

Occupational Health and Safety in Canada and the United States

*Presentation to the*  
**ABA Labor and Employment Law Section**

**Occupational Health and Safety**

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I. Introduction

A recent report published by the Ontario Ministry of Labour presented the following statistics:

Worker injury is a daily occurrence in Ontario workplaces. In 1996, there were over 100,000 serious injuries, 241 deaths, and more than 6,000,000 working days lost. Each injury carries with it the enormous human cost borne by the victims, their families and friends.

There are also financial costs. In 1996, compensation benefits of \$2.4 billion were paid out, and indirect costs have been estimated to raise the annual total bill for workplace injury to over \$10 billion. These costs are shared by every business in Ontario. It is a debilitating and unnecessary drain on the provincial economy.<sup>1</sup>

In Canada, over 820,000 work injuries occur every year; one worker is injured on the job for every

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<sup>1</sup> Ontario, Ministry of Labour, *Preventing Illness and Injury - A Better Health and Safety System for Ontario Workplaces* (Toronto: Queen's Printer, January 1998) at 4 [hereinafter *Preventing Illness and Injury*].

9 seconds of work.<sup>2</sup> The data from the United States is also staggering. According to the Bureau of Labor Statistics, a total of 6.2 million injuries and illnesses were reported in private industry workplaces during 1996, with approximately 2.8 million injuries and illnesses resulting in lost workdays<sup>3</sup> and 6112 fatal occupational injuries.<sup>4</sup> The direct costs of work-related accidents amounted to \$115.9 billion in 1992.<sup>5</sup>

The often tragic consequences on workers and their families of workplace injuries and fatalities as well as the enormous toll they exact on state economies galvanized lawmakers in both the United States and Ontario to enact comprehensive health and safety legislation. In the United States, the *Occupational Safety and Health Act* (“*OSH Act*”) was enacted by Congress in 1970 to “assure safe and healthful working conditions for men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the states in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.”<sup>6</sup> In 1979, Ontario enacted the *Occupational Health and Safety Act* (“*OHS Act*”)<sup>7</sup> designed “to protect workers against health and

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<sup>2</sup> Canada, Office of the Minister of Labour, News Release 98-36, “National Mourning Day” (April 28, 1998).

<sup>3</sup> United States, U.S. Department of Labor, Bureau of Labor Statistics, News Release 97-453, “Workplace Injury and Illness Summary” (December 17, 1997).

<sup>4</sup> United States, U.S. Department of Labor, Bureau of Labor Statistics, News Release 97-266, “National Census of Fatal Occupational Injuries, 1996” (August 7, 1997).

<sup>5</sup> National Safety Council, cited in Gregory Watchman, “Safe and Sound: The Case for Safety and Health Committees under OSHA and the NLRA” (1994) 4 Cornell Journal of Law and Public Policy, 65 at 70.

<sup>6</sup> 29 U.S.C.A. § 650 (West 1998).

<sup>7</sup> R.S.O. 1990, c. O.1 [hereinafter *OHS Act*]. The *OHS Act* consolidated into one Act four statutes that had until 1979 constituted the occupational health and safety laws of Ontario. The *OHS Act* is representative of workplace health and safety legislation in other Canadian jurisdictions. See footnote 59, *infra*, and corresponding text.

safety hazards in the workplace”.<sup>8</sup> Although motivated by similar objectives, the legislative schemes created by American and Ontario law-makers to effect these objectives differed in a number of significant respects.<sup>9</sup> The most important difference between the two systems is that while the *OSH Act* relies exclusively on a central administrative agency (the Labor Department’s Occupational Safety and Health Administration or “OSHA”) to enforce the standards developed under the statute, the *OHS Act* adopts the concept of joint responsibility of labour and management, which recognizes that:

[W]hile there must be a capacity in government to regulate, and in appropriate cases to enforce compliance, greater emphasis must be placed on promotion of participation and voluntary compliance, by both labour and management in accordance with the program strategies which they themselves develop and manage.<sup>10</sup>

Ontario chose to implement joint or internal responsibility by mandating the creation of joint health and safety committees (“JHSCs”) in the workplace, comprised of worker and management representatives who meet regularly to deal with health and safety issues. In order to achieve workplace-based self-regulation, the *OHS Act* confers important powers on the JHSCs (and in particular, on those worker and management representatives who have received training in workplace health and safety) that enable them to detect and remedy workplace hazards. The conferral of such powers has created additional differences between the U.S. and Ontario occupational health and safety programs. For instance, Ontario workers participate to a greater extent in health and safety

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<sup>8</sup> Ontario, Ministry of Labour, Occupational Health and Safety Division, *A Guide to the Occupational Health and Safety Act* (Toronto, 1987) at 5.

<sup>9</sup> A large number of states have enacted occupational health and safety laws under the *OSH Act* provision authorizing federally-approved state programs that are as effective as the federal program: 29 U.S.C.A. § 667 (West 1998). However, this paper will examine only the system for regulation of occupational health and safety established under the *OSH Act*.

<sup>10</sup> Ontario, Legislative Assembly, *Debates*, (13 December, 1978) at 6095.

enforcement than their U.S. colleagues, and Ontario enforcement agents<sup>11</sup> have a broader authority to shut down an unsafe workplace than their U.S. counterparts under the *OSH Act*.

There are other differences between U.S. and Ontario occupational health and safety regimes in addition to those that flow directly from the use of JHSCs. For example, Ontario workers have a broader, more clearly defined right to refuse unsafe work than that provided to U.S. workers by the *OSH Act*. Prosecutions under the *OHS Act* generally result in significantly higher fines than under the *OSH Act* for similar health and safety violations. Enforcement under the *OSH Act* relies to a greater extent on formalized court procedures and provides more avenues for court review than the *OHS Act*.

The purpose of this paper is to examine the principal differences between the provisions of the *OSH Act* and the *OHS Act* and between how they have been interpreted, enforced and implemented to achieve the objective of assuring safe and healthful conditions for American and Ontario workers. To fully explain and understand the origins of these differences, however, it may be useful to briefly review some dissimilarities between the social, legal and political environments that gave birth to these legislative initiatives.

The Canadian and American industrial relations frameworks are fundamentally similar in that they assume “that workers have little or no right outside of collective bargaining to participation in decision making in the workplace”.<sup>12</sup> However, observers note that a number of important differences between industrial relations in the United States and Ontario have influenced the approach

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<sup>11</sup> Inspectors and certified JHSC members.

<sup>12</sup> Elaine Bernard, “Canada: Joint Committees on Occupational Health and Safety” in Joel Rogers & Wolfgang Streeck, eds., *Works Councils - Consultations, Representation and Cooperation in Industrial Relations*, (University of Chicago Press: Chicago, 1995) at 353.

of these two jurisdictions to the regulation of health and safety.<sup>13</sup>

First, Canadian governments have been more interventionist in their approach to industrial relations by assuming more active roles in the mediation and conciliation of disputes.

Second, unlike the *National Labor Relations Act* in the United States, there is no single labour code for the entire Canadian state, and each of the ten provinces, the two territories, and the federal government have developed their own labour standards, industrial relations and occupational health and safety legislation, with varying degrees of innovation and experimentation.

Third, the Canadian labour movement has succeeded, through its support of social-democratic governments in various provinces, notably Saskatchewan, Ontario and Quebec, to extend worker rights and raise labour standards and health and safety protections. The greater strength of the Canadian labour movement relative to its U.S. counterpart ensures that it is in a stronger position to protect these gains when governments change.<sup>14</sup>

Fourth, Canadian governments, employers and labour have more willingly embraced bipartism, the “joint participation of business and labour in public policy decisions, or in the operation of public programs.”<sup>15</sup> Governments have adopted bipartite approaches in the complex and sensitive

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<sup>13</sup> Bernard, *supra* note 12; see also Michael D. Parsons, “Worker Participation in Occupational Health and Safety: Lessons from the Canadian Experience” (1988) 13 *Labor Studies Journal* 22 at 24.

<sup>14</sup> Bernard, *supra* note 12 at 353; Parsons, *supra* note 13 at 24. See also U.S., United States General Accounting Office, *Occupational Safety and Health: Differences Between Program in the United States and Canada*, GAO/HRD-94-15FS, (Washington, December 1993) at 30 [hereinafter *GAO Report*]. The GAO notes that Canada’s rate of unionization in the private sector was 29% compared to 12% in the U.S., and that it may be easier to implement JHSCs in organized workplaces. Significantly, Canada’s unionization rate in the private sector has fallen to under 20%: see Waldie & Taylor, *infra*, at note 15.

<sup>15</sup> K.G. Waldie & D.H. Taylor, *Bipartism: The Case of Health and Safety in Ontario* (IRC Press: Queen’s University, Kingston, 1994) at 1.

area of labour relations and employment standards to: (a) “tap the expertise of those with first hand knowledge of how a particular sector operates, to ensure that public policies are practical and workable”; (b) “achieve ‘buy-in’ to policies and programs to forestall opposition and criticism”; and (c) to obtain the co-operation of the stakeholders in order to reduce costs and make programs work more effectively.<sup>16</sup> Labour participates in bipartite decision making to extend “its influence among the population its seeks to represent,” and to increase the resources available to service that population.<sup>17</sup> Finally, employers participate in bipartite initiatives in order to influence the design of public policies that will affect them, while reducing confrontation with labour.<sup>18</sup>

The bipartite approach to the regulation of occupational health and safety through the establishment of joint committees was initially resisted by both management and labour. While employers feared that participation in joint committees would lead to unionization, unions feared that joint committees, as alternative forums for employee participation, would threaten their role as worker representatives and reduce their influence.<sup>19</sup> In fact, Ontario’s experience with JHSCs suggests that a cooperative approach to health and safety regulation based on JHSCs can coexist with an adversarial system of collective bargaining. Bernard states that such coexistence is possible because:

[N]either organized labor nor management views the mandated joint committees as either a substitution for or facilitator of unionism. From the management perspective, experience has demonstrated that these committees do not become incipient organizing committees prompting employees to unionize. At the same time, they provide management with independent worker participation and voice in

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<sup>16</sup> *Ibid.*, at 2-3.

<sup>17</sup> *Ibid.*, at 3.

<sup>18</sup> *Ibid.*, at 4-5.

<sup>19</sup> *Bernard*, *supra* note 12 at 363-368.

decision making. From the union side, the legislation does not attempt to circumvent unions and by generally extending worker rights has augmented union influence in organized work sites. Unions, for the most part, do not fear the committees will become substitutes for unions because they believe that the full exercise of workers' rights and empowerment requires both self-organization (and independence from management influence) and resources that only the labor movement can deliver to employee representatives.<sup>20</sup>

While the use of JHSCs in enforcing occupational health and safety standards is a good example of bipartism at work, there are many other examples of public programs that mandate the joint participation of business and labour. Ontario's *Pay Equity Act*, for example, provides that employers and unions must endeavour to agree on a pay equity plan.<sup>21</sup> In unrepresented establishments, employees may review and submit comments to the employer on the proposed plan, and may file notices of objection to the plan to the Pay Equity Commission.<sup>22</sup> Where an employer and union cannot agree on a pay equity plan or where employees file objections, the matter is decided by the Pay Equity Commission.<sup>23</sup> Another example of legislation using the bipartite approach is the Canadian *Employment Equity Act*, which requires employers to consult employee representatives or the employees' bargaining agent on the implementation of employment equity (affirmative action) in the workplace and to collaborate on the preparation and implementation of an employment equity plan.<sup>24</sup>

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<sup>20</sup> Bernard, *supra* note 12 at 372.

<sup>21</sup> R.S.O. 1990, c. P.7, s. 14.

<sup>22</sup> *Ibid.*, s. 15(4),(7).

<sup>23</sup> *Ibid.*, s. 16(2).

<sup>24</sup> S.C. 1995, c. 44. See also the Ontario *Employment Equity Act*, S.O. 1993, c. 35, Repealed S.O. 1995, c. 4, s. 1, which required employers and employee bargaining agents to jointly collect workplace information, review employment policies and devise an employment equity plan: s. 16(2). The statute provided that where there was more than one bargaining agent, the employer and bargaining agents were to form a joint committee with equal union and management representation: s. 16(3),(4). Employers were required to consult unrepresented employees: s. 17.

It is likely that each of these factors -- a tendency towards greater state intervention, membership in a federation of political entities each with exclusive jurisdiction over its regime of labour standards and industrial relations, the presence of a strong union movement influential of government policy and a willingness to adopt bipartite approaches in public policy -- have influenced the development of health and safety legislation in Ontario. They will provide a background against which the occupational health and safety regimes of Ontario and the United States, as they are set out in the *OHSA* and *OSH Act*, respectively, may be compared.

Part II of this paper compares the scope or application of these two statutes: what obligations and duties does each statute create to ensure occupational health and safety in the workplace, and on whom does it impose these obligations? Part III examines the extent to which the *OHSA* and *OSH Act* allow for employees to participate in the regulation of health and safety in their places of work. The approach adopted in the *OSH Act* of regulation based on the command and control model is compared to the internal responsibility system enacted in the *OHSA*, and predicated on the shared assumption of responsibilities and exercise of powers by employers and employees to achieve a safe and healthful workplace. The composition, duties and powers of JHSCs under the *OHSA* are discussed, as is the effectiveness of JHSCs in reducing workplace hazards. Part IV reviews the essential role of compliance officers and health and safety inspectors in enforcing the occupational health and safety standards promulgated under the *OSH Act* and the *OHSA*. The powers of inspectors to conduct inspections, issue orders, and assess fines and penalties are canvassed, as are the defences available to employers wishing to contest these penalties. While Part V of the paper describes the right of workers under each statute to refuse unsafe work, Part VI examines the degree to which employees who exercise their rights under the legislation, including the right to refuse unsafe work, are protected by law against employer reprisals. Finally, Part VII of the paper explores the opportunities provided to workplace parties by the *OHSA* and *OSH Act* to review the decisions and orders of enforcement officials in the courts, including

penalties and stop work orders.

## II. Application of the Health and Safety Legislation

### A. Workplace parties subject to health and safety laws

The *OHS*A is generally broader in application than its American counterpart, imposing a wider range of obligations to a larger number of workplace parties. Its provisions apply not only to “employers” in the traditional sense, but to a number of workplace parties, including employees. The *OHS*A defines the term “employer” more broadly than does the *OSH Act*, giving its provisions a wider application.<sup>25</sup> Section 1 defines “employer” as:

a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services.

The provisions of the *OHS*A extend obligations to constructors, licensees, employers, supervisors, workers, owners, project owners, suppliers, and directors and officers of a corporation.<sup>26</sup> The *OHS*A explicitly includes the provincial Crown and Crown agencies.<sup>27</sup> However, as a provincial statute, the *OHS*A does not apply to federal or federally regulated employers, which include banks,

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<sup>25</sup> The *OHS*A does not apply to private residences and farms: *OHS*A, s. 3.

<sup>26</sup> *OHS*A, ss. 23-32.

<sup>27</sup> *OHS*A, s.2

broadcasters, airlines and transportation companies operating nationally or internationally.<sup>28</sup> The *OHSA* also applies to employers notwithstanding that the employer may be subject to other health and safety legislation.<sup>29</sup>

*OHSA* applies to “workers.” As a result, an individual need not be characterized as an “employee” in the traditional legal sense of the term to be covered by the Act, and other workers, such as persons working on contract or term assignments, are also protected.<sup>30</sup> The legislative intent that the Act be inclusive in its application is also reflected in the definition of “workplace”. The Act defines it expansively as “any land, premises, location or thing at, upon, in or near which a worker works”.<sup>31</sup>

The *OSH Act* defines “employer” as “a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.”<sup>32</sup> In turn, “commerce” is defined as:

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<sup>28</sup> The statute governing those employers is the *Canada Labour Code*, R.S.C. 1985, c. L-2: see for example *R. v. O.J. Pipelines* (1993), 21 W.C.B. (2d) 503 (Ont. Prov. Div.). The *Canada Labour Code* covers approximately 7 percent of Canadian workers, while the *OSH Act* covers 93 percent of U.S. workers: *GAO Report*, *supra* note 14 at 11.

<sup>29</sup> Conversely, the *OSH Act* states that “Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies, acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health”: 29 U.S.C.A. §653(b)(1) (West 1998).

<sup>30</sup> “[W]orker” means a person who performs work or supplies services for monetary compensation but does not include an inmate of a correctional institution or like institution or facility who participates inside the institution or facility in a work project or rehabilitation program: *OHSA*, s. 1.

<sup>31</sup> *OHSA*, s. 1.

