

Patient Safety Law: From Silos to Systems

Appendix 3: Sector Reports OCCUPATIONAL HEALTH AND SAFETY

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Introduction

Although the federal, provincial and territorial governments in Canada each have authority over workplaces in their jurisdiction, basic similarities in their approach to occupational health and safety regulation exist. All jurisdictions save one have adopted relatively comprehensive occupational health and safety (OHS) statutes that set out a system of overlapping legal duties, rights and responsibilities for workplace stakeholders based on the internal responsibility system.¹ The internal responsibility system is a system of “universal, but *personal*, responsibility” in which every actor is responsible for safety.² Under the system, employers and other workplace parties have a general legal duty to take every reasonable precaution to ensure workplace safety and employees have three basic legal rights: the right to refuse to do unsafe work, the right to know or be informed of actual or potential workplace hazards; and the right to participate in health and safety activities through joint health and safety committees or an employee health and safety representative.³ These rights empower workers to fulfill their legal duty and are expressed through supportive processes and programs. Depending on the number of employees or the type of industry, employers are required by OHS statutes to establish joint health and safety committees of managerial and worker representatives that have the legal right to meet, participate in regulatory inspections and undertake investigations and make recommendations to management.⁴ Based on the concept that workplace safety is a shared responsibility and workplace stakeholders are best able to identify, assess and remove or control risks, OHS legislation creates a framework for the internal governance of occupational health and safety. Regulation is necessary, but not sufficient in itself. Leadership is very important for OHS’ internal responsibility system to succeed.

OHS law is also based on an external responsibility system, which has been defined as “the authority given to government, by itself, to enforce applicable health and safety legislation.”⁵ Government responsibilities generally include enforcing OHS legislation and regulations, conducting workplace inspections and promoting education, research and training. Governments have also passed OHS regulations that provide detailed rules and standards for specific areas of risk, such as rules for general blasting, underground mining or fall arrest systems.⁶ When these standards or other OHS legislative requirements are not being followed, government health and safety inspectors or officers may issue enforcement orders to address non-compliance, such as an order to stop work or to change a work practice within a certain time frame. Violations can also be addressed

¹ Norm Keith, *Workplace Health and Safety Crimes: Bill C-45 and the New Westray Criminal Offences* (Markham, Ontario: LexisNexis, 2004) at 98 [Keith, *Workplace Health and Safety Crimes*]. British Columbia lacks a specific OHS statute. OSH regulations made under its *Workers’ Compensation Act*, R.S.B.C. 1996, c. 492 contain the elements of the internal responsibility system.

² Peter Strahlendorf, “The Internal Responsibility System” (2001) 17:2 OH & S Canada 30 at 31.

³ Canadian Centre for Occupational Health and Safety, “OH&S Legislation in Canada – Basic Responsibilities”, online: <www.ccohs.ca/oshanswers/legisl/responsi.html>.

⁴ Keith, *Workplace Health and Safety Crimes*, *supra* note 1 at 102.

⁵ Norm Keith, *Canadian Health and Safety Law*, looseleaf (Aurora, Ont.: Canada Law Book Inc, 2005) at 1-24 [*Canadian Health and Safety Law*]; *Occupational Health and Safety Act*, S.N.S. 1996, c. 7, s.1 [Keith, *Occupational Health and Safety Act*].

⁶ Keith, *Canadian Health and Safety Law*, *ibid*.

through government prosecution and the laying of charges under OHS statutes. Punishable through fines or imprisonment, OHS regulatory offenses are quasi-criminal, strict liability offences. In addition, the *Criminal Code* was amended in 2004 to create a new health and safety duty that requires everyone who directs how an individual performs a task to take reasonable steps to prevent bodily harm to that person or others.⁷ A breach of this duty could result in a charge of OHS criminal negligence or other criminal offences. Relying on both internal and external regulatory measures, Canadian OHS law sets up a system of regulated self-regulation, where on the whole governments tend to promote “private resolution of safety and health concerns through technical advice and support to employers and workers and, when private resolution fails, through inspections and prosecutions.”⁸

In addition, each jurisdiction provides employees with compensation for workplace injuries through no fault worker compensation systems. In situations where the system applies, benefits are available from an accident fund which is funded by employer premiums and in exchange, employers are protected from tort liability. Workers’ Compensation Boards (WCB) or Commissions administer the statutory schemes. Most jurisdictions treat occupational health and safety and workers’ compensation as separate legislative areas.⁹ However, in British Columbia, they have been merged into one legislative scheme with the aim of harmonizing their goals, while in other jurisdictions, such as New Brunswick, one body administers both the OHS and workers’ compensation legislation. In Nova Scotia and in some other provinces, workplace insurance and health and safety prevention and education rests with the WCB, while the OHS Division of the Department of Environment and Labour is responsible for administering and enforcing the provincial OSH legislation.¹⁰

In general, it is important to note that there is limited and mixed evidence on the effect of introducing OHS Regulation on illness and injury outcomes. A study of OHS regulation in New York and Texas concluded that its introduction in New York increased the frequency of some injury types whereas its introduction in Texas reduced the frequency of some types of injury but increased it for others.¹¹ Lastly, a study of the introduction of OHS in Quebec concluded that the introduction of OHS regulation reduced frequency in some industries.¹²

⁷ Keith, *Canadian Health and Safety Law*, *ibid.* at 10-78-10-80.

