JURISDICTION FOR OCCUPATIONAL HEALTH AND SAFETY WITHIN BRITISH COLUMBIA

Issues Paper #3

submitted to the

Royal Commission on Workers’ Compensation
In British Columbia

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INTRODUCTION
This paper discusses the issue of jurisdiction for occupational health and safety within BC.\(^1\)

We first consider the separation of federal and provincial jurisdiction for OHS from a constitutional perspective. This is followed by a discussion of the jurisdiction for OHS within this province that is held by the Workers’ Compensation Board (the "Board" or "WCB") and other BC government ministries or agencies.

Given the different jurisdictions for OHS within BC, we consider how the federal government, the Board and other BC ministries and agencies have attempted to address their respective jurisdictions through agreements and appointments that they can establish with each other.

We end by identifying what we believe to be the major problems regarding the jurisdiction for OHS within BC and by offering some solutions.

THE CONSTITUTIONAL DIVIDE

Separating federal from provincial jurisdiction : Alltrans
As previously indicated to Commissioners,\(^2\) there are constitutional limits on the effective reach or jurisdiction of provincial OHS legislation. In a series of decisions known as the Alltrans trilogy,\(^3\) the Supreme Court of Canada held two provincial OHS statutes\(^4\) did not apply to three federal works and undertakings; namely, a trucking company, a railway company and a telephone company. Some consideration of the Alltrans trilogy is warranted to gain a better understanding of the constitutional underpinnings of the federal government's jurisdiction for OHS and what the courts have said regarding the scope of this authority.\(^5\)

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\(^1\) We wish to acknowledge that our discussion benefits from our having access to two WCB briefing papers regarding the subject of OHS jurisdiction: (i) Board’s Jurisdiction over Occupational Safety and Health, Nick Attewell, Prevention Division, WCB, July 26 1996, and (ii) Occupational Safety and Health - Jurisdiction, Policy and Regulation Development Bureau, W.C.B., July 7, 1997.


\(^4\) An Act Respecting Occupational Health & Safety (Quebec) and the Workers Compensation Act (BC)

\(^5\) The primary source for this discussion of the reasons for judgment in the Alltrans trilogy is a case comment by Elizabeth Edinger, Faculty of Law, the University of British Columbia which appears in (1989), 68 Can. Bar Rev. 631.
In the Alltrans case, an officer of the WCB inspecting the British Columbia places of business of Alltrans Express Ltd., a trucking company incorporated in Ontario and carrying on business interprovincially and internationally. The provincial officer noted that employees of the company were not wearing the footwear required by BC regulations. He ordered the use of such footwear and the formation of a safety committee as required by the WCAct. The penalty for non-compliance with these orders could ultimately include a penalty assessment or levy, prosecution and/or a closure order. The company challenged the constitutionality of being subjected to the OHS provisions of the WCAct.

It is noteworthy that Alltrans Express Ltd. did not challenge the constitutional validity of application to it of the compensation (as opposed to prevention) provisions of the WCAct. This was an apparent recognition of long-standing Privy Council and Supreme Court of Canada decisions holding such application to be proper. Such consideration did not arise in the two Quebec based cases in the Alltrans trilogy because the legislation in that province is a stand-alone OHS statute which contains no compensation provisions.

That the provincial legislation impugned in the Alltrans trilogy did not apply to the federal works and undertakings in question was a decision based on several propositions the analysis of which at times is quite tortuous in the written reasons of the Court. Both the Quebec and the BC statutes were conceded to be valid statutes of general application, but to determine their applicability to federal works and undertakings their subject matter had to be decided. If the subject matter of the two provincial statutes was determined to be labour relations and internal management then the statutes could not be applied to federal works and undertakings. This is because regulation of the labour relations and internal management of such works and undertakings is an integral and vital part of the primary federal legislative jurisdiction under the Constitution Act, 1867.

Ultimately, identification of the authorizing head of power in section 92 of the Constitution Act, 1867 was not determinative of the applicability of these provincial statutes to the federal works and undertakings in question. In the Alltrans decision itself, for example, the WCAct preventive provisions at issue were allocated to section 92(13) but were held not to be applicable to the company because they dealt with labour relations and internal management. The WCAct compensation provisions also were seen to be authorized by section 92(13), but were found to be applicable to the company because they deal with a completely different subject affecting federal works and undertakings with respect to a matter not within primary federal competence. The crucial factors are the subject matter of the provincial legislation and the subject matter affected by application of such legislation.

