ANALYSIS AND COMPARISON OF THE OHS ENFORCEMENT PROVISIONS OF THE WORKERS’ COMPENSATION ACT

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INTRODUCTION
We begin this paper with an introduction to the topic of regulatory compliance. We then discuss in general terms the alternative enforcement options that can be employed in a regulatory scheme, such as occupational health and safety legislation. With that foundation, we summarize the enforcement options which exist within the Workers’ Compensation Act (“the WCAct”)¹ and compare those options to the ones which have been adopted in Canadian OHS statutes. After describing what we have ascertained to be the short-comings or lack of the enforcement options for OHS within the WCAct, we end this paper by proposing that a series of specific enforcement provisions be embodied in a new OHSAct for British Columbia.

The focus of our analysis and comparison has been on the WCAct, because it is the statute which has the greatest impact on OHS in this province. Except for the brief comments that follow, we have not considered the Workplace Act² (“the WPAct”) or Mines Act.³

Section 2 of the WPAct adopts the enforcement powers of the Board and its officers as set out under the WCAct, supplemented by duplicate powers under section 3. Section 4 of the WPAct grants to the Board the power to make regulations. Subsection 6(2) gives the Board exclusive authority to initiate prosecutions under the WPAct. In this respect, the WPAct is secondary or supplementary OHS legislation, operating under the wing of the more extensive and substantial WCAct.

The enforcement provisions of the Mines Act are similar to those under the WCAct, but the Mines Act applies only to BC mines. The manner in which the Ministry of Employment and Investment administers the Mines Act also has not been the focus of research by the Commission. Indeed, none of the other provincial or federal agencies which administer OHS related legislation has been subjected to review.

For these reasons, we have not included the WPAct or Mines Act in our analysis and comparison of the enforcement provisions. We have, however, made occasional reference to certain useful provisions that can be found in these two statutes.

BACKGROUND RE: REGULATORY COMPLIANCE
Before considering enforcement options under the WCAct or within other Canadian OHS statutes, it is important to understand the role of enforcement within the regulatory approach to obtaining compliance with social policy objectives.

Several factors contribute to the need for a more effective approach to regulatory compliance:

¹ Workers Compensation Act, R.S.B.C. 1996, c.492.
² Workplace Act, R.S.B.C. 1996, c.493.
³ Mines Act, R.S.B.C. 1996, c.293.
• **Criminal sanctions alone do not always do the job**
The federal and provincial governments historically have used a criminal law model to enforce social policy standards. This model sets out rules of acceptable behaviour with criminal penalties for breaches of the prohibited behaviour. The system is based on the theory that people who might otherwise disobey the law will comply with the law to avoid the stigma of a criminal proceeding or conviction. The criminal law, however, was designed to deal with more serious societal crimes, such as murder and theft. It is not necessarily the best way to deal with such regulatory offences as failure to provide protective equipment at a work site or not complying with building standards.

Practical problems with the criminal law also exist. For example, enforcement officers may hesitate to prosecute people for regulatory offences. Using tougher sanctions often alienates the very people whose co-operation the government needs to achieve its regulatory objectives. If OHS was to be addressed exclusively through the criminal law, these problems would become even more pronounced.

Also, the courts also are beginning to distinguish more emphatically between "criminal" offences and "regulatory" offences, and are looking to governments to treat regulatory offences differently. Criminal offences are those where the Crown must prove both the act (or omission) and its criminal intent (*mens rea*) beyond a reasonable doubt. With regulatory offences, the Crown need only prove the act (or omission) took place and the standard of proof is lower; i.e. on a balance of probabilities.

• **Budgets are shrinking**
Shrinking enforcement budgets are forcing regulators to consider compliance activities other than frequent inspections and criminal proceedings. These options can be very labour intensive and may not be cost-effective, from a social policy perspective. Therefore, regulators are being forced to choose strategies that cost less and which, at the same time, result in greater compliance. They do this by studying in more detail the underlying causes of violations and finding ways to make compliance with the social policy objectives easier.

• **The threat of law suits**
Governments have become increasingly exposed to civil liability for damages to third parties caused by inadequate enforcement. This is particularly true in situations where the safety and health of the public are at stake. Already, substantial damages have been awarded against the Crown for losses suffered because regulators failed to take effective action to secure compliance. When governments establish regulatory requirements, they usually have a consequential legal obligation to mount reasonably effective programs to secure compliance with those requirements.
• The Canadian Charter of Rights and Freedoms
Governments and public agencies are subject to increased monitoring by the courts, whose remedial powers have been broadened by the Charter. Unless an enforcement policy is rationally and consistently applied, the government or agency may face challenges under the Charter based on arbitrariness, injustice or inequity.

Having noted some of the factors that underscore the need for new approaches to regulatory compliance, it might well be asked where enforcement fits in. - How can enforcement activities be employed to strengthen the incentives and minimize the disincentives to compliance? Are the same factors that influence voluntary compliance under a regulatory program also helpful in identifying pressure points for the application of effective sanctions?

A key element influencing the ability and willingness of people to comply with the law is the capability of regulatory programs to promote, monitor and enforce compliance.

The first step in developing a regulatory compliance strategy is to settle on an appropriate balance between promotion and monitoring/enforcement activities. - Is the emphasis to be on activities which inform people about the law and encourage compliance? Or will it be on detection of violations and enforcement?

The balance to be struck is best founded on an assessment of the factors affecting compliance, the profile of the group to be regulated and how best to influence that group.

Compliance promotion tools include information (e.g., media campaigns and public education) and rewards (e.g., reducing monitoring for good performers, public recognition, financial incentives and research support). It must be cautioned that public communication materials prepared to provide explanations, interpretations and elaborations of regulatory programs must be carefully drafted to avoid any conflicts with legal requirements. This is equally the case whether such information is to be made available to the general public, the regulated parties or inspectors.

Compliance monitoring of a regulatory program involves more than just ensuring that effective inspection and enforcement powers are part of the legislation. As it is impossible for regulatory officials to be in all places at all times, public awareness (which can trigger investigations), third party monitoring (by other federal, provincial or municipal officials) and self-monitoring are all to be encouraged. As well, "whistle-blower" laws which protect employees who provide information about offences committed by their employers may assist compliance tracking.

Enforcement activities, including prosecution, are a fundamental component of most regulatory programs. Where a regulatory program is founded on a sufficiently compelling social purpose (for example, protecting and improving the health and safety of the work
force), the use of coercive methods to gain compliance should be an included option.
Arguably, over the long run, however, a regulatory regime that relies wholly on activities
that promote compliance will get into trouble. People expect that regulatory authorities
will monitor the activities of the regulated group and that the law will be enforced fairly
and effectively. Members of the regulated group expect that the authorities will not
penalize those who obey the law, but take action against those who do violate the law. If
this does not happen, an increase of non-compliance across the board will inevitably occur.

Monitoring of compliance and the ability to invoke meaningful enforcement measures is
necessary to ensure the long-term effectiveness of a regulatory regime and to ensure
fairness in its administration.

ALTERNATIVE ENFORCEMENT OPTIONS
There exists a range of enforcement options which a regulatory agency can employ to
encourage or obtain compliance with the legislation it administers. Some exist in British
Columbia’s present OHS legislation and others do not. We will discuss these differences
later in this paper.

Ordered in a hierarchy of increasingly more firm response, possible enforcement options
for OHS are:

(a) Contractual standards
(b) Licensing and performance bonds
(c) Regulatory offences
   • verbal or written warnings
   • increased administrative activities
   • negotiated settlements
   • directives or orders
   • administrative penalties
   • regulatory prosecutions
      - fines
      - imprisonment
      - award of costs
      - additional fines (to claim monetary benefit that accrued to
        offender)
      - publishing facts of the offence
      - fines for public education
      - submitting additional information re compliance
      - performing community service
      - paying a performance bond
(d) Injunctions
(e) Criminal prosecutions
We summarize these options in this part and provide examples from various Canadian OHS statutes, when useful. In the next part, we will discuss those options that are employed in the WCAAct. Subsequently, we will compare the WCAAct’s provisions to those in other Canadian OHS statutes.

In the final analysis, however, what is integral to a review of the various types of enforcement options available under a regulatory program and necessary for an identification of the responses to be chosen for such program, are factors such as:

What best influences the group to be regulated to behave as desired (i.e. in the OHS milieu, employers - supervisors - workers - suppliers - others)?

What formal information-gathering mechanisms (e.g. investigation powers) should be provided under the legislation?

With the exception of the first option, each of the following must be expressly authorized in the governing legislation. If they are not, the agency responsible does not have the legal authority to apply them.

1) Contractual standards
It is open to government ministries and agencies to state in the contracts that they establish with suppliers of goods and services that those supplier must maintain certain standards of performance in terms of health and safety, in particular standards that may not be expressly required under the applicable OHS statute. For example, the government could require a supplier to put into place prevention systems and protective equipment that would ensure that supplier’s accident rate or claims experience did not exceed some set threshold (e.g. the average for its industry) during the term of the contract.

