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OHS & Workers' Compensation

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

“THE FUTURE OF WORKPLACE SAFETY IN ONTARIO: DEAN PANEL RECOMMENDATIONS REVEALED”

In the OHS world, tragedy frequently begets change. In Ontario, tragedy came in the form of six construction-related workplace fatalities occurring in late 2009 and early 2010, including the highly-publicized quadruple fatality involving immigrant, non-union workers who fell after a swing-stage failure on Christmas Eve 2009. In the wake of these events, the Ontario government announced a comprehensive review of the Ontario OHS system by a ten person Expert Advisory Panel, chaired by Tony Dean, a professor at the University of Toronto's School of Public Policy and Governance and former Secretary of the Cabinet. Appointed in March, 2010, the Panel reviewed hundreds of submissions from workplace stakeholders and, on December 16, 2010, released an eighty-page Report setting out forty-six sweeping recommendations for change to Ontario's health and safety system¹. The recommendations address such issues as the internal responsibility system, the underground economy, incidents of reprisals, the means and consistency of enforcement of OHS in Ontario, the underground economy, and vulnerable workers (including recent immigrants, temporary workers and workers in construction in particular) to improve their safety.

For the last number of years, and in the lead up to the appointment of the panel, the Ontario government has repeatedly pointed out that the province has doubled the number of full-time OHS Inspectors engaging in proactive inspections and reactive investigations since 2005, and that workplace injury and accident rates are going down, not up. The Ontario government has engaged in ongoing hazard-specific blitzes since 2008. Corporate and individual penalties for OHS contraventions in Ontario are amongst the highest in Canada. Despite this, the Chair of the Advisory Panel, Tony Dean, has been quoted as saying that his desire, and that of the Panel is to “make Ontario the safest jurisdiction in the world”. Indeed, the Report states that the goal is to achieve improved compliance and zero workplace injuries, illnesses and fatalities.

This article examines a number of the forty-six detailed recommendations contained in the Expert Advisory Panel Report. There are a number of specific themes that repeat themselves throughout the recommendations of the Panel, and a brief recitation of those themes may allow employers and managers in Ontario to better appreciate and grapple with the impact of expected changes to the OHS system. The themes stressed repeatedly in the Panel's Report and recommendations include:

¹ The full Expert Advisory Panel on Occupational Health and Safety report can be found online at: <http://www.labour.gov.on.ca/english/hs/eap/report/index.php>

- Concern that the OHS system is complex, and there is insufficient coordination in delivery between the Ministry of Labour (MOL), Workplace Safety and Insurance Board (WSIB), and health and safety associations. There are too many mostly unconnected services provided by various delivery organizations and there is not enough guidance for employers, particularly small business;
- The nature of work and workplace relationships has changed dramatically since the Ontario *Occupational Health and Safety Act* (OHSA) was developed. It would assist employers and other stakeholders for the MOL to clarify roles and responsibilities of supervisors, constructors, independent contractors, and clarify concepts such as “construction versus maintenance”, and the respective roles of employers and temporary agencies ensuring worker safety;
- While the internal responsibility system (IRS) on which the Ontario OHSA is based remains valid, health and safety representatives, supervisors and workers are not adequately trained and informed of roles of the parties and key workplace rights and responsibilities and other essential matters. They need mandatory training in matters to support the IRS;
- Current policies and procedures of the MOL do not adequately address the problem of underground work, often conducted on evenings and weekends to avoid detection by inspectors;
- MOL and WSIB incentive programs focus significantly on surcharges and rebates based on claim severity and frequency, rather than OHS improvements, or development and implementation of successful health and safety programs that go beyond minimum OHS compliance;
- There is a need for better OHS enforcement – more consistency in the treatment of serious wilful contraventions, and more flexibility in the treatment of minor contraventions, including use of compliance assistance. Penalties for tickets should be increased and administrative monetary penalties should be imposed for wilful or repeat offences;
- Enhanced protection of workers who may assert their safety rights, specifically by protecting their right to be free from reprisal, should be provided. Reprisals for attempts to exercise OHS rights should be the subject of prosecution, and there should be expedited processes for worker complaints to the Ontario Labour Relations Board (OLRB).

The recommendations most likely to significantly impact Ontario employers, in our view, are discussed below. As well, please refer

to our side-bar which details the Advisory Panel’s priority items and those expected to result in procedural or legislative amendments.

New Prevention Organization

The Panel recommends a new prevention organization, within the MOL, to be headed by a Chief Prevention Executive, with a multi-stakeholder Prevention Council. It is recommended that each have responsibilities and powers explicitly set out under the Ontario OHSA, with a view to developing integrated occupational health and safety strategies across the current health and safety system, which includes safe workplace associations, the Ontario Ministry of Labour, and the Workplace Safety and Insurance Board.

