COMMENTARY ON SPECIFIC ENFORCEMENT PROBLEMS WITH
THE INDUSTRIAL HEALTH AND SAFETY REGULATIONS AND
THE OCCUPATIONAL HEALTH AND SAFETY PROVISIONS OF
THE WORKERS’ COMPENSATION ACT

Issues Paper #4

submitted to the
ROYAL COMMISSION ON WORKERS’ COMPENSATION IN BC

Prepared by the OHS Legislation Research Team (Legal Consultants) being:

George K. Bryce and George R. Heinmiller

August 17, 1997
TABLE OF CONTENTS

Introduction

Part One : The IH&S Regulation

Part Two : The WCAct

Recommendations
INTRODUCTION
This paper discusses certain enforcement problems of the Industrial Health and Safety Regulations (the “IH&S Regulations”)\(^1\) and the OHS provisions of the Workers’ Compensation Act (the “WCAct”).\(^2\) A more detailed consideration of the enforcement options under the WCAct and a comparison of the major OHS provisions of the WCAct and the IH&S Regulations to those found in OHS statutes from other jurisdictions (including enforcement options) will be addressed in two separate and subsequent papers.

PART ONE: THE IH&S REGULATION
The IH&S Regulations are the major and the largest of the regulations administered by the Board. This set of regulations contains about 4,000 separate provisions or requirements.\(^3\) While there are many other BC statutes and regulations which impact on OHS,\(^4\) this group of regulations is the primary source of OHS legislation in British Columbia. Indeed, the IH&S Regulations contain most of the provisions that are commonly found in OHS statutes from other Canadian jurisdictions, such as those setting out the fundamental rights and responsibilities of employers and workers.

The Board has announced that a new set of regulations will be replacing (in part) the IH&S Regulations. These new regulations would be titled the Occupational Health and Safety Regulations (the “OHS Regulations”). Apparently, the provisions of the IH&S Regulation that would not be replaced are to be continued, either within an amended version of the IH&S Regulation or as renumbered but unchanged provisions within the new OHS Regulation.

The Board hopes to have the new OHS Regulation filed with the Registrar of Regulations at the office of the Legislative Counsel by the end of August 1997. (The regulation number would be assigned at that time.) The Board has indicated that the new regulation will come into effect about eight months later, on April 15, 1998.

While it might be advisable to review and comment on the enforceability of the new regulations as well as the current IH&S Regulations, we do not propose to undertake that task at this time for a number of reasons. As of the date of this commentary, the Commission has not been provided with a copy of the final version of the proposed OHS Regulation to be deposited with the Registrar. A draft from 1996 was provided, but it is now out-of-date. More importantly, until such time as the new regulation comes into effect, it can be subjected to further amendments, particularly in light of recommendations the Commission may make in its October 1997 report.

We would be pleased to undertake an analysis of the enforcement problems of the new OHS Regulations when it has been finalized.

---

\(^1\) Industrial Health and Safety Regulations, B.C. Reg. 585/77, as amended by B.C. Regs. 374/79, 71/82, 126/82, 523/82, 266/93, 267/93, 343/93, 7/96, 8/96 and 43/96.
\(^2\) Workers’ Compensation Act, R.S.B.C. 1996, c.492.
\(^3\) Presentation of Mr. R. McGinn, WCB, to the Commission, July 18, 1997, Vancouver BC.
\(^4\) See the August 14, 1997 discussion paper prepared by the authors, titled: A List of Federal and Provincial Occupational Health and Safety Legislation that Applies within British Columbia.
1) Assignment of responsibilities

As noted above, there are about 4,000 separate provisions or requirements set out within the IH&S Regulations. Of those:

- 101 provisions expressly require that the employer must or must not do something;
- 6 provisions expressly require that a supervisor must or must not do something;
- 70 provisions expressly require that a worker must or must not do something;
- 32 provisions expressly require that a person must or must not do something.

The remaining 3,800 or so provisions are silent with respect to stating who is responsible for complying with those requirements. In other words, less than 5% of the provisions in the Regulations expressly assign responsibility to someone for complying with a stated requirement. The remaining 95% of the provisions do not expressly assign responsibilities. In a few cases it may be fairly obvious who would have to be responsible, but in many it is not.

Section 2.16 purports to establish “cascading responsibilities” for compliance with the Regulations from the employer to the supervisor through to the worker. 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 contraventions under the IH&S Regulation. However, that directive becomes confusing 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 for which the employer is deemed to be responsible for upholding.

