SBH MANAGEMENT LAWYERS

UPDATE

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Bill 160 Proposes Significant Amendments to the *Occupational Health and Safety Act* and *Workplace Safety and Insurance Act*

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On March 3, 2011 the Ontario Government introduced Bill 160[1], which proposes a number of significant changes to the *Occupational Health and Safety Act* ("OHSA") and the *Workplace Safety and Insurance Act* ("WSIA"). Bill 160 arises out of some of the recommendations which were set out in a December 2010 report of an Ontario Government-appointed Expert Advisory Panel on Occupational Health and Safety.

The Expert Panel was set up in response to a tragic accident on Christmas Eve 2009 that resulted in four workers losing their lives. The Expert Panel, chaired by former Cabinet Secretary Tony Dean, recommended significant changes to Ontario's occupational health and safety system. If Bill 160 becomes law, it would make a number of fundamental changes to the OHSA and the WSIA.

Bill 160 has passed the first reading in the Ontario Legislature. The current Ontario Government has made reforming the OHSA a significant priority and, in my view, a final version of Bill 160 will be passed prior to the provincial election on October 6, 2011.

I have set out below a summary of the major changes proposed by Bill 160:

[1] *Occupational Health and Safety Amendment Act, 2011*

Approved Training Programs and Repeal of Injury Disease Prevention Provisions of the WSIA

(i) Ministry of Labour Approved Training Programs

Bill 160 gives the Ministry of Labour the authority to approve providers of specific training required under the OHSA and Regulations. This represents a departure from the Ministry of Labour's traditional "hands off" approach to regulating training providers. As we discuss in more detail below, the WSIB has historically regulated and accredited safe workplace associations and other prevention partners.

However, there are a vast number of training providers offering services to employers which are currently not subject to any regulation or accreditation. It is my view that requiring all providers to meet government accredited standards when offering legally mandated training is a welcome development.

(ii) WSIB Prevention Partners

Bill 160 proposes that the "Injury and Disease Prevention" provisions of the WSIA be repealed, and responsibility transferred to the Ministry of Labour. From the perspective of prevention, the WSIB is currently responsible for administering a number of "safe workplace associations" and other safety partners, which are accredited and funded by the WSIB for the purpose of assisting employers with safety compliance. The WSIB website provides a listing of the accredited safe workplace associations and other WSIB safety partners involved in prevention.

Bill 160 provides that the Ministry of Labour will have the power to designate an entity as a safe workplace association, medical clinic, or training centre specializing in occupational health and safety matters. The Ministry of Labour will have the power to develop specific standards that an entity must meet in order to be a designated provider. Providers which are currently approved by the WSIB will be continue to be approved to provide services until a specific date designated by the Ministry of Labour after Bill 160 has become law.

As a practical matter, this means that providers approved by the WSIB will not be "grandfathered" and will be required to apply to the Ministry of Labour for designation and must meet the standards set out by the Ministry of Labour. I expect that many of the current providers which have been approved by the WSIB will apply for designation by the Ministry of Labour. The actual content of the Ministry's standards and the extent to which new entities will seek designation from the Ministry remains to be seen, but it seems clear that a number of new players will seek designation from the Ministry of Labour if Bill 160 passes.

Providers which are designated by the Ministry of Labour will be entitled to apply for a grant to fund their operations. Bill 160 gives the Ministry of Labour extensive powers to monitor and audit the operations of designated providers. In circumstances where an entity fails to comply

with the standards set out by the Ministry of Labour, the Ministry has the power to impose sanctions up to and including the appointment of an administrator to assume control of an entity.

(iii) Status of the Workwell Program

The WSIB currently operates a program known as "Workwell". The Workwell program involves WSIB employees performing on-site health and safety audits of firms when their experience rating indicates that there is a higher risk of injury at their workplace (compared to other firms doing similar work). Employers who "fail" the Workwell audit more than once face financial penalties. There has been some talk in the OH&S community that transferring prevention functions to the Ministry of Labour is a sign that Workwell will soon be a thing of the past.

Although Bill 160 repeals the prevention section of the WSIA, it does not have the legal effect of repealing the WSIB's right to conduct the Workwell program. The legislative authority for the Workwell program comes from section 82 of the WSIA, which will remain in force even if Bill 160 passes (in its present form). This means that the WSIB will be able to continue to operate the Workwell program after most of the WSIB's prevention functions are transferred to the Ministry of Labour. The WSIB may very well decide to scrap Workwell at some point in the future, but Bill 160 does not require it to do so.

Prevention Council and Chief Prevention Officer

A key provision of Bill 160 involves the establishment of a "Prevention Council", which would be responsible for providing advice to the Minister of Labour. This proposed council would consist of worker and employer representatives and other persons with occupational health and safety experience. The Prevention Council would be responsible for advising the Minister of Labour on the appointment of a Chief Prevention Officer and providing advice to the Chief Prevention Officer on important OH&S issues.

The Chief Prevention Officer would be responsible for:

a) developing a provincial occupational health and safety strategy;
b) preparing an annual report on occupational health and safety;
c) exercising powers or duties delegated by the Minister;
d) providing advice to the Minister on the prevention of workplace injuries; and
e) providing advice to the Minister on proposed changes to the funding and delivery of services for the prevention of workplace injuries.

The Chief Prevention Officer will be appointed for a renewable five year term. It is clear that the Chief Prevention Officer is intended to be the primary party responsible for advising the government on the performance of the OH&S system, developing a provincial strategy for OH&S and proposing major changes to the funding or delivery of OH&S services. Of course,

the government which is in power will ultimately have the final say on whether any of the recommendations of the Chief Prevention Officer are enacted into law.

