OHSInsider
Your Easiest Path to OHS Compliance in Canada
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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;

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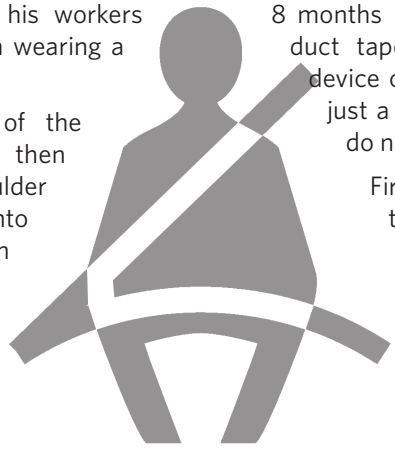
No Firing Worker When Another Worker Gets Written Warning for Same Offence

Discipline for safety infractions must be not only fair but also consistent. That's the moral of this case that began when a mining supervisor caught one of his workers operating a haul truck with wearing a seat belt.



After ordering him out of the vehicle, the supervisor then discovered that the shoulder belt had been jammed into the retracting mechanism with the shoulder belt hanging loosely next to the operator's seat. The worker was fired for violating the company's strict mandatory seat belt policy and deliberately disabling a safety device.

Normally, I would have upheld dismissal for this kind of violation, especially given the safety-sensitive nature of the workplace, said the arbitrator. The problem was that 8 months later, a worker caught using duct tape to disable the retracting device of his haul truck got off with just a written warning. So, what to do next?

Firing the first offender was too harsh; but reinstating him after his serious safety offences was unrealistic. So, the arbitrator said the company had to pay him wrongful dismissal damages instead [*North American Mining Inc. v International Union of Operating Engineers, Local Union No. 955*, 2018 CanLII 101945 (AB GAA), Oct. 26, 2018].

...OHS Year In Review continued from cover

- Current OHS regulatory restrictions on being at the workplace while impaired;
- 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). *See Table 1. Workplace Harassment Initiatives by jurisdiction on OHSInsider.com.*

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. 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.

OHSInsider
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The OHSI Compliance Awards for 2018

MOST IMPORTANT CASE OF THE YEAR

Goes to the Alberta Court of Appeal for rejecting the OHS prosecutor's argument that the mere fact that an incident occurred was proof that the employer didn't take all the "reasonably practicable" measures required to prevent it. Imagine the power prosecutors would wield over employers if incidents were enough to prove an OHS violation.

MOST PROGRESSIVE NEW LAW

Goes to federal Bill C-65, the new standard in workplace violence and harassment whose cutting edge provisions include the worker's rights to have violence and harassment complaints investigated and, if necessary, resolved by a neutral third party turning what's universally recognized as a best practice into a legal obligation.

WISEST RULING OF THE YEAR

Goes to the Ontario judge for holding that forklift operators who used a cell phone while sitting in the driver's seat improperly "operated" the equipment even though the forklift was stopped and not actually moving. Simply *having* the cell phone on them while operating a forklift was a violation, the judge reasoned.

THE MAYBE NOT SO WISEST RULING OF THE YEAR

Is awarded to the Ontario arbitrator who reinstated a catering attendant with a long service record after she was fired for bullying and harassing co-workers and not showing up for her disciplinary hearing. Apparent message: The attendant's 21+ years of service trumped her deplorable behaviour.

SCARIEST CASE OF THE YEAR

The Québec ruling convicting an excavation contractor of a worker's death in a trench collapse of not just criminal negligence (under what was once known as Bill C-45) but also manslaughter, a form of homicide.

BEST CANNABIS LEGALIZATION RESPONSE BY A GOVERNMENT OHS AGENCY

Perhaps surprisingly, goes to the Northwest Territories/Nunavut WHSCC which has been in front of the issue from the start and which recently adopted Canada's most complete and intelligent workplace impairment regulations requiring, among other things, that employers perform a hazard assessment and implement a written workplace impairment policy setting out measures taken to deal with identified hazards.

TRENDIEST NEW LAW

Cyber bullying laws allowing victims to sue those who publish or post intimate images of them online without consent, which have been adopted by a number of jurisdictions in the past year—and rightly so!