Subsection (2) then sets off 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.

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 assign responsibility to an employer, a worker, a supervisor or some other appropriate person. Clarification of responsibilities in this way would go a long way to ensure the Regulations are enforceable, be this in a court of law or by one of the Board’s administrative enforcement options.

2) Who has been assigned responsibilities

Only a few provisions of the *IH&S Regulations* have assign responsibilities to an owner, a principal contractor or a contractor. No provisions have given a supplier direct responsibility for ensuring the safety of the equipment or materials that are supplied to a worksite.

(a) Owners, principal contractors or contractors

Section 4.02 makes an owner responsible for accident prevention programs, but only if there is no principal contractor involved at that worksite. Subsection (4) states:

(4) When the work force at a place of employment includes workers of more than one employer, each employer shall be responsible for the accident prevention program for his workers. Where the work areas of two or more employers adjoin or overlap, the principal contractor, or if there is no principal contractor, the owner shall ensure the continuing coordination of the industrial health and safety activities of the several employers.

This same provision creates one of the few direct responsibilities for principal contractors.

A principal contractor or an owner is also responsible under section 34.16 for notifying the Board before a new construction project is commenced.
Two closely related clauses in the Regulation are among the few provisions which assign responsibility to an contractor. Subsection 34.10(1) requires contractors to making certain information available during the construction of bridges:

(a) During the construction of bridges, the contractor shall ensure that all pertinent construction details including erection procedures are available at the jobsite at all times.

(b) In cases where the bridge construction requires special care to control potential hazards in the construction of foundations, launching and installation of stringers and placement of deck, the contractor shall upon request submit to the Board all pertinent work procedures in writing.

(b) Suppliers
No specific, expressed duties have been imposed on BC suppliers within the IH&S Regulation.

One area where we would expect that suppliers would have a duty is in section 8.02 re: ensuring machinery or equipment supplied to a worksite is capable of safely performing its functions. However, this general duty has been expressly given to employers. In a similar way, the duty to ensure that safeguards, safety appliances and devices are available is given only to employers under section 8.14(3).

The regulation-making authority of section 71(1) the WCAct allows the Board to make regulations applicable to “all other persons... contributing to the production of any industry within the scope of this Part.” Similar wording is found under section 2.02 of the IH&S Regulations. It is therefore possible for the Board to establish regulations that are directed at suppliers, but it has not done so.

The few duties assigned to owners, principal contractors, contractors and the lack of any supplier duties under the IH&S Regulation does not mean that these parties cannot be held accountable under more general duties that have been imposed on all persons under the Act or regulations.

For example, under section 8.16 “no person shall intentionally remove, impair, or render ineffective any safeguard provided for the protection of workers.” Section 8.26 requires that the person responsible for putting equipment or machinery into operation to ensure that all safeguards are in place and functioning, and that no one will be endangered by putting the equipment into operation. While there may be some general provisions that could be applied to prosecute suppliers, there are no specific, expressed provisions directed at suppliers. The issue of enforcing the regulations against suppliers under the WCAct will be dealt with in Part Two of this paper.
3) Board acceptances
There are about 175 of provisions which state that something must be done in a manner that is acceptable to or authorized by the Board, or where the Board's approval must be obtained before the equipment, process, etc. is used.

The following are examples of these types of provisions:

Section 4.06(2)(e) requires that the record the proceedings of a joint work site committee meeting be recorded in a form that is acceptable to the Board.

Section 8.140 states that a suspended length of a vertical lifeline must not exceed 91 metres (300 ft), unless a greater length has been previously authorized by the board.

Section 11.06(2) requires divers to be trained by an agency or person acceptable to the Board.

The definition of an "accredited course" for underwater commercial diving in section 11.10 says that the course must be a vocational training course that is recognized by the Board.

Section 11.10(14)(b) requires diving supervisors to obtain prior written authorization from the Board to use other than normal mixes of gases in respirable air.

Section 12.09(e) proclaims that volatile flammable solvents with flash points below 100°F* (38°C) cannot be used as manual cleaning agents, unless written permission has been obtained in advance from the Board.

Sections 22.34 and 30.10 state that metal ladders, or wire-reinforced wooden ladders cannot be used in proximity to energized electrical equipment, except where the Board has authorized that use or some other agency acceptable to the Board has granted that authorization.

