



Labour **O**HCO**W** **A**cademic **R**esearch **C**ollaboration

Submission to Mining Health, Safety and Prevention Review

June 13, 2014

LOARC Members:

Chair: Andy King, formerly United Steel Workers union; LLM.

Alan Hall, Memorial University of Newfoundland (MUN)

Wayne Lewchuk, McMaster University

Syed Naqvi, Occupational Health Clinics for Ontario Workers (OHCOW)

John Oudyk, Occupational Health Clinics for Ontario Workers (OHCOW)

Terri Aversa, Ontario Public Service Employees Union (OPSEU)

Nancy Johnson, Ontario Nurses' Association (ONA)

Laura Lozanski, Canadian Association of University Teachers (CAUT)

Sari Sairanen, Unifor

Ellen Simmons, Workers Health & Safety Centre (WHSC)

TABLE OF CONTENTS

INTRODUCTION	1
LOARC opposes defining the IRS	2
Tracing Ontario's occupational health and safety regime.....	4
First came legislation.....	4
1914 <i>Workers' Compensation Act</i>	4
Next came the internal responsibility	4
1978 to1997: Increasing participation and reducing enforcement.....	5
Self-reliance: 1995 to 2010.....	5
Where are we now.....	6
What we know about participation.....	7
Failing to protect workers from reprisal.....	8
Undermining worker OHS representation	8
The teeter-totter of enforcement and the IRS	10
Enforcement needs to be paired with a stronger IRS.....	10
Evidence that worker participation works and how.....	12
How worker representation works.....	13
LOARC 2013 research shows how to strengthen worker representation.....	13
CONCLUSION	16
Works cited.....	18

LOARC Submission to Mining Health, Safety and Prevention Review

June 13, 2014

Introduction

The **L**abour **O**HCO**W** **A**cademic **R**esearch **C**ollaboration (LOARC) has prepared this paper for consideration by the Mining Health, Safety and Prevention Review announced by the Ministry of Labour on March 31, 2014.

Labour OHCOW Academic Research Collaboration (formed in 2008) is a network of union health and safety representatives, occupational health practitioners, and academic researchers who draw on collective experience, knowledge and research to present evidence to improve occupational health and safety. While this MOL review focuses on mining, we believe that there are implications, especially with regard to worker participation and enforcement that makes the review relevant to all sectors in Ontario.

In this paper we focus our comments specifically on the Internal Responsibility System (IRS) part of the review. LOARC focused on the same topic during the Expert Panel Review of the occupational health and safety system led by Tony Dean with our written submission “Internal responsibility: The challenge and the crisis” and our presentation on August 25, 2010.

Indeed, LOARC is in a unique position to comment on the IRS. LOARC’s academics, Dr. Wayne Lewchuk (Professor, McMaster University) and Dr. Alan Hall (Professor, Memorial University) have spent many decades researching and writing numerous scholarly articles on occupational health and safety and worker representation. Multidisciplinary health experts such as Dr. Syed Naqvi (Occupational Ergonomist) and John Oudyk (Occupational Hygienist) at Occupational Health Clinics for Ontario Workers (OHCOW) bring technical expertise and decades of experience working with many types of organizations in Ontario to improve workplace health and safety. Training professional Ellen Simmons (Workers Health & Safety Centre) has spent years creating and implementing high quality health and safety training programs for workers and employers that make a difference in workplace health and safety. Union health and safety representatives Andy King, (retired from United Steelworkers) Laura Lozanski, (Canadian Association of University Teachers), Nancy Johnson (Ontario Nurses’ Association), Sari Sairanen (Unifor), and Terri Aversa (Ontario Public Service Employees Union) use their years working in various sectors and workplaces and their roles in the trade union labour movement to understand how Ontario’s health and safety system affects health and safety on the shop floor.

In sum, LOARC brings many types of knowledge together to offer reasoned and evidence-based recommendations to this review.

LOARC opposes inserting a definition of the IRS into the *Occupational Health and Safety Act*

Ontario is fortunate to have a rich history of empirical study of its OHS regime going back to its beginnings in the end of the 20th century. LOARC draws from this research as well as the collective experience of its members, all of whom have been participants at one time or another in the evolution of Ontario OHS since 1975.

Our principal recommendations are that enforcement needs to be enhanced and worker participation strengthened. We believe that both of these goals can be achieved by changes in strategy and practice within the Ministry of Labour.

We caution against legislative amendments that purport to define Internal Responsibility and what it means. Recent experience with the 2009 Bill 168 amendments to the *OHS Act* to address workplace harassment enhances our concern. Workers were disappointed that the law requires only that a policy be created that contains reporting and investigation mechanisms. Workers believed that the amendments were supposed to protect them from workplace harassment, but according to the Ontario Labour Relations Board workers have gained no enforceable protection.¹ As one recent decision points out,

An interpretation that allows employers to penalize or retaliate against workers who make a workplace harassment complaint would entirely undermine the procedural mechanism that the *Act* creates through which harassment issues can be brought forward in the workplace. If workers can be terminated for making a complaint that the employer's legislatively imposed policy enables them to do, then only the most intrepid or foolish worker would ever complain. In practical terms, there would be no measure or procedure for making a complaint of harassment. Moreover, the occupational health and safety value, whatever it may be (and I have speculated above as to some of the possible values of requiring such a process), that caused the Legislature to impose this obligation on employers would be eviscerated.²

In particular, we have two main reasons for opposing the definition of IRS in the *Occupational Health and Safety Act (OHS Act)*:

1. **The components of the IRS are in the Act.** The IRS is the sum of employer duties, worker rights and duties, committee/health and safety representative rights/roles, and enforcement responsibilities prescribed therein. Imposing a general definition on top of these requirements limits workers' rights because it focuses on individuals in the workplace rather than on employers' responsibilities to provide safe and healthy workplaces. And definitions of the IRS based solely

¹ See *Shlomo Conforti v. Investia Financial Services Inc. and Industrial Alliance Insurance and Financial Services Inc.* 2011 CanLII 60897.