⁸ Randy S. Rabinowitz & Mark M. Hager, “Designing Health and Safety: Workplace Hazard Regulation in The United States and Canada” (2000) 33 *Cornell Int’l L.J.* 373 at 396-97 [Rabinowitz].

⁹ Keith, *Canadian Health and Safety Law*, *supra* note 5 at 1-7.

¹⁰ Workers’ Compensation Board of Nova Scotia, “Prevention Services,” online: <<http://www.wcb.ns.ca/new/prevention.php>>.

¹¹ W. Currington, “Federal versus State Regulation: The Early Years of OSHA” (1988) 69 *Soc Sci Q* 341.

¹² P. Lanoie, “The Impact of Occupational Safety and Health Regulation on the Risk of Workplace Accidents in Quebec, 1983-87” 27 *J Human Resources* 643; P Lanoie, “Safety Regulation and the Risk of Workplace Accidents in Quebec” (1992) 58 *Southern Economic J* 950.

Jurisdiction

Approximately 10% of workplaces in Canada fall within federal jurisdiction, while 90% fall within provincial jurisdiction.¹³ The Canadian *Constitution Act, 1867* does not explicitly refer to OHS in its division of powers between federal and provincial governments. Consequently, the courts have determined where jurisdictional authority lies.¹⁴ Occupational health and safety falls primarily under provincial jurisdiction as part of the broader provincial responsibility for labour relations. However, the federal government administers labour laws (including OHS laws) in the following sectors that have been either explicitly designated to be under federal jurisdiction in the *Constitution Act 1867* or have been ruled to be federal by the courts: industries that are extra-provincial or international (e.g., various transportation sectors); telecommunications; banking; and federal crown corporations and agencies.¹⁵ The *Canadian Charter of Rights and Freedoms* applies to OHS law. A list of acts which address occupational health and safety at the provincial and federal level are included as an appendix at the end of this report.¹⁶

Specific Elements of Canadian OHS Law:

The Internal Responsibility System

Widely regarded as the conceptual foundation of OHS law in Canada, the internal responsibility system holds that workplace stakeholders have the primary and shared responsibility to ensure workplace safety, as they are best positioned to effectively identify, assess and control or eliminate risk.¹⁷ Key elements of the system include legislating positive duties and responsibilities for various stakeholders and providing certain rights to workers, so that the principal parties involved in managing and improving occupational health and safety are workplace stakeholders.¹⁸ Although it is not an exhaustive definition, Nova Scotia was the first Canadian jurisdiction to explicitly define the internal responsibility system in its legislation:

¹³ Keith, *Workplace Health and Safety Crimes*, *supra* note 1 at 97.

¹⁴ *Ibid.*

¹⁵ Government of Canada, "Jurisdiction of the Federal Government, the Provinces and the Territories in the Field of Occupational Health and Safety," online: HRSDC <http://www.hrsdc.gc.ca/asp/gateway.asp?hr=/en/lp/spila/cli/ohslc/02jurisdiction_federal_government_and_provinces.shtml&hs=oxs>; Part II of the *Canada Labour Code*, R.S.C. 1985, c. L-2 dealing with OHS does not apply to specific undertakings that are regulated by the *Nuclear Safety and Control Act*, R.S.C. 1997, c. 9.

¹⁶ See Canadian Centre for Occupational Health and Safety, online: CCOHS <<http://www.ccohs.ca/legislation/fulllist.html>> for a complete list of provincial and federal enviroOSH legislation.

¹⁷ Keith, *Canadian Health and Safety Law*, *supra* note 5 at 2-2.

¹⁸ Depending on the jurisdiction, stakeholders can have legal duties include contractors, employers, supervisors, workers, licensees, professional engineers, architects, directors, officers and suppliers. See *Canadian Health and Safety Law*, *ibid.*

2. The foundation of this Act is the Internal Responsibility System which
- (a) is based on the principle that
 - (i) employers, contractors, constructors, employees and self-employed persons at a workplace, and
 - (ii) the owner of a workplace, a supplier of goods or provider of an occupational health or safety service to a workplace or an architect or professional engineer, all of whom can affect the health and safety of persons at the workplace,
 share the responsibility for the health and safety of persons at the workplace;
 - (b) assumes that the primary responsibility for creating and maintaining a safe and healthy workplace should be that of each of these parties, to the extent of each party's authority and ability to do so;
 - (c) includes a framework for participation, transfer of information and refusal of unsafe work, all of which are necessary for the parties to carry out their responsibilities pursuant to this Act and the regulations; and
 - (d) is supplemented by the role of the Occupational Health and Safety Division of the Department of Labour, which is not to assume responsibility for creating and maintaining safe and healthy workplaces, but to establish and clarify the responsibilities of the parties under the law, to support them in carrying out their responsibilities and to intervene appropriately when those responsibilities are not carried out.¹⁹

As indicated in Part 2(c) of Nova Scotian definition, a critical part of the IRS system is the granting of three basic workers' rights to empower them in relation to OHS:

- i) the right to know about workplace dangers, such as how to identify and protect themselves from risks. The Workplace Hazardous Materials Information System (WHMIS), a national, legislative regime of hazardous materials labeling, handling measures and training, is a manifestation of the broader right to know;²⁰
- ii) the right to participate in OHS decisions without reprisal, usually through OHS committee or individual representatives; and
- iii) the right to refuse dangerous work without reprisals.²¹

The right to participate is represented in the legislative requirement for the establishment of Joint Health and Safety Committees, which are forums that involve both employers and employees in identifying, monitoring and improving occupational health and safety.²² While everyone in the system has a personal and shared responsibility for ensuring a safe workplace for themselves and others, the system recognizes that one's

¹⁹ *Occupational Health and Safety Act*, *supra* note 5 at s. 2.

