

**SUBMISSION  
TO THE  
MINING HEALTH, SAFETY  
AND  
PREVENTION REVIEW**

**BY  
THE ONTARIO FEDERATION OF LABOUR**



**June 2014**

# Mining Health, Safety and Prevention Review

## INTRODUCTION

The Ontario Federation of Labour (OFL) is the central labour organization in the province of Ontario. It has an affiliated union membership of 1,000,000 members and 54 unions from all regions of the province. With most unions in Ontario affiliated, membership includes nearly every job category and occupation.

As a province-wide central labour body, the OFL works to develop and coordinate policy as passed at our conventions and by our executive bodies. One of the key roles of the OFL is to try to influence public policies that affect all working people, their families and their communities. One of the most important areas of public policy that we try to influence is the prevention of work-related injuries and illnesses.

It is important for us to provide an overview of how we came to be participating in this review. In June 2011, two workers at the Stobie Mine near Sudbury, owned by multi-national mining company Vale Canada, were killed when a “run of muck” came crashing down and engulfed them. Within days of the tragedy, the OFL called on the Sudbury Chief of Police to conduct an investigation based on the Bill C-45 *Criminal Code* provisions.

The OFL also supported the USW’s call for a public inquiry into the safety of Stobie and other Ontario mines and for a ministerial committee to review current Health and Safety legislation and enforcement. Our calls were not heeded.

In a plea deal the USW referred to as a “betrayal” the company pled guilty to three violations of the Occupational Health and Safety Act and received a fine of \$350,000 for each count. This was far short of the \$500,000 they could have received for each count.

No criminal charges were brought by police despite the evidence exposed by the USW investigation that the company willfully violated the legislation and ordered protective barriers removed. In letters sent in September to Ontario’s Attorney General (AG) and Minister of Community Safety and Correctional Services (MCSCS) the OFL demanded answers as to why the Canadian managers of Brazilian mining giant Vale were not criminally charged for the deaths of the two miners.

Instead of a public inquiry mine workers received this ministry led review. It is important that labour’s view be taken seriously.

We welcome the opportunity to provide comments to the Review.

## The Role of Health and Safety System Partners

The Ministry of Labour (MOL) is the only “partner” that can enforce the Occupational Health and Safety Act. How the Ministry carries out this role impacts on the ability of the other partners to succeed in their roles. According to the MOL:

*...the ministry's mandate is to set, communicate and enforce workplace standards while encouraging greater workplace self-reliance. The Ministry also develops, coordinates and implements strategies to prevent workplace injuries and illnesses and can set standards for health and safety training.<sup>1</sup>*

It is Labour's conviction that a dedicated enforcement function based on clear policies can bring about much needed improvements and enhance the internal responsibility system (IRS). It is our view that a highly visible and enforcement mandated inspectorate is a key factor for positive health and safety performance.

Further, it is labour's position that the enforcement system should **drive** the IRS. The IRS should not drive the enforcement system. For a more detail look at labour's position on enforcement see, Labour's Program for an Effective Enforcement System in the appendix.

Labour had presented concerns to the Expert Panel<sup>2</sup> in 2010. In their report it stated:

*Labour stakeholders expressed concerns that inspectors did not sufficiently focus on enforcement action on some specific areas of non-compliance. They identified the areas of training and compliance with JHSC and Health and Safety Representative sections of the Act as requiring consistent enforcement.*

The panel looked at the issue of enforcement and made a number of recommendations dealing with enforcement and penalties including:

### *Recommendation 25*

*The Ministry of Labour should review its current enforcement policy and supports for inspectors with a view to creating a consistent approach of tough enforcement for serious and wilful contraventions, as well as compliance assistance where guidance and support for employers help achieve compliance.*

The intent of the compliance assistance is not a replacement for enforcement but an additional tool for inspectors to provide advice in non-complex situations on how an employer can achieve compliance with an order from the ministry inspector.

Other recommendations by the panel dealt with using ticketing as a way of enforcing violations that undermine the IRS and introducing Administrative Monetary Penalties for high risk contraventions.

