Obstruction of a Public Health Inspector in a food premises, the safety and legal implications

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Abstract: This case study outlines an obstruction incident involving a Public Health Inspector (PHI) being obstructed while conducting an inspection. PHIs are empowered by legislation to conduct inspections and investigations without obstruction or hindrance from any person. Managers and employers have a duty to ensure PHIs are able to conduct their work free from harm or harassment. Previous case law provides an excellent perspective as to what actions constitute obstruction. In the current case, previous case law was used to substantiate the evidence and perspective of the Prosecutor and PHI when prosecuting the offender. To better safeguard PHIs during incidents involving obstructive behaviour, implementing an administrative warning system of problematic premises in addition to working in pairs, when feasible, will ensure inspection services are carried out safely and effectively.

Key words: Obstruction, case law, trial, inspection, deterrence, health and safety.

Introduction

In the spring of 2010, during a routine inspection of a high-risk food premises located in the City of Toronto, a Public Health Inspector (PHI) was confronted with an uncooperative operator. The actions of the operator created an environment that hindered and obstructed the PHI, ultimately preventing him from carrying out lawful duties required by the Health Protection and Promotion Act, R.S.O. 1990 c. H.7 (HPPA). Enforcement action was taken to achieve behaviour change and to ensure inspection services are provided without risk of harm to the PHI during future encounters.

Event summary

A routine inspection was initiated at a high-risk take-out restaurant located in Toronto, Ontario. Prior to beginning the inspection, the PHI approached the operator, verbally identified himself as a PHI, and presented the operator with a City of Toronto business card. After securing consent from the operator, the PHI began the inspection by assessing the food preparation processes throughout the premises in accompaniment and cooperation of the operator.

As the inspection progressed, the PHI focused his attention on the cleaning and sanitizing practices at the premises. The PHI, accompanied by the operator, entered the back of the food premises, an area designated for the cleaning and sanitizing of multi-use utensils. The PHI requested the operator describe the equipment sanitation procedures implemented

at the premises to verify compliance with the Ontario Regulation 562, (Food Premises) (R.R.O 1990, Reg 562, s 71). The PHI's request for information was not fully complied with as the operator refused to demonstrate the utensil sanitation procedures. As well, the operator began to dismiss questions regarding types of sanitizing solutions used at the premises and began to question the PHI's motives for information gathering. Further, the operator accused the PHI of harassment during the inspection. Attempts to educate the operator on requirements resulted in dismissive and insulting remarks as well as aggressive gestures using physical equipment. Subsequently, the operator completely refused to acknowledge any further questions and requests from the PHI and refused to allow the inspection process to proceed.

After refusing to cooperate with the PHI, the operator further escalated the situation by locking the front entrance. When attempting to exit because of the deteriorating situation, the PHI was obstructed from leaving as the operator physically blocked the front entrance. The PHI was able to leave shortly after when a patron knocked on the door causing the operator to open the door. After exiting the premises, the PHI called for assistance from another PHI and advised the Area Manager of the situation. Assistance was also requested from Toronto Police Services. Upon arrival of the second PHI and the Police, the operator was approached and upon explanation of the PHI's right of entry and duty to inspect, the operator allowed the inspection to continue.

The aforementioned incident resulted in the enforcement of a Part III offence as per the Provincial Offences Act, R.S.O. 1990, c. P. 33 (POA). Specifically, the operator was charged with "Obstruction of a Public Health Inspector lawfully

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carrying out a power, duty, or direction”, an offence under Section 42(1) of the HPPA, and a trial ensued.

Discussion

Applicable legislation

In Ontario, the HPPA grants a PHI powers, duties, and directions for the purposes of carrying out the Act. Specifically, Part III, Section 10 of the HPPA provides PHIs with the duty to inspect for the purposes of “preventing, eliminating, and decreasing the effects of health hazards in the health unit”. To fulfill the obligation to inspect the health unit, under the authority of Part V, Section 41(3) of the HPPA, PHIs “may enter and have access to, through and over any premises”. Further, the HPPA provides PHIs with other powers including, but not limited to: (i) “mak[ing] examinations, investigations, tests and inquiries” (HPPA section 41(4)); (ii) “mak[ing], tak[ing] and remov[ing] or require the making, taking and removal of copies, samples or extracts related to an examination, investigation, test or inquiry” (HPPA section 41(5)); and (iii) “seiz[ing] or caus[ing] the seizure of the substance, thing, plant or animal” (HPPA section 19(1)). As such, the HPPA prescribes that “no person shall hinder or obstruct a public health inspector lawfully carrying out a power, duty or direction under the Act” (HPPA section 42(1)).