²⁰ All Canadian jurisdictions have amended their legislation to address the WHMIS program and passed regulations for its implementation. See Keith, *Canadian Health and Safety Law*, *supra* note 5 at 4-1-4-2.

²¹ Government of Saskatchewan Department of Labour, "Occupational Health and Safety Committee Manual: The Internal Responsibility System for Occupational Health and Safety," online: Saskatchewan Labour <<http://www.labour.gov.sk.ca/safety/committee-manual/chapter-1/internal.htm>>.

²² All Canadian jurisdictions have statutory provisions for joint committees, however, whether employers are legally required to establish them in a given jurisdiction may depend on either the number of employees or the type of industry.

ability to do so is tied to the level of authority and control one possesses. Given their greater degree of control over the workplace, employers “ultimately and practically” have the highest degree of legal responsibility under the IRS system.²³ Although the structure of an internal responsibility system varies from province to province, the IRS system overall “provides legal requirements, standards and procedures for workplace health and safety, promotes self-regulation of workplace hazards, and reduces the need for government regulators to intervene in the workplace.”²⁴

Legal responsibilities and duties

As part of the IRS system of shared responsibility, Canadian OHS law creates an accountability framework for occupational health and safety by defining the legal responsibilities and duties of various stakeholders, such as employers, contractors, suppliers, owners, supervisors and employees. There is some variation across jurisdictions as to which workplace stakeholders have legislatively defined duties and these duties may overlap. Duties are more than normative statements and their breach is punishable by a variety of statutory enforcement mechanisms. No one stakeholder is exclusively responsible for ensuring compliance with OHS laws. The responsibilities of governments, as well as the common legal duties assigned to employers and employees as part of the internal responsibility system, will be addressed below.

Government

OHS legislation establishes the duties and responsibilities of government actors. Generally, provincial and territorial Ministers and Deputy Ministers of Labour have been given the broad responsibility of administering and enforcing OHS legislation. Other responsibilities may include the resolution of OHS conflicts, the promotion of education, training or research and the setting or approval of standards or codes of practice. Under Nova Scotia’s OHS legislation, the Minister is responsible for the supervision and management of the Act.²⁵ The legislation explicitly states that the OHS division of the Department of Labour is not responsible for creating and maintaining safe workplaces, but rather its role is to support the internal responsibility system through advice and intervention when appropriate.²⁶ The Division is also charged with maintaining reasonable standards, promoting and/or conducting OHS research and education programs and preparing, either alone or with the WCB, OHS statistics.²⁷

Employers

²³ Keith, *Workplace Health and Safety Crimes*, *supra* note 1 at 104.

²⁴ *Ibid.*

²⁵ *Occupational Health and Safety Act*, *supra* note 5 at s. 6.

²⁶ *Ibid.* at s. 2.

²⁷ *Ibid.* at s.9. Although it would appear to fall under the OHS Division’s responsibility for conducting educational programs, health & safety prevention education is being undertaken by the provincial WCB.

Canadian OHS laws contain a number of common duty provisions for employers. All jurisdictions have in place a general duty for employers to take all reasonable precautions to ensure a safe and healthy workplace for workers.²⁸ This overarching general duty clause can require employers to meet a higher standard than may be specified in the regulations, if the circumstances warrant such an action.²⁹ Other common legal duties for employers include a duty to:

- establish a OHS policy or program, either in general or in relation to specific hazards;
- ensure workers are properly trained and supervised;
- warn workers about potential workplace hazards and provide them with information and training around how to safely handle hazardous substances under the WHMIS program;
- establish and cooperate with a joint health and safety committee or OHS representatives;
- inform workers of their legal rights and responsibilities or post the relevant OHS legislation or regulations;
- report to the applicable agency serious illnesses, injuries, or accidents, which is accompanied by a duty to investigate and take corrective measures.³⁰

Employees

Just as employers have a general duty to ensure the safety of employees, so too employees have a legal duty to take reasonable care in the workplace to protect both themselves and others. Workers are also generally required by law to co-operate with their employer, co-workers, joint health and safety committees or representatives, and government actors in relation to OHS. In most jurisdictions, there is an express duty on workers to use the personal protective equipment required by the employer or under OHS law. Some jurisdictions also give workers a positive legal duty to inform the employer (or his or her agents) of any dangerous condition that is or may affect the safety of the workplace.