<sup>32</sup> 29 U.S.C.A. § 652(5) (West 1998).

trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (...) or between points in the same State but through a point outside thereof.<sup>33</sup>

Significantly, the Occupational Safety and Health Review Commission (“OSHRC”) and the courts have interpreted the concept of interstate commerce liberally in order to further the policy goals of the *OSH Act*. The *OSH Act* clearly applies to employers operating nationally, who, almost by definition, affect interstate commerce. The statute has also been held to apply to local employers on the basis of their use of supplies produced out of state.<sup>34</sup> This issue has become less of a practical concern as individual states have introduced their own health and safety legislation. As of 1993, the *OSH Act* covered approximately 60% of the workforce, while 21 states operated their own health and safety programs.<sup>35</sup>

The *OSH Act* provides a broad if somewhat circular definition of “employee”: “an employee of an employer who is employed in a business of his employer which affects commerce”.<sup>36</sup> Unlike the *OHS Act*, the *OSH Act* does not require an employee to be working for “monetary compensation” in order to be able to invoke its protection, and has thus been held to apply to employees being

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<sup>33</sup> 29 U.S.C.A. § 652(3) (West 1998).

<sup>34</sup> *U.S. v. Dye Const. Co.*, C.A.10 (Colo.) 1975, 510 F.2d 78.

<sup>35</sup> States may operate their own programs under federal supervision if they are “at least as effective” as the federal standards: 29 U.S.C.A. § 667 (West 1998). State programs receive up to 50% of their funding from OSHA through general tax revenue: *GAO Report, supra* note 14 at 11-13. In addition, 29 C.F.R. § 1902 addresses State plans, and specifies at par. (d) “The policy of the Act is to encourage the assumption by the States of the fullest responsibility for the development and enforcement of their own occupational safety and health standards. This assumption of responsibility is considered to include State development and enforcement of standards on as many occupational safety and health issues as possible”.

<sup>36</sup> 29 U.S.C.A. § 652(6) (West 1998).

compensated by barter. On a literal interpretation, such persons would be beyond the scope of the *OHS*A.

Although the *OSH Act* does not define the term “workplace”, courts have held that it should be given its ordinary, common-sense meaning.<sup>37</sup>

## **B. Duties of the workplace parties**

Both the *OSH Act* and *OHS*A are preventative in intent: they attempt to remedy existing dangers in order to protect workers from future injury. The obligations imposed by the statutes illustrate their preventative intent. The *OSH Act* imposes a general duty on employers to provide a safe workplace, but also mandates that they comply with specific standards: Section 5(a) states:

(a) Each employer:

- (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
- (2) shall comply with occupational safety and health standards promulgated under this chapter.<sup>38</sup>

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<sup>37</sup> See for example *Frank Diehl Farms v. Secretary of Labor*, C.A.11 1983, 696 F.2d 1325, rehearing denied 704 F.2d 1253.

<sup>38</sup> 29 U.S.C.S. § 654(a) (West 1998).

The employer is thus responsible to ensure that the provisions of the Act are complied with, and court decisions have confirmed that the employer alone is ultimately responsible for workplace safety.<sup>39</sup> In order to prove a violation of the general duty clause, however, the Secretary of Labor must demonstrate that the employer had recognized the hazard, or that the hazard was recognized generally within the industry.<sup>40</sup>

The *OSH Act* does not expressly impose on employers an obligation to provide training to employees, but courts have held that the general duty clause requires an employer to take steps to prevent and suppress hazardous conduct by employees, including to provide them with proper training and supervision.<sup>41</sup> Furthermore, the statute places an affirmative duty on the Secretary of Labor to “provide for the establishment and supervision of programs for the education and training

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<sup>39</sup> See for example *Kane v. J.R. Simplot Co.*, C.A.10 (Utah) 1995, 60 F.3d 688, where the court held that the owner of a building under construction did not have a duty to protect an employee from recognized hazards related to scaffolding, as the contractor was in complete control of the work site. Also, *Horn v. C.L. Osborn Contracting Co.*, C.A.5 (Ga.) 1979, 591 F.2d 318, rehearing denied 595 F.2d 1221, where the court held that the general contractor on a project had no duty to provide the employees of the independent subcontractor with a safe working environment, and even *Teal v. E.I. DuPont de Nemours and Co.*, C.A.6 (Tenn.) 1984, 728 F.2d 799, which confirmed that every employer owes a duty to its employees to protect them from serious hazards, but strengthened the application of the provisions by stating that the employer owes that duty whether or not it is responsible for the hazard, and whether or not it has the best opportunity to abate the hazard.

<sup>40</sup> See for example *Whirlpool Corp. v. Occupational Safety and Health Review Commission*, C.A.D.C. 1981, 645 F.2d 1096, 207 U.A. App.D.C. 171, where the court held that the elements of a violation of the general duty clause are the likelihood of the hazard to cause death or serious bodily harm, recognition of the hazard either by the specific employer or generally within the industry, and the existence of a feasible method of abatement. In particular, differences can be noted with the requirement that the hazard have been “recognized” before liability will be imposed. In Ontario, liability has been recognized even when the hazard had not been previously identified by the company, the supplier, or the manufacturer; see for example *R. v. Plastic Impressions Inc.* (January 12, 1995), (Ont. Ct. (Prov. Div.)) [unreported], guilty plea before McNish J.P., for an accident resulting in permanent disability to the employee’s hand; \$25,000 fine imposed on joint submission. As a result of the accident the supplier proposed modifications to the equipment which was being used nation-wide.

<sup>41</sup> See for example *General Dynamics Corp., Quincy Shipbuilding Div. v. Occupational Safety and Health Review Com’n*, C.A.1 1979, 599 F.2d 453.

of employers and employees in the recognition, avoidance, and prevention of unsafe or unhealthful working conditions in employments covered by this chapter".<sup>42</sup> The Secretary must also adopt standards unless such standards would not improve the safety and health of specifically designated employees.<sup>43</sup> For example, in seeking to protect workers from toxic materials or harmful physical agents, the Secretary must set a standard that:

most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.<sup>44</sup>

The provisions of the *OHSA*, by contrast, extend duties to all of the parties listed.<sup>45</sup> The *OHSA* expressly lists certain obligations and allows for specific standards to be designated in the Regulations. Some of the duties listed are general. For example, constructors and licensees are obliged to ensure that they comply with the measures and procedures prescribed in the Act on the project or area within which they are operating.<sup>46</sup>

*OHSA* imposes duties of a more specific nature on employers. It lists 30 obligations, including that the employer comply with the measures and procedures prescribed in the Act, that the employer prepare and review at least annually a written occupational health and safety policy and develop and

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<sup>42</sup> 29 U.S.C.A. § 670(c) (West 1998).

<sup>43</sup> 29 U.S.C.A. § 655 (West 1998).

<sup>44</sup> 29 U.S.C.A. § 655(b)(1) (West 1998).

<sup>45</sup> *OHSA*, ss. 23-32.

<sup>46</sup> *OHSA*, ss. 23 and 24.

maintain a program to implement that policy, and that the employer appoint a supervisor who is a competent person.<sup>47</sup> The *OHS*A imposes a number of specific obligations on the employer with regard to toxic substances, including hazardous materials and new biological or chemical agents.<sup>48</sup> For instance, employers must identify and inventory hazardous materials, properly inform and train their employees, and inform the Director<sup>49</sup> when they are unable to identify the ingredients of a hazardous material as required by the regulations. In addition to the specific requirements to provide information and training to workers “exposed or likely to be exposed to a hazardous material or to a hazardous physical agent”, the *OHS*A imposes a general duty on the employer to “provide information, instruction and supervision to a worker to protect the health and safety of the worker.”<sup>50</sup>

The *OHS*A imposes obligations on workers and supervisors, who may be liable under the statute if they violate its provisions. Four affirmative duties are imposed on workers which provide, in part, that the employee must work in compliance with the provisions of the Act and the regulations, including using the equipment and protective devices required by his employer, and, significantly, that the employee must report to his supervisor or employer any contravention of the Act of which he is aware, and any absence or defect in equipment which might endanger a worker. The prohibitory duties mandate that the employee not create or contribute to a situation which might endanger a

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<sup>47</sup> *OHS*A, ss. 25(1)(c), 25(2)(j), and 25(2)(c) respectively. Section 1 defines “competent person”: a person who,

- (a) is qualified because of knowledge, training and experience to organize the work and its performance,
- (b) is familiar with this Act and the regulations that apply to the work, and
- (c) has knowledge of any potential or actual danger to health or safety in the workplace.

<sup>48</sup> *OHS*A, ss. 33-39, 41, 42.

<sup>49</sup> A “Director” is an inspector under the Act who has been appointed a Director for the purposes of the Act; s.1.

<sup>50</sup> *OHS*A, ss. 42 and 25(2)(2).

worker, including the removal of protective devices or the operation of equipment in a manner that might endanger a worker, and conduct of a general nature that might endanger an employee.<sup>51</sup>

The duties on workers apply to supervisors as they also fall within the definition of “worker”. However, the *OHSA* imposes a number of additional duties on supervisors.<sup>52</sup> Supervisors must ensure that workers work in the manner and with the protective devices, measures and procedures required by the Act, and that they use or wear the equipment, protective devices or clothing required to be used or worn by their employer. In addition, supervisors must advise workers of potential or actual dangers to their health or safety of which the supervisors are aware, provide workers with written instructions as to the measures to be taken for their protection, and take every precaution reasonable in the circumstances to protect the workers.

The *OHSA* expressly provides that a number of workplace parties can be found liable for a violation of the Act. It is not unusual that individual supervisors be found liable along with the employer, and fined personally, or be found solely liable in cases where the employer could not have known of a breach because the supervisor failed to inform it.<sup>53</sup>

The direct imposition of duties on employees and supervisors reflects a fundamental difference between the *OHSA* and the *OSH Act*. The *OSH Act* places the responsibility of ensuring a safe workplace for employees on the employer. The duties of the employee under the *OSH Act* are limited to compliance “with occupational safety and health standards and all rules, regulations, and orders

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<sup>51</sup> *OHSA*, s. 28. S.28(2)(c) mandates that the worker not “engage in any prank, contest, feat of strength, unnecessary running or rough and boisterous conduct”.

<sup>52</sup> *OHSA*, s. 27.

<sup>53</sup> See for example *R. v. Kenaidan Contracting Ltd.* (January 12, 1995), (Ont. Ct. (Prov. Div.)) [unreported].

issued pursuant to this chapter which are applicable to his own actions and conduct”.<sup>54</sup> Under the *OHSA*, by comparison, the responsibility to ensure a safe workplace is shared by all the workplace parties. The *OHSA* imposes affirmative duties in addition to obligations for compliance. It is premised on the view that a safe workplace cannot be maintained without the full co-operation and commitment of all parties, including suppliers, employees and senior management. In furtherance of this view, the statute mandates that employers establish in their workplaces JHSCs comprised of non-management and management employees.<sup>55</sup>

Although there may be a number of possible explanations for the imposition by the *OHSA* of shared responsibilities, the most notable may be the existence in Ontario of a public healthcare system. When employers fail to meet the standards set out in the *OHSA* and regulations, it is not the employer or employee alone who bear the costs. Nonetheless, there are obvious costs to the employee, and the employer is hurt both by the lost employee time, necessary accommodations that must be made, as well as through increased contributions to the Worker’s Safety Insurance Board.<sup>56</sup> Accordingly,

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<sup>54</sup> 29 U.S.C.A. § 654(b) (West 1998). See for example *Skidmore v. Travelers Ins. Co.*, E.D.La. 1973, 356 F.Supp. 670, affirmed 483 F.2d 67, where the court held that the obligations of the employer did not extend liability for the performance of that duty to an officer or other employees of the employer, and the following year *Buhler v. Marriott Hotels Inc.*, E.D.La.1974, 3890 F.Supp. 999, rejecting anything to the contrary in *Skidmore v. Travelers Ins. Co.*, and confirming that the provisions impose duties to on the employees as well as employers to comply with the standards and rules, regulations and orders.

<sup>55</sup> *OHSA*, s. 9(4).

<sup>56</sup> The *Worker’s Safety and Insurance Board* (previously the *Workers’ Compensation Board*) is funded by employer assessments and its investments. Since 1994 the WCB has operated at a positive net income. In 1996 Assessment Revenues made up 71.1% of the WCB’s revenues, \$2,610 million on the basis of a total assessable payroll of \$86,844 million. Assessment revenue is determined on the basis of actual and estimated payrolls for employers included in Schedule 1 of the *Worker’s Compensation Act*, R.S.O. 1990, c.W.11., and adjusted for experience where relevant. Included in the assessment revenue are reimbursements by self-insurers for claims paid, as well as the cost of administering those claims. In 1996, as a result of economic growth, assessable payrolls increased by \$779 million, or 0.9%. Gross assessments, however, did not increase due to a shift of revenue from higher assessment rate industries to industries with lower assessment rates. Total assessment revenue decreased by \$43 million, or 1.6%, compared with 1995. Total WCB revenue increased by \$75 million, or 2.3%, as investment income more

all workplace parties have an interest in reducing the risk of disabling injuries.

### III. Employee Participation in the Regulation of Workplace Health and Safety

#### A. Different Models of Regulation

At the end of the 19th century, most industrialized economies adopted the administrative or “command and control” model of regulation under which the state “assumed responsibility for designing and implementing formal safety standards and enforcing them through a professional inspectorate.”<sup>57</sup> For example, although the *OSH Act* contemplates “encouraging joint labor-management efforts to reduce injuries and disease arising out of employment,”<sup>58</sup> it sets out an administrative regulatory system that relies primarily on inspections and enforcement measures undertaken by a central agency - the OSHA.

In Canada, health and safety legislation in most provinces was initially “a patchwork of divergent statutes and administrations” each focusing on a particular industry. All Canadian jurisdictions had adopted the administrative regulatory model based on state standard-setting and

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than offset the decline. The decline in the assessment revenue was attributed to higher provisions for experience rating net refunds, and lower reimbursements from self-insurers. Experience rating net refunds increased by \$50 million, or 20.2 %, and Schedule 2 reimbursements declined by \$18 million, or 6.8%, as a result of fewer accidents sustained by workers. The average rate of assessment in 1996, per \$100 of payroll, was \$3.00, which was unchanged from the previous two years, and other than a \$2.95 assessment in 1993, the lowest it has been since 1988: Ontario, Workers’ Compensation Board of Ontario, 1996 Annual Report (Toronto: 1997).

<sup>57</sup> W. Lewchuk, A.L. Robb & V. Walters, “The Effectiveness of Bill 70 and Joint Health and Safety Committees in Reducing Injuries in the Workplace: *The Case of Ontario*” (1996) XXII:3 Canadian Public Policy, 225.

<sup>58</sup> 29 U.S.C.A. § 651 (West 1998).

enforcement.<sup>59</sup> In 1972, the New Democratic government of Saskatchewan introduced legislation which, for the first time in North America, “established the workers *right to know* about hazardous material, the *right to refuse* dangerous work, and the *right to participate* in decision-making concerning the work environment through mandatory worker-management health and safety committees.”<sup>60</sup> Most Canadian jurisdictions moved throughout the 1970s and 1980s to institute legislation based on the Saskatchewan model. In Ontario, this became known as the “internal responsibility” model of workplace regulation.

The Internal Responsibility System is based on the premise that “it is the workplace stakeholders who are best able to assess and determine the particular workplace hazards and health and safety needs of the workers and to provide the most localized, specific and effective solutions for reducing workplace hazards, risks to workers, injuries and accidents.”<sup>61</sup> Legislators adopted this system of workplace regulation when they realized that regulation by “command and control” alone could not effectively ensure occupational health and safety:

With the rising toll of injury and disease came concern about the effectiveness of existing regulatory and enforcement mechanisms. The inspectorate seemed unable to monitor workplace conditions adequately, for the number of inspectors was small, and consequently, the frequency with which they could visit work sites was limited. Even if the number of inspectors and inspections were to be increased (with a necessary increase in public expenditure), inspections can never be an adequate prevention mechanism, for the workplace in compliance with regulations today may be in violation tomorrow

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<sup>59</sup> Bernard, *supra* note 12 at 353.

<sup>60</sup> Bernard, *supra* note 12 at 354.

<sup>61</sup> N. Keith, Ontario Health and Safety Law, (Aurora, Ontario: Canada Law Book, April 1998) at § 1:8200.

because of faulty equipment or careless housekeeping.<sup>62</sup>

Under the Internal Responsibility System, the role of the state becomes one of “ensuring that an institutional framework exists for workplace-based self-regulation, advising labour and management on safety issues, and acting as the arbitrator of last resort in cases where workplace-based regulation breaks down.”<sup>63</sup>

The cornerstone of the Internal Responsibility System and the main instrument of workplace-based self-regulation is the institution of joint health and safety committees, consisting of labour and management representatives who meet on a regular basis to deal with issues of health and safety. The composition and duties of JHSCs under the *OHSA* are reviewed in the following section.

## **B. Employee Participation under the *OHSA*: JHSCs and HSRs**

### **1. Requirement**

The JHSC is the principal instrument by which labour and management regulate occupational health and safety in the workplace. *OHSA* requires employers to establish and maintain a JHSC<sup>64</sup> at workplaces at which twenty or more employees are regularly employed, and in all workplaces with respect to which a designated substance regulation (e.g. regulating the use of arsenic, asbestos,

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<sup>62</sup> K. Swinton, “Regulating Occupational Health and Safety: Worker Participation through Collective Bargaining and Legislation” in Geoffrey England, ed., *Essays in Collective Bargaining and Industrial Democracy* (Don Mills, Ont.: CCH, 1983) 43 at 51.

