Administrative and Criminal Penalties in the Enforcement of Occupational Health and Safety Legislation

R. M. Brown

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/ohlj
Article

Citation Information
http://digitalcommons.osgoode.yorku.ca/ohlj/vol30/iss3/10

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.
Administrative and Criminal Penalties in the Enforcement of Occupational Health and Safety Legislation

Abstract
The sanction for occupational health and safety offences in Ontario is a regulatory prosecution in provincial criminal court. In contrast, regulatory officials assess administrative penalties in British Columbia and the United States. A larger proportion of offenders are punished under these administrative processes than in the Ontario criminal justice system, and the average administrative penalty generally is higher than the average criminal fine. In addition, a system of administrative penalties is better able to identify employers who warrant punishment because regulators apply the civil standard of proof, attach great weight to a firm’s compliance history, and do not reserve penalties for offences that actually result in a worker being harmed.
ADMINISTRATIVE AND CRIMINAL PENALTIES IN THE ENFORCEMENT OF OCCUPATIONAL HEALTH AND SAFETY LEGISLATION

By R.M. Brown*

The sanction for occupational health and safety offences in Ontario is a regulatory prosecution in provincial criminal court. In contrast, regulatory officials assess administrative penalties in British Columbia and the United States. A larger proportion of offenders are punished under these administrative processes than in the Ontario criminal justice system, and the average administrative penalty generally is higher than the average criminal fine. In addition, a system of administrative penalties is better able to identify employers who warrant punishment because regulators apply the civil standard of proof, attach great weight to a firm's compliance history, and do not reserve penalties for offences that actually result in a worker being harmed.

I. INTRODUCTION ............................................................ 692

II. SYSTEMS OF ADMINISTRATIVE PENALTIES ........................................ 694
A. Administrative Penalties in British Columbia ........................................ 694
   1. Criteria for imposing penalties .............................................. 695
   2. Process for assessing penalties .............................................. 696
   3. Process for appealing penalties .............................................. 697
B. Administrative Penalties in the United States ...................................... 698
   1. Criteria for imposing penalties .............................................. 699
   2. Process for proposing penalties ............................................ 700
   3. Process for contesting penalties ............................................ 701

III. COMPARING ADMINISTRATIVE AND CRIMINAL PENALTIES .................. 702
A. Securing Compliance ....................................................................... 703
   1. Compliance theory ........................................................ 703
   2. Certainty of punishment ................................................... 706
   3. Severity of punishment ..................................................... 710

© Copyright, 1992, R.M. Brown.
* Professor of Law, University of Auckland.
I. INTRODUCTION

Penalties are an important part of any regulatory regime and the type of sanctioning mechanism utilized is likely to play a major role in determining whether regulated firms comply with legal requirements. This study compares regulatory prosecutions in Ontario with administrative penalties in British Columbia and the United States as mechanisms for promoting compliance with occupational health and safety regulations.

Since the inception of factory legislation in Canada during the late nineteenth century, the sanction of choice for health and safety offences has been prosecution in the provincial criminal courts. This sanction continues to be the primary one in Ontario and in most other Canadian jurisdictions. Prosecution is also the sanction typically used in settings such as consumer safety and environmental regulation. A prosecution for a regulatory offence is markedly different from a proceeding under the *Criminal Code*. However, for present purposes a penalty levied by the courts under regulatory legislation is labelled as criminal to distinguish it from a penalty imposed by an administrative agency. The hallmark of a system of regulatory prosecution is that only the courts have the power to levy penalties, although regulators typically have the authority to issue compliance orders.

Under a pure system of administrative sanctions, regulatory agencies levy monetary penalties. The courts are not involved, except in rare cases of judicial review of agency action. The Workers' Compensation Board in British Columbia and the Occupational Safety and Health Administration in the United States both assess monetary...
penalties. A parallel criminal process exists in each of these jurisdictions, but criminal prosecutions are extremely rare compared with administrative penalties. These two agencies are among the few in Canada and the United States to make extensive use of administrative penalties.¹

This purely administrative penalty should not be confused with a distinctly different hybrid penalty, which is a cross between administrative and criminal sanctions. These hybrid penalties are very similar to the ticketing schemes widely utilized by the police for motor vehicle offences. Under such a scheme regulators have the power to assess a penalty, but if the penalty is contested, the matter is ultimately adjudicated by a court rather than by a second administrative agency. Hybrid penalties are addressed briefly in the concluding part of this paper.

The second part of the paper contains a brief description of the systems of administrative penalties utilized by the Workers' Compensation Board and the Occupational Health and Safety Administration. The factors considered in deciding both whether to levy an administrative penalty and how large to set the penalty are described along with the decision-making process at first instance and on appeal. The third part presents a comparative evaluation of criminal and administrative sanctions in the health and safety context. The primary criteria for evaluating these two enforcement mechanisms are the deterrent effect of penalties, as measured by the certainty and severity of punishment, and the accurate selection of offenders who warrant punishment. The cost of operating the criminal and administrative processes is also considered, as is the speed with which cases are decided. This analysis is based primarily upon data from British

¹ The American scene is surveyed by Goldschmid and Diver. See: H. Goldschmid, "Report in Support of Recommendation 72-6: An Evaluation of the Present and Potential Use of Civil Monetary Penalties as a Sanction by Federal Administrative Agencies" (1972) 2 Recommendations and Reports of the Administrative Conference of the United States 896; and C. Diver, "The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies" (1979) 8 Colum. L. R. 1435. The only Canadian regulatory agency known to make extensive use of administrative penalties is the federal Department of Transport, which is empowered to assess a penalty of up to a thousand dollars for certain aviation safety offences. If the penalty is not paid, the matter is referred to the Civil Aviation Tribunal for adjudication. Administrative penalties are more commonly used in the fields of taxation and social welfare. For example, Revenue Canada levies penalties for income tax evasion and the Canadian Employment and Immigration Commission does the same for fraudulent unemployment insurance claims.
Columbia and the United States, where administrative penalties are used, and from Ontario, where enforcement is more stringent than in other provinces utilizing prosecution. The final part summarizes the strengths and weaknesses of administrative and criminal penalties. It briefly discusses hybrid penalties and concludes by recommending a dual system in which administrative sanctions are commonly used but criminal prosecution is retained for flagrant offenders.

II. SYSTEMS OF ADMINISTRATIVE PENALTIES

In British Columbia and the United States, the power to impose penalties is shared by two regulatory bodies. The agency that promulgates health and safety standards and whose officers conduct inspections is empowered to propose penalties. When this front-line agency decides that a penalty is warranted, the agency advises the employer concerned that it is proposing a penalty of a specified amount. The employer may contest the proposed penalty before a second agency which is more or less independent of the first. This decision-making structure has been labelled the "Split-Enforcement Model." In both jurisdictions, only employers can be penalized for contravening a regulatory standard; supervisors and workers cannot.

A. Administrative Penalties in British Columbia

In British Columbia, the front-line agency empowered to propose penalties is the Workers' Compensation Board. Until recently, disputed penalties were adjudicated by the Commissioners of the Board. As the Commissioners bore ultimate responsibility for all of the Board's operations, there was not an arm's length relationship between the officers in the Board's Occupational Health and Safety Division who proposed a penalty and the Commissioners who adjudicated it. The

---

2 Unless otherwise indicated, the data utilized were obtained by the author directly from the enforcement agencies in these three jurisdictions and are not available from published sources.


4 Hereinafter wcb.
decision-making structure was altered in June 1991 to grant adjudicators greater independence from field officers. Contested penalties (and contested workers' compensation claims) are now adjudicated by the newly created Appeal Division of the WCB. The head of the Occupational Health and Safety Division reports to the President of the WCB, whereas both the President and the head of the Appeal Division are appointed by and accountable to the WCB's Board of Governors.

1. Criteria for imposing penalties

The *Workers' Compensation Act*\(^5\) empowers the Board to impose penalties for violations of occupational health and safety regulations but offers no guidance either as to when a penalty is to be imposed or as to the amount of a penalty.\(^6\) The WCB policy manual directs its field officers to consider recommending a penalty when an employer knowingly exposes workers to a serious hazard or persistently fails to comply with legal requirements. Officers also are directed to consider a penalty for the occurrence of any of the eleven listed high risk violations.

The amount of a penalty is determined according to a schedule adopted by the WCB in June 1986. The amount of a penalty varies with the severity of the violation and the number of previous penalties, as well as with the size of the employer's payroll. For this purpose, serious violations are those involving a high risk of injury or disease or resulting in a fatality or serious injury. In the case of first penalties for non-serious violations, the schedule calls for a fine ranging from $1,500 to $4,000, depending upon a firm's payroll. First penalties for serious violations range from $3,500 to $15,000. A second sanction for a more serious violation within five years of the first, or a second sanction for a less serious violation within three years of the first, results in a doubling of the penalty.

\(^5\) R.S.B.C. 1979, c. 437.

\(^6\) *Ibid.*, s. 73(1) as am. by S.B.C. 1985, c. 87, s. 2.
2. Process for assessing penalties

The penalty process begins with a penalty recommendation memorandum prepared by an officer from the Field Services Department of the Board's Occupational Health and Safety Division. If this recommendation is approved by the officer's regional manager, it is forwarded to the Variance and Sanction Review Section of the Research and Standards Department, which is located in the same Division. A clerk in that section reviews the wcB's file on the employer to verify the information contained in the penalty recommendation. The clerk prepares a summary of the information in the employer's file and forwards it along with the penalty recommendation to one of three sanction review officers, all of whom have previous experience as field officers.

If the sanction review officer believes that the material at hand does not warrant a penalty, the officer so advises the regional manager. In the event they cannot agree on how to proceed, final decision-making authority resides with either the Director of Research and Standards or the Director of Field Operations, depending upon which of them is readily available. A review of all penalty recommendations made by field officers in the first six months of 1985 found that 8.8 per cent were rejected at this stage.

If the penalty recommendation is sustained, the sanction review officer prepares what might be described as a show cause letter. This letter advises the employer that the Board proposes to assess a penalty unless the employer shows cause why this course should not be followed. The employer is informed of the amount of the penalty usually levied in similar circumstances. The letter closes by offering the employer an opportunity to make representations in writing or at a meeting.

