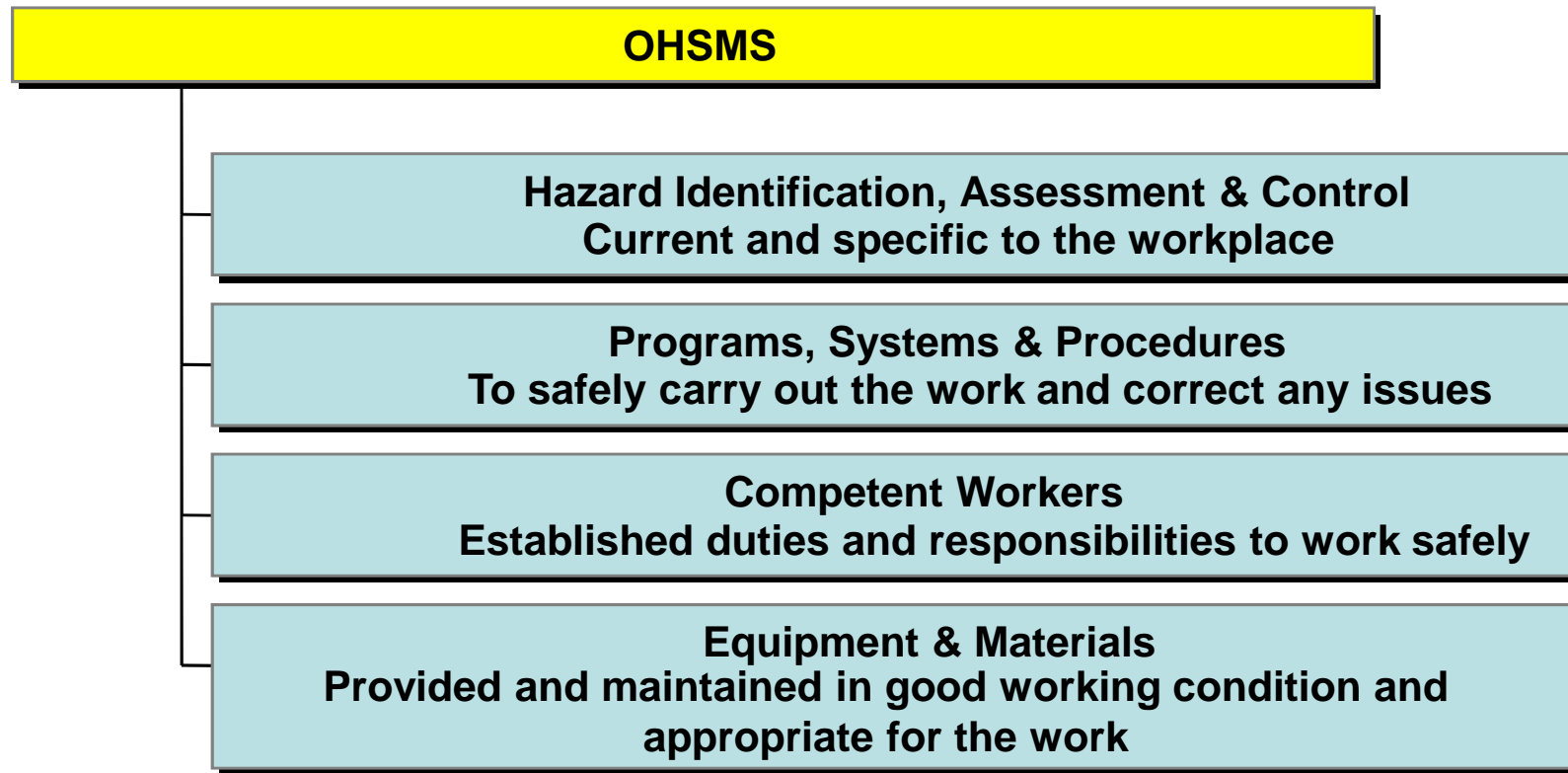


- Legal definition - Two Branches:
 - *R. v. City of Sault Ste. Marie* (1978): “The defence will be available if the accused [1] reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or [2] if he took all reasonable steps to avoid the particular event.”

