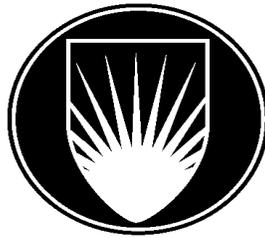


**ROYAL COMMISSION ON WORKERS' COMPENSATION
IN BRITISH COLUMBIA**



**REPORT ON SECTIONS 2 AND 3(a)
OF THE COMMISSION'S TERMS OF REFERENCE**

October 31, 1997

Canadian Cataloguing in Publication Data
Royal Commission on Workers' Compensation in British Columbia
Report on sections 2 and 3(a) of the Commission's terms of referenc

ISBN 0-7726-3412-2

1. Industrial hygiene – Law and legislation –British Columbia.
2. Industrial safety – Law and legislation – British Columbia.
3. 3. Workers' compensation – Law and legislation – British Columbia. I. Title.

KEB409.4.R69 1997 344.711'0465'02642 C97-960317-X
KF3570.R69 1997

October 31, 1997

His Honour, The Honourable Garde Gardom
Lieutenant-Governor, Government of British Columbia
Government House
1401 Rockland Avenue
Victoria, BC

Your Honour:

The Royal Commission on Workers' Compensation in BC received its Terms of Reference on November 7, 1996. These terms were amended on April 7, 1997. Section 7(a) of the amended Terms of Reference provides that the commission shall make a report by October 31, 1997, on sections 2 and 3(a).

In accordance with that term, the undersigned submit this report.

Yours respectfully,

Gurmail S. Gill
Commission Chairman

Oksana Exell
Commissioner

Gerry Stoney
Commissioner

**ROYAL COMMISSION ON WORKERS' COMPENSATION
IN BRITISH COLUMBIA**

**REPORT ON SECTIONS 2 AND 3(a)
OF THE COMMISSION'S TERMS OF REFERENCE**

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October 31, 1997

His Honour, The Honourable Garde Gardom
Lieutenant-Governor, Government of British Columbia
Government House
1401 Rockland Avenue
Victoria, BC

Your Honour:

The Royal Commission on Workers' Compensation in British Columbia is pleased to present this report on sections 2 and 3(a) of our Terms of Reference as amended by Order-in-Council on April 24, 1997. While this report and its contents are the work and responsibility of this commission, they are informed by the voices and words of over 1,700 individuals and organizations that have spoken or written to us to date.

Paragraph number seven of the amended Order-in-Council instructs the commission in part to:

- ...provide a final report respecting
 - (a) sections 2 and 3(a) of these terms of reference, by no later than October 31, 1997...

The wording of terms 2 and 3(a) is as follows:

2. To examine the process for the development and implementation of health and safety regulations and to provide recommendations for an efficient, timely process to establish and update these regulations appropriate to changing workplaces and work organization into the 21st century. To examine the current statutory framework to ensure that appropriate legislation protects and promotes workplace health and safety including
 - (a) the need for a new health and safety statute, and
 - (b) the consolidation of regulatory jurisdictions.
3. To inquire into recurring and current issues pertaining to the operation and administration of the workers' compensation system, and without limiting the number, nature and scope of these issues, to include
 - (a) benefits for fatality claims...

In the opinion of the commission, term 2 contains two distinct parts. Part one refers to the process for developing and implementing health and safety regulations. Part two refers to the legislative framework for occupational health and safety.

This report begins with an examination of part two of section 2. In addressing the legislative framework, the report:

- (a) describes the characteristics appropriate to statutes and regulations;
- (b) identifies provisions common to Canadian occupational health and safety statutes;
- (c) identifies problems with both the framework and content of this province's current occupational health and safety legislation;
- (d) states the need for a provincial occupational health and safety act;
- (e) identifies cabinet as the most appropriate body for promulgating regulations;
- (f) considers key aspects of an occupational health and safety act;
- (g) reviews and makes recommendations on enforcement; and
- (h) proposes a method for identifying which regulatory jurisdictions might best be consolidated under a provincial occupational health and safety statute.

This report does not address which agency should administer occupational health and safety in British Columbia. Currently the Workers' Compensation Board of BC holds primary responsibility for occupational health and safety in the province. Whether this is appropriate in light of the board's historic role as the agency responsible for compensation matters and its more recent role in rehabilitation, or whether this responsibility should reside with another agency or more directly within government, cannot be addressed until the commission has completed its review of the board.

This review will be completed in the summer of 1998. Our report on the governance, management and operation of the board, including recommendations pertaining to occupational health and safety program and service delivery, will form part of our final report, due September 30, 1998.

Next, the report addresses part one of section 2 – the process for developing regulations. This report:

- (a) describes the salient features of the recent regulation review process undertaken by the board;
- (b) states principles and criteria for effective public consultation in a regulatory environment;
- (c) states the need for a more inclusive model for effective consultation;
- (d) states the need for ongoing, proactive review; and
- (e) places ultimate accountability for overseeing regulation review in the hands of government.

Addressing the third component of this report, section 3(a), presented the commission with a different challenge than that found in section 2. The challenge is inherent in the opening paragraph to section 3 of the Terms of Reference:

To inquire into recurring and current issues pertaining to the operation and administration of the workers' compensation system...

While it is possible to describe and analyze the legislative framework for occupational health and safety separate from the "operation and administration of the workers' compensation system," the same is not true for all of the various issues pertaining to survivor benefits. This includes issues surrounding the deductibility of CPP benefits, the calculation and adequacy of fatality benefits in a variety of circumstances, and the degree to which personal attributes, whether determined individually or as a group, should influence benefit eligibility and amount. Thus the reality that survivor benefits are indivisible from the compensation system; the principles that apply in this area relate to other areas within the system.

The Honourable Garde Gardom
October 31, 1997

Faced with this reality, the commission has concluded that the review of certain areas of fatality benefits cannot be finalized at this time. To do so before we have completed our review of the compensation system would be tantamount to charting a course of unknown destination.

In light of the foregoing challenge, the commission has discharged its mandate by limiting its recommendations to survivor issues where the potential effect on the compensation system is predicted to be less significant. The commission has also therefore made its recommendations within the framework of existing workers' compensation legislation.

Yours respectfully

Judge Gurmail S. Gill

LEGISLATIVE FRAMEWORK FOR OCCUPATIONAL HEALTH AND SAFETY IN BC

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BC'S LEGISLATIVE FRAMEWORK FOR OCCUPATIONAL HEALTH AND SAFETY

INTRODUCTION

Forty statutes and 84 regulations enacted by the federal and provincial governments impact occupational health and safety at BC worksites. A complete listing of this legislation is set out in Appendix A.

Seventeen federal statutes and 32 regulations apply to federal works and undertakings in the province. Human Resources Development Canada has primary responsibility for this legislation, but seven other federal agencies also administer occupational health and safety related legislation that applies in BC.

Twenty-one provincial statutes and 32 regulations deal with public, as well as workplace health and safety issues. We refer to these as being “dual purpose” legislation. The Ministries of Employment and Investment, Municipal Affairs and Housing, Health and three other BC ministries administer this dual-purpose legislation. Two other BC statutes and 20 other provincial regulations focus primarily, if not exclusively, on occupational health and safety.

In BC, the Workers' Compensation Board administers the Workers Compensation Act¹ and the Workplace Act² and their regulations. These comprise the province's primary occupational health and safety legislation. The Ministries of Employment and Investment, Municipal Affairs and Housing, and Health administer occupational health and safety legislation covering industries that fall outside the scope of the board's mandate.

BC's primary occupational health and safety legislation

The Workers Compensation Act is the major source of BC's occupational health and safety legislation. The board under the authority of this Act has promulgated the following regulations:

- Agricultural Operations Regulations, BC Reg. 146/93
- Fishing Operations Regulations, BC Reg. 339/94
- Industrial Health and Safety Regulations, BC Reg. 585/77³ (the “IH&S Regulations”)
- Occupational First Aid Regulations, BC Reg. 344/93
- Occupational First Aid Applicability Regulation, BC Reg. 345/93
- Reports of Injuries Regulation, BC Reg. 713/74
- WHMIS and First Aid Applicability Regulation, BC Reg. 377/92

- Workplace Hazardous Materials Information System Regulation (Workers' Compensation), BC Reg. 299/88

The board recently approved the *Occupational Health and Safety Regulation* (the "OHS Regulation"), which updates provisions found in the current *IH&S Regulations* and consolidates provisions from other regulations. This regulation is scheduled to come into force in April 1998.

The Workplace Act adopts many of the inspection and enforcement powers set out under the Workers Compensation Act. Two specific regulations approved by the board under this statute are:

- Occupational Environment Regulations, BC Reg. 128/74
- Workplace Hazardous Materials Information System Regulation, BC Reg. 258/88

While the Workers Compensation Act, the Workplace Act and their regulations are the primary occupational health and safety legislation for BC, three other collections of legislation address specific industries and hazards not covered under the primary legislation.

- 1 The Ministry of Employment and Investment administers and enforces the Mines Act. Three regulations approved by the provincial cabinet affect occupational health and safety at mines:

- Mine Health, Safety and Reclamation Code, parts 1 to 9, 11 and 12
- Workplace Hazardous Materials Information Systems Regulations (Mines) , BC Reg. 257/88
- *Mines Regulation* , BC Reg. 126/94

Although approved by the cabinet, *Mine Health, Safety and Reclamation Code* is exempted from the Regulations Act⁴; it has not been filed as a BC Regulation and has not been assigned a number.

- 2 The Ministry of Municipal Affairs and Housing administers and enforces the Railway Act. A number of regulations passed under this statute affect occupational health and safety:

- Occupational Safety and Health Regulations for Railways, BC Reg. 74/93 [NOTE: This is also referred to as Part XIV of the Canadian Rail Operating Rules Regulation, BC Reg. 464/90.]
- Visual Acuity, Colour Perception and Hearing of Railway Employees Regulation, BC Reg. 457/59 [NOTE: This is also referred to as Part VI of the Canadian Rail Operating Rules Regulation, BC Reg. 464/90.]
- Workplace Hazardous Materials Information System Regulation, BC Reg. 277/88

3 The Ministry of Health administers and enforces four regulations under the Health Act. These regulations affect occupational health and safety at remote worksites:

- Industrial Camps Health Regulations, BC Reg. 427/83
- Sanitation and Operation of Food Premises Regulations, BC Reg. 148/74
- Safety Drinking Water Regulations, BC Reg. 230/92
- Sewage Disposal Regulations, BC Reg. 411/85

THE CHARACTERISTICS OF AN APPROPRIATE LEGISLATIVE FRAMEWORK

Before considering whether British Columbia's current legislation optimally protects, promotes and supports workplace health and safety, it is important to state what constitutes an appropriate legislative framework. Statutes and regulations serve different purposes. Distinguishing what these two types of legislation should and should not attempt to do is essential to understanding the concept of legislative accountability. It is also a key determinant of how autonomous a government agency should be in making regulations.

Although written over 25 years ago, the 1968 report of the Ontario *Royal Commission Inquiry into Civil Rights*, chaired by Honorable J.C. McRuer⁵ is acknowledged still as an influential and authoritative commentary on legislative frameworks and accountability. A provincial perspective is provided by a 1982 document entitled *Cabinet Legislation Committee Policies and Procedures*⁶. This Legislation Committee Policy guides BC ministries in preparing statutes and regulations to this day. The commission relied on both of these documents in its deliberations.

THE DIFFERENCES BETWEEN STATUTES AND REGULATIONS

The term "legislation" encompasses both statutes and regulations; they are distinguished by the nature and significance of their provisions.

In an ideal legal system, all rights and liabilities of the individual in relation to others and to government would be established by stated rules of law applied by the ordinary courts of law. New rules would be made by the Legislature, which is representative of and responsible to the people, with constitutional and political safeguards for the exercise of its power. There would be no arbitrary or discretionary powers vested in bodies or persons other than the Legislature, or those directly responsible to it.

It must be recognized and accepted that the practical demands of modern government could not be met under such an ideal system. The Legislature cannot state in complete detail all the rules to apply under new statutes. Nor is it desirable that it should attempt to do so where flexibility of their application in administrative matters is necessary. The Legislature should enact statutes in as much detail as is practicable and confer power to complete the statutory schemes by making regulations that have the force of law.

Where it is not possible to state in a statute the detail of all the law required to carry out its scheme, or where flexibility is needed, definite advantages are gained if powers to make regulations to supplement the statute are conferred on the proper body...

McRuer⁷

McRuer recommends a set of principles to guide a legislature's examination and review of the regulations that flow out of the exercise of subordinate legislative power (i.e., regulation making authority) by delegated persons or bodies. These principles identify what regulations (as opposed to statutes) should and should not do:

- regulations should be confined to details to give effect to the policy established by the statute in question and should not contain provisions initiating new policy;
- regulations should not have retrospective effect unless clearly authorized by statute;
- regulations should not exclude the jurisdiction of the courts;
- regulations should not impose a fine, imprisonment or other penalty, as sanctions should be left to the statute;
- regulations should not shift the onus of proof of innocence onto a person accused of an offence;
- regulations should not impose anything in the way of a tax (as distinct from fixing the amount of a license fee, or the like); and
- regulations should not make any unusual or unexpected use of a delegated power. An example of this would be regulations that attempt to authorize a further sub-delegation of power or regulations that attempt to impart a power to vary or amend regulations.

Two provisions should be added to this list:

- wherever possible, all matters intended to be dealt with by regulations under an enabling statute should be listed by subject matter in the statute's regulation-making provisions in sufficient detail to ensure that they cannot later be challenged as being outside the legal authority of that statute; and
- all legislation should be expressed in precise and unambiguous language.

Not surprisingly, the 1982 Legislation Committee Policy reflects the direction taken in the McRuer Report. While some policies and procedures within this cabinet directive are administrative or raise technical and drafting issues, most provide guidance on what should or should not be contained in legislation. For example, one statement that helps differentiate between statutes and regulations is that technical or routine matters that are suitable for inclusion in regulation should not be included in a statute. This directive complements the McRuer guidelines listed above.

The Policy states that the following directives apply to all BC legislation, unless cabinet grants an exception:

- legislation should not contain provisions that have no legal effect. This suggests that if the government is not willing to prosecute for a breach of a provision, the provision should not be in legislation but addressed in educational documents or through other non-enforceable instruments;
- matters relating to an agency's internal administration should not be included in legislation;
- the public should be able to identify the person who has been granted a power under a statute;
- a statute should not provide for broad delegation of powers from one person or body to another. If a specific matter requires delegation, it should be identified in the legislation and the delegation limited (see also s.23 of the Interpretation Act);
- legislation should not abridge the rules of natural justice or place an unreasonable restriction on a person's liberty, such as undue powers of arrest or search;
- there should be no deviation from or diminution of the Canadian Charter of Rights and Freedoms;
- there should be a right to appeal administrative decisions to an administrative tribunal or the courts, or both;
- access to the courts to seek a review of matters that could be reviewed under the Judicial Review Procedures Act should not be denied;
- legislation should not unreasonably interfere with property rights;
- it should be clear which provisions in a statute create offences and what the applicable penalties are for contravening those provisions;
- consideration should be given to enforcement via the removal of a privilege or a license in instances where this may be more effective than a standard summary conviction penalty;
- when incorporating a non-statutory document by reference, it should be clear whether that document has been incorporated "as amended from time to time" or not;

- the need to preserve confidentiality (or non-compellability) of information obtained under legislation should be carefully considered;
- a body subordinate to the Legislature should not be given the power to amend a statute; and
- the office of Legislative Counsel should be consulted in the early stages of preparing legislation, and outside counsel should not draft legislation without the specific authorization of the Attorney General or Cabinet.

This commission has adopted the legislative framework and accountability principles of the McRuer Report and the Legislation Committee Policy. In our opinion, only statutes should:

- contain provisions initiating new government policy or changing existing policy;
- confer the power to make or amend regulations, or authorize the granting of exemptions or variances to regulations;
- have retrospective effect to cure administrative, judicial or legislative errors;
- exclude or limit the jurisdiction of the courts over the enforcement agency;
- define what constitutes an offence and prescribe the fines, terms of imprisonment or other penalties on conviction;
- shift the onus of proof to someone accused of an offence;
- impose anything in the way of a tax; and
- define and place limits on the delegation of powers necessary to help achieve the legislative objectives.

Similarly, regulations:

- must relate to and be authorized by the governing statute;
- must be approved only by the cabinet; and
- should be the legislation that sets out the detailed, technical requirements necessary to give effect to government policy.

LEGISLATIVE ACCOUNTABILITY

The most common approach in Canada to developing occupational health and safety statutes is one where new statutes or proposed amendments to existing statutes are:

- **developed** by a branch of a ministry (not a compensation board); and
- **approved** by the legislature.

British Columbia differs from the rest of Canada in that, through its very broad authority under the Workers Compensation Act and Workplace Act, the Workers' Compensation Board has the

exclusive power to develop and approve all aspects of this province's policy concerning workplace health and safety. For example, the board prescribes the responsibilities of employers and workers, and most of the responsibilities of the board itself through board-approved policies. Every one of the important policy decisions about the prevention of injuries and disease at BC worksites commonly found in statute elsewhere in Canada are buried in regulations that the board alone develops, approves and enforces.

Generally speaking, in Canada important social policy objectives addressing such things as occupational health and safety are established by a legislature within a statute that states the fundamental rights and duties of affected parties. This approach is particularly important when it is necessary to address disagreements among the affected parties as to what those rights and duties should be.

An example of the difficulties that can arise when tough decisions typically left to legislatures are left to an agency without statutory accountability is the board's recent attempt to produce a new set of rights and duties. The November 1995 draft of the proposed Part 3 of the new *OHS Regulation* was based on an earlier report prepared by a bipartite group (Working Group on Responsibilities) made up of employer and worker representatives, chaired by a board representative (see section two of this report for an analysis of the regulation review process). That draft part, titled "Rights and Responsibilities," contained detailed provisions proposing new fundamental rights and duties of employers, workers and supervisors. It also contained provisions concerning:

- joint health safety committees;
- safety representatives;
- the right to refuse unsafe work assignments; and
- protection from discrimination.

Part 3 also contained provisions covering multi-employer worksites based on the final report of the bipartite Construction Safety Sub-committee.

In many respects, these provisions taken together would have brought BC's primary occupational health and safety legislation into line with developments that have taken place in the rest of the country over the past two decades. Unfortunately, the employer and worker representatives participating in the board's regulation review process failed to agree on all of the proposed provisions.

It appears that the initial disagreement concerned:

- the number of workers at a worksite necessary to require creating a joint worksite committee or designating a worker safety representative;
- the training and certification of committee members or representatives, and who should pay those costs;
- the nature of the powers committee members and representatives could exercise to affect change at their worksites; and
- the rules to define the roles of the principal contractor (or owner) and subcontractors at multi-employer worksites in all industries⁹.

The commission has been told that failure to achieve consensus on these issues undermined the process. After November 1995, the positions of the employer and worker representatives started to diverge and the extensive consensus that had been achieved in a number of other areas unwound, resulting in a truncated version of Part 3 being approved in the new *OHS Regulations* introduced in September of this year.

In a 1997 briefing paper, *Regulation Review and Development Process*,⁹ the board implies that resolution of the more contentious occupational health and safety issues is a task that could be undertaken by the BC Legislature, the resulting resolution being set out under a separate occupational health and safety statute:

The BC board's attempts at revising the 1978 IH&S Regulations included working out core principles, such as those governing rights and responsibilities of workplace parties. A lack of consensus on these principles has been a major stumbling block to timely completion of the review process, since core principles are normally the foundation which support the balance of the regulations.

In other Canadian jurisdictions and many other countries, these key principles are set out in their separate OHS statutes. Trying to agree on first principles is arguably the hardest part of the process. An alternative is to establish these core principles by statute. (emphasis added)

The commission believes that the need for political accountability in establishing social policy is incompatible with an independent agency holding the exclusive authority to develop and approve the laws that it is charged with enforcing. To do so runs contrary to the general principles that the ultimate decision on policy affecting civil and property rights should rest with political authorities and be set out in statute.

This does not mean that an administrative agency like the board should not contribute to the discussion; the agency should continue to play an important consulting and research role in

developing the social policy. However, by granting the board exclusive authority to prescribe this province's policies concerning workplace health and safety, the usual accountability structure is missing from BC's legislative framework for occupational health and safety.

For decades the BC Legislature and the provincial cabinet have effectively excluded themselves from the important social policy decision-making processes that have taken place under the Workers Compensation Act and Workplace Act; they have granted the board a virtually unmonitored legislative monopoly.

Therefore, the commission recommends that:

1. The Legislature assert its responsibility for the important social policy issues inherent in occupational health and safety by enacting new legislation to address these issues.

In addressing this recommendation, government must decide if it should propose amendments to the Workers Compensation Act (and possibly consolidate the Workplace Act and other legislation in that process) or pass a new occupational health and safety statute.

BC is the only Canadian jurisdiction – possibly the only jurisdiction in the western industrialized world – that has not expressed government's objectives for occupational health and safety in a separate statute. Every other jurisdiction has found it useful and necessary to separate strategies to address compensation from strategies to address injury and illness.

This decision must be based on an important distinction; the principles of our current compensation system (no-fault insurance and collective liability) do not contribute to, nor necessarily promote the prevention of workplace injuries and illnesses. While compensation and rehabilitation are extremely important objectives, preventing workplace injury and illness must be given the highest priority. Relegating occupational health and safety to regulations under the Workers Compensation Act is an inherent weakness in BC's current legislative framework.

This commission believes that occupational health and safety should not be merely a subset of workers' compensation legislation. It is time for the Legislature to state this province's policy on occupational health and safety. Occupational health and safety is in everyone's interest and a new and separate statute should be the focus of a truly public debate centered in the Legislature.

Therefore, the commission recommends that:

2. (a) The new legislation be a separate occupational health and safety statute for the province of British Columbia; and
(b) The current occupational health and safety provisions found in the Workers Compensation Act and Workplace Act be incorporated in this new statute.

Establishing a new and separate occupational health and safety statute should not sever the important links between compensation services and prevention programs in this province. However, recommending a separate occupational health and safety statute does raise an important question: Should the Workers' Compensation Board of BC be responsible for accident prevention, compensation and rehabilitation?

The answer to this question is beyond the scope of this report. It involves a detailed understanding of the board's current policies and programs in relation to occupational health and safety, compensation, and rehabilitation, as well as education and research. These matters will be dealt with in the commission's final report in September 1998.

HOW AUTONOMOUS SHOULD AN AGENCY BE IN ITS REGULATION-MAKING DECISIONS?

An important aspect of the significant latitude British Columbia's current legislative framework assigns to the Workers' Compensation Board is its exclusive authority to develop, approve and enforce occupational health and safety regulations. This combined role is unique in Canada and may place the board in an unnecessarily compromised position akin to that which the police would be in if they were expected to prepare and approve, as well as enforce the Criminal Code of Canada.

The Workers Compensation Act states (in part):

71(1) The board may make regulations, whether of general or special application and which may apply to employers, workers and all other persons working in or contributing to the production of an industry within the scope of this Part, for the prevention of injuries and occupational diseases in employment and places of employments, including regulations limiting the right to conduct blasting operations in industries within the scope of this Part to those persons who are the holders of a blaster's certificate issued by the board.

In addition, the Workplace Act states (in part):

- 4(1) The board may make regulations of both general and special application that are considered necessary or advisable
- (a) for the protection of the health, safety and comfort of persons working in or contributing to the operation of a factory, office or shop, including, without limiting the generality of the foregoing, regulations
 - (i) applying to owners and employers,
 - (ii) applying to manufacturers and distributors of poisons, or of dangerous or harmful articles or substances used in a factory, office or shop, and

- (iii) applying to doctors and others with respect to the reporting of cases of affection from dangerous or harmful substances or industrial poisoning,
- (b) requiring medical examinations of persons referred to in paragraph (a) and imposing fees in respect of those examinations,
- (c) prescribing fees and charges to be paid into the accident fund by persons in respect of services provided by and functions performed by the board pursuant to this Act or the regulations made under it,
- (d) providing for the enforcement of decisions, orders or rulings made, and of penalties imposed, by a person under this Act and for appeals from these decisions, orders, rulings and penalties, and,
- (e) for the administration of this Act.

Using the permissive phrase “may make regulations” in the regulation-making sections of these statutes is not unusual; similar wording is found in other statutes. What is unusual is that in every other Canadian jurisdiction except Quebec (which delegates certain regulation-making authority to its occupational health and safety agency) the power to make regulations is held by the cabinet (i.e., “the Lt. Gov. in Council may make regulations”). In BC, neither the Ministry responsible nor the provincial cabinet plays any role in the decision-making process.

The McRuer Report¹⁰ observed the following about the role of an agency granted subordinate legislative power:

Subordinate legislative power is a law-making power exercised by persons or bodies subordinate to the Legislature. In its exercise rules having the force of law are formulated as a result of a decision or decisions made on the grounds of policy. In accordance with constitutional principles ... the exercise of powers to make decisions affecting rights of individuals on grounds of policy by persons or bodies other than the Legislature should be subject to political control ... [P]olitical control of subordinate legislative power should be maintained by conferment of power on ministers, either singly or collectively, who are responsible to the Legislature, or on persons subject to the supervision and control of ministers...

Some statutes confer subordinate legislative power on bodies other than the Lieutenant Governor in Council or a minister, which may be exercised without the supervision of ministers. This is a breach of sound constitutional principles and gives rise to unjustified encroachments on civil rights. (emphasis added)

McRuer¹¹ goes on to state that:

In many instances where power to make rules or regulations is conferred on a person or board apparently independent of a minister or the Lieutenant Governor in Council the person or board is not in fact independent. As a practical matter, the person or board is subject to the

direction and control of a minister. In such cases the lack of independence of the subordinate legislator should be recognized and the power should be conferred on the Lieutenant Governor in Council, or on a minister with the board acting in an advisory capacity. If effective administration requires that legislative powers be conferred directly on a person or body other than the Lieutenant Governor in Council or a minister, political control can be and should be maintained by making the exercise of the power subject to the approval or disallowance of the Lieutenant Governor in Council or a minister. ... In any case all regulations made by an independent person or body should be reported to a minister, who should have power to disallow them. So-called independent boards or bodies should never be given legislative powers free from political control as a subterfuge, or to relieve the political authorities from embarrassing duties. (emphasis added)

Comparing the way new occupational health and safety regulations or amendments to existing regulations are developed in Canada shows that the most common approach is one where the regulations are:

- **developed** by a branch of a ministry (not a compensation board);
- **approved** by cabinet and promulgated under the authority of the occupational health and safety statute; and
- **enforced** by a branch of the ministry separate from the branch that developed the regulations or amendments, or a compensation board.

In all cases, the compensation and rehabilitation functions remain with the provinces' compensation boards.

This suggests that there are practical alternatives to the current approach to developing, and approving occupational health and safety regulations in this province. The authority to develop and approve regulations could be placed with an entity separate from the agency mandated to administer and enforce the regulations. Other jurisdictions have done this by assigning the power to develop regulations to the equivalent of a ministry of labour and giving the power to approve those regulations to the cabinet.

Alternatively, the administering agency could be given a significant (if not the lead) role in developing the regulations, with cabinet having the final authority to approve the regulations. Thus, in order to amend or propose a regulation, the agency would submit a proposal to cabinet, most likely through the Minister of Labour, and cabinet would give final approval before the proposed change became law.

Under either of these options, vesting regulation-approval in the cabinet would provide the public accountability currently lacking in BC's occupational health and safety regulation-making system.

Therefore, the commission recommends that:

3. Cabinet approve the occupational health and safety regulations to be promulgated under the new occupational health and safety statute.

THE CONTENT OF A NEW OCCUPATIONAL HEALTH AND SAFETY STATUTE

The commission has reviewed the occupational health and safety statutes of every other Canadian jurisdiction in order to identify common characteristics and understand those things that act to optimally protect, promote and support workplace health and safety. This was a difficult but worthwhile exercise: there is no standard occupational health and safety act establishing uniform right and duties in Canada. Instead, the provinces' occupational health and safety statutes have evolved over time, sometimes borrowing provisions from each other's legislation and, on occasion, developing new and innovative provisions. This has led to certain similarities, but there are many noteworthy differences.

The focus of the following discussion is on content of a new occupational health and safety statute, on its purpose and application, the fundamental rights and duties of workplace parties, and its enforcement.

PURPOSE AND APPLICATION

Legislative Objectives and Agency Directives

It is becoming more common for Canadian occupational health and safety legislation to clearly state its intended social policy, or legislative objectives. Typically, occupational health and safety legislation also includes directives that instruct the administering agency to undertake certain tasks in support of the legislation. Alternatively, the statute may authorize the minister (or cabinet) to provide specific direction to the agency concerning how the stated legislative objectives are to be achieved, or empower the minister to approve objectives or mandate statements that the agency has developed. The power to issue such directives can be authorized under the statute, without spelling out the directives within the statute itself.

*Driedger on the Construction of Statutes*¹² offers a useful definition of legislative objectives or purpose statements:

A purpose statement is a provision set out in the body of legislation that declares the principles or policies the legislation is meant to implement or the objectives it is meant to achieve. Usually purpose statements are found at the beginning of an Act or the portion of the Act to which they relate.... Like preambles, purpose statements reveal the purpose of legislation and they are also an important source of legislative values.

Usually stated in general terms, legislative objectives provide general guidance to the agency, the affected parties and the courts as to the legislature's intentions. This can assist judicial understanding of the legislation as a whole and guide interpretation in a particular direction. For example, reference to the objectives can help resolve ambiguous wording within a statute where two or more reasonable but alternative interpretations are possible.

Driedger notes that legislative objectives are binding on the courts or an administrative tribunal in that the courts or the tribunal cannot contradict them; they carry the authority and the weight of duly enacted law. The judicial guidance that can be taken from legislative objectives can also benefit those who must comply with the legislation.

At the same time, providing clear direction to the agency through directives that speak to the means by which the agency is to achieve the legislative objectives makes the agency accountable for pursuing these means and for achieving these objectives.

Legislative objectives can create problems if they are improperly drafted or not reviewed on a regular basis to ensure that they are not outdated. Purpose provisions with more than one objective, for example, must be internally consistent and not conflict with each other. Nor can objectives be allowed to conflict with substantive provisions found elsewhere within the statute. Agency directives can create similar problems if they are improperly drafted or become outdated, thereby binding the agency to actions that are no longer relevant.

Highly prescriptive objectives and directives may limit an agency's discretion in situations where flexibility may be important, as when that agency is working with various interest groups who have different and at times conflicting viewpoints. With more general statements of objectives or directives, the agency has greater freedom to make decisions that represent compromise. On the other hand, when objectives or directives are vague, different interest groups can more easily argue that their particular recommendation for change is consistent with those legislative pronouncements. Clearly, a balance must be struck between these competing concerns.

The commission believes that legislative objectives, both general and specific, and agency directives are important provisions that should be set out in legislation to guide both the agency and the courts.

Therefore, the commission recommends that:

4. The province's occupational health and safety statute include:
 - (a) general and specific legislative objectives; and
 - (b) agency directives.

Based on our review of similar provisions in other Canadian and foreign legislation, and our understanding of the purpose of occupational health and safety legislation, we believe that the following general and specific objectives should form part of BC's occupational health and safety statute. We are not proposing that the legislature adopt our wording; our intent here is to reflect the themes and messages presented to us by British Columbians that have been supported through our research.

We believe that while the primary goal of occupational health and safety should be to prevent workplace accidents, injuries and illnesses, clearly society's objective should be to prevent more than just those workplace conditions that result in workers losing income or requiring other compensation benefits. Occupational health and safety legislation should serve the public interest by contributing to an environment which could lead to better worker health and safety, reduced worker reliance on other social safety nets such as health care and social welfare programs, and lower employer costs. It should contribute to the quality of life inside, as well as outside the workplace, while ensuring that the financial responsibility for achieving these objectives is appropriately allocated between employers and society at large.

General objective

The objective of this Act is to preserve and protect the human resources of the province of British Columbia for the benefit of all of its citizens.

Specific objectives

The specific objectives of this Act should be:

- (a) to prevent workplace accidents, injuries and illnesses, and protect persons from risks to their health and safety arising out of, or in connection with, activities at workplaces;
- (b) to promote a culture of occupational health and safety at all workplaces and excellence in health and safety management by employers;

- (c) to encourage education of the public and workers regarding occupational health and safety;
- (d) to promote and maintain the highest degree of physical, mental and social well-being of workers and other workplace parties;
- (e) to place and maintain, as far as reasonably practicable, workers and other persons in an occupational environment that meets their health and safety needs;
- (f) to ensure that all parties who can affect the health and safety of persons at the workplace share the responsibility for workplace health and safety to the extent of each party's authority and ability to do so;
- (g) to foster co-operative and consultative relationships between employers, workers and other persons regarding workplace health and safety, and promote worker participation in workplace health and safety programs and decision-making processes; and
- (h) to minimize wage loss, medical expenses, lost production, and disability compensation payments, thereby enhancing the competitiveness of British Columbia in the Canadian and world economies.

Whether or not the board or a new agency eventually administers the new occupational health and safety statute, the commission believes that the responsible agency should be required to follow a set of directives in a financially responsible and accountable manner. These directives should provide a means by which to hold the agency accountable; they should be developed by the Legislature, rather than the minister or the board, and finalized in consultation with the agency and those who must comply with the legislation.

The following are examples of agency directives. They are examples of elements that should be included in the statute.

Agency Directives

- (1) To ensure that the agency contributes to achieving the legislative objectives, the agency must:
 - (a) evaluate risks to the health, safety and well-being of persons at workplaces;
 - (b) develop programs to minimize or eliminate those risks; and
 - (c) monitor the effectiveness of the programs it develops and use the results to improve those programs.
- (2) Without limiting the generality of subsection (1), the agency must also undertake the following specific tasks:
 - (a) complete at least once every five years a comprehensive review of this Act and other legislation that impacts on or affects workplace health and safety to ensure that this Act is appropriate and effective, and when change is required, develop proposed

amendments to this Act or other statutes to be approved by the Legislature;

- (b) complete at least once every three years a comprehensive review of the regulations to ensure that they are appropriate and effective, and, when change is required, develop proposed new regulations or amendments to existing regulations to be approved by the Lt. Gov. in Council;
- (c) consult with employers, workers and others who must comply with the Act and the regulations, in particular when developing legislative changes;
- (d) cooperate with and, when so required, enter into formal agreements with other agencies responsible for other legislation that impacts on or affects workplace health and safety;
- (e) ensure that a sufficient number of suitably trained, qualified and knowledgeable persons are employed
 - (i) to enforce this Act and the regulations;
 - (ii) to otherwise promote the objectives of this Act, and
 - (iii) to ensure that these persons remain competent and act in a fair and effective manner;
- (f) ensure the provision of appropriate occupational health and safety education and training programs to those who require such programs;
- (g) devise courses in relation to occupational health and safety and recommend that such courses be integrated into educational programs. This should be done in co-operation with educational authorities including, but not limited to, universities, colleges, training institutes, local school boards and safety associations;
- (h) employ workplace health and safety experts to be available to provide consultation to those who require such advice;
- (i) examine, review and make recommendations in relation to existing and proposed registration or licensing schemes relating to occupational health and safety, and administer those schemes assigned to the agency by the Act or regulations;
- (j) undertake, encourage or sponsor research and inquiries, gather and disseminate information, and undertake related activities in support of the legislative objectives;
- (k) promote community awareness about workplace health and safety; and
- (l) inquire into and report to the minister within the time specified by the minister upon any matters referred to the agency by the minister.

Terms and Conditions

In undertaking the directives, the agency must:

- (a) act in a financially responsible and accountable manner; and
- (b) ensure that employers, workers and others retain their collective responsibility for creating and maintaining safe and healthy workplaces.

Application of the New Statute and Regulations

Most Canadian occupational health and safety statutes state the scope or application of the Act and the regulations, including areas where there is a need to clarify the legislation's application in

a particular circumstance. These provisions may also set out limitations or exceptions to the application of the legislation. It is also common for an occupational health and safety statute to declare that the Act is binding on the provincial (or federal) Crown and its agencies.

Currently there is no provision in either the Workers Compensation Act or the Workplace Act addressing the application of occupational health and safety provisions. By virtue of the board's regulation-making and enforcement powers, it can be implied that current occupational health and safety provisions in this statute apply to employers and workers generally, but not to certain other workplace parties, such as self-employed persons without employees and suppliers. Similarly, the Workplace Act applies to workplaces, such as factories, offices and shops, but not to private dwellings unless designated by regulation. However, occupational health and safety provisions should apply to all persons in need of protection and guidance, regardless of where they may be working.

Therefore, the commission recommends that:

5. The province's occupational health and safety statute and its regulations apply to all persons employed at or attending a place where persons work, or whose actions or omissions may affect the health and safety of workers, including, but not limited to
 - (a) employers;
 - (b) workers;
 - (c) self-employed persons without employees;
 - (d) supervisors;
 - (e) contractors,
 - (f) suppliers of goods and services, and
 - (g) visitors.

FUNDAMENTAL RIGHTS AND DUTIES

Although the employer has primary responsibility for workplace health and safety, occupational health and safety is everyone's responsibility; it does not fall on the shoulders of one party to the exclusion of another. Therefore, the general rights and duties of employers, workers, suppliers and others must be reflected in statute.

This approach was supported in a number of written and oral submissions to the commission. The difficulty is to properly articulate rights and duties that appropriately reflect each party's particular involvement in workplace health and safety. Some progress was made in defining and expressing those duties in the November 1995 draft of Part 3 of the new *OHS Regulation*. Unfortunately, many of those apparently useful provisions were not brought forward in the final

version. Subject to the refinements offered in this report, the commission believes that those earlier provisions could form the basis for provisions in the new statute.

The following sections address various rights and duties that should be described within the new occupational health and safety act. Enforcement will be addressed later in this report.

EMPLOYER DUTIES

Most Canadian occupational health and safety statutes declare that the employer has an overarching duty to take reasonable precautions to ensure that the worksite is safe and that workers are protected from harm. This broadly stated general duty applies even if there are no other specific or more detailed duties set out in the statute or regulations.

Such a provision reflects a general duty to do whatever is reasonable in the circumstances to ensure worker health and safety, and to take measures to ensure that workers are protected from workplace hazards. Indeed, as noted in the *Canadian Employment Safety and Health Guide*³ (CCH Guide), such a general duty provision may require the employer to **exceed** specific standards set out elsewhere in the legislation, according to the circumstances. Thus, while regulations may prescribe specific duties, the general duty to protect workers can require the employer to comply with a higher standard. A breach of any provision of the legislation would likely be encompassed within this general duty, therefore, a charge against an employer could use the wording of the general duty and make reference to any specific provision that was breached.

Canadian occupational health and safety statutes set out a number of other employer duties. These include a duty:

- to establish an occupational health and safety policy or program to address workplace health and safety in relation to general or specific hazards;
- to inform workers of their legal rights and duties or to post a copy of the applicable act and regulations;
- to warn workers concerning workplace hazards in general (e.g., WHMIS¹⁴) or in relation to specific hazards, including providing necessary information, posting notices and similar actions;
- to ensure workers are properly trained, experienced or supervised to perform their work safely;
- to supply personal protective equipment (as may be required by the legislation), sometimes at no cost to the worker (unless addressed in collective agreements) and to ensure that workers know how to use that equipment; and

- to cooperate with joint worksite committees, safety representatives, and workers in general, including providing information when requested or required.