Of the approximately eight hundred employers who received a show cause letter from the wcB in 1990, about one-half requested a meeting. The rest submitted a written defence only. A meeting with the employer is chaired by a sanction review officer—not necessarily the same officer who prepared the show cause letter—and attended by the field officer who initiated the penalty proceeding. The employer is invited to present its cases and is allowed to produce witnesses. The initiating officer responds to the employer's presentation and the employer is permitted to reply to the officer. This exchange is conducted informally. Witnesses are not sworn or formally examined.
and cross-examined. A clerk attends the meeting to take notes of what is said. Written submissions follow a similar format. The employer's reply to the show cause letter is sent to the regional manager and field officer for comment and their comments are forwarded to the employer for reply. Worker representatives are not notified of penalty proceedings or invited to make submissions.

After considering the defence offered by the employer, the sanction review officer prepares both a draft letter to the employer and a memorandum summarizing the issues and recommending how to proceed. These documents are forwarded to the Director of the Research and Standards Department who decides whether to levy a penalty.

In 1990 field officers recommended 862 penalties. Six hundred and twenty-four (72.4 per cent) were confirmed by the Occupational Health and Safety Division after the employers concerned were given an opportunity to make representations. An employer rarely succeeds in proving that a violation did not occur. Much more often an employer avoids a penalty by demonstrating that it took all reasonable precautions to prevent a violation or by convincing Board officials that a penalty is not necessary to secure future compliance. When the Board is persuaded by these arguments, the typical response is to withdraw the penalty completely rather than to reduce the amount of the penalty.

3. Process for appealing penalties

A penalty imposed by the Occupational Health and Safety Division may be contested before the Appeal Division. Of the 624 penalties confirmed by the Occupational Health and Safety Division in 1990, 45.4 per cent were appealed. Some of these appeals were pending at the time of writing. Of the 114 cases decided, 70.2 per cent of penalties were confirmed, 8.7 per cent were reduced in amount, and 21.1 per cent were set aside entirely.

While employees cannot launch a penalty appeal, a worker representative is invited to participate in an appeal initiated by an employer. The Occupational Health and Safety Division is not a party to appeal proceedings. All documentation gathered by this Division in

7 Workers' Compensation Act, s. 96(1).
the course of a penalty proceeding is forwarded to the Appeal Division, including the field officer's penalty recommendation, all documents prepared by the Variance and Sanction Review Section, and notes of any meeting with the employer held by that Section. The Appeal Division holds an oral hearing in approximately 25 per cent of all cases. Other cases are adjudicated on the basis of written submissions and penalty documents forwarded by the Occupational Health and Safety Division. Most employers do not request an oral hearing. Hearing requests are granted if there is a factual dispute that cannot be resolved without the testimony of the inspecting officer or other witnesses.

During the 1980s, after employers had exhausted the informal processes of the Occupational Health and Safety Division and the formal processes of the Appeal Division, approximately 65 per cent of the penalties initially proposed were confirmed.

The Appeal Division is the final trier of fact. While the Division is not bound by policies adopted by the Occupational Health and Safety Division, it is bound by policies established by the Board of Governors.8

B. Administrative Penalties in the United States

In the United States, the Occupational Safety and Health Administration9 within the Department of Labor promulgates and enforces legal standards. As part of its enforcement role, OSHA is empowered to assess monetary penalties. A penalty levied by OSHA may be contested before the Occupational Safety and Health Review Commission10, an independent administrative agency whose commissioners are appointed by the President. This system of administrative penalties operated by OSHA and OSHRC applies in approximately one-half of the states of the union. The remaining states have their own similar systems of administrative penalties.

8 Ibid.
9 Hereinafter OSHA.
10 Hereinafter OSHRC.
1. Criteria for imposing penalties

Some criteria for imposing penalties are found in the Occupational Safety and Health Act and others are set out in OSHA's operations manual. The Act requires OSHA to assess a penalty for any "serious" violation and gives the agency discretion to impose a penalty for other types of violations. A serious violation is defined as one, which gives rise to a hazard that poses a "substantial risk of death or serious physical harm" of which the employer "knew" or could have known through the exercise of "reasonable diligence." OSHA's policy is to assess a penalty for all willful and repeat violations as well as for all violations which were previously cited and not abated, known as "failure to abate violations."

As originally enacted by Congress in 1970, the Act fixed maximum penalties at $10,000 for a willful or repeat violation and $1,000 for other violations. Effective 1 March 1991, the maximum penalties for all violations were raised sevenfold and a minimum penalty was introduced for willful violations. The current maximum penalty is $70,000 for willful or repeat violations and $7,000 for all other violations. The new minimum penalty for willful violations is $5,000. The Act requires OSHA to fix penalties "giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations."

OSHA's field operations manual contains extremely detailed guidelines for calculating penalties. The first step in this calculation is to determine a "gravity-based penalty," based on the probability and severity of harm. This penalty ranges from a high of $5,000 for a violation rated as "high" severity and "greater" probability to a low of zero for a violation rated as "minimal" severity and "lesser" probability. The gravity-based penalty may be adjusted downwards by reference to mitigating factors, with a maximum possible reduction of 95 per cent (up

12 Ibid., §§ 17(a) to (d).
13 Ibid., § 17(k).
14 Ibid., §§ 17(a) to (d).
15 Ibid., § 17(j).
to 60 per cent for size of the employer's business; 25 per cent for good faith; and 10 per cent for violation history).

OSHA generally combines two or more violations of the same standard into one citation and assesses a single penalty. Since 1986, a different approach has been taken in "egregious cases" whereby a penalty is levied for each separate occurrence of a violation. This approach requires the consent of the Assistant Secretary of Labor in charge of OSHA. Even before the sevenfold increase in maximum penalties, the resulting mega-fines in egregious cases ranged from $1.38 million to $7.3 million.\textsuperscript{16}

2. Process for proposing penalties

As in British Columbia, the penalty process at OSHA begins with a field officer recommending a penalty. The officer's recommendation is reviewed by his or her supervisor and then forwarded to the area director. If the area director accepts the recommendation, a citation is issued setting out the penalty.

An employer faced with a proposed penalty may request to meet with the area director in what is known as an informal settlement conference. Worker representatives cannot initiate an informal settlement conference to challenge a penalty. When such a conference is held at the request of an employer, an employee representative is entitled to attend unless the employer objects in which case a separate conference is held with the employee representative.

The only data available on informal settlements are contained in a 1984 report prepared by the General Accounting Office.\textsuperscript{17} The percentage of all violations addressed in informal settlement proceedings was 10.6 per cent in fiscal year (FY) 1980-81, 14.0 per cent in 1981-82, and 15.0 per cent in 1982-83. As not all violations involve a penalty, and the approximately 30 per cent of violations that were penalized in these years were more likely to be the subject of a


settlement conference, the percentage of penalized violations subject to settlement could be as high as 50 per cent.

The General Accounting Office examined in detail 946 violations addressed in informal conferences in FY 1982-83. The vast majority of these informal settlements resulted in a reduction in the amount of the penalty assessed. Very rarely was a penalty withdrawn entirely. This occurred in less than 4 per cent of violations subject to informal settlements, which represents less than 0.6 per cent of all violations. In FY 1982-83, proposed penalties totalling $4,064,214 were settled informally and the total amount of these penalties was reduced by 56.4 per cent to $1,773,304. The corresponding percentages for 1981 and 1982 are 53.5 per cent and 58.9 per cent respectively. As the total amount collected in penalties levied in 1983 was just over five million dollars, over three million dollars must have been collected in penalties that did not go through the informal settlement process.

3. Process for contesting penalties

An employer may contest an OSHA penalty before the independent Occupational Safety and Health Review Commission. While only an employer may commence OSHRC proceedings over a penalty, a worker representative is entitled to participate. OSHA's regional solicitor also takes part.

OSHRC fulfills both mediation and adjudication functions. Since 1987, OSHRC has assigned each case to an administrative law judge (ALJ) designated as a "settlement judge." A settlement negotiated at this stage is known as a "formal settlement" and requires the consent of the employer, any worker representative, and OSHA's Regional Solicitor. When settlement proves impossible, OSHRC provides a two stage adjudication process. First, a hearing is held before an ALJ. Here OSHA bears the burden of proving on the balance of probabilities that a violation occurred. Second, an aggrieved party may seek leave to have an ALJ's decision reviewed by the Commissioners themselves. When the Commissioners grant leave, they generally receive written submissions and review the record of the ALJ proceeding, rather than conduct a second oral hearing.

Over the last decade, the percentage of inspections with violations for which notice of contest was filed with OSHRC has ranged
from a low of 3.2 per cent in FY 1984-85 to a high of 10.9 per cent in 1981-82. The number of contests filed with OSHRC has ranged from a high of 3,739 in 1980-81 to a low of 1,307 in 1984-85. In 1990-91, the number of contests filed with OSHRC was 3,350; 10.4 per cent of all inspections with violations were contested. As most inspections with violations result in a penalty, the contest rate for inspections with penalized violations cannot exceed 20 per cent. In other words, the vast majority of penalties are paid without formal contest.

Approximately 90 per cent of all cases in which a formal contest is lodged with OSHRC are settled or withdrawn prior to adjudication. In FY 1990-91, 217 cases were settled by an ALJ and sixty-four such decisions were referred to the Commissioners for review. Details are not available as to the nature of settlements or the disposition of adjudicated cases.

OSHRC has the final say on questions of fact relating to the occurrence of a violation. However, the Supreme Court recently ruled that OSHRC must defer to OSHA’s interpretation of a legal standard so long as that interpretation is reasonable.18

III. COMPARING ADMINISTRATIVE AND CRIMINAL PENALTIES

How do the systems of administrative penalties found in British Columbia and the United States compare to the criminal process utilized in Ontario? In this part, the criminal and administrative processes are compared with reference to their capacity to promote compliance with regulatory requirements and to identify offenders who warrant punishment. Also considered are operating costs and the speed with which cases are decided.

A. Securing Compliance

A comparative evaluation of the ability of administrative and criminal penalties to promote compliance with occupational health and safety legislation must begin with some theory of a causal link between punishment and conformity with legal requirements. The next section sets out a theory of compliance and the following sections apply that theory to criminal and administrative penalties.

1. Compliance theory

There is good reason to believe that penalties enhance compliance in the short-term by threatening would-be offenders with punishment, and in the long-term by changing attitudes about what is morally acceptable behaviour.