THE GOOD GUYS WIN IN THE END AWARD

Is a tie between the Ontario paramedic who, after years of litigation, won his workers' comp case for the arm injuries he sustained while delivering life-saving emergency while off duty and the PEI government worker who won his 5-year quest to get back the 3.5 hours of pay he was docked because he wouldn't drive to the office through a life-threatening snow storm.

2019 Workers' Comp Rates

Having tamed its operating deficit, the Ontario WSIB is cutting rates dramatically from $2.35 to $1.65; meanwhile, New Brunswick is going in the opposite direction as an escalating deficit forces a $0.95 increase to a Canada-high $2.65 (the same rate as Nova Scotia). Stability in rates is pretty much the pattern in all other jurisdictions.

Jurisdiction	2019 Average Assessment (per $100 assessable payroll)	2019 Maximum Assessable Earnings	2018 Average Assessment (per $100 assessable payroll)	2018 Maximum Assessable Earnings	2019 Filing Deadline
Alberta	$1.08	$98,700	$1.04	$98,700	Feb. 28
BC	$1.55	$84,800	$1.55	$81,900	Feb. 28 – March 15*
Manitoba	$0.95	$127,000	$0.95	$127,000	Feb. 28
New Brunswick	$2.65	$64,800	$1.70	$63,600	Feb. 28
Newfoundland Labrador	$1.69	$65,600	$1.90	$64,375	Feb. 28
Nova Scotia	$2.65	$60,900	$2.65	$59,800	March 31
Ontario	$1.65	$92,600	$2.35	$90,300	March 31
Prince Edward Island	$1.58	$55,000	$1.60	$53,400	Feb. 28
Québec	$1.79	$76,500	$1.79	$75,500	March 15
Saskatchewan	$1.17	$88,314	$1.19	$82,627	Feb. 28
Northwest Territories	$2.10	$92,400	$2.00	$90,600	Feb. 28
Nunavut	$2.10	$92,400	$2.00	$90,600	Feb. 28
Yukon	$2.05	$89,145	$1.93	$86,971	Feb. 28

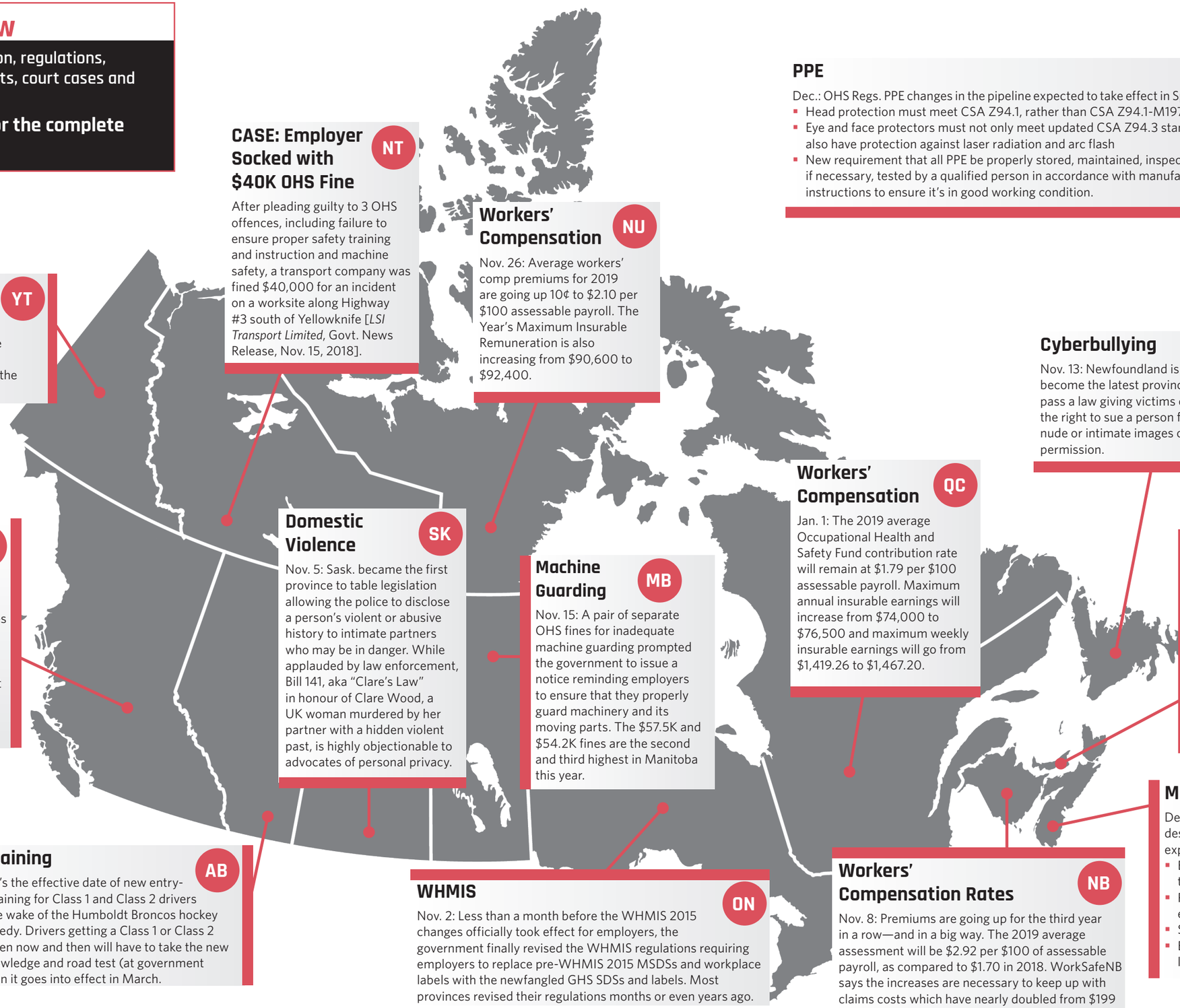
Notes:

*In BC, filing deadlines are staggered among Feb. 28, March 15 and March 31 based on the final 2 digits of the employer's account number

Month In Review

A roundup of new legislation, regulations, government announcements, court cases and arbitration rulings.

Visit OHSInsider.com for the complete Month-In-Review.



PPE — FED

Dec.: OHS Regs. PPE changes in the pipeline expected to take effect in Spring:

- Head protection must meet CSA Z94.1, rather than CSA Z94.1-M1977
- Eye and face protectors must not only meet updated CSA Z94.3 standards but also have protection against laser radiation and arc flash
- New requirement that all PPE be properly stored, maintained, inspected and, if necessary, tested by a qualified person in accordance with manufacturer's instructions to ensure it's in good working condition.

CASE: Employer Socked with $40K OHS Fine — NT

After pleading guilty to 3 OHS offences, including failure to ensure proper safety training and instruction and machine safety, a transport company was fined $40,000 for an incident on a worksite along Highway #3 south of Yellowknife [*LSI Transport Limited*, Govt. News Release, Nov. 15, 2018].

Workers' Compensation — NU

Nov. 26: Average workers' comp premiums for 2019 are going up 10¢ to $2.10 per $100 assessable payroll. The Year's Maximum Insurable Remuneration is also increasing from $90,600 to $92,400.

Climate Change — YT

Dec. 17: Public review ends on Yukon's climate change and green energy strategy. The government plans to publish a first draft of the plan based on the comments received.

Cyberbullying — NL

Nov. 13: Newfoundland is set to become the latest province to pass a law giving victims of revenge porn the right to sue a person for publishing nude or intimate images of them without permission.

Workers' Compensation — QC

Jan. 1: The 2019 average Occupational Health and Safety Fund contribution rate will remain at $1.79 per $100 assessable payroll. Maximum annual insurable earnings will increase from $74,000 to $76,500 and maximum weekly insurable earnings will go from $1,419.26 to $1,467.20.

Workers' Compensation—Reporting — BC

Jan. 25: That's the deadline to comment on proposed policy changes to simplify and reduce employer reporting and remitting obligations. Currently, employers with annual assessments of $1,500 or more must report payroll and remit assessment premiums to WorkSafeBC every quarter.