While these sorts of provisions may give the Board some further flexibility to prescribe rules that employers, workers and others must follow, they do suffer from certain problems:

Extensive use of Board acceptances contributes to a lack of precision and clarity within the regulations. No one will know what they must do until they apply to obtain the approval of the Board.

Requiring that things be done with Board approval extends the legislative reach of the Board beyond the ambit of the regulations themselves and increases the discretionary power of the Board.

There is no statutory or regulatory provision which describes what someone must do to obtain an acceptance, or authorization or prior approval, or what information they must provide in support thereof.

There is no legislative provision which allows others affected by the acceptance or authorization to appeal that decision.5

5 Section 2.12 of the IH&S Regulations creates a right for others to appeal a Board order or directive. However, it is arguable that that section does not create a right to appeal a Board acceptance, as that provisions speaks to Board orders and directives.
Without expressed statutory authority for granting acceptances or approvals, it is possible that these various regulatory provisions could be found to be *ultra vires* the Act.

The Board should perhaps not be directly involved in making such decisions as the consequence of making a wrong decision is that the Board could be found liable. At best, the Board could be seen to be taking on more responsibility for OHS than it should be.

4) **Board variances**
An issue related to Board acceptances is the issue of the Board granting variances to the regulations. 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.

**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.

In addition to this general provision, in many provisions the Regulation allow the Board to grant acceptances which are alternatives to a specific requirement. For example:

Section 11.02 allows the Board to approve alternative rules regarding diving operations that the rules set out in section 11 "Underwater Diving".

Section 16.102 allows for exemptions to be renewed for those exemptions granted to the earlier lock-out requirements, so long as the renewal is made in writing, an alternative procedure has been approved by the joint worksite committee, is enforced and a copy is provided to the Board.

Where circumstances render compliance with the requirements regarding operator protective structures impracticable, clause 26.16(c) allows an employer to submit an alternative proposals designed to provide equivalent protection to workers to the Board for consideration. A similar provision can be found in section 32.60 re: suspended powered platforms and section 32.60A regarding suspended work platforms.

Section 72.304 requires that all gas sample containers 1 1/2 cubic feet (42.5 dm3) or less in size in certain applications to conform to the specifications of the Canadian Transport Commission, the U.S. Inter-State Commerce Commission, the American Society of Mechanical Engineers, or some other authority that is acceptable to the Board.

Section 72.316 says that valves in gas sample containers must be of the needle-valve type or some other type of value that is acceptable to the board.

Section 74.04 (2) says that the required safety devices in window clearing operations may include ladders, platforms, swing stages, monorail systems, boatswain's chairs, suspension harnesses, extended window platforms, personal fall protection systems, or such other devices that may be acceptable to the board.
A number of concerns arise with respect to the Board’s general authority to grant variances or accept alternatives to specified provisions.

The apparent need for variances or exemptions begs the question: What is wrong with the existing requirement? If a variance must be granted, this suggests that the originating rule was unrealistic. If repeated variances are granted, there are probably serious problems with the applicable regulation.

Should this power rest with the Board? This question raises the same issue about the Board’s rule-making authority which was discussed in the Legislative Accountability issues paper. In brief, the issue can be framed by asking: If the power to approve a regulation should rest with the provincial cabinet and not the Board, then should the power to grant a variance from a regulation also rest with the cabinet and not the Board?

There is no statutory or regulatory provision that sets out a process by which an affected party can apply to obtain an exemption or variance. There is also no legislative provision which allows others affected by the variance to appeal that decision.\(^6\)

Other Canadian jurisdictions have granted limited powers to vary a regulation requirement to the agency which enforces their OHS statutes. Those provisions will be compared in detail in a later and separate issue paper. However, at this time we would suggest that the power to grant variances to the regulation is the same as the power to approve regulations in the first instance, and therefore, this power should be expressly set out under the Act with authorizes the approval of the regulations.

5) Adoption of other provincial and federal legislation

There are many provisions in the *IH&S Regulation* which require compliance with other provincial or federal legislation. For example:

Section 11.10(23) states that all tanks, fixtures, fittings and associated components used in diving must comply with the requirements of the "Boiler and Pressure Vessel Act" of BC and its regulations.

Section 11.18(1) requires that all diving operations, repetitive dives and treatment of divers must be carried out "in strict accordance" with the tables and procedures produced by the Defence and Civil Institute of Environmental Medicine (Canada), the United States Navy or some other agency "acceptable to the Board".

