Compliance Year In Review: The 7 Biggest OHS Stories of 2018

The fact that the year's biggest OHS story, namely, cannabis legalization, was so weird belies just how normal 2018 actually was. Adding to the irony is how the red-letter date of October 17 is really just the beginning rather than the end of the story as it will require years to iron out the OHS aspects of legalization. Meanwhile, the other predominant themes in OHS and workers' comp lawmaking and litigation were continuations of previous trends. And as the year comes to close, new developments from Manitoba suggest that after years of talk, one important trend in OHS law is about to become reality.

1. **Cannabis Legalization**

On October 17, after a 3-month delay, Canada became the second country to legalize recreational cannabis. Although workplace use of impairing substances is a perennial challenge, legalization sent OHS directors scurrying to review their current drugs and alcohol policies.

Impact on You: Recognize that legalization is a work in progress with many of the details to be worked out over the coming years. Specifically, provinces will have to review their OHS laws and make necessary adjustments. In the meantime, you can use OHSI's Model Drug and Alcohol Testing

and Fitness for Duty Policies to vet your own policies and rely on the following laws to control the use of cannabis and other impairing substances, legal or illegal, in your workplace:

- Your OHS law duty to take reasonably necessary measures to protect workers against known and foreseeable risks;
- The worker's OHS duty to work safely;
- Indoor smoking laws, which have been broadened to include cannabis; and
- Traffic safety laws.

2. **OHS Laws Move toward Psychological Safety**

The extension of OHS regulation into the realm of social behaviour began with workplace violence and has expanded to harassment. In 1999, Québec created new legal psychological harassment for workers. In 2010, Ontario made the employer duty to prevent workplace harassment an OHS duty. Since then, just about all jurisdictions have followed suit with no fewer than 5 jurisdictions adopting new workplace harassment laws (or expanding current ones):

Table 1. Workplace Harassment Initiatives in 2018

Jurisdiction	Initiative
Federal	Bill C-65 extending current OHS workplace violence protections to harassment take effect Oct. 25, 2018
Alberta	New harassment obligations under Bill 30 took effect Jan. 1, 2018
New Brunswick	New workplace harassment requirements (OHS Regs., Part XXII.1) take effect April 1, 2019
Québec	Bill 176 expansion of psychological harassment protections take effect Jan. 1, 2019
BC	WorkSafeBC conducting full-scale review of current OHS workplace harassment and bullying laws as part of 2018-20 strategic plan

Prediction: The next phase in the morphing of 'psychological safety' as OHS duty: domestic violence, specifically rules extending employers' workplace violence duties to include domestic violence at the workplace, provided that they know or should know of the threat a la Ontario Bill 168 and recently adopted by Alberta (Bill 30) and New Brunswick (Part XXII.1).

3. **Workers' Comp Broadens Mental Stress Coverage**

Coverage of psychological disorders like PTSD (which we'll refer to as 'mental stress') is the workers' comp counterpart of the psychological safety evolution of OHS laws. Historically, mental stress was 'compensable' only if it was caused by a discrete, identifiable, extraordinary and shocking event at work, like witnessing a co-worker get killed in a grisly accident. Over time, it was extended to psychological disorders developing gradually over time. Recently, several provinces (Ontario, Alberta, BC and PEI) have begun to cover mental stress caused by 'stressors,' i.e., stress inducers that cause damage but don't rise to the level of 'traumatic,' such as harassment, bullying and interpersonal conflicts. 2018 witnessed continuation of the trend via the creation of new rules presuming mental stress disorders to be work-related. Approaches differ regarding whether the presumption covers:

- All disorders recognized in the Diagnostic and Statistical Manual of Mental Disorders (DSM) or just PTSD; and/or
- All workers or just designated high-stress occupations like first responders and firefighters.

Table 2. Workers' Comp Mental Stress Coverage Initiatives in 2018

Jurisdiction*	Initiative

Ontario	Policy 15-03-14 expanding coverage for chronic mental stress due to substantial work-related stressors took effect Jan. 1, 2108
Alberta	Bill 30 extends presumption that PTSD is work-related that had previously applied only to EMT workers to cover *all* workers, effective April 1, 2018
BC	Bill 9 presuming any DSM disorder to be work-related when suffered by police officers, firefighters, emergency medical assistants, sheriffs and corrections officers took effect May 17, 2018
Nova Scotia	Bill 7 presumption that PTSD suffered by emergency response workers is work-related took effect Oct. 26, 2018
Newfoundland	WorkplaceNL Policy EN-18 presumption that any DSM disorder suffered by any worker is work-related takes effect Summer 2018
Prince Edward Island	Bill 102 presumption that any DSM disorder suffered by any worker is work-related took effect June 2, 2018

* Saskatchewan was the first province to make any DSM-recognized disorder suffered by any worker presumably work-related in 2017

Trends & Predictions: Claims for mental stress claims are increasing faster than any other injury or illness. The new coverage rules will no doubt fuel that trend. Even so, mental stress claims remain difficult to prove due not only to coverage limitations but also because claimants must show that the cause be objectively traumatic, i.e., that a reasonable person would have found it traumatic. And even in stressor jurisdictions, the well-established rule is that normal job pressures and stresses don't count, only egregious or unexpected stresses, including harassment and bullying.