These further duties do not limit the employer's general duty. Rather, they provide more detailed guidance to an employer regarding its general duty.

There is no general duty provision in the Workers Compensation Act, the Workplace Act, the *IH&S Regulations* or the new *OHS Regulation* that can be directly attributable to an employer. Section 2.04 of the *IH&S Regulation* (replicated in part in section 2.2 of the *OHS Regulation*) purports to create a general duty that all work must be carried out without undue risk of injury or occupational disease, but the employer is not expressly assigned that duty. More importantly, although some - not all - of the general duties commonly found in other Canadian occupational health and safety statutes in a single section are spread throughout the *IH&S Regulations* (and the *OHS Regulation*), neither section 2.04 nor the new section 2.2 directly addresses general duty.

In addition, although certain provisions of the Workers Compensation Act might suggest such a duty, no provision specifically requires an employer to cooperate with joint worksite committees established at that employer's place of business. There is also no provision under the Act or regulations that requires employers (or others) to cooperate with the board or its officers (e.g., during an inspection). The Workers Compensation Act prohibits persons from obstructing or misleading an officer, but it does not express a duty to cooperate with the board and its officers. For example, the Act does not state that employers and others must provide board officers reasonable assistance in gaining access to all areas of a worksite, speaking to workers, or testing or operating equipment or machinery.

The first five provisions in the November 1995 draft of the *OHS Regulation* did describe employer duties and, for the most part, those duties were similar to those found in other Canadian occupational health and safety statutes. These provisions state:

Prevention of injury and disease

1. The employer must ensure compliance with these regulations and take all reasonable precautions to prevent occupational injury and disease to workers.

Unsafe equipment

2. The employer must not sell, lease, loan or transfer possession of any equipment, tool, device or thing for use in the workplace where the equipment, tool, device or thing is unsafe or does not comply with these regulations.

Planning

- 3 (1) The employer must ensure that work is adequately planned to eliminate or effectively control the risk of injury or disease to workers.
- (2) Planning must include provisions for emergencies and treatment of ill or injured workers and must be developed in consultation with the occupational health and safety committee, if any, or the worker occupational health and safety representative.

Corrective action

- 4 (1) The employer must ensure that:
 - (a) all hazards at a workplace which could result in occupational injury or disease are identified and documented;
 - (b) preventive measures are developed and implemented to eliminate or effectively control the hazards;
 - (c) immediate steps are taken to eliminate or effectively control the worker's exposure to the hazard through engineering or administrative controls: and
 - (d) where engineering or administrative controls are not practicable, protective measures, including safe work procedures and use of personal protective equipment, are implemented as a means to control a worker's exposure to the danger, and the worker is given adequate training in the use and application of the protective measures.
- 4 (2) (a) Where an employer is required by these regulations to determine the practicability of a hazard control measure, the employer must, in selecting which control measures will be adopted, give primary regard to the degree of risk to which workers will be exposed and to the requirements of these regulations.
- (b) The employer must then consider in the following sequence:
 - (i) the state of knowledge about the risk and methods for eliminating or controlling the risk;
 - (ii) the availability and suitability of methods for eliminating or controlling the risk;
 - (iii) the cost of eliminating or controlling the risk.

Worker supervision and instruction

- 5 The employer must ensure that:
 - (a) each supervisor is qualified to perform his or her assigned duties;
 - (b) each worker is qualified to perform assigned duties or is working under the direct supervision of a qualified person;
 - (c) each worker is provided with adequate direction and instruction in the safe performance of assigned duties;

- (d) each worker is instructed and trained in safe procedures required by these regulations and in preventive measures required to control hazards associated with the assigned work;
- (e) workers are adequately supervised to ensure that their work is carried out in such a manner that all reasonable precautions are taken to prevent occupational injury or disease; and
- (f) all workers, including newly hired, relocated workers or workers affected by a change in the work process, are given a health and safety orientation which must be documented, and which covers topics as provided in Table 3-1.

Table 3-1: Orientation topics

Topics, as applicable, to be covered before the worker begins work at the workplace:

- (i) Emergency procedures
- (ii) Physical, chemical and biological hazards to which workers may be exposed
- (iii) Personal protective equipment
- (iv) Workplace health and safety rules
- (v) Location of first aid facilities, and means of summoning first aid and reporting illnesses and injuries.

Topics, as applicable, to be covered within 2 weeks of commencement of employment at the workplace:

- (i) Rights and responsibilities under board regulations
- (ii) Company health and safety program overview
- (iii) WHMIS overview
- (iv) The means of contacting the occupational health and safety committee, if any, or worker health and safety representative.

Some of these duties were carried forward into the 1997 draft of the *OHS Regulations*. A number were not.

Therefore, the commission recommends that:

6. The province's occupational health and safety statute place a general duty on employers to:
 - (a) establish occupational health and safety policies and programs;
 - (b) inform workers of their rights and duties;
 - (c) warn workers of workplace hazards and advise them on how to address those hazards;
 - (d) ensure workers are properly trained, experienced and supervised to perform their work safely;
 - (e) supply personal protective equipment and ensure workers know how to use that equipment;
 - (f) cooperate with workers, committees or representatives; and
 - (g) cooperate with the occupational health and safety agency.

SUPPLIER DUTIES

Suppliers have been assigned general duties in nine Canadian occupational health and safety statutes. The Legislatures in those provinces have found it necessary to require that suppliers ensure that the equipment, materials and substances they supply comply with the Act or regulations (in particular WHMIS for hazardous substances). They have also imposed duties to supply safe equipment and necessary health and safety information, as well as related duties that may arise through leases and similar agreements. There are also often supplementary provisions addressing protection of proprietary information.

A good example of a supplier general duty can be found in Nova Scotia's occupational health and safety statute¹⁵:

"(S)upplier" means a person who manufactures, supplies, sells, leases, distributes or installs any tool, equipment, machine or device or any biological, chemical or physical agent to be used by an employee;

Every supplier shall take every precaution that is reasonable in the circumstances to:

- (a.) ensure that any device, equipment, machine, material or thing supplied by the supplier is in safe condition, and in compliance with this Act and the regulations when it is supplied;
- (b.) where it is the supplier's responsibility under a leasing agreement to maintain it, maintain any device, equipment, machine, material or thing in safe condition and in compliance with this Act and the regulations; and

- (c.) ensure that any biological, chemical or physical agent supplied by the supplier is labeled in accordance with the applicable federal and Provincial regulations.

Neither the Workers Compensation Act, the Workplace Act nor the *IH&S Regulations* (or the new *OHS Regulation*) assign specific duties to suppliers.

Therefore, the commission recommends that:

- 7. The province's occupational health and safety statute place a general duty on suppliers to:
 - (a) ensure that the equipment or material they supply is safe, complies with legislation, and if required by an agreement, maintain equipment in a safe condition; and
 - (b) ensure that any biological, chemical or physical agent they supply is labeled in accordance with WHMIS regulations

DUTIES FOR SELF-EMPLOYED PERSONS WITHOUT EMPLOYEES

For purposes of voluntary compensation coverage, the Workers Compensation Act uses the term "independent operators" to describe self-employed persons who do not have employees. We prefer the term "self-employed persons without employees."

Eight Canadian occupational health and safety statutes describe specific duties for self-employed persons who do not have employees. In some of these jurisdictions, the self-employed have been required to comply with the general duties assigned to workers; other jurisdictions have set out specific duties.

As with suppliers, BC's current occupational health and safety legislation does not contain expressed duties for self-employed persons without employees. The new *OHS Regulation*, however, defines a worker (in part) as:

... a person otherwise deemed a worker under the Act (for example, a volunteer member of a fire brigade, a person involved in mine rescue or inspection, and an independent operator when admitted by the board under section 2(2) of the Act),...

This new definition suggests that the only way that self-employed persons without employees could be responsible for complying with the Workers Compensation Act and the regulations would be if they voluntarily applied for compensation coverage under the Act. However, if they did so, their duties would be limited to those assigned to workers, duties that may not be entirely applicable to self-employed persons without employees.

In principle, the public has an interest in self-employed persons, including self-employed persons working in private residences, complying with occupational health and safety requirements that preserve and promote their health and safety. This public interest exists whether they have or do not have employees or personal optional protection under the compensation system. This means that the act should address the workplace hazards that the self-employed may face, whether or not they have compensation coverage. Manitoba's legislation¹⁶ provides a useful example:

6. Every self-employed person shall, in accordance with the objects and purposes of this Act,
 - (a) conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that he or any other person is not exposed to risks to his or that person's safety or health, arising out of, or in connection with, activities in his workplace;
 - (b) comply with this Act and the regulations; and
 - (c) co-operate with any other person exercising a duty imposed by this Act or the regulations.

Therefore, the commission recommends that:

8. The province's occupational health and safety statute place a general duty on self-employed persons without employees to:
 - (a) ensure that neither the self-employed person nor any other person is exposed to risk arising out of, or in connection with, the self-employed person's activities;
 - (b) comply with the occupational health and safety statute and regulations; and
 - (c) cooperate with the occupational health and safety agency.

Home-based businesses present a challenge to developing occupational health and safety legislation that addresses the needs of all British Columbians. This type of worksite is becoming increasingly more common yet its extent, nature and effect on health and safety are still poorly understood. The commission will address this issue in more detail in its final report.

WORKER DUTIES

Every Canadian jurisdiction has assigned general duties to workers. While those duties vary across the country, generally speaking Canadian workers must:

- comply with the Act and regulations;
- take reasonable care to protect themselves and others at their places of employment;
- use personal protective equipment provided to them by their employer;
- inform the employer (or its agents) regarding such things as dangers, accidents and breaches of the legislation; and
- cooperate with the employer (and its agents), joint worksite committees, safety representatives and the enforcement agency.

Some occupational health and safety statutes (including BC's current *IH&S Regulations*), prohibit workers from engaging in improper or hazardous behaviour or conduct, including but not limited to horseplay, fighting and consumption of alcohol or illegal drugs.

Unlike every other Canadian jurisdiction, BC workers have not been assigned the general duty to comply with the Act and regulations, nor with the direction set out in a board officer's orders and related directives. In fact, workers have been assigned few duties under the Workers Compensation Act, the current *IH&S Regulations* or the new *OHS Regulation*. What duties they appear to shoulder must be implied from general prohibitions directed at all persons. Section 14 of the *IH&S Regulations* generally requires workers to use the personal protective equipment provided by their employer; the combined effect of sections 8.26 and 8.30 suggest that workers also have a duty to take reasonable care to protect themselves and their fellow workers. However, there is no expressed duty for workers to cooperate with their employer, joint worksite committees, safety representatives or with officers in resolving workplace hazards.

The November 1995 draft of Part 3 of the proposed *OHS Regulation* contained two provisions under the heading "Worker's Responsibilities."

- 9 Workers must take all reasonable precautions to protect the health and safety of themselves and of other workers.

- 10 A worker must:
 - (a) use or wear the equipment, protective devices or clothing required by these regulations,
 - (b) carry out all assigned work in accordance with established safe work procedures as required by these regulations,
 - (c) report to the supervisor or employer the absence of or defect in any equipment or protective device of which the worker is aware and which may endanger any worker,
 - (d) report to the supervisor or employer, any contravention of the Act or these regulations or the existence of any uncontrolled or previously unidentified hazard of which the worker has knowledge,
 - (e) operate only the machinery or equipment the worker is authorized and trained to operate,
 - (f) not engage in horseplay or similar conduct which may endanger any person, and
 - (g) ensure his or her ability to perform the job is not impaired by alcohol, drugs or other cause.

These two provisions do not exist in the final version of this new regulation. The commission believes they should be set out in the new occupational health and safety statute.

Therefore, the commission recommends that:

9. The province's occupational health and safety statute place duties on workers similar to those duties described in the November 1995 draft of sections 9 and 10, in Part 3 of the *OHS Regulations*.

MULTIPLE AND CASCADING RESPONSIBILITIES

Cascading Responsibilities

The Workers' Compensation Board has attempted, through section 2.16 of the *IH&S Regulation*, to establish "cascading responsibilities" from employers, to supervisors, to workers. This section reads:

Contravention by persons subject to regulations

- 2.16 (1) Contravention of a regulation shall be deemed to be a contravention by the employer and shall make that employer liable for the penalty prescribed by the Workers Compensation Act, but nothing in this clause shall relieve the supervisor or worker.
- (2) Contravention of a regulation by a supervisor or a worker shall be deemed to be a contravention by the supervisor and shall make that supervisor liable for the penalty prescribed, but nothing in this clause shall relieve the worker.
- (3) Contravention of a regulation by a worker shall make that worker liable for the penalty prescribed.
- (4) Contravention of a regulation by a person working in or contributing to the production of an industry within the scope of Part 1 of the Workers Compensation Act, being neither an employer nor a worker, shall make that person liable for the penalty prescribed.

By virtue of the phrase, "contravention of a regulation shall be deemed to be a contravention by the employer," subsection (1) appears to make an employer responsible for all contravention under the regulations. However, that directive is confused by the closing phrase of that subsection: "but nothing in this clause shall relieve the supervisor or worker." This suggests that if a supervisor or worker was responsible for the contravention, then they rather than the employer would be deemed to have breached the applicable provision. It also suggests that the employer and the supervisor and/or the worker could be jointly responsible for a contravention.

The situation is further complicated by the second phrase in subsection (1): “and shall make that employer liable for the penalty prescribed by the Workers Compensation Act.” This suggests that the employer can be held financially accountable for the penalty prescribed by the Act if the supervisor, a worker or some person other than the employer breached a provision which employer is deemed to be responsible for upholding.

Subsection (2) then describes the responsibility of the supervisor versus the worker, and appears to make the supervisor liable for any breach of a regulation by a worker. Subsection (3) is narrower and merely asserts that a worker who contravenes the regulation is responsible for the prescribed penalty. Subsection (4) states the same thing for persons who are not employers or workers, but it does not exclude supervisors.

This present scheme of cascading responsibilities suggested by section 2.16 may offend section 7 of the **Canadian Charter of Rights and Freedoms**. In Reference re Section 94(2) of the Motor Vehicle Act,¹⁷ the Supreme Court of Canada held that any law which can convict a person who has not done anything wrong offends the principles of fundamental justice. If imprisonment is available as a penalty, such a law violates a person's right and liberty under section 7 of the Charter.

Even if the intention of section 2.16 was made clearer, from an enforcement perspective it would be preferable if each of the 4,000 or so specific requirements set out under the *IH&S Regulations* expressly assigned responsibility to an employer, a worker, a supervisor or some other appropriate person. Clarifying responsibilities in this way would help ensure that the regulations are enforceable, whether in a court of law, by the board or by a board officer.

Multiple Responsibilities

An attempt to answer the question, “Who should bear the primary responsibility for occupational health and safety at such sites?” was made in the November 1995 draft of Part 3 of the *OHS Regulations*. Section 6 of that draft stated:

Coordination of multi-employer workplaces

- 6 (1) When a workplace involves the work of 2 or more employers or their workers, the individual employers and workers have the primary responsibility for complying with applicable health and safety regulations.

- (2) (a) When a workplace has overlapping or adjoining work activities that create a hazard to workers, the principal contractor, or if there is no single principal contractor, the owner, must ensure the coordination of the occupational health and safety activities for such work locations
- (b) Coordination of health and safety activities for those work locations must be undertaken by a qualified coordinator whose duties include:
 - (i) informing the employers and workers of the hazards created; and
 - (ii) ensuring the hazards are addressed throughout the duration of the work activities.
- (3) (a) Individual employers must notify the owner or principal contractor of any undertaking that is likely to create a hazard for workers of the other employers at the worksite.
- (b) Such notice must be received by the principal contractor in advance of commencing such activities.
- (4) At any workplace involving the work of 2 or more employers or their workers, the individual employers must give the coordinator the name of the qualified person designated to be responsible for site health and safety activities.
- (5) The owner of a workplace must ensure that
 - (a) the workers of other employers at the workplace are made aware of the hazards with respect to the manufacturing or industrial process, machinery and automated systems or any other owner activity, and
 - (b) the workers or other employers at the workplace are made aware of the health and safety activities used to address the hazards presented.
- (6) Clauses (1) to (4) do not apply when the combined workforce at the workplace is fewer than 6 workers, in which case it remains the responsibility of the employer or the employer's workers, to communicate any undertaking that is likely to create a hazard for the workers of the other employers at the worksite.

Alberta's Occupational health and safety statute¹⁸ addresses the situation that may arise from time to time when someone holds more than one duty. For example, when someone is both an owner of a worksite, the principal contractor of other contractors providing services on that worksite and the employer of some workers at that worksite, that person could hold three or more separate and distinct duties under the Act or regulations. Section 2.2 of Alberta's statute reads:

Multiple obligations

- 2.2 (1) In this section "function" means the function of prime contractor, contractor, employer, supplier or

worker.

- (2) If a person has 2 or more functions under this Act in respect of one work site, the person must meet the obligations of each function.

Holding more than one responsibility need not affect responsibilities that may cascade from one workplace party to another. Nova Scotia has addressed this issue in its statute and the applicable provision reads:

No limitation on generality

- 23 (1) A specific duty or requirement imposed by this Act or the regulations does not limit the generality of any other duty or requirement imposed by this Act or the regulations.
- (2) Where a provision of this Act or the regulations imposes a duty or requirement on more than one person, the duty or requirement is meant to be imposed primarily on the person with the greatest degree of control over the matters that are the subject of the duty or requirement.
- (3) Notwithstanding subsection (2), but subject to subsection (5), where the person with the greatest degree of control fails to comply with a duty or requirement referred to in subsection (2), the other person or persons on whom the duty or requirement lies shall, where possible, comply with the provision.
- (4) Where the person with the greatest degree of control complies with a provision described in subsection (2), the other persons are relieved of the obligation to comply with the provision only
 - (a) for the time during which the person with the greatest degree of control is in compliance with the provision;
 - (b) where simultaneous compliance by more than one person would result in unnecessary duplication of effort and expense; and
 - (c) where the health and safety of persons at the workplace is not put at risk by compliance by only one person.

- (5) Where the person with the greatest degree of control fails to comply with a provision described in subsection (2) but one of the other persons on whom the duty or requirement is imposed complies with the provision, the other persons, if any, to whom the provision applies are relieved of the obligation to comply with the provision in the circumstances set out in clauses 4(a) to (c) with the necessary modifications.

In principle, the party with the greatest degree of control at any particular worksite should be responsible for occupational health and safety at that site. In the case of multi-employer sites, the party with the greatest degree of control - whether that is the owner, the prime contractor, the largest employer on the site, or someone else - should be responsible for coordinating the activities of those worksite parties who bear front-line occupational health and safety duties. In this context, coordination means:

- developing and implementing an overall occupational health and safety plan for the site;
- instructing those with front-line duties to the purpose and operation of the plan (in particular their obligations under the plan and consequences of breaches of such obligations); and
- enforcing the plan to the point of disciplining, directly or contractually, those who fail to comply with it.

The commission believes that by discharging its responsibility in this manner, the party responsible for overall workplace health and safety on a multi-employer site would be able to successfully raise a defence of due diligence in the case of another worksite party failing to comply with the statute or regulations.

Section 6 of the November 1995 draft of the *OHS Regulation* proposed a single mechanism to address the need to coordinate responsibilities for occupational health and safety at multi-employer worksites. However, the commission is of the view that a single mechanism, such as a “qualified coordinator,” will not work at every site; imposing a solution is not necessarily the best route to take in addressing this potentially complex subject.

Instead, the commission prefers Nova Scotia’s approach to the underlying issue, the need to impose primary legal responsibility for occupational health and safety on the party with the greatest degree of control over matters that are the subject of legislative requirement. This approach is clearer from a legal perspective and more meaningful than the one set out under section 2.16 of the current *IH&S Regulations*, or the solution proposed in the November 1995 draft of section 6 of the new *OHS Regulation*. Rather than letting occupational health and safety

responsibilities cascade downward, Nova Scotia forces them up the ladder of control. We believe that British Columbia should do the same.

Therefore, the commission recommends that:

10. The province's occupational health and safety statute contain provisions on multiple obligations and primary responsibilities similar to those found in section 2.2 of Alberta's occupational health and safety statute and section 23 of Nova Scotia's legislation, respectively.

WORKER RIGHTS

Every Canadian occupational health and safety statute addresses three fundamental rights of workers:

- the right to know;
- the right to participate (through joint worksite committees, safety representatives or other forms of worker participation); and
- the right to refuse unsafe work assignments without discrimination.

The commission received many written and oral submissions on this subject. The submissions generally agreed with these three fundamental worker rights and there was little opposition to the suggestion that such rights should be in statute rather than regulation.

Where the submissions diverge is in the details: What constitutes a right or duty? and How are rights and duties to be expressed?

For example, employers and workers might agree that workers have a duty to protect their own personal health and safety, as well as that of other workers or persons at worksites. However, some workers likely would not readily agree with an employer suggestion that properly trained and supervised workers should be responsible for their actions to the extent that sanctions (e.g., orders, fines) should be levied on them and not necessarily on their employers for violating those duties. Similarly, while employers and workers might agree that a duty of employers is to ensure the safety and health of workers at work, employers likely would not readily agree with the suggestion that such a duty should be absolute and not modified by the term "reasonable practicality."

These concerns are not without merit and it is not surprising that, given these differences, the board was unable to reach a consensus on the proposed wording of the November 1995 version of Part 3 of the new *OHS Regulation*.

The Worker's Right to Know (and the Employer's Duty to Inform)

Of all worker's rights, the commission regards the right to know as the most important. It is the basis of a worker's rights to participate in the workplace or refuse unsafe work in a meaningful way.

While this might seem obvious, occupational health and safety legislation in BC and most other Canadian jurisdictions does not directly address this right. Instead, the right must be deduced from the duties placed on other parties, such as employers who must provide workers with information, training, proper supervision, so that the worker will have the necessary skills, knowledge and ability to perform their work safely.

The commission believes that British Columbia should take the lead in the field of occupational health and safety legislation by enhancing a worker's right to become more aware of potential workplace hazards.

A provision like subsection 10(1) in Quebec's Occupational health and safety statute¹⁹ is a useful starting point. That provision states in part that: "... the worker is entitled... to training, information and counseling services in matters of occupational health and safety, especially in relation to his work and his work environment, and to receive appropriate instruction, training and supervision."

The CCH Guide²⁰ makes the following comments on this commonly recognized but rarely entrenched worker right:

Until the mid and late 1970s, Canadian law confined the regulation of the workplace environment largely to the employers and the government. Workers were not perceived as having a useful role to play in the active discovery of workplace hazards, nor as having any rights to know what was happening to them. As a result of pressure from organized labour and an evolving change of attitudes generally, Canadian law began to accord a greater role to workers.

One of the most valuable aspects of the legislative changes has been the accent on legal mechanisms used to inform workers of what is going on in the workplace. Legislators are now prepared to acknowledge in some tentative ways that, if the means of providing information to workers are established, workers may take advantage of them to change their own situations, or the workplace environment, for the better. ...

The availability of existing information on occupational health and safety grows more crucial as technology and research expand. In the field of safety, researchers are discovering that accident causation can be a very complex inquiry. It can involve factors not commonly considered when existing workplaces and routines were designed such as workplace layout, noise and pay schemes. In health, we literally find ourselves in a laboratory. There are over 55,000 chemicals used in industry. Of those, there are exposure limits developed for only a small proportion. The experts who develop these criteria admit that standards are not developed for many substances simply because there is insufficient data. Even substances for which standards are developed are not necessarily safe, notwithstanding that the exposure criteria may be met.

With workers being, in effect, the subjects of multiple and relatively uncontrolled laboratory experiments, concerned workers really have no option but to become informed about the actual and potential hazards in the workplace and what is being done to control them.

While the right to know is fundamental to participating in the workplace, it is only half of the equation; complementary duties must be placed on employers, supervisors, suppliers and others to ensure that workers are provided with information and training. Some Canadian legislation already recognizes this. For example:

- Section 9(2) of Saskatchewan's Occupational health and safety statute²¹ places a duty on management to forward all information and data relevant to occupational health and safety to a health safety committee, whether or not requested by the committee.
- WHMIS regulations, common across Canada, require employers to develop worker education programs that focus on hazardous materials covered by WHMIS rules.

BC's *IH&S Regulations* currently contain two provisions relevant to this subject:

Instruction of Workers

Employer's responsibility

8.18 Every employer shall ensure the adequate direction and instruction of workers in the safe performance of their duties.

Supervisor's responsibility

8.20 Every supervisor shall be responsible for the proper instruction of workers under his direction and control, and for ensuring that their work is performed without undue risk.

The commission holds the view that the board should also be required to provide workers with information. This would include injury and illness claims statistics applicable to the workers'

specific worksite. Section 12 of the Ontario Occupational health and safety statute²² is a useful model for BC:

Summary to be furnished

12 (1) For workplaces to which the Workers Compensation Act applies, the Workers' Compensation Board, upon the request of an employer, a worker, committee, health and safety representative or trade union, shall send to the employer, and to the worker, committee, health and safety representative or trade union requesting the information an annual summary of data relating to the employer in respect of the number of work accident fatalities, the number of lost workday cases, the number of lost workdays, the number of non-fatal cases that required medical aid without lost workdays, the incidence of occupational illnesses, the number of occupational injuries, and such other data as the Board may consider necessary or advisable.

(2) Upon receipt of the annual summary, the employer shall cause a copy thereof to be posted in a conspicuous place or places at the workplace where it is most likely to come to the attention of the workers.

(3) A Director shall, in accordance with the objects and purposes of this Act, 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.

Therefore, the commission recommends that:

11. The province's occupational health and safety statute state that:

- (a) a worker has a right to receive appropriate training, information, instructional services and supervision on matters of occupational health and safety, especially in relation to the worker's work and work environment;
- (b) a worker's right to receive appropriate training, information, instructional services and supervision on matters of occupational health and safety be supplemented and supported by complementary duties held by employers, supervisors, suppliers and others; and
- (c) the occupational health and safety agency must:
 - (i) provide workers with detailed information applicable to their worksite describing injury and illness claims, similar to that set out in section 12 of Ontario's occupational health and safety act; and
 - (ii) provide the information described in 11(c)(i) in appropriate plain language and in a clear and concise manner.

The Worker's Right to Participate: Joint Health Safety Committees

Joint health safety committees are a prevention tool. The effectiveness of this tool is based on the assumption that people who work at a particular site and who are knowledgeable or trained in the operations performed at that site can make a positive contribution to preventing workplace

injury and illness. However, the simple fact that committees consisting of knowledgeable, trained people exist does not ensure an improvement in the occupational health and safety aspects of a workplace environment. Like all other tools, it is how the tool is used that is important.

Joint health safety committees are often cited as an example (often the primary example) of the worker's right to participate in the workplace. For many decades, Canadian governments have described committees as one way (perhaps the only way) to promote cooperation in an area that is traditionally viewed as the exclusive domain of management. But committees are more than that. They are a clear application of an internal responsibility system that is dependent on effective cooperation between the employer, workers and other parties at the worksite.

The commission recognizes that the most pressing issues relating to committees concern their rights, powers and duties. At the same time, we are aware that creating any new rights, powers or duties could encroach on the basic premise that since employers have primary control over the workplace they are primarily responsible for creating and maintaining a safe work environment. Consequently, the commission believes that any initiatives in this area should refine generally recognized and existing committee rights, powers and duties, without creating new ones that substantially alter the status quo.

Criteria for Establishing a Committee

Although every Canadian occupational health and safety statute and British Columbia's *IH&S Regulations* address joint worksite committees, legislation varies considerably in terms of the specific requirements. For example:

- committees are mandatory in nine of the 13 jurisdictions. Most jurisdictions, including the four where committees are not mandatory, also give authority to a senior agency official, the minister, or the cabinet to require employers to establish committees;
- some jurisdictions link the requirement for a committee to certain industries, or the existence of certain workplace hazards, while others have made committees a general requirement;
- some occupational health and safety statutes with general requirements grant exemptions to certain employers or worksites; and
- the number of workers that must be at a worksite (for a defined period of time) to trigger a mandatory requirement to form a committee varies from a low of ten workers in most Saskatchewan workplaces to a high of 50 workers in certain BC industries. Some jurisdictions do not state any number, leaving it open to discretion of government; and

- a few occupational health and safety statutes recognize the committees that can be or have been established under collective agreements, or by request of at least ten percent of workers. BC's legislation is silent on this point.

The current criteria for establishing committees at BC worksites is found in section 4.02 of the *IH&S Regulation*, and in the new *OHS Regulation*. It is linked to the A-B-C industry classification system used primarily to establish levels for first aid at worksites. The combined effect of subsection 4.02(1) and clause 4.02 (5)(g) is that:

[An Industrial Health and Safety Committee] shall be [established] by each employer having:

- (a) a work force of twenty or more workers, in an industry classified as "A" or "B" hazard by the Board's First Aid Regulations, or
- (b) a work force of fifty or more workers in an industry classified as "C" hazard by the Board's First Aid Regulations.

Subsection 4.02(2) of the IH&S Regulation states:

- (2) Notwithstanding [the requirements of subsection 4.02(1)], and industrial health and safety program may be required when, in the opinion of a Board officer, such a program is necessary.

Subsection 4.02(5), in turn, specifies that committees are a mandatory component of an industrial health and safety program required under subsection 4.02(1).

Every other Canadian jurisdiction except Saskatchewan, New Brunswick and the federal government has this "fall back" designation process in its occupational health and safety statute. However, the authority to order an employer to establish a committee at workplaces that are not captured by the general mandatory requirement is usually vested in the minister or a senior official, not in a field officer.

The commission does not feel that it is in a position to state whether basing the 20/50 threshold on the first aid classification system, or adopting the general threshold of 20 workers proposed in subsection 14(3) of the November 1995 draft of the *OHS Regulation*, is appropriate. However, the submissions we have received and our brief review of the criteria used to establish the 20/50 split has raised a number of concerns; primarily, there are "C" category worksites which, because of hazards at those sites, should have committees mandated, although their workforce is less than 50.

Therefore, the commission recommends that:

12. The province's occupational health and safety legislation:
 - (a) direct the occupational health and safety agency to:
 - (i) review the current industry classification system to ascertain if that system, or some other approach, should be adopted as the criteria to require employers to establish joint occupational health safety committees at British Columbia worksites with less than 50 workers; and
 - (ii) report its findings to the Minister of Labour so that the province's occupational health and safety statute can be written or amended to reflect the appropriate criteria;
 - (b) ensure that the criteria for establishing committees be reviewed as part of a regular legislative review; and
 - (c) at any workplace where there are 20 – 49 workers the employer must establish and maintain a joint health safety committee unless the employer is exempted from so doing on application to the occupational health and safety agency or unless the employer is exempted by virtue of falling into an exemption classification or industry as established by the Lt. Gov. in Council on recommendation by the agency.

Appointing Workers to Committees

Canadian jurisdictions generally require at least one half of the members of a health safety committee to be workers who do not exercise any managerial functions; some set a minimum and/or maximum number of members. New Brunswick and Nova Scotia simply let the workplace parties determine what should be the minimum and maximum number of committee members.

Alberta is the only jurisdiction that does not state that workers must elect worker members. Nine jurisdictions grant the trade union(s) at the worksite the option to appoint the worker members. About half the jurisdictions state that there must be co-chairs; one a worker, the other an employer representative or manager.

Section 4.04 of the *IH&S Regulations* states a minimum (not a maximum) number of members for a committee and specifies that it cannot have more employer representatives than worker representatives. However, the regulation is silent on how worker members are appointed.

Section 16 of the November 1995 draft *OHS Regulation* sets out four alternative mechanisms for selecting worker members of committees and recognizes the role a union can play in that process. The provisions were not brought forward to the new *OHS Regulations*.

Selection of committee members

- 16 The members of the committee must be selected as follows:
 - (a) employer representatives must be selected according to the procedures of the employer;

- (b) worker representatives in a unionized workplace must be selected from among workers employed at the workplace, according to the procedures of the union(s);
- (c) where only part of the labour force is represented by a union, each group of workers must be represented proportionately on the committee;
- (d) worker representatives in non-union workplaces must be elected by the workers by secret ballot; and
- (e) in circumstances where workers do not select their own representatives on their own initiative the employer has an obligation to seek out worker representatives.

Therefore, the commission recommends that:

13. The province's occupational health and safety statute set out the method of selecting joint health safety committee members according to the procedures described in the November 1995 draft of section 16 in Part 3 of the *OHS Regulation*.

Rights and Duties of Committees

Not surprisingly, the statutory provisions governing committees start to diverge significantly from each other when the legislation speaks to the rights and duties of committees. While a few Canadian jurisdictions set out a general power, most prescribe a series of rights and duties. For example, most jurisdictions speak to the right (or duty) of a committee to:

- inspect the worksite, identify hazards and undertake related investigative activities, including testing equipment, etc.;
- participate in either the employer's accident investigations (or any investigation) or those conducted by the investigating officer from the agency;
- obtain and study information on workplace hazards, claims and other accident statistics (from the compensation board), research and other data;
- advise the employer (and others), make recommendations and develop if not implement corrective action, including (most often) educational programs; and
- either receive and investigate worker complaints about unsafe or unhealthy conditions, or become involved in investigating the circumstances of a "dangerous work" refusal situation, or both.

Only a few jurisdictions speak to the committee's right to be provided with information about contravention, orders and prosecutions affecting their worksite. Generally, this is a right implied from the employer's duty to provide that sort of information to the committee. The CCH Guide²³ offers the following comment on this issue:

Organized labour generally takes the view that, for committees and representatives to do a proper job, they need to be given complete access to information, rigorous training, and sufficient authority to make at least some binding decisions for the workplace. They argue that effectiveness demands employee participation in the final decision-making process. On the other hand, management sometimes questions the amount of information that committees and representatives really need, and firmly holds the view that committees and representatives must perform advisory roles only.

Generally, the rights and duties assigned to joint health safety committees under BC's *IH&S Regulations* parallel those found in other Canadian occupational health and safety legislation. Section 18 of the November 1995 draft of the *OHS Regulation* did set out a detailed and comprehensive list of duties that was more expansive than the ones listed in the *IH&S Regulations*; however, they were not incorporated in the final version of the new *OHS Regulation*.

If committees are going to make a contribution to workplace health and safety, they need to be supported. However, the commission did not find an expressed right in BC's current legislation for committees to be provided with, or undertake their own research to obtain information concerning workplace hazards. Similarly, the employer is not required to provide equipment, premises or clerical support to help the committee carry out its mandated functions. Quebec has legislated some aspects of support. Subsection 51(15) states that the employer must: "put at the disposal of the health and safety committee the equipment, premises and clerical personnel necessary for the carrying out of its functions."

Therefore, the commission recommends that:

14. The province's occupational health and safety statute:

- (a) set out the rights of joint health safety committees and the duties of employers with committees; and
- (b) be drafted in a manner that ensures that
 - (i) committees will be effective; and
 - (ii) that the rights can be used to assess the effectiveness of committees.

Board officers and presenters at the public hearings told the commission that the quality of labour-management relations can significantly affect how well joint health safety committees function. While negotiations can lead to greater powers and responsibilities for committees, negative attitudes toward worker participation in the workplace or the employer's role in the workplace, or relegating health and safety to the status of a labour relations issue will critically affect a committee's ability to contribute. This means that while workplace parties must be free to negotiate certain aspects of the powers and roles of committees, legislation must set

benchmarks and ensure that the rights and duties of committees at worksites are effective and responsibly exercised so that worksites with less than optimal labour-management relations do not slip below a minimum threshold.

Educational Leave for Committee Members

Most Canadian occupational health and safety statutes make it clear that workers must be paid at their regular rates of pay for work they perform as committee members. Only three provinces state that the employer must pay for certain educational programs the committee members take to help them perform their functions. For example, Manitoba's Occupational health and safety statute states:

Educational leave

44 (1) Subject to subsection (2), every employer, except an employer on a construction project, at a workplace where there is a workplace safety and health committee or where there is a workplace safety and health representative shall allow each member of the committee, the safety and health representative, or their respective designates, to take educational leave for a period of two normal working days to a maximum of 16 hours each year without loss of pay or other benefits for the purposes of attending workplace safety and health training seminars, programs or courses of instruction offered by the Workplace Safety and Health Division or approved by the Workplace Safety and Health Committee, or provided in the current collective bargaining agreement respecting the workers at the workplace.

(2) The total number of safety and health committee members for whom the employer is required to provide educational leave in accordance with subsection (1) during any year is equal to the number of members constituting the normal size of the committee.

(3) On a construction project, each employer who employs five or more workers on that project shall institute a safety and health education program at the worksite at which all workers shall attend without loss of pay or other benefits for a period or periods equivalent to 30 minutes every two weeks, of which no period shall be less than 15 minutes.

The Workers Compensation Act and the *IH&S Regulations* are silent on the issue of the employer's duty to pay for educational leave. In fact, the amount and cost of training committee members was one of the factors which led to the unraveling of the November 1995 draft of the Part 3 of the new *OHS Regulation*. The current and draft regulations are also silent on what subjects should be addressed in any training programs for joint health safety committee members.

The commission recognizes that training can enhance the effectiveness of joint health safety committees, whether the trainees are worker or employer representatives. The commission also believes that level of training appropriate to a committee, and that the subjects addressed in

training lie on a continuum that stretches from basic orientation to comprehensive, week-long programs. A basic in-house program might include learning about:

- the site and the employer's safety program;
- what to do in an emergency;
- where the safety equipment is and how to access and use that equipment; and
- how to contact the board.

A more advanced course might see representatives from the board, the union and the industry safety association come to the worksite to present a seminar to the committee. Another course might involve off-site training for members in more complex subjects such as risk analysis techniques and engineering control principles. The type of workplace hazards found at a specific worksite will in large part define the appropriate course.

Committee member training, like committees themselves, is a joint responsibility of employers and workers or their trade union representatives; all parties should be encouraged to participate in training. Most importantly, if committees are mandatory, then their members must be trained so as to be able to achieve their mandate.

Therefore, the commission recommends that:

15. The province's occupational health and safety statute:

- (a) require employers to provide educational leave to worker members of joint health safety committees for a minimum period of one (1) normal working day to a minimum of eight (8) hours each year, without loss of pay or other benefits, for the purpose of attending workplace health and safety training seminars, programs or courses;
- (b) authorize the Lt. Gov. in Council to make regulations increasing the minimum period of educational leave set out in 15(a) according to the nature of the potential hazards at a committee's worksite and the level of education required to address those hazards

While we believe that a mandatory minimum period of education leave with pay for committee members should be set out in legislation, this provision should be reviewed and revised as part of the regular legislative review proposed in "Agency Directives" to ensure that it meets its objectives.

Committee Minutes

Canadian employers are often required to post the names of committee members and the committee's minutes at the workplace. This is done to inform workers of the issues the committees are addressing, in particular any complaints the workers may have brought to their committees.

While most committees are required to prepare and keep copies of their minutes, investigation reports and similar documents, only three provinces (BC, Quebec and New Brunswick) require minutes (and sometimes reports) to be automatically sent to the enforcement agency. In BC, the minutes are sent directly to the relevant board officer, not to any centralized location. While the minutes often consist of little more than “fix it” items, this record can provide board officers (and employers) with a mechanism to:

- refresh their knowledge of the industry in general and a worksite in particular;
- track workplace problems or committee difficulties;
- identify situations where a committee is deadlocked;
- gain insight into how well the committee is functioning, particularly when compared to other similar committees; and
- identify potential “hot spots” which can be used to target their inspections.