The Ontario Ministry of Health and Long-Term Care specifically directs Boards of Health, and by extension PHIs, as to how to fulfill the obligations of the HPPA. In so doing, the Ontario Public Health Standards (2008) (OPHS) establishes requirements for public health programs and services and outlines expectations for a number of listed requirements. For example, the Food Safety Protocol (2008) requires Boards of Health to adhere to inspection frequencies of food premises such that high-risk, medium-risk, and low-risk food premises are inspected no less than once every four, six, and twelve months, respectively (Ministry of Health and Long Term Care 2008).

Review of case law

In Canada, there have been instances where Inspectors, in different capacities, have been obstructed in upholding their obligations. Individuals committing those acts of obstruction were prosecuted and findings of guilt ensued. These documented court decisions, in the form of case law, were used during the City of Toronto obstruction trial to support the arguments of the prosecutor. The case law presented at trial provided further interpretation and identified specific actions that could be deemed as obstruction. Importantly, case law decisions may act as a precedent and can bind future court decisions (Boyd 2011).

Regina v. O'Hara

In *R. v. O'Hara* (1993), a Nova Scotia Department of Environment Inspector was obstructed while conducting an investigation of an oil spill. While entering the property under investigation, the Inspector was ordered off the property by the

defendant. The defendant alleged that the Inspector was mistaken for an intruder and did not realize the Inspector had attended the property in an official capacity. However, during the trial testimony revealed the Inspector had identified himself sufficiently, both orally and through the use of an official business card. Testimony from the Inspector indicated that during the on-site investigation, the defendant became agitated when the Inspector began asking specific questions regarding a potential oil spill on his property. Instead of answering the Inspector's inquiries, the defendant raised his voice, became visibly upset, and subsequently yelled, “Your inspection is finished . . . get off this site now”. The presiding Justice found that the actions of the defendant prevented the Inspector from carrying out his duties, and further stated, “Obstruction need not be physical, but may be verbal or merely a failure to do something”. As such, the defendant was found guilty of obstructing the Inspector.

Regina v. Keough and Payne

In *R. v. Keough and Payne* (2011), Newfoundland Department of Fisheries and Oceans Inspectors were obstructed from carrying out their duties. Specifically, the Inspectors were prevented from examining the defendants' equipment that was suspected of being used for illegal fishing. During the court proceedings, testimony from the Inspectors indicated one defendant raised his fists while moving toward one of the Inspectors, so as to possibly use physical force to prevent the Inspectors from examining his equipment. Other witnesses on site also corroborated the evidence of the Inspectors. As a result, the Inspectors left fearing for their safety and were unable to complete their inspection. Ultimately, the presiding Justice found the defendants guilty of obstruction because the Inspectors were not able to completely execute their duties due to interference by the defendant.

City of Toronto obstruction case

Employers' responsibilities and obstruction

Instances of obstruction encountered by PHIs involving hostile members of the public can, on occasion, be violent and (or) harassing. As such, employers are concerned and responsible for the safety of PHIs, who are lawfully carrying out required duties under the HPPA. The obligation to protect PHIs from workplace violence and harassment is required by the Occupational Health and Safety Act R.S.O., 1990, c. 0.1, s 1(1), which defines workplace violence as:

“(a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker, (b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker, (c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker”.

Also, in the City of Toronto, an established Human Rights and Anti-Harassment policy requires any member of the public, including visitors to City of Toronto facilities, or individuals conducting business with the City of Toronto, act

in a manner conducive to a harassment-free workplace for employees (City of Toronto 2008). Therefore, it is necessary for managers and employers of PHIs to have a firm understanding of their duties to properly respond to and protect PHIs from obstructive behaviours and to allow for effective delivery of inspections services in a safe workplace.

Perspective of the prosecutor at trial

The task before the prosecution and the defense and the court's interpretation. The prosecution was required to prove beyond a reasonable doubt that the defendant did in fact obstruct the PHI from carrying out his duties under the HPPA on the offence date. To obtain a conviction for obstruction, the prosecution was required to prove that the PHI was attempting to inspect a food premises, that the PHI identified himself to the operator as a PHI, and that the operator then obstructed the PHI from carrying out his duties.

