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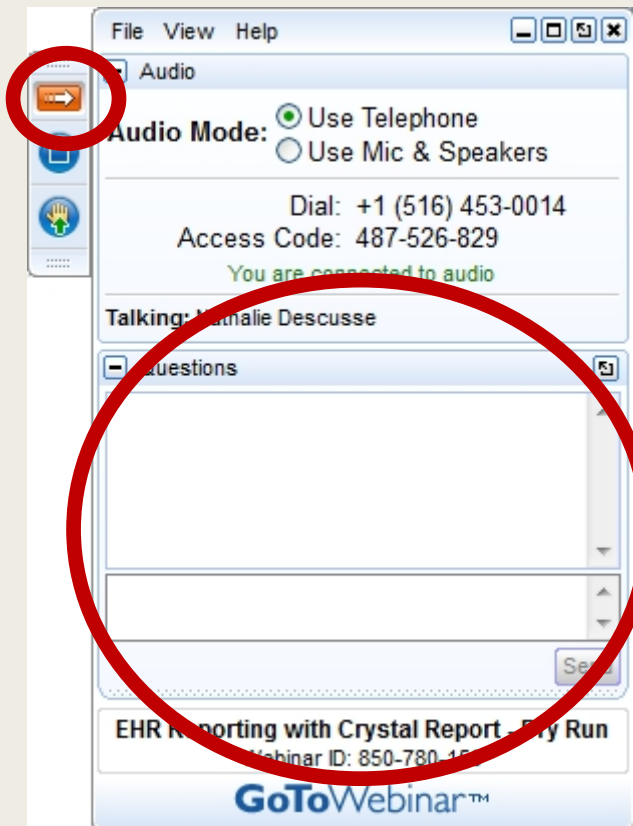
COMPLIANCE FORECAST—  
THE TOP 5 OHS TRENDS & HOW  
THEY IMPACT YOUR OHS PROGRAM