Board officers are not obligated to retain the minutes, although some have organized ad hoc filing systems for that purpose. The board itself does not track or retain the minutes or use them for any form of data analysis to inform occupational health and safety decisions.

While minutes are useful to officers, it is important that they be read and considered by employers and workers at the worksite; the health and safety record of a worksite should concern the workplace parties as it is the workplace parties that are responsible for attending to the safety of the worksite. There is value in retaining the minutes for a sufficiently long period of time that allows a historical review of occupational health and safety issues raised at a worksite and addressed by the committee to be undertaken, if necessary. However, board officers generally need only have access to committee minutes, they do not need to be sent a copy after every meeting. An annual summary by the committee of the issues it has addressed and the employer’s response to the committee’s recommendations could supplement the officer’s access to the minutes. The summary would be sent to the employer and the board. The board could use these summaries to better understand the issues being addressed in the workplace and committee activities both within and across industries.

Recognizing the value of this “historical tracking” raises two issues: Where should the minutes be kept? and How long should they be kept?

The commission has concluded the paper trail would be best kept by requiring the employer to retain committee minutes for some minimum number of years. Access to this record would allow the employer, the committee or the board or board officer to follow issues over time; on a more

immediate level, it would allow board officers access to more complete information on the worksite.

Therefore, the commission recommends that:

16. The province's occupational health and safety statute:

- (a) require employers to:
 - (i) retain a copy of the minutes of joint health safety committee meetings for at least seven years from the date of the committee's meeting; and
 - (ii) ensure that minutes are readily accessible to agency officers and committee members and other persons designated by the occupational health and safety agency or the minister;
- (b) require committees to:
 - (i) produce an annual report summarizing the previous year's committee activities by the end of January of the following year;
 - (ii) send a copy of the annual report to both the employer and the occupational health and safety agency;
- (c) require the occupational health and safety agency to:
 - (i) retain copies of joint health safety committee annual reports for a minimum of seven years from the date of the committee's report; and
 - (ii) make committee annual reports accessible to agency officers, other members of the occupational health and safety agency and researchers.

What Happens if the Committee is Deadlocked?

Committee members should be able to call on a knowledgeable, neutral third party such as the board to help resolve internal disputes. Notice that a committee was approaching deadlock could be done through the minutes by requiring committees to file a separate document that "red flags" unresolved situations that have a potentially significant affect on health and safety at the worksite. Ultimately, however, there needs to be a mechanism to address these conflicts.

Therefore, the commission recommends that:

17. The province's occupational health and safety statute state that when committees are unable to reach a decision on solutions to resolve situations that have a potentially significant effect on workplace health and safety:

- (a) the chair of the committee shall take the committee's concerns to the occupational health and safety agency; and
- (b) the agency shall investigate and attempt to resolve the dispute.

What Happens if the Employer Disagrees with Committee Recommendations?

Four jurisdictions have assigned some power to a committee's recommendations by requiring that the employer respond in writing and, if the employer is not going to proceed as the committee has recommended, explain why that recommendation is being rejected. Often the right of the committee to take the issue to the enforcement agency supplements this step. For example, Nova Scotia's Occupational health and safety statute states:

34 (1) An employer who receives written recommendations from a committee or representative and a request in writing to respond to the recommendations, shall respond in writing to the committee or representative within twenty-one days, and the response shall

- (a) indicate acceptance of the recommendations; or
- (b) give reasons for the disagreement with any recommendations that the employer does not accept,

or, where it is not reasonably possible to provide a response before the expiry of the twenty-one day period, provide within that time a reasonable explanation for the delay, indicate to the committee or representative when the response will be forthcoming, and provide the response as soon as it is available.

Four jurisdictions have made it clear that the committee also has the ability to approach the enforcement agency if they are unable to convince the employer to take or not take a specific action. Most often, however, complaining to the agency is only permitted after the employer has rejected the committee's recommendation. For example, section 34 of Nova Scotia's Occupational health and safety statute states that:

(2) Where the committee or representative makes a request pursuant to subsection (1) and is not satisfied that the explanation provided for a delay in responding is reasonable in the circumstances, the chair or co-chairs of the committee, or representative, as the case may be, shall promptly report this fact to an officer.

Only Ontario has developed a mechanism that can effectively force an employer to take action. In brief, if two workers certified under a process overseen by the ministry find dangerous circumstances at their workplace, they have the power to direct the employer to stop work or to stop the use of any part of a workplace or of any equipment, machine, device, article or thing. At least one worker member of a committee must be "certified" by the Workplace Health and Safety Agency as capable of performing this and other functions. The constructor or employer is required to immediately comply with that direction and ensure that compliance is effected in a way that does not endanger a person.

The lack of any duty on the employer to respond to a joint health safety committee's request in writing is a problem with BC's current legislation. The November 1995 draft of Part 3 of the *OHS Regulations* came close to adopting requirements similar to those in Nova Scotia's legislation. It read:

20. The employer must respond, in writing, to recommendations of the committee in a timely manner and include
 - (a) the acceptability of the recommendation,
 - (b) the extent to which the recommendation will be implemented, and
 - (c) where applicable, a schedule for implementation.

By modifying this draft to correspond more closely with section 34 from Nova Scotia's legislation, this provision could be a useful addition to the occupational health and safety statute. At this time, however, the commission does not believe that the statute should force the employer to accept and implement a committee's "recommendations," such as exists in Ontario's legislation.

Therefore, the commission recommends that:

- 18 The province's occupational health and safety statute
 - (a) adopt the mechanism described in Section 34 of Nova Scotia's occupational health and safety statute;
 - (b) authorize a committee to take its concerns to the occupational health and safety agency if they disagree with the employer's response; and
 - (c) require that the occupational health and safety agency responds and resolves the disagreement.

Safety Representatives

Worker appointed safety representatives are not as widely referred to in Canadian occupational health and safety statutes as joint health safety committees. Indeed, legislation in Alberta and the Northwest Territories is entirely silent on this form of worker participation.

In those jurisdictions that do address safety representatives in legislation, they are often appropriately identified as an alternative to joint work site committees or as a direct substitute on smaller or less hazardous worksites. As with committees, they can be established by order of a senior official, the minister or by regulation.

Like committees, most jurisdictions require safety representatives to be elected by workers or appointed by unions at the worksite. Depending on the jurisdiction, representatives share most or all the rights and duties of a committee and enjoy the same or similar protection in terms of

being paid by the employer while performing their statutory duties. Only a few jurisdictions address paid educational leave for representatives.

As with committees, when a safety representative submits recommendations to an employer in Saskatchewan, Ontario or Nova Scotia, the employer is required to respond in writing and explain what action will be taken and, if no action is to be taken, the reasons why. As a matter of practice, however, representatives may not be as effective as committees because, generally speaking, they will not have the same time or resources as a committee, and may not have as much influence as a committee which has management representatives.

There is no separate provision or set of provisions in the Workers Compensation Act or regulations which establishes safety representatives, either as an alternative to joint health safety committees or to supplement or complement their functions. The *IH&S Regulations* states that representatives may join an officer during a worksite inspection as an alternative to a committee member. The provision does not require that representatives be appointed.

The November 1995 draft of the *OHS Regulation* would have established representatives in smaller workplaces where committees are not required and assigned them duties similar to those for committees. The commission believes that the principle of internal responsibility should logically extend to all workplaces and therefore must apply regardless of the number of workers. However, it is also recognized that certain procedural structures that are necessary for larger workplaces may not serve some smaller workplaces, especially low risk workplaces, which thrive on flexibility.

High hazard industries, such as those currently designated as A or B class, will not have mandated health and safety committees if they have less than 20 workers. In these instances the commission believes that such industries should have a designated safety representative having all of the rights and duties of a joint health safety committee, this being deemed necessary to address the higher degree of risk.

The principles of internal responsibility should also apply in low hazard industries which have less than 20 employees. However, these industries would not necessarily benefit from using the procedural mechanisms that apply to joint health safety committees. The commission has previously noted that there are a number of industries within the low hazard, or C class designation, which in fact have demonstrated levels of hazards that merit their inclusion into a higher hazard class. Any such industries should be identified and re-classified without delay. Pending completion of that task, the commission believes that all industries with less than 20

workers currently falling within the C class should be required to designate a safety representative for the worksite. This representative would fulfill the internal responsibility component of workplace health and safety in a manner that would not necessarily be dictated by the rights and duties applicable to health and safety committees, but would rather be free to address any occupational health and safety concerns in a manner individually tailored to the worksite.

Therefore, the commission recommends that:

19. The province's occupational health and safety statute state that:

- (a) at "A" or "B" class worksites where there are fewer than the prescribed number of workers necessary to establish a joint health safety committee:
 - (i) require employers to establish safety representatives; and
 - (ii) assign rights and duties to safety representatives that mirror those granted to joint health safety committees;
- (b) at "C" class worksites where there are fewer than the prescribed number of workers necessary to establish a joint health safety committee, require employers to establish safety representatives.

The commission believes that there must be a provision in the new statute authorizing a mechanism by which employers could be granted an exemption from this "safety representative" requirement, but only if an employer can provide sufficient grounds for an exemption.

The Worker's Right to Refuse

For many years there has been debate as to whether workers should be required to refuse unsafe work assignments – have a legal duty to refuse - or be granted the right to refuse unsafe work.

Advocates for assigning a legal duty to refuse unsafe work state that workers should hold some responsibility for their own safety and the safety of others, and that making it a worker's duty to refuse such work is the best solution. They often argue that as employers hold similar duties, why not workers? Also, they state that a legal duty might make it easier for workers to tell employers that they have no option but to refuse, thereby making it easier for workers to refuse unsafe work assignments than would be the case if they had an option.

However, in those jurisdictions where workers have a legal duty to refuse unsafe work, workers who fail to refuse have technically broken the law and can face a fine or imprisonment, as well as be subjected to discipline by the employer or be discharged. The duty requirement may also compromise or make irrelevant the subjective requirement that the worker must "believe" that an imminent danger may exist.

Advocates of rights point out that the common law has long recognized a worker's right to refuse. However, as the common law also allowed an employer to dismiss a worker who exercised this right, there was a great disincentive to the right being exercised.

Taking an employer to the courts for wrongful dismissal based on the right to refuse unsafe work was even more problematic; the worker had to sue the employer, a process that could take many months if not years to be resolved. When the courts ruled in favour of the worker, they could only order financial restitution. They could not, or would not order reinstatement or a clearing of the worker's employment record. Even workers covered under collective agreements were not assured that they were protected from reprisal for exercising their right as the decision to grieve an action by the employer rested with the worker's bargaining agent.

The arguments surrounding the right/duty issue in the Canadian occupational health and safety statutes reflects the fact that, ultimately, this area requires a political as opposed to a bureaucratic or technical decision. Starting in the 1970s, Canadian legislatures began to pass legislation to address these problems. This legislation vested a statutory right to refuse with the worker, coupled with protection against reprisal. The right to refuse and the right to complain about unfair treatment when that right was exercised thus rested with the individual worker.

With the exception of BC and Alberta, every Canadian jurisdiction has granted workers the expressed right to refuse unsafe or imminently dangerous work assignments. The two Western provinces have framed refusal of unsafe work as a legal duty. Breaching this duty constitutes an offence under the applicable legislation.

The right to refuse is not absolute; an employee must first have "reasonable grounds" to refuse and a risk of some degree of imminent and serious harm must exist. As noted in the CCH Guide:²⁴

An employee will be regarded as having had reasonable grounds to believe a situation unsafe if, objectively, such reasonable grounds exist, and provided that there is no reason to believe that the employee was acting out of ulterior motives. If the reasonable grounds are not objectively demonstrable, then the employee may show from his/her own subjective point of view why he/she personally had reasonable grounds.

In the last analysis, if the worker appears to be genuinely and seriously concerned about the health and safety risks of a particular situation, then that employee will be vindicated in using the right to refuse.

A few of the jurisdictions that have framed the work refusal provision as an expressed right also make it an offence for a worker to exercise his/her right in an improper manner. For example, Newfoundland's occupational health and safety statute²⁵ states that:

48. A worker shall not take advantage of his or her right to refuse to work under section 45 without reasonable grounds.

Other jurisdictions have placed limits or described situations when a worker may not refuse. For example, Nova Scotia's occupational health and safety statute states:

43 (9) An employee may not, pursuant to this Section, refuse to use or operate a machine or thing or to work in a place where
(a) the refusal puts the life, health or safety of another person directly in danger; or
(b) the danger referred to in subsection (1) is inherent in the work of the employee.

The Yukon occupational health and safety statute²⁶ addressed this issue as follows:

15(7) The employer may, within 10 days following the [officer's] final decision, dismiss, suspend or transfer a worker or impose a disciplinary measure, if the final decision indicates that the worker abused his right.

Regardless of whether the work refusal provisions are framed as a right or a duty, almost every jurisdiction follows the same general process once a worker refuses to perform unsafe work. That worker must report the refusal to the employer (or agent) as soon as practical and the employer must take action to address that refusal, usually to investigate and report to the refusing worker and the committee or representative, if one has been established.

Where they are required by legislation, committees and representatives can also become directly involved in investigating and attempting to resolve unsafe work refusal situations. In some occupational health and safety statutes, complaining to the committee or representative is simply the next step the worker can take if the employer does not respond to the worker's satisfaction. This is also an option for an employer if it does not believe the worker's continued refusal is justified.

Similarly, most jurisdictions allow the employer or the worker to approach the enforcement agency to investigate the worker's continued refusal or the employer's decision that the refusal is not justified. The agencies hold broad powers to investigate and order remedial action.

Provisions start to vary significantly after these steps have been taken. Most jurisdictions allow employers to assign the refusing worker and others affected by that refusal to alternative work

and state that a worker cannot be financially penalized for refusing or continuing to refuse unsafe work. Only a few jurisdictions appear to have addressed the effect one worker's refusal may have on the wages of other workers. For example, Quebec's occupational health and safety statute states (in part):

28. Where the exercise of the right of refusal results in depriving of work other workers in the undertaking, these other workers are deemed to be at work for the duration of the work stoppage.

Jurisdictions also vary in terms of who a worker (or employer) may turn to if they disagree with an officer's determination in a work refusal situation. Some send such matters to their labour relation boards, others refer the appeals to advisory councils, and a few direct the appeals to the courts.

A few jurisdictions have also recognized the right of employers and unions to negotiate terms and conditions regarding work refusals which may provide greater protection to workers than those set out in the legislation. For example, the Canada Labour Code²⁷ states:

Where collective agreement exists

131. The Minister may, on the joint application of the parties to a collective agreement if the Minister is satisfied that the agreement contains provisions that are at least as effective as those under sections 128 to 130 [re: right to refuse, officer investigations, etc.] in protecting the employees to whom the agreement relates from danger to their safety or health, exclude the employees from the application of those sections for the period during which the agreement remains in force.

Apart from the issue of whether a worker's refusal to perform unsafe work should be a duty or a right, BC's occupational health and safety legislation is deficient in the following fundamental ways:

- Employers are not required to advise other workers who may be assigned the work which a worker has already refused to perform of the fact of that refusal and the reasons for the refusal;
- There is no expressed right for a worker or an employer dissatisfied with a board officer's decision on the validity of a worker's refusal to work to appeal that decision.

The November 1995 draft of the new *OHS Regulation* contained a provision that would have required the employer to advise another worker assigned the refused work that the first worker had refused to perform that work and the reasons why. The provision does not appear in the final version of the regulation.

Given the origins of the right to refuse in the common law and the fact that other Canadian jurisdictions have entrenched this right in their statutes, this commission believes that workers in this province should have the right and not simply the duty to refuse hazardous work assignments.

Therefore, the commission recommends that:

20. The province's occupational health and safety statute:

- (a) include the provisions in the IH&S Regulations (or the new OHS Regulations) that state:
 - (i) a worker must report a refusal to work to the employer as soon as is practical;
 - (ii) the employer must take action to address that refusal; and
 - (iii) the employer must report the action taken to the refusing worker and the joint health safety committee or representative;
- (b) state that:
 - (i) the employer must advise other workers (who may be assigned tasks a worker has already refused to perform) that a worker refusal has occurred. The employer must include the name of the worker who refused and the reason(s) for refusing;
 - (ii) the employer, the worker or their representative(s) may ask the occupational health and safety agency to decide on the validity of a worker's refusal to perform unsafe work; and
 - (iii) the employer and worker may appeal the occupational health and safety agency's determination to the Appeal Division or some new appeal body, but not the Labour Relations Board.

If refusal to perform unsafe work is framed as a right, then a worker should not take advantage of this right without reasonable grounds.

Therefore, the commission recommends that:

21 The province's occupational health and safety statute:

- (a) describe a worker's refusal to perform unsafe work as a right and not as a duty; and
- (b) clearly state that a worker must not take advantage of the right to refuse unsafe work.

Government should also consider placing limits on or describing situations when a worker may not refuse a task. Ontario's legislation, for example, does not permit police officers, fire fighters, correctional employees or certain health care workers to refuse hazardous work assignments if:

- those risks are inherent to their work or a normal condition of their employment; or
- the worker's refusal might directly endanger the life, health or safety of another person.

The Yukon occupational health and safety statute contains similar restrictions that apply to all workers.

Due consideration should also be given to recognizing the rights of employers and unions to negotiate terms and conditions regarding work refusals which may provide greater protection to workers than those set out in the legislation. If negotiations provide greater protection, then the terms of the agreement and not the lesser standards in the occupational health and safety statute should be binding on the parties and enforceable by the board's officers.

It should also be clear that in cases where a worker's action or inaction could affect the safety of other workers or members of the workplace, the general duty assigned to workers to take all reasonable steps to protect the health and safety of themselves and others would override any considerations relating to the right to refuse.

Protecting Workers From Discriminatory Action

The commission received a number of submissions on this subject. While the various Canadian occupational health and safety statutes share a common framework for protecting workers from discriminatory actions, there are significant differences in the details of the legislation.

Every Canadian occupational health and safety statute but one makes it an offence for the employer (and others) to discriminate against a worker who has exercised his right (or duty) to refuse. Often, this applies to workers complying with the Act or regulations generally, and not just in relation to the work refusal; however, some statutes, such as Newfoundland's, list specific things in respect of which a worker is protected. Ontario's frames protection in very general terms:

- 50(1) No employer or person acting on behalf of an employer shall,
- (a) dismiss or threaten to dismiss a worker;
 - (b) discipline or suspend or threaten to discipline or suspend a worker;
 - (c) impose any penalty upon a worker; or
 - (d) intimidate or coerce a worker, because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the Coroners Act.

Ontario also prohibits discrimination in relation to workers seeking compliance or giving evidence.

Under British Columbia's *IH&S Regulation* the employer is only prohibited from disciplining a worker in two specific instances. Section 8.24(6) of the Regulation states:

No worker shall be subject to disciplinary action because he has acted in compliance with this regulation [unsafe work refusal] or an order made by an officer of the Board.

This prohibition remains virtually unchanged in the new *OHS Regulation* and was not substantially modified in the November 1997 draft of that regulation. The commission believes it does not sufficiently protect workers when compared to the broadly stated or reasonably exhaustive lists found in other Canadian occupational health and safety statutes.

In a few jurisdictions, other parties who are expressly prohibited from discriminating against workers include trade unions. Indeed, non-discriminatory action prohibitions are often the only provisions in any Canadian occupational health and safety statute that place an expressed and direct legal duty on trade unions. For example, Manitoba's occupational health and safety statute states:

- 42 (1) No employer, union, or person acting on behalf of an employer or union shall take or threaten discriminatory action against a worker
- (a) for exercising any right or carrying out any duty in accordance with the provisions of this Act or the regulations; or
 - (b) for the reason that the worker has testified or is about to testify in any matter, inquiry or proceeding under this Act; or
 - (c) has given any information to
 - (i) an employer or person acting on behalf of an employer,
 - (ii) a safety and health officer or any other person concerned with the administration of this Act, or
 - (iii) another worker or union representing a worker;regarding workplace conditions affecting the safety, health or welfare of that person or any other workers.

While perhaps rare, there may be situations when a union might discriminate against one of its members. This might occur if a member provided evidence to the board contrary to union policy in a prosecution of another worker, or if a member gave information to the employer that union officials did not agree with.

The commission's final observation on this issue is that BC's current provision declares a prohibition but does not state who is responsible for complying with that restriction.

Therefore, the commission recommends that:

22. The province's occupational health and safety statute:

- (a) incorporate the anti-discrimination provisions found in the Workers Compensation Act;
- (b) expand those provisions to include complaints flowing from:
 - (i) a worker's compliance with the legislation in general or a specific order;
 - (ii) a worker seeking to enforce the legislation; or
 - (iii) a worker having given evidence in a proceeding with respect to the enforcement of the legislation, or in an inquest under the Coroners Act.
- (c) state that any workplace party including any party with institutional authority over a worker, or persons acting on their behalf, must not take or threaten discriminatory action.

Most Canadian occupational health and safety statutes provide workers, who believe that they have been unfairly treated by an employer, the right to file a complaint with the enforcement agency. This usually triggers a duty on the agency to investigate and resolve the matter. Resolution can include (in some jurisdictions) an order to reinstate, financial restitution, and/or removing disciplinary documents from a worker's employment file and related orders. For example, section 26 of New Brunswick's occupational health and safety statute²⁸ grants the investigating agency the power to issue:

- (a) an order to the employer or union to cease the discriminatory action;
- (b) an order to an employer to reinstate the employee to his former employment under the same terms and conditions under which he was formerly employed;
- (c) an order to the employer to pay to the employee any wages the employee lost because he was wrongfully discriminated against; or
- (d) an order to the employer or union that any reprimand or other reference to the matter in the employer's or union's records on the employee's conduct be removed.

An employer who disagrees with an order, or a worker who feels an order should have been made, can appeal to a tribunal, independent arbitrator or a labour relations board if the worker can access that agency. Typically, the appeal body holds the same or similar remedial powers as the investigating agency holds in the first instance.

BC's primary occupational health and safety legislation does not address these subsequent steps. Some may be permitted within the more general provisions of the Workers Compensation Act or regulations, but compared to almost every other Canadian jurisdiction, BC's legislation is silent in this area. The CCH Guide comments:²⁹

The legislation in British Columbia does not outline a specific procedure for worker complaints. Claims of unjust reprisal must therefore be addressed through judicial remedy.

Therefore, the commission recommends that:

23. The province's occupational health and safety statute:

- (a) include a mechanism for workers to file a complaint with the occupational health and safety agency if they believe they have been unfairly treated by their employer as a result of refusing unsafe work or generally complying with the occupational health and safety act or regulations;
- (b) authorize agency officers to issue remedial orders; and
- (c) permit appeals of remedial orders described in 22(b) to the Appeal Division or some new occupational health and safety appeal body.

Under current subsection 2.12(3) of the *IH&S Regulations*, an appeal of a board officer's order does not automatically result in a stay. The commission believes that, in relation to appeals to remedial orders flowing from a worker complaint of discriminatory action, government ought to consider authorizing the appeal tribunal to grant a stay. This should not occur automatically, but only by application.

Four provinces have set out a reverse onus provision stating that as long as the worker can provide some evidence that he was discriminated against by the employer contrary to the general prohibition, the employer has the burden to provide convincing evidence that the worker's refusal (or activity) was not legitimate, or that the penalty appealed by the worker was reasonable in the circumstances or justified for other reasons. For example, section 133(6) of the Canada Labour Code states:

A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) [discipline prohibited in defined circumstances] by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party.

Section 42(2) of Manitoba's occupational health and safety statute states:

Where, in a prosecution under this Act or in a proceeding before the Manitoba Labour Board, a worker establishes that he was subject to a discriminatory action, and where he establishes that he did conduct himself in a manner described in clause (1)(a), (b) or (c) [exercised a right, carried out a duty, testified at an inquiry or provided information or complained], there shall be a presumption that the discriminatory action was taken against the worker because that worker conducted himself in the manner described in either of those clauses; and the onus is on the employer, or union, as the case may be, to prove that the decision to

take discriminatory action was not in any way influenced by that conduct on the part of the worker.

The CCH Guide suggests that the reverse onus provisions exist because the agency that deals with worker complaints in those jurisdictions with reverse onus is the labour board

Therefore, the commission recommends that:

24. The province's occupational health and safety statute contain a reverse onus provision, which states that as long as the worker can establish a case that, if it were unopposed and believed would demonstrate the worker was discriminated against contrary to the general prohibition, the alleged discriminating party has the burden to provide convincing evidence that:
 - (a) the worker's refusal to work, or the worker's activity, was not legitimate; or
 - (b) the penalty suffered by the worker was reasonable in the circumstances, or justified for other reasons.

INSPECTIONS AND ENFORCEMENT

Inspections and enforcement are tools that promote workplace health and safety by ensuring general compliance with the regulations. They are two of a number of tools intended to reinforce the ability and willingness of employers and workers to foster prevention.

The Canadian "compliance tool kit" rests on the principle that employers have primary control of the workplace, and therefore primary responsibility for workplace safety. This principle is recognized through the use of tools such as Employer Rated Assessments and the general trend in western jurisdictions toward the use of internal responsibility systems.

The complete tool kit also includes non-enforcement options such as media campaigns, public education, training programs, licensing and certification, and occupational health programs and medical surveillance. Some statutes expressly encourage or require industry to create associations, commonly funded through compensation assessments, to promote the prevention of workplace injuries and illnesses and occupational health and safety within those industries. Most statutes also mention codes of practice; a few clarify the status of these codes as educational instruments rather than as indirect forms of enforceable regulations. The effectiveness of all of these tools relies on the regulations and supporting materials being carefully drafted and written in plain language. This is equally the case whether such information is made available to the general public, employers, workers or inspectors.

Establishing an appropriate balance between enforcement and promotion is key to developing a successful compliance strategy. Legislation should be drafted in consultation with the

occupational health and safety agency such that the agency is committed to allocating at least a minimum amount of resources to each area to develop long-term programs and services to meet the province's legislative objectives. These resources could then be supplemented by the agency in a manner that would allow it to emphasize one tool over another in order to address the needs of the worksites, hazards or industries it is attempting to regulate. This approach could lead to more consistency in program delivery.

Monitoring compliance with a regulatory program involves more than just ensuring that legislation provides for effective inspection and enforcement. It is impossible for officials to be in all places at all times and public awareness (which can trigger investigations), third party monitoring (by other federal, provincial or municipal officials) and self-monitoring (internal responsibility systems) must all be parts of a successful strategy. However, over the long run, a regulatory regime that relies wholly on activities that promote compliance will fail to prevent workplace injury and illness. Enforcement is a necessary function and submissions to the commission have made it clear that the general public, employers and workers all expect the activities of regulated groups to be monitored and that the law be enforced fairly and effectively. If this does not happen, non-compliance with the regulations will occur and likely increase.

While the resources committed to enforcement may be insufficient to meet every need, they are rarely so inadequate as to be unable to be effectively employed to target the worst offenders. These and other issues relating to the allocation of resources and the behaviour of the board and its officers will be addressed in the commission's final report in September of 1998.

ENFORCEMENT OPTIONS

The enforcement options that currently exist under the Workers Compensation Act and Workplace Act fall into three general categories based on who has the primary authority to carry out the option: officer actions; board actions; and crown actions.

(a) Officer actions: inspections, reports, orders

The Workers Compensation Act, the *IH&S Regulations* and the other regulations contain a cascading sequence of enforcement and sanction options designed to foster compliance. These options are described in the Board's OHS Division Policy & Procedures Manual (the "Policy Manual").

While officers can give a verbal warning at any time during or subsequent to an inspection, Inspection Reports flow out of worksite inspections conducted under the authority of the Workers Compensation Act. If violations of the Act or the regulations are noted, such reports may contain

written directives requiring the correction of hazards, and/or 24-hour Closure Orders if conditions of immediate danger threaten the health or safety of any worker. With the approval of the Vice-President, Prevention Division, Closure Orders may be imposed for longer than 24 hours.

An initial order can lead to an immediate recommendation that a penalty assessment sanction be imposed against an employer if the observed violation and hazard involves one of what the board refers to as the "11 deadly sins." What is more common is that, where follow-up inspections lead either to a series of repeat orders for the same hazard or to new orders for newly observed hazards, a Warning Letter to senior management is issued advising the employer of the strong likelihood of a more stringent sanction (i.e., penalty assessment) should the employer not comply. Warning Letters are generated on recommendations by board officers to board management. Re-issuance of an outstanding order can also lead to the requirement that the employer send a Notice of Compliance to the Board.

Separate from Inspection Reports are Observation Reports issued if the board officer is of the view that violations of regulations by workers or supervisors are willful or are due to carelessness or neglect rather than ignorance or a lack of instruction or training. Considering whether or not to proceed with prosecuting a worker occurs when Observation Reports have been issued to the worker on two or more occasions and where Reports are issued as a result of violations which exposed the worker and fellow workers to serious risk of injury or occupational disease. In situations of fatal and serious accidents, investigating officers complete Accident Investigation Reports and separate Inspection Reports, the latter either listing contravention of the regulations relevant to the accident in question or indicating that no such contraventions were observed.

(b) Board actions: warning letters and penalty assessments

In BC, according to the Policy Manual, written warning letters are sent by board management to employers' senior management (not to workers or others) on the recommendation of a board officer where outstanding orders remain unmet or existing hazards remain unaddressed. A primary purpose of such letters is to warn of the strong likelihood of more stringent sanction (e.g., penalty assessment). Continued non-compliance most often leads to the officer recommending more stringent sanctions to board management. These are usually financial sanctions in the form of penalty assessments, but when a particular set of circumstances involves an actual accident, rather than just a hazard, the officer may recommend prosecution. Neither Warning Letters nor recommendations for further sanction are included in Inspection Reports.

Penalty assessments under the Workers Compensation Act are initiated when a letter is sent to the employer advising that a penalty is being considered. The board's policy sets out the amount

of the penalty and the criteria to be applied when making penalty assessments. The employer is then given 21 days to reply or request a meeting.

If a meeting is requested, what amounts to an "in person hearing" occurs. If the employer does not reply to the letter, senior board management decides whether to actually levy a penalty. This is followed by a sanctions review hearing which the Policy Manual states must observe the rules of natural justice. In both cases, the board informs the employer in writing if a penalty assessment is to be levied or not.

A decision to impose a penalty may be re-considered if senior board management is convinced on the grounds of new evidence or an error of law or policy that re-consideration is warranted. Also, section 96(6) of the Workers Compensation Act provides a right to appeal a penalty assessment to the Appeal Division on the grounds of error of law or fact, or a contravention of the published policy of the governors of the board.

(c) Crown actions: Prosecutions

Prosecutions can occur when a recommendation for a more stringent sanction arises out of an accident, rather than merely a hazardous situation. In such cases, not only board management but also its Legal Services Division and external Crown Counsel must approve the decision to prosecute.

Perhaps the greatest short-coming with prosecution as an enforcement option has been the relatively high chance of acquittal. According to the CCH Guide:³⁰

Traditionally, the chances of an accused successfully defending an occupational health and safety prosecution and being acquitted have always been relatively good. Most prosecutions are against employers, and the low conviction rate reflects the fact that judges are not keen on convicting employers, except in cases where management has clearly been at fault ... [Fault] should not usually be the relevant legal criterion for deciding whether someone has breached an occupational health and safety statute. What sometimes happens in practice, however, is simply that the judges interpret the facts and the law in light of their own perceptions about the value of health and safety prosecutions.

Another disadvantage from a compliance perspective is that judges can choose to impose fines and/or imprisonment that fall short of the maximum a statute might permit. Because relatively few prosecutions have occurred under the Workers Compensation Act, there is no substantive body of case law on which courts can base their decisions. In addition, prosecutions do not provide a direct remedy for affected workers.

The strength of prosecution as an enforcement option is that a monetary penalty and/or a term of imprisonment can make a very strong impression on any offender, employer and worker alike, and send a strong message of deterrence. In addition, the stigma associated with prosecution can have a profound affect on a corporate or non-corporate employer concerned with its public image. This effect may extend beyond that realized by any financial penalty.

INSPECTION POWERS

Every Canadian occupational health and safety statute designates persons as officers to enforce the legislation and describes the designated officers' powers of inspection. The Workers Compensation Act gives officers the power to enter premises without warrants and undertake certain investigative actions. However, compared to other Canadian statutes, the Act is silent on other necessary or incidental inspection powers, such as the power to:

- take samples of materials, etc.;
- seize equipment, materials, etc. (and to account for same);
- make tests, demonstrations, etc.;
- take photographs or recordings, or make sketches; and/or
- bring along other persons, equipment, etc. to assist during the inspection.

In addition, the Act does not require an officer to first obtain a court order or warrant in order to access medical records or investigate private dwellings. The latter would apply to home offices where self-employed persons without employees carry out their business.

Therefore, the commission recommends that:

25. The province's occupational health and safety statute:

- (a) incorporate all of an agency officer's inspection powers under the current Workers Compensation Act;
- (b) enable agency officers to:
 - (i) take samples of materials, etc.;
 - (ii) seize equipment, materials, etc. (and to account for same);
 - (iii) make tests, demonstrations, etc.;
 - (iv) take photographs, or make recordings or sketches; and
 - (v) bring along other persons, equipment, etc. to assist during the inspection.

The statute must state that an officer first obtain a court order or warrant to access medical records or investigate private dwellings.

ENFORCEMENT POWERS

Although officers have the authority to issue orders requiring an employer or worker to comply with the legislation, take remedial actions, cease and desist certain conduct, stop work or using equipment, the BC statute is silent on other types of enforcement powers found in Canadian occupational health and safety statutes. This includes issuing orders to:

- secure a worksite pending an investigation;
- remove workers from a worksite;
- barricade an unsafe area at a worksite;
- require suppliers or employers to provide information to workers;
- require regular inspections of worksites; or
- require equipment be certified as safe.

These appear to be reasonable and worthwhile enforcement options. At the least, adding them to the occupational health and safety statute would mean that officers could employ them when necessary without being challenged.

Therefore, the commission recommends that:

26. The province's occupational health and safety statute:

- (a) incorporate the enforcement powers under the current Workers Compensation Act;
- (b) enable agency officers to:
 - (i) ensure that a worksite is not disturbed until an investigation is completed, unless necessary to prevent further harm to workers;
 - (ii) remove workers from a hazardous area, or seal or barricade an area or site;
 - (iii) stop suppliers supplying harmful equipment, materials or substances to a worksite;
 - (iv) ensure employers are providing workers with information necessary for their protection;
 - (v) ensure regular inspections of a worksite are undertaken to identify and eliminate hazards;
 - (vi) ensure tests are made or that equipment or work processes are certified as safe by appropriate professionals (e.g., engineers, architects, etc.); and
 - (vi) suspend licenses or certificates issued under the legislation.

OFFICER LIABILITY

Many Canadian occupational health and safety statutes limit an officer's liability for actions arising from the exercise of statutory duties. These statutes also limit the liability of other parties who cooperate with an enforcement officer. The fact that these provisions are missing in the Workers Compensation Act appears to be a major deficiency with BC's primary occupational health and safety legislation.

Therefore, the commission recommends that:

27. The province's occupational health and safety statute grant officers and others immunity to claims of civil liability that may result from them carrying out their statutory functions under the occupational health and safety act

Confidentiality and non-compellability

Some Canadian occupational health and safety statutes state that information collected by officers cannot be disclosed to third parties, or may be disclosed only under certain circumstances. Provisions may complement these secrecy requirements which state that officers (and others) are not compellable as witnesses in civil or criminal proceedings unless so ordered by the courts or as otherwise required by law.

The commission is aware that employers are concerned that proprietary information and trade secrets that they believe are critical to their operation should not be available to board officers without appropriate confidentiality protection. The current Act does not provide that protection; while section 95 contains a secrecy requirement, the Act does not limit disclosure, including non-compellability of officers (and others) in civil proceedings.

Therefore, the commission recommends that:

28. The province's occupational health and safety statute address:
 - (a) the confidentiality of information obtained during an inspection; and
 - (b) the compellability of officers (and others) or disclosure of that information in other proceedings.

Duty to assist officers

Most Canadian occupational health and safety statutes prohibit persons from obstructing or misleading officers. This is sometimes complemented by a general duty on persons to assist officers. Some jurisdictions also give a corresponding right to officers to obtain restraining orders. Others allow officers to ask for assistance from the police.

The Workers Compensation Act prohibits obstructing or misleading officers, but does not impose a general duty to assist officers. There is also no provision stating that officers may ask the police for assistance if, for example, an employer refuses to allow an officer to investigate a workplace accident.

Therefore, the commission recommends that:

29. The province's occupational health and safety statute:

- (a) incorporate the current prohibition against obstructing officers found in the Workers Compensation Act;
- (b) create a general duty to assist officers; and
- (c) authorize officers to ask the police for assistance.

ENFORCEMENT AGAINST SUPPLIERS

As noted previously, BC's primary occupational health and safety legislation does not assign specific duties to suppliers. This, along with other legislative deficiencies, makes enforcement against suppliers very difficult.

There are limits on the scope of the board's rule-making and enforcement powers relating to suppliers. The board cannot directly regulate suppliers located outside the geographic boundaries of the province nor can it enforce any regulations against them.

This is not to say that the board may not be able to achieve some enforcement against suppliers by focusing on employers within the province or by prosecuting suppliers resident in BC. This option, however, may be of limited use in light of the above-mentioned lack of duties assigned to suppliers under the regulations.

Section 71(2) of the Workers Compensation Act sets out the power of officers to issue orders and directions to suppliers, but because that subsection focuses on worksites, an order cannot be issued against a provincially resident supplier until such time as defective or problematic products, equipment or materials are delivered to a worksite. This may apply even if the supplier has breached one of the general duty provisions given to all persons.

Similarly, with respect to section 73 of the Workers Compensation Act, the board's power to issue penalty assessments does not appear to cover suppliers; it is clearly and narrowly directed at employers.

Section 75(2) of the Act could be used to prosecute a supplier as that provision declares (in part) that "every person who contravenes or fails to comply with a regulation... under section 71" commits an offence. However, to prosecute a supplier, the board would first have to prove that the supplier breached a provision of the regulations that applied to a supplier (i.e., a general duty

provision). If the board cannot make that case, a supplier cannot be prosecuted under this section of the Act.

Therefore, the commission recommends that:

30. The province's occupational health and safety statute include enforcement mechanisms that apply to suppliers.

Any enforcement provisions for suppliers must take into consideration constitutional and practical constraints.

ENFORCEMENT AGAINST SELF-EMPLOYED PERSONS WITH NO EMPLOYEES

As noted earlier, self-employed persons without employees have not been expressly assigned duties under the Workers Compensation Act, Workplace Act or the regulations. As with suppliers, the situation is no different when the board's powers of inspection and enforcement are considered.

The board's power to inspect under section 71(3) of the Act focuses on "the place of employment of a worker." This wording suggests that board officers may not have the right to inspect the workplace of a self-employed person if the place of employment is a home, even if apparent violations of the Act or regulations are taking place there.

Sections 73 and 74 of the Workers Compensation Act apply only to employers; self-employed persons without employees are not employers for the purposes of the Act. This means that it is not possible for the board to issue a stop work order under section 74 to a self-employed persons without employees or levy financial penalties for violations of the regulations under section 73.

