



OCTOBER 25, 2011

OHS & Workers' Compensation

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

Charting OHS Change in Ontario: From Dean Panel to Bill 160, and Beyond

In early December 2010 the report of the Expert Advisory Panel on Occupational Health and Safety (Dean Panel) set out forty-six detailed recommendations to change the OHS system in Ontario. In June 2011, Bill 160 was passed to implement many of the Dean Panel recommendations. Bill 160 became law rather quickly following the Dean Panel Report, and it left many Ontario employers wondering what Dean Panel recommendations made it into Bill 160, what was left out, and what is yet to come. This article provides an update and a chart tracking the status of OHS change in Ontario with reference to the Dean Panel Report and the Bill 160 amendments.

The Ontario Ministry of Labour (MOL) immediately indicated its commitment to adopt the Dean Panel's recommendations, and promptly established an implementation team consisting of its own personnel, members from the Workplace Safety and Insurance Board (WSIB), and members of existing health and safety associations. Yet, Bill 160 is just the beginning. Implementing all of the recommendations requires the development of numerous new regulations, operational policies, procedures, and infrastructure at the MOL. Full implementation of all the changes residing in Bill 160 may still require further changes to the *Occupational Health and Safety Act (OHSA)* and *Workplace Safety and Insurance Act (WSIA)*.

At a high level, Bill 160 creates the structures and framework necessary to implement the vast and varied recommendations of the Dean Panel – whether they are contained in Bill 160 or await implantation through future legislation or other means.

1. NEW PREVENTION ORGANIZATION, CHIEF PREVENTION OFFICER, AND PREVENTION COUNCIL

The Bill 160 amendments created a significant role for a new Chief Prevention Officer, appointed by the Minister of Labour, who is supported by the new Prevention Council in carrying out a broad new set of duties mandated under the OHSA. In August 2011, George Gritzotis was appointed as Ontario's first Chief Prevention Officer. Mr. Gritzotis previously served as the founding executive director of the Construction Sector Council. Mr. Gritzotis assumed his new role as Chief Prevention Officer on October 17, 2011.

Bill 160 also created provisions for a new Prevention Council, comprised of employers, representatives of trade unions and provincial labour organizations, non-unionized workers, the WSIB, and other OHS experts. Provisions relating to the Prevention Council and Chief Prevention Officer became law when Bill 160 received Royal Assent on June 1, 2011.

An Interim Prevention Council is in place. We are still awaiting word on the composition of the Prevention Council. Employer representation is still required. It is expected that the Council will 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 to the Chief Prevention Officer and the Minister of Labour. The role of the new Chief Prevention Officer and Prevention Council appears largely advisory in nature. We do, however, expect that each will be influential because, by April 1, 2012, the Minister of Labour will be required to consider the advice received pursuant to the OHSA. Their key functions involve advising the Minister of Labour about preventing work-related injuries and illnesses, provincial occupational health and safety strategy, and any other matters specified by the Minister of Labour.

The Dean Panel Report contained a recommendation that the Council should be charged with creating a multi-year social awareness strategy directed at reducing public tolerance of workplace injuries, illnesses and fatalities. Under the Bill 160 amendments, that duty rests with the Minister of Labour. However, the Minister is empowered to delegate the power to an employee of the Ministry such as the Chief Prevention Officer who can, in turn, seek advice from the Council. We anticipate that the Minister, the Chief Prevention Officer, and the Prevention Council will largely form the direction of future health and safety strategy in the province of Ontario.

2. SHIFTING PREVENTION MANDATE TO MINISTRY OF LABOUR

Bill 160 added provisions to the OHSA specifying that the Minister of Labour will now be responsible for preventing work-related injuries and illnesses. These provisions will become law no later than April 2012. This is currently creating some confusion for stakeholders, as the transfer of authority and programs is starting to take place but the provisions await proclamation. The Minister will have express powers to:

- as noted above, 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.

Part 2 of the WSIA, the provisions related to Injury and Disease Prevention, have been 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 now sets the standards for these organizations. All existing safe workplace associations, clinics and training centres are expected to be retained.

3. MANDATORY TRAINING FOR WORKERS AND HEALTH AND SAFETY REPRESENTATIVES

(a) Setting of Training Standards and Recommended New Worker, Supervisor Fall Protection Training

The Bill 160 amendments permit the Minister of Labour to establish standards for training programs, and to approve programs that meet those standards. They also empower the Minister to collect information regarding a worker's completion of an approved training program, and permits the Minister, with a worker's 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. This could lead to greater access to the existing training status of a particular worker.