Joint Health and Safety Committee Changes

(i) Training

Under the current provisions of the OHSA, one worker member and one management member of the joint health and safety committee ("JHSC") are required to be a "certified member". In order to be a "certified member", a committee member must have taken legally required training. Under Bill 160, the Ministry of Labour has the power to establish training and certification standards for JHSC members. It is expected that the Ministry will require that all members of the JHSC be "certified". Committee members who are already certified will be "grandfathered" and will not be required to recertify.

Bill 160 will also require constructors and employers to ensure that health and safety representatives (representatives who are appointed when a workplace does not require a JHSC) receive training that would enable them to effectively exercise the powers and perform the duties of a health and safety representative, and that this training will meet all standards required by Regulation.

(ii) Change to how JHSC Recommendations are Made

Currently, the JHSC has the authority to make recommendations to the employer. Under Bill 160, if the JHSC does not reach consensus on recommendations after considering the issue in good faith, either the worker co-chair or the management co-chair of the JHSC may make their own recommendations, so long as the employer is provided with a summary of the positions of both sides and information about how the committee members tried to reach a consensus.

It is my view that this change makes considerable sense. An employer ought not to be prevented from hearing and responding to competing positions on a contentious safety issue if a consensus cannot be reached. However, as a practical matter, I expect that most employers would become aware of any major disputes on the JHSC through the management representatives.

Codes of Practice

Bill 160 allows the Ministry of Labour to develop codes of practice which would set out instructions for how workplace parties are expected to comply with specific legal requirements in the OHSA and Regulations. Bill 160 specifically states that complying with the provisions of a code of practice will result in an employer being deemed to comply with the legal requirement in the OHSA or Regulations.

However, failing to comply with the terms of a code of practice does not automatically result in a finding that a workplace party breached the OHSA or Regulations. Under the OHSA, the legal

requirements imposed upon employers are often very general. If codes of practice become commonplace, I expect that the Ministry will set out specific measures which an employer can implement to ensure compliance with the Act.

The codes of practice could have a significant impact on litigation under the OHSA. For example, in one recent case[2] the employer was accused of failing to ensure that a supervisor was competent to operate a "skid steer" (a loading vehicle) which had been rented by the constructor for use on a project. An accident occurred when a worker approached the skid steer while the supervisor was operating it. The shovel of the skid steer landed on the worker's foot when the sleeve of the supervisor's jacket activated the control of the machine. The supervisor testified that he had frequently used similar skid steers with other employers but had never been formally trained in their safe operation.

The court found the defendant employer not guilty of the charges, primarily on the basis that the supervisor was very experienced in the construction industry, had used similar equipment in the past without incident, and had received safety rules related to wearing loose clothing. The result at trial may have been very different if the Ministry had established a code of practice by regulation, which mandated that all workers receive formal training in the safe operation of a skid steer before being allowed to operate it on a project.

Inspectors to Have the Power to Refer Reprisal Complaints for a Hearing

Under Bill 160, Section 50 of the OHSA would be amended to permit Ministry of Labour inspectors to refer a matter to the Ontario Labour Relations Board ("OLRB") for a determination of whether an employer (or a person acting on behalf of an employer) has engaged in a reprisal against a worker. The inspector would only have the power to refer a reprisal to the OLRB where "the circumstances warrant," and where: (i) the matter alleged to have caused the reprisal was not dealt with by arbitration under a collective agreement or by the filing of a complaint with the Board; (ii) the worker consents to the referral; and (iii) the Director has established a policy on referrals.

It is important to appreciate that employers are subject to a reverse onus and are required to prove on a balance of probabilities that a reprisal did not occur. It is somewhat unusual for a government official to have the power to initiate a civil type proceeding on behalf of an individual litigant. It is likely that the number of reprisal complaints will increase significantly if Bill 160 passes in its present form.

Interestingly, an inspector is not a compellable witness before the OLRB when a reprisal complaint has been filed by a worker or referred to the OLRB by the inspector. It is my view that there are situations where the inability to call the inspector as a witness could prejudice the interests of either party to the proceeding, particularly where the inspector was actively involved in the issues which gave rise to the proceeding

[2] *R v. Rochon Building Corporation* (unreported, Ont. Ct. Jus., Whitby, February 24, 2011, Read J.P.) The case is currently being appealed by the Ministry of Labour.

To deal with reprisal cases in a timely manner, Bill 160 gives the Chair of the OLRB the discretion to make rules to expedite proceedings for reprisal claims. I anticipate that such rules will be enacted and that reprisal cases would be heard fairly quickly. It is possible that an employer could face a hearing within a few weeks of an application being filed. Section 50 of the OHSA allows the OLRB to reinstate a worker who suffered a reprisal. I expect that reinstatement (which has not been commonly ordered historically) would become a more common remedy where an expedited hearing takes place.

The Bill also expands the scope of the office of the Worker Advisor and the Office of the Employer Advisor. The Office of the Worker Advisor and the Office of the Employer Advisor will provide support for workers and employers in reprisal cases. With respect to the Office of the Employer Advisor, this is limited to employers with fewer than 100 employees.

Next Steps for Bill 160

Bill 160 passed first reading on March 3, 2011 and is currently the subject of second reading debate as of the date of this writing. In light of the importance that the Ontario Government has placed on the issue of occupational health and safety, I expect that the Bill will be enacted into law in the near future with fairly limited changes.

Further, the Dean Panel made 46 recommendations to improve the OH&S system and Bill 160 only addresses some of them. I expect that further amendments to the OHSA will be made over the course of the next few years, particularly if the current government is re-elected.

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