Over the long-term, stigmatizing health and safety offenders by subjecting them to legal punishment may generate a stronger moral commitment to protecting the well-being of employees. The relative ability of administrative and criminal sanctions to promote compliance in this way depends entirely upon which produces the greater stigma. Where conscience fails to induce obedience to law, the threat of punishment may suffice. Deterrence theory posits that compliance is a function of the probability of an offender being punished and the severity of the penalty. In recent years, a number of studies have attempted to determine whether individuals can be deterred from law breaking. Most of these studies have examined the relationship between self-reported juvenile delinquency or tax evasion, and perceptions of the probability and severity of punishment. This research has produced little evidence that the perceived severity of sanctions affects compliance but substantial evidence that the perceived certainty of punishment does. A number of these studies have distinguished between formal sanctions and informal sanctions. Formal sanctions include incarceration or monetary fines, imposed directly by the legal system, while informal penalties are those indirectly caused by legal punishment, such as the disapproval of family and peers and loss of social standing. Informal
sanctions have been found to have a much stronger effect on an individual's conformity to legal requirements than formal sanctions.\textsuperscript{19}

Some commentators have argued that punishment is likely to be a stronger deterrent for corporations than individuals because corporate crimes are almost never spontaneous or emotional, but rather an exercise in calculated risk taking.\textsuperscript{20} However, there has been relatively little empirical research on corporate deterrence. One study of the enforcement of nursing home standards in Australia found no association between compliance and the perceived severity and certainty of formal punishment.\textsuperscript{21}

Several researchers have attempted to measure the impact of OSHA’s enforcement activities. The only study of the impact of OSHA penalties on the extent of employer compliance with health and safety regulations found a strong association between compliance and the average penalty per inspection.\textsuperscript{22}

Other studies have examined the association between OSHA penalties and injury rates rather than compliance rates. Any association between penalties and injuries is certain not to be as strong as the association between penalties and compliance because most injuries cannot be prevented by complying with existing regulations.\textsuperscript{23}

Three studies of the impact of OSHA penalties on injuries used data aggregated at the industry level for a period not long after OSHA was established in 1970: 1972 to 1975 in one case, 1974 to 1978 in another, and 1973 to 1983 in the third.\textsuperscript{24} None of these three studies found a


\textsuperscript{21} Braithwaite & Makkai, supra note 19.


Occupational Health and Safety

statistically significant association between either the number of penalties per employee, or the mean penalty amount in an industry, and the injury rate for that industry.

Another study, using data from 1979 to 1985 for individual employers, found that an employer's injury rate was inversely related to both the probability of that employer being penalized and the mean penalty for the employer's industry. This study is more likely than the earlier studies to measure OSHA's true impact for two reasons. First, this study used data for a later period when employers were more accustomed to OSHA's enforcement activities. Second, while other studies compared industries, this study compared individual employers, avoiding the problems that arise from aggregating data on injuries and penalties at the industry level. Rather than assuming that all employers in an industry faced the same probability of a penalty, the researchers developed a model to estimate the probability of each employer being penalized based on that employer's size and injury record as well as on the average number of penalties per employer in that industry. The greater precision of this employer-level study lends credence to its conclusion that penalties do prevent injuries.

The researchers conducting this study estimated that a 10 per cent increase in the number of penalties would reduce the number of injuries by 1.61 per cent and that a similar increase in the average size of penalties would reduce injuries by 0.93 per cent. In other words, both the severity and certainty of punishment strongly influence injury rates, although certainty has a substantially stronger effect than severity. The researchers also found that penalties prevent more injuries by altering the conduct of employers who have not themselves been penalized than by influencing the performance of penalized employers. In other words, general deterrence is a more potent force than specific deterrence in preventing injuries.

All these OSHA studies focused exclusively upon formal sanctions. As mentioned above, the informal sanctions flowing from legal punishment were found to be a stronger deterrent than legal punishment for individuals in the context of juvenile delinquency and tax evasion. Is the same true for corporations and other organizational employers? A

---

series of case studies of various allegations and prosecutions against major corporations suggests the answer is yes. The loss of corporate prestige and employee morale caused by adverse publicity, and the distraction of senior managers from their normal duties while they defended the corporation from public attack, were found to have a larger impact on the corporate wrongdoer than large fines. Two studies of the enforcement of routine water pollution offences in Britain concluded that adverse publicity was a more effective deterrent than admittedly low criminal fines. Managers of regulated firms were concerned that being labeled a troublemaker by one regulatory agency would cause other agencies to follow suit.

The next three sections assess the relative deterrent effect of administrative and criminal penalties using data from British Columbia, the United States, and Ontario, where enforcement is more stringent than in other provinces utilizing criminal sanctions.

2. Certainty of punishment

The likelihood of a known offender facing an administrative penalty in the United States is many times higher than the likelihood of facing a prosecution in Ontario. The probability of an administrative sanction in British Columbia is about twice as high as the probability of a criminal proceeding in Ontario. These are the results of a comparison of penalty frequency across jurisdictions taking into account the number of inspections conducted and the number of violations recorded. The data are broken down by fiscal year in a crude attempt to control for

---


28 As this paper is about penalties, the focus is on the probability of known violations resulting in a penalty, something the type of penalty utilized may influence. The probability of violations being detected is ignored because it is not a function of penalty type. A comparison across jurisdictions of the overall probability of violations being detected and penalized would have to take into account the low probability of a workplace being inspected by OSHA and the higher probability of a workplace being inspected in Ontario.
macro-economic variables, which may affect the stringency of enforcement.  

In the United States, OSHA often assesses more than one penalty against the same employer for violations detected on a single inspection, whereas the practice in British Columbia and Ontario is to combine all such violations into a single penalty proceeding or prosecution. For this reason, comparing the number of OSHA penalties with the number of proceedings elsewhere would make OSHA enforcement look more stringent than it actually is. To avoid this problem, the penalty data utilized for OSHA are the number of inspections with one or more penalties rather than the total number of penalties. As WCB in British Columbia and OSHA in the United States do not regulate the mining industry, information for Ontario is presented only for the industrial and construction sectors and not for the mining sector. As the agencies studied in British Columbia and the United States can levy penalties only against employers, and not against employees or supervisors, the data presented for Ontario are for employers only. Data on employer prosecutions in Ontario are not available for years preceding FY 1986-87.  

Table 1 reports the percentage of inspections resulting in penalty action against an employer. The frequency of penalties decreased during the recession of the early 1980s, but since then it has increased more or less consistently. The percentage of inspections resulting in an employer prosecution in Ontario is far lower than the percentage of inspections resulting in an administrative penalty proceeding in British Columbia or the United States. In Ontario, the percentage of inspections which yielded a prosecution ranges between 0.4 per cent in FY 1986–87 and 0.9 per cent in 1990–91. The percentage of British Columbia inspections which led to penalty action during this period

---

29 The fiscal year in Ontario is April to March and in the United States is October to September. As the fiscal year for British Columbia is the calendar year, the data presented throughout this paper are for the years 1980 to 1990.

30 As an employer is one of the parties charged in almost all prosecutions by the Industrial Health and Safety Branch of the Ontario Ministry of Labour, all prosecutions by this Branch are treated as employer prosecutions. Construction Health and Safety Branch prosecutions fall into two categories, tickets under Part I of the Provincial Offences Act, R.S.O. 1990, c. P.33, almost all of which involve only workers, and full-blown prosecutions under Part III of the Act almost all of which involve an employer. Only the latter are included in the data presented here. Although the Ontario legislation distinguishes between employers and constructors, constructors are treated as employers for present purposes.
ranges between 0.9 per cent to 1.8 per cent. The corresponding percentages for OSHA are much higher with a low of 33 per cent and a high of 63 per cent. In FY 1990-91, a prosecution followed 0.9 per cent of all inspections by the Ontario Ministry of Labour, whereas an administrative penalty was proposed for violations found in 1.8 per cent of WCBO inspections and in a whopping 63 per cent of OSHA inspections. This cross-jurisdictional comparison offers a rough measure of the relative certainty of punishment for known violations as long as the violations detected on inspections do not differ substantially in number or type from one jurisdiction to the next.

### TABLE 1

<table>
<thead>
<tr>
<th>Year</th>
<th>Ontario</th>
<th>British Columbia</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980-81</td>
<td>0.3</td>
<td>27</td>
<td></td>
</tr>
<tr>
<td>1981-82</td>
<td>0.2</td>
<td>21</td>
<td></td>
</tr>
<tr>
<td>1982-83</td>
<td>0.2</td>
<td>22</td>
<td></td>
</tr>
<tr>
<td>1983-84</td>
<td>0.2</td>
<td>24</td>
<td></td>
</tr>
<tr>
<td>1984-85</td>
<td>0.4</td>
<td>27</td>
<td></td>
</tr>
<tr>
<td>1985-86</td>
<td>0.7</td>
<td>30</td>
<td></td>
</tr>
<tr>
<td>1986-87</td>
<td>0.4</td>
<td>1.0</td>
<td>33</td>
</tr>
<tr>
<td>1987-88</td>
<td>0.6</td>
<td>0.9</td>
<td>41</td>
</tr>
<tr>
<td>1988-89</td>
<td>0.7</td>
<td>1.2</td>
<td>53</td>
</tr>
<tr>
<td>1989-90</td>
<td>0.8</td>
<td>1.6</td>
<td>62</td>
</tr>
<tr>
<td>1990-91</td>
<td>0.9</td>
<td>1.8</td>
<td>63</td>
</tr>
</tbody>
</table>

While there is no ready way to control for the type of violations cited, the number of orders issued to correct offences can be taken into account. As reported in Table 2, the number of violations per inspection is consistently lower in Ontario than in the other two jurisdictions. While these numbers could reflect a real difference in the average state of compliance at inspected sites, they are just as likely to be a product of different administrative practices in recording violations. Even if these numbers do reflect real differences in violation rates, any such differences are smaller than the differences in the percentage of inspections resulting in penalty action. OSHA has approximately sixty
times as many penalties per inspection as Ontario but only three times as many recorded violations. WCB records one and a half times as many violations per inspection but has twice as many penalties.