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7 i.e., was the subject matter of the legislation "health and safety" making it legislation in relation to section 92(16) ["matters of a merely local or private nature in the province"] or "labour relations and internal management" making it legislation in relation to section 92(13) ["property and civil rights in the province"]?
The lengthy judgment in the Bell Canada component of the Alltrans trilogy clearly states that provincial statutes will not be applicable if they affect matters falling within the primary jurisdiction of the Parliament of Canada over federal works and undertakings. Any effect on such matters is fatal even if the degree of impairment is minimal. This is a re-affirmation of what is called the "doctrine of interjurisdictional immunity" which in the Alltrans trilogy cases works to protect exclusive federal jurisdiction over certain works and undertakings in order to buttress the divided legislative jurisdiction created by the Constitution Act, 1867.

If a work or undertaking is federal, the first step in invoking the interjurisdictional immunity doctrine is to define the scope of primary federal jurisdiction. While the reasons for judgment in the Alltrans trilogy do not provide an exhaustive definition for all federal works and undertakings, they do make it clear that the internal management of such works and undertakings is always a matter within primary federal jurisdiction.

The next step is to determine if the provincial legislation affects matters which the first step has defined as matters within primary federal jurisdiction. Given that in the Alltrans trilogy the subject matter of the provincial statutes was characterized as being labour relations and internal management and given that such subject matter is recognized as being of primary federal jurisdiction, the application of provincial OHS statutes to these federal works and undertakings would have affected a vital part of them.

Interestingly, characterization of the provincial legislation in issue as having to do with "health and safety" rather than labour relations would likely have seen the same result being reached. This is because a primary federal jurisdiction (i.e., labour relations and internal management in respect of federal works and undertakings) would still have been affected by the application of provincial legislation characterized as dealing with "health and safety". Arguably, the conclusion that the subject matter of the provincial statutes under consideration in the Alltrans trilogy is labour relations and internal management is inescapable given that the means by which to attain health and safety is control of the conditions of work in the workplace - and such control squarely involves labour relations and internal management.

While the characterization upon which British Columbia and Quebec relied (i.e., that their OHS legislation was intended to protect the health and safety of their residents) could have been adopted by the Court and the provinces' legislation still held to be inapplicable as affecting labour relations and internal management in federal workplaces, it was easier for the Court to hold for inapplicability if labour law (a matter within the exclusive jurisdiction of Parliament for federal enterprises) was the characterization chosen because such legislation directed at federal enterprises clearly is ultra vires the province.
Extent of the Federal Authority over OSH 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 given that provincial legislation in this regard is inapplicable to them. The Canada Labour Code, Part II and the body of regulations thereunder address this challenge with respect to workplaces which fall under federal jurisdiction.

Section 2 of the Canada Labour Code states:

2. 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 the phrase "federal work, undertaking or business" as that phrase is used in the Code 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.
While 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, if a conflict arises the federal legislation prevails. As discussed below with particular reference to memoranda of understanding that exist between the Board and the Canadian Coast Guard and the Department of Fisheries & Oceans, agreements between the two levels of government are a means by which to minimize the prospect of conflict and to clarify jurisdiction.

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

INTRA-PROVINCIAL JURISDICTION

What is not within the OHS jurisdiction of the federal government falls within the OHS jurisdiction of BC

(a) Provincial Legislation and OHS Jurisdiction

If an industry does not involve a "federal work, undertaking or business" and if the particular hazards applying to a workplace are not ones over which there exists federal jurisdiction, the laws of the province of British Columbia prevail with respect to matters of occupational health and safety.

This having been said, however, intra-provincial OHS jurisdiction does not necessarily fall to the Board in every case.

