WHY WE NEED HEALTH AND SAFETY REGULATIONS

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Introduction

The union movement has been a part of the development process for many of the health and safety regulations in our country, including those promulgated under Part 2 of the Canada Labour Code.

Internationally, we have seen this tri-partite process result in health and safety protection for workers in countries such as Sweden, and indeed throughout the European Community.

Within the federal jurisdiction, the government inspectorate uses the “general duty” clause (the employer obligation to provide a safe and healthy workplace) to write orders on employers. The question then becomes for employers with which health and safety initiatives must I comply? Without detailed, prescriptive regulations, compliance with the law becomes unclear. We presume that most employers are law-abiding. But without making laws explicit, how can compliance be achieved?

Why We Need Regulations

Regulations are laws. They are promulgated pursuant to a statute. Passed by Cabinet as an Order-in-Council they do what they are intended to do – require certain behaviour by certain people to protect certain people. They protect the social good.

Corporations challenge the need for regulations. There are too many regulations, they claim. Too much red tape restricts our ability to remain competitive, they assert. Are these allegations true or not? Unions say they are nonsense. Corporations in Canada have been among the most profitable in the entire world. General Motors, for example, established the highest profits in Canadian history in 1997, exceeding even the enormously profitable banks. In that year, GM made more money in Canada than they did in the United States or anywhere else in the world. Embarrassed by their riches, GM stopped publishing Canadian profits separately from U.S. profits so today we do not know how staggering these monies are but when pressed, they do not deny their current Canadians profits are at least $500 million per year.

Many governments in Canada claim that they, their agencies and employers and employees all have a common goal: to create the safest workplaces in the world. We know that is not true. If employers truly shared this goal we would not need unions, we would not need government regulations, and we would not need health and safety committees. We could simply rely on the employer to make our workplaces safe. But the goal of employers is profit. If safety coincides with the goal of profit, then workplaces will be safe. If it does not, workplaces will not be safe. Unfortunately, in most workplaces today, it is the latter that is the case.

When workers are faced with health hazards such as a too fast pace of production which causes repetitive strain injuries and stress, employers still speed up work to make ever higher profits.
Governments often claim employees and employers should be partners. But we are not partners. Our interests are often different. Employers may put production before health and safety. It is not they who get hurt. Workers, however, put our health and safety first, before production, since it is our health and safety that is at risk.

“Competitiveness” is not a health and safety goal nor is “prosperity” or the “overall economy” or “productive” workplaces or “job creation” and “economic growth”. All of these are economic goals and have no place in a discussion about health and safety. If healthy and safe workplaces are also productive, that is a useful side effect. But the purpose of Part 2 of the Canada Labour Code is to protect health and safety, not to foster economic growth.

Purpose of Part

122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

122.2 Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees.

It is illegal for any regulation and, we say, the lack of regulation, to conflict with the purpose of the Code.

Clear Evidence of the Need for Regulations

The most widespread and highly reported workplace injury statistics are the workers’ compensation statistics. Because of restricted entitlement by both statute and policy, interference in the claims process caused by experience rating, low reporting and the denial of claims, these statistics are not a true reflection of actual workplace injuries. However, looking at recent figures we see that lost time claims in Canada are far too high and, each year, workers continue to die from occupational injuries and disease.

We need more regulations, not less; more enforcement, not less, to stem this completely unacceptable tide of injury, disease and death.

Deregulation - a Race to the Bottom

Business has put forward the proposition that less regulation is better. Some governments have bought that argument to the detriment of worker and public safety. We say just the opposite. Laws work. They compel corporations (and individuals) to modify their behaviour in accordance with society’s wishes. They ensure that the dictate of profit will not be the only mechanism which influences corporate behaviour.

It is not, however, just our opinion. The need for regulations has been recognized in a variety of courts. In 1982, Mr. Justice Bair had this to say in the Ontario Court of Appeal in the Cotton Felts
“While values necessarily underlie all legal prescriptions, a regulatory offence really gives expression to the view that is expedient for the protection of society, and for the order and use in sharing of society’s resources that people act in prescribed manner in prescribed situations, or that people take prescribed standards of care to avoid risks of injury. The object is to induce compliance of rules for the overall benefit of society.”

