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CANADIAN OCCUPATIONAL HEALTH AND SAFETY LEGISLATION

By Richard M. Brown*

I. INTRODUCTION

No area of Canadian employment law has undergone greater ferment in the last decade than has occupational health and safety. In 1972 Saskatchewan became the first province to pass a comprehensive health and safety act embracing the entire working population.¹ Nova Scotia, Prince Edward Island and British Columbia are the only jurisdictions that have not followed suit.²

An occupational health and safety statute must respond to three challenges. The law should strive to ensure that both labour and management devote their best efforts to the prevention of injury and disease. As control of many aspects of the work environment has been a management prerogative, the scope for worker participation in the prevention of injury and disease must be increased. In addition to bolstering the internal responsibility system, the law must provide a framework for the creation and enforcement of minimum legal standards. Finally, the traditional legal focus upon industrial accidents must be broadened to include occupational disease. This paper examines the response of Canadian legislatures to these challenges—but a word of caution is in order: many legislative provisions are no more than promises that an administering agency may fail to fulfill.

II. THE RIGHT TO KNOW

An employee's right to know the hazards of work rests upon a basic human entitlement to information that bears directly upon bodily integrity. Information is also a central part of an effective campaign against injury

¹ Occupational Health Act, 1972, S.S. 1972, c. 86. This statute has been superseded by the Occupational Health and Safety Act, R.S.S. 1978, c. 0-1.

and disease because all strategies that are designed to promote health and safety depend ultimately upon a knowledgeable workforce. Joint labour-management committees and worker representatives cannot fulfill their functions without adequate information concerning occupational hazards. Neither the right to refuse unsafe work nor protective reassignment can be invoked by a worker to escape exposure to an unknown risk. Similarly, workers who do not have access to facts cannot participate effectively in the establishment or enforcement of standards. Even the most vociferous opponents of government regulation, who would prefer to allow the level of health and safety to be determined by the market, recognize that information is of vital importance to economic efficiency. Perhaps the strongest criticism levelled at the performance of governments and employers is that they frequently fail to inform workers, but little has been done to remedy this problem.

Several statutes fail to address the right to know. Employers in other jurisdictions are obliged to provide workers with all information necessary to ensure their health and safety, but this obligation is deficient in several respects. First, it neither extends to information in the sole possession of the administering agency nor embraces information about persons who may be slowly developing a latent disease caused by employment that has terminated. Second, there is no requirement that the risks of employment be recorded in writing to aid communication and to facilitate surveillance of employer compliance. Finally, the duty provides no guidance as to the type of information that must be provided.

More specific disclosure requirements should be adopted. Information relating to the causes of occupational illness is especially vital because many employees are not aware of these hazards. In several jurisdictions, management is obliged to identify all dangerous substances used or emitted in the workplace. Knowledge of the identity of a material is only useful as a means to determining its harmful characteristics and elsewhere employers may be required to describe those threats to health, to record this information in writing, and to display it on container labels. Employers are offered little guidance as to the scope of their duty, however, as only a few hazardous materials have been enumerated—lead, benzol, benzene, ar-
senic, hydrocyanic acid, carbon tetrachloride, and some carcinogens.\textsuperscript{10} Although an exhaustive list is not possible, notice of the danger associated with all regulated substances should be required because the existence of a standard signals a risk that almost always exceeds zero even when legal compliance is achieved. In Saskatchewan the obligation to disclose is widely extended to any material that is held suspect by workers.\textsuperscript{11} The precise nature of the risk that must be disclosed is almost never specified by law. A Saskatchewan worker must, however, be informed that asbestos may cause pneumonoconiosis, lung cancer and mesothelioma, and that the risk of harm is increased by smoking.\textsuperscript{12}

The information that workers need is often not known to management, so imposing a duty to disclose is futile. An employer in Newfoundland, however, is directed to take all reasonable steps to ascertain the composition and risk of materials from suppliers.\textsuperscript{13} As a breach of this duty would be difficult to establish and reasonable efforts may fail to achieve results, the statute strives to involve workers in the pursuit of information by obliging an employer to inform them of the trade name and manufacturer of any substance that is suspect. A far more efficient way of disseminating information relating to a dangerous product would be to require the manufacturer to disclose prescribed information on a label. Disclosure is opposed by manufacturers on the ground that it would allow competitors access to trade secrets. The disclosure of occupational risks and the protection of commercial recipes are not compatible, but one strategy that might only slightly compromise these two conflicting objectives would be to compel the identification of chemical components—and perhaps approximate proportions—but not the precise amount of each.\textsuperscript{14}

A further problem is that an employer may be unaware of the amount of a contaminant in the occupational environment. Under the Ontario Act, management may be required by regulation to keep accurate records of the use and level of biological, chemical or physical agents in the workplace, of the exposure of each person to these agents, and to disclose this data\textsuperscript{15}—but no regulations have yet been passed.

Workers should be offered other information possessed by management or government. Access to reports of inspections and accident investigations, conducted by an administering agency or employer, and receipt of compliance orders allows workers to assess the efforts that are being directed towards their protection and may disclose latent dangers. The existence of a health hazard and the severity and frequency of consequent illness may be revealed by management or government epidemiological studies or monitor-

\textsuperscript{10} B.C. Reg. 585/77, ss. 12.23, 35.01; Man. Reg. 208/77, s. 2; Quebec, s. 64, 223(3), (20).
\textsuperscript{11} Supra, note 9.
\textsuperscript{12} Sask. Reg., s. 115.
\textsuperscript{13} Nfld. Reg. 104/79, s. 25(2)(b), (3); see also Sask. Reg., s. 67(2), (4).
\textsuperscript{14} Quebec, ss. 67, 234; see also Ontario, s. 34(1)(b) and Canada, s. 93(2).
\textsuperscript{15} Ontario, s. 15(1)(c), (d), (f); see also Quebec, s. 51(13), 180(6).
ing programmes. Disclosure of workers' compensation board data relating to an employer's claims experience would serve a parallel purpose, at least with respect to injuries that often lead to compensation. One final type of information concerns not the existence of a risk but methods of controlling it. Employers who have knowledge of work practices and standards in similar establishments and industries should be required to share it with workers. Each of these informational needs has been met in one or more jurisdictions, but not in most.16

III. HEALTH AND SAFETY COMMITTEES AND REPRESENTATIVES

A central tenet of Canadian occupational health and safety law is that hazards can only be effectively controlled through the combined efforts of workers and employers. Joint committees and worker representatives have been widely adopted as the primary vehicles of shared responsibility.

A committee may be established by law in every jurisdiction except Prince Edward Island and Nova Scotia.17 At least one-half of the members must represent the workforce;18 and they may be chosen by a trade union where one exists.19 Two co-chairmen, one representing each side, direct the activities of a committee in several jurisdictions.20 A minimum membership requirement, either two or four, is typical and a maximum may be set.21 Generally, a meeting must be held quarterly22 and minutes are either to be filed routinely with the administering agency or produced upon request.23

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16 Inspection and accident reports and orders are addressed in Canada, s. 84.1(4)(c); British Columbia, s. 71(3); Manitoba, s. 32 and Man. Reg. 158/77, s. 8(2); Ontario, s. 29(6); Quebec, s. 186; Saskatchewan, s. 18(4), (5) and Sask. Reg., ss. 28(1), 29(1). As to epidemiological and other studies, see Canada, s. 84.1(4) (1), (e); Sask. Reg., s. 28(2). Workers' compensation claims data is covered by Ontario, s. 9 and the practices and standards at other worksites are addressed in Ontario, s. 8(b), (d)(ii).

17 Canada, s. 84.1(1); Alberta, s. 25(1) and Alta. Reg. 218/77, 306/77 and 91/78; B.C. Reg. 585/77, s. 4.02(2); Manitoba, s. 40(1) and Man. Reg. 235/80; N.B. Reg. 77-1, s. 3(6); Newfoundland, s. 35 and Nfld. Reg. 104/79, s. 4; Ontario, s. 8(1), (2); Quebec, ss. 68, 69, 204; Saskatchewan, s. 24(1).

18 Canada, s. 84.1(2); Alberta, s. 25(3); B.C. Reg. 585/77, s. 4.04(1)(b); Manitoba, s. 40(2); N.B. Reg. 77-1, s. 3(6)(a); Newfoundland, s. 36(2); Ontario, s. 8(5); Quebec, s. 71; Saskatchewan, s. 24(2).

19 Canada, s. 84.1(2); Manitoba, s. 40(2); Ontario, s. 8(5); Quebec, s. 72. The Newfoundland Act allows either workers or the union to make the choice; see s. 36(3). The same is true in Saskatchewan; see s. 24(2). In Alberta, the trade union plays a more limited role in the selection of the Committee; see Alta. Reg. 197/77, s. 4(2).

20 Canada, S.O.R. 78/559, s. 3; Alta. Reg. 197/77, s. 6(1), (2); Man. Reg. 158/77, s. 5; Sask. Reg., s. 20(2).

21 Canada, S.O.R. 78/559, s. 3; Alta. Reg. 197/77, s. 2; B.C. Reg. 585/77, s. 4.04(1)(a); Manitoba, s. 40(2); Newfoundland, s. 36(1); Ontario, s. 8(s); Saskatchewan, s. 24(2).

22 Canada, s. 84.1(6); Alta. Reg. 197/77, s. 7(1); Man. Reg. 158/77, s. 6(1); N.B. Reg. 77-1, s. 3(6)(g); Newfoundland, s. 38; Ontario, s. 8(11); Quebec, s. 74; Sask. Reg., s. 21.

