COMPARING APPLES AND ORANGES


Submitted to: Royal Commission on Workers’ Compensation in British Columbia

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By: George K. Bryce
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1. INTRODUCTION
This report compares the recommendations that the Commission made in its October 31, 1997 Report on Sections 2 and 3(a) of the Commission’s Terms of Reference (the Commission’s recommendations) to the provisions of Bill 14 (1998), which will become the Workers’ Compensation (Occupational Health and Safety) Amendment Act, 1998 (“Bill 14 (1998”).

1.1 Recommendations compared
The comparison considers the 31 numbered recommendations set out in the boxes throughout the Commission’s October 1997 report that addressed subjects relevant to an occupational health and safety (“OHS”) statute.

In a few cases a recommendation may have contained two parts: one dealing with a statutory matter, the other with a consequential program or administrative matter. Only that part of a recommendation directed to an OHS statute is considered in this report.

There are substantive comments in the text before and after some of the Commission’s recommendations that address the content of an OHS statute. Some of these substantive comments are not reflected or stated in the recommendations themselves, but in some instances the government has acted as if these comments were part of the original recommendations. Where appropriate, I have also extracted these substantive comments.

1.2 Recommendations not compared
Appendix “A” sets out the text of 24 of the Commission recommendations that were not included in this comparison. These excluded recommendations that applied to regulations (as opposed to a statute) or to board programs or policies, or provided general guidance to government on a issue not commonly the subject of legislation. Also, I have not considered the recommendations that dealt with fatality benefits under the Workers’ Compensation Act (the “WCA Act”). Again, the only recommendations compared in this report are those which relate to the subject of an OHS statute.

1.3 Provisions from Bill 14 (1998) not considered
While I have been able to link almost all of the provisions of Bill 14 (1998) to one or more of the Commission’s OHS statute recommendations, for various reasons a number of the provisions from this amendment legislation were not considered in this comparison. For example:
I have not considered provisions that simply amended an existing definition, repealed a redundant definition, or created a new definition.

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1 I will refer herein to the amending legislation as “Bill 14 (1998)”. After the Bill receives Royal Assent, the amending legislation may then be referred to as the “Workers’ Compensation (Occupational Health and Safety) Amendment Act, 1998.”
I have not linked the first four of the consequential amendments that Bill 14 (1998) will make to various statutes; being sections 16 to 22 of the Bill. (Section 23 of the Bill will repeal the Workplace Act; one of the Commission’s recommendations.) I have not linked the various provisions in sections 24 to 37 of Bill 14 (1998) that provide for various transitional matters necessary to introduce the new OHS Part to the WCAct. I have also not considered the commencement provision, being section 38 of the Bill.

Setting aside these legislative drafting and technical provisions of the Bill, there remain a set of provisions that addressed substantive policy issues that were not addressed in the Commission’s recommendations. These provisions are listed in Appendix “B” of this report.


This section sets out the Commission’s recommendations concerning an OHS statute. These recommendations are found in the enclosed boxes.

In a few cases, a recommendation may be broken down into two or more elements, in particular where one element relates to a statutory subject and the other to a program or administrative subject. In a one instance, two recommendations were merged together because the subjects they addressed were set out in a single set of provisions.

The page number in the Commission’s 1997 report where the original recommendation can be found is noted in brackets after each recommendation (e.g. “ref. pg. #”).

After each recommendation is an extract from Bill 14 (1998) of the provisions that apply to that recommendation, if any (in Helvetica font). The full text of an extract from Bill 14 (1998) is provided for ease of reference. Bold text is the wording from a specific amending section of that Bill. The non-bolded text is an extract from the new sections introduced, usually by section 15 of the Bill.

After each extract from Bill 14 (1998) is a brief commentary that indicates whether or not the Commission’s recommendation has been acted on, or acted on only in part. Cross-references and other comments are also offered.

2.1 Legislative accountability

**RECOMMENDATION 1.** the Legislature assert its responsibility for the important social policy issues inherent in occupational health and safety by enacting new legislation to address these issues. (ref. pg. 11)

**COMMENTARY:** Recommendation acted on.
The Legislature has asserted its responsibility for OHS by introducing Bill 14 (1998), that will become the *Workers Compensation (Occupational Health and Safety) Amendment Act, 1998* on Royal Assent. This amendment legislation was introduced about six months after the Commission reported to the governing on its OHS terms of reference.

**RECOMMENDATION 2. (a) the new legislation be a separate occupational health and safety statute for the province of British Columbia; and (ref. pg. 12)**

**COMMENTARY:** *Recommendation not acted on.*

Rather than introduce a new, separate OHS statute, the government has introduced a series of amendments to the *WCAct*. The major amendment found in section 15 of Bill 14 (1998) would add a new Part 3 to the *WCAct* dealing with OHS matters.

**RECOMMENDATION 2. (b) the current occupational health and safety provisions found in the Workers Compensation Act and Workplace Act be incorporated in this new statute. (ref. pg. 12)**

**APPLICABLE EXTRACT FROM BILL 14 (1998):**

2 Section 6 (5) is repealed.

3 Section 13 (2) is repealed.

4 Section 36 is amended by striking out "expenses incurred in administering the Workplace Act," and substituting "expenses incurred in administering Part 3 of this Act,”.

5 Sections 70 to 72 are repealed.

... 7 Section 74 is repealed.

8 Section 75 is amended
(a) by repealing subsection (2),
(b) in subsection (3) by striking out "any other regulation” and substituting "a regulation”, and
(c) by repealing subsections (4) and (5).

... 13 Section 95 (1.1) (d) is amended by striking out "under this Part” and substituting "under this Part or Part 3”.

14 Section 96 is amended
(a) by repealing subsection (6) (c) and substituting the following:
(c) a levy under section 73, and

(b) by repealing subsection (6.1) (a) and substituting the following:

(a) an assessment, other than an assessment under section 223 (1) (a), .

15 The following ... is added:

...
(l) establishing requirements with respect to the disclosure of information in respect of a hazardous substance, including disclosure of confidential business information;
(m) providing for exemptions from disclosure of confidential business information in respect of a hazardous substance;
(n) establishing or designating an agency, board or commission to determine whether information in respect of a hazardous substance is confidential business information;
(o) respecting the procedures, powers and functions of an agency, board or commission referred to in paragraph (n);
(p) respecting the reporting by physicians and others of cases in which workers are affected by hazardous substances.

**Certification and training of first aid attendants and instructors**

159 The board may

(a) supervise the training of and train occupational first aid attendants and instructors,
(b) appoint examiners and conduct examinations for the purposes of this section,
(c) issue, renew and amend certificates to occupational first aid attendants and instructors,
(d) enter into arrangements by which other persons provide training, give examinations and issue certificates for the purposes of this section, and
(e) establish fees for the purposes of this section.

**Installation and maintenance of required first aid equipment**

160 If an employer fails, neglects or refuses to install or maintain first aid equipment or service required by regulation or order, the board may do one or more of the following:
(a) have the first aid equipment and service installed, in which case the cost of this is a debt owed by the employer to the board;
(b) impose a special rate of assessment under Part 1 of this Act;
(c) order the employer to immediately close down all or part of the workplace or work being done there until the employer complies with the applicable regulation or order.

**Medical monitoring programs**

161 (1) If the board considers this is advisable given the nature or conditions of a work activity, the board may, by regulation, require employers of workers who carry out that activity or who are exposed to those conditions to establish a medical monitoring program in accordance with this section and the regulations.
(2) The following apply to a medical monitoring program under this section:
(a) the program is to be provided at the expense of the employer;
(b) a worker may not be compelled to participate in the program;
(c) a worker who participates in the program must be advised of the results of each examination.
(3) A regulation under subsection (1) may prescribe
(a) the medical examinations, including tests and X-rays, that are required,
(b) the type of health professional who is authorized to conduct the examinations,
(c) when examinations are required,
(d) the information that must be obtained and recorded,
(e) the information that must be provided to the worker, and
(f) responsibilities for keeping the records related to the program.
(4) The board may require the health professional who conducted an examination for the purposes of this section, or the person keeping the records for the purposes of the program, to provide to the board the information referred to in subsection (3) (d).
Medical certification requirements
162 (1) If the board considers this is advisable given the physical requirements of a specific type of work, the board may, by regulation, require employers to ensure that workers performing that work are medically certified as to their physical fitness for the work.
(2) A regulation under subsection (1) may prescribe
(a) the medical examinations, including tests and X-rays, that are required for certification,
(b) the type of health professional who is authorized to make the certification,
(c) when reevaluations and renewals of certificates are required,
(d) the information that must be obtained and recorded, and
(e) who is to pay for the cost of the certification.
(3) The board may require the health professional who conducted an examination for the purposes of this section to provide to the board the information referred to in subsection (2) (d).

Certification and training of blasters
163 The board may
(a) supervise the training of and train blasters and instructors,
(b) appoint examiners and conduct examinations for the purposes of this section,
(c) issue, renew and amend certificates to blasters and instructors,
(d) enter into arrangements by which other persons provide training, give examinations and issue certificates for the purposes of this section, and
(e) establish fees for the purposes of this section.

Employer or supervisor must not attempt to prevent reporting
177 An employer or supervisor must not, by agreement, threat, promise, inducement, persuasion or any other means, seek to discourage, impede or dissuade a worker of the employer, or a dependant of the worker, from reporting to the board
(a) an injury or allegation of injury, whether or not the injury occurred or is compensable under Part 1,
(b) an illness, whether or not the illness exists or is an occupational disease compensable under Part 1,
(c) a death, whether or not the death is compensable under Part 1, or
(d) a hazardous condition or allegation of hazardous condition in any work to which this Part applies.

Repeal of Workplace Act
23 (1) The Workplace Act, R.S.B.C. 1996, c. 493, is repealed.
(2) The Supplement to the Workplace Act is repealed.

Amendment of continued regulations
26 (1) As soon as is reasonably practicable after this section comes into force, the board must
(a) review the continued regulations [as per section 25 of the transitional provisions] to identify provisions that conflict with the new Part, and
(b) amend those regulations within its jurisdiction to remove or resolve the conflict.
(2) Despite the Workers Compensation Act, the board may but is not required to hold public hearings on amendments referred to in subsection (1) of this section.
COMMENTARY: Recommendation acted on.
While a new OHS statute has not been introduced, a number of the OHS provisions found in the other parts of the WCAct have been repealed and moved or incorporated into the new OHS Part.

The following are the specific provisions from the current WCAct that will be moved from other parts of the WCAct to the new Part 3 (as noted above) but are not otherwise addressed by the Commission’s other recommendations:

<table>
<thead>
<tr>
<th>New section number for Part 3</th>
<th>Current section number from WCAct</th>
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<tbody>
<tr>
<td>s. 114</td>
<td>s. 71(9)</td>
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<tr>
<td>s. 158</td>
<td>ss. 71(1.1) &amp; (1.2)</td>
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<td>s. 159</td>
<td>s. 70(3)</td>
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<td>s. 162</td>
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<td>s. 163</td>
<td>ss. 71(1) &amp; (6)</td>
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<tr>
<td>s. 177</td>
<td>s. 13(2)</td>
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Section 23 of the Bill’s consequential amendments will repeal the Workplace Act, as its provisions will be incorporated within the new OHS Part.

Section 26 of the Bill’s transition provisions requires the board to review the OH&S Regulation (continued under section 25 of Bill 14 (1998)) and remove or resolve conflicts between that regulation and the new OHS Part. (See also the discussion of recommendations 3 and 55, below, regarding new sections 109 and 228 that address ongoing reviews of OHS statute and regulations.)

2.2 How autonomous should an agency be in its regulation-making decisions?

RECOMMENDATION 3. cabinet approve the occupational health and safety regulations to be promulgated under the new occupational health and safety statute. (ref. pg. 15)

APPLICABLE EXTRACT FROM BILL 14 (1998):

Division 17 -- Regulations
Cabinet regulations
224 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the Interpretation Act.²

² Section 41 of the Interpretation Act reads:

Powers to make regulations
(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

(a) defining words or expressions used but not defined in this Part;
(b) establishing criteria that must be applied and procedures that must be followed in making decisions under this Part or the regulations;
(c) requiring a greater number for minimum membership of a joint committee as referred to in section 127 (a) and the circumstances when that greater number is required;
(d) establishing additional functions and duties for joint committees as referred to in section 130 (j);
(e) establishing a longer period of educational leave as referred to in section 135 (1);
(f) establishing assistance that must be provided to a joint committee by the employer in addition to the requirements of section 136;
(g) prescribing information that must be included in an occupational health and safety information summary under section 155;
(h) prescribing classes of health professional for the purposes of section 157;
(i) specifying provisions of the regulations of the Lieutenant Governor in Council under this Part for which a variance under Division 9 of this Part may be ordered;
(j) prescribing a type of decision under this Part or the regulations as being appealable under Division 14 of this Part and prescribing who may bring an appeal of such a decision;
(k) amending the Act to reflect the deemed amendments under section 25 (4);
(l) respecting any other matter for which regulations of the Lieutenant Governor in Council are contemplated by this Act.

Board regulations

225 (1) In accordance with its mandate under this Part, the board may make regulations the board considers necessary or advisable in relation to occupational health and safety and occupational environment.

(2) Without limiting subsection (1), the board may make regulations as follows:

(a) respecting standards and requirements for the protection of the health and safety of workers and other persons present at a workplace and for the well-being of workers in their occupational environment;
(b) respecting specific components of the general duties of employers, workers, suppliers, supervisors, prime contractors and owners under this Part;
(c) requiring employers to prepare written policies or programs respecting occupational health and safety and occupational environment in accordance with the regulations;
(d) regulating or prohibiting the manufacture, supply, storage, handling or use of any tool, equipment, machine or device or the use of any workplace;

41 (1) If an enactment provides that the Lieutenant Governor in Council or any other person may make regulations, the enactment must be construed as empowering the Lieutenant Governor in Council or that other person, for the purpose of carrying out the enactment according to its intent, to

(a) make regulations as are considered necessary and advisable, are ancillary to it, and are not inconsistent with it,
(b) provide for administrative and procedural matters for which no express, or only partial, provision has been made,
(c) limit the application of a regulation in time or place or both,
(d) prescribe the amount of a fee authorized by the enactment,
(e) provide, for a regulation made by or with the approval of the Lieutenant Governor in Council, that its contravention constitutes an offence, and
(f) provide that a person who is guilty of an offence created under para-graph (e) is liable to a penalty not greater than the penalties provided in the Offence Act.

(2) A regulation made under the authority of an enactment has the force of law.
(e) respecting standards and requirements for the monitoring of atmospheric or other workplace conditions or to demonstrate compliance with this Part, the regulations or an applicable order;
(f) restricting the performance of specified functions to persons possessing specified qualifications or experience, including establishing certification requirements and establishing or arranging certification and instructor training programs;
(g) requiring the preparation, maintenance and submission of records respecting statistical data related to occupational health and safety or occupational environment;
(h) respecting the form and manner of reporting on any matter required to be reported under this Part or the regulations;
(i) respecting any other matter for which regulations, other than regulations of the Lieutenant Governor in Council, are contemplated by this Act.

Notice and consultation before board makes regulation
226 (1) Before making a regulation under this Part, the board
(a) must give notice of the proposed regulation in the Gazette and in at least 3 newspapers, of which one must be published in the City of Victoria and one in the City of Vancouver,
(b) must hold at least one public hearing on the proposed regulation, and
(c) may conduct additional consultations with representatives of employers, workers and other persons the board considers may be affected by the proposed regulation.

(2) A defect or inaccuracy in the notice under subsection (1) (a) or in its publication does not invalidate a regulation made by the board.

When board regulation comes into force
227 A regulation of the board must specify the date on which it is to come into force, which date must be at least 90 days after its deposit under the Regulations Act.

Minister may direct board to consider amendment
229 (1) The minister may direct the board to consider whether the board should make, repeal or amend its regulations in accordance with the recommendations of the minister.
(2) If a direction under subsection (1) is made, the board must consider the recommendations and report its response to the minister.
(3) If the board does not make, repeal or amend its regulations as recommended, the Lieutenant Governor in Council may, by regulation, make, repeal or amend the regulations of the board in accordance with the recommendations of the minister.
(4) On coming into force, a regulation under subsection (3) is deemed to be a regulation of the board.

Authority and application of regulations generally
230 (1) The authority to make regulations under this Division does not limit and is not limited by the authority to make regulations under another provision of this Part.
(2) Regulations under this Part may do one or more of the following:
(a) be made applicable to employers, workers, suppliers and any other persons working in or contributing to the production of an industry;
(b) be different for different workplaces, industries, activities, persons, things or categories of any of these;
(c) delegate a matter to, or confer a discretion on, the board, an officer or another person.
...
COMMENTARY: Recommendation acted on.
While the Commission recommended that the Provincial Cabinet alone hold the final authority to review and approve all the OHS regulations that would be prepared by the board (or possibly some other agency), the government has opted to employ a hierarchy of regulation-making authorities. This approach appears to meet the spirit of the Commission’s recommendation 3.

At the highest level, the Cabinet (i.e. the Lt. Gov. in Council) holds the exclusive authority to make regulations in relation to the major social policy issues that are reflected in the new Part 3 and in relation to certain contentious issues (e.g. increasing the number of members of a joint committee, prescribing committee duties and increasing the length of educational leave for committee members).

At the next level, the board may make regulations covering subjects that have not been assigned to the Cabinet. For the most part, given that the new OHS Part sets out the core features of OHS policies and programs for BC and that the Cabinet holds an over-arching regulation-making powers, the board’s regulation-making authority will now be focused on more technical matters, such as safety standards and requirements. While the board can approve more detailed regulations concerning general duties of employers, workers and others, the foundation of those duties remains within the purview of the Legislature as set out in the general statutory duty provisions. (As a matter of common law, the board’s regulations cannot conflict with or compromise those general statutory duties.)

