THE STATE'S ROLE IN OCCUPATIONAL HEALTH AND SAFETY ADMINISTRATION

by

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ABSTRACT

In the following thesis the administrative strategies in occupational health and safety regulation form the primary focus of discussion.

The initial approach for ensuring acceptable work conditions had been through direct state intervention and the use of coercive power. In view of the limitations of this approach, over time, state regulation was replaced by the "self-regulation" or "internal-responsibility system" under which participants at the workplace were given an enhanced say in the regulatory process. Recent trends have continued to favour this shift towards deregulation of the state's administrative structures.

The self-regulation strategy, however, also has limited applicability and can only prove effective if applied in combination with the state's enforcement strategies. The two approaches need to be viewed as being complimentary to one another and not mutually exclusive. This being the case the state's role in the regulatory process would require re-examination and alteration to ensure an effective and efficient regulatory structure.

RÉSUMÉ

Dans cette thèse, nous discuterons d'abord les stratégies administratives dans la réglementation de la santé et de la sécurité du travail.

L'approche initiale d'assurer des conditions de travail acceptables était par l'utilisation du pouvoir coercitif de l'état. Vu les limitations de cette méthode, la réglementation étatique a graduellement été remplacée par le système de la "responsabilité interne", selon lequel les participants du milieu du travail se veraient accordés une voix substantive dans le processus de réglementation et de contrôle de la sécurité du travail. La tendence actuelle est encore de favoriser cette transition vers la déreglementation de l'intervention administrative de l'état.

La stratégie de responsabilité interne a néanmoins une applicabilité limitée et ne s'avère qu'efficace si elle est appliquée en combinaison avec la mise en oeuvre par les autorités étatique. Les deux approches doivent être considérées comme complémentaires et pas mutuellement exclusives. Ceci étant dit, le rôle de l'état dans le processus réglementaire devrait être réexaminé et altéré afin d'assurer une structure réglementaire efficace.

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INTRODUCTION

Work occupies a pivotal role in our lives. When performed in an organized manner, termed as employment, its importance finds reflection in demands for control over the nature, place, and conditions of employment, seeking to ensure maintenance of certain acceptable standards. History, however, has a different story to tell, this place of employment has been the very cause of myriad sufferings, illustrated in classic style during the industrial revolution when the work place became synonymous with morbid, insanitary conditions, resulting in numerous injuries and deaths. Although over time these conditions were made the cause of social reform, the change has been inadequate and tardy. Even today, a century later, our success is limited, leaving a vast scope for reform. The reasons for this slow pace of reform are many, ranging from purely economical - reluctance to interfere in the free market, to purely sociological - emphasising the power relations established through centuries of social existence.

With initial attempts through the courts being largely unsuccessful the emphasis/pressure for reform shifted towards the emerging welfare states. By direct market intervention the state sought to ensure minimum standards and the provision of a regulatory administrative regime to ensure compliance. Although the state succeeded in establishing an infrastructural framework for regulation, the actual enforcement left much to be desired The market was still in firm control.

These futile attempts at reform contributed to the belief that the "rule of law" alone would not bring about the required change, that a degree of involvement by the parties concerned was essential. The new approach known as "self-regulation" was marked by a shift in direction of the occupational health and safety legislation towards granting of more power and control to the participants concerned. Joint health and safety committees were established, the worker was given the right to refuse unsafe work and provisions insuring access to information were incorporated. Instead of mere punishment for non-compliance with state laws, the trend was to encourage improved self-regulation of safety within minimum statutory requirements. The principal responsibility and legal obligation for ensuring compliance with health and safety measures at the workplace was placed upon the employers, employees and other such persons involved in the work process.

Having been in operation for over a decade now the results from the internal-responsibility approach have started to come in On a preliminary analysis a trend does seem to indicate that after a positive development stage the benefits from this "self-regulatory" approach have reached a plateau, a state of levelling-off.

It is my intention, through a review of the secondary sources, to study the "self-regulatory" approach seeking to evaluate the causes for stagnation. What I hope to show is that the full benefits of "self-regulation" can only be achieved when it is applied in combination with state regulation This thesis is based on the inherent defects prevalent in the "self-regulatory" approach which are difficult to correct without state patronage and in its absence, tend to hamper progress. It is my belief that a more active state role in providing supportive and infrastructural facilities would be a step in the right direction. By conducting the inquiry through a comparative analysis between the two approaches i.e. the self-regulatory and the state regulatory, the attempt would be to determine the appropriate mix between the two The position of the state and its role in the administrative structure of occupational health and safety would form the focus for my research. In this regard the Ontario jurisdiction has been selected as the primary focus for discussion.

Since the outline of the thesis has retained as its main focus the state's role in the regulation of occupational health and safety, the discussion tends to underemphasise the benefits of an enhanced worker participation. This partial analysis does not in any way suggest that an increase in worker participation be viewed as a negative development; however, it does seek to assert that the regimes providing greater workplace autonomy in regulating occupational hazards suffer from structural imbalances and limitations which can only be remedied through effective state support. In light of the changing economic climate, a trend towards smaller workplaces and decreasing rates of unionisation, the conclusion clearly points towards a re-evaluation of the internal-responsibility system and determination of the appropriate state role in the process.

For structural clarity the thesis has been divided into 4 main chapters. The first part takes a historical look at the broader social developments which formed the basis for government intervention. It briefly discusses the mediums through which such initial state intervention was channelled, namely the factories legislation and the workmen's compensation schemes and analyses the limitations of the enforcement procedures which later were to justify the shift towards deregulation of the system.

Chapter 2 deals with the transformation stage of the occupational health and safety ideology From complete reliance on state enforcement the trend began to reflect a greater shift towards worker participation. Keeping in mind the limitations of extensive state regulation and rule making, the focus was on enhancing self-regulation at the workplace The discussion in the chapter attempts to bring out the factors which prompted this shift and outlines the form which it ultimately took. The legislated format of the internal responsibility system, as it existed, has been detailed

Chapter 3 deals specifically with the limitations of the internal-responsibility system The objective of the discussion is not to criticise the delegation of power in the hands of the participants but to show that the field is essentially an interdependant one and requires the establishment of a tripartite structure. The chapter examines the policy assumptions underlying the internal-responsibility system and discusses some specific situations where the IRS fails to provide the required initiative The fact sought to be emphasised is that the dynamics of the relationship, between workers, employers and the state, has material influences upon occupational health and safety issues As a consequence state policy forms an important tool through which to direct the reformative actions towards reducing workplace risks.

The last chapter of the thesis then picks up the discussion to provide policy alternatives for state action. The "regulatory pluralism" approach adopted, identifies some of the areas where the state's role retains its legitimacy. The study also makes recommendations for ensuring that, in the areas of state influence, the regulation retains its effectiveness and efficiency.

In conclusion the question of an ideal system with the exact and appropriate mix between state and self regulation remains unanswered, however, in the process of improving upon the present structure the importance of obtaining an input from all concerned participants has been clearly brought out. This is of special relevance for the state, as its pivotal role in the regulatory process could ensure that the efforts for providing the workers with a safe and healthy workplace are not subordinated to economic concerns Further the analysis highlights the fact that for ensuring a continuous movement towards the ideal it is essential that a combination of approaches be adopted Although a variety of workable options are available, regulatory pluralism with the state retaining a central role emerges as the most effective method for ensuring a reduction in workplace risks.

CHAPTER ONE
STATE INTERVENTION

INTRODUCTION

All forms of production contain some measure of risk to the health of those engaged in their performance. From the days of the Egyptian pyramids and the Sicilian mining slaves of the Romans to the present modern conglomerates, the necessity for working rules and provisions for medical care in the workplace have time and again been reinforced, more so with the theoretical and practical innovations in the nature and methodology of work. Over the ages this relationship between work and health has only grown stronger and today can be seen symbolised on the covers of books, such as *Work is Dangerous to Your Health*, *Dying For a Living* and *Muscle and Blood*.[1] Varying in degree and nature between different modes of production this relationship has been conceptualized in the form of technological aspects on the one hand and physical/psychological aspects on the other.[2]

To understand the state's present role in occupational health and safety, it is essential that we first view the state's actions from a historical perspective. In the chapter that follows, a brief look is taken at the events and pressures which helped bring about the establishment of occupational health and safety policies in exception to the widely held theories of laissez-faire and non-intervention.[3] Recognising that the labour process is directly influenced by broader social developments, the interrelation between labour and social development is fundamental in determining the conditions of health and safety in the workplace.[4] This relationship is studied in the ensuing discussion through a review of the economy in its

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[1] Stillman & Daum, *Work is Dangerous to Your Health* (New York: Vintage Books, 1973); D. Berman, *Dying for a Living* (New York: Monthly Review Press, 1978); R. Scott, *Muscle and Blood* (New York: E.P. Dutton, 1974).

[2] Eric Tucker, *Administering Danger in the Workplace: The Law and Politics of Occupational Health and Safety Regulation in Ontario, 1850 - 1914* (Toronto: University of Toronto Press, 1990) at 9 [hereinafter *Administering Danger*].

[3] It was the relative success achieved in this limited intrusion which set the precedent for subsequent justifications in regulating the private sphere for the public good.

[4] *Administering Danger*, *supra*, note 2 at 38 - 39.

transition towards industrial capitalism, followed by a discussion of the administrative regimes in occupational health and safety which came to be established in exception to the principles of laissez-faire.

BROADER SOCIAL DEVELOPMENTS

It was the change in the technological aspect of the production process, brought about by the Industrial Revolution, that resulted in an increased health risk to the workers during the nineteenth century. The growth of the factory system, increased reliance on mechanical means of production and preference for unskilled labour all contributed towards increasing the rate of industrial accidents and diseases. With prevailing economic theories preaching strict adherence with the principles of free trade and laissez-faire, these social and technological changes were the direct cause of numerous deaths/injuries. The resultant human loss being of such dimension that it has come to be referred to as the "butcher bills of industrialization."[5]

i. Industrial Canada

Canada at the turn of the nineteenth century was still predominantly an agricultural/mercantilistic society, in contradistinction to its colonial authority, England, which had by then begun the turn towards the "most important of the transformations",[6] the Industrial Revolution. Witnessing little industrial activity, the economy primarily relied upon its trade with England in natural resources for survival. Forming a part of the vast British political and economic empire, a major portion of its trade was dominated by the British merchants who, supported in their endeavours through imperial laws, were reluctant to change the status quo. The economy was a typical example of the protection-based mercantilistic ideology of the times.[7] This policy of protectionism and support for

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[5] *Administering Danger, supra*, note 2 at 5.

[6] R.K. Webb, *Modern England*, 2d ed. (New York: Harper & Row, 1980) at 107.

[7] The merchant, preferring to limit his risk to the minimum was primarily oriented towards earning at the cost of the others. His prime strategy was focused on speculation and not production. The emphasis on capital and quick turnover required liquidity and restricted the investments to products which were low in risk and high in demand. Though at times investments of a fixed nature were made to derive long term profits, the predominant viewpoint was short term, without any sense

commercial enterprise was to continue for eighty years, till the period when in the 1840s Britain itself embraced the philosophies of free trade, free enterprise and commenced removing the barriers to free commerce.[8]

Although the transition from the mercantilistic system of commercial capitalism to industrial capitalism was not a smooth one,[9] by the mid-nineteenth century signs of an emergent industrial economy were visible.[10] The termination of one era marked the start of another. Large scale investment by the government in public works and construction of elaborate transport networks (railways and canals) helped to open the country and bring it to a position of independent economical survival based upon industrial development. Proceeding through a phase of small-scale industrial units called "manufactories",[11] by the 1860s the factory system had established itself in the country's industrial centres. The advent

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of responsibility for the suppliers or the producers. For a more comprehensive description of the merchant class and the mercantilistic ideology see: H.C. Pentland, *Labour and Capital in Canada, 1650 - 1860* (Toronto: J. Lorimer, 1981) at 149.

[8] The Navigation Act which restricted trade to and from the colonies to British ships existed until 1849. The timber duties and corn laws were repealed between 1842 and 1846.

[9] The frustration of the merchant classes was evident in the riots which took place in Montreal on 25 April, 1849. The mob led by merchants burned the parliament building, attacked the Governor General, Lord Elgin, and later sought to circulate the Annexation Manifesto calling for Canada to join the United States.

[10] Even though little was known about this pre-industrial period till recent work on the subject, the traditional view has been dominated by the "staples theory" of economic development propounded by W.A. Mackintosh and Harold Innis in the 1920s. Describing economic development primarily in terms of the evolution of the staples trade, this view has been criticised of late for "its silence on the stage of pre-industrial development and class formation".The debate centres around the relative importance of commercial capitalism and industrial capitalism in the development of Canadian economy. For details of the arguments see: H.A. Innis, *The Fur Trade in Canada* (Toronto: University of Toronto Press, 1970); H.C. Pentland, *supra,* note 7; G.S. Kealey, *Toronto Workers Respond to Industrial Capitalism, 1867 - 1892* (Toronto: University of Toronto Press, 1980) [hereinafter *Toronto Workers*]; G.S. Kealey & M.S. Cross, eds, *Canada's Age of Industry, 1849-1896* (Toronto: McClelland & Stewart, 1982); Bryan Palmer, *A Culture in Conflict: Skilled Workers and Industrial Capitalism in Hamilton, Ontario, 1860 - 1914* (Montreal: McGill-Queen's University Press, 1979) [hereinafter *A Culture in Conflict*].