The Dean Panel recommended mandatory health and safety awareness training for all workers and supervisors responsible for frontline staff. It was recommended that such training include health and safety rights and responsibilities; the role of health and safety authorities, the MOL, and the WSIB; hazard recognition, control and elimination; Workplace Hazardous Materials Information Systems (WHMIS); and other elements. Mandatory training on high risk issues, starting with fall protection training,

was recommended. All standards and content for the proposed mandatory health and safety training (free mandatory entry training for workers, free mandatory entry training for supervisors, mandatory construction worker training, and mandatory fall protection training) will be set by the MOL – through the Chief Prevention Officer. The MOL is currently developing all of this training, but regulatory change and perhaps further OHSA amendments will be required beyond the Bill 160 amendments. Given that this training will be made available in multiple languages and delivery formats, the current “best guess” from the MOL is that the recommended training will be available in 18 to 24 months.

The MOL is considering mandatory fall protection training in all sectors, starting with construction. Existing training that meets the new standards is expected to be recognized under equivalency provisions.

The provisions relating to the authority over training all became law on receipt of Royal Assent on June 1, 2011. However there are no provisions, as yet, requiring employers or constructors to provide specific additional training pending development of training programs and legislative change.

Bill 160 also provides for a change in the authority over certification training for Joint Health and Safety Committee (JHSC) members. As with Designated Entities, this responsibility is in the process of being transferred from the WSIB to the Ministry 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, will rest with the MOL, through the Chief Prevention Officer, on or before April 1, 2012.

(b) Health and Safety Representative Training

A priority recommendation was a new requirement that health and safety representatives receive training. Previously, the OHSA did not impose an obligation to train a health and safety representative, required at Ontario workplaces where the number of workers is regularly between six and nineteen. Bill 160 amended section 8 of the OHSA to 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. The Bill 160 amendments state that this training shall meet such requirements as may be promulgated in supporting regulations.

Provisions relating to this mandatory training have been passed but not yet proclaimed in force. Unlike some of the amendments mentioned above, these provisions will not come into force until proclaimed. The standards have not yet been set. The training required may well be “certification light”, i.e. something less than is required for certified members of a JHSC.

4. NEW AUTHORITY FOR JHSC CO-CHAIRS

Bill 160 amended section 9 of the OHSA to permit a single Co-Chair of a JHSC to submit written recommendations directly to the employer or constructor. Previously, the OHSA gave the power to make recommendations to the JHSC as a whole. The amended section 9 OHSA states that, 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 is permitted to make a recommendation. Employers and constructors have the same obligation to respond to a recommendation from an individual Co-Chair, as existed for recommendations from the entire JHSC. These provisions have been passed and will be proclaimed in force no later than April 1, 2012.

5. REPRISALS

The Dean Panel expressed concern respecting the manner in which reprisal complaints, made under Section 50 of the OHSA, were 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 added a number of provisions to the OHSA in an attempt to remedy this concern. The new Section 50.1 designates 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 is 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 has been created. Under the Bill 160 amendments, a MOL inspector can refer a matter of an alleged reprisal directly to the Ontario Labour Relations Board (the “Board”). The Board Rules requiring a response to a complaint would be triggered upon such a referral. However, before a matter can be referred directly to the Board, a number of conditions have

to be met: the involved worker must consent to the referral, a policy respecting reprisal referrals must be established by the Board and MOL, and the alleged reprisal cannot already be the subject of a complaint to the Board or have been arbitrated under a collective agreement. Policies are currently being developed. We understand that the Board's expectation will likely be that a referral from a MOL inspector contain all information currently required in a reprisal complaint filed by a worker.

Under the Bill 160 amendments, it appears that, as before, MOL inspectors will have virtually no role or function in the determination of the referred reprisal complaint. The inspector is not a competent or compellable witness in the proceeding meaning the inspector cannot testify. Although the MOL inspector may have a role in referring a complaint, it still appears that the worker is responsible for representing themselves or obtaining advice and assistance from the Office of the Worker Advisor.

Employers should take note of the changes involving reprisal complaints for a few reasons. First, the reverse onus, requiring the employer to prove that a reprisal did not occur, will continue. Second, under the Bill 160 amendments the decision of a MOL inspector to refer a complaint is not one that can be appealed, meaning that 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. These Bill 160 provisions have been passed, but not have yet been proclaimed in force. This is another set of amendments that do not automatically come into force and will not be operative until proclaimed.

6. CODES OF PRACTICE

Bill 160 amended the OHS provisions relating to Codes of Practice to facilitate their development. The provisions of section 32 of the OHS 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, Bill 160 amended the OHS 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 and provisions already existed in the OHS for development of such Codes.. 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. These provisions were passed

in June 2011. There is still no word from the Ontario MOL on planned Codes of Practice.

