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Seismic Shift: Historic Changes to Ontario OHSA Take Effect

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On December 14, 2017, Bill 177 and the most dramatic and far-reaching changes made to the Ontario Occupational Health & Safety Act (OHSA) in nearly 30 years took effect. The Ontario government has, amongst other things, tripled corporate fines and quadrupled individual fines. This article discusses the changes and analyzes the impetus for them and the potential impact they could have on Ontario businesses, their management and leaders, and even workers, going forward.

SUMMARY OF KEY CHANGES

Bill 177 is titled the Stronger, Fairer Ontario Act (Budget Measures), 2017 and was passed quickly by the Ontario Legislature - moving from First Reading to Royal Assent in exactly one month. The details of the changes of the OHSA, which can be found in Schedule 30, can be grouped into three categories which are briefly set out below, followed by our analysis of those changes.

1. Dramatically Increased Fines

(a) **Tripled Corporate Fines**: Since 1990, the maximum corporate penalty for a violation of the OHSA, has been $500,000 per charge. Effective December 14, 2017, corporations are now liable to a maximum fine of $1,500,000 per charge. A surcharge of 25%, required under the Provincial Offences Act, is automatically imposed in addition to the fine; and

(b) **Quadrupled Individual Fines**: Also since 1990, any individual, including a supervisor, worker, director or officer, was liable to a maximum penalty under the OHSA of a $25,000 fine and/or one year in jail per charge. Effective December 14, 2017, individuals are now exposed to a maximum fine of $100,000 per charge for a contravention of the OHSA. This could be in addition to a potential jail term – the maximum term of which has not changed. As noted earlier, a surcharge of 25%, automatically imposed under the Provincial Offences Act, is added to any fine imposed.

2. Expanded Limitation Period

The limitation period for bringing a prosecution under the OHSA has, historically, been one year from the date of the alleged contravention. Effective December 14, 2017, the limitation period has been lengthened to include the day upon which an Inspector becomes aware of the alleged offence. This means, if an Inspector becomes aware of an alleged contravention of the OHSA or its regulations, even if it occurred more than one year ago and even before this historic change, a charge could be investigated and laid within one year of the Inspector discovering the contravention. As discussed in more detail below, this change stands to have a profound effect on the enforcement of the OHSA and to create new issues in prosecutions under the OHSA.

3. New Reporting Requirements

(a) **New Reportable Incident – Structural Inadequacy**: As of December 14, 2017, an employer must notify the Ministry of Labour (MOL) if a joint health and safety committee or a health and safety representative identifies potential structural inadequacies of a workplace as a source of danger or a hazard to workers. This includes potential structural inadequacies in a building, structure or any other part of a workplace, whether temporary or permanent. Notably, and for reasons that are not clear, this obligation does not apply to an employer that owns the workplace;

(b) **Further Reportable Incidents May Be Added to Regulations**: The Bill 177 provisions amending the OHSA allow for passage of further regulations to specify additional prescribed locations in which employers or other parties are required to report an accident or other incident under section 53 of the OHSA. This means that the locations in which reporting incidents – like explosions, fires, floods, and equipment failures – that do not result in a fatal, critical, or disabling injury, are likely to expand beyond a construction project site or mine; and

(c) **Potential Further Expansion to Content and Timing of Reportable Injury Notices:** The Bill also allows for regulations to specify additional notice requirements that must be met where a person is killed or critically injured at a workplace; where a person is disabled or requires medical attention because of an accident, explosion, fire, or incident of violence at a workplace; and where an accident occurs at a project site or mine. This may result in statutory requirements for further details and particulars of investigations and corrective action to be included in accident reports in the foreseeable future.

ANALYSIS

We anticipate that the changes to the OHSA by Bill 177 will profoundly alter health and safety enforcement in Ontario. Higher penalties, prosecution of alleged historic or latent contraventions, and expanded notification obligations resulting in increased investigations by the MOL all appear to lie ahead. Each of these probable developments creates issues that have not been addressed before under the OHSA or have not been addressed in a generation. Our initial and immediate comments on the potential implications for employers and management are below.

INCREASED MAXIMUM FINES

(a) **Dramatic Increase to Fines for Corporations:** As OHS counsel to employers and management we have been regularly advising on the upward creep in corporate penalties. Indeed, our anecdotal experience has been that prosecutors believe that fines should escalate over time. However, there appears no particular logic or particular trigger to this amendment to treble the potential maximum fine up to $1,500,000 per charge – which ties Ontario with Saskatchewan for the highest maximum corporate penalty available in Canada for a contravention of OHS legislation. We note that multiple charges can be, and frequently are, commenced in relation to a particular workplace accident or event. For example, the charges laid could include a substantive charge relating to equipment or a workplace condition, a charge pertaining to information, instruction and supervision, a charge related to a general failure to take “every precaution reasonable”, and numerous other potential charges. To the extent that Crown prosecutors may have felt constrained by the maximum penalty for an individual offence, seeking or requiring convictions on multiple offences would have the effect of expanding the maximum penalty available.

