Culture of Fear

A report on the status of the enforcement of reprisal protection for workers under the Ontario Occupational Health and Safety Act

By

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Abstract

This report focuses on the current policy of the Ontario Ministry of Labour not to enforce the reprisal protection provisions under section 50 of the Occupational Health and Safety Act. The report attempts to fill a gap in the occupational health and safety research and provide a fuller picture of reprisals, the players and policies that may be involved when a worker seeks a remedy to a reprisal. It begins with a review of the relation of effective reprisal protection and the internal responsibility system. There is a brief review of existing scholarship, policy work and governmental reviews of reprisals. It looks at the many difficulties that confront workers—particularly unorganized ones—when they seek to exercise their rights under the *Act*, and when they seek compensation after they have been punished by their employer for exercising these rights. It deals with the lack of coordination between the Ministry of Labour and the Ontario Labour Relations Board with respect to occupational health and safety-based reprisals. Arguments for a renewed commitment from the Ministry of Labour to prosecuting employers for reprisal action are provided.

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Introduction:

Reprisals taken by employers against workers in contravention of Ontario's *Occupational Health and Safety Act* have often been discussed, but have rarely been studied, by the labour community. The following paper seeks to paint a much fuller picture of reprisals, one that draws upon the positions and policies of the many different players that might become involved when an employee experiences an occupational health and safety-based reprisal and seeks a remedy.

In many Ontario workplaces, complaining about health and safety conditions, whether to a supervisor, an employer or the Ministry of Labour, is not done nearly enough: fear of reprisal prevents many concerns from being raised in the first place. Moreover, many Ontario workers know nothing about the *Act*'s anti-reprisal language, which works to strengthen the culture of fear surrounding health and safety that is present in so many workplaces. All the same, when an employee does complain or tries to exercise occupational health and safety rights, and is punished, he or she cannot expect extensive support from the Ministry in terms either of getting compensation, or of the enforcement of the *Act* through prosecution. It is the explicit policy of the Ministry not to investigate reprisals unless an inspector is considering prosecuting an employer for the reprisal activity. Ministry policy also does not allow inspectors to rule on reprisals, and to order a remedy. In addition, the Ministry has shown a clear reluctance to prosecute employers following reprisal action.

What makes the situation even worse is that most of the workers who complain to the Ministry of reprisal action never bring an application to the Ontario Labour Relations Board, which can order a remedy in reprisal cases. Moreover, when employees do file an application, most do so unrepresented. Because of the settlement policies of the Board and the quasi-judicial nature of the Board process, these applicants consequently face almost insurmountable obstacles to getting a fair deal at the Board. Finally, the vast majority of workers who file a reprisal application with the Board never contact the Ministry of Labour about the alleged reprisal. This means that Ministry of Labour health and safety

inspectors never report to these workplaces to examine—in accordance with Ministry policy—the health and safety issues underlying the potential reprisal, nor can they discover whether prosecution should be recommended.

Because of this state of affairs, alternatives to the legislative and policy structure that today governs occupational health and safety-based reprisals in Ontario need to be examined. One alternative lies in amending the *Act* and Ministry policy in order to allow health and safety inspectors to rule on reprisals. Inspectors have this power in Manitoba, among other provinces. I will draw heavily on anti-reprisal legislation and policy in Manitoba in setting out the details of this alternative approach. Moreover, if this alternative framework is not adopted and the Ontario Labour Relations Board continues adjudicating reprisal allegations, it is crucial that legal representation be made more broadly available to Ontario's workers.

Change cannot stop there, however: the Ministry of Labour must commit itself to prosecuting employers for violations of section 50, in order to chip away at the cultures of fear that surround occupational health and safety in much of the province. The Ministry must also achieve greater co-ordination with the Ontario Labour Relations Board in the reprisal context. Considered holistically, the regulatory and policy framework that Ontario's workers encounter when they allege that an employer has taken a reprisal against them in the occupational health and safety context generally fails these workers. Preventing such massive failures in the future means that the current regulatory and policy framework that governs reprisals must be radically reshaped.

1. Reprisals, the Occupational Health and Safety Act, *and the Internal Responsibility System*

A. Statutory Framework

Section 50 of the *Occupational Health and Safety Act* prohibits employers from taking reprisal action against employees in the occupational health and safety context. The portions of the section that

are relevant to my analysis and discussion in this paper read as follows:

> 50. (1) No employer or person acting on behalf of an employer shall,
> (a) dismiss or threaten to dismiss a worker;
> (b) discipline or suspend or threaten to discipline or suspend a worker;
> (c) impose any penalty upon a worker; or
> (d) intimidate or coerce a worker,
> because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the Coroners Act.
> (2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Board in which case any rules governing the practice and procedure of the Board apply with all necessary modifications to the complaint.
> (3) The Board may inquire into any complaint filed under subsection (2) and section 96 of the Labour Relations Act, 1995, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.
> ...
> (5) On an inquiry by the Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.[1]

It is noteworthy that the Ministry of Labour's health and safety inspectorate—Ministry employees who are responsible for enforcing the *Act*—is mentioned nowhere in the text of section 50. In the non-reprisal context, inspectors often enforce the *Act* by issuing orders pursuant to their powers under section 57(1) of the *Act* or by initiating prosecutions for non-compliance. In the reprisal context, however, Ministry policy states that inspectors shall not issue orders under section 50 and it is exceedingly rare that an inspector initiates a prosecution for a violation of section 50. Moreover, the kinds of powers needed to give a worker a remedy following a reprisal—such as the power to reinstate a terminated worker—generally fall outside the scope of section 57(1). I will more closely examine the role of the inspectorate in the reprisal context later in this paper.

That the legislative and policy approach to reprisals on the part of the Ministry is remarkably

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[1] *Occupational Health and Safety Act* , R.S.O. 1990, Chapter O.1 [*OHSA*], s. 50.

constrained and "hands-off" is surprising, especially when we examine the importance of anti-reprisal protection in light of the *Act* as a whole, and in terms of the Ministry's regulatory strategy.

B. Value of Anti-Reprisal Protection

That section 50 of the *Act* seeks to protect workers from employer reprisals—whether threatened or carried out, whether taking the form of termination or of some lesser discipline—becomes even more important when we consider the framework surrounding the *Act* as a whole. Indeed, support for the internal responsibility system lies at the heart of the *Act*, despite the fact that no explicit reference is made to it in the *Act* or the regulations. John Laskin, in the Report on the Administration of the Occupational Health and Safety Act, notes,

> [T]he internal responsibility system is a system of self-compliance. Through a variety of mechanisms this system internalizes responsibility for work place health and safety to those most directly involved in the work place—the employer, supervisor and worker. Although nowhere referred to expressly in the *Act*, the internal responsibility system is embodied in the legislation in a number of important ways, for example, in prescribing the duties of employers and employees, [and] in giving workers a right to refuse work without reprisal.[2]

Though Laskin only mentions reprisals in the context of work refusals here, we can easily link the whole of the anti-reprisal section of the *Act*, which prohibits reprisal action in many different forms, to the internal responsibility system. On this model, for a workplace to have a good health and safety culture, worker participation is required. As Laskin identifies, this is why a worker is required, under subsections 28(1)(c) and (d), respectively, of the *Act*, to "report to his or her employer or supervisor the absence of or defect in any equipment or protective device of which the worker is aware and which may endanger himself, herself or another worker" and to "report to his or her employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he or she

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[2] G.G. McKenzie & J.I. Laskin, *Report on the Administration of the Occupational Health and Safety Act*, vol. 2 (Ministry of Labour:1987) at 16.

knows."[3] If a worker does not feel able to perform these reporting duties, not only does he or she violate the *Act*, but he or she also undermines the integrity of the internal responsibility system itself. Consequently, the anti-reprisal provisions of the *Act* do not only aim to protect the individual worker: they also aim to protect the core element of the Ministry of Labour's regulatory strategy for occupational health and safety. The reprisal provisions' latter function applies just as readily in work refusal scenarios, and with regard to joint health and safety committees and health and safety representatives. These, too, are key features of the internal responsibility system. Michael Grossman sums up the importance of the anti-reprisal provisions when he asserts that the various rights conferred upon workers by the *Act* "would not mean much without" legislated protection from reprisals.[4]

2. Past Scholarship and Governmental Review:

Despite the clear importance of the anti-reprisal provisions, they have not been subject to any extensive scholarly or governmental examination. Indeed, the scholarly attention that the provisions have received is often narrow in scope, and focused on the part the Ontario Labour Relations Board plays in the reprisal context. Vivienne Walters surveyed anti-reprisal jurisprudence from the Board from the 1980s in her article "State Mediation of Conflicts Over Work Refusals: The Role of the Ontario Labour Relations Board."[5] As is clear from the title, her analysis dealt only with the adjudicative methods used by Board decision-makers when ruling on the validity of the discipline imposed by employers following a work refusal. In 2000, Mark Harcourt, like Walters, considered discipline following work refusals, but did so in analyzing the value of having legal representation

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3 *OHSA*, s. 28(1)(c) and (d)

4 Michael Grossman, *The Law of Occupational Health and Safety in Ontario*, 2nd ed. (Toronto: Butterworths, 1994) at 8-9.