Alternative, the government could demand that the supplier take actions that would be greater than those specifically required by the governing legislation. For example, it could require that the supplier’s joint work site committees have the power to shut down the service to be provided under the contract if the committee determined there was a risk of serious harm to workers providing that service. (This example presumes that a right to shut down was not otherwise granted to committees under the applicable OHS legislation.)

The government putting standards into its contracts does not necessarily have to be authorized by statute. The government is free to negotiate such terms with its suppliers and require that its different ministries and agencies use such terms in their contracts.

Establishing different (but not conflicting) or higher standards for OHS within contracts is an option that is also available to the private sector. For example, a large company that enters into service contracts with smaller companies could add such terms to those contracts.
2) Licensing and performance bonds
Licensing is an option that is currently employed within existing OHS legislation, albeit in a narrow or specific way. For example, workers are not allowed to use explosives at BC worksites unless they are licensed blasters.

Licensing is an option could be expanded to apply on a larger scale. For example, the OHS legislation could require that companies (or persons) that wish to establish businesses which involve certain hazards (e.g. manufacturing highly toxic chemicals or employing hazardous work processes) must obtain a license from the OHS agency before they can commence operations. The criteria for businesses being granted the license would be set out under legislation. Owing to the unique hazards of particular work processes or substances, licenses for them might include terms may include terms and conditions that are more stringent than those required under the OHS legislation which has more general application to relatively less hazardous work processes and substances. If the company breached a term of its license, it could be forced to cease operation, pay a prescribed penalty (or forfeit a performance bond) or take some other actions specified in the license that would be designed to prevent further breaches as may be specified under the terms of the license.

Aside from licensing individual workers in such areas as blasting, we are not aware of any Canadian OHS statute that requires companies or persons engaged in hazardous businesses to obtain an OHS license or post a bond. Section 10 of the Mines Act requires a mine owner or operator to obtain a permit before starting up a mine, and that a bond (“security”) may be requested as a condition of issuing a permit. However, the conditions by which a mine owner or operator may forfeit his deposit do not include protection of workers; the focus is on mine reclamation and environmental protection. Five Canadian OHS statutes require companies or persons to notify the OHS agency before they start up hazardous process or if they want to use certain potentially harmful chemicals, but these jurisdictions do not go further and expressly require OHS-based licensing or performance bonds.

The absence of this option within Canadian OHS legislation does not mean that it is an approach which could not be employed without success in certain circumstances. At the least, we would suggest it is an option that should be studied further and, if considered useful, authorized under the applicable legislation.

3) Regulatory offences
Options to be considered under this heading are verbal or written warnings; increased administrative activities; negotiated settlements; directives or orders; administrative penalties; and regulatory prosecutions. As our later discussion will illustrate, a number of these enforcement responses are already reflected in BC's existing OHS legislation in one form or another.

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4 Alberta, Manitoba, Ontario, Quebec and the Yukon OHS statutes require notification for certain types of new projects and introduction of potentially harmful substances.
What this discussion will attempt to highlight, however, are some of the available variations which exist, particularly with respect to administrative penalties and prosecutions. A case may well be made for including such variations in any amendment to BC’s OHS legislation which the Commission might propose.

3.1) Verbal or written warnings
In the triage of available enforcement responses to regulatory offences, warnings given to the perceived offender are perhaps the "softest" enforcement option that can be invoked by a regulatory agency. Usually such warnings are verbal, but they can also be written. When the latter route is taken, it must be made clear that the correspondence is a warning and not an order.

3.2) Increased administrative activities
Increased administrative activities is another “soft” option and includes such actions as more stringent reporting requirements, more intensive inspections and cost recovery of additional inspections all being visited upon perceived offenders. In effect, this set of activities is an "in your face" response which imposes, however temporarily, an increased regulatory burden upon transgressors which they can ease or avoid by engaging in more compliant behaviour.

3.3) Negotiated settlements (e.g. consent agreements)
The concept behind this response to regulatory offences is to negotiate solutions to non-compliance and to back up any agreements that are reached by employing such tools as consent orders or agreements. These formal instruments could be relied on later if greater levels of enforcement activity are required. For example, consent orders or agreements could be held up in a court of law as evidence concerning what the transgressor had agreed to do to avoid a future prosecution.

3.4) Directives or orders
Orders and directions are a fundamental enforcement response that is well recognized in the OHS legislation of this province and elsewhere in Canada. Consequently, little need be said about these options other than to question whether (as with most other enforcement responses in BC's legislation) any amendment of the WCAct and applicable regulations might strive to make clearer the circumstances where they are to be the response to a regulatory offence.

3.5) Administrative penalties
Only two Canadian OHS jurisdictions set out some form of administrative penalty or ticket in their primary OHS statute: British Columbia and the Yukon Territory.⁵

An example of an administrative penalty is the penalty assessment that can be imposed by the Board under section 73 of the WCAct. The authority to impose such penalties,

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⁵ We have not undertaken a review of all the compensation statutes nor the OHS regulations under the OHS statutes to ascertain if there are administrative penalty provision in that legislation.
defining the circumstances when they may be imposed, and the maximum amounts (and possibly minimum amounts) must be expressly authorized under a statute. Usually, a right to appeal the penalty is provided, either to another tribunal or to the courts.

In the case of BC’s administrative penalty provisions, the fines so generated are in the form of an increased compensation premium or levy, usually of a one-time nature. The money generated by these financial penalties goes back into the Board’s general compensation account.

The Yukon is the only Canadian jurisdiction which has set out administrative penalties within its OHS statute in the form of tickets which its officers can issue those who breach its OHS legislation. It is instructive to set out the applicable provision from the Yukon’s Occupational Health and Safety Act in full:

47.1(1) Where a safety officer believes on reasonable grounds that a person has committed an offence under subsection 47(1), (2), or (3), then, as an alternative to prosecution for the offence, the officer may levy an administrative penalty against the alleged offender in the following amount:
   (a) for a first offence, up to $5,000 and, in the case of a continuing offence, to a further penalty of up to $500 for each day or part of a day during which the offence continues after the first day, and
   (b) for a second offence, up to $10,000 and, in the case of a continuing offence, to a further penalty of up to $1,000 for each day or part of a day during which the offence continues after the first day.

(2) The administrative penalty may be levied by serving on the alleged offender a notice of levy of administrative penalty in the same way as the Summary Convictions Act authorizes a ticket to be served.

(3) Within 21 days of being served with notice of the levy the alleged offender may by written notice to the board appeal the levy of the administrative penalty to the board, and the board may
   (a) revoke the levy,
   (b) decrease the levy, or
   (c) confirm the levy.

(4) The notice may be delivered to the director who shall forthwith notify the board of the appeal.

(5) If an alleged offender on whom a safety officer has served a notice of levy of administrative penalty
   (a) has not paid the administrative penalty within 21 days of being served with notice of the levy, or within such extended time as the director agrees to,
   (b) has not appealed the levy within the time for doing so, or

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6 We note that in a recent issue of AW CBC News, the comment was made that Nova Scotia’s OHS Act “paves the way for OHS officers to use summary offense tickets” (page 5), however, we can find no such provision in the version of that statute that we have obtained from the Canadian Centre for Occupational Health and Safety.

7 Occupational Health and Safety Act, R.S.Y.T. 1986, c. 123. Section 47.1 was added through an amendment to the OHS Act (by way of S.Y. 1992, c. 16, s. 102) which came into effect on January 1, 1993.
(c) has appealed the levy and been required by the board to pay an administrative penalty, but has failed to pay it within 21 days of the board's decision, or within such extended time as the director agrees to, the director may issue a certificate for the amount of the administrative penalty and may file the certificate in the Supreme Court. When filed in the Supreme Court, the certificate shall be deemed to be a judgment of the Court in favour of the Government of the Yukon and may be enforced by the director as a judgment for a debt.

(6) An alleged offender on whom a safety officer has served a notice of levy of administrative penalty shall not be prosecuted for the offence if
(a) the alleged offender pays the administrative penalty within 21 days of being served with notice of the levy, or within such extended time as the director agrees to,

(b) having appealed within the time for doing so and having been required by the board to pay an administrative penalty, the alleged offender pays the administrative penalty within 21 days of the board's decision, or within such extended time as the director agrees to,

(c) the alleged offender appeals the levy within the time for doing so and the board revokes the levy, or

(d) the director issues a certificate under subsection (5).

(7) The payment of an administrative penalty, or an admission of liability to pay it, may be used as a record of offences for the levying of subsequent administrative penalties, but may not be used or received in evidence for the purpose of sentencing after conviction of an offence.

(8) Administrative penalties shall be paid to the director who shall forthwith after payment transmit the money to the Workers' Compensation, Health and Safety Board for deposit in that Board's compensation fund to the credit of the class or subclass that includes the employment or activity that gave rise to the penalty.

3.6) Regulatory prosecutions
Every Canadian OHS statute contains provisions which define certain acts or omissions as offences which may be subjected to prosecution. In turn, those provisions set out the consequences if a court of law ascertains that someone has committed an offence.

