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Abstract
Government officials' laxness in enforcing Occupational Health and Safety Act standards was excused by the Labour Relations Board on the grounds that under the 'internal responsibility system' (IRS) the inspectors' primary role is not to police the workplace but to facilitate workers' cooperation with management in reducing hazards. The author argues that the IRS philosophy, borrowed from the 'equal-partner' ideology of collective bargaining law, has subverted the regulatory intent of the legislation by reinforcing worker powerlessness in the industrial hierarchy and undermining prescriptive standard setting. He criticizes the Board's reasoning and proposes measures to strengthen enforcement of the Act.
THE OCCUPATIONAL HEALTH AND SAFETY ACT AND THE INTERNAL RESPONSIBILITY SYSTEM

BY RICHARD FIDLER*

Government officials’ laxness in enforcing Occupational Health and Safety Act standards was excused by the Labour Relations Board on the grounds that under the ‘internal responsibility system’ (IRS) the inspectors’ primary role is not to police the workplace but to facilitate workers’ cooperation with management in reducing hazards. The author argues that the IRS philosophy, borrowed from the ‘equal-partner’ ideology of collective bargaining law, has subverted the regulatory intent of the legislation by reinforcing worker powerlessness in the industrial hierarchy and undermining prescriptive standard setting. He criticizes the Board’s reasoning and proposes measures to strengthen enforcement of the Act.

It’s a matter of concrete hazards, not whether Stan Gray gets along with the company. To ensure safety, if you have to be hostile, so be it. Mr. Bergie’s job was to enforce the Act, not to ensure that the company and the union get along. . . . [T]he Act reflects an inherent adversarial relationship.

— Stan Gray

I. INTRODUCTION

During the 1970s, Ontario overhauled its workplace safety legislation. The result of this reform was the Occupational Health and Safety Act, 1978 (OHS). This Act incorporates a number of provisions sought by the organized labour movement, such as increased protection for workers refusing unsafe work, mandatory appointment of worker health and safety representatives, procedures for designating and controlling the use of toxic substances, and increased penalties for contraventions of the Act.

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* Of the Ontario Bar. The author gratefully acknowledges the helpful comments on an earlier draft of this article of Professors Eric Tucker and Harry Glasbeek, and James Hayes of the Ontario Bar.

4 Ibid. ss 7(1), 8(8). The worker representatives are mandatory only where twenty or more workers are employed in the workplace or project. However, the Minister may order their appointment at smaller work sites (s. 7(2)).
5 Ibid. ss 20-22.
6 Ibid. s. 37.
Specific duties are imposed on employers, supervisors, owners, suppliers, contractors, and workers.7

Two permanent mechanisms in the Act ensure compliance with its provisions. The first of these is the inspectorate. Health and safety inspectors employed by the Ministry of Labour are empowered to enter any workplace at any time without warrant or notice. They may conduct tests, bring in experts for those tests, and require the employer to provide expert assessments at its own expense. They may interview any person in the workplace,8 and they may order the immediate shutdown of any hazardous operation.9 Although earlier legislation contained many of these far-reaching powers, they had been notoriously underutilized.

The second major enforcement mechanism, the principal innovation in the 1970s reforms, is the employer–worker health and safety committee.10 The committee’s function is to identify and obtain information on workplace hazards and to recommend programmes, measures, and procedures to improve health and safety in the workplace.11 It is mandatory in every industrial workplace with twenty or more workers, or where a designated substance under the Act is used, or where the Ministry has issued an order prohibiting or restricting the presence or use of a toxic substance in the workplace.12 The committee must have at least two members, and at least half of the members must be non-managerial personnel selected by the workers or their unions.13 Worker representatives on the committee have the right to inspect the workplace “not more often than once a month.”14 The committee is to keep minutes of its proceedings and make them available for examination and review by a Ministry inspector.15

Part VI of the Act prohibits an employer from disciplining or threatening a worker because that worker has complied with or sought to enforce the Act or the regulations. An aggrieved worker may take his or her other complaint under this section to binding arbitration if

7 Ibid. ss 13–19.
8 Ibid. s. 28.
9 Ibid. s. 29(4).
11 Ibid. s. 8(6).
12 R.S.O. 1980, c. 321, s. 8(2). Contractors and certain other designated employers are exempted from this requirement unless the Minister otherwise orders (ss 8(1), 8(3)).
13 Ibid. s. 8(5).
14 Ibid. s. 8(8).
15 Ibid. s. 8(7).
there is a collective agreement or file a complaint with the Ontario Labour Relations Board.\textsuperscript{16} The Act further provides that no person shall knowingly hinder or interfere with a committee, a committee member, or a health and safety representative in the exercise of his or her rights and duties under the Act.\textsuperscript{17}

Contraventions of the Act, or the regulations, or of an order of the inspector or the Ministry are subject to a fine of up to \$25,000, or imprisonment for up to twelve months, or both.\textsuperscript{18} Where an inspector has determined that a worker is endangered by machinery or a work process and a resulting order is ignored, the Director of the Occupational Health and Safety Division of the Ministry may seek an injunction.\textsuperscript{19}

The language of the Act would suggest that the primary enforcing authority is the inspectorate, with its sweeping coercive powers backed by penalties and injunctive relief. The joint committees, on the other hand, only consult and advise, playing a role subordinate to the inspectorate. The provisions governing the joint committees appear in Part II, Administration, while the inspectorate is covered by Part VIII, Enforcement.

That is not the Ministry's approach, however. In an accompanying guide to the Act the Ministry sets forth its interpretation:

The Act is based upon the principle that hazards can best be dealt with in the workplace itself through communication and co-operation between employers and workers.

Fundamental to the Act is the concept that employers and workers must share responsibility for occupational health and safety and that both must actively seek to identify hazards and develop responses to protect workers. This internal responsibility system assumes assessment of the system itself by employers and workers through the appointment of health and safety committees and representatives and through regular inspections of the workplace.\textsuperscript{20}

From this perspective, the inspectorate's role is distinctly secondary to that of the joint committee and the internal responsibility system (IRS). How successful is this approach with its underlying philosophy of shared responsibility in ensuring compliance with the Act? Has the joint committee system facilitated resolution of industrial health and safety problems? Do the Ministry inspectors strengthen on-the-job enforcement of the Act?

\textsuperscript{16} Ibid. s. 24(2).
\textsuperscript{17} Ibid. s. 33.
\textsuperscript{18} Ibid. s. 37.
\textsuperscript{19} Ibid. s. 31.
The organized labour movement, which initially greeted the joint committees as a vehicle of worker input, has heavily criticized the IRS. In 1984, Dupré stated:

Labour feels that the concept is deceptive in that it has an appearance of protecting workers, while in practice it provides both management and the government with an excuse for doing as little as possible. Specifically, labour is critical that the committees may appear to give workers an involvement in health and safety while denying them the power actually to accomplish anything. Labour is also concerned that the Ministry uses the IRS to avoid the necessity of action. Labour claims that Ministry officials respond to problems in the workplace by telling the two sides — management and labour — to work difficulties out together. Labour claims that the powerlessness of workers in a ‘work it out yourselves’ situation results in what is, in effect, collusive inaction between management and the government.21

The Ontario Federation of Labour endorsed a policy resolution stating flatly that “the effectiveness of the Act has been crippled by the Ministry of Labour’s lack of enforcement.”22

In 1982, New Democratic Party members of the Ontario Legislature constituted a Task Force on Occupational Health and Safety and held public hearings in ten cities throughout the province to assess the operation of the Act. The sixty-one page study is a comprehensive critical analysis by workers and their unions of the Act. “What did we find, and what did we hear?” asked the committee.

Principally, it was dissatisfaction, frustration, fear, disappointment and a sense of futility.

Dissatisfaction, first, with the Internal Responsibility System. Management, and not the health and safety committees, decided in the final analysis what would be done to correct health and safety problems. Frequently, if more than token costs were involved, that proved to be very little. Dissatisfaction, second, with the lack of enforcement of this province’s laws. Tens of thousands of orders are issued, and 10 to 15 percent must be repeated because companies fail to comply. Yet charges are few, fines are low and workers continue to get hurt or become ill.23

Shortly before the study was issued, Stan Gray, a worker health and safety representative at the Westinghouse Beach Road transformer plant in Hamilton, filed two complaints with the Ontario Labour Relations Board. One complaint alleged that on numerous occasions company officials had harassed, disciplined, or threatened Gray in the exercise of his duties contrary to s. 24 of the OHSA. The other complaint alleged,

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23 Not Yet Healthy, Not Yet Safe, based on a speech by Elie Martel, M.P.P. (Sudbury East), in the Legislative Assembly of Ontario (Debates, 26 April 1983, at 55). Martel was the chair of the Task Force.
in effect, that the company's actions had been backed by Lawrence D. Bergie, the Hamilton Area Manager of the Industrial Health and Safety division of the Ministry of Labour, in violation of Gray's rights under the Labour Relations Act. The Board dismissed Gray's request that both complaints be heard together.

The complaint against Bergie involved twenty days of hearings and the submission of 121 exhibits. On 2 February 1984, the Board issued its decision. The three-member panel substantially confirmed the factual basis of Gray's allegations, but it dismissed the complaint on the narrow ground that Bergie's conduct was motivated solely in furtherance of the policies and objectives of the OHSA. In doing so, the Board explicitly endorsed the Ministry's concept of the inspector's role and attempted to define it. Gray's complaint against Westinghouse has since been abandoned.

Gray v. Bergie involved much more than the alleged misconduct of a Ministry of Labour official. It was a trial of the Ministry and its interpretation of the philosophy underlying the OHSA. The Board's reasons described the Ministry's inaction and apparent collusion with company officials in the face of the company's persistent non-compliance with the Act. Although the Board failed to assign blame for this record to Bergie, the Board's findings regarding the operation of the IRS in the Westinghouse plant illustrate serious deficiencies in the enforcement of the Act. The Ministry's policy of avoiding 'heavy-handed' intervention and emphasizing the need for workers and management to collaborate in solving jointly workplace health and safety problems has deprived Ontario workers of the protections of the Act. The Ministry's interpretation of the inspectorate's function subverts the Act, which is designed to protect the lives and health of working people in the face of socially irresponsible employers. The decision in Gray v. Bergie underscores the need to rethink the IRS and its interaction with the inspectorate.

