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OHS & Workers' Compensation

M A N A G E M E N T U P D A T E

OHS Change in Ontario Marches Forward: Bill 160 Implementing The Dean Panel Recommendations

Following close on the heels of the Dean Panel Report, the Expert Advisory Panel on Occupational Health and Safety, which set out forty-six detailed recommendations to change the OHS system in Ontario, the government has moved to promptly implement the recommendations. Bill 160, which would amend the Ontario *Occupational Health and Safety Act* (OHSA) and *Workplace Safety Insurance Act, 1997* (WSIA) was introduced March 3, 2011. The government has already appointed an interim Prevention Council, consisting of many of the Dean Panel members, and there is every indication that a new Chief Prevention Officer, recommended by the Dean Panel, will be in place by June 2011.

The Ontario Ministry of Labour (MOL) has been actively establishing an implementation team consisting of its own personnel and others from the Workplace Safety and Insurance Board (WSIB) and existing health and safety associations. It is fully expected that implementation of all Dean Panel recommendations will require not only changes to the OHSA and WSIA, but development of numerous new regulations and operational policies and procedures at the MOL. In short, implementation will take time. However, our first glimpse of what may be in store for the OHS system in Ontario comes from Bill 160. Here are some of the key Bill 160 proposals in a nutshell.

1. New Prevention Organization, Chief Prevention Officer, And Prevention Council

If passed, Bill 160 would create a new Prevention Council, comprised of employers, workers and other OHS experts. It is expected that the Council would select a Chair. The Chair is not assigned any specific powers by the Bill but is the individual who will communicate on behalf of the Council. In addition, Bill 160 also creates a new Chief Prevention Officer, appointed by the Minister of Labour,



who would be supported by the Chair and new Prevention Council in carrying out a broad new set of duties mandated under the OHSA.

The role of the new Prevention Council appears largely advisory in nature. Its key functions will involve advising the Chief Prevention Officer about preventing work-related injuries and illnesses, provincial occupational health and safety strategy, and any other matters specified by the Minister of Labour.

We know from the Dean Panel Report that the Council will be charged with creating a multi-year social awareness strategy directed at reducing public tolerance of workplace injuries, illnesses and fatalities. We anticipate that the direction of future health and safety strategy in the province of Ontario will be largely formed by the Minister and new Prevention Council.

2. Shifting Prevention Mandate To MOL

The Bill would add provisions to the OHSA to specify that the Minister of Labour has powers with respect to preventing work-related injuries and illnesses. The Minister would have express powers to:

- promote public awareness of occupational health and safety;
- educate employers and others about occupational health and safety;
- foster commitment to occupational health and safety among employers, workers and others; and
- make grants to support occupational health and safety, which would include funding research.

Very importantly, Bill 160 would amend the OHSA to permit a Director of the MOL to establish written policies respecting interpretation, administration and enforcement of the OHSA, which a MOL inspector will be required to follow. It appears that extremely strong authority will be granted to the Directors of the MOL to set policy and, notably, there is no requirement that Directors confer with the Prevention Council or Chief Prevention Officer on such interpretation, administration and enforcement policies.

Part 2 of the WSIA, the provisions related to Injury and Disease Prevention, would be repealed. Those functions are to be transferred to the Minister of Labour, who will now have the power to create "Designated Entities" which will include safe workplace associations, training centres, or medical clinics specializing in occupational health and safety. In short, the Minister of Labour and not the WSIB will set the new standards

for these organizations. Whether or not the existing safe workplace association, clinic and training centre structure will be retained in the future remains to be seen.

3. Mandatory Training For Workers And Health And Safety Representatives.

(a) Setting of Training Standards

As expected, new provisions would be added to the OHSA to permit the Minister of Labour to establish standards for training programs, and to approve programs that meet those standards. The Bill also empowers the Minister to collect information regarding a worker's completion of an approved training program, and permits the Minister, with worker consent to disclose such information to anyone – including current or potential employers. In short, the MOL may become a repository for information about specific training a worker has received which can be accessed by workers and employers. Perhaps this could lead to greater electronic access to the existing training status of a particular worker.