<sup>63</sup> Lewchuk et al., *supra* note 57 at 226.

<sup>64</sup> *OHSA*, s. 9(4).

benzene, etc.) applies.<sup>65</sup> At workplaces numbering over 5 employees and for which a JHSC is not required, the *OHS*A requires employers to cause the workers to select at least one health and safety representative (“HSR”).<sup>66</sup> Most of the powers, duties and responsibilities conferred by the *OHS*A on JHSCs are also exercised by HSRs.

## 2. Composition

The *OHS*A requires that JHSCs be composed of 4 members for workplaces numbering over 50 employees and of 2 members for smaller workplaces.<sup>67</sup> The worker representatives on the JHSC, who must make up at least half of the committee, must be selected by the workers; if a union represents the workers, the representatives are selected by the trade union.<sup>68</sup>

JHSCs are co-chaired by a member selected by the worker representatives and a member selected by the management representatives. The *OHS*A requires that the employer ensure that at least one worker representative and one management representative are “certified”.<sup>69</sup> Certified members attend certification training in health and safety where they are instructed about ensuring health and safety in the workplace, including the responsibilities of joint committees, the relevant

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<sup>65</sup> *OHS*A, s. 9(2). Construction sites at which work is expected to last less than 3 months are excluded from this requirement: *OHS*A, s. 9(1)(a).

<sup>66</sup> *OHS*A, s. 8(1).

<sup>67</sup> *OHS*A, s. 9(6).

<sup>68</sup> *OHS*A, s. 9(8).

<sup>69</sup> *OHS*A s. 9(12).

legislative provisions, job safety analysis, inspections, and accident investigations.<sup>70</sup> The Workplace Safety and Insurance Board (“WSIB”),<sup>71</sup> the agency that administers the workers’ compensation programs in Ontario, also sets training standards, approves training programs and funds and supervises the various agencies that provide health and safety training.<sup>72</sup> The *OHSA* confers on certified members of a JHSC special duties and responsibilities, including the power to issue stop work orders in certain circumstances.<sup>73</sup>

### 3. Powers, Duties and Responsibilities

The *OHSA* sets out the different powers of JHSCs. These include the power to:

- (a) identify situations potentially dangerous for workers;
- (b) make recommendations to the employer to improve worker health and safety;
- (c) recommend to the employer and workers the establishment and monitoring of health and safety programs;
- (d) obtain information from the employer respecting the identification of potential or existing workplace hazards and respecting health and safety experience or work practices in similar industries that is within the employer’s knowledge;
- (e) obtain information from the employer concerning the testing of

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<sup>70</sup> Canadian Centre for Occupational Health and Safety (CCOHS), “How is a Joint Health and Safety Committee Created?”, [www.ccohs.ca/oshanswers/hscommittees/creation.htm/](http://www.ccohs.ca/oshanswers/hscommittees/creation.htm/) at 2.

<sup>71</sup> Formerly the Workers’ Compensation Board.

<sup>72</sup> *Preventing Illness & Injury*, *supra* note 1 at 7.

<sup>73</sup> *OHSA*, s. 45.

equipment or biological, chemical or physical agents for purposes of occupational health and safety;

- (f) be consulted about and have a designated employee representative be present at the outset of such testing, if the designated member believes this is necessary.<sup>74</sup>

The employer must provide a written response to the JHSC's written recommendations within 21 days.<sup>75</sup> The response must contain a timetable to implement the recommendations the employer agrees with and the employer's reasons for disagreeing with those recommendations it does not accept.<sup>76</sup>

The responsibilities of JHSCs include,

- ! to meet at least once every 3 months;<sup>77</sup>
- ! to maintain and keep minutes of its proceedings and make these available for examination and review by inspectors;<sup>78</sup>
- ! to designate a committee member and if possible, a certified member, to inspect the workplace on at least a monthly basis, and to inform the committee of workplace dangers or hazards;<sup>79</sup>

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<sup>74</sup> *OHSA*, s. 9(18). Powers analogous to those set out in paragraphs a, d, e and f are conferred on HSRs under ss. 8(10) and 8(11).

<sup>75</sup> *OHSA*, s. 9(20); a corresponding obligation exists for recommendations of a HSR: *OHSA*, s. 8(12).

<sup>76</sup> *OHSA*, s. 9(21); this also applies to HSRs: *OHSA*, s. 8(13).

<sup>77</sup> *OHSA*, s. 9(33).

<sup>78</sup> *OHSA*, s. 9(22).

<sup>79</sup> *OHSA*, ss 9(23)-9(30); s. 9(27) provides that where a monthly inspection is not practical, the designated member must inspect the workplace once a year, and at least a part of the workplace each month. HSRs are

- ! to establish an inspection schedule;<sup>80</sup>
- ! to investigate workplace accidents;<sup>81</sup>
- ! to investigate work refusals;<sup>82</sup>
- ! to participate in investigations and inspections conducted by the Ministry of Labour; and<sup>83</sup>
- ! to designate a member to represent workers when industrial hygiene testing is carried out.

The *OHSA* confers on certified members a number of additional responsibilities that are not conferred on HSRs. They are entitled to investigate complaints regarding the existence of dangerous workplace circumstances.<sup>84</sup> Certified members also have the power to initiate bilateral or unilateral work stoppages. In a bilateral work stoppage, a certified member who has reason to believe that dangerous circumstances exist at a workplace may request that a supervisor investigate the matter.<sup>85</sup> If the certified member has reason to believe that the dangerous circumstances persist following the supervisor's intervention, he or she may request that a certified member representing the other

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under similar obligations: *OHSA*, ss. 8(6)-(7).

<sup>80</sup> *OHSA*, s. 9(28); in workplaces with a HSR, the employer and HSR must agree to an inspection schedule: *OHSA*, s. 8(8).

<sup>81</sup> *OHSA*, s. 9(31); the corresponding provision for HSRs is s. 8(14).

<sup>82</sup> *OHSA*, s. 43(4),(7); these provisions also apply to HSRs.

<sup>83</sup> *OHSA*, s. 54(3); this provision applies also to HSRs.

<sup>84</sup> *OHSA*, s. 48. "Dangerous circumstances" is defined to include situations where a provision of the Act or regulations is being contravened, the contravention poses a danger or hazard to a worker, and the danger or hazard is such that any delay in controlling it may seriously endanger a worker: *OHSA*, s. 44.

<sup>85</sup> *OHSA*, s. 45(1).

workplace party investigate the matter.<sup>86</sup> If the two certified members agree that dangerous circumstances exist, they may direct the employer to stop the unsafe work, and the employer must immediately comply under this direction.<sup>87</sup> If the certified members disagree, either certified member may request that an inspector investigate the matter. The inspector investigates and renders a written decision.<sup>88</sup>

Where a certified member or an inspector has reason to believe that the bilateral work stoppage procedure is not sufficient to protect the workers at a workplace, he or she may apply to an adjudicator for a declaration that the unilateral work stoppage procedures apply to that workplace.<sup>89</sup> This proceeding allows a certified member to unilaterally direct the employer to stop work if he or she finds that dangerous circumstances exist.<sup>90</sup> The employer must immediately comply with this direction, and thereafter investigate the matter with the certified member.<sup>91</sup> If the employer and the certified member disagree about the existence of dangerous circumstances, either party may request an inspector to investigate and decide the matter.<sup>92</sup> Between 1992 and 1997, inspectors issued between 2289 to 3201 stop work orders yearly.<sup>93</sup>

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<sup>86</sup> *OHSA*, 45(2).

<sup>87</sup> *OHSA*, s. 45(4), (5).

<sup>88</sup> *OHSA*, s. 45(6).

<sup>89</sup> *OHSA*, s. 46(1).

<sup>90</sup> *OHSA*, s. 47(2).

<sup>91</sup> *OHSA*, s. 47(3)-(4).

<sup>92</sup> *OHSA*, s. 47(5).

<sup>93</sup> Conversation with Ministry of Labour officials, July 1998.

The *OHSA* allows the employer, workers, or trade union representatives to file complaints against certified members who recklessly or in bad faith exercised the stop work powers. Such complaints are heard by an adjudicator who may decertify the member.<sup>94</sup>

The *OHSA* imposes a number of duties on employers with regard to the JHSCs. Employers are responsible for establishing and maintaining a JHSC at the workplace. They must also ensure that at least one worker representative and one employer representative are certified. The employer must pay members their regular or premium wages for the time they spend obtaining certification training.<sup>95</sup> Employers must respond promptly to JHSC recommendations. They must post the names and locations of JHSC members.<sup>96</sup> Employers must afford the JHSC members time to prepare for meetings, to attend meetings and to carry out their inspection duties under the *OHSA* and must remunerate the members at their regular or premium rate.<sup>97</sup> Certified members exercising duties under the stop work provisions of the *OHSA* are also deemed to be working and entitled to remuneration.<sup>98</sup>

### **C. Employee Participation under the *OSH Act***

The *OSH Act* itself provides limited opportunities for employee involvement in enforcing the

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<sup>94</sup> *OHSA*, s. 49.

<sup>95</sup> *OHSA*, s. 9(36).

<sup>96</sup> *OHSA*, s. 9(32).

<sup>97</sup> *OHSA*, ss. 9(34) - (35); a comparable duty is imposed with respect to HSRs: *OHSA*, s. 8(15).

<sup>98</sup> *OHSA*, s. 48(2).

*Act* and ensuring occupational health and safety in the workplace.<sup>99</sup> Employees or employee representatives who believe that a violation of a safety and health standard exists may request an inspection by notifying *OHSA*.<sup>100</sup> They may also notify an *OHSA* inspector of violations before or during the inspection.<sup>101</sup> An employee representative may accompany an *OHSA* inspector on an inspection.<sup>102</sup> However, this “walk around privilege” is rarely exercised in non-unionized workplaces.<sup>103</sup> In addition, employers are under no obligation to pay employee representatives for the time they spend on the walkaround.<sup>104</sup> Where the Secretary of Labor decides to issue a citation for a violation, employees or an employee representative may challenge the reasonableness of the period of time fixed in the citation for the abatement of the violations.<sup>105</sup> If an employer contests a citation before an administrative law judge from the Occupational Safety and Health Review Commission (“*OSHRC*”), affected employees or their representative may participate in the hearing.<sup>106</sup> Because the Secretary of Labor has unfettered discretion to withdraw or settle a citation, the settlement process rarely involves employees. Employees and employee representatives are given

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<sup>99</sup> See generally Louise Sadowsky Brock, “Overcoming Collective Action Problems: Enforcement of Worker Rights” (1997) 30:4 *U. of Michigan J.L.Reform* 781 at 788-794.

<sup>100</sup> 29 U.S.C.A. § 657(f)(1) (West 1998).

<sup>101</sup> 29 U.S.C.A. § 657(f)(2) (West 1998).

<sup>102</sup> 29 U.S.C.A. § 657(e) (West 1998).

<sup>103</sup> D. Weil, “Enforcing *OHSA*: The Role of Labor Unions” (1991) 30:1 *Industrial Relations* 20 at 28-30. On average, 60% of inspections in unionized workplaces were carried out in the presence of an employee representative, compared to 3% in non-unionized workplaces. In addition, *OHSA* inspectors tended to investigate workplace conditions more vigorously and for longer periods of time in unionized workplaces.

<sup>104</sup> Brett R. Gordon, “Employee Involvement in the Enforcement of the Occupational Safety and Health Laws of Canada and the United States” (1994) 15 *Comp. Lab.L.J.* 527 at 545.

<sup>105</sup> 29 U.S.C.A. § 659(c) (West 1998).

<sup>106</sup> 29 U.S.C.A. § 659(c) (West 1998); 29 C.F.R. § 2200.20.

notice of a settlement agreement and have 10 days to file an objection to the reasonableness of any abatement time. The OSHRC provides the employees or employee representatives an opportunity to be heard on the objection<sup>107</sup>. Finally, employees who believe they have suffered discrimination at the hands of their employer for exercising their rights under the *OSH Act* may file a complaint with OSHA.<sup>108</sup> The low level of employee participation mandated by the *OSH Act* is blamed by some commentators for the fact that few workers know their rights under the *Act*.<sup>109</sup>

Although the *OSH Act* does not mandate the creation of JHSCs or employee participation beyond that outlined above, OSHA has implemented voluntary protection programs (VPP) that encourage employers to develop safety management programs that go beyond OSHA standards.<sup>110</sup> In return for the employer agreeing to operate an effective health and safety program, OSHA, after verifying that the program meets VPP criteria, removes the workplace from routine scheduled inspection lists. OSHA periodically reassesses the program to ensure continued compliance with VPP criteria.<sup>111</sup> Before OSHA accepts the employer's application to participate, an employer must provide assurances that:

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<sup>107</sup> 29 C.F.R. § 2200.100(c); see generally Gordon, *supra* note 104 at 546.

<sup>108</sup> 29 U.S.C.A. § 660(c) (West 1998).

<sup>109</sup> Gordon, *supra* note 104 at 547: A survey of OSHA inspectors revealed that 80% of inspectors believed that fewer than half of all workers were informed of their rights under the *OSH Act*.

<sup>110</sup> OSHA, *An Overview of VPP*, [www.osha.gov/oshprogs/vpp/overview.html](http://www.osha.gov/oshprogs/vpp/overview.html). OSHA developed VPP pursuant to 29 U.S.C.A. § 651(b)(1) (West 1998) which states in part that the purpose of the *OSH Act* is to ensure workers safe and healthful working conditions "by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions".

<sup>111</sup> *An Overview of VPP*, *supra* note 110.

- ! the employer will explain to its employees their rights under the *OSH Act* and the VPP;
- ! the employer will correct all hazards in a timely manner;
- ! employees who are given health and safety duties will be protected from discriminatory actions for exercising these duties; and
- ! employees will have access to inspection and investigation results on request.

The VPP also impose a variety of reporting requirements on employer participants.<sup>112</sup>

The “Star” VPP comprises employers with exemplary safety records that have shown lost work day rates and injury incidence rates below their industry average. Star participants in the construction industry must operate joint labour-management safety committees that have been in operation for at least one year, have an equal number of employee and management representatives, meet on a regular basis, inspect the workplace at least monthly and have access to relevant safety and health information.<sup>113</sup> Participants in other industries must encourage meaningful employee participation in identifying and resolving health and safety hazards, and may do so through joint committees. All Star participants must:

- (1) demonstrate “top-level management commitment to occupational safety and health”;
- (2) establish a qualified written safety and health program;
- (3) establish safety and health training for their supervisors and employees, and

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<sup>112</sup> OSHA, *Statement of Commitment*, [www.osha.gov/oshprogs/vpp/original/part1.html](http://www.osha.gov/oshprogs/vpp/original/part1.html).

<sup>113</sup> Gordon, *supra* note 104 at 550.

- (4) review annually their safety and health program to determine any necessary changes.<sup>114</sup>

There are presently 365 VPP administered at the Federal level by OSHA.<sup>115</sup> OSHA reports that in 1994, injury incidence at the participating workplaces were 55% below their industry average.<sup>116</sup>

OSHA has designed another voluntary compliance program, known as the “High Injury/Illness Rate Targeting System and Cooperative Compliance Program” or “CCP”.<sup>117</sup> Under this program, OSHA offers companies with the highest illness and injury rates an opportunity to partner with OSHA to identify and correct safety hazards cooperatively. Employers agree to work toward a significant reduction of injuries and illnesses by implementing a comprehensive safety and health program designed in conjunction with OSHA, and to involve workers in both the identification and correction of hazards and in the operation of the workplace’s safety and health program. In return, OSHA removes the employer’s name from its schedule of unannounced inspections. Although the CCP was to take effect in November, 1997, the program was stayed on February 17, 1998 by an order of the Court of Appeals (District of Columbia) pending the hearing of a challenge brought by the U.S. Chamber of Commerce to OSHA’s authority under the *OSH Act* to implement the targeted enforcement program.<sup>118</sup>

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<sup>114</sup> Gordon, *supra* note 104 at 550.

<sup>115</sup> OSHA, [www.osha.gov/oshprogs/vpp/fedgrow.html](http://www.osha.gov/oshprogs/vpp/fedgrow.html).

<sup>116</sup> OSHA, [www.osha.gov/oshprogs/vpp/benefits.html](http://www.osha.gov/oshprogs/vpp/benefits.html).

<sup>117</sup> OSHA Directive #CPL-2-0.119.

<sup>118</sup> Statement of Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health, February 17, 1998. In the interim, OSHA has proceeded with an alternative enforcement strategy that targets high hazard workplaces but does not include the impugned partnership element: Statement of Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health, April 6, 1998.