Joint Health and Safety Committees

A key aspect of the internal responsibility system, joint health and safety committees act as a forum for encouraging cooperation between workplace stakeholders on occupational health and safety issues and a means of enabling workers' participation rights. Canadian OHS law prescribes the circumstances in which an employer is obligated to establish a Joint Health and Safety Committee. Their establishment may be dependant on ministerial discretion, the nature of the industry, or a legislated threshold of

²⁸ British Columbia, *A Comparison of Fundamental Rights and Duties in Canadian Occupational Health and Safety Statutes* (Issues Paper #6, submitted to the Royal Commission on Workers Compensation in British Columbia) by George Bryce & George Heinmiller at 7.

²⁹ *Ibid.*

³⁰ *Ibid.* at 8.

employees. Many jurisdictions require committees in workplaces with twenty or more employees.

Committees act to ensure workplace safety in a relatively autonomous manner, although they must comply with the broad policy objectives of OHS legislation. Committees may receive, investigate and resolve complaints, and make recommendations to employers about OHS. They may also assist in resolving work refusals and stoppages and participate in government inspections. Certain jurisdictions require committees to undertake their own regular inspections.³¹ Further, “in many jurisdictions, health and safety committees must be consulted before new OHS programs are introduced” by employers.³² Committees also monitor compliance with workplace health and safety requirements. However, when voluntary compliance is not forthcoming, the government maintains a formal enforcement role.³³ Be it explicit or implicit, most jurisdictions generally grant committees access to relevant OHS information, such as accident data and investigation reports.³⁴ Committee functions listed in Section 31 (1) of Nova Scotia’s OHS Act include:

- (a) the co-operative identification of hazards to health and safety and effective systems to respond to the hazards;
- (b) the co-operative auditing of compliance with health and safety requirements in the workplace;
- (c) receipt, investigation and prompt disposition of matters and complaints with respect to workplace health and safety;
- (d) participation in inspections, inquiries and investigations concerning the occupational health and safety of the employees and, in particular, participation in an inspection referred to in Section 50 [government inspections];
- (e) advising on individual protective devices, equipment and clothing that, complying with this Act and the regulations, are best adapted to the needs of the employees;
- (f) advising the employer regarding a policy or program required pursuant to this Act or the regulations and making recommendations to the employer, the employees and any person for the improvement of the health and safety of persons at the workplace;
- (g) maintaining records and minutes of committee meetings in a form and manner approved by the Director and providing an officer with a copy of these records or minutes on request.

One analyst sums up the authority of a committee by stating that “although joint committees investigate and advise employers with limited decision making powers, they may promote health and safety in several *key* ways: by inducing employee-management cooperation, by giving employees a voice and forum for registering their knowledge and

³¹ British Columbia, *The Role of Joint Committees in Workplace Health and Safety: A Review of the Legislation and Previous Studies* (submitted to the Royal Commission on Workers Compensation in British Columbia) by John O’Grady (May 1998) at 15 [*Role of Joint Committees in Workplace Health and Safety*].

³² Keith, *Workplace Health and Safety Crimes*, *supra* note 1 at 102.

³³ Rabinowitz, *supra* note 8 at 401.

³⁴ Keith, *Role of Joint Committees in Workplace Health and Safety*, *supra* note 31 at 15.

concerns, and by promoting union attention to and possible collective bargaining on health and safety issues.”³⁵ However, critics of Canadian OHS law relating to joint committees note they are primarily advisory and lack real power to institute changes. In Ontario, certified committee members, who have specialized training, have the statutory authority to commence bilateral or unilateral work stoppages.³⁶ Ontario also has a legal mechanism through which committees can hold employers accountable for their recommendations. As a matter of law, employers must respond in writing to committee recommendations within 21 days and provide a timetable for implementing those recommendations they agree to and reasons for why they will not implement others.³⁷ If sound reasons are not given for refusing to implement a recommendation, a committee member may take their complaint to government enforcement officials.

Canadian OHS law also sets out requirements regarding committee composition and procedures. Most jurisdictions prescribe the minimum number of meetings that committees must have and require the keeping of minutes. At least half of the committee members are generally required by law to be non-managerial employees chosen by their fellow employees or their union. Workers and management are said to have equal interests in OHS joint committees. However, some regard this as an idealistic notion that ignores Canada’s history of adversarial labor-management relations.³⁸ Most jurisdictions prohibit employers and employees from discriminating against employees who serve on joint committees and execute health and safety duties.³⁹ Designed to ensure that worker safety concerns are voiced, many jurisdictions require the appointment of a health and safety representative in workplaces where there are too few employees to form a committee.⁴⁰

Joint committees of employees and management appear to have many benefits: increasing manager-worker trust, attempting to eliminate adversarial environments, serving as a useful investment to employers as evidence of due diligence if faced with

³⁵ Rabinowitz, *supra* note 8 at 411.

³⁶ Keith, *Canadian Health and Safety Law*, *supra* note 5 at 2-25.

³⁷ *Occupational Health and Safety Act*, R.S.O. 1990, c. 0.1, ss. 9(20), 9(21).

³⁸ Richard Fidler, “The *Occupational Health and Safety Act* and the Internal Responsibility System” (1986) 24 *Osgoode Hall L.J.* 315 at 315-52 [Fidler].

³⁹ Keith, “Designing Health and Safety,” *supra* note 33 at 411.