² *Ibid.*, at para 50.

on individual contributory responsibility undervalue the collective contributory responsibility for OHS (via joint health and safety committees, health and safety representatives, and unions) that James Ham identified in his 1976 Ham Commission Report,

the worker as an individual, and workers collectively, have been denied effective participation in tackling these problems; thus the essential principles of openness and natural justice have not received adequate expression (Ontario 1976, p. 6).

Recent research demonstrates that OHS is not merely a contractual bargain between workers and employers. Under international agreements and Charter decisions, OHS should be considered as a human right (Hilgert 2012). Despite Ham's recommendations and international law, some argue—without empirical research—that the IRS should focus on individuals. At a time in our history when so much of what workers do is predetermined by technology and directives, focusing on individuals would further undermine worker health. At a time when the power of employers is so much greater, focusing on individuals would increase risks to workers.

If the *OHS Act* aims to address the gap that Ham identified, then practice must support the collective contributions of workers. Strategies need to be adopted by the MOL to strengthen worker participation including representation.

2. Defining the IRS will further undermine enforcement of workers' rights when growing numbers of precarious employment situations and vulnerable workers lack voice in the IRS (and need stronger enforcement):

The enhanced focus on self-reliance implicit in defining the IRS reduces worker protection and increases the risk of injury and illness because it assumes that individuals are empowered to fully participate and raise health and safety concerns. What is needed is to use existing enforcement powers proactively to protect vulnerable workers and to strengthen their capacity for effective OHS representation.

What needs to happen? Weak enforcement and weak worker representation leads to unsafe workplaces.

- The Ministry of Labour must restructure its resources to provide in-field support for worker OHS representatives and to improve enforcement.
- The Ministry of Labour must take steps to enforce workers' protection against reprisals. The Bill 160 amendments to the *Act* which allow inspectors to refer reprisal cases to the Ontario Labour Relations Board (OLRB) has not acted as a deterrent to employers who continue to reprimand workers.

Tracing Ontario's occupational health and safety regime

First came legislation

Ontario's first commitment to an occupational health and safety regulatory scheme came in 1884 when the *Ontario Factories Act* established standards and government inspectors to enforce the standards. For the first time the self-regulating market economy was linked with state policy and political struggles regarding health and safety (Tucker 1984). While establishing the government's role in protecting workers' OHS, the tension between workplace health and safety, government enforcement bodies, and economic forces officially began.

The *Factories Act* regulated women and children in the workforce and created new general duty obligations for employers to ensure reasonable provisions for safety. It did not, however, substantially improve the health and safety for workers. Law professor Eric Tucker points out in his 1984 review that the regulation was "ambiguously worded and would not be likely to impose unreasonable costs upon owners of production" (p. 282). While arguably showing compassion for working people, the government of the day had to assure employers that they had nothing to fear from inconsistent, uncertain, and discretionary enforcement (Tucker 1984).

1914 Workers' Compensation Act

The failure of the *Factories Act* to reduce accidents contributed to the passage of the *Workers' Compensation Act* (Tucker 1990). Although originally limited in scope, by the 1960s workers compensation covered the majority of workplaces and workers. Expanding coverage in a no-fault system governed by an independent board to provide income replacement for injured workers paid for through employer premiums improved health and safety. In 1996, economists Don Dewees, David Duff and Michael Trebilcock reviewed empirical evidence to show that workers' compensation made a significant improvement to OHS when it was implemented (Dewees et al. 1996). The compensation law had a more significant positive impact for reducing injuries than either tort law or regulatory frameworks.

While the *Factories Act* and the *Workers' Compensation Act* provided the first frameworks for protecting the health and safety of workers before and after injury, the *Factories Act* was weakly enforced and workers (and their unions) still lacked individual and collective rights to participate in workplace occupational health and safety.

Next came the internal responsibility prong of Ontario's system

The deficiency in workplace participation was addressed when the *Occupational Health and Safety Act* was passed in the 1970s, officially characterizing the workplace parties as direct participants in the system of workplace health and safety (Lewchuk, Robb and Walters 1996). External enforcement would support a workplace system called the "internal responsibility system" (IRS), where workers would participate—individually and

collectively through joint health and safety committees and as health and safety representatives—with employers. Together they would solve workplace health and safety issues, ideally with minimal intervention by government inspectors. This vision would save enforcement for unwilling employers that need the compulsion that enforcement provides.

1978 to 1997: Increasing participation and reducing enforcement

Worker participation individually and collectively was encouraged by the new legislation with initial support from the Ministry of Labour. Consultation processes were established that continue until today. Funding for worker training, clinics and other resources were established.

However, as was noted in LOARC's submission to the 2010 Expert Panel Review and elsewhere, while worker participation was formally encouraged, enforcement declined. As the government adopted and promoted this new internal responsibility approach, it downgraded its role from enforcer to facilitator (Lewchuk, Robb and Walters 1996). Eric Tucker in his studies of enforcement (2003 and 2007) documents a continuing drop in enforcement activity leading up to 1995.

Downgrading enforcement in favour of the IRS was not a recommendation of the Ham Commission Report. Ham recognized that there were circumstances where the workplace would not be able to resolve the matter and external enforcement would be required. Ham (Ontario 1976) emphasized that health and safety enforcement needed to be "alert and responsive" (p. 250), and needed to "deal bluntly with the true offender" (p. 258).