While every OHS statute contains provisions which define offences and prescribe fines, not every statute employs the other penal options that are possible. Indeed, most of these options are found exclusively in one recent statute - Nova Scotia’s OHS statute. We will consider these newly prescribed court orders after considering the more traditional orders on conviction for OHS offenses of fines, imprisonment and costs.

3.6.1) Fines
While the amounts and when they may be applied varies, fines for convictions arising from breaches of OHS legislation is common to every Canadian OHS statute. Each jurisdiction defines offences in a different fashion. For example, one statute may have a single “everything is an offence” type of provision, while another (like the WCAct) creates a number of discrete offences. Some statutes speak to second and further offences; others
do not. In turn, these statutes prescribe different levels of fines on conviction for these different types of offences.

3.6.2) Imprisonment
Imprisonment is an option set out in seven of the OHS statutes, although certain limits on when imprisonment may be ordered by the courts may be attached to this option. Usually a term of imprisonment is an alternative or complement to a fine; in some instances imprisonment is available only if a fine is not paid on time. As with fines, the various jurisdictions have defined imprisonment offence differently and, in turn, have prescribed different terms on conviction.

3.6.3) Award of costs
Some OHS statutes allow the courts to issue, as an additional penalty, an award of costs to remunerate the agency for the expenses its may have gone in prosecuting a successful case. These provisions can be used, however, to award costs to an accused who has been found by the court not to have committed the offence or to have had a valid defense.

3.6.4) Additional orders
Nova Scotia is the only jurisdiction which has specifically set out a series of additional orders a court may hand down on conviction. These additional orders may direct the offender to do one or more of the following:
- to pay additional fine where he/she obtained monetary benefits due to the breach;
- to publish the facts of the offence in some publication;
- to pay a fine for public education;
- to submit information to prove compliance;
- to undertake community service;
- to post a performance bond.

The details of these additional orders are instructive. The applicable provisions from Nova Scotia’s Occupational Health and Safety Act\(^8\) state:

74... (3) Where a person is convicted of an offence pursuant to this Act and the court is satisfied that, as a result of the commission of the offence, monetary benefits accrued to the offender, the court may order the offender to pay, in addition to a fine imposed pursuant to subsection (1) or (2), a fine in an amount equal to the estimation by the court of the amount of the monetary benefits.

75(1) Where a person is convicted of an offence pursuant to this Act, in addition to any other punishment that may be imposed pursuant to this Act, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order
(a) directing the offender to publish, in the manner prescribed, the facts relating to the offence;

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\(^8\) Occupational Health and Safety Act, S.N.S. 1996, c.7
(b) directing the offender to pay to the Minister, in the manner prescribed by the regulations, an amount for the purpose of public education in the
   (i) safe conduct of the activity in relation to which the offence was committed, and
   (ii) principles of internal responsibility provided for in this Act;
(c) on application by the Director made within three years after the date of conviction, directing the offender to submit to the Director such information with respect to the activities of the offender as the court considers appropriate and just in the circumstances;
(d) directing the offender to perform community service, subject to such reasonable conditions as may be imposed in the order;
(e) directing the offender to provide such bond or pay such amount of money into court as will ensure compliance with an order made pursuant to this Section;
(f) requiring the offender to comply with such other reasonable conditions as the court considers appropriate and just in the circumstances for securing the offender’s good conduct and for preventing the offender from repeating the same offence or committing other offences,
but the total of any moneys payable or direct cost incurred by the offender pursuant to this subsection and subsection 74(1) shall not exceed the maximum amount payable pursuant to subsection 74(1).
(2) Where an offender fails to comply with an order made under clause (1)(a) directing the publication of the facts relating to the offence, the Director may publish the facts in compliance with the order and recover the costs of publication from the offender.
(3) Where the court makes an order pursuant to clause (1)(b) directing the offender to pay an amount for the purpose of education or the Director incurs publication costs pursuant to subsection (2), the amount or costs constitutes a debt due to Her Majesty in right of the Province and may be recovered as such in a court of competent jurisdiction.
(4) An order made pursuant to subsection (1) comes into force on the day on which it is made or on such other day as the court may order and shall not continue in force for more than three years after that day.

4) Injunctions
If authorized by statute, an agency can apply to the courts to obtain an injunction. The applicable provision will usually set out the terms and conditions that must exist before the court could award an injunction.

Different types of injunctions can be obtained which may be useful in the OHS context, such as mandatory injunctions (which require the affected party to do something or undo something that was done in the past) or preventive injunctions (which require the affect party to stop doing something or continuing to allow something to happen). Restraining orders are another form of injunctive relief which is a judgment that directs the affected
party not to do something. These injunctions can be temporary or permanent, depending on the circumstances and facts of the situation.

The advantage of an injunction is that, if the legislation so permits, it can be obtained in certain circumstances without informing the affect party that it is being applied for (i.e. an *ex parte* application). Generally speaking, injunctions can usually be obtained fairly quickly. Also, compared to a prosecution, an injunction may require a great deal less evidence and background work to prepare. This allows the agency to take prompt action to address potentially harmful circumstances.

In turn, a person who has been served with an injunction order can appeal that order to the courts. This provides another route to assess the merits of the original application. If the agency was premature or wrong in seeking an injunction, it can be penalized by the court awarding costs to the affected party.

If an injunction is breached by the affect party, it is possible to convert that breach into a civil action or a criminal prosecution.

5) *Criminal prosecutions*

In the hierarchy of possible enforcement responses, the fines and/or prison sentences that can flow from successful prosecutions are seen as the most serious penalties that can be meted out to those who have been found to have offended the rules set out in the OHS legislation.

This having been said, a distinction must be made between regulatory prosecutions (i.e. prosecutions under certain provisions of the OHS legislation which employ a model similar to the criminal law) and criminal prosecutions (i.e. prosecutions under provisions of the Criminal Code of Canada). Is there a place for criminal prosecutions in the realm of OHS?

The Canadian Employment Safety and Health Guide provides an answer to this question:

> Even though all levels of government have enacted many laws to regulate health and safety at work, the criminal law may still be relevant. Occupational health and safety law does not exhaust a person's duty to respect the norms of behaviour which the criminal law lays down. It is not a defense to charge under the criminal law to say that a person obeyed the relevant occupational health and safety statute ... [as established in The King v. Michigan Central Railroad Company (1907), 17 C.C.C. 483 (S.C.O.)] ... reckless disregard in action and attitude for the health and safety of others is clearly criminal conduct in the true sense of the word.

> Although there are a number of offences that could conceivably support a conviction in the occupational health and safety context, there are... 

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9 1996, CCH Canadian Limited at paragraphs 40,044 and 40,048
really only three that are likely candidates ... [they are the Criminal Code offences for criminal negligence, a master's duty to his servant and causing fire by negligence] ... Even of these three, the [modern] frequency of convictions are almost completely non-existent ... It may be that prosecutors feel that they do not need to resort to the criminal law, since occupational health and safety law appears to cover every situation. The reality, however, is that the criminal law is no less useful and relevant today than it was 90 years ago.

We note that, of the eleven OHS prosecutions the Board has recently initiated through the courts, none have apparently proceeding by way of the Criminal Code.

ENFORCEMENT OPTIONS UNDER THE WCACT

The enforcement options that currently exist under the WCAAct fall into three general categories which reflect who has the primary authority to carry out the applicable enforcement options:

- Officer actions: inspections, reports and orders;
- Board actions: warning letters and penalty assessments;
- Crown actions: prosecutions.

1) Officer actions: inspections, reports, orders

The WCAAct, the IH&S Regulations and the other regulations contain a cascading sequence of enforcement and sanction options designed to foster compliance. These options are described in the Board’s OHS Policy & Procedures Manual (the “Policy Manual”).

Out of the worksite inspections carried on by Board officers under the authority of the WCAAct flow Inspection Reports. If violations of the WCAAct or the regulations are noted, such reports may contain written directives requiring the correction of hazards and/or 24-hour Closure Orders if conditions of immediate danger threaten the health or safety of any worker. With the approval of the Vice-President, Prevention Division, a Closure Order may be imposed for longer than 24 hours.

Section 71(3): An officer of the board or a person authorized by the board may at all reasonable hours inspect the place of employment of a worker within the scope of this Part. Immediately after each visit the person authorized under this subsection shall cause to be posted in a conspicuous place, at or near the works, establishment or premises, a statement showing what portion of the works, establishment or premises has been inspected, and the condition found to prevail there, and he shall furnish a copy of the statement to the manager of the works, establishment or premises, and, where the inspection visit is made by an industrial hygiene officer, and where it is impracticable for the statement required by this section to be posted immediately after the visit, it shall be posted as soon as possible after the visit.
Section 71(2) of the WCAct is the statutory foundation of the Board's power to issue orders and directions specifying the means or requirements to be adopted in any employment or place of employment for the prevention of injuries and occupational diseases. Policy no. 1.4.5 of the Policy Manual sets out the means by which such orders and directives may be appealed. Sections 74(1) and 70(1)(c) of the WCAct are the basis of the Board's authority to issue Closure Orders.