[11] Rinehart describes manufactories as "...small, usually employing fewer than five people, and they catered to individuals in a limited geographic area, most production was in response to personal orders from local inhabitants." James W. Rinehart, *The Tyranny of Work* (Don Mill's, Ontario: Longman Canada, 1975) at 26. The significant difference between them and the factories, besides the number of workers employed, was the absence of power-driven machinery in the former.

of the power-driven machines, an increase in the number of skilled tradesmen and an expanded British investment for improving the transport facilities, helped significantly increase the rate of industrial development.[12] With favourable conditions and positive labour supply the manufacturing industries continued to consolidate and expand.[13]

However, viewed at a broader level, over the period of Canada's "heroic age",[14] the economy witnessed an increased disparity in income distribution, with increased economic power being concentrated in the hands of a select few. A further outcome of increased industrialization was seen in the shifting employment patterns. The rural-to-urban ratios started showing large-scale movements towards the urban centres.[15] Even then, with the rapid growth in the industrial sector, the demand for unskilled labour was fast outpacing the internal supply. As this demand could not be met from internal sources and as the ready availability of labour formed one of the essentials for economic development, the government sought to initiate an aggressive immigration policy. Succeeding in its endeavours,[16] the surplus labour supply created the conditions sought by the capitalists for containing the wage rates and blocking demands for additional expenditures to be incurred for improving working conditions. Being new to the country without any financial support and skills to back them up, it was this class of unskilled, immigrant labour, which formed the

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[12] The gross value of production had increased from $ 82 million in 1851 to $ 234 million by 1870. O.J. Firestone, "Development of Canada's Economy, 1850 - 1900" in *Trends in American Economy in the Nineteenth Century*, vol. 24 (Princeton: Princeton University Press, 1960) at 231.

[13] By 1900 the gross value of the manufactured goods was in the region of $ 584 million: Firestone, *Ibid.* at 231. Eric Tucker in his review of the economic scenario, though acknowledging the development, points to the unevenness of the process. See *Administering Danger*, *supra*, note 2 at 14.

[14] As referred to in Ian Drummond, *Progress Without Planning: The Economic History of Ontario from Confederation to the Second World War* (Toronto: University of Toronto Press, 1987) at 104.

[15] Jennissen, in her work, has calculated the Canadian rural-urban ratio for 1871 to be 81.7 : 18.3. This figure had changed to 62.5 : 37.5 by the year 1901. See: Jennissen, *Regulating the Workplace in Industrial Ontario: The Origins of Occupational Health and Safety Policy, 1880 - 1914* (Ph.D. Thesis, McGill University, 1991) at 52 [hereinafter *Jennissen*].

[16] The effects of this policy can be seen in the population growth from 2.4 million in the year 1851 to 4.8 million in the year 1891. *Jennissen*, *supra*, note 15 at 57.

backbone of Canada's economic development.[17] Used primarily for work in the factories, mines and construction camps they bore the brunt of the industrial "butcher bill."[18]

ii. Evolution of Class Structures

Prior to the advent of the Industrial Revolution the average worker was not likely to classify himself into the categories of skilled, semi-skilled or unskilled, unless working (apprenticed) in a particular craft or trade. Besides the craft tradesmen, the prevailing hierarchical employment structures classified workers as unskilled labour even though the work they performed required knowledge and particular ability learned over time. In addition the presence of a paternalistic employer attitude reinforced the absence of a structure of discipline or the capacity to rebel amongst the working class.

During the transitory phase of industrialization, development of the new factories was observed with mixed feelings of fear, distrust and dislike. The mechanized life and machine control were seen as threats to prevailing norms as well as personal freedom. Where first workmen were used to perform specific tasks in the sense of individual work they now were required to work as a team. Even though industries had earlier brought together workmen (sometimes in large numbers) to work under the same roof, as for example in naval dockyards, shipbuilding, and even in some exceptional cases the textile industries, the factories were now geared towards complete integration. The manufacturing process was no longer a structure which sought to combine the individual work of employees but more one in which each was assigned to a specific role in the process which tied him to a set routine, controlled and set by the machine.[19] The visible effect for the worker was a sense of competition with the machines.

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[17] For details about immigrant labour see: Donald Avery, *Dangerous Foreigners* (Toronto: McClelland & Stewart, 1979) c. 1.

[18] *Administering Danger, supra,* note 2 at 5.

[19] This change in the role of the worker was supported by the innovations in technology which enabled the organization to reduce costs and increase efficiency. Canada, a step behind in terms of the process of industrialization still showed remarkable ability to adapt and by 1831 - 1836 the rate of applications for patents of invention had reached the rate of one per month. H.C. Pentland, *supra,* note 7 at 184.

Untrained for any other kind of work and still frantically fighting to retain some semblance of a bygone era, the workers were being forced by the technological and demographic changes towards the industrial centres in search of employment. The resultant excess supply of unskilled labour, when put against the machines on one hand and the alternate source of cheap labour i.e., women and children[20] on the other, upset the delicate balance of the labour market, forcing accumulation of large pools of reserve labour. In the absence of any other means of livelihood, these workers were forced to live a life of misery, work in squalid conditions, accept employment at wages far below the subsistence rates and remain silent sufferers of the precarious conditions of work.

At the same time the employment relationship was moving towards a degree of impersonalisation which allowed the employers an absolute discretion in the selection of their requirements. As the free market took hold of the economy and markets started responding to the inflow of new products the employers were given the economic stability they needed to create the sort of class polarization that was to become the hallmark of that era. The ready availability of labour allowed the employer to abstain from long-term commitments, while at the same time the relative immobility of the workmen left him in a much weaker individual bargaining position. This distorted bargaining structure could only have been rectified through state intervention but "Government interference was, however, contrary to the spirit of the age. Self-help, independence, natural levels and laws were the watch-words of the times."[21]

The unskilled labour class were at the fore of the laissez-faire argument. Even in the rare case when the conception of the worker being within his rights to withdraw his service was recognised, the employers took pains to emphasise that in those circumstances the hiring of replacements was within their absolute discretion. The workers were not entitled to interfere in the exercise of that right. The consequence usually was the settlement of disputes through the use of violence. In such a period workers bound by common

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[20] The employment of women and children was not seen as being in contradiction with the moral conditions of the day. It was seen as a worthy deed to contribute to the family income and they were encouraged or rather forced to work. The fact that this system could be misused, at the cost of the workers, led to feeble attempts at state intervention which were not to have much success against arguments of economic necessity. R.K. Webb, *supra,* note 6 at 117.

[21] Robson, *On Higher Than Commercial Grounds: The Factory Controversy, 1850 - 1853* (New York: Garland Publishing, 1985) at 17.

interests/concerns and facing similar insecurities were brought together in the form of labour combinations to raise a collective voice.[22]

iii. The Rise of Collective Power

During the pre-industrial stage trade and craft groupings had established a small but well-knit source of skilled workmen who, bound under a mutual feeling of pride and respect, often organised on a local basis to control their limited markets. Members of this class, drawing upon the traditions of combinations and bound together in tight and disciplined units, were brought together in the relatively close environments of the industrial centres which further strengthened their bonds. However, since most work was only available on a seasonal basis, a majority of the demands for improved working conditions were made on an individual basis.[23]

With increased use of machines in the production process, the factories shifted their employment policies towards the hiring of cheaper unskilled labour as this cut the over-all labour cost and increased profit margins. This preference for unskilled workers over skilled workers forced the crafts/trades to unite in an attempt to put up a common front to preserve their employments. The first serious attempts at co-ordinated action by these crafts/trades were the direct consequence of the developing factory system. However, as the factory system expanded the futility of the struggle became apparent. More and more skilled workers were being absorbed into the new industrial order, and the battle was increasingly becoming one-sided. Even then they succeeded in obtaining some measure of recognition, partially due to the fact that they (the skilled workers) formed a crucial link in the developing factories. In the absence of detailed drawings and plans, most of the knowledge about machines was

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[22] For details on the union movements see: S. Langdon, *The Emergence of the Canadian Working-Class Movement, 1845 - 1875* (Toronto: New Hogtown Press, 1975); *Toronto Workers, supra,* note 10; G.S. Kealey & Bryan Palmer, *Dreaming of What Might Be: The Knights of Labor in Ontario, 1880 - 1900* (New York: Cambridge University Press, 1982) [hereinafter *Dreaming of What Might Be*]; *A Culture in Conflict, supra,* note 10; Bryan Palmer, *Working-Class Experience: The Rise and Reconstitution of Canadian Labour, 1800 - 1980* (Toronto: Butterworths, 1983) [hereinafter *Working-Class Experience*]; Charles Lipton, *The Trade Union Movement of Canada, 1827 - 1959,* 4th ed. (Toronto: NC Press, 1978); E. Forsey, *Trade Unions in Canada, 1812 - 1902* (Toronto; Buffalo: University of Toronto Press, 1982).

[23] Craig Heron, *The Canadian Labour Movement: A Short History* (Toronto: J. Lorimer, 1989) at 2 - 5.

learned through experience and carried as personal knowledge of these workers, enabling them to play an important part in the establishment and operation of the factories.[24] For a time this favoured position allowed them some measure of bargaining power. This transitory class, in bargaining for their rights, played an important role in the establishment of a structure for labour combines which could later be used by the general working class to press for reforms in working conditions.

As industrialisation proceeded and causes for common action multiplied, the rate of unionisation increased. Emerging from being defensive and compensatory bodies,[25] restricting their demands to individual cases, the unions by the 1870s had obtained sufficient maturity and quality of leadership to raise issues such as the restriction of the working day to nine hours,[26] factory regulations, right to strike, and picket line activity. Union activity, reaching a peak in 1870 with the formation of the Canadian Labour Union, was however so dependent upon the economic situation that any downward trend could seriously affect their position, as was the case in the mid-70s. With the return of prosperity in the 80s, the organised labour movements renewed their activities. The creation of the Trades and Labor Congress in 1883, and the emergence of the Knights of Labor,[27] saw the emphasis shift from predominantly craft unionisation towards one encompassing the entire labour class,[28] working conditions being one of the main areas for reform.

With the increase in their support base and observing the difficulties that would be encountered in bringing about the desired reforms in the absence of political support, the unions began to play a more active role in the municipal, provincial and federal political

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[24] The approval of education, especially technical education, and talk about the dignity and worth of labour highlighted the recognition of this class as being an important component of the production process.

[25] *Jennissen, supra,* note 15 at 64.

[26] For details see: John Battye, "The Nine Hour Pioneers: The Genesis of the Canadian Labour Movement" (1979) 4 Labour/Le Travailleur 25.

[27] Established in Philadelphia in 1869 the movement however was of not much importance until the 1880s whereupon it emerged for a brief but significant period before a precipitous decline. For details see: *Dreaming of What Might Be, supra,* note 22.

[28] This difference in approach signified a re-evaluation of the unions' organisational strategies - "[The] main focus was on organising all workers, specially industrial and unemployed workers, irrespective of race and gender." *Jennissen, supra,* note 15 at 70.

arenas. Although the extent to which "Labourism" existed is a subject of debate,[29] labour as a class in itself, holding political power, had come to stay. Even then the gains were not substantial, living conditions were still pathetic, with unemployment and inflation rising, the cost of living was increasing faster than the wages, working conditions continued to remain unhealthy and the rate of work-related accidents remained painfully high.[30]

iv. The State's Role

The predominant trend emerging from this period, early signs of which had already been seen during the pre-industrial period, was the increasingly important role which the state came to play in the free market. "The government in Canada has always been essential to the development strategies of capitalism... ."[31]

Taking into consideration the peculiar situation of Canada and its process of development from a dependent economy towards one that was relatively self-reliant, the state actively sought to encourage and support business interests.[32] Although the main emphasis of the government was for the establishment of a suitable climate under which the market could function, this in itself necessitated that the state intervene to ensure capital

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[29] The argument centres around the role of the unions in attempting to "launch a labour party and elect labour representatives to the houses of parliament independent of the liberal and conservative parties." For details see: Bernard Ostry, "Conservatives, Liberals and Labour in the 1880's" (1961) 27 Canadian Journal of Economics & Political Science 141; Craig Heron, "Labourism and the Canadian Working Class" (1984) 13 Labour/Le Travail 45.

[30] See: J.T. Copp, *The Anatomy of Poverty: The Condition of the Working Class in Montreal, 1897 - 1929* (Toronto: McClelland & Stewart, 1974); Michael J. Piva, *The Condition of the Working Class in Toronto, 1900 - 1921* (Ottawa: University of Ottawa Press, 1979).

[31] John Hutcheson, "The Capitalistic State in Canada" in Robert Laxer, ed., *Canada Ltd* (Toronto: McClelland & Stewart Limited, 1973) at 155 - 156.

[32] For support of the view that the state has played a dominant role in the interest of the private sector, see: Leo Panitch, "The Role and Nature of the Canadian State" in Leo Panitch, ed., *The Canadian State: Political Economy and Political Power* (Toronto: University of Toronto Press, 1977) at 14; Ivan Bernier & Andrée Lajoie, eds, *Family Law and Social Welfare Legislation in Canada* (Toronto: Published by the University of Toronto Press in co-operation with the Royal Commission on Economic Development Prospects for Canada and the Canadian Government Publishing Centre, Supply and Services Canada, 1986) at 74; Robert Laxer, ed., *Canada Ltd* (Toronto: McClelland & Stewart, 1973)

accumulation and a continuous supply of labour in the interests of the capitalists.[33] This was so even as the employers were preaching free trade and laissez-faire to forestall arguments for government intervention in the interest of the working classes.

The particular geographic situation of Canada and the responsibility of its government towards the British economic interests underlined the role served by the state.[34] This strategy is most visible during the period starting with the 1840s, when the government, involved in enormous public work projects, sought to support the contractors through the state enforcement mechanism. The low wage rates, long hours of work and dangerous working conditions focused government attention on attempting to keep the labourers at their work while at the same time pacifying/protecting the local residents and businessmen from any violence that might occur due to work-related agitations.

In one way this role was essential, as only through direct state support could the economy progress in the direction and with the speed which was required to make the Canadian economy self-sufficient. But on the flip side of the coin, this meant that the state actions were to remain dominated by employer interests and its policies would mirror the wants of the employers even when at the cost of those employed. To prevent state intervention in the market to support the employees, the argument used was that of laissez-faire, and for a period it was accepted. But by then the conditions had reached such an extreme position that the workers themselves were showing signs of breaking out. Rather than face mass uprising in a direct form the alternative was limited state intervention. As long as the state intervention remained dominated by economic considerations there was a reasonable surety that it would not be detrimental to the interests of the employers and they would continue to enjoy their dominant positions.

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[33] Besides control of the state in the direct form, Hutcheson suggests that there are three ways in which the capitalists exercise control: first, through control over the means of production; secondly through the dominant ideological institutions of society; and thirdly, through the control of the state itself. Within each of these levels there is a spectrum of control, from leadership to overt domination, the interlinkage between the various levels allowing for control within one reinforcing control within the others. For the details of this argument and a general history of the state role see: John Hutcheson, *supra*, note 31 at 157.