SPEAKER: GLENN S. DEMBY  
*J.D., EDITOR-IN-CHIEF, OHS INSIDER*  
MODERATOR: MORGAN BERNA



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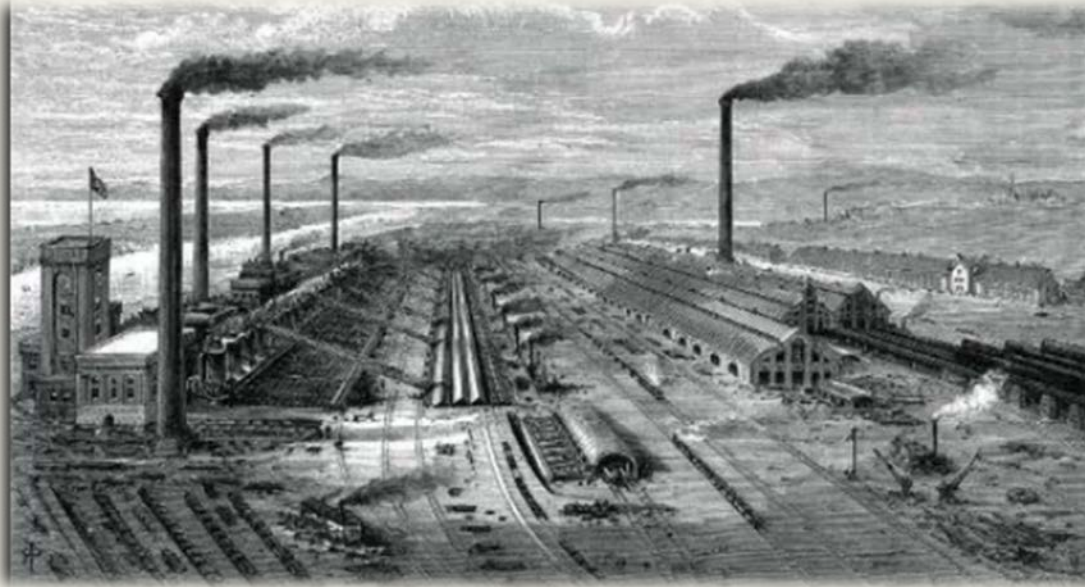
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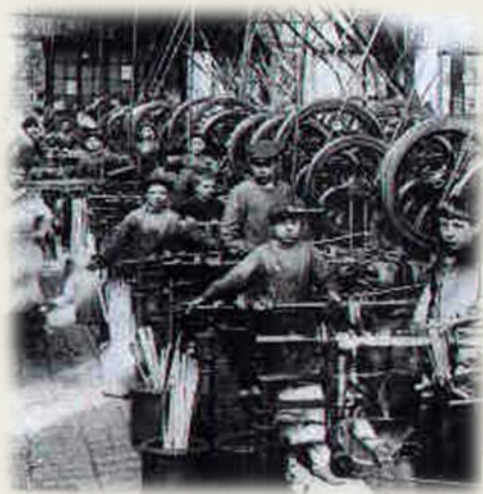
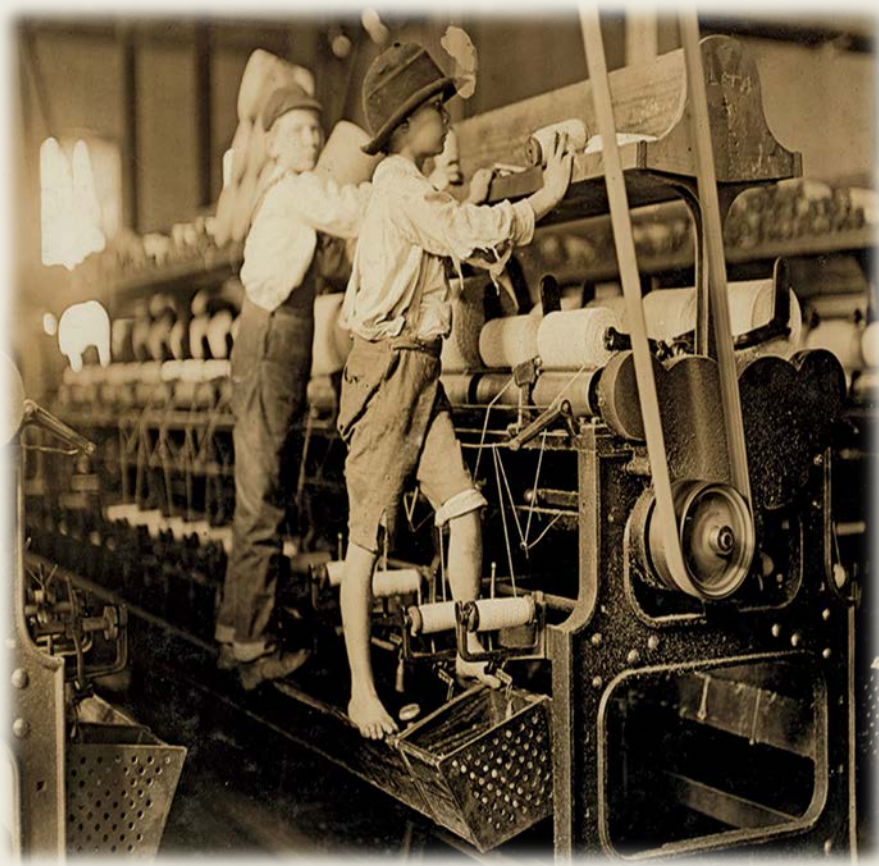