Creation of this organization has been listed as a priority recommendation. We expect to see the organization established and an interim Prevention Council set up in the next few months. The organization will have a number of significant roles if the Panel’s recommendations are accepted by the government. The Council will create, implement and audit training standards. A number of new mandatory training initiatives are recommended, and it also seems that this multi-stakeholder Prevention Council will oversee training in Ontario generally.


The Council will be charged with creating a multi-year social awareness strategy directed to reducing public tolerance of workplace injuries, illnesses and fatalities. The goal would be to create societal change in attitudes, beliefs and behaviours around occupational health and safety.

A strong recommendation made in the Report is that prevention functions ought to be shifted away from the Workplace Safety and Insurance Board and back to the Ontario Ministry of Labour, and that incentives focusing on OHS programs and improvements to programs be created for employers. The new prevention organization would be responsible for accreditation programs to reward employers to motivate appropriate health and safety performance.

Mandatory Training for Health and Safety Representatives

The Ontario OHSA was amended in 1980 to require detailed certification training for certified joint health and safety committee (JHSC) members. No such training is required for a health and safety representative, which is required at workplaces at which under twenty workers are regularly employed.

The expert Advisory Panel recommends basic, flexible, and accessible training for health and safety representatives be developed by the new prevention organization and made available to employers for a nominal fee. The intent of this recommendation is focused on providing health and safety representatives with greater information to support the internal responsibility system. No specific content for the recommended training is set out in the Report. The recommendation does not contemplate training equivalent to that provided to certified members of a joint health



and safety committee as it suggests that the duration of the training would be shorter than for certified members. This recommendation would require only minor changes to the OHSA. Small businesses and short term construction projects, in particular, should expect to see this recommendation implemented. The Report suggests that, to take into account the realities of short term construction projects, the government consider amending the OHSA to include a provision allowing a health and safety representative to cover more than one workplace of an employer for construction projects.

Strengthen Authority of JHSC Co-Chairs

The Panel recommends amendment of the OHSA to permit a single co-chair of the JHSC to submit a written recommendation to the employer. This arises from concern that a single co-chair's recommendations may be blocked after repeated attempts. This is a reportedly intended to ensure the functioning of the internal responsibility system.

Mandatory Health and Safety Awareness Training

A significant focus of several expert Advisory Panel recommendations is on mandatory health and safety training. In addition to the above mandatory training for health and safety representatives, the Report recommends mandatory training on other issues and for other parties, as follows:

- a) **Free Mandatory Entry Training for Workers** - mandatory standard health and safety awareness training for all workers, which workers would be required to receive before entering the workplace and being exposed to hazards. The Advisory Panel recommends that consultation on the content of basic mandatory health and safety training involve stakeholders with consideration given to the needs of small business and the language and literacy challenges present in the diverse workforce of Ontario. The Panel recommends that this be made free of charge to workers and employers. Where an employer has already established an equivalent program of basic entry level training, this would be grandfathered;
- b) **Free Mandatory Entry Training for Supervisors** - mandatory standard health and safety awareness training for each supervisor responsible for front line workers is recommended. Once again, consultation on content is recommended and the Advisory Panel recommends that the training be made available free of charge to supervisors and employers. Given the broad definition of supervisor under the OHSA, the scope of expected training will raise an interesting issue: Do all lead hands or working forepersons require training?
- c) **Mandatory Construction Worker Training** - mandatory entry-level training for all construction workers is recommended. The Advisory Panel does not detail the suggested content for this entry level training in the report; and
- d) **Mandatory Fall Protection Training** - mandatory fall protection training for all workers performing work at heights is recommended. This could potentially supplement or replace mandatory fall protection which is currently provided under section 26.2 of the Construction Regulations, and would be required in all sectors. The Report also recommends that the new prevention organization consult with stakeholders to determine other high-hazard activities that should also be the subject of mandatory training for workers. Whether or not entry-level training is a panacea for preventing fatal and critical injuries in construction or other high-hazard tasks, this is a strong recommendation from the Advisory Panel and employers and supervisors should expect to see amendments to the Ontario OHSA, or its Regulations, and training content from the new prevention organization.