Section 13.61(a) requires employers and workers to comply with the "Atomic Energy Control Regulations of Canada".

Section 13.77 request that illumination in industrial, commercial and retail establishments must comply with the "Occupational Environment Regulations", under the "Factories Act, 1966"

---

\(^6\) Section 2.12 of the *IH&S Regulations* creates a right for others to appeal a Board order or directive. However, it is arguable that that section does not create a right to appeal a Board acceptance, as that provisions speaks to Board orders and directives.
Section 20.10 requires that electric wiring and equipment in painting and coating operations must meet the requirements of the "Canadian Electrical Code, Part 1, section 18 re: hazardous locations, class 1, division 1.

Section 26.24(1)(b) requires operators of mobile equipment to be in possession of a valid driver's license of the appropriate class when so required by "provincial statute".

Section 32.20(3)(c) states that temporary passenger hoists used to access otherwise inaccessible scaffolds over 30 feet in height must be approved by the Elevating Devices Inspection Bureau of the Department of Labour.

Section 56.50A(2) states that electrically operated hoists and winches must be wired and grounded in accordance with the "Electrical Energy Inspection Act".

Section 60.260(1)(b) states that all small marine craft in or near booming areas must be designed, equipped, licenses and operated in accordance with the "Canada Shipping Act" and its regulations.

Section 60.260(9)(a) requires craft (boomboats) in navigable waters from sunset to sunrise or in conditions of restricted visibility to display navigation lights as per the "Canada Shipping Act".

Other provisions require compliance with legislation administer by other authorities, but these provisions do not specifically name or clearly identify that legislation. For example:

Section 10.18(3) requires the approval of the BC Fire Commissioner for the installation and location of any floating marine service station.

Section 10.18(18) requires inspection of fire protection equipment (on marine service stations) as required by the BC Fire Marshal.

Section 11.10(11)(b) requires an "alpha" code flag to be flown by divers working in navigable waters if required by the authority having jurisdiction.

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

The definition of "approved" used in section 14.14 for the requirement for safety helmets for motorcycles and snowmobiles means approved by the Motor Vehicle Branch, BC Department of Energy, Transportation and Communications.

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 CSA certification).

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 40.21(1) states that exhaust gas scrubbers used in underground workings must be approved by the Ministry of Fuel and Power of Great Britain, the United States Bureau of Mines or some other acceptable authority.

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.

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).

Adoption of other legislation in this way is problematic, because it creates legislative redundancy. No doubt, the legislation being referenced would already contain provisions which require employers, workers and other persons to comply with its provisions. Unless for some reason the referred legislation does not apply to BC worksites and there is a need to expand the ambit of that legislation so that it does apply to those worksites, there is no need for the Board’s regulations to duplicate the original legislation’s compliance provisions.

As we have found in researching the issues paper on Jurisdiction for OHS within BC, there are no jurisdictional agreements between the Board and the agencies which administer the other legislation that has been adopted within the IH&S Regulations. If there had been such agreements in place and Board officers were given the authority to enforce the adopted legislation, then those requirements might be justifiable. But in the absence of such enforcement agreements, the Board’s adoption of that legislation is unnecessarily repetitive.

The Board’s adoption of this other legislation is essentially useless from a compliance perspective because the Board does not have the authority to prosecute someone for breaching the adopted legislation; that authority rests with the agency which administers that legislation.

Further, the enforcement options available to the Board under the WCAct to enforce the adopted legislation may conflict or compromise those which are contained within that legislation.

On the other hand, the Board may be simply trying to make employers, workers and others aware that they must comply with legislation other than the IH&S Regulations. If that was the Board’s intention, then we would suggest that referring to that legislation in the Regulations is not the best
A better route would be to prepare an information booklet explaining to employers, workers and others what other legislation may apply to their circumstances. Indeed, the Board has provided such guidance within the text of the Regulation itself by its use of footnotes. 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 of federal authorities concerning their requirements for waste disposal. A similar footnote after section 12.25 uses the adjective "applicable" to describe these authorities.

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.

A footnote after section 28.20 states: "All marine craft used for the transportation of workers are governed by the 'Canada Shipping Act' and regulations pursuant thereto."

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

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."

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".