An initial order can lead to the generation of an immediate recommendation that a penalty assessment sanction be imposed against an employer if the observed violation and hazard involves one of the "11 deadly sins". What is more common, however, is that, where follow-up inspections lead either to a series of repeat orders for the same existing hazard or to new orders for newly observed hazards, a Warning Letter to senior management is issued advising the employer of the strong likelihood of a more stringent sanction (i.e., penalty assessment) should compliance with the orders not be forthcoming. Such Warning Letters are generated upon recommendations made by Board officers to Board management. Re-issuance of an outstanding order can also lead to the requirement that the employer send a Notice of Compliance to the Board.

Separate and apart from Inspection Reports are Observation Reports which are issued if the Board officer is of the view that observed violations of regulations by workers or supervisors are due to carelessness, neglect or are willful and not just the result of ignorance or a lack of instruction or training. Consideration of whether or not to proceed with prosecution of the worker will occur where Observation Reports have been issued to a worker on two or more occasions and where Observation Reports are issued as a result of violations which exposed the worker and fellow workers to serious risk of injury or occupational disease.

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11 Section 71(2): The board may issue orders and directions specifying the means or requirements to be adopted in any employment or place of employment for the prevention of injuries and occupational diseases.

12 Also see Section 75(1): In addition to the rules and regulations which may be made under this Part, the board may issue the orders and directives it considers requisite for the due administration and carrying out of this Part, and may prescribe the form and use of payrolls, records, reports, certificates, declarations and documents that may be requisite, and, if considered necessary, may make regulations for those purposes.

13 Section 70(1): Employers in an industry in which it is considered proper may be required to install and maintain the first equipment and service that the board by regulation of general application or by order related to a specific situation directs. Where the employer fails, neglects or refuses to install or maintain the first aid equipment and service, the board may ...

(c) order the employer to immediately close down all or part of the employment or place of employment and the industry carried on there.

14 We note that there is no reference in the WCAct or the regulations regarding an employer's duty to file a notice of compliance concerning actions it has taken flowing from an order.
In situations of fatal accidents and serious accidents, investigating Board officers generate Accident Investigation Reports and separate Inspection Reports with the latter either listing contraventions of the regulations which are relevant to the accident in question or indicating a "clean sheet" to the effect that no such contraventions have been observed.

2) Board actions: warning letters and penalty assessments
While informal verbal warnings can apparently be uttered by a Board officer at any time during or after an inspection, in BC written warning letters seem to be categorized in the Policy Manual as a higher order of response that are to be generated by Board management to employers' senior management (not to workers or others) upon the recommendation of a Board officer where outstanding orders remain unmet or existing hazards remain unfixed. Perhaps this is because a primary purpose of such letters seems to be to warn of the strong likelihood of more stringent sanction (e.g. penalty assessment). In BC, one can question not only the unclear legislative basis for such letters but also whether they should be an enforcement response available in the hands of Board officers directly and to a target audience wider than just employers' senior management.

Continued non-compliance in the face of the sanction of a Warning Letter most often leads to the Board officer preparing for the consideration of Board management a recommendation for more stringent sanctions. As with Warning Letters, such further sanction recommendations are not included in Inspection Reports. Most often these recommendations will be for financial sanctions on the form of penalty assessments, but when a particular set of circumstances involves an actual accident rather than just a hazard a prosecution can be recommended if there is a section in the WCAct that provides for such sanction.

Sections 73(1)\(^{16}\), 73(2)\(^{17}\) and 70(1)(b)\(^{18}\) respectively of the WCAct give the Board the authority to (i) assess and levy an additional assessment on an employer, (ii) levy and

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\(^{15}\) see policy no. 1.4.1-2 in the OHS Policy & Procedure Manual

\(^{16}\) Section 73(1): Where the board considers that
(a) sufficient precautions were not taken by an employer for the prevention of injuries and occupational disease;
(b) the place of employment or working conditions are unsafe; or
(c) the employer has not complied with regulations, orders or directions made under section 71,
the board may assess and levy on the employer an additional assessment determined by the board and may collect the additional assessment in the same way as an assessment is collected. The powers conferred by this subsection may be exercised as often as the board considers necessary. The board, if satisfied the default was excusable, may relieve the employer in whole or in part from liability.

\(^{17}\) Section 73(2): Where an injury, death or disablement from occupational disease in respect of which compensation is payable occurs to a worker, and the board considers that this was due substantially to the gross negligence of an employer or to the failure of an employer to adopt reasonable means for the prevention of injuries or occupational diseases or to comply with the orders or directions of the board, or with the regulations made under this Part, the board may levy and collect from that employer as a contribution to accident fund the amount of the compensation payable in respect of the injury, death or occupational disease, not exceeding in any case $11,160.08* [$36,297.21], and the payment of that sum may be enforced in the same manner as the payment of an assessment may be enforced.
collect a contribution from an employer, and (iii) impose a special rate of assessment. The Vice-President, Prevention Division exercises this authority on behalf of the Board.

In brief, the Board may levy a penalty assessment on any employer who does not take sufficient precautions to protect health and safety, or who does not comply with regulations, orders or directives. Policy nos. 1.4.1 and 1.4.1-1 of the Policy Manual set out the guidelines and procedures to be followed as regards penalty assessments and include a recommended schedule of what the dollar amount of such sanctions should be based upon the category of violations and the size of employers’ payroll. Not to be overlooked is section 78 of the WCAAct regarding the collection of penalties.

Unlike the Yukon’s ticketing option, penalty assessments under the WCAAct cannot be imposed by the inspecting Board officer or even upon senior Board management’s consideration of an officer’s recommendation. Rather, a letter is sent to the employer advising that a penalty is being considered. The employer is then given 21 days to reply or request a meeting.

If the employer does not reply to the letter, senior Board management decides whether to actually levy a penalty. A hearing takes place, but this is a "paper hearing" which purportedly observes the rules of natural justice. If a meeting is requested, one is arranged and what amounts to an "in person hearing" occurs. In both cases, the senior Board management making the decision informs the employer in writing if a penalty assessment is to be levied or not. A decision to impose a penalty may be re-considered if senior Board management is convinced on the grounds of new evidence or an error of law or policy that a significant error was made. Also, section 96(6) of the WCAAct provides a

(*) by section 25(4) the statutorily stated amount is periodically changed by regulation and effective January 1, 1996 it was the bracketed amount per BC Reg. 559/95).

18 Section 70(1): Employers in an industry in which it is considered proper may be required to install and maintain the first equipment and service that the board by regulation of general application or by order related to a specific situation directs. Where the employer fails, neglects or refuses to install or maintain the first aid equipment and service, the board may...

(b) impose a special rate of assessment ...

19 Aside from sections already noted, the following further provisions of the WCAAct speak of assessments as the sanction for their breach: Section 38(2) [requirement that employers furnish estimates of their payrolls], Section 40(2) [neglecting or refusing to comply with notice of assessment for the accident fund], Section 47(1)(2) [penalty for default in payment or return], section 54(8) [repayment of compensation paid where employer has not reported an accident] and Section 70(1)(a) [payment for Board installed first aid equipment].

20 Section 78: The penalties imposed by or under the authority of this Part are recoverable under the Offence Act or by an action brought by the board in a court of competent jurisdiction, and the penalties when collected shall be paid over to the board and shall form part of the accident fund.

21 See Policy Manual, policy no.1.4.1-1

22 Section 96(6): An employer who has received notice of
(a) an assessment under section 39 or 40,
(b) a classification, special rate, differential or assessment under section 42, or
(c) an additional assessment, levy or contribution under section 73
right to appeal a penalty assessment to the Appeal Division on the grounds of error of law or fact or a contravention of published policy of the Governors.

3) Crown actions: Prosecutions

As mentioned above, when a recommendation for more stringent sanction arises out of an accident situation, rather than merely a hazard situation, prosecution can occur where the alleged offence is one in respect of which a prosecution can occur under the WCAct. In such cases, not only Board management but also its Legal Services Division and external Crown Counsel must concur in pursuit of the recommended prosecution.

The Canadian Employment Safety and Health Guide describes a prosecution as follows:

Whenever a person fails to perform a statutory duty that is required of that person, he or she may be brought before a judge to be tried. If found guilty, the judge may impose a penalty, known as a sentence. This

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23 Provisions within the existing WCAct in respect of which "prosecutions" are the express sanction, include:

Section 13(2) Where an employer, or a worker of that employer having supervisory responsibilities, by agreement, threats, promises, inducements, persuasion or any other means seeks to discourage, impede or dissuade a worker of the employer, or the worker's dependent, from reporting to the board ... an injury ... an occupational disease ... a death ... or ... a hazardous condition ... the employer commits an offence and is liable on conviction to a fine not exceeding $5,000 [$18,148.70 as of Jan. 1/96]; and the worker having supervisory responsibilities commits an offence and is liable on conviction to a fine not exceeding $1,000 [$3,629.78 as of Jan. 1/96].