Ham recognized the importance of both internal and external auditors to moderate inevitable tension between conditions of work and personal well-being (Ontario 1976 p. 152). Ham could not have predicted that Ontario's government would dismantle the enforcement system to the point where it brings no reasonable prospect of enforcement to bolster the inadequacies of the IRS (Lewchuk, Robb and Walters 1996). While progressive employers may benefit from assistance and facilitation, every system of internal responsibility needs a reasonable prospect of enforcement to reinforce compliance among unwilling employers (Lewchuk, Robb and Walters 1996).

Self-reliance: 1995 to 2010

The election of the Harris government removed many resources of the OHS system without altering its fundamental structure. In doing so, it promoted an approach of self-reliance, in which employers were left on their own to "do the right thing." The Workplace Health and Safety Agency was eliminated, and the inspectorate was downsized. Specialists such as ergonomists and hygienists were reduced, and the budget of the MOL was frozen. Prevention was formally shifted to the Workplace Safety and Insurance Board (WSIB) and the WSIB took over training, clinics, and employer

associations. WSIB's main prevention tool was experience rating, which was continued and enhanced.

Therefore, monitoring of employers revolved around injury statistics—both with the experience rating program and by guiding strategies of government enforcement. With experience rating, employers received rebates if they kept their injury statistics low and faced the threat of surcharges if they showed higher statistics than their rate group average. If a worker was killed, that employer would be prosecuted by government enforcement, but only under provincial regulations.

In essence, the system used lagging indicators to encourage employer compliance. One of the problems with experience rating is that low injury statistics do not necessarily equate to safer workplaces, yet the OHS system considered injury statistics to be a measure of the level of workplace health and safety. Rather, low injury statistics can be achieved by any number of initiatives, such as discouraging workers to file claims or claims management strategies to fight claims or close files. Indeed, the damage which experience rating has done to health and safety has been well documented and confirmed by independent review (Arthurs, 2012; Policy and Practice 1 2012; Kralj 1994). Enforcement has been studied too. According to economist Boris Kralj (1994), the probability of health and safety compliance increases with government agency inspections. OHS researchers such as Eric Tucker, Wayne Lewchuk, Leslie Robb, Vivienne Walters, Alan Hall, and many others have written about the importance of health and safety enforcement. Enforcement and strong worker representation are tried and true; the government should stop using indirect methods to achieve OHS compliance (such as experience rating) and go back to old-fashioned enforcement combined with strong worker representation.

While prosecutions did increase in the 1990s as workers' deaths continued to occur (Tucker 2003), government policies shifted resources away from inspections, representing a huge withdrawal of government enforcement, leaving the IRS without appropriate support (Lewchuk, Robb and Walters 226).

The adverse consequences of all these policies on workers OHS, injured workers, the funding of workers' compensation, and public confidence are borne out each time a worker gets injured, dies, or develops occupational disease in Ontario.

Where are we now

The Mining Health, Safety and Prevention Review provides an opportunity to review OHS in the context of the industry which has had the longest history of worker participation. Examples from recent inquests confirm our fear that, even in well-established workplaces, worker participation is not fully supported by the system, by employers, or by the Ministry. The influence of self-reliance and the decline of enforcement threaten OHS even here. It is necessary to consider what does work to protect worker OHS.

What we know about participation

Providing participatory rights for workers (both individual and collective) to seek health and safety improvements is a positive addition to a system. The major support for worker representatives comes from the labour movement and the public. However, with only one-third of workplaces in Ontario unionized, the ability of unions to directly improve conditions in non-union workplaces especially in sectors which have less union experience has been limited (Canada 2014). The collective input of workers (with the union right to select JHSC members and health and safety representatives enshrined in the *OHSA*) is weakened as union density declines. Joint health and safety committees and health and safety representatives are often sidelined as employers focus more on individual responsibility in the workplace. In this environment, new strategies are necessary to support worker participation.

Even though the MOL has accepted the Expert Advisory Panel on Occupational Health and Safety's 46 recommendations in the report by Tony Dean, (Expert Panel 2010), the Ministry has yet to follow-through on recommendations that would strengthen workers and their representatives in the IRS system. For example, Recommendation 29 for a Section 21 Committee for vulnerable workers was downgraded to an informal Vulnerable Working Group which operates short of the power of Section 21 in the *OHSA*. And we have yet to see the new farming regulations specified in Recommendation 32.

And the strategy that the MOL did choose was one that put the bulk of responsibility on individuals to raise concerns. Recommendation 31—to produce information products in multiple language and formats—does not fully recognize the plight of “vulnerable workers” lack of voice in the self-reliance system.

The Ministry of Labour's March 3, 2014 launch of a new advertising campaign to assist vulnerable workers, “Know your workplace rights,” provides good information, but does not recognize the difficulty the workers have in asserting their rights individually (Ontario Ministry of Labour). Asking precarious workers to self-regulate their employer in the face of significant power imbalances is not likely to work (Lewchuk 2011). In 27 languages, the MOL informs workers that they have the following rights: to be treated fairly on the job; to work in a safe and healthy workplace; and to receive training to deal with workplace hazards (Ontario Ministry of Labour b). But the materials do not communicate how or assist workers to obtain the rights in practice. These “rights” essentially make the worker be the one who gets the ball rolling in the workplace to obtain health and safety protection. It assumes the worker has the courage or power to change anything, and it assumes that an employer would be agreeable and accommodating. The approach makes no sense because the worker has the least amount of decision-making power in the workplace to make a change. At the very least, this campaign should also have been directed at the employers who control the workplace and who have the obligations to protect workers.

While the campaign is aimed to send the workers boldly forward, the MOL does virtually nothing to protect these workers from reprisal if they exercise any of these rights and get dismissed from employment.

