SUBMISSION

BY

THE ONTARIO FEDERATION OF LABOUR

ON THE

MINISTRY OF LABOUR

CONFINED SPACE REGULATION

June 2005

The Ontario Federation of Labour (OFL) is the central labour organization in the province of Ontario. It has an affiliated union membership of over 700,000 members from all regions of the province. With most unions in Ontario affiliated, membership includes nearly every job category and occupation.

We supported the original concept of having one confined space regulation for all Ontario workplaces. We are disappointed that the MOL feels it was unable to move forward with a harmonized regulation. The current MOL plan to replace the confined space provisions in each sector regulation and one generic version for the remaining Ontario workplaces not specifically covered by a sector regulation creates new issues. The definition of "adequate" will not be limited to the confined space provisions but will apply to the whole of the industrial, mining and health care sector regulations.

The definition of "acceptable atmospheric levels" is distinctly different for the confined space requirements in the construction sector regulations than for the confined space requirements in all the other sector regulations and the generic version.

We were also led to believe that only the wording in the confined space provisions for construction would be different and the confined space provisions for each of the other sectors and the generic requirements would be identical. We find that this is not the case.

The term "competent worker" which has been used and defined in the construction regulations is now being proposed for the confined space provisions under all the other confined space requirements except for mining.

We do not support the use of "competent worker" for the industrial, health care and generic provisions. The language used should be consistent as follows, " a person with adequate knowledge, training, and experience."

The introduction of "competent worker" was opposed by labour early in our discussion with the MOL on this issue. The term was removed then but has now been reintroduced. This is completely inappropriate as the use of this term has serious implications. If the MOL feels the use of this term should be introduced into the other sector regulations, it should be raising this issue in face-to-face discussions so we can discuss the ramifications. The MOL should not be trying to slip this term in at the 11th hour.

Definitions

"adequate"

We have, in past comments around the proposed confined space regulation, expressed our concern about this definition. The latest proposed changes will make this definition apply to a number of the sector regulations in their entirety. We do not support the introduction of this definition into the sector regulations. The words "adequate" and "sufficient" are interchangeable. There is no measure against a known standard with these words, but in terms of a scale of what provides protection to workers, we suspect that these words are at the lower end.

Under the Act employers are held to a known standard. It is found in Section 25 (2)(h). There should not be any suggestion that the standard is somehow watered down in this regulation with words like “adequate” and “sufficient”.

As a minimum, paragraph (b) in this definition should read “takes every precaution reasonable to protect a worker from occupational illness or occupational injury”.

Similar language is already in place in the DSRs to reinforce this employer obligation.

If the MOL is not prepared to address our concern regarding this definition then no definition for “adequate” should be provided.

“assessment”

We continue to maintain that what the Ministry is proposing here is not an appropriate definition. This definition should explain that “assessment” is the act of inspecting, determining, recognizing and evaluating potential hazards.

“atmospheric hazards”

The definition for “atmospheric hazards” references “insufficient or excessive oxygen content in the atmosphere.” There is no definition for what is “insufficient or excessive” so they are left open to interpretation.

The definition for “acceptable atmospheric levels” provides lower and upper limits for oxygen content. We feel that paragraph (a) in the definition should be reworded as follows:

> “atmospheric hazards” means
>
> (a) an oxygen content in the atmosphere that is not within acceptable atmospheric levels

This would make it clear that if the oxygen is not within the limits provided for under the definition of “acceptable atmospheric levels” then it becomes an “atmospheric hazard”. There is no need for further interpretation.

“confined space”

The new definition for “confined space” still places restrictions on what will be considered a “confined space”. This will eliminate some locations from the protection provided by this regulation. This amendment places the lives of workers at risk and is not acceptable. Paragraph (a) should be deleted. The definition will then read as follows:

> “confined space” means a fully or partially enclosed space in which atmospheric hazards may occur because of its construction, location or contents or because of work that is done in it.

Construction

The definition of "acceptable atmospheric levels" is distinctly different for the confined space requirements in the construction sector regulations than for the confined space requirements in all the other sector regulations and the generic version.

While workers in all other occupational sectors covered under the Act have legislated occupational exposure limits that will apply in the confined space, the MOL is proposing to discriminate against workers in the construction sector. Under the proposed confined space amendments these workers can be exposed to toxic substances up to the point below where the concentration could "result in acute health effects that pose an immediate threat to life." As long as the exposures are below this point of being an immediate threat to life the exposures are defined as "acceptable atmospheric levels."

It is simply not appropriate to allow construction workers to be exposed to toxic substances at levels that would be illegal for any other worker.

In addition, there are any number of substances for which excessive exposures can have a delayed-onset toxic effect or otherwise serious impact to health and life. Some examples include welding fumes, hydrofluoric acid mist (diluted), acetonitrile and organophosphate pesticides. Then there are the long term health consequences of excessive exposures from work in confined spaces.

Equality before and under the law and equal benefit of the law without discrimination is guaranteed by Section 15 of the Canadian Charter of Rights and Freedoms.

It is the opinion of the Ontario Federation of Labour that the equality rights under Section 15 of the Canadian Charter of Rights and Freedoms is being violated by the Ontario Ministry of Labour by denying workers in the construction sector a statutory protection enjoyed by other occupational groups in Ontario.