The following account will summarize the principal findings of the Board, discuss the implications of the Board's decision with respect to enforcement of the Act, and indicate some possible changes in the provisions and implementation of the Act.

24 R.S.O. 1980, c. 228. Gray v. Bergie was filed pursuant to s. 89 of the Act. The form of these proceedings is discussed infra, at notes 69-70.

25 Stan Gray later resigned his employment at Westinghouse to become Staff Co-ordinator of the Hamilton Workers' Occupational Health and Safety Centre. The Centre, founded by Local 1005 of the United Steelworkers of America, quickly established a reputation for innovative and aggressive research, treatment, and political activism on behalf of workers throughout Ontario affected by workplace hazards.
II. THE WESTINGHOUSE INCIDENTS

A. The Terry Ryan Incident

On 29 November 1979, a drum exploded on the shipping floor at the Beach Road plant. The explosion blinded a twenty-two year-old worker, Terry Ryan. Ryan also lost his senses of smell and taste and has other continuing health problems as a result of the accident.\(^{26}\)

The forty-five gallon drum that exploded was part of an apparatus used to spray-clean assembled transformers prior to painting. It normally contains a mixture of water and Cromac 616, a detergent. Samples of the liquids found at the scene indicated that the explosion and flash fire had resulted from the presence of large amounts of Toluol, a flammable and highly volatile solvent, in the drum and the wand and hose of the spraying device. Toluol was not supposed to be in the drum or anywhere in its vicinity.

Toluol fumes affect the central nervous system and respiratory tract. They can cause dermatitis and damage the blood, liver, and kidneys.\(^{27}\) Toluol is a volatile substance and therefore a controlled chemical under the Ministry of Labour regulations. It is to be kept away from possible ignition sources and to be dispensed from safety containers with flame arresters in rooms and buildings that are well ventilated.\(^{28}\)

It is unclear what ignited the Toluol in the drum. Quite possibly a spark from static electricity touched off the explosion. Tests showed conditions favourable to static electrical build-up and sparking.\(^{29}\) Within hours of Terry Ryan’s accident, inspectors Lawrence Bergie and Bill Gordon of the Ministry of Labour conducted an investigation at the plant accompanied by Stan Gray and company officials. They were unable to determine how the Toluol came to be in the drum. They indicated some interest in Gray’s suggestion that improper practices in handling Toluol might be responsible for its presence in the drum but did not investigate further. On 19 December 1979, Gray was informed that the

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\(^{26}\) The following account is based on the Labour Relations Board decision, supra, note 1 at 180-82. Reference is also made to a typewritten memorandum prepared by Stan Gray for the Ministry of Labour and discussed infra: “Report on the Terry Ryan Accident” (July 1980) [hereinafter cited as “Gray Report”]. The Report is cited in the Board decision at 181-82. Gray has also described this incident and its aftermath in “The Case of Terry Ryan” in (1983) 16 (No. 7-8) Canadian Dimension 18.


\(^{29}\) Gray Report, supra, note 26 at 2-3.
Ministry had completed its investigation and found that there had been no violations of the law.

Gray, dissatisfied with the inquiry, carried out his own investigation pursuant to section 8(9) of the \textit{Act}.\footnote{S. 8(9) provides that, where a worker is killed or critically injured at a work place, a member of the joint health and safety committee may conduct his or her own investigation and report the findings to a Director and to the committee.} Ryan's family also indicated its dissatisfaction with the Ministry response and, as a result of their pressure, the Ombudsman later made some inquiries.\footnote{\textit{Gray v. Bergie}, supra, note 1 at 182.} On 18 July 1980, Gray submitted a forty-page report on his findings to the Ministry. Examining the possible explanations for the presence of Toluol in the drum, the report documented a number of unsafe practices involving the use and storage of Toluol in the Beach Road plant:

1. Toluol had long been used as an all-purpose solvent in a number of plant departments, although in most it was entirely unauthorized.
2. The normal practice was to keep it in plastic squirt bottles instead of the special metal containers required by the \textit{Act}. These squirt bottles had been removed only when the Ministry inspectors so ordered on the day Terry Ryan was injured.
3. Toluol was freely poured over transformers to cut the oil and grease. Protective equipment was rarely used.
4. No attempt was made to isolate Toluol and its vapours from potential ignition sources.
5. Workers had very little instruction in the hazards of Toluol. Union health and safety representatives, including Gray, had great difficulty in getting access even to a copy of a Westinghouse hygienist's safety report on Toluol, which outlined its hazardous effects and described procedures to control its handling and storage.\footnote{"Condensed Information on Toluene" annexed to Gray Report, supra, note 26.}
6. Supervisors were generally aware of the widespread unauthorized use of Toluol but ignored it.

The men were not officially told to spray with Tuluol, and none have stated that anyone was \textit{ordered} to do it by supervision. It seems that it was an occasional practice that some workers did and supervision quietly accepted since it appeared to speed up production. Of course, a worker who perceives that a supervisor is aware of the practice, but does nothing, assumes he has at least passive authorization to continue it, and that it has no harmful effect.\footnote{Gray Report, \textit{ibid.} at 10.}

In fact, the company had acknowledged the unauthorized use of Toluol to the Workers' Compensation Board in response to an employee claim.
7. Toluol was widely available. When the union safety representatives raised the matter, the Toluol would disappear for a while, then reappear. "It appeared to me," Gray reported, "that the Divisional management had organized a 'clandestine' system for the dispensing and use of Toluol, and that most workers involved either did not know its hazards or were afraid to speak up and do something about it."\textsuperscript{34}

Gray suggested an explanation for the "unsupervised availability" of Toluol. In November 1977, at union insistence, management had switched from using the hazardous Chlorothene Nu (Methyl Chloroform) as a general solvent to using Varsol 3135. But Varsol was not an effective cleaner. Gray alleged that during a strike in 1978 supervisory and other non-union personnel had tested various solvents, detergents, and tank-cleaning methods. As a result, Toluol, although unauthorized, found its way back into the plant.\textsuperscript{35}

This "system of unofficial use," Gray suggested, enabled management to disavow responsibility if an accident were to occur. After all, the workers were not authorized to use Toluol. That was exactly the kind of defence Westinghouse had presented in a 1977 prosecution under the OHSA for allowing employees to work under a load suspended from an overhead crane. The company produced as evidence a company safety booklet that labelled this work practice unsafe. In that case, however, the company was convicted when it was proved that working under loads was tolerated by foremen as a standard practice in the plant.\textsuperscript{36}

"Whether it was a Toluol sprayer or a prankster," Gray concluded, "the person who put Toluol in the drum that exploded had unrestricted access to the Toluol; and he had it because the company so designed it, for specific purposes, which included a scheme to allow Toluol to be used unsafely."\textsuperscript{37} Although still unable to show that these practices were the direct cause of the explosion, he alleged that the company had contravened sections 14 and 16 of the OHSA, which prescribe employers' and supervisors' duties.\textsuperscript{38}

Four weeks after Gray had submitted his report, the Ministry of Labour reversed its original decision not to prosecute and laid four charges.
against Westinghouse and two company supervisors.\textsuperscript{39} Several things indicated that the Ministry was less than eager to conduct a successful prosecution. First, the charges were seriously flawed.\textsuperscript{40} The date of the accident was incorrectly stated as 30 November 1979, and failure to correct that error would result in all of the charges being dismissed. Furthermore, the information incorrectly listed the sections of Regulation 692 that were allegedly contravened.

The Ministry had chosen to proceed under provisions in sections 14 and 16 that allow a due diligence defence.\textsuperscript{41} Gray suggested that a charge under s. 14(1)(a) and s. 14(2)(a),\textsuperscript{42} which do not contain a due diligence defence, would more readily allow the introduction of evidence of the basic crime: a pattern of unrestricted access to Toluol for all workers in the plant. All the charges originally laid were limited to the specific date of the accident and failed to account for the continuing offence of company negligence.

Following a meeting between Gray and the Ministry solicitor, the Ministry laid new charges. They corrected the error with respect to the date of the accident and extended the dates of the offences in two charges to cover a period of twelve days preceding the accident. However, some of the factual errors remained, and none of the charges specified the unsafe use of Toluol.

Following further remands and an unsuccessful attempt by Westinghouse to have the charges thrown out for "lack of particulars," the case finally came to trial in June 1981. After an adjournment, the workers came back to court with their witnesses, including worker safety representatives from other plants. They were prepared to testify on safety policies pertaining to flammables in the workplace as evidence of

\textsuperscript{39} 14(1) An employer shall ensure that . . . 
\(\text{(c) the measures and procedures prescribed are carried out in the work place.}\)

\textsuperscript{40} Memorandum by Stan Gray, no date, submitted in evidence at the Labour Relations Board hearing.

\textsuperscript{41} See s. 14(2)(g), supra, note 39. See also s. 37(2) On a prosecution for a failure to comply with . . . 
\(\text{(b) clause 14(1)(b), (c) or (d) . . . It shall be a defence for the accused to prove that every precaution reasonable in the circumstances was taken.}\)

\textsuperscript{42} S. 14(1)(a) An employer shall ensure that the equipment, material and protective devices as prescribed are provided; s. 14(2)(a) An employer shall provide information, instruction and supervision to a worker to protect the health or safety of the worker.
reasonable steps for an employer to take in the circumstances. The evidence was never heard. Before the trial resumed, the Ministry prosecutor informed the workers that a deal had been made. Six of the seven charges would be dropped and Westinghouse would plead guilty to a reduced charge. The company admitted no liability for Terry Ryan's accident. The prosecutor asked the court to be lenient with the company, incorrectly stating that it had no previous safety convictions. The company was fined $5,000. The fourteen charges against the two foremen were dropped.