# THE EVOLUTION OF OHS LAWS

## ■ THE INDUSTRIAL REVOLUTION DARK AGES



# No OHS Laws

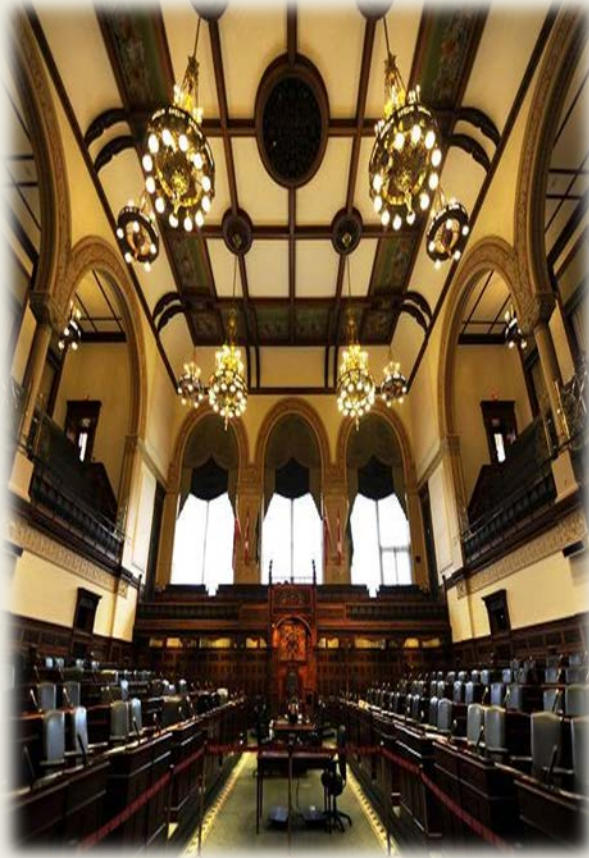


# THE 20<sup>th</sup> CENTURY





# 1970s: THE FIRST OHS LAWS





# TIMES CHANGE. . .



■ Pierre Lebrun,  
OC Transp Massacre  
Gunman



# ... AS DOES OUR UNDERSTANDING OF WORK HAZARDS

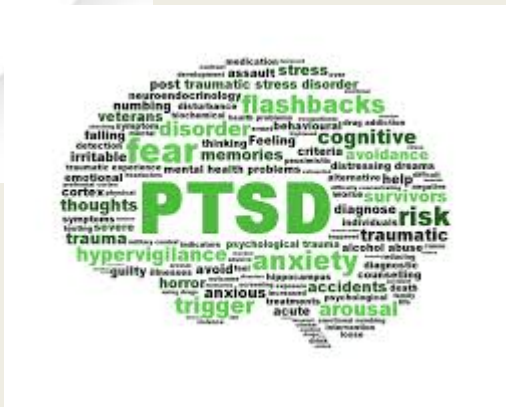


**NEW TOWN SCHOOL SHOOTING**  
**Massacre of innocents**

**‘PURE EVIL’**  
Gunfire, then carnage; death toll at least 59

**INSIDE THE WORST  
MASS SHOOTING IN  
TORONTO’S HISTORY**

**NOT  
AGAIN.**



# OHS TRENDS GROW OUT OF THIS EVOLUTION

1. Workplace Harassment as OHS Duty
2. Mental Stress & Workers' Comp
3. Legalized Marijuana
4. Criminal Prosecution
5. OHS Enforcement Pressure—from Policy to Institution

# 1. Workplace Harassment

- 1999: Psychological harassment in Quebec
- 2010: Bill 168 in Ontario



# Workplace Harassment

**Table 1. New OHS Workplace Harassment & Violence Initiatives in 2017-2018**

■ 2017-18

Jurisdiction	Initiative(s)
Federal	<u>Bill C-65</u> in Committee
Alberta	<u>June 1:</u> *Bill 30: Harassment duties Bill 19: Late night gas station & retail convenience stores
New Brunswick	New Part XXII.1 of OHS Regulations took effect May 16
Prince Edward Island	New OHS regulations consultations ended May 15
Québec	Bill 176 expansion of LSA psychological harassment protections tabled end of March
BC	WorkSafeBC full review of OHS workplace harassment and bullying laws



# Impact On You — What To Do

- Implement/Review Harassment Prevention Program
  - **Warning: Old HR Harassment Policies Out of Date**
    - Focus on:
      - Harassment away from work
      - Harassment by non-employees
      - New harassment technology
    - Other forms of sexual misconduct, e.g., privacy violations
  - Inadequate reporting mechanisms—fewer than 1 in 3 cases reported
    - Stronger support mechanisms
    - Stronger anti-reprisal protections

# Final Word

## PRACTICAL POINTER

- Harassment historic dominion of HR. But now needs to be addressed as part of OHS Program.