23 Canada, s. 84.1(5) and S.O.R. 78/559, s. 11; Alta. Reg. 197/77, s. 6(3); B.C. Reg. 585/77, s. 4.06(2)(e); N.B. Reg. 77-1, s. 3(6)(g); Ontario, s. 8(7); Sask. Reg., s. 25.
A code of practice for committee procedures has been promulgated in Manitoba.\textsuperscript{24}

Committee members perform several statutory functions.\textsuperscript{25} Perhaps the most important task is the identification of hazards and the communication of these dangers to the workforce. The information that worker committee members are entitled to receive from management and government under Canadian law has been described above.\textsuperscript{26} A committee may also collect data respecting injuries, disease and workplace environmental conditions by conducting inspections, accident investigations or by receiving employee complaints.

Knowledge of hazards is the first step towards rectifying them. Informed employees may through their own conduct protect themselves from some harm, but management has the sole authority to control many aspects of the occupational environment. An employer is generally obliged to consult with worker committee members\textsuperscript{27} and, in the event of disagreement, they may call upon the inspectorate to determine whether the current state of affairs contravenes a legal standard. The Quebec Act intrudes more deeply than those of other provinces into traditional employer prerogatives. In that province, a committee may choose the physician in charge of health services at a workplace, approve the physician's health programme, design training and information programmes, and select individual protective devices.\textsuperscript{28} In these decisions, labour and management have an equal voice and, in the case of a stalemate, either may submit an issue to the Commission for determination.\textsuperscript{29} As in other jurisdictions, the employer cedes no real power to workers as management retains a veto over committee decisions, but in Quebec, the administering agency plays a larger role. The Commission may provide detailed directions for future conduct and is not limited to either enjoining violations of minimum standards capable of application to all employers, or enforcing a vague general duty clause.\textsuperscript{30} Management's response to the demands of worker committee members will be conditioned by their ability to invoke these government powers; inability to predict Commission decisions will induce both sides to accommodate one another. The areas in which management shares responsibility with labour in this way are

\begin{itemize}
\item \textsuperscript{24} Man. Reg. 158/77, s. 1(3). Code of Practice published in the Manitoba Gazette, Sept. 10, 1977.
\item \textsuperscript{25} Canada, s. 81.1(4); Alberta, s. 25(1) and Alta. Reg. 197/77, s. 9; B.C. Reg. 577/78, s. 4.06; Manitoba, s. 40(5); N.B. Reg. 77-1, s. 3(6); Newfoundland, s. 37; Ontario, s. 8(6), (8), (9); Quebec, s. 78; Saskatchewan, ss. 22(4) and (5) and Sask. Reg., s. 11.
\item \textsuperscript{26} See text accompanying notes 3 to 16, supra.
\item \textsuperscript{27} Several statutes explicitly direct an employer to co-operate with a committee: Manitoba, s. 4(1)(e); Newfoundland, s. 5(8); Quebec, s. 51(14); Saskatchewan, s. 3(b). In several provinces employees are also directed to co-operate with a committee: Manitoba, s. 5(c); Newfoundland, s. 7(1)(b); Quebec, s. 49(6).
\item \textsuperscript{28} Quebec, s. 78(1)-(4).
\item \textsuperscript{29} Quebec, ss. 73, 79.
\item \textsuperscript{30} Quebec, ss. 166, 167.
\end{itemize}
of vital importance to workers, but do not relate to the design of the production process which is jealously guarded by employers.

A worker committee member may perform two other functions. When a person refuses to perform a task because a danger is perceived, a member may participate in the resolution of any ensuing dispute. A worker member may also be entitled to accompany an inspector during a visit to a workplace.

The breadth of coverage of the committee system varies greatly. Under the Canada Labour Code and in Manitoba and Alberta, committees are required in workplaces designated by the minister. Elsewhere, the creation of a committee is generally dependant upon the number of workers at an establishment exceeding a fixed minimum—twenty is a common figure. This approach might be seen as a small business exemption designed to lighten the regulatory load borne by entrepreneurs. The rigidity of a numerical formula may be softened by factors that reflect hazard levels. In British Columbia, the minimum number ranges from twenty to fifty, depending upon the risk associated with an industry as determined by the Workers' Compensation Board; presumably upon the basis of claims experience. Yet the relationship between claims and risk is quite weak with respect to health, as opposed to safety, because of the long latency period of many occupational diseases, failures of diagnoses and etiological uncertainties. Health concerns have achieved a higher profile in Ontario where a committee must be established at every worksite at which a regulated substance is utilized. The Ontario Act excludes offices, shops, restaurants, theatres and several other types of establishments, apparently because these are believed to be relatively safe places to work.

In several provinces, a worker safety representative may be appointed at a workplace where a committee is not created. The functions of health and safety representatives are virtually identical to those of committees. The selection of a representative is mandatory for every Ontario construction project where more than twenty persons are employed. In that province, and in two others, the minister may require the appointment of a worker to this post at any worksite without a committee. A representative must be chosen at certain establishments in Quebec despite the existence of a committee, perhaps because the committee system is too awkward and slow.

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31 See text accompanying notes 62 and 67, infra.
32 See text accompanying notes 128 and 129, infra.
33 Supra note 17.
34 The hazardous construction industry also appears in the list of exclusions but a single worker representative may be named at a construction site. Although the transient character of both job sites and employees in this industry may render the committee system cumbersome, these bodies are utilized in the Quebec construction industry.
35 Manitoba, s. 41(4), (5); Newfoundland, s. 42(1); Ontario, s. 7(6)-(8); Quebec, s. 90.
36 Ontario, s. 7(1).
37 Manitoba, s. 41(1); Newfoundland, s. 39; Ontario, s. 7(2), (4).
38 Quebec, ss. 87, 88. Different criteria apply to the construction industry; see s. 209.
to carry out some tasks. In British Columbia, an employer must hold monthly meetings with employees to discuss their concerns, even where no committee or representative exists.\textsuperscript{39}

Worker participation cannot be effective unless employees are assured that committee membership, appointment as a representative, or association with others who hold these positions will not jeopardize employment or income security. Typically, the work of committees and representatives must be carried out during work hours or be remunerated.\textsuperscript{40} Management retaliation against employees is generally forbidden.\textsuperscript{41} Worker participation may be bolstered by other types of support. A Quebec employer must provide premises, apparatus and clerical assistance,\textsuperscript{42} and in Saskatchewan, a worker committee member is granted paid educational leave for five days each year to attend courses sponsored by the administering agency.\textsuperscript{43}

IV. THE RIGHT TO REFUSE

The concept of joint responsibility, manifested at the level of the workforce in committees and representatives, also finds expression in the right of an individual employee to refuse to perform unsafe tasks without fear of employer retaliation. A refusal to work not only allows an employee to escape exposure to a danger, but may also compel management to rectify an ongoing health or safety deficiency. Unlike the committee system, a work refusal, especially by a person who must be paid, exerts economic pressure upon an employer. The right to refuse and the committee system bolster one another. The power of an individual to stop work provides a lever that may be utilized by an employee committee member who enjoys the support of endangered workers. Committee members can ensure that the right to refuse is used, but not abused, by disseminating information about occupational hazards and the legal protection afforded to a person who exercises this right. Worker committee members may also play a role in the resolution of disputes concerning the existence of a danger and may ensure that an employee who refuses work in accordance with the law suffers no harm.

The vast majority of Canadian workers are protected against acts of retaliation for declining to perform unsafe work.\textsuperscript{44} Only in Nova Scotia and Prince Edward Island is protection not provided. Most right to refuse pro-

\textsuperscript{39} B.C. Reg. 585/77, s. 4.02(3); see also N.B. Reg. 77-1, s. 3(5).
\textsuperscript{40} Canada, s. 84.1(7); Alberta, s. 25(3); Man. Reg. 158/77, s. 10; Newfoundland, s. 38; Ontario, ss. 8(12), 7(9); Quebec, ss. 74, 76, 92, 96; Sask. Reg., s. 24. In Quebec worker committee members and safety representatives must give notice to their supervisors before leaving their jobs; see ss. 77, 93.
\textsuperscript{41} See text accompanying notes 155 to 166, infra.
\textsuperscript{42} Quebec, ss. 51(15), 94.
\textsuperscript{43} Sask. Reg., s. 27.
\textsuperscript{44} Canada, s. 82.1(1); Alberta, s. 28; B.C. Reg. 585/77, s. 8.24(1); Manitoba, s. 43(1), (3); New Brunswick, s. 8(3), (4); Newfoundland, s. 43(1); Ontario, ss. 23(3), 24(1), 28(1)-(3); Quebec, ss. 12, 30, 31; Saskatchewan, ss. 26(1), (2). Unionized employees, who may be disciplined only for just cause, cannot be disciplined for refusing to perform unsafe work. See Brown and Beatty, \textit{Canadian Labour Arbitration} (Don Mills, 1977) at 348-50.
visions appear to confer upon employees an option to stop work, but these provisions must be read in conjunction with the statutory obligation upon workers to safeguard their own health and the well-being of others. The apparent right is in fact a duty.

Legal protection of a person who refuses to work is typically triggered by the existence of a "danger". This concept may be broken down into two components—the gravity of the harm and the probability that it will occur. Relief against discipline has been granted to a person who declined to incur a very remote risk of serious harm or death—although these factors were not addressed. In the field of occupational health and safety, the concept of danger entails another important element. The cost of avoiding an anticipated harm is as pertinent in the context of a work refusal as in the establishment of standards because zero risk is often not economically practical. To ignore financial considerations in right to refuse cases would be to allow workers to withdraw their services without loss of pay in order to obtain working conditions that could not be achieved through the standard-setting process.