6) Adoption of standards
At least 100 different national and international standards have been adopted within the Regulations and have therefore become mandatory requirements. For example:

Section 8.42(3) adopts the "National Building Code of Canada" re: safety glass in transparent glass doors in certain applications.

Section 10.08 states that life-bouys provided while workers are on or about the water shall confirm to the "Ministry of Transport (Canada) requirements" (but does not specify any particular standard by name or number).

A footnote after section 12.09(e) suggests that the calculation of flash points of prohibited flammable solvents must be done in accordance with the American Society for Testing Materials procedure D56-56, using a tag closed tester.

Section 14.08 (2) requires that safety footwear to be worn where there are hazards to the feet must comply with CSA standard Z195 "Safety Footwear”.

Section 14.12(3) requires that safety headgear to be worn when there are hazards to the head must comply with CSA standard Z94.1 "Industrial Protective Headwear".
Section 14.20(2) requires that industrial eye protectors must comply with CSA standard Z94.3 "Eye Protectors".

Section 14.23(2) in effect requires that protective respiratory equipment complies with NIOSH and MSHA standards (but does not specify any particular standard by name or number).

Section 14.25(2)(a) requires that compressed air used for breathing purposes in self-contained breathing apparatus complies with CSA standard Z180.1 "Purity of Compressed Air for Breathing Purposes".

Section 14.34 requires that safety-belts, lanyards and connecting parts comply with CSA standard Z259.1 "Fall Arresting Safety Belts and Lanyards for the Construction and Mining Industry".

Section 16.42(1) requires conveyors comply with American National Standards Association standard B20.1 "Safety Standards for Conveyors and Related Equipment".

Section 16.78(1) requires that the operation and maintenance of abrasive wheels be in accordance with American National Standard B7.1 "Safety Code for the Use, Care and Protection of Abrasive Wheels".

Section 16.104(2) requires that physical hazards around machinery be identified and marked in accordance with
- ANSI standard Z53.1 "Safety Colour Code for Marking Physical Hazards",
- ANSI standard Z35.1 "Specifications for Accident Prevention Signs", and
- the International Organization for Standardization standard R.557 "Symbols, Dimensions and Layouts for Safety Signs".

Section 21.06(1) requires that power actuated tools must meet the design requirements of CSA standard Z166 "Explosive Actuated Fastening Tools", unless otherwise required by the regulations.

Section 26.06(1)(a) requires that braking systems in all mobile equipment, except forklift trucks, comply with the Society of Automotive Engineers standards.

Section 26.06(2) requires that forklift trucks be equipped with braking systems that comply with ANSI standard B65.1 (1975), section 408.

Section 26.16(1)(b) requires that mobile equipment have operator protective structures that comply with a series of WCB standards and national standards.

Section 26.16(1)(a)(V) requires that rollover protective structures on certain designated mobile equipment be designed and built to comply with either
- Society of Automotive Engineer's recommended practice SAE J1040b "Performance Criteria for Rollover Protective Structures (ROPS) for Construction, Earthmoving, Forestry and Mining Machines", or
- ISO requirement 3471 (1975) "Earth-moving Machinery - Rollover Protective Structures - Laboratory Tests and Performance Requirements".

Various provisions in the regulations require that certain lumber referenced in various specific applications be graded in accordance with the National Lumber Grades Authority Rules and approved by the approving agency.
In a few sections, the *IH&S Regulations* state that compliance with the following national standards or codes constitutes compliance with the applicable provision of the regulation. However, these standards have not be expressly adopted as legal requirements per se. Examples of this type of indirect adoption are:

A footnote after section 13.37(1) concerning the installation and maintenance of ventilation systems refers to the American Conference of Governmental Industrial Hygienists manual, "Industrial Ventilation: A Manual for Recommended Practice".

A footnote after section 13.73 indicates that the standards and procedures for the use of lasers that would be acceptable to the Board are outlined in the American National Standards Institute Standard, ANSI Z136.1 (1973) "Safe Use of Lasers".

Section 16.108(4) states that ANSI standard A13.1 "Scheme for the Identification of Piping Systems" would be acceptable to the Board for the purposes of the previous requirements that pipes be identified.

Adoption of national and international standards is useful, because these standards are also commonly adopted under federal and other BC legislation, and by OHS legislation from other provinces. Thus, there is some harmonization across Canada and within North America in many areas.