Section 71(8) An officer of the board may investigate an accident resulting in injury to, or death of, a worker, and may inspect and inquire with respect to health and safety matters at any place of employment, and may make the inquiries and inspect the documents he considers necessary for these purposes, and any employer, worker or other person who withholds from the officer making inquiries, or who otherwise obstructs or interferes with the officer in the exercise of his functions under this section, commits an offence and is liable on conviction to a fine not exceeding $5,000 [$18,148.70 as of Jan. 1/96], or to imprisonment not exceeding 3 months, or to both.

Section 74(3) An employer who fails, neglects or refuses to comply with an order made by the board or an officer of the board under subsection (1) [i.e. an order to close down all or part of an employment or place of employment and the industry carried on there] commits an offence and is liable on conviction to a fine not exceeding $50,000 [$181,486.21 as of Jan. 1/96], or to imprisonment not exceeding 6 months, or to both.

Section 75(2) Every person who contravenes or fails to comply with a regulation or order under section 71 commits an offence and is liable on conviction to a fine not exceeding $10,000 [$36,297.21 as of Jan. 1/96], or to imprisonment not exceeding 3 months, or to both.

Section 75(3) Every person who contravenes or fails to comply with any other regulation made under this Part commits an offence and is liable on conviction to the fine prescribed by the regulations, but not exceeding $1,000 [$3,629.78 as of Jan. 1/96].

Section 77(2) Every person who commits an offence under this Act for which no other punishment has been provided is liable on conviction to a fine not exceeding $1,000 [3,629.78 as of Jan. 1/96]. --- Note that a number of provisions in the WCAct [namely, sections 14(2), 38(4), 44(2), 54(5), 70(2), 88(5) and 95(2)] speak of contravention or non-compliance with them as amounting to "an offence against this Part". Presumably, these are provisions to which Section 77(2) would refer.

24 1996, CCH Canadian Limited at paragraph 40,012
process of bringing a person to court for a trial and possible sentence is called a prosecution.

The essence of a prosecution is that it involves an allegation that a person has offended against the state by breaking its laws. In that sense it is quite different from a civil lawsuit in which a person alleges that another has inflicted a wrong, not against the state, but against the aggrieved person individually.

From a compliance perspective, the main advantage to be gained from a prosecution is that the monetary penalty and/or a term of imprisonment can make a very strong impression on the offender. If sufficiently serious, the penalty or imprisonment can also send a strong message of deterrence.

The disadvantages of prosecutions are that judges can choose to impose fines and/or imprisonment which are nowhere near to the maximum a statute might permit. Also, prosecutions do not provide a direct remedy for affected workers. Perhaps the greatest short-coming of using prosecutions to enforce compliance with OHS legislation has been the relatively high chance of acquittal. Again, as commented in the Canadian Employment Safety and Health Guide:

Traditionally, the chances of an accused successfully defending an occupational health and safety prosecution and being acquitted have always been relatively good. Most prosecutions are against employers, and the low conviction rate reflects the fact that judges are not keen on convicting employers, except in cases where management has clearly been at fault ... fault should not usually be the relevant legal criterion for deciding whether someone has breached an occupational health and safety statute. What sometimes happens in practice, however, is simply that the judges interpret the facts and the law in light of their own perceptions about the value of health and safety prosecutions.

Because relatively few prosecutions have occurred under the WCAct, there is no substantive body of case law upon which courts can base their OHS decisions. While recent renewed efforts aimed at achieving closer liaison and co-ordination amongst Board management, the Board's Legal Services Division and external Crown Counsel regarding prosecutions could lead in time to more successful prosecutions, a brief consideration of the defenses available to the accused yields an appreciation of the challenges which face successful use of prosecution as a "tool" to enforce compliance with OHS legislation.

25 1996, CCH Canadian Limited at paragraph 40,016
26 Reference the Memorandum of Understanding ("MOU") between Criminal Justice Branch, Ministry of Attorney General, Province of British Columbia and WCB signed May 23, 1997 on behalf of Ministry of Attorney General and June 25, 1997 on behalf of WCB. This MOU sets out the terms and conditions under which the Criminal Justice Branch will conduct prosecutions pursuant to the WCAct and related statutes and regulations.
Two types of defenses exist: (i) defenses on the merits and (ii) defenses which are not on the merits.

Defenses not on the merits have little to do with whether or not an offence was actually committed. These defenses commonly argue technical deficiencies with the charges, question the validity of a provision or question the authority of the law-making body to pass the legislation under which the charges have been laid.

On the other hand, there are a number of "defenses on the merits" which focus on actual commission of the offence charged. We will discuss two that are relevant to OHS prosecutions: (i) the defense of due diligence, and (ii) the defense of officially induced error.

**Defense of due diligence**

Offences can be put into three categories depending upon the mental element each requires. As set out in the Canadian Employment Safety and Health Guide these categories are:

1. Offences that require a guilty mind (mens rea): offences usually found in the Criminal Code, but can be found wherever the law explicitly or implicitly requires a guilty mind for a conviction. A guilty mind is one that intended to do the act, or one that was reckless as to the consequences of the act.

2. Strict liability offences: the vast majority of offences created by all levels of government for the protection of public welfare. In this type of offence, the prosecution only has to prove the act has been committed by the accused. Then it is up to the accused to show that there was some lawful excuse, such as a reasonable mistake of fact, or "due diligence", to satisfy the demands of the law.

3. Absolute liability offences: a rare type of offence in which all that needs to be proven is that the accused committed the prohibited act. In this type of offence, the accused has no defense based on his or her mental state or efforts to comply with the law.

The offences arising from federal or provincial OHS legislation generally fall into the categories of "strict liability" or "absolute liability". In the case of strict liability offences,

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27 In this regard section 2.16 of the IH&S Regulations which provides for joint liability of employers, supervisors, workers and persons working in an industry within the scope of Part I of the WCAct is worth noting. This regulation purports to make a contravener out of anyone who ranks higher in the employer/supervisor/worker hierarchy than the actual contravener. This scheme probably offends section 7 of the Canadian Charter of Rights and Freedoms. In Reference re Section 94(2) of the Motor Vehicle Act, (1985) 24 DLR (4th) 536, the Supreme Court of Canada held that any law which can convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such law violates a person's right and liberty under section 7 of the Charter.

28 1996, CCH Canadian Limited at paragraph 40,018

29 After the Supreme Court of Canada decision in R. v. Sault Ste. Marie [1978] 2 S.C.R. 1299, a person or corporation charged with breach of a regulatory statute is entitled to argue that it exercised due diligence to avoid committing the
if the accused can establish that "due diligence" was exercised by taking all reasonable steps in the circumstances to avoid committing the offence then acquittal will follow. In the case of the latter, a conviction must follow once commission of the prohibited act by the accused has been proven; the defense of due diligence is not permitted. In effect, someone responsible for compliance with a provision that could lead to an absolute liability offence is compelled to be a sort of a "guarantor" that the prohibited action will not take place.

If regulatory offences such as are contained in the WCAct are determined to be "absolute" and the defense of "due diligence" is therefore not available to them, conscientious employers and workers who make one mistake will be convicted just as surely as reckless employers and workers. Arguably, the "due diligence" defense provides an incentive for both employers and workers to improve internal compliance with OHS laws.

If, as has been suggested, the prosecution option is being pursued with renewed vigour in BC, then continuing to cast most offences in the OHS legislation as "strict liability" offences in respect of which a "due diligence" defense can be raised would seem to be appropriate. This is so because the availability of such a defense works to encourage all parties to engage in compliant behaviour which they some day might wish to point to in reliance upon that defense.

The impact of the defense of due diligence has had another impact on the enforcement of OHS legislation in Canada. In a landmark case from British Columbia, the Supreme Court of Canada found that the combination of an absolute liability offence and the possibility of a term of imprisonment for a breach of such a provision constitute a violation of section 7 of the Charter, as was thus struck down. Thus, if a regulatory provision is described as an absolute liability offence and someone convicted of that provision could be sent to jail, the applicable provision could be deemed to be of no force and effect. As a result of this possibility and as we describe later, the defense of due diligence has expressed in a number of Canadian OHS statutes, but not in BC’s WCAct. To Charter-proof BC’s legislation in this manner would seem to be prudent.

**Defense of officially induced error**

If an accused can provide evidence that he or she reasonably relied upon the erroneous legal opinion or advice of an officer (or some other official responsible for the administration or enforcement of the OHS legislation), that may provide a foundation for what is called the defense of “officially induced error”. This defense was first applied in an OHS prosecution from Ontario. For this defense to succeed, the court must conclude that the accused has proven, on a preponderance of the evidence, that he was misled by an

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We suspect, but cannot prove at this time, that the application of the defense of officially induced error coupled with the expansion of Crown liability may have made the Board and similar agencies across Canada no longer as proactive, directive or specific in the advice they offer to persons who are seeking their assistance in complying with the OHS legislation they administer.

COMPARISON OF CANADIAN OHS STATUTES
The chart set out in Appendix A describes a number of features of the different enforcement provisions of the various Canadian OHS statutes. (A similar comparison of the other non-enforcement provisions will be made in a later paper.)