### TABLE 2

**Average Number of Violations Per Inspection**

<table>
<thead>
<tr>
<th>Year</th>
<th>Ontario</th>
<th>British Columbia</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980-81</td>
<td>0.8</td>
<td>1.4</td>
<td>2.0</td>
</tr>
<tr>
<td>1981-82</td>
<td>0.8</td>
<td>1.6</td>
<td>1.6</td>
</tr>
<tr>
<td>1982-83</td>
<td>0.8</td>
<td>1.6</td>
<td>1.6</td>
</tr>
<tr>
<td>1983-84</td>
<td>0.7</td>
<td>1.2</td>
<td>1.6</td>
</tr>
<tr>
<td>1984-85</td>
<td>0.8</td>
<td>1.1</td>
<td>1.7</td>
</tr>
<tr>
<td>1985-86</td>
<td>0.8</td>
<td>1.2</td>
<td>2.0</td>
</tr>
<tr>
<td>1986-87</td>
<td>0.8</td>
<td>1.2</td>
<td>2.2</td>
</tr>
<tr>
<td>1987-88</td>
<td>0.9</td>
<td>1.4</td>
<td>2.7</td>
</tr>
<tr>
<td>1988-89</td>
<td>1.1</td>
<td>1.4</td>
<td>3.4</td>
</tr>
<tr>
<td>1989-90</td>
<td>1.1</td>
<td>1.5</td>
<td>3.8</td>
</tr>
<tr>
<td>1990-91</td>
<td>1.0</td>
<td>1.7</td>
<td>3.6</td>
</tr>
</tbody>
</table>

Some proposed administrative penalties are later withdrawn. Similarly, some prosecutions result in an acquittal. In recent years, approximately 80 per cent of the cases prosecuted in Ontario have resulted in a conviction. As noted above, approximately 65 per cent of the WCB penalties initially proposed during the 1980s were confirmed. Penalties proposed by OSHA are rarely withdrawn entirely as a result of informal settlement conferences. And less than 20 per cent of OSHA inspections with penalties are contested before OSHRC. While data are not available on the disposition of these appeals, no doubt some penalties are withdrawn or overturned at this stage. These figures demonstrate that the frequency of confirmed administrative penalties in British Columbia and the United States is higher than the frequency of convictions in Ontario.

The question remains whether the observed difference in the frequency of penalties is a function of the type of sanctioning mechanism utilized. Political factors offer another possible explanation. An activist government can dramatically increase the stringency of regulatory
enforcement just as a government with a free-market bent can have the opposite effect, whatever the sanctioning mechanism. However, politics cannot explain the higher frequency of penalties in British Columbia and the United States. The lower probability of punishment in Ontario persisted unabated throughout the late 1980s when that province was governed by the Liberals and both of the other jurisdictions had more conservative governments. A more convincing explanation for the observed differences in the probability of punishment is the type of sanction utilized. The reasons why penalty frequency is higher in the administrative process are discussed at the end of this section.

The greater probability of punishment for known violations under a system of administrative penalties is very important because deterrence research strongly suggests that more certain punishment leads to greater compliance.

3. Severity of punishment

The severity of punishment also may have a bearing on compliance, although there is less empirical evidence of any causal relationship. One measure of the severity of sanctions for health and safety offences is the size of monetary penalties. The data presented below reveal that, in recent years, the average court fine in Ontario has been substantially larger than the average OSHA penalty in the United States. Both jurisdictions sharply increased maximum fines during the 1990s, but it appears likely that Ontario fines will continue to be higher. However, Ontario’s advantage in penalty severity is more than offset by the far greater certainty of punishment in the United States. Total penalties in the United States—the product of the probability and severity of punishment—are many times higher than in Ontario. Prior to the 1990 enactment of Bill 208, which dramatically increased the maximum corporate fine in Ontario, average penalties in Ontario and British Columbia were not significantly different. Since the passage of Bill 208, average fines in Ontario have leapt ahead of those in British Columbia. As a result, total penalties in Ontario are likely to exceed

those in British Columbia in the future unless the WCB increases maximum penalties in step with other jurisdictions.

In the following analysis, the measure of penalty severity is the aggregate fine assessed against an employer for all violations detected on a single inspection. Unlike court fines in Ontario and administrative penalties in British Columbia, penalties initially levied by OSHA are frequently reduced as a result of settlements. For this reason, a distinction must be made between penalties initially assessed by OSHA and final penalties.

**TABLE 3**

Average Penalty

<table>
<thead>
<tr>
<th>Year</th>
<th>Ontario</th>
<th>British Columbia</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980-81</td>
<td>8,378</td>
<td>449</td>
<td></td>
</tr>
<tr>
<td>1981-82</td>
<td>3,984</td>
<td>341</td>
<td></td>
</tr>
<tr>
<td>1982-83</td>
<td>4,404</td>
<td>333</td>
<td></td>
</tr>
<tr>
<td>1983-84</td>
<td>1,800</td>
<td>3,123</td>
<td>353</td>
</tr>
<tr>
<td>1984-85</td>
<td>2,600</td>
<td>1,911</td>
<td>399</td>
</tr>
<tr>
<td>1985-86</td>
<td>2,400</td>
<td>2,368</td>
<td>505</td>
</tr>
<tr>
<td>1986-87</td>
<td>2,600</td>
<td>3,254</td>
<td>848</td>
</tr>
<tr>
<td>1987-88</td>
<td>3,200</td>
<td>4,914</td>
<td>1,146</td>
</tr>
<tr>
<td>1988-89</td>
<td>3,712</td>
<td>4,036</td>
<td>1,509</td>
</tr>
<tr>
<td>1989-90</td>
<td>5,667</td>
<td>5,223</td>
<td>2,212</td>
</tr>
<tr>
<td>1990-91</td>
<td>5,626</td>
<td>5,679</td>
<td>3,471</td>
</tr>
</tbody>
</table>

Table 3 records the average size of monetary penalties in the three jurisdictions. Like the frequency of penalties, the average penalty decreased during the recession of the early 1980s, but it has increased more or less consistently since then. OSHA periodically updates its penalty figures to reflect reductions in the amount of penalties that occur through settlement or adjudication. This updated data was used to construct Table 3. For FY 1980-81 through FY 1989-90, this table reports the average of OSHA penalties extant as of 12 May 1991 and

---

32 Data on employer penalties in Ontario are not available for years preceding FY 1983-84.
incorporates any reductions made before that date. For inspections conducted in FY 1988-89 or earlier, it is safe to assume, in almost all cases, that informal settlement procedures and OSHRC proceedings were waived or exhausted before 12 May 1991 so that the figures reported here accurately reflect the average amount of final penalties. For inspections conducted in OSHA's 1990-91 fiscal year, which ended on 30 September 1991, the data reported in Table 3 are for penalties extant as of 18 November 1991. Ultimately, a significant number of these penalties will be substantially reduced.\footnote{The average penalty per inspection was computed from the only data which could be obtained from OSHA. The adjusted amount of penalties was divided by the number of inspections with initial penalties. Accordingly, the amount of penalties reflects any reduction that occurred after initial assessment, whereas the number of penalties does not. For this reason, the average penalty per inspection reported here is slightly lower than the true adjusted figure.}

The data permit a reliable comparison of final penalties in the United States and Ontario for years up to and including FY 1988-89. For each of these years, the average OSHA penalty is much smaller than the average court fine in Ontario. However, the gap has narrowed considerably in recent years. In FY 1984-85, the average Ontario fine was 6.5 times larger than the average OSHA final penalty, but by 1988-89 it was only 2.5 times larger. For five of eight years, the only period for which comparable data are available, the average Ontario fine was smaller than the average administrative penalty in British Columbia, although in recent years the difference was very small.

While Ontario leads the United States by a large margin in the average amount of final penalties, this may not be the best measure of sanction severity in an analysis of deterrence. To the extent that the severity of sanctions is a deterrent, what matters is that the severity perceived by employers and perceptions may differ from reality. Employers' perceptions may be influenced by OSHA's initial penalties even if those penalties are later reduced in the settlement process. This is particularly so if large initial penalties generate more publicity than smaller, final penalties. If perceptions operate in this way, Ontario's advantage in sanction severity is not as large as the data on final penalties suggest.
### TABLE 4
**Distribution of Penalties**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1 to 499</td>
<td>3</td>
<td></td>
<td>10,172</td>
</tr>
<tr>
<td>500 to 999</td>
<td>5</td>
<td></td>
<td>6,222</td>
</tr>
<tr>
<td>1,000 to 2,499</td>
<td>23</td>
<td>83</td>
<td>7,231</td>
</tr>
<tr>
<td>2,500 to 4,999</td>
<td>25</td>
<td>183</td>
<td>2,872</td>
</tr>
<tr>
<td>5,000 to 9,999</td>
<td>32</td>
<td>61</td>
<td>1,080</td>
</tr>
<tr>
<td>10,000 to 19,999</td>
<td>22</td>
<td>26</td>
<td>508</td>
</tr>
<tr>
<td>20,000 to 49,999</td>
<td>5</td>
<td>4</td>
<td>218</td>
</tr>
<tr>
<td>50,000 to 99,999</td>
<td></td>
<td></td>
<td>35</td>
</tr>
<tr>
<td>100,000 to 499,999</td>
<td></td>
<td></td>
<td>12</td>
</tr>
<tr>
<td>500,000 to 999,999</td>
<td></td>
<td></td>
<td>7</td>
</tr>
<tr>
<td>1,000,000 or more</td>
<td></td>
<td></td>
<td>4</td>
</tr>
</tbody>
</table>

Table 4 provides a breakdown of the amount of penalties in the three jurisdictions for the last complete year for which data are available. One notable difference is that a large proportion of OSHA penalties are under $500 whereas penalties of this size are relatively rare in Ontario. At the other end of the scale, the largest penalties levied by OSHA far exceed those in Ontario. In FY 1989-90, there were no fines over $25,000 in Ontario. That year OSHA levied twenty-three penalties in excess of $100,000, eleven in excess of $500,000, and four in excess of $1,000,000. (In 1990-91, OSHA levied forty-seven fines over $100,000, fifteen over $500,000, and eight over $1,000,000.) As the OSHA data are for penalties initially assessed, final penalties will be lower, with many penalties reduced by an average of about 50 per cent through settlements and appeals. Even after the settlement and appeal processes are exhausted, a substantial number of very large penalties will remain. Although most OSHA penalties are small, the relatively few, huge penalties may have a substantial deterrent value if they attract more publicity, and therefore, have a greater impact on employer perceptions than do the smaller ones.

