Article

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This paper presents and analyses the salient features of the 1983 amendments enacted by Alberta's Progressive Conservative Government.

Alberta's *Occupational Health and Safety Act*[1] covers nearly all provincial, private and public sector industries, except those industries regulated by the Federal Government[2]. Recently enacted amendments to the Act signify a redirecting of Alberta regulatory policy in this area and now enable Alberta's legislation to take its place within the ranks of progressive provincial legislation in the occupational health and safety field. These amendments attempt to clarify legal responsability for occupational health and safety matters, to encourage greater occupational health and safety awareness and training within firms and public sector organizations, to foster greater flexibility in administration by shifting from specific to performance standards and to consolidate all regulations concerning occupational health and safety under one department.

The *Occupational Health and Safety Amendment Act, 1983*[3] was introduced into the Alberta Legislative Assembly on May 3, 1983. It received Royal Assent on June 6, 1983 and was proclaimed effective with the exception of sections 8 and 11 which are to come into force at a later date following industry consultations[4]. Throughout approximately fifty submissions received on the draft legislation, concern and guarded alarm was evidenced within the ranks of employers and organized labour[5]. A prominent Alberta labour relations lawyer pointed out that the Act could have a major impact on employers with collective agreements by potentially creating a double jeopardy situation in disciplining employees. He also opined that the amendments represented a significant shift of administrative authority to

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occupational health and safety officers with an attendant weakening of management rights[6]. The Alberta Federation of Labour expressed its concern that the shift towards performance standards might dilute previously established specific standards and, further, that workers might not possess rights and authority concomitant with the greater responsibilities conferred on them by the amendments[7].

This paper presents and analyses the salient features of the 1983 amendments enacted by Alberta's Progressive Conservative Government. Specific areas where legislative change was withheld are also canvassed. Throughout, the analysis is aided by reference to 1983 Bill 231 which was subsequently introduced into the Legislative Assembly by the Official Opposition, the New Democratic Party of Alberta[8].

REDEFINITION OF EMPLOYER AND EMPLOYEE OBLIGATIONS

Amended Definitions

The *Occupational Health and Safety Act* imposes upon employers the primary responsibility of ensuring the health and safety of workers[9]. The 1983 amendments, in addition to imposing new occupational health and safety duties upon employers, also expanded the definitional parameters of «employer». The definition, prior to the amendments, comprised «a person who employs one or more workers» or «a person who is self-employed in an occupation»[10]. The OHSAA, 1983 expanded that definition to include:

> (iii) a person designated by an employer as his representative, or
>
> (iv) a director or officer of a corporation who oversees the occupational health and safety of the workers employed by the corporation.[11]

A person designated by an employer as his representative could conceivably include the organization's safety officer or supervisors and crew leaders/workers, particularly if responsibility for occupational health and safety matters is part of their job descriptions. On the other hand, if such individuals can only act subject to discussions and the receipt of instructions from their superiors, the ultimate responsibility now would rest with «a director or officer of a corporation who oversees the occupational health and safety of the workers employed by the corporation[12]». The position where ultimate responsibility lies will be determinative of which «person[s]» might be prosecuted and subject to fines and/or imprisonment pursuant to section 32 of the Act[13].

This amended definition of «employer», especially insofar as it utilizes a default designation mechanism, fails to sufficiently and practically clarify

the ultimate pinpointing of occupational health and safety responsibilities. While increasing the number of mutually exclusive individuals within the definitional parameters of «employer» serves a laudable legislative purpose by encouraging each potential «employer» to err on the side of caution, it does so at the expense of creating concomitant uncertainty and encouraging resort to litigation to resolve subsequent questions of status. In addition, the potential labelling of certain managerial or supervisory personnel as «employer» may cause some confusion, particularly among laymen. Perhaps it would have been better to term such personnel «agents for the employer with regard to occupational health and safety matters» as seems to be the legislative intention[14]. And as «persons», they still remain subject to prosecution under section 32 for contravention of the Act or regulations. In this respect the New Democratic Party's proposed amendment in section 9 of Bill 231 also accepts the designation of managerial and supervisory employees as «employers» but goes further by attempting to impose exclusive liability for contravention of the Act or regulations upon such «employer». This proposal arguably serves as an attack on the «man-at-the-centre» theory of accident causation sometimes attributed to Alberta occupational health and safety legislation, i.e., that industrial accidents are caused by employers, their representatives, including supervisors, and the work environments supplied employees, rather than by workers' mistakes[15]. The cause of accidents, however, is often difficult to establish and determine at law and does not necessarily conform with simplistic theories affixing blame solely upon workers or solely upon management and the capital machinery supplied to workers[16].

In comparison with the primary responsibility imposed upon employers to ensure the safety of workers, the *Occupational Health and Safety Act* imposes upon principal contractors a general duty of ensuring, insofar as it is practicable to do so, that no subcontractor or worker for which they are responsible breaches the provisions of the Act or regulations[17]. As a consequence of expanding the definitional parameters of «employer», the definition of «principal contractor» has been somewhat simplied as follows:

> «principal contractor» means a person, partnership or group of persons who, pursuant to a contract, an agreement or ownership, direct the activities of 1 or more employers involved in work at a work site;[18]

It is important, especially in light of the foregoing amendments, to re-emphasize that the primary responsibility of ensuring the safety of employees falls upon those persons within the expanded category of «employer» and that the principal contractor's obligations in this respect are general. In *Regina* v. *Acton Developments Ltd.*[19], after an employee of a sub-contractor was injured, the general contractor was charged and con-

victed of failing to ensure the occupational health and safety of workers engaged in its employ contrary to section 2(5) of the Act. It successfully appealed this conviction and obtained a new trial on the grounds that the trial judge failed to differentiate between the duty of a general contractor and the duty of the worker's immediate employer.

Amended obligations of employers

Employers' and workers' occupational health and safety responsibilities were redefined by the 1983 amendments partially to facilitate the assignment of responsibility for industrial accidents and injuries during subsequent litigation. This was necessitated in large part because «...some confusion...occurred in the courts when specific responsibilities were not clearly identified»[20]. It was also apparent from certain court cases that some employees were not aware of their responsibilities, rights and duties under the occupational health and safety legislation[21]. In *Regina* v. *Syncrude Canada Ltd.*[22], the corporate accused was acquitted of criminal negligence causing death after two workmen suffocated while making an unauthorized entry into a reactor containing nitrogen to retrieve a dropped tool. Syncrude, the principal contractor, had ensured that its sub-contractors were fully aware of their duties and responsibilities under the Act. Nevertheless, at least one of the sub-contractor's employees needlessly lost his life because he was neither forewarned of the danger of entering the vessel nor aware of his occupational health and safety obligations. Other graphic illustrations are documented elsewhere[23].