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<sup>1</sup> <http://www.labour.gov.on.ca/english/about/index.php>

<sup>2</sup> Expert Advisory Panel on Occupational Health and Safety, December 2010

The government has committed to acting on the recommendations and should move forward on them.

The other two “partners” labour has the greatest interest in are the Occupational Health Clinics for Ontario Workers (OHCOW) and the Workers Health and Safety Centre (WHSC). Both of these labour endorsed organizations have unique and important roles to play in assisting workers and their representatives to reduce the human toll caused by work related injuries and illnesses.

Both of these organizations have made presentations to this review. We will not duplicate an explanation of those roles or how the workers and their representative have come to rely on their services. We will defer to their presentations.

Labour supports a stronger role in the system for both organizations which requires additional resources. Labour also supports the autonomy of these organizations so they can continue to meet labour’s priorities.

On the question of system resources, the system is starved for resources years of cuts and budgets flat lined have undermined the entire system. One way to increase the resources is by acting on the Expert Panel recommendation on Administrative Monetary Penalties. Monies collected can be rolled into the system unlike monies collected from tickets and court fines.

Additionally many Ontario employers are not required to pay into the WSIB. Many of these employers are provincially regulated and subject to the Occupational Health and Safety Act and enforcement by the ministry. These employers therefore are not paying their fair share. They are not paying for the administration of the act or for any of the resources in the prevention system.

In Ontario, WSIB coverage is by inclusion. Unless the nature of an employer’s business is listed in one of two Schedules to the *Workplace Safety and Insurance Act*, there is no requirement for the employer to obtain WSIB coverage (although employers can choose to obtain coverage by application).

This basic model goes back to the original legislation passed in 1915. Although the schedules have been modified since then, they can hardly be described as up-to-date. Thus, employers who manufacture cheese boxes, butter churns and “spokes and hubs for wooden vehicles” are still subject to mandatory WSIB coverage.<sup>3</sup> Software developers and call centre operators, however, are not.

The schedules have always left out a significant portion of Ontario’s economy. The most significant omissions include professional offices (accountants, doctors, lawyers, management consultants, architects, etc.), banks and insurance companies, real estate

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<sup>3</sup> O.Reg. 175/98, Sch. 1, Class D, 3(i).

offices and privately funded schools, as well as non-government-run daycare centres, home nursing and attendant services and child welfare services. In addition, many other smaller industries and workers are non-covered. A list of non-covered industries provided by the WSIB to the OFL runs to twenty pages.<sup>4</sup>

The WSIB commissioned Brock Smith to do an extensive review of the issue of coverage which showed 38% of workers in the province not covered and recommended full coverage<sup>5</sup>. This was accepted by the Board of Directors of the WSIB in 2003. That report has since been ignored to the detriment of many workers who have become injured and left on their own, many without benefits, left to rely on social assistance and the public health care system picking up the costs of their healthcare. This is an unfair burden on society.

Brock Smith carried out stakeholder consultations during the review. Labour's position then<sup>6</sup> and now regarding coverage is clear, all workers, regardless of where they work or how they earn a living, should be covered by the *Workplace Safety and Insurance Act*.

A 2003 report by Douglas Hyatt from the Roman School of Business states that if the 1.3 million workers not covered by the system were brought in it would add an additional \$200 million plus to the Board's finances annually<sup>7</sup>. The report also concluded there would be no discernible negative impact to Ontario's economy. Mandatory coverage would add premiums to the WSIB and would help spread the risk among a larger pool of employers in exchange for full no fault coverage and a level playing field in Ontario. Many of the employers currently not covered would be assessed at a low premium rate which in turn would lower Ontario's average premium rate.

As well, the Expert Panel stated under Additional Issues:

*While it was recognized that WSIA coverage was not considered to be within the Panel's scope, this issue was raised on several occasions by stakeholders during the consultation. The Panel heard that an estimated 38% of the Ontario workforce is not covered by the WSIA. It was argued that because the OHS system is funded through WSIB premiums, many employers are not paying their share for prevention and enforcement.*

Further, since the Ministry of Labour uses WSIB data to target enforcement initiatives, many of these workplaces are not even on the radar of the Ministry, leaving workers in these sectors vulnerable.