[34] The role served at the time was one of direct intervention, in terms of providing financial support and the use of its administrative/coercive power in the interest of the Canadian bourgeoisie. This point is illustrated by Macdonald's National Policy of 1879 and the recruitment of troops to perform the work of labourers in times of shortage, or later through their use to suppress any demands for reform. For details see: H.C. Pentland, *supra*, note 7 at 190.

THE EXCEPTION TO LAISSEZ-FAIRE

i. The Basis for Intervention

As seen in the previous section, the second half of the nineteenth century was the phase of industrial revolution for the Canadian economy. Bringing along with it its peculiar problems of unemployment, inflation, urbanization and suffering, the development also marked a change in the underlying assumptions of the doctrine of laissez-faire. The doctrine, which had gained academic recognition after Adam Smith's conceptualisation in his book *The Wealth of Nations*, characterised the market as supreme and self-regulatory. Critical of any intervention in the free market process, its proponents preferred to operate on the principles of free choice based upon supply and demand.[35] The belief centred upon the conception that the value of a particular commodity is based upon what the person who has a need for it is willing to pay to obtain it i.e., if the supply exceeds the demand the price will fall and similarly if the demand exceeds the supply the price will rise. On the basis of this analysis labour too was classified as a commodity and its costs sought to be determined by the market forces. What this meant in terms of the practical situation was that as long as a replacement could be found and a reserve pool existed, the capitalists could control the wage structures and conditions under which work was performed.

The striking anomaly of this reasoning lies in its underlying assumptions of a rational, informed, and economic choice combined with complete mobility to interact with the shifting demand and supply patterns.[36] These assumptions ignored the effect of prevailing

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[35] Robson suggests that the reason for this complete reliance on the principles of demand and supply was not commercial considerations alone, but a mixture of the commercial, religious and political conditions prevalent during that time. "The advocates of laissez-faire in the 1830's and 1840's strove for two things; they wanted to increase their commercial prosperity and to gain recognition of their position in society." Robson, *supra*, note 21 at 1.

[36] The defects in this reasoning are best illustrated in the common-law rules which governed the employment relationship on the basis of a contractual relationship. "In the nineteenth century the courts transformed the law of health and safety obligations by making them contractual rather than customary, thus forcing workers to bargain with their employers, whether they wanted to or not." Eric Tucker, "The Persistence of Market Regulation of Occupational Health and Safety: The Stillbirth of Voluntarism" in *Essays in Labour Law* (Don Mills: CCH Canadian, 1986) 219 at 224 [hereinafter *Stillbirth*]. In the application of these rules, the balance was clearly in favour of the employer as his inability to perform the contract, though ground for a suit, did not entitle the employee to break the contract. However refusal to work or breach of the contract by the employee could result in the imposition of criminal sanctions. For more details see: Paul Craven, "The Law of Master and Servant in Mid-Nineteenth Century Ontario" in David H. Flaherty, ed., *Essays in the History of Canadian*

circumstances, limited resources, lack of information and restricted mobility of the workers.[37] With increasing class segmentation and visible divergences in living standards, the argument for government support in favour of those least able to protect themselves was gaining ground. Support for such intervention was theoretically justified by such eminent economists as Senior, McCullock and J.S. Mill[38] who, while not rejecting laissez-faire, sought to create a distinction between "political economy" and "classical economy". The distinction would allow for separate considerations in the treatment of commercial and human wealth. It was an argument of humanity against logic.

ii. The Jurisdictional Question

At the time of confederation *The British North America Act* of 1867,[39] in conformity with the principles of federalism, had distributed legislative powers between the federal and provincial governments. Control over the field of labour and its allied subjects however was to remain a particularly contentious issue between the two jurisdictions. It was only after numerous shifts in position that provincial jurisdiction, under section 92(13) "property and civil rights", would be upheld.[40] This confusion was effectively put to use by the opponents of health and safety regulations to delay and limit the scope of any legislative initiative for improving the conditions of work.

Law, vol. 1 (Toronto; Buffalo: Published for the Osgoode Society by University of Toronto Press, 1981) 175 - 211.

[37] The fact that all decisions are directly affected by prevailing circumstances and that in such a situation the short-term advantage may influence or guide the economic choice, was only gradually accepted by economists.

[38] Theoretically this was justified by Mill, when he said "That all men are not free and, therefore not subject to the principles of laissez-faire." This exception, created in the guiding economical principle of laissez-faire, gave direction for emergence of the welfare state. See. J.S. Mill, *Principles of Political Economy* (London: Longmans & Green, 1909) at 950 - 979. As quoted in Robson, *supra*, note 21 at 19.

[39] *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c.3 (formerly *British North America Act, 1867*).

[40] This was established in the case of *Toronto Electric Commissioners v. Snider* [1925] A.C. 396. Even then, later cases created an exception for federal undertakings and their *"related and essentially connected works."* See: *Reference Re Industrial Relations and Disputes Investigation Act (Can.)* [1955] S.C.R. 529.

Although at the federal level the issue was introduced time and again through the tireless efforts of Darby Bergin, the government's attention remained concentrated upon dealing with organised labour and the establishment of a framework within which industrial relations could be mediated.[41] The only significant action taken in the health and safety field was the establishment of two Royal Commissions of Inquiry, which included within their scope the conditions of work.[42] These Commissions reaffirmed the gravity of the situation but, besides increasing the general level of awareness and sources for statistical information in the occupational health and safety arena, succeeded in achieving little else. With stiff employer opposition and excuses of "lack of jurisdiction" at the federal level,[43] the provinces were forced to take the initiative.

The structures sought to be established in the ensuing enactments centred upon two basic themes, prevention and compensation. The former was primarily used for the establishment of an industry-wise regulatory regime which sought to pre-empt and reduce the conditions under which injury, disease and accidents occurred. The compensational approach emerged a short time later and was designed to enable financial compensation for the victim of an industrial accident, or in case of his death, for his family.

An analysis of all provincial legislation of the time dealing with the area of occupational health and safety would form an area of research in itself, and furthermore, beside setting

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[41] After defining the role of the trade unions in the *Trade Union Act*, 1872. 35 Vict., c.30 [hereinafter *Trade Union Act, 1872*] the federal government's attention became focused upon industrial relations. The legislation which followed such as *The Conciliation Act*, 1900. 63-64 Vict., c.24., and the *Industrial Disputes Investigation Act*, 1907. 6-7 Edward., c,20., illustrates the point. Whether this lack of attention to health and safety issues was justifiable on jurisdictional grounds has been seriously questioned. A majority of the authors seem to view this excuse, on the federal government's part, as being unjustified. This reasoning is based, not upon legal grounds, but on the analysis that prior to the last attempt the reasons given for refusal were always other than jurisdiction. See G S. Kealey, ed., *Canada Investigates Industrialism: The Royal Commission on the Relations of Labor and Capital, 1889* (Toronto: University of Toronto Press, 1973) ix; Bernard Ostry, *supra*, note 29 at 150.

[42] See: G.S. Kealey, *Ibid.*. Also see: *Canada, Report of Commissioners Appointed to Enquire into the Working of Mills and Factories of the Dominion and the Labour Employed Therein* (Ottawa, January 1882) Canada Parliament, Sessional Papers, 9, No. 42.

[43] For a comprehensive discussion of the legislative debates at the federal and provincial levels (Ontario), which preceded the passing of the Ontario *Factories' Act, 1844*, S.O. 1884, c.39., [hereinafter *Factories Act, 1884*] see: *Administering Danger, supra*, note 2 in c. 4 - 5. Also see: Eugene Forsey, "Note on the Dominion Factory Bills of the Eighteen Eighties" (1947) 13 Canadian Journal of Economics & Political Science 580.

the background for future analysis, is not in direct relation to this study. Thus the following discussion has been limited to the regimes established in the province of Ontario. *The Ontario Factories Act*, 1884 and the *Workmen's Compensation Act*, 1914[44] illustrate the development of both the preventive and compensatory ideologies.

iii. The Factories Legislation

a. The Case for Intervention

It was the striking changes occurring in the social environment which won the argument for state regulation of the manufacturing process. These changes, in fact forced state intervention, compelling a re-evaluation of the sacred principles of laissez-faire.[45] Though poverty and appalling working conditions were not a new phenomenon,

> " The poverty which existed in the towns was more noticeable because it was grouped together in the slums. Charity was not as effective in the industrial areas, and starvation and epidemics could not be ignored when found on the doorsteps of the wealthier class. The working classes, in addition, were more vocal and organised in their suffering, and their voice could not be ignored in an age which prided itself on, and justified its institutions by, material progress."[46]

The pattern had shifted from manual, labour-oriented, skill-based productions towards one in which skills played a diminishing role. With the increased emphasis on machine-regulated division of labour, the size of production units had begun to increase.[47] Large scale units, which helped capture economies of scale, began to replace the smaller craft businesses. This increase in size and scale required the grouping together of a large number

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[44] *Workmen's Compensation Act*, S.O. 1914, c.25 [hereinafter *Workmen's Compensation Act, 1914*].

[45] See: Denis Guest, *The Emergence of Social Security in Canada* (Vancouver: University of British Columbia Press, 1980).

[46] Robson, *supra*, note 21 at 12.

[47] Jennissen quotes figures showing that in 1851, 24% of Hamilton's industrial force was employed in factories employing 10 persons or more. By 1871, this had increased to 83%. In Toronto out of a total of 572 factories in 1871, 8.6% (or 49 factories) employed more than 50 workers. See: *Jennissen*, *supra*, note 15 at 161. Tucker estimates a higher figure, that of 67% of employees in manufacturing working in factories employing more than 30 persons *Administering Danger*, *supra*, note 2 at 14. For more statistical data see: Richard Pomfret, *The Economic Development of Canada* (Agincourt, Ontario: Methuen, 1981) at 128 - 129.

of workers at single sites, in close proximity with machines they were ill equipped to use. The increasingly monotonous and routine methods of operation limited the amount of control the worker had over the final product, his contribution being limited to one, or a few, of the steps which went into the production process.

A combination of the factors of economic control and changed methods of production contributed towards making the workplace, specifically large and mechanized factories, places which constituted serious health and safety risks. Poor ventilation, inadequate lighting, long hours of work, a dirty and cluttered environment, lack of space which resulted in overcrowding and close proximity with unfenced and dangerous machinery were common features at most workplaces.[48] In such a situation it was but natural that the risk of injury, disease or death would increase.

> "The enactment of the Ontario Factories' Act of 1884, signalled official acceptance of the idea that regulation in this area was a public responsibility requiring direct state intervention. This intervention took the form of politically determined minimum standards enforced by an inspectorate."[49]

The history of factory legislation in Ontario provides an illustration of the state's attitude at that time towards worker demands. The employers had, at the federal level, effectively defeated seven attempts at such legislation. Similarly, the provincial legislation, plagued by a history of excuses and blockades, came after a prolonged period of dawdling and delay. Although the legislature was quick to pass the legislation once it was

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[48] The earliest comprehensive source available for industrial statistics about working conditions is the *Labour Gazette* which began in the year 1900. Before that, information sources are restricted to reports of the Labour Commission and after 1888 reports of the factory inspectorate. For a detailed description of the conditions of work prevalent during that time see: M.W. Thomas, *The Early Factory Legislation: A Study in Legislative and Administrative Evolution* (Westport, Conn: Greenwood Press, 1970); Claire Brandler Walker, *A History of Factory Legislation and Inspection in New York State, 1886 - 1911* (Thesis: Columbia University) (Ann Arbor: Xerox University Microfilms, 1974); J.T. Copp, *supra*, note 30; Michael J. Piva, *supra*, note 30; *Administering Danger*, *supra*, note 2; Harry Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto: University of Toronto Press, 1985); G.S. Kealey, *supra*, note 41; Craig Heron, *Working in Steel: The Early Years in Canada, 1883 - 1935* (Toronto: McClelland & Stewart, 1988).

[49] *Stillburth*, *supra*, note 36 at 226.

presented,[50] the date for it to come into force was withheld for another two years.[51] In addition to this game of political manouvering and delay, the legislation itself reflected the dominance of employer lobbies in the political powerhouses. The enactment, being relatively mild in its scope, made only a half-hearted attempt at improving the conditions of health and safety at work. In this connection, organised labour's subsequent criticism of the legislation is of relevance.[52]

b. Scope of the Legislation

The legislation was limited in its applicability to cover only factories employing more than 20 persons, with the exception of private dwellings operating without mechanical power and using only family labour. The structure of the Act was divided under three broad categories. The first related to prohibiting the employment of children[53] and establishing hours of work limitations for boys between the age of 12 and 14, girls between the ages of 14 and 18, and women over 18. In addition the Act prohibited their employment for certain specified kinds of work. They were entitled to a one-hour lunch break which could, if the inspector authorised, be taken at a place other than where the manufacturing process was being performed.

The second category dealt with general safety and health conditions in the workplace, and, though vague and ambiguous, provided for some basic standards such as on adequate ventilation, overcrowding, cleanliness, fencing of machinery, fire protection/escape provisions and separate closet facilities for men and women etc. The last category dealt with the administrative framework under which the Act was to operate. It covered the rights, duties and powers of the factory inspectors including procedural measures required from employers such as notices, display boards and maintenance of records and registers.

The administration of the Act was left completely in the hands of the inspectors, appointed by the Lt. Governor, who were responsible for enforcing and ensuring compliance

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[50] The bill was introduced in the house on 26th February, received second reading on the 11th of March, and Royal Assent on the 25th of March 1884.

[51] The Act finally came into force on 1st December 1886.

[52] *Administering Danger, supra,* note 2 at 99.

[53] Children included boys under the age of 12 and girls under the age of 14.

with the regulations. In this regard they were given the authority to enter industrial establishments at all reasonable hours without warrants, to require the production of documents and registers kept under the Act and to summon and cross-examine individuals under oath. In conducting the enquiry they could, if the need arose, ask for the assistance of the local health officer or constables. A yearly report of their working was submitted to the government.

Prosecution under the Act was brought before two justices of the peace, the statute entitling them, besides the imposition of the penalties of fines and imprisonment, to issue directory orders ensuring conformity with the Act's provisions.

c. Effect of the Legislation

With enforcement of preventive legislation, the gradual transition towards a liberal welfare state had begun, an exception to the principle of laissez-faire had been recognised. This however did not imply that the state was to become a willing or supportive partner. It still remained under the influence of the capitalistic market.