⁴⁰ Ottawa, Human Resources and Skills Development Canada, *Canadian Legislation Relating to Safety and Health Representatives* (Ottawa: Labour Law Analysis, International and Intergovernmental Labour Affairs, Labour Branch, 2005) at 5. According to several studies, unionized workplaces are more likely to be organized and safer workplaces in the Canadian and international context. Union supported health and safety committees according to some studies, have “a significant impact on reducing injury rates.” (Canadian Ministries of Labour 1993) Further, “78-79% of unionized workplaces reported high compliance with health and safety legislation with only 54-61% of non-unionized workplaces reporting such compliance.” (Ontario Workplace Health and Safety Agency studies 1994 and 1996) In 1995, the World Bank stated that “trade unions can play an important role in enforcing health and safety standards. Individual workers may find it too costly to obtain information on health and safety risks on their own, and they usually want to avoid antagonizing their employers by insisting that standards be respected.” This information was quoted by the UNISON Scotland, online: <http://www.unisonscotlandlaw.co.uk/article_view.html?id=520>. Studies also indicate that Unions and joint committees are both effective in curtailing safety risks because consultation methods used to target safety risks improve the safety culture in a workplace.

charges, and reducing workplace injuries.⁴¹ Some studies indicate that joint committees create more positive and trusting relationships between labour and management representatives, and argue that employers and employees both recognise benefits in the decision to create joint health and safety committees. According to one analysis, employment lawyers have directly attributed positive OHS practices in the workplace to these committees. In turn, this gained trust “leads to a less legalistic approach to resolving health and safety issues” in the workplace.⁴² As such, some suggest that employers recognize the value of joint committees in creating safe and cost-effective work environments due to decreased accident rates and lower workers’ compensation levies.⁴³ Similarly, the Ontario Workplace Health and Safety Agency determined that manufacturers attribute lowered accident rates and compensation costs to their use of health and safety committees.⁴⁴ A review of studies concerning joint OHS committees done for the BC government in 1998 identified three main factors that influence the effectiveness of committees: their rights to information, their level of training and the level of managerial commitment.⁴⁵

One reason that joint committees are regarded as beneficial may be the ability of such committees to create accessible channels of communication and thereby foster greater transparency. Studies tend to agree that open pathways of communication are crucial in order to avoid accidents and workplace injuries. But not all studies indicate that joint committees are the most effective means by which safety issues are dealt with. Writing about Australian OHS, one analyst argues that when committees are asked to solve specific problems, they are often less effective than individual decision-makers. However, the same study concludes that committees do have good “judgment” regarding safety issues and produce effective safety solutions when members meet for consultations, but only after they have brainstormed specific dilemmas or issues independent of each other prior to meeting as a group.⁴⁶

Standards and Guidelines

OHS legislation stipulates who has the authority to make regulations and orders setting standards or codes of practice. In most provinces, authority to set or approve standards lies with the Minister under the authority of the Governor in Council or the Lieutenant Governor in Council. In other provinces, legislation grants Worker Compensation Boards the power to set workplace standards. OSH regulations generally contain standards that are either sector specific (i.e., standards for the mining industry or health care facilities) or subject specific (i.e., hazardous materials). OHS regulations may incorporate by reference industry or technical standards, such as those passed by the

⁴¹ John Beaufoy, “Legal Update: Occupational Health and Safety,” *Canadian Lawyer* 18:5 (June 1994) 42 at 42 [Beaufoy].

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Role of Joint Committees in Workplace Health and Safety*, *supra* note 31 at 15.

⁴⁶ John Culvenor, “Comparison of Team and Individual Judgments of Solutions to Safety Problems” (2003) 41 *Safety Science* 543 at 551.

Canadian Standards Association, which makes them legally enforceable. When standards and rules do not adequately protect employees from safety risks, the “general duty may require prevention beyond what specific standards require.”⁴⁷

Workplace Conditions

Quebec’s OHS statute is unique in Canada in that it expressly gives every worker the right “to working conditions that have proper regard for his health, safety and physical well-being.”⁴⁸ B.C. was the first jurisdiction to legislate duties around workplace ergonomics and its OHS regulations require employers to identify and minimize or eliminate where possible risks around musculoskeletal injury (MSI).⁴⁹ In the area of workplace violence and harassment, certain jurisdictions, such as Alberta, Saskatchewan, and British Columbia, have legislative initiatives that address one or both of these issues. In Alberta, employers are required to develop policies around workplace violence, train employees on how to identify and respond to workplace violence and undertake an assessment of the potential for violence in their workplace.⁵⁰ In Saskatchewan, OHS legislation places a duty on employers, to the extent that it is reasonably possible, to ensure workers are not exposed to harassment in the workplace, while in other provinces and territories, harassment is dealt with through human rights legislation.⁵¹ Some studies suggest that harassment falls within OHS legislation as a legitimate reason for an employer to use his or her right to refuse work.⁵²

Complaint Mechanisms

OHS law outlines the basic right of an employee to lodge a complaint or report OHS concerns without fear of discrimination by employers, unions or others.⁵³ OHS legislation in each province defines several key relationships designed to ensure that employees have a way to communicate OHS concerns for purposes of accountability. At the most basic level, employees may take concerns to their immediate supervisors or employers. They may also raise concerns with OHS committees and representatives. To facilitate this right, an employer is responsible for posting the names and locations of committee members. Under Section 17 (2) of Nova Scotia’s *Occupational Health and Safety Act*, employees have a positive duty to report dangers and are given of hierarchy of actors to report to (first, supervisors, followed by the OHS committee or representative and lastly, the government’s OHS Division) in case the response at one level is not satisfactory.