7. MORE TO COME- WHAT WE DID NOT SEE IN THE BILL 160 AMENDMENTS

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 did not, in and of itself, further those protections. Specific steps recommended in the Dean Panel Report such as new OHS posters explaining rights and responsibilities of workplace parties, how to contact a MOL inspector, and the specifics of more frequent proactive inspections and enforcement campaigns at workplaces in sectors where vulnerable workers are concentrated, did not appear in the Bill. These recommended steps still have to await guidance from the MOL and its policies on administering and enforcing the OHS.

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 OHS – though we understand the MOL is preparing to regularly conduct enforcement activities outside of normal working hours.

Bill 160 confirmed the Ontario Government's commitment to implementing the Dean Panel recommendations. The amendments generally focused on establishing the institutions of the new health and safety regime, permitting the setting of prescribed training standards, and addressing reprisal complaints. Employers should anticipate further and more significant changes as the Prevention Council and Chief Prevention Officer roles become operative, once enforcement strategy is created, and once any and all supporting regulations are created. We will continue to keep readers up to date on changes. ■

Dean Panel Recommendation	Bill 160 Amendment to OHSA	Date In Force
<p>New Prevention Organization (Priority Recommendation): Chief Prevention Executive and Prevention Council with powers set out under the <i>Occupational Health and Safety Act</i> (OHSA). Organization to be structured with a view to developing an integrated occupational health and safety (OHS) strategy for the province.</p>	<p>Chief Prevention Officer (CPO): Responsible for provincial OHS strategy, setting out specific goals and performance indicators. Also responsible for establishing training standards, preparing annual report and providing advice to the Minister of Labour (section 22.3 OHSA). Prevention Council: Advise the Minister of Labour and CPO on the prevention of work-related injuries and occupational diseases, provincial OHS strategy and annual report, significant changes to funding and delivery of services, the appointment of the CPO, and other matters specified by the Minister of Labour (section 22.2 OHSA)..</p>	<p>June 1, 2011</p> <p>Part II.1 of Bill 160 came into force on the day Bill 160 received Royal Assent (June 1, 2011). See Bill 160, s. 29(1)</p>
<p>Compliance Support: The Ministry of Labour (MOL) should institute a regulatory review approach that ensures regulations are current, consistent and provide compliance flexibility and support.</p>	<p>Codes of Practice: The Minister of Labour may approve a Code of Practice, and subject to any terms or conditions set out in the approval, compliance with an approved Code of Practice is deemed to be compliance with the legal requirement. Failure to comply with the approved Code of Practice is not, in itself, a breach of a legal requirement (Section 32.1 already provides for approval of Codes of Practice. Sections 32.2 and 32.4 amend these OHSA provisions).</p>	<p>June 1, 2011</p> <p>Section 11 of Bill 160 came into force on the day Bill 160 received Royal Assent (June 1, 2011). See Bill 160, s. 29(1)</p>
<p>Mandatory Health and Safety Awareness Training (Priority Recommendation): Entry level health and safety awareness training for all workers, construction workers, front line supervisors; and mandatory fall protection training for all sectors.</p>	<p>Standards for Training Programs: The CPO can set or amend standards for training programs required under the OHSA or the regulations(section 7.1 and 7.2 OHSA).</p>	<p>June 1, 2011</p> <p>Section 3 of Bill 160 came into force on the day Bill 160 received Royal Assent (June 1, 2011). See Bill 160, s. 29(1)</p>
<p>System Integration: Single authority to drive and be accountable for integration and direction of OHS strategies on prevention and education.</p>	<p>Minister of Labour Given New Powers and Duties: The Minister's powers and duties now include the promotion of OHS and the prevention of workplace injuries and occupational diseases; promoting public awareness of OHS; education of employers, workers and other persons; fostering a commitment to OHS among employers, workers and others; and making grants to support OHS (section 4.1 OHSA).</p>	<p>No later than April 1, 2012</p> <p>Section 2 of Bill 160 comes into force as per s. 29(3)</p>
<p>Strengthen Authority of Joint Health and Safety Committee (JHSC) Co-Chairs: Amend OHSA to permit a single co-chair to submit a written recommendation to the employer.</p>	<p>JHSC Recommendations: A single co-chair of a JHSC may make written recommendations directly to the employer or constructor, after the JHSC has failed to reach consensus, after attempting in good faith, triggering the obligation for the employer or constructor to respond in writing within 21 days (section 9 (19.1) OHSA).</p>	<p>No later than April 1, 2012</p> <p>Section 7 of Bill 160 comes into force as per s. 29(3)</p>