> "The partial politicization of class relations led the state to participate in the construction of institutional arrangements which mediated class conflicts, but which did not seriously challenge the dominant position of capital."[54]

Recognition of the need for change formed only a part of the struggle for improving the conditions of the work. Once the need to maintain certain minimum standards at the workplace had been recognised, it was the practical enforcement of those statutory provisions which became the centre of contention.

The influence of market forces upon the state was visible from the very terms of the legislation, which made only partial progress towards the establishment of health and safety provisions. Although the Act signified a victory in terms of recognition of working class interests, it did not go far in removing the actual grievances. Its limited scope, minimum intervention into the free market, vague and ambiguous terminology and extensive delegation to an administrative body all served to benefit the business class interests. Not being particularly successful at restraining the inspectors' powers in the statutes itself, the focus for

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[54] *Administering Danger, supra,* note 2 at 137.

business now shifted towards ensuring that the appointments were not pro-labour.[55] Furthermore, the administrative capabilities of the inspectorate were seriously restrained by reason of the inadequate resources devoted for enforcement of the act.[56]

Dissatisfied with the slow rate of progress being made, the labour organizations continued to press for reform and better enforcement. These movements achieved partial success in 1889, when the Act was extended to factories and workshops employing six or more people. The results however were far short of what the practical situation warranted. The strategy for ensuring compliance, adopted by the inspectors, was based more upon persuasion than prosecution.[57] In justification of their stance the inspectors cited[58] ignorance of law as the prime cause for violations, hence the belief in education and persuasion as the prime strategy. Tucker, in his review of the process,[59] portrays external constraints in terms of resources,[60] the prevalence of class power in the workplace and the limited world view of the inspectors,[61] as underlying reasons in the choice of the

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[55] *Administering Danger*, *supra*, note 2 at 138 - 139.

[56] For further details about the resource constraints see: *Administering Danger*, *supra*, note 2 at 147.

[57] Tucker has calculated that during a period of the first twelve years of the enactment only 35 charges were prosecuted. During the same period he lists the fatal accidents at 207 and reported accidents causing serious injury at 2632. In none of these cases was the employer prosecuted for violating the Act. *Administering Danger*, *supra*, note 2 at 146.

[58] *Report of the Inspectors of Factories for the Province of Ontario for the Year Ending 31 Dec, 1888*, Ontario, Legislative Assembly, Sessional Papers (No. 39) (Toronto, 1889), 6. Source: *Jennissen*, *supra*, note 15 at 204.

[59] In *Administering Danger*, *supra*, note 2 at 147 - 176. Also see: Eric Tucker, "Making the Workplace 'Safe' in Capitalism: The Enforcement of Factory Legislation in Nineteenth-Century Ontario" (1988) 21 Labour/Le Travail 45; *Stillbirth*, *supra*, note 36 at 227.

[60] At the commencement of the regime three inspectors had been appointed providing a ratio of approximately 1:55,000. Even though women formed 20% of the total manufacturing population in the province and the Act was primarily related to women and children, it was not until the appointment of Margaret Carlyle in 1896 that a female factory inspector was appointed. Although the size of the inspectorate increased from 3 in 1887 to 10 in 1909, this increase was hardly in proportion to the pace at which the manufacturing sector was developing. In terms of budgeting too the administration was in a pitiful state. The annual budget in 1888 was a mere $4245.5 and by 1913 had only increased to $24,830.4. Source: *Jennissen*, *supra*, note 15 at 204 - 209.

[61] Another consequence of these factors was the liberal construction given to the ambiguous sections of the Act. *Administering Danger*, *supra*, note 2 at 167.

persuasion strategy. The effect of this choice was that violations were frequent and mostly went unpunished. Although one may concede ignorance as the initial reason for such disregard of the law, later reports show that the economic and workplace-control reasons for violations were more compelling.[62]

The state, as yet, was not ready to put into practice what it was just learning to preach. Repeated attempts at improving the enforcement structure were met with stiff employer resistance. On the other hand, the relative silence maintained by the manufacturers re-enforces the belief in the success of market power over the interest of workers. However a consequential benefit of this resistance was to allow the labour unions a common cause of action upon which to establish their organisations. Having seen the government's inability to effectively support their cause, the alternative was to strive for greater self-regulation.

iv. Workers' Compensation Legislation

After state intervention in the free market through preventive legislation, the rationale for providing legislation covering the second theme in occupational health and safety, i.e., compensation, was easy to justify. With a rising rate of industrialisation and the advent of railways the conditions of work had fast deteriorated. Accidents and fatalities were common. Beside the immediate loss and suffering the problem was compounded by future difficulties which lay in store for the victims by reason of reduced or terminated incomes. The factories legislation had sought to prevent the occurrence of these accidents, but when they did occur - a frequent occurrence given that the enforcement of the preventive legislation was still not up to the mark - the need to provide some compensatory financial relief was acutely felt.[63]

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[62] *Report of the Inspectors of Factories*, Ontario, Legislative Assembly, Sessional Papers (Number 25) (Toronto, 1893) 5; (Toronto, 1891) 12, as quoted in *Jennissen*, *supra*, note 15 at 204.

[63] For details on the development of workmen's compensation see: "Compensation for Injuries to Canadian Workmen" (1918) 15 Canadian Law Journal; P.W.J. Bartrip and S.B. Burman, *The Wounded Soldier's of Industry: Industrial Compensation Policy, 1833 - 1897* (London: Oxford University Press, 1983); Eric Tucker, "The Law of Employers' Liability in Ontario 1861 - 1900: The Search for a Theory" (1984) 22 Osgoode Hall Law Journal 213; R.C.B. Risk, "This Nuisance of Litigation: The Origins of Workers Compensation in Ontario" in D.H. Flaherty, ed., vol. 2 *Essays in the History of Canadian Law* (Toronto: University of Toronto, 1989) 418: Michael J. Piva, "The Workmen's Compensation Movement in Ontario" (1975) 67 Ontario History 39.

a. The Case for Intervention

Under the common law injured workers still retained the right to sue for damages. However, in view of the practical constraints of the economic structure, the chances of these rights being successfully used were reduced to a minimum. Operating under the common-law rules of negligence and tort, the courts based their reasoning on the finding of fault. With the rapid changes made in the method of production, the old paternalistic order[64] where the employer worked with and had complete control over the nature of work had disappeared, to be replaced by a hierarchical system with a rung of middle and senior managers/supervisors separating the worker from the employer. This made it all the more difficult to establishment fault on the part of the employer. Even when fault could be established the court had, through judicial precedent,[65] created the restrictive rules of contributory negligence, voluntary assumption of risk and the fellow servant doctrine which prevented, except in the rare case,[66] the courts from allowing the workers any financial relief.

The hardship which this caused was not simply a matter of financial constraints but had a tremendous effect upon the workmen's mental and psychological health. The sudden reduction, or even complete termination, of an already meagre income forced these injured workmen to become dependent members of the family. In the absence of social security they

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[64] During the paternalistic era of employment the employer, from a sense of responsibility and personal gratification, sometimes provided financial compensation for industrial accidents. This was a purely voluntary gesture and even then was hardly commensurate with the actual damage suffered. For example, the railways provided discretionary compensation which could include cost of treatment, funeral expenses or financial compensation up to one year's salary. See Paul Craven, "Law and Railway Accidents, 1850 - 80" (1987) II Canadian Law in History Conference (Carleton University, 1987) at 47, 67.

[65] The establishment of these rules, employers' defenses as they were called, was first seen in the case of *Priestly v. Fowler* (1837) 3 M&W 1, 150 E R 1030, where the injured employee was refused compensation upon the vaguely cited grounds of voluntary assumption of risk and contributory negligence. The fellow servant rule found application in the later case of *Farwell v. Boston and Worcester Railroad* (1842) 45 Mass (4 Met) 49.

[66] Though no accurate figures of compensation litigation are available Woolner estimates 20-30% of the occupational injuries were covered by legal relief. Tucker however portrays a bleaker picture when he shows that out of the 20 reported cases in Ontario during the period of 1861 - 1886, the workers lost in 17 (85%). Risk documents 16 reported cases between 1865 and 1880 in which the workers failed in almost all, "with the fellow servant rule barring recovery in eight of the cases." For details see: E. Woolner, *Workmen's Compensation in Canada* (Ottawa, 1969) 3; Eric Tucker, *supra*, note 63 at 220 - 228; R.C.B. Risk, *supra*, note 63 at 422.

were forced to rely upon charity and municipal help as the sole means of support.[67] In some cases unions provided for a relief fund or an insurance scheme, but this was the exception rather than the rule, th .neral situation remainir.g that of extreme economic and psychological hardship.

It was under these conditions that the Ontario legislature enacted the *Workers Compensation for Injuries Act, 1886.*[68] Finding it politically inappropriate to exclude compensatory legislation after the establishment of preventive legislation, the government's only aim was to consolidate the common law into statute form. The Act restricted the common law defences to a limited extent but the worker still had to prove negligence to obtain a favourable judgment. The employer defences of voluntary assumption of risk and contributory negligence were still very much in force. This regime continued in its original form over a period of 28 years, marked by amendments which reflected both gains and losses for the workers.[69] The Act's inherent weaknesses - which included retention of many of the employer defences, the limited application of the legislation,[70] the opting-out

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[67] See: Richard Splane, *Social Welfare in Ontario, 1791 - 1893: A Study of Public Welfare Administration* (Toronto: University of Toronto Press, 1965) 79 - 116; Denis Guest, *supra,* note 45 at 12 - 15 & 36 - 38.

[68] *Workmen's Compensation for Injuries Act,* S.O., 1886, c.28 [hereinafter *Worker's Compensation for Injuries Act, 1886*].

[69] Amongst the major amendments and events were-
- In 1889 the term "superintendent" was expanded and the term "employer" was clarified. Street railways and contractors/sub-contractors were specially brought within the purview of the Act. In addition, continued employment without knowledge of defect or negligence was not seen as voluntary assumption of risk.
- In 1892 prior amendments were consolidated into the *Workmen's Compensation for Injuries Act,* 55 Vict., 1892, c.30.
- In 1893 farmers were exempted from the provisions of the *Workmen's Compensation of Injuries Act.*
- In 1899 a limited step towards "no fault compensation" was taken, modelled upon the English legislation, which shifted .he onus of proof with respect of dangerous machines on to the employer. The employer however still retained the other defences.
- In 1900 the Navor Commission advised the government to "wait and watch" the effects of the European "no fault" legislations before proceeding upon similar lines. As quoted . : *Jennissen, supra,* note 15 at 253 - 264.

[70] The enactment did not cover domestic employment, farm labourers and initially even railway employees. Railway workers were covered by a parallel compensatory scheme.

provisions and the negative judicial attitude[71]- lead to its being seen as the stepping stone for a more comprehensive regime which was achieved in the form of the *Workmen's Compensation Act* of 1914.

b. Scope of the Legislation

The support for this legislation had come from both the employers and the workers. The workers, facing difficulty in obtaining financial relief, were agitating for reform on the no-fault insurance pattern of the European legislation. The employers on the other hand, having had practical experience with the compensatory regime over the past 28 years, had realised that besides increasing their litigation and insurance costs the enactment was achieving little.[72] The Meredith Commission on Workmen's Compensation, in its report, re-affirmed these beliefs.[73]

The passage of the 1914 Act heralded the arrival of no-fault insurance on the Canadian occupational health and safety scene. Compensation became payable for any injury sustained through employment or specified work-related disease, regardless of fault, after a seven-day delay unless the injury was the result of the wilful misconduct on the part of the worker. In

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[71] Although Tucker provides figures to justify his assumption of an increase in litigation victories (out of 43 reported between 1886 - 1900, workers won 23 times [44%] as compared to pre - 1886 periods when the rate was 15%) the area would need to be studied in greater detail to evaluate the actual benefits of the legislation. This is especially so in light of the significant increase in the manufacturing sector and the prevailing barriers to litigation. For details see: R.C.B. Risk, *supra,* note 63 at 426 - 448.

[72] Jennissen has, besides the economic argument, suggested "progressive management and acceptance of the inevitable" as two subsidiary reasons for the manufacturers' support, another reasoning being that they wanted to control the system from within rather than risk a radical enactment. For details see: Theresa Jennissen, "The Development of the Workermen's Compensation Act of Ontario, 1914" (1981) 7 Canadian Journal of Social Work Education at 55; R.C.B. Risk, *supra,* note 63 at 459 - 463; James Weinstein, "Big Business and the Origins of Workers Compensation" (1967) 8 Labour History 156.

[73] The Meredith Commission on Workmen's Compensation was appointed in June 1910 to examine similar schemes employed in Europe and the United States and make recommendations. The Commission held 27 public hearings from 23 Oct 1911, to 20 March 1913, the findings of which were presented in two reports, the final being submitted on 31 Oct 1913. In addition the Commission also presented a draft bill which, after minor alterations, was to become the *Workmen's Compensation Act, 1914.* The recommendations were patterned on the German model, adopting the no-fault insurance pattern, financed exclusively through employer contributions to a state accident fund. For a discussion of the political lobbying by Labour and Canadian Manufacturing Associations at the time of the Commission see: R.C.B. Risk, *supra,* note 63 at 456 - 471.

the case of death this compensation became payable to his family or next of kin. The rates for compensation were established through a percentage calculation (55%) over the average salary of the previous 12 months subject to maximum prescribed limits.[74] Though initially only six diseases were specified, the compensation board had the authority to add to the list.

The administration of the Act was vested in the Workmen's Compensation Board, whose members were employed for ten-year periods. The Board had vast administrative and discretionary powers with exclusive and final jurisdiction over the area of compensation. Common-law claims and appeals from the Board's decisions were barred. The financial cost of compensation was to be borne through a fund established from the sole contributions of the employers. The rate at which the contributions were to be made was determined by the Board, which also had responsibility for administering the collected amount. The fund's total receipts were required to cover pay-outs, future reserves and administrative costs, with the Board retaining the right to enforce additional or special rates upon certain industries.

c. Effect of the Legislation

Having succeeded in obtaining a major concession from the employers, the workers were to be let down once again on the administrative aspect of the legislation. Following a similar pattern to the factories legislation and its administrative structure, the enforcement of the Compensation Act left much to be desired. Although the purpose of the enactment had been to ensure easier and certain financial support for victims of industrial accidents, whether this was actually achieved is a subject of dispute.