As with suppliers, it may be possible to prosecute self-employed persons who have breached one of the provisions of the regulations, but only if they have first obtained compensation coverage, thereby establishing that they are a worker, and the applicable duty was assigned to workers generally.

It should be noted that the commission has already recommended that the province's occupational health and safety statute and its regulations should apply to all persons employed at or attending a place where persons work, or whose actions or omissions may affect the health and safety of workers.

ADMINISTRATIVE PENALTIES

In BC, the Workers Compensation Act states:

73(1) Where the board considers that

- (a) sufficient precautions were not taken by an employer for the prevention of injuries and occupational disease;
- (b) the place of employment or working conditions are unsafe; or
- (c) the employer has not complied with regulations, orders or directions made under section 71,

the board may assess and levy on the employer an additional assessment determined by the board and may collect the additional assessment in the same way as an assessment is collected. The powers conferred by this subsection may be exercised as often as the board considers necessary. The board, if satisfied the default was excusable, may relieve the employer in whole or in part from liability.

(2) Where an injury, death or disablement from occupational disease in respect of which compensation is payable occurs to a worker, and the board considers that this was due substantially to the gross negligence of an employer or to the failure of an employer to adopt reasonable means for the prevention of injuries or occupational diseases or to comply with the orders or directions of the board, or with the regulations made under this Part, the board may levy and collect from that employer as a contribution to accident fund the amount of the compensation payable in respect of the injury, death or occupational disease, not exceeding in any case \$11,160.08 [\$36,297.21 as of January 1, 1996 by BC Reg. 559/95], and the payment of that sum may be enforced in the same manner as the payment of an assessment may be enforced.

Policy 1.4.1 in the board's *OHS Policy Manual* sets out how these penalties based on the compensation premium system are to be assessed and applied against employers. It also sets out the amounts of these compensation penalty assessments for particular circumstances, but not the additional contribution situations described in subsection 73(2) of the Act.

Like BC, most Canadian jurisdictions levy compensation premium surcharges similar to BC's penalty assessments after a compensable accident has occurred, usually after considerable review and discussion of the investigation report into such accidents. These surcharges are not necessarily linked to breaches of occupational health and safety legislation.

Rather than basing the imposition and collection of its penalties on the compensation premium system, the Yukon government has established an administrative penalty system that authorizes its officers to issue administrative penalties to workplace parties at the time a breach of the legislation is observed. When a Yukon safety officer has reasonable grounds to believe that an offence has been committed against certain sections of the statute the officer may, as an

alternative to prosecution, levy an administrative penalty. This penalty can be up to \$5,000 (\$500 for each day during which the offence continues) for a first offence, and \$10,000 (\$1,000 for each day during which the offence continues) for a subsequent offence. Current practice is that officers undertake a file review before they issue an administrative penalty notice under section 47.1 for an infraction that they observed at any worksite.

Persons served with an administrative penalty in Yukon will not be charged with the offence if they pay the penalty, successfully appeal the penalty, or receive a certificate of debt payment from the director, which has been issued as a judgment in favour of the government by the Supreme Court. Paying an administrative penalty, or admitting liability to pay it, may be used as a record of offences for levying future penalties, but may not be used or received in evidence for the purpose of sentencing after conviction of an offence.

While section 47.1 came into force in 1993, Yukon officers only began using this enforcement option in 1996. To date, four administrative penalties in the range of \$500 to \$3,500 have been levied against employers. No penalties have been levied against workers or other workplace parties.

The commission understands that Yukon has the only active administrative penalty system of its kind in Canadian occupational health and safety legislation; however, the concept is not unique. Nova Scotia's occupational health and safety statute states (in part):

82(1) The Governor in Council ... may make regulations ...
(an) respecting the administration of a system of administrative penalties;

To date no such regulations have been promulgated in Nova Scotia.

The apparent reason there has not been more movement in this area is that other issues have been assigned higher priority on governments' legislative agendas. However, applying administrative penalties for designated offences is becoming increasingly more common in the regulatory environment. One rationale for such an approach is expressed in the Regulatory Impact Analysis Statement³¹ for regulations made under the federal Contravention Act³² which, in part, states:

The Contravention Act ... provides for the establishment of a contravention scheme as an alternative to the current onerous Criminal Code process. It gives the Governor in Council the authority to make regulations designating offences as contraventions for which enforcement authorities may issue tickets to persons who are charged with such offences. In addition to decriminalizing federal

offences that are designated as contraventions, the Act allows individuals to plead guilty to a contravention and pay the set fine for that contravention, thus avoiding the burden of a formal court process and a formal court appearance as is the case under the Criminal Code. By eliminating the trial of cases where the alleged offender wants to plead guilty to the offence and pay the set fine, the Act ... ease(s) the workload of the enforcement officers, the federal prosecutors and the courts who would have been involved under the ... Criminal Code process.

A number of regulatory schemes in BC currently employ administrative penalties. For example, the Forest Practices Code³³ contains a mechanism similar in some respects to that found in Yukon's occupational health and safety statute:

Penalties

117(1) If a senior official determines that a person has contravened this Act, the regulations, the standards or an operational plan, the senior official may levy a penalty against the person up to the amount and in the manner prescribed.

(2) If a person's employee, agent or contractor, as that term is defined in section 152 of the Forest Act, contravenes this Act, the regulations or the standards in the course of carrying out the employment, agency or contract, the person also commits the contravention.

(3) If a corporation contravenes this Act, the regulations or the standards, a director or officer of it who authorized, permitted or acquiesced in the contravention also commits the contravention.

(4) Before the senior official levies a penalty under subsection (1) or section 119, he or she

(a) must consider any policy established by the minister under section 122, and

(b) subject to any policy established by the minister under section 122, may consider the following:

- (i) previous contravention of a similar nature by the person;
- (ii) the gravity and magnitude of the contravention;
- (iii) whether the violation was repeated or continuous;
- (iv) whether the contravention was deliberate;
- (v) any economic benefit derived by the person from the contravention;
- (vi) the person's cooperativeness and efforts to correct the contravention;
- (vii) any other considerations that the Lieutenant Governor in Council may prescribe.

(5) The senior official who levies a penalty against a person under this section, section 118 (4) or (5) or 119 must give a notice of determination to the person setting out all of the following:

- (a) the nature of the contravention;
- (b) the amount of the penalty;
- (c) the date by which the penalty must be paid;
- (d) the person's right to a review and appeal including the title and address of the review official to whom a request for a review may be made.

(6) For the purposes of subsection (1), the Lieutenant Governor in Council may prescribe penalties that vary according to

- (a) the area of land affected by the contravention,
- (b) the volume of timber affected by the contravention,
- (c) the number of trees affected by the contravention, or
- (d) the number of livestock affected by the contravention.

Penalties for unauthorized timber harvesting

119(1) If a senior official determines that a person has cut, damaged, removed or destroyed Crown timber in contravention of section 96 [re: unauthorized timber harvest operations], he or she may levy a penalty against the person up to an amount equal to

- (a) the senior official's determination of the stumpage and bonus bid that would have been payable had the volume of timber been sold under section 20 of the Forest Act, and
- (b) 2 times the senior official's determination of the market value of logs and special forest products that were, or could have been, produced from the timber.

(2) A penalty may not be levied under both section 117 and subsection (1).

(3) In addition to a penalty under section 117 or subsection (1), a senior official who determines that a person has cut, damaged, removed or destroyed Crown timber in contravention of section 96 may levy a penalty against the person up to an amount equal to the senior official's determination of

- (a) the cost that will be incurred by the government in re-establishing a free growing stand on the area, and
- (b) the costs that were incurred by government in applying silviculture treatments to the area that were rendered ineffective because of the contravention.

Policies and procedures established by the minister

122(1) The minister may establish, vary or rescind policies and procedures respecting penalties and remediation orders.

(2) Before a person levies a penalty under section 117 or 119, or makes an order under section 118, the person must consider any applicable policy or procedure established under this section.

(3) The policies and procedures established, varied or rescinded under subsection (1) must be made available for inspection by any person.

Compared to the penalty assessment mechanism in Yukon's occupational health and safety legislation and that found in the Forest Practices Code, the mechanism under the Workers Compensation Act is indirect and slow. It does not provide for a direct and immediate financial response to a breach of their regulations.

The major factor which contributes to this lack of timely direct response is the fact that the penalty for breaching an occupational health and safety regulation is linked to the collection of compensation premiums. In contrast, penalties under the Forest Practices Code do not depend on another collection mechanism; payment of the administrative penalty is directly linked to the

breach in both form and process. This means that the financial consequences of a breach under the Code are far more apparent than they are under the Workers Compensation Act. The delays, which occur in the board's penalty assessments (and its prosecutions), dilute their deterrent effect.

Submissions made to the commission have suggested that any reformed system for occupational health and safety have a mechanism for applying administrative penalties, via ticketing or some comparable mechanism, against employers and workers. Some employer submissions pointed out that their disciplinary measures against workers who knowingly breached safety rules were frustrated in industries where there was a high worker turnover rate (such as construction) or where lengthy grievance procedures resulted from the disciplinary action. Other submissions pointed out that some employers may be indifferent to workers breaching safety rules if it is convenient. Labour submissions suggest that employers should have the exclusive right to ensure safe worker conduct and that any "outside" penalty scheme would intrude into labour relations issues.

In all of these instances, the potential for injury to such workers, or their co-workers, increases. The natural instinct for self-preservation is not always sufficient to motivate an individual to observe a safety rule, especially where the hazard sought to be addressed by the rule is not immediately present or apparent. As such, while maintaining the employer's primary responsibility for enforcing safety via disciplinary procedures against workers who knowingly breach safety rules, direct worker accountability through an administrative penalty mechanism is a necessary additional deterrent against unsafe worker conduct especially where employer efforts might be lacking or are otherwise ineffective.

If for no other reason than to protect others at the worksite, both indifferent employers and indifferent workers must be held more immediately accountable for safety breaches, an administrative penalty mechanism would enhance workplace safety.

Any such system must be open, fair, equitable and proportionate, meaning that administrative penalties must reflect each workplace party's responsibilities and duties and must consider the offending party's degree of knowledge, authority over and control relating to the infraction. This mechanism must in no way dilute the employer's primary responsibility for workplace health and safety or the general duties applied to all persons on a worksite.

Recognizing this, it is important to emphasize that restraint must be exercised in administering penalties against parties who do not have primary responsibility for safety in the workplace. For

example, workers committing a first offence might often be warned by an agency officer rather than penalized, unless a thorough review of the available worker and employer history, or the particular circumstances, made a penalty clearly justified. If any particular workplace party has not been assigned a duty in a regulation, that party would not be subjected to an administrative penalty were that provision to be breached.

The following hypothetical cases illustrate how these principles might be applied. Both examples assume that an administrative penalty scheme is in place.

1) An agency officer visiting a construction site sees a trench eight feet deep that has not been cutback or supported with shoring, as required by the regulations. While no workers have entered the trench, it is apparent some are preparing to do so and would have entered had the officer arrived a few minutes later.

The officer confirms that the employer holds the duty to cutback or shore this trench. The officer then refers to the administrative penalty regulation which indicates that the range of employer penalties for breaches of the trenching provisions range from a minimum of \$1,000 to a maximum of \$20,000, taking into consideration various factors set out in the text in the regulation.

This is the second time the officer has found an unshored trench at this worksite. The first time, the officer issued a warning notice. Applying the policy set out in the regulation to the circumstances of this case, the officer decides that a \$5,000 administrative penalty would be in order and issues that notice to the employer. The employer has three weeks to appeal the notice before it must pay the penalty directly to the occupational health and safety agency.

2) An agency officer arrives after workers have entered an unsafe trench. As there is no indication the employer intended to cutback or shore the trench, the administrative penalty regulation indicates that the maximum of a \$20,000 fine against the employer is appropriate.

In this example, the officer could also turn to the *OHS Regulation* to ascertain if workers hold a duty not to enter into a deep trench without sloping or shoring. If such a duty was assigned to workers, the officer could again turn to the administrative penalty regulation for guidance. That regulation could indicate that a breach by a worker of the duty not to enter an unsafe trench can lead to a fine of a minimum of \$50 to a maximum of \$200, depending on the circumstances. The worker would face no penalty if the officer found that the worker was not adequately trained or informed of this duty, or that the worker had accidentally slipped and fell into the trench, or if the officer was satisfied that the employer had coerced the worker into entering the trench. (i.e., "Get into the trench and clear it now, or get off this worksite.")

These examples illustrate four features of an administrative penalty system that the commission believes should be set out within BC's occupational health and safety legislation:

- *The occupational health and safety regulations must expressly state who holds what responsibilities.* In both examples, the employer held the duty to ensure that unsafe trenches of a certain minimum depth are either cutback or shored. The worker held a narrower duty not to enter such trenches until they were either sloped or shored.
- *The administrative penalty regulation must expressly set out what the minimum and maximum penalties would be for breaching any particular occupational health and safety provision.* If no penalty has been ascribed to the breach of a particular provision, an administrative fine cannot be imposed. In the above examples, the employer faced an administrative penalty of between \$1,000 and \$20,000; the worker faced a fine of between \$50 and \$200.
- *The administrative penalty regulation must provide guidance to an officer as to the factors that the officer is to take into consideration when issuing an administrative penalty.* There were a number of factors in each of the examples that the officer would have to consider. These include the seriousness of the infraction in terms of potential impact on healthy and safety:
 - Were workers in the trench?
 - Had the employer been warned previously?
 - Was there evidence that the employer was intending to shore the trench?
 - Was there evidence that the worker had been coerced into the trench?
- *The occupational health and safety statute must expressly state that no worker may receive an administrative penalty for any specified duty assigned to them unless the agency officer is satisfied they have been suitably trained or are otherwise knowledgeable of that duty.* It would be unfair and unsupportable to penalize workers for breaching obscure health and safety regulations which are unfamiliar to them.

While the commission believes that administrative penalties applied immediately and even at the worksite should be an enforcement option, administrative penalties are not intended to displace a court prosecution or an employer compensation penalty assessment. Instead, administrative penalties could be used in certain particular and defined situations, and be

focused predominantly on breaches of specific regulatory provisions. If an administrative penalty were not chosen or applicable in a particular instance, a compensation penalty assessment for an employer or a court prosecution may still be an appropriate option. There should, however, be a prohibition against using more than one enforcement option in each case. For example, if a worker receives an administrative penalty, it would be inappropriate for the board to prosecute that worker for the same offence. In a similar vein, if the employer receives an administrative penalty, it would be inappropriate to later prosecute that employer through the courts or levy a compensation penalty assessment on that employer for the same breach.

It would also be unfair to allow the employer to take disciplinary action against a worker where the employer had also received a penalty for the same event. This would not be the case, however, where the worker alone received the penalty. If a worker acted in a willful and reckless manner that threatened that worker or other workers' safety, such as operating machinery under the influence of alcohol, the employer should retain the ability to further discipline the worker, regardless of the worker having received an administrative penalty.

To summarize, there is a need for an occupational health and safety enforcement option separate from the court and compensation system that is applicable to all workplace parties. Such a mechanism is not intended to dilute primary employer responsibility for safety in the workplace, but rather to enhance workplace safety. In our view, a carefully designed and implemented administrative penalty scheme would best address this need.

Therefore, the commission recommends that:

31. The province's occupational health and safety statute establish a direct administrative penalty mechanism; and that:
 - (a) the maximum amount of an administrative penalty be set at \$500,000, or authorize the Lt. Gov. in Council to do so by regulation, and that fines applicable to workers shall be prescribed with due regard to their earnings;
 - (b) the criteria to be used when administrative penalties may be imposed or authorize the Lt. Gov. in Council to do so by regulation;
 - (c) specify amounts for breaches of designated provisions of the occupational health and safety statute and the regulations;
 - (d) no person may be charged with an offence or subjected to a compensation penalty assessment if they pay the full amount of a direct administrative penalty;
 - (e) the notice of a direct administrative penalty may be appealed to an administrative body (such as the Appeal Division);
 - (f) an employer is prohibited from disciplining a worker who receives a direct administrative penalty for the same events which led to that penalty if the employer also received a sanction arising out of these same events; and
 - (g) payment of a direct administrative penalty should not be used as evidence for the purposes of sentencing after conviction for another offence.

Any administrative penalty system must be applied fairly, consistently and effectively. If such a mechanism is to be put into the hands of officers, they would have to be trained in its proper application before being authorized to use it. Indeed, the commission would prefer to see officers obtain special certification before being entitled to employ administrative penalties.

Therefore, the commission recommends that:

32. The province's occupational health and safety statute:

- (a) should direct the occupational health and safety agency to provide agency officers appropriate training in applying the criteria in the administrative penalty regulations;
- (b) authorize agency officers to issue direct administrative penalties once they have received appropriate training.

COMPENSATION PENALTY ASSESSMENTS

The commission feels that the compensation penalty assessment mechanism reflected in section 73(1) of the Workers Compensation Act should be continued and transferred to the new occupational health and safety statute. As discussed previously, Section 73(1)(c) which relates to a breach by an employer of the Act or the regulations, should be transferred to the provision addressing the proposed administrative penalty mechanism.

As such, the commission wishes to make it clear that this penalty assessment mechanism under the current section 73(1) would be retained to supplement compensation funding and to enforce the concept of primary employer responsibility for safety in the workplace, and would not under any circumstances apply to workers.

The legal authority for the board's current compensation penalty assessment policy (Policy 1.4.1) appears to be based on the simple phrase "an additional assessment determined by the board" found in subsection 73(1) of the Workers Compensation Act. We are concerned that because Policy 1.4.1 seems to rest on what is at best an implied authority, it is open to a legal challenge.

Perhaps of greater concern is that the detailed and important social policy decisions set out in Policy 1.4.1 are not contained within legislation.

For example, the Workers Compensation Act and regulations are silent on the actual amount that can be applied as a penalty for breaches of the regulations other than for those that resulted in injuries or death due to gross negligence; the fines are prescribed in board policy. In fact, the Act offers no guidance in deciding what levels of fines are appropriate. Those criteria are also only in the policy.

By contrast, under the Forest Practices Code, the cabinet provides direction on the appropriate level of penalties through regulation and the minister has the statutory authority to provide further direction on the application of the legislation.

The provisions of the Forest Practice Code better reflect the direction offered by the McRuer Report and the Legislation Committee Policy on the initiation of new policies, rule-making authorities and the imposition of penalties or fines. Assuming that penalty assessments applied through the compensation system encourage compliance with the *OHS Regulation*, the commission believes that they should continue under the new occupational health and safety statute, and that the board's policy needs to be embodied in that statute.

Therefore, the commission recommends that

33. The province's occupational health and safety statute

- (a) authorize the occupational health and safety agency to impose penalty assessments as previously done pursuant to section 73(1) of the Workers Compensation Act;
- (b) set the maximum amount of a penalty assessment at not less than \$500,000, or authorize the Lt. Gov. in Council to do so by regulation; and
- (c) specify amounts for breaches of designated provisions of the occupational health and safety statute and the regulations.

CHARGE-APPROVAL FOR PROSECUTIONS

The board and the Ministry of the Attorney General are currently involved in a pilot project that could lead to more successful prosecutions. Aimed at achieving closer liaison and coordination among board management, its Legal Services Division and external Crown Counsel³⁴the memorandum of understanding establishing this project could, with some modification, be reflected in the new occupational health and safety statute. This would give permanence to that project and eventually lead to the enforcement agency having access to a Crown Counsel experienced in prosecuting occupational health and safety offences.

In the pilot project, the board submits a file to the Crown to determine if there should be a prosecution. The Crown reviews that file, ascertains the likelihood of conviction and, if there is sufficient evidence, indicates to senior board management that it would approve laying charges. The final approval resides with the board.

This process is different than the charge-approval process commonly employed under other regulatory statutes. Under any other statute, prosecution proceeds based on a final approval by the Crown. If the Crown decides to stay a charge, the attorney general must publish a notice to that effect in the Gazette. The board is not currently required to do that if, after the Crown decides it would be in the public interest to prosecute, the board decides not to proceed.

The commission is of the opinion that once the board submits a matter to the Crown for prosecution, the decision on whether or not to proceed with laying charges should rest with the Crown as it does in every other regulatory offence situation in BC. The board should not be placed in a position where it could be, or appear to be subjected to pressures from those it proposes to prosecute.

Therefore, the commission recommends that:

34. The current crown prosecution pilot project should become a permanent program.

Therefore, the commission recommends that:

35. The province's occupational health and safety statute state that the Crown alone approves all charges to be laid under this statute.

COURT ORDERS ON CONVICTION

The Workers Compensation Act does not encourage the court to be creative in the orders that flow out of a conviction. Nova Scotia's occupational health and safety statute does provide for such creativity.

- 74 (3) Where a person is convicted of an offence pursuant to this Act and the court is satisfied that, as a result of the commission of the offence, monetary benefits accrued to the offender, the court may order the offender to pay, in addition to a fine imposed pursuant to subsection (1) or (2), a fine in an amount equal to the estimation by the court of the amount of the monetary benefits.
- 75 (1) Where a person is convicted of an offence pursuant to this Act, in addition to any other punishment that may be imposed pursuant to this Act, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order
- (a) directing the offender to publish, in the manner prescribed, the facts relating to the offence;
 - (b) directing the offender to pay to the Minister, in the manner prescribed by the regulations, an amount for the purpose of public education in the
 - (i) safe conduct of the activity in relation to which the offence was committed, and
 - (ii) principles of internal responsibility provided for in this Act;
 - (c) on application by the Director made within three years after the date of conviction, directing the offender to submit to the Director such information with respect to the activities of the offender as the court considers appropriate and just in the circumstances;
 - (d) directing the offender to perform community service, subject to such reasonable conditions as may be imposed in the order;
 - (e) directing the offender to provide such bond or pay such amount of money into court as will ensure compliance with an order made pursuant to this Section;

- (f) requiring the offender to comply with such other reasonable conditions as the court considers appropriate and just in the circumstances for securing the offender's good conduct and for preventing the offender from repeating the same offence or committing other offences,
- but the total of any moneys payable or direct cost incurred by the offender pursuant to this subsection and subsection 74(1) shall not exceed the maximum amount payable pursuant to subsection 74(1).
- (2) Where an offender fails to comply with an order made under clause (1)(a) directing the publication of the facts relating to the offence, the Director may publish the facts in compliance with the order and recover the costs of publication from the offender.
- (3) Where the court makes an order pursuant to clause(1)(b) directing the offender to pay an amount for the purpose of education or the Director incurs publication costs pursuant to subsection (2), the amount or costs constitutes a debt due to Her Majesty in right of the Province and may be recovered as such in a court of competent jurisdiction.
- (4) An order made pursuant to subsection (1) comes into force on the day on which it is made or on such other day as the court may order and shall not continue in force for more than three years after that day.

While BC's Offence Act ³⁵and the common law could generate such orders after convictions under an occupational health and safety statute, the commission feels that these potentially more creative orders should be set out under the new statute. This would free the courts to exercise the options in the appropriate circumstances.

Therefore, the commission recommends that:

36. The province's occupational health and safety statute:

- (a) allow the courts to issue more creative orders following a conviction. This could include:
- (i) publishing the facts of an offence in a newspaper;
 - (ii) levying additional fines where the person convicted obtained monetary benefits by a the breach of the legislation;
 - (iii) levying a fine for public education;
 - (iv) requiring a convicted person to submit information to prove compliance;
 - (v) sentencing the convicted person to undertake community service; and
 - (vi) requiring a convicted person to post a performance bond.

INJUNCTIONS

Some Canadian occupational health and safety statutes authorize the enforcement agency to apply to obtain a court-ordered injunction. The provision usually sets out the terms and conditions that must exist before the court awards an injunction.

Different types of temporary or permanent injunctions may be useful in the context of occupational health and safety depending on the particular situation. These could include:

- mandatory injunctions directing the affected party to do something or undo something that was done in the past;
- preventive injunctions directing the affected party to stop doing something or continuing to allow something to happen; or
- restraining orders directing the affected party not to do something.

Injunctions allow an agency to take prompt action to address potential or existing harm, and can be obtained quickly under exigent circumstances, often without the need to provide advance notice to the affected party (i.e., an *ex parte* application). They permit the agency to rely on the enforcement powers of the court under appropriate and prescribed situations. If the affected party breaches an injunction, the breach can be converted into civil or criminal contempt proceedings.

In turn, a person served with an injunction can appeal that order to the courts. This provides a means to assess the merits of the original application. In addition, the court can penalize the agency if it was wrong or premature in seeking an injunction by awarding costs to the affected party.

The Workers Compensation Act does not grant the board the authority to obtain an injunction for occupational health and safety matters. While the board may be able to obtain an injunction through other legislation, that power should be available through the Act.

Therefore, the commission recommends that:

37. The province's occupational health and safety statute allow the occupational health and safety agency to apply to the courts to obtain an injunction.

COMPANY OFFICERS AND DIRECTORS LIABILITY

The Forest Practices Code provides for the liability of officers and directors in respect to administrative penalties under that Act. Section 77 of the Workers Compensation Act provides for similar liability offences under the occupational health and safety provisions.

The commission recognizes the need for personal responsibility under prescribed circumstances on the part of senior management in order to enhance workplace health and safety.

Therefore, the commission recommends that:

38. The provisions of section 77 of the Workers Compensation Act be transferred to the province's new occupational health and safety statute and that this provision should also be applicable to administrative penalties.

THE DEFENSE OF DUE DILIGENCE

Offences can be put into three categories. According to the CCH Guide³⁶ these categories are:

1. Offences that require a guilty mind (*mens rea*): offences usually found in the Criminal Code, but can be found wherever the law explicitly or implicitly requires a guilty mind for a conviction. A guilty mind is one that intended to do the act, or one that was reckless as to the consequences of the act.
2. Strict liability offences: the vast majority of offences created by all levels of government for the protection of public welfare. In this type of offence, the prosecution only has to prove the act has been committed by the accused. Then it is up to the accused to show that there was some lawful excuse, such as a reasonable mistake of fact, or "due diligence," to satisfy the demands of the law.
3. Absolute liability offences: a rare type of offence in which all that needs to be proven is that the accused committed the prohibited act. In this type of offence, the accused has no defense based on his or her mental state or efforts to comply with the law.

The offences arising from federal or provincial occupational health and safety legislation generally fall into the categories of "strict liability" or "absolute liability."³⁷ In the case of strict liability offences, if the accused can establish that "due diligence" was exercised by taking all reasonable steps in the circumstances to avoid committing the offence, then acquittal will follow. In the case of absolute liability, a conviction must follow once it is proven that the accused committed the prohibited act; the defense of due diligence is not permitted. The Workers Compensation Act does not describe the defense of due diligence or place the onus on the accused to raise that defense.

If prosecutions are pursued with renewed vigour in BC, then continuing to cast most offences in the occupational health and safety legislation as "strict liability" would seem to be appropriate. This is so because the availability of the due diligence defense works to encourage all parties to engage in compliant behaviour which they some day might wish to point to. If regulatory offences such as those contained in the Workers Compensation Act are determined to be absolute and the defense of "due diligence" is not available, conscientious employers and workers who make one mistake will be convicted just as surely as reckless employers and workers.

The defense of due diligence has had an effect on enforcing occupational health and safety legislation in Canada. In a landmark case from British Columbia, the Supreme Court of Canada found that the combination of an "absolute liability" offence and the possibility of a term of imprisonment for a breach of such a provision constitutes a violation of section 7 of the Charter of Rights and Freedoms, and was thus struck down.³⁸ This means that if a regulatory provision is described as an absolute liability offence and someone convicted of breaching that provision

could be sent to jail, the applicable provision could be deemed to be of no force and effect. As a result of this possibility, the defense of due diligence has been expressed in a number of Canadian occupational health and safety statutes.

Therefore, the commission recommends that:

39. The province's occupational health and safety statute:
 - (a) recognize the defense of due diligence; and
 - (b) place the onus on the accused person to establish that defence.

THE COERCION DEFENSE

Quebec's occupational health and safety statute has set out a coercion defense which a worker can raise in response to a prosecution. The provision reads:

240. Where a worker is being prosecuted for an offence against this Act or the regulations, proof that the offence was committed as a result of formal instructions given by his employer and despite the worker's objection suffices to release him from his responsibility.

This is a useful provision to include in BC's occupational health and safety legislation, particularly if workers can receive administrative penalties under the statute.

Therefore, the commission recommends that:

40. The province's occupational health and safety statute recognize the coercion defence modeled on section 240 of Quebec's occupational health and safety statute.

LEVEL OF FINES

Every occupational health and safety statute defines what constitutes an offence and prescribes the penalty faced on conviction for each offence, including minimum/maximum fines, terms of imprisonment and other types of court orders. However, there is considerable variation across Canada in terms of what acts or omissions constitute an offence and the corresponding penalties on conviction. Many occupational health and safety statutes, including BC's Workers Compensation Act, declare that corporate officers or directors may be liable if their company is convicted of a serious offence.

In the past decade, several jurisdictions have considered whether their fines were high enough to serve as a sufficient deterrent, and have made recommendations to increase them. The degree of increase is noteworthy.

For example, a 1989 legislative review in Saskatchewan³⁹ recommended that the maximum fine for contravening that province's occupational health and safety legislation increase twofold, from \$5,000 to \$10,000 for a first offence, and from \$500 to \$1,000 per day for a continuing offence. As a result of its 1995 review, Nova Scotia increased its maximum fines by a factor of 25, raising them from \$10,000 to \$250,000.

Currently, Alberta, Manitoba and Yukon set maximum fines to \$150,000 for a first offence and \$300,000 for a second offence. Maximum fines for corporations in Ontario and the Northwest Territories are set at \$500,000. Only Quebec, New Brunswick, PEI and Newfoundland continue to have fine limits of \$50,000 or lower, depending on the offence. Amounts in jurisdictions where fines can be applied for each day an offence continues can result in substantial totals on conviction.

The following provisions from the Workers Compensation Act define offences and set fines for occupational health and safety-related convictions in BC (the fine amounts indicated in brackets were set by recent regulations):

- 13 (2) Where an employer, or a worker of that employer having supervisory responsibilities, by agreement, threats, promises, inducements, persuasion or any other means seeks to discourage, impede or dissuade a worker of the employer, or the worker's dependant, from reporting to the board
- (a) an injury or allegation of injury, whether or not the injury occurred or is compensable under this Part;
 - (b) an occupational disease, whether or not the disease exists or is compensable under this Part;
 - (c) a death, whether or not the death is compensable under this Part;
- or
- (d) a hazardous condition or allegation of hazardous condition in any employment to which this Part applies,
- the employer commits an offence and is liable on conviction to a fine not exceeding [\$18,474.24]; and the worker having supervisory responsibilities commits an offence and is liable on conviction to a fine not exceeding [\$3,694.89].
- 71 (8) An officer of the board may investigate an accident resulting in injury to, or the death of, a worker, and may inspect and inquire with respect to health and safety matters at any place of employment, and may make the inquiries and inspect the documents he considers necessary for these purposes, and any employer, worker or other person who withholds information from the officer making inquiries, or who otherwise obstructs or interferes with the officer in the exercise of his functions under this section, commits an offence and is liable on conviction to a fine not exceeding [\$18,474.24], or to imprisonment not exceeding 3 months, or to both.

- 74 (3) An employer who fails, neglects or refuses to comply with an order made by the board or officer of the board under subsection (1) [work closures for conditions of immediate danger] commits an offence and is liable on conviction to a fine not exceeding [\$184,741.57], or to imprisonment not exceeding 6 months, or to both.
- 75 (2) Every person who contravenes or fails to comply with a regulation or order under section 71 commits an offence and is liable on conviction to a fine not exceeding [\$36,948.28], or to imprisonment not exceeding 3 months, or to both.
(3) Every person who contravenes or fails to comply with any other regulation made under this Part commits an offence and is liable on conviction to the fine prescribed by the regulations, but not exceeding [\$3,694.89].
- 77 (2) Every person who commits an offence under this Act for which no other punishment has been provided is liable on conviction to a fine not exceeding [\$3,694.89].

These fines are obviously less than those found in other Canadian jurisdictions. In fact, they are substantially less than those set out in other BC regulatory statutes, such as environmental protection.

Whether a fine arises through a direct administrative penalty, a penalty assessment via the compensation premiums system, or is ordered by the court following a conviction, the commission believes that the maximum and minimum amounts of these penalties needs to be at such levels as to have a meaningful deterrent effect. They cannot be viewed as simply the cost of doing business.

While statutory maximum fines may not always be imposed by the courts, except in the most flagrant of cases, the deterrent effect of having the potential maximum for life-threatening violations more closely correspond to the actual compensation costs of a serious or fatal injury sends a clear warning to those who would disregard workplace health and safety. Higher fines are also consistent with strong denunciation of unlawful acts or omissions which seriously compromise occupational health and safety.

The commission has previously discussed how this issue could be addressed in the context of penalty assessments. What remains is how the issue could be addressed in the context of court-ordered fines.

Therefore, the commission recommends that:

41. The province's occupational health and safety statute:

- (a) set out fines for convictions of breaches of the province's occupational health and safety statute that are greater than those currently set out under the Workers Compensation Act and correspond with the levels set out in other, recent Canadian occupational health and safety statutes and British Columbia regulatory statutes. In any event, the maximum fine should not be less than \$500,000; and
- (b) impose a minimum fine for those convicted of repeat offences. This should be similar to provisions found in British Columbia's wildlife protection legislation.

EFFECT OF A BREACH

Manitoba's occupational health and safety statute states, in part:

Effect on compensation

8. The failure to comply with any provision of this Act or the regulations does not affect the right of a worker to compensation under The Workers Compensation Act.

Effect on liabilities

9. The liabilities and obligations of any person under The Workers Compensation Act are not decreased, reduced, or removed, by reason only of his compliance with the provisions of this Act or the regulations.

While there are no similar provisions in the Act, subsection 5(3) of states that:

Where the injury is attributable solely to the serious and willful misconduct of the worker, compensation shall not be payable unless the injury results in death or serious or permanent disablement.

Adopting a provision similar to Manitoba's section 8 would not be inconsistent with subsection 5(3) of the Workers Compensation Act. The new provision would simply state that a worker is entitled to compensation authorized under the Workers Compensation Act. If that Act limits compensation for certain acts, that limitation would still apply, notwithstanding provisions in the new occupational health and safety statute. The principle is that a worker's failure to comply with the provisions of the occupational health and safety statute or its regulations would not automatically result in that worker losing the right to compensation under the Workers Compensation Act.

Similarly, section 9 of the Manitoba occupational health and safety act in effect says that, although someone might meet all their obligations under the occupational health and safety

legislation, that compliance does not relieve them from their obligations under workers' compensation legislation.

The commission believes that the province's new occupational health and safety statute should contain provisions like those found in Manitoba's statute.

Therefore, the commission recommends that:

42. The province's occupational health and safety statute state that:

- (a) a worker's failure to comply with the provincial occupational health and safety legislation does not affect the worker's right to compensation as set out under the Worker's Compensation Act; and
- (b) the liabilities and obligations of any person under the Worker's Compensation Act are not decreased, reduced, or removed, by reason only of that person's compliance with the provisions of the occupational health and safety statute or its regulations.

APPEALS AND RELATED MATTERS

Canadian occupational health and safety statutes often provide for administrative appeals of an officer's order and other enforcement options, including administrative penalties. These can be internal appeals to the enforcement agency, an advisory council or an external tribunal.

With the right of appeal, the statutes also commonly state that an appeal does not stay the application of an order, directive or penalty, unless the appellant tribunal so orders before ruling on the merits of the appeal. Some statutes provide a further right to appeal to the courts; others limit the court's jurisdiction to review a decision of the appellate body.

There are three types of appeals under BC's current occupational health and safety legislation:

- appeals to penalty assessments (and reconsideration) initiated pursuant to the Act;
- appeals to orders/directives initiated pursuant to the Regulations; and
- appeals to orders/directives that are granted by board policy.

Appeals to rejected compensation claims will be addressed in the commission's final report, due in September 1998.

Appeals to penalty assessments (and reconsiderations) pursuant to the Act

Subsection 96(6) of the Workers Compensation Act states that an employer can appeal a penalty assessment levied under section 73 of the Act to the Appeal Division:

An employer who has received notice of
(a) an assessment under section 39 or 40,
(b) a classification, special rate, differential or assessment under section 42,
or
(c) an additional assessment, levy or contribution under section 73 may, not more than 30 days after receiving the notice or within a longer period the chief appeal commissioner may allow, appeal the assessment, classification, special rate, differential or additional assessment, levy or contribution to the appeal division on the grounds of error of law or fact or contravention of a published policy of the governors.

The WCB's *Occupational Safety and Health Policy and Procedures Manual* policy number 1.4.4 restates this subsection (albeit in different wording), but adds the Charter as a basis to appeal a penalty assessment under section 73. This does not effectively broaden the grounds for an appeal. An appeal based on an alleged breach of the Charter falls within the scope of an "error of law" as set out under the Act.

Section 96.1 of the Workers Compensation Act addresses the reconsideration of an Appeal Division decision.

Reconsideration by appeal division

96.1(1) Subject to this section and sections 58 to 66, a decision of the appeal division is final and conclusive.

(2) A worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the appeal division on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the matter decided by the appeal division.

(3) Where the chief appeal commissioner considers that the evidence referred to in subsection (2)

(a) is substantial and material to the decision, and

(b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered, he may direct that

(c) the appeal division reconsider the matter, or

(d) the applicant may make a new claim to the board with respect to the matter.

Appeals to orders/directives pursuant to the Regulations

Subsection 96(6) of the Workers Compensation Act is silent on appeals of orders or directives that a board officer may issue. However section 2.12 of the *IH&S Regulations* states (in part):

(2) Any person affected by any order or directive issued under these regulations or by any penalty under Section 61 of the Workers Compensation Act, or any representative of such a person, may appeal to the Commissioners. Notice of appeal shall be submitted within 21 days,

or such further period as the Commissioners may allow, and shall be made in writing and shall state the reasons therefor.

- (3) No appeal in itself shall operate as a stay in respect of any order or directive or penalty assessment.

Appeals to orders/directives granted by Board policy

Policy 1.4.5 of the *OSH Policy Manual* provides an internal appeal mechanism to persons who disagree with a board order or directive. The first level of appeal is to the officer's Regional Manager. The next level is to the Director of Field Operations with the final appeal to the Vice-President, Prevention Division.

The Appeal Division does not accept appeals that may be submitted pursuant to section 2.12 of the Regulations or by Policy 1.4.5. It accepts only those appeals that flow from a penalty assessment, as permitted under section 96(6) of the Act and reconsideration under section 96.1.

It appears that the review of orders described under board policy 1.4.5 is simply the board's way to operationalize appeals to orders permitted under section 2.12 of the Regulations. However, the commission is concerned that establishing an appeal mechanism by regulation and policy for such a substantial area of law without expressed authorization in the Workers Compensation Act might lead to that mechanism being found to be beyond the authority of Act. At the very least, it appears to be a mechanism which the McRuer Report and the Legislation Committee Policy would suggest be expressly stated in the Act itself.