Domestic Violence — SK

Nov. 5: Sask. became the first province to table legislation allowing the police to disclose a person's violent or abusive history to intimate partners who may be in danger. While applauded by law enforcement, Bill 141, aka "Clare's Law" in honour of Clare Wood, a UK woman murdered by her partner with a hidden violent past, is highly objectionable to advocates of personal privacy.

Machine Guarding — MB

Nov. 15: A pair of separate OHS fines for inadequate machine guarding prompted the government to issue a notice reminding employers to ensure that they properly guard machinery and its moving parts. The $57.5K and $54.2K fines are the second and third highest in Manitoba this year.

Environmental Assessment — PE

Nov. 27: Proposed *Environmental Protection Act* amendments call for regulations formalizing the province's environmental assessment process. Although environmental assessment is required, PEI is the only province in which the EA process is governed by guidelines rather than formal regulations.

Safety Training — AB

March 1: That's the effective date of new entry-level safety training for Class 1 and Class 2 drivers adopted in the wake of the Humboldt Broncos hockey team bus tragedy. Drivers getting a Class 1 or Class 2 licence between now and then will have to take the new enhanced knowledge and road test (at government expense) when it goes into effect in March.

WHMIS — ON

Nov. 2: Less than a month before the WHMIS 2015 changes officially took effect for employers, the government finally revised the WHMIS regulations requiring employers to replace pre-WHMIS 2015 MSDSs and workplace labels with the newfangled GHS SDSs and labels. Most provinces revised their regulations months or even years ago.

Workers' Compensation Rates — NB

Nov. 8: Premiums are going up for the third year in a row—and in a big way. The 2019 average assessment will be $2.92 per $100 of assessable payroll, as compared to $1.70 in 2018. WorkSafeNB says the increases are necessary to keep up with claims costs which have nearly doubled from $199 million in 2014 to a projected $400 million in 2018.

Mining — NS

Dec. 18: New mining regulations designed to cut red tape for exploration take effect:

- Exploration licences extended from 1 to 2 years
- Reclamation plan must be updated every 3 years
- Security review required every 3 years
- Elimination of special licences and leases.

USMCA – Impact On Environmental Issues

The United States-Mexico-Canada Agreement (USMCA), which is set to replace NAFTA, concluded on September 30, 2018. Chapter 24 of this trilateral trade deal sets out the framework for environmental issues between the parties.

Here is a high-level summary of this chapter.

Chapter 24 puts an emphasis on USMCA parties cooperating to protect and conserve the environment. It requires each country to maintain an environmental impact assessment process that covers issues related to protecting the ozone layer, protecting the marine environment from ship pollution, improving air quality, preventing the loss of biodiversity, preventing, detecting and controlling invasive alien species, protecting and conserving marine species as well as promoting sustainable forest management. There is no mention of climate change in this chapter.

It also notably takes into consideration the constitutional rights of indigenous people, addresses the important economic, social and cultural role that the environment plays in their lives and recognizes the importance of consulting with them on efforts to enhance the long-term protection of the environment.

Some of the other notable provisions in the USMCA are mentioned below.

Environmental Goods and Services

The parties have agreed it is important to trade and invest in environmental goods and services, including clean technologies spurring potential growth in this important sector.

Ocean and Fisheries Issues

There are many provisions dealing with fisheries management that relate to overfishing, fish stock health, conservation and protection of marine species and marine litter.

Corporate Social Responsibility

The parties have agreed to promote corporate social responsibility and responsible business conduct within their borders by encouraging enterprises "to adopt and implement voluntary best practices of corporate social responsibility that are related to the environment."

Enforcement

USMCA's environmental provisions are designed to allow each party the discretion to decide how best to allocate its environmental enforcement resources. Yet, the parties agree they will enforce environmental laws and not "derogate from" these laws in a manner that weakens them to encourage trade or investment. The USMCA puts a bona fide test in place to ensure each party's focus and agenda items are in line with the common goal of achieving greater environmental protection.

It provides for an Environmental Cooperation Agreement with a mechanism for expanding the cooperative relationship on environmental matters, as well as an obligation to establish an environment committee made up of senior government representatives to assist with the implementation.