In establishing the Minister of Labour as the party responsible for training, Bill 160 has departed from recommendations made by the Dean Panel which suggested that the Prevention Council be charged with the creation and implementation of workplace training standards. The Minister may perform those duties or they may be delegated to employees within the MOL. It is also possible that these powers could be delegated to the Chief Prevention Officer. Only time will tell.

Bill 160 also proposes a change in the delivery of certification training for Joint Health and Safety Committee (JHSC) members. As with Designated Entities, this responsibility would be transferred from the WSIB to the Minister of Labour. All standards for training or other requirements for becoming a certified member of a JHSC, and the power to certify a person meeting the requirements, would rest with the MOL.

All standards and content for the proposed mandatory health and safety awareness training discussed in the Dean Panel recommendations (free mandatory entry training for workers, free mandatory entry training for supervisors, mandatory construction worker training, and mandatory fall protection training) will have to await passage of Bill 160 and the setting of standards for training programs by the MOL.



(b) Health and Safety Representative Training

One matter that would take effect promptly would be the requirement that health and safety representatives receive training. Currently, the OHSA does not impose an obligation to train a health and safety representative which is required at workplaces where the number of workers is regularly between six and nineteen. However, Bill 160 would require that health and safety representatives be trained. A new provision within Section 8 of the OHSA would require a constructor or employer to ensure that a health and safety representative receives training to enable him or her to effectively exercise the powers and perform the duties of a health and safety representative. Bill 160 says that this training shall meet such requirements as may be promulgated in supporting regulations. The standards have not yet been set but, if they are in keeping with the recommendations of the Dean Panel, the training required may well be something less than is required for certified members of a JHSC.

4. New Authority For JHSC Co-Chairs

Once again, as expected, a proposed amendment to Section 9 of the OHSA would permit a single Co-Chair of a JHSC to submit written recommendations directly to the employer or constructor. Currently, the OHSA gives the power to make recommendations to the JHSC as a whole. Under a proposed new Section 9(19.1), if the JHSC has failed to reach consensus about making a recommendation, after attempting in good faith to do so, either Co-Chair of the committee would be permitted to make a recommendation. Employers and constructors would have the same obligation to respond, in writing, to a recommendation from an individual Co-Chair as exists for recommendations from the entire JHSC. However, the recommendation from the individual Co-Chair would have to summarize all opposing positions, how the JHSC attempted to reach consensus, and the Co-Chair's recommendation.

5. Reprisals

The Dean Panel expressed concern respecting the manner in which reprisal complaints, made under Section 50 of the OHSA, are handled. Its report identified that reprisal complaints, which allege retaliation for seeking the enforcement of rights and obligations under the OHSA, are not prosecuted by the MOL and that non-union workers have difficulty navigating the complaint process. Bill 160 would add a number of provisions to the OHSA in an attempt to remedy the latter concern. A new Section 50.1 would designate the Office of the Worker Advisor as a body to provide support services to non-union workers in respect of a

reprisal complaint. The Office of the Employer Advisor would be designated as a body to provide support services to employers with fewer than one hundred workers (or another threshold that may be prescribed), who are responding to a reprisal allegation.

Most importantly, a new and additional mechanism for commencing a reprisal complaint would be created. Under Bill 160, a MOL inspector could refer a matter of an alleged reprisal directly to the Ontario Labour Relations Board (Board). The Board Rules requiring a response to a complaint would be triggered upon such a referral. However, before a matter could be referred directly to the Board, a number of conditions would have to be met: the involved worker must consent to the referral, a policy respecting reprisal referrals must be established by the MOL, and the alleged reprisal cannot already be the subject of a complaint to the Board or have been arbitrated under a collective agreement.