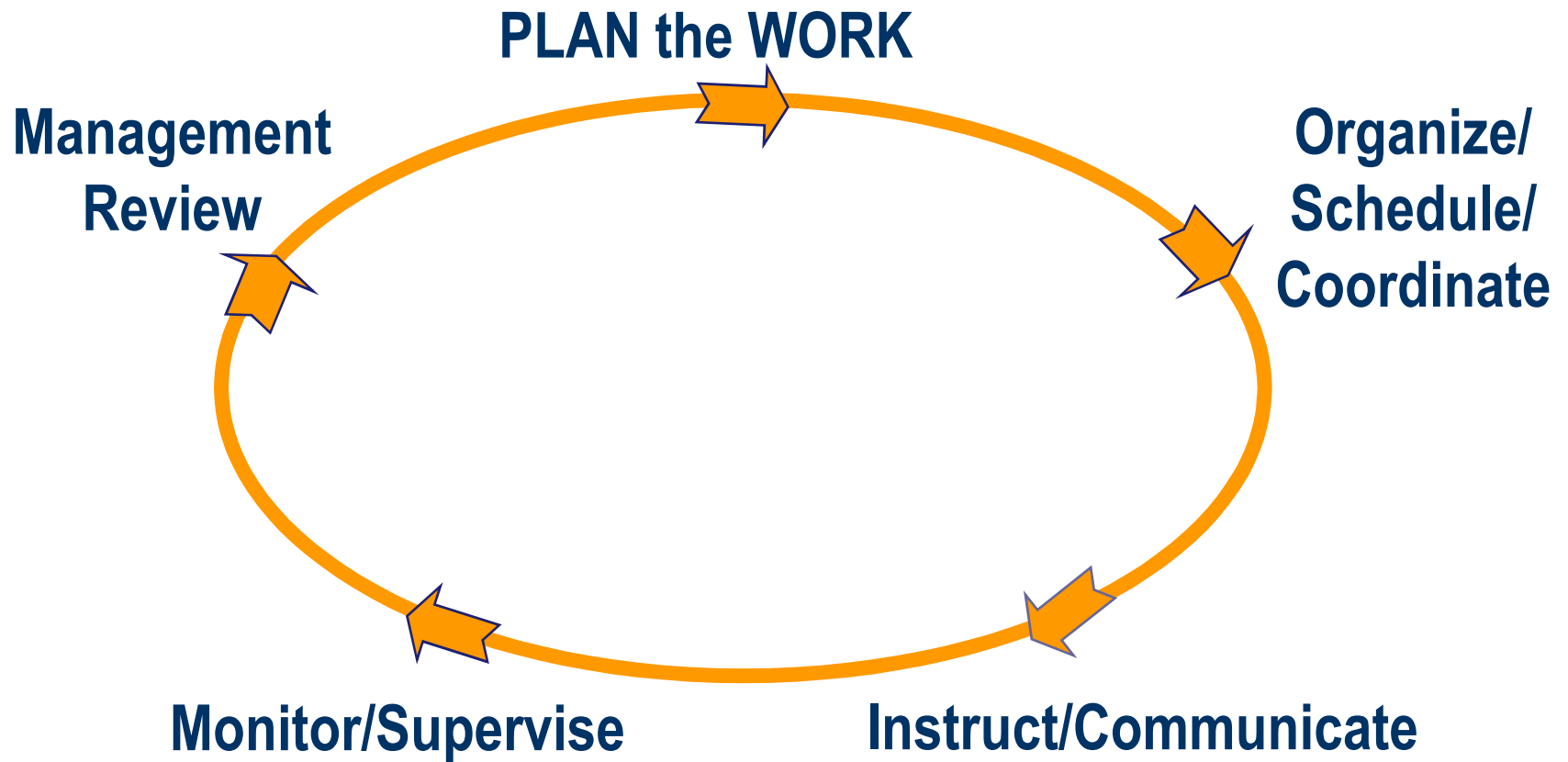
OHS Management System



- An OHSMS typically includes:



Managerial/Supervisory Functions



**FASKEN
MARTINEAU** 

Due Diligence



7

STEPS to OHS Due Diligence

1. **PRIORITY** by senior management to worker safety
2. **RISK** identification and assessment
3. **ELIMINATE** or control workplace hazards
4. **VERIFY OHS** programs and safe work procedures
5. **ENGAGE** managers and workers in OHS training
6. **NOTE** and document OHS program compliance
7. **TOTAL OHS** management system auditing

Action Items for all Organizations



- *OHSLAW* Gap Analysis of current legislative requirements, the legislative audit
- Protect your *OHSLAW* Gap Analysis by solicitor & client privilege to prevent incriminating documents
- OHS Policy and procedure development/improvement
- Due diligence training for managers and supervisors
- Effective implementation of OHS management system
- Incident Response Protocol for high risk workplaces
- Implement or improve your OHS management system

Contact Information



Norm Keith

Partner

+ 1 416 868 7824

nkeith@fasken.com



VANCOUVER

CALGARY

TORONTO

OTTAWA

MONTRÉAL

QUÉBEC CITY

LONDON

JOHANNESBURG

**FASKEN
MARTINEAU**