The administrative appointments certainly favoured the dominant interests[75] and Tucker's analysis of a "limited world view and protection of class interest"[76] would certainly have influenced the decisions made. A major portion of the debate, prior to the passage of the bill, had centred around the exclusive financial contributions of the employers, its acceptance being treated as a major concession. This negotiation strategy, supported by

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[74] In the case of disability benefits the maximum limit was set at $2000 per year. In case of compensation payable upon the death of a worker, to his dependants, the limit was $40 per month.

[75] For details about the appointments see: Campbell, *The Balancing Wheel of the Industrial System: Maximum Hours, Minimum Wages, and Workmen's Compensation Legislation in Ontario, 1900 - 1939* (Ph.D. Thesis, McMaster University, 1980) as quoted in *Jennissen, supra*, note 15 at 96.

[76] *Administering Danger, supra*, note 2 at 159.

exaggerated figures[77] of estimated costs, shifted the focus from the acceptance of liability towards the granting of a paternalistic concession.[78] After making this major concession, if the employers restricted the rate of payment to a minimum it could hardly be seen as unjustified. Even then the costs were never directly born by the employers: ultimately it was passed on to the consumers or through state support converted into financial incentives such as tax exemptions.

The exclusive jurisdiction and finality of its decisions made the Board the sole arbitrator of compensation claims. Operating from a class perspective and not adequately representing labour in its composition the working of this body was often the subject of labour criticism. In addition, its scope had been expressly restricted by the exclusion of such employments as domestic, merchandising and agricultural workers, even though the Meredith Commission had recognised them as being particularly hazardous areas of work. A similar pattern was visible in the listed diseases under which claims could be made. Still, in consideration of the fact that the regime was structured and adopted with the support of the employers and operating in a period when workers' rights were only just being recognised, the Act constituted a significant step in the promotion of occupational health and safety in the workplace. It was only after the establishment of these preventive and compensatory regimes that the workers could strive to obtain control over the administrative structures.

WORKPLACE CONTROL AND WORKER PARTICIPATION

Any review of the occupational health and safety regimes would be incomplete without acknowledging the role of organised labour. As seen in the previous section, class politics was one of the prime reasons which resulted in state intervention. Beside this visible form of recognition of workers' rights another battle was being fought, also upon class lines, which centred around control over the workshops and workplaces. This area of struggle was for the most part one of direct confrontation between the two parties: labour and management.

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[77] The Workers Compensation Board later reported that "the financial burden will be less than anticipated, the assessment for 1915 being in most cases more than sufficient to meet the requirements, and the Board has made substantial reductions in most classes of industries." *Jennissen*, *supra*, note 15 at 311.

[78] Even then medical and rehabilitation benefits were not a part of the Act until 1919.

Having opposing views over prime interests,[79] it was the balance of power between the two concerned parties which determined the relationship and attitudes essential to any workplace reform. This balance of power, not being a static phenomenon, was in the process of continuous change. With increased worker organisation, economic development, increased education, political awakening and governmental recognition, the workers' negotiating strength was on the rise.

Even then, short-term economic considerations and structural imbalances in the class relations prevented the attainment of desired results. On key issues the workers, from the pure pressure of economic necessity, could be cajoled into accepting short-term economic gains instead of health and safety reforms. The employers, operating from united and economically sound positions, presented a formidable opposition. As a result every concession was a prolonged struggle. These struggles took their toll on the working class but they also made them realise that for any concrete progress to be made they would have to obtain direct control over the manufacturing process, obtain a say in organising the production process and obtain a direct influence over the workfloor.

This struggle for workplace control[80] had its origin in the early craft and trade organisations. Before the advent of the mechanised means of production these crafts depended upon personalised knowledge and skills obtained through experience and practise. Glass-workers would provide the ideal example. This emphasis on skills in the production process forced the employer to rely heavily upon the workers, the dependency in turn allowing the workers control over their work, workplace and work environment.

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[79] This assertion, of an absence of a common interest, has been dealt with in greater detail in Chapter 3, however, for details on ideological differences between labour and management see: Leo Panitch, "Elites, Classes and Power in Canada" in Michel S. Whittington and Glen Williams, eds, *Canadian Politics in the 1980s* (Toronto: Methuen, 1981); Wallace Clement, *Class, Power and Property: Essays on Canadian Society* (Toronto: Methuen, 1983).

[80] For discussion on the workers' struggle to obtain control over the workplace see: Branko Pribicenic, *The Shop Stewards' Movement and Workers' Control, 1910-1922* (Oxford, 1959); David Montgomery, "Workers' Control of Machine Production in the Nineteenth Century" (1976) 17 Labor History 485; G.S. Kealey, "'The Honest Workingman' and Workers' Control: The Experience of Toronto Skilled Workers, 1860 - 1892" (1976) 1 Labour/Le Travailleur 32; Bryan Palmer, "The Culture of Control" in Kealey and Cross, ed., *Canada's Age of Industry, 1849-1896* (Toronto: McClelland & Stewart, 1982) 128 [hereinafter *The Culture of Control*]; Benson Soffer, "A Theory of Trade Union Development: The Role of the "Autonomous" Workman," (1960) 1 Labor History 141.

> "In this sense, workers' control was nothing more than the functional autonomy of the skilled worker, a workplace practice flowing out of the craft worker's knowledge of the production process."[81]

Conscious of their position and anxious to maintain their advantage these workers sought to establish a level of "restrictive control"[82] over their fields of employment. Restricting the number of apprenticeships and restraining output formed the prime areas of control. In other instances this measure of control could be seen in recruitment policies, negotiations and trade regulations. A parallel development, with restrictive control, was "shop control" which referred to control over the shop floor. This was usually achieved through the recognition of "shop stewards" or "shop committees" which operated in somewhat the same manner and on similar issues as the restrictive control mechanisms. The level of success achieved in each situation was, however, dependent upon the strength of the workers organisation. Glass workers for example, had so complete a control over their trade that they were able to restrict the output to specified limits, have a working day of seven or eight hours and continue their practise of a summer break. Not all organizations, however, achieved this level of success. Still, in some form or other the struggle for control was carried on.

The government was not of much help on this front, preferring to side with the employers in support of economic development. However, in certain cases intervention became a necessity. The most important single piece of labour legislation came in the form of the *Trade Union Act* of 1872 whereby labour unions were given legal recognition. It was no longer illegal to form labour combinations. Though the Criminal Code continued to provide restrictions on the workers' conduct during trade disputes, the mere recognition allowed the unions to step up their struggle to gain control in the workplaces.

Although unions were not new to the industrial world and though illegal groups had existed, and in some cases successfully operated since pre-industrial times, the structure of membership was changing. Emerging from being trade or craft unions the membership was increasingly being opened to unskilled and non-craft workers. With swelling membership and

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[81] *The Culture of Control, Ibid.* at 132.

[82] *The Culture of Control, supra,* note 80 at 133.

an expanding level of awareness the unions were seeking to re-establish their lost control. Non-union workers were slowly edged out and union influence at the shop floor level was expanded. Wherever the employers resisted the result was usually a violent and long, drawn-out, strike.[83] In times of cut-throat competition this could mean serious costs for the employer, forcing him to the bargaining table.

Facing a combined opposition in the form of employers' associations, the unions were also becoming aware of the advantages of industry-wide combinations. In order to establish this, the unions attempted to combine their individual pools and operate on an industrial level. With the formation of the first central in Toronto in 1871 (T.T.A.) the area of conflict shifted from individual establishment towards industry-wide control. Although the issues still centred around economic demands, basic health and safety provisions continued to form an important part of the settlements. The struggle received a further impetus with the internationalization of the unions and the emergence of the Knights of Labor as a dominant labour grouping. With this link came experience and organisational skills which allowed the unions to better confront the employers.[84]

However, over time the employers sought to diminish this power of the workers and obtain complete control over the production process. In cases where the conflict was open it usually resulted in violence, strikes and lock-outs. Hiring of non-union men, encouraging workers to break union rules, dismissal or refusal to hire union men and the granting of economic incentives to achieve their objectives were some of the favoured strategies in reducing the workers' control. Wherever the production became mechanized and could operate primarily upon the supply of unskilled labour the employers were successful. As the situation shifted towards complete industrialization the employers' control over the workplace increased. This control when exercised in a post-paternalistic capitalistic economy, enabled the employer to make full use of the laissez-faire argument irrespective of its detrimental consequences on labour. Economic downturns added to the woes of the working

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[83] The Moulders' Union struck work in 1874, the issue being that of union shop. Bottomers of the MacPherson & Company Shoe Works struck in 1879, on the issue of employment of a non-union member. For more details on such labour confrontations see: *The Culture of Control, supra,* note 80 at 128.

[84] In the 10 years from 1880 to 1890 there were 425 known strikes with 63 strikes each in 1883 and 1886 alone. Bryan Palmer, "Labour Protest and Organization in Nineteenth-Century Canada 1820 - 1890" (1987) 20 Labour/Le Travail 61 at 73.

class who were still struggling to retain some semblance of a say in the employment relationship. Faced with a continuous supply of cheap and unskilled substitute labour and facing the pressures of a fluctuating economy, the unions were in no position to retain control in any one place for long. The history of the union movement bears testimony to the number of different labour organisations which rose and were then plunged into the realms of obscurity.

The most significant consequence of this continuous confrontation was to give the unions the required support "in promoting a spirit of self-control... a spirit of self-reliance."[85] Strengthened by an inability to obtain effective state support, the unions increasingly relied upon their internal organizational abilities to obtain concessions during negotiations. Worker demands echoed the desires for an enhanced workplace control through self-regulation, but at the same time demands for an increased and more efficient state regulation were being made with equal force. In areas where employers' resistance was stiff and the situation was that of a stand off, where the workers wanted to consolidate their collective bargaining gains, or where the economic arguments only supported state intervention, the workers were still forced to turn towards the state for intervention.

As seen above the basis for self-regulation arose from the non-participatory nature of state administrative structures and their failure to effect the desired changes in relation to the health and safety concerns of the workers. Repeated attempts at obtaining state regulation in the area of health and safety had not succeeded in improving the situation. This discontent was translated into demands for greater autonomy and worker say in decisions made at the workplace which affect the health and safety of the workers.

CONCLUSION

The process of industrialization and its accompanying health and safety hazards provided justification for the state's initial intervention into the free market. Prior to the legislative enactments, the largely unorganised workforce was subjected to the most deplorable conditions of work. Long hours, unhealthy, unsafe and unsanitary conditions were a common feature in most industrial establishments. The employers were under no obligation

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[85] *Royal Commission on the Relation of Labor and Capital* as stated in *The Culture of Control, supra,* note 80 at 156.

to assume responsibility for the injuries or suffering that was resulting from the manufacturing operations; initiatives at promoting safety and health at the workplace or providing compensatory relief to the victims, were solely matters of employer discretion.

It was to amend these conditions and ensure some measure of employer responsibility that pressure was exerted on the state for intervention. Following an initial period of hesitation, the state finally acknowledged its responsibility towards the working public and helped establish the legislative enactments which provided for the maintenance of certain minimum standards of health and safety at the workplace. Whatever be the criticisms of the resultant legislation, the victory of labour in terms of establishing their position in the purely capitalist market was clear. The state had been forced to recognise that labour was not simply a commodity to be bought and sold as the market sought. In establishing the ideology and organisational capacity of the state to intervene "...the principle was established that the state bore some responsibility for ensuring that its citizens were not exposed to whatever hazards the capitalist labour-market generated."[86] This recognition formed the basis from which the conception of welfare state could function.

Starting with the Ontario Factories Act, of 1884, by 1917, most of the provinces had established similar statutes in their respective jurisdictions. In addition the employer liability acts and the workmen's compensation schemes were moving towards a modification of the common law defenses available to the employers. With enactment of the Ontario Workmen's Compensation Act of 1914, patterned on the social insurance scheme of Germany, the advent of no-fault insurance at the workplace became a practical reality. The initiative provided by Ontario was soon to be followed by the other provinces.

The limited scope of the legislation and the practical enforcement strategies adopted, however, still left the workers subjected to a high level of health and safety risk. As enforcement of the statutes was mainly the responsibility of the inspectors their inadequate knowledge and capabilities acted as impediments to effective implementation. Responding to pressures from the organised labour movements to improve upon these drawbacks the provincial governments took to establishing industrial hygiene divisions. The first of these was established in Ontario in 1920. This was soon followed by several provinces as well as the federal government.

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[86] *Administering Danger*, *supra*, note 2 at 131.

The increased awareness of the occupational health and safety issues was also helping to concentrate academic and research efforts towards this field. The introduction of industrial hygiene courses in the University of Toronto in 1943, formation of the Industrial Medical Association of the Province of Quebec in 1928, and the Industrial Medicine section in the Ontario Medical Association in 1944, illustrate the emergence of specialised professional bodies dealing exclusively with occupational health and safety concerns. This movement, towards workplace reform received additional emphasis during the World Wars I and II when reduced supplies of labour highlighted the necessity to conserve the remaining manpower resources.

Even in the post war period, when the health and safety issues were relegated to the background, the established structures continued to grow. With an increase in unionization and worker influence in political spheres both the provincial and federal governments increased their involvement in promoting workplace health and safety reforms. In 1945, the National Health and Welfare department was expanded to include the Civic Services Health Division; in 1953, the Federal Division of Industrial Hygiene became the Division of Occupational Health. Similar developments were taking place at the provincial levels, where by the early 1950s, several jurisdictions were operating employee health and safety programs.

This slow pace of structural reforms continued through the 1950s and 60s, without any major advances being made. Reorganisation of the worker compensation programs and enactment of the Canada Labour Code, part IV dealing with the safety of employees in 1968, were two significant features of this period. However, it was not until the early 1970s that any major re-evaluation of the occupational health and safety administration was undertaken. It was during this decade that the demands for reform came to emphasis prevention over compensation and the reflection of an appropriate worker participation in the regulation of occupational health and safety.