Employer Educational Responsibilities

The *Occupational Health and Safety Act* now imposes the following duties upon employers [with emphasis added to reflect the 1983 amendments]:

2(1) Every employer shall ensure, as far as it is reasonably practicable for him to do so,

(a) the health and safety of

(i) workers engaged in the work of that employer and,

(ii) those workers not engaged in the work of that employer but present at the work site at which the work is being carried out, and

(b) *that the workers engaged in the work of that employer are aware of their responsibilities and duties under this Act and the regulations.*

It is important to recognize at the outset that section 2(1)(a) does not impose an absolute obligation upon employers to ensure the occupational health and safety of workers[24]. It is clearly possible for the employer to avoid liability under the present provision by establishing that he took all reasonable care[25]. The NDP proposal in Bill 231, on the other hand, would, *inter alia*, remove the «reasonably practicable» proviso[26] from section 2(1), presumably in an effort to elevate an employer's failure to provide a safe and healthy workplace to the category of an absolute liability offence[27]. The employer's predicament in that instance is, perhaps, most acutely put forth by Trainor, J. in *Regina* v. *Z-H Paper Products Ltd.*:

> ...[I]n establishing and carrying on an industrial business, an employer quite properly should be accountable for the acts of his servants. Sanctions imposed upon him by legislation induce the employer to introduce and implement proper training programmes, safety standards and to hire competent and conscientious supervision. On the other hand, once the employer has acted as a reasonable person in this regard and has taken all normal and reasonable precautions, necessary to carry on his business safely, in my view, it cannot be said that by imposing absolute liability on him, especially where the breach of a Regulation is brought about by the act of another person disobeying not only the Regulation, but the standing order of the employer, the law is promoting a higher standard of care. Assuming that the employer has taken all reasonable precautions, how can he prevent a breach of a Regulation solely within the control of the employee, where the employee does the prohibited act intentionally, or through his own negligence or inadvertence. Surely, in those circumstances as has been said, «the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim»: *Reynolds* v. *G.H. Austin & Sons Ltd.*, [1951]2K.B. 135 at p. 149.[28]

This, among other considerations, led the majority of the Divisional Court of Ontario to conclude that the words «shall ensure», contained in section 24(1)(c) of the *Industrial Safety Act, 1971* (Ont.)[29] were insufficient to impose liability on the employer where the employer had to the best of its ability cautioned its employees, including the injured employee, as to the safe and proper operation of a machine and the employee, while acting on his own in the situation, injured himself.

Section 2(1)(b) of the OHSA as amended imposes new obligations upon employers in respect of occupational health and safety education by requiring employers to ensure, insofar as it is reasonably practicable to do so, that workers are aware of their occupational health and safety responsibilities and duties. Compliance, however, does not require that each employee have a personal copy of the Act and applicable regulations. Rather, the employee must possess a knowledge about the Act and relevant regulations as well as access to them on the work site[30]. An employer who fails to carry out the correlative occupational health and safety education

and training program could be prosecuted, a likely prospect if the employer is linked with a serious or fatal industrial accident or health problem. It is important to note, however, that the Alberta formulation still leaves it to management to determine and provide the appropriate educational component, including training.

It remains to be seen whether the imposition upon employers of an obligatory educational component coupled with the expectation of greater awareness on the part of employees of their duty to exercise reasonable care will reduce industrial injuries in Alberta. Occupational injuries are suffered by a «disproportionate number of persons newly assigned to jobs» and, for this reason, most Canadian jurisdications have seen fit to statutorily impose a duty on employers and supervisors to adequately train workers to safely handle the job to which they have been assigned[31]. While Alberta historically has not required that workers be adequately trained or adequately experienced for their jobs[32], section 14(2) of the General Safety Regulation[33] now requires the employer to ensure that work which may endanger any worker is done only by a competent worker or by a worker who is not competent working under the direct supervision of a competent worker. The manner in which the OHSAA, 1983 education-promoting amendment is implemented through such regulations will determine the extent to which it reduces industrial injuries. A useful precedent in this respect can be found in section 8 of Alberta's Chemical Hazards Regulation[34] which requires that a worker exposed to listed chemical hazards be trained in procedures that minimize his exposure, be instructed in the purpose, proper use and limitations of any protective equipment provided, and be instructed regarding the health hazards associated with his exposure.

Policy Statements and Codes of Practice

On the basis of its experience in administering and enforcing the OHSA, Alberta's Occupational Health and Safety Division has ascertained that «companies with successful occupational health and safety programs have been effective largely because they have clearly demonstrated their commitment to industrial health and safety by preparing management occupational health and safety policies and bringing these policies and procedures to the attention of their workers»[35]. Therefore some employers and principal contractors may soon be required by regulation to adopt in writing occupational health and safety policy statements to stipulate explicitly where occupational health and safety responsibilities and authority reside within their organization[36]. In a similar vein, principal contractors or employers responsible for work sites may be required to establish codes of practice[37].

The concept of an occupational health and safety «policy statement» is a novel creation of the OHSAA, 1983. It is intended to «assist both workers and employers in achieving a higher level of responsibility in preventing health and safety problems»[38]. While the precise content of a policy statement is not defined in the Act, Workers' Health, Safety and Compensation will be preparing guidelines for those designated employers and principal contractors who will be required to prepare these statements. The underlying expectation is that the preparation of occupational health and safety policies and their presentation to workers will promote greater commitment to occupational health and safety programs with resulting «improved prevention initiatives and associated savings in workers' compensation and other costs»[39].

A «code of practice», on the other hand, was previously defined in the OHSA as a code «specifying safe working procedures in respect of that work site»[40]. This definition has been broadened by the OHSAA, 1983 to include the following:

> ...practical guidance on the requirements of the regulations applicable to the work site, safe working procedures in respect of the work site and other matters as required by the Director or the regulations.[41]

The codes of practice are part of the Alberta Government's two-fold policy of «eliminating unnecessary regulations and encouraging self-regulation, [thereby reducing] the need for volumes of detailed regulatory provisions in particular industries, most notably the mining and construction industries»[42]. In addition to reducing regulatory control, the underlying expectation for these codes is to provide clearer working procedures and improved loss control. WHSC officers will also be able to refer to these codes in formulating opinions regarding unhealthy, unsafe or dangerous conditions and issuing stop-work orders under sections 7 and 8 of the Act[43].

The OHSAA, 1983 does not explicitly require that codes of practice be conveyed to workers and, consequently, does not address the critically important issue of the manner in which workers should be instructed to conform with codes of practice. The employer or principal contractor required to develop a code of practice is merely directed «to establish a code of practice and to supply copies of it to a Director»[44]. Establishing a code of practice may arguably fall short of implementing it and informing workers of it although in this regard section 14(3) of the General Safety Regulation[45] now imposes an active duty upon employers to insure that all workers who will be affected by a code of practice be made familiar with it prior to commencement of the work process involving it. Compliance with this duty to inform employees should, it is suggested, involve more than posting the codes of practice on bulletin boards in supervisors' offices, a situation hard-

ly conducive to careful study by employees[46]. The regulations to-date in this respect simply require the employer to ensure that copies of the code of practice are «readily available to each worker»[47]. Work practices, if important enough to be embodied in codes of practice, should also be the subject of detailed discussion and instruction.

According to WHSC, failure to comply with a code of practice will not, in itself, subject the employer or principal contractor to quasi-criminal liability. However, codes of practice will be admissible as evidence in a prosecution under the Act on the grounds that «...a code of practice will state how a particular work process will be undertaken»[48]. By contrast, quasi-criminal liability can more readily be established by reference to breach of an occupational health and safety policy statement. Insofar as a policy statement embodies an employer's or sub-contractor's intention and commitment to meet its statutory duty to provide a healthy and safe workplace, pursuant to section 2 of the Act, a proven deviation from that policy statement may comprise the constituent elements of an offence under section 32. In the final analysis, statements of policy and codes of practice, when fully operational, will often be used in concert with the amended definitions and obligations of «employer» and «principal contractor» to more readily affix responsibility in the event of work site or plant accidents, injuries or fatalities.