- Two potential outcomes:

1. \*Cooperation
2. \*Turf War

## 2. Mental Stress & Workers' Comp

Driven by same forces as first trend—need to rework old laws for new conditions, i.e., recognition of mental stress hazards

### Old Coverage Rules

- \*Mental injury deemed work-related if result of discrete traumatic event(s) at work
  - \*Objective standard

### Problem

- Out of touch with modern scientific evidence showing PTSD and other mental stress injuries develop gradually and cumulatively

## 2. Mental Stress & Workers' Comp cont'd

### Liberalization of Coverage Rules

#### Past Decade

1. Sector basis, e.g., police, fire, EMT (as with cancers)
2. General

#### 2017-18

- Ontario & Alberta make bold moves



## 2. Mental Stress & Workers' Comp cont'd

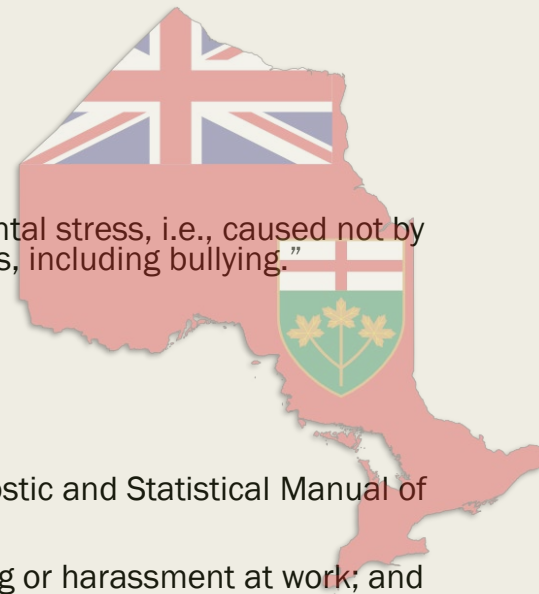
### From Trauma to Chronic Ontario

- [Policy 15-03-14](#) (Jan. 1, 2018) provides benefits for chronic mental stress, i.e., caused not by traumatic events but “substantial work-related stressors, including bullying.”

#### Coverage Criteria

Workers must:

- \*Get professional diagnosis of mental stress injury based on Diagnostic and Statistical Manual of Mental Disorders;
- \*Prove they suffered substantial work-related stressor(s) like bullying or harassment at work; and
  - \*Prove that stressor was predominant cause of diagnosed mental stress injury



## 2. Mental Stress & Workers' Comp cont'd

From Trauma to Chronic

### Alberta

- Bill 30 extends PTSD presumption for EMT workers to ALL workers, effective April 1, 2018





# 2. Mental Stress & Workers' Comp cont'd

## Other Jurisdictions

**Table 2. Workers' Comp Mental Stress Coverage Initiatives in 2017-2018**

Jurisdiction	Initiative
BC	<a href="#">Bill 9</a> making it easier for first responders and corrections officers to get benefits for PTSD and other mental disorders gets third reading and may take effect in 2018
Nova Scotia	<a href="#">Bill 7</a> creating presumption that PTSD by emergency response worker is work-related adopted in Oct. 2017
Newfoundland	WorkplaceNL ends public review and is set to adopt changes to <a href="#">Policy EN-18 to expand workers' comp coverage for mental stress beyond traumatic events to stress that develops gradually over time</a>
Prince Edward Island	WCB loosens definition of "impairment" to encompass not just physical but psychological conditions like PTSD and ongoing symptoms like chronic pain
Northwest Territories & Nunavut	WSCC amends <a href="#">Policy 03.09</a> to expand PTSD and mental stress coverage beyond discrete traumatic events to stress developing gradually over time
Yukon	<a href="#">Bill 8</a> creates PTSD presumption for emergency response workers including paramedics, firefighters and police officers