Immediacy of exposure to risk is a further element of the concept of danger in the context of the right to refuse. A person whose job entails a threat that will not arise before a supervisor or inspector can be summoned may be expected to continue to work until an investigation. A worker who is not satisfied with the response to a call for assistance may, of course, refuse to work before exposure to risk occurs. Two examples will serve as illustrations. An employee who is assigned to drive an unsafe truck tomorrow should not refuse to operate another vehicle today, because exposure to risk can be averted in other ways. Conversely, a worker who stops work to avoid exposure to a substance that may cause a disease with a long latency period should be protected because harm is immediate and only the manifestation of illness is delayed. The phrase "imminent danger" appears in the Canada Labour Code. Imminence has been held to be determined by the time necessary to bring a problem to the attention of an employer or an official and to rectify it. This qualification should be read into other statutes in order to further their purposes.

A hazard that evokes a work refusal may be the subject of a legal standard that was designed to prevent exposure to unacceptable risk. What is the relevance of this norm to a determination that a danger exists justifying a refusal to work? Consider a highly specific standard setting an exact maximum concentration for an airborne contaminant and a person who knows that the environment complies with the law, but believes that the

46 See text accompanying note 109, infra. However, the Manitoba Act requires a worker to report unsafe work and allows him to refuse to work; see s. 5(7).
47 British Columbia refers to "undue hazard"; see B.C. Reg. 585/77, s. 8.24(1).
50 Canada, s. 82.1(1); see also Alberta, s. 27.
51 Canadian National Railways, supra note 47.
standard is too lax, and so refuses to work. One might respond that the refusal should not be endorsed because the risk has been approved in the standard-setting process. Applied to occupational health, as opposed to safety, this answer is too facile, because the regulatory process cannot keep pace with scientific discoveries. The decision-making structure attached to an individual right to refuse case, however, is even more inappropriate for the resolution of complex health issues than the slow regulatory process, which can draw upon extensive research and involve the industrial relations community. For this reason, legal compliance should be treated as conclusive proof of safety unless there is clear evidence of harm.\(^5\)

Similarly, an employer cannot persuasively argue that no danger exists when a standard that is perceived to be too rigid is exceeded.\(^6\)

Industry practice is another reference point that might be considered in determining the existence of a danger. A practice that contravenes a specific legal standard obviously cannot be condoned but, even in the absence of such a rule, industrial norms should not be endorsed without question. Although the failure of an administering agency to curtail a practice might be equated with state approval, there are two flaws in this equation. A hazard may escape official scrutiny because it occurs rarely, is a late arrival on the industrial scene, or has only recently been the subject of scientific inquiry. Moreover, approval by a front-line inspector in the absence of a review embellished with procedural safeguards should not foreclose further inquiry. Industrial norms should be considered, but should not be accorded the same weight as legal standards. “Normal” dangers have been explicitly approved in several jurisdictions.\(^5\) A statute may refer to hazards that are usual in a type of employment, indicating that the touchstone is general practice in the industry rather than the conduct of a particular employer. The word “normal”, standing alone, should be construed in the same way. The designation “normal” might also be reserved for a hazard that has been carefully evaluated by the administering agency.

A person should be encouraged to escape any danger regardless of its cause and to refuse to carry out any act that endangers another. All statutory provisions clearly safeguard a worker who refuses to engage in conduct that would threaten that person.\(^5\) Protection may also be offered to an individual who will not labour in the face of a hazard arising out of either the work environment or the actions of another employee.\(^5\) The law in several provinces, however, is unclear with respect to these causes. The Ontario statute appears to withhold the right to refuse in the context of a danger created by the conduct of a co-worker.\(^6\) In several provinces, protection

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\(^{51}\) The case of a worker who is particularly susceptible to a hazard is discussed below under the heading “Protective Reassignment and Job Security.”


\(^{53}\) Canada, s. 82.1(12)(a), (b); Alberta, s. 27(2); Quebec, s. 13; Saskatchewan, s. 26(1).

\(^{54}\) Supra note 44.

\(^{55}\) Canada, s. 82.1(1)(b); Alberta, s. 27(1)(a); Manitoba, s. 43(3); Quebec, s. 12.

\(^{56}\) Ontario, s. 23(3).
extends to a refusal to operate a machine or a device that might harm another person and, elsewhere, to the performance of any task that threatens a second worker.

The right to refuse generally does not extend to fellow employees who are not at risk but wish to withdraw their services in support of someone who is in danger. The only exception is Ontario, where an employee may properly refuse to work because a co-worker in the same workplace is endangered by a contravention of the statute or regulations. This provision recognizes that an individual in danger cannot always be realistically expected to confront management alone.

In order to minimize exposure to an imminent hazard, a person must frequently stop work before consulting a supervisor. Consequently, at the time that a refusal occurs, a worker must independently form an opinion concerning the existence of a danger. By what standard should this judgment be tested when an employee is disciplined? Dishonest conduct cannot be condoned, but protection should not be denied simply because a person is later shown to have been wrong. Often there will be no sharp delineation between right and wrong, because the concept of danger is so amorphous. Even an employee judgment that is subsequently determined to be clearly erroneous should not be rejected for that reason alone. A person who perceives a hazard cannot afford the luxury of leisurely reflection which may be aborted by proof that the danger is real. The law in every jurisdiction except Alberta and New Brunswick protects a worker even though no hazard exists provided that the employee's perception of danger is reasonable. A range of factors bearing upon the situation of an individual have been considered in determining the existence of a reasonable belief: familiarity with a job and workplace, knowledge of the present situation, and any anxiety arising out of previous unsafe occurrences or generated by media accounts of occupational illness. In this way, the term "reasonable" has taken on a subjective hue.

An employee who has stopped work is required to inform a supervisor. Disagreements concerning the existence of a danger are common and, therefore, a statutory dispute resolution process is usually set out. Most procedures begin with a mandatory investigation carried out by labour and management, relying upon and enhancing the internal responsibility system. This task is normally undertaken by an employer spokesman in cooperation with either a worker committee member, a representative, or a trade union nominee.

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67 This is not true in Manitoba; see s. 43(3).
68 Alberta, s. 27(1)(b); Newfoundland, s. 43(1).
59 Ontario, s. 23(3)(c). Cf. Quebec, s. 12.
60 Canadian National Railways, supra note 47; Re Industrial Health and Safety Regulations (1980), 5 W.C.R. 86 (B.C.).
61 Canada, s. 82.1(2); B.C. Reg. 585/77, s. 8.24(2); Manitoba, s. 43(1); Newfoundland, s. 44; Ontario, s. 23(4); Quebec, s. 15.
62 Canada, s. 82.1(3); B.C. Reg. 585/77, s. 8.24(3), (4); Newfoundland, s. 43(1)(b); Ontario, s. 23(4); Quebec, s. 16; Saskatchewan, s. 26(1).
Only in Ontario and British Columbia is the person who declined to work entitled to participate in this inquiry.63

The dispute is resolved when all parties conclude that a job is safe or when the worker who refused is persuaded that there is no danger. The Ontario Act provides that an individual who continues to refuse after labour and management investigators agree that there is no hazard, enjoys legal protection so long as the worker continues to have reasonable grounds to apprehend a danger.64 At this stage, however, an employee must give due consideration to the opinions of others, especially those with greater experience or knowledge.65 In Saskatchewan, a person who will not work after an unofficial investigation discloses no undue risk is not sheltered from discipline.66 This approach buttresses the internal responsibility system by placing the ultimate authority in private hands, but labour and management may lack the expertise to reach an accurate decision. In other jurisdictions, where the legislation is less clear, the broader protection afforded to Ontario workers should be emulated because it best fulfills the statutory purpose of safeguarding a worker who refuses to work due to a reasonable perception of danger.

When a dispute is not resolved at the first stage, an inspector generally must be summoned and may be required to consult the persons who have a right to participate in an unofficial inquiry.67 An inspector's decision that there is a danger that must be rectified may be appealed by management.68 A contrary ruling that work is safe has widely different consequences across Canada. In Newfoundland, a person who refuses to return to work is not protected and cannot obtain review of an adverse decision in the way that management can.69 An Ontario employee may continue to refuse without fear of reprisal even after an official decision that work is safe, but a worker's conviction that a danger exists must take account of this ruling.70 The legality of a continued refusal in other jurisdictions is not clear but the Ontario position again most fully accomplishes the statutory purpose, because an inspector's opinion will not always be correct. In Ontario, a worker may also appeal a decision that a job is safe.71

Employers are prohibited from retaliating against a worker who lawfully exercises the right to refuse unsafe work. An employee whose belief is unreasonable or who fails to comply with a statutory obligation to report a

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63 Ontario, s. 23(4); B.C. Reg. 585/77, s. 8.24(3), (4).
64 Ontario, s. 23(6). See also Canada, s. 82.1(4).
65 Canadian Gypsum Construction, supra note 52; Canadian National Railways, supra note 47.
66 Saskatchewan, s. 26(1). See also Newfoundland, s. 43(1)(b).
67 Canada, s. 82.1(5)-(7); B.C. Reg. 585/77, s. 8.24(5); Manitoba, s. 43(1); Newfoundland, s. 45; Ontario, s. 23(7); Quebec, ss. 18, 19.
68 See text accompanying notes 136 to 139, infra.
69 Newfoundland, s. 43(1)(c). See also Canada, s. 82.1(8)-(11).
70 Inco Metals Ltd., supra note 48.
71 Ontario, s. 32. See also Quebec, ss. 21-24.
refusal to a supervisor is not protected because he is not acting in accordance with the law. The types of employer retaliation that are outlawed and the remedies that may be granted are described below.\textsuperscript{72}

The right to refuse unsafe work is not offered to some workers and is withheld from others in certain circumstances. In Ontario, a person employed in police, firefighting or correctional work is denied the right to refuse\textsuperscript{73} perhaps because people in these hazardous occupations are presumed to have voluntarily accepted all risks arising out of their employment. Persons employed in a health care institution, residential group home, ambulance service or laboratory in Ontario are denied the right to refuse when a work stoppage would place another person in imminent jeopardy.\textsuperscript{74} The security of the public is placed above the health and safety of these workers without regard to the number falling within each category. The balance may be appropriate for those who enter their employment knowing that it requires sacrifices to be made for the good of others, but this is not obviously true of all of the designated categories of workers.