Employer reporting requirements

The *Occupational Health and Safety Act* requires that a «serious injury» and an «accident that has the potential of causing serious injury»[49] be reported by the employer to WHSC[50]. Whereas formerly the employer was simply required to notify the Director of Inspection by telephone of the particulars and forward to him within 48 hours a written report, the 1983 amendments impose additional obligations upon the employer insofar as it is now required, *inter alia*, to carry out an investigation of the surrounding circumstances and in its report to outline any corrective action undertaken to prevent recurrence[51]. These changes represent an obvious illustration of the legislative policy of promoting accident prevention through implementation of corrective measures.

Amended obligations of employees

Duty to refuse unsafe work

A worker's right to refuse unsafe work may be contained, where applicable, in a collective agreement[52], implied by common law[53], and/or ex-

pressly created by statute. In respect of the latter, the *Occupational Health and Safety Act* has been amended to require a worker to refuse to carry out work if on reasonable and probable grounds he believes that an imminent danger to health and safety exists[54]. It should be noted that this Alberta formulation confers upon the worker not only a right but also a duty to refuse unsafe work under such circumstances[55]. There are two major elements to be considered in deciding whether a worker is entitled or required to refuse unsafe work, *viz.*, the elements of imminent danger and requisite belief.

«Imminent danger» under the Alberta Act continues to be defined in the following terms:

> 27(2)(a) a danger which is not normal for that occupation,
>
> or
>
> (b) a danger under which a person engaged in that occupation would not normally carry out his work.

The «normality» factor is intended to preclude, *inter alia*, firefighters and police officers from refusing to work, except under the most extreme circumstances[56]. The «imminent» factor clearly establishes a temporal dimension, *viz.*, that the risk of injury «is likely to happen at any moment without warning»[57]. In constricting these requirements the NDP proposal in Bill 231 is anomalous. It would permit a worker to refuse work «if the worker has grounds to believe that the performance of that work would endanger the health, safety or physical well-being of the worker or any other person»[58]. The proposed test is entirely subjective and not limited to «reasonable» grounds. In addition, the proposed removal of the «imminent danger» standard would allow some workers, police and firefighters for instance, to routinely refuse work.

Prior to the 1983 amendments the right to refuse unsafe work in Alberta was exclusively predicated upon the objective existence of an imminent danger, rather than upon a worker's belief[59]. While the Alberta legislation is unique in its requirement that a worker have «reasonable and probable» grounds for his belief in imminent danger, there is Canadian authority, albeit conflicting, on the parameters of a worker's reasonable grounds for belief. In *Pharand et al* v. *Inco Metals Co.*[60], the Ontario Labour Relations Board concluded that the test was an objective one, *viz.*, «whether the average employee at the work place, having regard to his general training and experience, would, exercising normal and honest judgment, have reason to believe that the circumstances presented an unacceptable degree of hazard to himself or to another employee»[61]. The Canada Labour Relations Board, on the other hand, in *Re Miller and Canadian National Railways* enunciated a subjective test, *viz.*, «an assessment...of the various influences coming to bear upon the employee's decision to refuse to

work»[62]. This patent conflict in legal pronouncements had led Nash (1983) to conclude that an employee will be regarded as having had reasonable grounds to believe a situation unsafe if:

> ...objectively such reasonable grounds exist, and provided that there is no reason to believe that the employee was acting out of ulterior motives. If the reasonable grounds are not objectively demonstrable, then the employee may show from his or her own subjective point of view why he or she personally had reasonable grounds. In the last analysis, if the worker appears to be genuinely and seriously concerned about the health and safety risks of a particular situation, then that employee will be vindicated in using the right to refuse.[63]

It is doubtful whether the Alberta requirement that a worker have reasonable *and probable* grounds for his belief imposes a heavier onus upon a worker to establish rightful refusal. The phrase has its origins in criminal law and judicial definition within that context does little to clarify what kind of belief is required before an Alberta worker can exercise his statutory duty to refuse unsafe work[64]. Its inclusion is an unfortunate, if unintended, departure from the otherwise uniform formulation of the requisite kind of belief emerging elsewhere in Canada[65].

The OHSA, 1983 also sets out the applicable procedures to be followed when a worker refuses unsafe work. The worker as soon as practicable must provide his employer with notice of his refusal and the reasons for it[66]. Upon notification the employer has a duty to investigate the danger[67], take the necessary action to eliminate it[68], and fully document his efforts[69]. And, while the employer is capable of requiring the worker who first raised the concern to remain at the work site and to accept a temporary alternate work assignment, the employer must ensure that the temporary assignment does not result in any loss of pay or otherwise «adversely affect [the] worker with respect to [his] terms or conditions of employment», or else the employer's action could be construed as a «disciplinary action»[70], potentially subjecting the employer to prosecution and/or the order of an officer of the Occupational Health and Safety Branch.

While Alberta has no express provision requiring a non-utilized worker to be paid for the time spent refusing work, albeit unsafe[71], the 1983 amendments do provide that a temporary reassignment with no loss in pay is not an employer reprisal[72]. Saskatchewan and British Columbia authorities have interpreted similar provisions to mean that pay is required on the ground that any instructions by the employer that result in loss of pay are, therefore, reprisals[73]. The applicability of those interpretations in Alberta is rendered more acute when one considers the effect of section 7(4) OHSA, as am. It provides that «[*if*] *the worker has worked elsewhere* while the dismissal or disciplinary action has been in effect, those wages earned

elsewhere shall be deducted from [any back pay ordered by an occupational health and safety officer]» (emphasis added). Impliedly, it would appear, if the worker has not worked elsewhere no amount should be deducted. Thus, in extraordinary cases where many working hours are lost without the availability of alternative temporary reassignment, it could be argued that the Alberta legislation, as amended, now departs from grievance arbitral jurisprudence and exempts the worker from any duty to mitigate losses.

A new statutory remedial scheme

The OHSAA, 1983 has effected significant changes in the ordermaking powers of Occupational Health and Safety Branch officers. Where, formerly, an officer who was of the opinion that the Act or regulations were not being complied with could only issue a stop-work order and/or require an employer to take certain measures to ensure compliance *in futuro*, the officer is now expressly empowered to include one or more of the following in his order:

(a) that the disciplinary action cease;

(b) reinstatement of the worker to his former employment under the same terms and conditions under which he was formerly employed;

(c) payment to the worker of money not more than the equivalent of wages that the worker would have earned if he had not been dismissed or received disciplinary action;

(d) removal of any reprimand or other reference to the matter from the worker's employment records.[74]

This new statutory remedial scheme applies whenever an employer has contravened the Act by imposing discipline upon an employee for acting in accordance with the Act[75]. It confers upon all employees remedies similar to those which organized workers have achieved through arbitration, including the reinstatement of workers who have been dismissed or disciplined and provision for their monetary reimbursement.

Although the scheme has provided aggrieved non-unionized employees with an alternative to common law recourse which is less expensive and less restrictive in terms of reinstatement, it has been the subject of criticism on the ground that it discriminates against employers and employees who are subject to collective agreements. In such circumstances parallel proceedings could take place with regard to a refusal to work. If, for example, an occupational health and safety officer determined, after the required investigation, that the work was not legitimately refused and that disciplinary action was warranted, the employee could lodge a grievance that the

employer breached the collective agreement. An arbitration board, basing its decision on different evidence, subsequently could find that the work was unsafe and the disciplinary action, therefore, unwarranted. Conversely, if the officer determined that the work was legitimately refused and reinstated the worker, the employer could lodge a grievance under the collective agreement in an attempt to convince an arbitration board otherwise[76]. The possibility of contradictory decisions is inherent where two tribunals possess concurrent and possibly coinciding jurisdictions and often is avoided through a deferral policy[77]. While Workers' Health, Safety and Compensation intends to implement the policy of deferring to the decisions of arbitration boards where there are collective agreements in effect[78], anomalous results may still ensue if occupational health and safety officers, called in during the initial investigation of a refusal, reinstate non-unionized employees when, in precisely the same circumstances, they would not reinstate unionized employees on the ground of deferring to the grievance arbitration process.

