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Think Tank Report Critical of Federal Occupational Health & Safety Enforcement

By Cheryl A. Edwards and Shane Todd

The Canadian Centre for Policy Alternatives, an independent, non-profit research organization, has released a report titled "Success is No Accident: Declining Workplace Safety Among Federal Jurisdiction Employers"¹ (the "Report"), criticizing the federal government's efforts to ensure the health and safety of workers in the federal jurisdiction. It is still too early to determine the full implications of the Report; however, federal sector trade unions and workers' rights advocacy groups are likely to use the Report to lobby for reform in monitoring, inspection and enforcement of federal workplace health and safety. If they are successful, this Report could provide the basis for the next significant evolution in workplace health and safety enforcement in Canada.

KEY FINDINGS OF THE REPORT

The Report relies on interviews with Labour Affairs Officers (LAOs), federal sector health and safety inspectors, and key statistics, such as workplace injuries and fatalities, to show that while the provinces have been successful in creating safer workplaces, workplace injuries in the federal sector appear to be on the rise. The Report points to important systemic differences in the way federal workplaces are regulated to account for the disparity. It recommends, among other things, more proactive enforcement and harsher penalties for federally regulated employers who are governed in occupational health and safety matters under Part II of the *Canada Labour Code* (the "Code.")²

FATALITY AND INJURY RATES ARE ON THE RISE

A key finding of the Report is that fatality and injury rates in the federal sector are on the rise. The Report notes that fatality and injury rates in the provincial sector have declined 25% from 2002 to 2007 while federal injury rates have risen 5% over the same time period.³ ►

The increase is particularly startling in light of the fact that almost half of federal sector workers work for the federal government or in the banking industry and 76% of those workers work in office settings which generally have lower fatality and injury rates.⁴ The Report highlights the significant rates of disabling injuries in the road and air transportation sector, and postal delivery sector. The Report attributes these statistics to a failure in federal health and safety enforcement. Unlike provincial occupational health and safety authorities, federal enforcers have not made concerted efforts to target high risk workplaces, set workplace injury reduction targets, and hire more inspectors to inspect workplaces and enforce the health and safety provision in Part II of the *Code* to, as the Report's author puts it, "keep offending employers in line."⁵

FEDERAL INSPECTORS ARE "OVERWORKED AND UNDERPAID"

This failure in federal occupational health and safety enforcement is found to be due, in part, to overburdened LAOs. LAOs are charged with providing preventative services, such as education and monitoring, as well as performing enforcement functions in the federal sector. The Report notes that in 2008, there were just 128 LAOs responsible for monitoring and inspecting federal workplaces where over one million workers work.⁶ This understaffing has resulted in very low inspection rates. Only 16% of federal workplaces classified as very high risk received two inspections per year and only 10% of federal workplaces classified as high risk received one inspection per year as mandated by Labour Program guidelines.⁷

Chronic understaffing is particularly dangerous under the voluntary compliance model adopted by Human Resources and Skills Development Canada (HRSDC) because in order to ensure compliance with an Assurance of Voluntary Compliance (AVC), a document that identifies a health and safety violation and the steps that the employer volunteers to take to rectify the situation, the preferred method of enforcement, LAOs must re-attend at the workplace. According to the Report, this important follow-up step often does not occur because LAOs are understaffed and overworked.

In addition to being understaffed, the Report notes that LAOs are underpaid relative to other safety professionals. In fact, 91% of Canadian safety professionals earn more than the best paid LAOs.⁸ Even when compared against safety professionals in the public sector, LAOs are reported to be among the 12% of worst paid.⁹

FEDERAL REGULATOR PROMOTES VOLUNTARY COMPLIANCE TO DETRIMENT OF ENFORCEMENT

LAOs interviewed by the Report's author, attributed lax enforcement of health and safety standards and the rise in fatality and injury rates, in part, to HRSDC's "client-centric" approach to health and safety enforcement. The "client-centric" approach strives to convince employers to voluntarily comply with health and safety obligations, rather than by coercing employers through other methods such as prosecution. The Report suggests that while the "client-centric" approach is valuable in some situations, fostering voluntary compliance must be coupled with preventative inspections and harsh enforcement penalties, particularly for repeat offenders and high-risk workplaces.