On the other hand, these standards are often updated and, therefore, references to standards in the Regulations can rapidly become out of date. Vigilance must be a priority to guard against obsolete references within the Board’s regulations.

In addition to the national standards adopted or referred to in the Regulations, the Regulations have made a number of standards that have been prepared by the Board itself legal requirements.
For example:

Section 14.04(2) requires that leg protection devices must comply with Workers' Compensation Board Personal Protective Equipment Standard 14.1 (or some other standard acceptable to the Board).

Section 26.16(1)(b) requires that mobile equipment have operator protective structures that comply with four national standards (see above) and the following WCB standards:

- WCB G601 "Standard for Log Loader and Log Yarder Backstops";
- WCB G602 "Standard for Log Loader and Log Yarder Raised Cabs";
- WCB G603 "Standard for Log Loader and Log Yarder Window Guards";
- WCB G604 "Standard for Light-Duty Screen Guards for Off-Highway Equipment";
- WCB G605 "Standard for Mobile Equipment Half-Doors";
- WCB G607 "Standard for Medium Duty Screen Guards - Front End Log Loader";
- WCB G608 "Standard for Mobile Equipment Roof Structures - Heavy Duty";
- WCB G609 "Standard for Mobile Equipment Roof Structures - Light Duty".

Section 26.16(2)(b) states that certain types of mobile equipment specified in clause (a) manufactured before July 1, 1992 shall have rollover protective structures that comply with that clause or WCB G610 (1979) "Analytical Design Criteria for ROPS on Mobile Equipment".

Section 32.36(2) requires that all elevating work platforms other than fire-fighting equipment be designed, fabricated, operated, etc. in accordance with certain national standards or applicable WCB standards:

- WCB standard A321 "Self-propelled Elevating Work Platforms";
- WCB standard A322 "Elevating Rolling Scaffolds";
- WCB standard A323 "Work Platforms Mounted on Industrial Lift Trucks".

Section 60.260(6) requires boomboats to comply with WCB standard G606 "Boomboat Operator Protective Structures".

From the perspective of promoting harmonization of OHS legislation across Canada and within North America, adoption of the Board’s standards is not as useful as adopting the national and international standards because the Board standards may be unique to this province.

This practice is also questionable because it effectively broadens the scope of the Board’s regulation-making authority beyond the ambit granted to the Board under section 71 of the WCAct.

Finally, as with the other standards, the reference in the Regulations to the Board’s own standards can become out of date.
7) Adoption of manufacturer’s specifications

Many of the sections in the IH&S Regulation also require compliance with manufacturer's specifications. For example:

Section 8.8(2) requires machinery, tools and equipment to be inspected in accordance with the manufacturer's recommendations.

Section 8.84 requires fire fighting equipment to be maintained in accordance with manufacturer's instructions.

Section 10.18(16) requires that a marine service station and all its equipment be maintained in accordance with the manufacturer's recommendations and the regulations.

There are obviously many such specifications and it appears it is not possible for the Board to identify these specifications by specific name or number, as it has done for most of the national or international standards that have been adopted. Instead, the requirement to follow manufacturer's specifications is kept general.

Adoption of manufacturer's specifications is also problematic because of the possibility of unauthorized sub-delegation of rule-making authority.

Finally, it is unlikely that the Board staff have thoroughly considered all of these specifications before making them legal requirements. Therefore, there is the real possibility that the manufacturer's specifications may conflict or compromise the Board's other safety rules.

8) General guidance

As noted above, the regulations contain many footnotes which provide general guidance to the reader but which do not appear to be legally binding provisions. For example:

Section 6.02 requires that employers inform the Board of serious or fatal accidents. After that provision is a footnote which reads:

Accidents may be reported to the nearest Board office, or to the Vancouver office by telephone to 266-0211 or Telex 04-507765 from 08:30 a.m. to 4:30 p.m. on weekdays. Reports after normal business hours and on weekends and holidays should be made by telephone 273-7711.
Section 8.32 requires an employer to check-in on a worker who is employed under conditions which present a significant hazard of disabling injury, and when the worker might not be able to secure assistance in the event of injury or other misfortunes. The accompanying footnote then goes on to explain:

The circumstances in which a worker might be required to work alone are many and varied. Consequently, it is not feasible to detail the circumstances in which checking is required, the intervals between checks, or the means by which checking is to be done. These must be determined by the employer through an assessment of the situation in each case. An employee engaged in office work would probably not be subject to injury, while a worker engaged in work involving the use of ladders, or working on machinery or with harmful substances might be subject to an injury which would prevent the worker from calling for assistance. Accident Prevention Officers of the Board, on request, will assist in making such determinations in establishing practicable means of checking their workers.

