OCCUPATIONAL HEALTH AND SAFETY PROVISIONS IN STATUTE OR REGULATION?

Issues Paper #7

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ROYAL COMMISSION ON WORKERS COMPENSATION IN BRITISH COLUMBIA

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INTRODUCTION

In this paper we consider the distinction to be drawn between the two primary legislative instruments; namely, statutes and regulations. Our discussion then sets out the principles which generally guide what the form and content of statutes and regulations should be. After considering the degree of independence that the Legislature should optimally confer upon subordinate regulation makers, and to illustrate some of these directives in the BC context, we contrast a provision from the IH&S Regulations with these principles. We end this paper by advancing a proposed outline, based upon previously highlighted principles, which could serve as the form and content framework for a new Occupational Health and Safety Act for British Columbia.

The 1971 report of the Ontario Royal Commission Inquiry into Civil Rights, chaired by Honourable J.C. McRuer (the “McRuer Report”), serves as the primary source of many of the principles and conclusions expressed in this paper. Though it was written almost thirty years ago, the McRuer Report is acknowledged to this day as an influential and authoritative commentary upon the matters which are the subject of this paper.

Another important background source provided to us by the Chief Legislative Counsel of the BC Ministry of Attorney-General, is a document entitled Cabinet Legislation Committee Policies and Procedures, adopted in 1982 (the “Legislation Committee Policy”). We understand that this Policy continues to guide BC ministries in the preparation of draft legislation - whether by statute or regulation.

THE DIFFERENCE BETWEEN STATUTES AND REGULATIONS

Statutes and regulations can be distinguished by the nature and significance of the provisions they contain. The McRuer Report\(^1\) is most instructive regarding the essential distinction between statutes and regulations:

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

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

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

In a discussion of how the Legislature should go about maintaining control by reviewing the regulations that flow out of the exercise of subordinate legislative power by delegated persons or bodies, the McRuer Report\(^2\) recommends a set of principles to guide the examination of such regulations. By paraphrasing the McRuer list, a good set of basic guidelines can be developed as to what regulations (as opposed to statutes) should and should not do.

- regulations should not contain provisions initiating new policy, but should be confined to details to give effect to the policy established by the statute in question;
- regulations should not have retrospective effect unless clearly authorized by statute;
- regulations should not exclude the jurisdiction of the courts;
- regulations should not impose a fine, imprisonment or other penalty as sanctions should be left to the statute;
- regulations should not shift the onus of proof of innocence onto a person accused of an offence;
- regulations should not impose anything in the way of a tax (as distinct from fixing the amount of a license fee, or the like); and
- regulations should not make any unusual or unexpected use of a delegated power.\(^3\)

To this list might be added the further proviso that, wherever possible, all matters intended to be dealt with by regulations under an enabling statute should be listed by subject matter in the statute’s regulation-making provisions in sufficient detail to ensure that they could not later be challenged as being *ultra vires* that statute. In other words, each regulatory provision should fit within or match the regulation-making provision of the enabling statute. The McRuer Report recommended that regulations should be in strict accord with the statute conferring the power to make them.

It is instructive to note that the McRuer Report also recommends that legislation should be expressed in precise and unambiguous language. Apparently, the issue of drafting in “plain language” has been with us for many decades.

Perhaps not surprisingly, the Legislation Committee Policy reflects the direction that was offered by the McRuer Report eleven years earlier. Some of policies and procedures within this cabinet directive are administrative in nature and a few raise technical or

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\(^2\) McRuer Report, volume 1 at page 378.

\(^3\) An example of this would be regulations that attempt to authorize a further sub-delegation of power or regulations that attempt to impart a power to vary or amend regulations.
drafting issues, but most provide guidance concerning what should or should not be contained in legislation generally, as opposed to differentiating between statutes and regulations. We will discuss those directives in the next part. However, the Policy does contain one statement that applies here. The Policy states that technical or routine matters that are suitable for inclusion in regulation but should not be included in a statute. In one respect, this guideline compliments the first one listed above and taken from the McRuer Report.