The investigation and prosecution arising out of the Terry Ryan accident indicated serious deficiencies in the Ministry's approach to enforcement of the Act. When the Westinghouse situation came to the attention of the Legislature in the autumn of 1982, it became clear that the pattern reflected policy decisions at the highest level of the Ministry.

B. The Stop-Blocks Incident

Some time prior to 1980, the worker representatives had raised the need for 'stop-blocks' on crane tracks to protect those repairing one crane from being struck by another. The issue took on greater importance in March 1980 when two crane repairmen narrowly escaped injury from a second crane. The company assured the Ministry inspector that it would henceforth enforce its safety procedures, as outlined in the company manual. "Whatever that meant," the Board panel comments, "it is apparent from the evidence that the company did not adopt a practice either of employing stop-blocks or of locking out the other cranes during crane repairs, and the hazards, from the union's point of view, continued."

In mid-1980, the union requested that Westinghouse either use stop-blocks or lock out the other cranes during repairs after it learned that

43 See text, supra, at note 36.

44 Terry Ryan, now classified as totally disabled, has been left with a Workers' Compensation Board pension of 75 percent of his pre-accident earnings, far less than he and his family might have recovered from a successful civil suit. Barred by s. 14 of the Workers' Compensation Act, R.S.O. 1980, c. 539 from suing his former employer Westinghouse as such, Ryan sought to sue the manufacturer of Toluol and eight present and former executive officers of Westinghouse Canada for negligence and commenced an action against Westinghouse and two of its supervisors for breach of the OHSA.

Following a hearing pursuant to s. 15 of the Act, the Workers' Compensation Board ruled that Part I of the Act deprived Ryan of any right of action against any of the defendants. On an application for judicial review of this decision, the Divisional Court held (6 November 1984) that the Board had acted within its jurisdiction and not contrary to the Canadian Charter of Rights and Freedoms as alleged by Ryan's counsel. The Court of Appeal refused leave to appeal (The [Toronto] Globe and Mail, 28 November 1984). For a comment on this decision, see note 70, infra.

45 Gray v. Bergie, supra, note 1 at 182-83. This account is based on evidence at the Labour Relations Board hearing as reported in the Board's decision.
the Ministry had ordered similar action at Stelco. There was no reply. Gray persisted with his request for stop-block implementation throughout 1981 and 1982. According to Gray, Bergie’s response was to scold the union for not communicating more effectively with the company. Finally, after two full years of persistent union pressure and several near miss incidents, the Ministry ordered Westinghouse to use stop-blocks.

C. Troubles in the Fabricating Shop

1. The welding fumes problem

During the winter of 1981–82 Westinghouse installed metal cladding on the outside walls of the ‘Fab’ shop to improve insulation. The union had earlier complained of inadequate ventilation in the building. When complaints of sore throats and nausea became more pronounced, the workers signed a petition requesting the Ministry to conduct an air sampling.

Stephen Kwok, a Hamilton supervisor of the Ministry’s Occupational Hygiene Service, went to the plant, took two samples of carbon monoxide, and ordered further testing. Before that could be done, a work refusal occurred over fumes on the paint line in the same building, and Kwok recommended that respirators be worn until the long-term test results were in. Another work refusal occurred on 3 February when the crane operator complained of the welding fumes; Kwok “sought to demonstrate to him that the fumes only appeared worse because the company had gone from white to orange lighting.” The long-term results indicated high readings of welding particulate at two of the work stations tested; Kwok ordered respirators to be worn at those two stations, pending the provision of more adequate ventilation. “The order reads, however, as if its full application is confined to those two stations, and the union was not satisfied. The company was not satisfied either, as they did not feel the samplings justified any order.”

More importantly, Kwok dismissed the lab report’s finding that two of the seven samples showed that oxides of nitrogen were at or above the accepted limit of exposure. Stan Gray then produced authoritative evidence, supported by outside doctors from the union-sponsored Barton Street Workers’ Occupational Health Clinic as well as from McMaster University, “that carbon monoxide is never a by-product of arc-type welding, that the oxides of nitrogen reading displayed a serious health

46 Ibid. at 184 (emphasis in original).
47 Ibid. (emphasis in original).
hazard, that a better method of testing existed, and that ozone (a harmful oxide) should have been tested for as well."

The Ministry tested for the wrong gas. It covered up its own findings of dangerous levels of oxides of nitrogen. It resisted the workers’ demands for full engineering controls for more than a year until Westinghouse finally consented to such controls in the face of unfavourable publicity in the media and the Legislature.

Were Ministry officials simply incompetent? The Board notes that “Mr. Kwok is an engineer and an experienced hygienist, having worked in that capacity in industry for five years, and then for the Ministry for another five years, and is one of only 40 certified industrial hygienists in Canada.”

Gray suggests another explanation:

Had the Ministry accepted their own findings, i.e. high levels of NO [oxide of nitrogen] gas, they would have had to order Westinghouse to do a costly ventilation of the building. This is because a respirator for the gases would be expensive and probably unusable with a welding helmet, or at least a special device would be needed, very costly and cumbersome. Ventilation would be the practical answer. So, to protect the company rather than the workers, the Ministry just denied the validity of their tests for NO.

2. Fumes from the spray-paint line

The Fab Shop also had a related problem regarding fumes from the spray-paint line, particularly the Threshold Limit Value [TLV] (safe exposure limit) for a solvent called Solvesso 100. The union had raised the matter with the company in September 1979 and with the Ministry inspector in October 1980. On 19 January 1982, nine workers refused to work, complaining that paint fumes were causing eye irritation, nausea, and sore throats. Kwok came to the plant, took samples, and ordered that protective equipment be worn by all workers in the department. The Ministry’s report, issued a few days later, listed a TLV for Solvesso 100 of 575 mg/m\(^3\). On the basis of discussions with the Westinghouse chemist and Ministry data sheets, Kwok noted that some of the samples he took showed readings above that TLV, standard, but he issued no orders.

At a meeting between the union and Ministry officials, including Bergie, Gray produced information found in the Ministry’s own library that a TLV of 275 mg/m\(^3\) was recommended by the manufacturer for

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48 Ibid. (emphasis in original).
49 Ibid.
51 This account is based on materials in the NDP Research files at Queen’s Park and the Labour Relations Board decision in Gray v. Bergie, supra, note 1 at 185-86.
Solvesso. In a subsequent test, Kwok again listed the TLV for Solvesso as 575. The union took its story to the press and to the New Democratic Party opposition members in the provincial Legislature, and Solvesso became a public issue. In November 1982, the Ministry set the TLV for Solvesso 100 at 275 mg/m³.

D. Oil Fumes Inside Transformer Tanks

The union was also concerned with the toxic effects of fumes to which workers were exposed while working on transformer cores inside a tank while the tank is still hot. Workers had complained of sore eyes and throats and dizziness; one worker passed out after being inside one of the tanks. Gray investigated and pressed for company and Ministry action:

1. In January 1980, he asked a Ministry inspector to get information about the oil and other substances used in the tanks. The company said a report “was in the process of being prepared.”

2. Eight months later, after several more attempts to get information, the company said it had been testing the tanks but “not keeping a permanent record of the results.” The company also said “it was developing its own list of priorities for the release of information.” The Ministry inspector reminded the company of the statutory obligation to provide information to the joint committee.

3. Eleven months after Gray’s initial request for information, the company produced a “fact sheet.” Under “Health” it simply said “Do not breathe oil mists.”

4. Gray continued to demand information and in April 1981 had enough to show the Ministry inspector that the company had been failing to disclose available information.

5. As a result of this pressure the Ministry did the following:
   (a) In January 1981, the Ministry took an oil sample but released no information.
   (b) In October 1981, the Ministry tested on a cold tank from outside the tank. Gray reminded them that a test inside a hot tank was required.
   (c) In January 1982, a contract consultant hired by the Ministry did a test on a cold tank from outside the tank. Gray reminded the Ministry that it was necessary to test inside a hot tank.

52 Ibid. at 185.
53 This account is based on the Labour Relations Board decision, ibid. at 186-88. All quotations are from that decision.
6. At a meeting in March 1982 between the union and Ministry officials, the Ministry’s Area Administrator Earl May insisted that tests had been conducted on hot tanks. But reports disclosed that no hot tanks were tested. Kwok said testing had not been done while the tanks were hot because he believed that the company did not let anyone enter the tank while it was hot. The Ministry ordered that no employee was to enter the tank without its first being tested and certified. The order was re-issued in September 1982, and the company then adopted a procedure of certifying tanks safe before entry.

It had taken two and a half years of persistent activity by Gray and the union to resolve this problem. The Board decision records no fewer than sixteen occasions on which the union raised the problem with Bergie or other Ministry officials. The Board acknowledges that the issue “took a distressingly long time to resolve” but insists that the evidence “establishes clearly” that the Ministry’s employees “either did not understand what Mr. Gray’s actual concern was, or did not believe that the entry into hot tanks was a genuine problem.”

E. Delay in Getting the Lead Out

Gray also complained to the Labour Relations Board about the delay of the company and the Ministry in enforcing controls on lead used in the spray-painting of transformers. The union raised the problem of possible lead poisoning on the paint line with the company in November 1981 and with the Ministry in March 1982. Lead was the first substance to be regulated under the ‘designated substance’ provisions of the Act. Exposure to lead causes fatigue, headache, insomnia, and high blood pressure. It can permanently damage the kidneys, the nervous system, and the reproductive system. An inspector ordered the company to carry out a lead assessment in consultation with the joint committee.

In April 1982, the company tested for lead on the paint line. The results showed levels three times above the acceptable limits, but the company maintained that respirators were adequate. A subsequent test showed readings six times the acceptable levels. Gray contacted the Ministry and, following a meeting on 8 September the Ministry undertook

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54 See R.R.O. 1980, Reg. 692, ss 72 and 73.
55 Gray v. Bergie, supra, note 1 at 199.
57 Gray v. Bergie, supra, note 1 at 188.
58 Ibid. See O. Reg. 536/81. This account is based on the Labour Relations Board decision, at 188-90, unless otherwise indicated.
to test for both lead and Solvesso 100 (which was still an issue at that date), with special attention to short-term exposure limits.