There remains to be considered the very recent increase in legislatively prescribed maximum penalties in both Ontario and the United States, which the preceding analysis largely ignores. Ontario's Bill 208 increased the maximum penalty for a corporation to $500,000.
from $25,000 effective 15 August 1990.\textsuperscript{34} Table 5 presents a comparison of fines before and after Bill 208. The “after” period includes all cases decided prior to 18 March 1992. Since Bill 208, there have been fewer fines under $1,000. There were no cases with total fines in excess of $25,000 in FY 1989-90, but there have been seventeen such cases after Bill 208. Indeed, there have been four fines in excess of $100,000, with the two largest fines to date being $300,000 and $400,000. The average fine after Bill 208 is $33,504, about six times the previous average.

**TABLE 5**

Ontario Penalties Before and After Bill 208

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1 to 499</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>500 to 999</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>1,000 to 2,499</td>
<td>23</td>
<td>5</td>
</tr>
<tr>
<td>2,500 to 4,999</td>
<td>25</td>
<td>5</td>
</tr>
<tr>
<td>5,000 to 9,999</td>
<td>32</td>
<td>13</td>
</tr>
<tr>
<td>10,000 to 19,999</td>
<td>22</td>
<td>13</td>
</tr>
<tr>
<td>20,000 to 49,999</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td>50,000 to 99,999</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>100,000 to 249,999</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>250,000 or more</td>
<td></td>
<td>2</td>
</tr>
</tbody>
</table>

The maximum fines found in the *Occupational Safety and Health Act* were increased sevenfold by Congress effective 1 March 1991.\textsuperscript{35} This legislative change is directly reflected in the formula for calculating penalties set out in OSHA’s operations manual. Currently gravity-based penalties range from $1,000 to $5,000 per violation, whereas previously they ranged from $100 to $1,000. In other words, the minimum gravity-based penalty grew tenfold and the maximum fivefold. In short, the size

\textsuperscript{34} As the new corporate maximum fine applies to offences committed after 15 August 1990, the data in Tables 3 and 6 for FY 1990-91 offences partially reflect the new maximum fines.

\textsuperscript{35} As OSHA’s 1990-91 fiscal year ended in September 1991, the data in Tables 3 and 6 on average penalties in that fiscal year partially reflect the new minimum and maximum penalties.
of penalties has grown at least as much in the United States as in Ontario. The average penalty in British Columbia is predicted to fall behind that in Ontario unless WCB revises its penalty schedule to keep pace with the new statutory maximum penalties in Ontario.

**TABLE 6**

**Total Penalties**

(Thousands of dollars)

<table>
<thead>
<tr>
<th>Year</th>
<th>Ontario</th>
<th>British Columbia</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980-81</td>
<td>603,223</td>
<td>7,167,108</td>
<td></td>
</tr>
<tr>
<td>1981-82</td>
<td>223,109</td>
<td>4,417,884</td>
<td></td>
</tr>
<tr>
<td>1982-83</td>
<td>264,244</td>
<td>5,003,897</td>
<td></td>
</tr>
<tr>
<td>1983-84</td>
<td>451,800</td>
<td>177,999</td>
<td>6,057,556</td>
</tr>
<tr>
<td>1984-85</td>
<td>418,600</td>
<td>212,098</td>
<td>7,620,781</td>
</tr>
<tr>
<td>1985-86</td>
<td>379,200</td>
<td>589,735</td>
<td>9,852,789</td>
</tr>
<tr>
<td>1986-87</td>
<td>548,600</td>
<td>1,343,500</td>
<td>17,028,109</td>
</tr>
<tr>
<td>1987-88</td>
<td>860,800</td>
<td>1,631,500</td>
<td>27,219,472</td>
</tr>
<tr>
<td>1988-89</td>
<td>1,247,232</td>
<td>2,086,750</td>
<td>43,804,886</td>
</tr>
<tr>
<td>1989-90</td>
<td>2,204,463</td>
<td>3,379,000</td>
<td>62,720,886</td>
</tr>
<tr>
<td>1990-91</td>
<td>2,149,132</td>
<td>4,895,080</td>
<td>91,676,337</td>
</tr>
</tbody>
</table>

To this point in the analysis, the size of monetary penalties has been treated separately from the certainty of known violations being punished. But deterrence is as much, if not more, a function of certainty as of severity. The total dollar value of all penalties, the product of the average monetary penalty and the number of penalties, is reported in Table 6. As complete data on final penalties are not available for British Columbia, the figures reported are for penalties initiated not those finalized. As noted above, approximately 65 per cent of all penalties proposed by WCB are confirmed and rarely is the confirmed penalty smaller than the one initially proposed. On the assumption that final penalties do not differ in size from those set aside, the total amount of penalties confirmed would be about 65 per cent of the amount reported in Table 6.

The total amount of OSHA final penalties is consistently much higher than the total amount of fines in Ontario and the differential has
increased with time. OSHA penalties in aggregate are thirteen times greater than total fines in Ontario for FY 1983-84 and thirty-five times larger for 1988-89, the last year for which reliable data on OSHA final penalties are available. When the total amount of proposed penalties in British Columbia is discounted by 35 per cent to estimate final penalties, the resulting figure is greater than the total amount of fines in Ontario in five of the eight years for which data are available. While the Ontario Ministry of Labour conducts more inspections each year than its counterparts elsewhere, total penalties in Ontario are less.

<table>
<thead>
<tr>
<th>Year</th>
<th>Ontario</th>
<th>British Columbia</th>
<th>United States</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980-81</td>
<td>17.7</td>
<td>126.7</td>
<td></td>
</tr>
<tr>
<td>1981-82</td>
<td>5.8</td>
<td>71.6</td>
<td></td>
</tr>
<tr>
<td>1982-83</td>
<td>6.5</td>
<td>73.9</td>
<td></td>
</tr>
<tr>
<td>1983-84</td>
<td>4.5</td>
<td>3.9</td>
<td>84.5</td>
</tr>
<tr>
<td>1984-85</td>
<td>4.4</td>
<td>4.9</td>
<td>106.2</td>
</tr>
<tr>
<td>1985-86</td>
<td>4.3</td>
<td>11.3</td>
<td>153.1</td>
</tr>
<tr>
<td>1986-87</td>
<td>7.3</td>
<td>22.2</td>
<td>276.7</td>
</tr>
<tr>
<td>1987-88</td>
<td>13.4</td>
<td>28.1</td>
<td>473.3</td>
</tr>
<tr>
<td>1988-89</td>
<td>16.6</td>
<td>31.6</td>
<td>805.5</td>
</tr>
<tr>
<td>1989-90</td>
<td>33.4</td>
<td>55.6</td>
<td>1380.1</td>
</tr>
<tr>
<td>1990-91</td>
<td>39.2</td>
<td>65.6</td>
<td>2177.8</td>
</tr>
</tbody>
</table>

A more precise comparison of the combined certainty and severity of punishment can be accomplished by dividing the total penalty dollars by the total number of inspections. The results are reported in Table 7 with the dollar amount of penalties proposed in British Columbia discounted by 35 per cent to estimate final penalties. The ratio of penalty dollars to total inspections is higher in British Columbia than in Ontario for six of the eight years for which data are available—from about 200 per cent higher in FY 1985-86 decreasing to 70 per cent higher in 1990-91. These figures do not take into account the very recent increase in Ontario fines brought about by Bill 208 and not matched in British Columbia. The ratio of total final penalties to
total inspections is nineteen times higher in the United States than in Ontario for FY 1983-84 and it increased to forty-nine times higher by 1988-89. For FY 1988-89, the amount collected per inspection by OSHA is $805.54 and by WCB is $31.56, as compared with $16.63 levied by the Ontario courts. Even though OSHA records close to 300 per cent more violations per inspection than does the Ontario Ministry of Labour, and WCB records 50 per cent more than the Ministry, these differences can explain such disparities in the total amount of penalties per inspection.

In summary, the probability of an employer being penalized after an inspection is roughly twice as high in British Columbia as in Ontario. Until recently, the average employer penalty was slightly higher in British Columbia in most years, but Bill 208 almost certainly will propel Ontario into the lead. While the ratio of total penalty dollars to total inspections was substantially higher in British Columbia before Bill 208, Ontario is now likely to move ahead on this front also. Although the future is uncertain, British Columbia easily could follow the lead elsewhere by dramatically increasing the size of penalties. If the average penalty in British Columbia was brought into line with the Ontario scale, more frequent WCB penalties again would provide a greater financial disincentive than Ministry of Labour prosecutions. The high cost of prosecution, discussed in detail below, is a major impediment to any substantial increase in the number of criminal penalties in Ontario.

The probability of an inspection yielding a penalty is more than sixty times higher in the United States than in Ontario, while the average penalty is now twice as high in Ontario. OSHA administrative penalties offer a greater financial deterrent to known offenders than do criminal penalties in Ontario for two reasons. First, the total amount of penalties is far greater in the United States, even when adjusted to account for the number of inspections and recorded violations. Second, deterrence research suggests the certainty of punishment has a greater bearing on compliance than does the severity of punishment.

For present purposes, Ontario provides an instructive example of the criminal process in action. The amount of fines per inspection is substantially higher in Ontario than in Alberta, Saskatchewan, Manitoba, New Brunswick, and Newfoundland, the only provinces for
which comparable information is available.\textsuperscript{36} Even though Ontario is the enforcement leader among prosecuting provinces, fines in Ontario have provided much less financial deterrence than administrative penalties in British Columbia and the United States.

4. Stigma of punishment

Potential offenders may be deterred more by informal sanctions, such as loss of personal and corporate prestige, which are triggered by the legal system, than by formal legal sanctions. If the stigma of being sanctioned promotes compliance, then it becomes important to understand how the stigma of punishment can be enhanced. Two factors that may determine the degree of stigma are the moral judgment of those who know that punishment has been imposed, and the number of people with this knowledge, particularly people whose opinion matters to the offender.

While a jail sentence is probably seen by most people as indicating greater moral turpitude than a monetary penalty, a prison sentence is very rare in the sphere of regulatory offences. A fine imposed by a criminal court for a health and safety offence may be perceived by most people as indicating greater wrongdoing than an administrative penalty, although there is little empirical evidence on this point.\textsuperscript{37} This perception may exist because judicial pronouncements are

\textsuperscript{36} For example, in 1986-87 the percentage of inspections resulting in a penalty was higher in Ontario (0.4) than in Manitoba (0.3), Saskatchewan (0.2), Newfoundland (0.1), or New Brunswick (0). While the percentage of inspections with penalty was higher in Alberta (0.5) than in Ontario, the average fine in Ontario was four times as large as in Alberta (and at least three times as large as in the other provinces listed). As the frequency and size of penalties in Ontario has more than doubled since 1986-87, it is highly unlikely that Ontario has lost the lead it held then.