Under Bill 160, it appears the MOL inspector would have virtually no role or function in the determination of the referred reprisal complaint. The inspector would not be a competent nor compellable witness in the proceeding meaning the inspector could not testify. It, therefore, appears that the involved worker would be responsible for representing themselves or obtaining advice and assistance from the Office of the Worker Advisor.

There are a couple of reasons that employers should take note of the changes involving reprisal complaints. First, is that the reverse onus, requiring the employer to prove that a reprisal did not occur, will continue to apply. Second, under Bill 160, the decision of a MOL inspector to refer a complaint is not one that can be appealed. As such, once the referral is made, the employer will have to respond to the allegations without the ability to challenge the inspector's decision to make the referral.

6. Codes Of Practice

The Bill would amend current OHSA provisions related to Codes of Practice, to facilitate their development. The provisions of Section 32 of the OHSA would provide that the Minister of Labour may approve a Code of Practice and the approved Code of Practice could be followed to comply with the legal requirement. Further, the Bill would amend the OHSA to provide that failing to follow an approved Code of Practice is not, in itself, a violation of the legal requirement for which the Code was approved. Codes of practice have been widespread in jurisdictions beyond Ontario. Presumably, the intent of this change is to encourage greater use of more prescriptive Codes of Practice to guide employers and constructors on meeting the general performance-based standards in the regulations.



7. What We Do Not See In The Bill

While much was said about creating greater protection for categories of workers identified as vulnerable, including workers in farming, construction, and the temporary staffing industry, Bill 160 does not, in and of itself, further those protections. Specific steps recommended in the Dean Panel Report such as new OHS poster explaining rights and responsibilities of workplace parties, how to contact a MOL inspector, and more frequent proactive inspections and enforcement campaigns at workplaces in sectors where vulnerable workers are concentrated do not appear in the Bill. These recommended steps still have to await guidance from the MOL and the potential modification of its policies on administering and enforcing the OHSA.

Similarly, the Dean Panel also made numerous specific recommendations for tackling the underground economy in the construction industry. Its recommendations included electronic registrations of subcontractors at construction projects, posting of Notices of Project, and proactive inspections by MOL inspectors on evenings and weekends. Any developments in this regard will also have to await MOL changes to administration and enforcement of the OHSA.

Bill 160 confirms the Ontario Government's commitment to implementing the Dean Panel recommendations. We anticipate Bill 160 to pass by June, 2011. For now, this Bill generally focuses on establishing the institutions of the new health and safety regime, setting prescribed training standards, and addressing reprisal complaints. Employers should anticipate further and more significant changes when the Prevention Council and Chief Prevention Officer roles are operative, once enforcement strategy is created, and once any and all supporting regulations are created.

SUMMARY OF RECOMMENDED CHANGES TO ONTARIO OHSA PROCEDURES

* indicates priority recommendation identified by Expert Advisory Panel

* New prevention organization with Chief Prevention Executive and Prevention Council;

New prevention organization to create, implement, and audit training standards;

New prevention organization to develop multi-year social awareness strategy;

New health and safety poster in multiple languages as mandatory posting;

* Mandatory training of health and safety representatives;

* Mandatory entry level health and safety training for all workers;

* Mandatory OHSA training for front line supervisors;

* Mandatory entry level training required for all construction workers;

* Mandatory fall protection training (expect extension to include training on high risk issues in a number of sectors);

Create a single entity responsible for overseeing and co-ordinating provincial strategy regarding underground economy;

Targeting of workplaces and sectors involved in underground economy for MOL inspections outside normal working hours;

Single Co-chair of joint health and safety committee able to make recommendation to employer for response;

Administrative monetary penalties;

Set fines for OHSA offences;

Farming Regulation – extension of existing Regulations and/or new Regulation recommended after consultation with stakeholders in farming community;

Cross-sector regulations – Panel recommends consideration in future of cross-sector Regulations for certain high risk hazards;

Pre-start health and safety reviews – Panel recommends consideration be given to expansion of mandatory pre-start safety review for more technical, complex, work situations than currently apply;

Posting of NOP's and Form 1000's at construction projects – possible amendments to require electronic filing of Form 1000, addition of information to NOP's;

Reprisal amendments to permit expedited process.



