The Voice of the Legal Profession

Bill 160
Occupational Health and Safety Statute Law Amendment Act, 2011

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Submitted to: **Standing Committee on Social Policy**

Submitted by: **The Ontario Bar Association**

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The Ontario Bar Association (the "OBA") appreciates the opportunity to provide comments on Bill 160, *the Occupational Health and Safety Statute Law Amendment Act, 2011* ("Bill 160" or "the Bill"). We support several of the objectives of this legislation, including ensuring that those who offer safety training programs are qualified to do so. However, we submit that amendments are necessary in order for the Bill to achieve these goals, without putting unnecessary burden on workers and Ontario businesses.

The OBA

As the largest voluntary legal organization in the province, the OBA represents 18,000 lawyers, judges, law professors and students in Ontario. OBA members practice law in no fewer than 36 different sectors. Our very active Labour and Employment Law Section has 900 members, including the leading practitioners in the field. Our members represent employees, unions, and employers in virtually every sector. In addition to providing legal education for its members, the OBA has assisted government with several legislative and policy initiatives - both in the interest of the profession and in the interest of the public.

Introduction

The OBA's comments with respect to the Bill essentially fall into three categories:

1. Avoiding unnecessary expense and time commitments for Ontario workers and businesses, by:

    a. Clarifying that the new prescribed standards and approval process apply to training providers only and will not inadvertently lead to a requirement that workers who have already been properly trained, be retrained at tremendous unnecessary expense to themselves and Ontario businesses; and

    b. Clarifying that the special training requirements for all worker representatives on a Health and Safety Committee will not be required in an environment, such as the construction industry, in which there may be many such representatives given the constant change of trades on the job site and the fact that many constructors

want representatives from every trade on the Health and Safety Committee, even though the Act does not require it; and

2. Ensuring clear safety standards that workers and businesses can follow, by providing a consistency requirement in the exercise of duties and powers of the Minster, the Director and the Chief Prevention Officer;

3. Providing proper support for workers and appropriate procedures for reprisal cases that have been referred to the OLRB by Health and Safety Inspectors.

I - Avoiding Unnecessary Expense for Ontario Businesses and Workers

(a) Clarifying that new Standards for training programs and service providers do not create a retraining requirement

The OBA understands that the purpose of the new approval regime is to ensure companies and individuals only offer safety training courses and programs that they are qualified to provide. We support this goal. However, as currently drafted, the legislation could be read to require unnecessary retraining of workers who have already been properly trained. The problem lies in the drafting of section 4 of Bill 160, which provides:

4. The Act is amended by adding the following sections:

 Standards – training programs
 7.1 (1) The Minister may establish standards for training programs required under this Act or the regulations.

 Approval – training programs
 (2) The Minister may approve a training program if it meets the standards established under subsection (1).

While the purpose of the Bill is to regulate program providers, rather than change the standards for safety on the job site, section 4 does not make this distinction clear. As it now stands, the section could be interpreted to essentially nullify completely satisfactory training that was provided before the new standards came into effect. Such training was not subject to, and therefore had no opportunity to technically meet, the prescribed standards, even if it was training of the highest caliber. Employers and employees who underwent and paid for training before the standards come into effect run the risk of being deemed to be untrained, or inadequately

trained, because the training took place before the standards were established. Because of the very strict requirements of due diligence in *Occupational Health and Safety Act* ("*OHSA*") cases, this could be interpreted to require all workers be retrained once the new standards are established. This unintentional over reach would, therefore, lead to significant uncertainty and potentially unnecessary expense and time commitment for Ontario businesses and workers.

In order to remedy this uncertainty and potential unnecessary cost to workers and businesses in Ontario, the OBA recommends that section 4 be amended as follows:

> 4. The Act is amended by adding the following sections:
>
> 7.1 (3) Nothing is this Act renders inadequate training received before the effective date of any standards established under subsection (1), and non-compliance with any standards established under subsection (1) is not, in and of itself, evidence of inadequacy of training received prior to the effective date of such standards.

(b) Clarifying training requirements for Health and Safety Committee Representatives in the Construction Context

Currently, the *OHSA* requires that one employer representative and one worker representative on an Occupational Health and Safety Committee ("HSC") be certified by the Workplace Safety and Insurance Board under the *Workplace Safety and Insurance Act, 1997*. Bill 160 adds a requirement that all worker and employer representatives on an HSC receive health and safety training. This follows the recommendation of the Report of the Expert Advisory Panel on Occupational Health and Safety (the "Dean Report"). If the regulations and standards follow the Dean Report's recommendations, that the training be easily accessible, flexible to accommodate work schedules and provided at a nominal cost, the training requirement should be achievable in most work forces.