4. **An OHS Prosecution Bullet Dodged**

An oilfield worker lies dead. There are no witnesses. All that's clear is that he got hit in the head after a release of torque during a tripping out operation caused the drill to rotate unexpectedly. The prosecution contends that the fact the accident happened is proof enough that the employer didn't take the 'reasonably practicable' measures required by the OHS laws. If the Crown is right, it means the employer will have to prove due diligence to avoid a conviction.

Luckily for the employer (and other employers across the country), the Alberta Court of Appeal doesn't accept the argument. The mere occurrence of an incident isn't enough; the prosecution must show the employer actually did something wrong, in this case, what reasonably practicable step it could and should have taken, to meet its burden of proving the violation [*R v Precision Diversified Oilfield Services Corp*, 2018 ABCA 273 (CanLII), Aug. 22, 2018].

Impact on You: While it may sound like so much legal technicality, the *Precision* case has enormous practical significance. Remember that in an OHS prosecution, the Crown has the burden of proving the violation beyond a reasonable doubt. Only if the Crown gets over that hump does the burden of proving due diligence shift to the defendant. This scheme works to the employer's advantage in the not uncommon situation where an incident occurs for a cause that can't be identified. Had *Precision* gone the other way, the Crown would have had the upper hand in such cases.

The other bit of good news is that Alberta isn't alone in ruling that the mere occurrence of an incident isn't enough to prove an OHS violation. Courts in Ontario (*Ontario v. Brampton Brick Ltd*., 2004 CanLII 2900 (ON CA)) and Saskatchewan (*R v Viterra Inc*., 2017 SKCA 51 (CanLII) (applying federal OHS laws)) have ruled the same way.

5. **The How Long Is Too Long for an OHS Trial Delay Debate Continues**

Historically, OHS prosecutors have been notoriously slow in bringing defendants to trial. So, in a 2016 case called *R v. Jordan*, the Canadian Supreme Court sent them a message by establishing the rule that an OHS trial delay of 18 months or more presumably violates a defendant's right to a speedy trial unless the prosecutor can show that: i. the case is unusually complex; and ii. it implemented a concrete plan to minimize the delay. Two of 2018's most important court cases involved interpretation of these so called *Jordan* rules. The first came in June when the Ontario Court of Appeal upheld the decision to dismiss a case after a 23-month trial delay. The case was complex, the Court acknowledged, but the Crown didn't have the necessary plan to minimize the delay to justify a delay exceeded the 18-month threshold [*R. v. Nugent, Guillemette and Buckingham*, 2018 ONSC 3546 (CanLII), June 8, 2018].

In November, a Newfoundland court broke new ground by holding that the *Jordan* 18-month delay rule covers OHS trials but not the laying of charges'or, to put it in lawyerly terms, *Jordan* applies to post-charge but not pre-charge delays which are still assessed under the historical case-by-case formula. Result: The Crown could still prosecute a construction subcontractor charged 2 years after an incident [*R. v Flynn Canada Limited*, 2018 CanLII 104609 (NL PC), Nov. 5, 2018].

Prediction: Although the *Flynn* case is a bit of a bummer, it's only the first salvo in what's likely to become a protracted battle. First, the *Flynn* ruling comes from the provincial court and could go through up to 2 rounds of appeal within Newfoundland. And even if it does survive, there's no way of knowing whether courts in other jurisdictions will rule the same way.

6. **Stepped Up Criminal Enforcement**

In addition to OHS charges, employers face risk of criminal prosecution for serious safety offences. But while it's been on the books for over a decade, the Bill C-45 law making it easier to prosecute companies and corporate officials for criminal negligence for such offences has laid dormant for a long time. That's starting to change. In 2017, two mining companies Detour Gold in Ontario and Century Mining in Québec were fined, respectively, $2.6 million and $200,000 for C-45 offences. In March 2018, the Ontario Court of Appeal upheld the 3.5-year prison sentence against the Metron Construction project manager stemming from the Christmas Eve swing stage scaffold collapse tragedy of 2009.

On March 1, 2018, things took a turn to the weird when the Court of Québec upheld the criminal conviction of an excavation contractor for a worker was killed in a trench collapse. The remarkable aspect of the *R c. Fournier* case was that the contractor was found guilty of not just C-45 criminal negligence but also *manslaughter*.

Trends & Predictions: The *Fournier* case will prove to be more of an outlier than a trend starter'both inside and especially outside Québec. But even if the manslaughter approach doesn't catch on, threat of criminal prosecution under C-45 remains a very real and increasing threat.

7. **Harmonization: The Future of OHS Law**

In recent years, Canadian governments have worked together to eliminate barriers to interprovincial trade and commerce. Among these barriers is the existence of different OHS requirements and standards in different jurisdictions. Accordingly, there has been much talk of harmonizing OHS rules across boundaries'a Canadian version of GHS harmonization of worldwide chemical safety standards. On November 23, Manitoba became the first province to take the plunge by announcing plans to revise provisions of its *Workplace Safety & Health Reg*. to harmonize with agreed-to standards.

Prediction: Now that the seal has been broken, expect other jurisdictions to follow Manitoba’s lead and harmonize their own OHS regulations. Most likely targets, at least initially: PPE, audiometric testing, respiratory protection, first aid and fall protection.