<p>Mandatory Training for Health and Safety Representatives (Priority Recommendation): Training for health and safety representatives should be developed by new prevention organization. Training should be focused on supporting the internal responsibility system.</p>	<p>Training for Health and Safety Representatives: Employers and constructors must 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. Training standards for health and safety representatives will be prescribed by Regulation (section 8 (5.1) OHSA).</p>	<p>Date to be proclaimed</p> <p>Section 6 of Bill 160 comes into force as per s. 29(2)</p>
<p>Expedite Resolution of Reprisal Complaints and Prosecution for Reprisals (Priority Recommendation): The MOL and Ontario Labour Relations Board (OLRB) should develop a process to expedite reprisal complaints, including the investigation of reprisal complaints by MOL inspectors and inspector referrals of reprisal complaints to the OLRB. The MOL should also provide guidance to inspectors on when to prosecute for a violation of s. 50.</p>	<p>Reprisals: An MOL inspector has the authority to refer a worker's reprisal complaint directly to the OLRB, upon consent of the worker. The referral then triggers the existing reverse onus on the employer to show that the impugned actions were not a reprisal for a worker attempting to enforce their OHSA rights (section 50(2.1) OHSA).</p>	<p>Date to be proclaimed</p> <p>Section 13 of Bill 160 comes into force as per s. 29(2)</p>
<p>Content and Delivery of Certification Training Has Eroded. Continued review of the certification program by the WSIB recommended. The Dean Panel had no specific recommendations as to content</p>	<p>Certification Standards for JHSC Certified Members: Criteria for certification was previously set by the WSIB, but Bill 160 transfers that function to the CPO. The CPO may change or add to the existing requirements (section 7.6 OHSA) .</p>	<p>No later than April 1, 2012</p> <p>Section 4 of Bill 160 comes into force as per s. 29(3)</p>
<p>Enforcement and Administrative Monetary Penalties (AMPs): MOL should enhance the current legislative provisions for penalties by adding AMPs as an enforcement tool, and should develop policies and procedures that govern their use. MOL should ensure consistent tough enforcement for serious, wilful violations.</p>	<p>Not in Bill 160.</p>	
<p>Set Fines: MOL should review offences for which tickets can be used and request that the Attorney General review and revise the existing set fines for OHSA offences.</p>	<p>Not in Bill 160. A change in fine amounts will require an amendment to Schedule 67.3 of the Ontario Courts of <i>Justice Act</i>.</p>	

<p>Targeting the Underground Economy: MOL should target workplaces and sectors operating in the underground economy for proactive inspections after normal working hours; the MOL and other government agencies should have a single entity oversee a province-wide approach to combating the underground economy.</p>	<p>Legislative amendments or Regulations not required.</p>	
<p>Protection of Vulnerable Workers (Priority Recommendation): MOL should appoint a committee to advise on OHS matters related to vulnerable workers; MOL should carry out proactive inspections and enforcement campaigns at workplaces and in sectors where vulnerable workers are concentrated; MOL should provide information in multiple languages and formats.</p>	<p>Legislative amendments or Regulations not required.</p>	
<p>Farming Regulations: MOL should develop regulations in consultation with stakeholders in the farming community to control key hazards associated with farm work; any mandatory training requirements should apply to farm workers.</p>	<p>Not in Bill 160.</p>	
<p>Cross-Sector Regulations: MOL should consolidate requirements for key hazards (eg. PPE, ladders, guarding, noise) to ensure consistent coverage across all sectors and eliminate inconsistencies and duplication.</p>	<p>Not in Bill 160.</p>	
<p>Pre-Start Health and Safety Reviews: Complex, highly technical workplaces would benefit from mandatory review by a competent individual, such as an engineer or other professional prior to use.</p>	<p>Not in Bill 160.</p>	

<p>Post Notice of Project (NOP) Form At Construction Project and Electronic Filing of Form 1000: Posting the NOP would ensure that specific information about the constructor is visible to all parties on site, including enforcement staff from all regulators; electronic filing of Form 1000 with MOL would permit inspectors to verify company registrations under other statutes and notify other regulators of violations.</p>	<p>Not in Bill 160.</p>	
<p>Incentives: Providing accreditation and incentives for high-performing employers and sharing best practices with other workplaces. Particular focus should be given to the characteristics and needs of smaller employers. The WSIB, in conjunction with the new Prevention Organization, should review and revise existing financial incentive programs, and reduce emphasis on claims costs and frequency.</p>	<p>Not in Bill 160.</p>	

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