1) The classification scheme
The classification scheme that we have employed is based in part upon the one developed by Matthias et al in their comparison of Canadian OHS legislation ten years ago. However, in developing the criteria to compare the enforcement provisions, we have refined and expanded on their earlier framework. We believe that the features we have described in our framework allow for an in-depth and useful comparison of legislative provisions, many of which may markedly different from each other in terms of how they have been drafted and organized within a statute. That said, these provisions share certain identifiable common characteristics which we believe are reflected in the classification that we have developed.

2) General observations
Based upon the comparison chart, we offer the following observations about the Canadian OHS statutes. We will describe specific short-comings of BC’s WCAct in the next part of this paper.

2.1) Common provisions
All or at least a majority (i.e. over half) of the Canadian OHS statutes contain certain common provisions:

- the Crown and its agencies will be bound to and will comply with the applicable legislation;
- a description of the application of the statute or specific exclusions or exemptions;
- officers may be hired to carry out inspections and given the authority to enforce the legislation, including directors;
- reciprocal enforcement agreements with other governments and agencies can be established;

limits are placed on the civil liability of officers (and others) carrying out their statutory functions;
certain information cannot be disclosed (e.g. confidentiality), including non-compellability of officers (and others) in civil proceedings;
a prohibition against obstructing or misleading officers (with a right to obtain restraining orders in some statutes), sometimes complemented by a general duty to assist officers;
broad powers are given to officers to enter premises without warrants (with warrants required for entry into private dwellings, in some statutes), and various specific powers are also prescribed, such as access documents, undertake inspections, interview witnesses and take statements, take samples, seize (and remove) things, account for things seized (or removed), make tests, take photographs and sketches;
officers may bring others along to help them in their inspections and require persons not to disturb a worksite pending completion of an investigation;
workers may accompany an officer, or the officer must consult with workers during (most) inspections;
officers may issue a wide range of orders, such as to comply with the legislation, take remedial actions, cease and desist certain conduct, stop work or using equipment, remove workers or barricade an area;
if an order is given orally, it must be confirmed by a written order within a reasonable period of time;
alternative ways to communicate or serve orders, such as by posting at a worksite, publication or delivery to certain persons, including giving copies to the person who initiated a complaint;
specific or general offences are defined and penalties for conviction are prescribed (including the possibility of imprisonment in some statutes);
limitation periods for prosecutions are either one or two years, one year being the most common (seven of the nine statute), but some start the clock running not on the occurrence of the offence but on the date the agency first became aware of the offence;
corporate officers or directors may be deemed to be personally liable if their company is found to have committed an offence;
two routes for administrative appeals exist: internal (to directors or others within the agency) or external (to a separate OHS council or to appointed arbitrators), but some statues only provide appeals directly to the courts;
appeals can be made to an officer orders or agency decisions;
limitation periods for initiating an appeal varies, from three days to 30 days;
for those statutes which do not declare that an administrative appeal decision is final and bind or cannot be subjected to judicial reviewed (or limits same), a further appeal to the courts is provided.
2.2) Variable provisions
Certain provisions are found in less than half of the Canadian OHS statutes:
- officers may ask for assistance from local police, who must respond to such requests;
- officers have the power to direct that tests be made or that equipment or work processes be certified as safety by particular professionals (e.g. engineers, architects, etc.);
- officers have been given the additional powers of a commissioner (under applicable evidence or inquiry statutes) to take affidavits, issue summons, etc. or the powers of a police officer under the Criminal Code of Canada;
- limits have been on an officer’s power to access medical records (or a general statement about medical confidentiality), with access allowed to directors of medical services (who must be doctors);
- the courts can be approached to obtain restraint orders, search warrants and related orders in defined circumstances;
- officers can order the employer to undertake regular inspections of the worksite to identify and eliminate hazards, or provide information about what measures they will undertake to protect workers;
- officers can issue orders against suppliers to stop supplying or selling hazardous equipment, materials, etc.;
- in certain circumstances, an officer’s order can be converted into a court order or judgment or injunctions can be obtained from the courts;
- leave must be obtained of a minister or some other official before a prosecution can be initiated;
- a separate offence may be deemed for each day that a on-going breach continues, leading to cumulative penalties;
- the defense of due diligence is described, often by placing the onus on the accused to raise that defense;
- on application, a conviction or fine can be converted to a judgment or order of the court;
- in addition to ordering a fine or term of imprisonment on conviction, the court may also issue an award of costs against the convicted person or company;

2.3) Unique provisions
A few provisions are unique to just one OHS statute. (We have not ascertained if they may exist in other legislation or in OHS regulations.) Those provisions which could be adopted by the other jurisdictions are:
- an officer must make a decision whether to issue and order or not as soon as possible (Saskatchewan, s.87);
- a breach of the OHS legislation by a worker does not affect his/her right to compensation or the employer’s duties under the compensation statute (Manitoba, ss.8 & 9);
- an officer may order the suspension of a worker’s license for a related breach of the legislation (Alberta, s.9.2(2));
an officer does not have to hold a hearing before issuing an order (Ontario, s.57(11));
the police may arrest someone for failing to comply with an officer’s order (Nova Scotia, s.73);
any person may lay an information to initiate a prosecution (Manitoba, s.58);
it is a defense for a worker to provide evidence that he/she followed the employer’s instructions and had objected to doing so (Quebec, s.240);
in addition to ordering fines or imprisonment upon convictions, the courts may order the offender do one or more of the following:
- pay additional fine where he/she obtained monetary benefits due to the breach;
- pay a fine for public education;
- publish the facts of the offence in a newspaper, etc.;
- submit information to prove compliance;
- undertake community service;
- pay a performance bond (Nova Scotia, s.75(1));
on a breach of the Act or regulation, pay an administrative penalty or ticket, with the proceeds payable to the compensation fund (British Columbia, s.73 and the Yukon, s.47.1)

SHORT-COMINGS OF THE CURRENT WCACT
In our August 14th paper, Commentary on Specific Enforcement Problems with the IH&S Regulations and the OHS Provisions of the WCAct, we described certain problems with the IH&S Regulation and the WCAct which made or might make enforcement of the regulations difficult or impossible in certain circumstances. The broader analysis of the enforcement provisions of the WCAct and comparison to other Canadian OHS statutes in this paper has led us to identify a number of short-comings with the current enforcement options under the WCAct beyond those discussed in our previous paper. The most common short-coming is that useful provisions found in other Canadian OHS legislation are not found in the WCAct. These short-comings and deficiencies are described in this part.

• Administrative activities
The use of more intensive and frequent inspections, and other increased administrative activities is an enforcement option that does not appear to be recognized in any formal manner in BC, or at least not actively or widely promoted by the Board. We note, however, that the Diamond Project when it is fully and widely implemented, will address this short-coming.
• **Negotiated settlements or consent agreements**
The use of negotiated settlements or consent agreements is an option that is not expressed in the WCAct. Such negotiations and agreements may take place on an informal basis, but there is not authorization or encouragement of such enforcement options under the Act.

• **Crown bound**
There is no provision in the WCAct which proclaims that the Crown and its agencies will be bound to and will comply with the applicable OHS provisions. In the absence of such a provision is might be open to another ministry being investigated by the Board to claim that the Board does not have jurisdiction to enforce the OHS legislation against that ministry.

• **Officer liability**
While Board staff are arguably protected by some degree of Crown immunity, there is not provision in the WCAct that places limits on the civil liability that officers (and others) may face in carrying out their statutory functions.

• **Confidentiality and non-compellability**
Certain information obtained during an OHS inspection should not be disclosed, but there is not expressed provision within the WCAct which provides guidance on the limits of disclosure, including non-compellability of officers (and others) in civil proceedings.

• **Duty to assist officers**
While the WCAct does contain a provision which prohibits persons from obstructing or misleading officers, there is not a complementary provision in the Act that imposes a general duty on others to assist officers. Further, there is no provision which states that officers may ask for assistance from local police, who must respond to such requests. It may be useful in some circumstances if the officers could call upon local police to assist them in their investigations, but there is not such provision in the Act which they can hold out to obtain that assistance.

• **Inspection powers**
The WCAct does give broad powers to officers to enter premises without warrants and undertake certain steps. However, compared to other OHS statutes, the Act is silent on certain specific powers:
  - to take samples of materials, etc.;
  - to seize equipment, materials, etc. (and to account for same);
  - to make tests, demonstrations, etc.
  - to take photographs or recordings, or make sketches;
  - to bring along other persons, equipment, etc. to assist during the inspection;

The Act also does not make it clear that officers may need other necessary or incidental powers not otherwise expressly stated.
On the other hand, no expressed limits have been placed on an officer’s powers of inspections which may be appropriate to set out in the Act. Indeed, the following limits can be found in other OHS statutes:
- access medical records;
- investigation of private dwellings.

In these cases, it is common for the OHSAct to require the officer to obtain a court order or warrant to broaden his or her investigation into these otherwise limited areas.

