LEGISLATIVE ACCOUNTABILITY

Issues Paper #2

submitted to the

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in British Columbia

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1.0 Purpose
The purpose of this paper is to discuss the question of the Board's legislative accountability as that issue relates to the Commission's Term 2.2. This discussion can be seen as an introduction to a broader discussion of the subject of governance.

An analysis of the process the Board has employed to develop the revised OHS regulations will be the subject of another research paper. Further, a discussion of the content of those draft regulations and the current regulations will be presented later. This paper focuses narrowly on the issue of the Board’s accountability for developing and approving OHS regulations under the Workers’ Compensation Act and the Workplace Act.

2.0 Issues in Brief
The following issues are discussed in this paper:

- How accountable is the Board for its legislative and enforcement decisions?
- What type of powers has the Board been granted with respect to OHS legislation and prevention programs?
- How does the way BC develops, approves and enforces OHS legislation compare to the way other Canadian jurisdictions have allocated these functions?

3.0 How Accountable is the Board?
Parliaments and cabinets can be held accountable for their legislative decisions. The question is: How accountable is the Board for its legislative decisions? There are two parts to the answer.

3.1 The Board's Power to Make Regulations
Section 71(1) of the Workers' Compensation Act (the OHS regulation-making provision) uses permissive language (i.e., “may make regulations”) instead of directive language (i.e., "shall make regulations"). The same provisions in the Workplace Act and the Mines Act use similar language. There is nothing unusual about this, as other statutes also use “may” instead of “shall” in their regulation-making provisions.

What is unusual is that in every other similar statute in Canada, the power to make regulations is held by the cabinet (i.e., “the Lt. Gov. in Council may make regulations”). BC is unique in granting the exclusive authority to develop and establish OHS regulations.
to the agency which also enforces those legal requirements; neither the Ministry of Labour nor the provincial cabinet play any role in that decision-making process. This combined role in terms of creation and enforcement of regulations may place the Board in unnecessary conflict.

The Tysoe Commission commented in 1966 that the then Board was having difficulty keeping the regulations up-to-date, and that there was a long delay in completing the process of regulation review. The same concerns have been expressed in recent years. This would suggest that the Board is having difficulty carrying out these responsibilities for which it has the authority.

3.2 The Board's Power is Absolute
BC is also different from the rest of Canada in that, through its very broad regulation-making authority, the Board has been given the exclusive power to prescribe all aspects of the province’s policy decisions concerning workplace health and safety. Generally speaking, it is more common for the legislature to establish the objectives of an important policy issue like OHS within a statute. The OHS statute, in turn, would contain the regulation-making provisions. Under BC’s WCA (the source of most of the OHS legislation in this province), there is no statement of the legislature's OHS objectives. Every one of the important policy decisions about the prevention of workplace injuries and disease that are commonly found in other Canadian OHS statutes are buried within the OHS regulations that the Board alone develops and approves.

Further, only in BC have the legislative decisions raised by these issues been left to a compensation board alone to decide. These decisions include, for example, defining workers’ rights to refuse unsafe work assignments and the consequential guarantees of protected work re-assignments when unsafe work has been refused. Another example is the entrenchment of worker’s rights to participate through membership on joint worksite health and safety committees and the delineation of the powers of those committees to influence OHS at their worksites.

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1 In Quebec, the regulation-making authority is split between the enforcing agency and the government. Under section 223 of Quebec’s OHS statute, the Commission de la santé et de la sécurité has authority over most substantive areas of OHS that are not addressed under the statute itself. The government holds the power to set the criteria and the procedural rules for granting exemptions and appeals to those decisions.
In its recent briefing paper, *Regulation Review and Development Process*\(^2\), the Board has suggested that resolving the more contentious OHS issues should be left to the legislature and that resolution be set out under a separate OHS statute (at page 28-29, footnotes omitted):

The B.C. Board\ëEs attempts at revising the 1978 IH&S Regulations include 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.

While revisions by statute would likely be quicker, the disadvantages of such change -- via a political decision -- is that this might result in less direct input from the administering agency.

Also in its *Briefing Paper*, the Board stated: “Direct regulation-making authority implies greater independence or control over the regulation development process by the enforcement agency.”\(^3\) While that is true, the question is: Should the enforcement agency also have the exclusive and complete authority to develop and approve the laws that it will in turn enforce?

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The Board was praised in the *1997 OHS Administrative Inventory* for the gains that it was able to make in the latest regulation review process. The *Inventory* concluded that there were benefits to leaving the Board with the final authority for promulgating workplace health and safety regulations:  

This makes for a very efficient regulatory system. Unlike what happens in the U.S., for example, Board regulations are not appealable in the courts, and workers and employers do not suffer the uncertainty of not knowing what is expected during years of costly judicial proceedings.