Failing to protect workers from reprisal

Without question the most important right that workers should have in Ontario is the one that is actually the weakest—to be free from reprisal for pursuing an OHS concern. The weakness was well documented by Brendan McCutcheon’s 2009 report for the Ontario Federation of Labour. If workers do feel secure enough to assert their health and safety rights at work, they often suffer termination and are left flapping in the wind even after the recent changes that were supposed to protect workers. The Ministry of Labour refuses to enforce a workers’ right to protection. An inspector is directed not to investigate or write an order on a reprisal. The reasoning is that the Ontario Labour Relations Board has the authority to hear the worker’s complaint. Therefore it is of no real help for the worker. No prosecution of employers. It’s a perfect storm.

Amendments in 2011 provide limited support for workers, but bolster help for small employers. An inspector can refer a worker’s complaint directly to the OLRB and can refer a worker to the Office of the Worker Adviser (OWA) for representation. However, employers were also assisted by being provided with free help from the Office of the Employer Adviser (OEA) to defend against reprisal complaints brought by workers. According to the OEA website, “As of April 1, 2012, the OEA assists employers confronted with unjust reprisal allegations raised under the OHSA. We [the OEA] provide employers with expert confidential legal advice and representation before the Ontario Labour Relations Board (OLRB), all at no fee to the employer” (OEA website). In the end, however, the protection is weak even for the workers with the strongest unions. Information from the OWA is that the majority of all complaints of reprisal involve a worker who threatened to complain or did complain to an inspector. The worker loses his or her job and cannot go back into the workplace to collect statements or evidence. Unions are often frustrated conducting a reprisal investigation. The only help from the inspector—who under *OHSA* it is an offence to obstruct—is to forward the complaint and refer them to someone else. Even if the worker is successful, all a worker gets, without a union, is some lost wages. There is no penalty to the employer.

The whole process leaves behind a workplace full of other workers who saw the worker who spoke up simply disappear. They saw the inspector not deal with the reprisal issue. They saw the employer get away with it and suffer no penalty. An OHS chill descends over the workplace that makes all other workers afraid to speak up for fear of suffering the same fate.

Undermining worker OHS representation

Associate Professor in the School of Occupational and Public Health at Ryerson University, Peter Strahlendorf argues that joint committees and worker representation in OHS are no longer needed. He argues that worker collective participation in OHS is a

corruption of OHS by labour relations. In his view of the world, responsibility is reduced to individuals.³ His approach argues for stronger employer control and delegation of responsibility. It puts workers back under the vulnerability of what their employer decides for them is safe and ignores the risks of speaking up without representation. It diminishes the rights of workers to know fully what is contributing to the risks they face and denies them access to information until the point where they have to do their work. It conveniently ignores what Ham made so clear in his report about collective responsibility to health and safety. Although rhetorically Strahlendorf asserts that everyone is accountable, by belittling worker representations, he would eliminate an internal mechanism by which management can be held responsible.

The employers' preoccupation with individual responsibilities was evident in 2002 following the Jetter Roofing tragedy where one worker died and another one was injured when they moved a scaffold, hitting an overhead power line. In court, the employer took the position as part of their "due diligence" defense that the supervisor should not be found guilty because he had assigned a lead hand (worker) to be in charge (Edwards 2002). Although the employer lost the case, their position illustrates the tendency to push responsibility downward to the lowest possible level (i.e. the worker) in the workplace. The trend is visible again in 2004 with the passage of *Bill C-45*, the law that holds CEOs and/or directors of firms criminally responsible for negligence that results in workplace fatalities. Employer counsel Cheryl Edwards (2005) observes that employers "sat up and paid close attention by reinforcing and expanding existing due diligence programs."

So far, judges have rejected the idea that supervisors can be held responsible for issues such as staffing which they cannot control, or that employers can thrust roles upon supervisors without providing appropriate training, authority, or resources. However, employers continue to divert responsibility to workers through due diligence programs while trying to minimize collective participation by isolating JHSCs and worker representatives.

Empirical research and experience shows that relying on individual responsibilities does not work. In fact, it was an IRS that highlighted only individual contributory responsibility that was part of the path that led to the Westray explosion in 1992 (Tucker 1998). Alan Hall (1996) adds research that points to gaps in relying on individual responsibility. Hall examined management safety systems at the former INCO mine by studying internal reports, observing interactions and meetings, and by interviewing managers, miners and labour representatives. Hall questions the effectiveness of individual workers'

³ Although Dr Strahlendorf's work is widely cited by the Ontario Ministry of Labour and associations like Workplace Safety North, we were not able to find any peer reviewed publications by him which provide an empirical basis for his assertions. His opinions are found in OHS practitioner magazines, power points, and as a co-author with Plummer and Holliday in the 2000 report, "*The internal responsibility system in Ontario mines: Final report: The trial audit and recommendations*. See "The internal responsibility system," OSH Canada magazine March, 2001; "The internal responsibility system," Workplace Safety North Sudbury April 17, 2013 powerpoint <http://www.workplacesafetynorth.ca/sites/default/files/The%20Internal%20Responsibility%20System%20-%20Strahlendorf%20.pdf>

complaints to management about health and safety in contexts where management is intent on reducing costs and transforming production and where unions and workers are in relatively weak bargaining positions. Although recognizing that management still required workers' co-operation and support in the labour process, Hall (1996) noted that simplistic systems focused on individual responsibilities had a major limitation,

Miners were repeatedly told that it was their responsibility to monitor ground or ventilation conditions and to use the formal reporting mechanism to ensure that actions were taken. Yet, when they did so, they frequently found that no actions were taken (p 66).