A footnote related to section 8.64(2) notes that the handrail height required in that section is similar to that required under the National Building Code (1975).

Section 14.04(1)(b) prohibits wearing of dangling neckwear, bracelets, watches and rings clothing around hazardous moving machinery and electrical contact hazards. The accompanying footnote then states:

The wearing of medic-alert bracelets is permitted when such bracelets are used with transparent rubber bands that fit snugly over the bracelets.

Section 14.04(1)(c) requires cranial and facial hair to be confined or worn at a length which will prevent it being snagged or caught in hazardous moving machinery and electrical contact hazards. Its subsequent footnote states:

This regulation does not prohibit any particular hair style. Its purpose is to ensure that long hair, which could be snagged in the work process, is confined or worn at a length which will prevent snagging. The permitted length necessarily depends upon evaluation of the hazards of the work process.

From a legislative drafting perspective, the existence of this sort of guidance within the legal text of the regulations is somewhat unusual, but on its face this practice does not directly compromise the enforceability of the IH&S Regulation generally. A particular footnote could make enforcement of a particular provision difficult if it said something which conflicted with or otherwise undermined the application of that provision in particular circumstances. That possibility aside, there is nothing inherently wrong with providing information to assist in compliance within the text of a regulation.

On the other hand, the number of such footnotes throughout the Regulations suggests that there is a pressing need for many more information programs, booklets and related documents to help employers, workers and others comply with the Regulations. This is an issue that other members of the OHS Research Team are to address in a separate research paper.
PART TWO: *THE WORKERS’ COMPENSATION ACT*

Two fundamental problems with the WCAct have been discussed in earlier papers:

The absence of legislative objectives and agency directive provisions in the Act was considered in Issues Paper #1: *OHS Legislative Objectives*.

The Board’s exclusive powers to approve OHS regulations under the Act was discussed in Issues Paper #2: *Legislative Accountability*.

These papers underline our view that the over-arching or primary problem with the WCAct is that, except for a few provisions, it relegates OHS to regulations rather than elevating this important area of social policy and treating it as the subject of a dedicated statute.

This having been said, in this part, we will focus on two related enforcement problems with the WCAct. As note in the Introduction to this paper, a more general discussion of the Board’s enforcement options under the Act will be addressed in a later paper, which will also compare the enforcement options under BC’s OHS legislation to those in other Canadian OHS statutes.

1) **Enforcement against Suppliers**

It is open to the Board to claim that the power of its officers to issue orders and directions under section 71(2) of the WCAct is sufficiently broad that it allows officers to issue orders against suppliers, however, that subsection focus on worksites. Therefore, it could be argued that an order could not be issued against a supplier until such time as a defective or problematic product, equipment, materials, etc. was actually delivered to a worksite. As a result, the Board cannot issue orders to BC suppliers to take corrective action before equipment or materials are delivered to a worksite.

The situation is no better with respect to closure orders. Under section 74 of the Act, a Board officer can only order an employer to close down all or part of its operation in an immediate danger situation. As suppliers are not mentioned in this provision, this enforcement option cannot be applied to them.

The next enforcement option is penalty assessments. The Board’s power to issue penalty assessments under section 73 of the Act does not apply to suppliers per se. It is clearly and narrowly directed at employers. This section states:

**Levies**

73. (1) Where the board considers that

(a) sufficient precautions are 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 the regulations made under this Part, the board may levy and collect from that employer as a contribution to the accident fund the amount of the compensation payable in respect of the injury, death or occupational disease, not exceeding in any case $36,948.28, and the payment of that sum may be enforced in the same manner as the payment of an assessment may be enforced.

[S.B.C. 1985, c. 87, s. 2; 1994, c. 24, s. 1; B.C. Reg. 3/97]

The penalty assessment enforcement option cannot be applied to suppliers, even if it was found that they had breached one of the general duty provisions given to all persons, as discussed in Part One of this paper.

On the other hand, the offence creating provisions of section 75(2) of the Act could be used to prosecute a supplier. That provision declares (in part) that “every person who contravenes or fails to comply with a regulation... under section 71” commits an offence. To effect a prosecution, the Board would first have to prove that a supplier breached a general provision of the IH&S Regulation which (indirectly) applied to a supplier (i.e. one of the “all persons shall” general duty provisions). If the Board cannot make that linkage, a supplier could not be prosecuted under this section of the Act.