ABOUT THE AUTHORS



Cheryl A. Edwards

cedwards@heenan.ca
Phone: 416 360.2897

Cheryl A. Edwards, a former Ontario Occupational Health and Safety (OHS) Prosecutor, is a Partner in Heenan Blaikie LLP's Labour and Employment Group and Lead in the firm's national OHS & Workers' Compensation Practice Group. Cheryl has more than 20 years of experience providing strategic, focused and practical advice and training to public and private sector organizations. She also has extensive experience representing employers, constructors, supervisors and officers and directors at trials, complaints, inquests and appeals. Cheryl has been recognized as one of the best OHS and Workplace Safety and Insurance Board lawyers in Canada on the National Post "Best Lawyers in Canada" list, and as a leading Canadian occupational health and safety practitioner by Lexpert for over 15 years. Cheryl can be contacted by e-mail at cedwards@heenan.ca or by telephone at (416) 360-2897.



Jeremy Warning

jwarning@heenan.ca
Phone: 416 643.6946.

Jeremy Warning is a Partner in Heenan Blaikie LLP's Labour and Employment Group and a member of the firm's national OHS & Workers' Compensation Practice Group. Prior to joining the firm, Jeremy spent more than seven years prosecuting charges under the *Occupational Health and Safety Act* for the Ontario Ministry of Labour. Jeremy now provides advice and representation to employers and management in occupational health and safety matters. Jeremy is also a co-author of the *Annotated Occupational Health and Safety Act*, a leading text used by lawyers, human resource and health and safety professionals. Jeremy may be contacted by e-mail at jwarning@heenan.ca or by telephone at (416) 643-6946.



A national practice solving local problems

ONTARIO

1. **Cheryl A. Edwards***
416 360.2897
cell 416 452.4958
cedwards@heenan.ca
2. **Douglas G. Gilbert**
416 360.3535
dgilbert@heenan.ca
3. **Jeffrey Goodman**
416 643.6824
cell 647 500.6824
jgoodman@heenan.ca
4. **Kevin D. MacNeill**
416 360.2602
cell 647 200.5326
kmacneill@heenan.ca
5. **Jeremy Warning***
416 643.6946
cell 647 407.5732
jwarning@heenan.ca

QUEBEC

6. **Rhonda Shirreff**
416 643.6858
rshirreff@heenan.ca
7. **Lia Chiarotto**
416 643.6954
lchiarotto@heenan.ca
8. **Dan Palayew**
613 236.6970
cell 613 296.8830
dpalayew@heenan.ca
9. **Julie Thibault**
613 236.2161
cell 613 866.2111
juthibault@heenan.ca
10. **Shane Todd**
416 643.6958
cell 647 267.5486
stodd@heenan.ca
11. **Francine Legault**
514 846.2348
flegault@heenan.ca
12. **Lucie Guimond**
514 846.2304
lguimond@heenan.ca
13. **Danielle Gauthier**
819 346.8073
dgaithier@heenan.ca
14. **Jean Boulet**
819 373.4370
jboulet@heenan.ca
15. **Simon Laberge**
514 846.7248
slaberge@heenan.ca

BC/ALBERTA

16. **Kate Bayne**
604 891.1163
kbayne@heenan.ca
17. **Jillian Frank**
604 891.1160
jfrank@heenan.ca
18. **Andrea Zwack**
604 891.1161
azwack@heenan.ca
19. **Najeeb Hassan**
604 891.1164
cell 604 551.2952
nhassan@heenan.ca

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