A refusal to work by one person will often affect others in ways that may be regulated by law. An employee who is directed to perform tasks that someone else has previously declined is clearly entitled to exercise the right to refuse. In addition, management's power to assign a worker to fill a vacancy created by a refusal may be limited. An employee who is assigned as a replacement in Quebec — even after an inspector rules that work is safe — must be informed of the earlier refusal and of the reasons for it.\textsuperscript{75} Without notification, the actions of one worker may place another in unknown jeopardy, but notice may not be sufficient protection for a worker who is less experienced or knowledgeable than the one who first refused. Until an inspector has found that a job is safe, a Quebec employer is prohibited from assigning anyone to it unless the worker representative involved in an unofficial investigation agrees that no danger exists.\textsuperscript{76} At the very least, tasks that have been refused should not be performed before a labour-management investigation is completed, so that its result is known to the worker who is assigned.

A refusal that causes a layoff affects the workforce in a different way. In Quebec, employees who are laid off must be paid.\textsuperscript{77} This entitlement ensures that an individual who is contemplating a refusal will not be pressured to continue working by peers who fear loss of their paycheques.

The focus has been upon events beginning with, and following, a refusal to work. Only in Manitoba can an employee compel an inspector to carry

\textsuperscript{72} See below under the heading "Discrimination".
\textsuperscript{73} Ontario, s. 23(1).
\textsuperscript{74} Ontario, s. 23(2). See also Quebec, s. 13.
\textsuperscript{75} Quebec, ss. 14, 17, 19. See also Nfld. Reg. 104/79, s. 22(3) and Ontario, s. 23(11).
\textsuperscript{76} Quebec, ss. 17, 26. This limitation does not apply after a refusal has prevented two other employees from working for six hours.
\textsuperscript{77} Quebec, s. 28.
out an investigation of a perceived danger before work has stopped. This approach alters the Hobson's choice faced by an employee elsewhere: refuse and seek statutory protection — which may be denied at worst or awarded belatedly at best — or continue to work with no right to force an inquiry by an inspector. For the employee who would choose the latter alternative, the Manitoba strategy marks an advance as an inspector can be called while work goes on. Two objections to this scheme might be made: there is no deterrent to frivolous complaints by an employee who continues to work and is assured payment; and early official involvement short-circuits the internal responsibility system. Both criticisms could be met by permitting only a worker committee member or representative to initiate an inspection.

V. PROTECTIVE REASSIGNMENT AND JOB SECURITY

Continued employment may pose a threat to a worker's health even though the job could be performed safely by someone else, because native susceptibility to injury and disease differs or because the risk associated with the performance of some tasks increases over time. Even for the majority of the working population, zero risk cannot be achieved. Greater occupational hazards may be faced by those who display an unusually low level of tolerance. What should the legal response be when a person who experiences an abnormally high risk desires to move to another job? Conversely, should the state or an employer be allowed to compel a worker to leave a job which will probably lead to disablement?

Upon request, an employee should be granted protective reassignment that entails security of both employment and income. Employment security might be protected by requiring management to transfer a person or by finding a new employer. An employee may prefer a transfer because it involves less disruption to seniority rights, pension entitlement, working life and personal affairs. A transfer may not be possible, however, either because the person cannot perform other jobs or because no safe job exists, as may frequently occur in a small or highly specialized establishment. In other circumstances, a transfer may entail costs that would not arise out of new employment. An employee may need training to work for the present employer in a new capacity that he would not need to be employed elsewhere. Second, a transfer to a vacant position may frustrate another worker's claim to that job pursuant to a collective agreement. Finally, all safe jobs may be occupied so that a transfer could be accomplished only by interchanging the person at risk with another employee who may view this switch with disfavour. Conversely, a lengthy quest for new employment may be more costly than an immediate transfer because an employee who is looking for work should receive financial support and job search assistance. These are the factors that must be considered in choosing the best strategy to protect employment security. When a transfer is not possible new employment is the

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78 Manitoba, s. 43(1).
79 Even a change in employment by a worker at risk may result in the assignment of another employee to replace the first, but this will not occur when someone is hired as a replacement.
Occupational Health and Safety

only alternative. The appropriate response will turn upon the range of considerations that have been identified. To avoid the administrative burden of case-by-case decisions, all employees could be denied the right to transfer and be assisted to find new employment.

Regardless of the approach taken to employment security, an employee should be safeguarded against loss of income while seeking a job, participating in a retraining programme, or working at a lower rate of pay than was previously received. Under workers’ compensation schemes, a disabled person is granted substantial, but not complete, wage protection. The same support should be granted to a person who leaves a job to avoid injury or disease. This indemnity, like workers’ compensation pensions, should be funded by employers to ensure that all social costs of production are initially borne by the producing enterprise.

A person who faces an exceptional risk should be assisted to escape exposure before any deterioration in health occurs. When any extra peril is eliminated by a change in either health or mode of production, an employer should be permitted to re-assign a transferred worker to the original job. Ought a worker be allowed to demand to be reinstated to that position? The strongest employee claim arises out of a transfer of brief duration, for example, in the context of childbearing. As time passes the adverse effects of a reinstatement upon other employees and upon management may increase.

The right to protective reassignment turns upon a determination that a worker is exposed to a danger that others do not encounter. An application for protective reassignment should be made by a worker to an administrative tribunal empowered to identify instances of abnormal risk, to award financial and other assistance, and perhaps to direct an employer to transfer a person to another job. These tasks involve judgments that are analogous to those made by agencies that administer workers’ compensation benefits, hence these tribunals are probably best suited to implement a protective reassignment scheme.

The most difficult aspect of protective reassignment remains to be addressed. Ought an administering agency or an employer be allowed to compel a worker to leave a job in which that person is subject to unusually high risk? The costs of disablement will be borne in part by industry and the public through workers’ compensation payments and other social welfare programmes, but this concern must be weighed against an individual’s claim to job security. Even the most generous indemnity scheme will fall short of full income maintenance and cannot protect against a loss of pension and seniority rights or discontinuity in personal and working life. A further consideration is that protective reassignment would be invoked against women with disproportionate frequency because of the threat to the health of unborn children.

The current state of Canadian law is unsatisfactory. Only in Quebec is assistance provided to a worker who wishes to change jobs. An employee

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80 Quebec, ss. 32-48.
whose health shows signs of deterioration or the mother of an unborn or nursing infant may request reassignment upon production of a medical certificate stating that a danger exists to worker or child. Management is not obliged to provide another job, but a person who is not transferred may stop work and is protected against loss of income by a claim against the employer for five days' pay and thereafter by a statutory indemnity. An employee is entitled to return to a former job when able to perform it safely.

Management's power to transfer or discharge an employee with a special susceptibility is not legally constrained, except in limited circumstances in New Brunswick. Moreover, an employer may be required by law to remove a person from exposure to hazard, either through termination or reassignment at management's option. In Manitoba and Saskatchewan the administering agency may direct the transfer of a person who has been overexposed to a dangerous substance, but only if the worker will recover sufficiently to be exposed again. Despite the severe consequences for an employee of an adverse medical opinion, no avenue of appeal is provided in any jurisdiction. Outside Quebec, a person who is dismissed is offered no assistance, save perhaps unemployment insurance payments.

What scope exists for the right to refuse in the context of an abnormal individual risk? A work refusal may serve as an effective catalyst to bring about a job transfer or payment of a statutory indemnity. The application of the right to refuse to a person who faces an above average peril turns upon the meaning of the word "danger", a term that is broad enough to encompass a hazard that is not encountered by others performing the same job. Except in Quebec, where a worker may claim a statutory indemnity, this construction would oblige an employer either to transfer a worker or to continue to pay that person while idle. The right to refuse will probably not be construed to mandate this outcome, because the more appropriate solution is a protective reassignment scheme that most legislatures have not adopted.

VI. MEDICAL EXAMINATIONS AND OCCUPATIONAL HEALTH SERVICES

A medical examination provides information which is vital to a worker and a comprehensive programme of examinations is a crucial ingredient in epidemiological research. Unfortunately, Canada suffers from an extreme shortage of physicians trained in occupational medicine.