During the trial, the defendant argued that the PHI did not properly identify himself and so he took the PHI as an intruder, causing the defendant to take extraordinary measures to protect his business. This defense was rejected by the Justice of the Peace (JP), who accepted as a fact that the PHI introduced himself to the defendant verbally and also presented a City of Toronto business card. The JP also found that the operator was aware of the PHI's identity as the operator initially showed no resistance and allowed the PHI to initiate his inspection. The operator's cooperation at the outset of the inspection demonstrated that he was satisfied with the PHI's credentials and was fully aware of the PHI's identity during the ensuing interaction, which involved obstructive behaviour on the part of the defendant. This position is supported by case law, which highlights that a verbal introduction and the issuance of a business card are sufficient to establish the identity of the inspector (R v. O'Hara 1993).

The defense also insisted that the PHI did not have the authority to conduct his inspection without prior appointment and that the PHI was harassing the operator because the number of inspections conducted each year. This defense was rejected by the JP in finding that the PHI acted lawfully under the HPPA. Further, it was found that there was no harassment by the PHI or the Health Unit as the PHI was conducting the first of three yearly minimum inspections required by the Food Safety Protocol (2008) under the OPHS.

The use of case law. The prosecution presented case law to demonstrate that obstruction of a PHI can be proven where the actions of the defendant prevent the completion of an inspection by an Inspector. As such, case law stipulates that obstruction need not involve physical obstruction, such that a finding of obstruction can be made where only part of an inspection has been completed. The case law of R. v. O'Hara (1993) was used to substantiate the City of Toronto PHI's actions of properly identifying himself orally and by providing an official business card to the operator. Further, the case law of R. v. Keough and Payne (2011) was used to substantiate that the operator's actions obstructed the PHI. Similar to the City of Toronto case, in R. v. Keough and Payne (2011) the defendant became upset part-way through the inspection and

ordered the Inspector off the site. The court stated that "by being ordered off the property before he had completed discharging either of these duties, he was affected in such execution. This amounts to obstruction" (R. v. Keough and Payne 2011).

Decision and penalty. In the City of Toronto case, the JP convicted the defendant. It was found that the PHI properly identified himself and that the defendant knew that he was an Inspector. The JP further found that the defendant's actions in not cooperating with the PHI constituted obstruction.

The JP fined the defendant \$1500. In doing so, she accepted the prosecution's submission on the fine and rejected the defendant's request for a lower fine of \$500 to \$600. In setting the fine at \$1500, the JP sent a message of both specific and general deterrence. The message of specific deterrence was directed at the defendant to ensure that he does not commit this offence again (R. v. Bassis 2012). The message of general deterrence was directed to the rest of the community, so that restaurant operators understand their obligation to allow for inspections and to safeguard the safety of PHIs (R. v. Bassis 2012).

Lessons learned

During the course of conducting inspections and investigations, operators and members of the public may engage in obstructive or hindering acts. As such, an important lesson learned from the City of Toronto case and from previous cases is that obstructive or hindering acts need not be physical but "may be verbal or merely a failure to do something" (R. v. O'Hara 1993).

Other lessons learned from the current case are important to consider in responding to and preventing acts of obstruction and (or) hindrance. Particularly, it is essential when interacting with an uncooperative or disgruntled operator to ensure assistance from a second PHI, other colleague, and (or) peace officers. It is also important to take preventative measures to ensure the safety of PHIs as well as the continuity and efficiency of inspections and investigations. For example, public health management may consider administrative systems to flag problematic operators and (or) premises. Additionally, management could consider options where PHIs work in a "buddy" system to provide assistance if needed. Such a buddy system would involve the attendance of two PHIs to foreknown problematic premises or the assistance of a second PHI during unforeseen problematic situations.

This obstruction case also presented important lessons learned relating to the enforcement of a POA Part III obstruction and (or) hindrance offence under the HPPA. Specifically, proper documentation of events during the inspection or investigation is necessary for enforcement and prosecution purposes. In the City of Toronto case, the trial was held approximately two years after the offence date. As such, proper documentation is necessary during prosecution proceedings to assist in the recollection of events. In this case, proper documentation consisted of clear and concise note-taking relating to the inspection and events.

Future challenges

The duties of PHIs are varied, resulting in a large number and wide variety of premises under inspection and investigation each year. The nature of the work and the obligations of PHIs make continued and prolonged contact with members of the public and operators a daily occurrence. As a result, there are a number of future challenges facing PHIs in similar circumstances where their duties may be obstructed or hindered.