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<sup>4</sup> WSIB, *Non-Covered Industries (Excluded and Omitted)*, March 23, 2006

<sup>5</sup> Final Report, Coverage Under the WSI Act Report to Board of Directors, Brock Smith, October 8, 2002

<sup>6</sup> **Error! Main Document Only.** Submission on the WSIB Consultation on Coverage by the Ontario Federation of Labour March 7, 2002

<sup>7</sup> Workplace Safety and Insurance Act Coverage Study, Douglas Hyatt, November 2003

The Ontario government should change the Workplace Safety and Insurance Act to extend full coverage to all employers in Ontario.

This would add additional resources to the system which would be available to:

- increase the budgets of OHCOW and WHSC,
- provide more funds for improving the training and skills of inspectors in the mining sector,
- provide more funds to hire technical experts in the mining sector to assist MOL inspectors,
- increase the number of inspectors,
- add the necessary occupational hygienists, occupational health nurses.

As well as re-establishing the mining master file, chest x-ray program to address the serious issue of occupational disease in this industry. Occupational disease is not being eliminated in this sector - it is only now going under-reported.

The planned "Ring of Fire" in Northern Ontario will create a demand on the MOL that we fear will exceed the ministry's ability to meet the demands that this initiative will create. The increase in the number of mines, the shift to more mines having 'fly-in' access only and the distance between mines will all tax the MOL's resources. The geographic region of Northern Ontario is larger than some European countries. More inspectors will be needed. We do not want to return to the day when we witness 20 to 30 mining fatalities a year.

### **The Internal Responsibility System**

The approach advocated by Ministry of Labour policy-makers is based on blind faith in the IRS as the fundamental mechanism to achieve compliance. While the IRS and the notion of "self-compliance" is a worthy ideal, it lacks the appropriate legal mechanisms that fully empower workers to influence decisions about health and safety issues.

It's not that labour is opposed to internal responsibility, we were negotiating joint health and safety committees in our collective agreements before they were required by law, the point is that Labour does not agree with the MOL's interpretation of IRS. That interpretation is moving to one of an individual responsibility system.

This shift results in a blame-the-worker mentality and supports employer efforts to introduce Behaviour Based Safety (BBS) programs in the workplace.

BBS programs are a recent twist on the old Myth of the Careless Worker. This myth first became popular with employers in the 1930's when an insurance investigator reviewed accident reports written by supervisors. Not surprisingly most placed the blame for the accident on the worker. From this the myth of the careless worker was born. BBS programs focus on the actions of the worker that preceded the accident rather than looking at root

causes such as poor workplace design, lack of training, understaffing, etc. BBS programs typically have supervisor and co-workers assigned to watch workers and note when they commit an unsafe act or perform a safe behaviour.

BBS is in conflict with the more modern and realistic prevention strategy of the hierarchy of control principle which calls first for controls at the source, such as use of engineering controls, substitution of toxic materials, etc; then controls along the path such as local ventilation; then using personal protective equipment and administrative controls.

The most appropriate place to focus behaviour modification is on those employers who continue to place workers in harm's way.

One of buzz phrases labour has been hearing from the ministry is the term "safety culture". Once again we could support a safety culture that speaks to a robust system that sees employers taking their responsibilities seriously, that provides for a meaningful role for workers individually and collectively, that allows workers to raise concerns without fear of reprisal, etc. We do not support safety cultures that seek to blame the workers for their injuries and illnesses. We have seen in some of our workplaces that the development of a "safety culture" is just another tactic to introduce BBS programs into the workplace.