Canadian occupational health and safety legislation provides for medical examinations for only a small number of workers: miners everywhere and,

81 A New Brunswick employer is prohibited from altering an employee's status as a result of information disclosed by a mandatory medical examination; see s. 13(2).
82 See text accompanying notes 85 to 87, infra. See also British Columbia, s. 6(5).
83 Manitoba, s. 51; Saskatchewan, s. 30.
84 Payment will be denied to a worker who voluntarily leaves a job without "just cause"; Unemployment Insurance Act, R.S.C. 1970, c. U-2, s. 41(1).
85 B.C. Reg. 409/59 and 411/59; Man. Reg. 209/79, Nfld. Reg. 104/79, s. 51; R.R.O. 1980, No. 694, ss. 273-78; Q. Reg. 75-1787; Sask. Reg. 284/78, s. 452.02. In other provinces the same result is accomplished by other legislation that applies only to the mining industry.
in a few jurisdictions, persons exposed to one or more of a range of hazards.\textsuperscript{86} An administering agency may also be empowered to require any worker to undergo an examination.\textsuperscript{87} In Saskatchewan, a person holding a designated job is entitled to be examined upon request once each year, but elsewhere employees in these occupations must submit to medical scrutiny.

A comprehensive occupational health service offers more constant and detailed scrutiny of a workforce than periodic examination. A service must be provided by an employer at a designated establishment in several provinces.\textsuperscript{88} In Quebec, an occupational health service may be furnished by a community health department to workers employed in an establishment without its own service.\textsuperscript{89} The Quebec statute provides the most detailed description of an occupational health programme. It must inform workers and management of risks and of necessary preventative measures, describe the health characteristics required to perform a job, identify the characteristics of each worker and establish a register of employees exposed to designated contaminants.\textsuperscript{90}

The selection of a physician to conduct examinations is most commonly made by an administering agency, but may be delegated to an employer.\textsuperscript{91} Outside the realm of employment the right of an individual to choose his own physician is not disputed. Why not permit a worker to select an occupational physician? One reason for rejecting individual choice is that co-workers may select different specialists, so that no doctor would acquire a comprehensive understanding of the workplace and of the health of the workforce, knowledge which is necessary to properly diagnose industrial disease and to draw accurate etiological conclusions. This concern could be overcome by allowing employees as a group to appoint a doctor. Similarly, a physician in charge of an occupational health service could be chosen and instructed by workers. This position has generally been filled by a doctor employed by management and critics have charged that their relationship influences medical findings and inhibits disclosure of both risks and latent disease to employees. Under the Quebec Act, the physician in charge of a mandatory health service is

\textsuperscript{86} As to silicone see: B.C. Reg. 283/68; Man. Reg. 209/77; Nfld. Reg. 104/79, s. 51; Q. Reg. 44-479, s. 31; Sask. Reg., s. 106. As to asbestos see: Man. Reg. 209/77; Nfld. Reg. 104/79, s. 51; Q. Reg. 44-479, s. 31; Sask. Reg., s. 119; see also Public Health Act, R.S.A. 1974, c. 294 and Alta. Reg. 72-3787, s. 5.33(b).

\textsuperscript{87} C.R.C. 1978, c. 997, s. 37(1)(b); Alberta, s. 19(2); Manitoba, s. 49(1); New Brunswick, s. 13(1); Newfoundland, s. 56; Q. Reg. 72-3787; Saskatchewan, s. 29(1).

\textsuperscript{88} Manitoba, s. 52; Newfoundland, s. 51; Ontario s. 15(1)(a); Quebec, s. 227(28). To date, the only designation applies to employees exposed to lead in Quebec: Q. Reg. 44-479, ss. 67-68.

\textsuperscript{89} Quebec, ss. 109, 115.

\textsuperscript{90} Quebec, s. 113.

\textsuperscript{91} B.C. Reg. 283/68.
chosen by a committee or, in the event of a deadlock, the Commission, and the health programme is approved in the same way.\(^{92}\)

The cost of medical services, like workers' compensation pensions and protective reassignment indemnities, should be financed by assessments upon employers. In Saskatchewan, an employer must pay for an examination,\(^{93}\) but elsewhere no provision is made for payment and the cost may fall upon workers whose provincial medical insurance plan does not cover this service. The physician in charge of a mandatory health service in Quebec is remunerated by the state.\(^{94}\) In several provinces, employees examined during working hours are protected from loss of pay.\(^{95}\)

The provision of medical services by a doctor who is not retained by an individual employee may strain the traditionally confidential relationship between patient and physician. In the context of occupational medicine, confidence not only serves a basic human right to privacy but may also indirectly protect job security by denying an employer knowledge of an adverse medical condition. Even if a claim to continued employment which may lead to disablement is not valued, privacy should be protected by disclosing to management only a finding of good or poor health and no other details. In Saskatchewan, the results of a medical examination cannot be divulged without an employee's consent, except to the administering agency.\(^{96}\)

VII. STANDARDS AND ADVANCE APPROVAL

The strategies discussed to this point have a common theme: the primary responsibility for health and safety rests with workers and employers. The law creates new rights to be consulted, to refuse unsafe work and to protective reassignment, as well as new duties to provide medical examinations and information. The incidence of injuries and disease, however, will largely be determined by the conduct of labour and management within this minimal legal framework. The heavy hand of government regulation, which has not yet entered the picture, moves into the foreground when mandatory standards are set.

The rationale for standards is that an unregulated labour market fails to adequately control hazards. Poor information about dangers, barriers to worker mobility and irrational reactions to low probability risks of serious harm combine to prevent workers from protecting themselves, from demanding that jobs be made safe or from obtaining a risk premium. Employers produce too little health and safety because they too lack knowledge of hazards and, despite the payment of partial compensation for lost wages, do not bear the full social cost of injury and disease. The right to refuse to work and access to information about dangers only partially correct these market failures,

\(^{92}\) Quebec, ss. 79, 112, 118.
\(^{93}\) Sask. Reg., ss. 106, 119. See also B.C. Reg. 283/68.
\(^{94}\) Quebec, s. 111.
\(^{95}\) Alberta, s. 16; Manitoba, s. 49(2); Newfoundland, s. 57; Saskatchewan, s. 29(2).
\(^{96}\) Sask. Reg., ss. 106, 119; see also Manitoba, s. 50(3).
because an employer retains a broad discretion to design the work environment to maximize profits and is under little economic incentive to control hazards. The case for standards is strongest with respect to conditions that may produce disease, as opposed to injury, as experts know much more than workers and employers about industrial illness whereas everyone experiences substantial difficulty in identifying the causes of many accidents. Standards are widely utilized across Canada, although the relative emphasis placed upon standards and other strategies varies from one jurisdiction to another.

Government regulation is under attack of late and occupational health and safety standards have received more than their share of criticism. One objection is that the law will often specify an expensive means to achieve a desired level of performance even though management could devise a cheaper means to accomplish the same end. This critique can be met by designing a standard that prescribes only the appropriate level of performance, allowing employers to determine the manner of attaining that objective. In other words, a performance standard could be utilized instead of a specification standard. Most jurisdictions have adopted rules of both types. In Ontario an employer may depart from a specification standard if the safeguards provided and those specified are equal with respect to “strength, health and safety.”

Uniform performance standards are criticized by economists who argue that because costs of compliance differ greatly among employers, the greatest amount of health and safety can be achieved at the least cost by requiring higher than average performance of establishments with low costs while permitting high cost employers to perform at a lower level. These variant management responses can be encouraged by experience-rated workers’ compensation assessments. Although laudibly efficient, at least theoretically, this strategy standing alone would produce enormous distributional inequities, as workers in high cost enterprises are forsaken in the name of economy. Experience-rating has been adopted in several provinces as a supplement, rather than as an alternative, to minimum standards. Pseudo-market incentives offer another advantage over either type of standard by inducing employers to control both hazards that lie beyond the foresight of regulatory bodies and dangers that cannot be detected by inspectors.

Critics of regulation also charge that standards are frequently based upon inaccurate measurements of either the severity and probability of harm or the costs of compliance. No one has a greater interest than labour and management in assuring that these facts are accurately determined and often they

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98 Canada, s. 84; Alberta, s. 31; British Columbia, s. 71(1); Manitoba s. 18; New Brunswick, s. 23; Newfoundland, s. 63 and Nfld. Reg. 104/79, s. 24(4)(a); Nova Scotia, s. 19; Ontario, ss. 20(1), 41; Prince Edward Island, s. 77; Quebec, ss. 66, 223; Saskatchewan s. 13.
100 R.R.O. 1980, No. 692, s. 2.
have knowledge that is not readily available to government. Consequently, their participation in the standard-setting process should reduce errors. In addition to making these factual determinations, regulators must place a value on life and health, a highly political task that cannot be avoided. Too often this decision, which should be made in a public process, is not explicitly articulated, not even privately. Workers have a special claim to participate in this exercise because occupational dangers, unlike environmental or highway hazards, affect only a segment of society and those at risk are neither randomly chosen nor, given labour market imperfections, voluntarily exposed. The value placed upon life should be constant so that a fresh determination should not be made each time a new hazard is regulated.

Public participation is mandated by law in only three jurisdictions. In Ontario, before a final standard relating to a biological, chemical or physical agent is adopted, the minister must publish a proposed version and receive comments from labour and management.

A hearing must be held by the British Columbia Workers' Compensation Board prior to the promulgation of any regulation, and presumably submissions made at a hearing may be controverted. Notice of a proposed standard, a right to make comments, and an opportunity to contest adverse submissions are essential to effective participation, but more is required. The administering agency should be obliged to disclose the evidence upon which a draft regulation is based so that labour and management are not forced to aim their comments at a hidden target. In addition, reasons for adopting the final standard should be published to encourage sound judgments.