Economic and budgetary concerns are an emerging challenge facing many public sector agencies. During times of economic instability and budget cuts, governments, at all levels, resort to reducing payroll by cutting jobs (Hatch 2004; Sherman and Lane 2009). As a result of the current economic climate, public health agencies are not exempt from government deficit reduction plans. For example, the Canadian federal government proposed reducing budgets and affecting the jobs of the Canadian Food Inspection Agency and the Public Health Agency of Canada (Fitzpatrick 2012). Jarris (2012) highlights that budget cuts to public health agencies at any government level have a cascading effect in reducing the ability to promote and protect public health. As a result, some public health agencies are facing, and may continue to face, problematic human resource allocation and inadequate staffing. As such, health units may not be able to allocate sufficient inspection staff to assist in situations where PHIs encounter problematic premises and (or) operators.

Another continuing challenge relates to the interactions between PHIs and new operators. As new food, recreational water, and other premises continue to expand and develop, PHIs will encounter operators who are not familiar with their obligations under the HPPA and enabled regulations. Further, these new operators are not familiar with the duties, authority, and rights of PHIs under the HPPA. This lack of understanding and knowledge may lead to confrontational situations where PHIs may be obstructed or hindered in conducting their duties.

Another emerging challenge facing many public sector agencies relates to the increasing rates of interactions with individuals suffering from mental illness. According to Health Canada (2002), approximately 20% of Canadians succumb to some degree of mental illness such as bipolar disorder and schizophrenia. This is a concern for public sector employees, as empirical evidence indicates an increasing number of interactions between police and public administration personnel with individuals suffering from mental illness (Health Canada 2002; Cotton 2004). Cotton (2004) highlights that the aforementioned interactions often involve bizarre behaviour by those suffering from mental health issues. Such bizarre behaviour could result in acts of obstruction and (or) hindrance. Thus, although PHIs may not encounter as many interactions as the police, PHIs should consider this increasing trend when confronted with obstructive and (or) hindering behaviour.

The authors hope this article provides an additional resource to public health professionals when confronted with similar circumstances. As PHIs are focused on promoting and protecting public health, it is sometimes difficult while exercising their duties to determine when obstruction has occurred. Therefore, it is important to remember that any action taken by a member of the public or operator(s) that prevents a PHI from completing his or her duties can be viewed as obstruction.

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References

- Boyd, N. 2011. Canadian Law, and Introduction: Fifth Edition. Toronto: Nelson.
- City of Toronto. 2008. Human Resources Policies: Human Rights and Anti-Harassment. [Online] Available at <https://wx.toronto.ca/intra/hr/policies.nsf/a8170e9c63677876852577d7004ff7f8/019a1b99227c73cd8525674d0047520a?OpenDocument>
- Cotton, D. 2004. The attitudes of Canadian police officers toward the mentally ill. *International Journal of Law and Psychiatry*, 27(2): 135–146.
- Fitzpatrick, M. 2012. 5,500-plus federal job cut notices sent out. [Online] Available: <http://www.cbc.ca/news/politics/story/2012/04/11/pol-job-cuts.html>
- Hatch, J. 2004. Employment in the public sector: two recessions' impact on jobs. *Monthly Labor Review*, 127(10): 38–47.
- Health Canada. 2002. A Report on Mental Illnesses in Canada. Ottawa, Canada. [Online] Available: <http://www.phac-aspc.gc.ca/publicat/miic-mmacc/index-eng.php>
- Jarris, P.E. 2012. Challenging Times for the Governmental Public Health Enterprise. *Journal of Public Health Management & Practice*, 18(4): 372–4.
- Ministry of Health and Long Term Care. 2008. Ontario Public Health Standards: Food Safety Protocol. [Online] Available at http://www.health.gov.on.ca/english/providers/program/pubhealth/oph_standards/ophs/progstds/pdfs/ophs_2008.pdf
- Regina v. Bassis, 2012. Toronto 4860 999 10 05100994 00 (Ont Prov Ct).
- Regina. v. Keough and Payne, 2011. J.J. No. 3 (NL Prov. Ct.).
- Regina. v. O'Hara, 1993. N.S.J. No. 595 (NS Prov. Ct.).
- Sherman, M., and Lane, N. 2009. Cut Loose: State and Local Layoffs of Public Employees in the Current Recession. Center for Economic and Policy Research, 1–4.