**Verbal or written warnings**
Written warning letters seem to be a higher order of response that are to be generated by Board management. Perhaps this is because a primary purpose of such letters is to warn of the strong likelihood of more stringent sanction (e.g. penalty assessment). In BC, one can question not only the unclear legislative basis for such letters but also whether they should be an enforcement response available in the hands of Board officers directly and to a target audience wider than just employers’ senior management.

**Orders**
Under the WCAct, officers have the authority to issue orders, such as orders requiring an employer or worker to comply with the legislation, take remedial actions, cease and desist certain conduct, stop work or using equipment. However, the Act is silent on certain types of orders that are found in other OHS statutes, such as:
- to order that a worksite not be disturbed until the investigation is completed, unless necessary to prevent further harm to workers;
- to order that workers be removed from an area or that an area be sealed-off or barricaded;
- to order that suppliers stop supplying harmful equipment, material or substance to a worksite;
- to order employers to provide information to workers necessary for their own protection;
- to order that regular inspections of the worksite be undertaken to identify and eliminate hazards;
- to order that tests be made or that equipment or work processes be certified as safety by particular professionals (e.g. engineers, architects, etc.);
- to order that a license or certificate required by the legislation be suspended.

Further, if an order is given orally, the Act does not state that it must be confirmed by a written order within a reasonable period of time. There is also no provision that requires an officer to make decision as soon as possible concerning whether or not to issue an order, or that makes it clear that an officer does not have to provide someone with a hearing before issuing that person an order.
• Police powers to arrest
One OHS statute provides that the police may arrest someone for failing to comply with an officer’s order. We could find no similar provision in the WCAct. Nova Scotia’s OHS Act states:

73. (1) A police officer who has reasonable and probable grounds to believe that a person is failing to comply with an order issued pursuant to subsection 55(4) [an order re: of danger or a hazard to the health or safety of a person at the workplace] may arrest the person without warrant and shall take the person before a justice as soon as practicable.
(2) A person taken before a justice pursuant to subsection (1) is entitled to an immediate hearing but, if a hearing cannot then be had, the person shall be released from custody on giving a personal undertaking to appear to answer to the charge at such time and place as shall then be fixed by the justice.
(3) A police officer who arrests a person pursuant to subsection (1) shall promptly inform the person of the reason for the arrest and of the right to retain and instruct counsel without delay.

• Appeals
Only penalty assessments can be appealed under the WCAct. Other provinces allow appeals to officer’s orders and related decisions, prior to the matter proceeding to either a prosecution or administrative penalty. These statutes also commonly state that the initiation of an appeal does not operate to stay the effect of the order, unless the appellate tribunal so authorizes.

• Injunctions
The authority to obtain an injunction is an enforcement option that has been expressly adopted in certain Canadian OHS statutes, but is not given to the Board under the WCAct.

• Administrative penalties and tickets
While the WCAct contains numerous provisions which authorize administrative penalties in the form of penalty assessments (additional to the usual assessments for the accident fund), this enforcement response in several ways is more circumscribed in BC’s OHS legislation than in other regulatory statutes generally and other OHS legislation specifically. Under the OHS legislation in this province administrative penalties target employers alone. Further, they can only be recommended by inspecting Board officers but not actually imposed by them in manner similar to how police officers can write tickets on the scene against those whom they believe have committed an offence against the Motor Vehicle Act.

It is becoming increasingly more common in the regulatory environment to empower front-line officers to levy administrative penalties in the form of tickets to persons
committing designated offences. One rationale for such an approach is well expressed in the Regulatory Impact Analysis Statement for regulations made under the federal Contraventions Act which, in part, states:

The Contraventions Act ... provides for the establishment of a contravention scheme as an alternative to the current onerous Criminal Code process. It gives the Governor in Council the authority to make regulations designating offences as contraventions for which enforcement authorities may issue tickets to persons who are charged with such offences. In addition to decriminalizing federal offences that are designated as contraventions, the Act allows individuals to plead guilty to a contravention and pay the set fine for that contravention, thus avoiding the burden of a formal court process and a formal court appearance as is the case under the Criminal Code. By eliminating the trial of cases where the alleged offender wants to plead guilty to the offence and pay the set fine, the Act ... ease(s) the workload of the enforcement officers, the federal prosecutors and the courts who would have been involved under the ... Criminal Code process.

As is evidenced by the Yukon Territory's OHSAct the imposition of administrative penalties in the form of tickets by front-line officers is not a concept without precedent in the realm of OHS legislation.

Where a safety officer has reasonable grounds to believe that an offence has been committed against certain sections of the Yukon statute such officer may levy, as an alternative to prosecution, an administrative penalty ticket of up to $5,000 ($500 for each day during which the offence continues) for a first offence, $10,000 ($1,000 for each day during which the offence continues) for a subsequent offence. Persons served with a penalty will not be charged with the offence if they pay the penalty, win an appeal of it or receive a certificate of debt payment from the director which has been issued as a judgment in favour of the government by the Supreme Court. The payment of such an administrative penalty or the admission of liability to pay it may be used as a record of offences for the levying of future penalties, but may not be used or received in evidence for the purpose of sentencing after conviction of an offence.

• Limitation period

There is no provision in the WCAct that states that a penalty assessment or a regulatory prosecution must commence within a specific period of time after either the event took place or the date the Board first became aware of the apparent offence.

33 Reference, for example, the Designated Provisions Regulations (SOR/86-596) made under the Aeronautics Act R.S.C. 1985, c. A-2, which designate those regulations and orders made pursuant to the Act which may be enforced by means of the levy of a prescribed ticketed fine assessed by inspectors authorized by the Minister of Transport. Those who wish to “fight the ticket” can engage in an administrative appeal process to the Civil Aviation Tribunal.

34 Contraventions Act S.C. 1992, c.- 47

35 namely, section 47(1) [contravention of the legislation generally], section 47(2) [failure to comply with an order] and section 47(3) [failure to comply with an order to stop a work procedure where an imminent danger cannot be rectified immediately]
• **Defenses**

There is no provision in the Act which either describes the defense of due diligence or place the onus on the accused to raise that defense. Recognition of this defense in the Act would ensure that the terms of imprisonment provisions of the Act could be applied in appropriate circumstances, as the regulatory offences under the Act would be defined by a court as strict liability as opposed to absolute liability offence provisions; i.e. “Charter-proofing” the Act.

In a similar fashion, there is no provision which recognizes that a worker accused of an offence could claim in his defense that he was following the employer’s instructions, albeit under protest.

• **Court orders on conviction**

The WCAct contains the usual provisions setting out fines and terms of imprisonment as options for successful convictions. However, the Act does not contain provisions which would allow the court to order more creative responses to a conviction, such as:

- the facts of the offence be published in a newspaper, etc.;
- pay additional fine where he/she obtained monetary benefits due to the breach;
- pay a fine for public education;
- submit information to prove compliance;
- undertake community service;
- pay a performance bond.

• **Effect of a breach**

There is no provision in the WCAct which expressly declares that a worker’s failure to comply with the OHS provisions of the Act or regulations would not result in that worker loosing his rights to compensation. Further, there is no provision which addresses the linkage between the compensation and injury/illness prevention requirements of the Act. Similar provisions can be found in Manitoba’s OHS statute:

**Effect on compensation**

8. The failure to comply with any provision of this Act or the regulations does not affect the right of a worker to compensation under The Workers Compensation Act.

**Effect on liabilities**

9. The liabilities and obligations of any person under The Workers Compensation Act are not decreased, reduced, or removed, by reason only of his compliance with the provisions of this Act or the regulations.

**RECOMMENDATIONS**

In light of the above and by way of summary, we would recommend to the Commission that it consider the following proposals. We offer these proposals on the understanding
that the new OHSAct the Commission has already decided should be established would contain the same or similar enforcement provisions found in the current WCAct. Therefore, if a new OHSAct was not to be drafted, these proposals would be amendments to the WCAct.

**Consent agreements:** There should be a formal recognition of the Board’s ability to enter into consent agreements with persons or companies who have breached the OHS provisions of the Act or regulations. However, before such an agreement could be finalized, the offender must acknowledge the breach and the facts thereof, and agree to the actions that the parties agreed must be taken to prevent future breaches. Further, the agreement should be made public.

**Crown bound:** The provincial Crown and its agencies should be expressly required to comply with the OHS provisions of the Act and regulations. Further, to the extent possible under the Constitutional division of powers, the federal Crown and its agencies should also be required to comply or, at least, agree to be bound to those requirements.

**Officer’s limited liability:** To ensure suitable protection of Board officers from law suits, there should be a provision which states that Board officers cannot be sued for actions arising from their enforcement duties under the Act. This protection should be extended to others who may assist Board officers in the performance of their duties.

**Confidentiality and non-disclosure:** The ensure that critical information obtained during an inspection is not disclosed to others not involved in that investigation, there should be a provision that defines the scope of confidentiality duties, including non-compellability of officers (and others) in civil proceedings relating to their investigations.

**Duty to assist officers:** To complement the current prohibition under the WCAct re: obstruction of officers, there should be a complementary provision that sets out a general duty on persons to assist officers during their investigations. This could include a power for officers to be able to request and obtain assistance from the police.