\textsuperscript{37} Some data on the way people perceive criminal and administrative penalties are offered by a survey of taxpayers who were asked about the impact on their reputation of "being penalized for negligently under-reporting taxable income to Revenue Canada" and "being found guilty in court of tax evasion". While forty-five per cent rated the impact of a guilty verdict on their reputation as either substantial or extreme, only sixteen percent felt the same way about a penalty. See N. Brooks & A. Doob, "Tax Evasion: Searching for a Theory of Compliant Behaviour," in M. Friedland, ed., Securing Compliance: Seven Case Studies (Toronto: University of Toronto Press, 1990). The answers may have been coloured by a suggestion in the question that the offence being penalized by Revenue Canada (negligently under-reporting) is less serious than the one considered by the court (tax evasion). Moreover, the question refers to a finding of guilt by the court but mentions no corresponding finding by Revenue Canada.
seen as more authoritative than are administrative rulings, or because the judiciary is associated with more serious crimes than are health and safety administrators. Even if such a perception does exist where all other things are equal, other things may differ. OSHA sometimes imposes fines in excess of $500,000 or even $1,000,000, something the Ontario courts have never done. It is possible that perceptions of moral turpitude are influenced by such huge penalties.

Left to its own devices, the media may be more likely to publicize criminal penalties than administrative sanctions because prosecutions are acted out in open court, whereas many administrative proceedings are conducted through correspondence or behind closed doors. However, regulators and administrators may be able to compensate for the inattentiveness of the media by issuing press releases or by publishing their own newsletters.

In the absence of solid empirical evidence, one can only speculate about the relative stigma of different enforcement mechanisms. While it is possible that criminal penalties carry greater stigma, the administrative approach almost certainly has the potential to produce more penalties of greater total value.

B. Deciding Who to Punish

The potential of the administrative process to generate more penalties than the criminal process is to be applauded only if those receiving administrative sanctions deserve them. There is good reason to believe that the administrative procedures utilized in British Columbia and the United States more accurately identify offenders who warrant punishment than does the court system in Ontario.

1. Determining fault

Fault is an important criterion in selecting offenders for punishment whatever the sanction. Not every employer who commits a health and safety offence is penalized. While the violation of a legal standard typically results in an order to rectify the resulting hazard, the vast majority of offenders in Ontario and British Columbia are not punished. The same is true of a large minority of offenders in the
United States. A penalty is more likely to result from a violation if the employer was not duly diligent in attempting to ensure compliance. Reserving penalties for employers who are at fault makes good sense. Employers who take all reasonable precautions to ensure that regulatory standards are met do not deserve to be punished when their efforts fail. Moreover, punishing employers who take all reasonable precautions would do little to enhance future compliance. The administrative process is better suited to determining whether reasonable steps were taken to comply with regulatory requirements because this process takes into account an employer’s history of previous violations.

If the resources of inspectors and adjudicators were unlimited, the ideal way to determine whether an employer exercised due diligence would be to investigate thoroughly not only the immediate circumstances of the offence, but also the employer's prevention programme which gave rise to those circumstances. This investigation would delve into the actions of all those involved at the time the violation occurred and probe the adequacy of aspects of the employer's health and safety programme such as its physical plant, maintenance procedures, inspection routines, training, and supervision. Unfortunately, if this sort of far-reaching inquiry is required whenever penalty action is considered, resource constraints dictate that few offenders would be penalized.

In many cases, a more practical way to determine whether all reasonable steps were taken to prevent a particular type of infraction is to review the employer’s record of previous occurrences of the same type of violation. When numerous occurrences of the same violation have been cited over the course of several inspections, there is good reason to conclude that the employer’s prevention programme is inadequate. A single violation may be nothing more than an aberration in the performance of a prevention programme that generally ensures compliance. But repeated infractions leave little doubt that the programme is deficient.

In the administrative process utilized in British Columbia and the United States, an employer’s compliance history is weighed in determining whether to take penalty action. While the governing legislation leaves the enforcement agency to decide whether to penalize repeat violations, the published policy of both agencies recognizes that an employer’s compliance history is an important factor in penalty decisions. OSHA’s policy is to penalize an employer who is cited for a
repeat violation, which is defined as an offence that is "substantially similar" to one previously cited. WCB's manual directs officers to consider a penalty when faced with persistent non-compliance. Empirical investigation confirms that WCB officials do take past offences into account when making penalty decisions. A questionnaire was sent to all Board officers and 63 per cent of them replied. Using a seven-point scale, respondents rated the importance of several factors in deciding whether to recommend a penalty for a particular infraction. As reported in Table 8, previous occurrences of the same violation received the highest mean score (6.5). A lower score was assigned to the other possible indicator of fault, the effort made to prevent a violation (5.8).

The significance of compliance history to both field officers and those who review their penalty recommendations is confirmed by a review of all documentation in the files relating to 230 penalties proceedings for offences occurring between January 1984 and June 1985. In most of these files, the only recorded basis for a finding of fault is a history of previous occurrences of the same type of infraction which prompted the penalty recommendation. The case of a tire repair shop penalized for violations involving the handling of split rims is illustrative. This offence had been cited previously and had resulted in two serious injuries as well as a fatality, over a period of six years. "We don't have the time or money for safety" was the way the officer concerned characterized the outlook of the firm's senior management. 38

38 While WCB officials attach great weight to previous violations of a particular regulation when that regulation is violated again, much less weight is attached to past occurrences of other types of offences. Previous occurrences of other types of violations received one of the lowest mean scores (4.3) of any of the factors officers were asked to rate. Many officers apparently divide an employer's compliance history into almost watertight compartments, one for each type of offence. This approach is also evident from a review of penalty files. When recommending a penalty, officers often mention past instances of the type of violation that precipitated the recommendation for sanction, but they seldom refer to other types of infraction. Perhaps officers follow this approach because reviewing a firm's history of previous violations of all types would be a burdensome task.
TABLE 8
Factors Influencing Penalty Decisions in British Columbia

<table>
<thead>
<tr>
<th>Factor</th>
<th>Mean Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any previous violations of the</td>
<td></td>
</tr>
<tr>
<td><em>same</em> regulation now being violated</td>
<td>6.5</td>
</tr>
<tr>
<td>Previous warning letter</td>
<td>6.5</td>
</tr>
<tr>
<td>Previous penalty</td>
<td>6.2</td>
</tr>
<tr>
<td>The particular regulation(s) violated</td>
<td></td>
</tr>
<tr>
<td>Probability that injury or disease <em>could have resulted</em> from violation</td>
<td>6.0</td>
</tr>
<tr>
<td>Severity of injury or disease which <em>could have resulted</em> from violation</td>
<td>5.8</td>
</tr>
<tr>
<td>The degree of effort made before the inspection to comply with the regulations</td>
<td>5.8</td>
</tr>
<tr>
<td>The <em>actual occurrence of serious</em> injury or disease</td>
<td>5.5</td>
</tr>
<tr>
<td>The degree of willingness expressed <em>during or after</em> the inspection to comply with the regulations</td>
<td>4.7</td>
</tr>
<tr>
<td>Number of violations discovered during the inspection</td>
<td>4.4</td>
</tr>
<tr>
<td>Any previous violations of <em>other</em> regulations</td>
<td>4.3</td>
</tr>
<tr>
<td>The size of the employer's business</td>
<td>1.9</td>
</tr>
<tr>
<td>Your assessment of the employer's ability to pay a penalty</td>
<td>1.8</td>
</tr>
</tbody>
</table>

In short, administrative penalty decisions made by both OSHA and WCB take into account an employer's compliance record. This is not to suggest that penalties are never imposed when there is no history of past offences. In the absence of such a history, other evidence relating to the immediate circumstances of a violation or to the employer's prevention programme may be found to demonstrate a lack of due diligence and to warrant a penalty. However, the vast majority of penalties are based upon a history of non-compliance.

When the sanctioning mechanism is prosecution rather than administrative penalties, health and safety officials are likely to take compliance history into account in deciding whom to prosecute simply because they have an ongoing relationship with regulated firms. This is
the approach to prosecution followed by the British Factory Inspectorate. No doubt regulatory officials in Ontario do the same. In the criminal process, however, the courts are charged with determining guilt and they ignore previous violations in making this determination. The rules of evidence applied in criminal proceedings prevent the prosecutor from tendering the employer's compliance record to prove a lack of reasonable care. While previous convictions are considered in fixing sentence, the accused's record of previous infractions is disregarded in deciding whether to convict or acquit, and the same is true of earlier offences that did not result in a prosecution.

With such evidence excluded, a judge's picture of the accused is both very different and less accurate than the one seen by the inspector concerned. An employer known by the inspector to be a habitual offender, with a grossly deficient compliance programme, appears to the court as an employer who has committed a single offence and who may have done so despite taking reasonable precautions. A similar difference of perspective between regulators and judges has been noted in the context of environmental offences in Britain. When past offences are not admitted in evidence, a judge must rely instead upon other evidence in applying the test of due diligence. A judge who focuses exclusively upon the immediate circumstances of the offence may conclude that those present did all that was reasonable in the circumstances to ensure compliance. The problem with this approach is that these circumstances may themselves be the product of an inadequate prevention programme. A different problem is encountered if the focus shifts to the adequacy of the employer's prevention programme. Delving into all the details of this programme requires more time than crowded court dockets permit and calls for more health and safety expertise than many judges possess. Reviewing an employer's record of previous occurrences of the same infraction is a much better way to determine whether reasonable steps were taken to prevent a violation from occurring.


40 Hawkins, supra note 27 at 189.
Yet judges are unlikely to embrace this approach for health and safety offences because it is so dramatically different from the way they deal with conventional crimes, which make up the bulk of their work. The judiciary pays little heed to major differences between regulatory offences and more conventional crimes like theft or assault. The rule of evidence that precludes the prosecution from relying upon previous offences to secure a conviction makes good sense for conventional crimes. In this context, the commission of the offence or the identity of the offender is usually in dispute. Sometimes both are at issue. Jumping from the premise that someone committed a particular criminal act on a previous occasion to the conclusion that that person did the same thing again entails too great a risk of convicting and perhaps incarcerating an entirely innocent person.