Miners experienced in very concrete ways, day after day, the limits of management claims of engineering, technological, management, and worker control. Worker disappointment in joint committees is founded in experience that the company used its authority and power to limit their effectiveness. The workers' frustration echoed what Tucker (1992) argued some time ago, that employers continue to separate business priorities from health and safety in an effort to render the committees meaningless.

Therefore, without the external support of [government] inspectors, worker health and safety representatives find themselves frustrated. These frustrations require the adoption of informal as well as formal mechanisms to make improvements for workers (Hall 1996). While OHSAs-described responsibilities at all levels of an organization ought to be part of an employer's health and safety program, the JHSC should remain the forum that represents the workers collective voice that is given life through meaningful participation.

The teeter-totter of enforcement and the IRS

Both enforcement and internal responsibility are crucial to improving health and safety. History shows us that external enforcement alone is not sufficient to prevent workplace injuries, fatalities, and incidences of occupational disease. Enforcement, if used within an IRS that gives individual and collective respect to workers, can support improving employer commitment to health and safety in Ontario workplaces and protect workers OHS.

Enforcement needs to be paired with a stronger IRS

Workers cannot rely on inspector enforcement alone because Ontario's Ministry of Labour enforcement strategy has gaps. The MOL sets its sights on high hazard sectors, and away from less obvious injuries caused by stress and occupational disease (Ontario Ministry of Labour). Indeed, Linn Holness, Professor at the Dalla Lana School of Public Health in Toronto, points out the lack of record-keeping in Ontario with regards to occupational disease (Holness, 2014). Specifically, Holness states that the lack of data in Ontario is partly responsible for the lack of enforcement and system focus on occupational disease and other not-so-obvious injuries (Holness 2014). Yet occupational disease still stalks Ontario's workers, as well as new hazards such as

nanomaterial, musculoskeletal injuries, and work factors that affect the psychological health of workers. These issues have been raised by community organizations, legal clinics, and unions working collaboratively with universities and OHCOW.

The MOL focuses its attention only on high profile cases after the fact with little strategic direction for vulnerable workers. As Ochsner and Greenberg (1998) argue, Canada's injury rates rose in the 1980's when workplace rights expanded because Canada under-allocated resources to enforce the new rights. Indeed, with approximately 338 inspectors currently overseeing over 500,000 workplaces in Ontario, it makes sense to strengthen the IRS to make it a viable contributor to Ontario's occupational health and safety strategy.

Government enforcement is also ineffective if employers ignore orders and the regulator fails to act. Brown and Rankin (2009) argue that over 90 percent of workplaces that were inspected over a 3-year period in B.C. had at least one repeat order. More than 10 percent of inspected workplaces have five or more repeat orders and more than three percent have 10 or more repeat orders (Brown and Rankin 2006).

Another problem often raised by the labour movement is that orders written for one location of an employer's operation do not automatically apply to other sites run by the same employer with the same deficiencies. For example, the MOL has written at least 10-20 sets of orders in the last three years for safety boots in different sites of a retail chain that has over 500 locations. This means that inspectors would have to visit as many as 500 sites to order this one employer to provide foot protection for material handling. This is not a good use of MOL enforcement resources.

Indeed, inadequacies of a weak enforcement system triggered widespread discontent and desire for change in 1960 following the Hogg's Hollow disaster when five workers were killed by carbon monoxide poisoning and drowning when a tunnel collapsed. (Tucker 1984). We saw it again with widespread public outcry after four workers were killed and a fifth seriously injured when their swing stage broke on the side of apartment building on December 24, 2009. This led to the Dean Review. Now we see it again as the fatalities at the Vale mining complex lead to this review. Workers' rights to protect their health and safety are important to all Ontarians.

While Ontario law requires that employers must take "reasonable precautions" for worker safety, employers do not voluntarily select the most protective measure (Dematteo 1996). For example, an employer's decision to train workers to lift appropriately may differ from a worker's opinion that heavy weights need to be eliminated at the source. And joint health and safety committee (JHSC) recommendations require a written response from the employer within 21 days, but require no obligation for employers to agree with or to implement the safety measure (OHS Act Sec 9). Compounding the issue is that Ontario law requires employers to provide health and safety certification training to only one worker member of the JHSC, leaving workers often with less training and expertise than their manager counterparts (OHS Act Sec 9).

Research supports the need for swift, progressive, and effective enforcement intervention. According to Tompa, Trevithick and McLeod (2007) “regulators need to be out in the field undertaking investigations and actively seeking out cases of non-compliance for regulation to be effective” (p. 92). The prospect of swift, progressive action by Ontario’s Ministry of Labour combined with a strengthened IRS will help improve Ontario’s health and safety system and will move Ontario closer to a more effective balance between enforcement and compliance.

Evidence that worker participation works and how

Workplace-level activities in the IRS are important if workers’ collective contributions on joint health and safety committees and as health and safety representatives are valued. Our concern with defining the IRS in the *OHSA* is that the current trend in today’s IRS devalues the collective opinions of workers by focusing on individual contributions. LOARC points to current research—like we did in our 2010 Expert Panel submission—to reinforce the importance of collective contributions to the IRS. In Ontario, the value and potential of worker representatives has been documented in many places, from parliamentary records and policy consultations with government and workers’ compensation boards, governance of the formal occupational health and safety OHS system, research studies, hearings on behalf of members, and dealings with inspectors, management and others. Much of this has been demonstrated by Ontario scholars from the 1970s through the 1990s—Vivienne Walters, Harry Shannon, Eric Tucker, Robert Storey, Alan Hall, Wayne Lewchuk and Ted Haines to name a few—studied the impact of the first legislation documenting both the limitations and the contributions of worker participation. More recently, researchers around the world have focused increasing attention on the profound changes that are taking place in employment and employment relations and the impact of those changes on accident and disease prevention (Quinlan, Mayhew and Bohle 2001).