On closer examination of the McRuer guidelines, it is clear that many of the things that regulations should not do are the very things that should be reserved for statute. By way of summary statutes should be the only legislative instruments that:

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

There are other directives contained within the Legislation Committee Policy that apply to the content of legislation generally and which are useful to consider. The Policy states that, unless the cabinet grants an exception, the following directives apply to all BC legislation. Some of these reflect what was recommended in the McRuer Report:

- generally legislation should not contain provisions that have no legal effect;
- internal administrative matters relating to how an agency administers itself should not be included in legislation;
- it should be possible for the public to be able to identify a person who has been granted a power under a statute;
- a statute should not provide for broad delegation of powers from one person or body to another, but if a specific matter requires delegation, it should be so identified in the legislation and the delegation so limited (see also s.23 of the Interpretation Act);
- legislation should not abridge the rules of natural justice or place an unreasonable restriction on a person’s liberty, such as undue powers of arrest or search;
- there should be no deviation from diminution of the Canadian Charter of Rights and Freedoms;
- there should be a right of appeal to administrative decisions, be this to an administrative tribunal or the courts, or both;
- access to the courts to seek review of matters that could be reviewed under the Judicial Review Procedures Act should not be denied;
- legislation should not unreasonably interfere with property rights;
- it should be clear which provisions in a statute create offences and, in turn, what the applicable penalty would be for contravention of those provisions;

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4 This directive suggests that, if the government is not willing to prosecute someone for a breach of a provision, the directive contained in that provision should not be set out in legislation but addressed in educational documents or through other non-enforceable instruments.

5 Section 23 of the Interpretation Act states:

23 (1) Words in an enactment directing or empowering a minister of the government to do something, or otherwise applying to the minister by his or her name of office, include a minister designated to act in the office and the deputy or associate deputy of the minister.

(2) If a deputy minister is absent or unable to act, an assistant deputy minister, or some other official authorized by the minister, has the powers and must perform the duties of the deputy minister.

(3) Words in an enactment directing or empowering a public officer to do something, or otherwise applying to the public officer by his or her name of office, include a person acting for the public officer or appointed to act in the office and the deputy of the public officer.

(4) This section applies whether or not the office of a minister or public officer is vacant.

(5) Subsection (1) does not authorize a deputy or an associate deputy of a minister to exercise an authority conferred on the minister to enact a regulation as defined in the Regulations Act.
consideration should be given to removing a privilege or a license, as those may be more effective enforcement tools than a standard summary conviction penalty; when incorporating a non-statutory document by reference, it should be clear whether the document has been incorporated “as amended from time to time” or not; the need to preserve confidentiality (or non-compellability) of information obtained under legislation should be carefully considered; the office of Legislative Counsel should be consulted in the early stages of preparing legislation, and outside counsel should not draft legislation without the specific authorization of the Attorney General or Cabinet.

The Legislation Committee Policy also notes that a body subordinate to the Legislature should not be given the power to amend a statute.

**HOW AUTONOMOUS SHOULD THE REGULATION MAKER BE?**

In this part, we revisit an issue raised in our May 30th Issues Paper #2, *Legislative Accountability* and touched on above.

In its consideration of the persons on whom a subordinate legislative power (i.e. a regulation-making authority) may be properly conferred, the McRuer Report\(^6\) made the following observations:

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

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

Section 71(1) of the *Workers Compensation Act* (WCAct) provides (in part) that “The board may make regulations ... for the prevention of injuries and occupational diseases in employments and places of employment ...”. McRuer would likely conclude that such a bare and extensive power to make and put regulations into effect without a requirement for prior Cabinet or ministerial approval is a power that should not be granted exclusively an independent board, like the Workers’ Compensation Board of BC (the “Board”). To do

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\(^6\) McRuer Report, volume 1 at pages 356 and 357.
so is to run contrary to the general constitutional principle that the ultimate decision on policy affecting civil rights should rest with the political authorities. As the McRuer Report comments later:

> In many instances where power to make rules or regulations is conferred on a person or board apparently independent of a minister or the Lieutenant Governor in Council the person or board is not in fact independent. As a practical matter, the person or board is subject to the direction and control of a minister. In such cases the lack of independence of the subordinate legislator should be recognized and the power should be conferred on the Lieutenant Governor in Council, or on a minister with the board acting in an advisory capacity. If effective administration requires that legislative powers be conferred directly on a person or body other than the Lieutenant Governor in Council or a minister, political control can be and should be maintained by making the exercise of the power subject to the approval or disallowance of the Lieutenant Governor in Council or a minister. ... In any case all regulations made by an independent person or body should be reported to a minister, who should have power to disallow them. So-called independent boards or bodies should never be given legislative powers free from political control as a subterfuge, or to relieve the political authorities from embarrassing duties. ... 