5 (1991) 21 *International Journal of Health Services*, 717 at 717.

before Canada's various labour relations boards or at arbitration hearings.[6] That same year, Harcourt published an article with Sondra Harcourt which, again, dealt only with discipline carried out pursuant to a work refusal. This article was very similar to that written by Walters in its consideration of adjudicative methods used by decision-makers in work refusal discipline cases.[7]

While these articles are certainly useful in understanding how the anti-reprisal provisions of the *Act* operate for employees, their limited scope has left major gaps in the scholarly literature on occupational health and safety-based reprisals. Indeed, the articles do not consider how reprisals can arise in contexts other than work refusals, nor do they analyze the role of the Ministry of Labour and the Ministry's relation to the Ontario Labour Relations Board in reprisal cases.

Notably, the Ontario government's consideration of reprisals has been similarly piece-meal. In the 1987 review of the *Act* conducted by G.G. McKenzie and J.I. Laskin, Laskin briefly discussed—and dismissed—allegations that the Ministry of Labour was not properly prosecuting reprisal actions from employers.[8] The review also included summaries of two reprisal cases. According to Laskin, the Ministry was considering prosecution in one of these cases (*Certified Brakes*), and had prosecuted the employer in the other (*St. Marys Tube Ltd.*).

Following the election of Mike Harris as Premier of Ontario, Minister of Labour the Hon. Elizabeth Witmer released a discussion paper, *Review of the Occupational Health and Safety Act*, which sought submissions from stakeholders on reprisals. The review notes, "To ensure that employees at all levels of an organization participate in and support the IRS, they must not be afraid of losing their jobs or being penalized or disciplined when they raise health and safety concerns."[9] The review also quickly canvassed the anti-reprisal protections and procedures adopted in other Canadian

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6 Mark Harcourt, "How Attorney Representation and Adjudication Affect Canadian Arbitration and Labour Relations Board Decisions", (2000) 21 *Journal of Labor Research*, 149.

7 Mark Harcourt & Sondra Harcourt, "When can an Employee Refuse Unsafe Work and Expect to be Protected From Discipline? Evidence from Canada", (2000) 53 *Industrial and Labor Relations Review*, 684.

8 *Supra* note 2 at 39.

9 The Hon. Elizabeth Witmer, *Review of the Occupational Health and Safety Act* (Ministry of Labour: 1997) at 30.

legislation, later asking how section 50 of the *Act* could "be modified to improve its effectiveness and to make workplace parties more accountable for their actions."[10] Importantly, following this review, when the Ministry of Labour released the paper setting out the government's occupational health and safety strategy—*Preventing Illness and Injury: A Better Health and Safety System for Ontario Workplaces*[11]—there was no mention of any amendment to the reprisal section or to anti-reprisal policy. As Eric Tucker and Robert Storey note, "the government did not follow up its discussion papers with major legislative changes."[12]

Indeed, the Ontario government was most vocal about adjusting its legislative and policy approach to reprisals well before either of these important reviews were released. As noted by the Timmins and District Labour Council, in 1986 Minister of Labour the Hon. William Wrye asserted in the Ontario Legislature that "the ministry and the government, through our act, will be very tough in terms of these reprisals." In 1987, Wrye, again in the legislature, stated, "If Ontario workers are to exercise their rights under the act freely and fully, they must be free from the fear of harassment, intimidation and reprisal. Therefore the government intends to establish a new office of investigations to help workers exercise this freedom."[13] Despite these comments, this office of investigation was never put into place.

Because of this haphazard and quite limited attitude to occupational health and safety-based reprisals from both the scholarly community and the Ontario government, the only report that extensively considers reprisals comes from the Timmins and District Labour Council. That report considers the dearth of prosecutions involving section 50 undertaken by the Ministry of Labour, and the

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[10] *Ibid.* at 31.

[11] Ministry of Labour, 1998.

[12] Robert Storey & Eric Tucker, "All That is Solid Melts Into Air: Worker Participation and Occupational Health and Safety Regulation in Ontario, 1970-2000", in Vernon Morgensen, ed., *Worker Safety Under Siege: Labor, Capital, and the Politics of Workplace Safety in a Deregulated World* (M.E. Sharpe: Armonk, 2006) 157 at 173.

[13] Timmins and District Labour Council, *The Refusal of Ontario's Ministry of Labour to Enforce Section 50 of the OHSA* (2007) [unpublished] at 14.

various difficulties that workers face in seeking compensation for the losses they have incurred as a result of reprisal action. The report also recommends that the Ministry of Labour inspectorate be able to order remedies for workers. The following descriptions seek to expand upon the Council's commentary on section 50 and its enforcement in Ontario's workplaces. They draw extensively upon formal interviews conducted with union health and safety representatives, legal professionals and Ministry of Labour health and safety inspectors, and upon statistical information from the Ministry of Labour and the Ontario Labour Relations Board gathered specifically for this report.

3. Findings Regarding Ontario's Current Anti-Reprisal Legislation, Policy and Practice:

A. Cultures of Fear

Many workers in Ontario are afraid to bring their occupational health and safety concerns to their supervisor or employer because of their fear of punishment. This is especially true in non-unionized workplaces. Linda Vannucci, executive director of the Toronto Workers' Health and Safety Legal Clinic, notes that when non-unionized workers approach the clinic for advice on how to handle health and safety hazards, they do so because it is "almost always [the case that] no one else will complain. Or everybody talks about it, but nobody will complain."[14] Vannucci connects this directly to a fear of reprisal.

A senior Ministry of Labour health and safety inspector, Inspector 1, agrees that such fear extensively obstructs the reporting of health and safety hazards. He reports, "Probably 90% of the complaints that we get in [at the Ministry of Labour]—90 or higher—would be listed as anonymous. Even in the anonymous, where people are told that their phone numbers won't be given out, etc., etc., I would say probably 75% refuse to give phone numbers or contact information."[15] Inspector 1 asserts

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[14] Interview of Linda Vannucci, Toronto Workers' Health and Safety Legal Clinic, by Brendan McCutchen (23 June 2009).
[15] Interview of Inspector 1, anonymous Ministry of Labour inspector, by Brendan McCutchen (27 July 2009).

that "the reason to remain anonymous" lies in the employees' fear of reprisal; certainly, with many of these anonymous complaints, "people will actually say that they have [a] fear of reprisal."[16] This fear extends beyond the complaint process, and into actual workplace inspections, Inspector 1 has found: "I would say, the general rule is, people are reluctant to talk and will show some fear about talking to an inspector while doing an inspection."[17] It is important to note, too, that such fear does not just make inspections more difficult and complaints to the Ministry more likely to be anonymous: such fear makes it very rare that a worker will even contact the Ministry about a health and safety issue, say Barry Fowlie and Kathy Yamich of Workers United, a union representing many seasonal and low-wage workers.[18]

Another senior inspector, Inspector 2, notes that, in around 90% of the workplaces he has visited during his tenure with the Ministry of Labour's inspectorate, he has observed deep-rooted attitudes of fear surrounding health and safety.[19] Importantly, he says that these attitudes are frequently present in unionized workplaces, too, where economic pressures and constraints sometimes compel workers not to forward their concerns to management or to the Ministry. Inspector 1 expands on the other inspector's concerns: "Basically, in any plant that we go into now, there's a reluctance to raise an issue, because it may be the issue that finally closes the doors."[20] Inspector 2 points to the continuing impact of the economic destabilization that he witnessed hitting Ontario's workplaces between 1989 and 1994: because of this situation of economic insecurity, health and safety cultures suffered, and, according to the inspector, have never fully recovered.[21]

Moreover, this broad-based reluctance to report health and safety concerns becomes more extreme in contexts where the workforce is especially vulnerable. This is particularly true for new

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[16] *Ibid.*
[17] *Ibid.*
[18] Interview of Barry Fowlie and Kathy Yamich, Workers United, by Brendan McCutchen (26 June 2009).
[19] Interview of Inspector 2, anonymous Ministry of Labour inspector, by Brendan McCutchen (19 August 2009).
[20] *Supra* note 15.
[21] *Supra* note 19.

Canadians and migrant workers in the province. Charles Reasons, Lois Ross and Craig Paterson state specifically of immigrant women in their book Assault on the Worker, "With the guarantee of a wage, often no matter how low, they silently agree to maintain their place without complaint or challenge in the face of appalling working conditions. Their fear is that any other course, even an assertion of basic human rights, will find them crossing the threshold between income and unemployment."[22] Assault on the Worker was written in 1981, but this fear of punishment continues today among large swaths of Ontario's immigrant and migrant workforce. Inspector 1 notes that, in many of the workplaces staffed mostly by immigrant workers, even unionization cannot always penetrate this fear: unionization often "means that your union steward is going to be just as terrified as everyone else."[23]

B. Low Worker Knowledge of the Anti-Reprisal Provisions

This widespread fear of reprisal becomes even more worrisome when we consider that not many workers have a solid understanding of their rights under the *Occupational Health and Safety Act*, and specifically of their right not to be disciplined when participating in the enforcement of the *Act*. In 1988, Vivienne Walters and Ted Haines conducted interviews with 311 Ontario workers. The pair concluded that "one of the more disturbing findings of this research is respondents' unfamiliarity with existing policy and their rights under this. Knowledge of the legislation was linked with the three indices of action we have used; those who did not know anything about the Act were those least likely to ask for information, to pursue a health and safety worry, and to refuse (informally) some potentially hazardous aspect of their job."[24]

Based on many of the interviews conducted for this report, such ignorance continues in many

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[22] Charles E. Reasons, Lois L. Ross & Craig Paterson, *Assault on the Worker: Occupational Health and Safety in Canada*, (Butterworths, Toronto, 1981) at 95.