Therefore, the commission recommends that:

43. The province's occupational health and safety statute state that persons who disagree with an officer's order or directive have the right to appeal that order or directive, with the following provisions:
- (a) an appeal itself does not operate to stay an order or directive before the merits of the appeal has been adjudicated, unless ordered by the appellate tribunal;
 - (b) the person appealing the order or directive must do so within a set period of time and provide grounds for the appeal. The scope of the appeal should be prescribed in the statute;
 - (c) the appellate tribunal should render a written decision within a maximum period of time; and
 - (d) the Lt. Gov. in Council should be authorized to approve a regulation which could set out detailed procedures to give effect to this appeal mechanism.

REGULATORY ISSUES

ONGOING REGULATION REVIEW

Under BC's current legislative framework, the board is solely responsible for making all the decisions regarding when the regulations should be reviewed, which regulations should be reviewed, and (after some consultation) what the regulations should ultimately state.

Earlier in this report, the commission recommended that in the future, the agency responsible for implementing and enforcing regulations not be the agency responsible for promulgating the regulations. In addition, The commission has recommended that the provincial occupational health and safety statute contain Agency Directives, one of which should state that the agency responsible for administering occupational health and safety in BC:

complete at least once every three years a comprehensive review of the regulations to ensure they are appropriate and effective, and when change is required, develop proposed new regulations or amendments to existing regulations to be approved by the Lt. Gov. in Council;

The process for developing and reviewing the regulations is discussed in more detail in Section Two of this report.

DRAFTING REGULATIONS

There are a number of technical and drafting problems with the current *IH&S Regulations* and the other regulations approved by the board under the Workers Compensation Act and Workplace Act. For example, there are approximately 4,000 separate provisions or requirements set out within the *IH&S Regulations*; however, less than 5% of the provisions expressly assign responsibility for complying with the stated requirement. In a few of the remaining provisions it may be obvious who would be responsible, but in many it is not.

Many of the problems with the *IH&S Regulations* have been addressed in the new *OHS Regulation*; however, they have not been entirely eliminated. More than half of the new provisions still do not state who is responsible for compliance. Drafting the regulations in an active voice could eliminate this problem while making their overall intent clearer.

Enforcement can only be as effective as the regulations. While exhaustive effectiveness or cost-benefit research is not necessary for every single occupational health and safety provision, there needs to be better information and more study regarding the general enforceability of regulations. While regulations act more as a deterrent against bad conduct and do not promote

conduct above a set minimum, a regulation properly designed, implemented and easily understood should have a positive effect on prevention.

Therefore, the commission recommends that:

44. The province's occupational health and safety regulations:
 - (a) identify the parties to whom they assign responsibility;
 - (b) clearly articulate what the parties are or are not to do;
 - (c) be written in clear and appropriate plain language; and
 - (d) be readily accessible to employers, workers and others affected by the legislation.

PERFORMANCE VS. PRESCRIPTIVE (OR SPECIFICATION) REGULATIONS

The commission received a number of submissions that raised the issue of performance vs. prescriptive (or specific) regulations. Some of these submissions advocated more performance and less prescriptive regulations; others argue the opposite.

The commission does not see this as an either/or situation. Whether a regulation states the objective to be achieved without prescribing a specific solution, or whether it specifies one or a limited number of solutions to achieve the desired outcome depends on the problem being addressed, the range of possible solutions and the relative effectiveness of these solutions.

For example, if there is only one recognized way of safely achieving a desired outcome, then a prescriptive and not a performance regulation is appropriate. On the other hand, if there are multiple and acceptable ways to address a particular hazard, simply stating the objective without specifying a solution or alternative solutions may be appropriate.

The commission cannot state conclusively when one type of regulation should be used instead of another; the decision must be made on a case by case basis after a meaningful assessment of the advantages and disadvantages of different solutions. This does not mean that performance regulations should become an excuse for an employer, worker or union to call in agency officers to decide what should be done to achieve a stated objective, or to verify that the employer is doing, or about to do something correctly. The onus of proving that a solution will in fact achieve a performance objective must rest with the party who has been assigned that duty.

REGULATORY VARIANCES OR EXEMPTIONS

There are legal and policy differences between a variance and an exemption. A variance replaces one legal requirement with another, ostensibly with one that provides equal or better protection than the original; it is possible to be prosecuted for breaching a variance. An exemption provides full relief from a legal requirement; there is no substitution or equivalence in an exemption and there is no longer a legal duty in place.

Three Canadian occupational health and safety statutes (Alberta, Nova Scotia and the federal government) authorize variances or deviations from requirements set out in their regulations. A fourth jurisdiction, Saskatchewan, focuses on granting exemptions and does not appear to contemplate variances. For example, there is no authority which allows the Saskatchewan director of occupational health and safety to apply terms or conditions to the exemption; such terms and conditions are commonly attached to variances. The Canada Labour Code authorizes both exemptions and variances, albeit only to the regulations which apply to federally-regulated coal mines.

Comparing the wording covering variances and exemptions in the statutes, it is possible to make the following general observations:

- To obtain a variance, the alternative must provide for equal or greater protection than specified in the regulations (Alberta and Nova Scotia) or must have substantially the same purpose and effect (Federal). This minimum threshold requirement provides the criteria against which the alternative must be assessed before an acceptance or variance can be granted.
- The threshold test to obtain an exemption (as distinct from a variance) is that no worker must be materially affected by the exemption (Saskatchewan) or the health and safety of workers would not be diminished (Federal).
- While not expressly stated, it appears that a variance can only be obtained for provisions that prescribe a specific solution that may not be reasonable to apply in certain circumstances (Alberta, Saskatchewan, Nova Scotia and Federal).
- Three jurisdictions (Alberta, Saskatchewan and Nova Scotia) give their senior officials the power to issue variances or exemptions. The federal government focuses on the Coal Mining Safety Commission or a person designated by that commission.
- Persons seeking a variance or exemption must apply in writing; it cannot be obtained verbally (Saskatchewan, Nova Scotia and Federal).
- The application must contain required technical information and information regarding the benefits and drawbacks that might reasonably be anticipated if the variance is authorized (Nova Scotia).

- Unless workplace parties agree otherwise, the application for a variance must be posted and communicated to the joint health safety committee (Nova Scotia).
- The director must consult with the applicant and others who may be affected, or notify them of the application (Saskatchewan and Nova Scotia), and allow others access to the application (Nova Scotia).
- The decision must be made within a defined period of time (within 28 days, Nova Scotia), be in writing (Alberta, Nova Scotia and Federal), and contain reasons and necessary details (Nova Scotia).
- When granting a variance or exemption, terms and conditions can be imposed including time limits (Alberta, Nova Scotia and Federal).
- The written decisions must be posted at the worksite (for at least 7 days, Nova Scotia) and sent to the joint health safety committee or representative, or others so requesting (Nova Scotia), and kept at the worksite while it is in effect (Nova Scotia).
- The person obtaining the variance must comply with their alternative proposal and any terms or conditions attached, just as if it was a regulation (Alberta and Nova Scotia).
- The director may reconsider, confirm, vary, revoke or suspend a variation at any time or at his initiative (Nova Scotia).
- A variance or exemption does not have to be reviewed, approved or published as is the case with a regulation (Alberta), but it may have to be posted at the worksite (Nova Scotia).

Other Canadian jurisdictions have granted a defined power to vary regulations to the agency which enforces the occupational health and safety statutes. However, because the power to grant variances or exemptions to regulations is the same as the power to approve regulations in the first instance, this authority is commonly set out within the statute, not within regulations.

Section 13 of the Mines Act contains a variance provision that reads:

Variance of regulations or code for individual mine

- 13 (1) On receiving a written application from the manager, the occupational health and safety committee or the local union requesting the suspension or variance of a provision of the regulations or of the code, the chief inspector may suspend or vary the provision if the chief inspector is of the opinion that the provision does not operate in the best interest of, or is not necessary to, health and safety in an individual mine.
- (2) The chief inspector must ensure that the parties affected by the application are advised of the application for, and the subsequent decision respecting, a variance.
- (3) The chief inspector must maintain a register of all variances.
- (4) At least once every 5 years, the chief inspector

- (a) must review each variance and advise the manager, occupational health and safety committee and local union that the chief inspector intends to review the variance, and
- (b) after reviewing any submissions, must advise them whether or not the variance is to continue.

The threshold test is that the applicable provision “does not operate in the best interest of, or is not necessary to, health and safety in an individual mine.” Presumably, “best interest” would lead to a conclusion that the requested variance would provide equal or greater protection; however, this test is not as clear as the “equal or greater protection” test employed elsewhere in Canada.

13(3) of the Mines Act implies that there will be a registry of all the variances that have been granted. At the least, this is a useful way to promote legislative accountability. The requirement for five year reviews of granted variances under 13(4) is also useful, especially if the variance does not contain a sun-set clause.

Section 2.10 of the *IH&S Regulations* allows the board to modify or vary a provision of the regulation, or substitute an alternative requirement. In addition to this general provision, in many provisions the regulation allows the board to grant acceptances, which are alternatives to a specific requirement.

The threshold test for allowing variances in the *IH&S Regulation* is the vaguest we have studied. It uses words like “appropriate” and where “the circumstances of a place of employment warrant” to set the criteria to assess the merits of a requested variance. At the same time, there is no statutory or regulatory provision that sets out the process by which an affected party can apply to obtain an exemption or variance and no provision allowing those affected by the variance to appeal the decision. In addition, nothing in the Workers Compensation Act or the board’s policies speaks to the board compiling variances or exemptions, or reviewing them on a regular basis.

The board’s *OHS Policy Manual* contains details on how it applies section 2.10 of the *IH&S Regulations*. This policy contains elements similar to those found in Canadian occupational health and safety statutes, such as the requirement to document the problem created by the regulation and why the proposed solution should be acceptable, and that workers (and union) be informed that an application has been made. It also suggests a threshold test similar to those found in Canadian statutes: “the proposed procedure or practice ... will provide an equivalent level of safety to that provided for by the regulation.” Given the vagueness of section 2.10 in the

regulations, this clarification is welcomed. At the same time, it should be articulated in legislation, and not left to board policy.

In addition, the policy purports to grant a right to appeal a variance decision, but only so long as that decision was not made by the vice-president of occupational health and safety. This is because the appellant must petition the vice-president for a reconsideration. No other route of appeal is offered.

Clearly, there is a need for some flexibility in regulations; granting variances or exemptions can be useful in certain circumstances and an applicant should not have to wait years for a regulation review process to be able to obtain an appropriate variance. However, the commission believes that this process should be as open as possible. In particular, persons who may be affected by a variance or exemption should have the right to either intervene before the decision is made or, at the least, be able to appeal that decision on its merits.

Therefore, the commission recommends that:

45. The province's occupational health and safety statute authorize and describe an open and flexible mechanism for persons to obtain variances or exemptions from the regulations (e.g., submit requests to the agency, a council or the minister with supporting rationale). These variances or exemptions must be either time limited or subject to a regular review. The statute should include:
 - (a) criteria against which the variance or exemption must be assessed (e.g., "equal or greater protection" or "the health and safety of a worker would not be adversely affected");
 - (b) a requirement to notify all potentially affected parties when a variance or exemption request is made by providing these parties with a copy of the final decision and reasons either in writing, or by posting them in the workplace;
 - (c) a right for those who may be affected by variances or exemptions to intervene before the decision is made, or to appeal decisions on the merits; and
 - (d) a provision that states that the person obtaining the variance or exemption must comply with the variance or exemption and any applicable terms or conditions.

Requests for variances or exemptions should be limited to prescriptive regulations; performance-based provisions should be sufficiently flexible to achieve the stated objective. It should not be permissible for the agency to grant a variance or exemption to provisions of the Act in any circumstance; the process would apply to regulations only.

There should be an administrative mechanism that ensures that requests for variances or exemptions which are granted form part of the information considered in the regular regulation review process. This would highlight regulations which have proved to be problematic, so that

participants in the review process could consider whether there is a need to amend the regulations in question. The very need for variances or an exemption begs the questions: What is wrong with the existing requirement? How might it be modified?

The commission is of the view that it should not be possible to automatically obtain or petition to obtain a “stay” of a regulation simply because a variance or exemption has been requested. Because regulations are instruments approved by the Lt. Gov. in Council, any decision to hold back their application pending the outcome of a variance or exemption request should rest with the cabinet and not the agency. That said, decisions on variance or exemption requests should be made as soon as is reasonably practical.

Once a variance or exemption has been granted, an appeal of that decision should not automatically lead to a stay. That preliminary issue should be placed before the appeal body alone to decide on its merits.

ADOPTING OTHER PROVINCIAL AND FEDERAL LEGISLATION

Many of the provisions in the current occupational health and safety regulations require compliance with other provincial or federal legislation. Other provisions require compliance with legislation administered by other authorities without specifically naming or clearly identifying that legislation.

It is not clear why the board adopts legislation in this manner. It is of little value from a compliance perspective because the board does not have the authority to prosecute someone for breaching the adopted legislation as that authority rests with the other agency which administers the legislation. Board officers could be given this authority by agreement with the administering agency; however, there are no jurisdictional agreements between the board and the administering agencies making adoption of the legislation pointless.

Presumably the legislation being referenced requires employers, workers and other persons to comply with its provisions. However, unless the legislation does not apply to BC worksites and there is a need to expand the scope of that legislation so that it does apply, there is no need for the board’s regulations to duplicate the original legislation’s compliance provisions. The enforcement options available under the Workers Compensation Act to enforce the adopted legislation may actually conflict or compromise those that are contained within that legislation.

If the intent behind the current method of adopting legislation is simply to make employers, workers and others aware that they must comply with legislation other than the primary

occupational health and safety legislation, referring to it in the Regulations is not the best way to convey the information. A better route would be to prepare an information booklet explaining to employers, workers and others what other legislation may apply to their circumstances. The current practice of providing guidance through footnotes to the Regulations is inadequate.

Therefore, the commission recommends that:

46. The province's occupational health and safety regulation:
 - (a) not adopt other provincial or federal legislation by reference; and
 - (b) provide information on the need to consider the effect of other provincial or federal legislation to those who must comply with the occupational health and safety regulations.

ADOPTING STANDARDS

At least 100 different national and international standards have been adopted within the regulations and have therefore become mandatory requirements. In a few sections, compliance with certain national standards or codes is deemed to constitute compliance with the applicable provision of the regulation. However, these standards have not been expressly adopted as legal requirements.

While adopting national and international standards leads to some harmonization across Canada and within North America, as with all standards the practice is only useful if it is kept up to date. Adopting standards that have been prepared by the board itself is not as useful from the perspective of promoting harmonization. It is also questionable because it effectively broadens the scope of the board's regulation-making authority beyond the scope granted under section 71 of the Workers Compensation Act.

Therefore, the commission recommends that:

47. The province's occupational health and safety statute state that:
 - (a) national or international standards can be adopted by regulation and are enforceable under the province's occupational health and safety regulations; and
 - (b) the occupational health and safety agency must review any amendments to the adopted standards to ensure their continued relevance. If the new version is useful, the occupational health and safety agency should recommend that the regulation be amended to adopt the new version of the standards.

CONSOLIDATION OF REGULATORY JURISDICTIONS

There are at least two possible interpretations of the phrase “the consolidation of regulatory jurisdictions” set out in clause 2(b) of the commission’s Terms of Reference. It could involve a technical review of the legislative advantages and disadvantages of consolidating all the legislation that protects and promotes workplace health and safety in BC. Or it could be limited to assessing the effectiveness of the various agencies that administer the legislation to ascertain if they or their programs should be consolidated.

It is not possible to complete an analysis of the dozens of provincial statutes and regulations (see Appendix A) that contain an occupational health and safety component, as well as a public safety or other component within the time frame of this commission. Similarly, the commission has not had the opportunity to review the programs of the various agencies that administer that legislation. Instead we are proposing a methodology that government can use to determine where and when it might be appropriate to consolidate provincial jurisdictions for workplace health and safety.

Before discussing this methodology, it is important to examine the federal and provincial governments’ various jurisdictions for occupational health and safety within BC. It is also important to examine related topics such as legislative declarations of jurisdiction and memoranda of understanding.

THE CONSTITUTIONAL DIVIDE: FEDERAL JURISDICTION FOR OCCUPATIONAL HEALTH AND SAFETY WITHIN BC

Separating the federal and provincial jurisdictions: Alltrans

There are constitutional limits on the application of provincial occupational health and safety legislation. In a series of decisions,⁴⁰ the Supreme Court of Canada confirmed that two provincial occupational health and safety statutes (Quebec and BC) did not apply to federal works and undertakings.

In the Alltrans case, a board officer inspected the BC places of business of Alltrans Express Ltd., a trucking company incorporated in Ontario and carrying on business inter-provincially and internationally. The provincial officer noted that employees of the company were not wearing footwear required by BC regulations and ordered the use of such footwear and the formation of a safety committee as required by the Workers Compensation Act. The penalty for non-

compliance with these orders could ultimately include a penalty assessment, prosecution and/or a closure order. Alltrans challenged the constitutionality of being subjected to the occupational health and safety provisions of the Act. (In an apparent recognition of long-standing Privy Council and Supreme Court of Canada decisions,⁴¹ Alltrans did not challenge the application of the compensation provisions of the Act.)

The Court's decision was based on several propositions, the analysis of which is at times quite complex. While both the Quebec and the BC statutes were conceded to be valid statutes of general application, they were deemed not to be applicable to federal works and undertakings if their subject matter was labour relations and internal management. This is because regulation of the labour relations and internal management of federal works and undertakings is an integral and vital part of federal legislative jurisdiction under the Constitution Act, 1867.

Characterizing the Workers Compensation Act as concerning "health and safety" rather than labour relations would likely have produced the same result. This is because a primary federal jurisdiction would still have been affected given that the means to attain health and safety is control of the conditions of work in the workplace. Such control involves labour relations and internal management.

EXTENT OF FEDERAL AUTHORITY OVER OCCUPATIONAL HEALTH AND SAFETY IN BC

The Alltrans trilogy makes it plain that Parliament must ensure that workers at federal enterprises in British Columbia are not put at risk by an absence of legislation designed to protect their health and safety. The Canada Labour Code, Part II and the body of regulations thereunder address this challenge with respect to workplaces falling under federal jurisdiction. Section 2 of the Canada Labour Code states:

In this Act, "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing:

- (a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,
- (b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,
- (c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,
- (d) a ferry between any province and any other province or between any province and any other country other than Canada,
- (e) aerodromes, aircraft or a line of air transportation,
- (f) a radio broadcasting station,

- (g) a bank,
- (h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces,
- (i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces, and
- (j) a work, undertaking or activity in respect of which federal laws within the meaning of the Canadian Laws Offshore Application Act apply pursuant to that Act and any regulations made under that Act.

Not surprisingly, this definition of "federal work, undertaking or business" in large measure parallels the expression of those matters over which the federal government has exclusive jurisdiction as set forth in section 91 of the Constitution Act, 1867.⁴²

Valid federal legislation and valid provincial legislation may co-exist in the same industry as long as they apply to different aspects of the industry. For example, there are federal regulations governing navigation which apply to vessels in the fishing industry and board regulations covering the health and safety of those engaged in the fishing industry. However, short of an agreement between the two levels of government clarifying jurisdiction, if there is a conflict, federal legislation prevails.

In addition to its occupational health and safety authority in respect to federal workplaces, Parliament has authority with respect to particular hazards and their control regardless of where they are found. Examples of this type of "dual purpose" (having a public or consumer safety aspect as well as a worker protection aspect) federal legislation include the Atomic Energy Control Act, Radiation Emitting Devices Act, Transportation of Dangerous Goods Act, 1992 and Hazardous Products Act.

DIFFERENT JURISDICTIONS WITHIN THE PROVINCIAL GOVERNMENT FOR OCCUPATIONAL HEALTH AND SAFETY

If an industry is not federal and if the particular hazards applying to a workplace are not subject to federal jurisdiction, the occupational health and safety legislation of the province of British Columbia prevails. However, intra-provincial jurisdiction for occupational health and safety does not necessarily fall entirely under the reach of the Workers' Compensation Board.

Section 2(1) of the Workers Compensation Act states that Part 1 of the Act applies to "all employers ... and all workers in British Columbia except employers and workers exempted by order of the Board." Part 1 includes Division (5), "Procedures and Miscellaneous" which contains

the specific sections which set out the board's regulation making and enforcement powers for occupational health and safety. However, depending on factors such as:

- the status of persons at worksites;
- the nature of the place of employment;
- the type of industry;
- the type of equipment; and
- the hazards workers face.

the jurisdiction for worker health and safety within the province may reside with BC government ministries or agencies whose jurisdiction for public safety or environmental protection includes workers within its scope.⁴³ This suggests that occupational health and safety jurisdictional conflicts can exist intra-provincially, as well as between the federal and provincial levels of government.

The Workers Compensation Act and the *IH&S Regulations* contain provisions which attempt to define the scope of the board's jurisdiction for occupational health and safety. This is done in two ways:

- by stating that the Act or regulations do not apply to certain industries or in certain circumstances; or
- by referring to other legislation or regulatory authorities and, by that reference, suggesting that the Board does not have jurisdiction over those matters.

For example, section 71(7) of the Workers Compensation Act states "subsections (3) [re: inspections of worksites] and (6) [re: training of blasters] do not apply to a mine or to a person employed in or about a mine as defined by the Mines Act."

Similarly, provisions in the *IH&S Regulations* limit the application of the regulations. For example, section 26.00 states that vehicles operating on fixed rails or tracks, under the jurisdiction of the "Mines Regulation Act" or under the "Coal Mines Regulation Act" are effectively excluded from the requirements of that section which pertain to mobile equipment.

The Regulations also contain a number of provisions suggesting, but not expressly declaring, that the board does not have jurisdiction over particular subject matter. For example, a footnote to section 12.09 states: "Electrical installations are governed by the requirements of the Electrical Energy Inspection Act of British Columbia and the regulations made pursuant thereto."

DECLARATIONS OF JURISDICTION WITHIN OTHER BC LEGISLATION

The commission has identified several provisions in other BC legislation that attempt to delineate jurisdiction of other agencies over certain subject matter. Some of these expressly exclude the board's jurisdiction.

For example, section 14 of the Building Safety Standards Act,⁴⁴ makes any regulation promulgated under the Workers Compensation Act of no force and effect if the board-approved regulation purports to address the design, construction, alteration, occupation or use of a building. This provision also says that regulations made under a series of specific statutes (not including the Act) which conflict with or alter the building safety or fire safety codes are of no force and effect. This means that board regulations may continue to have effect, so long as they do not address issues pertaining to the design, construction, alteration, occupation or use of buildings that are covered by the Building Safety Standards Act.

Memoranda of understanding

Given the variety of jurisdictions for occupational health and safety that exists in BC, the federal and provincial governments have implemented legislative provisions that permit them to enter into agreements and make appointments to clarify jurisdiction and develop cooperative relationships. These memoranda of understanding are possible under section 140 of the Canada Labour Code and subsection 71(9) of the Workers Compensation Act, which allow the parties to designate safety officers and to delegate authority to them.

To date, federal organizations employing officers designated under the Canada Labour Code, Part II include the Labour Program of Human Resources Development Canada (HRDC), operations in the air, marine and railway modes within Transport Canada, and the National Energy Board. As well, a number of HRDC officers hold designations under other federal legislation not administered by their branch.

However, notwithstanding the possibility of such appointments, federal occupational health and safety officers hold no appointments and discharge no responsibilities under any BC statutes. Similarly, while board officers have been designated as WHMIS Inspectors for the purposes of the Controlled Products Regulations made under the federal Hazardous Products Act, no board officers have been designated under any other legislation, either provincial or federal. The board also has not entered into any provincial agreements pursuant to subsection 71(9)(a) of the Workers Compensation Act whereby persons other than board officers can be authorized to carry out the duties and responsibilities of officers under the Act.

The board does have a number of memoranda with both federal and provincial agencies. These agreements relate to jurisdiction in particular industries and/or the promotion of co-operation in accident/incident investigations.

CONSOLIDATION AND TRANSFER

The Alltrans trilogy confirms that constitutional amendment would be required before federal occupational health and safety legislation could be consolidated within provincial legislation. This means that this commission's discussion must focus on the provincial sphere. By this we do not mean that matters of federal jurisdiction are immune from consideration. Pragmatically, however, federal-provincial memoranda are perhaps the best way to address these matters.

The commission reviewed a variety of provincial occupational health and safety-specific and dual purpose legislation to ascertain:

- if that legislation could be consolidated within a new occupational health and safety statute; and
- if the administration of that legislation could be transferred to the board or a new occupational health and safety agency.

The commission's review included previous studies on legislative consolidation and program transfers. Most useful was *Advancing Safety*,⁴⁵ a 1994 federal report that considered the results of a major consolidation in the area of public transportation accident investigation and safety. As stated above, we have not analyzed the dozens of provincial statutes and regulations that contain occupational health and safety components. This would be an unmanageable task within the commission's timeframe. Instead, the commission is proposing a method to determine where and when to consolidate provincial jurisdictions for workplace health and safety.

A methodology for assessing when it might be appropriate to consolidate legislation or transfer programs

The four step model the commission is proposing for assessing the appropriateness of consolidating legislation or transferring programs uses the following terms:

"Dual purpose legislation" means legislation which contains an occupational health and safety component as well as a public safety, environmental protection or some other non-occupational health and safety component, and is not occupational health and safety-specific legislation.

"Occupational health and safety agency" means the agency that is responsible for administering and enforcing the primary occupational health and safety legislation – this agency may or may not be the Workers Compensation Board of BC.

“Occupational health and safety-specific legislation” means legislation which is exclusively occupational health and safety legislation and does not have a dual purpose.

“Original agency” means the agency that administers the dual purpose legislation or occupational health and safety-specific legislation.

“Primary occupational health and safety legislation” or “primary legislation” means a new occupational health and safety act (or an amended Workers Compensation Act) and the occupational health and safety regulations promulgated there under, and which are administered by the occupational health and safety agency.

“Sever” means the legislative process whereby the occupational health and safety component of dual purpose legislation is removed from the dual purpose legislation.

“Consolidate” means the legislative process whereby the severed occupational health and safety component of dual purpose legislation or the occupational health and safety-specific legislation is brought within the primary legislation.

“Transfer” means the administrative process of moving programs, staff (or FTEs), equipment or other assets from the original agency to the occupational health and safety agency.

Step One: Identifying the occupational health and safety component

The first step is to decide if any portion of dual purpose legislation affects the reduction or elimination of workplace injury or disease. This decision is reached by answering questions such as:

Does the legislation:

- define or use terms like “worker,” “employer,” “workplace,” “hazards” or similar words suggesting an occupational health and safety component?
- include an objectives provision which suggests an occupational health and safety component?
- have a provision which declares or defines the application of the legislation that includes (or could include) a workplace or workers? Or is there a provision which declares exemptions or limits on the application of the legislation that, in turn, suggests it applies to a workplace or to workers?
- assign duties to workers, employers or others which, if met, would result in the reduction or elimination of workplace injury or disease directly or indirectly?

Also, if the legislation in question is a statute, do any of the regulation-making authorities grant the Lt. Gov. in Council the power to make regulations which, by the wording of that power, could encompass the reduction or elimination of workplace injury or disease directly or indirectly?

If the answers to these questions suggest that the legislation has an occupational health and safety component, the nature and the extent of that component should be described. This leads to a further question:

- If the occupational health and safety component is severed through amending legislation, would the remaining provisions constitute meaningful legislation?

If the answer is “yes,” this suggests that this legislation is dual purpose and would have to be severed before the occupational health and safety component could be consolidated within the primary legislation. If “no,” then the legislation is, in fact, occupational health and safety-specific and could be consolidated within the primary legislation.

Step Two: Technical consolidation of legislation

Once identified as either dual purpose or occupational health and safety-specific legislation, a decision must be made whether to consolidate the legislation under review within the primary occupational health and safety legislation. This is a technical analysis focusing on the legislative and related consequences of consolidation.

- Is it feasible or legislatively convenient to sever the occupational health and safety component from the dual purposes legislation and consolidate that component within the primary legislation?
- What legislative changes would have to be made to the primary legislation to accommodate the severed component? For example:
 - Are the inspection and enforcement mechanisms of the primary legislation similar to the inspection and enforcement provisions of dual purpose legislation?
 - If consolidation was to be done by regulation, what changes would have to be made to the primary statute’s regulation-making authorities?
- What legislative changes would have to be made to the dual purpose legislation in order to sever the occupational health and safety component?
- If consolidation is to be done by an amending statute, is there an opportunity to put that amendment on the Legislature’s agenda?
- If the consolidation is to be done by a regulation, when could the Cabinet consider that request?

A similar set of questions needs to be asked in reference to occupational health and safety-specific legislation within the primary legislation.

Step Three: Transfer of programs and other options

This step applies to both types of legislation. It focuses on whether the staff and resources used to administer and enforce the severed component or the occupational health and safety-specific legislation should be transferred from their existing agencies to an occupational health and safety agency. The analysis involves an in-depth review of the programs, policies and funding of the agency responsible for the administration and enforcement of the legislation to be consolidated.

It should be noted that the provincial government could simply transfer a program from an original agency to the occupational health and safety agency, and not consolidate the corresponding legislation. The government could also consolidate the legislation without transferring program responsibilities from one agency to another. In this case, the commission has assumed that, before government transfers programs, it would first consolidate the legislation or, at the least, decided that consolidation was feasible and appropriate and have confirmed the potential consequences of a program transfer. However, program transfer without legislative consolidation can have a similar effect to legislative consolidation without the requirement of approval by the Legislature. Nonetheless, it would still be necessary to ascertain if the program transfer would be in the public interest (see question 5).

To do this, it would be necessary to describe the agency that administers or enforces the component to be severed or the occupational health and safety-specific legislation before a transfer.

- Is it a branch of a ministry? A separate crown corporation or board?
- Where does it get its funding?
- To whom does it report?
- What types of staff with which skill sets have been hired to administer and enforce this legislation?
- Does the original agency administer or enforce any other legislation, in particular any legislation which is either occupational health and safety-specific or dual purpose?
- Has the agency entered into jurisdictional or enforcement agreements with other agencies concerning either the occupational health and safety-specific or the severed component to be consolidated?

While a case may be made for consolidation on technical grounds, the commission believes that doing so in the public interest is a more important consideration.

- Would transferring programs help to reduce or eliminate workplace injuries or diseases?
- Would transferring the administration and enforcement of programs compromise the legislation or programs that were left with the original agency?
- Would the program transfer compromise the objectives (stated or implied) of the legislation to be consolidated?
- Would the program transfer compromise the other legislation or programs of the occupational health and safety agency?
- Would changes have to be made within government to accommodate or resolve any problems which might arise from the transfer? For example, would it be necessary to upgrade the skills of the staff in one agency or the other? Would there be an impact on the pay scales of the staff to be transferred or others? Would there be strong resistance to the transfer amongst affected staff that could compromise the transfer? Does the applicable public service union agreement have an impact on such a change?
- Would the resulting program changes, if any, be more costly (in the short-term and long-term) than the benefits which might accrue from the transfer?

In order to fully answer these questions, it would be necessary to undertake an in-depth review of, among other things, the programs of the original agency and the occupational health and safety agency to ensure that the transfer would be in the public interest.

Step Four: Agreements as an alternative

Whether or not:

- it is not technically feasible or legislatively convenient to consolidate within the primary legislation the severed occupational health and safety component or the occupational health and safety-specific legislation, or
- it is too difficult or costly to transfer staff, resources and assets from one agency to another,

government needs to ascertain if a better alternative would be to establish jurisdictional or enforcement agreements between the original agency and the occupational health and safety agency so as to improve the way the component or specific legislation relates to or supports the objective of the primary legislation. Establishing agreements can be a viable alternative.

APPLYING THE CONSOLIDATION/TRANSFER METHODOLOGY

The commission received a number of submissions concerning consolidation in various areas. The four areas most commonly raised were mine safety, helicopter logging operations, industrial work camps and railways. The methodology we have described can be applied to all of the legislation regulating these industries. For the purpose of illustration we will focus most of our discussion on the Mines Act as it generated the most comment in written submissions and oral presentations. Other examples follow this discussion.

Mine safety

Subsection 71(7) of the Workers Compensation Act states that "subsections (3) [re: inspections of worksites] and (6) [re: training of blasters] do not apply to a mine or to a person employed in or about a mine as defined by the *Mines Act*." The board and others have interpreted this subsection as meaning that it has no jurisdiction for any aspect of occupational health and safety at mines.

Step One: Identifying the occupational health and safety component

Health and safety in BC mines is governed by the Mines Act. The Health and Safety Branch of the Energy and Minerals Division of the Ministry of Employment and Investment administer the applicable programs. Three regulations approved by the provincial cabinet under the Mines Act affect occupational health and safety at mines:

- One of the declared purposes of the *Mine Health, Safety and Reclamation Code*, is to "protect employees and all other persons from undue risks to their health and safety arising out of or in connection with activities at mines." The Code is also meant to:
 - safeguard the general public from risks arising out of or in connection with mining activities;
 - protect and reclaim land and watercourses affected by mining; and
 - undertake monitoring of mineral and coal extraction in an environmentally appropriate fashion.
- The *Workplace Hazardous Materials Information Systems Regulations (Mines)*, has provisions similar to the WHMIS regulations approved by the board which apply to other BC worksites.
- The *Mines Regulation* provides details regarding a mine inspector's powers to investigate a mine at any stage in its development regarding health and safety concerns and complaints, and requiring the mine management to grant the inspector full access to the mine and records.

The Code is an extensive regulation. It governs hours of work, joint worksite committees, response to accidents and other dangerous occurrences, personal protective equipment, workplace conditions, a worker's right to refuse, training and supervision, and certification of mine employees. It has adopted by reference the board's rules governing first aid supplies and services (sections 3.6.1 and 11.2.1, respectively) and the safe handling of asbestos (section 2.4.2, except at an asbestos mine). Section 2.11.15 applies by reference the provisions of the *Industrial Camps Health Regulations* administered by the Ministry of Health to seasonal, short-term mining camps.

If government decides to consolidate mine safety regulations under an occupational health and safety statute or the current *IH&S Regulations* (or the proposed, new *OHS Regulation*), the non-occupational health and safety aspects dealing with such concerns as mine closure, reclamation, public safety and environmental protection would have to be reassigned under the Mines Act. This demonstrates that the Code is dual purpose legislation. However, it would not be difficult identifying the occupational health and safety component of the Act or the Code.

Step Two: Technical consolidation of legislation

In general, the occupational health and safety provisions of this legislation do not appear to embody an environmental protection or public safety purpose. Those purposes are mostly addressed in other provisions. Therefore, occupational health and safety components of the legislation could be separated from the other components, creating a separate package of occupational health and safety-specific legislation for mines. The result would be two sets of regulations that would, nonetheless, have to relate to or refer to each other to ensure that the three purposes of the originating legislation - occupational health and safety, public safety and environmental protection - are achieved. The complexity of this cross-referencing would bring into the question the merits of separation.

The *Mines Regulation* is not restricted to occupational health and safety issues, but also defines the mine inspector's powers during exploration, closure and abandonment, and in relation to public safety issues. Therefore, if there was to be a separation of occupational health and safety from other mining subjects, two separate regulations dealing with inspectors' powers would have to be drafted. These regulations would not duplicate or conflict each other if one regulated occupational health and safety issues and the other exploration, closure, abandonment and public safety issues.

Step Three: Transfer of programs and other options

Moving mine occupational health and safety programs from the ministry responsible for promoting and developing mining has taken place in other Canadian provinces. The Northwest Territories, the Yukon, Quebec and New Brunswick have consolidated their mine specific occupational health and safety programs within trans-industry occupational health and safety programs operated by their compensation boards. Saskatchewan, Manitoba, Ontario, and Nova Scotia have moved them to labour ministries responsible for general occupational health and safety programs.

With the possible exception of Alberta, which retains the mine inspectorate within the Energy Utilities Board, BC is the only Canadian jurisdiction where mine occupational health and safety is retained within the ministry responsible for such functions as recording claims, assessing work, economic development and mine approvals.

The predominant theme from those provinces which have separated the occupational health and safety programs from development functions and consolidated those programs with other occupational health and safety programs is that they expected to reduce duplication of services and realize program savings as a result. However, none of the jurisdictions contacted by this commission could provide evidence that such savings were realized, or that occupational health and safety at mines necessarily improved with consolidation.

As part of the commission's research and in response to the issues raised in the public hearings, the commission wrote to Dan Miller, Minister of Employment and Investment, asking that he comment on the possible effects of consolidating mine worker health and safety legislation under the Workers Compensation Act and transferring the corresponding programs to the board. Unfortunately, the minister felt unable to respond to the commission's request, so the commission does not have the benefit of his observations on the merits of this suggestion.

This commission is unable to state if it is in the public interest to transfer any of BC's current mining safety legislation or program responsibilities to the board or some other occupational health and safety agency. While we have considered the arguments for and against such an action, and have studied previous reports on this issue, we have not evaluated the current mine safety programs or considered the effect of such a transfer.

Those who advocate a transfer of mine safety legislation to the board's jurisdiction have stated that having health and safety programs within the same legislative and ministry framework as programs designed to promote the development of natural resources could compromise

occupational health and safety at BC mines. To evaluate this concern it would be necessary to determine whether the current administrative separations that have taken place within the ministry are sufficient to minimize this possible effect. It would also be necessary to describe BC's mine inspectors and board officers by some common denominator, in order to study their respective backgrounds, qualifications and performance.

There are proportionately more mine inspectors than board officers. Some public submissions have stated that transferring these inspectors to the board would result in them becoming generalists; this, they believe, would lead to fewer occupational health and safety inspections in BC's mines. These presenters also tend to believe that the board is unable to respond as rapidly to occupational health and safety concerns as is the ministry.

The commission was also told that there is a need to maintain the highly specialized expertise of the current mine inspectorate and that there is a necessary link between their knowledge of and responsibility for mine safety hazards and the development and production of mines. The commission has been told that increases in fatalities and injuries in Quebec mines resulted when mine inspectors in that province were transferred to a general inspectorate. Since the late 1980s, only occupational health and safety inspectors with considerable mine expertise inspect Quebec mines.

An evaluation of mine safety programs would also be necessary to discover whether the current structure is able to provide workers with access to all of the occupational health and safety services they require. If the range of services available within the ministry is inadequate and cannot be efficiently and effectively met with services from outside the ministry, the analysis might point to the need to transfer programs, or for more or a better deployment of occupational health and safety resources within the ministry.

On the other hand, the ministry's mine safety program and its inspectors might benefit from being brought within the board if the board has an array of resources not currently available to the mine inspectors. This might include such things as an extensive library system, more health and hygiene services, and better staff training programs or opportunities for advancement.

In BC and some other jurisdictions, the agency responsible for administering mining occupational health and safety legislation takes a hands-on approach to certain aspects of mining operations, requiring mine managers to obtain approvals from the agency before they proceed. In some jurisdictions, such as Ontario, where mine safety has been taken away from a natural resource ministry and transferred to a general occupational health and safety program, agency approvals

have been replaced with an approval by a registered engineer. If BC's new occupational health and safety statute incorporates a similar move away from this form of approval, the effect of that change on mine safety would also have to be taken into consideration.

As we have already stated, answering these questions is beyond the scope of this commission's mandate. Government should further explore these issues if it wishes to fully ascertain the merit in transferring mine safety legislation to the board's or another agency's jurisdiction.