CHAPTER TWO
THE ADVENT OF SELF-REGULATION

INTRODUCTION

Even though limited and only partially successful, the state's intervention in regulating occupational health and safety had a basis, a benefit. As the prevention and compensation legislation had shown, the shifting of costs from the employees to the employer had brought to the fore the savings that could be obtained from providing a healthy and safe work environment. The free-market assumption of the occupational health and safety issue being one of worker self-interest i.e., that a worker could by applying market pressure or trading some economic benefits secure better work conditions and had thereby consciously accepted the remaining risk had been seriously challenged.[1]

In the following chapter the discussion is focused upon the choice of state strategy for market intervention and how the practical problems of application eventually lead to a re-evaluation of the regulation strategy. The emphasis shifted from state administration towards self-regulation, worker participation and internal responsibility.[2] The reasons for this change

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[1] Some authors acknowledge the presence of such risk premiums, however, the area remains one of dispute. Even if the presence of such premiums was to be presumed studies indicate that such premiums would be an inaccurate reflection of the employee preferences. For details see: M. Gunderson & K. Swinton, *Collective Bargaining and Asbestos Dangers in the Workplace* (Study Paper Prepared for the Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario, 1980); Mendeloff, *Regulating Safety: An Economic and Political Analysis of Occupational Health and Safety Policy* (Cambridge: M.I.T. Press, 1980); Nichols & Zeckhauser, "Government Comes to the Workplace: An Assessment of OSHA" (1977) 49 The Public Interest 39.

[2] The internal-responsibility system or the self-regulation doctrine was first recommended in the British report on occupational health and safety, better known as the *Robens Report*. This report forms one of the most comprehensive reviews in the field of British occupational health and safety. Its main recommendations, which were widely reflected in subsequent legislative amendments, were for a reduction in state regulation, inspection or enforcement and an increase in self-regulation, shared responsibility and voluntary action. The assumption was that the prime purpose of the occupational health and safety legislation was to, "...provide a regulatory framework within which those in the industry could themselves undertake responsibility for safety at work. This is the doctrine of *self regulation*. The second, to some extent a corollary, was that there should be means for *workforce involvement* in health and safety; that is, safety should be the responsibility not only of the employers and senior management, but also of employees who themselves experienced risks at work." As quoted in Sandra Dawson, et al., *Safety at Work: The Limits of Self-Regulation* (New York: Cambridge university Press, 1988) at 3 [hereinafter *Safety at Work*]. For additional details on the

can partly be ascribed to inherent defects in centralist rule making and partly to a change in attitude towards reasons for hazard causation. The early 1970s saw the governments seriously pursuing the strategy of enhancing the internal-responsibility system at the workplace.[3] Over the next decade most of the jurisdictions had taken steps to grant legislative support for self-regulation. The philosophy was reflected in the form of statutory rights for workers to refuse unsafe work, providing for the establishment of joint worker-employer health and safety committees and provisions which sought to ensure a better flow of information on matters concerning health and safety. The emergence of this trend is discussed, followed by a review of the present rights which outline the system of self-regulation.

RE-EVALUATING STATE INTERVENTION

i. The Prevailing State Structure

With the creation of an exception to the laissez-faire assumption of reliance on the free market, state regulation for social welfare became an accepted aspect of governmental duties. State intervention found justification on the grounds of a failure of the free market assumptions of knowledge, mobility, rationality and full employment.[4] In the absence of these factors, the market failed to respond to the needs of the workers and misallocated the

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Report see: R.W.L. Wowells, "The Robens Report" (1972) 1 The Industrial Law Journal 185. For the Commission Report see: *Safety and Health at Work, Report of the Committee 1970 - 72*, Cmnd 5034 (1972) U.K. [hereinafter *The Robens Report*].

[3] These changes were a result of the criticisms levelled against the health and safety inspectorate and the system in which they functioned. In this regard the internal-responsibility system was projected as a viable alternative. For details see: *Royal Commission on Health and Safety of Workers in Mines (1976) Report* (Toronto, Ontario: Queen's Printer, 1976) [hereinafter *The Ham Commission Report*]; Rapport Préliminaire, Comité d'étude sur la salubrité dans l'industrie de l'amiante (Quebec: Government of Quebec, 1976) [hereinafter *The Beaudry Commission Report*]; *Industrial Health and Safety Commission of Alberta (1975) Report* (Edmonton: Queen's Printer, 1975) [hereinafter *The Gale Commission Report*].

[4] For a detailed discussion of why the market cannot be relied upon to solve the health and safety problems of the work environment see: Ashford, *Crisis in the Workplace: Occupational Disease and Injury* (Cambridge: MIT Press, 1976) c. 7 at 310 - 381; Manga, Broyles & Reschenthaler, *Occupational Health and Safety: Issuers and Alternatives* (Economic Council of Canada, Technical Report No. 6) c. 5 [hereinafter *Manga*]; G.B. Reschenthaler, *Occupational Health and Safety in Canada: The Economics And Three Case Studies* (Montreal: Institute for Research on Public Policy, 1979) c.II [hereinafter *Reschenthaler*].

resources which could have been spent to protect and compensate the worker against risk.[5] Additional factors for consideration were the social costs associated with workplace health and safety. As all such costs were not borne by the producers alone, a significant amount being absorbed by society both directly through medical care, retraining, rehabilitation, income maintenance etc., and indirectly through family break-ups, trauma and law and order situations, the government had to intervene to compel the reflection of these costs upon either production figures or wage bills. This was done primarily to prevent the employer from transferring the complete cost for health and safety on to society.[6] Although the basic argument for intervention had been justified upon economical terms, customs, traditions and social factors contributed towards the ultimate form of intervention chosen.[7] The problem, as Reschenthaler says, is one of equity[8], and since the unregulated market is not structured to deal with such equity problems, the state has to intervene.[9]

The form chosen by the state for intervention was based upon the administrative approach.[10] The government on its part sought to ensure minimization of risk through the establishment of regulatory agencies charged with the task of reducing the risk and enforcing the laws, the typical mode of operation being the enactment of a statute, which provided the framework within which the particular problem in question was to be addressed. The law set out the rights and duties of the concerned parties and as in the case of collective bargaining

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[5] The validity of this argument in the labour market has been recognized by economists, though they still underplay the non-economic aspects of the problem. For details see: W. Kip Viscusi, *Risk by Choice* (Cambridge, Massachusetts: Harvard University Press, 1983); Nichols & Zeckhauser, *supra*, note 1 at 39; J. Hirshleifer, *Price Theory and Applications*, 2d ed. (Englewood Cliffs, N.J.: Prentice Hall, 1980).

[6] Reschenthaler suggests that although complete transfer of costs to the society would not occur, the employer, faced with a rise in direct and indirect operating costs with a deterioration in health and safety, preferring to retain a "socially optimal" amount, would still strive to transfer a major portion towards society. *Reschenthaler*, *supra*, note 4 at 16.

[7] For a general discussion on the influence of externalities and the resultant market response see: J. Hirshleifer, *supra*, note 5.

[8] *Reschenthaler*, *supra*, note 4 at 17.

[9] Ashford makes the same argument. See Ashford, *supra*, note 4 at 314.

[10] "The government assumes responsibility for designing and implementing formal safety standards and enforcing those standards through a professional inspectorate". *Reschenthaler*, *supra*, note 4 at 28.

regimes established, the regulatory agency charged with the responsibility of overseeing the enforcement of the enacted rules. "The administrative approach is rationalized on the basis that in the face of significant information deficiencies and externalities the government must fulfil the role of an industrial referee and a policeman."[11]

To fulfil this role of referee and policeman, although state intervention could take a variety of forms, from providing compensatory relief to penalising employers for failure to maintain the proper conditions, the most influential area in the occupational health and safety field remained that of the established and enforced health and safety standards.[12] A particular hazard was identified, declared to be harmful and a standard established to reduce the risk from that hazard to the minimum.[13] In most cases authority to establish and enforce these standards was delegated to the administrative agency itself. This subordinate legislation had the same legal effect as the original enactments, with the broad policy rationale being that the objectives of the agency are established by the legislature which then allows the agency administrative freedom to obtain the objectives subject to the guidelines and review procedures provided within the Act itself.

In the stipulation and enforcement of these standards, the jurisdiction within the provinces was divided between the various departments of labour, health, workmen's compensation, mines, agriculture etc. This resulted in the enactment of separate statutes to deal with specific work environments controlled and administered by separate state departments. For example in Ontario separate statutes had been enacted in relation to the health and safety issues in mines, construction, industrial establishments and logging. The

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[11] *Ibid.* at 28.

[12] "Standards can be defined as legally enforceable regulations governing conditions, practices, and/or operations of the regulated institutions to assure that certain objectives of the regulator can be achieved." Anderson, Buchholz & Allam, " Regulation of Worker Safety Through Standard-Setting: Effectiveness, Insights and Alternatives" (1986) 37 Labor Law Journal 731 at 734.

[13] Different approaches exist in regard to the establishment of standards, the most important being; firstly, the "no-risk" approach where any risk shown to have a harmful effect is prohibited. This is usually found in the edible substance regulations. The second is the "safest standard feasible" or the "best available technology" approach, reflected in toxic material standards of the United States where the legislation directs the Secretary of Labor to "set the standard which most adequately assures, to the extent feasible, on the basis of best available evidence, that no employee will suffer material impairment of health or functional capacity." [*Occupational Health and Safety Act of 1970*, 29 U.S.C. § 655 (b) (5) (1970)]. The third being the "cost-benefit" approach. For additional details on this approach see: *Infra*, note 20.

enactments themselves differed in scope and coverage, in some cases forming a comprehensive code, such as the Canada Labour Code Part IV, in other cases being restricted in their applicability to particular problems and risks. This meant that a firm could be covered by more than one statute at a time, for example, an omnibus statute covering all working places, an industrial statute dealing with that particular industry and a hazard oriented statute dealing with specific hazardous works or situations.

Although forming a major portion of the state intervention, occupational health and safety laws did not cover the entire gambit. Additional legal forms and processes such as human rights litigation, collective bargaining agreements, municipal by-laws and licensing procedures, public health regulations, Commissions of Inquiry, Task forces, Royal Commissions, criminal and quasi-criminal prosecutions, professional ethics complaints, coroners' inquests, medical examinations or fatality inquiries all formed part of the regulatory structure. International agreements and declarations formed another area of state regulation,[14] where a failure to comply could mean breach of international obligations.

Over all, until the change in thinking in the early 70's the emphasis in all state regulation was rule/standard based. Although in certain cases rules were used in conjunction with other regulatory strategies, the administration in most cases remained in the hands of the established agencies, with the concerned parties having little, if any, input in their enforcement. It was this administrative control which was sought to be reformed during the 1970s and 1980s under the ideology of self-regulation. Besides increasing worker demands for control over the workplace, another impetus for this change were the difficulties being faced with the established rules and standards.

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[14] Some of the most important of these include:
- *The Universal Declaration of Human Rights*, in which articles 22, 23, and 25 in particular talk about occupational health and safety.
- *The International Covenant on Economic, Social and Cultural Rights*, is more specific as illustrated by article 7(b) which recognises everyone's right to "safe and healthy working conditions."
- *The International Covenant on Civil and Political Rights* also contains such a provision.
In addition the I.L.O. has produced a series of conventions relating to occupational health and safety some of which have been ratified by Canada and need to be observed. For a list of these conventions see: Craig Paterson, *Canadian Occupational Health and Safety Law: Future Practice Perspectives* (Canadian Centre for Occupational Health and Safety).

ii. Deficiencies in the Administrative Approach

The legislation applicable to occupational health and safety had since state intervention been seen as requiring state enforcement and oversight, hence the complex administrative regimes and detailed regulatory standards. The envisaged role for the administration was that of a referee or policeman.[15] It was this effect which lead the Robens Committee to state that

> "the existence of such a mass of law has an unfortunate and all pervading psychological effect. People are heavily conditioned to think of health and safety at work as in the first and most important instance a matter of detailed rules imposed by external agencies. (Robens 1972a: 7)"[16]

With the increasing scope of business activities, advances in technology and methods of production, the sheer volume of legislation was appearing counter productive. The adoption of the administrative approach of enforcement meant not only the use of scarce financial and manpower resources, but was also impeding improvement as the legislature could not keep pace with the emerging health and safety problems.

Without delving too deeply into the reasons or inadequacies of formal rule making and administrative enforcement,[17] it is intended to briefly discuss some of the more important areas of criticism which formed the basis for a change in ideology towards self-regulation.

a. Economics and Efficiency

Perhaps the greatest amount of criticism against the administrative approach to

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[15] See: *supra*, note 11 and accompanying text.

[16] As referred to in *Safety at Work, supra*, note 2 at 11. For the commission report see *supra*, note 2.

[17] For a more comprehensive review of the administrative approach to regulation and its criticisms see: Robert Baldwin, "Why Rules Don't Work" (1990) 53 Modern Law Review 321; *Reschenthaler, supra*, note 4 at 28; *Manga, supra*, note 4 at 123; Ashford, *supra*, note 4 at 246 & 416; Anderson, Buchholz & Allam, supra, note 12 and Alternatives" 731; *The Robens Report, supra*, note 2; *The Ham Commission Report, supra*, note 3; *The Gale Commission Report, supra*, note 3; *The Beaudry Commission Report, supra*, note 3.

regulation has centred around the economic and efficiency arguments.[18] All schemes for regulation have a cost outlay and as the need for administrative enforcement increases so does the expenditure for maintaining the structure. With rapid industrialization and the consequential increase in size of the regulatory agencies, the demand for scarce resources has been on the increase. The state from the start has been hesitant to provide the full measure of resources required, still seeing itself as a mere supportive figure to the mechanisms of market control.[19] With mounting welfare state activities requiring excessive outlays and increased accountability of the government, the investment in health and safety prevention has sought to be analyzed on a cost-benefit basis.[20] Under those terms the amount of finances being spent, and estimated to be spent, have failed to provide the desired level of benefits, forcing the need to determine alternative and more cost-efficient methods of enforcement. In a way this reflects the free market attitude: to optimize outcome on limited resources, through the adoption of alternative strategies.