On 1 October Westinghouse submitted its proposed lead assessment programme. The union objected on the grounds that it had not been consulted on the content of the proposal, contrary to sections 6(3) and 7(3) of the Regulation on lead, and later filed a written critique of the assessment. The union then addressed the issue at a public hearing of the NDP's Task Force on Occupational Health and Safety, which began to look at the Westinghouse situation as a test case for the new lead-control regulations.59 When Gray sought to get information on the lead content of various paints in the company stockroom for the joint committee and the NDP investigation, he was suspended. The matter was raised in the Legislature and the Ministry was forced to intervene. During the resulting meeting, Bergie threatened Gray that if he took information to the NDP "there'll be big trouble."60 Political pressure continued to build around the lead issue. On 28 October, both the Ministry and Westinghouse retested for lead content. The Westinghouse results showed the highest levels ever, up to twenty times the threshold standard.

The Ministry's preliminary test results, showing readings between five and seven times the accepted limit, reached its Hamilton office on 8 November but were not made public until early December. On 26 November, Assistant Deputy Minister Ann E. Robinson issued a report in response to the union and NDP allegations stating incorrectly that the September tests had shown no lead readings above the legal limit. Robinson also stated incorrectly that the results of the 28 October tests were not yet available and concluded that:

the company has responded to the orders issued under the Regulation respecting Lead and has gone beyond the requirement for consultation with the committee to try to reach agreement on the provisions of the control programme. There is no indication that this company initiative is not a sincere attempt to effectively protect the health of workers.61

Labour Minister Russell Ramsay immediately branded the NDP and union charges "frivolous."62

The release of the October test results within days of the release of the Robinson report exposed the Ministry's cover-up and increased

60 Gray v. Bergie, supra, note 1 at 189.
61 Ontario, Ministry of Labour, Advisory Council on Occupational Health and Safety (Chair: Dr. J.F. Mustard), "Re Westinghouse Canada Ltd" (26 November 1982) at 5.
pressure on the Government. The NDP hammered away in the Legislature on the Ministry's refusal to prosecute Westinghouse. Newspaper articles documented that other companies in the Hamilton area had stopped using lead-based paints. Gray filed his complaints with the Labour Relations Board.

In late December, Bergie issued a written response to Gray's criticism of the company's lead assessment proposal of 1 October. The letter concluded that the assessment did not meet the requirements of the Regulation. Early in January 1983, Labour Minister Ramsay chaired meetings of the company, the union, and Ministry officials. The company was ordered to conduct a new lead assessment by 1 February and to have a control programme in place by 15 February. In late January, Westinghouse finally agreed to eliminate leaded paint from its spray painting operations in the transformer division by 31 March. The company said it was considering engineering controls, such as improved ventilation in the plant.

F. Threat to Dissolve Joint Committee

In March 1982, Bergie threatened to dissolve the joint committee because of the union's "confrontational style." The incident began with a joint committee meeting in the midst of the disputes over the stop-blocks, welding fumes, spray-paint fumes, transformer tank fumes, and lead. The meeting "was a particularly antagonistic one, with Mr. Gray reiterating a long list of demands unfulfilled by the company, and charging both the company and the Ministry with bad faith." When these remarks came to the attention of the Ministry, Bergie was ordered by Earl May, the Hamilton Area Administrator of the OHS branch, to go in and "tell them what the internal responsibility system was all about." The Board stated:

We find Mr. Bergie to have essentially berated the committee for its confrontational style, and to have said that the committee was not functioning in any way like it should. . . . Mr. Bergie said that he and Mr. May had been to Mr. McNair [Director of the Industrial Health and Safety Branch] and had found a way to petition the Minister to dissolve the committee, unless the people on the committee could "come up with something else."66

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66 Gray v. Bergie, supra, note 1 at 190-91. Gray told the author that Bergie's remarks were in fact made to the worker safety representatives, not the joint committee. (Interview, 28 October 1985).
Bergie told the Board that he had hoped to "shock" the committee into trying to work things out.

III. FACILITATING VS. ENFORCING: THE INTERNAL RESPONSIBILITY SYSTEM

A. 'Good Faith' Clears the Ministry

The incidents at Westinghouse constitute an appalling record of Ministry failure to enforce the provisions of the OHSA. Each case required months, if not years, of persistent struggle by the worker representatives to obtain even the simplest act of compliance with the workers' legislated rights. Yet the Labour Relations Board panel dismissed Gray's complaint, generously acknowledging that "not everything the Branch did with respect to Westinghouse was letter perfect" but concluding that "the evidence fails to satisfy us that Mr. Bergie, whether right or wrong in his interpretation of the Occupational Health & Safety Act, was intending to act other than in furtherance of the policies and objectives of that Act."68

A worker or union seeking to mount a legal challenge to the Ministry of Labour's failure to enforce the OHSA has three options:
1. A worker may appeal an inspector's refusal to make an order to the Director of the Ministry's Occupational Health and Safety Division under subsections 32(1) and (5) of the Act. The confederacy between the inspectors and other Ministry officials, including McNair, the director, diminishes the utility of this internal administrative review mechanism.

2. A worker may go to the courts in one of two ways. A private prosecution may be initiated alleging that a Ministry official "knowingly" hindered or interfered with a health and safety committee or representative in the exercise of a power or performance of a duty under the Act. Or the worker may initiate a civil action for damages or apply for prohibition or mandamus, which requires proof that the Ministry official acted with malice. The length and expense of such judicial proceedings generally preclude them as an option.

3. An application may be made to the Labour Relations Board under s. 89 of the Labour Relations Act. This section authorizes the Board to inquire into any allegation that an employer, employer's organization,

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67 Gray v. Bergie, supra, note 1 at 199.
68 Ibid. at 204.
69 But see infra, note 70.
trade union, council of trade unions, person, or employee has acted contrary to the Act and endows the Board with broad remedial powers.

Stan Gray took the third course. However, s. 89 does not contemplate complaints against a Ministry or the Crown except in their capacity as employers. Gray therefore had to show that a particular “person” had violated his rights. Gray alleged that Bergie’s threat to dissolve the joint committee and his warning of dire consequences if Gray took information to the NDP\textsuperscript{70} contravened sections 70 and 3 of the \textit{Labour Relations Act}. These sections read as follows:

\begin{itemize}
  \item \textbf{70} No person, trade union or employers’ organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers’ organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.
  \item \textbf{3} Every person is free to join a trade union of his own choice and to participate in its lawful activities.
\end{itemize}

Gray then had to contend with Bergie’s claim of Crown immunity, pursuant to s. 11 of the \textit{Interpretation Act}.\textsuperscript{71} This section has been construed narrowly, the Board observed, “so as to extend immunity for Crown servants only to acts authorized expressly or by necessary implication by statute or their superiors.” Gray therefore had to prove that Bergie

\textsuperscript{70} The Board rejected Bergie’s contention that Gray’s activity as a health and safety representative was not “protected activity” under the \textit{Labour Relations Act} and that Gray’s remedy lay exclusively under the \textit{Occupational Health and Safety Act}. Notwithstanding s. 2(2) of the \textit{OHSA}, which states that the provisions of the Act and the regulations prevail over any general or special Act, the Board decided that the \textit{OHSA} “did no more than establish a parallel avenue of relief to the \textit{Labour Relations Act}” and that the rights exercised by Gray in this case existed independently of the \textit{OHSA}, in the Westinghouse collective agreement. However, the Board left open the possibility that “\[w]here the same situation to be before the Board again, and the issue of jurisdiction put before the Board at the outset, the Board might well decide that the appropriate place for a case dealing with enforcement of the \textit{OHSA} is under that Act (at 192)\[2pt].”

\textsuperscript{71} R.S.O. 1980, c. 219 s. 11 states:

“No Act affects the rights of Her Majesty, Her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.”
had acted on his own initiative in committing the alleged acts and omissions. Gray tried to avoid the s. 11 strictures, but the Board noted:

[Mr. Gray] testified that it was his belief that “the Ministry” and Westinghouse were “in bed together,” and that he hoped this complaint would bring an end to the Ministry’s partisanship. He said he felt the problem was the “lack of political will” by the government to take on large employers, and that Mr. Bergie was simply carrying out Ministry policy. Even with respect to the complaint’s central allegation, the threat of dissolving the committee, Mr. Gray said that he did not believe that that had come from Mr. Bergie’s own personality; rather, he felt that the whole thing had been thought out “higher up.”

The Board chose not to decide the issue of Crown immunity, however, because of its decision on the merits of the complaint.

In alleging that Bergie had breached s. 70, Gray had to prove that Bergie had sought to compel him to refrain from exercising his rights under the Act. The narrow issue was Bergie’s motivation. Was Bergie “acting to protect either the employer, or the Ministry, or both, from being harassed and embarrassed, and to intimidate Mr. Gray into ceasing to pursue his lawful rights”?

The evidence revealed the following:

1. After a perfunctory investigation of Terry Ryan’s accident, Bergie decided not to recommend that Westinghouse be prosecuted. He submitted the matter to the Ministry’s Legal Branch only after the submission of Gray’s voluminous report, prompting by the victim’s family and an inquiry from the Ombudsman.

2. When the union pressured the Ministry to order Westinghouse to use stop-blocks, Bergie scolded them for not communicating effectively with the company. When Westinghouse had still not introduced stop-blocks a year and a half later, Bergie tried to talk Gray out of pursuing the issue because it would cost the company too much.

3. Bergie upheld erroneous testing of welding fumes and then scolded the worker representatives for going to “cock-and-bull” union doctors, the source of the new, correct evidence. Similarly, he failed to intervene when Gray showed that the Ministry’s exposure limits for Solvesso 100 were twice those set by the solvent’s manufacturer.