No regulatory agency can anticipate all hazards that will emerge in the future and provide detailed standards to control them. Substances not previously known to man are constantly introduced into commercial use. Work processes, tools and equipment are also continually changing. New building designs are adopted and plants are built where none previously existed. The most common response to these developments is to wait until a material, device or structure is in use before its consequences for the well-being of employees are evaluated. There are two obvious problems with this approach: workers serve as guinea pigs and the retro-fit costs of correcting defects may be high or even prohibitive. These difficulties could be avoided by requiring official approval in advance of utilization, manufacture or construction.

Advance approval schemes of varying scope have been adopted in several provinces. The most comprehensive programme is set out in the Ontario Act. The manufacture, distribution or use, except for research purposes, of any biological or chemical agent not listed in an official inventory is prohibited until notice is given to the administering agency, which is empowered to prohibit or restrict the use of a substance. The inventory

101 British Columbia, s. 71(1); Ontario, ss. 20(2)-(5), (12), (22); Quebec, s. 224.
102 See Ontario, s. 20(2).
103 Alberta, ss. 1(k), 10(3); Nfld. Reg. 104/79, s. 5(1).
104 Ontario, s. 21.
that has been adopted was compiled by the Environmental Protection Agency in the United States.\textsuperscript{105} Similar notice requirements and powers exist in Quebec.\textsuperscript{106} An Ontario employer is also required to submit plans and specifications for scrutiny before beginning a construction project or installing any equipment.\textsuperscript{107}

VIII. GENERAL DUTIES: EMPLOYERS, EMPLOYEES AND OTHERS

Employers are typically charged with a general duty to take all precautions necessary to ensure the health and safety of the workforce.\textsuperscript{108} Similarly, employees must exercise due care to protect themselves and their co-workers.\textsuperscript{109} In the absence of a specific provision, for example, to provide information concerning a substance or to maintain air quality at a precise level, the employer's general duty might be utilized to require management to perform in a particular way. However, enforcement agencies, especially the courts, may be reluctant to take this step.

The employer's general duty is commonly supplemented by an obligation to train\textsuperscript{110} and supervise\textsuperscript{111} workers. In Ontario management must set out written instructions for prescribed jobs but no designations have yet been made.\textsuperscript{112} A Quebec employer must appoint a person to be responsible for health and safety.\textsuperscript{113} In that province, and in British Columbia, management may be required to develop a comprehensive health and safety programme which sets out objectives and provides for the implementation of legal standards.\textsuperscript{114} A health and safety programme in British Columbia must describe the responsibilities of an employer, workers and supervisors and provide for periodic management meetings. Programmes in one or both of these provinces must also address the training and supervision of workers, inspections, accident investigations, personal protective equipment, and maintenance and disclosure of records — including inspection and accident investigation reports. The Quebec \textit{Occupational Health and Safety Act} requires that a description of the programme, together with a committee's comments on it, be forwarded to the Commission, which may direct that it be amended.\textsuperscript{115}

The Quebec and British Columbia approaches go beyond the law elsewhere by

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\textsuperscript{105} Ontario, s. 20(1) and R.R.O. 1980, No. 693.
\textsuperscript{106} Quebec, ss. 64-66, Nfld. Reg. 104/79, s. 24(4)(a).
\textsuperscript{107} Ontario, s. 18(3), R.R.O. 1980, No. 692, s. 7 and R.R.O. 1980, No. 694, s. 21.
\textsuperscript{108} Canada, s. 81(1), (2); Alberta, s. 2(1); B.C. Reg. 585/77, s. 2.04; Manitoba, s. 4(1); New Brunswick, s. 7; Newfoundland, s. 4; Ontario, s. 14(2)(g); Quebec, s. 51; Saskatchewan, s. 3(a).
\textsuperscript{109} Canada, s. 82; Alberta, s. 2(2); Manitoba, s. 5(a); Newfoundland, s. 6; Ontario, s. 17; Quebec, s. 49(2)-(3); Saskatchewan, s. 4(a).
\textsuperscript{110} B.C. Reg. 585/77, s. 8.20; Manitoba, s. 4(2)(b); N.B. Reg. 77-1, s. 3(7); Newfoundland, s. 5(b), (e); Ontario, s. 14(2)(a); Quebec, s. 51(9).
\textsuperscript{111} B.C. Reg. 585/77, s. 8.20; Manitoba, s. 4(2)(b); Newfoundland, s. 5(6); Ontario, s. 14(2)(a); Quebec, s. 51(9).
\textsuperscript{112} Ontario, s. 51(1)(c), (i).
\textsuperscript{113} Quebec, s. 51(2).
\textsuperscript{114} B.C. Reg. 585/77, s. 4.02; Quebec, ss. 58-60. See Alberta, ss. 20, 26.
\textsuperscript{115} Quebec, s. 60.
compelling management to think through its policies and to air them for scrutiny by officials and workers.

In a few jurisdictions duties are also imposed upon individuals, other than employers and employees. Supervisors may be required to provide instruction and supervision in safe work practices. The Ontario Act contains a long list of supervisory duties and a very broad obligation to take all reasonable precautions to ensure that the work environment is free of hazards. Only in Quebec are suppliers subject to comprehensive regulation: no person may manufacture, sell, or install any product or process unless it conforms to legal standards and a supplier of a dangerous substance must ensure that it is labelled and has been approved by the administering agency. New hazardous materials must also be approved in Ontario. In several provinces, a supplier may not rent any tool or equipment that is not safe. Finally, a principal contractor, defined as the owner of a work site or the person primarily responsible for work carried out on it, may be directed to safeguard employee health and safety.

IX. THE INSPECTORATE

Inspectors employed by the administering agencies perform several functions. They are commonly called upon to resolve disputes arising out of refusals to work and may also carry out accident investigations. Most of an inspector's energy is devoted to routine, periodic visits to workplaces to check for contraventions of occupational health and safety standards. Inspections are scheduled by the administering agency. As noted above, a worker can compel an investigation of a perceived danger only by first refusing to work, except in Manitoba where an official may be summoned while work goes on.

Inspectors are granted a broad range of investigative powers. In addition to entering premises, examining books and records and taking samples

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116 B.C. Reg. 585/77, s. 8.20. See also New Brunswick, s. 8(2) and Sask. Reg. 282/69, s. 14.08.
117 Ontario, s. 16.
118 Quebec, s. 63.
119 Quebec, s. 67.
120 See text accompanying notes 104 and 106, supra.
121 Ontario, s. 21.
122 Alberta, ss. 1(l), 2(3), (4); Newfoundland, ss. 1(l), 11; Ontario, s. 19(a)(b). This obligation extends in Ontario to a lessor who agrees to maintain equipment and in Alberta to a lessor who agrees to install or erect equipment.
123 In several provinces, this obligation applies only to the construction industry: New Brunswick, ss. 1, 5; Ontario, ss. 1(4), 13; Quebec, s. 196. Elsewhere all industries are embraced: Alberta, ss. 1(l), 2(5); Manitoba, ss. 1(n), (o), 7; Newfoundland, ss. 2(j), 10. The Ontario provision also extends to owners outside the construction industry: s. 18.
124 See text under heading “The Right to Refuse,” supra.
125 See note 78 and accompanying text, supra.
126 Canada, s. 91(2), (3); Alberta, s. 6; British Columbia, s. 71(3); Manitoba, s. 24; New Brunswick, s. 15(1); Newfoundland, s. 24; Nova Scotia, ss. 7, 11; Ontario, s. 28(3); Quebec, ss. 179, 180; Saskatchewan, s. 17.
for analysis, in several provinces they may take photographs, make recordings, conduct any other tests and be accompanied by an expert. The most complete authority is found in Ontario where an inspector may direct that any equipment or process be operated for the purpose of examination or may request an employer to provide an expert’s report concerning any structure, process or any biological, chemical or physical agent. A Quebec inspector may order the installation of a measuring device in a workplace.\textsuperscript{127}

An official who visits a worksite only periodically and briefly may fail to observe a hazard that would be detected by those who are present throughout every working day. For this reason, the quality of inspections is improved by consultation with management and labour representatives and by their accompaniment on a “walk around”. An employee spokesman is entitled to accompany an inspector in several provinces\textsuperscript{128} and in two others, management cannot object to worker participation although an inspector is not directed to allow an employee to participate.\textsuperscript{129} The employee is generally a worker committee member or representative or is chosen by a committee or union. In British Columbia and Saskatchewan, a worker who accompanies an inspector must be paid.\textsuperscript{130} In addition to permitting one employee to “walk around”, a Saskatchewan employer must allow any worker to consult with an inspector who may require that a person be temporarily relieved without loss of pay.\textsuperscript{131} An employer representative is entitled to accompany an inspector in three provinces.\textsuperscript{132}

Inspectors are empowered to direct adherence to the applicable act or regulations.\textsuperscript{133} Except in Nova Scotia and Prince Edward Island, they may also order that all work be stopped until compliance is achieved: the criteria ranges from a danger, to an imminent danger, to a serious danger.\textsuperscript{134} The modifier “serious” imposes an unnecessarily strict test. As in the context of refusals to work, the term “danger” alone should be interpreted to embrace only an imminent hazard that could not be corrected before persons who continued to work would be exposed to risk. The issuance of a stop work order might adversely affect employees who are laid off without pay and, therefore, the law in two provinces requires that employees who are deprived of work be paid.\textsuperscript{135}