Step Four: Agreements as an alternative

Being unable to answer the questions in Step Three, the commission cannot state whether a memorandum of understanding or other forms of agreement between the board and the Ministry of Employment and Investment should be pursued, or whether government should move to consolidate these pieces of occupational health and safety legislation in the new act.

In making that decision, government will need to address the fact that, at present, the occupational health and safety jurisdiction at BC mines is defined geographically and not functionally; jurisdiction applies to a site, rather than the things which occur on that site. The Workers Compensation Act recognizes this in subsection 71(7).

(3) [re: inspections of worksites] and (6) [re: training of blasters] do not apply to a mine or to a person employed in or about a mine as defined by the Mines Act.

Under section 1 of the Mines Act, a mine is defined as including:

- (a) a place where mechanical disturbance of the ground or any excavation is made to explore for or to produce coal, mineral bearing substances, placer minerals, rock, limestone, earth, clay, sand or gravel,
- (b) all cleared areas, machinery and equipment for use in servicing a mine or for use in connection with a mine and buildings other than bunkhouses, cook houses and related residential facilities,
- (c) all activities including exploratory drilling, excavation, processing, concentrating, waste disposal and site reclamation,
- (d) closed and abandoned mines, and
- (e) a place designated by the chief inspector as a mine.

While this wording makes it appear that bunkhouses, cook houses and related residential facilities may not be outside the board's current jurisdiction, the more important issue for government is the rationale that precludes the board from inspecting the construction of buildings at a mine site. Currently, the chief inspector of mines has the authority to deem work that could eventually lead to an operational mine – such as logging required to clear a site, road

construction, installation of power lines, and construction of mine buildings - as being part of a mine and subject to the Mines Act.

Once above-ground mine facilities have been completed and the mine is fully operational, the current geographic limit to the board's jurisdiction over mines may be appropriate. However, to exclude the board from operations that are not directly related to the operation of a mine does not appear to be in the public, worker or industry interest.

The commission believes that until such time as government has completed its analysis, there is merit in developing more formal links between the board and the ministry. Such links can be established through memoranda without legislative change or program transfers.

We also believe that until government has resolved the consolidation issue, the geographic limitations on the board's jurisdiction over mines should be removed to allow the board jurisdiction over above-ground site preparation and construction.

Therefore, the commission recommends that:

48. (a) The current geographic limitation on the Workers' Compensation Board's jurisdiction over mines should be replaced by a functional approach which would transfer jurisdiction over appropriate above-ground activities to the occupational health and safety agency; and
- (b) Greater program links should be developed between the Ministry of Employment and Investment and the Workers' Compensation Board so that the Workers' Compensation Board can provide additional services to the ministry on a cost-recovery basis.

A number of presentations to the commission have raised the concern that short of ordering mine closure, inspectors under the Mines Act do not have as broad an array of enforcement options as may be necessary, or as are available to board officers under the Workers Compensation Act. To address these concerns, the commission would suggest the Minister of Employment and Investment review the Mines Act to ensure there are sufficient enforcement options, in particular when compared to the new occupational health and safety statute the commission is recommending.

Heli-logging

It is becoming more common for logging companies to hire a helicopter company to help remove cut logs from areas where it is not viable to build an access road. The commission has been told

that there is a parallel trend toward federally-regulated helicopter companies operating their own logging operations instead of sub-contracting to a logging company.

Helicopters fall under the exclusive jurisdiction of the federal government, through its regulation of aeronautics and air safety. The board has no constitutional authority to regulate the operation of helicopters, even if a helicopter company is entirely an intra-provincial operation. The board, however, has jurisdiction over the way a logging company conducts its logging operation.

Heli-logging is not a situation where a technical consolidation of the legislation or a transfer of the applicable program to the board could be employed to resolve the jurisdictional problem; jurisdiction over the operation of the helicopter is exclusively within the federal sphere. However, the commission believes it should be possible for the board to regulate the health and safety of workers at heli-logging operations owned by federally-regulated helicopter companies if not the workers who operate the helicopter itself.

The board has already entered into jurisdictional agreements with the federal Department of Fisheries and Oceans and the Canadian Coast Guard in support of the occupational health and safety regulations the board has approved concerning health and safety of workers on commercial fishing vessels. The operation of marine vessels is another area of exclusive federal jurisdiction.

The jurisdictional problems inherent in heli-logging exemplify the types of situations that can be resolved by federal-provincial memoranda.

Therefore, the commission recommends that:

49. The provincial government pursue jurisdictional agreements with Human Resources Development Canada and Transport Canada in order to ensure that the logging aspect of heli-logging is fully within the occupational health and safety agency's occupational health and safety jurisdiction.

Industrial Camps

The *Industrial Camps Health Regulations* is occupational health and safety-specific legislation promulgated under the authority of the Health Act. This regulation requires an industrial camp operator to report communicable diseases that arise in the camp to the medical health officer ("MHO"). The MHO or a public health inspector has the regulatory authority to inspect a camp to ensure compliance, and these officials have the power to close a camp if a health hazard is identified.

In response to the commission's request that she consider the advantages and disadvantages of consolidating the *Industrial Camps Health Regulation* within an occupational health and safety statute (or the existing Workers Compensation Act), Joy McPhail, Minister of Health, stated: "[this regulation] should be administered or replaced by legislation directly enforceable by the Workers' Compensation Board." The Minister then raised the possibility of a consolidation, transfer or enforcement agreement with the board concerning three other public health regulations that are also applicable to industrial work camps: *Sanitation and Operation of Food Premises Regulations*, *Safe Drinking Water Regulations*, and *Sewage Disposal Regulations*.

Therefore, the commission recommends that:

50. The provincial government:

- (a) ascertain what legislative changes are required to transfer the workplace occupational health and safety components from public health regulations (Health Act) to the province's occupational health and safety statute; or
- (b) provide for an enforcement agreement whereby appropriately trained agency officers would hold delegated authority to enforce these regulations at remote industrial work camps.

Recommendation 49(a) does not necessarily mean that if there is to be a legislative consolidation, health protection programs or staff would have to transfer to the board. However, if industry is to bear the costs of administering these regulations, it follows that the board or a new occupational health and safety agency should be the responsible agency. The minister stated:

Work camps are commonly located in remote areas where access by environmental health officers of regional health authorities is difficult and costly. Camps are set up specifically by employers to ensure that their employees are readily available to carry out their business. In this matter they are quite different than environmental health services provided to residential communities. Work camps should be considered as part of the worksite and the cost of providing surveillance and monitoring borne by the industries that require these camps.

In relation to recommendation (b), the commission suggests that the enforcement options under the Health Act be compared to the enforcement options under the new occupational health and safety Act to ensure that the former provide protection equal to the latter.

Intra-provincial railways

BC's occupational health and safety legislation does not apply to the health and safety of railway workers employed by inter-provincial railway companies, because that segment of the railway industry is the exclusive responsibility of the federal government. Responsibility for the health and safety of workers employed by railways that operate entirely within BC, however, is another matter.

The first reaction might be to assume that the board has jurisdiction to approve and enforce regulations addressing health and safety hazards faced by workers employed at wholly intra-provincial railways. However, by virtue of regulations made under the provincial Railway Act, the province has legislation separate and apart from the Workers Compensation Act and its regulations which applies to all employees of intra-provincial railways, and all others who are subject to the jurisdiction of the Railway Act.

The *Occupational Safety and Health Regulation* promulgated under the Railway Act mirrors many of the provisions set out under the board's regulations. It states, in part:

Division 101 – Application

Common application of regulations

101.01 Divisions 100 to 107 apply to all railway employees and other persons who are subject to the jurisdiction of the Act.

Application to employees performing “non-operating” functions

101.02 Divisions 206 to 245 apply to all railway employees and other persons who are subject to the jurisdiction of the Act while not employed on trains in operation.

Application to employees performing “operating” functions

101.03 Divisions 300 to 309 apply to all railway employees and other persons who are subject to the jurisdiction of the Act while employed on trains in operation.

Further health and safety regulations under the Railway Act include:

The *Visual Acuity, Colour Perception and Hearing of Railway Employees Regulation*, which governs the visual and auditory status of railway workers. While this regulation is obviously necessary to ensure the safe operation of railways, it has the dual purpose of also protecting railway workers themselves.

The *Workplace Hazardous Materials Information System Regulation* was approved under the Railway Act, the Workers Compensation Act, the Mines Act, and contains provisions common to similar legislation that has been approved across Canada.

This is an occupational health and safety-specific regulation with little in the way of direct public health and safety provisions.

In response to a letter from the commission, Michael Farnworth, Minister of Municipal Affairs and Housing (the ministry responsible for intra-provincial railways), advised the commission he did not believe there would be an advantage in either consolidating occupational health and safety legislation or transferring programs. The minister noted that the current legislation governs all aspects of railway operations; it is integrated with public safety regulations so two streams of similar regulations would have to be drafted if there was to be legislative separation.

The minister also suggested that his department could not afford to transfer any staff to the board if legislative consolidation was to take place. At the same time, he did suggest that his staff could be empowered to enforce occupational health and safety regulations promulgated under a new occupational health and safety statute that could extend to railway workers that fall within his mandate.

Therefore, the commission recommends that:

51. The Workers' Compensation Board consult with the Ministry of Municipal Affairs and Housing to:
 - (a) identify what legislative changes would be required to British Columbia's railways safety regulations so that they would provide the same level of protection afforded to other non-railway workers in British Columbia; and
 - (b) establish a memorandum of understanding that would allow for reciprocal enforcement of occupational health and safety legislation.

Notwithstanding the minister's observations, submissions to the commission raised a number of concerns about the way in which the railway occupational health and safety regulations are administered. Examples of such concerns include delays in inspections and delays issuing reports. The commission believes these concerns should be investigated further.

PROVINCIAL RESPONSIBILITY

Earlier in this report, the commission recommended that a new occupational health and safety statute be established for the province. Creating this statute will require repealing the occupational health and safety provisions of the current Workers Compensation Act and the repeal of the Workplace Act. However, it may be useful and necessary to consider consolidating other legislation and also transferring program responsibilities under that legislation from the original agency to a new occupational health and safety agency or to the board.

In this chapter, we have discussed a method to explore these options. Time does not permit us to exhaustively apply what we have proposed to the many dozen of dual purpose statutes and regulations.

Therefore, the commission recommends that:

52. If the government wishes to consider jurisdictional consolidations for occupational health and safety beyond the consolidation addressed in this report, that the government apply the four step legislative consolidation and program transfer approach outlined in this report or adopt a similar approach.

Which branch of the provincial government should seize the initiative and address jurisdictional consolidation will depend on where the legislative or program gaps, duplications or conflicts exist. In some circumstances, the task might fall to the cabinet, in others it might fall to particular ministers.

Despite the legislative provisions authorizing jurisdictional and enforcement agreements between the board and other provincial agencies, there are few such agreements in place. Those that do exist focus narrowly on specific industries (e.g., fishing) or particular hazards (e.g. wildlife and dangerous trees) or deal with operational matters (e.g., prosecutions, cooperation with the Coroner and promoting occupational health and safety at schools).

A number of different pieces of occupational health and safety related legislation administered by provincial ministries and agencies other than the board are referenced in the board's regulations. These references suggest that the board recognizes the importance of this legislation to worksite health and safety. However, if a board officer identifies a potential breach of this legislation, the board officer currently has no authority to issue an order or take other enforcement action. This does not make administrative sense. Board officers should have the authority to enforce occupational health and safety legislation promulgated under other statutes, even if that authority is only to be exercised in limited and clearly prescribed circumstances. This authority and its limits could be the subject of further memoranda of understanding between the board and these other provincial ministries or agencies.

For example, the board could establish an agreement with federal authorities which formally recognizes that all of the logging operation of a helicopter company (except the transportation of logs by a helicopter) are under provincial jurisdiction and, therefore, subject to the regulations under the new occupational health and safety statute. It may also be possible for the board to establish a general framework agreement with the HRDC to set out a step-by-step process which

board officers could apply to decide in any particular circumstances if the federal government held exclusive authority for occupational health and safety issues or whether provincial legislation could apply.

Similarly, given the apparent difficulty which public health officials face in applying the regulations under the Health Act to industrial camps, a mechanism could be set out in an agreement which ensures that there will be no gap in coverage. This could be done by the Minister of Health delegating to board officers the authority to enforce the public health regulations when they visit such remote worksites.

Therefore, the commission recommends that:

53. The provincial government pursue more jurisdictional and enforcement agreements with federal and provincial agencies which also have responsibility for aspects of occupational health and safety at British Columbia's worksites. These agreements could provide:
 - (a) detailed descriptions of jurisdictions or the specific steps to be taken to ascertain jurisdictions in particular circumstances;
 - (b) a mechanism for dealing with legislative gaps, duplication or conflicts which may arise; and
 - (c) a reciprocal delegation of enforcement powers to inspectors.

-
- ¹ Workers' Compensation Act, R.S.B.C. 1996, c.492.
- ² Workplace Act, R.S.B.C. 1996, c.493.
- ³ This regulation has been amended several times since 1977. Those amendments appear to include the addition of new provisions regarding fall protection, noise protection, violence in the workplace and other subjects not otherwise listed herein.
- ⁴ Regulations Act, R.S.B.C. 1996, c.402.
- ⁵ *Royal Commission Inquiry into Civil Rights*, the Honourable. J.C. McRuer, Commissioner, Queen's Printer of Ontario; 1968. Volume 1.
- ⁶ *Cabinet Legislation Committee Policies and Procedures*. [Mimeograph]. Victoria (BC): Ministry of Attorney General. Office of Legislative Counsel; 1982.
- ⁷ McRuer, p. 335.
- ⁸ See also the *Explanatory Materials on Part 3: Rights and Responsibilities*, Workers' Compensation Board of BC, [Mimeograph]. November 20, 1995.
- ⁹ *Regulation Review and Development Process: A Briefing Paper*, Workers' Compensation Board of BC, [Mimeograph]. (May 26, 1997), at page 28-29 (footnotes omitted).
- ¹⁰ McRuer Report, pp. 356-357.
- ¹¹ *Ibid.*, pp. 359-360.
- ¹² *Driedger on the Construction of Statutes* (Toronto (ON): Butterworths, 1994, 3rd. ed.) at page 263.
- ¹³ *Canadian Employment Safety and Health Guide*, CCH Canadian Ltd., Toronto, (ON), volume 1, p. 503.
- ¹⁴ Because WHMIS was introduced across Canada at about the same time, it is common for there to be specific duties requiring an employer to provide worker education and training in relation to hazardous materials covered under WHMIS rules.
- ¹⁵ Occupational Health and Safety Act, R.S.N.S. 1996, c.7.
- ¹⁶ The Workplace Safety and Health Act, R.S.M. 1987, c.W210.
- ¹⁷ Reference re Section 94(2) of the Motor Vehicle Act, (1985) 24 DLR (4th) 536.
- ¹⁸ Occupational Health and Safety Act, R.S.A. 1980, c. 0-2.
- ¹⁹ An Act Respecting Occupational Health and Safety, R.S.Q. 1977, c. S-2.1
- ²⁰ CCH Guide, volume 1, pp. 1201-2.
- ²¹ The Occupational Health and Safety Act, R.S.S. 1993, c. 0-1.1.
- ²² Occupational Health and Safety Act, R.S.O. 1980, c. 0.1.
- ²³ CCH Guide, volume 1, p. 1803.
- ²⁴ CCH Guide, volume 1, p. 1324.
- ²⁵ Occupational Health and Safety Act, R.S.Nfld. 1990, c. 0-3.
- ²⁶ Occupational Health and safety Act, R.S.Y.T. 1986, c.123.
- ²⁷ Canada Labour Code, R.S.C. 1985, c. L-2.
- ²⁸ Occupational Health and Safety Act, S.N.B. 1983, c. 0-0.2.
- ²⁹ CCH Guide, volume 1, p. 1006.
- ³⁰ 1996, CCH Canadian Limited at paragraph 40,016.
- ³¹ Canada Gazette Part II, Vol. 130, No.14, pp. 2136-2137.
- ³² Contravention Act, S.C. 1992, c.- 47.
- ³³ Forest Practices Code, R.S.B.C. 1996, c. 159.
- ³⁴ Reference the Memorandum of Understanding ("MOU") between Criminal Justice Branch, Ministry of Attorney General, Province of British Columbia and WCB signed May 23, 1997 on behalf of Ministry of Attorney General and June 25, 1997 on behalf of WCB. This MOU sets out the terms and conditions under which the Criminal Justice Branch will conduct prosecutions pursuant to the WCA Act and related statutes and regulations.
- ³⁵ Offence Act, R.S.B.C. 1996, c.338.
- ³⁶ CCH Guide, Volume 1, pp. 12, 014.-12,015.
- ³⁷ After the Supreme Court of Canada decision in R. v. Sault Ste. Marie [1978] 2 S.C.R. 1299, a person or corporation charged with breach of a regulatory statute is entitled to argue that it exercised due diligence to avoid committing the offence. There are two exceptions: absolute liability offences where the language or

nature of the legislation does not permit the accused a defence; and offences where the legislation makes it clear that the prosecution must prove that the accused intended to commit the offence.

³⁸ Reference re: Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486 (S.C.C.).

³⁹ *Review of the Occupational Health and Safety Act: A report of the occupational health and safety council*: Regina (SK); September 1989, p. 25.

⁴⁰ Alltrans Express Ltd. v. W.C.B. (B.C.), [1988] 51 D.L.R. (4th) 253; Bell Canada v. C.S.S.T. et al., [1988] 51 D.L.R. (4th) 161; and Canadian National Railway v. Courtois and C.S.S.T. et al., [1988] 51 D.L.R. (4th) 271) sometimes referred to as the “Alltrans trilogy”.

⁴¹ Workers' Compensation Board v. C.P.Railway Co., [1920] A.C. 184 (P.C.) and Commission du salaire minimum v. Bell Telephone Co. of Canada, [1966] 59 D.L.R. (2d) 145 (S.C.C.)

⁴² Constitution Act, 1867, (U.K.) 30 & 31 Victoria, c.3.

⁴³ See the board's briefing papers: *Board's Jurisdiction over Occupational Safety and Health*, Prevention Division, W.C.B., July 26, 1996, and *Occupational Safety and Health Jurisdiction, Policy and Regulation* Development Bureau, July 7, 1997.

⁴⁴ Building Safety Standards Act, R.S.B.C. 1996, c.42.

⁴⁵ *Advancing Safety: Report of the Canadian Transportation Accident Investigation and Safety Board Act Review Commission*, Government of Canada, Ministry of Supply and Services, Ottawa, 1994.

EXAMINING THE REGULATORY REVIEW PROCESS

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EXAMINING THE REGULATORY REVIEW PROCESS

The Royal Commission on Workers Compensation in BC is directed in Section 2 of its terms of reference:

To examine the process for the development and implementation of health and safety regulations and to provide recommendations for an efficient, timely process to establish and update these regulations appropriate to changing workplaces and work organization into the 21st century....

Implicit in this term is the need to examine the effectiveness of regulations in achieving policy goals for workplace health and safety. However, this fundamental issue cannot be addressed at this time as it is intimately tied to governance, accountability and to program design and delivery for the workers' compensation system. These are topics for the commission's final report.

This report addresses the more narrow issues described in the terms of reference: the process for developing and implementing regulations. The process for implementing regulations is dealt with in Section One of this report (*The Legislative Framework*). This section examines the process for developing regulations that began in early 1992 and ended in 1997. A brief history of the regulatory review process in BC from 1916 to the present can be found in Appendix B.

Reviewing the regulations was an immense project. The last extensive review occurred twenty years ago and many changes were required to update the regulations. This gave the project extensive breadth and depth, and regardless of any criticism there might be of the process that was adopted, the commission recognizes that the board and the various participants have accomplished an important task. The object now must be to ensure that the regulations remain relevant

METHODOLOGY

To carry out this review, the commission:

1. identified models, procedural rules and principles for effective consultation;
2. developed evaluation criteria based on the principles identified in step one;
3. compared the criteria developed in step two to the actual events and circumstances of the 1992 – 97 review process to identify the degree of agreement with and variation from accepted principles for consultation. The comparison was based on:
 - an extensive review of board documentation on the process;
 - interviews with selected individuals;
 - interviews and focus groups with randomly selected individuals who had participated at different levels and on different committees throughout the process; and
 - telephone interviews with randomly selected individuals who had participated at different levels and on different committees throughout the process; and

4. developed guidelines to provide for a more rigorous process that will increase general confidence in the public consultation process.

The commission carried out its research in the summer and fall of 1997. The new *OHS Regulations*, the product of the review process were promulgated in September of this year. The commission was not mandated to, nor did it review any of the specific regulations.

CONSULTATION AND REGULATORY REVIEW

Before examining the process for regulatory review adopted by the board, it is important to discuss some of the characteristics of a successful consultation process.

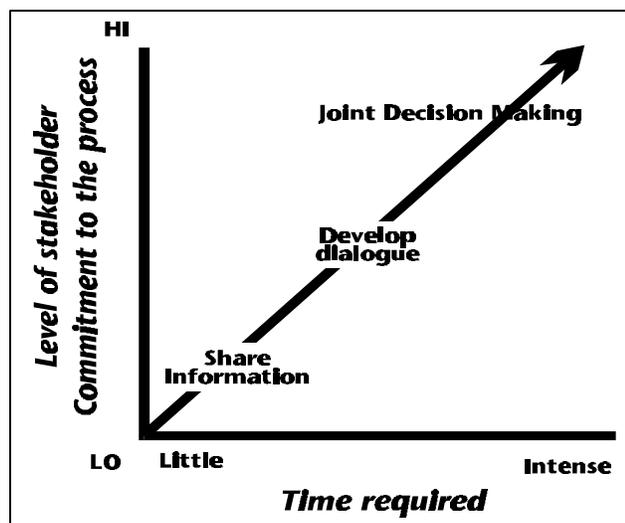
Any agency planning on conducting consultations must begin by answering a fundamental question: why consult? The simplest answer is that the agency may wish to:

- share information – this can be useful in shaping programs, projects or policy;
- develop an ongoing dialogue with individuals and interest groups; and
- involve individuals and interest groups in joint decision-making.

These are not discrete objectives. Joint decision making - the form of consultation attempted throughout much of the 1992 – 97 review - is dependent on the regulator, in this case the board and interest groups carrying on a meaningful dialogue. A meaningful dialogue is based on shared information.

Figure 1 shows the general relationship between consultation objectives, the commitment level of the interest groups, and the amount of time required for all parties to gain an understanding of the issues.

Figure 1



Once a decision to consult has been made, an effective process requires applying a plan similar to that described in Figure 2.

Figure 2

Phase 1 Consultation Preplanning	Step 1	Establish Consultation Purpose
	✓	Specify Mandate
	✓	Envision Successful Outcomes
	✓	Set Objectives
	Step 2	Analyze the Consultation Environment
	✓	Identify Strengths, Weaknesses, Opportunities, Threats
	✓	Identify & analyze supporting & restrictive forces
	Step 3	Identify Stakeholders
	✓	Establish participation criteria
	✓	Determine participation
	Step 4	Conduct Pre-Consultation Consultation
	✓	Consult Stakeholder or Consultation Mechanism
	✓	Identify Consultation Questions
Phase 2 Consultation Planning	Step 5	Establish the Consultation Team
	✓	Analyze Team Capability
	Step 6	Select Consultation Mechanisms
✓	Determine Appropriate Mechanism "Mix"	
✓	Identify Mechanism Implementation Issues	
	Step 7	Establish Consultation Action Plan
	◆	Finalizing consultation materials and documents
	◆	Finalizing consultation questions
	◆	Establishing information management strategy (internal)
◆	Defining communication strategy (external)	
◆	Finalizing consultation logistics	
Phase 3 Implementation	Step 8	Manage Consultation Issues
	✓	Manage Stakeholder Participation
	✓	Manage the Consultation Team
	✓	Manage Communication
✓	Manage problems/crises	
Phase 4 Follow Up	Step 9	Analyze and Report
	✓	Review and analyze stakeholder input
	✓	Integrate data into report on further regulatory changes
	Step 10	Communicate Results to Stakeholders
✓	Communicate results / content of consultation	
✓	Communicate decisions and rationale	
✓	Communicate "next steps" in context of maintaining relationships	
	Step 11	Evaluate and Monitor
✓	Identify "what went well," and "areas for improvement"	
✓	Monitor effectiveness of regulatory change	
✓	Review regulations according to plan	

In the **Pre-Planning** phase the agency must carefully consider the overall purpose for consulting and identify some of the issues that the consultation will need to address. The mandate and the desired outcomes and

objectives must also be clearly spelled out and act as a guiding philosophy to the consultation team.

Pre-planning also involves understanding the environment in which the consultation will take place, including understanding the political context, social issues, public opinion and other topics that could influence the process. The agency must also assess its own ability to bring the consultation to a successful outcome. This involves understanding factors such as:

- the agency's reputation;
- the ability of its staff to carry out the consultation; and
- the agency's organizational capacity.

A third pre-planning step is identifying the relevant interest groups. This includes developing selection criteria for participants that recognizes their potential contribution to the process and outcome of the review.

The fourth step requires contact with potential participants to assess their availability, interest and commitment to the process. This step is easier when the agency has completed:

- a preliminary review of the issues;
- and identified some of the relevant questions; and
- has a clear understanding of the key milestones in the decision-making process.

In the **Planning Phase**, a consultation team is assembled, external resources are secured, and a consultation strategy is established. The strategy must describe the mechanisms that will be used to involve the interest groups. The mechanisms must be chosen according to:

- the purpose for consulting;
- the time and money available; and
- the stakeholders' knowledge of the issues and readiness to participate.

Typically, an effective consultation uses a variety of mechanisms. Some are more suited to sharing information, while others are better at developing dialogue and joint decision-making. No single mechanism can meet all three purposes (sharing information, developing dialogue, and making decisions).

Proper **Implementation** of the strategy and the consultations includes managing interest groups, the consultation team, and the media. **Follow-Up**, phase four, is comprised of three steps. The data gathered throughout the consultation is analysed and committed to a report, the report is circulated to participants and the agency completes an internal evaluation.

In a regulatory environment, concluding a review usually initiates ongoing monitoring of the effectiveness of the regulations that have been the subject of the review.

THE BOARD'S APPROACH TO REGULATION REVIEW: 1992 - 1997

According to board documents and interviews conducted by the commission, the regulatory review strategy announced by the board of governors in January of 1992 was subjected to several changes before it was completed. The most notable was the passage of Bill 56 (in July of 1995), abolishing the board of governors and replacing it with a panel of administrators. This resulted in such significant change that a distinction must be made between the 1992 to 1995 phase and the post-1995 phase.

The review process used two main consultation mechanisms:

- **stakeholder working groups**, including speciality subcommittees to examine the content of the regulations and propose changes, and the Regulations Advisory Committee (RAC) to, among other things, review the core areas and advise on the overall process of the regulation review; and
- **public hearings** used to gather further stakeholder input in the regulatory review process once the work of the subcommittees and the RAC was completed.

The scope of the review was to be extensive, covering:

- Industrial Health and Safety Regulations;
- Occupational Environment Regulations;
- Industrial First Aid Regulations; and
- Workplace Hazardous Materials Information System regulations.

The strategy for the review stated that effective regulations:

- are achieved through a process that respects consensus and relies on the parties with the most direct interests and outcomes;
- are achieved through a process that provides for the greatest possible public participation and confidence in the outcomes;
- clearly address hazards in the workplace to protect the health and safety of workers;
- define responsibilities and accountabilities;
- clearly state the criteria for compliance;
- are in plain language, technically competent and easily understood;
- provide a mechanism for ongoing review and update in areas subject to changing knowledge and technology;
- do not restrict workplace activity and conditions beyond that necessary to address workplace hazards;
- address the diverse character of workplaces in the province; and
- are compatible with and do not overlap related regulations from other authorities.

The board's documentation shows that the regulatory review process was founded on several assumptions:

- Hearings would be held on priority items, such as agriculture and first-aid, and then on the overall package of regulations.
- Public hearings would be a minor exercise. High level consultation between labour and employer

representative was built into the regulation creation process.

- Employer and worker members would be directly involved in the process.
- The RAC would conclude its preliminary review of core area requirements early in the process.
- The RAC would make recommendations on regulations and leave policy and administrative matters to other bodies and consultative mechanisms.
- All issues where consensus could not be reached would be resolved in a timely manner through the Governors Committee for Regulation Review, or, failing that, the board of governors.

Regulation Review Structure

The structure for the review featured several bodies with varying scope and functions. These included the Governor's Committee on Regulation Review, the Regulation Advisory Committee, sixteen Specialty Subcommittees and a Secretariat for Regulation Review. In many ways, the most important feature of this structure was its bi-partite nature. Although board staff chaired and sat on many committees, they were limited to acting as facilitators and advisors to the labour and employer representatives. The governors did not recognize the administration of the regulatory agency as an interested party.

The Governor's Committee for Regulation Review consisted of two employers, two labour representatives and one public interest governor, as well as the chair of the board of governors. The GCRR was meant to:

- conduct public forums to assist in identifying issues;
- establish the position of coordinator of the regulation review process and fill it;
- participate in the regulation advisory committee;
- appoint members of specialty subcommittees;
- approve general budgetary and secretariat allocations;
- receive, review and, as necessary, amend the final report from the RAC;
- oversee the public hearing and gazetting process; and
- evaluate the effectiveness of regulation implementation.

The chair of the board of governors also chaired the RAC which, at the outset, was composed of seven labour and seven employer representatives selected by the governors on the advice of GCRR. The coordinator of the regulation review process (a board employee) served *ex officio* in an advisory capacity.

The RAC was to:

- implement the term of reference for regulation review adopted by the governors;
- make recommendations to the governors on the general structure of the regulations;
- review core area regulations. This included such things as:
 - the application of regulations;
 - joint occupational safety and health programs;
 - accident/incident investigations; and

- general requirements in places of employment;
- direct specialty subcommittees as necessary;
- review and integrate reports from specialty subcommittees; and
- participate in specialty subcommittees and otherwise act as ex-officio members on specialty subcommittees where appropriate.

In May of 1992, the RAC agreed to an operating protocol that included many of the points raised in *the Governor's Strategy for Regulations Review*. The protocol also included:

- the method of decision-making (by consensus);
- the method to be used should consensus not be possible (through voting);
- the frequency of meetings;
- the mechanism for establishing the meeting agenda;
- the conduct of the meeting and recording of minutes; and
- relationships with subcommittees.

Specialty subcommittees were established to review industry specific regulation. Typically, subcommittees had an equal number of labour and employer representatives (three to four), a board staff member seconded to the Secretariat for Regulation Review as chair, and a technical advisor. Given the magnitude of the task at the subcommittee level, it was deemed appropriate to phase in the subcommittees' work over three years according to the generality of the regulations, the priority of the topic area, and an estimate of the time required to review a section of regulations.

The Secretariat for Regulation Review was created to help develop regulations. The main duty of secretariat staff was to support the work of subcommittees and the regulations review process. Secretariat guidelines stated, in part, that:

- a secondment did not imply a full time transfer to the secretariat - staff still carried all or part of their regular duties;
- a subcommittee chair or technical advisor reported to the director of the secretariat/coordinator of the regulation review;
- those seconded to subcommittees were to be guided by the fundamental principle of the health and safety of workers;
- decision-making was to be accomplished through consensus. In the event of a vote, only worker and employer representatives had a right to vote; and
- dissensions were to be recorded in the form of a minority opinion.

The passage of Bill 56 – *the 1995 to 1997 Phase*

By the time Bill 56 replaced the board of governors with a panel of administrators, much had been accomplished:

- new regulations were in effect on permissible concentrations, violence in the workplace, occupational

- first aid, fishing and agriculture;
- public hearings on fall protection and ergonomics had been held; and
- the work of Phase 3 subcommittees was completed.

However, only a fraction of the regulations had been amended and enacted.

Following the passage of Bill 56, the RAC was replaced by the Advisors on Regulation Review with a membership composed of ten labour and ten employer representatives. Regulations were now submitted to the panel of administrators showing the consensus of the ARR as the recommendation.

Perhaps more significant than the creation of the ARR was the emergence of a tripartite model for regulation review; board staff were “officially” recognized. When consensus was not achieved on a particular regulation, staff now provided a position on the issue for the panel of administrators to consider.

In September 1996, the board held public hearings on the overall health and safety regulations. The results of the hearings were considered by the ARR who recommended the creation of small working groups structured along the lines of the former specialty subcommittees (typically two people from each major stakeholder). These working groups examined the input from the public hearings and made proposals for finalizing the regulations. Their recommendations were sent to the panel of administrators who made the final decision on promulgating the regulations.

The regulatory review process

Commission research identified 11 criteria for effective consultation in a regulatory environment. These criteria are based on a comparative analysis of principles enunciated in regulation reviews and public consultation processes in other sectors and jurisdictions. These criteria addressed the success of a process in:

- achieving its stated purpose;
- involving interest groups;
- designing and implementing appropriate involvement mechanisms;
- establishing a clear and defensible decision-making process;
- defining the roles, responsibilities and accountabilities of decision-makers;
- providing adequate resources to complete all phases of the process;
- establishing and meeting an appropriate time frame;
- sharing and distributing information;
- being compatible within the labour/employer/WCB context;
- being transparent and credible to those being consulted; and
- providing ongoing review.

The commission compared these criteria to the actual events and circumstances of the 1992 – 1997 review process as described in board documentation and through interviews. This comparison identified a number of

areas where there was considerable variance between principles for consultation and the experience of participants, particularly in the 1992 – 1995 phase. The following comments are examples drawn from the commission's research.

- Failed attempts at regulation review in the 1980's affected the board's credibility. This created a context that worked against the overall process.
- The series of public forums that began the review process offered the opportunity to raise concerns and issues on existing regulations. These meetings brought critical issues to the surface such as the need for regulations on Violence in the Workplace.
- Despite initially tight timelines, the board was flexible in offering additional time as required and adjusted the review process to respond to emerging issues. At the same time, the lack of an effective project management approach contributed to frequent deadline extensions.
- The consensus-driven bi-partite model adopted by the governors in 1992 led to stalemate and reinforced traditional partisan positions, possibly extending what was meant to be a two-year review into a six-year process. The closed nature of the debate between labour and management representatives did not aid in the search for new ideas.
- The mechanisms used by the board fostered confrontational, adversarial interaction instead of information sharing and an ongoing dialogue. For example, the public hearing was seen by some as a means to promote confrontation. Panel members were often physically separated from presenters and only intervened to ask questions. There was little room for dialogue or an exchange of ideas, and some interviewees indicated that panel members aggressively questioned and even embarrassed presenters in public.
- Interviewees noted that there were significant improvements following the passage of Bill 56; guidelines were provided to all public hearing panel members that clearly stated the appropriate conduct of panel members.
- While there was a high degree of consensus among labour and employer representatives in subcommittees, this consensus was not sustained in the RAC and among the governors. In general, consensus appeared to be more easily achieved when the topic was technical in nature (e.g., regulations on construction safety) and more difficult for topics that had social policy implications (e.g., workplace roles and responsibilities).
- Some interviewees felt RAC members represented the interests of their respective constituencies first and the mandate of the board second. While it had a broad mandate, serving as advisor, decision-maker and arbiter on issues unresolved at the subcommittee level, it seemed to hold little accountability for the quality of the regulations. In some respects, labour relations issues seemed to overshadow occupational health and safety issues and some interviewees stated that in an impasse, RAC was reduced to negotiating health and safety.
- Since 1995 the board has adopted an approach to decision-making which strives for consensus but reserves the right to make the final recommendation to the panel of administrators.
- Small business was under-represented at the start of the regulatory consultation process and

unorganized workers under-represented throughout. The board seemed to adjust its approach to small business by increasing employer representation on the ARR, and including representatives from small business. Even then, those representatives included in the later stages of the regulation review process clearly expressed some discomfort in “speaking on behalf of small businesses.”

- The more organized the stakeholder group, the more organized their participation in the consultation process. This was a source of frustration and discordance between labour and employer groups. For example, labour representatives perceived an inability or unwillingness on the part of employer's to make a decision on behalf of their constituents and interpreted it as a delaying tactic. At the same time, employer representatives were frustrated by what they perceived to be labour's better preparation. Employers also felt the process favoured labour, attributing this to several factors including the sympathies of the government in power and the direct influence of the chair of the board of governors.
- The decision-making process had a significant affect on the regulation review process. While the regulation review was comprehensive in scope, touching on and revising a substantial body of regulation several areas were not addressed or left unresolved including:
 - rights and responsibilities - health and safety committees, authority and training of members;
 - residual regulations related to occupational environment regulations;
 - medical programs;
 - camps (the governors had agreed to address only silviculture camps, but the RAC reversed this decision and required all camps to be addressed); and
 - occupational First Aid - hazard classifications.

(Note: although not resolved in the consultation process, the panel of administrators has addressed ergonomics.)

- Some participants commented that although board input into the regulatory review process was officially non-existent in the 1992 – 95 phase, the board did actually play an unofficial role which led to confusion and a lack to trust in the process. As well, regulations were sometimes written with little consideration for ease of administration and cost effectiveness. Some participants also felt that the board was not transparent in editing and writing the regulations.
- Consensus or agreement was reached in a number of areas during the 1992 - 1995 period. However, where consensus could not be achieved, decision-making mechanisms appeared to be unclear. In addition, the responsibility for decision-making in subcommittees and the RAC was not clear, or at the very least was not interpreted uniformly by all involved. Some interviewees said RAC made recommendations, other said they made decisions.
- The resources the board committed to the regulation review process were insufficient. While secretariat staff should be commended for providing subcommittees with all the data and information needed for their deliberations, some participants commented that many staff felt unduly pressured to chair subcommittees or provide technical expertise in addition to their regular duties. Some staff contributed significant amounts of overtime to support the review

process.

- In addition, a number of interviewees felt that per diem fees might have contributed to the time and expense of the process. They pointed out that some subcommittees included consultants paid by specific interest groups and that these consultants had a vested interest in prolonging the process.
- Subcommittees had a significant role in the review process and managed a substantial workload, particularly in reviewing the more technical side of the regulation. However, they were inconsistent in their output. While some subcommittees actually re-wrote the regulations, others only made recommendations on intent. Some subcommittee members clearly lacked expertise and an understanding of the issues.
- Information was not sufficiently shared among participants although the board made every effort to provide all appropriate technical level information. The level of information sharing at the RAC level was more similar to that found in formal labour relations negotiations than in a joint problem solving exercise. Complicating this, according to some interviewees, was a lack of understanding of the role interest groups played in the process. Information flowed more freely at the subcommittee level.
- There is little ownership and accountability by the workplace parties to the regulations drafted by the board after 1995. In addition, the haste to bring the review to a close in the 1996 - 1997 period led some participants to believe that the board was not being open.

In summary, many of the concerns expressed in the interviews and focus groups seem to relate to insufficient attention to project management principles and methodology. A clearer definition and “scoping” of the review process project would have led to more accurate forecasting of time requirements and identification of significant milestones. A thorough project break-down would have allowed for greater clarity of information and instruction to stakeholders regarding their key deliverables (in the form of reports, revised regulations and so on). Greater project definition would have tied the products of each stage of the review together.

ONGOING REVIEW

Regulations are only relevant for a limited period of time. Significant changes in such things as technology or social values can quickly make them obsolete, inadequate or even obstructive. This means that the regulatory agency must have in place a process for ongoing review. This requires a method to continually collect relevant information in order for the agency to anticipate and/or react to emerging issues and adherence to the same consultative principles as specific, time-limited initiatives.

