REGULATION VARIANCES OR EXEMPTIONS

Follow-up Report #3

submitted to the

ROYAL COMMISSION ON WORKERS COMPENSATION
IN BRITISH COLUMBIA

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October 7, 1997 (Amended)
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1) Introduction
The Commissioners have questioned what “limited powers to vary a regulation requirement” have been set out in Canadian OHS statutes, and what would be the important features of a variance/exemption mechanism.

In this follow-up report, we compare the provisions from those Canadian statutes which authorize the granting of variances or exemptions to an OHS regulatory requirement.

2) Comparison of Canadian OHS statutory provisions
Three Canadian OHS statutes contain provisions which authorize the granting of variances or deviations from the requirements set out in the OHS regulations. The three jurisdictions are Alberta, Nova Scotia and the federal government (applicable to federally-regulated coal mines).

Saskatchewan’s provision focuses on granting exemptions and does not appear to contemplate the granting of variances. For example, there is no authority which allows the Saskatchewan director to apply terms or conditions to the exemption that would necessary in the circumstances; such terms and conditions are commonly attached to variances. Saskatchewan’s section appears to be an “all or nothing” provision.

The provision in the Canada Labour Code authorizes both exemptions and variances, albeit only to the regulations which apply to federally-regulated coal mines.

The applicable provisions from these four jurisdictions are set out in Appendix A.
Comparing the wording of the four Canadian OHS statutes, it is possible to make the following general observations:

To obtain an acceptance, variance or deviation, 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 which prescribe a specific solution which may not be reasonable to apply in certain circumstances (Alberta, Saskatchewan, Nova Scotia and Federal).

Three of the 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 worksite committee (Nova Scotia).

The director must consult with the applicant and others who may be affect, 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), containing 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 committee or representative, or others so requesting (Nova Scotia), and kept at 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 decision 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 of a regulation (Alberta), but it may have to be posted at the worksite (Nova Scotia).
3) BC’s variance provisions

We could identify only two variance provisions in BC’s primary OHS legislation. British Columbia’s Mines Act contains a variance provision which reads:

\[\text{Variance of regulations or code for individual mine}\]

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.

Finally, the applicable provision from the IH&S Regulation reads:

\[\text{Modification of application of regulations}\]

2.10 The Board may modify the application of a regulation or substitute such alternative requirements as may be deemed appropriate, where, in the opinion of the Board the circumstances of a place of employment warrant such action.

4) Discussion

There are certain problems with the variance provisions in BC’s current OHS legislation, in particular when they are compared to those found in other Canadian statutes.

The threshold test in BC’s Mines Act is that the provision “does not operate in the best interest of, or is not necessary to, health and safety in an individual mine.” While “best interest” would hopefully lead to a conclusion that the requested variance would provide equal or greater protection, this test is not as direct or as clear as the “equal or greater protection” test employed elsewhere in Canada.

The test in the IH&S Regulation is the vaguest of those we have studied. It uses words like “appropriate” and where “the circumstances of a place of employment warrant” to establish the criteria to assess the merits of a requested variance.
On the other hand, in the requirement under the Mines Act there is a registry of all the variances that have been granted, a source which could be accessed by anyone. At the least, this is a useful way to promote legislative accountability. Further, the requirement for five year reviews of granted variances seems useful, especially if the variance does not contain a sun-set condition.

The Board’s OHS Policy Manual contains details regarding how it applies section 2.10 of the IH&S Regulations. This policy is reproduced in full in Appendix B. We have the following observations to make regarding this policy:

It contains elements that are similar to those found in Canadian OHS 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.

The test suggested by the policy is similar to those articulated in Canadian OHS statutes: “the proposed procedure or practice ... will provide an equivalent level of safety to that provided for by the regulation”. Given the vagueness of the wording of section 2.10, this clarification of the test the Board will employ is welcomed. On the other hand, it should be a test articulated in legislation, and not left to Board policy.

It purports to grant a right to appeal a variance decision itself, but only so long as the decision itself was not made by the Vice-President of OHS.

The researchers have asked the Board to provide details regarding the hundreds of variances or exemptions which have been granted under section 2.10. This information will hopefully provide us with the necessary information to be able to identify which of the current regulations are the most problematic (i.e. requiring the most number of variances or exemptions).

There is a need to recognize the legal and policy differences between a variance and an exemption. A variance is simply replacing one legal requirement with another, and hopefully one that provides equal or better protection than the original. One can be prosecuted for breaching a variance.
An exemption is full relief from a legal requirement. There is no substitution or equivalence in an exemption. One cannot breach an exemption, because once granted there is no longer any legal duty in place.