Mr. Justice Cory made similar points in 1991 in Wholesale Travel, a decision of the Supreme Court of Canada:

“It is difficult to think of an aspect of our lives that is not regulated for our benefit and for the protection of society as a whole. From cradle to grave we are protected by regulations. They apply to the doctors attending our entry into this world and to the morticians present at our departure. Every day from waking to sleeping we profit from regulatory measures which we often take for granted. Unwisely we use various forms of energy whose safe distribution and use are governed by regulation. The trains, buses and other vehicles that get us to work are regulated for our safety. The food we eat and the beverages we drink are subject to regulation for the protection of our health. In short, regulation is absolutely essential for our protection and well being as individuals, and for the effective function in society. It is properly present throughout our lives. The more complex the activity the greater the need for and the greater our reliance upon regulation and its enforcement. For example, most people would have no idea what regulations are required for air transport or how they should be enforced. Of necessity society relies on government regulation for its safety.”

Deregulation affects worker health and safety and public safety as well. Unfortunately, it is rare that workers’ safety is determined to be sufficiently important to warrant a public inquiry so we must look to inquiries about public safety for in-depth impartial looks at deregulation’s affect on safety.

The Commission of Inquiry into the Air Ontario Crash at Dryden, Ontario, made specific reference to this issue in the chapters entitled “Effects of Deregulation and Downsizing on Aviation Safety” and “Aviation Regulation: Resourcing Process”. Specifically, Mr. Justice Virgil Moshansky had this to say:

“The effect of Economic Regulatory Reform, combined with deficit reduction or, more specifically, the five-year Memorandum of Understanding between Transport Canada and the Treasury Board, created a synergy that in my opinion, based on the evidence before this Commission, had an adverse impact on the effective application of safety standards.” (Vol. III, p. 940)

and;

“Had the Transport Canada Aviation Regulation Directorate been in a position to discharge all of its responsibilities in an effective and timely manner, some of the factors that contributed to the Dryden accident may not have arisen.” (Vol. III, p. 914)
When companies are under intense pressure to compete, they are not in an objective position to develop standards of safety. The Honourable Mr. Justice Samuel Grange, in his report on the 1979 Mississauga train derailment described the situation very well:

“The railways are answerable to their shareholders; the Canadian Transportation Commission is answerable to the public.” (p. 126)

Business tries to claim that detailed safety regulations make companies less competitive. We disagree. Detailed safety regulations simply level the playing field so that companies who employ sound safety practices will not be competitively disadvantaged by those who don’t. Some companies claim that safety regulations pose a hindrance to their ability in enhancing technological change. Once again, we disagree. Sound regulation forces technological change that meets the needs of society as a whole.

In the Canadian automobile industry which has been extremely profitable until the recent downturn and where the vast majority of the workforce is represented by the CAW, safety laws have not hurt it one bit:

“Thirty years of federal safety rules - and the accompanying fuel-economy and air-quality demands - have cost the industry and its customers tens of billions of dollars. (But) it’s hard to argue that the federal watch-dogging of the last three decades has hurt the industry or the nation.”

- John K. Teaken, Jr., Senior Editor  
Automotive News, August 14, 1995

In the private sector, one of the main lobby groups for self-regulation has been the chemical industry. They advocate a self-regulation system called “responsible care”. Yet U.S. studies have shown that between 1990 and 2003, there has been no downward trend in the number of accidents at facilities that have adopted Responsible Care. According to an exhaustive study released in April, 2004 by the U.S. Public Interest Research Group, chemical facilities owned by companies enrolled in this industry-sponsored voluntary safety program have had more than 1,800 accidents per year since 1990, with the largest firms being BP, Dow and Dupont. The safety record of the member companies of the American Chemistry Council since responsible care began shows that voluntary measures just don’t work.

The KPMG Canadian Environmental Management Survey - 1994 reported in Hansard in 1998 found that Canadian corporate executives reported that 90% were motivated to take action on environmental issues so that they were in compliance with regulations while only 16% were motivated to take such action by voluntary government programs.