[23] *Supra* note 15.

[24] Vivienne Walters & Ted Haines, "Workers' Use and Knowledge of the 'Internal Responsibility System': Limits to Participation in Occupational Health and Safety", (1998) 14 *Canadian Public Policy* 411 at 421.

workplaces, even unionized ones. Inspector 2 reports that a "very good percentage of workers don't know the *Act*."[25] Lisa McCaskell of the Ontario Public Service Employees Union (OPSEU) notes that many workers have not received adequate health and safety training, and, as a result, "are unaware of the reprisal section in the *Act*, and so don't know that they can complain."[26] McCaskell states that within the diverse segments of the Ontario workforce represented by OPSEU knowledge varies, though she concedes that, overall, health and safety knowledge is low.[27]

Nancy Hutchison of the United Steelworkers says similar things about whether Steelworker bargaining units know about the *Act*'s anti-reprisal provisions, acknowledging that most Steelworker-represented workers would not know that these provisions exist unless their local union has been especially active with health and safety training.[28]

However, unlike non-unionized workers, unionized workers do have support networks in the workplace that can make up, to some extent, for their inadequate health and safety education. As Hutchison notes, local unions might teach their workers about the anti-reprisal provisions, and McCaskell reports that OPSEU's head office has programs in place that spread knowledge of section 50.[29] In non-unionized workplaces, Vannucci notes, "[m]ostly workers don't, in my experience, know that there's a section and what it says." Even worse, these workplaces lack the support networks that can chip away at workers' ignorance about the provisions.

Bluntly stated, what this means is that a good percentage of Ontario's workplaces are failing to uphold their legislated commitment to the internal responsibility system: many workers know nothing about section 50, which surely strengthens their fear-based reluctance to raise health and safety issues at work. In turn, this reluctance makes these workers contravene their duties under subsections

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[25] *Supra* note 19.
[26] Interview of Lisa McCaskell, Terri Aversa and anonymous representative, Ontario Public Service Employees Union, by Brendan McCutchen (5 June 2009).
[27] *Ibid.*
[28] Interview of Nancy Hutchison, United Steelworkers, by Brendan McCutchen (14 July 2009).
[29] *Supra* note 26.

28(1)(c) and (d) of the *Act* to report hazards. Indeed, instead of the lively co-operation the Ontario government has always envisioned, many workplaces are characterized by health and safety cultures of silence, fear and ignorance.

C. Nature of Reprisals

Despite these constraints, some workers do report hazards. However, in many non-unionized workplaces, if such reporting meets with the displeasure of a supervisor or an employer, the worker will likely be terminated. In its submission to the Ministry of Labour in 1997, the Toronto Workers' Health and Safety Legal Clinic stated, "Based on the cases that our Clinic handles, it is not a glib exaggeration to say that anyone who dares to question health and safety conditions in the workplace will end up out the door."[30] Indeed, Inspector 1 is clear that, when a reprisal does occur in a non-unionized workplace, "most of the reprisals would be, 'I was fired because...'."[31] Termination, of course, is the most extreme form of reprisal action that an employer or a supervisor can take, and is seen most often in non-unionized workplaces.

Inspector 1 notes that, generally speaking, different kinds of reprisals occur in unionized shops: "Unionized workers generally complain about treatment by a supervisor, and things like getting crappy work assigned to them, having to do more work than somebody else has to do. We still get into reprisals that are of a bullying nature, where, quite often, it will extend beyond the workplace."[32] Terri Aversa and Lisa McCaskell of OPSEU expand on Inspector 1's comments, asserting, "A lot of the reprisals come when...other aspects of health and safety rights [are being] asserted. Doing work

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[30] Toronto Workers' Health and Safety Legal Clinic, "Review of the Occupational Health and Safety Act: Analysis and Commentary", online: Toronto Workers' Health and Safety Legal Clinic <http://www.workers-safety.ca/remository?do=view&file=publications+%3D+newsletter%2C+Workers%27+Guide%2C+FACT+SHEETS%2C+reports%2C+etc.%7B%7B%7B%7C199_.+submissions+to+%5Bgov%27t%2C+etc.%5D%7C199_.+++submission.++OHSA-REV.SUB.wpd>.

[31] *Supra* note 15.

[32] *Ibid.*

refusals, for instance, being suspended. Being sent letters of discipline, like letters of counsel."[33]

Because of the broad scope of section 50 of the *Act*, a wide range of employer behaviour is prohibited: from threats to suspension, from modifications in work duties to changes in shift-times, from letters of discipline to outright termination. Unfortunately, numerous employers neglect their responsibility not to commit reprisals against employees in the occupational health and safety context. The question then becomes: how do these workers get a remedy?

D. The Ministry of Labour, its Inspectorate, and Health and Safety-Based Reprisals

As cited above, subsection 50(2) of the *Act* provides that workers who have suffered reprisal action that falls under the categories set out in subsection 50(1) have the choice to file a complaint with the Ontario Labour Relations Board. Unionized employees have the additional option of filing a grievance against their employer.

Despite the process laid out in the *Act*—one that does not explicitly involve the Ministry of Labour in reprisal complaints—on average over 100 workers a year contact the Ministry to complain of an occupational health and safety-based reprisal. Certainly, from January 1, 2000 to June 26, 2009, the Ministry received 1040 reprisals complaints,[34] with 36 complaints received just over halfway into 2009, 141 complaints received in 2008 and 106 complaints received in 2007.[35]

The Ministry of Labour provides an operational policy manual—*Operations Division Policy & Procedures Reference Manual*—to its health and safety inspectorate, and the manual has a section on the handling of possible reprisal situations. The Ministry's first act, when such a situation is brought to

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[33] *Supra* note 26.

[34] Letter from J. Brandon Larabie, Team Leader, Freedom of Information and Privacy Office, Ministry of Labour to Brendan McCutchen (29 July 2009). These statistics were only released by the Ministry of Labour pursuant to a Freedom of Information request.

[35] A more precise average of reprisal complaints per year is 109.47368 for the time period between January 2000 and June 2009 (1040 complaints / 9.5 years).

its attention, appears to be to "provide the worker with the phone number of the OLRB"[36]. This, of course, is in accordance with subsection 50(2) of the *Act*, whereby all workers can have recourse to adjudication at the Board for their reprisal allegation.

The next step in responding to a reprisal complaint is to send an inspector to the workplace. It is asserted in the manual, "When notified of a reprisal allegation, inspectors attend at the workplace and issue appropriate orders for any underlying health and safety violations that may have led to the reprisal complaint."[37] Orders, the manual is clear, cannot be issued regarding the reprisal action itself: "[Inspectors] do not make a determination as to whether a reprisal has been committed, nor do they take any enforcement action with respect to the alleged reprisal."[38]

While orders directly concerning the reprisal allegations are off the table, the policy does require inspectors to notify "the employer and the worker representative of their duties and rights under s. 50 of the OHSA," and to "[p]rovide a copy of the multilingual 'Protection for Workers from Reprisals by Employers' pamphlet to all appropriate parties," alongside completing a report of their visit to the workplace. Only in "exceptional circumstances" can an inspector investigate a reprisal allegation. Such investigations must occur with management approval, and are conducted solely "for the purpose of determining whether to recommend prosecution."[39] And importantly, even though an inspector might conclude during an investigation that a reprisal has occurred, the inspectors' coercive powers, expressed through an order, cannot be used.

The actual practice of inspectors occasionally departs from the clear guidelines set out in the policy manual. According to statistical information from the Ministry of Labour, 1004 field visits were carried out in relation to the 1040 reprisal complaints received by the Ministry of Labour between

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[36] "Events" in *Operations Division Policy & Procedures Reference Manual* (Ministry of Labour: December 2005) [unpublished] at 37. Please note that this section of the policy manual dates from December 9, 2005. Based on my interviews with inspectors, however, it does not appear that the policy stated in this section has changed since that time.

[37] *Ibid.*

[38] *Ibid.*

[39] *Ibid.*

January 1, 2000 and June 26, 2009. In addition, during this same time period, 889 reprisal investigations occurred, while no consultations—which the Ministry defines as "field visits...made to advise workplace parties of their rights, duties and responsibilities under the Act, and of the policies and procedures of the Ministry"[40]—were undertaken.[41]

What is interesting about these numbers is that not all reprisal complaints have been followed up by field visits. Although the gap between complaints and field visits is low—a difference of 36—this difference might mean that this bit of Ministry of Labour policy is not being uniformly followed in the field. More important, however, is the high number of reprisal investigations. The policy manual is clear that such investigations are to be conducted only rarely. Yet, based on these numbers, over 85% of reprisal complaints have led to investigations in the past nine and a half years.