⁴⁷ Rabinowitz, *supra* note 8 at 402.

⁴⁸ *An Act Respecting Occupational Health and Safety*, R.S.Q. c. S-2.1, s. 9.

⁴⁹ Paul Jay, “Occupational Health and Safety” *Canadian Lawyer* 22:7 (July 1998) 37 at 37 [Jay].

⁵⁰ *Alberta Occupational Health and Safety Code 2003* at ss. 389, 391.

⁵¹ Beaufoy, *supra* note 41.

⁵² *Ibid.* at 43.

⁵³ However, there is a discrepancy between provinces in the language used to discuss when an employee can complain/report. Some OHS legislation states that it is a “right” while other legislation states that an employee “may refuse to do acts.”

Under Canadian OHS law, employees also have the important legal right to refuse to do unsafe work. In British Columbia and Alberta, this right is expressed as a legal duty on workers not to perform dangerous work. In a case where an employee refuses work on reasonable grounds, he or she cannot be discharged, disciplined or discriminated against. Generally, this right allows an employee to refuse work where there is a perceived unusual risk or danger, even where there is no imminent risk. However, in Alberta, workers have the above duty only when there are reasonable and probable grounds to believe that the work represents an imminent danger. Some jurisdictions have also placed restrictions on the exercise of this right or made it an offence to abuse it. For example, under Quebec's OHS Act, the right of refusal may not be used if the danger is an inherent part of a worker's job and the right is suspended when exercising it would put the life, health, safety or physical well-being of others in immediate danger. In practice, workers who belong to a union exercise this right more often than non-unionized workers, which reflects the power imbalance in non-unionized workplaces and suggests in part a discrepancy regarding awareness.⁵⁴

While there are variations between jurisdictions, generally, the process required by OHS law following a work refusal starts with an investigation of the situation by the employer or supervisor. If the employee finds the outcome unsatisfactory, then the employee may take his or her concerns to the OHS committee or representative. The last option available to resolve issues of concern is to approach the government agency responsible for occupational health and safety. Section 43 of Nova Scotia's Occupational Health and Safety Act outlines the procedures to be followed after a work refusal:

- 43 (1) Any employee may refuse to do any act at the employee's place of employment where the employee has reasonable grounds for believing that the act is likely to endanger the employee's health or safety or the health or safety of any other person until
 - (a) the employer has taken remedial action to the satisfaction of the employee;
 - (b) the committee, if any, has investigated the matter and unanimously advised the employee to return to work; or
 - (c) an officer has investigated the matter and has advised the employee to return to work.
- (2) Where an employee exercises the employee's right to refuse to work pursuant to subsection (1), the employee shall
 - (a) immediately report it to a supervisor;
 - (b) where the matter is not remedied to the employee's satisfaction, report it to the committee or the representative, if any; and
 - (c) where the matter is not remedied to the employee's satisfaction after the employee has reported pursuant to clauses (a) and (b), report it to the Division.
- (3) At the option of the employee, the employee who refuses to do any act pursuant to subsection (1) may accompany an officer or the committee or representative, if any, on a physical inspection of the workplace, or part

⁵⁴ Rabinowitz, *supra* note 8 at 413.

thereof, being carried out for the purpose of ensuring others understand the reasons for the refusal.

Investigation and Enforcement

As part of the external responsibility system, government appointed inspectors act as occupational health and safety enforcement officers and their general role under OHS law is summarized below:

Inspectors consult, monitor compliance, and investigate fatalities, work refusals, and hazard complaints. Decisions whether to inspect are discretionary, except for mandatory work refusal investigations. ... [Government] targets inspections using employer-specific injury and illness information. Inspectors enter workplaces without warrants or prior notice. They may take samples, seize documents or things, and consult with outside experts and employees. Employee joint committee members and representatives may accompany inspectors and must be compensated for time spent with inspectors.⁵⁵

Should inspectors determine that OHS law has been contravened, they have the statutory authority to issue orders or directions that may stipulate corrective measures to be taken, employee-removal, equipment or workplace shut-down and other penalties and fines. Canadian jurisdictions have granted rights of appeal to workplace stakeholders in relation to these orders.

According to a 1986 analysis of OHS law in Ontario, relying on inspectors for many types of enforcement does not promote an environment in the workplace where workers' feel included in the process of OHS regulation. Recommendations on how to improve the IRS in order to make it more effective included a call to give "worker health and safety committee members and representatives the right to unilaterally shut down unsafe operations, to be present during all testing or monitoring and to do their own testing and monitoring with their own experts."⁵⁶ However, one study does warn that "there are obvious limits to what these measures can accomplish in a society in which private owners control investment decisions and production process. As long as employers have the power to discipline and lock out workers and as long as workers remain largely unorganized, a heavy burden falls on the government agency responsible for administering the protective legislation."⁵⁷ Another way to promote safety and ensure that employees are treated equitably is to stress the importance of government inspector and joint committee member cooperation. Inspectors should be prepared to backup committee decisions and listen to recommendations when they are trying to curtail employer-resistance to regulatory standards.⁵⁸

⁵⁵ *Ibid.* at 403.