Further, the OFL feels that there is a positive obligation on the Ontario government to provide legislative protection of occupational health hazards for workers in the Ontario construction sector equal to that provided to other occupational groups in Ontario.

Section 1 of the Charter does allow some limits to the guaranteed rights. That section reads as follows:

> "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

We would argue that excluding workers in the construction sector from the legislated occupational exposure limits enjoyed by other occupational groups is not a "reasonable limit" nor can it be "demonstrably justified in a free and democratic society."

Now that the MOL is aware of the problem, we hope that the senior levels of the Ministry will exercise due diligence and reasonable care and begin working in good faith to see that draft legislative changes which will provide workplace health protection equal to that provided to other occupational groups in Ontario is developed. The Ontario government should then follow through on its obligation to provide this legislative protection for workers in the construction

and building trades by enacting the changes into law.

Consultations

We do not know who in the construction sector unions the MOL was consulting with, but in conversations the OFL has had with some labour representatives in this sector, it is clear that they feel their organizations were not adequately consulted. We understand that the union representatives in the construction sector have asked for more time to review and consult on this latest construction version of the confined space regulation. The OFL supports this request.

Program

In the new draft there is now a requirement to consult with the Joint Health and Safety Committee (JH&SC) or representative in the development and maintenance of the program. Unfortunately a requirement that a copy of the program be provided to the JH&SC or representative which was in the previous draft has now been removed.

This amendment also has the effect of allowing workers where there is no JH&SC or representative, access to a copy of the program, but workers where there is a JH&SC or representative will not have that access.

So the JH&SC or representative is not entitled to a copy of the program and the workers where a JH&SC or representative exists are not entitled to access to a copy. This makes no sense. Employers should be required to both consult and provide a copy to the JH&SC or representative.

Assessment

For this regulation to be effective, there must be consultation with the JH&SC or representative as applicable on this issue. Consultation must be done with the initial assessment and with all reviews thereafter.

Reviews should be required annually and whenever there is a change of circumstances that may affect the safety of workers entering or working in any confined space.

Plan

The plan should be prepared in consultation with the JH&SC or representative. The employer should be required to review the plan in consultation with the JH&SC or representative annually and whenever there is a change of circumstances that may affect the safety of workers entering or working in any confined space.

Sub-section 6(2) allows for one plan for two or more confined spaces. We understand that there are some occasions where one plan could be appropriate. We do feel, however, that the wording needs to be stronger or employers will see it as a loophole to create one plan inappropriately. This loophole could place the lives of workers in danger.

We suggest the following wording for the first two subsections:

(1) The employer shall ensure that a written plan for hazard control and worker

protection, consistent with the program under subsection 4(1), is developed and implemented in consultation with the committee or the representative for each confined space in the workplace that workers may be required to enter.

(2) One plan may deal with two or more confined spaces that are of similar construction and present the same potential hazards.

On-site Rescue Procedures

Our concern regarding the requirement to have a practice drill to ensure the rescue procedures work as intended has not been addressed. We still feel that these procedures must be developed in consultation with the JH&SC or representative.

Attendant

There should be an addition to require a test of the communications device to ensure it is in good working order prior to the worker entering the confined space.

Explosive and Flammable Substances

20(1) does not address the issue of a flash fire from flammable dust covering the surfaces of the confined space.

Some gases are heavier than air. A measurement taken at waist height may not register the explosive level at the floor level.

During cold work, static electricity or sparks from steel tools or from electric tools can ignite localized gases or vapours. Only non-sparking tools should be used in a confined space where flammable or explosive gases, vapours or liquids are present.

Electrical Tools

We have argued in past submissions that all electrical tools and equipment must be protected by an approved ground fault interrupter (GFI). This is most important if they are used under wet conditions in a confined space. This, for the most part, is now addressed by the requirements found in the individual sector regulations where the confined space requirements will remain.

Unfortunately this is not specifically covered in the generic confined space regulation or the mining regulation. The MOL will need to rely on the general duty clause under the Act to ensure employers provide this protection to workers. Reliance on this clause was something the MOL has been trying to move away from by first trying to develop a harmonized confined space regulation and more recently establishing a generic regulation to cover those workplaces not covered by a sector regulation. The issue of GFI for confined space provisions in the generic and mining provisions needs to be addressed.

Hot Work

We still feel that the following provisions should be added to this section:

Torches and hoses used for welding, brazing or cutting must be

inspected and tested for leaks prior to entering a confined space and must be removed from a confined space when not in use and when the confined space is vacated;

A cylinder of compressed gas is not permitted inside a confined space, except for a cylinder of compressed air supplied to a respirator, medical resuscitation equipment, handheld aerosol spray containers or fire extinguishers.

Records

We feel very strongly that the training and air sampling records should be retained for more than just one year. This is most important for the exposure records where we feel they should be maintained for a period of 40 years. The air sampling records are very important for compensation purposes. We have seen too many of our members denied compensation because the employer had disposed of the evidence needed. That being the exposure records.

Respectfully submitted by,

THE ONTARIO FEDERATION OF LABOUR

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