At the final level, the Minister may ask the board to consider making or amending one of its regulations. If the board does not act as recommended by the Minster, the Cabinet can step-in and over-ride the board, and pass the requested regulation or amendment.

See also the commentary on recommendation 47, below, regarding the adoption of national or international safety standards within the regulations.

2.3 Legislative objectives and agency directives

RECOMMENDATION 4. the province's occupational health and safety statute include (a) general and specific legislative objectives; (ref. pg. 17)

SUBSTANTIVE COMMENT:
On page 18 of its 1997 report, the Commission offered the following substantive comments on this recommendation:

We believe that while the primary goal of occupational health and safety should be to prevent workplace accidents, injuries and illnesses, clearly society’s objective should be to prevent more than just those workplace conditions that result in workers losing income or requiring other compensation benefits. Occupational health and safety legislation should serve the public interest by contributing to an environment which could lead to better worker health and safety, reduced worker reliance on other social safety nets such as health care and social welfare programs, and
lower employer costs. It should contribute to the quality of life inside, as well as outside the workplace, while ensuring that the financial responsibility for achieving these objectives is appropriately allocated between employers and society at large.

**General objective**
The objective of this Act is to preserve and protect the human resources of the province of British Columbia for the benefit of all of its citizens.

**Specific objectives**
The specific objectives of this Act should be:
to prevent workplace accidents, injuries and illnesses, and protect persons from risks to their health and safety arising out of, or in connection with, activities at workplaces;
to promote a culture of occupational health and safety at all workplaces and excellence in health and safety management by employers;
to encourage education of the public and workers regarding occupational health and safety;
to promote and maintain the highest degree of physical, mental and social well-being of workers and other workplace parties;
to place and maintain, as far as reasonably practicable, workers and other persons in an occupational environment that meets their health and safety needs;
to ensure that all parties who can affect the health and safety of persons at the workplace share the responsibility for workplace health and safety to the extent of each party's authority and ability to do so;
to foster co-operative and consultative relationships between employers, workers and other persons regarding workplace health and safety, and promote worker participation in workplace health and safety programs and decision-making processes; and
to minimize wage loss, medical expenses, lost production, and disability compensation payments, thereby enhancing the competitiveness of British Columbia in the Canadian and world economies.

**APPLICABLE EXTRACT FROM BILL 14 (1998):**

*Purpose of Part*
107 (1) The purpose of this Part is to benefit all citizens of British Columbia by promoting occupational health and safety and protecting workers and other persons present at workplaces from work related risks to their health and safety.

(2) Without limiting subsection (1), the specific purposes of this Part are
(a) to promote a culture of commitment on the part of employers and workers to a high standard of occupational health and safety,
(b) to prevent work related accidents, injuries and illnesses,
(c) to encourage the education of employers, workers and others regarding occupational health and safety,
(d) to ensure an occupational environment that provides for the health and safety of workers and others,
(e) to ensure that employers, workers and others who are in a position to affect the occupational health and safety of workers share that responsibility to the extent of each party's authority and ability to do so,
(f) to foster cooperative and consultative relationships between employers, workers and others regarding occupational health and safety, and to promote worker participation in occupational health and safety programs and occupational health and safety processes, and
(g) to minimize the social and economic costs of work related accidents, injuries and illnesses, in order to enhance the quality of life for British Columbians and the competitiveness of British Columbia in the Canadian and world economies.

**COMMENTARY:** *Recommendation acted on.*
RECOMMENDATION 4. the province's occupational health and safety statute include...
(b) agency directives. (ref. pg. 17)

SUBSTANTIVE COMMENT
On page 19 to 20 of its 1997 report, the Commission offered the following additional
comments on this recommendation:

Whether or not the board or a new agency eventually administers the new occupational health and
safety statute, the commission believes that the responsible agency should be required to follow a
set of directives in a financially responsible and accountable manner. These directives should
provide a means by which to hold the agency accountable; they should be developed by the
Legislature, rather than the minister or the board, and finalized in consultation with the agency and
those who must comply with the legislation.

The following are examples of agency directives. They are examples of elements that should be
included in the statute.

Agency Directives
(1) To ensure that the agency contributes to achieving the legislative objectives, the agency must:
(a) evaluate risks to the health, safety and well-being of persons at workplaces;
(b) develop programs to minimize or eliminate those risks; and
(c) monitor the effectiveness of the programs it develops and use the results to improve those
programs.
(2) Without limiting the generality of subsection (1), the agency must also undertake the following
specific tasks:
complete at least once every five years a comprehensive review of this Act and other legislation
that impacts on or affects workplace health and safety to ensure that this Act is appropriate
and effective, and when change is required, develop proposed amendments to this Act or other
statutes to be approved by the Legislature;
complete at least once every three years a comprehensive review of the regulations to ensure that
they are appropriate and effective, and, when change is required, develop proposed new
regulations or amendments to existing regulations to be approved by the Lt. Gov. in Council;
consult with employers, workers and others who must comply with the Act and the regulations, in
particular when developing legislative changes;
cooperate with and, when so required, enter into formal agreements with other agencies
responsible for other legislation that impacts on or affects workplace health and safety;
ensure that a sufficient number of suitably trained, qualified and knowledgeable persons are
employed
to enforce this Act and the regulations;
to otherwise promote the objectives of this Act, and
to ensure that these persons remain competent and act in a fair and effective manner;
(f) ensure the provision of appropriate occupational health and safety education and training
programs to those who require such programs;
(g) devise courses in relation to occupational health and safety and recommend that such courses
be integrated into educational programs. This should be done in co-operation with educational
authorities including, but not limited to, universities, colleges, training institutes, local school
boards and safety associations;
(h) employ workplace health and safety experts to be available to provide consultation to those
who require such advice;
(i) examine, review and make recommendations in relation to existing and proposed registration
or licensing schemes relating to occupational health and safety, and administer those schemes
assigned to the agency by the Act or regulations;
(j) undertake, encourage or sponsor research and inquiries, gather and disseminate information,
and undertake related activities in support of the legislative objectives;
(k) promote community awareness about workplace health and safety; and
(l) inquire into and report to the minister within the time specified by the minister upon any
matters referred to the agency by the minister.

Terms and Conditions
In undertaking the directives, the agency must:
(a) act in a financially responsible and accountable manner; and
(b) ensure that employers, workers and others retain their collective responsibility for creating and maintaining safe and healthy workplaces.

APPLICABLE EXTRACT FROM BILL 14 (1998):

DIVISION 2 -- BOARD MANDATE

Board's mandate under this Part

111 (1) In accordance with the purposes of this Part, the board has the mandate to be concerned with occupational health and safety generally, and with the maintenance of reasonable standards for the protection of the health and safety of workers in British Columbia and the occupational environment in which they work.

(2) In carrying out its mandate, the board has the following functions, duties and powers:

(a) to exercise its authority to make regulations to establish standards and requirements for the protection of the health and safety of workers and the occupational environment in which they work;

(b) to undertake inspections, investigations and inquiries on matters of occupational health and safety and occupational environment;

(c) to provide services to assist joint committees, worker health and safety representatives, employers and workers in maintaining reasonable standards for occupational health and safety and occupational environment;

(d) to ensure that persons concerned with the purposes of this Part are provided with information and advice relating to its administration and to occupational health and safety and occupational environment generally;

(e) to encourage, develop and conduct or participate in conducting programs for promoting occupational health and safety and for improving the qualifications of persons concerned with occupational health and safety and occupational environment;

(f) to promote public awareness of matters related to occupational health and safety and occupational environment;

(g) to prepare and maintain statistics relating to occupational health and safety and occupational environment, either by itself or in conjunction with any other agency;

(h) to undertake or support research and the publication of research on matters relating to its responsibilities under this Act;

(i) to establish programs of grants and awards in relation to its responsibilities under this Act;

(j) to provide assistance to persons concerned with occupational health and safety and occupational environment;

(k) to cooperate and enter into arrangements and agreements with governments and other agencies and persons on matters relating to its responsibilities under this Part;

(l) to make recommendations to the minister respecting amendments to this Act, the regulations under this Part or Part 1 of this Act, or other legislation that affects occupational health and safety or occupational environment;

(m) to inquire into and report to the minister on any matter referred to it by the minister, within the time specified by the minister;

(n) to fulfill its mandate under this Part in a financially responsible manner;

(o) to do other things in relation to occupational health and safety or occupational environment that the minister or Lieutenant Governor in Council may direct.

Annual report

112 The annual report of the board under section 69 must include

(a) a review of its activities under this Part for the year, including financial, statistical and performance information, and
(b) an assessment of the occupational health and safety record of workplaces in British Columbia.

**Board jurisdiction under this Part**

113 (1) The board has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact and law arising or required to be determined under this Part, and the action or decision of the board is final and conclusive and is not open to question or review in any court.

(2) Despite subsection (1), the board has full discretionary power at any time to reopen, rehear and redetermine any matter, except a decision of the appeal tribunal, that is within the jurisdiction of the board under this Part.

(3) Proceedings by or before the board under this Part must not be restrained by injunction, prohibition or other process or proceeding in any court or be removed by certiorari or otherwise into any court.

... (5) The board may charge a class or subclass with the cost of investigations, inspections and other services provided to the class or subclass for the prevention of injuries and illnesses.

**COMMENTARY:** *Recommendation acted on.*

The board’s mandate in relation to review of regulations is addressed in new sections 109 and 208; see the discussion on recommendation 55, below. See also the discussion on recommendation 3, above, concerning the transfer of the board’s current authority to cooperate with other OHS agencies.

### 2.4 Application of the new statute and regulations

**RECOMMENDATION 5.** The province's occupational health and safety statute and its regulations apply to all persons employed at or attending a place where persons work, or whose actions or omissions may affect the health and safety of workers, including, but not limited to (a) employers; (b) workers; (c) self-employed persons without employees; (d) supervisors; (e) contractors; (f) suppliers of goods and services; and (g) visitors. (ref. pg. 21)

**APPLICABLE EXTRACT FROM BILL 14 (1998):**

*Application of Part*

108 (1) ... this Part applies to

(a) the Provincial government and every agency of the Provincial government,
(b) every employer and worker whose occupational health and safety are ordinarily within the jurisdiction of the Provincial government, and
(c) the federal government, every agency of the federal government and every other person whose occupational health and safety are ordinarily within the jurisdiction of the Parliament of Canada, to the extent that the federal government submits to the application of this Part.

**COMMENTARY:** *Recommendation acted on.*
While supervisors, contractors, and suppliers are not mentioned in subsection 108(1), these worksite parties have been assigned general duties later under Part 3. They are also subject to specific requirements throughout the proposed legislation.

There is no mention of self-employed persons without employees or visitors in this subsection or elsewhere in the proposed new Part. However, these worksite parties may be included in the provisions that apply to persons, generally. Finally, the board has the authority under new section 230(2)(a) to make regulations applicable to “other persons”.

See also the discussion concerning duties of self-employed persons without employees, as per recommendation 8, below.

2.5 Employer duties

RECOMMENDATION 6. the province's occupational health and safety statute place a
general duty on employers to
(a) establish occupational health and safety policies and programs;
(b) inform workers of their rights and duties;
(c) warn workers of workplace hazards and advise them on how to address those hazards;
(d) ensure workers are properly trained, experienced and supervised to perform their work safely;
(e) supply personal protective equipment and ensure workers know how to use that equipment;
(f) cooperate with workers, committees or representatives; and
(g) cooperate with the occupational health and safety agency. (ref. pg. 25)

APPLICABLE EXTRACT FROM BILL 14 (1998):

General duties of employers
115 (1) Every employer must
(a) ensure the health and safety of
   (i) all workers working for that employer, and
   (ii) any other workers present at a workplace at which that employer's
       work is being carried out, and
(b) comply with this Part, the regulations and any applicable orders.
(2) Without limiting subsection (1), an employer must
(a) remedy any workplace conditions that are hazardous to the health or safety of
   the employer's workers,
(b) ensure that the employer's workers
   (i) are made aware of all known or reasonably foreseeable health or
       safety hazards to which they are likely to be exposed by their work,
   (ii) comply with this Part, the regulations and any applicable orders, and
   (iii) are made aware of their rights and duties under this Part and the
       regulations,
(c) establish occupational health and safety policies and programs in accordance
   with the regulations,
(d) provide and maintain in good condition protective equipment, devices and clothing as required by regulation and ensure that these are used by the employer's workers,
(e) provide to the employer's workers the information, instruction, training and supervision necessary to ensure the health and safety of those workers in carrying out their work and to ensure the health and safety of other workers at the workplace,
(f) make a copy of this Act and the regulations readily available for review by the employer's workers and, at each workplace where workers of the employer are regularly employed, post and keep posted a notice advising where the copy is available for review,
(g) consult and cooperate with the joint committees and worker health and safety representatives for workplaces of the employer, and
(h) cooperate with the board, officers of the board and any other person carrying out a duty under this Part or the regulations.

COMMENTARY: Recommendation acted on.

## 2.6 Supplier duties

<table>
<thead>
<tr>
<th>RECOMMENDATION 7. the province's occupational health and safety statute place a general duty on suppliers to</th>
</tr>
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<tbody>
<tr>
<td>(a) ensure the equipment or material they supply is safe, complies with legislation, and if required by an agreement, maintain equipment in a safe condition; and</td>
</tr>
<tr>
<td>(b) ensure any biological, chemical or physical agent they supply is labeled in accordance with WHMIS regulations. (ref. pg. 26)</td>
</tr>
</tbody>
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APPLICABLE EXTRACT FROM BILL 14 (1998):

*General duties of suppliers*

<table>
<thead>
<tr>
<th>120 Every supplier must</th>
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<tbody>
<tr>
<td>(a) ensure that any tool, equipment, machine or device, or any biological, chemical or physical agent, supplied by the supplier is safe when used in accordance with the directions provided by the supplier and complies with this Part and the regulations,</td>
</tr>
<tr>
<td>(b) provide directions respecting the safe use of any tool, equipment, machine or device, or any biological, chemical or physical agent, that is obtained from the supplier to be used at a workplace by workers,</td>
</tr>
<tr>
<td>(c) ensure that any biological, chemical or physical agent supplied by the supplier is labelled in accordance with the applicable federal and provincial enactments,</td>
</tr>
<tr>
<td>(d) if the supplier has responsibility under a leasing agreement to maintain any tool, equipment, machine, device or other thing, maintain it in safe condition and in compliance with this Part, the regulations and any applicable orders, and</td>
</tr>
<tr>
<td>(e) comply with this Part, the regulations and any applicable orders.</td>
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</table>

COMMENTARY: Recommendation acted on.

See also the discussion on recommendation 30, below.
2.7 Duties for self-employed persons without employees

RECOMMENDATION 8. the province's occupational health and safety statute place a general duty on self-employed persons without employees to
(a) ensure that neither the self-employed person or any other person is not exposed to arising out of, or in connection with, the self-employed person’s activities; 
(b) comply with the occupational health and safety statute and regulations; and 
(c) cooperate with the occupational health and safety agency. (ref. pg. 27)

COMMENTARY: Recommendation not acted on.
As noted above, there is no mention of self-employed persons who have no employees anywhere in the proposed new Part.

That said, these worksite parties may be included in the provisions that apply to persons, generally. Also, self-employed persons without employees may fit within the definition of a worker, an owner or a supplier, depending on the particular circumstances. Finally, the board has the authority under new section 230(2)(a) to make regulations applicable to “other persons”, which could be used to create specific regulations for self-employed persons without employees.

2.8 Worker duties

RECOMMENDATION 9. the province's occupational health and safety statute place duties on workers similar to those duties described in the November 1995 draft of sections 9 and 10, in Part 3 of the OHS Regulations. (ref. pg. 29)

SUBSTANTIVE COMMENT:
The duties assigned to workers in the November 1995 draft of sections 9 and 10 of the OHS Regulations read:

9 Worker must take all reasonable precautions to protect the health and safety of themselves and of other workers.

10 A worker must: use or wear the equipment, protective devices or clothing required by these regulations, carry out all assigned work in accordance with established safe work procedures as required by these regulations, report to the supervisor or employer the absence of or defect in any equipment or protective device of which the worker is aware and which may endanger any worker, report to the supervisor or employer any contravention of the Act or these regulations or the existence of any uncontrolled or previously unidentified hazard of which the worker has knowledge, operate only the machinery or equipment the worker is authorized and trained to operate, not engage in horseplay or similar conduct which may endanger any person, and ensure his or her ability to perform the job is not impaired by alcohol, drugs or other cause.
APPLICABLE EXTRACT FROM BILL 14 (1998):

General duties of workers
116 (1) Every worker must
(a) take reasonable care to protect the worker’s health and safety and the health
and safety of other persons who may be affected by the worker’s acts or
omissions at work, and
(b) comply with this Part, the regulations and any applicable orders.
(2) Without limiting subsection (1), a worker must
(a) carry out his or her work in accordance with established safe work procedures
as required by this Part and the regulations,
(b) use or wear protective equipment, devices and clothing as required by the
regulations,
(c) not engage in horseplay or similar conduct that may endanger the worker or
any other person,
(d) ensure that the worker’s ability to work without risk to his or her health or
safety, or to the health or safety of any other person, is not impaired by alcohol,
drugs or other causes,
(e) report to the supervisor or employer
   (i) any contravention of this Part, the regulations or an applicable order of
       which the worker is aware, and
   (ii) the absence of or defect in any protective equipment, device or
       clothing, or the existence of any other hazard, that the worker considers
       is likely to endanger the worker or any other person,
(f) cooperate with the joint committee or worker health and safety representative
   for the workplace, and
(g) cooperate with the board, officers of the board and any other person carrying
   out a duty under this Part or the regulations.