While the broad jurisdictional authority and responsibility of the Board for OHS within the provincial sphere derives from the WCAct and the Workplace Act, and section 2(1) of the WCAct states that Part I thereof applies to "all employers ... and all workers in British Columbia except employers and workers exempted by order of the Board", other provincial legislation administered by BC government ministries or agencies other than the Board regulates aspects of occupational health and safety in BC by virtue of its being public safety or protection legislation that includes workers within its ambit.

Also, as is noted below in discussion of specific jurisdictional declarations within the WCAct and regulations, mine worker health and safety is expressly excepted from coverage under the WCAct. Section 71(7) of the WCAct 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." Health and safety in
mines is covered by the Mines Act and administered by the Health and Safety Branch of
the Energy and Minerals Division of the Ministry of Employment and Investment.

(b) Other Factors Impacting Upon Intra-provincial OHS Jurisdiction
Depending upon such factors as the status of persons at worksites, the nature of the place
of employment, the type of industry, the equipment involved and the hazards workers
face, the jurisdiction for OHS within this province may reside with BC government
ministries or agencies other than the Board:

(i) Status of Persons
By virtue of section 2(1), the WCA act applies to "all employers ... and all workers
in British Columbia except employers and workers exempted by order of the
Board". For increasingly prevalent non-traditional employer/worker relationships,
however, coverage cannot automatically be assumed without reference to such
section 1 definitions as those for "employer" and "worker" and how such
definitions have been interpreted by the Board. Also, while sections 2 and 3 give
the Board authority to admit and extend coverage to certain persons who might
not otherwise fall under the WCA act, section 71(1) expresses Board OHS
jurisdiction over "persons contributing to the production of an industry". Such
provisions permit the Board a certain latitude as to the persons over whom it may
exercise jurisdiction for OHS purposes.

(ii) Place of Employment
Because of such provisions as section 71(2) of the WCA act which authorizes the
Board to make regulations, orders and directives effecting "any employment or
place of employment for the prevention of injuries and occupational diseases",
OHS jurisdiction can also be considered in terms of the workplaces the WCA act
covers. When analysed from the workplace perspective, it once again becomes
evident that the Board's OHS jurisdiction is affected by constitutional
considerations, other provincial legislation and administrative jurisprudence
emanating out of the Board itself.

(iii) Industry Type
The scope of the Board's OHS jurisdiction can also be affected by the nature of a
particular industry which might cause it to be under federal rather than provincial
jurisdiction or which might cause it to be regulated by another provincial statutory

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10 consider, for example, the Alltrans trilogy discussed above.
11 consider, for example, a worker's activities on a highway (which is a "place of employment" while he is
driving in the course of his employment). Such activities will be governed by the Highway Act as well as
the WCA act and if a point of conflict arises between the two statutes the rules of statutory interpretation
would dictate that being the general statute the WCA act would yield to the Highway Act.
12 consider, for example, a worker's activities on a highway (which is a "place of employment" while he is
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the WCA act and if a point of conflict arises between the two statutes the rules of statutory interpretation
would dictate that being the general statute the WCA act would yield to the Highway Act.
scheme. For example, even if an airline is operating only in BC the Board has no OHS jurisdiction because the federal government has exclusive jurisdiction over aeronautics. Likewise, even though wholly intra-provincial railways fall under provincial jurisdiction the health and safety of their employees is governed by the provincial Railway Act (not the WCAct).\textsuperscript{13}

(iv) Equipment

Even if jurisdiction over an industry rests with the province, jurisdiction with respect to the health and safety aspects certain equipment may by statute rest with a ministry or agency other than the Board. For example, in BC the Elevating Devices Safety Act is administered by the Ministry of Municipal Affairs and Housing even in respect of elevators that are on worksites which are otherwise under the jurisdiction of the Board.

(v) Hazards

As is the case with certain equipment, the health and safety aspects of specific hazards arising in industry may not be governed by the Board under the WCAct and regulations. Rather, other ministries or agencies may have jurisdiction under separate federal and provincial statutes. While the Board may retain primary or general OHS jurisdiction electrical safety, for example, falls under the Electrical Safety Act administered by the Ministry of Municipal Affairs and Housing and safety issues with respect to the storage and transportation of explosives fall under the federal Explosives Act and the federal Transportation of Dangerous Goods Act, 1992.