**Performance-based Regulations**

We prefer detailed, prescriptive regulations over vague, performance-based regulations. Vague laws are open to a wide variety of interpretations and are often difficult to enforce. Flexibility may mean that the employer will have the flexibility to comply (or not) with sound safe work procedures.
Prescriptive laws are clear, unambiguous and easy to follow. Everyone has access to the law. There is no need to try to get one’s hands on Codes of Practice that may not be as easily available. Prescriptive laws level the playing field so that everyone follows the same rules.

In its 1997 discussion paper on the Ontario *Occupational Health and Safety Act*, the Harris government claims that performance-based legislation means that “The employer has the freedom to tailor a compliance strategy to a particular workplace.” That is precisely what we fear. The employer would have the opportunity to do the bare minimum that arguably could be considered in compliance with a particular law.

With respect to ergonomics, flexibility could mean if there is a requirement to ensure workers’ jobs are designed to reduce the risk of musculoskeletal injury, that job rotation rather than fixing the job would suffice as evidence of compliance with the law.

Vague laws are particularly onerous for small business. Small business often lacks the expertise and resources to interpret vague, “performance based” laws. It has been our experience in dealing with most employers in smaller workplaces that they prefer to be law-abiding. But with vague laws, they do not know how and feel they are at the mercy of the government inspector who might write orders on them or even prosecute. They want detailed, specific laws so that they can fully understand what is expected of them. Large employers have some possibility of deciding how to implement laws since they have professional health and safety staff. That possibility is unavailable to small employers.

Should the “workplace parties” have an opportunity to decide how to best implement procedural requirements? Only if the health and safety committee system is made stronger than it is at present. Apart from collective bargaining, health and safety committees and representatives are the only mechanism for workers to have input into health and safety workplace practices. Under federal law, these committees are relatively weak. They have only the power to make recommendations to the employer, not decisions. Yet the employer has up to half the membership on the committee!

It has been claimed that some jurisdictions such as the United Kingdom and Australia have adopted a performance-based approach to legislative development and advocate the idea (until the recent change of government in the UK, at any rate). Studies have shown that the system is not better than prescriptive regulations.

A 1992 study published in the *Journal of Occupational Health and Safety* had this to say:

“*The United Kingdom’s Health and Safety at Work Act 1974*, on which current Australian legislation is based, places reliance on industry self-regulation rather than on detailed regulations set out in statute and enforced by an external agency. In contrast, the United States’ *Occupational Safety and Health Act 1970* relies mainly on detailed regulations and a federal enforcement authority. Comparison of fatal injury rates between the United Kingdom and the United States since the mid-1970s shows a parallel decline in the two countries. Whatever the reason for the decline, there is no evidence of any clear superiority in the United Kingdom legislation, and it is possible that the improvement in
both countries is part of an evolutionary process independent of legislative changes...(I)t is premature to downgrade the relative importance of regulations...(F)uture strategy should be based on technology transfer, supported by the judicious use of regulations which clearly set out safe systems of work.”

With respect to chemical, biological and some physical hazards in the workplace, most governments have imposed detailed regulations, as Permissible Exposure Limits or Threshold Limit Values. While the union movement would argue that these limits are not stringent enough, they are clearly better than vague requirements. The same concept can be applied to prevent back injuries and RSIs. Considering a dose-response relationship between lifting heavy objects and the development of low back pain, surely specific limits are preferable to telling workers to bend their knees, not their back. For the areas in which we are not able to say with any scientific certainty what the number $x$ is with respect to the duration of micro pauses needed in each repetition for each one-minute job, more research is clearly needed.

**Enforcement**

The Honourable Mr. Justice Grange in his December 1980 report on the Mississauga derailment recognized the need to penalize offenders:

“(T)he best way to prevent similar occurrences, accidents or crimes, whichever word may be selected, is to make it more costly for railway companies to violate the law than to observe it.” (p. 191)

Mr. Justice La Forest had this to say about the level of fines in a case between Thompson Newspapers and the Restrictive Trade Practices Commission:

“Without being harsh, the fine must be substantial enough to warn others that the offence will not be tolerated. It must not appear to be a mere licence fee for illegal activity.”