The agency must be able to:

- collect relevant data;
- involve the workplace parties;
- adhere to the principles of effective public involvement; and

- ensure up-to-date occupational health and safety regulations.

As the board is currently developing a process for ongoing consultation, the commission was unable to ask participants about its ability to meet this criterion. In response to questions posed by the commission, the board characterised the strengths they used in completing the review process as including:

...enduring commitment to consultation, terms of reference for committees, the division of functions between the senior advisory committee and specialised industry specific and technical committees, and the participation of WCB staff in the discussion of the worker and employer.

A board document entitled **Proposed Strategy for Ongoing Review**, (July 15th 1997) proposed the following:

1. A standing senior advisory committee (the Health and Safety Advisory Committee – HSAC) be established as follows:
 - 12 community representatives - six each from the employer and worker communities, plus a chair and alternate chair from the WCB. There would exist the option of adding a public interest representative.
 - Representatives are to be drawn from the major sectors and include small business.
 - Rotation among the occupational sections aligned with the parts of the Regulations to be reviewed.
 - Membership is to be for two years.
 - Responsibilities include setting priorities for review, selection of community representatives on working groups, and review of care matters.
2. Establish subject and industry specific working groups composed of two to three representatives from each community, with the WCB acting in the capacity of chair and technical advisors. Third party representation would be included as appropriate.
3. Final reports from any committee are to be submitted to the Policy and Regulation Review Development Bureau.
4. HSAC and working groups are to be provided with terms of reference. The Board is to have final decision on terms of reference and membership.
5. Contracts with committees or groups would be provided and, in standard language, define terms and conditions including the "requirement to adhere to WCB abuse and harassment policy."
6. No voting rights are to be accorded to any person. All committees and groups are advisory only.
7. Differences of opinion would be recorded for consideration by the Board.

In its July 15th, 1997 resolution regarding Ongoing Review of the Occupation Safety and Health Regulation, the Panel of Administrators asked the Policy and Regulation Development Bureau to develop a discussion paper on "...development, review and approval of the Occupational Safety and Health Regulation." This paper is to be developed after consultation with the stakeholders.

The commission feels it is important for the board to develop an ongoing regulation review process. The regulations must reflect the nature of work in British Columbia. They must be timely and they must be effective. Section One of this report (The Legislative Framework for Occupational Health and Safety in BC) recommends that a new statute should direct the occupational health and safety agency to complete a review of the regulations every three years. This legislated requirement should lead to a process of ongoing information gathering, interest group consultation and public review. The agency should use the information it gathers to better identify where it needs to commit its resources to complete the review in a timely manner.

Recognizing the importance of effective ongoing consultation, the commission believes that the board or a new occupational health and safety agency should incorporate the following points into the consultation strategy. Doing so would bring the agency's approach more in line with accepted standards for consultation in a regulatory environment and better prepare it to address the health and safety issues of a rapidly changing workplace.

Interest Groups

1. Recognize that the regulator has a legitimate interest in the regulatory review process by giving it standing in any consultation process.
2. Broaden the current definition of stakeholder or interest group to ensure that the consultation process involves all of the appropriate parties. This could include, according to the issues being discussed and the forum they are discussed in, the medical community, small business, unorganized labour, injured workers, industry experts, the public at large, as well as organized labour and employers, and the traditional members of the bipartite structure.
3. Develop and publish criteria for selecting participants. The criteria should support a balanced selection of participants based on:
 - those central to the regulatory review process: employers and workers, and
 - those who may not be among the traditional groups but have the desire, ability and commitment to contribute significantly to the regulatory review process.
4. Develop and publish specific criteria for selecting members to serve on technical working groups. The criteria should ensure that all participants have an adequate level of expertise.
5. Whenever possible, pre-consult with potential participants to assess how to involve specific interest groups.
6. Provide training and education for participants appropriate to their roles and the information they require to participate.
7. Evaluate on an ongoing basis:
 - the contribution and commitment of the various participants;
 - the functioning of the review process; and
 - the quality (scientific credibility, timeliness) of the information that participants receive.

Roles and Responsibilities

8. Articulate clear terms of reference for each body, and evaluate their achievement.

Project Management

9. Allocate resources to the consultation process which adequately reflect the scope, timing and priority of ongoing regulatory review.
10. Adopt and follow a specific, structured project management approach to regulatory review. This should include clear timelines, milestones, deliverables and allocation of resources.
11. Provide participants with ongoing information describing the results of their contributions, the decisions that have been reached and the rationale for reaching them. Also provide details of the overall consultation process and status.
12. Adopt an evidence-based approach to consultation and regulatory review.
13. Evaluate the process and its outcomes and provide the report to the participants and the minister responsible for the agency.

Information

14. Define the critical consultation questions that are to be put to the participants. These questions should be developed from consultations with a wide variety of groups including the agency's internal staff. Public hearings are not a suitable forum for this activity.
15. Start the review process by having participants in technical working groups agree to the sources of information.
16. Develop the ability and capacity to synthesize research and clearly identify regulatory problem areas as a means to frame the regulatory review process.
17. Establish a mechanism to monitor the effectiveness of regulations.

Consultation Mechanisms

18. Employ a wider range of consultation mechanisms that recognize and respond to the varying needs, interests and resources of the broadest range of interest groups. The agency should do this by drawing on the experience of other agencies with consultation expertise, such as the Conference Board of Canada, to develop a consultation framework.
19. Use the consultation framework to guide all parties (including the agency) through a consistent problem-solving approach to defining the regulatory problem area, collecting and assessing data, generating potential solutions, defining decision-criteria and assessing and selecting potential solutions.
20. Consider using neutral third party facilitators to manage stakeholder participation.

Other Non-regulatory Mechanisms

21. Undertake research to identify alternative policy instruments to achieve policy goals in concert with or as alternatives to regulations such as education, technology change or incentive programs.

Therefore, the commission recommends that:

54. The occupational health and safety agency incorporate the principles described here in an ongoing regulatory review process.

Section One of this report also states that the agency that administers and enforces the regulations should not have the authority to promulgate them. This recommendation speaks directly to the issue of accountability, placing the responsibility for decision-making where it should most appropriately be, in cabinet. However, it does not address how regulations should reach cabinet.

Therefore, the commission recommends that:

55. The province's occupational health and safety statute state that:
 - (a) the occupational health and safety agency, in consultation with interest groups, develop and revise regulations and make recommendations on the adoption of those regulations to the agency's governing body;
 - (b) the occupational health and safety agency's governing body recommend changes to the regulations to the Minister of Labour; and
 - (c) the Minister of Labour decide which regulations to place before cabinet.

FATALITY BENEFITS

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INTRODUCTION

As part of its terms of reference, the commission has been asked to

... inquire into recurring and current issues pertaining to the operation and administration of the workers' compensation system, and without limiting the number, nature and scope of these issues, to include: ... 3(a) benefits for fatality claims ...

Survivors, and many other British Columbians, have identified a number of inequities in the current legislation. They have also told the commission how their lives have been drastically altered due to the work-related death of a loved one. Their stories speak of loss, suffering and grief. They have highlighted for the commission how difficult it is to draft legislation that compensates for this kind of loss. They have also reinforced our belief that the greatest hope lies in the prevention of workplace injuries and disease, that preventing fatalities will eliminate the need for fatality benefits and avoid needless suffering.

Addressing section 3(a) of the commission's terms of reference presents a different type of challenge than those found in section 2. The challenge is inherent in the opening paragraph to section 3:

To inquire into recurring and current issues pertaining to the operation and administration of the workers' compensation system...

While it is possible to describe and subsequently analyze the legislative framework for occupational health and safety separate from the "operation and administration of the workers' compensation system," the same is not true for all of the various aspects of benefits for fatality claims. Survivor benefits are indivisible from the compensation system; the principles that apply in this area relate to other areas within the system.

Knowing this to be true, the commission has concluded that in certain specific areas, such as Canadian Pension Plan benefits or those areas that are tied to the formula for calculating average earnings or levels of compensation, we cannot now make recommendations. To do so before we have completed our review of the compensation system could place the system on a path of unknown destination. We cannot risk committing that disservice to the people of this province.

This does not mean that the commission has been unable to address a number of inequities in the Act. Should government see fit to accept these recommendations and amend section 17 (and relevant sub-sections of sections 1 and 16), we suggest that a draft of the legislation be forwarded to the commission for review and comment.

This report begins with an analysis of three issues which the commission believes raise concerns about fatality benefits in relation to the Charter of Rights and Freedoms. It then addresses the separate provisions found in section 17 of the Workers Compensation Act.

The recommendations made in this report are not intended to characterize the system or make a statement on what its overall philosophy or rationale should be. These are issues for the final report.

Fatality Benefits and the Canadian Charter of Rights and Freedoms

Section 15 of the Canadian Charter of Rights and Freedoms prohibits discrimination on various grounds, including age, gender and, in some cases, sexual orientation and marital status.

The courts have created a variety of tests to assist in evaluating whether a given distinction is “discriminatory” within the meaning of s.15. One involves an assessment of whether a distinction between groups has been drawn on the basis of stereotypical presumed group characteristics rather than the actual merits, capacities or circumstances of group members. The more a distinction is based on the former, the more likely it becomes that it is discriminatory and contrary to s.15.

A finding that a distinction is discriminatory does not automatically mean that the distinction violates the Charter. Section 1 of the Charter makes it clear that guaranteed rights are not absolute and that an infringement of a specific Charter right, such as the s.15 equality right, may be justified in certain circumstances. The onus of establishing discrimination would be on a party alleging an infringement of s.15. Once that onus has been met, the government would then bear the onus of showing that the infringement is justifiable under s.1.

An inquiry into justification for an infringement under s. 1 cannot be done without first understanding the objectives the legislation at issue is designed to meet. This is because the courts require that the infringement of the Charter right be weighed against the legislation’s objectives. In particular:

- the objectives must be sufficiently important to warrant overriding a Charter right;
- the distinctions must be rationally connected to attaining those objectives; and
- there must be proportionality between those objectives and the measure resulting in infringement of the Charter right.

The commission has identified three broad categories of distinctions, which arise in the fatality benefit context and raise concerns about consistency with the Charter:

1. distinctions between legally married, common law and same sex couples;
2. age distinctions; and
3. distinctions between surviving spouses who remarry and those who do not.

The first two issues arise under the current fatality benefit provisions. The third does not arise at this time; however, it raises the question of whether the Act should be amended to provide for termination of spousal pension benefits on remarriage in some or all circumstances.

The commission has made recommendations to address distinctions between legally married, common law and same sex couples. However, the commission has determined that it cannot deal with the remaining two categories at this time. An adequate s. 1 analysis cannot be undertaken with respect to these matters until there has been a comprehensive inquiry into the overall philosophy and underlying social policy of the worker compensation system and its relationship to the fatality benefit scheme. This is discussed in more detail under the next two headings.

The Relevance Of Age Distinctions

Pension entitlements of surviving childless non-invalid dependent spouses vary under sections 17(3)(c) to (e) depending on age. While the formula is complex, in general those 50 years or over receive the highest levels of compensation and those under 40 years receive the lowest.

The commission considers that the age distinctions currently set out in 17(3)(c) to (e) very likely constitute discrimination contrary to the equality rights enshrined in s. 15 of the Charter. This is consistent with conclusions reached by the Appeal Division. However, this does not resolve the issue but simply shifts the focus from a s. 15 inquiry to s. 1.

The current age distinctions appear to relate solely to a surviving spouse's ability to secure other forms of support by becoming employed and perhaps by remarrying. Such considerations do not relate to the spouse's actual loss resulting from the worker's death but rather to the spouse's level of financial need. This raises the issue of the basic nature of fatality benefits in the context of loss vs. need. If fatality benefits are primarily loss-based and meant to secure income continuity, then such needs-based distinctions become less relevant and more difficult to justify. Thus they are more likely to infringe on the Charter.

However, if fatality benefits are primarily needs based, it is more likely that such distinctions are justifiable under s. 1. In this case, the more reliable the distinctions are as indicators of actual need, the more likely they will be supportable under the proportionality and rational connection tests applied under s. 1.

This needs vs. loss analysis must be undertaken within the context of the compensation system as a whole. Until the commission has reviewed and described the entire system, its objectives and the basis for compensation, the commission cannot make recommendations about the justifiability of age distinctions as currently set out or in alternative form. Therefore the issue of age distinction will be addressed in the commission's final report.

Termination Of Benefits Upon Remarriage

From 1916 until 1993 the Act stated that a surviving spouse's remarriage resulted in termination of pension benefits. The underlying rationale appears to have been that remarriage in all cases was presumed to have eliminated the economic effects arising from the death of the former spouse. In 1993, the Act was amended to

remove the termination provision and reinstate benefits for those who had remarried after s. 15 of the Charter came into effect (1985).

In *Grigg v. British Columbia*¹, the BC Supreme Court determined that:

... the distinction between those who remarried prior to the specified date and those who remarried after constituted discrimination and infringed s. 15.

This decision was based on the discrimination being due to the date of remarriage and not the fact of remarriage. Following the decision, and before the court could proceed to a planned inquiry into justification under s. 1 of the Charter, the provincial government reinstated terminated benefits to all survivors who had remarried, regardless of the date of remarriage.

Once again, this issue involves an assessment of whether the rationale and purpose underlying the compensation system as a whole and fatality benefits in particular justify termination of benefits on remarriage where it is clear that the surviving spouse's economic loss has been reduced by support now provided by the new spouse.

As the commission cannot address this issue until it has completed its inquiry into the entire system, its objectives and the basis for compensation, the commission has determined that the issue of remarriage will be dealt with in its final report.

FATALITY BENEFITS AND THE WORKERS COMPENSATION ACT

The following addresses the sections of the Workers Compensation Act that directly affect fatality benefits. It describes changes that the commission believes should and can be made to the Act now and identifies those areas that will be dealt with in the final report.

Adopting the recommendations made here should not dramatically affect the compensation system as a whole; it should make the application of fatality benefits more equitable pending the commission's final report.

SECTION 1 DEFINITIONS

“dependant” means a member of the family of a worker who was wholly or partly dependent on the worker’s earnings at the time of the worker’s death, or who but for the incapacity due to the accident would have been so dependent, and, except in section 17(3) (a) to (h), (9) and (13), includes a spouse, parent or child who satisfies the board that he or she had a reasonable expectation of pecuniary benefit from the continuation of the life of the deceased worker.

The commission recommends no changes to the section 1 definition of “dependant” at this time.

“member of family” means wife, husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half brother and half sister and a person who stood in loco parentis to the worker or to whom the worker stood in loco parentis, whether related to the worker by consanguinity or not.

“Member of family” is incorporated into the definition of “dependant.” Together, these provisions establish the categories of relationships to deceased workers that may give rise to entitlements to fatality benefits.

The commission believes that these categories should reflect current social norms and be consistent with relevant social legislation. The terms “wife” and “husband” connote legal marriage and heterosexual relationships and thus appear to exclude persons in common law or same sex spousal relationships. Maintaining such a definition is inconsistent with provincial legislation such as the Family Maintenance Enforcement Amendment Act and the Family Relations Act, both of which include definitions of “spouse” which incorporate formal marriages, common law relationships and same sex marriage-like relationships. The commission has not identified any potential rationale related to workers’ compensation legislation that could justify exclusion of benefits from common law or same sex couples that would otherwise be available to married couples. The term “spouse” is not defined in the Act.

Therefore, the commission recommends that:

56. (a) the reference to “wife” and “husband” be deleted and that word “spouse” be substituted in the s. 1 definition of “member of family” and that the same substitution be made throughout s. 17 where the words “wife” and “husband” currently appear;
- (b) the terms “widow” and “widower” be deleted where they appear throughout s. 17 and the term “surviving spouse” be substituted; and
- (c) the term “spouse” be defined in the act as meaning a person who:
 - (i) is married to another person; or
 - (ii) has lived with another person in a marriage-like relationship for a period of 2 years where there are no children, and 1 year where there are children, and the marriage-like relationship may be between persons of the same gender.

“invalid” means physically or mentally incapable of earning;

“invalid child” includes a child who, though not an invalid at the date of death of the worker, becomes an invalid before otherwise ceasing to be entitled to compensation.

The commission finds that the term “invalid” does not reflect modern language use. A more appropriate alternate term should be used.

Therefore, the commission recommends that:

57. A term alternate to “invalid” be used throughout the Workers Compensation Act.

SECTION 17(1) DEFINITIONS

Section 17(1) Definition of CHILD

“child” means

a child under the age of 18 years, including a child of the deceased worker yet unborn; an invalid child of any age; and a child under the age of 21 years who is regularly attending an academic, technical or vocational place of education,

and **“children”** has a similar meaning.

The commission believes that the object of this section should be to provide compensation to children of deceased workers until they are able to be reasonably self-sustaining. The current age limitations in the definition of “child” may not accomplish that object and in some circumstances will prematurely end surviving children’s benefits.

In the modern social context, many children remain in school and pursue post-secondary education well past the age of 21. This is reflected in other legislation, such as the Canada Pension Plan Act, as well as in many extended dental and health insurance plans, where it is common to extend benefits to children up to the age of 25 if they are attending recognized post-secondary institutions.

The cessation of benefits upon attaining the age of 18 years is also inconsistent with the Infants Act, which recognizes legal capacity at age 19. The Family Relations Act also makes parents responsible for maintaining children until that age.

Therefore, the commission recommends that:

58. (a) the reference to the age of 18 in part (a) of the above definition be changed to 19; and
- (b) the reference to the age of 21 in part (c) of the above definition be changed to 25.

Section 17(1) Definition of FEDERAL BENEFITS

“federal benefits” means

benefits payable under the Canada Pension Plan and to which any dependants are entitled as a result of the death, together with any benefits to which the dependant spouse is or becomes entitled under the Canada Pension Plan as a result of having retired or reached retirement age.

The commission recommends no change to this definition at this time (see discussion of CPP under s.17(3)).

SECTION 17(2): FUNERAL COSTS

Where compensation is payable as the result of the death of a worker or as the result of injury resulting in the death, the consequent funeral expenses in the sum of \$600, and incidental expenses relating to the death in the sum of \$200, must be paid in addition to any other compensation payable under this section; but the employer of the worker must bear the cost of transporting the body to the place of business of the nearest undertaker, and if burial does not take place there any additional transportation may, up to the sum of \$200, be paid out of the accident fund and no action for an

amount larger than that fixed by this subsection lies in respect of the funeral, burial or cremation of the worker of cemetery charges in connection with it.

In 1995 a tripartite Ad Hoc Committee recommended "a flat rate 'death benefit'" with a value of \$6,000, paid in advance (\$5,000 for the funeral and \$1,000 for incidentals). The board of governors of the Workers' Compensation Board adopted this recommendation on November 16, 1994. The governors then forwarded a request to the Minister of Skills, Training and Labour to amend section 17(2) to reflect the recommendation. The commission has confirmed with the Ministry of Labour that this recommendation was forwarded by the board, but was not acted upon.

Submissions made to the commission state that funeral costs are usually twice as much as the amount allowed for by the board. The commission agrees that benefits for funerals and related expenses should be increased to reflect actual costs. The commission also believes that the employer should remain responsible for the costs of transporting the body to the nearest undertaker.

Therefore, the commission recommends that:

59. (a) the amount payable for funeral expenses should be increased to an amount of \$6,000, being a consolidation of \$5,000 for the funeral and \$1,000 for incidental expenses;
- (b) the employer should continue to bear the cost of transporting the deceased worker from the worksite to the nearest undertaker;
- (c) the amount payable for additional transportation if burial does not take place at the nearest undertaker should be increased from "up to \$200" to "up to \$1,000";
- (d) the above funeral benefit should be adjusted pursuant to the Consumer Price Index to the date on which the governors' recommendation was made to government;
- (e) the transportation allowance should be annually adjusted pursuant to the Consumer Price Index effective from the date of this report; and
- (f) these new benefits should apply to new claims.

SECTION 17(3): CALCULATION OF COMPENSATION

Section 17(3)(a) and (b)

Where compensation is payable as the result of the death of a worker or of injury resulting in such death, compensation must be paid to the dependants of the deceased worker as follows:

- (a) *where the dependants are a widow or widower and 2 or more children, a monthly payment of a sum that, when combined with federal benefits payable to or for those dependants, would equal the total of*
 - (i) *the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability, subject to the minimum set out in paragraph (g); and*
 - (ii) *\$65 per month for each child beyond 2 in number;*
- b) *where the dependants are a widow or widower and one child, a monthly payment of a sum that, when combined with federal benefits payable to or for those dependants, would equal 85% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability, subject to the minimum set out in paragraph (g);*

As 17(3)(a) and (b) relate to compensation levels, the commission has determined that these cannot be dealt with in this report for the reasons set out in the introduction. In addition, both subsections address federal benefits. Canada Pension Plan benefits are treated differently when applied to compensating disabled workers (stacking) than they are when applied to fatality benefits (integration). The Workers' Compensation Board describes "stacking" and "integration" as follows:

When a worker or survivor receives benefits from two or more sources without any adjustment to reflect the existence of other benefits, there is said to be "stacking" of the benefits. When one benefit is reduced to take into account the receipt of a benefit from another sources, there is said to be "integration" between the two types of benefits.²

Submissions to the commission argue that it is inequitable to deduct Canada Pension Plan benefits from survivors' pensions where no similar deduction is made from disability pensions. This highlights the links between the various components of the compensation system and reinforces the commission's concern that changes in one part of the system could reverberate throughout the system in unexpected ways. Therefore the commission will defer any decisions in this area until it has had an opportunity to fully examine the whole compensation system, including stacking or integrating, and the adequacy of disability compensation benefits. These issues will be addressed in the final report.

Section 17(3)(c)

where the dependant is a widow or widower who, at the date of death of the worker, is 50 years of age or over, or is an invalid spouse, a monthly payment of a sum that, when combined with the federal benefits payable to or for that dependant, would equal 60% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability, but the monthly payment must not be less than \$234.36;

Section 17(3)(d)

where the dependant at the date of death is a widow or widower who is not an invalid and is under the age of 40 years, and there are no dependent children, a capital sum of \$10 000, of which \$1 000 is payable immediately and the remaining \$9 000 is payable at a time the board determines; but the payment must not, except at the request of the dependant, be delayed beyond 6 months after the date of death of the worker;

Section 17(3)(e)

where the dependant is a widow or widower who is not an invalid and who, at the date of death of the worker, has reached the age of 40 years but not the age of 50 years, and there are no dependent children, a monthly sum calculated under Schedule C;

Insofar as 17(3)(c) to (e) relate to compensation levels and raise Charter issues, the commission has determined that they cannot be dealt with in this report for the reasons set out in the introduction.

SECTION 17(3)(F): ORPHANED DEPENDANT CHILDREN

Section 17(3)(f)

where there is no surviving spouse or common law spouse eligible for monthly payments under this section, and

- (i) the dependant is a child, a monthly payment of a sum that, when combined with federal benefits to or for that child, would equal 40% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death sustained a permanent total disability;*
- (ii) the dependants are 2 children, a monthly payment of a sum that, when combined with federal benefits payable to or for those children would equal 50% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability; or*
- (iii) the dependants are 3 or more children, a monthly payment of a sum that, when combined with federal benefits payable to or for those children, would equal the total of*
 - (A) 60% of the monthly rate of compensation under this Part that would have been payable if the deceased worker had, at the date of death, sustained a permanent total disability; and*
 - (B) \$65 per month for each child beyond 3 in number, subject in all cases, to the minimum set out in paragraph (g);*

As 17(3)(f) relates to compensation levels, the commission has determined that it cannot be dealt with in this report for the reasons set out in the introduction.

SECTION 17(3)(G): MINIMUM ALLOWANCES/AVERAGE EARNINGS

Section 17(3)(g)

the minimum allowances payable under paragraphs (a), (b) and (f) must be the allowance that would be payable if the allowances were calculated under those paragraphs in respect of a deceased worker with average earnings of \$7 000 per annum;

As noted in the introduction to this report, fatality benefits pensions are based on the amounts for permanent total disability as it relates to a worker's average earnings. The commission will address benefit levels for fatalities in conjunction with the adequacy and appropriateness of levels for disability compensation. This analysis, which will form part of our final report will include calculations relating to minimum and maximum benefits for both fatality benefits and disability benefits.

SECTION 17(3)(H): OTHER DEPENDANTS

Section 17(3)(h)

where there is

- (i) no dependant spouse or child entitled to compensation under this section, but a worker leaves other dependants, a sum reasonable and proportionate to the pecuniary loss suffered by those dependants by reason of the death, to be determined by the board, but not exceeding in the whole \$115 per month; or*
- (ii) a dependant spouse, or a dependant child or children, entitled to compensation under this section, but not a spouse and child or children, and, in addition, the worker leaves a*

dependant parent or parents, then, in addition to the compensation payable to the spouse or children, a sum, reasonable and proportionate to the pecuniary loss suffered by the dependant parent or parents by the death, to be determined by the board, but not exceeding \$115 per month.

The commission acknowledges that there are meaningful family relationships besides spousal and parent-child in which dependencies exist. Under the fatality benefits scheme, if a deceased worker leaves both a dependant spouse and children, these other dependant relationships do not give rise to a right to fatality benefits. If a deceased worker leaves either a dependant spouse or children, only the worker's parents may advance claims under s. 17(3)(h)(ii). If a deceased worker leaves neither a dependant spouse nor children, all other dependants may advance claims under s. 17(3)(h)(i). This generally reflects and is consistent with the hierarchy of legal claims that may be advanced against individuals under the Family Compensation Act or against deceased individual's estates under intestate succession legislation.

The commission regards the current scheme as appropriate and does not recommend any changes with respect to the categories of relationships or the priorities set out in s. 17(3)(h). To the extent that 17(3)(h) also relates to compensation levels, the commission has determined that this aspect cannot be dealt with in this report for the reasons set out in the introduction.

SECTION 17(3)(I): REASONABLE EXPECTATION OF PECUNIARY BENEFIT

Section 17(3)(i)

where

- (i) no compensation is payable under the foregoing provisions of this subsection; or*
- (ii) the compensation is payable only to a spouse, a child or children or a parent or parents, but the worker leaves a spouse, child or parent who, though not dependant on the worker's earnings at the time of the worker's death, had a reasonable expectation of pecuniary benefit from the continuation of the life of the worker, payments, at the discretion of the board, to that spouse, child or children, parent or parents, but not to more than one of those categories, not exceeding \$115 per month for life or a lesser period determined by the board; and*

The Ad Hoc committee Report recommended that this provision be repealed, while some submissions to the commission have argued that it be broadened to allow claims by others besides a spouse, child or parent. In the commission's view, this section strikes an appropriate balance in its present form. It is reasonable to limit claims by those who cannot establish dependency, but who can show a reasonable expectation of monetary benefit from the continuation of the worker's life to spouses, children and parents. These individuals would be entitled by law to seek maintenance under the Family Relations Act during the worker's life.

To the extent that this section also relates to compensation levels, the commission has determined that this aspect cannot be dealt with in this report.

SECTION 17(3)(J): FOSTER PARENTS

Section 17(3)(j)

where the worker leaves no dependent widow or widower, or the widow or widower subsequently dies, and the board considers it desirable to continue the existing household, and when a suitable person acts as a foster parent in keeping up the household and taking care of maintaining the children entitled to compensation, in a manner satisfactory to the board, the same allowance is payable to the foster parent and children as would have been payable to a widow or widower and children and must continue as long as those conditions continue.

The commission agrees that in instances of the death of both parents, it may be appropriate to designate a foster parent to provide for the continued care and maintenance of surviving dependant children. Where the foster parent assumes the parental role so that the household can continue, overall household expenses may remain essentially unchanged and it is therefore appropriate that the foster parent receive compensation equal to what would have been paid to a surviving parent after a worker's death.

Deciding to continue an existing household and identifying a suitable foster parent are decisions that should be based on the best interests of the surviving children. The Workers' Compensation Board is a compensation and prevention agency. The commission is unaware of any expertise it might have in assessments relating to the best interests of the children. Other government agencies are established and experienced in this area and are better able to make these decisions.

The Ad Hoc Committee Report indicated that board policy prohibited a natural parent of surviving children from being paid as a foster parent under this section. If this is still true, the commission notes that this could leave a gap in the compensation scheme where a worker who is the custodial parent dies and a non-dependant spouse who is raising the children subsequently dies. In such circumstances, it may be appropriate for the non-custodial former spouse who is also the natural parent to assume responsibility for surviving children. The commission sees no reason why such an individual should not receive the same compensation that a foster parent would receiver under section 17(3)(j).

Therefore, the commission recommends that:

60. (a) 17(3)(j) be revised so that assessments relating to the best interests of children in regard to their living situation and selection of a suitable foster parent are undertaken by an agency or individual as designated by the Ministry for Children and Families;
- (b) if an existing household is continued and a foster parent designated, the Workers' Compensation Board shall make payments to the foster parent as currently provided by the section;
- (c) there be a periodic reassessment of the living situation by a party with suitable expertise as designated by the Ministry for Children and Families; and
- (d) the Workers' Compensation Board abandon the policy of prohibiting natural parents from being paid under this provision.

SECTION 17(4): DEPENDENCY STATUS CHANGES

Section 17(4)

Where an invalid spouse ceases to be an invalid or a widow or widower with dependent children no longer has dependent children or there is a reduction in the number of dependent children, the spouse, widow, widower or children is then entitled to the same category of benefits as would have been payable if the death of the worker had occurred on the date the invalid spouse ceases to be an invalid or the widow or widower no longer has dependent children, or the number of dependent children is reduced, as the case may be.

The current fatality benefit scheme bases eligibility for benefits on existing circumstances of dependency at the time of a worker's death. This section provides for monitoring to ensure that the grounds for compensation are ongoing and allows for changes in compensation levels in response to changes in survivors' circumstances.

The commission agrees that there should be a mechanism within the current fatality benefits scheme to respond to changes in dependency status and recommends no change at this time to s.17(4).

SECTION 17(5): DEATH OF A DEPENDENT WIDOW(ER) WITH CHILDREN

Section 17(5)

Where there is a widow or widower and a child or children, and the widow or widower subsequently dies, the allowances to the children must, if they are in other respects eligible, continue and be calculated in the same manner as if the worker had died leaving no dependent spouse.

As with section 17(4), this section also allows for monitoring of and response to changes in dependency status. In this instance, the provision would result in overall reduction of benefits to a family upon the subsequent death of the surviving spouse unless that person's role is subsequently assumed by a foster parent, as dealt with in section 17(3)(j). Between them, sections 17(3)(j) and 17(5) provide a complete mechanism to allow for appropriate adjustments to surviving children's benefits upon the subsequent death of a remaining parent.

The commission recommends no change at this time to section 17(5).

SECTION 17(6): DISABLED SPOUSE (NON-INVALID)

Section 17(6)

Where at the date of a death a spouse is not an invalid, but is suffering from a disability that results in a substantial impairment of earning capacity, the board may, having regard to the degree of disability or the extent of impairment of earning capacity, pay the spouse a proportion of the compensation that would have been payable if the spouse had been an invalid.

The commission notes that this section only applies to non-invalid spouses under the age of 50 at the date of the worker's death since those aged 50 and over receive the same amount as is paid to invalid spouses under section 17(3)(c).

Section 17(6) gives the board a discretion to pay additional compensation to a spouse who does not come within the definition of invalid, but who can demonstrate a disability resulting in an impairment of earning ability. The commission considers it appropriate to confer such discretion on the board to mitigate the harshness of an “all or nothing” rule, particularly in light of the gray areas which may exist in terms of defining invalid status.

Section 17(6) is not limited on its face to dependent spouses, although common sense would dictate that this must be intended by the provision. In addition, since the section only applies to a spouse who is suffering both a disability and a resulting impairment of earning capacity, there appears to be no valid reason why the section should allow the board discretion in considering either the degree of disability or the extent of earning impairment in deciding whether increased benefits are appropriate. The commission believes that it is more appropriate for the board to consider both of these factors together.

Therefore, the commission recommends that:

61. Section 17(6) be amended to read:

Where at the date of death a dependent spouse is not an invalid, but is suffering from a disability that results in a substantial impairment of earning capacity, the board may, having regard to the degree of disability and the extent of impairment of earning capacity, pay the spouse a portion of the compensation that would have been payable if the spouse had been an invalid.

The commission notes that s.17(6) refers to “spouse,” a term not currently defined in the act. The “spouse” referred to in s.17(6) clearly relates back to the “widow” or “widower” referred to in the relevant portions of section 17(3). This is an example of the need for consistency in the use of terminology, an issue which the commission has attempted to address by way of the extended definition of “spouse” recommended above.

SECTION 17(7): DEEMED DEPENDENCY (SPOUSES)

Section 17(7)

where 2 workers are married to each other and both are contributing to the support of a common household, each is deemed to be a dependant of the other.

The objective of this provision is administrative convenience; it eliminates the need to adjudicate degrees of dependency in individual cases. As long as some degree of contribution was present, the provision makes irrelevant the proportion of the surviving spouse’s contribution to the support of the household. The commission supports this rationale; however, the reference to two “workers” is not appropriate and should be removed. This term may preclude recognition, with reference to a surviving spouse, of non-financial contributions to a household as well as financial contributions by surviving spouses who, for reasons such as self-employment, would not come within the definition of “worker” as set out in the act.

The commission is also of the view that the term “married” is not appropriate and should be removed as it may exclude those in common law and same sex relationships. As discussed in connection with the recommended definition of “spouse” set out earlier in this report, such distinctions are not in keeping with current social norms and legislation in other areas.

Therefore, the commission recommends that:

62. The term “worker” be removed and that the section provide that two “spouses” each be deemed to be a dependant of the other.

SECTION 17(8): DEEMED DEPENDENCY (CHILDREN)

Section 17(8)

Where 2 parents contribute to the support of a common household at which their children also reside, the children are deemed to be dependants of the parent whose death is compensable under this Part.

Like section 17(7), the objective of this provision is administrative convenience where the board would otherwise have to adjudicate degrees of dependency. As with section 17(7), the commission supports this rationale.

However, the commission is of the view that the term “parents” and the reference to “their” children may exclude a same sex partner who is living in a marriage-like relationship and raising natural children of the other partner. It is also not clear whether the term “parents” would include step-parents and adoptive parents. The commission believes that the deeming provisions should apply with respect to all of the foregoing.

Therefore, the commission recommends that:

63. (a) 17(8) be amended so that it will apply to situations where two individuals are in a marriage-like relationship and where both are parents or stand *in loco parentis* to the children; and
(b) if the definition of “spouse” recommended earlier is adopted, the section be redrafted as follows:
Where 2 spouses contribute to the support of a common household at which children also reside, the children are deemed to be dependants of the spouse whose death is compensable under this Part.

SECTION 17(9): SPOUSES RESIDING “SEPARATE” AND “APART”

Section 17(9)

Where compensation is payable as the result of the death of a worker, or of injury resulting in death, and where at the date of death the worker and dependent spouse were living separate and apart, and

(a) *there was in force at the date of death a court order or separation agreement providing periodic payments for support of the dependent spouse, or children living with that spouse, no compensation under subsection (3) is payable to the spouse or children living with the spouse; but*

(i) *where the payments under the order or agreement were being substantially met by the worker, monthly payments must be made in respect of that spouse and children equal to the period payments due under the order or agreement; or*

(ii) *where the payments under the order or agreement were not being substantially met by the worker, monthly payments must be made up to the level of support that the board*

- believes the spouse and those children would have been likely to receive from the worker if that death had not occurred; or*
- (b) *there was no court order or separation agreement in force at the date of death providing periodic payments for support of the dependent spouse, or children living with that spouse, and*
- (i) *the worker and dependent spouse were living separate and apart for a period of less than 3 months preceding the date of death of the worker, compensation is payable as provided in subsection (3); or*
- (ii) *the worker and dependent spouse were separated with the intention of living separate and apart for a period of three months or longer preceding the death of the worker, monthly payments must be made up to the level of support which the board believes the spouse and those children would have been likely to receive from the worker if the death had not occurred.*

This section has two main components:

1. Where there is an existing court order or separation agreement providing amounts for the maintenance of a spouse and/or children, s.17(9)(a) relates those amounts to fatality benefits and provides that benefits will match the prescribed maintenance if payments were being substantially met by the now deceased worker. However, if the deceased worker had not been in compliance with the order or agreement, payments will only be made to the level that the board believes the spouse and children would have actually received.

This bases a permanent pension award on the state of enforcement at the date of the worker's death. At worst this presupposes enforcement would not have succeeded at a greater level in the future; at best it puts the onus on surviving spouses and children to prove to the board that enforcement would have succeeded in a now hypothetical future. In view of recently improved legislative mechanisms for enforcement of maintenance payments, these presumptions are increasingly suspect. The commission believes that the deceased worker's history of compliance is irrelevant; benefits should be paid at a level equal to the maintenance order or agreement.

2. Section 17(9)(b)(i) provides benefits in those instances where the worker was separated from the spouse and children for less than three months at the date of death but no maintenance order or agreement was in place. The commission believes that it is appropriate to ignore a separation of less than three months.

Section 17(9)(b)(ii) addresses intentional separations of more than three months. The commission interprets this subsection as giving the board discretion, (a) where a reconciliation was probable, to award the full pension, and (b) where the separation was probably permanent, to award the amount which the family would likely have received had the worker's death not occurred. The commission interprets the discretionary nature of this provision to mean that the board would accept evidence from a surviving spouse or children that a separation of more than three months was not intended to be permanent, and that the spouses intended to reconcile.

Therefore, the commission recommends that:

64. Compensation should be paid in accordance with maintenance orders and agreements, regardless of the workers' compliance history as of the date of death.

The commission does not recommend any change to Section 17(9)(b)(i) and (ii) at this time.

SECTION 17(10): LEVEL OF COMPENSATION

Section 17(10)

Compensation payable under subsection (9) must never exceed the compensation that would have been payable under subsection (3) if there had been no separation.

This section provides that a separated surviving spouse and children can never receive greater levels of compensation pursuant to a maintenance order or agreement than a surviving spouse and children would have received had no separation occurred.

The commission does not recommend any changes to 17(10) at this time.

SECTION 17(11): COMMON LAW RELATIONSHIP

Section 17(11)

Where a worker has lived with and contributed to the support and maintenance of a common law wife or common law husband, and
(a) where the worker and the common law wife or common law husband have no children, for a period of 3 years; or
(b) where the worker and the common law wife or common law husband have children, for a period of one year
immediately preceding the worker's death, and where the worker does not leave a dependent widow or widower, the board may pay the compensation to which a dependent widow or widower would have been entitled under this Part to the common law wife or common law husband.

This section distinguishes between common law and legally married spouses. If the extended definition of "spouse" is adopted as recommended above, this distinction will disappear and the basis for this section would be eliminated. In addition, section 17(11) generally appears to provide that payment of any benefits to common law spouses is discretionary; the board "may" pay compensation to common law spouses who come within the requirements of the section. The commission can find no justification for this. Qualified common law spouses should be entitled to benefits as if they were legally married.

As with other sections of this Act, the three year cohabitation period set out in s.17(11)(a) is not in uniformity with other BC legislation such as the Family Compensation Act and the Family Relations Act and should be changed to two years. At the same time, the limitation stated in s.17(11)(b) is appropriate; the presence of a child in any relationship does not necessarily indicate, by itself, a continuing relationship.