Coupled with the economic argument, critics of the administrative approach, have highlighted the enhanced efficiency which comes with internal-regulation. As the workers-employers are directly affected by violations, internal-regulation would provide for a more careful and strict enforcement, the concerned parties' continuous and practical experience

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[18] *Reschenthaler, supra*, note 4 at 31; *Manga, supra*, note 4 at 124; Evan, Buchholz & Allam, *supra*, note 12 at 732; Robert Smith, *The Occupational Safety and Health Act: Its Goals and Its Achievements* (Washington, D.C.: American Enterprise Institute, 1976) as quoted in Mendeloff, *supra*, note 1; Charles Noble, *Liberalism at Work: The Rise and Fall of OSHA* (Philadelphia: Temple University Press, 1986) c. 4; W. Kip Viscusi, *supra*, note 5 in c 2.

[19] For details about the state's expenditure on occupational health and safety from a historical perspective see: Eric Tucker, *Administering Danger in the Workplace* (Toronto: University of Toronto Press, 1990) c. 6 [hereinafter *Administering Danger*].

[20] The cost-benefit analysis has been widely supported, especially in the United States, and forms the analytical basis for all major health and safety rules. This was particularly so during the tenure of President Reagan. See: *Executive Order 12,291 (1981) 46 F.R. 13193.* In Canada, though supported, exclusive reliance upon cost-benefit has been criticised. See: G. Doern, M. Prince & G. McNaughton, *Living With Contradictions: Health and Safety Regulation and Implementation in Ontario* (Ontario Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario, Study Series, No. 5, 1982); Tuohy, "Regulation and Scientific Complexity: Decision Rules and Process in the Occupational Health Arena" (1982) 20 Osgoode Hall Law Review 562; Eric Tucker, "The Determination of Occupational Health and Safety Standards in Ontario, 1860-1982: From the Market to Politics of...?" (1984) McGill Law Journal 260.

with the workplace rendering this possible.[21] This shift would allow blocked resources to be freed which could then be used to target extremely hazardous or problematic employers more efficiently, while at the same time concentrating efforts towards prevention and research techniques.

b. The Problems in Inspection

The very nature of the administrative approach makes detailed and thorough inspections a practical necessity. The exercise is clearly labour-intensive and requires a substantial amount of personal interpretation and judgement. In this regard the training, expertise and experience of the inspectors are important considerations. These essentials, for effective regulation, form the basis for another of the criticisms against the administrative approach.

The inspection staff was seen as being inadequately trained and lacking the practical knowledge and experience required to ensure effective enforcement of the stipulated standards.[22] Besides facing a shortage of equipment, personnel and finances the inspectorate showed a clear favour towards the enforcement of safety standards over the health standards. A lack of knowledge, health training and inadequate research and education on health hazards were some of the cited reasons for such an attitude.

Further even if one was to presume upon the capability of the inspection staff the inspectors base their findings upon a sample analysis which may not represent the true over-all picture; furthermore, they may not be able to cover the full area for inspection or may not be shown the problematic spots.[23] The subjective nature of enforcement, when combined with the persuasive strategy, makes continued violations easy. In addition the ambiguous nature of the legislation and interpretive discretion vested in the enforcing staff could be used in different ways to subvert uniformity in enforcement.

An important aspect of the enforcement structure is the degree of continuity which needs to be maintained and the amount of follow-up that needs to be undertaken. This is essential to ensure that the desired results are being obtained, and also to provide a checking

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[21] See: Robert Baldwin, *supra*, note 17.

[22] For further details see: *Manga*, *supra*, note 4 at 124.

[23] Anderson, Buchholz & Allam, *supra*, note 12 at 736.

measure to confirm the effectiveness of the enacted rules. The continuous nature of the regulation process made it an extremely cost heavy and tedious affair, which was just not practical in the prevailing industrial climate. In addition, since the inspector was only expected to make periodic visits, daily problems got side-lined and even when reported were caught in the adversarial nature of the process.

c. Persuasion as the Adopted Strategy

From the very start of the health and safety regimes the strategy for enforcement has been that of persuasion rather than prosecution. As detailed by Tucker, in his study of the factories legislation in Ontario during the nineteenth century, the initial reaction was to treat the employer as 'well intentioned but ignorant'.[24] Violators were seen as requiring informational and persuasive support rather than to be treated as criminals. The choice of this strategy found additional justification with reasons such as

1) a lack of resources available, both financial and manpower;

2) an inability to classify employers in the criminal category, violations of these laws still being viewed as economic prerogatives not requiring moral and state sanctions; and

3) a conception of self-induced compliance being more effective in the long run than state enforced sanctions.

The belief of the enforcement staff remained that the state's intervention should be retained to the minimum. In addition, the discretion vested in the inspecting authorities, the lack of incentives to prosecute and the tendency for the inspectors to be "co-opted" were cited as some other limitations of the administrative approach.[25]

Although, over the years, prosecutions had increased in number, the general approach remained the same and but for the serious hazards or the consistently problematic employer, persuasion remained the dominant strategy.[26] The effect was that compliance was lax and

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[24] *Administering Danger, supra,* note 19. Also see: Harry Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in the Nineteenth Century England* (Toronto: University of Toronto Press, 1985).

[25] *Reschenthaler, supra,* note 4 at 33; *Manga, supra,* note 4 at 124.

[26] The argument for increased prosecution is alive even today; for details see: Claudia J. Postell, "A Criminal Lack of Safety in the Workplace" (1986) 22 Trial 121; D.E. Grant, "Death in the Workplace: Occupational Health and Safety Prosecution" (1986) 3 Business Law Review 75; H.J.

in the absence of strict enforcement of the laws the benefit desired from the legislation could not be achieved. This strengthened the arguments for a re-evaluation of the enforcement strategies and the need for bringing the regulatory structure closer to those being regulated.

d. Internal Dynamics of the Workplace

The adoption of exclusive state regulation ignored the role played by the workers within the workplace and though legislating for their benefit, did not provide them with an adequate say in the process.[27] This also brought out the economic and efficiency arguments, as by letting the two concerned parties negotiate settlements the state not only saved spending upon enactment and enforcement, but voluntary acceptance by the parties ensured a better compliance and respect for the agreements. Although this argument was again subject to the free market deficiencies, it was argued that the participatory nature would at least result in the reduction of those hazards and firm-based concerns which were accepted by both parties as employment risks and generally formed part of the negotiated settlements.

The reflection of health and safety issues in the collective agreements was argued in terms of its merits in providing for the unions to have a greater role in workplace decision making and allowing the workers to increase their solidarity and self-confidence. Recognition of the workers' role in regulating occupational health and safety would contribute towards their struggle in achieving workplace control, allowing them an enhanced say in the nature of the working conditions, albeit under a regulated environment. This would allow labour and the employers to give practical reality to the process and not be subjected to rules which both construed differently or which both had no say in preparing and may not even have wanted.

The process of bureaucratic rule making itself presented an ample chance of rules being formulated which did not reflect the needs of the concerned parties.[28] The

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Glasbeek, "The Role of Criminal Sanctions in Occupational Health and Safety" (1988) Meredith Lectures 125.

[27] For support on this point see: Robert Baldwin, *supra*, note 17 at 332.

[28] For further details see: Hushion, Ogilvie Associates Limited, *An Assessment of the Effectiveness of Government Decision-Making Process in the Field of Occupational Health and Safety* (Economic Council of Canada, Technical Report No. 5, 1981).

difference of approach and the underlying considerations between the rule makers, the enforcers and the concerned parties could seriously flaw the system, and even upon a post-legislative stage court decisions and economic environments could apply distorting pressures on regulatory regimes. The enforcement of deficient schemes of regulation will necessarily produce inefficient and undesirable results.

e. Involvement in the Process

It has been generally acknowledged that voluntarily accepted standards have a greater positive effect than enforced regulations.[29] This aspect of voluntary acceptance was, to an extent, ignored in statute making as both concerned parties, apart from the limited indirect involvement, were relegated to the sidelines. In the absence of worker-employer involvement, the costs for negotiating rules into operation could be substantially increased. Continuous amendments and the politics of enforcement contributed towards rendering state intervention unacceptable to both the concerned parties.[30] Although it must be admitted that co-operation and participation in all spheres is never possible, its very absence contributes towards the creation of an adversarial impression which makes regulation difficult.

f. Enforcement Rather than Prevention

Additional arguments against the administrative approach were made on the basis of the effect that it had on the internal health and safety policies of the industrial establishments. These arguments were based on the premise that with an increase in the number of laws and regulations to be complied with, the direction of enforcement tends to shift towards the centralist approach rather than attempting to improve the work situations.[31] The establishment of such administrative structures results in the creation of its own bureaucratic hierarchy, leading to an increase in costs, decrease in efficiency and a

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[29] See: R. Dixon, *Standards Development in the Private Sector: Thoughts on Interest Representation and Procedural Fairness 2*, (A Report to the National Fire Protection Association, 1978) as quoted in Michael S. Baram, *Alternatives to Regulation* (Lexington: Lexington Books, 1982) at 53.

[30] See: Robert Baldwin, *supra*, note 17 at 334.

[31] For details see: Anderson, Buchholz & Allam, *supra*, note 12 at 736.

resurgence of the agencies' internal dynamics. The administration becomes caught up in its own network of rules and regulations, in certain cases the legislation being enforced, or sought to be enforced, having nothing to do with health and safety but merely forming a part of the administrative entanglement of bureaucracy. The consequence is that an enormous amount of time and effort is spent in just keeping up to date with the current laws, all at the cost of reduced preventive initiatives. The continuous administrative necessity of compiling returns, records and inspections all eat into resources, those which could have been free for ensuring that preventive steps were taken. This sort of extensive and unreasonable enforcement also reduces the importance of the law in the eyes of the employer, leading to an increase in attempts at circumvention or an increased indifference towards the enactments. This in effect shifts the entire load for ensuring compliance on to the state.

g. Detailed Regulation and the Changing Production Process

The conditions of work are a product of the technology and methods of production employed at the workplace; with rapid changes occurring in both of these areas detailed regulations, up-to-date at the time of their introduction, are rendered obsolete with each new innovation. To some extent, this had been reduced through administrative delegation in regard to rule-making and amendment, but the diversity of factors makes it practically impossible to amend at a pace with the advances. If the entire structure was to depend upon state administration, the time delay during which the hazard was identified, confirmed and covered by legislative regulation could work at the cost of the workers' health and safety.

This could also be said of the methods of production, as in most industries the conditions of work are defined by age, type, climatic conditions and capital outlay of the firm. The fluctuating situational factors, peculiar to each particular firm, could not be subjected to uniform regulations without giving adequate weight to each of these individual influences.

h. The Enactment of Laws is Crisis Oriented

Another limitation of the administrative approach was argued on the grounds that as the laws/amendments in most cases are the outcome of a major catastrophe, in such situations, political considerations mandate the setting up of quick and speedy remedial

solutions.[32] This, however, means that the enactments are based upon political, emotional and ethical motivations and are devoid of the legal and practical considerations which are essential to make them workable. This has an even greater effect in cases of legislation which applies across the board to all industries, irrespective of the peculiar nature of particular employments. The absence of a careful and detailed review of the situation works to the disadvantage of practical enforcement, as well as resulting in more comprehensive and effective enactments being subverted and delayed.

The conclusions which emerged from a study of these defects of strict state enforcement indicated that the unique conditions of individual workplaces made it impractical to produce uniform regulations for all hazardous work, and in the absence of adequate incentives being provided to the employers to undertake the necessary improvements on a voluntary and self-motivated basis, the efficiency of the health and safety legislation would remain at a less than optimum level. The alternative was to provide for greater self-regulation through the transfer of administrative control into the hands of the parties concerned, entitling them to obtain a say in the regulation process. This would increase efficiency, reduce costs and at the same time allow the workers control over their work and the environment in which it was performed. This was sought to be achieved through the internal-responsibility system.

iii. From Blaming the Worker to Blaming the Employer

At the same time as these criticisms were gaining ground, an important change was being witnessed in the theories of accident causation, which in the coming years was to have an influential effect upon the direction of occupational health and safety reform.

Professor Reason[33] cites three categories of people as being concerned with the hazardous conditions and situations: 1) those who create them; 2) those who experience them; and 3) those who regulate them. Following this categorization the logical step in finding the solution to workplace health and safety problems would be to determine the first of the three i.e., who creates them.

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[32] *Reschenthaler, supra,* note 4 at 3.

[33] Reason, Ross & Paterson, *Assault on the Worker* (Toronto: Butterworths, 1981) at 13.

In the case of work related hazards the traditional theory has been that of "blaming the worker"[34] or of holding him out as being "accident prone", thus transferring the cause of risk from social environment based factors towards physical and psychological attributes of the workers. This was reflected in the traditional policy of holding the workers responsible for industrial accidents, by accusing them of personal incompetence, psychological influences, non-observance of safety regulations or not making proper use of the protective equipment provided. By establishing the blame of accidents on the workers, the employers' were provided with an easy excuse to escape responsibility and never really allowed their liability, in such situations, to be seriously questioned. As a consequence of such an attitude, the solution for occupational health and safety risks was diverted towards removing or screening these physical and psychological attributes of the workers, rather than dealing with the actual class and environmental nature of the problem.

The attempt had been to focus research upon the personal characteristics and individual behaviour patterns rather than the work environment in which such accidents occurred. Physical attributes such as age, attitude, aggressiveness, sex, education, experience, fatigue and carelessness were cited as the central factors in explaining the cause of accidents. This approach was not restricted to safety alone but even covered the health aspect of working conditions, with victims being blamed for the diseases they had.[35]

Although what particular role personal behaviour played in the causation of risk was still a question surrounded by controversy, recent studies had begun to emphasise the

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[34] The origin of this conception, of holding the worker responsible, was made as early as 1919 but it only gained widespread popularity through the writings of H.W. Heinrich, a safety superintendent of a major insurance company. For details see: H.W. Heinrich, *Industrial Accidents Prevention*, 4th ed. (New York: McGraw-Hill, 1959), as cited by Robert Sass in his article, "The Labour Process and Health: An Alternative Conception of Occupational Health and Safety" (1985) 5 Windsor Year Book of Access to Justice 352 at 358. In the same article, Sass gives the primary source for this "worker accident proneness" theory to be the Reports of M. Greenwood & H.M. Woods, *The Incidence of Industrial Accidents Upon Individuals with Special Reference to Special Accidents* (Report of the Industrial Fatigue Research Board, No. 4 [London: H.M.S.O., 1919]) and M. Greenwood & G.U. Yule, "An Inquiry into the Nature and Frequency Distribution Representative of Multiple Happenings, with Particular Reference to the Occurrence of Multiple Attacks of Disease of Repeated Accidents" (1920) 83 Journal of the Royal Statistical Society.