COMMENTARY: Recommendation acted on
There is no specific reference in new section 116 to the Commission’s recommendation
that would bring draft clause 10(e) into the Act: “operate only the machinery or
equipment the worker is authorized and trained to operate”. However, the board has the
authority under new section 225 to address this type of provision. Therefore, I have
concluded that this recommendation has been met by the provisions of Bill 14 (1998).

2.9 Multiple and cascading responsibilities

RECOMMENDATION 10. the province's occupational health and safety statute contain
provisions on multiple obligations and primary responsibilities similar to those found in
section 2.2 of Alberta's occupational health and safety statute and section 23 of Nova
Scotia's legislation, respectively. (ref. pg. 34)

SUBSTANTIVE COMMENT:
On pages 32 to 33 of it 1997 report, the Commission stated:

Section 2.2 of Alberta’s statute reads:

Multiple obligations
2.2 (1) In this section “function” means the function of prime contractor, contractor, employer, supplier or worker.

(2) If a person has 2 or more functions under this Act in respect of one work site, the person must meet the obligations of each function.

Holding more than one responsibility need not affect responsibilities that may cascade from one workplace party to another. Nova Scotia has addressed this issue in its statute and the applicable provision reads:

No limitation on generality

23(1) A specific duty or requirement imposed by this Act or the regulations does not limit the generality of any other duty or requirement imposed by this Act or the regulations.

(2) Where a provision of this Act or the regulations imposes a duty or requirement on more than one person, the duty or requirement is meant to be imposed primarily on the person with the greatest degree of control over the matters that are the subject of the duty or requirement.

(3) Notwithstanding subsection (2), but subject to subsection (5), where the person with the greatest degree of control fails to comply with a duty or requirement referred to in subsection (2), the other person or persons on whom the duty or requirement lies shall, where possible, comply with the provision.

(4) Where the person with the greatest degree of control complies with a provision described in subsection (2), the other persons are relieved of the obligation to comply with the provision only

(a) for the time during which the person with the greatest degree of control is in compliance with the provision;
(b) where simultaneous compliance by more than one person would result in unnecessary duplication of effort and expense; and
(c) where the health and safety of persons at the workplace is not put at risk by compliance by only one person.

(5) Where the person with the greatest degree of control fails to comply with a provision described in subsection (2) but one of the other persons on whom the duty or requirement is imposed complies with the provision, the other persons, if any, to whom the provision applies are relieved of the obligation to comply with the provision in the circumstances set out in clauses 4(a) to (c) with the necessary modifications.

In principle, the party with the greatest degree of control at any particular worksite should be responsible for occupational health and safety at that site. In the case of multi-employer sites, the party with the greatest degree of control - whether that is the owner, the prime contractor, the largest employer on the site, or someone else - should be responsible for coordinating the activities of those worksite parties who bear front-line occupational health and safety duties. In this context, coordination means:

developing and implementing an overall occupational health and safety plan for the site;
instructing those with front-line duties to the purpose and operation of the plan (in particular their obligations under the plan and consequences of breaches of such obligations); and
enforcing the plan to the point of disciplining, directly or contractually, those who fail to comply with it.

APPLICABLE EXTRACT FROM BILL 14 (1998):

Coordination at multiple-employer workplaces

118 (1) In this section:

ômultiple-employer workplace" means a workplace where workers of 2 or more employers are working at the same time;
ôprime contractor" means, in relation to a multiple-employer workplace,
(a) the directing contractor, employer or other person who enters into a written agreement with the owner of that workplace to be the prime contractor for the purposes of this Part, or
(b) if there is no agreement referred to in paragraph (a), the owner of the workplace.

(2) The prime contractor of a multiple-employer workplace must
(a) ensure that the activities of employers, workers and other persons at the workplace relating to occupational health and safety are coordinated, and
(b) do everything that is reasonably practicable to establish and maintain a system or process that will ensure compliance with this Part and the regulations in respect of the workplace.

(3) Each employer of workers at a multiple-employer workplace must give to the prime contractor the name of the person the employer has designated to supervise the employer's workers at that workplace.

**General duties of owner**

119 Every owner of a workplace must

(a) provide and maintain the owner's land and premises that are being used as a workplace in a manner that ensures the health and safety of persons at or near the workplace,

(b) give to the employer or prime contractor at the workplace the information known to the owner that is necessary to identify and eliminate or control hazards to the health or safety of persons at the workplace, and

(c) comply with this Part, the regulations and any applicable orders.

**General obligations are not limited by specific obligations**

122 A specific obligation imposed by this Part or the regulations does not limit the generality of any other obligation imposed by this Part or the regulations.

**Persons may be subject to obligations in relation to more than one role**

123 (1) In this section, "function" means the function of employer, supplier, supervisor, owner, prime contractor or worker.

(2) If a person has 2 or more functions under this Part in respect of one workplace, the person must meet the obligations of each function.

**Responsibility when obligations apply to more than one person**

124 If

(a) one or more provisions of this Part or the regulations impose the same obligation on more than one person, and

(b) one of the persons subject to the obligation complies with the applicable provision,

the other persons subject to the obligation are relieved of that obligation only during the time when

(c) simultaneous compliance by more than one person would result in unnecessary duplication of effort and expense, and

(d) the health and safety of persons at the workplace is not put at risk by compliance by only one person.

**COMMENTARY:** *Recommendation acted on.*

### 2.10 The worker’s right to know (and the employer’s duty to inform)

RECOMMENDATION 11. the province's occupational health and safety statute state that

(a) worker has a right to receive appropriate training, information, instructional services and supervision on matters of occupational health and safety, especially in relation to the worker's work and work environment;

(b) a worker's right to receive appropriate training, information, instructional services and supervision on matters of occupational health and safety be supplemented and supported by complementary duties held by employers, supervisors, suppliers and others; and
(c) the occupational health and safety agency must
   (i) provide workers with detailed information applicable to their worksite describing
       injury and illness claims, similar to that set out in section 12 of Ontario's occupational
       health and safety act; and
   (ii) provide the information described in 11(c)(i) in appropriate plain language and in
       a clear and concise manner. (ref. pg. 38)

SUBSTANTIVE COMMENT:
On page 36 of its 1997 report, the Commission stated:

A provision like subsection 10(1) in Quebec’s Occupational health and safety statute is a useful
starting point. That provision states in part that:... the worker is entitled... to training, information
and counseling services in matters of occupational health and safety, especially in relation to his
work and his work environment, and to receive appropriate instruction, training and supervision.
...
While the right to know is fundamental to participating in the workplace, it is only half of the
equation; complementary duties must be placed on employers, supervisors, suppliers and others to
ensure that workers are provided with information and training.

APPLICABLE EXTRACT FROM BILL 14 (1998):
This recommendation has been addressed in various provisions throughout the new
legislation:

General duties of employers
115 ... (2) [A]n employer must ...
   (b) ensure that the employer's workers
       (i) are made aware of all known or reasonably foreseeable health or
           safety hazards to which they are likely to be exposed by their work,
       ...
       (iii) are made aware of their rights and duties under this Part and the
           regulations,
       ...
   (e) provide to the employer's workers the information, instruction, training and
       supervision necessary to ensure the health and safety of those workers in
       carrying out their work and to ensure the health and safety of other workers at the
       workplace,
   (f) make a copy of this Act and the regulations readily available for review by the
       employer's workers and, at each workplace where workers of the employer are
       regularly employed, post and keep posted a notice advising where the copy is
       available for review,
   ...

General duties of supervisors
117 ... (2) [A] supervisor must
   (a) ensure that the workers under his or her direct supervision
       (i) are made aware of all known or reasonably foreseeable health or
           safety hazards in the area where they work,
       ...

General duties of suppliers
Every supplier must ...  
(b) provide directions respecting the safe use of any tool, equipment, machine or device, or any biological, chemical or physical agent, that is obtained from the supplier to be used at a workplace by workers,  
(c) ensure that any biological, chemical or physical agent supplied by the supplier is labelled in accordance with the applicable federal and provincial enactments, ...

Posting of information  
154 (1) Where this Part, the regulations or an order requires an employer or other person to post information at a workplace, the person must  
(a) post the information at or near the workplace in one or more conspicuous places where it is most likely to come to the attention of the workers, or  
(b) otherwise bring it to the notice of and make it available to the workers at the workplace in accordance with the regulations.  
(2) If reasonably practicable, at least one place of posting under subsection (1) (a) must be at or near the equipment, works or area to which the information relates.  
(3) As an exception, if posting or notice referred to in subsection (1) is not practicable, the employer or other person must instead adopt other measures to ensure that the information is effectively brought to the attention of the workers.

Occupational health and safety information summary  
155 (1) An occupational health and safety information summary for a workplace or workplaces of an employer may be requested by  
(a) the employer,  
(b) a joint committee or worker representative of the employer,  
(c) a union representing workers of the employer, or  
(d) if there is no joint committee or worker representative for a workplace, any worker of the employer working at the workplace.  
(2) On receiving a request under subsection (1), the board must prepare a summary in relation to the workplace or workplaces for which the request is made of  
(a) the prescribed information relating to the previous calendar year, and  
(b) any other data the board considers necessary or advisable to provide.  
(3) A summary requested under this section must be sent to the person who made the request and, if the request was made by a person other than the employer, to the employer.  
(4) As soon as reasonably practicable after an employer receives a summary under this section, the employer must  
(a) post a copy at the workplaces to which it relates,  
(b) provide a copy to the joint committees or worker representatives, as applicable, and  
(c) if workers at a workplace to which it relates are represented by a union, send a copy to the union.

COMMENTARY: Recommendation acted on.  
While the employer and others hold a legal duty to inform, instruct, train, supervise, etc. workers, there is no provision in the Bill that expressly declares this worker right that would be analogous to section 10(1) of Quebec’s OHS statute.  
Nonetheless, a duty placed on an employer (for example) for the benefit of workers creates an implied right for workers generally. Thus, Bill 14 (1998) creates an implied rather than an expressed right for workers to be informed, instructed, trained and
supervised. This is why I have concluded that this recommendation has been substantially acted on.

The OHS information summary requirements of new section 155 are based on section 12 of Ontario’s OHS legislation that was quoted in the Commission’s report.

Clause 11(c)(ii) of the Commission’s recommendation is a program directive.

2.11 Criteria for establishing a committee

RECOMMENDATION 12. the province's occupational health and safety legislation
(a) direct the occupational health and safety agency to:
   (i) review the current industry classification system to ascertain if that system, or
   some other approach should be adopted as the criteria to require employers to
   establish joint occupational health safety committees at British Columbia worksites
   with less than 50 workers; and
   (ii) report its findings to the Minister of Labour so that the province's occupational
   health and safety statute can be written or amended to reflect the appropriate criteria;
(b) ensure that the criteria for establishing committees be reviewed as part of a regular
   legislative review; and
(c) at any workplace where there are 20 - 49 workers the employer must establish and
   maintain a joint health safety committee unless the employer is exempted from so doing
   on application to the occupational health and safety agency or unless the employer is
   exempted by virtue of falling into an exemption classification or industry as established
   by the Lt. Gov. in Council on recommendation by the agency. (ref. pg. 41)

SUBSTANTIVE COMMENT:
On page 40 of its 1997 report, the Commission stated:

The commission does not feel that it is in a position to state whether basing the 20/50 threshold on
the first aid classification system, or adopting the general threshold of 20 workers proposed in
subsection 14(3) of the November 1995 draft of the OHS Regulation, is appropriate. However, the
submissions we have received and our brief review of the criteria used to establish the 20/50 split
has raised a number of concerns; primarily, there are “C” category worksites which, because of
hazards at those sites, should have committees mandated, although their workforce is less than 50.

APPLICABLE EXTRACT FROM BILL 14 (1998):

When a joint committee is required
125 An employer must establish and maintain a joint health and safety committee
   (a) in each workplace where 20 or more workers of the employer are regularly
   employed, and
   (b) in any other workplace for which a joint committee is required by order.

Variations in committee requirements
126 (1) Despite section 125, the board may, by order, require or permit an employer to
   establish and maintain
   (a) more than one joint committee for a single workplace of the employer,
(b) one joint committee for more than one workplace or parts of more than one workplace of the employer, or
(c) one joint committee for the workplace or parts of the workplaces of a number of employers, if the workplaces are the same, overlapping or adjoining.

(2) An order under subsection (1) may
(a) specify the workplace, workplaces or parts for which a joint committee is required or permitted, and
(b) provide for variations regarding the practice and procedure of a joint committee from the provisions otherwise applicable under this Part or the regulations.

COMMENTARY: Recommendation acted on (in part).
New section 125 adopts a “minimum number” criteria for establishing committees, but new section 126 will allow for variations in appropriate circumstances. Bill 14 (1998) is silent with respect to the board reviewing its current classification system to ascertain if that system, or some other approach should be adopted as the criteria to require employers to establish joint committees at worksites with less than 50 workers. Because the government has decided to adopt the approach set out under the draft OHS Regulations that were mentioned by the Commission, I have thus concluded that this recommendation has been acted on, albeit perhaps not precisely as the Commission directed.

The new section 109 authorizes the Minister to appoint a committee to review Part 3 or any regulation. A new section 228 requires the board to establish a process for ongoing review of its regulations. (See the discussion under recommendation 3, above, and recommendation 55, below.) So, those other provisions would address the Commission’s recommendation 12(b).

2.12 Appointing workers to committees

RECOMMENDATION 13. the province's occupational health and safety statute set out a method of selecting joint health safety committee members according to the procedures described in the November 1995 draft of section 16 in Part 3 of the OHS Regulation. (ref. pg. 42)

SUBSTANTIVE COMMENT:
Section 16 of the November 1995 draft of the OHS Regulation read:

Selection of committee members

The members of the committee must be selected as follows:

16 employer representatives must be selected according to the procedures of the employer;
worker representatives in a unionized workplace must be selected from among workers employed at the workplace, according to the procedures of the union(s);
where only part of the labour force is represented by a union, each group of workers must be represented proportionately on the committee;
worker representatives in non-union workplaces must be elected by the workers by secret ballot; and
in circumstances where workers do not select their own representatives on their own initiative the employer has an obligation to seek out worker representatives.

APPLICABLE EXTRACT FROM BILL 14 (1998):

**Membership of joint committee**

127 A joint committee for a workplace must be established in accordance with the following:

(a) it must have at least 4 members or, if a greater number of members is required by regulation, that greater number;
(b) it must consist of worker representatives and employer representatives;
(c) at least half the members must be worker representatives;
(d) it must have 2 co-chairs, one selected by the worker representatives and the other selected by the employer representatives.

**Selection of worker representatives**

128 (1) The worker representatives on a joint committee must be selected from workers at the workplace who do not exercise managerial functions at that workplace, as follows:

(a) if the workers are represented by one or more unions, the worker representatives are to be selected according to the procedures established or agreed on by the union or unions;
(b) if none of the workers are represented by a union, the worker representatives are to be elected by secret ballot;
(c) if some of the workers are represented by one or more unions and some are not represented by a union, the worker representatives are to be selected in accordance with paragraphs (a) and (b) in equitable proportion to their relative numbers and relative risks to health and safety;
(d) if the workers do not make their own selection after being given the opportunity under paragraphs (a) to (c), the employer must seek out and assign persons to act as worker representatives.

(2) The employer or a worker may request the board to provide direction as to how an election under subsection (1) (b) is to be conducted.

(3) The employer, or a union or a worker at a workplace referred to in subsection (1) (c), may request the board to provide direction as to how the requirements of that provision are to be applied in the workplace.

**Selection of employer representatives**

129 (1) The employer representatives on a joint committee must be selected by the employer from among persons who exercise managerial functions for the employer and, to the extent possible, who do so at the workplace for which the joint committee is established.

(2) For certainty, an individual employer may act as an employer representative.

**COMMENTARY:** *Recommendation acted on.*

**2.13 Rights and duties of committees**

**RECOMMENDATION 14.** The province's occupational health and safety statute

(a) set out the rights of joint health safety committees and the duties of employers with committees; and
(b) be drafted in a manner that ensures that 
(i) committees will be effective; and 
(ii) that the rights can be used to assess the effectiveness of committees. (ref. pg. 43)

APPLICABLE EXTRACT FROM BILL 14 (1998):

Duties and functions of joint committee
130 A joint committee has the following duties and functions in relation to its workplace:
(a) to identify situations that may be unhealthy or unsafe for workers and advise on effective systems for responding to those situations;
(b) to consider and expeditiously deal with complaints relating to the health and safety of workers;
(c) to consult with workers and the employer on issues related to occupational health and safety and occupational environment;
(d) to make recommendations to the employer and the workers for the improvement of the occupational health and safety and occupational environment of workers;
(e) to make recommendations to the employer on educational programs promoting the health and safety of workers and compliance with this Part and the regulations and to monitor their effectiveness;
(f) to advise the employer on programs and policies required under the regulations for the workplace and to monitor their effectiveness;
(g) to advise the employer on proposed changes to the workplace or the work processes that may affect the health or safety of workers;
(h) to ensure that accident investigations and regular inspections are carried out as required by this Part and the regulations;
(i) to participate in inspections, investigations and inquiries as provided in this Part and the regulations;
(j) to carry out any other duties and functions prescribed by regulation.

Joint committee procedure
131 (1) Subject to this Part and the regulations, a joint committee must establish its own rules of procedure, including rules respecting how it is to perform its duties and functions.
(2) A joint committee must meet regularly at least once each month, unless another schedule is permitted or required by regulation or order.

Time from work for meetings and other committee functions
134 (1) A member of a joint committee is entitled to time off from work for
(a) the time required to attend meetings of the committee, and
(b) other time that is reasonably necessary to prepare for meetings of the committee and to fulfill the other functions and duties of the committee.
(2) Time off under subsection (1) is deemed to be time worked for the employer, and the employer must pay the member for that time.