According to the Report, LAOs who seek to move from voluntary to coercive compliance measures face resistance from HRSDC officials. HRSDC encourages LAOs to issue numerous AVCs rather than issuing a Direction, a legally binding order requiring the employer to take some action, which may lead to a prosecution. This is because HRSDC's performance metrics view coercive measure such as issuing Directions and prosecuting employers as failures of the "client-centric" voluntary compliance model. As a result, LAOs who seek to move to coercive compliance measures often lack the support of HRSDC officials.

ADDITIONAL NOTEWORTHY DIVERGENCES BETWEEN PROVINCIAL AND FEDERAL ENFORCEMENT

While the Report highlights several systemic differences in workplace health and safety enforcement between the federal and provincial sectors, there are at least three additional differences not considered by the Report that warrant comment. These additional differences have long been evident to federal sector employers and legal professionals who practice in the federal sector.

As noted in the Report, prosecutions in the federal jurisdiction under the *Code* are relatively rare and occur primarily after very serious, often fatal, workplace accidents occur. What the Report does not note is that when these prosecutions do occur and convictions are obtained, the penalties imposed are far smaller than those imposed in provincial jurisdictions. In Alberta, for example, fines equal to, or in excess of, \$300,000 have regularly been imposed between 2006 and 2009.¹⁰ In one recent case, the



court imposed a fine of \$375,000 after two workers were fatally injured when a welding torch ignited vapour from a leaking propane cylinder inside a metal shipping container.¹¹

In Saskatchewan, fines equal to or in excess of \$200,000 have been imposed in 2008 and 2009.¹² The Potash Corporation of Saskatchewan, for example, was recently fined \$420,000 after a worker was killed when the jeep he was driving went over an unmarked ledge in a mine.¹³ In Ontario, fines have been even more substantial. In a recent decision, Ford Motor Company of Canada was fined \$850,000 after two workers were killed in separate workplace accidents, both involving being struck and crushed by lift trucks.

In contrast, fines in the federal sector are modest. The *Code* provides for a maximum fine of up to \$1,000,000.¹⁴ In practice, however, while fines have increased somewhat in recent years, they rarely exceed \$200,000 and then only in the most serious workplace accidents involving a fatality. To date, only three fines in excess of \$200,000 have been imposed in the federal sector. Further, the highest fine imposed in the federal sector is modest compared to provincial jurisdictions. The record federal jurisdiction fine of \$280,000 was imposed in 2009 following a double fatality in which two workers were asphyxiated in an oxygen deficient atmosphere.¹⁵ In contrast, fines approaching the maximum allowable fines are not uncommon in Alberta, Saskatchewan and Ontario, particularly for repeat offenders.

A second notable difference between federal and provincial enforcement agencies is the method used to publicize workplace accidents and enforcement decisions. In all provincial jurisdictions, information about convictions under workplace health and safety legislation and the fines imposed is now prominently published. In Ontario, convictions under the *Occupational Health and Safety Act* are regularly announced in press releases and the press releases themselves are published on the Ministry of Labour's website.¹⁶ Saskatchewan follows the same process.¹⁷ In all other provincial jurisdictions, information about convictions is available on the regulator's website. In the federal sector, convictions are only briefly noted at the end of the Liaison Bulletin, a periodic, electronic publication of HRSDC. This distinction may reflect HRSDC's preference for voluntary compliance compared to the provinces' more coercive approach which favours the general and specific deterrence of a widely publicized conviction.

A third distinguishing feature of federal versus provincial sector

enforcement is that individuals are rarely charged for violations of the health and safety provisions contained in Part II of the *Code* and the *Canada Occupational Health and Safety Regulations*.¹⁸

In theory, the *Code* is sufficiently inclusive to charge individuals. It provides that "any person" who violates Part II of the *Code* can be held liable.¹⁹ In practice, usually only employers are charged. At the provincial level, individuals, including supervisors, directors and officers, are frequently charged along with corporate employers and constructors. In Ontario, individual directors have received penalties as high as \$50,000. In Alberta, an individual member of the Board of Directors of Western Biodiesel Inc. was recently charged after a worker was killed in an explosion that occurred while he was welding a biodiesel tank.²⁰

The method of charging individuals varies from jurisdiction to jurisdiction. In Ontario, the *Occupational Health and Safety Act* has specific provisions that allow for individuals to be charged. In other jurisdictions, the definition of employer is broad enough to include supervisors and officers and directors, and as a result, individuals are charged under the employer provisions of health and safety legislation. Whatever process is followed, the prospect of personal liability creates an incentive for supervisors, officers and directors to take an active role in workplace health and safety and also acts as a general deterrent to noncompliance.