The regulatory setting is very different in two senses. When the defence of due diligence is raised, the violation of a legal standard by the accused has already been established. Moreover, the liberty of the accused is almost never at risk in occupational health and safety cases. Although the criminal courts are empowered to impose a prison sentence, they almost never do and cannot where the accused is a corporation. Under a system of administrative penalties, imprisonment is never possible. When the violation of a legal standard is proven or admitted, and all that is in dispute is the effort made to comply, an employer's record of recent occurrences of the same type of violation offers a reliable basis for deciding whether to impose a monetary penalty.

2. Punishing risk versus harm

Most of the health and safety infractions detected by inspectors are discovered before someone is actually harmed. There is a strong argument that offenders should be penalized for creating risk, not just for causing, harm because the objective of health and safety standards is to compel employers to take precautions, which reduce the risk of injury and disease. If a particular violation gives rise to a chance of serious injury, mere luck determines which of the employers who commit this offence will injure a worker. The fortunate employer whose offence hurts no one is as much in need of deterrence as the unfortunate one
whose employee is maimed. The available evidence strongly suggests that the administrative process is more likely than the criminal justice system to punish offenders whose transgressions create risk but cause no actual harm.

In British Columbia, 80 per cent of the administrative penalties recommended during the first six months of 1985 for safety violations were prompted not by an injury or fatality, but by the risk of such harm. In answering the questionnaire, WCB officers reported that their decisions about penalties are more strongly influenced by the potential for harm (mean of 6 for probability and 5.8 for severity) than by its actual occurrence (mean of 5.5) as reported in Table 8. Risk also plays a major role in OSHA’s penalty decisions. The vast majority of the tens of thousands of administrative penalties imposed annually by OSHA are in cases where no one has been hurt.

Where health and safety offenders are punished under the criminal justice system, a smaller percentage of sanctions are for offences that do not result in a worker being injured or killed. The only Ontario data available are for cases referred to the Ministry of Labour's Legal Branch by health and safety officials with a recommendation for prosecution. Not all of these cases result in a prosecution. The percentage of cases recommended for prosecution, which involved a fatality or critical injury, is 42 per cent for FY 1985-86, 32 per cent for 1986-87, and 40 per cent for 1987-88. There are no doubt additional cases where an injury, which was not critical, prompted a recommendation to prosecute. The experience with criminal sanctions in other provinces is similar. Between FY 1983-84 and 1986-87, there were sixteen prosecutions in Saskatchewan, all but one in response to an injury or fatality. In Newfoundland, five out of nine prosecutions from 1983 to 1986 involved harm to an employee. Most prosecutions are in

41 Indeed, one commentator has suggested that the need for a penalty is least when serious harm occurs, because a major injury or fatality is itself a sufficient deterrent. However, the deterrent effect of an injury may be specific rather than general, affecting only the particular offender and not employers at large. Other employers may be deterred by a penalized employer whose violation caused an injury even if the penalty is not needed to deter the specific employer. See T.G. Ison, "The Uses and Limits of Sanctions in Industrial Health and Safety" (1975-76) 2 Workers' Compensation Reporter 203.

42 The distinction between risk and actual harm is easy to make in the context of safety violations posing a risk of injury because an injury can be readily detected. The distinction is much more difficult to apply to health violations causing a risk of disease because employees who are adversely affected often do not show any signs of ill health for many years.
response to harm in other countries. In Britain, 40 per cent of all prosecutions by the Factory Inspectorate follow upon a fatality or serious injury.\textsuperscript{43} Senior Australian regulators rated the occurrence of harm as the most important factor in deciding whether to prosecute an offender.\textsuperscript{44}

Why does the administrative process punish more offenders for causing risk, but not harm, than does the criminal process? One explanation derives from the high costs of prosecuting health and safety offenders in the courts. This places a severe constraint upon the number of offenders who can be prosecuted. Only able to afford to prosecute a tiny minority of offenders, regulatory officials may select for prosecution those who caused an injury because they are believed to be the most deserving of punishment. Another explanation focuses upon the role that judges play in health and safety prosecutions. Where prosecution is the sanctioning mechanism, health and safety officials are likely to take their cue from the bench and to concentrate their energies on prosecuting employers whose offences are most likely to result in a conviction and a substantial fine. Judges who spend much of their time dealing with such matters as theft and assault, where actual harm is readily apparent, may view offences which create only a risk of harm as being less serious. Whatever the explanation, offenders who create a risk of harm, which only good fortune prevents from occurring, are more likely to be punished under a scheme of administrative penalties than in the courts.

3. Standard of proof

A stricter standard of proof is applied when an employer is prosecuted for a health and safety offence than when an administrative penalty is imposed. Before a criminal court will enter a conviction, the prosecution must prove beyond a reasonable doubt that the accused committed the offence charged. The civil standard of proof utilized in


\textsuperscript{44} J. Braithwaite & P. Grabosky, Occupational Health and Safety Enforcement in Australia: A Report to the National Occupational Health and Safety Commission (Canberra: Australian Institute of Criminology, 1985).
the administrative process is significantly lower. A penalty will be confirmed if regulators demonstrate that it is more likely than not that the employer concerned committed an infraction. As a result of these differing standards, an offence can be proven more readily in the administrative process than in the criminal.

While the criminal standard prefers acquitting the guilty to convicting the innocent, the civil standard views the risk of allowing an offender to escape punishment as no less troublesome than the risk of penalizing an innocent party. The criminal standard of proof is appropriate when the liberty of the accused is at stake. However, this standard of proof is not warranted in the context of monetary penalties for health and safety offences because it gives the benefit of any reasonable doubt to employers' bank accounts rather than to the health and safety of workers. The civil standard of proof applied in administrative proceedings is more appropriate because it treats corporate treasuries as no more worthy of protection than the health and safety of employees.

C. Cost and Speed

The criminal and administrative processes also differ in their operating costs and in the speed with which cases are processed.

1. Cost of administrative and criminal penalties

The cost of adjudication is higher in the criminal process because its procedures are more labour intensive and its staff more highly paid than those found in the administrative process. Moreover, employers more often demand full-scale adjudication over a criminal fine than over an administrative penalty.

One obvious strength of the criminal process is the high degree of procedural justice accorded to those accused of breaking the law. While all of the same procedural safeguards could be built into the administrative process, the unsuitability of some aspects of the criminal process for regulatory offences has already been demonstrated. The twin objectives of deterring offences and punishing only deserving offenders are poorly served by ignoring previous infractions in assessing
fault and by applying the criminal standard of proof. On the other hand, several of the procedural safeguards found in the criminal justice system are equally appropriate in the regulatory context—the presumption of innocence, an impartial adjudicator, representation by counsel, and a full-hearing including the cross-examination of adverse witnesses. The important point is that the administrative process can offer these protections at a much lower cost than conventional criminal proceedings.

The court system is very labour intensive. Summons are served by hand. Officials appear in court just to set trial dates and the number of court appearances often multiplies because adjournments are granted. Even where the accused pleads guilty, this plea has to be entered with all concerned present in the court room. Regulators often must educate inexpert prosecutors and judges about the technical aspects of health and safety law, so that they are sufficiently informed to make whatever decisions are required.

The administrative process avoids much of this work. Consider, for example, the procedures followed in British Columbia. Unlike prosecutors, WCB officials are health and safety specialists who do not need a crash course in technical matters. Notification of penalty proceedings is delivered by mail. Dates for meetings and hearings are arranged through correspondence or over the telephone. The administrative equivalent of a guilty plea is handled through correspondence rather than in court. If an employer ignores a show cause letter, the WCB confirms the proposed penalty and proceeds to collect it.

The rules of evidence in court proceedings contribute to their high cost. The criminal standard of proof and the exclusion of evidence of past offences when assessing fault make it more difficult and more expensive to secure a conviction in court than to justify an administrative penalty.

The staff employed in the criminal process is relatively expensive. Highly paid lawyers play a much larger role in criminal than in administrative proceedings. The opposite is true for regulatory officials. In the criminal process, regulators decide whether to recommend a prosecution, but once charges are laid, the case is carried by lawyers. In the administrative process, regulators notify an employer of a proposed penalty and conduct settlement negotiations. Agency lawyers typically play no role in cases where the employer pays the proposed penalty.
without protest, or in cases settled before a formal contest is launched. While OSHA solicitors are involved in OSHRC hearings in the United States, the WCB is not even a party to proceedings before the Appeal Division in British Columbia.

Not only is the criminal process more costly than its administrative counterpart, the limited data available suggest that an employer faced with a criminal prosecution is more likely to mount a full-scale defence than is an employer faced with an administrative penalty. As a result, costly court trials occur more frequently than do less expensive administrative proceedings. Of the charges laid in Ontario for offences alleged to have occurred during the first six months of 1989, 60.1 per cent were met with a plea of not guilty and so proceeded to trial.\(^{45}\) Since Bill 208 came into effect, not guilty pleas have become more common, perhaps because the Bill has resulted in higher fines. Of the charges laid for offences allegedly occurring between September and December 1991, just over three-quarters proceeded to trial.\(^{46}\)

Employers in British Columbia and the United States utilize the full range of administrative procedures available to them less frequently than Ontario employers insist upon a full-blown trial. Of the approximately eight hundred British Columbia employers who received a show cause letter from the WCB in 1990, about one-half requested an informal meeting with a penalty officer. Informal OSHA settlement conferences occur with about the same frequency. Fewer employers seek a formal hearing, especially in the United States. Of the penalties confirmed by the WCB's Occupational Health and Safety Division in 1990, only 45 per cent were appealed to the Appeal Division and most of the employers filing appeals did not request an oral hearing. In the United States, less than 20 per cent of OSHA inspections with penalized violations are the subject of a formal contest before the OSHRC. Approximately 90 per cent of these contested cases are settled or withdrawn without a hearing.

One possible explanation for a lower contest rate in the United States than in British Columbia is that OSHA penalties are typically smaller than WCB penalties. As monetary penalties in British Columbia and Ontario differ little in size, this factor does not explain the different rates of contest in these two jurisdictions. The most likely explanation is

---

\(^{45}\) Charges that were withdrawn or stayed are not included in this analysis.