Therefore, the commission recommends that:

65. The definition of “spouse” recommended earlier be adopted and that, in consequence, this provision be eliminated entirely.

SECTION 17(12): COMMON LAW SPOUSE AND DEPENDENT WIDOW(ER)

Section 17(12)

Where

- (a) a worker has lived with and contributed to the support and maintenance of a common law wife or common law husband for the period set out in subsection (11);*
- (b) the worker also left surviving a dependent widow or widower from whom, at the date of death, the worker was living separate and apart; and*
- (c) there is a difference in the amount of compensation payable to the widow or widower by reason of the separation and the amount of compensation that would have been payable to that person if that person and the worker had not been living separate and apart,*
the board may pay compensation to the common law wife or common law husband up to the amount of the difference.

This section addresses situations where a worker leaves behind more than one dependent spouse. While it refers to a legally married separated spouse (i.e., “widow” or “widower”) and a common law spouse, the commission considers it more appropriate to refer to two “spouses” (see Section 1 Definitions). The section should continue to distinguish between the spouses on the basis that one was cohabiting with the worker at the date of death and the other was living separate and apart. The section currently gives priority to the separated spouse, providing for the resident spouse only that amount which may be left over. The commission believes that a more suitable distribution would occur on the basis of a deemed equal entitlement.

As such, the compensation ordinarily payable to a single surviving spouse should be divided equally between the two surviving dependent spouses. The total amounts to be distributed between the spouses should not exceed the amount which would be payable to a single spouse.

In cases where a separated spouse is receiving less than 50% of the spousal amount under a maintenance order or agreement, the separated spouse’s share should be limited to that amount with the difference going to the other spouse.

Therefore, the commission recommends that:

66. (a) s.17(12) be amended to remove language relating to legal and common law relationships and substitute "spouse" as defined in the extended definition recommended earlier in this report;
- (b) the section provide for apportionment of benefits as between spouses. Where there are two spouses and there is no order or agreement for maintenance to the separated spouse or the order or agreement provides for maintenance in excess of 50% of the spousal amount, the separated spouse and cohabiting spouse should each receive 50% of the spousal amount. Where there is a maintenance order or agreement under which the separated spouse receives less than 50% of the total spousal amount the separated spouse should receive the amount provided for under the order or agreement and the cohabiting spouse should receive the remainder.

SECTION 17(13): LUMP SUM PAYMENT – COMMON LAW SPOUSE/FOSTER-PARENT

Section 17(13)

In addition to any other compensation provided, a dependent widow or widower, common law wife or common law husband or foster parent in Canada to whom compensation is payable is entitled to a lump sum of \$500.

The commission agrees that a lump sum payment providing for extraordinary expenses not covered in section 17(2) should be provided to a dependent spouse or foster parent following the worker's death. This amount is not an advance.

Therefore, the commission recommends that:

67. If the extended definition of "spouse" recommended earlier in this report is adopted, the words "widow or widower, common law wife or common law husband" be deleted from section 17(13) and replaced by the word "spouse."

To the extent that section 17(13) relates to compensation levels, the commission has determined that aspect cannot be dealt with in this report.

SECTION 17(14): APPORTIONMENT

Section 17(14)

Where in any situation there is a need to apportion allowances payable to dependants among those dependants, the formula for apportionment must be at the discretion of the board; but, unless the board has grounds for a different apportionment, the apportionment must be:

- a) *where there is a dependent spouse and one child, 2/3 to the dependent spouse and 1/3 to the child;*
- b) *where there is a dependent spouse and more than one child, 1/2 to the dependent spouse and 1/2 among the children in equal shares; and*
- c) *where there are children but no dependent spouse, among the children in equal shares.*

There are situations where benefits payments may need to be divided between spouses and children, such as when a dependent child is at school and living away from home. The commission agrees with the guidelines

set out in section 17(14) and agrees that the board should be given an overriding discretion to depart from these guidelines where appropriate.

The commission recommends no changes at this time to section 17(14).

SECTION 17(15): ENEMY WARLIKE ACTION

Section 17(15)

Where personal injury to, disablement of or death of a worker occurs in the course of the worker's employment as a direct result of enemy warlike action or counteraction taken against it and provision has been made for compensation in respect of it for the worker or the worker's dependants by the government of Canada, the worker or the dependants are entitled to compensation under this Part only when the compensation provided by the government of Canada is less than that provided by this Act, and then only to the extent of the difference.

The commission notes that this section raises similar issues to those identified in connection with the deduction of Canada Pension Plan benefits (stacking and integration). That issue has been deferred to the final report, therefore the commission recommends no change to section 17(15) at this time.

SECTION 17(16): DOUBLE ENTITLEMENT

Section 17(16)

A dependant who, when receiving or entitled to receive compensation as the result of the death of a worker, becomes entitled to receive compensation as the result of the death of another worker, must receive in the whole the compensation that the board may, in its discretion, determine; but the compensation must not be less than the higher of the amounts payable in respect of the death of either worker, or more than 75% of the amount referred to in section 33(6).

This section raises issues similar to those raised in connection with the termination of benefits upon remarriage. As this involves a review and examination of the overall rationale of the system, the commission will address these issues in its final report.

SECTION 17(17): DISCRETIONARY POWERS OF THE BOARD

Section 17(17)

Where a situation arises that is not expressly covered by this section, or where some special additional facts are present that would, in the board's opinion, make the strict application of this section inappropriate, the board must make rules and give decisions it considers fair, using this section as a guideline.

The commission agrees with the intent of this section and considers it vital to allow those administering the Act the ability to deal with unforeseen circumstances.

The commission recommends no changes to 17(17) at this time.

OTHER RELEVANT SECTIONS OF THE WORKERS COMPENSATION ACT

SUB-SECTION 16(2): VOCATIONAL REHABILITATION

16(2) Where compensation is payable under this Part as a result of the death of a worker, the board may make provisions and expenditures for the training or retraining of a surviving dependent spouse, regardless of the date of death.

The commission believes that where a surviving dependent spouse requires vocational rehabilitation such services must be made available.

Therefore, the commission recommends that:

68. s.16(2) be amended to provide that, where such services have been requested and a need has been determined, “the board shall make provisions and expenditures for the training or retraining of a surviving dependent spouse, regardless of the date of death.”

SUB-SECTION 16(3): COUNSELLING AND PLACEMENT SERVICES

16(3) The board may, where it considers it advisable, provide counselling and placement services to dependants.

The commission believes that where surviving dependants require counselling and placement services, such services must be made available.

Therefore, the commission recommends that:

69. S. 16(3) be amended to provide that, where such services have been requested and a need has been determined, “the board shall provide counselling and placement services to dependants.”

¹ Grigg v. British Columbia (1995), 138 D.L.R. (4th) 548 (B.C.S.C).

² Workers' Compensation Board of British Columbia. Policy and Regulation Development Bureau. Benefit Stacking and Integration: a briefing paper. Richmond (BC): The Board; May 21, 1997, page 2.

Appendix A

LIST OF FEDERAL AND PROVINCIAL OCCUPATIONAL HEALTH AND SAFETY LEGISLATION THAT APPLIES IN BC

PART ONE : FEDERAL LEGISLATION (MINISTRY OR AGENCY RESPONSIBLE)

(a) Primary OHS legislation

- Canada Labour Code, Part II, R.S.C. 1985, c.L-2 (Human Resources Development Canada)
 - *Aviation Occupational Safety and Health Regulations*, S.O.R. 87-182 (in conjunction with Transport Canada)
 - *Canada Occupational Safety and Health Regulations*, S.O.R. 86-304
 - *Marine Occupational Safety and Health Regulation*, S.O.R. 87-183 (in conjunction with the Canada Coast Guard)
 - *Oil and Gas Occupational Safety and Health Regulations*, S.O.R. 87-184
 - *On Board Trains Occupational Safety and Health Regulations*, S.O.R. 87-182 (in conjunction with Transport Canada)
 - *Safety and Health Committees and Representatives Regulations*, S.O.R. 86-305

(b) OHS related or dual purpose legislation

- Aeronautics Act, R.S.C. 1985, c.A-2 (Transport Canada)
 - *Canadian Aviation Regulations*, S.O.R. 96-433

- Atomic Energy Control Act, R.S.C. 1985, c.A-16 (Atomic Energy Control Board)
 - *Atomic Energy Control Regulations*, C.R.C. 1978, c.365
 - *Transport Packaging of Radioactive Materials Regulations*, S.O.R. 83-740

- Canada Shipping Act, R.S.C. 1985, c.S-9 (Canada Coast Guard)
 - *Boat and Fire Drill Regulations*, C.R.C. 1978, c.1406
 - *Dangerous Chemicals and Noxious Liquid Substances Regulations*, S.O.R. 934
 - *Large Fishing Vessel Inspection Regulation*, C.R.C. 1978, c.1435
 - *Medical Examination of Seafarers Regulations*, C.R.C. 1978, c.1447
 - *Safe Manning Regulations*, C.R.C. 1978, c.1466
 - *Safe Working Practices Regulations*, C.R.C. 1978, c.1467
 - *Small Fishing Vessel Inspection Regulations*, C.R.C. 1978, c.1486

- Canada Transport Act, S.C. 1996, c.10 (Canada Transportation Agency)
NOTE: The regulations under the now repealed Railway Act which impact on railway safety have been continued under this statute by transition provisions. Also impacting upon OHS in the federal transportation sector is the aviation, marine and train OHS regulations under the Canada Labour Code (see above) and the Railway Safety Act and its regulations (see below).

- Canadian Centre for Occupational Health and Safety Act, R.S.C. 1985, c.C-13 (Human Resources Development Canada)
NOTE: This statute establishes the Centre as an independent agency which compiles and distributes information regarding OHS and environmental protection.
- Canadian Transportation Accident Investigation and Safety Board Act, S.C. 1989, c.3 (Canada Transportation Accident Investigation and Safety Board)
 - *Transportation Safety Board Regulations*, S.O.R. 92-446
- Explosives Act, R.S.C. 1985, c.E-17 (Natural Resources Canada)
 - *Ammonium Nitrate and Fuel Oil Order*, C.R.C. 1978, c.598
 - *Explosives Regulations*, C.R.C. 1978, c.599
- Hazardous Materials Information Review Act, R.S.C. 1985, c.24 (3rd Supp.) (Health Canada)
 - *Hazardous Materials Information Review Regulations*, S.O.R. 88-456
- Hazardous Products Act, R.S.C. 1985, c.H-3 (Health Canada)
 - *Consumer Chemicals and Container Regulations*, S.O.R. 88-566
 - *Controlled Products Regulations*, S.O.R. 88-66
- Motor Vehicle Safety Act, S.C. 1993, c.16 (Transport Canada)
 - *Motor Vehicle Safety Regulations*, C.R.C. 1978, c.1038
- Motor Vehicle Transport Act, R.S.C. 1985, c.29 (3rd Supp.) (Transport Canada)
 - *Commercial Vehicle Drivers Hours of Service Regulations, 1994*, S.O.R. 94-716
- Non-Smokers' Health Act, R.S.C. 1985, c.15 (4th Supp) (Health Canada and Human Resources Development Canada)
 - *Non-Smokers' Health Regulations*, S.O.R. 90-21
- Pest Control Products Act, R.S.C. 1985, c.P-9 (Health Canada)
 - *Pest Control Products Regulation*, C.R.C. 1978, c.1253
- Radiation Emitting Devices Act, R.S.C. 1985, c.R-1 (Health Canada)
 - *Radiation Emitting Devices Regulation*, C.R.C. 1978, c.1370
- Railway Safety Act, R.S.C. 1985, c.32 (4th Supp.) (Transport Canada)
 - *Mining Near Lines of Railways Regulation*, S.O.R. 91-104
 - *National Transportation Agency General Rules*, S.O.R. 91-547
 - *Notice of Railway Works Regulation*, S.O.R. 91-103
 - *Railway Works Filing of Affidavits Regulation*, S.O.R. 91-102

- Transportation of Dangerous Goods Act, 1992, S.C. 1992, c.34 (Transport Canada)
 - *Transportation of Dangerous Goods Regulations*, S.O.R. 85-77

PART TWO : BRITISH COLUMBIA (MINISTRY OR AGENCY RESPONSIBLE)

(a) Primary OHS legislation

- Workers' Compensation Act, R.S.B.C. 1996, c.492 (Workers' Compensation Board of BC)

- *Agricultural Operations Regulations*, B.C. Reg. 146/93
- *Fishing Operations Regulations*, B.C. Reg. 339/94
- *Industrial Health and Safety Regulations*, B.C. Reg. 585/77

NOTE: This regulation has been amended several times since 1977. Those amendments appear to include the addition of new provisions regarding fall protection, noise protection, violence in the workplace and other subjects not otherwise listed herein.

- *Occupational First Aid Regulations*, B.C. Reg. 344/93
- *Occupational First Aid Applicability Regulation*, B.C. Reg. 345/93
- *Reports of Injuries Regulation*, B.C. Reg. 713/74
- *WHMIS and First Aid Applicability Regulation*, B.C. Reg. 377/92
- *Workplace Hazardous Materials Information System Regulation (Workers' Compensation)*, B.C. Reg. 299/88

- Workplace Act, R.S.B.C. 1996, c.493 (Workers' Compensation Board of BC)
 - *Occupational Environment Regulations*, B.C. Reg. 128/74
 - *Workplace Hazardous Materials Information System Regulation*, B.C. Reg. 258/88

- under the Health Act, the following regulations address OHS issues in relation to workers at work camps:

- *Industrial Camps Health Regulations*, B.C. Reg. 427/83,
- *Sanitation and Operation of Food Premises Regulations*, B.C. Reg. 148/74,
- *Safety Drinking Water Regulations*, B.C. Reg. 230/92,
- *Sewage Disposal Regulations*, B.C. Reg. 411/85

- under the Mines Act, the following regulations address OHS issues:

- *Mine Health, Safety and Reclamation Code*, parts 1 to 9, 11 and 12. [NOTE: Although approved by the cabinet, this regulation is exempted from the Regulations Act, so it has not been filed as a B.C. Regulation and has not been assigned a number.]

- *Workplace Hazardous Materials Information Systems Regulations (Mines)*, B.C. Reg. 257/88
- *Mines Regulation*, B.C. Reg. 126/94

- under the Railway Act, the following regulations address OHS issues:

- *Occupational Safety and Health Regulations for Railways*, B.C. Reg. 74/93
[NOTE: This is also referred to as Part XIV of the *Canadian Rail Operating Rules Regulation*, B.C. Reg. 464/90.]
- *Visual Acuity, Colour Perception and Hearing of Railway Employees Regulation*, B.C. Reg. 457/59 [NOTE: This is also referred to as Part VI of the *Canadian Rail Operating Rules Regulation*, B.C. Reg. 464/90.]
- *Workplace Hazardous Materials Information System Regulation*, B.C. Reg. 277/88

(b) OHS related or dual purpose legislation

- Building Safety Standards Act, R.S.B.C. 1996, c.42 (Ministry of Municipal Affairs)
NOTE: This statute establishes a Building Safety Standards Appeal Board which has the authority to hear appeals flowing from the above statutes, including appeals permitted under regulations pursuant to the Workplace Act. The *BC Building Code* is established by a regulation that has been approved under the Municipal Act (see below).
- Commercial River Rafting Safety Act, R.S.B.C. 1996, c.56 (Ministry of Environment, Lands and Parks)
 - *Commercial River Rafting Safety Regulation*, B.C. Reg. 294/88
- Commercial Transport Act, R.S.B.C. 1996, c.58 (Ministry of Transportation and Highways)
 - *Commercial Transport Regulations*, B.C. Reg. 30/78
- Electrical Safety Act, R.S.B.C. 1996, c.109 (Ministry of Municipal Affairs)
 - *BC Electrical Code Regulations*, B.C. Reg. 237/95
 - *Electrical Regulations for Power-Houses and Substations*, B.C. Reg. 474/59
 - *Electrical Safety Regulations*, B.C. Reg. 487/95
 - *Television Equipment Installations on Overhead Electric Lines Regulations*, B.C. Reg. 259/66
- Elevating Devices Safety Act, R.S.B.C. 1996, c.110 (Ministry of Municipal Affairs)
 - *Elevating Devices Safety Regulations*, B.C. Reg. 28/90
- Fire Services Act, R.S.B.C. 1996, c.144 (Ministry of Municipal Affairs)
 - *BC Fire Code Regulation*, B.C. Reg. 403/92
- Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c.159 (Ministry of Forests)
 - *Forest Fire Prevention and Suppression Regulation*, B.C. Reg. 169/95
 - *Forest Road Regulations*, B.C. Reg. 172/95

- *Forest Service Road Use Regulations*, B.C. Reg. 173/95
- *Silviculture Practices Regulation*, B.C. Reg. 179/95
- *Timber Harvesting Practices Regulation*, B.C. Reg. 181/95

- Gas Safety Act, R.S.B.C. 1996, c.169 (Ministry of Municipal Affairs)
 - *BC Gas Code Regulation*, B.C. Reg. 442/92
 - *BC Propane Code Regulation*, B.C. Reg. 443/92
 - *Gas Safety Regulations*, B.C. Reg. 95/83

- Health Act, R.S.B.C. 1996, c.179 (Ministry of Health)

- Highway Act, R.S.B.C. 1996, c.188 (Ministry of Transportation and Highways)
 - *Highway Act Regulations*, B.C. Reg. 174/70

- Highway (Industrial) Act, R.S.B.C. 1996, c.189 (Ministry of Transportation and Highways)
 - *Vehicular Traffic on Industrial Roads Regulations*, B.C. Reg. 450/59

- Mines Act, R.S.B.C. 1996, c.293 (Ministry of Employment and Investment)

- Motor Vehicle Act, R.S.B.C. 1996, c.318 (Ministry of Transportation and Highways)
 - *Bicycle Safety Helmet Exemption Regulation*, B.C. Reg. 261/96
 - *Bicycle Safety Helmet Standards Regulation*, B.C. Reg. 234/96
 - *Motor Vehicle Act Regulations*, B.C. Reg. 26/58

- Motor Vehicle (All Terrain) Act, R.S.B.C. 1996, c.319 (Ministry of Transportation and Highways)
 - *Snowmobile Regulation*, B.C. Reg. 65/72

- Municipal Act, R.S.B.C. 1996, c.323 (Ministry of Municipal Affairs)
 - *Building Regulations of BC*, B.C. Reg. 351/92 [NOTE: This regulation adopts the *National Building Code of Canada, 1990* and the *Canada Plumbing Code, 1990* as the *BC Building Code*.]

- Pesticide Control Act, R.S.B.C. 1996, c.360 (Ministry of Environment, Lands and Parks)
 - *Pesticide Control Act Regulation*, B.C. Reg. 319/81

- Petroleum and Natural Gas Act, R.S.B.C. 1996, c.361 (Ministry of Employment and Investment)

NOTE: A number of regulations have been approved under this statute. The ones which appear to have an OHS component are:

 - *Drilling and Production Regulation*, B.C. Reg. 336/91
 - *Petroleum Development Road Regulations*, B.C. Reg. 771/69

- Pipeline Act, R.S.B.C. 1996, c.364 (Ministry of Municipal Affairs)
 - *Pipeline Regulations, Part 30*, B.C. Reg. 451/59

- Power Engineers and Boiler and Pressure Vessel Safety Act, R.S.B.C. 1996, c.368 (Ministry of Municipal Affairs)
 - *Boiler and Pressure Vessel Code*, B.C. Reg. 312/82
 - *Mechanical Refrigeration Plant Regulation*, B.C. Reg. 154/88

- Railway Act, R.S.B.C. 1996, c.395 (Ministry of Municipal Affairs)
 - *Location, Construction and Use of Aerial Tramways Regulations*, B.C. Reg. 95/82 [NOTE: This is also referred to as Part XI of the *Canadian Rail Operating Rules Regulation*, B.C. Reg. 464/90.]
 - *Storage, Handling and Transportation of Dangerous Goods by Railway*, B.C. Reg. 85/89 [NOTE: This is also referred to as Part XII of the *Canadian Rail Operating Rules Regulation*, B.C. Reg. 464/90.]

- Transportation of Dangerous Goods Act, R.S.B.C. 1996, c.458 (Attorney General)
 - *Transportation of Dangerous Goods Regulations*, B.C. Reg. 203/85

A Brief History of Regulatory Review in BC

1915/16 The Government of British Columbia appointed Avarad Pineo to investigate workmen's compensation laws in eastern Canada and the United States and to make recommendations for a BC workmen's compensation law. Pineo recommended an accident prevention system that "*...may be described as a system by which the administration of the labour laws, including the power to make safety orders or accident prevention rules, as well as the duty to see that those rules are carried out in practice, is imposed directly on the same Board which administers the workmen's compensation law.*"¹

Pineo suggested that:

*Such rules are looked at not as being imposed on the industry by some body from the outside which may or may not have a very practical conception of the needs, but as having been framed in a measure by the employers and the workmen themselves in their own interests through the co-operation of their own representatives. The effectiveness of such rules and the comparative ease with which they were enforced is ample proof of the value of this method of dealing with the subject.*²

- 1917 *Workmen's Compensation Act* comes into effect January.
- 1918 Accident Prevention Regulations take effect June.
- 1920 Additions and amendments to the Accident Prevention Regulations take effect January 16. First Aid Requirements take effect September.
- 1922 First Aid Regulations amended August.
- 1933 Addition of Compressed Air and Submarine Diving Regulations effective October.
- 1934 Workmen's Compensation Board hires first accident prevention inspector.
- 1935 The General Accident Prevention Regulations made in 1920 are repealed; new Accident Prevention Regulations effective May.
- 1937 New Regulations for the Prevention of Accidents and Industrial Diseases in logging take effect in June. The Submarine Diving Regulation adopted in 1933 is revised effective October.
- 1939 Amendments to General Accident Prevention Regulations, which became effective in 1935, are made and take effect in November; includes enhanced regulations for the construction industry.
- 1940 "Pneumoconiosis" added to Industrial Disease Schedule in April.
- 1941 Amendments to General Accident Prevention Regulations take effect November. Government appoints the Honourable Gordon McGregor Sloan as Chair of the First Royal Commission to investigate *Workmen's Compensation Act*.
- 1942 The sections of Sloan's report dealing with the development of regulations describe only the duty of the Accident Prevention Division to frame and issue regulations concerning safety and First Aid. Additional industrial diseases are added to Schedule

in September.

- 1943 General Accident Prevention Regulations are expanded considerably, effective June; Accident Prevention Regulations for Ship construction industry are added and take effect April; new industrial diseases are added to the Schedule on four separate occasions throughout the year.
- 1944 Three changes to Industrial Disease Schedule.
- 1945 General Accident Prevention Regulations that became effective in 1943 are repealed; new General Accident Prevention Regulations become effective November. Additions include metal trades and construction.
- 1947-48 Additions and changes to Industrial Disease Schedule.
- 1949 Government re-appoints Sloan to second Royal Commission on Workers' Compensation. The task of revising the Accident Prevention Regulations was in progress during the year. In addition to several informal discussions with labour and management representing various industries, public hearings were held to consider revising the regulations covering the construction, logging and wood-product industries.
- 1950 Revised Accident Prevention Regulations become effective September 1. The November 1945 regulations are repealed.
- 1951 Additions and changes to Industrial Disease Schedule.
- 1952 Sloan delivers his second Royal Commission report to the Legislature. In it he describes his view of the framework of the responsibility of the board for accident prevention as belonging to the board, management and labour. WCB's Chief Safety Inspector, responsible for all accident-prevention activities of the board, testifies that two of his major responsibilities are, "*to formulate regulations aimed at the prevention of industrial accidents and to act as a consultant to industry on all matters of industrial safety.*"³
- 1955 Addition of Accident Prevention Regulations for Explosive Actuated Tools effective February.
- 1956 Addition of Accident Prevention Regulations for Underground Diesel Equipment (effective February 1); Well Drilling and Servicing Industry (effective April 1). More industrial diseases are added to Schedule.
- 1957 More industrial diseases are added to Schedule.
- 1959 General Accident Prevention Regulations effective in 1950 are repealed; new regulations are adopted including changes to First Aid Service Requirements, buoyancy devices, compressed air work, electrical transmission systems, grain-elevators, swinging stages, volunteer fireman, explosive actuated tools, ship construction, submarine diving, underground diesel equipment and well drilling and servicing; and amendments to industrial disease schedule re: asbestosis, pneumoconiosis, silicosis, tuberculosis.
- 1961 Amendments to General Accident Prevention Regulations including new logging safety regulations and changes to compressed air regulations go into effect.

- 1962 Government announces third Royal Commission into Workers' Compensation. Appoints Honourable Chief Justice DesBrisay. DesBrisay dies early in the commission and is replaced by the Honourable Chief Justice Charles Tysoe.
- 1966 Tysoe releases his report. He stressed the importance of timely regulation review :
- ...the keeping of the Board's accident regulations up to date at all times is a matter of vital importance. It is not something for spare time and out-of-hours work. During the long delay in completing the review of the regulations and advancing the matter to the point where new and more appropriate regulations could be brought into force, more and more accidents to workmen were occurring.⁴*
- General Accident Prevention Regulations are revised and take effect.
- 1970 Regulations on Permissible Noise Exposure established.
- 1972 Accident Prevention Regulations revised.
- 1978 Accident Prevention Regulations revised and re-named the Industrial Health and Safety Regulations. Changes become effective in January. During this revision, employer and labour groups asked for increased representation on review committees and demanded a more open and consultative approach to regulation development.
- 1979 New regulations for Industrial First Aid become effective in September.
- 1982-84 Minor revisions to Industrial Health and Safety Regulations including construction, fire-fighting and occupational environment. A major revision was attempted at this time. An unsuccessful tripartite process was established with representation from labour and management as well as experts from engineering and occupational medicine. Labour withdrew and objected to both process and content. The board's 1982 Annual Report noted that it was the board's first attempt at an "ongoing" rather than periodic review process.
- 1985-89 Workplace Act effective May 24. Workplace Hazardous Information System Regulation goes into effect October 31, 1988. Attempts to revise regulations according to an administrative model are unsuccessful. Board staff developed draft regulations in 1988, which were then distributed to stakeholders for input. A second draft, which was circulated in October 1989, was put on hold pending the recommendations of the Munroe Advisory Committee.
- 1992-95 A Bipartite Model (management and labour) implemented for regulation review. Board of Governors takes stewardship over the regulation review and development process.
- New Regulations for Agriculture Operations (effective April 1993),
- Protection of Workers from Violence in the Workplace (effective November 1993).
- Occupational First Aid (effective January 1994).
- Fishing Operations (effective January 1995).
- 1995 Tripartite Model (management, labour and the board) for Regulation Development

implemented. Panel of Administrators delegates the authority for overseeing the regulation review process to the Vice President of Prevention.

1997 Panel of Administrators announces in August its decision to adopt a comprehensive set of new Occupational Health and Safety Regulations to become effective April 15, 1998. Regulations regarding rights and responsibilities for employers and workers remain unchanged since they were revised in 1978.

¹ Pineo (1916) p. 8

² Pineo (1916) p.8

³ Sloan (1952) p. 215

⁴ Tysoe (1966) p. 120

Sources for the Royal Commission on Workers' Compensation in British Columbia Report on Sections 2 and 3(a) of the Commission's Terms of Reference

BC'S LEGISLATIVE FRAMEWORK FOR OCCUPATIONAL HEALTH AND SAFETY

LEGISLATION AND CASE LAW

Act Respecting Occupational Health and Safety, R.S.Q. 1977, c.S-2.1.

Agricultural Operations Regulations, B.C. Reg. 146/93.

Alltrans Express Ltd. v. W.C.B. (B.C.) (1988) 51 D.L.R. (4th) 253.

Atomic Energy Control Act, R.S.C. 1985, c.A-16.

Atomic Energy Control Regulations, C.R.C. 1978, c.365.

Bell Canada v. C.S.S.T. et al. (1988) 51 D.L.R. (4th) 161.

Building Safety Standards Act, R.S.B.C. 1996, c.42.

Canada Labour Code, Part II, R.S.C. 1985, c.L-2.

Canada Labour Code, R.S.C. 1985, c.L-2.

Canada Pension Act, R.S.C. 1996, c.C-8.

Canadian National Railway v. Courtois and C.S.S.T. et al. (1988) 51 D.L.R. (4th) 271.

Constitution Act, 1867, (U.K.) 30 & 31 Victoria, c.3.

Contravention Act, S.C. 1992, c.-47.

Coroners Act, R.S.B.C. 1996, c.72.

Fishing Operations Regulations, B.C. Reg. 339/94.

Forest Practices Code, R.S.B.C. 1996, c.159.

Hazardous Products Act, R.S.C. 1985, c.H-3.

Health Act, R.S.B.C. 1996, c.179.

Industrial Health and Safety Regulation, B.C. Reg. 585/77.

Interpretation Act, R.S.B.C. 1996, c.238.

Judicial Review Procedures Act, R.S.B.C. 1996, c.241.

Mines Act, R.S.B.C. 1996, c.293.

Mines Regulation, B.C. Reg. 126/94.

Motor Vehicle Act, (1985) 24 D.L.R. (4th) 536. [Section 94(2)].

Motor Vehicle Act, S.C. (1985) 2 S.C.R. 486 (S.C.C.).

Occupational First Aid Applicability Regulation, B.C. Reg. 345/93.

Occupational First Aid Regulations, B.C. Reg. 344/93.

Occupational Health and Safety Act, R.S.A. 1980, c.0-2.

Occupational Health and Safety Act, R.S.N.S. 1996, c.7.

Occupational Health and Safety Act, R.S.Nfld. 1980, c.0.3.

Occupational Health and Safety Act, R.S.O. 1980, c.0.1.

Occupational Health and Safety Act, R.S.S. 1993, c.0-1.1.

Occupational Health and Safety Act, R.S.Y.T. 1986, c.123.

Occupational Health and Safety Act, S.N.B. 1983, c.0-0.2.

Offence Act, R.S.B.C. 1996, c.338.

R. v. Sault Ste. Marie (1978) 2 S.C.R. 1299.

Radiation Emitting Devices Regulations, C.R.C. 1978, c.1370.

Railway Act, R.S.B.C. 1996, c.395.

Regulations Act, R.S.B.C. 1996, c.402.

Reports of Injuries Regulations, B.C. Reg. 713/74.

Safe Drinking Water Regulation, B.C. Reg. 230/92.

Sanitation and Operation of Food Premises Regulations, B.C. Reg. 148/74.

Sewage Disposal Regulation, B.C. Reg. 411/85.

Transport Packaging of Radioactive Materials Regulations, S.O.R. 83-740.

Transportation of Dangerous Goods Act, 1992, S.C. 1992, c.34.

WHMIS and First Aid Applicability Regulations, B.C. Reg. 377/92.

Workers' Compensation Act, R.S.B.C. 1996, c.492.

Workers' Compensation Board v. C.P. Railway Co., (1920) A.C. 184 (P.C.).

Workplace Act, R.S.B.C. 1996, c.493.

Workplace Hazardous Materials Information System Regulation (Workers' Compensation), B.C. Reg. 299/88.

Workplace Hazardous Materials Information Systems Regulation (Mines), B.C. Reg. 257/88.

Workplace Safety and Health Act, R.S.M. 1987, c.W210.

RESEARCH

Canada. Canada Gazette. Part II. Ottawa (ON): Queen's Printer for Canada; 1996; 130(14):2136-2137.

Canada. Ministry of Supply and Services. Canadian Transportation Accident Investigation and Safety Board Act Review Commission. *Advancing safety: a report of the Canadian Transportation Accident Investigation and Safety Board Act Review Commission*. Ottawa (ON): The Commission; 1994.

CCH Canadian Limited. *Canadian employment safety and health guide*. Volume 1. Don Mills (ON): CCH Canadian; 1996.

McRuer J C, Ontario. *Royal Commission Inquiry into Civil Rights*. Royal Commission inquiry into civil rights. Volume 1. Toronto (ON): Queen's Printer; 1968.

Memorandum of Understanding between Criminal Justice Branch, Ministry of Attorney General, Province of British Columbia and Workers' Compensation Board (1997). [This MOU sets out the terms and conditions under which the Criminal Justice Branch will conduct prosecutions pursuant to the Workers' Compensation Act and related statutes and regulations].

Ministry of Attorney General. Office of Legislative Counsel. [mimeograph] *Cabinet Legislation Committee policies and procedures*. Victoria (BC): The Ministry; 1982.

Perrin, Thorau and Associates. *Canadian jurisdictions' death benefit provisions*. [Contract research for the Royal Commission on Workers' Compensation in BC]. [Victoria (BC): unpublished; October 10, 1997].

Saskatchewan. Occupational Health and safety Council. *Review of the Occupational Health and Safety Act: a report of the Occupational Health and safety Council*. Regina (SK); September 1989.

Sullivan R. *Driedger on the construction of statutes*. 3rd ed. Toronto (ON): Butterworths; 1994.

Workers' Compensation Board of British Columbia. *Board's jurisdiction over Occupational Health and Safety Division*. Richmond (BC): The Board; July 26, 1996.

Workers' Compensation Board of British Columbia. Explanatory materials on part 3: rights and responsibilities. Richmond (BC): The Board; November 20, 1995.

Workers' Compensation Board of British Columbia. Policy and Regulation Development Review. Occupational Safety and Health jurisdiction. Richmond (BC): The Board; July 7, 1997.

Workers' Compensation Board of British Columbia. Policy and Regulation Development Bureau. Regulation review and development process: a briefing paper. Richmond (BC): The Board; May 26, 1997.

REGULATORY REVIEW PROCESS

RESEARCH

Canada. Treasury Board Secretariat. Consultation guidelines for managers in the federal public service. Ottawa (ON): The Secretariat; December 7, 1994.

Canada. Treasury Board Secretariat. Enlightened practices in regulatory programs. Ottawa (ON): The Secretariat; May 1993/ February 1994.

Canada. Treasury Board Secretariat. Federal regulatory policy. Ottawa (ON): The Secretariat; 1995.

Canadian Petroleum Agency. Public consultation guidelines for the Canadian petroleum industry. Calgary (AB): The Agency; 1989.

Canadian Standards Association. A guide to public involvement. Ottawa (ON): The Association; March 1996.

Connor, DM. Preventing and resolving public controversy. 1997. Available from:
[URL:http://www.islandnet.com/~connor/preventing.html](http://www.islandnet.com/~connor/preventing.html).

Connor, DM. Ten lessons learned in 22 years of public participation. 1997. Available from:
[URL:http://www.islandnet.com/~connor/lessons.html](http://www.islandnet.com/~connor/lessons.html).

Institute for Participatory Management and Planning. Citizen participation handbook for public officials and other professionals serving the public. 8th ed. Monterey (CA): The Institute; 1994.

Organisation for Economic Co-operation and Development. Current concerns in OECD countries. Paris: OECD; 1992. (Regulatory Management and Reform Series, No. 1).

Organisation for Economic Co-operation and Development. Recommendation of the Council of the OECD on improving the quality of government regulation. Paris: OECD; March 1995.

Organisation for Economic Co-operation and Development. Public Management. The design and use of regulatory checklist in OECD countries. Paris: OECD; 1993. (Regulatory Management and

Reform Series, No.2)

Organisation for Economic Co-operation and Development. Public Management. The OECD report on regulatory reform: summary. Paris: OECD; June 1997.

Organisation for Economic Co-operation and Development. Public Management. Public consultation in regulatory development. Paris: OECD; October 13-14, 1996.

Organisation for Economic Co-operation and Development. Public Management. Regulatory reform: overview and proposed OECD workplan. Paris: OECD; 1996.

Review and strategy document development of Occupational Safety and Health regulations: decision of Governors No. 9. Worker's Compensation Reporter. 1992 January 7:53-60.

Sterne P, Zagon S, Canadian Centre for Management Development. Public consultation guide - changing the relationship between government and Canadians. [s.l.]: The Centre; 1997. Management Practices No. 19.

Workers' Compensation Board of British Columbia. 1992 Annual report. Richmond (BC): The Board; 1992.

Workers' Compensation Board of British Columbia. Guidelines for persons seconded to the Secretariat [mimeograph]. Richmond (BC): The Board; [s.a.].

Workers' Compensation Board of British Columbia. Selection of materials describing the regulation review process, 1992-1996. [Richmond (BC): unpublished; s.a.].

Workers' Compensation Board of British Columbia. Board of Governors. Regulation Advisory Committee operating protocol [mimeograph]. Richmond (BC): The Board; May 15, 1992.

Workers' Compensation Board of British Columbia. Policy and Regulation Bureau. Regulation review and development process. Richmond (BC): The Board; May 26, 1997.

Workers' Compensation Board of British Columbia. Prevention Division. Operational status report. Richmond (BC): The Board; November 19, 1996.

FATALITY BENEFITS

LEGISLATION AND CASE LAW

Grigg v. British Columbia (1995), 138 D.L.R. (4th) 548 (B.C.S.C.).

Canada Pension Plan Act, R.S.C. 1996, c.C-8

Child, Family and Community Service Act, R.S.B.C. 1996, c.46.

Family Compensation Act, R.S.B.C. 1996, c.126.

Family Maintenance Enforcement Act, R.S.B.C. 1996, c.127.

Family Relations Act, R.S.B.C. 1996, c.128.

Workers Compensation Act, R.S.B.C. 1979, c.437.

RESEARCH

Anderson P. Fatalities benefits. [Contract research for the Royal Commission on Workers' Compensation in BC]. [Vancouver (BC); unpublished; May 12, 1997].

Association of Workers' Compensation Boards of Canada. Comparison of workers' compensation legislation in Canada. Edmonton (AB): The Association; 1995.

Bryce G. Scoping out the unresolved issues re: fatality benefits [Contract research for the Royal Commission on Workers' Compensation in BC]. [Vancouver (BC): unpublished; January 23, 1997].

Canada. Canadian Charter of Rights and Freedoms. Ottawa: Department of the Secretary of State; 1987.

Currie J. Charter issues pertaining to survivor benefits. [Contract research for the Royal Commission on Workers' Compensation in BC]. [Vancouver (BC): unpublished; August 27, 1997].

Perrin, Thorau and Associates. Canadian jurisdictions' death benefit provisions. [Contract research for the Royal Commission on Workers' Compensation in BC]. [Victoria (BC): unpublished; October 10, 1997].

Perrin, Thorau and Associates. Comparative review of workers' compensation systems and governance models: final report. [Contract research for the Royal Commission on Workers' Compensation in BC]. [Victoria (BC): unpublished; May 23, 1997].

Workers' Compensation Board of British Columbia. Ad Hoc Committee. Compensation and death of a worker: discussion paper, May 22 1995. Richmond (BC): The Board; 1995.

Workers' Compensation Board of British Columbia. Policy and Regulation Development Bureau. Benefit stacking and integration: a briefing paper. Richmond (BC): The Board; May 21, 1997.

Workers' Compensation Board of British Columbia. Policy and Regulation Development Bureau. Compensation and death of a worker: a briefing paper. Richmond (BC): The Board; November 14, 1996.

Workers' Compensation Board of British Columbia. Policy and Regulation Development Bureau. Compensation rate: a briefing paper. Richmond (BC): The Board; April 4, 1997.