(c) Intra-provincial OHS Conflict

When considering the OHS jurisdiction within this province that is held by the Board and other BC ministries and agencies, one gets the sense that the potential for OHS jurisdictional conflict can exist as much intra-provincially as it does between the federal and provincial levels of government. As discussed below, memoranda of understanding between the Board and other BC ministries and agencies are a means by which to minimize the prospect of such conflicts.

Declarations of jurisdiction within the WCAct and regulations

The WCAct and the IH&S Regulations contain provisions which attempt to define the scope of the Board's jurisdiction for OHS. This is done in two ways:

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

\textsuperscript{13} the provincial Railway Act is administered for such purpose not by the Board but by that group in the Engineering and Inspection Branch of the Ministry of Municipal Affairs and Housing which is responsible for Railways, Pipelines and Aerial Tramways.
For example, section 71(7) of the WCAct 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."

A few provisions in the IH&S Regulations set out express exclusions or limits on the application of that legislation. For example:

Section 26.00 states that vehicles operating on fixed rails or tracks or under the jurisdiction of the Mines Regulation Act or the Coal Mines Regulation Act are effectively excluded from the requirements of that section re: mobile equipment.

Section 34.14(2) exempts rescue nets used by firefighters in the performance of their duties from the requirement that safety nets comply with a specific American National Standards standard.

Section 50.00 states that that section applies to miscellaneous permanently installed material hosts not covered under the Factories Act or its regulations.

Section 62.68(5) states that, when specifications for loading and transportation of lumber by rail or other modes of transportation [such as those under the Railway Act or the Highway Transportation Act] conflict with the requirements of the regulation, the Board may grant an exemption to the regulations in accordance with section 2.10.

The Regulations also contain a number of provisions which suggest that the Board does not have jurisdiction over a particular subject matter, but these sections do not expressly declare that limitation. For example:

A footnote after 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".

A footnote after section 12.11(1) advises the reader to consult the "appropriate" or municipal, provincial or federal authorities concerning their requirements for waste disposal. A similar footnote after section 12.25 uses the adjective "applicable" to describe these authorities.

Section 13.61(b) points out that employers and workers "concerned with the use, storage, handling, transportation or disposal of radioactive substances" must comply with the regulations that have been made under the "applicable" federal or provincial legislation.

Section 22.36 requires that all dielectric strength test equipment and equipment to detect faulting wiring operating at potentials above 50 volts must be acceptable to the Ministry of Labour, Safety Engineering Services Division, Electrical Safety Branch (and bear evidence of Canadian Standards Association certification).

A footnote at the end of section 26.00 states that mobile equipment operated under the jurisdiction of the Motor Vehicle Act or the Industrial Transportation Act is subject to the regulations if the matter is not specifically governed by those statutes or their regulations.
Section 28.20 requires power-driven marine craft used to transport workers to have fire extinguishers as required by regulations issued pursuant to the Canada Shipping Act, but a footnote then states: "All marine craft used for the transportation of workers are governed by the 'Canada Shipping Act' and regulations pursuant thereto."

Section 28.22 points out that the "transportation of workers by aircraft shall be effected in conformity with the requirements of such of these regulations as are applicable, and in accordance with the relevant regulations of the Department of Transport (Canada)."

A footnote after section 33.00 notes that "crewing, maintenance, and operation of aircraft are governed by Department of Transport (Canada) regulations".

Section 33.10 states that "emplaning and deplaning from aircraft in flight shall be undertaken only with the prior approval of the Department of Transport (Canada)".

Section 46.136(c) requires approval of the Ministry of Transport (Canada) for use of aircraft and the Ministry of Energy, Mines and Resources (Canada) for the use of explosives in avalanche control operations, prior to the Board accepting the control procedures.

A footnote at the start of section 46.38 notes that: "Transportation of explosives is governed by the 'Explosives Act' (Canada) and regulations issued pursuant thereto."

Section 46.92 requires a license or permission of the Chief Inspector, Explosives Division, Department of Energy, Mines and Resources (Canada) for blending ammonium nitrate and fuel oil or similar mixtures, and (further) requires that such blending be done in accordance with that license or permit.