Conclusion

While the USMCA allows discretion over the specific initiatives a party can prioritize, the parties have agreed to work together towards better protecting the environment and promoting sustainable development.

With special thanks to Brandon Burke, articling student, for his contribution to this article.

About the author Janet Bobechko

Janet Bobechko is a well-recognized senior practitioner with extensive experience in all aspects of environmental law. She routinely provides sophisticated environmental advice on environmental compliance, strategic advice on environmental impact assessments, mergers, acquisitions, real estate and portfolio acquisitions, financings and environmental management systems. She provides strategic advice to many industrial sectors, including manufacturing, mining, transportation, chemical, pulp and paper. Ms. Bobechko has advised on renewable energy projects for solar and cogeneration. She is involved in infrastructure projects for linear transportation. Ms. Bobechko has a particular specialty in providing advice on management of contaminated sites and brownfield development and has been extensively involved in law reform on these issues.

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Incident Response

Cleaning Up an Accident Scene Without Obstructing the Investigation

If there's an accident at your workplace, your first instinct may be to clean up the mess and get operations back on track as soon as possible—especially true if the accident appears minor and your workplace is a store, restaurant, hospital or other establishment frequented by the public. Giving in to the urge can get you into big trouble. OHS laws impose a duty not to disturb an accident scene until an inspector looks it over and gives the all-clear. Exception: You're allowed to move wreckage or clean up messes to prevent further injuries or protect valuable equipment. There may also be situations where you can clean up right away even where life, limb or expensive machinery isn't at stake. Here's a look at a real case from Ontario involving a company in this situation. The left side shows what the company did; the right shows what it should have done.

WRONG WAY—WHAT THE COMPANY DID

WHAT HAPPENED

A waitress slips and falls while carrying a tray full of food. It's right in the middle of lunchtime and the restaurant manager is feeling a lot of pressure. He assumes the waitress will be fine and orders the mess cleaned up immediately. It turns out that the waitress has suffered a hairline fracture of the leg. The restaurant doesn't report the injury to the Ministry of Labour (MOL) as required by Ontario OHS law. The MOL learns of the accident a few days later. But since all of the evidence has been removed, it can't investigate.

OUTCOME

The restaurant is charged and convicted of failing to preserve the accident scene and fined $20,000. The restaurant is fined another $20,000 for not reporting the accident to the MOL [*R. v. Famz Foods Ltd.*, Unreported Decision of the Ont. Ct. (Prov. Div.)].

RIGHT WAY—WHAT THE COMPANY SHOULD HAVE DONE

WHAT HAPPENED

The same accident occurs. The restaurant manager, still feeling the pressure to restore order and assuming the waitress is okay, orders the area temporarily blocked off. He immediately calls the MOL regional office and describes what happened. The MOL says it will take at least 90 minutes for an inspector to arrive. The manager calmly explains that he has a restaurant to run and asks for permission to clean up the mess without waiting for the inspector. He offers to take photos of the accident scene.

OUTCOME

Three different OHS lawyers—one from Alberta, one from B.C. and one from Ontario—confirm that OHS officers tend to be cooperative and would likely agree to such request. But they add one important piece of advice: Get written confirmation of your conversation. *Click here for a Model Confirmation Form*

ASK THE EXPERT

Do We Have to Provide Notification of Medical Treatment Injuries to the MOL?

QUESTION

We know that we have to report work injuries requiring medical treatment to the WSIB. But do we have to notify the MOL, too? The *OHS Act* requires reporting to the MOL "if an inspector requires" it. Can you translate that? How are we supposed to know if the inspector requires notification?

ANSWER

The *OHS Act* (Sec. 52(1)) says you must provide medical treatment to the workplace JHSC, health and safety representative or union, if there is one. You don't have to notify the MOL unless an inspector requires you to. You'll know that such notification is required because the inspector will tell you. In other words, the burden is on the inspector to notify you and you don't have to read the inspector's mind.

Do We Have to Create Modified Duty Work for Workers with Non-Work Related Injuries?

QUESTION

An employee broke his ankle while on holidays and can't return to full duties for 3 months. But he wants to return to work with modified duties as soon as possible. We're a small company with no meaningful modified work available for the next 3 months. Can you please outline our duty to accommodate the employee, keeping in mind that his injury isn't work-related. We're in Alberta.