Many workplaces in the United States voluntarily use joint safety and health committees. Often, these are agreed upon by unions and employers in collective bargaining agreements. However, many of these committees have been characterized as “paper tigers” because they “lack credibility, resources, and training and are, therefore, unable to make a substantial contribution to raising safety consciousness or improving safety conditions in the workplace.”<sup>119</sup> Gordon notes that safety committees in the U.S. automotive industry have a primarily advisory role, and do not keep records, make monthly inspections or accompany workers on work refusal investigations.<sup>120</sup> A 1986 survey by the U.S. Bureau of National Affairs found that while 49% of sampled contracts for all industries provided for joint safety and health committees, only 65% provided for periodic meetings, 36% provided that members be paid for time spent on committee activities, and less than half provided for periodic inspections.<sup>121</sup> Few joint committees were empowered to shut down unsafe machinery.<sup>122</sup> A large proportion of non-unionized workplaces in the United States have also established joint committees. A 1993 study by the National Safety Council found that 75% of firms employing over 50 workers and 31% of firms employing fewer than 50 workers had set up committees.<sup>123</sup>

Finally, a number of U.S. states mandate the use of safety and health committees. While most state safety and health statutes require joint committees for employers with more than a specified number of employees, a large number also impose this requirement on employers with high lost

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<sup>119</sup> Ruth Ruttenberg, *The Role of Labor-Management Committees in Safeguarding Worker Safety and Health*, (Washington: U.S. Department of Labor, 1989) at 1.

<sup>120</sup> Gordon, *supra* note 104 at 552.

<sup>121</sup> Ruttenberg, *supra* note 119 at 6-10.

<sup>122</sup> *Ibid.*, at 11.

<sup>123</sup> Watchman, *supra* note 5 at 78.

workday or injury rates or high workers' compensation experience ratings.<sup>124</sup> Some state programs do not require JHSCs to carry out inspections.<sup>125</sup>

#### **D. Effectiveness of the Internal Responsibility System**

A number of empirical studies have been conducted to determine the effect of joint health and safety committees on improving health and safety in Ontario workplaces. Overall, these studies demonstrate that while the use of JHSCs is linked to reduced workplace injury rates, merely mandating employers to create JHSCs is not a guarantee of a healthier and safer workforce.

Tuohy and Simard used information gathered from over 900 Ontario workplaces in addition to administrative data on workplace injuries, inspections, and orders from 1983 to 1987 to study the effect of JHSCs on injury rates, enforcement rates, and problem-solving in the workplace.<sup>126</sup> The authors of the study found that: “[c]ommittees with bipartite structures, broad scopes of activities and institutionalized procedures reduce injury rates and improve problem-solving capabilities at the workplace level.”<sup>127</sup> Although the authors determined that in general, lower relative injury rates were explained mostly by the presence of an experienced, stable workforce, committee “capacity” and the bipartite structure of committees had a substantial impact in reducing injuries.<sup>128</sup> Significantly, the

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<sup>124</sup> Watchman, *supra* note 5 at 78-80.

<sup>125</sup> *GAO Report*, *supra* note 14 at 27.

<sup>126</sup> Carolyn Tuohy & Marcel Simard, *The Impact of Joint Health and Safety Committees in Ontario and Quebec*, (Canadian Association of Administrators of Labour Law, January 1993).

<sup>127</sup> *Ibid.*, Executive Summary, at 1. Institutionalized procedures included, for example, scheduling regular meetings, keeping regular minutes, posting committee member names and posting minutes.

<sup>128</sup> *Ibid.*, at 5: The authors defined “committee capacity” as including factors such as a broad scope of activity, a broad scope of information and training for JHSC members, use of institutionalized procedures, joint

authors found that where unions were present in the workplace, committee capacity as well as the “size and depth” of management representation were even more strongly related to lower injury rates than was the presence of a stable, experienced workforce.<sup>129</sup> Finally, the study also determined that older, more established JHSCs with a broader scope of activity, institutionalized procedures, a higher level of member training and bipartite structures were more likely to generate recommendations on health and safety issues that were acceptable to management.<sup>130</sup>

The authors concluded that legislative initiatives to ensure that JHSCs follow institutionalized procedures, have a bipartite composition, and have well trained and well informed members will likely reduce injury rates and improve the capacity of workplaces to develop and implement non-governmental solutions to their health and safety problems. In addition, the authors noted that the results of their study indicate that inspectors should target workplaces for inspection based not on the age of JHSCs, which was not directly related to lower injury rates, but on their “capacity”.

In 1994, the Ontario Workplace Health and Safety Agency (“WHS”) commissioned a survey of 1800 worker co-chairs and 1800 management co-chairs of JHSCs in Ontario workplaces.<sup>131</sup> The survey revealed that overall, the internal responsibility system was functioning well in Ontario workplaces. Most JHSCs complied with *OHS*A requirements regarding their composition and institutional procedures: of the JHSCs that responded, 96% had equal worker/management

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training of worker and management representatives and decision-making status.

<sup>129</sup> *Ibid.*, at 8; the extent of management representations was measured by the number of management representatives attending JHSC meetings, the presence of medical personnel, and participation of the industrial relations director.

<sup>130</sup> *Ibid.*, at 16.

<sup>131</sup> SPR Associates Inc., *Highlights of the 1994 Ontario Survey of Occupational Health and Safety and Joint Health and Safety Committees*, (Toronto: November 1994).

representation, 82% reported that member names were posted in their workplaces, 80% met on 4 or more occasions every year, over 94% took written minutes of meetings, over 89% always/usually reached agreement on health and safety issues, over 85% always/usually made recommendations, close to 85% circulated minutes to their members and over 77% posted the minutes in the workplace.<sup>132</sup> The authors found that worker and management members of JHSCs were more likely to engage in cooperation rather than in bargaining-type strategies. Significantly, over 40% of management and worker members reported that their JHSC work had improved labour management relations. Close to 90% of management members and over 80% of employee members reported that their relationships on the JHSCs were trusting, cooperative, friendly and reflected mutual respect. In fact, 70% of management members and 63% of worker members stated that they would maintain JHSCs even if they were not required by law.<sup>133</sup>

On a less positive note, the study found that a large proportion of JHSCs reported that their members lacked occupational health and safety training. In fact, over 35% of management members and 41% of employee members reported that they had received no training.<sup>134</sup> In addition, the JHSC co-chairs reported that 50% of managers and 57% of employees who were not members of joint committees had no health and safety training.<sup>135</sup> The authors of the study also found that JHSCs did not perform the number of inspections required by the *OHS*A. Only 35% of JHSCs reported monthly inspections. Almost as many reported that they performed less than 4 inspections per year.<sup>136</sup> A substantial majority of JHSCs reported that inspections followed up on previously reported problems,

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<sup>132</sup> *Ibid.*, at 12-15.

<sup>133</sup> *Ibid.*, at 32-35.

<sup>134</sup> *Ibid.*, at 16-17.

<sup>135</sup> *Ibid.*, at 20-21.

<sup>136</sup> *Ibid.*, at 24.

resulted in recommendations to the JHSC, reviewed the results of past inspections, resulted in advisories regarding unsafe behaviour and in written reports. However, only 50% of inspections were reported to involve worker interviews, machinery was examined in 45% of inspections, processes were examined in 37% of inspections and only 32% of inspections involved interviews of supervisors.<sup>137</sup>

While the Tuohy and SPR studies underscore the positive role played by JHSCs in improving health and safety, several other studies express reservations about whether legislatively mandated JHSCs have a positive impact on health and safety. Lewchuk et al. acknowledged that there was a definite reduction in work-related injury and illness rates in the Ontario manufacturing sector in 1980 and the following years, corresponding with the introduction in 1979 of the *OHSA*, which mandated the creation of JHSCs in that sector.<sup>138</sup> No comparable reduction was found in the retail sector, to which critical sections of the *OHSA*, including the requirement for JHSCs, did not apply. However, the authors also found that while workplaces that had formed JHSCs prior to 1980 had experienced a major drop in injury and illness rates, workplaces that formed JHSCs *after* the legislation came into effect did not enjoy a drop in injury and illness frequency. The authors observe that:

It appears that workplaces that moved towards the Internal Responsibility System before or as soon as the new mode of regulation was suggested by the state as an alternative, enjoyed sizeable decreases in injury and illness rates even if JHSCs had limited powers in the early years. However, for workplaces that moved to the systems slowly, and in some cases only after a period when they were in contravention of Bill 70, the effect of committee formation (as

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<sup>137</sup> *Ibid.*, at 26.

<sup>138</sup> Lewchuk et al., *supra* note 57.

distinct from the legislation itself) appears to have been minimal.<sup>139</sup>

The authors suggest that it is arguable that the workplaces that were slow to adopt the Internal Responsibility System likely lack a commitment to the co-management of health and safety at the workplace and conclude that:

From a policy point of view the results of this paper speak to two issues. The first is that the Internal Responsibility System, and the co-management of this aspect of a workplace's operations, can lead to significantly lower injury and illness rates with positive benefits for workers and the workplaces employing them. This system of health and safety regulation works and should be encouraged. However, the second is that these improvements are neither automatic, nor enjoyed by all workplaces. Simply mandating committees is unlikely to have much effect at workplaces where the Internal Responsibility System and the co-management of health and safety matters is not embraced by management and/or labour. At these workplaces, special measures may be needed to educate labour and management of the potential benefits of co-management as well as measures to ensure that committee members have the knowledge and authority to internally regulate health and safety matters.<sup>140</sup>

The Lewchuk study and other similar studies<sup>141</sup> indicate that legislating the presence of

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<sup>139</sup> Lewchuk et al., *supra* note 57 at 234.

<sup>140</sup> Lewchuk et al., *supra* note 57 at 236.

<sup>141</sup> See for example, Christian Lévesque, "State Intervention in Occupational Health and Safety: Labour-Management Committees Revisited" in Anthony Giles, Anthony E. Smith & Kurt Wetzel, eds., *Canadian Industrial Relations Association - Proceedings of the XXXIst Conference*, (1994) 217. Lévesque concludes, at 228, that "[a]n increase by law of JHSC involvement in the decision-making process does not necessarily foster cooperative or adversarial relations within these participatory bodies(...) In workplaces where there are tensions over production and safety imperatives and, simultaneously, where management is less likely to value the involvement of workers through participatory bodies (...) JHSC legislative provisions appear to maintain and possibly exacerbate some form of conflict within JHSCs. In other words, when JHSC provisions are at odds with the social relations within a workplace, it does not generate cooperative relationships within

JHSCs in Ontario workplace does not in itself guarantee improved worker-management cooperation or lower injury and disease rates. Where parties lack commitment to the co-management of workplace health and safety, JHSCs are likely to be ineffective, and the Internal Responsibility System will not yield the intended benefits.

#### **IV. The Role of the Inspectorate in Enforcing Occupational Health and Safety Standards**

Enforcement of occupational health and safety standards under the *OSH Act* and the *OHSA* is provided to a large extent (and in the case of the *OSH Act*, almost exclusively) by workplace inspections.

##### **A. Inspections**

Under the *OHSA*, Ministry of Labour inspectors carry out inspections in four circumstances. First, many workplace inspections are performed unannounced on a random basis.<sup>142</sup> Inspectors also investigate work refusals at the workplace,<sup>143</sup> and conduct inspections in the context of a contested bilateral or unilateral work stoppage.<sup>144</sup> Finally, inspectors may inspect workplaces where they have been notified by an employer of a workplace death or injury.<sup>145</sup>

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JHSCs.”

<sup>142</sup> But see *Preventing Illness & Injury*, *supra* note 1 at 10: Ministry of Labour inspectors now have access to Workers’ Compensation data, allowing them to target firms with poor occupational health and safety performance for enforcement activities.

<sup>143</sup> *OHSA*, s. 43(7).

<sup>144</sup> *OHSA*, ss. 45(6), 47(6).

<sup>145</sup> *OHSA*, s. 51(1).

Inspectors are provided broad authority to perform their duties under the *OHSA*, including the power to:

- ! enter in any workplace (that is not a dwelling) at any time without a warrant;<sup>146</sup>
- ! question any workplace party;<sup>147</sup>
- ! require the production of documents and remove the documents after giving a receipt therefor;<sup>148</sup> and
- ! conduct or take tests of equipment, material, etc. and take away samples or require an employer to take such tests at its expense.<sup>149</sup>

During workplace inspections, the inspectors must be accompanied by a worker JHSC representative or HSR.<sup>150</sup> All workplace parties are prohibited from hindering an inspector performing an inspection or any other duty under the *OHSA*, and have a duty to assist the inspector in the exercise of her powers or the performance of her duties under the *OHSA*.<sup>151</sup>

*OSHA* inspectors enforce the health and safety standards established by the *OSH Act* and the regulations promulgated under it by performing random workplace inspections, inspections in response to employee complaints alleging a danger of serious bodily harm or death and inspections

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<sup>146</sup> *OHSA*, s. 54(a).

<sup>147</sup> *OHSA*, s. 54(h).

<sup>148</sup> *OHSA*, ss. 54(c), (d).

<sup>149</sup> *OHSA*, ss. 54(e), (f).

<sup>150</sup> *OHSA*, s. 54(3).

<sup>151</sup> *OHSA*, ss. 62(1), (2).

following an incident where an employee is either seriously injured or killed due to a workplace hazard.<sup>152</sup>

The powers of inspection provided to OSHA inspectors under the *OSH Act* are weaker than those conferred on Ontario inspectors by the *OHS Act*. Most notably, inspectors must obtain a warrant from a district court or secure the employer's consent before they set foot in a workplace to perform an inspection.<sup>153</sup> An inspector acting under *OHS Act* has a statutory right of entry. The roles of other workplace parties in assisting the inspector during inspections and facilitating the exercise of his or her powers are also different. While the *OHS Act* mandates that an inspector be accompanied during an inspection by the JHSC's worker representative or by a HSR, the *OSH Act* states only that employer and employee representatives shall be given "the opportunity" to accompany the inspector.<sup>154</sup> Furthermore, although the *OSH Act* provides that employees present in the workplace may notify the inspector, in writing, prior to or during a workplace inspection of any violation they have reason to believe exists in the workplace,<sup>155</sup> it does not impose on workplace parties a *duty* to assist an inspector as provided by the *OHS Act*.

## **B. Issuance of Orders**

If a Ministry of Labour inspector determines that a provision of the *OHS Act* or the regulations is being contravened, he or she may issue an order against the person believed to be in charge of the

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<sup>152</sup> *Gordon, supra* note 104 at 534.

<sup>153</sup> See Part VII, *infra*.

<sup>154</sup> 29 U.S.C.A. § 657(d) (West 1998). Weil reports that on average, only 3% of non-unionized employees take the "opportunity" to accompany an inspector on a walkaround: Weil, *supra* note 103 at 29.

<sup>155</sup> 29 U.S.C.A. § 657(f) (West 1998).

workplace or the suspected contravener, directing that person to comply with the provision forthwith or within a specified time period.<sup>156</sup>

If the inspector finds that the contravention is a danger or hazard to the health or safety of a worker, the inspector may issue an order directing that a machine not be used, that work be stopped until the order is withdrawn or that the area where the contravention exists be cleared of workers and physically isolated.<sup>157</sup> If the employer contravenes such an order, the Ministry of Labour may seek an injunction.<sup>158</sup> When issuing an order, including a stop work order, the inspector is not required to afford a hearing to any person, including the owner or employer.<sup>159</sup>

When an employer who has received an order believes that compliance with the order has been achieved, the employer must submit a notice of compliance to the Ministry of Labour, along with a statement from one of the JHSC's worker representatives or from a HSR agreeing or disagreeing with the contents of the notice.<sup>160</sup> If an employer whose workplace is subject to a stop work order has given notice of compliance, work may resume pending an inspection if a worker representative of the JHSC advises the inspector that he or she believes that the order has been complied with.<sup>161</sup> An employer does not *achieve compliance*, however, until an inspector so

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<sup>156</sup> *OHS*A, s. 57(1).

<sup>157</sup> *OHS*A, s. 57(6).

<sup>158</sup> *OHS*A, s. 60. Such application may be made without notice.

<sup>159</sup> *OHS*A, s. 57(1).

<sup>160</sup> *OHS*A, ss. 59(1), (2).

<sup>161</sup> *OHS*A, s.57(7).

determines.<sup>162</sup> The *OHSA* allows any party aggrieved by an inspector's order to appeal the order to an adjudicator from the Office of Adjudication.<sup>163</sup> From 1992 to 1997, inspectors issued between 39,318 and 64,480 orders yearly.<sup>164</sup>

Where an inspector finds that an employer has contravened *OHSA*, a separate determination is made as to whether charges should be laid against the employer. These charges are quasi-criminal, and brought by the Crown pursuant to the *Provincial Offences Act*.<sup>165</sup> Generally, the inspector will prepare a report for the Ministry of Labour, and the Crown, in consultation with the Ministry, will decide whether or not to lay charges.