Clause 52.04(1)(a) requires that traffic control procedures and equipment on public highways comply with the applicable regulations of the BC Department of Highways and Public Works.

Clause 52.04(1)(b) requires that traffic control procedures and equipment in municipal controlled areas comply with the applicable regulations of the "municipal authority having jurisdiction".

Section 58.14(4) requires that pile drivers, dredges and such equipment operating in navigable waters comply with all the requirements of the Department of Transport (Canada).

Section 60.20 requires that all aircraft operations be conducted in accordance with section 33 and the relevant regulations of the Department of Transport (Canada).

Section 60.226(1) purports to bring roads within the scope of the "Industrial Transportation Act" as being subject to the WCB's regulations re: "haul roads".

A footnote at the end of section 60.230 notes that industrial roads and control of traffic thereon are governed by the Forest Act and Industrial Transportation Act.
Declaration of jurisdiction within other BC legislation
We have undertaken detailed reviews of certain other BC legislation which has an impact on OHS. From those reviews we can identify a few provisions which attempt to delineate jurisdiction for OHS. For example:

Section 14 of the Building Safety Standards Act, R.S.B.C. 1996, c.42, makes any regulation promulgated under the WCAct of no force and effect if that WCB-approved regulation purports to address the design, construction, alteration, occupation or use of a building.\(^\text{14}\)

Section 19 of the Electrical Safety Act, R.S.B.C. 1996, c.109, states that the Act (and hence the regulations, including the adopted codes) do not apply to a mine within the meaning of the Mines Act.

Section 2 of the Elevating Devices Safety Act, R.S.B.C. 1996, c.110, sets out a series of situations when the Act and its regulations do not apply. The devices and situations described in clauses 2(c) to (o) would be commonly found at worksites, but they do not describe all possible elevating devices found at workplaces. To date, no elevating devices has been exempted under clause 2(p).

JURISDICTIONAL AGREEMENTS AND APPOINTMENTS

Legislative provisions
Given the different jurisdiction for OHS that exists between the federal government and provincial governments, and between BC ministries and agencies, the federal and provincial governments have recognized in legislation the importance of entering into agreements and making certain appointments to clarify jurisdiction and develop cooperative relationships. The legal foundation for these agreements and appointments has been set out under certain of the OHS legislation which applies in BC.

(a) Federal (Canada Labour Code, Part II)
Section 140 of the Canada Labour Code, Part II, R.S.C. 1985, c. L-2 provides as follows:

(1) The Minister may designate any person as a regional safety officer or as a safety officer for the purposes of this Part.
(2) The Minister may with the approval of the Governor in Council, enter into an agreement with any province or any provincial body specifying the terms and conditions under which a person employed by that province or provincial body may act as a safety officer for the purposes of this Part and, where such an agreement has been entered into, a person so employed and referred to in the agreement shall be deemed to be designated as a safety officer under subsection (1).

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\(^{14}\) On the other hand, this provision also says that regulations made under a series of specific statutes (but the WCAct is not mentioned) which conflict with or alter the building safety or fire safety codes are also of no force and effect. So, it would appear that WCB regulations may continue to have effect, so long as they do not address issues re: design, construction, alterations, occupation or use of buildings.
(b) Provincial (Workers' Compensation Act)

Section 71(9) of the Workers' Compensation Act, R.S.B.C. 1996, chapter 492 provides that:

Notwithstanding anything contained in any Act, the board may enter
(a) an arrangement with any minister of the crown in right of Canada or
the Province, whereby inspectors in the employ of Canada or the
Province or an agency of them may, when considered necessary in the
interests of safety and accident prevention, be authorized and required
to carry out the duties and responsibilities of an inspector under this Act,
and every inspector in the course of those duties and responsibilities
shall be under the direction of the board; and
(b) a similar arrangement by which officers of the board may carry out
the duties of inspectors or safety officers under any other Act, or by
which the board and its officers may cooperate in research into the
causes of injuries and occupational diseases and in programs for their
reduction or prevention.