The stark escalation in the maximum penalty is apparent by looking at the application of the 25% surcharge that automatically applies to the penalty pursuant to the Provincial Offences Act. The surcharge arising from a $1.5 million penalty would be $375,000. That figure alone would be comparable to the current high water mark for a corporate penalty on a large national or multinational corporation for a serious event.

We anticipate this amendment will have the greatest impact in cases involving large national or multinational corporations. The new ceiling will permit significantly higher fine amounts to be sought against larger organizations that may already have multiple convictions. It can be expected the Crown Prosecutors will commence seeking penalties over $1 million or close to the maximum per charge, for the largest and most significant "offenders". However, notwithstanding that the increase in the penalty may have been targeted at, or may more immediately effect, larger organizations or those with significant prior convictions, it is reasonable to anticipate that fine amounts will rise across the board for all corporations. One of the traditional sentencing factors considered by courts is the maximum penalty available. The maximum penalty available has now tripled, meaning that penalties imposed under the previous sentencing regime could, arguably, be distinguished as relative to the old maximum penalty and not probative of the penalties to be imposed under the new regime.

The efficacy of the sentencing principle of general deterrence (penalizing one as an example or warning to others) can be debated. However, the Bill 177 amendments establish that the Ontario government clearly believes that sentencing and deterrence are all about the penalty. In revising the sentencing provisions of the OHSA, the government did not move in the direction of other Canadian jurisdictions, whereby a significant proportion of penalties are regularly targeted to meaningful prevention initiatives. These are often referred to as "creative sentences" but remain unavailable in Ontario as the government has committed to an approach with the singular focus of higher fines.

(b) **Dramatic Increase to Individual Fines:** Fines for individuals have been in place for decades, although it should be remembered that directors' and officers' provisions establishing obligations and thus penalties for directors and officers, were only introduced in 1990. Like corporations, individuals are about to experience a tremendous change in the penalties that could be imposed if convicted of a breach of the OHSA. The impetus for such a dramatic change in the individual penalty is not clear. It may go without saying that $25,000 today is not the same as $25,000 in 1980; however, $100,000 today is not, in relative terms, equivalent to $25,000 in 1980. As such, there has been a proportional increase in the maximum penalty.

As with prosecutions under the OHSA against a corporation, multiple charges can be commenced against an individual in relation to the same event. The highest penalties meted out to date against individuals have been against corporate directors. For example, in the now infamous Metron Construction case involving a swing stage collapse, the director of Metron received a total $90,000 penalty for four separate convictions under the OHSA - not including the surcharge. In other less well-known cases, supervisors, directors and managers have received penalties ranging between $20,000 and $50,000, again not including the required surcharge. With the increased maximum individual penalty, these penalties will likely increase, and may do so significantly, depending upon the seriousness of the contravention and the culpability of the individual. Again, just how dramatic an increase in the maximum fine has occurred is demonstrable by considering the victim fine surcharge. The surcharge, alone, on a maximum fine of $100,000 would be $25,000, which is equal to the former maximum fine amount.

Once again, we anticipate the highest individual fines being sought against individuals who have been convicted of serious and significant breaches of the OHSA, potentially with an element of knowledge of circumstances that are highly culpable. Much higher fines should now be expected against individuals who have previously been convicted under the OHSA, especially if the circumstances of a previous offence substantially mirror the subsequent offence.

As mentioned, Bill 177 did not add longer periods of incarceration for individuals who violate the OHSA. Indeed, the maximum jail sentence available has not changed from the time the OHSA was first

enacted and it remaining unaltered suggests that fines are to be the principal sentencing option. This harkens back to decisions issued when the penalties were last revised in 1990. Notably, in R. v. Ellis-Don Ltd. (1990 CanLII 6968), the Ontario Court of Appeal noted that deterrence for a violation of the OHSA "is intended to be in the pocket book". That sentiment informed a much more recent case, Ontario (Ministry of Labour) v. New Mex Canada Inc. (2017 ONCJ 626 (CanLII), in which an appeal court overturned the jail sentences imposed on two directors by the trial court (the Crown has appealed further to the Court of Appeal). If fines are seen both by the government and the courts as the main sentencing option, and the courts are indicating that sentencing courts should not shy away from significant monetary penalties, it seems reasonable to anticipate a significant escalation in the penalties sought against, and imposed on, individuals convicted under the OHSA. Custodial sentences may remain relatively rare but individuals will be at greater risk of receiving tremendously high fines.