On the assumption that there will be an opportunity for the Legislature to enact a new OHSAct for British Columbia, we would restate our earlier conclusion: that the Cabinet should hold the final approval of the regulations to be promulgated under that Act, whether they are developed by the Board, another agency or a ministry assigned the responsibility to administer that new Act.

If the WCAct is simply to be amended, the Board’s power to approve the regulations should, at most, be made the second-to-last step in the approval process; the Act should be amended so that Cabinet should hold the final authority to approve the OHS regulations. Having been granted a virtually unmonitored legislative monopoly, it is perhaps not surprising that the Board has taken the route it has in drafting without direction from the Legislature the OHS rules and regulations which have significantly shaped the OHS policies and programs of this province. Indeed, we would suggest that, if responsibility for this state of affairs is to be assigned to any one entity, it should be assigned to the Legislature for leaving the Board to its own devices and not dealing with the Board’s lack of legislative accountability.

**AN INTERESTING EXAMPLE**

As noted in Issues Paper #5, *Analysis and Comparison of the OHS Enforcement Provisions of the WCAct*, under section 96(6) of the WCAct an employer can appeal a penalty assessment levied under section 73 to the Appeal Division, but this provision is silent with respect to appeals regarding orders. However, section 2.12 of the IH&S Regulations states:

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7 McRuer Report, volume 1 at pages 359 and 360.
2.12 (1) Every person to whom an order or directive is issued by the Board shall comply forthwith or so soon thereafter as the order or directive shall provide.

(2) Any person affected by any order or directive issued under these regulations or by any penalty under Section 61 of the Workers’ Compensation Act, or any representative of such a person, may appeal to the Commissioners. Notice of appeal shall be submitted within 21 days, or such further period as the Commissioners may allow, and shall be made in writing and shall state the reasons therefor.

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

Applying the principles set out above, we are of the opinion that section 2.12 is problematic for the following reasons and serves as an useful example of many of the issues we have canvassed in this paper:

Subsection (1) comes close to defining or describing an offence, a legislative function that should be the exclusive domain of a statute.

By saying that persons affected by an order or directive may appeal those enforcement activities to the Commissioners (now the Appeal Division), subsection (2) is effectively amending the WCAAct by way of regulation. Only the Legislature should have the power to amend a statute. A creature of the Legislature (i.e. the Board) should not purport to apply its regulation-making authority in this manner.

Subsection (3) declares that initiating an appeal does not automatically lead to the order or directive being set aside pending the outcome of the appeal hearing. As that is a issue of substantive social policy, the Legislature alone should be making such decisions through is statute-approval powers; it should not be a decision that is made by the Board.

Finally, as applies to all the regulations that it has approved under the WCAAct, the Board should not be granted the exclusive authority to approve, amend or vary regulations; Cabinet should hold that final authority.

The same rigour that we have applied in contrasting section 2.12 to the McRuer principles could be applied in respect of a number of other sections in the IH&S Regulations, in particular those found in the current Part 3.

RECOMMENDATIONS:
PROPOSED FRAMEWORK FOR AN OHSACT FOR BC

Guided by the foregoing principles, we believe that, the following are the subjects that could be addressed within a new OHSAct (or an amendment to the WCAAct). Generally speaking, these are not matters that should be contained within a regulation. Ultimately, however, whether the new Act in fact contains each and everyone of these particular provisions will depend on the drafting instructions that the Minister and cabinet provide to the Office of Legislative Counsel.
The new OHSAct could:

- set out in a summary form the social policy objectives of the Act (i.e. legislative objectives);
- prescribe the agency’s directives that flow from that purpose (or authorize the Minister or cabinet to provide those directives) and thereby establish a foundation for promoting agency accountability to the Legislature;
- set out the scope or the application of the Act and the regulations, including areas where there is a need to clarify the legislation’s application, or state any limitations or exceptions to its application;
- state whether the Act was binding the provincial Crown and its agencies;\(^8\)
- provide for inter-agency agreements to clarify jurisdiction between the federal and provincial government and between the agency and other BC agencies and ministries, address legislative gaps or conflicts, and promote arrangements for reciprocal enforcement;
- define important words or phrases used in the Act, in particular if those definitions would be different than the common dictionary meaning;
- state in reasonable detail the fundamental duties of employers, supervisors, workers, contractors, owners, suppliers, self-employed or independent contractors, and other persons who can have an impact on worker health and safety;
- articulate the liability of other persons (such corporate officers and directors) in defined situations (such as if a company was convicted of a serious offence);
- entrench the three OHS rights of workers: the right to know, the right to refuse unsafe work assignments without discrimination, and the right to participate (through joint worksite committees, safety representatives or other forms of worker participation);
- prescribe the criteria when a joint worksite committee or representative must be established, define the committee’s or representative’s powers and responsibilities, and address related issues, such as educational leave for members or representatives;
- provide a mechanism whereby certified workers in certain circumstances would have the authority to require the employer to take action to address particular types of workplace hazards;

\(^8\) We point out, however, that section 14 of the Interpretation Act states:

**Government bound by enactments; exception**

14 (1) Unless it specifically provides otherwise, an enactment is binding on the government.

(2) Despite subsection (1), an enactment that would bind or affect the government in the use or development of land, or in the planning, construction, alteration, servicing, maintenance or use of improvements, as defined in the Assessment Act, does not bind or affect the government.
provide details regarding important prevention programs, such as workplace policies and programs, WHMIS (control of and protection from hazardous substances), occupational health services, etc;

require the employer or owner to notify the agency regarding a serious injury, illness or accident, and before starting or using a new project, substance, etc. that involves a serious risk of harm or could have a large impact on workplace health and safety;

appoint the necessary staff (officers, directors, etc.) so that the legislative objectives and agency directives can be realized;

designate officers, and fully describe their powers of inspection and enforcement (including writing orders, issuing tickets, etc.), including any limitations or necessary pre-conditions to the exercise of their powers, and any unique powers they should hold;

articulate any limitations on officer liability for actions arising from their duties under the Act, and limitations on liability of other parties, as required;

state when information collected by officers can and cannot be disclosed to third parties, including the compellability of officers (and others) in civil or criminal proceedings;

set out a limitation period and define what constitutes an offence and prescribe the appropriate penalty on conviction for each offence, including minimum/maximum fines, terms of imprisonment and other types of court orders;

entrench the defense of due diligence and the worker’s “he made me do it” defense;

state that failure to comply with the legislation does not affect rights to compensation and delineate the legislation’s effect of liabilities under the WCAct;

describe and authorize the application of enforcement options in addition to orders and prosecutions, such as administrative penalties (tickets) and injunctions;

provide a mechanism for administrative appeals (to the agency, a council or the WCB Appeal Division) concerning the effect of an officer’s order and the other enforcement options, including administrative penalties, and state whether an appeal stays the application of an order, directive or penalty;

provide a further right to appeal to the courts or establish appropriate on the court’s jurisdiction (e.g. a privative clause as per section 96(1) of the WCAct);

describe and authorize the development and application of non-enforcement options to encourage healthier and safer worksites, such as research, inquiries, grants, education and training programs, licensing and certification, exchange of information with other agencies;

encourage the creation of industry OHS associations (to be funded through compensation assessments) to promote the prevention of workplace injuries and illnesses and the promotion of OHS generally;

define a code of practice and clarify its legal status as an educational instrument, not as an indirect form of regulation;
state the exclusive authority of the provincial cabinet to approve regulations to be promulgated under the Act;

establish an independent council to advise the Minister regarding OHS matters, including the need for new regulations or amendments to existing ones, and to conduct a review of the Act every [five] years to ensure it remains relevant, both after consulting those who are governed by the legislation;

describe all the subjects that are to be addressed in the regulations to ensure there is sufficient-regulation-making authority under the Act to support those regulations, including the legality of adopting provincial, national or international standards by reference;

provide clear authority for and describe a mechanism for persons to obtain variances or exemptions from the regulations (e.g. submit requests to the agency, the Council or the Minister with supporting rationale), and include a right of those who may be affected by a granted variances/exemptions to appeal those decisions (unless made by cabinet alone) or to intervene before the decision is made;

describe how the activities of the agency (and the advisory council) are to be funded, whether or not the agency is to be the Board;

give direction (to the agency responsible for preparing draft legislation) to attempt to consolidate under the new OHS Act as much of the OHS related legislation outside the Act as possible, bearing in mind the impact of consolidations on the programs and mandates of other ministries.