However, as the Dean Report recognizes, construction projects provide unique challenges and require unique solutions that recognize the difficulty and expense involved in providing training for each new representative in a constantly changing work force. The Act usually requires no more than four representatives - two worker representatives and two management representatives - on an HSC, even on large construction projects. However, because of the large number of sub-contractors on many construction sites, and because of the ever changing composition of workers on such a site, many constructors require a Health and Safety representative from each sub-trade to sit on the committee. This can be very important for insuring all trades are aware of the particular circumstances and safety requirements on a given project. Absent from Bill 160 is the

Dean Report's recommendation that the introduction of mandatory training requirements come with special provisions for construction projects (Dean Report, Recommendation 13, p. 31.). This needs to be addressed in the legislation. Representation of all trades on and HSC is a desirable voluntary practice in the construction industry and should not be discouraged by a requirement that every member be specially trained. So long as there are certified members from both workers and management, representation of a multiplicity of trades should be encouraged even if all of them have not been trained. Often a particular trade will only be present on a project for a relatively short period and a training requirement should not be a hinderance to that trade participating in the important work of the HSC, especially on construction sites.

II – Ensuring Clear, Consistent Safety Standards

Bill 160 provides new powers to the Minister to establish standards for Safety Training Programs. The Bill also creates a Chief Prevention Officer ("CPO") who will be responsible for, among other things,

> 22.3 (1)(a) develop[ing] a provincial occupational health and safety strategy....

In addition to Bill 160's new rolls for the Minister and the CPO, the *OHSA* already provides for a "Director" who is required to

> 12 (3) … ensure that persons and organizations concerned with the purposes of this Act are provided with information ***and advice*** pertaining to its administration and to the protection of the occupational health and occupational safety of workers generally. R.S.O. 1990, c. O.1, s. 12 (2, 3) (emphasis added).

There are also, of course, Inspectors who, among others, enforce the *OHSA*.

Nothing in the Bill ensures consistency among that the "strategy" developed by the CPO, the standards for training programs developed by the Minister and the "advice" that is to be provided by the Directors or applied by inspectors. In order to be consistent with Ontario's Open for Business Strategy, it is crucial that employers and workers have one clear, consistent regulatory scheme to follow. This crucial consistency is, in turn, dependant on clearly defined roles. This was recognized in the Dean Report, which concluded, at page 15, that:

> Improving role clarity will be an important driver of a more connected system, leading to provision of better support training and enforcement services. This is especially true for Ontario's small-business community….

Thus the Bill should be amended to add a requirement for each of the Minister, Director and CPO that their duties and powers are exercised consistently with one another.

III –Processing Section 50 Reprisals Referred by Inspectors

Section 13 of Bill 160 amends section 50 of the *OHSA*, in part, by adding the following subsection:

> (2.1) Where the circumstances warrant, an inspector may refer a matter to the Board if the following conditions are met:
>
> 1. The worker has not had the matter dealt with by final and binding settlement by arbitration under a collective agreement or filed a complaint with the Board under subsection (2).
> 2. The worker consents to the referral.
> 3. A policy respecting referrals has been established under subsection 6(3)

The OBA respectfully suggests that, as they are currently drafted, the proposed amendments to section 50 of the *OHSA* will create hardship for the employee and the employer as well as present practical issues with the way all parties will proceed at the Board. It may also produce practical problems for the Board, whose resources are already stretched with the new cases now being brought as a result of the recently passed Bill 168.

Overlapping Jurisdictions and Concurrent Proceedings

As the provision is currently drafted, Inspectors may refer a reprisal matter to the Ontario Labour Relations Board (the "Board") provided that the matter has not been dealt with by final and binding settlement by arbitration. It is agreed that arbitrators have jurisdiction to deal with section 50 reprisals, however, the grievance process is not immediate and the proposed language implies that an Inspector may make a referral even if a grievance has been commenced, and even if an arbitrator is in the process of deciding the matter, but has not yet done so. In addition, there are other proceedings which could overlap with the issues referred by an Inspector.

Therefore, the OBA suggests that subsection 13(1) of the Bill be amended, as follows, to account for separate but related proceedings that may have already been initiated:

> 13(1) Section 50 of the Act is amended by adding the following subsections:
>
> (2.1) Where the circumstances warrant, an inspector may refer a matter to the Board if the following conditions are met:
>
> 1. No proceedings in respect of the matter have been commenced by or on behalf of the worker, including but not limited to, a grievance or arbitration pursuant to the grievance and arbitration provisions of a

Collective Agreement, an application to the Ontario Labour Relations Board pursuant to s. 50 of the *Ontario Labour Relations Act,* a proceeding under the *Employment Standards Act* or a court proceeding .

2. **The matter has not been dealt with by final and binding settlement**.
3. The worker consents to the referral.
4. A written policy has been established by the Director with respect to such referrals by an inspector pursuant to s. 6(3).