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72 Gray v. Bergie, supra, note 1 at 193.
73 Ibid. at 179.
74 Text, supra, at notes 30 to 39.
75 Text, supra, at note 45.
76 Text, supra, at notes 46 to 48.
77 Text, supra, at note 52.
4. The union protested repeatedly about exposure to fumes while working on transformer cores inside hot tanks. It took two years of conflict before the Ministry responded correctly.\textsuperscript{78}

5. After the Ministry stalled for months on union requests for a full order for lead control, the union took its case to the public through the NDP. When Gray was suspended by the company for his efforts to get information on lead levels in paint, Bergie threatened that he had better not give other information to the NDP “or there’ll be big trouble.”\textsuperscript{79}

6. Instructed by his superiors to tell the plant’s joint health and safety committee “what the internal responsibility system was all about,” Bergie berated the committee (specifically the worker representatives who were documenting the company’s refusal to comply with the Act) for their “confrontational style” and threatened to dissolve the committee.\textsuperscript{80} Despite this record, the Board held that Bergie had only a “tangential” role in some of the incidents. He may have misunderstood the union’s concerns in some instances, but his conduct was not unreasonable in light of his responsibilities under the Act.\textsuperscript{81} As for the threat to dissolve the joint committee, this “was not a tactic, no matter how well-meant, which the panel would wish to endorse” but was only “one final attempt by Mr. Bergie to generate some form of change in the adversarial relationship he saw dominating the joint committee, in an effort to better effectuate the policies” of the Act.\textsuperscript{82} The Board found that Bergie’s warning not to take plant problems to the NDP was done to encourage the company to make more prompt and complete disclosure of information to the joint committee.\textsuperscript{83}

B. **Blaming the Victims**

Why did the Board resist drawing the obvious conclusions from the facts? Fundamental to its reasoning and its conclusions is its interpretation of the internal responsibility system. The Board stated that consideration of the merits of Gray’s case “must begin” there.\textsuperscript{84} The role assigned by the Act to the joint health and safety committees “would

\textsuperscript{78} Text, supra, at notes 53 and 54.

\textsuperscript{79} Text, supra, at notes 57 to 60.

\textsuperscript{80} Text, supra, at note 66.

\textsuperscript{81} Gray v. Bergie, supra, note 1 at 199-200.

\textsuperscript{82} Ibid. at 203.

\textsuperscript{83} Ibid. at 204.

\textsuperscript{84} Ibid. at 194.
appear to reflect a legislative recognition that, ideally at least, industrial health and safety in many of its aspects can best be achieved through the joint efforts and awareness of the people most directly involved in the day-to-day operation of [the] work place."\(^{85}\)

The Ministry's manual for health and safety inspectors,\(^{86}\) the Board noted, begins its instructions regarding the philosophy of the system at 1.1 as follows:

**Internal Responsibility System Cyclical Review**

Employers and employees have the primary responsibility for occupational health and safety. The establishment of an effective Internal Responsibility System is an essential first step to prevent injury or health deterioration. As an Internal Responsibility System improves, the level of compliance will move from enforced compliance, through self-compliance to ethical compliance.

To encourage this Internal Responsibility System to develop, the role of facilitator has been given to the Inspector, who will identify, evaluate and review the actions of labour and management on a regular basis. This will facilitate that first step by identifying areas where the Internal Responsibility System can be improved. . . .

The 1976 Report of the provincial Royal Commission on the Health and Safety of Workers in Mines (the Ham report) stressed the need for labour’s co-operation through joint labour-management committees. The Board states: “The hope was, and continues to be, that on matters of health and safety the parties in a unionized institution might be able to divorce themselves from the adversarial approach characteristic of collective bargaining in this jurisdiction.”\(^{87}\)

More recently, the Burkett Commission defined the “challenge” as one of developing “the capability to deal with day-to-day health and safety concerns in a co-operative and consultative manner within the context of a free collective bargaining system. . . .” As a “facilitator” for the “direct responsibility system,” the inspection staff had the task of “identifying and responding to relationship breakdowns.”\(^{88}\)

The Industrial Health and Safety Branch ensures compliance with the Act “when the outer limits of the ‘internal responsibility system’ have been exhausted,” the Board says. But it is not the task of the Labour Relations Board to second-guess the responsible officials as to when those limits have been reached.\(^{89}\)

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\(^{85}\) Ibid. at 196.

\(^{86}\) Ibid. at 197.

\(^{87}\) Ibid. at 198.


\(^{89}\) Ibid. at 198.
The Board is not so reticent when assigning blame for the breakdown in the IRS at Westinghouse. The entire thrust of its decision is to blame Gray and the workers. 90

Mr. Gray’s concerns were too well researched, too well documented, and, on the basis of the limited sampling of concerns highlighted in these proceedings, too well vindicated to dismiss Mr. Gray as an over-reacting ideologue [sic]. . . . But there is also little doubt that Mr. Gray would be a problem for anyone genuinely trying to mediate, or “facilitate”, the health and safety situation in the Transformer Division of Westinghouse. In his lengthy appearance before the Board, Mr. Gray demonstrated an uncompromising cynicism and tenacity, as well, as the record indicates, as an abundant willingness to politicize and “media”-tize his concerns. It may well be that all of this can be fully justified by Mr. Gray’s experience at Westinghouse: other methods were tried and failed, and the reasons for Mr. Gray’s frustration are apparent. But one has to reflect, nonetheless, on the concern expressed in the Burkett Report about the manner in which denigrating and politicizing can feed upon themselves, and produce an ever-increasing disincentive for cooperation. 91

Gray, the victim, becomes the criminal. Gray’s approach ran counter to the philosophy of mediation on which the internal responsibility system is based. 92

The Board’s approval of the Ministry’s approach has ominous implications for workers who take seriously the protections they are given in the Act. Stan Gray and the other workers in the joint committee at Westinghouse complied fully with the rules. Only when they were unable to resolve those concerns in the committee or with Ministry assistance did they take them to the media and the NDP. Every proposal they put forward was eventually accepted. Yet the record showed that in no instance did the Ministry initially accept the workers’ claims while often it accepted the employer’s excuses. The Ministry’s faith in the employer’s efforts was never seriously shaken. The Ministry never indicated that Stan Gray and his colleagues were worthy of similar trust.

C. Self-Regulation vs. State Regulation

The decision in Gray v. Bergie focuses attention on the internal responsibility system and the inspectorate’s role in that system. As the Board notes, the Ministry relies on the IRS for enforcing the Act. The IRS is not mentioned in the Act, however.

90 Ibid. at 200.
91 Ibid. at 200 (emphasis added).
92 The Board used a number of devices to excuse Bergie’s conduct. First, each incident was treated separately, and the Ministry’s failure to act promptly was explained by Bergie’s reliance on assistants, supervisors, and experts. Second, the Board characterized Gray and Bergie very differently. Gray was the bright political activist; Bergie was the hardpressed, overworked civil servant.
The Ham inquiry on safety in the mining industry\(^9\) noted the inability of the then-existing system of workplace safety regulation to curb the rising incidence of industrial injury and disease.\(^9\) The weakest aspect of the system was the lack of enforcement, in particular the deficiencies of the inspectorate. At the root of these deficiencies was a contradiction between the state-regulatory approach of the legislation and the reliance on self-regulation that prevailed in practice.

The system was founded on the assumption that the employer was legally and financially responsible for the health and safety of workers; that this was the sole responsibility of management; that industry was largely capable of regulating itself and willing to do so, and that the role of government (and thus the inspectorate) was to encourage and support this self-regulation.\(^9\)

Ham accepted the self-regulatory framework and proposed shifting the emphasis from external enforcement in the scheme of preceding statutes to internal enforcement. His major innovation was to involve the workers in the detection of workplace hazards. Under Ham's proposed "internal responsibility system for the performance of work," management was to define safety standards and supervise their implementation.\(^9\) Worker safety representatives were to "audit" safety conditions and be front-line advisors to both the inspectorate and company supervisors.\(^9\) The joint labour-management committees were to play a "consultative and advisory role,"\(^9\) "communicating management intentions" to the workers and enabling management to "benefit from the insight of workers."\(^9\) These proposals reflected Ham's conviction that workplace hazards were an essentially administrative problem.

The reformed legislation combined both systems of enforcement. It retained the external state inspectorate, with its extensive powers of intervention and coercion. But it also adopted Ham's proposals pertaining


\(^{94}\) These concerns are discussed in V. Walters, Occupational Health and Safety Legislation in Ontario: an Analysis of its Origins and Content (1983) 20 Canada Rev. Soc. & Anth. 413. Walters argues that a primary motivation behind the reforms of the 1970s was the increasing strain on the public treasury of health care costs, and the cost to employers of workers' compensation payments and lost work time from industrial accidents and the destruction of labour power through the long-run health effects of speed-up, new technologies, and new materials.


\(^{96}\) The Ham Report, supra, note 93 at 148-51.

\(^{97}\) Ibid. at 154.

\(^{98}\) Ibid. at 157.

\(^{99}\) Ibid. at 160.
to the joint committees. By 1984, the Dupré Commission was able to describe the IRS as the “cornerstone of the *Ontario Health & Safety Act* and the foundation for the regulations made thereunder.” The “successful operation of the joint committee,” he said, was determinative of the “long-term success of the IRS.”

### D. Some Underlying Assumptions

There are good reasons to involve workers directly in the monitoring of workplace hazards. They have first-hand knowledge of those hazards, suggestions on how to counter them and an interest in eliminating threats to health and safety. A system of continuing monitoring by the workers has evident advantages over sporadic visits by a government inspector. Increased worker surveillance, however, will be of no advantage unless hazards, once detected, are promptly eliminated.

Three concepts in the IRS are fatal to the effective regulation of occupational health and safety. These are

1. the worker’s inability to make decisions affecting workplace hazards;
2. the deference to market regulatory principles; and
3. the rule that the inspectorate is to apply its coercive power to issue orders and prosecute only as a last resort.

#### 1. Worker powerlessness

Joint committees are strictly consultative. Worker representatives assist in the detecting and defining of hazards, but company supervisors or the inspectorate determine policies pertaining to those hazards. The *Act* reflects this approach in its definitions of the respective responsibilities of the worker, the worker representative, and the joint committee.