Other employer obligations to support committee
136 (1) The employer must provide the joint committee with the equipment, premises and clerical personnel necessary for the carrying out of its duties and functions.
(2) On request of the joint committee, the employer must provide the committee with information respecting
(a) the identification of known or reasonably foreseeable health or safety hazards to which workers at the workplace are likely to be exposed,
(b) health and safety experience and work practices and standards in similar or other industries of which the employer has knowledge, 
(c) orders, penalties and prosecutions under this Part or the regulations relating to health and safety at the workplace, and 
(d) any other matter prescribed by regulation.

COMMENTARY: *Recommendation acted on.*

The employer’s general duty to cooperate with committees is set out under new section 115(2)(g); see the discussion under recommendation 6, above.

It remains to be seen whether the new section 130 will provide a basis to ensure committees will be effective or whether that provision can be used as a basis to assess the effectiveness of committees generally.

### 2.14 Educational leave for committee members

**RECOMMENDATION 15.** the province's occupational health and safety statute
(a) require employers to provide educational leave to worker members of joint health safety committees for a minimum period of one (1) normal working day to a minimum of eight (8) hours each year, without loss of pay or other benefits, for the purpose of attending workplace health and safety training seminars, programs or courses;
(b) authorize the Lt. Gov. in Council to make regulations increasing the minimum period of educational leave set out in 15(a) according to the nature of the potential hazards at a committee's worksite and the level of education required to address those hazards. (ref. pg. 45)

**APPLICABLE EXTRACT FROM BILL 14 (1998):**

*Educational leave*

135 (1) Each member of a joint committee is entitled to an annual educational leave totalling 8 hours, or a longer period if prescribed by regulation, for the purposes of attending occupational health and safety training courses conducted by or with the approval of the board.

(2) A member of the joint committee may designate another person as being entitled to take all or part of the member's educational leave.

(3) The employer must provide the educational leave under this section without loss of pay or other benefits and must pay for, or reimburse the worker for, the costs of the training course and the reasonable costs of attending the course.

**COMMENTARY: Recommendation acted on.**

New clause 224(2)(e) under the Cabinet’s regulation making authority (see recommendation 3, above), addresses the Commission’s recommendation 15(b).

### 2.15 Committee minutes

**RECOMMENDATION 16.** the province's occupational health and safety statute
(a) require employers to
(i) retain a copy of the minutes of joint health safety committee meetings for at least seven years from the date of the committee's meeting; and
(ii) ensure that minutes are readily accessible to agency officers and committee members and other persons designated by the occupational health and safety agency or the minister;
(b) require committees to
   (i) produce an annual report summarizing the previous year's committee activities by the end of January of the following year;
   (ii) send a copy of the annual report to both the employer and the occupational health and safety agency;
(c) require the occupational health and safety agency to
   (i) retain copies of joint health safety committee annual reports for a minimum of seven years from the date of the committee's report;
   (ii) make committee annual reports accessible to agency officers, other members of the occupational health and safety agency and researchers. (ref. pg. 47)

APPLICABLE EXTRACT FROM BILL 14 (1998):

Committee reports
137 (1) After each joint committee meeting, the committee must prepare a report of the meeting and provide a copy to the employer.
(2) The employer must
   (a) if so requested by a union representing workers at the workplace, send a copy of the reports under subsection (1) to the union,
   (b) retain a copy of the reports for at least 2 years from the date of the joint committee meeting to which they relate, and
   (c) ensure that the retained reports are readily accessible to the joint committee members, workers of the employer, officers and other persons authorized by the board or the minister.

Employer must post committee information
138 At each workplace where workers of an employer are regularly employed, the employer must post and keep posted
   (a) the names and work locations of the joint committee members,
   (b) the reports of the 3 most recent joint committee meetings, and
   (c) copies of any applicable orders under this Division for the preceding 12 months.

COMMENTARY: Recommendation acted on (in part).
While new section 137(2) requires an employer to retain copies of committee minutes, the retention period is two not five years. Further, the new legislation is silent with respect to the board’s having to retain copies of committee minutes for seven years and use those for follow-up inspections, research and related purposes.

2.16 What happens if the committee is deadlock?

RECOMMENDATION 17. the province's occupational health and safety statute state that when committees are unable to reach a decision on solutions to resolve situations that
have a potentially significant effect on workplace health and safety
(a) the chair of the committee shall take the committee's concerns to the occupational health and safety agency; and
(b) the agency shall investigate and attempt to resolve the dispute. (ref. pg. 48)

APPLICABLE EXTRACT FROM BILL 14 (1998):
Assistance in resolving disagreements within committee
132 If a joint committee is unable to reach agreement on a matter relating to the health or safety of workers at the workplace, a co-chair of the committee may report this to the board, which may investigate the matter and attempt to resolve the matter.

COMMENTARY: Recommendation acted on.

2.17 What happens if the employer disagrees with committee recommendations?

RECOMMENDATION 18. the province's occupational health and safety statute
(a) adopt the mechanism described in Section 34 of Nova Scotia's occupational health and safety statute;
(b) authorize a committee to take its concerns to the occupational health and safety agency if they disagree with the employer's response; and
(c) require that the occupational health and safety agency responds and resolves the disagreement. (ref. pg. 49)

APPLICABLE EXTRACT FROM BILL 14 (1998):
Employer must respond to committee recommendations
133 (1) This section applies if a joint committee sends a written recommendation to an employer with a written request for a response from the employer.
(2) Subject to subsections (4) and (5), the employer must respond in writing to the committee within 21 days of receiving the request, either
(a) indicating acceptance of the recommendation, or
(b) giving the employer's reasons for not accepting the recommendation.
(3) If the employer does not accept the committee's recommendations, a co-chair of the committee may report the matter to the board, which may investigate and attempt to resolve the matter.
(4) If it is not reasonably possible to provide a response before the end of the 21 day period, the employer must provide within that time a written explanation for the delay, together with an indication of when the response will be provided.
(5) If the joint committee is not satisfied that the explanation provided under subsection (4) is reasonable in the circumstances, a co-chair of the committee may report this to the board, which may investigate the matter and may, by order, establish a deadline by which the employer must respond.
(6) Nothing in this section relieves an employer of the obligation to comply with this Part and the regulations.

COMMENTARY: Recommendation acted on.
The new section 133 is very similar to section 34 of Nova Scotia's occupational health and safety statute.
2.18 Safety representatives

RECOMMENDATION 19. the province's occupational health and safety statute that
(a) at "A" or "B" class worksites where there are fewer than the prescribed number of
workers necessary to establish a joint health safety committee:
   (i) require employers to establish safety representatives; and
   (ii) assign rights and duties to safety representatives that mirror those granted to joint
        health safety committees;
(b) at "C" class worksites where there are fewer than the prescribed number of workers
necessary to establish a joint health safety committee, require employers to establish
safety representatives. (ref. pg. 51)

SUBSTANTIVE COMMENT:
On page 51 of its 1997 report, the Commission stated:

The commission believes that there must be a provision in the new statute authorizing a mechanism
by which employers could be granted an exemption from this "safety representative" requirement,
but only if an employer can provide sufficient grounds for an exemption.

APPLICABLE EXTRACT FROM BILL 14 (1998):

Worker health and safety representative

139 (1) A worker health and safety representative is required
(a) in each workplace where there are more than 9 but fewer than 20 workers of
the employer regularly employed, and
(b) in any other workplace for which a worker health and safety representative is
required by order of the board.
(2) The worker health and safety representative must be selected in accordance with
section 128 from among the workers at the workplace who do not exercise managerial
functions at that workplace.
(3) To the extent practicable, a worker health and safety representative has the same
duties and functions as a joint committee.
(4) Sections 133 to 136 apply in relation to a worker health and safety representative as if
the representative were a joint committee or member of a joint committee.

Participation of worker representative in inspections

140 If
(a) this Part or the regulations give a worker representative the right to be present
for an inspection, investigation or inquiry at a workplace, and
(b) no worker representative is reasonably available,
the right may be exercised by another worker who has previously been designated as an
alternate by the worker representative.

COMMENTARY: Recommendation acted on.
While the new legislation does not make reference to class A, B or C worksites, worker
representatives are required in smaller worksites where the number of workers would not
lead to the creation of joint committees as per the new section 125 (discussed under recommendation 12, above).

The Commission’s substantive comment in relation to safety representatives has not been addressed in Bill 14 (1998). The variance provisions of new Division 9 apply only to regulations, not to the provisions of the Act; see the discussion under recommendation 45, below.

2.19 The worker’s right to refuse

RECOMMENDATION 20. the province's occupational health and safety statute (a) include the provisions in the IH&S Regulations (or the new OHS Regulations) that state
   (i) a worker must report a refusal to work to the employer as soon as is practical;
   (ii) the employer must take action to address that refusal; and
   (iii) the employer must report the action taken to the refusing worker and the joint health safety committee or representative;
(b) state that
   (i) the employer must advise other workers (who may be assigned tasks a worker has already refused to perform) that a worker refusal has occurred. The employer must include the name of the worker who refused and the reason(s) for refusing;
   (ii) the employer, the worker or their representative(s) may ask the occupational health and safety agency to decide on the validity of a worker's refusal to perform unsafe work;
   (iii) the employer and worker may appeal the occupational health and safety agency's determination to the Appeal Division or some new appeal body, but not the Labour Relations Board. (ref. pg. 55)

SUBSTANTIVE COMMENT:
On page 56 of its 1997 report, the Commission stated:

Government should also consider placing limits on or describing situations when a worker may not refuse a task. Ontario’s legislation, for example, does not permit police officers, fire fighters, correctional employees or certain health care workers to refuse hazardous work assignments if:
   those risks are inherent to their work or a normal condition of their employment; or
   the worker’s refusal might directly endanger the life, health or safety of another person.

The Yukon occupational health and safety statute contains similar restrictions that apply to all workers.

Due consideration should also be given to recognizing the rights of employers and unions to negotiate terms and conditions regarding work refusals which may provide greater protection to workers than those set out in the legislation. If negotiations provide greater protection, then the terms of the agreement and not the lesser standards in the occupational health and safety statute should be binding on the parties and enforceable by the board’s officers.

It should also be clear that in cases where a worker’s action or inaction could affect the safety of other workers or members of the workplace, the general duty assigned to workers to take all reasonable steps to protect the health and safety of themselves and others would override any considerations relating to the right to refuse.
Worker must immediately report a refusal
142 (1) A worker who exercises his or her right to refuse unsafe work must immediately report the refusal and the reasons for it to his or her supervisor or to the employer.
(2) Until any investigation under this Part is completed, the worker must remain available at the workplace during his or her normal working hours.

Supervisor or employer must respond to report
143 A supervisor or employer who receives a report from a worker under section 142 must immediately investigate the matter, and must either
(a) ensure that any unsafe condition is remedied without delay, or
(b) if in his or her opinion the work is not unsafe or the circumstances referred to in section 141 (3) apply, so inform the worker.

If worker continues to refuse
144 (1) If the matter is not resolved under section 143 and the worker continues to refuse under section 141, the supervisor or employer must investigate the matter in the presence of the refusing worker and a worker representative.
(2) As an exception, if there is no worker representative or the worker representative is not reasonably available, a reasonably available worker selected by the refusing worker as a representative is entitled to accompany the supervisor or employer on an investigation under subsection (1).
(3) A worker is to be considered not reasonably available for the purposes of subsection (2) if the supervisor or employer objects to that person's participation in the investigation on the basis that it would unduly impede production, but the supervisor or employer may only object to one person on this ground.
(4) If the worker continues to refuse after the investigation under this section, the employer and the worker must report the matter to the board.

Investigation and determination by officer
145 (1) If a report is made to the board under section 144, an officer must promptly investigate the situation and determine whether the work is unsafe and whether the refusing worker had reasonable grounds for believing the work to be unsafe.
(2) In addition to the persons entitled under section 182, the refusing worker is entitled to accompany the officer on any physical inspection of the workplace conducted for the purposes of the investigation under this section.
(3) The officer must
(a) advise the worker, the employer and the joint committee or worker health and safety representative of the officer's determinations under subsection (1), and
(b) if the officer determines that the work is not unsafe, advise the worker to return to work.
(4) If an investigation under this section determines that work is unsafe, the officer conducting the investigation must order the employer to take appropriate remedial action.
(5) For certainty, if an investigation under this section determines that the worker did not have reasonable grounds for believing that the work was unsafe, disciplinary action by the employer in relation to the matter may not be the subject of a complaint under Division 6 of this Part.

Employer may reassign worker to other work
146 (1) Subject to this section, if a worker exercises the right to refuse unsafe work,
(a) the employer may temporarily reassign the worker to reasonable alternative work, and
(b) the worker must accept the reassignment until he or she returns to work in accordance with section 141 (4).

(2) A reassignment under subsection (1) does not affect the refusing worker's right to be present under section 144 (1) or 145 (2).
(3) A reassignment under subsection (1) may not be the subject of a complaint under Division 6 of this Part.

**Effect of refusal on workers exercising right and assisting in investigation**

147 (1) If a worker is reassigned to other work under section 146, the employer must pay the worker the same wages as would have been paid had the worker continued in the worker's normal work.

(2) If a worker who is exercising the right to refuse unsafe work has not been reassigned under section 146, the employer must, until the circumstances of section 141 (4) (a) or (b) are met, pay the worker the same wages as would have been payable had the worker continued to work.

(3) The time spent by a worker accompanying the employer or supervisor under section 144 (1) or an officer under section 145 (2) is deemed to be time worked for the employer, and the employer must pay the worker for that time.

**Effect of refusal on work of other workers**

148 (1) If workers are unable to proceed with their assigned work because of another worker's refusal under section 141, unless otherwise provided in a collective agreement, the workers are deemed, for the purpose of calculating wages, to be at work until work resumes or until the end of their scheduled work period, whichever period is shorter.

(2) Unless otherwise provided in a collective agreement, workers due to work on a scheduled work period after a work period to which subsection (1) applies are entitled to be paid in accordance with the Employment Standards Act.

(3) An employer may assign reasonable alternative work to workers to whom subsection (1) or (2) applies.

**Requirements before another worker is assigned to do refused work**

149 If a worker exercises the right to refuse unsafe work, no other worker may be assigned to do that work until the matter has been dealt with under sections 141 to 145, unless the other worker has been advised by the supervisor or employer of

(a) the refusal by the worker exercising the right,
(b) the reason for the refusal, and
(c) his or her rights under section 141.

**COMMENTARY: Recommendations acted on.**

Recommendation 20(b)(iii) has been addressed in relation to reviews and appeals under new Division 13 and 14, respectively; see the discussion under recommendation 43, below.

**RECOMMENDATION 21.** the province's occupational health and safety statute
(a) describe a worker's refusal to perform unsafe work as a right and not as a duty; and
(b) clearly state that a worker must not take advantage of the right to refuse unsafe work.
(ref. pg. 56)
APPLICABLE EXTRACT FROM BILL 14 (1998):

**DIVISION 5 -- RIGHT TO REFUSE UNSAFE WORK**

*Worker may refuse unsafe work*

141 (1) Subject to this section, a worker may refuse to carry out work if the worker has reasonable grounds for believing that the work is unsafe.

(2) For the purposes of this Division, work is unsafe if

(a) the work activities,
(b) the conditions of the work, or
(c) the conditions that would result if the work were done

are such that there is or would be a significant risk that the worker or another person might be killed, seriously injured or suffer serious illness.

(3) The right to refuse under subsection (1) does not apply if

(a) the refusal would directly endanger the health or safety of another person, or
(b) the risk referred to in subsection (2) is inherent in the worker's work.

(4) The right to refuse under subsection (1) continues until

(a) the employer has taken remedial action to the satisfaction of the worker, or
(b) an officer has investigated the matter and has advised the worker to return to work.

COMMENT: *Recommendation acted on (in part)*

There is no provision in Bill 14 (1998) that speaks to recommendation 21(b): the OHS legislation should “clearly state that a worker must not take advantage of the right to refuse unsafe work”. Specifically, there is no duty placed on workers not to take advantage of their right as can be found in section 48 of Newfound’s OHS statute, referred to on page 53 of the Commission’s 1997 report.

### 2.20 Protecting workers from discriminatory action

**RECOMMENDATION 22.** The province's occupational health and safety statute

(a) incorporate the anti-discrimination provisions found in the Workers' Compensation Act;

(b) expand those provisions to include complaints flowing from

(i) a worker's compliance with the legislation in general or a specific order;
(ii) a worker seeking to enforce the legislation; or
(iii) a worker having given evidence in a proceeding with respect to the enforcement of the legislation, or in an inquest under the Coroners Act.

(c) state that any workplace party including any party with institutional authority over a worker, or persons acting on their behalf, must not take or threaten discriminatory action. (ref. pg. 58)

APPLICABLE EXTRACT FROM BILL 14 (1998):

**DIVISION 6 -- PROHIBITION AGAINST DISCRIMINATORY ACTION**

*Actions that are considered discriminatory*

150 (1) For the purposes of this Division, "discriminatory action" includes any act or omission by an employer or union, or a person acting on behalf of an employer or union, that adversely affects a worker with respect to any term or condition of employment, or of membership in a union.
(2) Without restricting subsection (1), discriminatory action includes
   (a) suspension, lay-off or dismissal,
   (b) demotion or loss of opportunity for promotion,
   (c) transfer of duties, change of location of workplace, reduction in wages or change in working hours,
   (d) coercion or intimidation,
   (e) imposition of any discipline, reprimand or other penalty, and
   (f) the discontinuation or elimination of the job of the worker.