\textsuperscript{127} Quebec, s. 180(b).
\textsuperscript{128} Alta. Reg. 197/77, s. 10(1); British Columbia, s. 72; Man. Reg. 158/77, s. 7(1); Nfld. Reg. 104/79, s. 21(5). In Newfoundland and Alberta this right arises only where a committee or worker representative exists.
\textsuperscript{129} Ontario, s. 28(3); Sask. Reg., s. 26.
\textsuperscript{130} British Columbia, s. 72(8); Sask. Reg. 437/81, s. 26.
\textsuperscript{131} Sask. Reg. 437/81, s. 26.
\textsuperscript{132} Alta. Reg. 197/77, s. 10(4); British Columbia, s. 72; Nfld. Reg. 104/79, s. 21(5).
\textsuperscript{133} Canada, ss. 94, 96(1); Alberta, ss. 7-10; British Columbia, s. 74; Manitoba, ss. 26, 33, 35; New Brunswick, s. 15(2), (3); Newfoundland, ss. 25-28; Nova Scotia, s. 9(1), (2); Ontario, s. 29 (1), (2), (4); Prince Edward Island, s. 71(3); Quebec, ss. 182, 186-90; Saskatchewan, s. 18(1)-(3).
\textsuperscript{134} Id.
\textsuperscript{135} British Columbia, s. 74(2); Quebec, s. 187.
An administrative appeal may be taken by management from an order. The reviewing body may be either a higher officer within the agency that employs the inspector who issued the directive, or an outside tribunal, commonly a labour relations board. Several jurisdictions provide for a second level of review by a labour relations board or the courts. Yet, across most of Canada, workers are denied the basic right to contest official inaction. Only the Ontario *Occupational Health and Safety Act* allows an appeal from a refusal to issue an order, and thereby allows employees to challenge an inspector's opinion that management conduct is legal.

Another important procedural safeguard that has nowhere received statutory recognition is the right of labour and management to participate in an appeal launched by the other.

X. SANCTIONS

The contravention of occupational health and safety legislation, regulations or orders may lead to criminal prosecution. In addition, the British Columbia Workers’ Compensation Board may levy an administrative penalty upon an employer.

The primary responsibility for initiating criminal prosecutions or penalty proceedings must rest with the administering agencies because employers, workers and unions often lack the expertise, resources or motivation to take these steps. Labour and management, however, should be allowed to launch enforcement proceedings. In Alberta and British Columbia, prosecutions cannot be initiated without the consent of either the administering agency or the attorney general, and employees can be prosecuted under the *Canada Labour Code* only with the minister’s approval. Elsewhere, any citizen may initiate a criminal action.

Enforcement agencies rely heavily upon compliance orders and rarely commence proceedings which may lead to the imposition of a sanction. Canadian occupational health and safety law provides no criteria for identifying violations for which penalties should be sought, so that administering agencies must develop their own guidelines. Consequently, these guidelines may not be carefully articulated, consistently applied or exposed to public scrutiny. These pitfalls could be avoided by stipulating in regulations or legislation the factors that are to be weighed in each case. Three criteria that

136 Canada, ss. 93, 96(2)-(4), 106.1; Alberta, s. 11; B.C. Reg. 585/77, s. 2.12; Manitoba, ss. 37-39; New Brunswick, s. 15(b); Newfoundland, ss. 30-31; Nova Scotia, s. 9(3)-(5); Ontario, s. 32; Quebec, ss. 191-192; Saskatchewan, s. 20(1).

137 Canada, s. 95; Alberta, s. 11; Manitoba, s. 37.

138 Alberta, s. 11(5)-(6); Manitoba, s. 39(1); Newfoundland, s. 31; Saskatchewan, s. 21.

139 Ontario, s. 32(5).

140 Canada, s. 97(1), (3); Alberta, s. 32(1); British Columbia, ss. 75(2)-(3); Manitoba, s. 53; New Brunswick, s. 21; Newfoundland, s. 64(1); Nova Scotia, s. 23; Ontario, s. 37(1); Quebec, ss. 236, 237; Saskatchewan, s. 32.

141 British Columbia, s. 73; see also Prince Edward Island, s. 78.

142 Canada, s. 98(2); Alberta, s. 32(3); cf. British Columbia, s. 75(4).
might be considered are: the actual or potential harm to workers posed by a violation; the violator's "state of mind", which may range from willful through reckless, negligent and careful; and past violations of the same or another standard. The factors that have been listed are necessarily vague and, in a particular case, some criteria may favour sanctions while others point to the opposite conclusion, so that competing considerations must be balanced. Consequently, these guidelines preserve a degree of flexibility but permit an administering agency to be called upon to justify its decisions by references to general principles. A small number of more rigid rules might also be adopted. For example, a penalty might be mandatory for every willful violation that seriously compromises worker health.

An employer may attempt to escape liability by demonstrating that all reasonable precautions were taken to prevent an impugned occurrence. Some statutory duties are qualified by a phrase such as "so far as is reasonably practical." The Supreme Court has ruled that a defence of due diligence may be successfully raised even though it is not explicitly allowed by statute. The judiciary cannot apply this defence when legislative language expressly precludes it, but Ontario is the only province that limits the defence of due diligence by statute. For example, an employer in Ontario who fails to provide information, training or protective devices as prescribed or who violates a standard that limits exposure to a chemical agent is strictly liable. However, management may escape criminal responsibility in Ontario for failing to achieve results that depend upon the co-operation of workers: an employer is only obliged to take reasonable precautions to ensure that employees utilize protective devices and follow proper work practices.

The financial penalties that an employer may face vary from jurisdiction to jurisdiction. Maximum fines are commonly set, ranging from $50,000 in Quebec to $500 in Nova Scotia. Several statutes permit a further levy for each day that a violation has persisted. Typically, no minimums are fixed nor is any statutory guidance provided with respect to the exercise of discretion. The Quebec Occupational Health and Safety Act structures sentencing by providing different maximum fines for individuals and corporations, for contraventions that seriously compromise the health and safety of workers and other violations, and for first and subsequent offenders. This statute also fixes minimum fines, ranging up to $10,000 depending upon the nature of the violation. Employees, supervisors, and suppliers are generally

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144 Ontario, s. 37(4). See also R. v. Inco Ltd., unreported, March 1981 (Ont. Prov. Ct.).
145 Maximum fines are commonly set, ranging from $50,000 in Quebec to $500 in Nova Scotia. Several statutes permit a further levy for each day that a violation has persisted.
146 In British Columbia, the maximum fine is an amount equal to the employer's annual assessment.
147 Quebec, ss. 236, 237; see also Alberta, s. 32.
subject to the same fines as an employer.\textsuperscript{148} although the \textit{Canada Labour Code} sets a lower maximum penalty for workers and in Quebec they do not face the stiffer penalties that apply to corporations.\textsuperscript{149} A conviction may lead to imprisonment for a term up to twenty-four months in Saskatchewan. A Manitoba court may order a person not to work in a position of authority over employees during the six months following conviction.\textsuperscript{150}

The structure of authority in a workplace is hierarchical and those at the top exercise influence over hazardous conduct of others. The law in British Columbia, Ontario and Quebec encourages the use of this power by holding an employer vicariously liable for the conduct of members of management, supervisors and employees,\textsuperscript{151} usually subject to a due diligence defence.\textsuperscript{152} Attributing criminal responsibility to management is most effective if liability is focused upon an individual because an impersonal entity can neither suffer the stigma of a conviction nor be imprisoned for a serious offence. A director, officer or agent of a corporation who participates or acquiesces in a corporate violation may be convicted in Manitoba and British Columbia.\textsuperscript{163}

A criminal prosecution is a slow process and may be inappropriate where an ongoing violation continues to endanger health and safety. In Ontario, the administering agency may proceed expeditiously by filing an \textit{ex parte} application for a judicial order restraining contravention of a stop-work directive.\textsuperscript{154} Breach of this order would constitute contempt of court.

\textbf{XI. DISCRIMINATION}

A major thrust of Canadian occupational health and safety legislation is the encouragement of worker participation. Any retaliatory action by employers must be curtailed to accomplish this objective. The prohibited discriminatory action against a person who refuses to perform unsafe work has been discussed.\textsuperscript{166} There is a broader proscription against discrimination in most jurisdictions.\textsuperscript{156} Protection may extend to a worker who acts in compliance with or seeks the enforcement of a statute or regulation. This comprehensive formulation protects a worker who refuses to perform unsafe work,

\begin{itemize}
\item \textsuperscript{148} Saskatchewan, s. 33. See also: Alberta, ss. 32(1), (2), (2.1); British Columbia, s. 75(2); Manitoba, s. 54(3); Newfoundland, s. 64 (1); Ontario, s. 37(1).
\item \textsuperscript{149} Canada, s. 98(1); Quebec, ss. 236, 237. In British Columbia the maximum fine for employees is $10,000.
\item \textsuperscript{150} Manitoba, s. 54(4).
\item \textsuperscript{151} B.C. Reg. 585/77. s. 2.16; Ontario, s. 37(3); Quebec, s. 239.
\item \textsuperscript{152} This may not be so in Ontario; see note 144 and accompanying text, supra.
\item \textsuperscript{153} British Columbia, s. 77; Manitoba, s. 55; see also Canada, s. 104 and Saskatchewan, s. 34.
\item \textsuperscript{154} Ontario, s. 31; see also Alberta, s. 33.
\item \textsuperscript{155} Canada, s. 97(1)(d), B.C. Reg. 585/77, s. 8.24(6); Alberta, s. 28; Manitoba, s. 43(3); New Brunswick, s. 8(3), (4); Newfoundland, s. 47(d); Ontario, s. 24; Quebec, s. 30; Saskatchewan, s. 26(2).
\item \textsuperscript{156} Canada, s. 97(1)(c); British Columbia, s. 13(2); Manitoba, s. 42(1); New Brunswick, s. 8(3); Newfoundland, s. 47(3)(a)-(c); Ontario, s. 24(1); Quebec, ss. 30, 81, 97; Saskatchewan, s. 25(1). In Manitoba, discrimination by a trade union is also forbidden; s. 42(1).
\end{itemize}
Occupational Health and Safety
gives testimony in enforcement proceedings, has any association with a
committee or representative, provides information to an inspector, or seeks to persuade an employer to comply with the law. Legislation in several jurisdictions sets out a list of protected activities, which is invariably incomplete.