In addition to the foregoing substantive problems, procedural difficulties may also arise. While the Act continues to give occupational health and safety officers extensive inspection and evidence-gathering powers[79], the amendments have clarified neither the type(s) of investigation and hearings that will be involved nor the types of evidence that will be admissible. Also, there is no requirement, similar to that applicable in grievance arbitration awards, that reasons for the officer's opinion that the work is safe be conveyed to an aggrieved employee or reported to a statutorily-designated authority. Indeed, there is no requirement for written, reasoned decisions if the officer is of the opinion that the work is safe[80]. All that can be said with certainty is that investigations, hearings and orders will have to conform with the rules of natural justice including the «duty of administrative fairness»[81], and that the orders or decisions of occupational health and safety officers remain subject to the appellate jurisdiction of the Occupational Health and Safety Council[82] and, ultimately, the Court of Queen's Bench[83].

Where a worker has reasonable cause to believe that he has been dismissed or subjected to disciplinary action for his refusal to perform unsafe work or his participation in a joint work site health and safety committee, he may file a complaint with an occupational health and safety officer under the new section 28.1 OHSA, as am[84]. This procedure may be impugned on the ground that, while the section requires an officer to receive such a complaint, it does not go further and require the officer to conduct an investigation, however perfunctory, into the complaint or to formally indicate his disposition concerning it[85]. The absence of mandatory provisions concerning investigation and disposition[86] relegate these matters to the realm of administrative discretion and relieve the officer of any obligations in that respect except those imposed by policy, courtesy and good administration.

WITHHOLDING LEGISLATIVE CHANGE

Protection against reprisals

The OHSAA, 1983 does not extend anti-reprisal protection *per se*. As a consequence, employees who attempt in good faith to enforce existing occupational health and safety law remain vulnerable[87]. What the Act does do is to prohibit employer reprisals by way of dismissal or any other «disciplinary action» against a worker who acts «in compliance with th[e] Act, regulations or an order given under th[e] Act»[88]. This formulation, therefore, continues to protect employees who are penalized for exercising any of their rights or duties under the law[89]. In addition, other activities such as participation in joint work site health and safety committees remain expressly protected against employer reprisals[90]. But a worker who otherwise raises an occupational health and safety issue may find himself without recourse if penalized by his employer. The NDP proposal in Bill 231 specifically addresses this problem and would provide a higher level of anti-reprisal protection to employees because the ambit of legislative protection would extend to situations where «...the worker has reported or intends to report to the appropriate authority conditions contravening th[e] Act, the regulations or orders given under th[e] Act[91].

Role of joint occupational health and safety committees

The 1983 amendments did not alter provisions concerning joint work site health and safety committees. Under section 25(1) they continue to exercise the following functions: (1) identifying work site situations which may be unhealthy or unsafe, (2) making recommendations for the improvement of work site health and safety, (3) establishing and maintaining educational programs for work site health and safety, and (4) carrying out duties and functions prescribed by the regulations. By contrast, the NDP proposal in Bill 231 would expand committee functions to include, *inter alia*, the investigation of unsafe work refusals under section 27 of the OHSA[92] and the right to conduct regular work site inspections[93]. This proposal to involve committees in unsafe work refusals and another proposal which would protect committee participants against employer discriminatory action by a reverse onus provision[94] are clearly patterned on the «Saskatchewan model»[95] and contemplate substantive change in Alberta's anti-reprisal protection. The proposal to provide committees with the right to conduct regular work site inspections, on the other hand, contemplates less change in existing practice. Over 134 joint work site occupational health and safety committees have already been established in Alberta by regulation[96], and given the added duty of carrying out periodic inspections at the work site[97].

Increased fines via common law

Although the OHSAA, 1983 imposed greater occupational health and safety obligations upon employers and employees, it made no attempt to raise the maximum fines provided in the principal legislation for contravention of these obligations[98]. The fines remain, in the case of a first offence, at $15 000 and, in the case of a subsequent offence, at $30 000[99]. On a comparative basis, these maximum fines place Alberta in the upper echelon of provincial formulations of maximum penalty[100]. Historically, however, fines were not imposed anywhere near these maximum levels. In 1978-79, for example, the average fine per conviction under the Alberta Act was approximately $1 400[101].

A recent and dramatic change in this judicial tendency was effected by the Ontario Court of Appeal's decision in *Regina* v. *Cotton Felts Limited*[102], a case representing the first appeal against sentence to reach a provincial appellate court under occupational health and safety legislation. In that case a workman's arm was injured by a machine's rollers and had to be amputated. The employer was charged for failing to ensure that the machine was stopped before being cleaned by the worker as required under the Industrial Establishments Regulations pursuant to Ontario's *Occupational Health and Safety Act*. After the employer pleaded guilty in Provincial Court, Dnieper J. imposed a substantial fine of $12 000, an amount well in excess of the Crown's recommendations, and in so doing the judge graphically described the conditions in the employer's premises and his reaction to them:

> The procedures that were rife in this plant were not just unsafe, they were certain to produce mutilation of a human being. The results bear out this, two men were injured. The body of one employee was repaired, the other lost an arm...
>
> Thruthfully I fail to understand how firstly, those machines had been operating for 25 years and have been cleaned for 25 years without an automatic disengagement switch on a guard. I do not know, if I might say this, I do not know how the Ministry itself permitted the operation of those machines.
>
> Indeed in all the time I have been hearing cases under the *Construction Safety Act*, and *Industrial Safety Act*, I have never run across a more unsafe situation, nor have I seen a situation that was more repeatedly and obviously unsafe[103].

On appeal, the court eschewed the employer's contention that prior lower court decisions established a substantially lower range of fines which should be observed by all judges imposing sentence under the Act[104]. Instead, it stressed the responsibility of the sentencing judge to impose a fit sentence taking into account a multiplicity of factors:

...The amount of the fine will be determined by a complex of considerations, including the size of the company involved, the scope of the economic activity in issue, the extent of actual and potential harm to the public, and the maximum penalty prescribed by statute. Above all, the amount of the fine will be determined by the need to enforce regulatory standards by deterrence.

...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.[105]

The general sentencing principles enunciated in *Cotton Felts* have been followed in Alberta and have resulted in a substantial increase in the fines imposed for occupational health and safety violations[106]. In *Regina* v. *Suncor*[107], for example, Horrocks J. expressly followed *Cotton Felts* and imposed a fine of $10 000 after a guilty plea by the corporate accused. Thus, while it can be said that the penalty provisions were unaltered by the 1983 amendments, it must be kept in mind that interim common law developments have resulted in a *de facto* quantum increase in the fines imposed by Alberta courts under the Act.

EXPANDED REGULATORY AUTHORITY

The OHSAA, 1983 expanded the Cabinet's regulatory authority to serve two main purposes, *viz.*, to further legislative consolidation and to promote greater flexibility in devising methods of complying with the principal legislation and regulations.

The five safety regulations of 1976[108] contained demonstrable overlap and redundancy. Specific changes to section 31 of the OHSA ensured the existence of sufficient regulation-making authority to permit their consolidation into the General Safety Regulation of 1983[109] as well as to permit further promulgation of the developing Mine Safety Regulation and the draft Industrial Explosives Safety Regulation[110].