In addition, section 8.1 of the WCA Act states that:

(1) The board may enter into an agreement or make an arrangement
with Canada, a province or the appropriate authority of Canada or a
province to provide for
(a) compensation, rehabilitation and health care to workers in
accordance with the standards established under this Act or
corresponding legislation in other jurisdictions,
(b) administrative co-operation and assistance between jurisdictions
in all matters under this Act and corresponding legislation in other
jurisdictions, or
(c) avoidance of duplication of assessments on workers' earnings.

(2) An agreement or arrangement under subsection (1) may
(a) waive or modify a residence or exposure requirement for eligibility
for compensation, rehabilitation or health care, or
(b) provide for payment to the appropriate authority of Canada or a
province for compensation, rehabilitation costs, or health care costs
paid by it.
The Existing Jurisdictional Agreements and Appointments

(a) Federal (Human Resources Development Canada)

To date the federal organizations employing individuals that have been designated as safety officers under the Canada Labour Code, Part II include the Labour Program of Human Resources Development Canada (H.R.D.C.); Operations in the Air, Marine and Railway modes within Transport Canada; and the National Energy Board.

According to the Labour Program of H.R.D.C., as of mid-May, 1997 in British Columbia:

(a) the Labour Program of H.R.D.C. has 15 officers holding safety officer designations. In addition to their functions under the Canada Labour Code, Part II, these officers also discharge responsibilities under the following federal statutes:
   - Hazardous Products Act;
   - Non-smokers Health Act; and

(b) Transport Canada - Aviation has 3 officers holding safety officer designations. In addition to their functions under the Canada Labour Code, Part II, these officers also discharge responsibilities under the federal Aeronautics Act.

(c) Transport Canada - Marine has 31 officers holding safety officer designations. In addition to their functions under the Canada Labour Code, Part II, these officers also discharge responsibilities under the federal Canada Shipping Act.

Note that the generally applicable Canada Occupational Safety & Health Regulations made under the Canada Labour Code, Part II do not apply in respect of persons employed on trains & aircraft while in operation, on ships, on or in connection oil and gas work in Canada lands or on or in connection with works specifically excluded from application of the Code by order made under it. In such cases, sets of "sector specific" regulations apply. These "sector specific" regulations include the Aviation Occupational Safety & Health Regulations; the Maritime Occupational Safety & Health Regulations; the Oil and Gas Occupational Safety & Health Regulations; and the On-Board Trains Occupational Safety & Health Regulations. With respect to trains, aircraft and ships (for example) such sector specific regulations are made by the Governor-in-Council (i.e., the federal cabinet) on the recommendation of Minister of Labour and the Minister of Transport and (by interdepartmental Memoranda of Understanding) they are administered by Transport Canada on behalf of HRDC.

The Regulatory Impact Analysis Statement for each of the sector specific regulations expresses the rationale for such regulations. As an example, that relating to aviation states in part:

To date employees working on airplanes in operation have not been protected by Occupational Safety & Health Regulations. They have been protected by various legislation governing public safety such as: Air Navigation Orders, the Aeronautics Act (and) the Transportation of Dangerous Goods Act. However, they have been denied the three protective rights enjoyed by other non-operating aviation employees to whom (Part II) of the Canada Labour Code applies, i.e., the right to know of dangerous situations, the right to refuse to work in such situations and the right to participate in maintaining a safe workplace. Though the Minister of Labour is responsible for all federal occupational safety and health programs, Transport Canada will administer the (programs), on his behalf, on airplanes in operation ...

Correspondence dated May 16, 1997 from Betty Ryan, Acting Technical Advisor, OSH, Human Resources Development Canada, Labour Program to Royal Commission on Workers’ Compensation in BC
(d) Transport Canada - Rail has 10 officers holding safety officer designations. In addition to their functions under the Canada Labour Code, Part II, these officers also discharge responsibilities under the federal Railway Safety Act; Hazardous Products Act; and Transportation of Dangerous Goods Act, 1992, and

(e) the National Energy Board has 15 officers across Canada holding safety officer designations any one or more of whom could at any time be working in British Columbia. In addition to their functions under the Canada Labour Code, Part II, these officers also discharge responsibilities under the federal National Energy Board Act.

Currently, federal officers (including those mentioned above) hold no appointments and discharge no responsibilities under any British Columbia statutes. This is the case notwithstanding the possibility of such appointments through section 71(9) of the WCAct.