# IMPACT ON YOU—WHAT TO DO

- Expand scope of your OHS program to mental and psychological injuries
  - Implement proactive measures such as counselling or EAP programs to help your workers cope with workplace stressors
  - Benefits include not only preventing workers' comp claims but enhancing productivity & morale

## 3. LEGALIZED CANNABIS

### The 4 Things OHS Directors Need to Know About Legalization

#### 1. Current Canadian Cannabis Law

- Medical v. Recreational



### 3. Cannabis cont.

#### Timeline:

- 1922: Cannabis made illegal
- 2000: Medical cannabis legalized by Courts
- 2001: Health Canada issues medical cannabis rules
  - 2013: Health Canada loosens restrictions
- 2017: Federal government mandates nationwide legalization of recreational cannabis
  - July 1, 2018: Original implementation deadline



# 3. CANNABIS — The 4 Things You Need to Know cont.

## 2. What Legalization Means

- Not just de-criminalization but establishment of new government system to regulate recreational cannabis production, distribution & sale

## 3. How Legalization Works

- Between now and legalization effective date, each of the 14 jurisdictions must create its own set of laws governing recreational cannabis within its boundaries.

### Four stages:

- I. Hearings
- II. Propose legislation
- III. Adopt legislation
- IV. Adopt implementing regulations



### 3. CANNABIS – The 4 Things You Need to Know cont.

#### 4. Legalization's Impact on Employers & Workplaces

- **Primary Rules:** Little to no impact unless organization directly involved in recreational cannabis-related commerce
  - **Secondary Rules:** Will impact you, including:
    - Changes to indoor smoking laws
    - Changes to traffic safety laws
    - Changes to OHS laws
- Parts of new legislation/regulations themselves, e.g., provisions limiting use to private residences (PEI, NB)



# IMPACT ON YOU—WHAT TO DO

- \*Modify your current Anti-Drug & Testing Policies:
  - \*Base policy on fitness for duty, NOT morality or legality
  - \*Modify indoor & vehicle smoking policies
  - \*Accommodate medical cannabis
- \*Educate workers that legal to use NOT same as legal to use/be impaired **at work**



## 4. STEP UP IN CRIMINAL PROSECUTION

*Not a new threat, but a growing one*

### C-45

- Adopted after Westray mine explosion to make it easier to prosecute companies, corporate officials and individuals for criminal negligence
  - Requires:
    - ✓ Control over work
    - ✓ Wanton & reckless disregard for safety



## 4. Criminal Prosecution cont'd

Historically, prosecutors have been reluctant to use because of high burden of proof

- **Criminal:** Beyond a reasonable doubt
  - **OHS:** Balance of probabilities
  
- **Criminal:** *Actus reus + mens rea*
  - **OHS:** *Actus reus* only

## 4. Criminal Prosecution cont'd

Steady increase in recent years.

### Significant C-45 Prosecutions in 2017-18

- \* **Ontario: Detour Gold Corp.** Record \$2.6 million after firm pleads guilty to criminal negligence for worker's acute cyanide intoxication death;
- \* **Quebec: Century Mining Corp.** \$200K fine for criminal negligence in failing to protect worker crushed by a heavy truck. Twist: Firm had declared bankruptcy 5 years earlier; and
- \* **Ontario: Metron Construction project manager** sentenced to 3.5 years in prison for his role in Christmas Eve swing stage scaffold collapse tragedy of 2009

## 4. Criminal Prosecution cont'd

### Beyond C-45: A New Criminal Theory Emerges

*R c. Fournier*: Excavation contractor responsible for fatal trench collapse convicted of not just criminal negligence under C-45 but also manslaughter

# IMPACT ON YOU—WHAT TO DO

## Takeaway Lessons

- Don't get too caught up over manslaughter—*Fournier* more outlier than precedent
  - You DO need to be concerned about C-45, however

## Avoiding Criminal Liability

- Due diligence is the key.