This remarkably high percentage of investigations is possibly due to a miscategorization of the investigations: these investigations probably do not relate to the investigation of reprisals as permitted in the policy manual—which would mean investigations done with an eye strictly for prosecution—but to the investigation of underlying health and safety hazards, or to a non-prosecutorial investigation of the reprisal. This explanation seems sound largely because of the position taken by the Ministry regarding the prosecution of employers who violate section 50 of the *Act*. This is a position that is nowhere to be found in the policy manual.

Inspector 1 notes that, when he receives a reprisal complaint, he often departs from the policy manual's directions, and investigates the reprisal allegation itself.[42] Inspector 1 is clear, however, that he does not investigate these reprisals with an eye to prosecution. This is because, he says, Ministry of Labour management and the Legal Services Branch at the Ministry—the office at the Ministry that

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[40] Ministry of Labour, "Report Card: Health and Safety Statistics", online: Ministry of Labour <http://www.labour.gov.on.ca/english/hs/stats/index.html>.

[41] *Supra* note 34.

[42] *Supra* note 15.

would be responsible for actually prosecuting the employer—are reluctant to prosecute under section 50 of the *Act*. He says of reprisal prosecutions:

> Because we call back and forth when we get something that's strange, and with the inspectors that were hired roughly in the same time range that I am, so that we feel comfortable in critiquing each other's work, I would say that I would probably get maybe a call a year, where they're looking at it and they're saying, "This is a good one, it really looks like it could go, but how can we twist somebody's arm to get them to actually take it?".
> Our managers and our regional program coordinators now...we'd have to get past them first, and then once we've tried to get past them, if you could get them on side, then you'd have to convince the Legal Services Branch to carry it.
> ...
> If it were up just strictly to the inspectors, we would bring the cases forward. Usually by the time they get to us, there's not a large number of people that complain when you consider the overall number of complaints we get...Usually by the time somebody gets to us with a concern, there's a good enough case built that it would be almost a slam dunk to bring it in, and say, you know, let's make sure that this one goes forward. Take whatever action we should.[43]

Inspector 2 agrees to some extent with Inspector 1's position: he asserts that the Ministry is "not keen on prosecuting reprisals."[44] Indeed, Inspector 2 notes that, in the last 20 years, he has never recommended prosecution under section 50. He attributes the Ministry's reluctance to prosecute to the evidentiary difficulties that the Legal Services Branch might encounter in conducting a section 50 prosecution: to score a conviction, lawyers at the Branch would have to show an intention to discipline an employee for desiring to exercise his or her rights under the *Act* or for seeking the *Act*'s enforcement. This scenario contrasts with what is required of the Branch's lawyers in other prosecutions under the *Act*, where an employer or a supervisor's intentions are irrelevant.

Other actors in the occupational health and safety community have encountered the Ministry's unwillingness to go after employers that have violated section 50. Linda Vannucci once tried to get the Legal Services Branch to take on a reprisal case. This case involved a reprisal against an employee who had testified in support of a co-worker at a section 50 hearing at the Ontario Labour Relations

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[43] *Ibid.*
[44] *Supra* note 19.

Board. Both workers had complained to the Ministry of Labour about an unguarded machine, which had been the subject of several orders, and both had been fired. Vannucci notes that she spoke extensively with Ministry of Labour inspectors and Legal Branch employees about initiating a prosecution on the reprisal action. However, these efforts were for naught: "they [the Legal Branch employees] just wouldn't do it."[45]

It is important that we characterize this reluctance to prosecute under section 50 of the *Act* carefully. The Ministry has prosecuted, or has seriously considered prosecution, under the section in the past: as noted above, Laskin in his 1987 report on the *Act* pointed out that reprisal prosecution was carried out against St. Marys Tube Ltd., and was being considered against Certified Brakes. In addition, in 1991, a reprisal prosecution was successfully carried out against de Havilland Canada Ltd., after the company disciplined a worker following a work refusal.[46] The most recent prosecution started "in September 2002, and resulted in a stay of the charges by the court in October 2004," according to correspondence received by the Ontario Federation of Labour from Virginia West, former Deputy Minister of Labour.[47] Moreover, past allegations that the "Ministry is intentionally and systematically thwarting prosecutions under the Act" have met with findings that the Ministry is properly prosecuting, as is clear from the 1987 report.[48]

All the same, it is evident that elements of the Ministry of Labour inspectorate have an understanding that when they go into a workplace for a visit relating to a reprisal allegation, they are not to consider prosecution. This state of affairs is particularly worrisome when we consider it in light of the entrenched cultures of fear surrounding health and safety in many Ontario workplaces. In such workplaces, employers and supervisors can violate the *Act* with impunity, knowing that their workers

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[45] *Supra* note 14.
[46] *R. v. de Havilland Canada Ltd.*, [1991] O.J. No. 2396.
[47] Letter from Virginia West to Wayne Samuelson (26 March 2008).
[48] *Supra* note 2 at 3, 45.

are too scared to inform the Ministry and, thereby, to support the operation of the internal responsibility system. The dearth of attempts to punish employers and supervisors that have created cultures of fear around health and safety, either by threatening or actually carrying out reprisals in contravention of section 50, means that these harmful cultures can easily contaminate, and persist in, workplaces. Instead of looking to prosecute where necessary, Inspectors 1 and 2 often visit in these situations with an eye to mediation. The latter inspector says that he meets with the parties, takes their stories, and tries to resolve the situation. Sometimes he will "tell the employer frankly" that he believes a reprisal has been committed in doing this mediation work.[49] Inspector 1 also reports of warning employers that they might "be running afoul of the legislation" during reprisal-based field visits.[50] Both inspectors attribute their willingness to help the parties negotiate to their status as senior inspectors who have been with the Ministry for a long while. Inspector 1 notes that other inspectors do not share this approach: "I think of a couple of inspectors that I know quite well. They would have a tendency to go in, say, 'Nope, it's a reprisal, here's your pamphlet. There's a recourse for you: you'll have to go the OLRB,' and walk away."[51] Inspector 2, rightly, says that such an approach is in accordance with the policy and their training: inspectors are not to mediate, and they are only to investigate the reprisal directly if prosecution is on the table. As such, he notes, many inspectors do exactly as the policy says.[52]

Several inspectors have gone even further beyond the policy: they have gone beyond mediation, and have actually written orders under section 50 of the *Act*. Inspectors have the authority to make orders upon observing a contravention of one of the provisions of the *Act* under subsection 57(1). An order, once issued, compels " the contravener to comply with the provision and may require the order to be

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[49] *Supra* note 19.
[50] *Supra* note 15.
[51] *Ibid.*
[52] *Supra* note 19.

carried out forthwith or within such period of time as the inspector specifies."[53] Since 1992, inspectors have issued 95 orders when they have spotted a violation of section 50; 58 of these orders were issued since 2000.[54] Almost all of these orders merely cite parts of subsection 50(1) of the *Act*. The others, however, refer to particular workplace events. One order, dated October 20, 2004, names a supervisor, who "responded to [a] work refusal in a manner that is in contravention of section 50(1)(d) of the *Occupational Health and Safety Act*." Another order, dated March 30, 2004, reads that it "is in reference to the employer's reprisal against an educational assistant who had exercised her Right to Refuse Unsafe Work under Sec. 43 of the *Act*." It is impossible at this point to explain why these 95 orders were issued, particularly when Ministry of Labour policy has long prohibited inspectors from doing so. It is telling, however, that these inspectors, despite the policy, felt comfortable in ruling on a reprisal, and using their coercive powers to remedy the actions of the employer or supervisor.

In this context, two things are especially noteworthy. First, inspectors' current legislated powers do not permit them to order the reinstatement of a terminated employee, or to order an employer to pay wages that would have been earned absent the reprisal action.[55] Indeed, s. 57(1) simply allows inspectors to order employers or supervisors to "comply with the provision" that has been violated. Consequently, broadening inspectors' powers in the reprisal context would mean not just changing Ministry of Labour policy, but amending the *Act* itself.

Second, there is nothing "natural" or "unavoidable" about the Ministry's current approach to reprisals. Indeed, Manitoba—as I will discuss further in section 4—has legislated very different procedures for dealing with reprisals: there, specialized inspectors directly investigate reprisal complaints, and can order that a worker be given missed wages or even reinstated. Alberta, Saskatchewan and Nova Scotia

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[53] *OHSA*, s. 57(1).

[54] This information was released by the Ministry of Labour pursuant to a Freedom of Information request. Also requested were print-outs of the orders.

[55] *Supra* note 47.

have adopted approaches similar to Manitoba's.[56] Because of this diversity in regulatory approach, there are numerous examples to which we can refer in considering alternatives to the Ministry's current framework for handling occupational health and safety reprisals.