ANSWER

You must accommodate the employee but don't necessarily have to create a meaningless job just so he can return.

Explanation:

A broken ankle is a disability requiring accommodations to the point of undue hardship under human rights law regardless of whether it's work-related. While each situation is different, a strong case can be made that creating a meaningless modified work position that adds no value to your organization is undue hardship. But while you don't necessarily have to grant the request, you do have to activate an accommodations process to address it thoroughly and fairly, including via:

- Assessing the employee's capabilities;
- If necessary, seeking to modify the position in accordance with those capabilities;
- If that's not possible, determining if there are other jobs the employee can do.

If you've already done these things, just make sure you have clear and thorough records documenting your actions and decisions.

Last but not least, be mindful of the workers' comp issues. The good news is that while it doesn't relieve you of the human rights duty to accommodate, the fact that the injury isn't work-related does get you out of the new Alberta Bill 30 workers' comp duty to reinstate the employee which covers only "compensable injuries."

How Often Do You Have to Inspect Scaffolding in Ontario?

QUESTION

How frequently must scaffolding inspections be performed under the Ontario construction regulations?

ANSWER

Generally, a scaffold must be inspected by a professional engineer or competent worker designated by the project supervisor before its first used to ensure it's erected in accordance with the design drawings (*Const. Regs,* Sec. 130(3)). Thereafter, inspection must take place at least as often as required in the manufacturer's instructions.

There are also specific inspection frequency rules for particular types of equipment. For example, a centre pole scaffold used in silo construction must be inspected at the intervals set out in Sec. 132. In addition, a professional engineer must inspect the centre pole scaffold's structural adequacy either (whichever comes **earlier**):

- After every 24 uses since the last inspection; OR
- For a scaffold used in the construction of a:
  - Monolithic silo: 2 years after the scaffold is erected or after the most recent inspection; and
  - Stave silo: 1 year after the scaffold is erected or after the most recent inspection.

Last but not least, there are also separate and more rigorous inspection and testing requirements for suspended work platforms and boatswain's chairs (which are listed starting at Sec. 136).

To be fair, none of the MOL guidelines say this or even address the issue of inspector notification of the duty to notify the MOL of medical treatment injuries. But the only way the rule makes sense is if the inspector expressly tells the employer that MOL notification is required.

ENFORCEMENT TRENDS

The 10 Biggest OHS Fines of 2018

Continuing recent trends, OHS penalties became not only more frequent but more expensive in 2018. Ontario remains the leader for massive fines, supplying 4 of the Top 10, including what may be the first 7-figure fine ever imposed for an OHS violation. The balance of the Top 10 came from Alberta, BC and Saskatchewan with 2 apiece. All but one of the Top 10 involved a fatality. Surprises:

- The Number 2 OHS fine for 2018, $628K, was for a workplace violence violation; and
- Two of the Top 5 biggest fines came from Saskatchewan.

Two caveats about this list:

- It covers only the OHS fines that got reported and thus excludes cases where government agreement not to publish is part of the settlement; and
- It runs only through Dec. 5, 2018—we still have 3+ weeks of the year to go. (If necessary, we will revise the Top 10 List next month to reflect any subsequent cases.)

*Note: *All defendants convicted as employers*

1 $1.3 MILLION

Jurisdiction: Ontario
Defendant: First Nickel (now bankrupt)
Trigger Incident: Two workers killed by falling material at Lockerby Mine in accident caused by seismic activity
OHS Offence(s): Failure to ensure mine was free of accumulations or water flow that could endanger workers + 5 other offences

2 $628,034

Jurisdiction: British Columbia
Defendant: Interior Health Authority
Trigger Incident: Mental health centre worker and client attacked by intruder who was denied entry as visitor
OHS Offence(s): Failure to perform workplace violence hazard assessment and develop workplace-specific prevention procedures addressing identified risks

3 $490,000

Jurisdiction: Saskatchewan
Defendant: Agrium Inc.
Trigger Incident: Potash mine worker seriously injured after getting hit in stomach by conveyor belt cable that wasn't secured
OHS Offence(s): Failure to furnish and maintain safe plant systems and working environment