⁵⁶ Fidler, *supra* note 38 at 349.

⁵⁷ *Ibid.* at 350.

⁵⁸ *Ibid.* at 352.

A number of studies, Canadian and otherwise assess the impact of OHS inspections on illness and injury outcomes. The results are somewhat mixed. Some suggest that inspections reduce the frequency and/or severity of injuries, some suggest that inspections reduce frequency when first employed but do not after a period of time has passed, some that the type of inspections makes a difference with complaint inspections reducing frequency, others that inspections increase frequency or have no effect on it.⁵⁹ It is difficult therefore to assess the utility of inspections as a means of reducing workplace injury.

According to one employment lawyer, “smaller fines do have a positive effect” when they are directed at persons in supervisory roles, “since they force line managers to take responsibility for health and safety problems, instead of leaving the obligation to ‘the company.’”⁶⁰ Targeting supervisors is also an economically appealing option for both governments and companies who note that large-sum fining may result in decreased investor confidence. Overall, though, some analysts suggest that it is difficult to prove if large fines directed at companies have a deterrent effect.⁶¹ Analysts are also divided on whether citations and fines impact upon illness and injury outcomes. Some suggest that inspections with penalties reduce injury frequency, others that injury frequency is initially reduced but remains static or increases later, others that it actually increases injury frequency.⁶²

Occupational health and safety inspectors may also recommend the prosecution of violations as an additional though rarely used means of deterrence. Quasi-criminal in

⁵⁹ JT Chung, *The Effectiveness of Enforcement Activities of the Occupational Safety Program of Korwa* (PhD Thesis, American University, 1990) [unpublished]; Wayne B. Gray & John Mendeloff, “The Declining Effects of OSHA Inspections on Manufacturing Injuries, 1979-1998” (2002) NBER Working Paper 9119 (Washington: National Bureau of Economic Research) [Gray & Mendeloff]; Wayne B. Gray & Scholz, “Analysing the Equity and Efficiency of OSHA Enforcement” (1991) 13 *Law & Pol’y* 185 [Gray & Scholz, “Analysing”]; Ruser & Smith, “Reestimating OSHA’s Effects: Have the Data Changed?” (1990) 26 *J Human Resources* 212; Scholz & Gray, “OSHA Enforcement and Workplace Injuries: A Behaviourial Approach to Risk Management” (1990) 3 *J Risk & Uncertainty* 283 [Scholz & Gray, “OSHA Enforcement”]; Scholz & Gray, “Can Government Facilitate Cooperation? An Informational Model of OSHA” (1997) 41 *Am J Political Science* 693 [Scholz & Gray, “Can Government Facilitate Cooperation?”]; Sha, *Accident Rates, Workers’ Compensation and Safety Regulations* (PhD Thesis, State University of NY at Stony Brook, 1995) [unpublished] [Sha]; Smith, “Impact of PSHA Inspections on Manufacturing Injury Rates” (1979) 14 *J Human Resources* 145; Baggs *et al.*, *Observed Associations Between WISHA Activities and Compensable Claims Rates* (Olympia WA: Safety and Health Assessment and Research for Prevention (SHARP) Program, 2001); Guo, *The Influence of OSHA Inspectors’ Detection Capabilities on OSHA’s Effectiveness: Evidence From Panel Data, 1979-1985* (PhD Thesis, Clark University, 1999) [unpublished] [Guo]; Kim 1991 *The Political Economy of OSHA Regulation: A Poled Tiem Analysis* (PhD Thesis, University of Georgia, 1991) [unpublished] [Kim]; Lanoie, *supra* note 12, Lanoie & Streliski, “L’impact de la réglementation en matière de santé et sécurité du travail sur le risque d’accident au Québec: de nouveaux résultats” (1996) 51 *Relations Industrielles* 778 [Lanoie & Streliski]; DP McCaffrey, “An Assessment of OSHA’s Recent Efforts On Injury Rates” (1983) 18 *J Human Resources* 131; W. Kip Viscusi, “The Impact of Occupational Safety and Health Regulation, 1973-1983” (1986) 17 *Rand J of Economics* 567 [Viscusi].

⁶⁰ Jay, *supra* note 49 at 39.

⁶¹ See *e.g.* John Hill in Jay, *supra* note 49.

⁶² Gray & Mendeloff, *supra* note 59; Gray & Scholz, “Analysing”, *supra* note 59; Guo, *supra* note 59; Kim, *supra* note 59; Lanoie *supra* note 12; Lanoie & Streliski, *supra* note 59, Viscusi, *supra* note 59.

nature, most OHS regulatory offences are strict liability offences. For strict liability offences, the prosecution need only prove beyond a reasonable doubt the act was committed, unlike criminal offences where a mental element, or intent, must also be proven. Defendants may raise the defense of due diligence and one branch of the defense allows workplace stakeholders to argue they have taken reasonable steps to comply with OHS law. Offences are punishable through fines or imprisonment. In Nova Scotia, offences carry a maximum sentence of two years imprisonment or a fine of \$250,000, plus up to \$25,000 per day for each additional day the offence continues.