An even better system than the prosecution method of the Occupational Health and Safety Act is an administrative penalty system. Prosecution is a reactive, after the fact enforcement mechanism that penalizes illegal activities only after the offence has occurred. It serves no prevention function in the instant case but only as a deterrent with respect to future incidents or for other employers if the penalty is made public. In safety enforcement it is extremely rare that a conviction, let alone a stringent fine is imposed without a fatality or a very serious injury having occurred. Absent a disaster, the state doesn’t react. Prosecutions are costly, time consuming of the inspectors’ time, rely on prosecutors and judges who often view safety regulatory offences as, at best, white collar crime, require a high standard of proof in a court of law, and exclude the union as a party to the proceedings.

With respect to musculoskeletal injuries, it is particularly difficult to prosecute employers since injuries develop over time and are often invisible. A judge is unlikely to convict, let alone impose a high fine on an employer who fails to protect workers from these strains and strains injuries.

What is needed instead is an obligation on the government inspectorate to write orders on all
violations of health and safety regulations and to have at its disposal the ability to impose administrative penalties on violators.

Administrative sanctions for violations can be imposed promptly by the inspectorate who have (or should have) a thorough knowledge of health and safety regulations and the implications of non-compliance. Administrative penalties can be imposed quickly and in sufficient magnitude to ensure that the cost of non-compliance is higher than the cost of compliance. An administrative penalty system can be set up so that the union is a party to the imposition of the initial penalty and to any appeal proceedings. And finally and perhaps most importantly, stringent administrative sanctions can be imposed by the regulatory agency before accidents occur.

The penalty assessment system is used by the B.C. Workers’ Compensation Board for violations of health and safety regulations. It is time that the B.C. penalty assessment system is introduced by Workers’ Compensation Boards throughout the country and used to enforce health and safety compliance in both the federal and provincial jurisdictions.

We wish to make it perfectly clear that we are talking about administrative penalties imposed on employers, not workers. It is workers who are at risk from injuries and diseases in the workplace, not employers. It is workers who are at risk from employer discipline if they violate health and safety rules. There is no corresponding mechanism for workers to discipline employers. There is no justification for workers to be at risk of a third penalty from the federal health and safety officer. If the officer were to penalize workers, employers can easily get “off the hook” from bothering to impose discipline on workers who violate health and safety rules and can always hide behind a claim that the workers were told about the rule but they continued to violate it. It is always amazing to unions to hear this from employers who have no difficulty whatsoever in penalizing workers who have bad attendance records, who report for work late, who are insubordinate, but these same employers become suddenly powerless when workers violate health and safety rules. The real reason for this of course is that employers often subtly encourage workers to take short cuts so that production will not be impeded. The federal government should not let employers avoid their responsibility to provide a healthy and safety workplace by ensuring safe work practices are followed by everyone.

In the March, 2004 Working Paper #213 of the Ontario Institute for Work and Health, researchers from the Institute, the University of Toronto and McMaster University did a comprehensive review of the literature which they published as “A Systematic Review of the Preventive Incentives of Insurance and Regulatory Mechanisms for Occupational Health and Safety”. They found “strong evidence that the experience of (employers) actually being cited and/or penalized (i.e., specific deterrence) was associated with a reduction in (workers’ compensation) claims. This was based on five high quality and two medium quality studies.” They emphasize there was strong evidence that actual citations and penalties reduce frequency and/or severity of injuries.

A 2001 study of the Washington State Department of Labor and Industries determined there was a 22% reduction in compensable claims in fixed-site industries, which included government and manufacturing among others, and an 11% reduction in compensable claims in non-fixed site industries as a result of their enforcement activity. Further, targeted enforcement activity was associated with a 22% greater decline in fixed site workplaces and a 13% greater decline in
non-fixed site workplaces. The same study noted no reduction in claims as a result of consultation activity. The study was replicated in 2003 and the results were confirmed.

Conclusion

In conclusion, workers risk their health, life and limbs in the workplace. Employers must be compelled to protect workers from painful and disabling injuries, diseases and death from work. The federal government must confirm and assert it is in the government business. The time for detailed, prescriptive regulations to be promulgated and stringently enforced in the federal jurisdiction is now.