Many have provided interpretations on what James Ham intended when he shared his vision of an internal responsibility system for the performance of work<sup>8</sup>. We think that Paul. C Weiler Professor of Law Harvard Law School got it right when he wrote,

*...into the "internal" responsibility model which Bill 70 set out to nurture within the enterprise itself. The centerpiece of this regime is the joint labour-management safety committee, which is designed to elicit the efforts of both manager and worker (and trade union, where there is one) in identifying and reducing the hazards of the workplace.<sup>9</sup>*

Those who interpret the IRS as an individual system ignore Ham's own words:

*the worker as an individual and workers collectively in labour unions or otherwise have been denied effective participation in tackling problems thus the essential principle of openness and natural justice have not received adequate expression.*

*The worker, the shift boss, the union, and management must work together to restore a sense of mutual responsibility for working conditions.*

Ham also recognized the weakness of the IRS he envisioned. He stated:

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<sup>8</sup> Report of the Royal Commission on the Health and Safety of Workers in Mines, James M. Ham, June 1976

<sup>9</sup> Protecting the Worker from Disability: Challenges for the Eighties, Paul. C Weiler, April 1983 Pg109

*The self-regulatory approach to problems of health and safety for workers, whatever the quality of its general performance, has a fundamental weakness or incompleteness. Not all management in Ontario mines have seen, or are likely to see, collective interest as corresponding to self-interest. A well-informed Mines Inspection Authority is necessary on several grounds, but in particular to discern and to deal bluntly with this situation.*

It is worth repeating, the enforcement system should **drive** the IRS. The IRS should not drive the enforcement system.

The other point that is addressed in the above quotes is the role of unions in the IRS. The OFL is consistently reminding the MOL that where a union exists in the workplace that it is a workplace party and that it has a role to play in the IRS in that workplace.

The rights and duties of trade unions are spread throughout the *Act*. In fact, including the definition, there are 23 provisions under the *OH&S Act* referencing trade unions, their rights or duties. The OFL has prepared a factsheet on this issue which has been provided in the appendix.

The MOL needs to recognize that workers collectively and their unions have a significant role to play in the IRS not externally to the IRS. Where a union exists it is a workplace party for the purposes of the *Act*.

The Expert Panel made a number of recommendations that can improve the effectiveness of an IRS. In particular they recommended the following

- Allow a co-chair of a JHSC to submit written recommendations to the employer,
- Create mandatory training of health and safety representatives,
- Mandatory awareness training for workers and supervisors,
- Use of ticketing employers who undermine the IRS and JHSC,
- Prosecuting employers who carry out reprisals against workers who exercise their rights.

Not all of the expert panel recommendations have been acted upon. The government needs to move forward on all the Expert Panel recommendations. In addition there should be zero tolerance for reprisals against worker members of JHSC and representatives who are carrying out their responsibilities under the *Act*.

Reprisals against workers destroy any chance that there can be an effective IRS in that workplace. In 2009 the OFL investigated this issue and prepared a report which was presented to the Expert Panel. The report was appropriately titled, *Culture of Fear*.<sup>10</sup> In the conclusion the report states,

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<sup>10</sup> *Culture of Fear* A report on the status of the enforcement of reprisal protection for workers under the Ontario Occupational Health and Safety Act Brendan McCutchen For the Ontario Federation of Labour December 2009



*It is vital to characterize occupational health and safety-based reprisals correctly: they attack the validity of the internal responsibility system itself, not just the individual worker. Strong deterrent action, expressed through prosecutions, is consequently required in order to protect the system.*

The OFL presents this report as part of our submission. It can be found in the appendix of this submission.

At the public consultation session in London labour heard from workers regarding the frustration they hear from the ministry's own inspectors who have been prohibited from writing orders against employers who have clearly violated section 50 of the Act. Some employers are so arrogant that they admit to inspectors they carried out a reprisal but there is a clear directive by the ministry not to act on the reprisal component of a section 50 complaint. The ministry needs to review this policy and give the inspectors the support and the tools to enforce this section of the Act.

The OFL has also reviewed the submission provided by LOARC.<sup>11</sup> They have provided a significant contribution to this review. The research they have provided and conducted shows how the IRS is being undermined and what can be done to reverse this trend.