(c) **Existing Charges and Charges for Alleged Offences Committed Before December 14, 2017:** Likely, those who currently have OHSA charges before the courts will be questioning whether they are now subject to the increased penalties. Those who have already been charged, or are charged with offences that are alleged to have been committed prior to December 14, 2017, are not subject to the increased penalties. Indeed, section 11(i) of the Canadian Charter of Rights and Freedoms specifically addresses how penalties will be applied. It sets out that "if the punishment for the offence has been varied between the time of commission and the time of sentencing [the defendant is entitled] to the benefit of the lesser punishment". As such, in order for the new maximum penalties to apply, the offence cannot have been committed before the increase.

(d) **Altered Publication Thresholds?:** Anyone who has visited the "Court Bulletins" section of the MOL website will recognize that the MOL publicizes certain convictions and sentences imposed under the OHSA. Typically, if a corporate defendant is fined $50,000 or more (not including the surcharge), the MOL will issue a press release and post information about the conviction and penalty on its website for approximately two years. The threshold for an individual defendant is a fine of at least $5,000 (again not including the surcharge). All jail sentences, regardless of duration, are publicized by the MOL.

It is too early to know if the MOL will revise these thresholds for cases prosecuted under the new penalties. If not, then an escalation of the penalties will likely lead to more press releases by the MOL as cases that may, previously, have attracted a fine below the thresholds attract penalties that meet or exceed them.

EXPANDED LIMITATION PERIOD FOR OHSA CHARGES

Section 69 of the OHSA establishes the deadline by which charges must be commenced (often referred to as the limitation period). Prior to the enactment of Bill 177, section 69 read: "No prosecution under this Act shall be instituted more than one year after the last act or default upon which the prosecution is based occurred". Thus the limitation period began to run on the date on which the last event occurred, regardless of the MOL's knowledge of the contravention.

Now, the limitation on the ability of the Crown to initiate a prosecution under the OHSA includes an element of discoverability. That is to say, if the contravention is not discovered by the MOL until a later point, the limitation may not start to run until that point. This is a result of Bill 177 adding a second phrase to section 69 establishing that the limitation can run for one year after "the day upon which an inspector becomes aware of the alleged offence".

The amended OHSA now clearly allows a prosecution to be commenced either one year after the incident giving rise to the prosecution, or one year after the day upon which an MOL Inspector

learns of the alleged offence. This could extend the limitation period, and the risk of prosecution, in circumstances where an incident may not have been reported – even if the incident was not required to be reported. The limitation period could also be extended if a key witness comes forward or new information is discovered following the one-year limitation, though the new information would have to provide evidence of an offence where there was no such evidence previously.

The amended limitation period appears to most directly apply to latent health and safety violations that may not be immediately identifiable. This could include matters such as worker endangerment by negligent or incompetent advice from engineers and architects (addressed in subsection 31(2) of the OHSA) or safety defects resulting from substandard processes by manufacturers or fabricators. An example of the latter could be where an Ontario manufacturer or fabricator of a scaffold system or component departs from industry standards when making the system or component and workers are endangered or injured. The manufacturing defect may have occurred long before the circumstances that bring it to the attention of an MOL Inspector, yet it may now be actionable such that a charge under the general duty clause of the OHSA could be investigated and laid.

Such latent health and safety violations appear to be the principle reason for the alteration of the limitation period, and can reasonably be characterized as the government response to cases such as an unsuccessful OHSA prosecution involving the Corporation of the City of Guelph, (2012 ONCJ 251 (CanLII)), where a wall in a municipal building collapsed and tragically killed a student five years after the wall was built. The architect and the engineer involved with the project were charged under the OHSA with providing negligent or incompetent advice which endangered a worker. The charges against the architect and engineer were dismissed on the basis that they were not instituted within the one year limitation period under the OHSA. The court found that the charges addressed the alleged provision of negligent or incompetent advice that had been given years before the collapse of the wall. The court also explicitly noted that the OHSA lacked specific language importing the "discovery principle" into the limitation period, and declined to import one into the OHSA.

In our view, this amendment should result in parties taking considerable care when determining, post-incident, whether an OHSA prosecution may occur, or whether the matter has been settled. This considerable expansion of the time frame in which a prosecution could potentially be commenced most definitely increases uncertainty in this area, as well as potential OHSA liability.

In light of this expansion to the limitation period, employers should be particularly diligent in completing a comprehensive internal investigation at the time that injuries occur in the workplace, regardless of whether the incident is reported to the MOL. Failure to complete an internal investigation at the time of the incident, or completing an investigation that is limited in scope, may result in significant prejudice to the employer should the MOL decide to commence a prosecution when it becomes aware of the alleged offence, which could, potentially, be years after the incident. While this amendment clearly provides MOL Inspectors with the ability to review past workplace incidents, how such powers of review will actually be exercised remains to be seen.