Unlike their Ontario colleagues, OSHA inspectors cannot direct an employer to immediately stop work that they believe is dangerous. Instead, they must seek an injunction in the district court ordering an employer to stop work. Furthermore, an injunction is granted only where a danger exists which could reasonably be expected to cause death or serious physical harm immediately. An inspector who concludes that the described conditions exist in a workplace must inform the affected employees and employers of the danger, and that he is recommending to the Secretary that relief be sought.<sup>166</sup>

When an OSHA inspector detects a violation of a health and safety standard which does not place employees in imminent danger, the inspector cannot seek an injunction, but may issue a

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<sup>162</sup> *OHSA*, s. 59(4).

<sup>163</sup> *OHSA*, s. 61. See Part VII of this paper, *infra*.

<sup>164</sup> Conversation with Ministry of Labour officials, July 1998.

<sup>165</sup> R.S.O. 1990, c. P.33.

<sup>166</sup> 29 U.S.C.A. § 662 (West 1998).

citation.<sup>167</sup> A citation is a notice of the violation, detailing the remedial steps that must be taken by the employer to abate the violation, and the time period within which the employer must comply. The citation can also include a monetary penalty for each violation. The inspector must classify violations into one of the four categories used in the statute: *de minimus*, non-serious, serious or willful.<sup>168</sup> A *de minimus* violation is one which is a breach of the statute but does not affect the health and safety of employees directly. A citation does not have to be issued by the inspector for this type of a violation, but often an abatement order is issued. Non-serious and serious violations are usually first addressed by an abatement order rather than a monetary penalty, with the fine being imposed for lack of compliance with the order rather than for the initial breach of the statute. However, a fine can be imposed directly for any violation of the statutory provisions. The citation must be issued within 6 months of the violation<sup>169</sup> and the employer has 15 days in which to contest the citation before an OSHRC Administrative Law Judge. If no contest is brought forward, the order becomes final and enforceable. If the employer decides to contest the citation, the employees also have standing to challenge the order. However, if the employer does not contest the order, employees may only challenge the length of the abatement period. Once a notice of contest is filed, the abatement sought by OSHA is stayed until OSHRC makes a final order.<sup>170</sup>

The Secretary of Labor retains full discretion to alter or completely withdraw a citation. If the employer and the Secretary of Labor agree to a settlement, the citation is withdrawn. Withdrawing a citation has two key consequences. Firstly, a withdrawal means that there is no final order against the employer on the matter and a subsequent violation by the employer will not be

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<sup>167</sup> 29 U.S.C.A. § 658(a) (West 1998).

<sup>168</sup> 29 U.S.C.A. § 666 (West 1998).

<sup>169</sup> 29 U.S.C.A. § 659 (West 1998).

<sup>170</sup> 29 U.S.C.A. § 659 (West 1998).

characterized under the statute as “repeated”, thus reducing the likely penalty assessment. Secondly, the employees have no right to challenge the initial citation or the withdrawal, nor any aspect of the settlement.<sup>171</sup>

### C. Fines and Penalties

The *OHSA* extends liability to *every* person who contravenes the Act or fails to comply with an order.<sup>172</sup> Convicted individuals are subject to a fine not exceeding \$25,000 or imprisonment for a term of not more than twelve months, or both.<sup>173</sup> Corporations are liable for a maximum fine of \$500,000.<sup>174</sup> Consequently, individual supervisors or managers are often found liable in addition to the corporate body. Prosecutions must be commenced at the latest one year after the last violation upon which they are based.<sup>175</sup> In 1997, there were 253 convictions under the *OHSA*, for which fines

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<sup>171</sup> See for example *Donovan v. Occupational Safety and Health Review Com'n*, C.A.2 1983, 713 F.2d 918, where the court held that neither an employee nor an employee representative had a right to a hearing on objections to the adequacy of abatement procedures included in a settlement agreement between the employer and the Secretary, and *Donovan v. International Union, Allied Industrial Workers of America and its Local 370*, C.A.8 1983, 722 F.2d 1415 where the court determined that the Secretary must have issued a citation, and the employer must have invoked the Commission's jurisdiction by filing a notice of contest before the union had any right to be heard by the Commission on any issue other than the reasonableness of the abatement period.

<sup>172</sup> In the decision of *R. v. Bradsil 1967 Ltd.* (1994), 23 W.C.B. (2d) 565 (Ont. Prov. Div.) a constructor was fined \$15,000, the employer, \$12,500, the constructor's supervisor, \$1,000, and the employer's supervisor \$800 for omitting to place perimeter guard rails at a construction site. No accident had occurred, and none of the accused had a significant record of prior infractions.

<sup>173</sup> *OHSA*, s. 66(1).

<sup>174</sup> The maximum fine for corporations under the *OHSA* was raised from \$25,000 to \$500,000 in 1990 amendments to the statute.

<sup>175</sup> *OHSA*, s. 69.

totalling \$3 million were assessed, compared to 169 convictions and \$3.2 million in fines in 1996.<sup>176</sup>

The *OHSA* does not specify the factors that are to be weighed in assessing the appropriate penalty. In *R. v. Cotton Felts*,<sup>177</sup> the Ontario Court of Appeal considered “the proper principles governing the imposition of fines for this type of offence.” Noting that “the range of fines imposed by the county court appear[ed] inordinately low for these offences,” the Court held that:

To a very large extent the enforcement of [regulatory] statutes is achieved by fines imposed on offending corporations. The amount of the fine will be determined by a complex of considerations, including the size of the company involved, the scope of the economic activity in issue, the extent of actual and potential harm to the public, and the maximum penalty prescribed by statute. Above all, the amount of the fine will be determined by the need to enforce regulatory standards by deterrence(...) The paramount importance of deterrence in this type of case has been recognized by this court in a number of recent decisions(...) Without being harsh, the fine must be substantial enough to warn others that the offence will not be tolerated. It must not appear to be a mere licence fee for illegal activity.<sup>178</sup>

More recently, sentencing courts have considered whether a violation is a first offence or the most recent in a series of repeated offences.<sup>179</sup> The courts have also expressed a willingness to

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<sup>176</sup> Conversation with Ministry of Labour Officials, July 1998.

<sup>177</sup> *R. v. Cotton Felts* (1982), 2 C.C.C. (2d) 287 (Ont. C.A.) [hereinafter *Cotton Felts*].

<sup>178</sup> *Cotton Felts*, *supra* note 177 at 294-95. The court noted that both negative and positive deterrence were important; that is, the moral and educative effect of “emphasizing community disapproval of an act... and thereby affect[ing] the attitude of the public”.

<sup>179</sup> See for example *R. v. Falconbridge Ltd.* (May 2, 1996), (Ont. Ct. (Prov. Div.)) [unreported] and *R. v. Bradsil*, *supra* note 172.

consider the steps taken by an employer to abate a violation in their sentencing decisions. In considering these factors, courts weigh the employer's good faith efforts to comply with the standards and their concern for, or indifference towards, employee health and safety. As a result, employers regularly adduce evidence explaining the merits of their health and safety programs, not in an attempt to dispute the prosecution, but rather to minimize the fine on a guilty plea.

Fines imposed on individual supervisors or directors are generally in the \$2,000 to \$15,000 range, both for fatalities and non-fatalities.<sup>180</sup> However, over the past 15 years, fines against employers have risen dramatically. In 1991, the maximum fine for corporations was raised to \$500,000. In the following year an employer was fined \$100,000 for a violation that resulted in a broken arm<sup>181</sup> and another employer was fined \$300,000 for violations related to an accident that resulted in the amputation of an employee's leg.<sup>182</sup> Though the fines for non-fatal injuries vary greatly, depending on the individual employer, fines, including those submitted to the court on a joint submission by the parties following a guilty plea, routinely range from \$20,000 to \$80,000 for crushed or broken hands, arms and legs. The courts have not hesitated to impose higher fines for fatal injuries in order to further the *OHSA*'s goal of deterrence. Where a violation of the statute results in a fatal accident, employers are routinely fined from \$100,000 to \$250,000.<sup>183</sup> The St. Catharines General Hospital, and an excavating company, Anpro Excavating & Grading Ltd., was fined

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<sup>180</sup> Jail sentences are unusual.

<sup>181</sup> *Rexwood Products Limited* (1992) [unreported].

<sup>182</sup> *698984 Ontario Ltd.* (1992) [unreported].

<sup>183</sup> Employers fined for multiple violations culminating in the same or related accidents have paid \$500,000 and \$600,000 fines arising from a single fatality. Most recently, Inco Ltd. was fined \$250,000 for each of three violations that resulted in the death of an employee in April 1996. This \$750,000 fine was the highest to date, and reflected the fact that Inco Ltd. had nine previous convictions under the Act, including fatalities. By comparison, a hospital was recently fined \$85,000 for failing to ensure that an employee wore rubber electrical safety gloves when statutorily required which resulted in the death of an employee

\$150,000 after pleading guilty to failing to provide a signaller, a violation which also resulted in the death of an employee.

Courts are not adverse to imposing fines for violations of the statute in the absence of a workplace accident. The fines in these situations run from \$5,000 to \$200,000, with most fines in the \$20,000 to \$80,000 range. By imposing such fines, courts have indicated that they wish to enhance the remedial and deterrent effects of the legislation, and not punish employers for employee injuries.

Another factor tending to raise the financial impact of a conviction on an employer is the statutory “victim surcharge” on fines. Pursuant to s.60.1 of the *Ontario Provincial Offences Act*,<sup>184</sup> a surcharge is imposed on fines levied under the *Act*, as prescribed in Ontario Regulation #785/94. For fines over \$1,000, the surcharge is 20%. As the surcharge is mandatory it is not taken into account by the court in determining the appropriate fine<sup>185</sup>.

The *OSH Act* expressly sets out applicable fines for each category of violation.<sup>186</sup> Fines are mandatory for serious violations and for wilful violations causing death, while the penalties for the other violations are discretionary. Although the Secretary must issue a citation within 6 months when he or she believes that an employer has violated the provisions of the chapter,<sup>187</sup> he or she retains the discretion to alter or withdraw the citation, such that the penalties as a whole are discretionary.

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<sup>184</sup> R.S.O. 1990, c. P.33.

<sup>185</sup> *R. v. Galco Food Products* (December 6, 1995), (Ont. Ct. (Prov. Div.) [unreported] was overturned on appeal. The court had reduced the fine to \$41,700 so that it came to approximately \$50,000 with the victim surcharge, which was determined to be an improper consideration as the surcharge is mandatory.

<sup>186</sup> 29 U.S.C.A. § 666 (West 1998).

<sup>187</sup> 29 U.S.C.A. § 658 (West 1998).

Citations for violations which are “specifically determined not to be of a serious nature, may be assessed a civil penalty of up to \$7,000 for each such violation.”<sup>188</sup> When the violation is determined to be of a serious nature, the fine imposed is up to \$7,000 for each violation. A serious violation will be found if the employer knew or could have known of the danger with reasonable diligence,<sup>189</sup> and if there is a substantial probability that death or serious physical harm could result from the non-compliance.<sup>190</sup>

The highest penalties arise when a violation is found to be wilful or repeated. An employer commits a “repeated” violation if there was a prior final order against the employer for a substantially similar violation.<sup>191</sup> Citations for wilful violations are issued when the employer has intentionally disregarded, or was plainly indifferent to, the requirements under the Act.<sup>192</sup> A court need not find

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<sup>188</sup> 29 U.S.C.A. § 666(c) (West 1998). The levels of fines for both serious and non-serious violations was raised from \$1,000 to \$7,000 by the *Omnibus Budget Reconciliation Act* of 1990.

<sup>189</sup> See for example *Dunlop v. Rockwell Intern*, C.A.6 1976, 540 F.2d 1283 and *Accu-Namica, Inc. v. Occupational Safety and Health Review Commission*, C.A.5 (Tex.) 1975, 515 F.2d 828, rehearing denied 521 F.2d 814, certiorari denied 96 S.Ct. 1492, 425 U.S. 903, 47 L.Ed.2d 752.

<sup>190</sup> 29 U.S.C.A. § 666(k) (West 1998). See for example *D. & S. Grading Co., Inc. v. Secretary of Labor*, C.A. 11 1990, 899 F.2d 1145, rehearing denied. See also *Kelly Springfield Tire Co., Inc. v. Donovan*, C.A.5 1984, 729 F.2d 317, rehearing denied, where the court held that a violation may be deemed serious where there is a substantial probability of serious injury if an accident occurs, even if the accident itself is only merely possible, that is, that it *could* result from the condition. In *Conie Const., Inc. v. Reich*, C.A.D.C.1995, 73 F.3d 382, 315 U.S.App.D.C. 282, the court held that despite testimony of the employer’s expert witness that an accident was unlikely, the OSHRC had properly concluded that the gravity of the employer’s violation was moderate to high since it had concluded that were an accident to occur, serious injuries to the employee would “most surely result”. The court found substantial evidence that the employer was aware of the requirements of the Act but had chosen not to comply with them, and that this supported an enhanced fine for a willful violation.

<sup>191</sup> *Reich v. D.M. Sabia Co.*, C.A.3 1996, 90 F.3d 854, also holding that a repeated violation requires no more than a second violation, and does not require proof of “flaunting”.

<sup>192</sup> *Reich v. Trinity Industries, Inc.*, C.A.11 1994, 16 F.3d 1149; the employer had been aware of the Act’s requirements but intentionally chose not to comply. *Valdak Corp. v. Occupational Safety and Health Review Com’n*, C.A.8 1996. 73 F.3d 1466.

that the employer held malicious motives or specific intent for the violation to be deemed “willful”.<sup>193</sup> Deliberate flaunting and an obstinate refusal to comply with the requirements of the Act, although evidence of a wilful violation,<sup>194</sup> are not elements of the offence. In fact, an employer was found to have committed a wilful violation despite the fact that the employer’s foreman held a good faith belief that the operation could continue without a hazard because the foreman’s decision to continue, aware of the contravention, was an “intentional, deliberate, and voluntary” act.<sup>195</sup> A penalty of up to \$70,000 but no less than \$5,000 may be imposed for each wilful violation.<sup>196</sup> Although OSHA has a discretion to recommend the maximum penalty, and administrative law judges have the power to impose it, employers are not often fined in the higher range.<sup>197</sup>

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<sup>193</sup> *Ensign-Bickford Co. v. Occupational Safety and Health Review Com’n*, C.A.D.C.1983, 717 F.2d 1419, 230 U.S.App.D.C. 362, certiorari denied 104 S.Ct. 1909, 466 U.S. 937, 80 L.Ed.2d 458, where the employer had repeatedly ignored accepted industry standards.

<sup>194</sup> *Universal Auto Radiator Mfg. Co. v. Marshall*, C.A.3 (Pa.) 1980, 631 F.2d 20.

<sup>195</sup> *Donovan v. Capital City Excavating Co., Inc.*, C.A.6 1983, 712 F.2d 1008.

<sup>196</sup> The level of fines for wilful violations was raised from \$10,000 to \$70,000 by the *Omnibus Budget Reconciliation Act* of 1990.

<sup>197</sup> A striking example of this is found in the case of *Interstate Erectors, Inc. v. Occupational Safety and Health Review Com’n*, C.A.10 1996, 74 F.3d 223. The individuals who controlled Interstate Erectors Inc. had operated in the construction industry since 1970. Interstate was the third incarnation of this employer, which had already involved the same principals. The previous incarnations of this company, which had been directed by the same individuals, were dissolved following fatal fall accidents. The employers had been cited for violations of fall protection standards arising out of each of the deaths. In addition, the employers had been issued citations on numerous prior occasions for similar violations of fall protection standards, including a repeat violation and a \$24,000 fine for a willful violation resulting in the death of an employee. Interstate was cited for the willful violation of two provisions requiring fall protection when the workplace is more than 25 feet above ground after an OSHA compliance officer observed two employees working 42 feet above the ground without a fall protection device, in contravention of the standard of which the principals admitted being aware. While the Secretary had proposed two maximum penalties for a total of \$140,000, the ALJ imposed penalties of \$28,000 and \$35,000. The appellate court denied the employer’s appeal and confirmed that the employer’s blatant and continual disregard of the *OSH Act* requirements was a willful violation which warranted increased penalties. It noted that the managers has specifically been advised by *OSH Act* of the requirements, that the same managers had been cited previously for similar violations which had resulted in fatal accidents, and that the employer had continued to adopt its own interpretations of the standards and had

In light of the foregoing, it is not surprising that the OSHRC, the Department of Labor, and the courts have sought methods by which to bolster the impact of a citation and increase its deterrent effects on employers. For violations labelled as “egregious,” Administrative Law Judges have imposed penalties on a per employee basis for each violation. Expected fines of not more than \$70,000 could be multiplied by an employer’s total number of employees. Such fines clearly impacted employers who could otherwise have regarded lower fines as an operating expense.<sup>198</sup> In the decision of *Reich v. Arcadian Corp.*, however, a court of appeals held that this was not a permissible interpretation of the legislation, and that fines could only be imposed on a per violation basis.<sup>199</sup>

The most severe fines provided for by the statute can accumulate pursuant to a provision of the *OSH Act* that imposes a fine of not more than \$7,000 *for each day* that an employer fails to comply with an order to correct a violation. Penalties imposed under this section have issued a clear warning to employers that compliance is mandatory, and that contempt of compliance orders will not be tolerated.<sup>200</sup>

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left workers exposed to fall hazards.