While in theory it may be possible to apply certain provisions to suppliers and possibly prosecute them for breaches, there is a constitutional limit on the scope of the Board’s rule-making and enforcement powers which is relevant to suppliers. In brief, the Board cannot purport to make regulations that apply to suppliers outside the geographic boundaries of the province. Further, the Board cannot enforce any of its regulations against suppliers if they are located outside of BC. This is not to say that the Board cannot achieve the same objective by focusing on employers within the province, which it does; rather, the Board faces legal constraints on the ambit of its rule-making and enforcement powers in relation to suppliers.

In conclusion, we are of the view that the only enforcement option available to the Board under the Act is the power to prosecute suppliers resident in BC. The order provisions and the penalty assessment provisions do not apply to suppliers.
2) **Enforcement against Independent Operators / Self-Employed**

The Board’s power to inspect under section 71(3) of the Act focus on “the place of employment of a worker”. This wording suggests that Board officers can be denied the right to inspect the workplace of independent operators or self-employed persons, even if there are apparent violations of the Act or Regulations taking place.\(^7\) The situation does not improve with respect to enforcing the Act on these types of persons.

As noted above, sections 73 and 74 of the **WCACT** apply only to employers. Independent operators and the self-employed are not “employers” for the purposes of the Act. This means that it is not possible for the Board to issue an stop work order under section 74 against an independent operator or a self-employed person.

With respect to section 73 of the Act, it not possible for the Board to levy financial penalties against independent operators (or self-employed persons without employees) for violations of the **IH&S Regulations**, even if they were found to be responsible for breaching one of those provisions.

As was the case with suppliers, it may be possible to prosecute an independent operator or a self-employed person who has breached one of the general duty provisions of the Regulations.

**RECOMMENDATIONS**

In light of the above, we recommend the following to the Commission:

When the new **OHS Regulations** have been finalized, the Commission should ascertain if the same sorts of problems exist within those new provisions as have been identified in Part One of this paper concerning the **IH&S Regulations**.

Given the delayed implementation of the new **OHS Regulations** and the likelihood that the same sort of enforcement problems will be found in those new provisions, the Commission should be prepared to recommend that:

- each substantive provision in the regulations clearly assign responsibility to the employer, a worker, a supervisor, a supplier, etc.;
- the number and scope of Board approvals or acceptances be narrowed, and approvals or certifications by professional engineers, architects and others similar professionals be substituted for Board approvals wherever possible;
- where the Board must retain its power to approve or accept something, the legislation make it clear how acceptances can be obtained and provide a right to appeal such decisions to persons so affected.

The issue of granting variances to the regulations should be studied further and, if the Board has granted a large number of variances in the past, the resulting changes (if any) that have been made to the applicable provisions of the new **OHS Regulations** should be identified and described.

---

\(^7\) This conclusion is mirrored in *Determining Who is a Worker under the Workers Compensation Act*, a March 24, 1997, WCB briefing paper, at page 23.
If it is determined that the Board should continue to grant variances, the legislation make it clear how to apply for variances and provide a right to appeal such decisions to persons so affected.

Other provincial and federal legislation should not be adopted under the regulations, unless that legislation does not already apply to BC worksites and there is a need to extend the application of that legislation through the Board’s regulations.

Adoption of national and international standards should be encouraged, in particular those that have been adopted by other jurisdictions. However, an “up grading” provision should be included in the regulations (or the Act) so that when a new standard replaces one that has been expressly adopted by the regulations, the new standard would then apply. Alternatively, when a new standard has been developed, it should be referenced in the regulations by a timely amendment.

The essential provisions of the Board’s own standards should be incorporated into the regulations and not adopted by reference.

In relation to manufacturer’s specifications, the Board should ensure that

- adoption of manufacturer’s specifications would not constitute unauthorized sub-delegation of its rule-making authority;

- wherever possible, all manufacturer’s specifications be review to ensure they do not conflict or otherwise compromise with the regulations.

Consideration should be given to amending the inspection and enforcement options under the Act so that suppliers and independent contractors (and persons other than employers or workers) can be specifically and directly ordered to take certain action or be subjected to some form of financial penalty.