In fact, IRS systems that possess a robust and healthy collective participation can address certain workplace health and safety issues that would not be the focus of the enforcement system inspectors, thus adding a nuance to prevention that enforcement cannot provide. For example, workplace parties are more likely to identify gaps such as understaffing or workload whereas government inspectors may not identify or effectively address such root causes of injuries and illnesses (Tompa, Trevithick and McLeod 2007). Another example, strong worker representation on joint health and safety committees in the education sector can focus on working conditions for teachers that include class size, hours of work, educational resources, leadership opportunities, and professional development, while MOL inspectors tend to focus on traditional hazards such as machine guarding and confined space (Young 2008). Inspector effectiveness is not only limited by lack of training, resources and time, but also limited by unfamiliarity with different types of workplaces (Tompa, Trevithick and McLeod 2007).

How worker representation works

The 2010 LOARC submission to the Dean Panel reviewed the published studies that looked at different factors associated with effective worker representation. We found that the following factors affected workers' effectiveness:

- the importance of training for workers,
- committee size, committee composition, meeting frequency and length, written agendas and minutes, committee scope, and various committee procedures
- access to information and training for the representatives,
- the size of the firms, the types of production, the level of mechanization and automation,
- the presence of a union,
- the attitudes and expertise of management regarding health and safety
- the presence and quality of overall union representation,
- the knowledge and militancy of front-line workers,
- the level of government or ministry of labour enforcement of the legislation.

Many researchers who have looked at these issues have suggested that union representation is critical in shaping management commitment—that is, in the absence of union security—conflicts of interest between employers and workers are almost always resolved through the exertion of management power; whereas in the context of union shops, there is a greater tendency for efforts at consensus building which forms the foundation of a sound participative approach. The research also shows that in most non-union contexts, robust government monitoring and enforcement are critical to the workers' capacities to exercise their responsibilities and rights under health and safety law. Small workplaces are identified as being particularly problematic, both unionized and not, with a number of deficits in terms of training and knowledge, low levels of compliance, and a top-down approach to health and safety.

Since the LOARC review there has been another U.S. study of the effectiveness of joint health and safety committees. In 2013, Tim Morse and his colleagues published a study of 380 JHSC members (40% were hourly workers) from 176 workplaces. They compared the efforts of the committee with their workplace injury rates. They found that quicker reaction to addressing "action items", an emphasis on ergonomics, and committees involved in planning worker training were all associated with lower injury rates. They also found that the greater the discrepancy between management and worker on estimating overall safety the higher the injury rates.

LOARC 2013 research shows how to strengthen worker representation

In 2006, Alan Hall, Anne Forrest, Alan Sears and Niki Carlan at the University of Windsor published a study examining the different strategies used by worker OHS representatives. Drawing on in-depth interviews with 31 unionized worker health and safety reps, the research was designed to explore whether different approaches to worker representation were being used and which approach was most effective. What they found was that the worker representatives tended to define their role in one of two

ways, either in narrow technical and legalistic terms relying on rules and procedures or in broader political terms willing to challenge management's assumption and even mobilize support from co-workers. The political representatives were more successful in making change. When the researchers looked more closely at this latter group, they identified a subgroup that developed strategies and tactics based on independent research and using external knowledge about hazards. This subgroup—knowledge activists—was the most effective in addressing health and safety problems, achieving in some cases even hard to get changes such as engineering improvements, work organization improvements, and major work process modifications.

Recent LOARC work reinforces the idea that strengthening the rights and roles of workers on JHSCs and as health and safety representatives will help the IRS function better in Ontario's health and safety regime. Copies of all LOARC documents can be found at <http://www.opseu.org/information/health-and-safety-2>

LOARC's Hall, King, Lewchuk, Naqvi, and Oudyk (2013) completed a research project funded by Ontario's Research Advisory Council (RAC) to further build on the real life insights of health and safety worker representatives, with the aim of improving the capacities of all representatives across Ontario to achieve needed changes in the workplace. The report, "Making participation work in the new economy: Report to RAC, WSIB," summarizes the experiences of 888 worker representatives who completed a questionnaire. Fifty-two of those were also selected for in-depth interviews. The findings replicate the Hall et al. (2006) study by also identifying 'knowledge activists' as the most successful group of activists in achieving changes in workplace health and safety conditions. As found in the earlier study, "knowledge activists" used knowledge and research to achieve a broader range of health and safety improvements, going well beyond the technical roles described in health and safety legislation.

Knowledge activists also spent a greater proportion of their time on networking activities and building relationships of trust:

- dealing with workers about problems or issues
- dealing with managers and supervisors about problems or issues
- doing their own searches for information through the web/libraries or outside help
- building and organizing worker support for health and safety
- delivering or providing specific health and safety training to workers

In terms of the range of activities, knowledge activists were more active in all 12 categories of prevention activities that we asked about (everything from housekeeping to addressing workload issues). Knowledge activists had a statistically significant greater impact on eight of the twelve types of interventions (in order of frequency):

- convince management to purchase new personal safety equipment or replace old/worn safety equipment
- make improvements in basic housekeeping
- replace or retire unsafe tool or piece of machinery, equipment, or furniture

- deliver a new training program for workers
- substitute an important product, practice or chemical used in the workplace that was believed to be hazardous
- significantly reorganize a work process or method
- change the number of employees in order to address workload or safety issues (includes resisting management cuts to the number of workers).

Factors that were associated with the biggest impact:

- the amount of experience the respondent had on the JHSC
- the amount of time spend as a representative training other workers
- the amount of paid time for performing H&S representative duties
- being a co-chair of the JHSC
- having a more responsive management.