E. The Ontario Labour Relations Board: Settlements, Adjudication and Representation

When a non-unionized worker complains of a reprisal and the complaint is not resolved through the issuing of an order or through mediation led by a health and safety inspector—with both the issuing of the order and the mediation efforts going against explicit Ministry policy—the worker has no choice but to turn to the Ontario Labour Relations Board for assistance. Unionized workers, as noted above, can also file a section 50 application with the Board, and many do: of the 547 applications that the Board received between April 2004 and March 2009, 176 of these came from unionized workers.[57] In comparing the complaints alleging reprisal received by the Ministry between January 2004 and March 2009 to the list of applications filed with the Board between April 2004 and March 2009, however, we find that very, very few complainants to the Ministry become section 50 applicants at the Board. In short, the Board is almost never relied upon by the people who call the Ministry to report reprisal action, as the following figures demonstrate:

- Of all the complaints received by the Ministry of Labour between January and March 2009 (36, 3 of which do not provide enough information about a workplace to be useful in this comparative analysis), not a single one has translated into an application at the Board. This means that 0% of complainants filed an application.
- Of all the complaints received by the Ministry of Labour in 2008 (141, 10 of which do not

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[56] See s. 37 of Alberta's *Occupational Health and Safety Act*, R.S.A. 2000, c. O-2, ss. 28 and 29 of Saskatchewan's *Occupational Health and Safety Act*, S.S. 1993, c. O-1.1, and s. 46 of Nova Scotia's *Occupational Health and Safety Act*, S.N.S. 1996, c. 7.

[57] This statistical information was provided by Voy Stelmaszynski, Ontario Labour Relations Board solicitor.

provide enough information about a workplace to be useful in this comparative analysis), only 14 have translated into applications at the Board. This means that only 10.7% of complainants filed an application.

- Of all the complaints received by the Ministry of Labour in 2007 (106, 9 of which do not provide enough information about a workplace to be useful in this comparative analysis), only 15 have translated into application at the Boards. This means that only 15.5% of complainants filed an application.
- Of the 547 applications filed at the Board from April 2004 to March 2009, and restricting the scope of our analysis to complaints received by the Ministry of Labour between January 2004 and March 2009, only around 69 complaints translated into Board applications. During the latter time period, the Ministry received 613 complaints, 79 of which do not provide enough information about a workplace to be useful in this comparative analysis. This means that only around 12.9% of complainants filed an application.

It is vital to put these numbers in context. The Ministry of Labour complaint records do not say whether a particular complainant is unionized or not. Consequently, we have to rely on the information provided by the Ministry of Labour inspectors that respond to these complaints. Inspector 1 notes that, in the area in which he operates, around 75% of reprisal complaints come from the non-unionized workforce.[58] Inspector 2 rated the number of reprisal complaints from non-unionized workers at a lower level, indicating that around 50% of the reprisal complaints his office has dealt with originate in unorganized workplaces.[59] Even if we assume the lower figure is true, this still means that around half of the reprisal complaints come from workers who do not have recourse to any grievance procedure. As such, these unorganized workers can only turn to the Board, but, as the above figures show, it

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[58] *Supra* note 15.
[59] *Supra* note 19.

appears that the Board is not being relied upon by these workers in anything close to the way that the legislation envisions.

It is important to note, too, that reprisal allegations are only occasionally resolved with the help of Ministry inspectors. While both inspectors interviewed for this project report some success, their tendency to mediate is not indicative of the occupational styles of other inspectors. In addition, in contexts involving terminations, Inspector 1 declares that mediation is even less likely to be successful: "I've tried a couple of times. Usually, there's a reluctance [from] both parties...It's not often that we can do much work there. We would hand out...what I would personally do at that point, would be to hand out the information and say, 'Here you go.' And give some guidance, and what my belief is, where they would end up."[60] Interestingly, most of the complaints received by the Ministry of Labour from June 27, 2008 to June 26, 2009 concerned termination reprisals: of 136 complaints, at least 77 were terminations. Consequently, if the kind of illicit mediation that Inspector 1 and Inspector 2 speak of cannot produce resolutions for terminated employees, it appears that a majority of reprisal complaints cannot be resolved among the inspector and the parties. A remedy lies, then, only at the Board or in the grievance process. Moreover, since terminations are far more likely to occur in non-unionized workplaces than unionized ones, it seems, again, that the only recourse for most of these terminated workers is the Board. This information produces a dismal picture of employee reliance on the Board: even when their only option lies in the Board, far too few workers who complain to the Ministry of reprisal choose it. As Inspector 2 asserts, with reprisal cases from non-unionized complainants, few ever got to the Board, perhaps only "one or two" of those in which he has been involved as an inspector.[61]

Explaining why more workers do not file applications with the Board is a difficult, if not impossible,

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[60] *Supra* note 15.
[61] *Supra* note 19.

task. The most likely explanation lies in the complex nature of the process that workers who do file section 50 applications have to go through at the Board. This process is quasi-judicial, and it is one that requires some level of representation. Linda Vannucci agrees:

> The Labour Board is not a lay person's tribunal in my view: there are preliminary objections; there's case law; they mimic civil setting court rooms in some ways, like case law; the common law is relied on. So, I think [section 50 applicants] need to be represented. I think they need to be represented during the settlement process, too. I can't imagine what happens to workers on their own in the settlement process. Just what I've seen representing workers in the settlement process.[62]

Worries about navigating the complexities of the Labour Relations Board without representation could plausibly keep workers with solid reprisal complaints from ever going to the Board.

Unfortunately, the majority of the workers who do file a section 50 application at the Board do so unrepresented. According to the statistics provided by Board solicitor Voy Stelmaszynski, of the 547 applications filed between January 2004 and March 2009, 350 were filed by individuals that were either unrepresented or represented by "a friend, colleague or relative" that is not a licensed legal professional.[63] This means that 64% of section 50 applicants did not have experienced legal or trade union representation when they filed their respective applications. Of the remaining 197 applications, paralegals represented 47 workers, lawyers connected to the worker's trade union represented 46 workers, lawyers retained by the individual worker represented 66 workers, and union officials represented 38 workers.

Mark Harcourt, in "How Attorney Representation and Adjudication Affect Canadian Arbitration and Labor Relations Board Decisions," notes that in section 50 hearings concerning work refusals, "employees can improve their chances of winning by hiring a lawyer when employers do not [and] employees can save money on legal fees and not decrease their chances of winning by not hiring a

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[62] *Supra* note 14.
[63] E-mail from Voy Stelmaszynski to Brendan McCutchen (26 Aug 2009).

lawyer when employers do."[64] A major limitation of Harcourt's article lies in its focus on rulings. According to Stelmaszynski, most section 50 applications never get to the stage where the Board has to rule on the case: "[w]e settle between 80 and 85% of all the cases that come to the Board."[65] The settlement rate for reprisal complaints is slightly lower than the global settlement rate at the Board set out by Stelmaszynski: in 2007-2008, 68 of 103 processed cases were settled (66.0%); in 2006-2007, 78 of 101 processed cases were settled (77.2%); and in 2005-2006, 101 of 120 processed cases were settled (84.2%).[66] Hence, Harcourt's conclusion that legal representation is not always necessary in the adjudication of section 50 cases is not readily applicable in a forum characterized less by adjudication than by mediation and negotiation.

Certainly, Stelmaszynski notes of the settlement process, "I think that there are enormous pressures [during the process], particularly on the unrepresented ones. If this is the breadwinner in the family, they have just been fired, they have rent to pay or mortgages to pay, or other payments, mouths to feed, there's enormous pressure on them to get it dealt with as quickly as possible."[67] These pressures can lead unrepresented litigants to accept settlements that do not adequately reflect their reprisal-based losses. Stelmaszynski says:

> I think that's the case in a lot of applications where there is no union. Employees don't know what their rights are entirely, or what the remedy could or should be. The Board is not here to advise one side or the other. We will fashion a remedy or a settlement, but we can't tell the parties whether it's good or bad, or whether it's fair or not fair to them. They are entitled to get whatever advice they can outside of the Board.[68]

Representation—either by a legal professional or a union representative—thus becomes crucial during

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[64] *Supra* note 6 at 158.

[65] Interview of Voy Stelmasynzki, lawyer at the Ontario Labour Relations Board, by Brendan McCutchen (22 May 2009).

[66] These statistics come from the Ontario Labour Relations Board's Annual Reports. Ontario Labour Relations Board, "Annual Report 2007-2008", online: Ontario Labour Relations Board <http://www.olrb.gov.on.ca/english/AnnRep0708.pdf > at 13. Ontario Labour Relations Board, "Annual Report 2006-2007", online: Ontario Labour Relations Board <http://www.olrb.gov.on.ca/english/AnnRep0607.pdf> at 13. Ontario Labour Relations Board, "Annual Report 2005-2006", online: Ontairo Labour Relations Board <http://www.olrb.gov.on.ca/english/AnnRep0506.pdf > at 13.

[67] *Supra* note 65.

[68] *Ibid.*

the settlement process. Unfortunately, however, as the above statistics show, such representation is infrequent in section 50 cases at the Board.

Of course, some workers might qualify for free representation under Ontario's legal aid system—and specifically at the Toronto Workers' Health and Safety Legal Clinic—for their section 50 application. The criteria are stringent in these cases: as Michael Trebilcock notes in his *Report of the Legal Aid Review*, these criteria are "seriously out of step with current cost of living levels and unrelated to any overarching conception of basic needs or a more and coherent conception of poverty to which social programs (including legal aid) might be anchored."[69] Vannucci notes that, nonetheless, there are many workers who can meet these criteria: they might not have any savings, and might be "one pay cheque away from welfare."[70]

What is surprising here is that many of the workers who do meet the financial eligibility criteria for free representation in section 50 proceedings from the Health and Safety Legal Clinic are not approaching the clinic for help. Indeed, over the past decade the clinic has had to significantly adjust the focus of its casework to make up for the dearth of reprisal complainants: now, most of the clinic's casework concerns workers' compensation appeals, and its section 50 expertise is being seriously under-utilized.[71] This adjustment has been subject to much speculation at the clinic. Vannucci hypothesizes, "I think just having to do with the changing nature of work, the precarious nature of employment, people working for agencies. And, like the kinds of people we've given advice to seem to go from 'they don't like health and safety' at one job working for an agency. Rather than raise the issue, they just try and get transferred to another workplace, so they have no disruption in income."[72] The clinic's 2009 Annual Report notes that this shift in casework "seems to reflect a growing fear or

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[69] Michael Trebilcock, *Report of the Legal Aid Review 2008*, online: Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf> at 72.