**Expansion of an officer’s inspection powers:** The current inspection powers granted to officers should be reviewed to ensure they are sufficiently broadly stated to allow officers to take actions necessary for this function. Specific attention should be paid to the types of powers granted under other OHS statutes which state that officers in those jurisdictions can:

- take samples of materials, substances, etc.;
- seize equipment, materials, etc. (and account for those seizures if removed from the worksite);
- make tests, under take demonstrations, or require the employer to do same;
- take photographs or recordings, or make sketches or drawings;
- bring along equipment or other persons to assist during the inspection;

A general provision granting officers other necessary or incidental powers should be included.
Limitation on an officer’s powers: To ensure that appropriate limits are placed on officer’s inspection powers, they should be precluded from accessing medical records or inspecting private dwellings, unless they have obtained a search warrant.

Written warnings: Consideration should be given to allowing Board officers to issue written warnings, as opposed to leaving this as an action limited to senior officials at the Board.

Expansion of officer’s orders: The current scope of orders that officers may issue under the Act should be reviewed to ensure they are sufficiently broad to allow them to direct that employers, workers and others take the required actions. In particular, the orders set out under other OHS statutes could be incorporated, such as the power:
- to order that a worksite not be disturbed until the investigation is completed, unless necessary to prevent further harm to workers;
- to order that workers be removed from an area or that an area be sealed-off or barricaded;
- to order that suppliers stop supplying harmful equipment, material or substance to a worksite;
- to order employers to provide information to workers necessary for their own protection;
- to order that regular inspections of the worksite be undertaken to identify and eliminate hazards;
- to order that tests be made or that equipment or work processes be certified as safety by particular professionals (e.g. engineers, architects, etc.);
- to order that a license or certificate required by the legislation be suspended.

If an order is given orally, the Act should require that the officer confirm that order in writing within a reasonable period of time. An officer should also be directed to make decision as soon as possible concerning whether or not to issue an order.

On the other hand, the Act should make it clear that an officer does not have to provide someone with a hearing before issuing that person an order.

Police to arrest: It may be useful to grant the police the power to arrest someone who fails to comply with an officer’s order, in particular an order requiring the correction of hazardous situations.

Expansion of appeals: The scope of matters which can be appealed (to the Appeal Division) should be expanded to include appeals to officer’s orders and other final Board decisions relating to OHS matters. If this expansion was to generate a substantial volume of appeals, consideration should be given to establish a new and separate OHS Council which could hear those appeals, and perhaps also appeals regarding penalty assessments (the current jurisdiction of the Appeal Division).

Injunctive relief: To provide the Board with another useful enforcement instrument, the Act should include a provision allowing the Board to apply (ex parte, if necessary) for injunctions to restrain or direct persons to take certain actions.
**Ticketing:** The current enforcement option of penalty assessments under the **WCA** should be revised and expanded to establish a dynamic and effective ticketing system. In particular, the power to issue tickets for obvious breaches of the OHS provisions of the Act and regulations should be granted to Board officers.

In may be appropriate to define certain types of breaches for which tickets may be issued and the amount of the fines which could be so ordered for those breaches. However, if a ticket was issued, that should preclude the Board from also prosecuting the offending person or issuing a penalty assessment. There should also be a right to appeal a ticket once it has been issued.

**Limitation periods:** While the **WCA** allows the Board to prosecute an offender through the courts, rather than by penalty assessments, no limitation periods for initiating either action have been specified within the Act. Consideration should be given to set a limitation period of at least two years, but that it be triggered by the date of the breach or the date that the Board or an officer first became aware of the salient facts.

**Defenses:** To ensure that the offences defined under the **WCA** would be viewed by a court as strict and not absolute liability offense, and to further ensure that terms of imprisonment be an option the court could order, the defense of due diligence should be expressed within the Act with the onus placed on the accused to raise that defense.

**Fines and terms of imprisonment:** Further research should be undertaken to ascertain if the fines and terms of imprisonment provided under the **WCA** should be increased to correspond with levels set out in other, newer Canadian OHS statutes, and are in keeping with society’s expectations of the consequences of a conviction under the Act.

**Other court orders:** To provide the courts with options other than ordering a fine, term of imprisonment or an award of costs, the WCAct should be amended to allow the court to impose the following on those convicted of an offence:
- the facts of the offence be published in a newspaper, etc.;
- pay additional fine where he/she obtained monetary benefits due to the breach;
- pay a fine for public education;
- submit information to prove compliance;
- undertake community service;
- pay a performance bond.

**Effect of a breach:** The **WCA** should expressly declare that a worker’s failure to comply with the OHS provisions of the Act or regulations should not result in that worker loosing his rights to compensation. Further, as is set out in Manitoba’s OHS statute, it should be made clear that the liabilities and obligations of any person under the Act are not decreased, reduced, or removed, by reason only of his compliance with the provisions of the OHS provisions.
### Appendix “A” - COMPARISON OF SELECTED ENFORCEMENT PROVISIONS FROM CANADIAN OHS STATUTES

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<td>- to close operation, or stop work or using equipment</td>
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<td>36(b)</td>
<td>57(6)(c), 58</td>
<td>55(4)(c)</td>
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<td><strong>- to provide information, etc. re: protective measures</strong></td>
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<td><strong>- to direct that tests be made, work be certified, etc</strong></td>
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<td><strong>• Service of orders, and alternatives</strong></td>
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<td><strong>• Communication of past reports to new owners</strong></td>
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**PROSECUTIONS through the courts**

**• Offence defined** | 13(2), 70(2), | 54 | 66(1) | 234 - 237 | 47(1) | 74(1) | 31(1) | 67(1) | 47 | 22 | 148 |
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**ADMINISTRATIVE PENALTIES**

| • Administrative penalties/ticketing | | | | | | | | | | | | | 47.1 |
| • - or compensation assessment penalty | | | | | | | | | | | | | 73 |
| • Mechanism for initiating administrative penalty | | | | | | | | | | | | | 47.1(2) & 6 |
| • Limitation period | | | | | | | | | | | | | 47.1(3) |
| • Minimum/maximum amounts | | | | | | | | | | | | | 73 |
| • Relationship to prosecutions | | | | | | | | | | | | | 47.1(6) & 7 |

**OTHER ENFORCEMENT OPTIONS**

| • Converting officer/director order to court order/judgment | 33 | | | | | | 71 | | | | | 47.1(5) |
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<td>• Arrest by police for failing to comply with order, etc.</td>
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#### INTERNAL APPEALS to director, Minister, etc.

| • Right to appeal and grounds | 49(1) | 38(1) | 191.1 | 37(1) | 54, 67 | 11(1) | 32(1) | 12(2), 16(1) | 146(1) |
| • Appeal mechanism described | 191.2 | 67(3)(a) | 11(2) & (3) | 32(2) | 16(2) | 146(3) |
| • Initiating does not suspends the order, unless so ordered | 54 | 38(4) | 191 | 37(2) | 67(5) - (7) | 11(7) | 34 | 146(4) |
| • Powers of director or supervisor to act on appeal | 49(2) | 38(3) | 37(1) | 67(3)(b), | 32(4) | 16(2)(b) | 146(3) |
| • Limitation period (specified) | 49(1) - 21d | 38(1) - 3d | 191.1 - 10d | 67(1) - 14d | 32(1) - 7d | 16(1) - 30d | 146(1) - 14d |
| • Decision is final and binding, or judicial review is limited |  |  |  |  |  |  |  | 67(8) |

#### APPEALS TO A TRIBUNAL (Council, Labour Board, etc.)

| • Right to appeal and grounds | 96(5) | 11(1) | 50(1) & (2), 51 | 37(1), 39 | 61(1) | 193 | 69(1) | 12(1) | 33(1) | 29(1) |
| • Appeal mechanism described | 85.1, 85.2, 87, 91(2) | 11(2) & (4) | 50(2), 52 | 37(3), 39 | 62(2) & (3) | 69(2) & (5) | 12(2) - (4) | 29(2) & (3) |
| • Initiating does not suspends the order, unless so ordered | 11(7) | 54 | 37(5), 37(6) | 61(7) | 192 | 69(7) - (9) | 34 | 29(5) |
| • Powers of tribunal to act on appeal | 11(3) | 53 | 37(3) | 61(4) | 69(6) | 33(2) | 29(4) |
| • Limitation period | 96(5) - 30d | 11(2) - 30a | 50(1) - 21d | 38(9) - 14d | 193 - 10d | 12(1) - 30a | 33(1) - 3d | 29(2) - 21d |
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- Converting tribunal order to court order/judgment: 53(2) 39(5)
- Decision is final and binding, or judicial review is limited: 96(1), 96.1(1)
- 39(3) 61(6) 70 12(5) 33(3)

#### APPEALS TO THE COURTS

- Right to appeal and grounds: 11(4) & (5) 56(1)
- Appeal mechanism described: 11(6)
- Initiating does not suspends the order, unless so ordered: 11(8)
- Powers of court to act on appeal: 11(5) 56(2)
- Limitation period: 11(6) - 30d

Current to: August 23, 1997 @ 11:00 pm