Targeting the Underground Economy

The Panel acknowledged that the Ontario government has been committed to tackling the underground economy in the construction industry for many years. In addition to existing initiatives, the Panel recommends that the Ontario government create a single provincial entity responsible for overseeing and coordinating a province-wide strategy to address the underground economy. On the safety front, a number of specific steps are suggested for construction employers and constructors:

- a) that the Regulations For Construction Projects be amended to require constructors to post notices of project (NOP's) in a conspicuous place, and in a place visible to the general public, and with a hotline number to report concerns to the MOL;
- b) that registration forms (Form 1000) naming sub-contractors at the project be posted electronically with the MOL and kept on site to allow verification by the MOL of company registrations under the WSIA and other statutes;
- c) that the MOL engage in proactive inspections at construction projects on evenings and weekends – which could mean a particular focus on residential projects.

Enforcement and Penalties

The Panel acknowledges that the OHSA already permits OHS inspectors to wield large sticks. If implemented, the recommendations in the report would lead to amendment of the OHSA to permit a wider variety of enforcement mechanisms and permit potentially greater consequences for employers who fail to comply.

- a) **Set Fines for Tickets** - They recommend that the Ministry of Labour review the “set fines” for tickets which can be issued under provincial offences legislation for non-compliance with OHSA requirements. Tickets, which are similar in nature to

traffic tickets, have been available for contravention of construction regulatory requirements for many years. The Report suggests that tickets rather than compliance orders “provide stronger deterrence” to repeated OHSA contraventions and recommends that stakeholders be consulted with a view to assessing the nature of contraventions for which tickets should be applied. Presumably this encourages consultation to determine whether enforcement through ticketing should be expanded. The Panel specifically recommends that consideration be given to ticketing in the construction sector for failing to file an NOP, post an NOP, establish a joint health and safety committee, and other similar technical matters.

- b) **More Consistent Enforcement** - The Panel recommends more consistent, tough enforcement for “serious and wilful contraventions” presumably the corollary is less significant penalties for minor contraventions. We note that this recommendation appears to reflect the current sentencing practices of the courts, but could be interpreted as suggestive that courts should get even tougher than they already are in sentencing corporate OHS offenders in Ontario. One positive aspect of the recommendations is an emphasis that MOL inspectors return to a more supportive role and provide assistance with compliance where the violation or issue on the site is minor, and where a small business in particular requires assistance in understanding in how to comply with legislative provisions.
- c) **Introduction of Administrative Monetary Penalties** - Most striking amongst the recommendations respecting enforcement and penalties is a recommendation that Ontario consider administrative monetary penalties (AMP's) for OHS contraventions. Under an administrative monetary penalty regime offences prescribed by regulation would have fixed fine amounts. Upon imposition of the monetary penalty, employers normally have a right to appeal the penalty, but no right to a trial. British Columbia, Nova Scotia and the Yukon are currently the only jurisdictions in Canada to regularly utilize AMP's for contraventions of OHS requirements. Given the Canadian enforcement environment, employers should expect the Ontario government to give very serious consideration to amendments which focus greater energy on enforcement via a multi-pronged approach of tickets, prosecutions, and administrative penalties.

There could be a significant impact on employers if OHS inspectors are given the power to issue AMP's. An appeal against an AMP would likely involve a determination of two issues: (1) Whether the alleged OHSA breach has been proven; and (2) Whether due diligence was exercised. Under the existing regime, in which financial penalties are imposed through prosecution in the courts, the Crown (Ministry of Labour) must prove the OHSA breach beyond a reasonable doubt. In an AMP regime, where appeals would likely be

adjudicated by a body such as the OLRB, the evidentiary burden on the Ministry of Labour would likely be the lesser standard of proof on a balance of probabilities. In our view, the strict, court-developed due diligence standards, to which employers are held, are unlikely to be relaxed meaning constructors and employers would be held to the same standard while the Ministry of Labour would have a decreased burden of proof.

Reprisals

The Panel made a number of recommendations arising from concerns about the way in which reprisal complaints, under section 50 of the OHSA, are handled. A concern identified is that Ministry of Labour inspectors receiving reprisal complaints where a worker alleges adverse action for raising a safety issue, attend and investigate any underlying health and safety concern but do not investigate the reprisal allegation itself. Reprisal complaints are not prosecuted by the Ontario MOL. Non-union workers (who must go to the OLRB, as opposed to unionized workers who may grieve or proceed before the OLRB) have difficulty navigating the complaint process. The Panel suggests two remedial steps respecting the situation:

- a) that the Ministry of Labour and OLRB develop a process to expedite resolution of reprisal complaints. As part of this, the Panel suggests (rather surprisingly) that inspectors investigate the reprisal and, in “clear and obvious cases” and with the consent of the worker, refer the matter to the OLRB without the requirement of a formal additional complaint by the worker. This is rather surprising and of concern, given that the employer faces a reverse onus in a section 50 complaint, and that the Board can order interim reinstatement of the worker;
- b) that the MOL provide guidance to inspectors on when to prosecute for a violation of the reprisal provisions of the OHSA, thus suggesting that prosecutions of employers, and of potentially any person committing a section 50 violation, could become more frequent in future.