Procedural Difficulties and Access to Justice

The Purpose and Powers of the Board

The Board is not generally an investigative body. Rather, its primary function is to adjudicate and resolve labour and employment disputes. As outlined in the Board's website:

> The Board is an independent, adjudicative tribunal issuing decisions based upon the evidence presented and submissions made to it by the parties, and upon its interpretation and determination of the relevant legislation and jurisprudence. It plays a fundamental role on the labour relations regime in Ontario and encourages harmonious relations between employers, employees and trade unions by dealing with matters before it as expeditiously and as fairly as reasonably possible.

With this function in mind, the *Labour Relations Act, 1995* gives the Board a broad range of decision-making powers.

It is recognized that, on its face, it seems that in certain instances, the Board may have the legislative authority to conduct investigations. For example, section 111(2)(j) of the *Labour Relations Act* states:

> Without limiting the generality of subsection (1), the Board has power to authorize the chair, a vice-chair or a labour relations officer to inquire into any application, request, complaint, matter or thing within the jurisdiction of the Board, or any part of any of them, and to report to the Board thereon.

In addition, subsections 110(18) and 110(20) of the *Labour Relations Act*, allow the Board to make rules for expedited proceedings (subsection 110(18)) and "may authorize the Board to make or cause to be made such examination of records and such other inquiries as it considers necessary in the circumstances" (subsection 110(20)).

However, the above powers were only typically given to labour relations officers. This practice is no longer applied and interferes with the labour relations officers' role as mediators. In any

event, the *Labour Relations Act* does not provide the Board with the power or authority to assist the Applicant in, for example, establishing its case. Applying its powers provided by subsections 110(18) and 110(20) of the *Labour Relations Act*, the Board typically engages in a "Consultation". The Board may ask more questions than it would normally, but will still render a decision based on the information before it. If the party holding the burden of proof does not participate, the matter will not proceed.

By way of comparison, the Board exists for an entirely different purpose than the Ontario Human Rights Commission (the OHRC) once did. The OHRC was primarily an investigative body that reffered cases it investigated to a Board of Inquiry, and later the Ontario Human Rights Tribunal if it determined their was a prima facia case to be heard. The OHRC would not only refer the case to the tribunal, but take carriage of the case before the Tribunal. In this way it functioned as both a gate-keeper to, and participant in, the adjudicative process. The Board on the other hand is the adjudicative body established to hear cases that come under its jurisdiction. It is not an investigative body like the OHRC was and has no procedures or personnel suited to an investigative role, or to carrying the case for litigants before the Board. The Board can not assist in carriage of cases it is required to adjudicate.

Therefore, the Board's current purpose and procedures do not account for Inspector referrals and the inevitably related carriage and participation issues. In order to allow the Board to properly deal with cases referred by inspectors, the OBA suggests the following amendment to subsection 13(4) of the Bill:

(4.1) The chair of the Board may make rules under subsection 110(17) of the *Labour Relations Act, 1995* relating to the participation of a worker in a referral made under subsection (2.1)

(4.2) The chair of the Board may make rules under subsection 110(18) of the *Labour Relations Act, 1995* to expedite proceedings relating to a complaint filed under subsection (2) or a referral made under subsection (2.1)

(4.3) Subsections 110(19), (20), (21), and (22) of the *Labour Relations Act, 1995* apply, with necessary modifications, to rules made under subsection (4.1)

Inspectors not compellable

In addition, the Board has the power to order particulars and the production of documents. The Board regularly exercises these powers. If a party does not comply with the orders, the Board will make an adverse inference and a finding based on the information it has before it. However, in the instance of a reprisal case referred to the Board by an Inspector, that Inspectors (and likely his/her records) are not compellable under the OHSA as it now is. Given that the Inspector who referred the case presumably has crucial information, the Applicant will have limited ability to provide evidence to corroborate his position and may not be able to establish his case, especially if faced with strong evidence led by the employer. These difficulties would affect all workers - unionized, non-unionized and whether or not supported by a representative. At a minimum, Inspectors who refer a reprisal issue to the Board should be compellable in the proceedings that arise from that referral, just as Inspectors are compellable in court proceedings that arise out of charges laid under the *OHSA*. The following amendment to subsection 13(1) of the Bill is recommended:

> (2.4) Despite subsection 63(3) of the Act, an Inspector who refers a matter to the Board under subsection (2.1) is a compellable witness in a proceeding before the Board that arises out of that referral.

Carriage Issues

As Bill 160 is currently drafted, Inspectors may refer a reprisal matter to the Board with the consent of the allegedly reprised employee (Subsection 13(1) of the Bill – proposed section 50(2.1)2 of *OHSA*). As the Bill is currently drafted, this employee will then be left as the sole "Applicant" in a Board proceeding without the support of an Inspector and without any understanding of how to properly present his or her case, how to deal with the employer's response, or how to effectively represent himself before a Vice Chair in keeping with the Board's established rules and procedures.