The criminal sanctions model of enforcing OHS law has been growing in last decade and in November 2003, the federal government used, in area of occupational health and safety, its authority to criminalize conduct. Bill C-45 amendments to the *Criminal Code* established new rules by which organizations can be held criminally liable and created an OHS legal duty within the *Criminal Code* for the first time in Canadian legal history. In force since March 2004, these amendments were motivated by the 1992 Westray mine disaster in Plymouth, Nova Scotia that resulted in the deaths of 26 workers.⁶³ Contained in the criminal negligence provisions of the *Criminal Code*, the new duty states that “everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under the legal duty to take responsible steps to prevent bodily harm to that person, or any other person, arising from that work or task.”⁶⁴ By introducing a legal duty to ensure workplace safety within the *Criminal Code*, the federal government has arguably created one overarching standard that covers OHS throughout the country.⁶⁵

OHS Law and WCB Injury Compensation

Tort liability in OHS has been largely replaced by a social insurance system established by workers’ compensation legislation. The WCB mandatory no-fault insurance scheme is the primary way that jurisdictions resolve OHS liability. Each Canadian province has enacted workers’ compensation laws and where applicable, coverage is compulsory. Injured employees receive compensation for injuries and illnesses that arise in the workplace or are related to their employment in the form of medical care and wage replacement benefits. Dependents receive survivor’s benefits in the case of fatalities. However, workers’ compensation is exclusive and employees and their dependents lose the right to sue under the system. Workers’ compensation does not usually grant damages for non-economic losses, such as pain and suffering. The exception is Ontario, where standardized non-economic compensation is awarded for permanently impaired workers.

The system is funded through employer premiums. Employer premiums are assessed based on injury levels associated with their industry and may vary up or down depending on the individual employer’s safety record. This type of variation “creates a link between

⁶³ At Westray, mine managers failed to follow proper safe mining procedures, workers continued to work despite their OHS concerns because of unemployment fears, and government regulators did not rigorously enforce OHS requirements. See Keith, *Workplace Health and Safety Crimes*, *supra* note 1 at 15-18.

⁶⁴ R.S.C. 1985, c. C-46, s. 217.1.

⁶⁵ Keith, *Workplace Health and Safety Crimes*, *supra* note 1 at 99.

workers' compensation cost and safety and health performance. At least one province tightens that link by specifying compliance with health and safety regulations as an explicit criterion for individualized assessments."⁶⁶ In addition to their OHS reporting duties, employers are also required under workers' compensation legislation to report workplace injuries and accidents to WCBs, although these reports differ in that they require medical details and do not normally lead to potential prosecutions, as OHS reports may.

The WCB no-fault system aims to both compensate for workplace injuries or illnesses and to deter injuries and illnesses by preventing incidents and accidents from occurring in the workplace. Advocates of no-fault liability systems "emphasize improved deterrence, or injury prevention, and prompt mitigation of injuries that do occur."⁶⁷ Further, "deterrence is meant to be increased through more systematic case finding, more expert resolution of claims, enhanced monitoring and education, and better economic incentives."⁶⁸ WCB programs are generally thought to be more efficient than the tort system at providing compensation. However, studies have also suggested that a no-fault system can create moral hazards:

- (1) "When premiums have not been fully experience-rated, employers have been less prone to provide a safe work environment;
- (2) Even when employers do promote safety, employees may become more careless when compensated for injuries;
- (3) When well insured, injured workers have a tendency to take longer to return to work."⁶⁹

Additional Federal Legislative Initiatives relating to OHS

The Canadian Centre for Occupational Health and Safety (CCOHS)

Established in 1978, the Canadian Centre for Occupational Health and Safety (CCOHS) is a federal government agency listed under Schedule II of the *Financial Administration Act* as an "independent departmental corporation," and is accountable to Parliament through the federal Minister of Labour. While created by statute, the agency is not legally involved in OHS accountability or enforcement, but rather is mandated to improve performance through advice, information and education. At the national level, the CCOHS serves as an OHS information repository, with an extensive advisory role for governing bodies (provincial, national and international) and for employers and employees. The CCOHS aims to find "the most effective methods of assembling, analyzing, and disseminating information and advice" to fulfill its mandate to prevent occupational diseases, injuries and fatalities and increase employer and employee

⁶⁶ Rabinowitz, *supra* note 8 at 419.

⁶⁷ See Randall R. Bovbjerg & Frank A. Sloan, "No-Fault for Medical Injury: Theory and Evidence" (1998) 67 U. Cin. L. Rev. 53 at 65 for a discussion of the WCB system as a model for medical injury reform.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* at 79.

awareness of OHS issues.⁷⁰ The agency is governed by a Council that has representatives from the provincial, federal and territorial governments, employers and workers.

The CCOHS acts as an accessible and credible source of information that gives meaning to the right to know. According to the CCOHS, person-to-person and on-line services have directly influenced how employers and employees approach safety concerns in the workplace.⁷¹ According to their own reports, over 75 percent of CCOHS clients claim to have instituted changes in the workplace in part as a result of visiting CCOHS.”⁷²

⁷⁰ Canada, *Canadian Centre for Occupational Health and Safety Report of the Council: April 1, 2003 to March 31, 2004* (Ottawa: CCOHS, 2004) at 1, online: CCOHS <http://www.ccohs.ca/ccohs/reports/AnnualReport_0304.pdf>.

⁷¹ *Ibid.* at 4.

⁷² *Ibid.* at 1, 4.