These results show the value of experience on the JHSC (learning over time) and the value of being the co-chair (power to set the agenda and organize members to a common goal). Being paid (security of position and time to address issues) to perform health and safety representative duties resulted in greater impact. Working with responsive management counterparts was also shown to increase impact which underscores the important link between the employers' commitment to health and safety and the effectiveness of the IRS.

From the interviews, the researchers distilled the following guiding ideas and principles from the more effective representatives:

1. Build and support a stronger orientation and capacity to do research and strategically use research to make claims, present solutions, and build legitimacy and trust.
2. Emphasize the importance of working within and outside the committee context.
3. Recognize and understand the political demands of representation—how to mobilize power using knowledge, the law and worker support.
4. Mobilizing power must include the education, active involvement, and organization of workers. Engage workers in the monitoring and change process.
5. Confronting power and negotiating with power requires a constant effort to educate management and seeking to influence the management culture (i.e. constantly reinforce the message that health and safety meets a range of management interests).
6. Recognize and understand the importance of building social relationships in the committee and in the workplace and the need to build trust and legitimacy.
7. Recognize that effective relations with different managers and supervisors often require different approaches.
8. Be assertive and persistent but not hostile or insistent. Know when to back off but don't back away.
9. Understand that effective change efforts involving significant cost or production impacts require long term strategies and persistence.
10. Don't just identify hazardous conditions, provide solutions with costing.

11. Recognize the value of inspections, systematic reports and minutes but, do not define the role of representation in these terms. Beware of management efforts to confine activities to a technical or bureaucratic box.
12. Recognize the limitations of the law but know and use the law and regulations where they provide leverage.
13. Develop a relationship of trust with local MOL inspectors and use that relationship strategically.
14. Seek formal management and union support for more dedicated time for representation. Build and implement a political strategy to achieve this.

We provide a detailed summary of our findings because we believe that worker representation needs to be strengthened, not weakened by defining an IRS prefaced on individual responsibility. Knowledge activists build collective worker support for health and safety improvements because collective support is necessary to convince the employer of the validity and importance of workers' positions. Collective mechanisms are more important than ever, especially for vulnerable workers who do not have a union mechanism for voice.

Conclusion

We believe that LOARC's 2013 study of almost a thousand health and safety representatives adds to an already rich body of research that reinforces the importance of worker representation in workplace health and safety.

Certainly the Ham Report emphasized the importance of both individual and collective worker participation in OHS after reviewing in detail Ontario's system following a wildcat strike by uranium workers in 1974. The workers had attended a conference in France only to find out that both the government and the employer had known but kept secret information about miners dying from uranium cancers (MacDowell 2012). Therefore Ham's intent was not so much aimed at making sure that workers know and carry out their workplace responsibilities in OHS, but to ensure that the workers have sufficient empowerment and ability to be vigilant and critical about what others such as the employer and the government want them to accept. Tucker said this best in his 1998 evaluation one year after *The Westray Story* was published, "Where safety does not pay, some kind of countervailing pressure is required to ensure that occupational health and safety conditions do not fall below socially acceptable levels. Inspection and enforcement of state standards is one response; empowering workers is another" (p.3). Indeed, worker representation has never been more important than at a time when the changing work environment is creating more groups of vulnerable workers.

LOARC urges the Ministry to refrain from defining our OHS system in purely individual terms. In fact, we say the definition of the IRS is already found within the *OHS*A and therefore defining it further is unnecessary and would not enhance worker health and safety. Any move to further entrench the individualism within the IRS process will reinforce the capacity of management to use the system to their advantage.

We appreciate the opportunity to offer this submission to the Mining Health, Safety and Prevention Review. Please direct any questions to LOARC's Chair, Andy King at agrking@hotmail.com.

Works Cited

- Arthurs, Harry. 2012. *Funding Fairness: A Report on Ontario's Workplace Safety and Insurance System.* Queen's Printer for Ontario.
- Brown, Richard and Murray Rankin. 2009. "Persuasion, penalties, and prosecution: Administrative v. criminal sanctions." Martin Friedland (Ed.) *Securing Compliance: Seven Case Studies.* Toronto. University of Toronto Press: 325-353.
- Canada. a. Employment and Social Development Canada. Work—Unionization Rates. Retrieved 7 April 2014 http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=17#M_4
- Canada. b. Labour force characteristics by province: Seasonally adjusted. Jan 2014. <http://www.statcan.gc.ca/daily-quotidien/140307/t140307a003-eng.htm>
- Dean, Tony. 2010. *Expert advisory panel on occupational health and safety: Report and recommendations to Ontario's Ministry of Labour.*
- Dematteo, Bob. 1996. "The future of health and safety: Looking back to the future." Presentation at Health and Safety Association of Newfoundland, Newfoundland, 9 May 1996.
- Deweese, Don. N., David Duff, and Michael J. Trebilcock. 1996. *Exploring the domain of accident law: taking the facts seriously.* Toronto: Oxford University Press.
- Garcia-Serrano, Carlos, Virginia Hernanz, and Luis Toharia. 2010. "Mind the gap, please! The effect of temporary help agencies on the consequences of work accidents." *Journal of Labor Research* 31: 162-182.
- Edwards, Cheryl. 2005. "Where are all the OH&S Bill C-45 Prosecutions?" *OH&S Due Diligence Update.* Stringer Brisbin Humphrey: 5 July 2005.
- Edwards, Cheryl. 2006. "Are your lead hands minding the shop? A caution from the courts." *Canadian Occupational Safety Magazine.* Feb. 2002.
- Hall, Alan. 1999. Understanding the impact of mine health and safety programs: Controlling and taking risks. *Labor Studies Journal* 23.4: 51-76
- Hall, Alan, Anne Forrest, Alan Sears, and Niki Carlan. 2006. "Making a difference: Knowledge activism and worker representation in joint OHS committees." *Relations Industrielles/Industrial Relations* 61.3: 408-436.
- Hall, Alan, Andy King, Wayne Lewchuk, John Oudyk, and Syed Naqvi. 2013. "Making participation work in the new economy: Final report to RAC, WSIB."