Notwithstanding this limitation on the workers’ authority, the workers are said to be “equally responsible” with management for health and safety. Why then are they not assigned an equal role in resolving problems? The answer lies in certain assumptions made by the proponents of the IRS. One assumption is that no self-regulatory system can function unless management retains effective control over investment decisions and the work process. Another assumption is that management and

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100 Supra, note 21, Vol. 2, at 509.
101 Ibid. at 522.
102 See text, supra, at notes 11 to 17.
103 See, for example, Dupré, supra, note 21 at 512. Referring to the requirement in s. 8(5) of the *OHSA* that at least half the members of the joint committee must be workers, Dupré concludes that “the evident intention of the Act is to institutionalize the concept that workers are equally responsible for health and safety with management.”
workers have a common interest in maintaining a safe and healthy workplace, and that most hazards occur because management does not know what is happening on the plant floor. The workers can bring hazards to the attention of management through the joint committee, and management will then make reasonable efforts to eliminate those hazards. This presumes that management can be relied on to conduct testing and prepare assessment programmes. Doubts about management's good intentions are counter-productive and evidence of ulterior motives.\textsuperscript{104} To quote Ham: "Since both parties desire the good of the individual worker, confrontation can and must be set aside with respect both to accidents and to health-impairing environmental exposure."\textsuperscript{105}

The belief that management and workers have a common interest in workplace health and safety is ideological, however. The same studies that argue there exists a common interest recognize that in all other aspects of industrial relations their interests are opposed. For example, the Labour Relations Board insists that the parties must "divorce themselves from the adversarial approach" in confronting workplace hazards.\textsuperscript{106} Ham stated that "there is emphatically no place for the adversary system of collective bargaining in dealing with matters of health and safety."\textsuperscript{107} Burkett argued that unions must recognize that "day-to-day attention to health and safety matters is distinct and apart from the other aspects of the union-management relationship."\textsuperscript{108}

Fears about the persistence of adversarial relationships exist because management and workers do not in reality have convergent interests in workplace health and safety. Fearful that adversarial relationships would prevail in the mining industry, Burkett went so far as to recommend that worker representatives be barred from engaging in "partisan union political activity of any kind."\textsuperscript{109} Burkett was also critical of the independence of worker representatives, and he urged that they be required to work closely with the company.\textsuperscript{110}

\textsuperscript{104} Burkett (supra, note 88) goes so far as to recommend that unions "reinforce the efforts being made by the company" in health and safety through such means as "internal union communications which describe the company effort in favourable terms... even where an individual issue may have been disposed of in a manner which is not altogether satisfactory to the union" (at 88).

\textsuperscript{105} The Ham Report, supra, note 93 at 121.

\textsuperscript{106} Text, supra, at note 87.

\textsuperscript{107} The Ham Report, supra, note 93 at 157.

\textsuperscript{108} The Burkett Report, supra, note 88 at 87.

\textsuperscript{109} Ibid. note 88 at 69, 71. No similar proposal was made to bar management representatives from membership in the Canadian Manufacturers Association or the Chamber of Commerce.

\textsuperscript{110} Ibid. at 68-69.
2. Deference to market regulation

Proponents of the IRS agree that the joint committee must not become a vehicle for circumscribing management prerogatives any more than is required by the legislation. Ham argued that management must retain "the authority to define policies that govern the response to anomalous conditions and that power to provide physical and human resources to correct them..." The Burkett report said that management had "primary and direct responsibility" for health and safety matters; labour's role was only "contributive." Professor Swinton, explaining why the joint committees are limited to an advisory role, writes:

"[T]he legislation's commitment is to consultation, but no more. There is a strongly held belief that health and safety come within management's prerogative, unless bargained away, and the OSHA was not meant to shift the balance of power in the workplace to the worker side, either by granting actual decision-making power to joint health and safety committees or by turning government inspectors into interest arbitrators."

Swinton further argues that inspectors will tend to eschew definitive rulings on programmes to control toxic substances, for such rulings "would require decisions about capital expenditures, assignment of the work force, and feasibility of changes in production processes, and the OSHA and regulations were not designed to remove final responsibility for such decisions from management."

These quotations accurately describe not the Act, but the IRS. The IRS has served increasingly as the basis for a reinterpretation of the legislation. It emphasizes the non-binding functions of the joint committee and de-emphasizes the obligatory standard-setting provisions and the overall prescriptive nature of the Act. The Act's substantive protections are viewed as secondary to the procedural framework it provides. This new interpretation bears the noticeable imprint of labour relations law and ideology, with its emphasis on dispute-resolution mechanisms, such as grievance arbitration and collective bargaining.

When the IRS proponents describe the role of the joint committees as "communicating management intentions" to workers and helping management "benefit from the insight of workers," they mean much the same thing. Both Ham and Burkett emphasized that the joint

111 The Ham Report, supra, note 93 at 148.
112 The Burkett Report, supra, note 88 at 87.
114 Ibid. at 154.
115 Supra, note 93 at 160.
committees were not to focus on particular contraventions of the Act but were, as Ham said, "to reach beyond individual conditions [in the workplace] to the generic context in which they occur." 116 The committees are to focus on the human relations aspect of the problem, to convince the workers of management's good intentions, and to stimulate the workers' interest in helping management achieve its goals.

As a self-regulatory mechanism, the joint committee offers obvious attractions to employers and governments. It avoids the reallocation of state expenditures and increased state intervention in the workplace that a substantial expansion of the inspectorate would entail. Its structure fosters the appearance of equality, thereby enhancing the legitimacy of the industrial hierarchy. Its resemblance to collective bargaining makes it familiar and palatable to at least the unionized sector of the workforce. But above all, the joint committee structure provides the appearance of meaningful reform while maintaining the balance of power on the shop floor in favour of management. Worker members continue to face constraints imposed by the employer's need to maintain a profit. Behind this insistence on insulating the joint committees from the adversarial relationship is the rationale of small-group dynamics. Isolated from their constituents, the worker representatives may be made more aware of employer constraints and more disposed to accommodate them. The IRS does not significantly alter the system of market regulation. Whether the regulation of workplace hazards should be left to market forces is another question.

3. The facilitating inspectorate

The central role accorded the joint committee in the IRS necessarily entailed a substantial redefinition of the role of the Ministry and its agents. The emphasis was now explicitly on persuasion, not coercion, and on "dialogue," not the issuing of orders or prosecutions. Professor Swinton argues that disputes within joint committees "can be resolved only through mediation. This will require a change in inspector training in the future to include emphasis on human relations skills, and not just the provisions of the legislation." 117 The focus has shifted toward the interrelationships between the parties to the employment contract and away from objective regulatory standards.

For example, under the IRS the role of the Ministry's technical staff has changed, Dupré reported, so that now

116 Ibid. at 159-60.
117 Supra, note 113 at 150.
the company takes primary responsibility for air sampling and monitoring, with the Ministry performing an auditing role. Likewise, the roles of the employer and of the joint committees in devising aspects of the control programme which deal with work and hygiene practices and with medical examinations have resulted in a devolution of the primacy once held by the Ministry of Labour, and hence represent a clear transfer of duties to the workplace in these areas.\textsuperscript{118}

Dupré endorsed these changes, while acknowledging that "[b]eyond its activities directly in support of the IRS, the Ministry is responsible, \textit{in the last analysis}, for enforcing the Act and regulations."\textsuperscript{119}

A study prepared for the Dupré commission explained what the Ministry meant when it said its goal was to move "from enforced compliance . . . to ethical compliance"\textsuperscript{120} with the Act.\textsuperscript{121}

The Ministry defines enforced compliance as situations where legal action must ultimately be taken because the employer refuses to abide by work orders issued by the inspector. The Ministry sees itself as having failed if an order must be litigated in the courts. Self-compliance occurs where an employer, after having been made aware of the law through the issuance of an order, complies without recourse to the legal system. Less coercive than enforced compliance, self-compliance is a signal that the health and safety inspectorate commands legitimacy. Nevertheless, at this stage in time the internal responsibility system is seen by the Ministry to have not fully matured. Ethical compliance, the ideal of the Ministry, involves the least intervention by the inspectorate. The issuance of orders is not necessary in this ideal setting because employers and employees working together in workplace committees come to understand the law, acknowledge its legitimacy, and strive to go beyond the minimal requirements stipulated in the regulations.

\textit{It is an article of faith within the Ministry that ethical compliance must ultimately be relied upon for the effective implementation of the law.}

\section*{E. \textit{Ethical Compliance}: a Formula for Non-Enforcement}

If it were true that workers and employers had common or convergent interests in maintaining safe and healthy workplaces, the Ministry's 'ethical compliance' goal would make sense. However, none of the many studies that propound this view presents any evidence to support it. As Gunningham notes, the presumptions "pre-empt any serious analysis."\textsuperscript{122}

The plain fact is that employers often do not have an interest in minimizing work hazards. In many situations the costs to the employer of accidents and disease (remembering that many of the costs are "externalized" onto workers, their families

\begin{itemize}
\item \textsuperscript{118} Supra, note 21, at 520.
\item \textsuperscript{119} Ibid. (emphasis added).
\item \textsuperscript{120} See text, supra, at note 86.
\item \textsuperscript{121} Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario, \textit{Living with Contradictions: Health and Safety Regulation and Implementation in Ontario} (Study No. 5) by G.B. Dolin, M.J. Prince, and G. McNaughton (Ottawa: Centre for Policy and Program Assessment, Carleton University, February 1982) at 3.42-3.43 (emphasis added).
\item \textsuperscript{122} N. Gunningham, \textit{Safeguarding the Worker: Job Hazards and the Role of the Law} (Agincourt, Ont.: Carswell, 1984) at 269.
\end{itemize}
and society generally) are less than the cost of preventing them. Accordingly it will often be cheaper for the employer to pay the costs associated with accidents (workers' compensation premiums, damage to machinery, loss of skilled personnel, loss of production, etc.) than it will be to incur the expenditure necessary to stop the hazards.123

This is even more apparent with respect to health hazards, since in some cases symptoms may not appear until decades after the worker's initial exposure to the contaminated substance, when the victim will have great difficulty in establishing a causal relationship.