5) Conclusions
With the Commission’s recommendation that the Cabinet and not the Board should hold the legislative authority to approve OHS regulations under a new OHS statute, it will be essential that the Board’s role in granting variances or exemptions be clarified under that new statute. It would not be acceptable as a matter of law or social policy if the Board continued to grant variances, relying on section 2.10 of the *IH&S Regulations* or its replacement. Further, the Board should not purport to amend Cabinet-approved regulations through the operation of a Board policy, such as Policy 1.2.5 in the current *OHS Policy Manual*. This leads to the question: What should be set out in a variance/exemption provision under the new OHS statute?

We would suggest that the general observations we have made concerning the four Canadian OHS provisions (as set out in section 2, above) provide a useful framework to draft a variance provision in BC’s new OHS statute. In particular, we would suggest that this provision should authorize the granting of variances only to regulations which impose a specific workplace solutions, and such variances should be permitted only if the proposed alternative arrangement provides equal or greater protection than the prescriptive regulation. Whatever mechanism is eventually established under the new OHS statute, it should be clear, transparent and open about how variances can be obtained, and should be timely and effective. All affect parties should have a right to participate.

As to whether the Board or some other agency should be allowed to grant exemptions (as opposed to variances) and whether exemptions should be available to both prescriptive and performance types of regulations is an issue we cannot address in this paper. Our suggestion would be that, except in emergency situations, only the Cabinet should be authorized to grant an exemption to an OHS regulation.
Appendix A

Extracts from Canadian OHS Statutes re:
Regulation Variances or Exemptions

ALBERTA
OCCUPATIONAL HEALTH AND SAFETY ACT

Acceptances
26.1(1) A Director may, in accordance with the regulations, issue in writing an acceptance to a prime contractor, contractor or employer if, in his opinion, an alternative tool, appliance, equipment, work process, first aid service or first aid supplies or equipment at a work site provides equal or greater protection than that provided for by the regulation to persons affected by the tool, appliance, equipment, work process, first aid service or first aid supplies or equipment.
(2) A Director may impose terms and conditions he considers necessary on the acceptance and those terms and conditions are part of the acceptance.
(3) An acceptance is in effect only during the period prescribed in it and, notwithstanding anything in this Act or the regulations, during that period the terms, conditions or requirements set out in it apply with respect to the tool, appliance, equipment or work process at the work site to which the acceptance applies.
(4) A prime contractor, contractor or employer who is issued an acceptance shall ensure that the acceptance is complied with.
(5) The Regulations Act does not apply to an acceptance issued by a Director.

SASKATCHEWAN
OCCUPATIONAL HEALTH AND SAFETY ACT, 1993
S.S. 1993, c. O-1.1

46(1) In order to meet the special circumstances in a particular case, the director may, on receipt of a written application and after any consultation with interested persons that the director considers advisable, exempt conditionally or otherwise any person or class of persons from any provision of the regulations or a code of practice.
(2) An exemption pursuant to subsection (1) shall be made only where the director is satisfied that the standard of health and safety of any worker is not materially affected by the exemption.
NOVA SCOTIA
OCCUPATIONAL HEALTH AND SAFETY ACT
S.N.S. 1996, c. 7

83(1) Where an application is made in writing to the Director for authorization to deviate at a workplace or workplaces from a provision of the regulations, unless the standard to be used by the Director in considering an application is altered by regulation, the Director may authorize the deviation where the Director is satisfied that the deviation affords protection for the health and safety of employees equal to or greater than the protection prescribed by the regulations from which the deviation is requested.

(2) The Director may attach such terms and conditions to an authorization of a deviation pursuant to subsection (1) as the Director considers advisable.

(3) Subsections (4) to (13) apply to an application for a deviation made pursuant to subsection (1) unless
(a) the processes required pursuant to those subsections are altered by regulation; or
(b) a notice period is reduced or eliminated pursuant to subsection (15).

(4) Where the workplace location or locations exist for which a deviation pursuant to subsection (1) is requested, unless
(a) the committee or representative at a workplace, if any; or
(b) where there is no committee or representative, all the employees at the workplace,
agree otherwise, upon applying for a deviation, the applicant for the deviation shall post a copy of the application, ensure it remains posted for at least twenty-eight days and furnish a copy to the committee or representative, if any, at the workplace.

(5) Where the workplace location or locations for which a deviation pursuant to subsection (1) is requested are not yet in existence, the applicant shall, upon applying for a deviation, publish, at the applicant's cost, a notice of the application for a deviation
(a) that contains information regarding the deviation being requested; and
(b) where it would reasonably be expected to come to the attention of persons interested in health and safety who might be affected by the decision regarding the deviation.

(6) After receiving an application for a deviation pursuant to subsection (1), the Director may conduct such consultation or give such notice of the application as the Director considers advisable.