Another expressed purpose of the OHSAA 1983 was to incorporate provisions of the *Coal Mine Safety Act*[111], and the *Quarries Regulation Act*[112], into new regulations under the OHSA[113]. The 1983 amendments provide that extant licensing provisions under the foregoing Acts will continue under the OHSA when a new Mine Safety Regulation is promulgated[114]. The amendments also confer upon WHSC, subject to Cabinet approval, regulation-making authority to provide, *inter alia*, for the qualifications and licensing of workers at mines and quarries[115], for the regulation of conduct, duties and responsibilities of all participants thereat[116], and for the maintenance of a registry of licensed workers, mine owners and

managers[117]. Additional regulation-making authority was also conferred in respect of a host of specific health and safety matters affecting Alberta's mines and quarries[118].

Further illustration of the legislative policy to provide increased flexibility in implementing standards is contained in the provisions for variances, exemptions and acceptances. The OHSAA, 1983 created a mechanism whereby variances to or exemption from a provision of occupational health and safety regulations can be granted by Cabinet in the form of variance or exemption regulations:

> 31(1.1) Any regulation made under subsection (1) may be made to apply generally or to a particular work site, employer, principal contractor, supplier or worker or a class of work sites, employers, principal contractors, suppliers or workers.[119]

The customary steps in the process for developing regulations would be followed in making variances or exemptions. This means that compliance would be the general rule and that the onus would be on an employer who wants an exception to establish that it is justified. Thus, the employer would initially have to petition the Occupational Health and Safety Division which would then evaluate the petition and forward its recommendation to the Minister who, in turn, would present to Cabinet his recommendation to grant or refuse the variance or exemption[120]. A precedent for this process is found in the *Coal Mine Safety Act*[121].

A new section 26.1 in the OHSA, as am., permits an employer, with the written acceptance of the Director, to employ «an alternative tool, appliance, equipment or work process at a work site»[122]. The Director may provide such written acceptance, whenever specified within a regulation, when he is satisfied that an alternative piece of equipment, work process or industrial safety code provides equal or greater protection for workers[123]. This «acceptances» program will complement the increased use of performance standards in the developing safety regulations[124] and was based upon the Occupational Health and Safety Division's belief that «...flexibility will encourage industry to develop viable alternatives to some ... regulations ... alternatives which should be acceptable within the objectives of industrial health and safety»[125].

It should be pointed out, however, that, as a matter of definition, it is certainly not clear that an acceptance cannot be a reduction in some way of existing OHSA standards. On this and similar issues Alberta's Official Opposition remains skeptical that the standards heretofore developed in the regulations under the OHSA will be maintained. In particular, the NDP

proposal in Bill 231 reflects concerns earlier expressed by the Alberta Federation of Labour[126] and indirectly attacks what its proponents view as a potential weakening of previous standards by imposing a duty upon the employer to provide a «safe and healthy workplace» in accordance with expanded definitions of «health» and «safety»:

> 2(1) Every employer shall provide a safe and healthy workplace, and, with relation to the work being carried out for the employer and work site, shall take the necessary measures to protect the health and safety of...workers...
>
> 1(e.4) «health» means
>
> (i) the promotion and maintenance of the highest degree of physical, mental, social well-being of workers insofar as the influences of the workplace are concerned.
>
> (ii) the prevention among workers of ill health caused by their working conditions.
>
> (iii) the protection of workers in their employment from factors adverse to their health, and
>
> (iv) the placing and maintenance of workers in occupational environments which are adapted to a reasonable degree to their individual physiological and psychological conditions;
>
> 1(k.1) «safety» means, with regards to the workplace, a condition in which the sum of all factors bearing on the discharge by a worker of his duties as a worker does not pose a threat to the continued well-being of the worker that is greater than any such threat that would be encountered by that worker during the course of his normal activities away from that workplace, and «safe» has a corresponding meaning.[127]

The proposal is especially noteworthy in that the notion of work stress is introduced through the concept of «individual ... psychological conditions» under «health» and in that the concept of a safety hazard is extended to include a threat to the worker's well-being that is greater than what he would encounter in normal activities away from the workplace. It is doubtful, however, whether «all factors bearing on the discharge by a worker of his duties as a worker» could, first, be measured and, second, be summed. The process of summing factors clearly ignores cancelling effects and cybernetic effects, which are so troublesome in the area of occupational health and safety.

CONCLUSION

Through recent amendments to the *Occupational Health and Safety Act* and the consolidation of occupational health and safety regulations under it, Alberta is embarking on a progressive, yet conservative, experiment which should challenge employers, workers and administrators. Key elements in the amended occupational health and safety program are the new employer responsibilities in the provision of occupational health and safety education and in the development of statements of policy and codes of practice, the new administrative procedures to benefit employers in developing and implementing, through the variance, exemption and acceptance programs, generic performance standards which will at least equal, if not better, the specific standards previously implemented under the Act and regulations, the expanded employee responsibilities in the refusal of unsafe work and the new remedial regime to enforce extant anti-reprisal protection. Equally noteworthy in the amended ocupational health and safety program is the continued de-emphasis of the role of joint occupational health and safety committees during unsafe work refusals and the failure to significantly extend anti-reprisal protection to employees. The failure to increase the statutory maximum penalties for contravention of the Act has been mitigated somewhat by the recent judicial inclination toward imposition of higher fines. This *de facto* increase should be taken into consideration in any attempt to assess the interim impact of Alberta's legislative changes on the province's industrial accident rates.

Of course, the full impact of the 1983 amendments will not be discerned until the consolidated regulations and guidelines, policy statements, codes of practice, employer educational programs and expanded worker awareness are fully operational.

NOTES

1 R.S.A. 1980, c.0-2. Hereinafter the Act, may be referred to as OHSA.

2 The Crown in Right of Alberta is bound by the OHSA: see s. 37 and various occupations have been designated as falling under the aegis of the Act pursuant to s. 31(1)(a): see Designation of Occupations Regulations, Alta. Reg. 288/76.

3 S.A. 1983, c. 39. Hereinafter the Act may be referred to as OHSAA, 1983. The 1983 amendments derive from solicited submissions, recommendations of previous commissions, Alberta litigation involving work site facilities, a joint industry — labour advisory committee (in mining) and the ongoing program of governmental legislative consolidation: see Workers' Health, Safety and Compensation, *Background Briefing Notes on Bill No. 51 — Occupational Health and Safety Amendment Act, 1983*; May 4, 1983 at p. 1.

4 These sections concern the early identification of the loci of responsibility for occupational health and safety matters and the establishment of lines of communication with Workers' Health, Safety and Compensation (WHSC), particularly on large or hazardous new projects: see *Background Briefing Notes on Bill No. 51, supra*, fn. 3 at pp. 3-4.

5 «Worker Safety Rules in Works», *The Edmonton Journal*: February 28, 1983.

6 G.A. LUCAS, «The Employer Viewpoint on Grievance Arbitration», Arbitration Conference, University of Calgary, June 8, 1983.

7 *Supra*, fn. 5.

8 *An Act to Amend the Occupational Health and Safety Act*, 1983, Bill 231, Mr. Martin.

9 *Regina* v. *Acton Developments Ltd.*, (1983), 49 A.R. 318 (Alta. Q.B.).

10 Section 1 (e)(i), (ii) OHSA.

11 Section 2(c) OHSAA, 1983 amending the definition of «employer» in s. 1(3) of the principal Act.

12 Employers that make these occupational health and safety designations may have to increase the remuneration for those positions to which these responsibilities are added.