On the other hand, while 41 WCB Prevention Officers have been designated as WHMIS Inspectors for the purposes of the Controlled Products Regulations made under the federal Hazardous Products Act, no other WCB Prevention Officers have been designated under any other legislation, either provincial or federal.17

(b) Provincial (Workers' Compensation Board)

The WCB has not entered into any agreements pursuant to section 71(9)(a) of the WCAct whereby persons other than WCB Officers have been authorized to carry out the duties and responsibilities of such officers under the WCAct. Accordingly, there exist no agreements between the WCB, on the one hand, and either other provincial agencies or the federal government, on the other hand, providing for such designation.18

The WCB does have in place a limited number of Memoranda of Understanding between itself and both federal and provincial agencies relating to issues of jurisdiction and/or the promotion of co-operation regarding accident/incident investigation. Likely made under the authority of section 8.1 of the WCAct, the following is a brief description of all such Memoranda of Understanding:19

(i) between WCB and Provincial Ministries and Agencies


17 correspondence dated May 8, 1997 from Ralph W. McGinn, Vice-President, Prevention Division, WCB to Royal Commission on Workers' Compensation in BC
18 correspondence dated June 13, 1997 from Ralph W. McGinn, Vice-President, Prevention Division, WCB to Royal Commission on Workers' Compensation in BC
19 per correspondence dated June 26, 1997 from Ralph W. McGinn, Vice-President, Prevention Division, WCB to Royal Commission on Workers' Compensation in B.C
This MOU establishes the respective responsibilities of the Ministry of Environment, Lands & Parks, the Ministry of Agriculture, Fisheries & Food and the WCB for the implementation of the pesticide applicator certification requirement for agricultural producers as defined in the April 30, 1993 Regulations for Agricultural Operations issued by the WCB.

b. Memorandum of Understanding 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 and related statutes and regulations.


This MOU establishes a framework for co-operation between the Office of the Chief Coroner and the Prevention Division of the WCB with respect to whether or not an inquiry or inquest by a Coroner should be conducted and the extent of such inquiry or inquest in relation to industrial fatalities.


This MOU establishes a working agreement regarding wildlife or dangerous trees amongst the three noted parties and is intended (i) to recognize the Wilderness Tree Committee as the advisory body acting on behalf of the three signatories to represent all wildlife tree matters in the Province; and (ii) to define each agency's role and responsibilities concerning the management of wildlife or dangerous trees such that the three of them will work together for the common purpose of developing, maintaining and managing the natural wildlife habitat of standing green, dying or dead trees in forestry operations in a safe manner for the best interests of the citizens of British Columbia.


This MOU renews that MOU referred to in subparagraph (d) above.

This MOU is intended to form a partnership between the two parties to promote the awareness of health and safety amongst students placed on work experience while in the charge of teachers and school district staff. The Ministry of Education, Skills & Training undertakes jointly to present workshops for educators and for health and WCB safety officers that will assist them to assess the safety of the workplace and provide awareness to protect the interests of students assigned to work experience sites.

(ii) between WCB and Federal Ministries and Agencies

a. Memorandum of Understanding between Canadian Coast Guard, Western Region and WCB signed December 16, 1994 on behalf of Canadian Coast Guard, Western Region and January 26, 1995 on behalf of WCB.

This MOU is intended to record and communicate to the officers responsible for the administration and enforcement of the WCB's Fishing Operations Regulations, arrangements made between the Canadian Coast Guard, Western Region and the WCB for administration and enforcement of these regulations. The document recognizes that the occupational health and safety of persons working on commercial fishing vessels in BC is within the jurisdiction of the WCB and is addressed by these regulations.

b. Memorandum of Understanding between Department of Fisheries & Oceans, Government of Canada and WCB signed September 7, 1995 on behalf of Department of Fisheries & Oceans, Government of Canada and August 17, 1995 on behalf of WCB.

This MOU is intended to record and communicate to the officers responsible for the administration and enforcement of the WCB's Fishing Operations Regulations, arrangements made between the Department of Fisheries & Oceans (Pacific Region) and the WCB for administration and enforcement of these regulations. The document recognizes that the occupational health and safety of persons working on commercial fishing vessels in BC is within the jurisdiction of the WCB and is addressed by these regulations.