THE LIKELIHOOD OF REFORM

Although the Report recommends specific changes to health and safety enforcement in the federal jurisdiction, it is unclear at this early stage what, if any, reform will actually occur. However, organized labour and workers' advocacy groups have already demonstrated that they intend to use the Report to push for improvements in workplace health and safety in federal workplaces. Just days after the Report was released, several organized labour and workers' advocacy groups issued press releases about the Report. For example, the Public Service Alliance of Canada, which represents workers in the federal public service, issued a press release asking the federal government to ensure that LAOs receive their proper compensation and that the government commit to reducing workplace injury rates by 20% within the next five years.²¹

While it is too early to determine the precise shape of any

potential reforms, given organized labour's early attempts to rely on the Report to advocate reform, the federal government will certainly be under pressure to increase health and safety

enforcement. This Report may be the beginning of the next significant change in workplace health and safety enforcement in Canada. ■

ENDNOTES

- ¹ David MacDonald, "Success is no Accident: Declining Workplace Safety Among Federal Jurisdiction Employers" (April 2010) online: Canadian Centre for Policy Alternatives <http://www.policyalternatives.ca/sites/default/files/uploads/publications/reports/docs/Success%20Is%20No%20Accident_0.pdf>. ["*Success is no Accident*"]
- ² R.S.C. 1985, c. L-2 ["*Code*"].
- ³ *Success is no Accident*, *supra* note 1 at page 3.
- ⁴ *Success is no Accident*, *supra* note 1 at page 7.
- ⁵ *Success is no Accident*, *supra* note 1 at page 23.
- ⁶ *Success is no Accident*, *supra* note 1 at page 4.
- ⁷ *Success is no Accident*, *supra* note 1 at page 15.
- ⁸ *Success is no Accident*, *supra* note 1 at page 13.
- ⁹ *Success is no Accident*, *supra* note 1 at page 13.
- ¹⁰ Alberta, Ministry of Employment and Immigration "Alberta OHS Prosecutions Penalties Summary 2004-2009", online: Government of Alberta <<http://employment.alberta.ca/SFW/5538.html>>.
- ¹¹ Alberta, Ministry of Employment and Immigration "Convictions under the *Occupational Health and Safety Act* and the *Employment Standards Code* – 2010 Convictions," online: Government of Alberta <<http://employment.alberta.ca/SFW/6752.html>>.
- ¹² Saskatchewan, Ministry of Advanced Education, Employment and Labour "Enforcement, Accountability and Performance Measures" online: Government of Saskatchewan <<http://www.aeel.gov.sk.ca/enforcement-accountability>>. Saskatchewan, Ministry of Advanced Education, Employment and Labour, News release "Pcs Lanigan Pleads Guilty to OHS Violations in Workplace Fatality" (15 March 2010), online: Government of Saskatchewan <<http://www.gov.sk.ca/news?newsId=de0ea46b-560f-46e7-840b-aa1ec594a959>>.
- ¹³ *Code*, *supra* note 2, ss.148(2).
- ¹⁴ Canada, Human Resources and Skills Development Canada "Liaison Bulletin No. 78" (June 2009) online: HRSDC <http://www.hrsdc.gc.ca/eng/labour/health_safety/liaison/78.shtml>.
- ¹⁵ Ontario, Ministry of Labour, "Court Bulletins," online: <<http://www.labour.gov.on.ca/english/news/courtbulletins.php>>.
- ¹⁶ Saskatchewan, Ministry of Advanced Education, Employment and Labour "Enforcement, Accountability and Performance Measures" online: Government of Saskatchewan <<http://www.aeel.gov.sk.ca/enforcement-accountability>>.
- ¹⁷ SOR/86-304.
- ¹⁸ *Code*, *supra* note 2, ss. 148(2).
- ¹⁹ Alberta, Ministry of Employment and Immigration "Charges under the *Occupational Health and Safety Act* and the *Employment Standards Code*," online: Government of Alberta <<http://www.employment.alberta.ca/SFW/6751.html>>.
- ²⁰ Public Service Alliance of Canada, News Release, "Harper government is endangering workers' health and safety" (28 April 2010), online: <<http://www.psac-afpc.org/news/2010/releases/20100428-e.shtml>>.



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