13 Section 32(3), however, imposes a mandatory requirement that the Attorney General must sign a *fiat* when an information is to be laid under the OHSA: see *Re Quinn Contracting Ltd.*, (1982), 27 Alta.L.R. (2d) 334 (Alta.Q.B.). This represents a form of control so that WHSC and the minister are fully aware of what is taking place with respect to the prosecution.

14 The actions of managerial and supervisory personnel acting within the scope of their employment are, as a general rule, legally binding upon their employers: see 1 *Halsbury's Laws of England* (4th ed.) at para. 728ff. and authorities cited therein. Moreover, Nash argues that the interests of supervisors, in particular, may be more closely aligned with those of their employer rather than their subordinates notwithstanding that, under certain occupational health and safety statutes, they are required to inform employees about potential risks or hazards in the work place: see M.I. NASH, *Canadian Occupational Health and Safety Law Handbook*, Don Mills, CCH Canadian Ltd., 1983, at pp. 29-30.

15 The competing theory to the «man-at-the-centre» theory of accident causation is the «work-at-the-centre» theory, in which it is thought that the working environment is the root cause of the preponderance of injuries: see NASH, *supra,* fn. 14 at p. 321, note 6.

16 See, for example, G.B. RESCHENTHALER, *Occupational Health and Safety in Canada: The Economics and Three Case Studies*, Montréal, Institute for Research on Public Policy, 1979.

17 Section 2(5) and *Regina* v. *Acton Developments Ltd.*, *supra*, fn. 9. See also s. 3 of the General Safety Regulation, Alta. Reg. 448/83, which addresses the problem where operations are undertaken at a work site involving two or more employers responsible to a principal contractor who is not present. In such circumstances the latter must designate in writing a person at the work site who will ensure, on the principal contractor's behalf, compliance with s. 2 (5).

18 Section 2(f) OHSAA, 1983, amending the definition of «principal contractor» contained in s. 1(j) of the principal legislation. By contrast, the former definition was «... the person, partnership or group of persons who enter into a contractual arrangement with an employer under which workers in the employ of that employer carry out their occupations at a work site that the person, partnership or group of persons owns or for which that person, partnership or group of persons is primarily responsible».

19 *Supra*, fn. 9.

20 *Background Briefing Notes on Bill No. 51, supra*, fn. 3 at p. 2.

21 H. BUCKWALD and G. BRYCE, «Bill 51 — Occupational Health and Safety Amendment Act, 1983»; Edmonton Chamber of Commerce Labour Relations Committee, June 28, 1983.

22 (1983), 48 A.R. 368 (Alta, Q.B.).

23 See NASH, *supra*, fn. 14 at pp. 27-28.

24 The Supreme Court of Canada has recognized three categories of provincial offences according to the kind of mental element required: (1) offences requiring some positive state of *mens rea* (guilty mind); (2) strict liability offences where the doing of the prohibited act creates the offence but leaves it open for the accused to show a lack of fault, i.e., that there was some lawful excuse for his conduct such as reasonable mistake of fact or due diligence; and (3) absolute liability offences where it is not open to the accused to escape liability by showing he was free of fault: see *Regina* v. *Sault Ste. Marie*, (1978), 40. C.C.C. (2d) 353 (S.C.C.); *Regina* v. *Chapin*, (1979), 45 C.C.C. (2d) 333 (S.C.C.). It falls upon the court to categorize the offence and give effect to the legislative intent as found in the words used: *Regina* v. *Brown and Ballman*, (1982), 69 C.C.C. (2d) 301 (Alta. C.A.). The usual presumption in provincial «public welfare» enactments such as occupational health and safety legislation is in favour of strict liability offences: *Regina* v. *United Ceramics Ltd.*, (1980, 52 C.C.C. (2d) 19 (Ont. Prov. Ct.).

25 Such an inquiry would necessarily involve consideration of what a reasonable employer would have done in the circumstances: *Regina* v. *Sault Ste. Marie, supra*, fn. 24 at p. 374.

26 No specificity is provided in Alberta legislation as to the meaning of the phrase. NASH, *supra*, fn. 14 at p. 158, opines that cost would be a relevant factor and would enable an employer to exonerate himself if he could demonstrate a gross disproportion between the costs and benefits of further protection.

27 Section 3 would amend s. 2(1) of the principal legislation by providing that «Every employer shall provide a safe and healthy workplace, and, with relation to the work being carried out for the employer and the work site, shall take the necessary measures to protect the health and ensure the safety of...»

28 (1982), 52 C.C.C. (2d) 91 at p. 96 (Ont. H.C.).

29 Section 24(1)(c) provided that an employer «shall ensure» that the measures and procedures prescribed by the regulations were carried out. The Act was since repealed by s. 42 of and replaced by the *Occupational Health and Safety Act*, S.O. 1978, c. 83.

30 BUCKWALD and BRYCE, *supra*, fn. 21.

31 NASH, *supra*, fn. 14 at p. 27. See, for example, Industrial Health and Safety Regulations, B.C. Reg. 585/77, s. 8.18 which provides that «Every employer shall ensure the adequate direction and instruction of workers in the safe performance of their duties».

32 This «hands off» approach was identified as the partial cause of an alarming injury rate in Alberta's petroleum and coal mining industries during 1979-80: see NASH, *supra*, fn. 14 at p. 27.

33 Alta. Reg. 448/83.

34 Alta. Reg. 8/82.

35 *Background Briefing Notes on Bill No. 51, supra*, fn. 3 at p. 5.

36 Section 11 OHSAA, 1983 which adds a new s. 25.1 to the principal Act whereby an employer or principal contractor can be required by regulation to develop a written policy statement, state the arrangements to implement that policy and, insofar as is reasonably practicable, inform his workers of the policy.

37 Section 12 OHSAA, 1983 which amends s. 26(1) of the principal Act by providing that a principal contractor or employer responsible for a work site may be required by written order of a Director or by regulation to establish a code of practice and to supply copies of it to a Director.

38 *Supra*, fn. 35.

39 *Id.*

40 OHSA, RSA 1980, c.0-2, s. 26(1).

41 Section 12 which adds this new subsection (1.1) to s. 26 of the principal Act.

42 See, for example, s. 2(3) of the Coal Dust Regulation, Alta, Reg. 243/83. According to WHSC, codes will also be required in the developing Mine Safety Regulation and the Industrial Explosives Regulation. It is important to note in this respect that guidelines and draft codes of practice will be prepared to assist those specific industries or work processes that will require codes of practice: *Briefting Notes on Bill No. 51, supra,* fn. 3 at p. 5.

43 *Supra*, fn. 35

44 *Supra*, fn. 37.

45 Alta. Reg. 448/83.

46 It is not without significance that s. 31(1)(u) of the OHSA, as am., allows Cabinet to pass regulations concerning the posting of, *inter alia*, codes of practice. At this time regulations concerning posting of other health and safety notices and orders under s. 31(1)(u) merely requires posting «in a conspicuous place at a work site»: s. 12(1), Alta. Reg. 448/83.

47 See, for example, s. 3(2) of the Coal Dust Regulation, Alta. Reg. 243/83.

48 *Supra*, fn. 35.

49 These phrases are defined by regulation: see Designation of Serious Injury and Accident Regulations, Alta. Reg. 298/81, s. 2.

50 Section 13(1).

51 Section 10 OHSAA, 1983 amending s. 13 of the principal Act. In an effort to ameliorate the employer's burden, WHSC plans to develop guidelines for these reports and to work in co-operation with the Workers' Compensation Board to ensure that serious injury and accident reporting requirements are not duplicated: *Background Briefing Notes on Bill No. 51, supra*, fn. 3 at p. 4.