SUBMISSIONS

A recent sonar search of the submissions revealed few substantive comments concerning jurisdiction for OHS at BC worksites. No submissions could be identified which raised the issue of problems regarding the federal governments jurisdiction for OHS at BC worksites. No comments could be identified regarding conflicts or duplication with other legislation, such as elevating devices, electrical safety or building codes. There were no comments about jurisdictional agreements.
A number of similar submissions raised the related issue of the consolidation of the Board's jurisdiction for OHS in relation to mining safety. Those submissions asserted that mining is unique and dangerous, and noted that mine safety legislation and programs have been in place longer than the Board (since 1877). These submissions stated that the legislation and programs for mining are comprehensive and work well, and that the mines inspectors are professional and experienced. In conclusion, they recommend that mine safety should not be transferred to the Board.

Surprisingly, no comments could be identified which raised the issue of the transferring railway safety or industrial camp health concerns to the Board. In his July 18th submission, Mr. McGinn noted that these were possible areas for legislative and jurisdictional consolidation, but did not take a firm position either way.

**ISSUES**

The following are the major issues which arise from a consideration of the subject of the jurisdiction for OHS at BC worksites.

**Federal-Provincial Jurisdictional Issues**

The Alltrans trilogy has provided a legal foundation for defining the constitutional limit of the provinces' ability to regulate OHS at federal works and undertakings. In brief, the health and safety of workers at federal enterprises falls within the exclusive legislative jurisdiction of the Parliament of Canada because provincial legislation in this regard does not apply to them.

If the province (in particular the WCB) wanted to become responsible for OHS at federal works and undertakings within BC, that would have to be accomplished by an amendment to Canada's constitution or by a formal agreement between the federal and provincial governments transferring such authority to the province.

With the exception of the recent agreements concerning BC's fishing industry, no formal agreement have been established between the WCB and HRDC (or any other federal agency) to operationalize the Alltrans decision.

**Intra-Provincial Jurisdictional Issues**

In BC, the Workers Compensation Board has the broadest jurisdiction for OHS through the combined effect of the WCAct and the Workplace Act. However, the Ministry of Employment and Investment has exclusive jurisdiction for OHS at mines governed by the Mines Act. Also, by virtue of the provincial Railway Act, the Ministry of Municipal Affairs and Housing has exclusive jurisdiction for OHS at railways within the province that are not regulated by the federal government. The Ministry of Health, likewise, exercises jurisdiction over certain health matters at BC industrial camps through its regulations under the Health Act.
The remaining BC legislation that has an OHS component again is administered by the Ministry of Employment and Investment, the Ministry of Municipal Affairs and Housing and the Ministry of Health and three other provincial ministries. Some of these statutes and regulations give certain of these branches of government exclusive jurisdiction for particular types of workplace hazards.

Despite the legislative provisions which authorize jurisdictional and enforcement agreements between the WCB and other provincial agencies, there are precious few of 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 OHS at schools).

A number of different pieces of OHS related legislation are referenced in the Board's regulations. This legislation is administered by provincial ministries and agencies other than the Board. These references suggest that the Board recognizes the importance of this legislation on worksite health and safety. If a Board officer identifies a potential breach of this legislation for which the Board is not responsible, such Board officer currently has no authority to issue an order or take other enforcement action under that legislation. We suggest that it would be administratively effective and appropriate if Board officers were given the authority to enforce such non-Board OHS related legislation, albeit perhaps 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.

RECOMMENDATIONS AND OPTIONS
In light of the above, we offer the following recommendations to the Commission:
To promote inter-agency cooperation, the Board should establish more jurisdictional and enforcement agreements with federal and provincial agencies which share responsibility for OHS at BC worksites. Subjects that could be addressed under such agreements could include:

- the provision of a detailed description of jurisdiction in particular circumstances or the specific steps to be taken to ascertain jurisdiction in particular circumstances;
- the provision of a mechanism for dealing with legislative gaps, duplication or conflicts which may arise;
- provisions for reciprocal delegation of enforcement powers to inspectors.