<sup>198</sup> Interestingly, Summers reports that “90% of citations are settled by negotiation with a reduction or elimination of the fine, usually in exchange for the employer’s agreement to correct the unsafe condition.” As a result, employers usually pay only a third of the proposed fine: Clyde Summers, “Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals” (1992) 141 U of P.A. L.R. 457 at 506.

<sup>199</sup> *Reich v. Arcadian Corp.*, C.A. 5 1997, 110 F.3d 1192. The court stated that when appropriate, however, OSHRC could consider the number of employees exposed to the hazardous situation in “analysing the gravity of a violation for the purposes of determining the appropriate penalty.”

<sup>200</sup> 29 U.S.C.A. § 666(d) (West 1998). See for example, *Reich v. Sea Sprite Boat Co., Inc.*, C.A.7 1995, 50 F.3d 413, rehearing and suggestion for rehearing *en banc* denied, where the court upheld a penalty of \$2,000 per day, for a total of \$1,425,000, imposed on an employer for its contemptuous refusal to obey a court order enforcing an OSHRC administrative order. Despite repeated formal notices and demands, the employer had refused to comply with the administrative order. In addition, the employer’s president and sole shareholder had attempted to avoid liability by transferring assets to shell companies.

#### D. Defences

The primary defence for prosecutions under the *OHSA* is due diligence. For some alleged violations, the Act provides for a statutory defence equivalent to the defence of due diligence that has developed at common law. Specifically, s. 66(3) provides that an employer will not be liable for a failure to comply with ss.23(1), 25(1)(b)-(d), or 27,<sup>201</sup> if the employer can prove that it took every “precaution reasonable in the circumstances.” Where an employer is accused of failing to identify the ingredients of a hazardous material as required under the regulations, s. 36(4) provides that the employer is not in contravention of the *OHSA* if it has “made every effort reasonable in the circumstances to identify or obtain the identity of the ingredients.”<sup>202</sup> The courts have held that because the *OSHA* as a whole imposes strict liability for offences, it must allow for a due diligence defence.<sup>203</sup> The Ontario Court of Appeal described the elements of this defence as follows:

The test which should have been applied was not whether a reasonable man in the circumstances would have foreseen the accident happening in the way that it did happen but rather whether a reasonable man in the circumstances would have foreseen that an “overswing” of the gate could be dangerous in the circumstances and if so whether the respondent in this case had proven it was not negligent in failing to check the extent of overswing in order to consider and determine whether it created in any way a potential source of danger to

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<sup>201</sup> These sections generally provide that constructors, employers and supervisors must ensure that the measures prescribed by the *OHSA* are complied with and that every worker complies with the *OHSA*.

<sup>202</sup> This defence is in keeping with the preventative goals of the Act, since s.36(5) requires that an employer notify the Director of such a situation, and the Director may restrict or prohibit its use pursuant to s.33.

<sup>203</sup> In the decision of *R. v. Camco Inc.* (May 26, 1983), (Ont. Prov Offences Ct.) [unreported], aff’d (June 6, 1984), (Ont. C. Ct.) [unreported], an employer was acquitted of a charge of contravening s.25(2)(h) because it found a lack of *mens rea* on the part of the company. It has been suggested that on the basis of this decision, a charge under s. 25(2)(h), or under s.27(2)(c), would be treated as a full *mens rea* offence: Keith, *supra* note 61 at §11:5210.

employees and in failing to take corrective action to remove the source of danger.<sup>204</sup>

The court treated the foreseeability of danger arising from an act or omission (the alleged contravention of the statute) as a factor to be considered when determining whether an employer “took all the care which a reasonable man might have been expected to take in the circumstances.”<sup>205</sup>

While the courts appear to recognize that unanticipated situations can arise for which the employer would not be liable if it had exercised every reasonable precaution, some court decisions indicate a hesitation to lay blame on injured employees.<sup>206</sup> For example, one court stated:

[I]n respect of the [machine in question], it is clear that access to the exposed part was not prevented - it was restricted and would have been difficult to accomplish - but the scheme of the Act appears to be to protect the foolish, heedless, thoughtless employee; the wise, careful and thoughtful one will protect him or herself.<sup>207</sup>

While this statement should not be taken to suggest that liability is absolute in all cases, it indicates the same judicial concern which has fuelled larger penalties for violations of the *OHSA*.

The appellate courts have not yet decided which factors should be considered to establish a due diligence defence. However, it is clear that the determination is factually driven. In *R. v. Kenaidan Construction Ltd.*, the court held that the following facts had established the defence of due diligence:

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<sup>204</sup> *R. v. Rio Algom Ltd.* (1988), 66 O.R. (2d) 674, 46 C.C.C. (3d) 242 (C.A.) at 681-82.

<sup>205</sup> Swaigen, J. *Regulatory Offences in Canada - Liability and Defences*, (Toronto: Carswell, 1992) at 98.

<sup>206</sup> Keith, *supra* note 61 at §11:5220.

<sup>207</sup> *R. v. Commodore Business Machines* (November 15, 1985), (Ont. Prov. Offences Ct.) Harris Prov.Ct.J. [unreported] at 11.

## Occupational Health and Safety in Canada and the United States

1. There had been pre-construction meetings in which safety was part of the overall planning of the project.
2. A supervisor employed by the constructor was onsite at all times to deal with the subcontractors and with safety issues.
3. An outside safety consultant attended at the project from time to time to audit the safety program.
4. There were regular safety meetings held at the construction project.
5. The directing mind representative of the corporation attended at the project weekly.
6. The constructor's supervisor and safety consultant had the necessary authority to stop work at any time over safety-related concerns.
7. The constructor was never advised by its supervisor of the problems with the subcontractors failing to comply with the fall restraint requirements of the Construction Project regulation.
8. The safety program and supervisor were adequate to meet the requirement of the employer having done all that could reasonably be expected of it.<sup>208</sup>

In a number of decisions, courts have weighed the conduct of the workers, as well as that of the employer in determining whether due diligence was made out.<sup>209</sup>

In addition to the defence of due diligence, the defences of officially induced error and “project transition” have led to employer acquittals. A defence of officially induced error “will lead to an acquittal under the *OHS*A if the defendant can prove, on a balance of probabilities, that he or

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<sup>208</sup> *R. v. Kenaidan Contracting Ltd.* (January 12, 1995), (Ont. Ct.(Prov.Div.)) [unreported].

<sup>209</sup> See for example *R. v. Klimack Construction Ltd.* (June 16, 1988), (Ont. Prov. Offences Ct.) [unreported] and *R. v. Proboard Ltd.* (November 16, 1990), (Ont. Ct. (Prov. Div.)) [unreported].

she was misled by an inspector and that reliance on the erroneous legal opinion of the official was reasonable.”<sup>210</sup> In *R v. Fairwin Construction Co.*, construction scaffolding was being moved in the course of a project transition. At the time the scaffolding was being moved, it did not comply with regulations applying to scaffolding. An employee was killed when he fell off the scaffolding. The court held that “[a]s a matter of logic, one could never reasonably expect a scaffold that is being dismantled piece by piece to comply with the various provisions of the regulations,” and that the regulations were not applicable to the facts of that case.”<sup>211</sup>

In the United States, the primary defence to a citation is that of reasonable care. To begin with, the courts have held that an employer cannot be issued a citation under *OSH Act* if a reasonable person in the employer’s position would not have recognized the existence of the hazard.<sup>212</sup> In addition to the general defence of due diligence, several specific defences have developed. It is an affirmative defence for an employer to show that compliance with the standard was impossible or infeasible, for it or for all similar companies.<sup>213</sup> The “greater hazard” defence provides that an employer need not comply with the *OSH Act* standard if compliance would result in hazards greater

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<sup>210</sup> Keith, *supra* note 61 at §11:5230. The author notes however, that the only known trial decision accepting that defence in an *OHS*A prosecution is *R. v. Bono General Construction Ltd. and Chewka* (November 27, 1986), (Ont. Prov. Offences Ct.) [unreported], leave to appeal to Ont. C.A. refused April 16, 1987. This case is interesting to note because the employer had been found to have violated the regulation but was acquitted on the defence of officially induced error since the employer had been allowed to continue with the work and charges had not been laid until three months later.

<sup>211</sup> *R. v. Fairwin Construction Co. Ltd.* (1983), 9 W.C.B. 157 (Ont. Co. Ct.) at 3. Keith observes that: “[t]he court’s reference to “logic” demonstrates a willingness to analyse charges under the *OHS*A as they relate to the actual construction process, rather than looking only to the fact of an accident and personal injury to a worker. The court’s refusal to apply the specific regulation under which the accused was charged amounted to a complete defence to the charges”: Keith, *supra* note 61, at §11:5360

<sup>212</sup> *Corbesco, Inc. v. Dole*, C.A.5 1991, 926 F.2d 422.

<sup>213</sup> *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, C.A.D.C. 1980, 647 F.2d 1189, 208 U.S.App.D.C. 60, certiorari denied 101 S.Ct. 3148, 453 U.S. 913, 69 L.Ed.2d 997, stay lifted in part. Also *Bancker Const. Corp. v. Reich*, C.A.2 1994, 31 F.3d 32.

than the hazards of noncompliance.<sup>214</sup> Employers may also argue that the standard is simply invalid. An “unpreventable employee misconduct” defence is established if the employer shows not only that it implemented a safety program and trained employees on the program, but also that it enforced contraventions and disciplined employees who did not abide by the program’s standards.<sup>215</sup>

The application by courts of the “economic feasibility” defence, where employers assert that a standard promulgated under the *OSH Act* is economically infeasible has limited the effect of the *OSH Act*. Early decisions interpreted the “feasibility” limitation as requiring that the regulation be attainable at a practical cost; i.e., as including both technological and economic feasibility.<sup>216</sup> Some decisions have held that Congress recognized that compliance with the *OSH Act* would impose substantial costs for employers, and intended that such costs be incurred by employers when necessary to create a safe and healthful working environment.<sup>217</sup> These decisions state that a standard will not be determined to be “economically infeasible” simply because it is financially burdensome, or even if it threatens the continued existence of individual employers.<sup>218</sup> However, recent decisions show that the “economic infeasibility” defence places significant limits on OSHA’s efforts to

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<sup>214</sup> *Loomis Cabinet Co. v. Occupational Safety & Health Review Com’n*, C.A.9 1994, 20 F.3d 938. The court held that this defence could not be raised without the employer first having exhausted the procedures for obtaining a variance under the *OSH Act*.

<sup>215</sup> See for example *P.Gioioso & Sons, Inc. v. Occupational Safety and Health Review Com’n*, C.A.1 1997, 115 F.3d 100, where the employer’s inability to establish all the elements was fatal to its defence, notwithstanding that the employer had made a meaningful effort to develop a satisfactory safety program.

<sup>216</sup> *Texas Independent Ginners Ass’n v. Marshall*, C.A.5 1980, 630 F.2d 398.

<sup>217</sup> *American Textile Mfrs. Institute, Inc. v. Donovan*, U.S. Dist. Col. 1981, 101 S.Ct. 2478, 452 U.S. 490, 69 L.Ed.2d 185.

<sup>218</sup> *Asarco, Inc. v. Occupational Safety and Health Admin.*, C.A.9 1984, 764 F.2d 962, and *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, C.A.D.C. 1980, 647 F.2d 1189, 208 U.S.App.D.C. 60, certiorari denied 101 S.Ct. 3148, 453 U.S. 913, 69 L.Ed.2d 997, stay lifted in part.

promulgate occupational safety and health standards.<sup>219</sup>

### **E. Enforcement Presence**

The effectiveness of an inspectorate in enforcing occupational health and safety standards depends on the level of enforcement presence it maintains through inspections in the workplaces under its jurisdiction.

In Ontario, the Ministry of Labour is responsible for over 287,000 workplaces employing approximately 5 million workers.<sup>220</sup> In 1998-1999, 239 Ministry of Labour health and safety inspectors will conduct approximately 50,000 inspections.<sup>221</sup>

The enforcement presence of OSHA in the United States is significantly smaller than that of the Ministry of Labour in Ontario. A contingent of 1235 OSHA compliance officers are responsible for 6.4 million establishments employing 104 million employees. In 1997, OSHA officers conducted

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<sup>219</sup> See for example *AFL-CIO v. OSHA*, U.S. Dept. of Labor, C.A.11 1992, 965 F.2d 962, where the court held that the OSHA had failed to establish, in issuing a revised air contaminants standard, that its new exposure limits were either economically or technologically feasible. See also *Color Pigments Mfrs. Ass'n., Inc. v. Occupational Safety and Health Admin.*, C.A.11 1994, 16 F.3d 1157, where the court held that the OSHA had failed to substantiate that the limit it sought to impose on airborne cadmium was economically feasible.

<sup>220</sup> *GAO Report*, *supra* note 14 at 30. Statistics Canada reports that as of May 1998 there were 5,607,500 employees in Ontario: Statistics Canada, News Release, Labour Force Survey - May 1998 (June 5, 1998).

<sup>221</sup> Conversation with Ministry of Labour officials, July, 1998. The number of inspectors employed by the Ministry of Labour will be increased from the 204 inspectors employed in 1997-1998. See also Ontario, Ministry of Labour, *Ontario Government Business Plans - 1998-1999*, <http://www.gov.on.ca/MBS/english/press/plans98/lab.html>, at 3-5 [hereinafter *MOL Business Plan*].

34,007 inspections.<sup>222</sup> To make the most of its limited resources, OSHA conducts approximately 70% of its inspections in the construction and manufacturing industries. Inspections in these industries average once every eight to ten years. Although OSHA inspections increase the compliance and decrease the injury rates of inspected establishments, they have had little effect on aggregate injury rates.<sup>223</sup>

## V. The Right to Refuse Unsafe Work

Both the *OHSA* and the *OSH Act* provide employees with a right to refuse unsafe work. However, the two legislative schemes differ in a number of important respects. First, the *OSH Act* allows employees to refuse unsafe work in a narrower range of circumstances than the *OHSA*. Second, unlike the *OSH Act*, the *OHSA* sets out a detailed procedure that employees should follow to exercise their right to refuse work. Third, although both the *OHSA* and *OSH Act* protect employees who refuse unsafe work from employer retaliation, the scope of the protection provided by the Ontario statute is broader.

The right to refuse unsafe work is not expressly defined in the *OSH Act*, but is prescribed by

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<sup>222</sup> Conversation with OSHA officials, July, 1998. The number of compliance officers and the number of inspections are for fiscal year 1997. Statistics regarding the number of establishments and employees covered by OSHA are for 1998. OSHA's enforcement presence appears to be declining. In 1988, OSHA had 1181 compliance officers to inspect 4,500,000 establishments employing 65 million workers, and made fewer than 59,000 inspections: see Summers, *supra* note 198 at 504-5.

<sup>223</sup> Thomas O. McGarity & Sidney A. Shapiro, "OSHA's Critics and Regulatory Reform" (1996) 31 Wake Forest L.R. 587 at 597; see also Kenneth A. Kovach et al., "Policy Essay - OSHA and the Politics of Reform: An Analysis of OSHA Reform Initiatives Before the 104th Congress" (1997) 34 Harvard J. on Legislation 169 at 180, who report a study of 778,000 OSHA inspections showing that lack of inspections since 1990 correlated with 78% of the worksites where workers suffered serious accidents in 1994 and early 1995. OSHA has also been criticized for not conducting enough follow-up inspections to ensure that employers have implemented necessary abatement measures: see Gordon, *supra* note 104 at 536. Indeed, follow-up investigations were reported to take place in less than 10% of cases, although in 32% of the follow-up inspections, the employer had failed to abate: see Summers, *supra* note 198 at 507.

regulation. Interestingly, the regulation stipulates first that employees are not entitled to refuse work because of “potential unsafe conditions” at the workplace but instead may request an inspection or seek OSHA’s assistance. It states that employers may discipline employees who refuse to work in such circumstances without breaching the *OSH Act*.<sup>224</sup> The regulation then sets out the circumstances in which employees may validly refuse unsafe work and be protected by the *OSH Act* from employer retaliation:

However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refused in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee’s apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.<sup>225</sup>

In its decision in *Whirlpool Corp. v. Marshall*, the U.S. Supreme Court held that the regulation allows employees to refuse work when they are ordered to work under conditions that they reasonably believe pose an imminent risk of serious death or bodily injury and where they have reason to believe that there is not sufficient time or opportunity either to seek effective redress from their

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<sup>224</sup> 29 C.F.R. 1977.12(a).

<sup>225</sup> 29 C.F.R. 1977.12(b).

employer or to apprise OSHA of the danger.<sup>226</sup> The Court confirmed that “any employee who acts in reliance on the regulation runs the risk of discharge or reprimand in the event a court subsequently finds that he acted unreasonably or in bad faith.”<sup>227</sup> The *OSH Act* does not oblige an employer to pay employees who refuse to work, nor must the employer provide them with alternative work.