Workers, on the other hand, do not share the employer's profit-maximizing compulsion. They do have an abiding interest in minimizing workplace hazards. But because they do not own the factories, mines, or offices, they do not control their work conditions. It is therefore nonsense to assign workers and employers "equal responsibility" for health and safety. A variety of economic and social factors, such as the pressure of high unemployment, oblige workers to accept jobs with a serious degree of physical risk. Their absence of power frequently deprives them of the information they need to identify hazards in substances and the work process.

The struggle for lead controls at Westinghouse illustrates these conflicting interests.124 Tests by both the company and the Ministry repeatedly revealed readings far above the maximum regulatory limits. Engineering controls were necessary to conform to the requirements of the regulation. Yet the company, unwilling to make these costly expenditures, resisted such controls for almost a year, insisting that the workers wear respirators instead. The Ministry, unwilling to force compliance, stalled and covered up for months before adverse publicity in the media and Legislature finally forced a showdown.

The situation at Westinghouse was typical of many industries. Here are just a few additional examples of employer defiance of the law and Ministry of Labour acquiescence in that defiance:

1. At the Mack Canada truck assembly plant in Oakville, tests showed airborne concentrations of lead up to seven times the short term exposure limit. The employer, with Ministry approval, used air-supply respirators and monitored lead levels in the workers' blood but did not effect the engineering controls or monitor airborne concentrations as demanded by the workers and required by the regulation.125

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124 See text, *supra*, at notes 56 to 65.
2. Excess lead levels were recorded by the Ministry at Wilco Canada Ltd. refrigeration and automotive parts plant in London. It was only after twenty-one workers were hospitalized for lead poisoning that the Ministry took any substantial action by fining Wilco $1,500.126

3. At the window and door manufacturing plant of Robert Hunt Corp. in London, tests showed carbon monoxide levels were three to five times the limit set by the Ministry. The Ministry acknowledged that ventilation was inadequate but issued no specific orders. Following further tests in January 1984, the Ministry concluded that pollution levels in the plant were at dangerous levels but described the problem as “temporary and intermittent” and issued no engineering control orders.127

4. In January 1985 it was reported that at the Valenite-Modco Ltd. precision tool manufacturing plant in Windsor, Ministry inspectors had found dangerously high levels of metal dust for ten years. Yet workers were still being required to wear respirators because the company had not installed adequate ventilation. A Ministry spokesman said no charges had been laid against the company because the inspectors “believed the company was co-operating” in reducing worker exposure.128

5. In July 1984 workers in the transformer division at Westinghouse in Hamilton alerted the Ministry of possible PCB contamination. In October 1984 Ministry tests showed two danger areas, one with three times the maximum allowable contamination. The test results were not shown to the worker representatives on the joint committee until February 1985, when the Ministry ordered Westinghouse to clean up “forthwith.” In mid-March 1985 the hazard was still uncorrected, but a Ministry inspector “gave the plant a clean bill of health” and praised its internal responsibility system.129

The NDP Task Force reported that the inspectorate’s failure to “force companies to comply with either the spirit or in some instances, the


letter of the law” was “the single most common complaint in submissions across the province.” Inspectors, it said,

arbitrarily limited their own ability to force the company to clean up the workplace. They resorted to the most narrow and technical reading of the Act and regulations to avoid writing orders or taking positions that would be unpopular with management. Ministry inspectors would refuse to require the company to clean up a workplace by issuing orders which involved extensive costs. Not only were inspectors reluctant to write strict orders, they often overlooked outstanding hazards at the plant.

Inspectors also asked specifically at the end of each tour if there were any unresolved problems. If the problems were being discussed at the health and safety committee meetings, the inspector would consider the problem resolved. Another common complaint heard by the Task Force was that even when inspectors did issue orders, the orders were often simply issued and re-issued by the Ministry after no action by the company without charges ever being laid against chronic violators.

According to the Ministry of Labour, 48,881 orders were issued from 1 April 1983 to 31 March 1984 in the industrial sector alone. Yet the Ministry prosecuted only 88 cases.

F. The Inspectorate — ‘Referee’ or Interest Arbitrator?

Some critics of the Ministry’s reliance on ‘ethical compliance’ suggest that the ‘referee’ role of the inspectorate and the Ministry under the Labour Relations Act prevents the Ministry from performing any other function in matters of health and safety. Their comment is a striking reflection of the influence of labour relations ideology on the administration of the OHSA:

The Ministry is a ministry of labour and not for labour. The primary function of a labour ministry is to facilitate the conduct of labour-management relations, the focus of which is traditional collective bargaining. In this important sense, the MOL must take an even-handed role between business and labour. But the Division cannot function in a pro-labour way because of the overall referee role of the MOL. The “internal responsibility” system reinforces this referee role but it is important to note that the referee constraints long pre-date the 1978 legislation.

Under the IRS, the Ministry is not simply a neutral ‘referee’. As the Westinghouse experience demonstrates, the ‘work it out together’ phi-

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130 Supra, note 23 at 10.
131 Ibid. at 10-11.
132 Ontario Ministry of Labour, Annual Report: 1983-84, at 34. The Ontario Federation of Labour, in a November 1984 policy statement, notes that of the convictions registered in 1982-83, “many” were “against workers for not wearing their hard hats…”
133 Supra, note 121 at 3.98.
134 Ibid. at 3.49.
135 Ibid. at 3.98 (emphasis in original).
losophy leads the inspectorate to discount workers' complaints of company violations of the law and to give management the benefit of the doubt.

Some critics of Ministry inaction have argued that the OHSA would be more effectively enforced by a more independent agency. However, the 'captive agency' theory is an inadequate explanation of the Ministry's failure to enforce the Act. The Ministry's lack of enforcement stems above all from firmly held beliefs about the nature of the Act and management rights that are inherent in the internal responsibility doctrine. The Ministry sees the Act as a procedural framework for self-regulation of industry rather than a substantive restraint on management prerogatives and market forces. However, the external enforcement mechanisms in the legislation — the statutory right of refusal, the provisions for regulation of toxic substances, the powers of the inspectorate, the protection of employees against employer reprisals, the duties imposed on employers, the injunctive remedies, and the offences and penalties — all indicate that the Act has a fundamentally coercive purpose.

G. The Legislation Subverted

The 'internal responsibility' philosophy marks a major retreat from the traditional concept of workplace safety statutes as public welfare legislation. The Factories Act of 1884, Ontario's first major occupational health and safety enactment, recognized that the parties to the employment 'contract' are not equal and that acceptable standards could not be established or maintained if left to employer initiatives or to negotiations between the employer and his workers. As its title stated, it was "An Act for the Protection of Persons Employed in Factories." It was the first step in abandoning the doctrines used by the courts to absolve employers of liability for injuries to their employees.

The legislation was inadequately enforced. The inspectorate was insufficiently staffed and funded and tended to pursue negotiation rather than coercion and prosecution. This meant that the system was largely dependent on employers complying voluntarily with the regulations. However, the new structure of self-regulation, by serving as a substitute for external enforcement, has further weakened the protection provided to workers by the legislation. Unable to look to the government inspectorate to pressure the employer into compliance, workers must bargain

136 For example, the Ontario Federation of Labour proposes that administration of occupational health and safety in Ontario be assigned to "a separate entity, a public corporation, that is run by a board of directors or commissioners made up of equal numbers of full time labour and management persons" with its own staff albeit funded through the Ministry of Labour (1984 convention statement, supra note 22).

137 47 Vict. (Ont.), c. 39.
with the employer for a standard that may be lower than the statutory minimum. At Westinghouse, for example, the Ministry evidently saw the problem, not as the employer’s refusal to voluntarily comply with the external standards, but rather as the workers’ failure to co-operate and negotiate for a lower level of protection. The fundamental purpose of the Act, protection against workplace hazards, is subverted.

In *Gray v. Bergie*, the Labour Relations Board endorsed the ‘labour relations’ interpretation of the *OHSA*. It said that Ministry representatives must maintain an “essential neutrality” in conflicts between the employer and employees. It stressed the need for labour-management co-operation in industrial health and safety, while reminding us that management alone “possess the right to implement changes...”

The Board’s criticism of Gray for talking to the press and the NDP only makes sense if it is assumed that transactions between the workers and the company are not of public concern — the approach normally taken in grievance arbitration and often in collective bargaining. But the *OHSA* is a public regulatory statute. Surely the public and the Legislature had a direct interest in knowing whether the enacted standards were being enforced.

Finally, the Board stigmatized Gray, the “complainant,” as the “problem” for the facilitating inspector Bergie. The Board describes at one point how Bergie handled this “problem”:

[Bergie] pointed out that the company and the union had adopted an adversary approach to health and safety, and that it was time they “took a look” at themselves. ... Mr. Bergie told Mr. Gray that he felt Mr. Gray employed too much of a hostile manner, and too much rhetoric. He said that the union should keep its requests reasonable, and should drop hazards “from 1911”...

When this homily was delivered:

1. The company was facing four charges of serious violations of the Act arising out of the Terry Ryan accident, with further charges pending;
2. The union was pressing Westinghouse to use stop-blocks on overhead cranes;
3. The company had assured Gray that a report on toxic fumes inside transformer tanks was “being prepared,” yet one month earlier (no report having yet been produced) it had told the union it “was developing its own priorities for the release of information.”

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139 *Gray v. Bergie*, *supra*, note 1 at 198.
140 There are nine references to this in the Board decision, in addition to a comment (at 200) about Gray’s “media-tizing.”
Is it not possible that a little less emphasis by Bergie on human relations counselling and a little more attention by the Ministry to Westinghouse's non-compliance with the Act might have made a more effective contribution to the cause of health and safety in the plant? That is not what the Board says. Bergie, after all, was only doing his duty under the internal responsibility system. (Stan Gray's answer to Bergie's lecture is quoted at the beginning of this article.)

IV. STRENGTHENING ENFORCEMENT

There is a growing recognition that the IRS is not fulfilling the claims made on its behalf. The system must be measured by its success in reducing workplace injury and illness; but the statistics are not encouraging. In 1978, the last year before the current Act came into force, a total of more than 4,300,000 workdays were lost in Ontario as a result of temporary total disability caused by employment-related accidents or conditions. The total has risen steadily in each succeeding year and in every one of the ten categories of employment listed by the Workers' Compensation Board.