Without support, the vulnerable, procedurally unsophisticated Applicant (who is the very type of person likely to be the subject of inspector referrals), runs the risk of having his/her claim dismissed by the Board because he or she fails to respect deadlines or otherwise participate in accordance with Board rules. This dismissal would preclude, or at least make it very difficult for, the applicant to bring the claim themselves when she/he feels more prepared or is better able to afford legal assistance. It is crucial then that unrepresented Applicants in an inspector referred complaint have support.

The support mechanism outlined in Bill 160 is to allow for regulations that could increase the functions of the Office of the Worker Adviser. It is not clear that the Office of the Worker Adviser would be *required* to assist an Applicant whose case had been referred by an inspector. This support scheme raises two issues:

(i) The staff at the Office of the Worker Advisor is trained to provide support to injured workers with regard to the Workplace Safety and Insurance Board and the Workplace Safety and Insurance Appeals Tribunal. It is unlikely that the Office of the Worker Adviser is familiar with the Board's Rules and Procedures. It is necessary that the legislative provisions be accompanied by additional capacity for, and retraining of, the Office of the Worker Adviser. Otherwise, vulnerable workers who have been the subject of reprisals will be in a worse position than they are currently; and

(ii) The Office of the Worker Adviser should be required to assist an unrepresented Applicant whose matter has been referred by an inspector, if the Applicant wants this assistance. The only policy reason to have this representation be permissive rather than compulsory is to allow the Office of the Worker Adviser to screen out unmeritorious claims. However, in the case of inspector referrals, the inspector would have already made a *prima facie* determination of merit before referring the matter. Section 14 of the Bill should, therefore, be amended as follows:

14. Part VI of the Act is amended by adding the following section:

50.1(1) The Office of the Worker Adviser, as it has been established pursuant to section 176 of the *Workplace Safety and Insurance Act, 1997*, will represent a worker in matters referred to the Board made under subsection (2.1), unless the worker refuses such representation or refuses to communicate with the Office of the Worker Adviser.

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Section 4 – training standards (see pages 3-4)

4. The Act is amended by adding the following sections:

Standards – training programs
7.1 (1) The Minister may establish standards for training programs required under this Act or the regulations.

Approval – training programs
(2) The Minister may approve a training program if it meets the standards established under subsection (1).

(3) Nothing is this Act renders inadequate training received before the effective date of any standards established under subsection (1), and non-compliance with any standards established under subsection (1)

Section 13 - multiple and concurrent proceedings (see pages 6-7)

13(1) Section 50 of the Act is amended by adding the following subsections:

(2.1) Where the circumstances warrant, an inspector may refer a matter to the Board if the following conditions are met:

1. No proceedings in respect of the matter have been commenced by or on behalf of the worker, including but not limited to a grievance or arbitration pursuant to the grievance and arbitration provisions of a Collective Agreement, an application to the Ontario Labour Relations Board pursuant to s. 50 of the *Ontario Labour Relations Act,* a proceeding under the *Employment Standards Act,* or a court proceeding .
2. **The matter has not been dealt with by final and binding settlement**.
3. The worker consents to the referral.
4. A written policy has been established by the Director with respect to such referrals by an inspector pursuant to s. 6(3).

Section 13 – procedural issues (see pages 7-9)

13(4) Section 50 of the Act is amended by adding the following subsections:

(4.1) The chair of the Board may make rules under subsection 110(17) of the *Labour Relations Act, 1995* relating to the participation of a worker in a referral made under subsection (2.1)

(4.2) The chair of the Board may make rules under subsection 110(18) of the *Labour Relations Act, 1995* to expedite proceedings relating to a complaint filed under subsection (2) or a referral made under subsection (2.1)

(4.3) Subsections 110(19), (20), (21), and (22) of the *Labour Relations Act, 1995* apply, with necessary modifications, to rules made under subsection (4.1)

Section 13 – compellability of Inspectors (see page 9)

13(1) Section 50 of the Act is amended by adding the following subsections:

(2.4) Despite subsection 63(3) of the Act, an Inspector who refers a matter to the Board under subsection (2.1) is a compellable witness in a proceeding before the Board that arises out of that referral.

Section 14 - support for unrepresented applicants (see pages 9-10):

14. Part VI of the Act is amended by adding the following section:

50.1(1) The Office of the Worker Adviser, as it has been established pursuant to section 176 of the *Workplace Safety and Insurance Act, 1997*, will represent a worker in matters referred to the Board made under subsection (2.1), unless the worker refuses such representation or refuses to communicate with the Office of the Worker Adviser.