Discrimination against workers prohibited
151 An employer or union, or a person acting on behalf of an employer or union, must not take or threaten discriminatory action against a worker
   (a) for exercising any right or carrying out any duty in accordance with this Part, the regulations or an applicable order,
   (b) for the reason that the worker has testified or is about to testify in any matter, inquiry or proceeding under this Act or the Coroners Act on an issue related to occupational health and safety or occupational environment, or
   (c) for the reason that the worker has given any information regarding conditions affecting the occupational health or safety or occupational environment of that worker or any other worker to
      (i) an employer or person acting on behalf of an employer,
      (ii) another worker or a union representing a worker, or
      (iii) an officer or any other person concerned with the administration of this Part.

COMMENTARY: Recommendation acted on.

RECOMMENDATION 23. the province's occupational health and safety statute
(a) include a mechanism for workers to file a complaint with the occupational health and safety agency if they believe they have been unfairly treated by their employer as a result of refusing unsafe work or generally complying with the occupational health and safety act or regulations;
(b) authorize agency officers to issue remedial orders;
(c) permit appeals of remedial orders described in 22(b) to the Appeal Division or some new occupational health and safety appeal body. (ref. pg. 59)

SUBSTANTIVE COMMENT:
On page 59 of its 1997 report, the Commission stated:

Under current subsection 2.12(3) of the IH&S Regulations, an appeal of a board officer’s order does not automatically result in a stay. The commission believes that, in relation to appeals to remedial orders flowing from a worker complaint of discriminatory action, government ought to consider authorizing the appeal tribunal to grant a stay. This should not occur automatically, but only by application.

APPLICABLE EXTRACT FROM BILL 14 (1998):
Complaint by worker against discriminatory action or failure to pay wages
152 (1) A worker who considers that
(a) an employer or union, or a person acting on behalf of an employer or union, has taken, or threatened to take, discriminatory action against the worker contrary to section 151, or
(b) an employer has failed to pay wages to the worker as required by this Part or the regulations
may have the matter dealt with through the grievance procedure under a collective agreement, if any, or by complaint in accordance with this Division.

(2) A complaint under subsection (1) must be made in writing to the board,
(a) in the case of a complaint referred to in subsection (1) (a), within 1 year of the action considered to be discriminatory, and
(b) in the case of a complaint referred to in subsection (1) (b), within 60 days after the wages became payable.

Response to complaint
153 (1) If the board receives a complaint under section 152 (2), it must immediately inquire into the matter and, if the complaint is not settled or withdrawn, must
(a) determine whether the alleged contravention occurred, and
(b) deliver a written statement of the board's determination to the worker and to the employer or union, as applicable.
(2) If the board determines that the contravention occurred, the board may make an order requiring one or more of the following:
(a) that the employer or union cease the discriminatory action;
(b) that the employer reinstate the worker to his or her former employment under the same terms and conditions under which the worker was formerly employed;
(c) that the employer pay, by a specified date, the wages required to be paid by this Part or the regulations;
(d) that the union reinstate the membership of the worker in the union;
(e) that any reprimand or other references to the matter in the employer's or union's records on the worker be removed;
(f) that the employer or the union pay the reasonable out of pocket expenses incurred by the worker by reason of the discriminatory action;
(g) that the employer or the union do any other thing that the board considers necessary to secure compliance with this Part and the regulations.

COMMENTARY: Recommendation acted on.
Recommendation 23(c) has been addressed in new Division 13 re: review of officers orders; see the discussion on recommendation 43, below.

RECOMMENDATION 24. the province's occupational health and safety statute contain a reverse onus provision, which states that as long as the worker can establish a case that, if it were unopposed and believed would demonstrate the worker was discriminated against contrary to the general prohibition, the alleged discriminating party has the burden to provide convincing evidence that
(a) the worker's refusal to work, or the worker's activity, was not legitimate; or
(b) the penalty suffered by the worker was reasonable in the circumstances, or justified for other reasons. (ref. pg. 60)
APPLICABLE EXTRACT FROM BILL 14 (1998):

Complaint by worker against discriminatory action or failure to pay wages
152 ... (3) In dealing with a matter referred to in subsection (1), whether under a collective agreement or by complaint to the board, the burden of proving that there has been no such contravention is on the employer or the union, as applicable.

COMMENTARY: Recommendation acted on.

2.21 Inspection powers

RECOMMENDATION 25. the province's occupational health and safety statute
(a) incorporate all of an agency officer's inspection powers under the current Workers’ Compensation Act;
(b) enable agency officers to
   (i) take samples of materials, etc.;
   (ii) seize equipment, materials, etc. (and to account for same);
   (iii) make tests, demonstrations, etc.;
   (iv) take photographs, or make recordings or sketches; and
   (v) bring along other persons, equipment, etc. to assist during the inspection.
The statute must state that an officer first obtain a court order or warrant to access medical records or investigate private dwellings. (ref. pg. 65)

APPLICABLE EXTRACT FROM BILL 14 (1998):

DIVISION 11 -- INSPECTIONS, INVESTIGATIONS AND INQUIRIES
Application of Division
178 This Division, as it applies in relation to inspections, also applies to investigations and inquiries.

Authority to conduct inspections
179 (1) An officer of the board may enter a place, including a vehicle, vessel or mobile equipment, and conduct an inspection for the purpose of
   (a) preventing work related accidents, injuries or illnesses,
   (b) ascertaining the cause and particulars of a work related accident, injury or illness or of an incident that had the potential to cause a work related accident, injury or illness,
   (c) investigating a complaint concerning health, safety or occupational environment matters at a workplace, or
   (d) determining whether there is compliance with this Part, the regulations or an order.
(2) An inspection may be conducted
   (a) at a reasonable hour of the day or night, or
   (b) at any other time if the officer has reasonable grounds for believing that a situation exists that is or may be hazardous to workers.
(3) An officer may do one or more of the following for the purposes of an inspection under this Division:
   (a) bring along any equipment or materials required for the inspection and be accompanied and assisted by a person who has special, expert or professional knowledge of a matter relevant to the inspection;
(b) inspect works, materials, products, tools, equipment, machines, devices or other things at the place;
(c) take samples and conduct tests of materials, products, tools, equipment, machines, devices or other things being produced, used or found at the place, including tests in which a sample is destroyed;
(d) require that a workplace or part of a workplace not be disturbed for a reasonable period of time;
(e) require that a tool, equipment, machine, device or other thing or process be operated or set in motion or that a system or procedure be carried out;
(f) inspect records that may be relevant and, on giving a receipt for a record, temporarily remove the record to make copies or extracts;
(g) require a person to produce within a reasonable time records in the person’s possession or control that may be relevant;
(h) question persons with respect to matters that may be relevant, require persons to attend to answer questions and require questions to be answered on oath or affirmation;
(i) take photographs or recordings of the workplace and activities taking place in the workplace;
(j) attend a relevant training program of an employer;
(k) exercise other powers that may be necessary or incidental to the carrying out of the officer’s functions and duties under this Part or the regulations.

(4) The authority to conduct an inspection under this Division is not limited by any other provision of this Part or the regulations giving specific authority in relation to the inspection.

(5) If an officer of the board requests this, a peace officer may assist the officer in carrying out his or her functions and duties under this Part or the regulations.

Officer must produce credentials on request
180 (1) The board must provide officers with written credentials of their appointment.
(2) On request, an officer must produce the credentials provided under this section when exercising or seeking to exercise any of the powers conferred on the officer under this Part.

Restrictions on access to private residences
181 (1) If a workplace, in addition to being a workplace, is occupied as a private residence, the authority under section 179 may be used to enter the place only if
(a) the occupier consents,
(b) the board has given the occupier at least 24 hours’ written notice of the inspection,
(c) the entry is made under the authority of a warrant under this Act or the Offence Act, or
(d) the board has reasonable grounds for believing that the work activities or the workplace conditions are such that there is a significant risk that a worker might be killed or seriously injured or suffer a serious illness.
(2) The authority under section 179 must not be used to enter a place that is occupied as a private residence, but is not a workplace, except with the consent of the occupier or under the authority of a warrant under this Act or the Offence Act.

Representation on inspection
182 (1) Subject to this section, if an officer makes a physical inspection of a workplace under section 179,
(a) the employer or a representative of the employer, and
(b) a worker representative or, if there is no worker representative or the worker representative is not reasonably available, a reasonably available worker selected
by the officer as a representative, are entitled to accompany the officer on the inspection.

(2) A worker is to be considered not reasonably available for the purposes of subsection (1) if the employer objects to that the person's participation in the inspection on the basis that it would unduly impede production, but the employer may only object to one person on this ground.

(3) Despite subsection (1), an officer may conduct a physical inspection of a workplace in the absence of a person referred to in that subsection if the circumstances are such that it is necessary to proceed with the inspection without the person.

(4) The time spent by a worker accompanying an officer under this section is deemed to be time worked for the employer, and the employer must pay the worker for that time.

(5) Nothing in this section requires the board or an officer to give advance notice of an inspection.

(6) If an inspection involves the attendance of an officer at a workplace for a period longer than one day, the rights under this section may be abridged by direction of the officer.

**Employer must post inspection reports**

183 If an officer makes a written report to an employer relating to an inspection, whether or not the report includes an order, the employer must promptly

(a) post the report at the workplace to which it relates, and

(b) give a copy of the report to the joint committee or worker health and safety representative, as applicable.

**Person being questioned is entitled to have another person present**

184 (1) A person who is questioned by an officer on an inspection is entitled to be accompanied during the questioning by one other person of his or her choice who is reasonably available.

(2) As a limit on the person's choice under subsection (1), the officer may exclude a person who the officer has questioned or intends to question in relation to the matter.

(3) Subject to subsections (1) and (2), a person may be questioned by the officer either separate and apart from anyone else or in the presence of any other person permitted to be present by the officer.

**Limited authority to seize evidence without warrant**

185 (1) An officer may seize something without a warrant if

(a) the thing has been produced to the officer or is in plain view, and

(b) the officer has reasonable grounds for believing that this Part, the regulations or an order has been contravened and that the thing would afford evidence of the contravention.

(2) The officer must inform the person from whom a thing is seized under subsection (1) as to the reason for the seizure and must give the person a receipt for the thing.

(3) The officer may remove a thing seized under subsection (1) or may detain it in the place in which it was seized.

(4) As soon as reasonably practicable after something is seized under subsection (1), the officer must bring the thing, or a report of it, before a justice to be dealt with in accordance with the Offence Act as if it were seized pursuant to a warrant under that Act.

**Court orders for access**

222 Without limiting the authority under the Offence Act, a justice may issue warrants for the purposes of this Act as follows:

(a) on being satisfied on evidence on oath or affirmation that a place is used as a workplace, the justice may issue a warrant authorizing an officer or other person named in the warrant to enter the place and conduct an inspection, investigation or inquiry;
(b) on being satisfied on evidence on oath or affirmation that there are in any place records or other things for which there are reasonable grounds to believe that they are relevant to a matter under this Part or the regulations, the justice may issue a warrant authorizing an officer or other person named in the warrant to enter the place and search for and seize any records or other things relevant to the matter in accordance with the warrant;

(c) on being satisfied on evidence on oath or affirmation that access or review of a worker's medical records is reasonably required for the purposes of this Part or the regulations, a justice may issue a warrant authorizing an officer or other person named in the warrant to access and inspect the record in accordance with the warrant.

COMMENTARY: Recommendation acted on.

2.22 Enforcement powers

RECOMMENDATION 26. the province's occupational health and safety statute
(a) incorporate the enforcement powers under the current Workers' Compensation Act;
(b) enable agency officers to
   (i) ensure that a worksite is not disturbed until an investigation is completed, unless necessary to prevent further harm to workers;
   (ii) remove workers from a hazardous area, or seal or barricade an area or site;
   (iii) stop suppliers supplying harmful equipment, materials or substances to a worksite;
   (iv) ensure employers are providing workers with information necessary for their protection;
   (v) ensure regular inspections of a worksite are undertaken to identify and eliminate hazards;
   (vi) ensure tests are made or that equipment or work processes are certified as safe by appropriate professionals (e.g. engineers, architects, etc.); and
   (vi) suspend licenses or certificates issued under the legislation. (ref. pg. 66)

APPLICABLE EXTRACT FROM BILL 14 (1998):

Division 12 -- Enforcement
General authority to make orders
187 (1) The board may make orders for the carrying out of any matter or thing regulated, controlled or required by this Part or the regulations, and may require that the order be carried out immediately or within the time specified in the order.
(2) Without limiting subsection (1), the authority under that subsection includes authority to make orders as follows:
   (a) establishing standards that must be met and means and requirements that must be adopted in any work or workplace for the prevention of work related accidents, injuries and illnesses;
   (b) requiring a person to take measures to ensure compliance with this Act and the regulations or specifying measures that a person must take in order to ensure compliance with this Act and the regulations;
(c) requiring an employer to provide in accordance with the order a medical monitoring program as referred to in section 161;
(d) requiring an employer, at the employer's expense, to obtain test or assessment results respecting any thing or procedure in or about a workplace, in accordance with any requirements specified by the board, and to provide that information to the board;
(e) requiring an employer to install and maintain first aid equipment and service in accordance with the order;
(f) requiring a person to post or attach a copy of the order, or other information, as directed by the order or by an officer;
(g) establishing requirements respecting the form and use of reports, certificates, declarations and other records that may be authorized or required under this Part;
(h) doing anything that is contemplated by this Part to be done by order;
(i) doing any other thing that the board considers necessary for the prevention of work related accidents, injuries and illnesses.

(3) The authority to make orders under this section does not limit and is not limited by the authority to make orders under another provision of this Part.

Contents and process for orders
188 (1) An order may be made orally or in writing but, if it is made orally, must be confirmed in writing as soon as is reasonably practicable.
(2) An order may be made applicable to any person or category of persons and may include terms and conditions the board considers appropriate.
(3) If an order relates to a complaint made by a person to the board or an officer, a copy of the order must be given to that person.
(4) An officer of the board may exercise the authority of the board to make orders under this Part, subject to any restrictions or conditions established by the board.

Notice of cancellation
189 (1) If the board cancels an order, it must give notice of the cancellation to the employer or other person in relation to whom the order was made.
(2) If the person given notice under subsection (1) was required by or under this Part to post a copy of the original order or to provide copies of it to a joint committee, worker representative or union, the person must post and provide copies of the cancellation notice in accordance with the same requirements.

Orders to stop using or supplying unsafe equipment, etc.
190 (1) If the board has reasonable grounds for believing that a thing that is being used or that may be used by a worker
(a) is not in safe operating condition, or
(b) does not comply with this Part or the regulations,
the board may order that the thing is not to be used until the order is cancelled by the board.

... (3) Despite section 188 (1), an order under this section may only be made in writing.
(4) The board may cancel an order under this section only if it is satisfied that the thing in respect of which the order was made is safe and complies with this Part and the regulations.

Orders to stop work
191 (1) If the board has reasonable grounds for believing that an immediate danger exists that would likely result in serious injury, serious illness or death to a worker, the board may order
(a) that work at the workplace or any part of the workplace stop until the order to stop work is cancelled by the board, and
(b) if the board considers this is necessary, that the workplace or any part of the workplace be cleared of persons and isolated by barricades, fencing or any other means suitable to prevent access to the area until the danger is removed.

(2) If an order is made under subsection (1) (b), an employer, supervisor or other person must not require or permit a worker to enter the workplace or part of the workplace that is the subject of the order, except for the purpose of doing work that is necessary or required to remove the danger or the hazard and only if the worker
   (a) is protected from the danger or the hazard, or
   (b) is qualified and properly instructed in how to remedy the unsafe condition with minimum risk to the worker's own health or safety.

(3) Despite section 188 (1), an order under this section
   (a) may only be made in writing, and
   (b) must be served on the employer, supervisor or other person having apparent supervision of the work or the workplace.

(4) An order under this section expires 72 hours after it is made, unless the order has been confirmed in writing by the board.

**Effect of orders on workers**

192 (1) If, as a result of an order made under section 190 or 191, a worker is temporarily laid off, the employer must pay the worker the amount the worker would have earned or, if this cannot be readily determined, the amount the worker would have been likely to earn,
   (a) for the day on which the order came into effect and for the next 3 working days during which the order is in effect, or
   (b) for a longer period, if this is provided under a collective agreement.

(2) Nothing in this section prevents workers affected by an order referred to in subsection (1) from being assigned to reasonable alternative work during the time that the order is in effect.

**Posting of orders by officer**

193 (1) An officer may
   (a) post at a workplace, or
   (b) attach to any product, tool, equipment, machine, device or other thing,
   a copy of an order or a notice related to that order.

(2) An order posted or attached under subsection (1) must not be removed except
   (a) in accordance with the order, or
   (b) by an officer or a person authorized by an officer.

**Compliance reports**

194 (1) An order may include a requirement for compliance reports in accordance with this section.

(2) The employer or other person directed by an order under subsection (1) must prepare a compliance report that specifies
   (a) what has been done to comply with the order, and
   (b) if compliance has not been achieved at the time of the report, a plan of what will be done to comply and when compliance will be achieved.

(3) If a compliance report includes a plan under subsection (2) (b), the employer or other person must also prepare a follow-up compliance report when compliance is achieved.

(4) In the case of compliance reports prepared by an employer, the employer must
   (a) post a copy of the original report and any follow-up compliance reports at the workplace in the places where the order to which it relates are posted,
   (b) provide a copy of the reports to the joint committee or worker health and safety representative, as applicable,
   (c) if the reports relate to a workplace where workers of the employer are represented by a union, send a copy to the union, and
   (d) if required by the board, send a copy of the reports to the board.
Suspension or cancellation of certificates

195 (1) If the board has reasonable grounds for believing that a person who holds a certificate issued under this Part or the regulations has breached a term or condition of the certificate or has otherwise contravened a provision of this Part or the regulations, the board may, by order,

(a) cancel or suspend the certificate, or
(b) place a condition on the use of that certificate that the board considers is necessary in the circumstances.