A last issue in relation to this expanded limitation period, that we believe is worth comment, is whether a matter involving an accident or injury preceding these amendments, which only becomes actionable because of the new discoverability principle added to the OHSA, would be subject to the new OHSA penalties. As noted above, if the offence occurred prior to December 14, 2017, the defendant, in our view, is not to be subject to the increased penalties. However, we anticipate debate in future cases about when the offence actually occurred, as that date will likely be determinative of which sentencing regime will apply. It is reasonable to anticipate arguments, similar to those made by the Crown in the Corporation of the City of Guelph,

suggesting interpretations of the OHSA and its regulations that would see the offence as having occurred at a time that subjects the defendant(s) to the increased penalties. Consequently, we anticipate that such issues, which have seldom been litigated under the OHSA, may become more common.

NEW AND EXPANDING NOTIFICATION REQUIREMENTS

(a) **New Notification Required Where Structural Inadequacy Identified:** While these amendments do not increase the powers of joint health and safety committees or worker representatives, they do impose a new positive obligation upon employers to report structural hazards, alleged by representatives or the committee, to the MOL. Such potential hazards may no longer be exclusively dealt with internally. We expect this may result in further reporting, in particular at construction projects (in relation to temporary structures) and at facilities managed by external parties or owners.

Notably, there is no requirement for any reasonable or objective basis to believe a structural hazard exists, such as an expert examination or report, before a report can be made by the committee or representative to the employer, thereby triggering the reporting obligation to the MOL. It is not entirely clear whether a report to the employer by the committee must be based on consensus within the committee. For workplaces in which structural hazards are alleged, time will reveal whether this new obligation will increase the attendance of MOL engineers or if the MOL will address concerns by requiring employers to investigate and determine the adequacy of the structure in issue by utilizing the services of an expert at the employer's expense.

The direct impetus for this amendment appears to have been the Algo Centre Mall roof collapse, which occurred in Elliot Lake, Ontario in 2012, and resulted in two fatalities and multiple injuries. Sadly, there have also been numerous roof collapses, and collapses of work platforms and other structures, at construction projects, mines, and industrial establishments. All suspect structures in all sectors would now be subject to such reporting.

In the Algo Mall matter, the roof collapse gave rise to multiple civil actions, as well as charges under the OHSA and Criminal Code against the engineer who declared the mall structurally sound in a report prepared weeks before the collapse. Within that report, the engineer had indicated that an investigation of the structure had revealed rusting and leakage, but concluded that the load carrying capabilities of the structure had not been detrimentally affected. While the engineer was ultimately acquitted of the charges of criminal negligence, and the OHSA charges were withdrawn, it appears the Legislature has taken additional steps to prevent similar events in the future by imposing proactive obligations upon employers to provide the MOL with notice of any structural issues identified within the workplace.

(b) **Authority to Introduce / Amend New Regulations:** Lastly, the amendments allow for the introduction of numerous additional regulations with respect to accident and incident notice requirements. Interestingly, to date, the provisions of sections 51, 52 and 53 of the OHSA and mandatory reporting requirements to the MOL contained therein, and relatively brief sector-specific regulations (Industrial Establishments, Construction Projects, Mines, Health Care) have driven the timing and content of prescribed reporting of accidents and incidents. It appears this is about to expand.

We anticipate there will be new notice requirements applicable to accidents occurring within additional prescribed locations. These have not as yet been identified or defined. New persons will apparently be required to report an accident and, again, the specifics have not been detailed. New dates or times at which certain reporting ought to be required may be set. Most significantly, it appears that the content and particulars of mandatory accident reports may be expanded, such that the current approach by employers to provide the required minimum, non-incriminating details, will

need to be reassessed, or employed in new circumstances. This may bring accident reporting and the particulars required in same more into line with other Canadian jurisdictions, where there are more expansive minimum reports required.

Because the ability of the government to introduce such changes will be prescribed in regulations, not the OHSA, the government will not be required to follow the legislative process associated with the passage of a Bill when it chooses to introduce such changes. The Ontario government often, but does not always, provide a consultation opportunity or period. Consequently, such regulations may come into force immediately upon their introduction, and may provide employers with little time to adjust to any new obligations.

CONCLUDING THOUGHTS

While Bill 177 amended a small number of provisions in the OHSA, key provisions were amended in historic ways and are poised to have broad and significant implications. Increased and record-setting fines likely loom on the horizon. Historic matters believed to be long over may be actionable and an increasing number of workplace events are to be reported to the MOL for investigation. Employers and their management and leaders would be well-advised to ensure that the organization's health and safety program is robust and well-documented, and that MOL investigations and workplace incidents are addressed in a manner consistent with the possibility of even more significant OHSA liability. Bill 177 has resulted in a seismic shift, the full effect of which will play out in the years to come.

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