### **Technology/Management of Change**

The OFL defers to the USW District 6 comments and supports recommendations 11 to 22.

### **Training, Skills and Labour Issues**

The OFL continues to support the recommendations made by the Expert Panel on the issue of training. We do however have serious concerns with the online training. This needs to be revisited by the MOL. We expect the government to live up to the spirit and intent of those recommendations. The MOL needs to move forward on these recommendations.

In the Unifor submission they have identified the experienced labour shortage as a risk to the lives of mine workers. They have also identified how to resolve this issue. The OFL supports their recommendations.

To this we add our concerns over the increasing use of contractors in mines. This is often a tactic by employers to avoid their liabilities and responsibilities by using contractors instead of hiring more company employees. The most recent double fatality in a mine were both contract employees.

### **Health and Safety Hazards in the Mining Sector**

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<sup>11</sup> Labour OHCOW Academic Research Collaboration, Submission to Mining, Safety and Prevention Review, June 13, 2014

The OFL supports the USW District 6 comments and recommendations 1 to 10. In addition Unifor has made a number of excellent recommendations in their submission which we also support.

We wish to emphasize the importance of the Precautionary Principle which was recognized by Justice Campbell.

*Perhaps the most important lesson of SARS is the importance of the precautionary principle. SARS demonstrated over and over the importance of the principle that we cannot wait for scientific certainty before we take reasonable steps to reduce risk. This principle should be adopted as a guiding principle throughout Ontario's health, public health and worker safety systems<sup>12</sup>*

The Ontario government should adopt the recommendations on the Precautionary Principle made by Justice Campbell in his report.

Occupational disease remains a serious concern for miners and their families. Only the labour endorsed organizations are taking this issue seriously. It is our view that the employer safety associations are simply not taking this issue to heart. Much more needs to be done to address this issue than can be discussed in this submission. An occupational disease prevention strategy for the mining sector needs to be developed with the involvement and participation of the labour involvement.

Hazards that have resulted in mine fatalities are subject to review by a Coroner's Inquest. We feel that too often the MOL fails to act on inquest recommendations that could improve the health and safety in mines. We feel that any inquest recommendation that could prevent another fatality should be acted upon.

### **Emergency Preparedness/Mine Rescue**

Labour has been hearing mixed reviews about the mine rescue program since it was downloaded from the MOL to Workplace Safety North. Designated independent mine rescue stations have been all but eliminated across the province. Mine rescue officers and teams now have to rely on the good will of employers to find a place on their properties to practice and maintain their equipment and skills.

The OFL supports the USW District 6 comments and supports recommendation 49. Unifor has also identified some concerns on this issue which should be addressed in keeping with the USW recommendation.

There should be a comprehensive review of the mine rescue program involving labour, industry, government, the mine rescue members and teams, and the Mining Legislative

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<sup>12</sup> The SARS Commission Report, Spring of Fear, Justice Archie Campbell, December 2006

Review Committee to discuss the challenges they face and improvements that can enhance the program including possible recommendations to the Minister. The Ontario mine rescue program was recognized by many as world class – we must ensure that recognition remains with the quality of the program and skill. This program requires the proper funding and staffing levels to make that happen.

Also included in this conversation must be the role of the mine rescue teams in recovery operations. Often what occurs now in remote areas is when it is known that the worker(s) have been killed and a ‘rescue’ is not probable or possible, it is left to many untrained co-workers, possible friends of the deceased to recover and remove the body from the mine. We do not feel that this is an acceptable practice. It will unnecessarily add to the trauma of the workers in the mine. This is work best left to those who have the skills and experience to carry it out.

This submission is dedicated to the thousands of miners who have lost their lives in the mining industry in this province and beyond. Our hearts go to the families left behind who struggle to make sense of their loss. May we all ensure that not one life goes unrecognized and that through this process the government will act for positive change to protect the lives of those left behind and of our mine workers in the future.

Respectfully submitted by:

**THE ONTARIO FEDERATION OF LABOUR**

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