\(^{46}\) This analysis includes only those cases resolved by 7 February 1992.
that more offenders contest criminal penalties than administrative sanctions. A study of the use of administrative and criminal penalties for securities violations by the Securities and Exchange Commission in the United States came to the same conclusion.47

If employers are more prone to contest criminal fines than administrative penalties, why might this be? One explanation may be that criminal fines carry a greater stigma. A more subtle explanation may be that the criminal process promotes contest by not deciding whether a penalty is warranted, or how large the penalty will be, until after a full-scale trial in which the accused employer is invited to participate. In the administrative process, both of these decisions are made by the front-line enforcement agency at an early stage, before the employer decides whether to contest the matter. Only if the employer refuses to accept these decisions does the matter proceed to adjudication before a second agency. Perhaps employers are more likely to admit having engaged in wrongdoing when faced with a preliminary decision to that effect. Perhaps they are more inclined not to protest their innocence when they know in advance the financial consequences of not protesting. Whatever the explanation, higher contest rates in the criminal process require more resources to be devoted to investigating and adjudicating cases.

Costly court procedures combined with the propensity of employers to make greater use of the criminal process render the court system much more expensive than its administrative counterpart. Some measure of the resource implications can be gleaned by comparing the Ontario Ministry of Labour staff involved in prosecutions with the WCB staff involved in penalty proceedings. In FY 1989-90, fourteen lawyers employed by the Legal Services Branch of the Ontario Ministry of Labour devoted about 70 per cent of their time to approximately five hundred health and safety prosecutions. In stark contrast, three WCB sanction review officers handled over eight hundred British Columbia penalty proceedings in 1990. Moreover, the number of hours devoted to prosecutions by Ontario inspectors and judges far exceeds the time spent by their British Columbia counterparts on administrative proceedings. The burden of legal costs for taxpayers is a drawback of the criminal process, but not the major one. A more important shortcoming of

criminal proceedings is that the high cost is a huge disincentive to penalizing offenders.

2. Delay in the administrative and criminal process

The administrative process functions much faster than the judicial process. Speed is important because the field officer who recommends a sanction and the accused firm are cast in the role of adversaries while enforcement proceedings are pending. A cooperative relationship is not likely to be restored until these proceedings run their course.

In Ontario, the average delay between the occurrence of a violation and the laying of charges was approximately 250 days in FY 1989-90 and FY 1990-91. The average time lapse between the occurrence of a violation and the entering of a verdict at trial was approximately 500 days. Appeals consume additional time.

In British Columbia, show cause letters are issued about twenty days after the occurrence of the violation, which prompted the penalty recommendation. When the employer elects to respond with a written submission, a decision whether to confirm a penalty is usually made within sixty-five to seventy days of the occurrence. When the employer requests a meeting, proceedings often take about twice as long because of the difficulty of finding a date when all concerned are available to meet. The Appeal Division is obliged by statute to render a decision within ninety days of the commencement of an appeal except where the Chief Appeal Commissioner determines that certain statutory exceptions apply.

Over the last decade at OSHA, the average time lapse between inspection and penalty citation has varied from a low of 17 days in 1981-82 to a high of 30 days in 1990-91. In 1985-86, the only year for which OHSRC data are available, the average time lapse from assignment of a case to an administrative law judge until disposition was 171 days for

---

48 The show cause letter fixes a deadline of twenty-one days for the employer to make submissions and the employer is allowed the same time to reply to anything new arising out of the initiating officer's comments about the employer's submissions.

49 Workers' Compensation Act, s. 91(3).
settled cases and 307 days for cases which were adjudicated. Additional time was required for cases referred to the commissioners.

D. Why Regulators Prefer Administrative Penalties

A comparison of administrative penalties in British Columbia and the United States with prosecution in Ontario and other provinces strongly suggests more offenders are penalized under an administrative system. The study of the Securities and Exchange Commission mentioned above reached the same conclusion.\textsuperscript{50} The Commission was more likely to initiate penalty proceedings when administrative sanctions were available than when the only sanction was prosecution for a regulatory offence. One virtue of this study is that it compared the use of these two enforcement mechanisms by a single agency, thereby eliminating any differences caused by the characteristics of the agency.

Why do regulators make greater use of administrative penalties than of criminal sanctions? Several reasons have been suggested in the literature. The one most often cited is the high cost of criminal proceedings.\textsuperscript{51} Enforcement agencies simply cannot afford to prosecute as frequently as they can afford to levy administrative penalties. Regulators must allocate fixed resources between more prosecutions and other means of achieving compliance, such as more inspections. The opportunity cost of a prosecution, in terms of inspections foregone, is much higher than the opportunity cost of an administrative proceeding.

As well as consuming vast amounts of agency resources, court proceedings entail personal costs for inspectors. A dislike of doing the paper work required for prosecutions or of being cross-examined in court may lead field officers, the gatekeepers of the enforcement process, not to recommend prosecutions in the first place.\textsuperscript{52} The

\textsuperscript{50} Shapiro, \textit{supra} note 47 at 192.

\textsuperscript{51} Administrative Conference, Recommendation 72-6, (1972) 2 Recommendations and Reports of the Administrative Conference of the United States 896; Ison, \textit{supra} note 37; J. Braithwaite, \textit{To Punish or Persuade: The Enforcement of Coal Mine Legislation} (Albany: State University of New York Press, 1985); Shapiro, ibid.

\textsuperscript{52} Hawkins, \textit{supra} note 27 at 199.
administrative process is less burdensome for inspectors because it is more streamlined and has a lower contest rate.

Another factor contributing to regulators’ reluctance to prosecute offenders is the difficulty of securing a conviction. Regulatory officials are reluctant to take penalty action unless there is a high chance of success. The criminal standard of proof and the exclusion of evidence of prior offences when assessing fault make it more difficult to secure a criminal conviction than to justify an administrative penalty. The longer delays of the criminal process also make prosecution less attractive than administrative sanctions.

Regulators’ perception of the stigma associated with criminal proceedings may add to their reluctance to prosecute. Regulatory officials may believe court fines to be more stigmatizing than administrative penalties. If they do, they are likely to view administrative sanctions as appropriate for offenders who deserve punishment but are thought not to warrant the stigma of a criminal penalty.

IV. CONCLUSION

The relative merits of administrative and criminal penalties can be briefly summarized. The administrative process is faster and less expensive. Offenders who warrant punishment are more likely to be identified in the administrative process because it takes account of previous offences in assessing fault, punishes offenders for causing risk not just harm, and applies the civil standard of proof. The administrative process has the potential to generate more penalties and thereby to give employers a greater incentive to comply with regulatory requirements. This potential will be realized so long as health and safety regulators adopt an aggressive enforcement policy. Where the criminal process is utilized, regulators who wish to embark upon a stringent enforcement campaign are constrained by the high cost of the criminal process and by the rules of evidence in criminal proceedings. These advantages of administrative penalties present a strong case for making

---

53 Ibid. at 186.
54 Administrative Conference, supra note 51.
greater use of them, as has been advocated in the United States by the Administrative Conference.  

While the administrative process has several attractions, the criminal process may have one redeeming virtue. Criminal sanctions may be more stigmatizing than administrative penalties, although there is little empirical evidence on this point. The possibly greater stigma of criminal penalties may enhance their ability to deter offenders and eventually may lead more employers to comply with health and safety legislation because compliance is viewed as morally correct. Unfortunately, the possibly greater stigma of criminal penalties may deter regulators from prosecuting some offenders who should be penalized.

In occupational health and safety regulation, there is a hybrid of the criminal and administrative types of sanctions. Under a hybrid scheme, regulators have the power to assess a penalty, but if the employer protests, the matter is ultimately adjudicated by a court rather than a second administrative agency. Hybrid penalties are plagued by the major weaknesses of both the administrative and criminal processes. Contested cases proceed to court with all of the attendant drawbacks. Even for uncontested cases, it would be wrong to assume that a hybrid scheme avoids the disadvantages of the criminal process. While the first stage of a hybrid procedure has the trappings of the administrative process, it operates in the shadow of the courts and is strongly influenced by them. Regulators are reluctant to propose a hybrid penalty, which does not have a high chance of being confirmed by a judge if disputed in court. As most cases are resolved without judicial intervention under a hybrid scheme, most fines entail no more stigma than an administrative penalty.

This is not to suggest that hybrid schemes have none of the advantages of either administrative or criminal penalties. Uncontested cases are handled in a summary fashion, which is less cumbersome than court proceedings. Convictions in contested cases carry whatever stigma

\[55\] Ibid.

\[56\] One example of the hybrid approach is the ticketing scheme used in Ontario by the Construction Health and Safety Branch to deal primarily with offences by employees. Another example is found in Quebec where the Commission de la Santé et de la Sécurité du Travail issues a notice of violation for certain types of infractions whether committed by employees or employers. The person receiving such a notice can avoid appearing in court by paying the fine specified therein.
Occupational Health and Safety goes with the judicial process. Nonetheless, a hybrid scheme is seriously flawed.

A dual system of administrative and criminal penalties has much more to recommend. Administrative penalties could be utilized for the vast majority of regulatory infractions, and criminal prosecution held in reserve for the most serious offences. The low cost of the administrative process would permit deserving offenders to be penalized with sufficient frequency to provide a large financial deterrent to violating regulatory standards. The occasional high profile prosecution would enhance employers' perception of the stigma they risk incurring if the law is not obeyed. This sort of dual system is one example of the “enforcement pyramid” advocated elsewhere.

Establishing a dual system of penalties is easier said than done. When regulators have been allowed to choose between administrative proceedings and prosecution, administrative penalties have been utilized almost to the total exclusion of criminal sanctions. There was not a single prosecution in British Columbia between 1986 and 1990 even though the WCB is empowered to prosecute offenders. In the United States, an employer may be prosecuted for a health and safety violation only if it is committed “wilfully” and causes death. During the first eighteen years of OSHA’s existence, 1970 to 1988, only forty-two cases were referred to the Department of Justice for prosecution and only fourteen prosecutions were initiated. The obvious inference is that OSHA uses administrative penalties much more often than criminal sanctions even for wilful violations causing death. The challenge in designing a dual system of penalties is to ensure that the criminal option is used with sufficient frequency to make it a real threat, even though most penalties are of the administrative variety. This could be accomplished by defining a category of serious offences for which the only available enforcement route is the criminal one, leaving the administrative avenue open for less serious violations.

A dual system of penalties offers the best of both administrative and criminal sanctions. It holds great promise for occupational health and safety and other types of social regulation.

57 Braithwaite, supra note 51 at 142-147.
58 Workers’ Compensation Act, s. 75.
59 Occupational Safety and Health Act, § 17(e).