(2) An order under this section suspending a certificate must specify the length of time that the suspension is in effect or the condition that must be met before the suspension is no longer in effect.

COMMENTARY: Recommendation acted on.
Recommendations 26(b)(i) was addressed in new section 179(3)(d); see the discussion on recommendation 25, above.

2.23 Officer liability

RECOMMENDATION 27. the province's occupational health and safety statute grant officers and others immunity to claims in civil liability that may result from them carrying out their statutory functions under the occupational health and safety act. (ref. pg. 66)

APPLICABLE EXTRACT FROM BILL 14 (1998):

Board jurisdiction under this Part [in part]

113 ... (4) An action must not be maintained or brought against the board or any governor, officer, appeal commissioner or employee of the board for any act, omission or decision done or made in the genuine belief that it was within the jurisdiction of the board or person under this Part.

COMMENTARY: Recommendation acted on.

2.24 Confidentiality and non-compellability

RECOMMENDATION 28. the province's occupational health and safety statute address
(a) the confidentiality of information obtained during an inspection; and
(b) the compellability of officers (and others) or disclosure of that information in other proceedings. (ref. pg. 67)

APPLICABLE EXTRACT FROM BILL 14 (1998):

Information that must be kept confidential

156 (1) A person must not disclose or publish the following information, except for the purpose of administering this Act and the regulations or as otherwise required by law:
(a) information obtained in a medical examination, test or X-ray of a worker made or taken under this Part or the regulations, unless the worker consents or the
information is disclosed in a form calculated to prevent the information from being identified with a particular person or case;
(b) information with respect to a claim under Part 1 of this Act obtained by the person by reason of the performance of any duty or the exercise of any power under this Part or the regulations;
(c) information with respect to a trade secret, or with respect to a work process whether or not it is a trade secret, obtained by the person by reason of the performance of any duty or the exercise of any power under this Part or the regulations;
(d) information obtained under this Part or the regulations that is exempted or subject to a claim for exemption as confidential business information in respect of a hazardous substance, as referred to in section 158 (2) (m);
(e) in the case of information received by the person in confidence by reason of the performance of any duty or the exercise of any power under this Part or the regulations, the name of the informant.

(2) Except in the performance of his or her duties,
(a) an officer,
(b) a person who accompanies an officer under section 182, or
(c) a person who conducts a test or other examination under this Part at the request of an officer
must not publish or disclose information obtained or made by the officer or other person in connection with his or her duties or powers under this Part.

(3) Despite subsection (2), the board may disclose or publish information referred to in that subsection, or authorize it to be disclosed or published.

(4) Except for the purposes of an inquest under the Coroners Act, an officer or other person referred to in subsection (2) is not a compellable witness in a civil suit or other proceeding respecting any information provided to the person in confidence.

(5) For the purposes of section 21 (1) (b) of the Freedom of Information and Protection of Privacy Act, information referred to in subsection (1) (c) or (d) or (2) of this section that is in the custody or under the control of the board, whether or not supplied to the board, is deemed to be supplied to the board in confidence if it is
(a) information with respect to a trade secret, or with respect to a work process whether or not it is a trade secret,
(b) exempted or subject to a claim for exemption as confidential business information in respect of a hazardous substance, as referred to in section 158 (2) (m), or
(c) commercial, financial, labour relations, scientific or technical information of an employer or supplier.

(6) This section does not apply to prevent a person from providing information, including confidential business information, in a medical emergency for the purpose of diagnosis, medical treatment or first aid.

Information that must be provided in a medical emergency

157 (1) If a medical practitioner, a nurse or a person who is a prescribed health professional determines that
(a) a medical emergency exists, and
(b) information regarding a hazardous substance is needed for the purpose of diagnosis or providing medical treatment or first aid,
an employer, supplier or chemical manufacturer must immediately disclose to the requesting health professional all applicable information, including confidential business information, that is in the possession of the employer, supplier or manufacturer.

(2) A person to whom information is provided under subsection (1) must keep confidential any information specified by the person providing the information as being confidential, except for the purpose for which it is provided.
COMMENTARY: Recommendation acted on.

224 Duty to assist officers

RECOMMENDATION 29. The province's occupational health and safety statute
(a) incorporate the current prohibition against obstructing officers found in the Workers' Compensation Act;
(b) create a general duty to assist officers; and
(c) authorize officers to ask the police for assistance. (ref. pg. 67)

APPLICABLE EXTRACT FROM BILL 14 (1998):

Assistance on inspection
186 (1) A person must provide all reasonable means in that person's power to facilitate an inspection under this Part.
(2) A person must not
(a) hinder, obstruct, molest or interfere with, or attempt to hinder, obstruct, molest or interfere with, an officer in the exercise of a power or the performance of a function or duty under this Part or the regulations,
(b) knowingly provide an officer with false information, or neglect or refuse to provide information required by an officer in the exercise of the officer's powers or performance of the officer's functions or duties under this Part or the regulations, or
(c) interfere with any monitoring equipment or device in a workplace placed or ordered to be placed there by the board.

COMMENTARY: Recommendation acted on.

2.26 Enforcement against suppliers

RECOMMENDATION 30. The province's occupational health and safety statute include enforcement mechanisms that apply to suppliers. (ref. pg. 68)

EXTRACT FROM BILL 14 (1998):

Orders to stop using or supplying unsafe equipment, etc.
190 ... (2) If the board has reasonable grounds for believing that a supplier is supplying a thing that
(a) is not in safe operating condition, or
(b) does not comply with this Part or the regulations,
the board may order that supplier to stop supplying the thing until the order is cancelled by the board.

COMMENTARY: Recommendation acted on.
Also, with the exception of administrative penalties (new section 196), the other enforcement mechanisms under the Part 3 apply to “persons”, which would include a supplier, either as an individual or as a corporation. See the extracts from Bill 14 (1998) under recommendations 26, above.

2.27 Administrative penalties

RECOMMENDATION 31. the province's occupational health and safety statute establish a direct administrative penalty mechanism; and that (a) the maximum amount of an administrative penalty be set at $500,000, or authorize the Lt. Gov. in Council to do so by regulation; and that fines applicable to workers shall be prescribed with due regard to their earnings; (b) the criteria to be used when administrative penalties may be imposed or authorize the Lt. Gov. in Council to do so by regulation; (c) specify amounts for breaches of designated provisions of the occupational health and safety statute and the regulations; (d) that no person may be charged with an offence or subjected to a compensation penalty assessment if they pay the full amount of a direct administrative penalty; (e) the notice of a direct administrative penalty may be appealed to an administrative body (such as the Appeal Division); (f) an employer is prohibited from disciplining a worker who receives a direct administrative penalty for the same events which led to that penalty if the employer also received a sanction arising out of these same events; and (g) that payment of a direct administrative penalty should not be used as evidence for the purposes of sentencing after conviction for another offence. (ref. pg. 78)

SUBSTANTIVE COMMENT:
Starting on page 74 of its 1997 report, the Commission stated:

Any such system must be open, fair, equitable and proportionate, meaning that administrative penalties must reflect each workplace party’s responsibilities and duties and must consider the offending party's degree of knowledge, authority over and control relating to the infraction. This mechanism must in no way dilute the employer’s primary responsibility for workplace health and safety or the general duties applied to all persons on a worksite.

Recognizing this, it is important to emphasize that restraint must be exercised in administering penalties against parties who do not have primary responsibility for safety in the workplace. For example, workers committing a first offence might often be warned by an agency officer rather than penalized, unless a thorough review of the available worker and employer history, or the particular circumstances, made a penalty clearly justified. If any particular workplace party has not been assigned a duty in a regulation, that party would not be subjected to an administrative penalty were that provision to be breached.

On pages 76 to 77 of its 1997 report, the Commission went on to stated:

While the commission believes that administrative penalties applied immediately and even at the worksite should be an enforcement option, administrative penalties are not intended to displace a court prosecution or an employer compensation penalty assessment. Instead, administrative penalties could be used in certain particular and defined situations, and be focused predominantly...
on breaches of specific regulatory provisions. If an administrative penalty were not chosen or applicable in a particular instance, a compensation penalty assessment for an employer or a court prosecution may still be an appropriate option. There should, however, be a prohibition against using more than one enforcement option in each case. For example, if a worker receives an administrative penalty, it would be inappropriate for the board to prosecute that worker for the same offence. In a similar vein, if the employer receives an administrative penalty, it would be inappropriate to later prosecute that employer through the courts or levy a compensation penalty assessment on that employer for the same breach.

It would also be unfair to allow the employer to take disciplinary action against a worker where the employer had also received a penalty for the same event. This would not be the case, however, where the worker alone received the penalty. If a worker acted in a willful and reckless manner that threatened that worker or other workers’ safety, such as operating machinery under the influence of alcohol, the employer should retain the ability to further discipline the worker, regardless of the worker having received an administrative penalty.

To summarize, there is a need for an occupational health and safety enforcement option separate from the court and compensation system that is applicable to all workplace parties. Such a mechanism is not intended to dilute primary employer responsibility for safety in the workplace, but rather to enhance workplace safety. In our view, a carefully designed and implemented administrative penalty scheme would best address this need.

**APPLICABLE EXTRACT FROM BILL 14 (1998):**

**Administrative penalties**

196 (1) The board may impose an administrative penalty in accordance with this section if it considers that

(a) an employer has failed to take sufficient precautions for the prevention of work related injuries or illnesses,

(b) an employer has not complied with this Part, the regulations or an applicable order, or

(c) a workplace or working conditions are not safe.

(2) Before imposing an administrative penalty, the board must serve a penalty notice on the employer that sets out

(a) the basis on which the administrative penalty is being considered,

(b) the amount of the proposed administrative penalty,

(c) the employer’s options to accept the penalty as proposed or to make representations to the board respecting the proposed penalty or the amount, and

(d) the time limit for giving notice to the board that the employer intends to make representations referred to in paragraph (c), which must be at least 30 days after the penalty notice is served on the employer.

(3) On receipt of a penalty notice, the employer must

(a) provide a copy of the notice to the joint committee or worker health and safety representative, as applicable, and

(b) if the workers at the workplace to which the penalty notice relates are represented by a union, send a copy to the union.

(4) In response to a penalty notice, the employer may

(a) accept the proposed administrative penalty, in which case it is deemed to be an administrative penalty imposed under subsection (6) that is payable as ordered by the board, or

(b) within the time limit established under subsection (2) (d), notify the board that the employer wishes to make representations to the board respecting the matter.

(5) If an employer has given notice referred to in subsection (4) (b), the board must give the employer a reasonable time in which to provide information and make other representations to the board respecting the matter.

(6) After considering any representations made by the employer under subsection (5) and any other information the board considers relevant, the board may, by order, impose an administrative penalty on the employer, subject to the limits that
(a) the employer is not liable to an administrative penalty if the employer proves that the employer took every precaution that was reasonable in the circumstances to prevent the failure, non-compliance or conditions to which the penalty relates, and
(b) the board must not impose an administrative penalty greater than $500,000.

(7) An employer subject to an administrative penalty under this section must pay the amount of the penalty to the board for deposit into the accident fund.
(8) If an administrative penalty is reduced or cancelled on appeal, the amount to be returned to the employer must be paid out of the accident fund and must include interest calculated as referred to in section 96 (7).
(9) If an administrative penalty is imposed on an employer, a prosecution under this Act for the same contravention may not be brought against the employer.

**Special rules for review of orders in relation to administrative penalties**

197 (1) Once a penalty notice is served under section 196 (2), an order in relation to which the administrative penalty is contemplated may not be reviewed under Division 13 of this Part.

(2) Despite subsection (1), an order referred to in subsection (1)

(a) may be reviewed in the context of the decision on imposing an administrative penalty if
   (i) a review of the order is underway but has not been completed at the time the penalty notice is served, or
   (ii) the order was made not more than 60 days before the penalty notice was served, and

(b) may be considered in the context of the decision on imposing an administrative penalty, even if the order has previously been reviewed or the time limit under section 201 (1).

**COMMENTARY:** *Recommendation acted on.*

Recommendation 31(c) has been addressed in the new Division 14. Under the provisions of that Division, an employer may appeal a section 196 administrative penalty directly to the appeal division. (Note: The appeal division has been defined under Bill 14 (1998) as the appeal tribunal.)

As these provisions apply only to employers, the last part of recommendation 31(a) and recommendation 31(f) are redundant.

**RECOMMENDATION 32.** The province’s occupational health and safety statute

(a) should direct the occupational health and safety agency to provide agency officers appropriate training in applying the criteria in the administrative penalty regulations;

(b) authorize agency officers to issue direct administrative penalties once they have received appropriate training. (ref. pg. 78)

**COMMENTARY:** *Recommendation not acted on.*

There is no provision in the new Part 3 that specifically directs the board to train its officers in applying administrative penalties. Further officers would be allowed to issue
administrative penalties under new section 196, but there is no provision that links the appropriate training of officers to their authority to use that section.

2.28 Compensation penalty assessments

RECOMMENDATION 33. the province's occupational health and safety statute (a) authorize the occupational health and safety agency to impose penalty assessments as previously done pursuant to section 73(1) of the Workers' Compensation Act; (b) set the maximum amount of a penalty assessment at not less than $500,000, or authorize the Lt. Gov. in Council to do so by regulation; and (c) specify amounts for breaches of designated provisions of the occupational health and safety statute and the regulations. (ref. pg. 80)

APPLICABLE EXTRACT FROM BILL 14 (1998):
6 Section 73 is repealed and the following substituted:

Levy from employer to cover amount of compensation
73 (1) If
(a) an injury, death or disablement from occupational disease in respect of which compensation is payable occurs to a worker, and
(b) the board considers that this was due substantially to
(i) the gross negligence of an employer,
(ii) the failure of an employer to adopt reasonable means for the prevention of injuries, deaths or occupational diseases, or
(iii) the failure of an employer to comply with the orders or directions of the board, or with the regulations made under Part 3 of this Act,
the board may levy and collect from that employer as a contribution to the accident fund all or part of the amount of the compensation payable in respect of the injury, death or occupational disease, to a maximum of $40 000.
(2) The payment of an amount levied under subsection (1) may be enforced in the same manner as the payment of an assessment may be enforced.

COMMENTARY: Recommendation acted on (in part).
The major difference between the Commission’s recommendation and new section 73, is that the maximum penalty would be $40,000, and not $500,000 as per recommendation (33(b). Further, there will be no designated provisions of the OHS statute or regulations to which this revised new section would apply.

2.29 Charge-approval for prosecutions

RECOMMENDATION 35. the province's occupational health and safety statute state that the Crown alone approves all charges to be laid under this statute. (ref. pg. 81)

APPLICABLE EXTRACT FROM BILL 14 (1998):

Limits on prosecutions
214 ... (2) An information in respect of an offence may only be laid with the approval of the board.

COMMENTARY: Recommendation acted on (varied).
The new subsection 214(2) would preclude persons other than the board from initiating a prosecution under the new Part 3. Under subsection 4(3) of the Crown Counsel Act, the Crown must approve all charges initiated by the board under new subsection 214(2), and once initiated, the Crown alone is responsible for the final approval and conduct of a prosecution. That section reads (in part):

Responsibilities of Crown counsel
4 ... (3) Subject to the directions of the [Assistant Deputy Attorney General] or another Crown counsel designated by the ADAG, each Crown counsel is authorized to
(a) examine all relevant information and documents and, following the examination, to approve for prosecution any offence or offences that he or she considers appropriate,
(b) conduct the prosecutions approved, and ...

2.30 Court orders on conviction

RECOMMENDATION 36. the province's occupational health and safety statute
(a) allow the courts to issue more creative orders following a conviction. This could include
   (i) publishing the facts of an offence in a newspaper;
   (ii) levying additional fines where the person convicted obtained monetary benefits by a breach of the legislation;
   (iii) levying a fine for public education;
   (iv) requiring a convicted person to submit information to prove compliance;
   (v) sentencing the convicted person to undertake community service; and
   (vi) requiring a convicted person to post a performance bond. (ref. pg. 82)

APPLICABLE EXTRACT FROM BILL 14 (1998):
Additional penalty to reclaim monetary benefit
218 (1) On conviction for an offence, if the court is satisfied that monetary benefits accrued to the offender as a result of the commission of the offence, the court may order the offender to pay a fine in an amount equal to the estimation by the court of the amount of the monetary benefits.
(2) A fine under subsection (1) is additional to any fine imposed under section 217.

Additional powers on sentencing
219 (1) If a person is convicted of an offence, in addition to any other punishment imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order doing one or more of the following:
   (a) directing the person to perform community service in accordance with the requirements established by the court;
   (b) directing the person to pay to the board an amount for the purpose of research or public education related to occupational health and safety;
   (c) directing the person to post a bond or pay into court an amount of money the court considers appropriate for the purpose of ensuring compliance with any prohibition, direction or requirement under this section;
(d) directing the person to submit to the board, on application by the board within 3 years after the date of the conviction, any information respecting the activities of the person that the court considers appropriate in the circumstances;
(e) directing that the facts relating to the commission of the offence be published by the board at the expense of the person convicted, subject to any maximum amount or other restrictions established by the court;
(f) prohibiting the person from working in a supervisory capacity at any workplace for a period of not more than 6 months from the date of conviction;
(g) requiring the person to comply with any other conditions that the court considers appropriate for securing the person's good conduct and for preventing the person from repeating the offence or committing other offences under this Part.

(2) An order under subsection (1) comes into force on the day on which it is made or on another day specified by the court, but must not continue in force for more than 3 years after that day.

(3) If the court makes an order under subsection (1) (b) or the board incurs publication expenses under subsection (1) (e), the amount or expenses constitute a debt due to the board.

COMMENTARY: Recommendation acted on.