4 $420,000

Jurisdiction: Saskatchewan
Defendant: Shercom Industries
Trigger Incident: Worker killed after his hand and arm get caught in shredder conveyor belt pulley
OHS Offence(s): Failure to provide and maintain plant, systems of work and working environments ensuring, as far as reasonably practicable, workers' health, safety and welfare, resulting in a worker's death

5 $325,000

Jurisdiction: Ontario
Defendant: Coco Paving Inc.
Trigger Incident: Welder crushed to death by steel casing that rolled while being moved by a forklift
OHS Offence(s): Not specified

6 $300,000

Jurisdiction: Alberta **Defendant:** City of Edmonton
Trigger Incident: Street sweepings spill out of dump truck fatally engulfing one of the workers unloading them
OHS Offence(s): Failure to ensure containment of materials that could be spilled, moved or dislodged

7 $241,087 + stop work order

Jurisdiction: British Columbia
Defendant: Skookumchuck Pulp Inc.
Trigger Incident: None—violation discovered during WorkSafeBC inspection (reasons for conducting inspection not specified)
OHS Offence(s): Repeat and high-risk violations at mill for dust accumulations on horizontal surfaces and fixtures of chip screen building in direct contact with potential ignition sources, including electric motors, light fixtures and conveyor rollers and bearings

8 $175,000

Jurisdiction: Ontario
Defendant: Dematic Limited
Trigger Incident: Warehouse worker installing conveyor system is killed after getting pinned between work platform guardrail and a steel structure
OHS Offence(s): Failure to ensure that all vehicles, machinery, equipment and tools were used in accordance with operating manuals

9 $172,500 + 2 years' corporate probation

Jurisdiction: Alberta
Defendant: The Driving Force Inc.
Trigger Incident: Mechanic killed after being rolled out by vehicle he was repairing from underneath
OHS Offence(s): Failure to ensure health and safety of a worker

10 $170,000

Jurisdiction: Ontario
Defendant: Walker Aggregates Inc.
Trigger Incident: Metal bar quarry worker is using to remove ice buildup on conveyor pulley gets caught in pinch point and is pulled into machine along with the worker, causing fatal head injuries
OHS Offence(s): Failure to ensure conveyor was properly de-energized and that its prime power source was locked out during servicing

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IN THE NEWS

Not Filing Safety Grievance Doesn't Violate Union's Fair Representation Duty

First, she injured her hand; next, she noticed that safety pins were missing; finally, she was left alone at work without a radio. After each incident, the worker raised safety concerns with the union steward. In all 3 cases, she was dissatisfied with the union's response. Frustrated and fed up, she filed a complaint charging the union with violating its duty to represent her fairly. As usually happens with union fair representation cases, the Board tossed the complaint. The union addressed each complaint and decided that advising the worker to take her safety concerns directly to the employer made more sense than filing a grievance. The worker didn't take the advice or clearly specify what she wanted the union to do [*Walker v Construction and General Workers' Union, Local No. 92*, 2018 CanLII 101429 (AB LRB), Oct. 29, 2018].

18-Month OHS Trial Delay Limit Doesn't Apply to Laying of Charges

In a 2016 case called *R v. Jordan*, the Canadian Supreme Court ruled that an OHS trial delay of 18 months or more is presumed to violate a defendant's right to a speedy trial unless the prosecutor can rebut the presumption. A construction subcontractor charged 2 years after an incident claimed that *Jordan* should apply not just to trial delays but also delays in laying charges. The court disagreed. While post-charge delays are subject to the *Jordan* rules, pre-charge delays are still assessed under the historical case-by-case formula, it reasoned [*R. v Flynn Canada Limited*, 2018 CanLII 104609 (NL PC), Nov. 5, 2018].

Paper Mill Gets 6 Months to Pay $218.75K for Air Pollution Offences

A Terrace Bay pulp and paper mill was fined $175K + a $43.7K victim surcharge for excessive releases of Total Reduced Sulphur, a compound mixture with a nasty odour that causes headaches and itchy eyes [AV Terrace Bay Inc., *Govt. News Release*, Nov. 28, 2018].