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Tony Dean Panel Report Proposes Sweeping Reforms to Ontario OH&S Law

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The Expert Panel appointed to conduct a detailed review of the entire occupational health and safety system has released its highly anticipated report[1]. The expert panel was convened in response to the tragic deaths of four workers at a Toronto construction project on December 24, 2009.

The Panel solicited and reviewed hundreds submissions from employer groups, the labour movement, the academic community and workplace health and safety associations. The Panel made a comprehensive series of recommendations designed to achieve the perhaps unrealistic goal of reducing the number of workplace accidents and illnesses to zero. I have a set out a summary below of the major recommendations which are most likely to impact employers if they are enacted.

Major Recommendations

(i) New Prevention Organization

The Panel has recommended the creation of a new prevention organization headed by a Chief Prevention Executive who reports directly to the Deputy Minister of Labour. The organization is expected to try and coordinate delivery of prevention services which are currently delivered

[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

by a number of parties (*i.e.* the Ministry of Labour, safe workplace associations, the WSIB etc.). A major goal of the new organization will be to make sure that all of the parties in the prevention system are reading from the same page in terms of priorities, goals and strategies.

I expect that the role of the Workplace Safety and Insurance Board in providing prevention services will be greatly reduced or eliminated. The WSIB currently operates a safety audit program known as "Workwell". Workwell employs auditors who evaluate an employer's safety program for compliance with specific standards. Employers who repeatedly fail the Workwell Audit face financial penalties.

It is likely that Workwell will be replaced by an "Accreditation" program operated by the Ministry of Labour which will provide various incentives for employers to meet specific standards or performance targets. It is my view that this is a positive development. Primary responsibility for enforcement of health and safety standards in the workplace has always rested with the Ministry of Labour. I am of the view that the WSIB's current prevention programs unnecessarily duplicate the work being performed by the Ministry of Labour and interferes with the WSIB's core function of providing benefits to injured workers.

Another key responsibility for this new organization will be to create, implement and audit the new training standards which are discussed below. This organization is a key priority for the Panel and I anticipate that the Ministry of Labour will quickly act on this recommendation.

(ii) Mandatory Safety Awareness Training

The Panel has recommended specific mandatory entry health and safety awareness training for workers, supervisors and specific construction safety training for workers employed in the construction industry. The Panel does not recommend specific content for this training. However, the Panel has encouraged consultation with stakeholders and that consideration be given to the needs of small business and literacy challenges.

I expect that the OHSA will be amended to require workers and supervisors to take a mandatory safety awareness training course before starting any work in Ontario. Employers will likely be prosecuted for failing to ensure that workers have taken the required training course.

Employees who have already received comprehensive basic safety training from their employers will likely be exempted from the new training requirement. Employers should be aware that the OHSA defines the term "supervisor" broadly, and that the supervisor training obligations will likely apply to any employee with any type of responsibility for directing workers (including possibly unionized lead hands and foremen).

(iii) Administrative Monetary Penalties

The Panel has recommended that Ministry of Labour Inspectors be given the power to impose Administrative Monetary Penalties ("AMPs") on employers who contravene the OHSA. AMPs are different than the charges that are currently laid under the OHSA. When an Inspector lays a charge (even for minor offences) the Defendant is generally required to attend in Provincial Offences Court to contest the matter or enter a guilty plea. All of the usual court procedures, burden of proof and rules of evidence apply to OHSA charges.

I anticipate that AMPs will involve the Ministry of Labour Inspector issuing a document accusing an employer of violating a particular provision of the OHSA and requiring the employer to pay a specific financial penalty. Unlike a charge where the matter proceeds to court, we anticipate that the employer's only recourse for appeal would be to an administrative tribunal (most likely the Ontario Labour Relations Board).

Under the AMP system, I anticipate that the Ministry of Labour will have a lower burden of proof (*i.e.* on a balance of probabilities as opposed to beyond a reasonable doubt) to establish that the contravention occurred. Employers will likely still be held to same standards that are applied in court to prove that all reasonable precautions had been taken to avoid the commission of the offence. There is no reference in the Panel's Report to how penalties for AMPs should be calculated. I note that under the British Columbia AMP system, the penalties are often calculated as a specific percentage of an employer's payroll (the amount of the percentage is based on the seriousness of the contravention).

It appears from the Report that the Panel is not recommending that AMPs replace court prosecutions. In British Columbia, AMPs are by far the most common enforcement tool employed by WorksafeBC (the B.C. OH&S regulator) and court prosecutions are fairly rare. However, I anticipate that court prosecutions will remain the most common enforcement tool for serious contraventions in Ontario.

(iv) Reprisals

Currently section 50 of the OHSA prohibits employers from committing reprisals against workers attempting to enforce their rights under the OHSA. Enforcement of section 50 is a compliant driven process where workers either file an Application with the Ontario Labour Relations Board ("OLRB") or unions can have the compliant heard by a labour arbitrator. The Ministry of Labour as a matter of policy does not prosecute reprisal complaints in court.

The Panel was concerned that vulnerable workers are not being effectively protected because they find it difficult to understand the OLRB's procedural requirements for filing a complaint. The Panel has recommended that the OLRB develop a process for making it easier to file a compliant and to have the resolution of the complaints expedited.

The Panel has also recommended that a process be implemented where Ministry of Labour Inspectors could refer serious reprisal complaints to the OLRB directly with the consent of the worker. This recommendation raises a number of serious concerns. In effect, the Panel is suggesting that Inspectors be given the right to commence a legal proceeding against an employer to which the Ministry would not be a party. It is my view that giving Inspectors this power is akin to allowing WSIB adjudicators to directly commence human rights applications on behalf of injured workers. It is my view that this recommendation is unlikely to be adopted.

The Panel has also recommended that the Ministry of Labour consider prosecutions of employers or other parties committing reprisals contrary to section 50 of the OHSA. It is my view that this recommendation is likely to be adopted and that prosecution for serious section 50 violations will become a very real possibility.

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