The *OHSA* also provides workers with a right to refuse unsafe work and establishes a procedure, comprising a number of distinct steps, to exercise this right.<sup>228</sup> A worker may first refuse to perform work if he or she has reason to believe it is unsafe. The employer investigates this first work refusal and brings corrective action, if necessary. If the employee once again refuses to work, despite the measures taken by the employer, an inspector from the Ministry of Labour must investigate and decide whether the work is unsafe. The worker may still refuse to work after a decision by the investigator that the work is safe. However, for each subsequent work refusal, the worker bears an increasing onus to be able to support the validity of the refusal.

A worker may initially refuse to do particular work where he or she has “reason to believe” that the equipment the worker is to use, the physical condition of the workplace or a contravention of the *OHSA* relating to the worker’s equipment or workplace is “likely to endanger” that worker or another worker<sup>229</sup>. The test employed to determine whether a worker had reason to believe that the

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<sup>226</sup> (1980), 445 U.S. 1 at 10 [hereinafter *Whirlpool*].

<sup>227</sup> *Ibid.*, at 21.

<sup>228</sup> *OHSA*, s. 43. Workers enumerated in s. 43(2), and including members of police forces, firefighters, employees of correctional institutions and health care workers, cannot exercise this right where the “unsafe work” is inherent in their employment or where their refusal to work would directly endanger the life, health or safety of another person: *OHSA*, s. 43(1).

<sup>229</sup> *OHSA*, s. 43(3).

work was likely to endanger that worker is subjective in nature<sup>230</sup>. There must be a “subjective, personal belief by the refusing worker that his or her job is unsafe for self or others or both.”<sup>231</sup>

Unlike the *OSH Act*, the *OHSA* does not restrict the exercise of the right to refuse unsafe work to circumstances where the danger to the worker is imminent or where there is not sufficient time for the worker to seek redress from his or her employer or to apprise the authorities of the danger<sup>232</sup>. While the regulation under the *OSH Act* specifies that the right to refuse unsafe work is

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<sup>230</sup> *Sidbec Dosco Inc.* (1988), OLRB Rep. 1334 at 1341.

<sup>231</sup> Keith, *supra* note 61 at 7:3100; The OLRB noted, in *The Corporation of the City of Toronto*, [1986] OLRB Rep. Dec. 1834, at 1852, that s. 43(3) imposed on employees an obligation lower than the objective standard prescribed by the previous statute that required employees to have “reasonable cause to believe” that there was danger. This distinction was illustrated in *Sidbec Dosco Inc.* [1988] OLRB Rep. 1334 at 1341-2. In that case, the OLRB doubted that the employee had reason to believe the work in question was unsafe because at the time of his refusal, he had been unable to articulate his safety concerns to his supervisor. The OLRB was nevertheless satisfied, having observed the employee’s testimony and having considered all the evidence, that the employee “held the belief that the work was unsafe to perform” and found that the work refusal was valid. The Board held that while it should not give s. 43 an unduly rigid construction, thus discouraging employees from raising safety issues, it should also ensure that the right to refuse unsafe work is not abused or raised to camouflage illegal strikes. In the decision of *The Corporation of the City of Toronto, supra*, the OLRB determined that city employees refused to work not because of a *bona fide* safety concern but because they sought to engage in a strike, and held that this was not a valid exercise of the right to refuse unsafe work. Although the test to ascertain whether the employee has reason to believe the work is unsafe is a subjective one, the OLRB will on occasion seek to identify evidence which would provide objective support for the employee’s belief. For example, in *AMS Diamond*, [1981] OLRB Rep. Nov. 1534, an employee refused to strip jewellery using an electrolytic solution containing cyanide in a poorly ventilated room because she believed that she risked being poisoned by hydrogen cyanide gas. She experienced dizziness and nausea and consulted a physician. The OLRB stated, at p. 1540, that the ill effects that she had felt the day before and the medical diagnosis that she had obtained which pointed to noxious fumes as the cause of her nausea were valid grounds for her belief that the work was unsafe. Her refusal was therefore valid.

<sup>232</sup> In the case of *Domtar Inc.*, [1988] OLRB Rep. Aug. 780, it was known that the fire alarm systems in a mine did not function during power failures. A number of employees refused to work because they were of the view that a contingency plan prepared by the employer in case a fire occurred during a power failure did not adequately protect the mineworkers. The employer argued that the employees’ refusals were based on a hypothetical state of affairs; there was no fire or power failure at the time of their refusal. The OLRB dismissed this argument, stating at p. 795 that the *OHSA* contemplated that work refusals often anticipate the possibility of accidents or other breakdowns before they occur.

triggered only by a risk of death or serious bodily injury, the *OHS*A provides that a worker may refuse work “likely to endanger” the worker or a co-worker<sup>233</sup>.

A worker exercising her right to refuse unsafe work under the *OHS*A must promptly report the circumstances of her refusal to her supervisor or employer. The supervisor must immediately investigate the report in the presence of the worker and a member of the JHSC, a HSR or a designated employee representative.<sup>234</sup> Following the inspection and any steps taken by the employer to deal with the circumstances leading to the worker’s refusal, the worker may yet again refuse to perform work where she has “reasonable grounds to believe” that the equipment, physical condition of the workplace or a contravention of the *OHS*A continues to be likely to endanger herself or another worker. Following a second refusal, the worker, the employer or their representatives must notify

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<sup>233</sup> The OLRB has held that an employee cannot refuse work that causes discomfort and inconvenience but does not endanger the employee: *Wheeler Metal Products Ltd.*, [1988] OLRB Rep. June 1044. On the other hand, in *Domtar Inc.*, *supra* note 232, the OLRB rejected the argument that workers who work in workplaces that are relatively more dangerous than others (e.g. mines) cannot complain of danger and stated, at p. 798:

Regardless of the inherent risks of their occupations, employees are entitled to insist that their workplace be made as safe as is reasonably possible, and to resort to work refusals when the conditions of section 23 [now s. 43] have been met.

We are of the view that employees who have lived with one degree of risk are entitled to refuse a higher degree or to insist that that risk be minimized, providing, of course, that any refusal to work in this regard otherwise fits within section 23. Indeed, it might well be that in a workplace which is less safe to begin with, lesser circumstances might provide reasonable grounds for a work refusal because the margin of safety is already so slim.

<sup>234</sup> *OHS*A, s. 43(4).

an inspector, who shall investigate the refusal in their presence.<sup>235</sup>

A worker exercising her right to refuse work a second time must meet a higher standard than was required at the first refusal. The higher standard is an objective standard which asks the question: “would an average or reasonable worker with a good knowledge of the workplace have reasonable grounds to believe that the workplace is unsafe?” The employee must be able to establish, through cogent evidence, the existence of the safety hazard which triggered her work refusal.<sup>236</sup>

Following the investigation, the inspector decides whether the machine or workplace is likely

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<sup>235</sup> *OHS*A, ss. 43(6) - (7). On a number of occasions, the Ontario Ministry of Labour was criticized by adjudicators where it was determined that its inspectors had conducted investigations of work refusals by telephone. Adjudicators have held that inspectors must attend at the workplace to carry out the second stage investigation. See *C.A.W., Local 598 v. Ontario (Ministry of Labour)* (September 24, 1996), Doc. APP 9596-12-344, Decision No. OHS 96-46 (Ont. OHS Adjud.) reported in Ontario OH&S Law Report, Vol. 8, No. 3 (May/June 1996).

<sup>236</sup> Keith, *supra* note 61 at 7:3400; In the *AMS Diamonds* case, *supra*, the OLRB held that an employee had “reason to believe” that her exposure to an electrolytic solution containing cyanide in a poorly ventilated workspace was likely to endanger her because of the ill effects she had felt after spending a day in the workplace and because of a doctor’s opinion that the ill effects were caused by noxious fumes. Thus, the employee’s first work refusal was valid because the employee had grounds for her belief that the physical condition of her workspace was likely to endanger her. In response to her first refusal, her employer told her that on the basis of his years of experience in jewellery manufacturing, her fears were unjustified. Nevertheless, she again refused to work. The OLRB held, at p. 1540-41, that at the time of her second refusal to work, the employee had “reasonable grounds” to believe the work was unsafe for the following reasons:

In addition to the ill effects which she had experienced the day before, she had the advice, whether or not it was justified, of a former teacher and an officer of the Occupational Health Branch that the circumstances seemed irregular and dangerous. She also had the experience from her own community college training and apprenticeship in another jewellery shop which suggested that the stripping process as set up in the respondent’s washroom did not have adequate ventilation. We cannot conclude that in these circumstances she should have been entirely persuaded by her employer’s arguments about his own experience and judgment in the matter.

to endanger the refusing worker or another worker, and notifies the employer and employee or their representatives of the decision.<sup>237</sup> The worker, employer or union may appeal this decision.<sup>238</sup> If the inspector finds that the machine or workplace is not likely to endanger the refusing worker or co-worker, the refusing worker may either return to work or may continue to refuse to work. A worker refusing to work after a “neutral expert” investigates the workplace and decides that the work is safe faces “an increasing onus with respect to the reasonableness of his or her position.”<sup>239</sup>

The *OHSA* provides that pending the investigation of the workplace by an investigator, the worker must remain at a safe place near his workstation unless his employer assigns him reasonable alternative work.<sup>240</sup> The employer may not assign other workers to use or operate equipment or work in the workplace that is the subject of the inspection without first informing them of the work refusal and reasons therefor in the presence of a JHSC member or HSR.<sup>241</sup> Finally, unlike the *OSH Act*, the *OHSA* obliges an employer to pay a refusing worker his or her regular or premium rate, as may be

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<sup>237</sup> *OHSA*, s. 43(8)-(9).

<sup>238</sup> *OHSA*, s. 61.

<sup>239</sup> *Domtar Inc.*, *supra* note 232 at 791. Although the *OHSA* does not expressly define the onus on the worker to justify his or her third refusal, the worker should logically assert grounds weightier than the inspector’s findings: Arturo D. Brion, *The Right to Refuse Unsafe Work in Ontario* (L.L.M. Thesis, York University, 1994) at 184. The OLRB has held that the onus upon the refusing worker does not increase where there is no meaningful inspection. In *Inco Metals*, [1980] OLRB Rep. July 981, where workers refused to work with a damaged anode furnace used to refine copper, the inspector had informed the employees that he had no personal experience with anode furnaces and that he had concluded, based on the expertise of the company representatives with whom he had spoken, that the furnace was safe. The OLRB held, at p. 997, that while the inspector’s opinion was that of a neutral party, it was not that of a neutral expert, and the employees could not be faulted “for being sceptical of an official opinion that appeared to be an adoption of the company’s view.”

<sup>240</sup> *OHSA*, s. 43(10).

<sup>241</sup> *OHSA*, s. 43(11), (12).

proper, for the duration of the first stage investigation and the inspector's investigation.<sup>242</sup> However, "the employer may temporarily lay off workers where no alternative work is available and the work refusal takes considerable time to resolve."<sup>243</sup>

Between 1992 and 1997, inspectors were called to investigate second stage work refusals on average 392 times per year.<sup>244</sup> There is, of course, a significantly higher but unquantified number of work refusals which are resolved at an earlier stage. The impact of a work refusal taken together with the subjective analysis which applies at the first stage of the analysis, has caused many employers to complain that this right is used in too many cases to exert pressure to achieve objectives unrelated to health and safety.

Employees who decide to exercise their rights under occupational health and safety legislation, including the right to refuse unsafe work, may face discriminatory treatment from their employers. Both the *OSH Act* and the *OHSA* protect employees from employer reprisals, but offer significantly different levels of protection.

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<sup>242</sup> *OHSA*, s. 43(13).

<sup>243</sup> Keith, *supra* note 61 at §7:3800.

<sup>244</sup> Conversation with Ontario Ministry of Labour officials, July 1998. According to the results of a survey of over 1700 JHSCs in Ontario, approximately one third of first work refusals were followed by second work refusals. This means that there are on average approximately 1200 first work refusals per year: see SPR Consultants, *supra* note 131 at 30. Comparable data for the United States was not available, as OSHA does not track work refusals *per se*, but only employee complaints of employer discrimination following employee work refusals or requests for inspections: conversation with OSHA officials, July, 1998.

## VI. Employer Reprisals

Both the *OSH Act*<sup>245</sup> and the *OHSA*<sup>246</sup> endeavour to protect employees who exercise rights under the statute, including the right to refuse unsafe work, from employer reprisals. An employee who believes that she has been discriminated against because she exercised a right under the *OSH Act* (eg., requesting an OSHA inspection or refusing to perform unsafe work) must file a complaint with OSHA within 30 days of the violation.<sup>247</sup> OSHA investigates the complaint and decides whether it has merit. If the complaint is meritorious, OSHA attempts to settle the complaint.<sup>248</sup> If the complaint is not settled, OSHA refers it to the Solicitor of the Department of Labor, who decides whether to bring proceedings against the employer in the District Court.<sup>249</sup> If OSHA finds that the complaint lacks merit, it dismisses the complaint. The complainant may appeal this decision within the Department of Labor.<sup>250</sup> When the complaint is pursued in the District Court, the ultimate burden of persuasion regarding the existence of intentional discrimination falls on the plaintiff.<sup>251</sup> A number of U.S. commentators have observed that the *OSH Act* offers employees scant protection against employer retaliation.<sup>252</sup> Gordon reports that only 559 of 3342 complaints were referred by OSHA

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<sup>245</sup> 29 U.S.C.A. § 60(c)(1) (West 1998).

<sup>246</sup> *OHSA*, s. 59(1).

<sup>247</sup> 29 U.S.C.A. § 660(c) (West 1998); see also Summers, *supra* note 198 at 513.

<sup>248</sup> Employees generally have no say in whether or not a settlement negotiated by *OHSA* is acceptable: See Jon Jefferson “Dying for Work” *ABA Journal*, (January 1993) 46 at 49.

<sup>249</sup> A decision not to sue leaves the complainant with no recourse: Jefferson, *ibid.*, at 49.

<sup>250</sup> Summers, *supra* note 198 at 513.

<sup>251</sup> Gordon, *supra* note 104 at 540.

<sup>252</sup> Michael Yates, *Power on the Job: The legal rights of working people*, (Boston: South End Press, 1994) at 237; Gordon, *supra* note 104 at 540; Summers, *supra* note 198 at 513-4; Jefferson, *supra* note 248 at 49.

for litigation in 1989. According to Summers, of 2433 complaints received by OSHA in 1985, just over 1% were pursued by the Department of Labor. The Department's Solicitor unsuccessfully argued in favour of an interpretation of the *OSH Act* that would provide employees with a private right of action in cases of employer retaliation, because the Department of Labor did not have sufficient resources to pursue employee complaints.<sup>253</sup>

Ontario workers receive significantly higher protection against employer reprisals than their U.S. counterparts. The *OHSA* allows workers who allege employer reprisals to file a complaint with the OLRB.<sup>254</sup> A reverse onus applies in such proceedings and the employer must establish that it did not act contrary to the anti-reprisal provision of the *OHSA*.<sup>255</sup> A review of OLRB decisions respecting complaints brought under the anti-reprisal provision of the *OHSA* reveals that between 1993 and 1997, the OLRB disposed of between 73 and 109 complaints per year. Most complaints (between 61% and 88%) were withdrawn, usually following an agreement between the parties. Between 1% and 25% of complaints were dismissed. At the most, 7% of complaints were granted by the OLRB.<sup>256</sup> Although OLRB decisions may be judicially reviewed in the Ontario Divisional Court, the Court will intervene only if the applicant establishes that the OLRB's decision is patently unreasonable.

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<sup>253</sup> Summers, *supra* note 198 at 514 citing *Taylor v. Brighton Corp* (1980) 616 F. 2d (6th Cir.).

<sup>254</sup> *OHSA*, s. 50(2). Unionized employees have the additional option of referring the complaint to an arbitrator under a collective agreement.

<sup>255</sup> *OHSA*, s. 50(5).

<sup>256</sup> This information was compiled from cases reported in the OLRB Reports from 1993 to 1997.

## VII. Review and Adjudication under the *OHSA* and the *OSH Act*

### A. General

The *OHSA* and the *OSH Act* differ significantly with respect to the extent to which they allow parties to review the orders of inspectors, to challenge inspections, and to challenge health and safety standards promulgated under the legislation.

Under the *OHSA*, parties aggrieved by an inspector's order requiring that remedial action be undertaken by a party in the workplace<sup>257</sup> or by an inspector's decision<sup>258</sup> (usually relating to the validity of a work stoppage or work refusal) may, within 14 days of the making of the order, appeal the order to an adjudicator from the Office of Adjudication.<sup>259</sup> An appeal does not automatically stay the operation of the order, but the adjudicator has the power to order a stay.<sup>260</sup> Parties may commence an appeal by telephone, orally, or in writing.<sup>261</sup> However, an adjudicator may request that the grounds of appeal be specified in writing before hearing the appeal. Proceedings before an adjudicator, including the hearing, are governed by the *Statutory Powers Procedures Act*,<sup>262</sup> which

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<sup>257</sup> *OHSA*, s. 61(1).