- Hilgert, Jeffrey. 2012. "Building a human rights framework for workers' compensation in the United States: Opening the debate on first principles." *American Journal of Industrial Medicine* 55:506-518.
- Holness Linn. 2014. "Building front-line capacity to prevent occupational disease in Ontario." Presentation, Institute for Work & Health, 11 March 2014 Presentation. Toronto.
- Kralj, Boris. 1994. "Employer responses to workers' compensation insurance experience rating." *Relations Industrielles/Industrial Relations* 49.1:41-60.
- Lewchuk, Wayne, Leslie A Robb and Vivienne Walters. 1996. "The effectiveness of Bill 70 and joint health and safety committees in reducing injuries in the workplace: The case of Ontario." *Canadian Public Policy* 23.3: 225-243.
- Lewchuk, Wayne. 2011. "Ontario's health and safety regulations under review: Where to next?" Summary at <http://www.opseu.org/hands/loarc/2011/presentation%201%20lewchuk.pdf>
- Lewchuk, Wayne. 2013. "The limits of voice: Are workers afraid to express their health and safety rights?" *Osgoode Law Journal* 50: 6-29.
- Labour OHCOW Academic Research Collaboration (LOARC). 2010. "Internal responsibility: The challenge and the crisis." <http://www.opseu.org/information/health-and-safety-2>
- MacDowell, Laurel Sefton. 2012. "The Elliot Lake uranium miners' battle to gain occupational health and safety improvements, 1950–1980," *Labour/Le Travail* 69: 91–118.
- Mansfield, Liz, Ellen MacEachen, Emile Tompa, Christina Kalcevich, Marion Endicott, and Natalie Yeung. 2012. A critical review of literature on experience rating in workers' compensation systems. *Policy and Practice in Health and Safety* 1: 3-25.
- Morse Tim F., Anne Bracker, Nicholas Warren, Jeanette Goyzueta, and Matthew Cook. 2013. "Characteristics of effective health and safety committees: Survey results." *American Journal of Industrial Medicine* 56.2:163-179.
- McCutcheon, Brendan. 2010. "Culture of fear." Report prepared for the Ontario Federation of Labour.
- Ochsner, Michele, and Michael Greenberg. 1998. "Factors which support effective worker participation in health and safety: A survey of New Jersey industrial hygienists and safety engineers." *Journal of Public Health Policy* 19.3: 350-366.

- O'Grady, John. 2000. "Joint health and safety committees: Finding a balance." *Injury and the new world of work* Ed. Terrance Sullivan. Vancouver: UBC Press.
- Ontario 1976. *Report of the Royal Commission on the Health and Safety of Workers in Mines* [Ham Commission], Toronto: Queen's Printer.
- Ontario. Ministry of Labour. a. Protecting workers and increasing fairness. December 4, 2013. News. Retrieved 4 March 2014.
<http://news.ontario.ca/mol/en/2013/12/protecting-workers-and-increasing-fairness.html>
- Ontario. Ministry of Labour. b. Every worker has rights. March 2014. Retrieved 4 April 2014. <http://www.labour.gov.on.ca/english/atwork/workplacerrights.php>
- Plummer, Ian M., Peter W. Strahlendorf, and Michael G. Holliday. 2000. *The internal responsibility system in Ontario mines: Final report: The trial audit and recommendations*. Toronto. 31 July 2000.
- Policy and Practice in Health and Safety. 2012. "Special Issue on experience rating." 10:1.
- Quinlan, Michael, Claire Mayhew, and Philip Bohle. 2001. "The global expansion of precarious employment, work disorganization, and consequences for occupational health: a review of recent research." *International Journal of Health Services* 31.2: 335-414.
- Storey, Robert. 2005. "Activism and the making of occupational health and safety law in Ontario, 1960s-1980." *Policy and Practice in Health and Safety* 03.1:41-68.
- Tompa, Emile, Scott Trevithick, and Chris McLeod. 2007. "Systematic review of the prevention incentives of insurance and regulatory mechanisms for occupational health and safety." *Scandinavian Journal of Work and Environmental Health* 33.2: 85-95.
- Tucker, Eric. 1984. "The determination of occupational health and safety standards in Ontario, 1860-1982: From the market to politics to...?" *McGill Law Journal* 29: 260-311.
- . 1990. *Administering danger in the workplace: The law and politics of occupational health and safety regulation in Ontario*. University of Toronto Press
- . 1992. "Worker participation in health and safety regulation: Lessons from Sweden." *Studies in Political Economy* 32: 95-127.

- . 1996. "Worker health and safety struggles: Democratic possibilities and constraints." *New Solutions*. Winter: 61-69.
- . 1998. "The road from Westray: A predictable path to disaster?" *Acadiensis* XXVIII.1.
- . 2003. "Diverging Trends in Worker Health and Safety Protection and Participation in Canada, 1985-2000." *Relations industrielles / Industrial Relations*, 58:3 395-426.
- .2007. "Remapping Worker Citizenship In Contemporary Occupational Health And Safety Regimes." *International Journal of Health Services*, 37:1, 145–170.
- Young, Valence. 2008. "How effective are the health and safety committees in elementary schools? An action research project: Reflections on practice." A Women's Leadership Institute: Elementary Teacher's Federation of Ontario.