This reference to the U.S. is irrelevant in Canada, however, given that unlike their American counterparts, Canadian employers and workers do not have the right to challenge the substance of a regulation at the time of its promulgation. They can only initiate a technical challenge of whether or not there is sufficient authority under the Act to pass the regulation. To praise the compensation board by comparing it to the U.S. legislative system is misdirected and misleading.

### 4.0 How Have Other Canadian Governments Addressed OHS Legislation and Enforcement?

In their separate research paper, D. Perrin and K. Thoreau will describe the workers’ compensation and OHS programs that exist in other Canadian and selected foreign jurisdictions. That paper will provide details regarding the way in which OHS legislation and programs have been organized in each of those jurisdictions.

From that a draft of that paper, it is possible to conclude that the most common approach to OHS legislation in Canada is one where:

1) a branch of a ministry (not a compensation board) *develops* new OHS legislation or proposed amendments to existing legislation;

2) the legislature alone *approves* the new *OHSAct* or amendments thereto;

3) the cabinet alone *approves* new OHS regulations or amendments thereto, promulgated under the authority of the *OHSAct*;

4) a different branch of the same ministry as in step (1) or a compensation board *enforces* the *OHSAct* and regulations;

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

5.0 Conclusions

By providing exclusive authority to the Board to create and enforce its own regulations, and removing this authority from the cabinet, the normal accountability structure is lost. The Board thus becomes solely responsible for making decisions regarding when the regulations should be reviewed, which regulations should be reviewed, and what the regulations should ultimately state. At the same time, the Board is responsible for identifying who should be sanctioned for violations of the regulations and how these sanctions will be applied.

Whether or not the regulation review process is fairer and more efficient and effective in other jurisdictions where cabinet retains the power to approve regulations is a question for further research, and this issue can certainly be pursued further by the Team. Regardless, however, it can be stated that the situation in BC gives complete latitude to the Board to prescribe all of the responsibilities of employers and of workers, and most of the responsibilities of the Board, with respect to occupational health and safety. In all other Canadian jurisdictions, these kinds of decisions are made only by the legislature or cabinet.

Furthermore, as discussed in our Issues Paper #1, the WCAct contains no expressed OHS objectives and limited direction on how the Board is to achieve the implied objectives. Consequently, any statements that go further to define mandate, purpose, goals, activities, and so on, whether implied or expressly stated in regulations or in other documents such as the Board’s Policy and Procedure Manuals, are those that the Board alone develops and approves.

All aspects of OHS legislation and programs have been delegated to the Board under the WCAct and the WAct. (The cabinet holds this authority under the Mines Act). The complete delegation of OHS legislative and program authority found within these two statutes is the source of the Board’s lack of accountability for OHS.

Short of a fundamental revision to the WCAct and WAct, the BC legislature and cabinet are presently excluded from the development, approval and enforcement of OHS legislation. If the BC legislature decided to create a new OHS statute, that process would provide an important forum for public discussion on the policy issues inherent within OHS.
legislation. Vesting the OHS regulation-making authority with the cabinet would provide a further form of public accountability which is lacking within BC’s current system.

5.1 Alternative Approaches
There are two obvious alternatives to BC's current approach to developing, approving and enforcing OHS regulations.

The first alternative would be to remove all of the Board's current authority to develop and approve OHS regulations and give the power to develop OHS legislation to the Ministry of Labour (for example) and the power to approve OHS regulations to the provincial cabinet. The consequence of this alternative would be that the Board would no longer have any regulation-making authority; it would simply be charged with the administration and enforcement of the OHS regulations, including educational and promotional functions.

The second alternative falls half-way between the current approach and the first alternative. The Board could continue to play a significant (if not the lead) role in the development of OHS regulations, but cabinet rather than the Board would be the final authority to approve such regulations. Thus, in order to amend an existing OHS regulation or propose a new regulation, the Board would have to submit that change to cabinet for final approval before the change would become law.

6.0 Recommendations
The OHS Research Team presents the following recommendations to the Commission:

1) that the responsibility to develop the regulations remain with the Board or be assigned to another agency (e.g., the Ministry of Labour) and,

2) that the power to approve the regulations be vested with the provincial Cabinet.

These recommendations would apply regardless of whether a new OHS statute is to be created, or revisions are simply to be made to the existing WCAct and WAct.

The question of whether or not the Board or some other agency should be given the power to enforce the new OHS regulations that cabinet would approve will be dealt with by the Team in a later issues paper.

If the responsibility to develop OHS regulations is taken away from the Board, it would be necessary to establish a new OHS regulation-development process and the Board’s role
within this new process would have to be redefined. If the regulation-development responsibility was given to a branch of the Ministry of Labour, for example, then as a consequence of that change the Office of the Legislative Counsel would likely be given the responsibility for the final drafting of the OHS regulations that the Ministry develops. The Team will provide the Commission with further details about the OHS regulation-development processes employed in other jurisdictions, in particular, where the compensation boards no longer hold the major responsibility for developing and drafting regulations.