2.31 Injunctions

RECOMMENDATION 37. the province's occupational health and safety statute allow occupational health and safety agency to apply the courts to obtain an injunction. (ref. pg. 83)

APPLICABLE EXTRACT FROM BILL 14 (1998):

Court injunction
198 (1) On application of the board and on being satisfied that there are reasonable grounds to believe that a person
   (a) has contravened or is likely to contravene this Part, the regulations or an order, or
   (b) has not complied or is likely not to comply with this Part, the regulations or an order,
the Supreme Court may grant an injunction restraining the person from continuing or committing the contravention or requiring the person to comply, as applicable.
(2) An injunction under subsection (1) may be granted without notice to others if it is necessary to do so in order to protect the health or safety of workers.
(3) A contravention of this Part, the regulations or an order may be restrained under subsection (1) whether or not a penalty or other remedy has been provided by this Part.

COMMENTARY: Recommendation acted on.

2.32 Company officers and directors liability

RECOMMENDATION 38. the provisions of section 77 of the Workers' Compensation Act be transferred to the province's new occupational health and safety statute and that
this provision should also be applicable to administrative penalties. (ref. pg. 84)

APPLICABLE EXTRACT FROM BILL 14 (1998):
10 Section 77 is amended... (a) by repealing subsection (1),
...

15 The following... is added:

Duties of directors and officers of a corporation
121 Every director and every officer of a corporation must ensure that the corporation complies with this Part, the regulations and any applicable orders.
...

Offence to contravene Part, regulation or order
213 ... (2) If a corporation commits an offence referred to in subsection (1), an officer, director or agent of the corporation who authorizes, permits or acquiesces in the commission of the offence also commits an offence.
(3) Subsection (2) applies whether or not the corporation is prosecuted for the offence.

COMMENTARY: Recommendation acted on.
Subsection 77(1) of the WCACT established liability for corporate officers.

2.33 The defence of due diligence

RECOMMENDATION 39. the province's occupational health and safety statute
(a) recognize the defense of due diligence; and
(b) place the onus on the accused person to establish that defence. (ref. pg. 85)

APPLICABLE EXTRACT FROM BILL 14 (1998):
Defence of due diligence
215 A person is not guilty of an offence if the person proves that the person took every precaution that was reasonable in the circumstances to prevent the commission of the offence.

COMMENTARY: Recommendation acted on.
As a matter of common law, the defence of due diligence must be raised by the accused.

2.34 The coercion defense

RECOMMENDATION 40. the province's occupational health and safety statute
recognize the coercion defence modeled on section 240 of Quebec's occupational health and safety statute. (ref. pg. 85)

SUBSTANTIAL COMMENT:
Section 240 of Quebec’s OHS statute quoted by the Commission on page 85 of its 1997 report reads:

240. Where a worker is being prosecuted for an offence against this Act or the regulations, proof that the offence was committed as a result of formal instructions given by his employer and despite the worker's objection suffices to release him from his responsibility.

APPLICABLE EXTRACT FROM BILL 14 (1998):

Additional defence for workers
216 A worker is not guilty of an offence if the worker proves that the offence was committed
(a) as a result of instructions given by the worker's employer or supervisor, and
(b) despite the worker's objection.

COMMENTARY: Recommendation acted on.

2.35 Level of fines

RECOMMENDATION 41. the province's occupational health and safety statute (a) set out fines for convictions of breaches of the province's occupational health and safety statute that are greater than those currently set out under the Workers' Compensation Act and correspond with the levels set out in other, recent Canadian occupational health and safety statutes and British Columbia regulatory statutes. In any event, the maximum fine should not be less than $500,000; and (b) impose a minimum fine for those convicted of repeat offences. This should be similar to provisions found in British Columbia's wildlife protection legislation. (ref. pg. 88)

APPLICABLE EXTRACT FROM BILL 14 (1998):

DIVISION 15 -- OFFENCES
Offence to contravene Part, regulation or order
213 (1) A person who contravenes a provision of this Part, the regulations or an order commits an offence.
...

Limits on prosecutions
214 (1) The time limit for laying an information in respect of an offence is 2 years after the last occurrence of the act or omission on which the prosecution is based.
...

General penalties
217 On conviction for an offence, a person is liable to the following penalties:
(a) in the case of a first conviction,
(i) a fine of not more than $500 000 and, in the case of a continuing offence, to a further fine of not more than $25 000 for each day during which the offence continues after the first day,
(ii) imprisonment for a term not exceeding 6 months, or
(iii) both fine and imprisonment;
(b) in the case of a subsequent conviction,
   (i) a fine of not more than $1 million and, in the case of a continuing
   offence, to a further fine of not more than $50,000 for each day during
   which the offence continues after the first day,
   (ii) imprisonment for a term not exceeding 12 months, or
   (iii) both fine and imprisonment.

COMMENTARY: Recommendation acted on.

2.36 Effect of a breach

RECOMMENDATION 42. the province's occupational health and safety statute state that
(a) a worker's failure to comply with the provincial occupational health and safety
legislation does not affect the worker's right to compensation as set out under the
Worker's Compensation Act; and
(b) the liabilities and obligations of any person under the Worker's Compensation Act are
not decreased, reduced, or removed, by reason only of that person's compliance with the
provisions of the occupational health and safety statute or its regulations. (ref. pg. 89)

APPLICABLE EXTRACT FROM BILL 14 (1998):

   Relationship with Part 1

   110 (1) The failure to comply with any provision of this Part or the regulations does not
   affect the right of a worker to compensation, if otherwise entitled, under Part 1 of this Act.
   (2) The liabilities and obligations of a person under Part 1 of this Act are not decreased or
   removed by reason only of the person's compliance with the provisions of this Part or the
   regulations.

COMMENTARY: Recommendation acted on.

2.37 Appeals and related matters

RECOMMENDATION 43. the province's occupational health and safety statute state that
persons who disagree with an officer's order or directive have the right to appeal that
order or directive, with the following provisions:
(a) an appeal itself does not operate to stay an order or directive before the merits of the
appeal has been adjudicated, unless ordered by the appellate tribunal;
(b) the person appealing the order or directive must do so within a set period of time and
provide grounds for the appeal. The scope of the appeal should be prescribed in the
statute;
(c) the appellate tribunal should render a written decision within a maximum period of
time; and
(d) the Lt. Gov. in Council be authorized to approve a regulation which could set out
detailed procedures to give effect to this appeal mechanism. (ref. pg. 92)
DIVISION 13 -- REVIEWS

What decisions are reviewable

199 The following are the decisions that are reviewable under this Division:

(a) an order, other than
   (i) an order under section 196 imposing an administrative penalty, or
   (ii) an order referred to in section 197 (1) that may be considered in the
context of deciding whether or not an administrative penalty is to be
imposed;
(b) the refusal to make an order that is reviewable under paragraph (a);
(c) the cancellation of an order that is reviewable under paragraph (a);
(d) a determination under section 145 (1) respecting the right to refuse unsafe
work;
(e) a determination under section 153 (1) respecting discriminatory action or
failure to pay wages.

Who may apply for a review

200 An employer, worker, supplier, union or other person aggrieved by a reviewable
decision may have the decision reviewed in accordance with this Division.

Applying for a review

201 (1) In order to have a decision reviewed, the person aggrieved must apply to the
board within 60 days after the date of the decision.

(2) An application for a review must
   (a) be made in writing or in another manner acceptable to the board,
   (b) identify the decision for which a review is requested, and
   (c) state the basis on which the application for review is made and the outcome
requested.

Board to have application dealt with by reviewing officer

202 (1) The board must have an application for review dealt with by a reviewing officer as
expeditiously as reasonably practicable after it has been received.

(2) A review of
   (a) a refusal to make an order, if the basis for the application for review is that an
order is required to ensure that an unsafe condition is remedied, or
   (b) an order under section 195 suspending or cancelling a certificate
must be given priority and dealt with by a reviewing officer as quickly as possible after the
application has been received.

(3) Unless the complexity of the matter makes this impracticable, a decision on the review
must be made within 60 days after the application for the review is received by the board.

(4) The board must designate officers to act as reviewing officers for the purposes of this
Division, but the reviewing officer in a specific case must not be a person who is the direct
supervisor of the officer who made the decision under review.

Generally a review does not operate as a stay

203 (1) Unless the reviewing officer directs otherwise, a review under this Division does
not operate as a stay or suspend the operation of the decision under review.

(2) The reviewing officer may make a stay or suspension referred to in subsection (1)
subject to any conditions the officer specifies.

Notice to other persons

204 (1) In the case of a review requested by an employer, the employer must
   (a) post a notice of the application for review at the workplace to which the
decision under review applies,
(b) provide notice of the application to the joint committee or worker representative, as applicable, and
(c) if workers of the employer at that workplace are represented by a union, send notice of the application to the union.

(2) In the case of a review requested by a worker or union, the worker or union must provide notice of the application for review to the employer, who must give notice in accordance with subsection (1).

(3) In the case of a review requested by a person other than an employer, worker or union, the person must give notice in accordance with the directions of the reviewing officer.

(4) As an exception, the requirements of subsection (2) do not apply in relation to an order referred to in section 166 (2).

Review process
205 (1) Subject to the regulations and this section, the reviewing officer may deal with a review in a manner the officer considers appropriate to the nature and circumstances of the decision being reviewed.

(2) The applicant requesting a review and an employer, worker or union required to be given notice under section 204 are entitled to present information respecting the review to the reviewing officer.

(3) Without limiting subsection (1), the reviewing officer may do one or more of the following:
   (a) receive any evidence or information on oath, affidavit or otherwise as the officer considers appropriate, whether or not it is admissible as evidence in a court of law;
   (b) conduct an inquiry into the matter and consider new information provided by other officers or any other person;
   (c) hold a hearing, if the officer is of the opinion that the circumstances justify this;
   (d) subject to the entitlement under subsection (2), specify the persons or organizations who may participate in a review and the manner in which they may participate;
   (e) require the applicant or other parties to provide further information.

Decision on review
206 (1) In dealing with a review, the reviewing officer may confirm, vary or cancel the decision under review or substitute his or her own decision for the decision under review.

(2) The reviewing officer must provide a written copy of his or her decision on the review, with reasons, to
   (a) the applicant for the review, and
   (b) any other parties who participated in the review.

(3) If the decision on a review is in relation to an order that was required by or under this Act to be posted by an employer at a workplace, the reviewing officer must provide a copy of the decision to the employer, who must then post it at the workplace.

(4) Subject to the authority of the board under section 113 (2) or an appeal under Division14 of this Part, a decision of a reviewing officer on any matter in which the reviewing officer has jurisdiction under this Division is final and conclusive and is not open to question or review in a court on any grounds.

DIVISION 14 -- APPEALS
What decisions are appealable to appeal tribunal
207 The following are decisions that may be appealed to the appeal tribunal in accordance with this Division:
   (a) in relation to administrative penalties under section 196,
      (i) an order imposing an administrative penalty,
(ii) the cancellation of an order imposing an administrative penalty, or
(iii) a decision not to impose an administrative penalty made after issuing
a penalty notice under section 196 (2);
(b) a decision on a review under Division 13 of this Part in relation to a
determination or order under section 153, including a decision respecting the
refusal to make or the cancellation of an order under that section;
(c) a decision on a review under Division 13 of this Part in relation to an order
under section 195;
(d) any other decision under this Part or the regulations that is prescribed by
regulation to be an appealable decision.

Who may bring an appeal
208 The following may bring an appeal of an appealable decision:
(a) for an appeal in relation to an administrative penalty,
   (i) the employer subject to the penalty, unless the employer accepted the
       penalty under section 196 (4) (a),
   (ii) a worker of the employer or a union representing workers of the
       employer, or
   (iii) any other person aggrieved by the decision;
(b) for an appeal in relation to a decision under section 153, the worker, employer
   or union affected by the decision;
(c) for an appeal in relation to an order under section 195, the person subject to
   the order;
(d) for an appeal in relation to a decision prescribed to be appealable, the
   persons permitted by regulation to appeal.

Applying for an appeal
209 (1) In order to bring an appeal under this Division, a person must apply in writing to
the appeal tribunal within 30 days of the decision being appealed.
(2) An application under subsection (1) must
   (a) identify the decision that is the subject of the application for appeal,
   (b) state the basis on which the application for an appeal is made and the
       outcome requested, and
   (c) include any other information required by the appeal tribunal.

Generally an appeal does not operate as a stay
210 (1) Unless the appeal tribunal directs otherwise, an appeal does not operate as a stay
or suspend the operation of the decision under appeal.
(2) The appeal tribunal may make a stay or suspension referred to in subsection (1)
subject to any conditions it specifies.

Appeal process
211 (1) Subject to this Division, sections 85.1, 85.2 and 87 apply for the purposes of an
appeal under this Division.
(2) In the case of an appeal by an employer, worker or union, notice of the appeal
application must be given in accordance with section 204 (1) and (2).
(3) In the case of an appeal by a person other than an employer, worker or union, the
person must give notice in accordance with the directions of the appeal tribunal.
(4) For certainty, section 96.1 does not apply to an appeal under this Division.

Decision on an appeal
212 (1) After considering the appeal, the appeal tribunal may
   (a) confirm, vary or cancel the decision under appeal, or
   (b) refer the matter back to the board for reconsideration.
(2) The appeal tribunal must make a written copy of its decision, with reasons, available to
(a) the applicant for the appeal, and
(b) any other parties who participated in the appeal.

(3) A decision of the appeal tribunal on any matter in which it has jurisdiction is final and conclusive and is not open to question or review in a court on any grounds.

COMMENTARY: Recommendation acted on.
The government has retained the current two-step review and appeal process, but has given the review process a statutory foundation. This first step in the process was originally granted by board policy.

Recommendation 43(c) has been dealt with in that the Cabinet holds the regulation-making powers under new clause 224(2)(j) regarding appeals initiated pursuant to new Division 14; see the discussion under recommendation 3, above.

2.38 Regulatory variances or exemptions

RECOMMENDATION 45. the province's occupational health and safety statute authorize and describe an open and flexible mechanism for persons to obtain variances or exemptions from the regulations (e.g. submit requests to the agency, a council or the minister with supporting rationale). These variances or exemptions must be either time limited or subject to a regular review. The statute should include
(a) criteria against which the variance or exemption must be assessed (e.g. "equal or greater protection" or "the health and safety of a worker would not be adversely affected");
(b) a requirement to notify all potentially affected parties when a variance or exemption request is made by providing these parties with a copy of the final decision and reasons either in writing, or by posting them in the workplace;
(c) a right for those who may be affected by variances or exemptions to intervene before the decision is made, or to appeal decisions on the merits; and
(d) a provision that states that the person obtaining the variance or exemption must comply with the variance or exemption and any applicable terms or conditions. (ref. pg. 98)

SUBSTANTIVE COMMENT:
On pages 98 to 99 of its 1997 report, the Commission stated:

Requests for variances or exemptions should be limited to prescriptive regulations; performance-based provisions should be sufficiently flexible to achieve the stated objective. It should not be permissible for the agency to grant a variance or exemption to provisions of the Act in any circumstance; the process would apply to regulations only.

There should be an administrative mechanism that ensures that requests for variances or exemptions which are granted form part of the information considered in the regular regulation review process. This would highlight regulations which have proved to be problematic, so that participants in the review process could consider whether there is a need to amend the regulations in question. The very need for variances or an exemption begs the questions: What is wrong with the existing requirement? How might it be modified?
The commission is of the view that it should not be possible to automatically obtain or petition to obtain a “stay” of a regulation simply because a variance or exemption has been requested. Because regulations are instruments approved by the Lt. Gov. in Council, any decision to hold back their application pending the outcome of a variance or exemption request should rest with the cabinet and not the agency. That said, decisions on variance or exemption requests should be made as soon as is reasonably practical.

Once a variance or exemption has been granted, an appeal of that decision should not automatically lead to a stay. That preliminary issue should be placed before the appeal body alone to decide on its merits.

APPLICABLE EXTRACT FROM BILL 14 (1998):

**DIVISION 9 -- VARIANCE ORDERS**

**Board may authorize variances**

164 (1) On application, the board may, by order, authorize a variance from a provision of the regulations.

(2) A variance order may be made only if the board is satisfied that the variance
(a) affords protection for workers equal to or greater than the protection
established by the provision being varied, or
(b) has substantially the same purpose and effect as the provision being varied.

(3) A variance order may be made applicable to
(a) a specified workplace, or
(b) a specified work process at all or specified workplaces of a specified employer.

(4) As a limit on the authority under subsection (1), a provision in a regulation of the Lieutenant Governor in Council under this Part may only be varied if this is permitted by regulation of the Lieutenant Governor in Council.

**Effective period for variance order**

165 (1) Unless another time is established in the order, a variance order ceases to have effect 3 years from the date on which it first comes into effect.

(2) The board may only establish an effective period longer than 3 years if the application for the variance expressly requested the longer period.

**Application for variance**

166 (1) Subject to the regulations and subsection (2), an application for a variance must be made in writing to the board and must include
(a) a description of the requested variance,
(b) a statement of why the variance is requested, and
(c) information with respect to the benefits and drawbacks in relation to the matters addressed by the regulation that might reasonably be anticipated if the variation is allowed.

(2) In the case of an application by a single worker for a variance order that would apply only to that worker, an application may be made as permitted by the board.

(3) The applicant must also provide the board with the technical and any other information required by the board to deal with the application.

**Notice of application**

167 (1) If the variance would apply to an existing workplace, the applicant must
(a) post a copy of the application at the workplace and keep it posted there until the decision on the requested variance is received by the applicant,
(b) provide a copy to the joint committee or worker representative, as applicable, and
(c) if workers at the workplace are represented by a union, send a copy to the union.
(2) If the variance would apply to a workplace that is not yet in existence, immediately after submitting the application for variance, the applicant must publish a notice of the application, including
   (a) a description of the requested variance, and
   (b) a statement of why the variance is requested,
where it would reasonably be expected to come to the attention of persons who may be affected by the decision on the requested variance.