<sup>258</sup> *OHSA*, ss. 43(8), 45(6) and 47(5).

<sup>259</sup> *OHSA*, s. 61(1).

<sup>260</sup> *OHSA*, s. 61(7). Adjudicators apply a three-part test to determine whether to stay a stop-work order. The first and primary consideration is whether workers could be endangered by the granting of a stay. Second, the adjudicator considers whether the employer would suffer prejudice if a stay is not granted. Finally, the adjudicator considers whether there is a strong *prima facie* case for the success of the appeal on its merits: see *Zehrs Markets (Re)*, March 6, 1991, (Blair).

<sup>261</sup> *OHSA*, s. 61(2).

<sup>262</sup> R.S.O. 1990 c. S.22.

prescribes that parties benefit from a number of procedural safeguards, such as the right to receive adequate notice, to be represented, to call evidence, and to cross-examine witnesses.<sup>263</sup> Adjudicators have a greater discretion and flexibility than courts as to the evidence they decide to admit.<sup>264</sup> Adjudicators may rescind the inspector's order, affirm it, or substitute their findings for those of an inspector.<sup>265</sup> Although the decisions of adjudicators are final, they have the discretion to reconsider a decision upon a party's request. Judicial review of an adjudicator's decision is available before the Ontario Divisional Court. However, the Court is likely to defer to the decisions of adjudicators given the factual nature of their determinations.

The *OSH Act* provides parties, and especially employers, with a number of opportunities to review OSHA enforcement activities. An employer may contest a citation issued following an OSHA inspection before an OSHRC Administrative Law Judge.<sup>266</sup> Employees may contest the abatement period stipulated in the citation. Employers and employees must provide OSHRC with a written notice of contest within 15 days of receiving the citation or within 15 days of the employer's posting of the citation in the workplace, respectively. Once a notice of contest is filed, the required abatement is stayed until OSHRC makes a final order.

The Secretary of Labor then files and serves a written notice of complaint, setting forth the alleged violations, abatement period and proposed penalty or a statement saying why the proposed

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<sup>263</sup> Keith, *supra* note 61 at §10:5400.

<sup>264</sup> *OHSA*, s. 61(4).

<sup>265</sup> *OHSA*, s. 61(6); Keith, *supra* note 61 at §10:6700.

<sup>266</sup> 29 U.S.C.A. §659 (West 1998); see generally OSHRC, *Guide to Review Commission Procedures*, [www.oshrc.gov/guideproc/guidesec2html](http://www.oshrc.gov/guideproc/guidesec2html) at 1.

abatement period is reasonable.<sup>267</sup> Employers must file a written answer with OSHRC within 20 days. Employees have 10 days to file a response stating why the abatement period is unreasonable. The parties then proceed to discovery,<sup>268</sup> and a hearing is subsequently held before an Administrative Law Judge,<sup>269</sup> who applies the Federal Rules of Evidence.<sup>270</sup> Parties may call witnesses, introduce evidence, and cross-examine witnesses. A transcript is prepared by a court reporter.

OSHRC also provides for a streamlined hearing procedure called “E-Z Trial”, which does not require complaints and answers and does not involve motions or discovery, but requires disclosure by the Secretary of Labor of inspection details.<sup>271</sup> Hearings are less formal and the Federal Rules of Evidence do not apply. Cases can be selected for this procedure if they involve simple issues of law and fact, few citation items, a proposed penalty of less than \$20,000, no allegations of willfulness or repeated violations, no fatalities, a small unrepresented employer or if they will take less than 2 days. A party may oppose the other party’s request for an E-Z Trial.

Parties may petition OSHRC for a discretionary review of the judge’s decision if they believe that (1) the judge made findings of material facts unsupported by the evidence; (2) the judge’s decision is contrary to law; (3) a substantial question of law, policy or abuse of discretion is involved; or (4) a prejudicial error was committed. A party adversely affected by a final OSHRC order may

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<sup>267</sup> 29 C.F.R. § 2200.34 (employer contests) and § 2200.38 (employee contests).

<sup>268</sup> 29 C.F.R. § 2200.52.

<sup>269</sup> 29 C.F.R. § 2200.60 *et seq.*

<sup>270</sup> 29 C.F.R. § 2200.71.

<sup>271</sup> 29 C.F.R. § 2200.200 *et seq.*

appeal the decision to a United States Court of Appeals.<sup>272</sup>

## **B. Work Stoppages**

Under *OHSA*, the certified members of a JHSC representing the employees and management may direct an employer to stop work if they find that “dangerous circumstances” exist. If only one certified member has reason to believe that dangerous circumstances exist, he or she may request an investigator to investigate the circumstances and direct the employer to stop work. Although the employer may appeal this decision to an adjudicator, it must immediately comply with the stop work order.<sup>273</sup> Under the *OSH Act*, the Secretary of Labor may apply to the U.S. district court for an injunction to restrain conditions or practices, but only if these place workers in imminent danger of death or serious physical harm.<sup>274</sup>

## **C. Inspections**

Under *OHSA*, an inspector may enter in or upon any workplace at any time without a warrant or notice, as long as the workplace is not a dwelling.<sup>275</sup> Under the *OSH Act*, the U.S. Supreme Court decided that inspectors could not conduct non-consensual work site inspections without the benefit of a warrant, and held that requiring a warrant would not make inspections and enforcement less effective.<sup>276</sup> When faced with a non-consenting employer, OSHA must thus request a warrant

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<sup>272</sup> 29 C.F.R. § 2200.91 *et seq.*

<sup>273</sup> *OHSA*, s. 45.

<sup>274</sup> 29 U.S.C.A. § 662(a) (West 1998).

<sup>275</sup> *OHSA*, s. 54(1)(a).

<sup>276</sup> *Marshall v. Barlow's Inc.* (1978), 436 U.S. 307.

authorizing a workplace inspection from a district court. Even where inspectors produce a warrant, however, employers may refuse them entry and subsequently seek to quash the warrant in court.<sup>277</sup> Furthermore, employers who allow inspectors entry may subsequently seek to exclude the evidence discovered by the inspector on the ground that the warrant is invalid.

#### **D. Standard Setting**

The *OHSA* confers the power to promulgate occupational health and safety standards on the Lieutenant Governor in Council.<sup>278</sup> In practice, a committee composed of equal numbers of worker and employer representatives selected by the Ministry of Labour use a consensus approach to identify areas requiring health and safety regulation and to determine the appropriate standards. The Ministry of Labour provides the committee with technical expertise. Draft regulations are published, and a period of time is provided for public comment.<sup>279</sup>

The *OSH Act* authorizes the Secretary of Labor to establish mandatory health and safety standards.<sup>280</sup> OSHA develops standards through an administrative rulemaking process. Significantly, the *OSH Act* allows persons who may be adversely affected by a standard promulgated under the statute to challenge its validity in the United States Court of Appeals.<sup>281</sup> The courts have rigorously

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<sup>277</sup> See generally, David Miller & James Beach “Employer Options under the OSHA Inspection Warrant Procedure: A Rock and a Hard Place” (1990) 20 Seton Hall L.R. 804. Employers who take this approach risk the imposition of a civil or criminal contempt order if they fail to quash the warrant.

<sup>278</sup> *OHSA*, s. 70.

<sup>279</sup> See generally *GAO Report*, *supra* note 14.

<sup>280</sup> 29 U.S.C.A. § 655 (West 1998).

<sup>281</sup> 29 U.S.C.A. § 655(f) (West 1998).

reviewed OSHA standards. For example, OSHA has encountered significant difficulties in setting standards for safe levels of airborne hazardous chemicals, known as permissible exposure levels (PELs). The courts have required OSHA to “establish that existing exposure levels in the workplace present a significant risk of material health impairment or that the new standards eliminate or substantially lessen the risk.”<sup>282</sup> One reason for this close judicial scrutiny is that the *OSH Act* provides that “determinations of the Secretary shall be conclusive if supported by substantial evidence in the [administrative rulemaking] record considered as a whole.”<sup>283</sup> As a result, OSHA “has set fewer than three health-based standards per year throughout its twenty-two year history.”<sup>284</sup>

Workplace parties have greater opportunities to review citations, to challenge inspections and to challenge occupational health and safety standards under the *OSH Act* than under the *OHS Act*. In addition, OSHA compliance officers are required to seek court intervention more regularly in the course of their enforcement activities than inspectors under *OHS Act*, i.e. to obtain search warrants and to seek court injunctions to stop unsafe work. The relative ease with which parties in the United States may seek to resolve workplace health and safety issues in the courts impacts on the probability of success of JHSCs in such an environment. the GAO observed that:

Using the courts to resolve conflicts is much more common in the United States than in Canada. While establishment of joint safety and health committees might be easier if employers see the participation of workers as a way to reduce litigation, stakeholders who are accustomed to seeking a remedy through the courts may be less likely to go through the time and effort needed in consensus decision making. In addition, the threat of suit could inhibit committee

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<sup>282</sup> *AFL-CIO v. OSHA*, 965 F. 2d 962 at 980 (11th Cir. 1992).

<sup>283</sup> 29 U.S.C.A. § 655(f) (West 1998).

<sup>284</sup> Daniel A. Graff “Safe Workplaces? Judicial Review of OSHA’s Updated Air Contaminant Standards in *AFL-CIO v. OSHA*” (1995) 11 *The Labor Lawyer* 151 at 163.

participation and could limit employers' willingness to share decision making and information.<sup>285</sup>

## VIII. Conclusion

Both the United States and Ontario have established regulatory regimes to protect the health and safety of the workers in their jurisdiction. These regimes, as they are set out in their constituent legislation and as they are given effect follow different approaches to achieve their desired objectives. This paper has provided a brief overview of the most significant differences between the U.S. regime established under the *OSH Act* and the Ontario system under the *OHSA*. These differences relate to:

- the statutory duties and responsibilities of the different workplace parties;
- the degree of participation of workers in the regulation of workplace occupational health and safety;
- the mechanisms in place to enforce occupational health and safety standards;
- the scope of the right of employees to refuse unsafe work;
- the protection offered to employees against employer retaliation; and
- the importance of court review and adjudication in regulating occupational health and safety.

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<sup>285</sup> *GAO Report, supra* note 14 at 30.

Although both the *OHSA* and the *OSH Act* extend to employers various obligations to ensure the health and safety of their employees, the *OHSA* imposes affirmative duties on many more workplace parties, including workers, supervisors, suppliers, owners and corporate directors and officers. This illustrates a legislative intent that all workplace parties in Ontario share the responsibility to ensure a safe workplace.

The *OSH Act* provides fewer opportunities for employees to participate in assuring workplace health and safety, and relies almost exclusively on the enforcement activities of the OSHA inspectors. Under the *OHSA*, employees play a central role by participating in mandatory joint worker-management health and safety committees, monitoring their workplace, detecting and reporting safety hazards and by participating in their abatement. The certified members of JHSCs have the power to direct employers to stop work if they believe a contravention of the *OHSA* endangers a worker. Studies have suggested that the use of JHSCs is linked to reduced injury rates. However, mandated JHSCs do not guarantee workplace health and safety, and a strong inspectorate has served as a backup to the internal responsibility system.

Both the *OHSA* and the *OSH Act* rely to a significant extent on inspectors to ensure compliance with health and safety standards. However, the power of Ontario inspectors to conduct inspections without a warrant, and the duty on workplace parties in Ontario to assist the inspectors, facilitates the performance of their enforcement duties. Furthermore, the *OHSA* provides inspectors with broad powers to order the abatement of workplace hazards, or to stop work they believe to be dangerous. OSHA inspectors possess more limited powers and may seek injunctive relief only where workplace hazards place workers in imminent danger of death or severe physical harm. The inspectorate in both Ontario and the United States may impose fines and penalties for violations of their health and safety laws. However, under the *OHSA*, liability may attach to many workplace parties, in addition to a corporate employer, including individual supervisors and workers. In

addition, for similar violations, higher fines are imposed under the Ontario statute than under the *OSH Act*. While both the *OSH Act* and the *OHSA* allow employers to assert a due diligence defence, a number of additional defences have arisen under the *OSH Act*. Employers may claim that they could not reasonably have been expected to recognize the existence of a hazard, that compliance with a health and safety standard is infeasible, or that an accident resulted from unpreventable employee misconduct.

Ontario workers exercise a clearer and broader right to refuse unsafe work than their American counterparts. The right to refuse unsafe work under the *OSH Act* is triggered only where circumstances pose an imminent risk of death or serious bodily injury and where there is no time to seek corrective measures from the employer or to apprise OSHA of the danger. Workers in Ontario may refuse unsafe work if they hold a subjective, personal belief that their job is unsafe for them or their co-workers.

Ontario workers enjoy from stronger statutory protections against employer reprisals. While American workers must demonstrate that their employer's actions constitute discrimination against them for having exercised rights under the *OSH Act*, the *OHSA* imposes on employers the burden of showing that their actions were not reprisals against an employee for exercising his or her rights under the Act.

The *OSH Act* provides parties, and especially employers, with many opportunities to review the administrative enforcement activities of OSHA. Most notable is the power of parties adversely affected by health and safety standards promulgated by OSHA to challenge these standards in the courts.

It is unquestionable that the most significant difference between the U.S. and Ontario regimes

is Ontario's reliance on the Internal Responsibility System and JHSCs to regulate workplace health and safety. A properly functioning JHSC continuously monitors the workplace to detect health and safety hazards, to bring these to the attention of management and to make recommendations as to how they should be remedied. The certified members of JHSCs wield significant powers to protect workers where dangerous circumstances are found to exist in the workplace, including the right to direct the employer to stop work.

Voluntary JHSCs also exist in many workplaces in the United States and at least 12 state occupational health and safety laws mandate their creation. As the *OSH Act* nears its thirtieth anniversary, a number of proposals to bring important reforms to the legislation have been put forward. The proposed *Comprehensive Occupational Safety and Health Reform Act* ("*COSHRA*") would require employers to adopt a written health and safety program providing for the identification, evaluation and correction of workplace hazards, investigation of workplace injuries, employee participation and the designation of an employee representative to identify and correct hazards. *COSHRA* would also require that employers of more than 10 employees establish JHSCs with powers similar to those in Ontario.<sup>286</sup> In addition, JHSC members would receive health and safety training at the employer's expense and would be remunerated for time spent on JHSC duties. Under *COSHRA*, the mandatory introduction of JHSCs into U.S. workplaces covered by the *OSH Act* would be accompanied by significantly enhanced enforcement powers. For example, the filing of a notice of contest would no longer suspend abatement until a final OSHRC order where the alleged violation is serious and presents a substantial risk to employees.<sup>287</sup> Inspectors would have the power to identify imminent dangers in the workplace. Employees exposed to the identified dangers could refuse to work and receive absolute protection against employer retaliation. Substantial civil penalties

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<sup>286</sup> Stephen Yohay, *Comprehensive OSHA Reform a Serious Prospect* (1992) 17:4 Employee Relations L.J. 661 at 662-4. See also Watchman, *supra* note 5 at 71.

<sup>287</sup> *Ibid.*, at 666.

(\$10,000 to \$50,000) could be levied for each day of continued exposure.<sup>288</sup>

More recent reform proposals, however, have focused on reducing the regulatory burden imposed by the current occupational health and safety regime on employers.<sup>289</sup> Although both the *Occupational Safety and Health Reform and Reinvention Act*<sup>290</sup> and the *Safety and Health Improvement and Regulatory Reform Act*<sup>291</sup> “address the importance of labor-management committees,” they appear to contemplate a significant reduction in OSHA enforcement activities.<sup>292</sup>

As Americans consider the Canadian experience in health and safety, it would be wrong to leave the impression that Canadian employers, trade unions and employees are necessarily satisfied with the operation of the existing legislation in this country. For example, employers have argued that the work refusal provisions are too subjective and are prone to exploitation to apply pressure on the employer for purposes unrelated to health and safety. Trade unions, in turn, complain that regulatory standards are too weak and that enforcement of the statute is random. Each country stands to benefit from the other's experience in refining their legislation to best achieve the objective of a safer workplace.

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<sup>288</sup> *Ibid.*

<sup>289</sup> See Kovach et al., *supra* note 223.

<sup>290</sup> S. 1423, 104th Cong. 1st Sess. (1995).

<sup>291</sup> H.R. 1834, 104th Cong., 1st Sess. (1995).

<sup>292</sup> *Ibid.*, at 175. See also McGarity & Shapiro, *supra* note 222 at 588-9. For example, both Bills would allow small businesses to avoid no-notice inspections if their lost workday injury rate was less than their industry average: Kovach et al., *supra* note 222 at 171. The problem posed by this provision is that where the average lost workday rate is seen as a target, the health and safety in industries with high average rates may not improve very much. In addition, both Bills would reduce violations to warnings in the absence of serious injury or death, and would make financial penalties apply only to serious violations. Another proposed reform would see OSHA change its standard setting approach based on scientific and technological data to a cost-benefit analysis: see generally McGarity & Shapiro, *supra* note 222 at 622.