[70] *Supra* note 14.

[71] See Toronto Workers' Health and Safety Legal Clinic, "Annual Report 2009", online: Toronto Workers' Health and Safety Legal Clinic <http://www.workers-safety.ca/annual-report-2009> at 2.

[72] *Supra* note 14.

disinterest among low income workers in enforcing their rights under the OHSA; this would perhaps be expected to intensify with the recently-begun economic downturn."[73]

Another explanation might lie in workers' not knowing about the clinic. According to the clinic's 2008 Annual Report, "Direct contact with front-line staff of the community and government agencies that deal with the Clinic's target client group is the most important way in which awareness about the services available from the Clinic can be promoted. We simply do not have the resources or manpower to reach the clients themselves through advertising or other promotional means."[74] This inability to promote the clinic might work to prevent eligible clients from discovering the clinic at all.

In any case, there is something of an access to justice crisis in the section 50 context. Most workers have no skilled representation, either from a trade union, a lawyer or a paralegal, despite the fact that such representation appears to be necessary in order to get a fair deal during the Board's settlement process and in order for a worker to perform well at a potential hearing. What is worse is that existing legal aid services are not being appropriately relied upon: either these extremely low-income workers are representing themselves or, as Vannucci and the clinic declare, are not pursuing their complaints. The *Report of the Legal Aid Review* suggests that Ontario's legal aid system is in a sad state: financial eligibility criteria are too severe, and too much of the Ontario public is left without legal representation as a result.[75] It is vital to remember that these access to justice problems are present in section 50 cases, as well.

F. Lack of Co-ordination Between the Ontario Labour Relations Board and the Ministry of Labour

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[73] *Supra* note 71.

[74] Toronto Workers' Health and Safety Legal Clinic, "Annual Report 2008", online: Toronto Workers' Health and Safety Legal Clinic <http://www.workers-safety.ca/annual-report-2008>.

[75] *Supra* note 69 at 72, 76.

As noted above, of the 547 section 50 applications received by the Board in the last five years, only about 69 of these applications came from workers that had complained to the Ministry of Labour. This statistic is cause for concern: according to the Ministry policy previously discussed, when a section 50 complaint is received by the Ministry, an inspector generally reports to the workplace and addresses underlying health and safety issues. An inspector might also investigate the reprisal in order to consider prosecution. What is problematic about section 50 complaints that go straight to the Board—which is true of 87.4% of the section 50 applications received by the Board—is that the Ministry cannot address underlying health and safety issues, nor can it consider prosecution.

Stelmaszynski comments on the interaction between the Ontario Labour Relations Board and the Ministry of Labour:

> It appears to be two silos, I think. We don't get much information from the Ministry of Labour in terms of what kinds of investigations they are conducting. And generally when an applicant comes to us with a section 50 complaint, we don't get any information from the applicant or anyone else about the Ministry's presence or visit to a workplace. I think it would help if we knew that an inspector had been in a workplace.[76]

What is also important is the obverse relation: how information flows from the Ontario Labour Relations Board to the Ministry of Labour. Stelmaszynski notes that the Board simply sends its section 50 decisions to the Ministry.[77] As a result, since most section 50 cases end in settlement, the Ministry never hears about the majority of section 50 complaints filed at the Board. What this means is that there is a large swath of reprisal allegations that come from workplaces that are never subject to the scrutiny of the health and safety inspectorate as a result of the allegation.

4. Ways Forward: Dealing with the Findings

The above findings are, in many ways, disconcerting. Employee complaints are often dropped

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[76] *Supra* note 65.
[77] *Ibid.*

before they can get a remedy. Many workers who do file an application at the Board do so unrepresented, and thus at a great disadvantage. The Ministry of Labour, and its health and safety inspectorate appear to operate on the understanding that prosecution is not a real option in most reprisal cases. Finally, the lack of co-ordination between the Ministry and the Board means that the Ministry frequently never reports to workplaces where reprisal allegations have occurred. Radical improvement, then, is needed. This section lays out various ways forward.

A. Expanding the Powers of the Health and Safety Inspectorate: Writing Orders Under Section 50

When the Hon. Elizabeth Witmer released her discussion paper on occupational health and safety in the province in 1997, she noted that some stakeholders had suggested "that Ministry inspectors should be able to investigate and render decisions on whether an employee has been unjustly disciplined by the employer."[78] This idea has been endorsed by some sectors of the labour and employment advocacy community, including the Timmins and District Labour Council in its report on section 50 of the *Act*.[79]

In its submissions to the Ministry of Labour following the Ministry's request, the Toronto Workers' Health and Safety Legal Clinic rejected the idea:

> [Section 50] complaints invariably involve conflicting evidence. Employers always have a different version of events as compared to the worker. Resolving these conflicts is never easy. If the matter cannot be settled voluntarily, a hearing before the O.L.R.B. is still a better forum for resolving contradictory allegations than an informal inspector's investigation. Even if inspectors were given the power to render decisions in these cases, the principles of natural justice dictate that there be an opportunity to appeal. If that is given, then nothing much has been gained by the process.[80]

In addition, the Ministry of Labour policy on reprisals asserts that its current "approach reflects the

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[78] *Supra* note 9 at 31
[79] *Supra* note 13 at 25.
[80] *Supra* note 30 at 38.

respective areas of expertise of the Inspectors and of the OLRB."[81]

While it is true that inspectors might be thrust into tough situations if they were able to issue orders on reprisals, the benefits of Ministry of Labour intervention in reprisal cases could outweigh any difficulties this new framework would cause. As noted above, in the last five years, only 12.9% of complainants to the Ministry of Labour went on to file a section 50 application at the Board. Moreover, during this same time period, over half of the section 50 applicants went to the Board unrepresented either by a legal professional or a union official. Empowering inspectors in the way just set out would be a way of confronting these all-important access to justice issues. Reprisal allegations could be dealt with in a manner that would not require representation, and that would proceed much more quickly for the complainant than pursuing his or her case at the Board.

Looking at Manitoba's anti-reprisal provisions and policy in the occupational health and safety context is instructive. Under section 42 of the *Workplace Safety and Health Act*, reprisal action—what Manitoba's legislation calls "discriminatory action"—is prohibited. If a worker "believes on reasonable grounds that the employer or union has taken discriminatory action against him or her," he or she "may refer the matter to a safety and health officer."[82] An investigation will then begin generally within 48 hours of the complaint being received, asserts Bryan Zirk, Director of the Inspection Services Branch.[83] Importantly, when a complaint is received, it is "assigned 'Immediate Response' status."[84] This explains why an investigation occurs so quickly. Investigations are then carried out mostly by lead investigators, who specialize in reprisal complaints. In Manitoba's more Northern regions, however, standard health and safety officers generally conduct these investigations,

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[81] *Supra* note 36 at 37.

[82] *Workplace Safety and Health Act*, C.C.S.M. c. W210 [*WSHA*], s. 42.1(1).

[83] Interview of Bryan Zirk, Director, Inspection Services Branch, Workplace Safety and Health Division, Manitoba Labour and Immigration, by Brendan McCutchen (21 July 2009).

[84] E-mail from Bryan Zirk to Brendan McCutchen (28 July 2009).

but they do so in consultation with the lead investigators.[85] The investigations consist of gathering documentation, looking at personnel records, and interviewing the parties involved. Sometimes, the employer and/or the worker will have legal representation, but, because of the non-legalistic nature of the process, such representation is not all that important.[86]

Zirk notes:

> [The] [d]uration of the investigations is directly related to the accessibility of information from both parties. Factors such as companies that choose to communicate through a lawyer, and the geographic location of the occurrence also affect the time an investigation may take. That said, when all parties willingly participate and are located in the city, an average investigation will take between one and two weeks.[87]

When the investigation is over, the investigator or the health and safety officer makes a decision: where warranted, the investigator or officer uses his or her power under subsection 42.1(2) of the *Act* to reinstate the worker, order lost wages to be paid, and so on.[88]

There are two levels of appeal through which an employer or employee can go if he or she is displeased with the decision of the investigator or officer. First, an appeal can be made to the Director of the Workplace Safety and Health Division under section 37 of the *Act*. Second, the Director's decision can be appealed to the Manitoba Labour Board under section 39 of the *Act*. Appeals to the Director are generally dealt with within a period of two weeks to a month,[89] with appeals to the Board likely taking a while longer.