52 The collective agreement may expressly provide a right to refuse unsafe work or may impliedly provide so by resort to «just cause» provisions. For a full discussion see NASH, *supra,* fn. 14 at pp. 120-124.

53 There are general common law principles governing employer-employee realtionships which offer limited protection to workers. For a full discussion see NASH, *supra*, fn. 14 at pp. 125-126.

54 Section 27, as am. by s. 14(a) OHSAA, 1983.

55 The key point of difference distinguishing a right from a duty is that a risk of prosecution goes with the duty to refuse. And, as noted by Nash, *supra*, fn. 14 at p. 119, «[A]s some jurisdictions place more and more emphasis on the 'man-at-the-centre' theory of accident causation, it becomes increasingly likely that someone will be prosecuted as an example to others».

56 Police and firefighters are covered under the OHSA pursuant to the Designation of Occupations Regulations, Alt. Reg. 288/76.

57 See *Re Miller and Canadian National Railways*, [1980] 2 Can. L.R.B.R. 241 at p. 248.

58 Section 7, 1983 Bill 231.

59 Among Canadian provinces only Newfoundland now negatives the worker's belief: see *Occupational Health and Safety Act*, R.S.N. 1978, c. 23, s. 8.

60 [1980] 3 Can. L.R.B.R. 194.

61 *Ibid.*, at p. 208.

62 *Supra*, fn. 57 at p. 352.

63 *Supra*, fn. 14 at p. 109.

64 The Ontario Court of Appeal in *Kennedy* v. *Tomlinson et al.*, (1959), 126 C.C.C. 175 at p. 206, stated that the real test of what is meant in s. 25(1) of the *Criminal Code* (now R.S.C. 1970, c. C-34) by the words «who, on reasonable and probable grounds believes» is «whether the facts relied upon would create a reasonable suspicion in the mind of a reasonable man». In order for a person to maintain an action for malicious prosecution, the plaintiff must show that the defendant had acted without reasonable and probable cause. In this context, the

term means «an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.»: *Hicks* v. *Faulkner*, (1878), 8 Q.B.D. 167 at p. 171, as quoted with approval by the Manitoba Court of Appeal in *Henderson* v. *Bailleul*, [1927] 3 D.L.R. 374 at p. 381.

65 See NASH, *supra*, fn. 14 at p. 105.

66 Section 14(b) amending s. 27 of the principal legislation.

67 In appropriate cases, the employer might consider expediting the process by bringing in an ocupational health and safety officer to assist in inspection and formulation of corrective action.

68 Section 27(4) (a) OHSA, as am. It should also be noted that the employer is prohibited from assigning another worker to perform the impugned work unless the danger has been eliminated or the worker so assigned is not exposed to it: see s. 27(4)(b), as am. The 1983 amendments do not, however, address the issue of pay for workers deprived of work because of the refusal by another worker. *Cf.* the NDP proposal in Bill 231 which provides that «for the purpose of pay and benefits [such worker shall] be deemed to be at work for normal working hours until the issue is determined...»: s. 8.

69 The employer must prepare a written record of the orginal worker's notice, the investigation undertaken and the remedial action taken by the employer and provide the original worker with a copy: see. s. 27(4)(c), (d) OHSA, as am. There does not appear to be any requirement for the employer to document the reasoning for the action taken in addition to recording the nature of that action.

70 See the definition of «disciplinary action» in s. 1(d.1) OHSA, as am. by s. 2(b) OHSAA, 1983.

71 *Cf. Canada Labour Code*, R.S.C. 1970, c.L-1, s. 97.1 (d).

72 Section 14(b) OHSAA, 1983 amending s. 27 of the principal Act.

73 See NASH, *supra*, fn. 14 at p. 115.

74 Section 6, adding a new subsection (3) to section 7 of the principal legislation.

75 This is the effect of ss.7(3) and 28 OHSA, as am.

76 While the vast majority of grievances are initiated by unions, both parties to the collective agreement can lodge grievances.

77 See Donald J.M. BROWN, J.M. DONALD and David M. BEATTY, *Canadian Labour Arbitration,* Agincourt, Canada Law Book Ltd., 1977 et pp. 16-22. See also M.R. Grosky, *Evidence and Procedure in Canadian Labour Arbitration,* Don Mills, Richard De Boo Ltd., 1981 at pp. 113-116.

78 BUCKWALD and BRYCE, *supra*, fn. 21.

79 Section 6(1) OHSA. Although occupational health and safety officers formerly required on occasion the production of medical information pursuant to these powers, a new subsection (1.1) was added by the 1983 amendments which now ensures the confidentiality of medical records by providing that only a Director of Medical Services or a person authorized in writing by him may require the production of or examine and make copies of medical reports and records: see s. 5(b) OHSA, 1983.

80 From the Department's standpoint, however, the mechanism in practice should involve (a) investigation of a complaint by an occupational health and safety officer, (b) submission of his report to his Director, the employer and the worker, and (c) writing the appropriate order if necessary: *Background Briefing Notes on Bill No. 51, supra*, fn. 3 at p. 7.

81 For a full discussion see E.E. PALMER, *Collective Agreement Arbitration in Canada*, 2nd ed., Toronto, Butterworths & Co., 1983, at pp. 13-26 and 592-595. The «duty of administrative fairness» is essentially a restatement of the *audi alterem partem* rule of procedural fairness, which is part of the rules of natural justice.

82 Section 11(1) OHSA, as am. The Council includes representatives from labour and management and, in addition to hearing appeals under the Act, advises the minister and performs other functions assigned to it under the Act by the minister: ss. 4, 5, as am.

83 Section 11(5) OHSA.

84 This section was added by s. 15 OHSAA, 1983. As to the function of joint work site health and safety committees, see discussion *infra*.

85 There is authority to suggest that a formal disposition to make no order is itself an order and, therefore, appealable: see, for example, *Re MacFarlane and Anchor Cap & Closure Corp. of Canada Ltd.*, (1981), 33 O.R. (2nd) 317 (Ont. H.C.), where a Director's decision refusing an application to amend a control order under Ontario's *Environmental Protection Act* was held itself to be an order giving rise to a right of appeal.

86 *Cf.* New Brunswick's Occupational Safety Code Regulations, N.B. Reg. 77-1, s. 3(4).

87 NASH, *supra*, fn. 14 at p. 160, argues that «[i]deally employees should be protected against reprisals for doing anything that is a legitimate health and safety activity», and cites as ideal the Ontario formulation which protects an employee against any form of reprisal on the grounds that «the worker has acted in compliance with this Act or the regulation or an order made thereunder or has sought the enforcement of this Act or the regulations»: *Occupational Health and Safety Act*, R.S.O. 1980, C. 321, s. 24(1).

88 Sectin 28 OHSA.

89 The provision of information to occupational health and safety officers under section 6, OHSA, for example, would be a duty afforded protection.

90 Section 25(6) OHSA.

91 Section 8. *Cf., supra*, fn. 87.

92 1983 Bill 231 would require that the employer remove the grounds for refusal of unsafe work and, where an employer fails to do so, empowers a joint work site health and safety committee to determine whether or not the refusal was justified: see s. 7. The decision of the committee could then be appealed to an occupational health and safety officer.

93 Section 6.

94 1983 Bill 231 proposes an amendment to s. 28 of the OHSA which would place the onus upon an employer in all such cases of alleged discriminatory action «to show the action was taken for [other] good and sufficient reasons»: see s. 6. This would parallel what is done in grievance arbitration under collective agreements in discharge and disciplinary cases: see GORSKY, *supra*, fn. 77 at pp. 128-129.