Greater Guidance To Employers and Other Stakeholders

The recommendations acknowledge the importance of compliance assistance, particularly to small business. In several places the Report recommends that government increase available information and guidance through publications. It is recommended that the Guide to the OHSA and for Joint Health and Safety Committees be updated. The Panel recommends that the MOL create guidance to clarify “supervisor”, “constructor”, “construction versus maintenance” terms and concepts. The Report also suggests that materials, posters and other information products from the MOL and OHS system be made available in multiple languages. Greater guidance on JHSC's and their functions, including the function of multi-workplace JHSC's and how



knowledge sharing among multiple workplaces covered by a single JHSC can improve effectiveness, is also recommended.

Incentives

The Panel strongly suggests that the WSIB review and revise existing financial incentive programs which focus on rewards and disincentives based on claims costs and frequency, and reward positive OHS practice improvements and organizations that qualify suppliers based on supplier health and safety performance. Accreditation would be the responsibility of the new prevention organization, which would develop standards and guidelines for accreditation. We expect that removal of the prevention function from the WSIB will result in elimination of penalties based on workwell assessments, should result in termination of the Board's "no rebate in the year of a fatal accident" policy that looked solely at such negative events and not at proactive improvements made by employers, and may result in elimination of the system of safety groups and safe community incentive programs in which employers group together to achieve WSIB rebates, since if the recommendations are accepted, all prevention functions will transfer to the MOL.

Greater Protection for Vulnerable Workers – Farming, Construction, Temporary Staffing Industry

The Panel expresses concern that there is a need for better protection for a number of categories of workers identified as vulnerable. Noting that many vulnerable workers still lack basic awareness of rights under the OHSA, the Panel recommends a number of general steps including a new OHS poster explaining rights and responsibilities of workplace parties, and how to contact an MOL inspector, as a mandatory posting in all workplaces, available in multiple languages. The Panel recommends more frequent proactive inspections and enforcement campaigns at workplaces and in sectors where vulnerable workers are concentrated, and information products for distribution through general media and the safety system to reach vulnerable workers. A number of categories of workers are characterized as vulnerable: new immigrants; young workers; workers new to their jobs or in new companies; the hotel/hospitality sector; construction; workers in the staffing industry; and seasonal workers.

The Panel specifically identifies the need for stronger health and safety protection for farm workers and recommends that the MOL extend existing regulations under the OHSA (e.g. WHMIS) to farms and/or develop new regulatory provisions specific to farms to govern key hazards that are currently the subject of guidelines. Mandatory training for workers and supervisors, as recommended and discussed above, should also apply to farms, the Panel states. The Panel has moved swiftly to develop a comprehensive, complex set of recommendations. Changes to the legislation and overall system could be equally swift. The Ontario government has already

committed to appoint a Chief Prevention Officer and the Advisory Panel, in its final recommendation, suggested that, among others, the recommendations related to the new prevention organization, workplace training and reprisals be "implemented as priorities over the next twelve months". Employers, and managers and OHS professionals, and their counsel will wish to watch closely as the future of OHS in Ontario unfolds.

SUMMARY OF EXPECTED CHANGES TO ONTARIO OHSA AND PROCEDURES IF RECOMMENDATIONS ACCEPTED

* indicates priority recommendation identified by Expert Advisory Panel

* New prevention organization with Chief Prevention Executive and Prevention Council – powers to be set out in Ontario OHSA;

New health and safety poster in multiple languages as mandatory posting – expect section 25 OHSA amendment;

* Mandatory training of health and safety representatives – section 8 OHSA amendment required;

* Mandatory entry level health and safety training for all workers – section 25 OHSA amendment required;

* Mandatory OHSA training for front line supervisors – OHSA amendment required;

* Mandatory entry level training required for all construction workers – new Regulation or OHSA or Construction Regulation amendment required (possible extension to other sectors);

* Mandatory fall protection training – OHSA or Regulation amendments required (expect extension to include training on high risk issues in a number of sectors);

Single Co-chair of joint health and safety committee able to make recommendation to employer for response – OHSA section 9 amendment required;

Administrative monetary penalties – OHSA requires amendment, potential Regulation to guide application of administrative monetary penalties;

Set fines for OHSA offences – Regulations under the *Provincial Offences Act* to be amended to add specific or increased set fines for specific matters under OHSA and Regulations;

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 - possible new Regulation or amended Regulations;

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 – Construction Regulation amendment required;

Reprisal amendments to permit expedited process – possible amendment to section 50 OHSA or Rules of OLRB if recommendations on reprisals accepted.

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