Notably, Manitoba's Workplace Safety and Health Division receives few reprisal complaints compared to Ontario's Ministry of Labour, and consequently carries out far fewer investigations than Ontario does field visits in reprisal cases. Between 2004 and 2008, just 63 investigations into reprisals

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85 *Supra* note 83.
86 *Ibid.*
87 *Supra* note 84.
88 See *WSHA*, s. 42.1(2).
89 Interview of Bryan Zirk by Brendan McCutchen (28 July 2009).

occurred in Manitoba.[90] Importantly, too, reprisal complaints are diligently screened by Client Service officers, which ensures that claims that do not link to section 42 of the *Act* are not investigated.[91]

There are real benefits to Manitoba's legislative and policy approach to reprisals. Employing specialized officers allows reprisal complaints to be investigated from a position of expertise. Moreover, since this process is inquisitorial rather than adversarial, as is the case at the Ontario Labour Relations Board, representation by a trade union or a legal professional is far less necessary. Finally, the speed of the investigation process is crucial to ensuring that workers with solid reprisal allegations get a remedy: in Ontario far too many workers give up following their complaint to the Ministry of Labour. If the Ministry's inspectors could investigate the complaint and swiftly order a remedy, surely many of these complaints would not be dropped and justice would be better served.

The concern of the Toronto Workers' Health and Safety Legal Clinic set out above—that giving Ontario inspectors the power to make orders on reprisals would lead to appeals, which would compel workers to go to the Ontario Labour Relations Board anyway—should be addressed. In the 2007-2008 fiscal year, Ministry inspectors issued 176,669 orders.[92] Interestingly, for that same year, only 184 appeals of inspectors' orders were filed at the Ontario Labour Relations Board,[93] pursuant to section 61 of the *Act*. Based on these figures, it would be unreasonable to think that all, or even most, reprisal determinations would lead to appeals.

In addition, if Ontario were to follow Manitoba's lead and start developing a specialized sector of the inspectorate proficient in reprisal and compensation issues, the Ministry's concerns about a "lack of expertise" on the part of their inspectors could be dissipated, at least to some extent. Notably, Inspector 1 suggests that the Ontario Labour Relations Board could continue to have some role at this

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[90] *Ibid.*
[91] *Supra* note 83.
[92] *Supra* note 40.
[93] *Supra* note 66 at 13.

initial stage: "If it was found [by an inspector] that there was an offence of the *Act* in there, then it would then have to go to the OLRB for the penalty. Allow us to have some say prior to sending it up."[94]

Of course, allowing inspectors to write orders under section 50 would require substantial legislative changes—with sections 50 and 57 of the *Act* amended to look more like section section 42 of Manitoba's health and safety legislation—and policy changes, but such changes could directly confront the access to justice crisis that is now part and parcel of the section 50 remedial process. We must not overestimate the discomfort that inspectors would feel in ruling on reprisals, too: as the 95 orders discussed above show, sometimes inspectors feel so strongly about a reprisal that they violate explicit policy in order to protect an employee. Moreover, Inspector 2 asserts that some of the reprisal complaints he has received are truly "clear-cut"[95]. Consequently, not every reprisal case would require a sophisticated investigation of the complaint.

Lastly, the adoption of Manitoba's approach to reprisal action would bring uniformity to the Ministry of Labour's occupational health and safety regulatory strategy. Today, pursuant to the Ministry's policy manual, inspectors have to turn a blind eye to potential violations of section 50 unless they are considering prosecution. Permitting inspectors to thoroughly examine every reprisal allegation—just as they examine non-reprisal health and safety allegations—and to make orders where necessary would streamline the tasks of inspectors, while allowing them to get a fuller picture of a workplace's health and safety environment. In addition, such integration would reflect the importance of section 50 within the context of the *Act* as a whole, and in terms of the internal responsibility system. As noted above, section 50 aims to protect the ability of employees to contribute to the operation of the internal responsibility system. Without such employee contributions, the system itself

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[94] *Ibid.*
[95] *Supra* note 19.

cannot function. Consequently, mandating the investigation and issuance of appropriate orders in the reprisal context would stress to employers and supervisors the importance of respecting section 50 and, by extension, the operation of the internal responsibility system itself.

B. Access to Justice

If the amendments to the *Act* and to Ministry policy outlined above do not occur, it is vital that legal aid services be expanded, and financial eligibility criteria for legal aid correspondingly loosened. The difficulties facing so many section 50 complainants also face many other Ontarians when they interact with the province's legal system. As such, these difficulties extend far beyond the Ministry of Labour or the Ontario Labour Relations Board. As Michael Trebilcock asserts in his *Legal Aid Review*:

> [F]ewer and fewer citizens qualify for legal aid, and many working poor and lower middle-income citizens of Ontario confront a system which they cannot access and which they are expected to support through their tax dollars even though they themselves face major financial problems in accessing the justice system. Both LAO and the Government of Ontario, through the Ministry of the Attorney General, need to accord a high priority to rendering the legal aid system more salient to middle-class citizens of Ontario (where, after all, most of the taxable capacity of the province resides).[96]

Alongside the expansion of legal aid services, there must be greater promotion of the services that the Toronto Workers' Health and Safety Legal Clinic offers. Compared to past years, the clinic today is under-used in section 50 proceedings, despite the steady stream of reprisal complaints received by the Ministry, and of section 50 applications filed at the Board. Getting the word out about the clinic might mean providing the clinic with additional funds for advertising. It is important to note that the clinic, though based in Toronto, has a provide-wide catchment area.[97] Because of this feature of the clinic, its under-use by workers who have experienced reprisals is even more worrisome, and shows a need for promotional activities across the province.

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[96] *Supra* note 69 at iv.

[97] E-mail from Linda Vannucci to Brendan McCutchen (6 November 2009).

The website of the Ontario Labour Relations Board contains a section entitled "Legal Assistance."[98] The section provides workers seeking legal aid support with the number and website of Legal Aid Ontario, alongside a link to a listing of community legal clinics funded by Legal Aid. While this information is helpful for workers, there is a chance that potential or actual section 50 applicants need further support in seeking out legal aid services. Modifying the section so that the name, address and telephone number of the Toronto Workers' Health and Safety Legal Clinic appear on the webpage might work to ensure that more potential or actual applicants know about the clinic's services.[99] This could be supplemented by adding the clinic's contact information to OLRB Information Bulletin #14[100], which sets out the application, settlement and adjudicative processes for section 50 complaints, and to Form A-53[101], which is the application form that must be completed in order to initiate a section 50 complaint. Nowhere in Bulletin #14 or Form A-53 is there a recommendation that a worker seek legal representation; such a recommendation should appear in these documents.

Moreover, since so many workers never make it to the Board in the reprisal context, only providing legal assistance information on the Board's website is likely insufficient. The Ministry of Labour thus might supply this information on its website, too. There are surely other ways of confronting the promotional problems confronting the Health and Safety Legal clinic, and of spreading awareness of available free representation. What is important is that something be done to improve worker reliance on legal representation, whether through legal aid or not. In this vein, the labour community should seek out meetings with OLRB and Ministry of Labour officials to discuss ways in

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[98] See Ontario Labour Relations Board, "Legal Assistance", online: Ontario Labour Relations Board <http://www.olrb.gov.on.ca/english/legalas.htm>.

[99] This option is derived from the practice of the Workplace Safety and Insurance Appeals Tribunal. The tribunal's website provides contact information for Ontario's various legal aid offices and all the community legal clinics that offer workers' compensation services in the province. See http://wsiat.on.ca/english/appeals_2007/worker.htm.

[100] Ontario Labour Relations Board, "Ontario Labour Relations Board Information Bulletin No. 14: Unlawful Reprisal Applications under Section 50 of the Occupational Health and Safety Act", online: Ontario Labour Relations Board, <http://www.olrb.gov.on.ca/english/infob/infbul14.pdf>.

[101] Ontario Labour Relations Board, Form A-53, online: Ontario Labour Relations Board, <http://www.olrb.gov.on.ca/english/forms/aforms/fa53.pdf>.

which current application, settlement and adjudication processes could be adjusted to facilitate applicant access to legal representation. These meetings might also involve discussing options for simplifying Board processes for unrepresented litigants. For example, Bulletin #14 tells potential applicants nothing about application deadlines, which arise out of Board case law. Since most unrepresented litigants do not know that they should look to case law in order to determine whether a potential application would be "timely," having information on deadlines in the bulletin itself might prevent strong reprisal allegations from being dismissed for "untimeliness." Stelmaszynski himself concedes that such information should be in the bulletin.[102] Any future meetings might address similar issues that might stand in the way of an unrepresented applicant getting appropriate compensation.