(7) The applicant for a deviation pursuant to subsection (1) shall submit with the application, at the applicant's cost,
(a) the technical information required to enable the Director to determine the application;
(b) information with respect to the benefits and drawbacks to health and safety that might reasonably be anticipated if the deviation is authorized; and
(c) any fee prescribed by the regulations.
(8) The applicant for a deviation pursuant to subsection (1) for an existing workplace location or locations shall ensure that the information required pursuant to clauses (7)(a) and (b) is made available for examination at the applicant's workplace by the committee or representative, if any, and by the employees.

(9) The Director may make available the information required pursuant to clauses (7)(a) and (b) to any person for examination on request.

(10) A decision by the Director pursuant to subsection (1) shall
(a) not be made less than twenty-eight days following the date of the application; and
(b) be accompanied by written reasons for the decision that shall include
(i) the information considered in arriving at the decision and the rationale for the decision;
(ii) the specifics of a deviation that is authorized, including the location of the workplace or workplaces where the deviation applies; and
(iii) the details of any terms or conditions attached to the authorization of a deviation.

(11) The applicant for a deviation pursuant to subsection (1) shall ensure that
(a) a copy of the Director's decision is
(i) posted for at least seven days, or longer if additional time is necessary to enable employees at the workplace to inform themselves of the content, and
(ii) furnished to the committee or representative, if any, at the workplace; and
(b) where a deviation is authorized, a copy of the Director's decision is posted and maintained throughout the time the deviation is in effect.

(12) The Director shall provide a copy of the decision referred to in subsection (10) to anyone from whom the Director has received a written response to the application for a deviation pursuant to subsection (1).

(13) In applying a regulation for which a deviation pursuant to subsection (1) is authorized, a deviation and any terms and conditions authorized pursuant to this Section shall, while the deviation is in effect, be substituted for the prescription or requirement in the regulations.

(14) The Director may, at the initiative of the Director or upon application, reconsider, confirm, vary, revoke or suspend the Director's decision regarding a deviation at any time when information is produced that, had it been known when the request for the deviation was determined previously, would reasonably be expected to have resulted in a different decision from the one made at that time, and subsections (1) to (13) apply with the necessary modifications.

(15) Notwithstanding the periods of notice required pursuant to this Section, where information that was not available at the time a decision was made by the Director regarding a deviation pursuant to this Section is produced that indicates that imminent danger might result as a result of the deviation, the Director may reduce or eliminate a period of notice required pursuant to this Section.
Approval of plans, procedures

137.2(1) The Commission or a person designated by the Commission for the purposes of this subsection may approve in writing, with or without modification, plans or procedures submitted in accordance with paragraph 125.3(1)(d).

(2) On the application of an employer, the Commission or a person designated by the Commission for the purposes of this subsection may, where, in the opinion of the Commission or that person, protection of the safety and health of employees would not thereby be diminished,

(a) approve in writing the use by the employer in coal mines of mining methods, machinery or equipment in respect of which no prescribed safety standards are applicable; or

(b) approve in writing, notwithstanding anything in this Part, the use by the employer in coal mines, for a specified time and subject to specified conditions, of any mining method, machinery or equipment that does not meet prescribed safety standards applicable in respect of it.

(3) On the application of an employer, the Commission may, where in its opinion protection of the safety and health of employees would not thereby be diminished, by order,

(a) exempt the employer from compliance with any provision of the regulations in the operation of coal mines controlled by the employer, subject to any conditions contained in the order; or

(b) substitute for any provision of the regulations, so far as it applies to coal mines controlled by the employer, another provision having substantially the same purpose and effect.

(4) The Commission may make recommendations to the Minister for amending or revoking any provision of the regulations applicable to coal mines or for adding any provision thereto.
Industrial Health & Safety Regulation 2.10 empowers the Board to modify the application of a regulation or substitute alternative requirements. This is termed granting a "variance".

A request for a variance must be made in writing by the employer to the Occupational Safety and Health Division and must include the following information:

The location of the worksite.
The type and nature of the work process.
A list of regulations which need to be modified.
A description of the problem that would be encountered in complying with the existing regulation(s).
A description of the proposed procedure or practice which will provide an equivalent level of safety to that provided for by the regulation.
How workers will be trained and supervised.
Confirmation that the workforce has been informed of the variance application.

The Occupational Safety and Health Division will give notice of the application to the trade union representing the workers affected and the Chair and Secretary of the Industrial Health and Safety Committee at the worksite. If there is no trade union or committee, notice will, where practicable, be given to a worker representative. The persons notified will be asked for comments, invited to participate in any hearing or other proceedings that may be held concerning the request, and advised of the decision.

The decision on the application will be made by the Vice-President, Occupational Safety and Health Division, or any officer, manager or director assigned in writing by the Vice-President to exercise this authority. Other officers of the Board do not have authority to modify a regulation.

Where the decision is not made by the Vice-President, Occupational Safety and Health Division, an appeal from the decision may be made to the Vice-President or to another person assigned that authority in writing by the Vice-President.

Copies of assignments of authority under this policy can be obtained on request.