Other aspects of the 1978 reforms have not met their expectations. The widely-hailed right to refuse unsafe work is largely unavailable to unorganized workers, the large majority. Further, despite the existence of the Occupational Health and Safety Advisory Council, the Ministry has established regulations for only nine designated toxic substances.

What can be done?

Most proposals for reform emphasize the need to increase workers' input in the enforcement process, by increasing the scope and frequency of worker inspection, providing for mandatory appointment of full-time worker representatives in large plants, and by more frequent meetings of the joint committees and more training of committee members.

The NDP has made further recommendations to make the IRS more responsive to workers' needs. Among the proposals are

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142 Advisory Committee on Occupational Health and Occupational Safety, Sixtieth Annual Report, 1983-84 (Canadian Centre for Occupational Health and Safety, April 1983) App. E. Days lost for fatalities and for medical-aid only and light duty are not included in these figures.

143 The text that follows is intended only to indicate some lines of approach, not to blueprint all the possible changes that might be made to improve the effectiveness of the OHSA.

144 Swinton, supra, note 113 at 154.

145 Ibid. Also, The Burkett Report, supra, note 88 at 65-69.

146 Martel, supra, note 23 at 57-61.
1. Extending the coverage of the *OHSA* to all workers in Ontario under provincial jurisdiction, and providing the right to joint health and safety committees in all workplaces;\(^{147}\)

2. Giving worker health and safety committee members and representatives the right to unilaterally shut down unsafe operations, to be present during all testing or monitoring and to do their own testing and monitoring with their own experts;\(^{148}\)

3. Establishing worker-controlled occupational health clinics in every major industrial city, “funded collectively by employers” as in workers’ compensation;

4. Clarifying the purpose of the legislation to employers and the inspectorate by entrenching in the *Act* the right of every worker to a healthy and safe workplace, including:

   the worker’s right to participate, the right to inspect, the right to shut down any operation that is unsafe, the right to full wage-and-benefit protection as result of any medical monitoring programme or during any work loss or shut-down due to health and safety problems, the right to know, the right to refuse and the right to strict enforcement of the act by the Ministry of Labour.

The point of departure of these proposals is the acknowledgement of the adversarial relationship between workers and employers. The proposals are supplemented by other recommendations in the NDP brief intended to strengthen the role of the trade unions in regulating workplace health and safety, such as the proposal to amend the *Labour Relations Act* to facilitate the organization of workers into unions.\(^{149}\) Unorganized workers, too, would benefit from “guaranteed [government] funding to

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\(^{147}\) Tucker, *supra*, note 95 notes that a large number of industrial workers have no practical means at all of bargaining over health and safety issues with their employers since they do not have joint committees or unions. According to Industrial Health and Safety Branch data, as of 15 November 1984, joint committees existed in 8,844 (12%) of the 72,230 firms on file with the Branch. These committees covered 1,133,520 (50%) of the 2,254,631 employees on file. But the Branch lists 1.6 million production workers under its jurisdiction. Thus, 560,000 production workers (30% of the total) do not have joint committees. A further breakdown of the data reveals that 63% of unionized workers under Branch jurisdiction have joint committees, compared to only 32% of non-unionized workers. These figures, says Tucker, “indicate that in the implementation of a regulatory strategy that relies heavily on a reformed system of self-regulation, we have left a lot of workers subject to the unreformed system of self-regulation. . . .”

\(^{148}\) Under the Swedish legislation, workers have a majority on the joint safety committees, and plans for new machines, materials, or work processes must be approved by the committees before they are introduced (Swinton, *supra*, note 113 at 155). Worker majorities on the joint committees are permissible under the existing Ontario legislation: see s. 8(5).

\(^{149}\) A major problem at Westinghouse during the events discussed in this article was the weakness of the union. Stan Gray and his fellow safety representatives did not have the full support of the local or national officials of their union, the United Electrical, Radio & Machine Workers of America (UEW). Analysis of this problem and its causes is beyond the scope of this study. Gray has written an interesting and valuable account of it in *Canadian Dimension, supra*, note 27.
community occupational health and safety groups ... [which] carry out vital education and advocacy work.”

This ‘redefinition’ of the IRS would strengthen on-the-job enforcement of the Act. But there are obvious limits to what these measures can accomplish in a society in which private owners control investment decisions and production process. As long as employers have the power to discipline and lock out workers and as long as workers remain largely unorganized, a heavy burden falls on the government agency responsible for administering the protective legislation. The Ministry could more vigorously enforce the present Act. This was acknowledged by the current Minister of Labour, William Wrye, on 21 November 1985, when he announced a policy directive of the new Liberal government regarding the issuance of orders under the Act. The new policy called for greater use of orders, specified time limits for compliance, and prompt prosecution in cases of non-compliance.

Six months later, however, few changes had occurred. Ministry inspectors, through their union, issued a strong statement blaming lack of enforcement on the Ministry’s senior administration. Among the problems they cited were the lack of systematic training in the principles of occupational health and safety, a “resolute reluctance” to initiate prosecutions, absence of a clear policy on enforcement of designated substances, and inadequacy of inspection cycles and staffing. The inspectors called for “an enforcement policy and procedure that relies less on the internal responsibility system and voluntary compliance, and more on legal compliance with the Act and Regulations.”

Although much is said about the high cost of the inspectorate, Ministry critics make telling comparisons with other government programmes. In 1982, MPP Elie Martel pointed out that in prosecuting automobile odometer frauds

more than 1000 charges were laid since 1979, with a conviction record of 100 percent. Fines were imposed up to $10,000, and jail sentences of up to three months. Turning to enforcement under Bill 70 [the OHSA], in industrial health and safety, there were 340 prosecutions in 1981, and sixty-eight convictions with fines totalling $189,000, averaging $3,000. In construction safety in 1980-81, there were 374 prosecutions, 181 convictions with fines totalling $98,000, averaging

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150 Supra, note 23 at 61.
151 Statement to the Legislative Assembly by the Hon. William Wrye, Minister of Labour citing “Policy Regarding Orders Issued Under the Occupational Health and Safety Act and Regulations, Including Designated Substance Regulations” (Ontario, Legislative Assembly, Debates, No. 47 (21 November 1985) at 1664).
152 Occupational Health & Safety Officers Subcommittee of the Ontario Public Service Employees Union’s Divisional Negotiating Committee, Submission to the Minister of Labour on Enforcement Problems Facing Occupational Health & Safety Officers (21 May 1986).
The Occupational Health and Safety Act

S$500. In mining, twelve prosecutions in 1981, and ONE fine amounting to $10,000.153

Clearly, insufficient weight is being given to the injury and destruction of human beings.

Exemplary prosecutions should be emphasized. Stronger charges154 might be effectively used in egregious cases to show that the state will not tolerate violations of its occupational health and safety standards. The Ministry’s legal services branch (which lists only five solicitors for all of Ontario) should be reinforced. Stiff fines and jail sentences should be sought as serious deterrents.

A frequent criticism of the tactic of prosecutions is that courts are unwilling to convict corporate offenders.155 However, Ontario courts have on occasion demonstrated a clearer understanding than the Ministry of the philosophy and punitive functions of the OHSA.156 A relatively low number of well-prepared,157 high-profile prosecutions could result in verdicts that send a strong message to other corporate offenders.158

153 Quoted in Canadian Dimension, supra, note 27 at 20.
155 Brown, supra, note 112 at 464.
156 The leading Ontario case is Regina v. Cotton Felts Ltd (1982), 2 C.C.C. (3d) 287. Although the issue was the amount of the fine, the Court of Appeal (per Blair, J.A., at 294) situated it in a more general context:

The Occupational Health and Safety Act is part of a large family of statutes creating what are known as public welfare offences. The Act has a proud place in this group of statutes because its progenitors, the Factory Acts, were among the first modern public welfare statutes designed to establish standards of health and safety in the work place. . . . To a very large extent the enforcement of such 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. . . .

157 J. Deverell, “Mack Plant Lead Levels Still High, New Tests Show,” supra, note 125, reported that

Ministry of Labour officials have indicated that part of their reluctance to order engineering controls in poisoned workplaces arises from their failure a year ago to get a conviction against Toronto Refiners and Smelters Ltd. for violation of the lead regulations. A provincial court judge held that the respirators provided to the smelter employees were sufficient to bring the company into compliance with the lead control law and dismissed the ministry’s charges. During the half-day trial, however, the ministry’s lawyers contented themselves with proving that airborne lead levels in the plant were too high. They didn’t call any expert witnesses to explain to the judge why engineering controls were desirable or what changes in the smelter’s production methods they wanted when they issued their control orders and later launched the prosecution.

158 The 25-year prison sentences handed down in July 1985 to three former executives of a silver-recovery company in Illinois convicted of murder in the cyanide-poisoning death of an employee were widely publicized throughout North America and resulted in extensive coverage in the Canadian mass media. K. Makin, “Take Hard Line If Firms Harm, Professor Urges” The [Toronto] Globe and Mail (2 July 1985) M3.
None of this will happen unless the Government has the political will to enforce the *Act*. It must abandon the utopian goal of ‘ethical compliance’. Inspectors must understand that they are interest arbitrators and not neutral referees. They must be prepared to back worker safety committee members and representatives in their fight against employer resistance to regulatory standards even when the resulting action affects profit sheets.

As the Westinghouse situation illustrates, current Ministry policy is the polar opposite to this. As Stan Gray puts it, under the banner of “internal responsibility . . . the employers and the government are quietly rewriting the safety laws of Ontario. They are robbing us on the shop floor of legislative protections gained by a decade of struggle by labour and its political allies.”\(^{159}\)

Although Stan Gray lost on the narrow issues, his case has highlighted many of these broader issues and problems pertaining to occupational health and safety regulation, a necessary precondition to any significant improvement in enforcement of the *Act*.

\(^{159}\) Gray, *supra*, note 125.