The prohibition is commonly against any type of reprisal. How is this ban to be applied to a person who refuses to perform unsafe work? An employer should be permitted to reassign a worker to reasonable, alternative employment for the duration of a refusal. An employee who is either not reassigned, and so remains idle, or is transferred to a lower paid position should be remunerated at the rate for the job that was refused. Several statutes explicitly recognize management’s power to transfer a person who has refused to work and expressly prohibit any loss of pay. Outside the context of work refusals, all transfers should be viewed as discriminatory. Regardless of the setting, the notion of discrimination should embrace disciplinary warnings, demotion, denial of a transfer or promotion, and any reduction in wages or benefits. Several provinces have rejected a broad definition of discrimination in favour of a list of proscribed reprisals, which is often not exhaustive.

An employer — or person acting on behalf of an employer — is prohibited from taking any of the proscribed steps against a worker who has engaged in a protected activity. Consequently, motive is a crucial ingredient of an offence. An employer often will act with more than one purpose, but a violation should be found whenever any part of management’s motivation is tainted by illegality. This is the approach that has been consistently followed by Canadian courts and labour relations boards in entertaining complaints of discrimination against trade union members. To prove the existence of an illicit design is often a difficult task. For this reason, an employee should be expected to establish only that he engaged in protected conduct and that discriminatory action followed and an employer should then be called upon to demonstrate the absence of an unlawful motive. In several provinces the burden of proof has been reversed in this fashion.

An employer who retaliates against a worker is subject to the penalties that apply to any violation. Except in Alberta and New Brunswick, an employee may be reinstated and obtain compensation for lost wages.

157 Section 93(4) of the Canada Labour Code provides additional protection to informants by prohibiting disclosure of their names.
158 Newfoundland, s. 43(2); Ontario, s. 23 (10); Quebec, s. 25.
159 Canada, s. 97(1)(d); B.C. Reg. 585/77, s. 8.24(7); Newfoundland, s. 43(3).
161 Manitoba, ss. 42(2), 43(4); Newfoundland, s. 48; Ontario, s. 24(5); Saskatchewan, ss. 25(2), 26(3); cf. Quebec, s. 228.
162 See text under heading “Sanctions,” supra.
163 Canada, ss. 96.1-96.4; British Columbia, s. 75(1); Manitoba, s. 44(3); Newfoundland, s. 50(1)(a), (b); Ontario, s. 24(2)-(4), (6)-(8); Saskatchewan, s. 27; Quebec, ss. 229-231.
These remedies are commonly dispensed by a labour relations tribunal, which may also be empowered to reinstate a worker pending a final decision or to substitute a lesser penalty for one imposed by management.

XII. AGENCIES OF GOVERNMENT

Ministries, independent tribunals and courts take part in the regulation of occupational hazards in every jurisdiction, but the division of labour among these bodies varies across the country. What should be the assignment of responsibilities? This question is best addressed by distinguishing among three functions performed by government: setting health and safety standards, conducting inspections and attempting to obtain voluntary compliance, and enforcing the law by adjudicating alleged violations and fashioning penalties and other remedies.

Adjudication is everywhere conducted by a body that is independent of government, either the courts or an administrative agency. An employee who has been the victim of discrimination typically may obtain compensation and reinstatement at the hands of a tribunal. Other sanctions are generally dispensed by the courts, but the British Columbia Workers' Compensation Board may levy a financial penalty. The administrative process may be well suited to this role. Judicial attitudes to white-collar crime, particularly where no ascertainable injury or disease has been caused by a violation, may unduly limit enforcement. The judiciary may also construe statutory provisions and regulations so strictly that the legislative purpose is frustrated, because it or the factual context is not clearly understood by an inexpert court. Court proceedings — including precisely drafted documents, rules of evidence and the criminal burden of proof — are costly and time consuming and may shift the advantage too far in favour of the alleged violator to the detriment of those whose health and safety is at risk. Finally, a criminal court will probably prefer fines for past violations to other sanctions whereas a specialized tribunal is more likely to utilize such remedies as stop work orders and ongoing financial penalties for continuing violations. The criminal process should not be abandoned, but it should be held in reserve for extreme situations in which the stigma of conviction, perhaps followed by imprisonment, is appropriate and the safeguards of the criminal law system are essential.

In most jurisdictions, the remaining functions are assigned to a government ministry, but there are important exceptions to this general pattern. Regulations in British Columbia and Quebec are promulgated by an independent agency. The political act of placing a value on health and

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164 Where a grievance procedure exists a worker may utilize it or have recourse to a statutory tribunal: Ontario, s. 24(2); Quebec, ss. 232, 233; cf. Reed Ltd., [1978] O.L.R.B. 1; but see Newfoundland, s. 49(2).
165 Quebec, s. 229.
166 Ontario, s. 24(7).
167 See, supra notes 164 to 166 and accompanying text.
168 See, supra notes 140, 141 and 162, and accompanying text.
Occupational Health and Safety

safety should be undertaken by officials who can he held accountable through the political process. Once this task is performed, standard-setting is largely an exercise in fact-finding with respect to the degree of hazard and costs of compliance. Isolating the standard-setting process from political pressures ensures that these determinations are made in an even-handed fashion. Equal treatment also requires an independent inspectorate. Although the criminal law analogy might suggest the contrary, this analogy is inapt because the enforcement of occupational health and safety law is not as widely approved by persons with the power to influence government decisions as in the application of law designed to protect property and to control violence. The inspectorate is independent in British Columbia and New Brunswick and may be so rendered by cabinet order in Quebec.  

Should responsibility for standard-setting, inspections and adjudication be assigned to the same agency, or is the separation of these powers desirable? A single body, which could co-ordinate all three functions and draw upon a common pool of expertise, might deliver the most effective prevention programme.

The impartiality of an adjudicator may be strained, however, by employment in the same agency as an inspector who gathers evidence against an accused. To combat bias, the adjudication and inspection functions could be assigned to separate tribunals or inspections and first level adjudications might be performed by a single authority whose decisions could be appealed to a second body. The latter alternative ensures a measure of impartiality, co-ordination and shared expertise. The British Columbia prevention system combines standard-setting, inspection and adjudication in a single agency, but allows no outside appeal.

The argument for an omnibus agency may be carried further. The responsibility for controlling hazards should be exercised by the same agency that administers benefits to disabled workers. A compensation system has the potential to generate information concerning the causes of injuries and diseases that is vital to an effective prevention programme. In addition, a single body can select the best mix of prevention strategies, such as experience-rated workers' compensation assessments, support for the internal responsibility system, and enforcement of standards. Finally, an umbrella agency may be expected to launch a more vigorous prevention programme than an authority whose jurisdiction does not extend to compensation. This is because an increase in resources devoted to a successful control programme can be partly financed by a reduced compensation workload and because heightened employer resistance to greater prevention efforts would be offset by enhanced management goodwill generated by lower assessment rates. Workers' Compensation Boards in British Columbia and Prince Edward Island are responsible for both compensation and prevention.

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169 British Columbia, ss. 71(3), 74; Occupational Health and Safety Commission Act, S.N.B. 1980, c. 0.001, s. 7; Quebec, s. 193.

170 See text under the headings “Health and Safety Committees and Representatives” and “The Right to Refuse”, supra.
XIII. CHALLENGE AND RESPONSE

Three challenges were identified at the outset: to buttress the internal responsibility system, to establish a framework for the creation and enforcement of minimum legal standards, and to address health concerns.

Labour's claim to participate in shaping the work environment has not received adequate recognition. The committee system and the right to refuse have not been adopted in two provinces. Worker committee members outside Quebec have no power to alter any management practice that conforms to minimum legal standards of general application. In Quebec, authority over medical services, training, information, and personal protective devices is removed entirely from management and vested in a joint committee, or, in the event of a stalemate, the Commission. Legislatures elsewhere should identify areas in which real responsibility can be shared between labour and management in this way. In several provinces the prohibition of employer retaliation against workers who participate in the control of hazards is too narrow or the remedy of reinstatement is not available. The right to know has been ignored in some jurisdictions and disclosure requirements that have been enacted are typically too vague and do not provide access to information in the possession of government or suppliers. The internal responsibility system is in need of additional legal support.

The most glaring inadequacy in the standard-setting and enforcement processes is the denial of procedural safeguards to both labour and management. Across Canada rules may be promulgated without the three basic elements of due process—notice, public submissions, and reasons for decision. Although management may appeal a compliance order, workers typically cannot contest an inspector's decision not to issue a directive. Only the administering agency can initiate a prosecution in two provinces.

Canadian occupational health and safety legislation has also failed to provide the weapons for the battle against industrial disease. Few employees are offered medical examinations or other health services, or are entitled to claim protective reassignment. Employers are not explicitly required to inform a person who encounters a regulated substance of either the level of exposure or the associated risk. Outside Ontario and Quebec, new chemical and biological agents may be introduced into the workplace without official clearance.

In short, the response of the Canadian legal system to the challenges of a hazardous work environment displays serious deficiencies.