Consultation on application
168 (1) After receiving an application for variance, the board may give notice of the application and conduct consultations respecting that application as the board considers advisable.
(2) Before making a decision on an application, the board must provide an opportunity for persons who may be affected by the requested variance to submit to the board information respecting their position on the requested variance.
(3) A union representing workers who may be affected by the requested variance is considered a person who may be affected for the purposes of subsection (2).

Decision on application
169 (1) The board must give written reasons for a decision on an application for a variance order.
(2) The board must give notice of its decision, including the written reasons and any variance order made, to the applicant and to any persons who submitted information under section 168 (2).
(3) The applicant must post a copy of the decision at each workplace to which it relates as follows:
   (a) if the application for a variance order was refused, the applicant must keep the decision posted for 7 days or the period required by the order, whichever is longer;
   (b) if a variance order was made, the applicant must keep the order and written reasons posted throughout the time the variance is in effect.

Legal effect of variance
170 (1) A variance order authorizes variance from the applicable provision of the regulations
   (a) only in accordance with the terms and conditions of the variance order, and
   (b) only during the time that there is compliance with its terms and conditions.
(2) For certainty, if the terms and conditions of a variance order are not met, the applicable provision of the regulations applies and the variance order is without effect.

Regulations review must consider variance history
171 The board must consider the history of variance applications and variance orders as part of its process of regulations review referred to in section 228.

COMMENTARY: Recommendation acted on.
Appeals to board decisions concerning variances may be taken through the review and appeal processes of new Division 13 and 14, respectively; see the discussion under recommendation 43, above.

2.39 Adopting standards

RECOMMENDATION 47. the province's occupational health and safety statute state that
(a) national or international standards can be adopted by regulation and are enforceable under the province's occupational health and safety regulations;
(b) the occupational health and safety agency must review any amendments to the adopted standards to ensure their continued relevance. If the new version is useful, the occupational health and safety agency should recommend that the regulation be amended to adopt the new version of the standards. (ref. pg. 100)

APPLICABLE EXTRACT FROM BILL 14 (1998):

Authority and application of regulations generally

230 ... (3) A regulation under this Part establishing a standard, code or rule may do so by adopting a standard, code or rule
(a) published by a national or international standards association, or
(b) enacted as or under a law of another jurisdiction, including a foreign jurisdiction.
(4) A standard, code or rule referred to in subsection (3)
(a) may be adopted in whole, in part or with any changes considered appropriate, and
(b) may be adopted as it stands at a specific date, as it stands at the time of adoption or as amended from time to time.

COMMENTARY: Recommendation acted on.
The new sections 109 and 228 re: regular reviews of the regulations would apply to any standards adopted under the authority of new subsection 230(3).

2.40 Applying the consolidation/transfer methodology - mine safety

RECOMMENDATION 48. (a) the current geographic limitation on the Workers' Compensation board's jurisdiction over mines should be replaced by a functional approach which would transfer jurisdiction over appropriate above ground activities to the occupational health and safety agency; (ref. pg. 117)

APPLICABLE EXTRACT FROM BILL 14 (1998):

Application of Part

108 ... (2) This Part and the regulations do not apply in respect of
(a) mines to which the Mines Act applies, ...

COMMENTARY: Recommendation not acted on.

2.41 Applying the consolidation/transfer methodology - industrial camps

RECOMMENDATION 50. the provincial government (a) ascertain what legislative changes are required to transfer the workplace occupational health and safety components from public health regulations (Health Act) to the province's occupational health and safety statute... (ref. pg. 119)
APPLICABLE EXTRACT FROM BILL 14 (1998):

Application of Part

108 ... (2) This Part and the regulations do not apply in respect of ...
(c) subject to subsection (3), the operation of industrial camps to the extent their operation is subject to regulations under the Health Act.

(3) The Lieutenant Governor in Council may, by regulation, provide that all aspects of this Part and the regulations apply to camps referred to in subsection (2) (c), in which case this Part and the regulations prevail over the regulations under the Health Act to the extent of any conflict.

COMMENTARY: Recommendation acted on (varied).
Rather than transfer the OHS components of the public health legislation to the new OHS Part, the government has taken the reverse position. It has exempted industrial camps governed under the health regulations from the operation of the new Part, but allowed the Cabinet to apply the new Part to industrial camps subject to the Health Act. The net effect, however, appears to be the same as the objective of the Commission’s recommendation.

2.42 Ongoing regulation review - other non-regulatory mechanisms

RECOMMENDATION 55. the province's occupational health and safety statute state that:
(a) the occupational health and safety agency, in consultation with interest groups, develop and revise regulations and make recommendations on the adoption of those regulations to the agency's governing body;
(b) the occupational health and safety agency's governing body recommend changes to the regulations to the Minister of Labour; and
(c) the Minister of Labour decide which regulations to place before cabinet. (ref. pg. 143)

APPLICABLE EXTRACT FROM BILL 14 (1998):

Review of Part and regulations

109 (1) The minister may appoint a committee to conduct a review of all or part of this Part and the regulations and to report to the minister concerning its recommendations.
(2) A review under this section must include a process of consultations with representatives of employers, workers and other persons affected by this Part and the regulations.
(3) For certainty, the costs of a review under this section are part of the costs of administering this Act.

... Regulations review must consider variance history

171 The board must consider the history of variance applications and variance orders as part of its process of regulations review referred to in section 228.

... Ongoing review of board regulations
228 The board must undertake a process of ongoing review of and consultation on its regulations to ensure that they are consistent with current workplace practices, technological advances and other changes affecting occupational health and safety and occupational environment.

COMMENTARY: *Recommendation acted on.*
See also the extract and the commentary in relation to recommendations 3 and 4, above.
Appendix “A”

Non-applicable Commission Recommendations

The following are the Commission’s recommendations that did not apply to the creation of a OHS statute (e.g. they applied specifically to regulations made under such an act) or applied to administrative or program issues, as opposed to legislation.

LEGISLATIVE FRAMEWORK

34. the current crown prosecution pilot project should become a permanent program.

44. the province's occupational health and safety regulations
   (a) identify the parties to whom they assign responsibility;
   (b) clearly articulate what the parties are or are not to do;
   (c) be written in clear and appropriate plain language; and
   (d) be readily accessible to employers, workers and others affected by the legislation. (ref. pg. 93)

46. the province's occupational health and safety regulation
   (a) not adopt other provincial or federal legislation by reference; and
   (b) provide information on the need to consider the effect of other provincial or federal legislation to those who must comply with the occupational health and safety regulations. (ref. pg. 100)

48. (b) greater program links should be developed between the Ministry of Employment and Investment and the Workers’ Compensation Board so that the Workers’ Compensation Board can provide additional services to the ministry on a cost-recovery basis.

49. the provincial government pursue jurisdictional agreements with Human Resources Development Canada and Transport Canada in order to ensure that the logging aspect of heli-logging is fully within the occupational health and safety agency's occupational health and safety jurisdiction. (ref. pg. 118)

50. the provincial government... (b) provide for an enforcement agreement whereby appropriately trained agency officers would hold delegated authority to enforce [public health] regulations at remote industrial work camps. (ref. pg. 119)

51. the Workers’ Compensation Board consult with the Ministry of Municipal Affairs and Housing to
   (a) identify what legislative changes would be required to British Columbia’s railways safety regulations so that they would provide the same level of protection afforded to other non-railway workers in British Columbia;
   (b) establish a memorandum of understanding that would allow for reciprocal enforcement of occupational health and safety legislation. (ref. pg. 121)

52. if the government wishes to consider jurisdictional consolidations for occupational health and safety beyond the consolidation addressed in this report, that the government apply the four step legislative consolidation and program transfer approach outlined in this report or adopt a similar approach. (ref. pg. 122)
53. the provincial government pursue more jurisdictional and enforcement agreements with federal and provincial agencies which also have responsibility for aspects of occupational health and safety at British Columbia's worksites. These agreements could provide:
(a) detailed descriptions of jurisdictions or the specific steps to be taken to ascertain jurisdictions in particular circumstances;
(b) a mechanism for dealing with legislative gaps, duplication or conflicts which may arise; and
(c) a reciprocal delegation of enforcement powers to inspectors. (ref. pg. 123)

REGULATORY REVIEW

54. the occupational health and safety agency incorporate the principles described here in an ongoing regulatory review process. (ref. pg. 143)

FATALITY BENEFITS

56. (a) the reference to "wife" and "husband" be deleted and that the word "spouse" be substituted in the s.1 definition of "member of family" and that the same substitution be made throughout s. 17 where the words " wife" and "husband" currently appear;
(b) the terms "widow" and "widower" be deleted where they appear throughout s. 17 and the term "surviving spouse" be substituted; and
(c) the term "spouse" be defined in the act as meaning a person who:
(i) is married to another person; or
(ii) has lived with another person in a marriage-like relationship for a period of 2 years where there are no children, and 1 year where there are children, and the marriage-like relationship may be between persons of the same gender. (ref. pg. 151)

57. A term alternate to "invalid" be used throughout the Workers' Compensation Act. (ref. pg. 151)

58. (a) the reference to the age of 18 in part (a) of the above definition be changed to 19; and
(c) the reference to the age of 21 in part (c) of the above definition be changed to 25. (ref. pg. 152)

59. (a) the amount payable for funeral expenses should be increased to an amount of $6,000, being a consolidation of $5,000 for the funeral and $1,000 for incidental expenses;
(b) the employer should continue to bear the cost of transporting the deceased worker from the worksite to the nearest undertaker;
(c) the amount payable for additional transportation if burial does not take place at the nearest undertaker should be increased from "up to $200" to "up to $1,000";
(d) the above funeral benefit should be adjusted pursuant to the Consumer Price Index to the date on which the governors' recommendation was made to government;
(e) the transportation allowance should be annually adjusted pursuant to the Consumer Price Index effective from the date of this report; and
(f) these new benefits should apply to new claims. (ref. pg. 153)

60. (a) 17(3)(j) be revised so that assessments relating to the best interests of children in regard to their living situation and selection of a suitable foster parent are undertaken by an agency or individual as designated by the Ministry for Children and Families;
(b) if an existing household is continued and a foster parent designated, the Workers’ Compensation Board shall make payments to the foster parent as currently provided by the section;
(c) there be a periodic reassessment of the living situation by a party with suitable expertise as designated by the Ministry for Children and Families; and
(g) the Workers’ Compensation Board abandon the policy of prohibiting natural parents from being paid under this provision. (ref. pg. 157)

61. Section 17(6) be amended to read:

Where at the date of death a dependent spouse is not an invalid, but is suffering from a disability that results in a substantial impairment of earning capacity, the board may, having regard to the degree of disability and the extent of impairment of earning capacity, pay the spouse a portion of the compensation that would have been payable if the spouse had been an invalid. (ref. pg. 159)

62. the term "worker" be removed and that the section provide that two "spouses" each be deemed to be a dependant of the other. (ref. pg. 160)

63. (a) 17(8) be amended so that it will apply to situations where two individuals are in a marriage-like relationship and where both are parents or stand in loco parentis to the children; and
(b) if the definition of "spouse" recommended earlier is adopted, the section be redrafted as follows:

Where 2 spouses contribute to the support of a common household at which children also reside, the children are deemed to be dependants of the spouse whose death is compensable under this Part. (ref. pg. 160)

64. Compensation should be paid in accordance with maintenance orders and agreements, regardless of the workers’ compliance history as of the date of death. (ref. pg. 162)

65. the definition of "spouse" recommended earlier be adopted and that, in consequence, this provision be eliminated entirely. (ref. pg. 163)

66. (a) s.17(12) be amended to remove language relating to legal and common law relationships and substitute “spouse” as defined in the extended definition recommended earlier in this report;
(b) the section provide for apportionment of benefits as between spouses. Where there are two spouses and there is no order or agreement for maintenance to the separated spouse or the order or agreement provides for maintenance in excess of 50% of the spousal amount, the separated spouse and cohabiting spouse should each receive 50% of the spousal amount. Where there is a maintenance order or agreement under which the separated spouse receives less than 50% of the total spousal amount the separated spouse should receive the amount provided for under the order or agreement and the cohabiting spouse should receive the remainder. (ref. pg. 164)

67. If the extended definition of "spouse" recommended earlier in this report is adopted, the words "widow or widower, common law wife or common law husband" be deleted from section 17(13) and replaced by the word "spouse.” (ref. pg. 164)

68. s.16(2) be amended to provide that, where such services have been requested and a need has been determined, "the board shall make provisions and expenditures for the training or retraining of a surviving dependent spouse, regardless of the date of death." (ref. pg. 166)
69. s. 16(3) be amended to provide that, where such services have been requested and a need has been determined, "the board shall provide counselling and placement services to dependants." (ref. pg. 166)
Appendix “B”

The following are those provisions from Bill 14 (1998) that address substantive policy issues that were not addressed by the Commission’s recommendations. These residual provisions do not include those that affected legislative definitions, made consequential amendments or introduced transitional provisions.

15 The following... is added [under Part 3]:

... General duties of supervisors
117 (1) Every supervisor must
(a) ensure the health and safety of all workers under the direct supervision of the supervisor,
(b) be knowledgeable about this Part and those regulations applicable to the work being supervised, and
(c) comply with this Part, the regulations and any applicable orders.
(2) Without limiting subsection (1), a supervisor must
(a) ensure that the workers under his or her direct supervision
(i) are made aware of all known or reasonably foreseeable health or safety hazards in the area where they work, and
(ii) comply with this Part, the regulations and any applicable orders,
(b) consult and cooperate with the joint committee or worker health and safety representative for the workplace, and
(c) cooperate with the board, officers of the board and any other person carrying out a duty under this Part or the regulations.
...

DIVISION 10 -- ACCIDENT REPORTING AND INVESTIGATION
Immediate notice of certain accidents
172 (1) An employer must immediately notify the board of the occurrence of any accident that
(a) resulted in serious injury to or the death of a worker,
(b) involved a major structural failure or collapse of a building, bridge, tower, crane, hoist, temporary construction support system or excavation,
(c) involved the major release of a hazardous substance, or
(d) was an incident required by regulation to be reported.
(2) Except as otherwise directed by an officer of the board or a peace officer, a person must not disturb the scene of an accident that is reportable under subsection (1) except so far as is necessary to
(a) attend to persons injured or killed,
(b) prevent further injuries or death, or
(c) protect property that is endangered as a result of the accident.

Incidents that must be investigated
173 (1) An employer must immediately undertake an investigation into the cause of any accident or other incident that
(a) is required to be reported by section 172,
(b) resulted in injury to a worker requiring medical treatment,
(c) did not involve injury to a worker, or involved only minor injury not requiring medical treatment, but had a potential for causing serious injury to a worker,
(d) was an incident required by regulation to be investigated.

(2) Subsection (1) does not apply in the case of a vehicle accident occurring on a public street or highway.

Investigation process
174 (1) An investigation required under this Division must be carried out by persons knowledgeable about the type of work involved and, if they are reasonably available, with the participation of the employer or a representative of the employer and a worker representative.

(2) As far as possible, the investigation must
   (a) determine the cause or causes of the incident,
   (b) identify any unsafe conditions, acts or procedures that contributed in any manner to the incident, and
   (c) if unsafe conditions, acts or procedures are identified, recommend corrective action to prevent similar incidents.

(3) The employer must make every reasonable effort to have available for interview by a person conducting the investigation, or by an officer, all witnesses to the incident and any other persons whose presence might be necessary for a proper investigation of the incident.

(4) The employer must record the names, addresses and telephone numbers of persons referred to in subsection (3).

Incident investigation report
175 (1) As part of an investigation required by this Division, an employer must ensure that an incident investigation report is prepared in accordance with the regulations.

(2) The employer must provide a copy of the incident investigation report to
   (a) the joint committee or worker representative, as applicable, and
   (b) the board.

Follow-up action and report
176 (1) Following an investigation under this Division, the employer must without undue delay undertake any corrective action required to prevent recurrence of similar incidents.

(2) As soon as is reasonably practicable, the employer must prepare a report of the action taken under subsection (1) and
   (a) provide the report to the joint committee or worker representative, as applicable, or
   (b) if there is no joint committee or worker representative, post the report at the workplace.

Penalties to be paid into accident fund
220 On receipt of payment of a fine ordered under this Division, the amount must be transferred for deposit into the accident fund.

DIVISION 16 -- GENERAL

Service of orders and other documents
221 (1) A notice, order or other document that is required to be served on or otherwise sent to a person under this Part is deemed to have been served if
   (a) it is personally served on the person, or
   (b) it is sent by registered mail to the person's last known address.

(2) If service is by registered mail, the document is deemed to be served on the person on the eighth day after it is deposited in a Canada Post Office.

(3) At the request of a person on whom a document is required to be served, the document may be transmitted to the person electronically or by fax machine.
(4) A document transmitted under subsection (3) is deemed to have been served when
the person serving the document receives an acknowledgment of the transmission from
the person served.

Collection by assessment or judgment
223 (1) If a person fails to pay an amount owed to the board under this Part, the board
may,
   (a) if the person is an employer, direct that the amount be levied on the employer
       by way of an assessment, and
   (b) in any case, issue a certificate for the amount owed and file that certificate in
       the Supreme Court.
(2) An assessment under subsection (1) (a) is deemed to be an assessment under Part 1
of this Act and may be levied and collected under and in accordance with that Part.
(3) A certificate filed under subsection (1) (b) has the same effect, and all proceedings
may be taken on it by the board, as if it were a judgment of the court for the recovery of a
debt of the amount stated in the certificate against the person named in it.