95 *The Occupational Health and Safety Act*, R.S.S. 1978, c. 0-1, as am., ss. 24(e), 25(2).

96 Joint Work Site Health and Safety Committee Regulations, Alta. Regs. 197/77, 218/77, 306/77 and 91/78.

97 Alta. Reg. 197/77, s. 9 provides that such inspections should be carried out «at least as frequently as there are meetings of the committee». In this respect, while each committee was required to «meet initially within ten days of its establishment» and «to hold regular meetings not less than once every month» [see s. 7(1)], a department study revealed that the average time until the first meeting was 42 days, and that one-fifth had not yet met within the first two months: see Alberta Workers' Health Safety and Compensation Department, *An Initial Review of the Joint Work Site Health and Safety Committee Program in Alberta*, Edmonton, August, 1978; updated October, 1979 at p. 41.

98 *Cf.* The NDP proposal in 1983 Bill 231 which could increase the maximum fine for a first offence from $15 000 to $25 000, and for subsequent offences, from $ 30 000 to $ 50 000: see s.9.

99 Section 32(1) OHSAA. It should also be added that, in the case of continuing offences, further fines for each day during which the offence continues after the first day are provided.

100 For a complete comparative breakdown on a province-by-province basis, see NASH, *supra*, fn. 14 at pp. 128-129.

101 NASH, *supra*, fn. 14 at p. 129, citing from Alberta, Department of Labour, *Annual Report*, 1978-79, p. 87. Nor is the Alberta experience atypical; in Ontario the average fine in the industrial sector during the 1979-80 period was roughly the same: see Ontario, *Ministry of Labour Annual Report*, 1979-80, at pp. 18-20.

102 (1982), 2 C.C.C. (3d) 287 (Ont. C.A.).

103 *Ibid.*, at p. 290.

104 The attention of the Court of Appeal was drawn to a number of unreported cases decided by the same trial court judge, and also to a report of the success of subsequent appeals to the County Court. In all cases appealed, in the relevant range of fines imposed by that trial judge, the County Court reduced the fines to a third or less.

105 *Supra*, fn. 102 at pp. 290-291.

106 According to K. Tjosvold of the Attorney-General's Office, fines imposed during the first half of 1983 rose to an average between $2 000 to $2 500.

107 Unreported, May 6, 1983 in the Provincial Court of Alberta before His Honour Judge Horrocks in Fort McMurray.

108 See the General Accident Prevention Regulations, Alta. Reg. 267/76; the Safety Regulations Governing Grain Elevators, Grain Annexes, Flour Mills, Feed Mills and Seed Cleaning Plants, Alta. Reg. 268/76; the Lumbering Safety Regulations, Alta. Reg. 269/76; the Petroleum and Natural Gas Safety Regulations, Alta. Reg. 270/76; the Construction Safety Regulations, Alta. Reg. 271/76.

109 The General Safety Regulation under the OHSA comes into force on September 1, 1984 except s. 104 which comes into force on January 1, 1985 and s. 201 which has an alternate allowance until April 30, 1985.

110 *Background Briefing Notes on Bill No. 51, supra*, fn. 3 at p. 7.

111 R.S.A. 1980, c. C-15.

112 R.S.A. 1980, c. Q-1, as am., by S.A. 1983, c. 37 s. 60.

113 *Background Briefing Notes on Bill No. 51, supra*, fn. 3 at p. 1.

114 *Background Briefing Notes on Bill No. 51, supra*, fn. 3 at pp. 2-3, and s. 7 OHSAA, 1983 adding a new s. 9.2 to the principal Act conferring authority upon WHSC to cancel and suspend certificates or permits for mines and quarries.

115 Section 17 (a)(xv) OHSAA, 1983 amending s. 31(z.3) of the principal Act.

116 Section 17(a)(xviii) OHSAA, 1983 adding clause (z.7) to s. 31 of the principal Act.

117 Section 17(a)(xiv) OHSAA, 1983 adding, *inter alia*, clause (z.24) to s. 31 of the principal Act. The registry would presumably afford assitance in quasi criminal and civil litigation.

118 See, for example, s. 17(v) OHSAA, 1983 which adds regulation-making authority under s. 31 of the principal Act to require the establisment of mine rescue stations, rescue training and evacuation routes, a system of reporting unsafe conditions in mines and to govern mine ventilation, water control, lighting and the use of electricity.

119 See s. 17(b) OHSAA, 1983 which adds subsection (1.1) to s. 31 of the principal Act.

120 *Background Briefing Notes on Bill No. 51, supra*, fn. 3 at p. 8.

121 *Supra*, fn. 111, s. 52(1).

122 Section 13, OHSA, 1983.

123 *Ibid.* See also the General Safety Regulations, Alta. Reg. 448/83, s. 9.

124 See, for example, the Chemical Hazards Regulations, Alta. Reg. 8/82, s. 9.

125 *Background Briefing Notes on Bill No. 51, supra*, fn. 3 at p. 6.

126 See text accompanying fn. 7.

127 1983 Bill 231, ss. 2(a), (b), 3.

Les modifications à la loi de l'Alberta sur la santé et la sécurité au travail 1983

Les modifications apportées à la *Loi sur la santé et la sécurité au travail* en Alberta, dont l'objet est la réorientation des mesures réglementaires, sont à la fois progressives sur certains points et conservatrices sur d'autres, principalement en ce qui a trait au développement des comités de santé et de sécurité. Elles sont progressives en ce qu'elles s'efforcent de clarifier les responsabilités juridiques en matière de santé et de sécurité au travail, à favoriser une plus grande vigilance et une meilleure formation dans les entreprises et les organisations du secteur public, à assurer l'implantation de méthodes administratives plus souples et à réunir en un seul service les divers règlements.

Les éléments clés du nouveau texte sont les suivants: de nouvelles responsabilités imposées aux employeurs dans la promulgation des mesures de sécurité et des codes de pratiques, de nouvelles procédures administratives avantageuses pour les employeurs favorisant le développement et l'application, par des programmes diversifiés d'exemption et d'adhésion, des normes générales d'exécution au moins aussi valables sinon supérieures aux normes spécifiques de génie antérieurement en vigueur (et encore exigées dans beaucoup de cas), des responsabilités accrues aux salariés en ce qui a trait au refus de travaux dangereux, de nouveaux pouvoirs accordés aux inspecteurs de la santé et de la sécurité au travail leur permettant de prendre des décisions sur place au sujet de l'exécution de travaux présumés dangereux et enfin une protection quelque peu améliorée contre les mesures de représailles.

Il faut aussi noter la diminution encore augmentée du rôle des comités paritaires de santé et de sécurité au travail à l'occasion du refus des travaux dangereux et des risques contrôlés ainsi que le défaut d'assurer d'une façon valable la protection des employés contre des représailles. Le fait de n'avoir pas augmenté les amendes légales minimales dans les cas de contravention à la loi a été tempéré jusqu'à un certain point par la tendance des tribunaux à imposer des amendes plus fortes.

L'augmentation *de facto* des amendes pour contravention devrait être considérée comme un des moyens d'évaluer le résultat temporaire de ces modifications législatives sur le taux des accidents du travail en Alberta. Le résultat des modifications de 1983 ne sera pas appréciable tant que les règlements, les normes, les principes d'action, les codes de pratique, les programmes de formation du côté des employeurs et la vigilance accrue des travailleurs ne seront pas devenus opérationnels.