C. Prosecutions Under S. 50

In his 1987 report, Laskin acknowledges the low number of prosecutions undertaken by the Legal Services Branch of the Ministry of Labour following reprisal action by employers. However, he defends the actions of the Branch as follows:[103]

> While it is true that the Ministry does not often charge an employer for a contravention of section 24(1), there are good reasons for not invoking prosecution under the Act in the event of a reprisal. Section 24(2) provides that a worker complaint of reprisal can additionally be dealt with before the Ontario Labour Relations Board (the "Board"). There are two compelling advantages to the worker in proceeding before the Board. First, as prescribed in section 24(5) of the Act, on an inquiry by the Board the burden of proof that an employer did not act contrary to section 24(1) lies not on the employee but on the employer or the person acting on behalf of the employer. Second, proceedings before the Board may result in an order for compensation in favour of the worker or for reinstatement in employment, an order which cannot be obtained in a prosecution under the Act.[104]

In this passage, Laskin explains the dearth of prosecutions by referring to the civil remedies available to workers. Consequently, he does not adequately distinguish between the goals of prosecution, and the

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[102] *Supra* note 65.
[103] Note that in 1987 the anti-reprisal provisions were listed in s. 24 of the *Act*.
[104] *Supra* note 2 at 39-40.

goals of the remedial process at the Board. Ministry of Labour policy is clear that "[t]he purpose of prosecution is to achieve compliance with the legislation. Compliance is achieved by deterrence: specific deterrence for the offender and general deterrence for other potential offenders. The most important consideration is general deterrence."[105] Laskin himself knows this to be true of prosecution, noting that in "*Regina v. Cotton Felts*, the Ontario Court of Appeal stresses the paramount importance of deterrence in public welfare offences."[106] He then acknowledges that the *Occupational Health and Safety Act* creates just such public welfare offences.

In contrast, the Board process does not seek to deter offenders, but to compensate the wronged party for any losses he or she has suffered. As Stelmaszynski says, if a vice-chair or panel at the Board finds that an employer has punished an employee in contravention of section 50 of the *Act*, "a ' make whole' remedy [is sought out]. That puts [the worker] back to the position as if none of the violations had happened."[107] As such, it is essential that we do not taint our analysis of prosecution policy with thoughts about the civil procedures established at the Ontario Labour Relations Board to deal with reprisals. They are separate processes, serving different ends, and involving different parties, with the Board process pitting the employer against the employee, and prosecution pitting the state against the employer.

Deterrence is sorely needed in the reprisal context. As discussed above, fear of reprisal and ignorance of section 50 are widespread, sometimes even in unionized environments. Because of these factors, workers are falling afoul of their legislated reporting obligations, and the internal responsibility system is not operating as it should. In order to protect the system that provides the regulatory bedrock for the *Act*, employers must be deterred from establishing cultures of fear in their workplaces, and from

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105 "Prosecution" in *Operations Division Policy & Procedures Reference Manual* (Ministry of Labour: January 2006) [unpublished] at 3.

106 *Supra* note 2 at 12.

107 *Supra* note 65.

taking reprisals against their employees in the occupational health and safety context. Three or four prosecutions under the anti-reprisal provisions in the last 22 years are not sufficient to deter employers from attacking the internal responsibility system by way of reprisal action.

Moreover, existing Ministry policy can easily encompass vastly increased reprisal prosecutions. The policy manual states "prosecution must be considered" in situations where there is a "disregard" for the *Act* or the regulations: "Disregard of the *OHSA/* regulations refers to those persons who have duties and responsibilities under the *OHSA* and are attaching insufficient importance to their obligations under the *OHSA* or its regulations, or where the person is ignoring the requirements of the *OHSA* or its regulations."[108] Such disregard is clear in many reprisal cases: when employers or supervisors punish an employee for refusing to work, or complaining about health and safety, they are setting aside their duty not to take reprisals and rejecting their mandated commitment to the internal responsibility system.

Of course, not every situation of reprisal needs to lead to prosecution. It should also be noted that, even if the Legal Services Branch of the Ministry carries out many more section 50 prosecutions, convictions may be infrequent. In OLRB section 50 proceedings, the burden of proof—pursuant to 50(5) of the *Act*—is on the employer: the employer must show that **it was more likely than not** that the disciplinary action was not imposed in contravention of section 50(1) in order to escape civil liability. In contrast, in section 50 prosecutions, the Branch bears the burden of proof, and must show **beyond a reasonable doubt** that the employer disciplined the employee in contravention of section 50(1) in order to secure a conviction. As noted above, Inspector 2 reports that the Ministry's reluctance to prosecute under section 50 is tied to concerns about satisfying this burden of proof.

However, acknowledging such obstacles to conviction cannot excuse current Ministry of Labour policy and practice. Indeed, instead of seeking out the strongest reprisal cases for prosecution,

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[108] *Supra* note 105 at 8.

the Ministry has rarely sought out any. As a result, employers that establish cultures of fear around health and safety, and employers that take reprisals against their workers can violate the *Act* without real risk of prosecution.

What is necessary now, then, is a solid commitment from the Ministry of Labour that aims to deter such employer conduct through section 50 prosecutions. Both inspectors interviewed for this project report that prosecutions are being strongly encouraged by the Ministry today.[109] Inspector 1 reports, "The new hires are prosecuting like gangbusters."[110] All the same, both inspectors still assert that there is widespread unwillingness to prosecute under section 50 among the inspectorate, management and the Legal Services Branch. Consequently, the Ministry must combat this unwillingness, and commit itself to integrating section 50 prosecutions into its prosecution policy and practice. This might require a special emphasis on section 50 prosecutions.[111] Such an emphasis might be signaled to the public if the Ministry began to more extensively monitor inspectors' handling of reprisal complaints. For instance, it would be helpful if the Ministry began tracking recommendations to prosecute under section 50.[112]

The Ministry's special emphasis on section 50 prosecutions would also have to lead to changes in how the Ministry paints occupational health and safety-based reprisals in its publications. In its report on reprisals, the Timmins and District Labour Council called attention to worrisome phrasing on reprisals on the Ministry's "Work Smart Ontario" website, which is directed specifically at "young workers and new workers," two of the most vulnerable groups of workers in Ontario society.[113] Incredibly, this phrasing is still on that website, and reads as follows:

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[109] *Supra* note 19.

[110] *Supra* note 15.

[111] Notably, when an employer takes reprisal action against an employee in the occupational health and safety context, that employer violates both s. 50 of the *Occupational Health and Safety Act* and s. 425.1 of the *Criminal Code*, R.S.C. 1985, c. C-46. To date, no prosecutions have been undertaken under s. 425.1.

[112] In the correspondence from Virginia West referred to in *supra* note 47, West noted, "the ministry does not track findings of reprisals or recommendations to prosecute."

[113] *Supra* note 13 at 5.

> If you feel you have been disciplined (e.g. sent home without pay, had your hours drastically cut or were fired), you can report it to the Ministry of Labour, who will guide you either to your union (if there is one) or to the Ontario Labour Relations Board (OLRB) who will rule on the situation. The Ministry doesn't make any rulings or decisions in these situations. The union or the OLRB will handle the process. Be aware that it may take some time to resolve.
>
> Even if you only feel that after a refusal you were treated differently, remember that the loss of a job is nothing compared to losing a finger, getting burned or perhaps losing your life. Give yourself a pat on the back for exercising your rights and protecting yourself and your co-workers. It probably isn't a great place to work if your employer reacts by punishing you.[114]

These words are remarkable because of their directness: here, the Ministry appears to be acknowledging that its coercive powers are not exercised in the reprisal context. The Ministry very rarely prosecutes, and its inspectorate has been restricted by the *Act* and Ministry policy in terms of writing orders. What these regulatory choices have meant is that a worker who has experienced a reprisal cannot expect assistance from the Ministry in getting a remedy. Reshaping the Ministry's legislative and policy approach to reprisals—and specifically with regard to prosecutions—thus also means re-orienting its educational materials, so that they show workers that the Ministry can, and will, support the rights of workers who have experienced reprisals.

D. Co-ordination Between the Ontario Labour Relations Board and the Ministry of Labour

If the Ontario Labour Relations Board is to continue adjudicating reprisal complaints, greater co-ordination is needed between the Board and the Ministry of Labour. Of course, such co-ordination must not impact on the adjudicative independence of the Board. Workers should be able to apply to the Board for relief in the section 50 context only after they have reported the reprisal to the Ministry of Labour. Far too many reprisal allegations are never encountered by the Ministry of Labour, and its health and safety inspectorate. Consequently, underlying health and safety issues might not be

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[114] Ministry of Labour, "Can I be disciplined or fired for refusing to work or raising concerns?", online: Work Smart Ontario, <http://www.worksmartontario.gov.on.ca/scripts/default.asp?contentID=2-4-3#H5>.

remedied, nor is prosecution ever considered in these cases. One option to produce greater co-ordination lies in amending section 50 so that the aforementioned precondition becomes law.

Conclusion

The policy, practice and legislative recommendations set out above seek to address the various problems and inadequacies that today colour the way the Ministry of Labour and the Ontario Labour Relations Board deal with reprisals. 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. Too many Ontario workers are afraid to complain about health and safety, and too many are not aware of section 50 of the *Act*. It is the responsibility of the Ministry of Labour to ensure that such fear and ignorance are vastly reduced, and that its chosen method of occupational health and safety regulation flourishes in Ontario's workplaces.

In addition, when a worker experiences a reprisal, far more must be done to ensure that that worker gets a fair deal when he or she seeks help and compensation. Most workers who complain to the Ministry never get to the Ontario Labour Relations Board; even among those who do manage to file an application, legal or trade union representation is spotty. Worse, many of the workers who would qualify for free legal representation through the Toronto Workers' Health and Safety Legal Clinic are not pursuing representation there. These access to justice issues must be addressed, whether through legislative reform that allows inspectors to write orders under section 50 of the *Act* or through the province-wide expansion of legal aid services.