Explanation: Although not technically a criminal defence, due diligence blows away “wanton and reckless”



## 5. INTENSIFICATION OF OHS PROSECUTION—FROM POLICY TO SYSTEM

OHS prosecutions & penalties continue to increase

*But that's old news*

**What IS new—and very troubling:**

New OHS laws expanding not just penalties but scope  
and power of OHS enforcement and enforcers

## 5. OHS Enforcement cont'd

### Recent Developments

- In past 12 months, 6 jurisdictions have adopted such legislation, including Ontario

**Table 3. Key Ontario *OHS Act* Changes under Bill 177 (Effective Jan. 1, 2018)**

OHS Act Provision	Previous Rule	New Rule
Maximum penalty for corporation	\$500K per charge	\$1.5 million per charge (tied with Sask. for highest in Canada)
Maximum penalty for individual	\$25K per charge and/or 1 year in jail	\$100K per charge and/or 1 year in jail
Limitation period for bringing OHS charges	1 year from date of alleged violation	1 year from date inspector becomes aware of alleged violation
New incident reporting requirement	NA	Employer must notify MOL Director if joint health safety committee (JHSC) or health safety representative (HSR) identifies structural inadequacies of workplace as source of danger to workers

## 5. OHS Enforcement cont'd

### Other Jurisdictions

- **Alberta:** Bill 30 new govt. powers to investigate injuries/incidents, interview persons not present at work site during incident and issue stop work and stop use orders. More court authority to impose creative sentences for OHS violations
- **BC:** New WorkSafeBC policy expands agency authority to impose penalties for repeat OHS violations
- **Nova Scotia:** Bill 165 powers of OHS inspectors to stop repeat violations, including getting injunction to enforce stop work order
- **Northwest Territories/Nunavut:** WSCC ticketing for OHS offences

# IMPACT ON YOU—WHAT TO DO

## What Should OHS Directors Do in Response?

1. Nothing—as far as the **substance** of your OHS program is concerned. Just keep on doing what you're doing.
2. Everything—as far as your position and leverage within the organization is concerned. As the laws change and threat of criminal and OHS prosecution intensifies, the value of your OHS program and what you do for your organization and its principles increases accordingly.

**JUST MAKE SURE YOU LET *THEM* KNOW THAT!!!**

# BONUS COVERAGE—GET READY FOR WHMIS 2015



The employer GHS compliance deadline is December 1, 2018—just six months away. Will you be ready?

# Getting Set For WHMIS GHS Changes



## The 5 Things You Have to Do Between Now & December 1:

1. Revise your hazardous products inventory on basis of new GHS classification criteria
2. Ensure each hazardous product has a container or workplace label meeting new GHS label criteria
3. Go through your MSDS binder and ensure every MSDS is replaced with an SDS meeting GHS requirements
4. Revise your written chemical safety program both cosmetically, e.g., by changing “MSDS” references to “SDS,” and substantively
5. Ensure that each worker who uses, works near or is otherwise exposed to controlled products has the necessary GHS training and that such training was understood and is being practiced

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Questions



# Upcoming Webinars

- June 13: OHS Update - 10 Recent OHS Cases You Should Know About with Adrian Miedema, Partner at Dentons Canada LLP
- July 4: Dealing with Inspectors with Ryan J. Conlin, Partner at Stringer LLP
- August 22: Worker's Safety Obligations (What Workers Are Legally Required To Do To Remain Safe) with Norm Keith, Partner at Fasken

# Contact Us

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