[35] See: Robert Sass, *Ibid.* at 358.

environment factors as being more important in determining health and safety risks.[36] The general argument in favour of the environmental influences was as follows - The environment in which work is performed has a significant effect upon the behaviour of a person. The speed of production, ineffective design and maintenance of equipment etc., all contribute towards increasing that risk irrespective of personal attributes, and since management has control over the work environment the blame should be that of the employer and not the worker.

> "The management selects the technology, it controls training programs, it ultimately controls the work rate and it also controls, or monitors the employees. Labour cannot by itself control all these variables..... management should be seen as controlling the work environment which in large measure determines worker behaviour."[37]

Industrial disease, work related stress and psychological problems provides a clear example of influence of environmental hazards which have no relation to the personal attributes of the worker.[38]

What complete reliance on the theory of accident proneness overlooked, was that workers are not willing participants to workplace violence, but by economic and social pressure are forced into such situations where violence is a natural outcome. They all form only a part of the total work environment, an environment controlled by the management, which is the main determinant of unhealthy and unsafe work conditions. Production quotas, bonus schemes, overtime, mechanical means of production, dangerous and unprotected

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[36] For a general discussion on the topic see: Ashford, *supra*, note 4 at 108 - 113; Robert Sass, *supra*, note 34 at 352; Reason, Ross & Paterson, *supra*, note 33 in c.7; *Reschenthaler*, *supra*, note 4 in c. III; Vincente Navvaro, "The Labour Process and Health: A Historic Materialistic Interpretation" (1982) 12 International Journal of Health Services 5; Ray H. Elling, *The Struggle for Workers Health: A Study of Six Industrialized Countries* (New York: Baywood Publishing, 1986); Richard Fidler, "The Occupational Health and Safety Act and the Internal Responsibility System" (1986) 24 Osgoode Hall Law Journal 315 at 334.

[37] *Reschenthaler*, *supra*, note 4 at 21.

[38] Even here arguments of personal life-styles and habits have been put forward in support of personal fault. Although one may accept the influence of personal habits such as smoking or eating styles in some cases, these arguments look silly when applied to hazards such as radiation, asbestos or chemical exposures which, but for work-related conditions, are not generally encountered in a worker's daily life.

machinery, inadequate training and information are all the responsibility of the employer. As long as that environment is not targeted in reform the attempts will remain inefficient/ineffective.

Recent studies[39] argued in support of these views, and gradually most researchers accepted that individual characteristics themselves were not grounds for accident proneness. Nevertheless the belief that personal attributes are influencing factors remained.[40] Reschenthaler,[41] when working through these issues, has detailed the findings of the Hale and Hale study,[42] prepared for the Robens Committee,[43] which after a review of 350 research papers assented to a link, though a weak one, between workers and accidents. However, at the same time they rejected the accident proneness theory, emphasizing instead the positive relation between environmental factors and accident frequency.

> "[They] concluded that any general theory of accident causation must consider first the physical and social environment of work, second the behavioral characteristics of workers and finally, the interaction of both."[44]

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[39] For research in support of these views see: Jean Surry, *Industrial Accident Research: A Human Engineering Appraisal* (University of Toronto, 1969); Robert Sass & Richard Butler, *Accident Proneness: A Conception Without Foundation* (Saskatchewan Department of Labour, Occupational Health and Safety Branch, 1150 Rose Street, Regina, Saskatchewan), as quoted in Robert Sass, *supra*, note 34.

[40] In reference to those who still argued for individual attributes as influencing factors, Tucker cites them as more progressive variants of the traditional approach as they did not "blame the victim but rather examine group characteristics such as age and education to explain variants in accident rates." *Administering Danger*, *supra*, note 19 at 9. For additional details of this view see: William Ryan, *Blaming the Victim* (New York: Vintage Press, 1971).

[41] *Reschenthaler*, *supra*, note 4 at 22.

[42] A.R. Hale and M. Hale (1972) *A Review of the Industrial Accident Literature. Research Paper for the Committee on Safety and Health at Work.* London: H.M.S.O., as quoted in *Reschenthaler*, *supra*, note 4 at 24.

[43] Although the Robens Committee accepted the worker proneness theory, as reflected in their remarks "....our deliberations over the course of two years have left us in no doubt that the most important single reason for accident at work is [worker] apathy"(as quoted in *Reschenthaler*, *supra*, note 4 at 21 - 22), the Hale and Hale study, which formed a part of the committee's research, adopted a contradictory position. Here it should be noted that the Hale and Hale study should be given more emphasis as they were directly concerned with the research and it was on their work that the committee had based its results.

[44] As cited in *Reschenthaler*, *supra*, note 4 at 24.

They were supported in their reasoning by Nichols and Armstrong,[45] who in the course of their research found that the personal characteristics were important but that the major cause was the pressure of production, especially in the present economic settings. "This kind of pressure is essentially a transmitted form of pressure from foreman and management"[46] to maintain a particular level of production forcing the workers to take risks and violate rules which they would not normally have done.[47]

Although this conflicting and inadequate statistical support for any one theory resulted in the creation of ambiguity and no conclusion could be reached, one thing was clearly established and that is that the personal attributes of workmen are not the major causes of workplace accidents. The ambiguity had now been translated into conflict over the amount of weight to be given to chance, the behavioral factors or the environmental factors; but the very fact of recognition of the environment as a significant cause had shifted the blame from the worker to the employer. This allowed the solution to target the working conditions through improving worker participation in decision making and to allow a level of control over the environment in which they work.

"Class formation and class struggles play a central role in shaping the total work environment, which includes organization of and control over the production process."[48] This recognition caused the focus to shift from changing the worker, towards changing the environment and as the environment was, and is, controlled by the management this means that the state had now to intervene in the internal power struggle of the workplace and seek to ensure that the workers were allowed an increased say in the determination of occupational health and safety conditions. It was statute-enforced worker self-regulation through which the state was now striving to better the conditions of work.

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[45] T. Nichols & P. Armstrong, *Safety or Profits: Industrial Accidents and Conventional Wisdom* (Bristol: Falling Press, 1973), as quoted in *Reschenthaler, supra*, note 4 at 25.

[46] *Ibid.* at 5.

[47] This pressure need not come from the employer himself, but may be the creation of the particular work atmosphere or mere peer pressure, especially where financial incentives are provided to increase/maintain production levels. All these environmental factors influence the workmen's behaviour. Even his personal reaction may be a consequence of prevailing social relations.

[48] *Administering Danger, supra*, note 19 at 10.

A change attitude and the clear recognition of environmental influences over workers and working conditions contributed towards the advent of self-regulation. As the work environment was under the control of the employer, its effect upon the worker made the ultimate liability that of the employer. To change this the worker would have to obtain a say in the structuring of work-floor decisions, and this could only be possible if they were given a say in the decision making process.

iv. Self-Regulation

Until 1972 the predominant form for dealing with health and safety issues in the workplace was the enactment of standards and administrative structures which covered specific work-related hazards. This could be seen in Ontario where separate statutes covered the mining, construction, industrial establishment and logging sectors. Izumi Nash explains the situation well when he states that,

> "Under the old regime there were monumental difficulties: some workplaces or problems were covered by several statutes while others were not covered at all, there was no overall direction for research, senseless anomalies amongst different workforces abounded, the standards for exposure to workplace hazards were generally out of date, the penalties were ridiculously low, and workers had little access to information.....workers were no longer prepared to accept those risks nor to be treated paternalistically in trying to deal with them. The existing framework just could not respond to the new realities because the framework itself had been constructed on an ad hoc basis over the course of the preceding eighty years."[49]

Towards the beginning of the 1970s, the answer to these problems was thought to be found in the "worker model", the "worker approach",[50] or the "new regulation"[51] policies which had found acceptance in the reports released by the Robens Committee in 1972 (U.K.),[52] the Gale Commission in 1975,[53] the Ham Commission in 1976,[54] and the

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[49] Michael Izumi Nash, *Canadian Occupational Health and Safety Handbook* (Don Mills, Ontario: CCH Canadian, 1983) at 7.

[50] Michael D. Parson, "Worker Participation in Occupational Health and Safety: Lessons From the Canadian Experience" (1988) 13, No.4, Labor Studies Journal 22 at 22.

[51] *Reschenthaler, supra*, note 4 at 1.

[52] *The Robens Commission Report, supra*, note 2.

Beaudry Commission in 1976.[55] In this regard the Ham Report

> "envisaged two types of responsibility systems - direct and contributive. The direct system would require management to define clear standards of work, assign responsibility for particular tasks, and then establish lines of accountability to ensure proper performance. This system of 'direct responsibility' would be facilitated by a contributive system consisting of an external auditing function, carried out by worker auditors and joint labour-management health and safety committees."[56]

The key factor in the process was the availability of information and a structure for co-operative decision-making and control. This approach was thought to reflect the benefits of self-enforcement, with resultant savings in resources and increased efficiency in operation. Recognising for the first time that the workers had a right to a healthy and safe work environment, the recommendations of the committees were to an extent translated into legislative policy through amendments and re-enactments.[57] Saskatchewan was the first to follow this policy in 1972 when it enacted the first omnibus occupational health and safety statute, followed by Alberta, Manitoba, Ontario and New Brunswick in 1976, Newfoundland and Canada in 1978 and Quebec in 1979.[58]

The principal characteristic of these enactments was a consolidation of the administrative and statutory regimes into one omnibus statute, the administration of which was vested in one governmental department or commission. In some cases it was to be

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[53] *The Gale Commission Report, supra,* note 3.

[54] *The Ham Commission Report, supra,* note 3.

[55] *The Beaudry Commission Report, supra,* note 3.

[56] K. Swinton, "Enforcement of Occupational Health and Safety Legislations: The Role of the Internal Responsibility System" in K. Swan & K. Swinton, *Studies in Labour Law*, eds (Toronto: Butterworths, 1983) 143 at 145.

[57] For example the Ontario government has designated the internal-responsibility system as its governing philosophy. For a detailed and clear description on the adoption of this philosophy see: *Gray v. Bergie* (1984), O.L.R.B. Rep. Feb. 177 at 197 - 198. Also see: *Towards Safe Production, Report of the Joint Federal-Provincial Inquiry Commission into Safety of Mines and Mining Plants in Ontario* (Toronto: The Commission, 1981) (Chair: K.M. Burkett); *Report on the Administration of the Occupational Health and Safety Act* (Ontario Ministry of Labour, Jan 1987) (G.G. Mckenzie and J.I. Laskin).

[58] Michael Izumi Nash, *supra*, note 49 at 5.

assisted by an advisory council, comprised of members drawn from both management and labour. The workers were provided with an increased access to information and certain services such as training, information and counselling as well as preventive and curative services were guaranteed. The structure for an increased co-operation between the employers and workers was achieved, with provision for the establishment of labour-management health and safety committees, based upon the number of workmen in an establishment or upon governmental direction. In addition to, or as a substitute for the committees, the statutes also provided for the appointment of a health and safety representative. The importance of the workers' role was enshrined by the right to refuse unsafe work. In retaining the old system of external state enforcement the government still enjoyed the right of intervention and coercive enforcement, but the emphasis had been shifted towards allowing the parties to regulate the work environment themselves.

THE LEGISLATED INTERNAL-RESPONSIBILITY SYSTEM

With an emerging consciousness about workplace risks, increased labour pressure for health and safety reform and wide spread public concern about environmental issues and their influence on the work environments,[59] the decade of the 70s formed the turning point as far as the regulatory ideology in occupational health and safety was concerned. This period witnessed the establishment of several commissions and studies,[60] the reports of which all accepted the principle that workers and their organizations had a fundamental right to participate in developing, implementing and enforcing policies relating to workplace health and safety. The ensuing amendments complied with the recommendations and operating upon a tripartite basis sought to increase worker participation in the process.

The Acts sought to ensure that both management and workers contributed their best towards ensuring a safe and healthy workplace and for that purpose relied upon the internal-responsibility system, providing minimum standards as guidelines for operation.[61] Accepting

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[59] In relation to environmental consciousness and its effect upon the political attitude for workplace reform see: Ashford, *supra*, note 4 at 46.

[60] See: *supra*, notes 52 - 55 and accompanying text.

[61] For details about Canadian occupational health and safety legislation see: Richard Brown, "Canadian Occupational Health and Safety Legislation" (1982) 20 Osgoode Hall Law Journal 90; Michael Izumi Nash, *supra*, note 49; *Labour Law: Cases Materials and Commentary*, 5th ed.

the effect of environmental factors in increasing risk, the emphasis was on allowing workers a greater say in the process. This was mainly achieved through three provisions: the right to information, the right to refuse unsafe work and the establishment of joint health and safety committees.

The following discussion attempts to outline the law as it currently exists.[62] Since these provisions form the foundation of worker self-regulation, an analysis of their practical working and inherent defects provides the basis for the thesis.

i. Access to Information

Access to information is considered to be one of the most important aspects of any decision-making process, and if the workers are to have a say in regulating their work environment, provisions to ensure access to workplace information are essential.[63] This fact has even been recognised by staunch free-market supporters, as it is only through informed

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(Kingston, Ontario: Industrial Relations Centre, Queens University, 1991); *Canadian Employment Safety and Health Guide* (Don Mills, Ontario: CCH Canadian) [hereinafter *CEH&S Guide*]; *Canadian Master Labour Guide* (Don Mills, Ontario: CCH Canadian) [hereinafter *CML Guide*]; *Canadian Occupational Safety and Health Law* (Don Mills, Ontario: Corpus Information Services) [hereinafter *CH&S Law*].

[62] The following section covers the statutes relating to occupational health and safety in the various jurisdictions and includes: Alberta, *Occupational Health and Safety Act*, R.S.A. 1980, c. O-2 [hereinafter *Alberta*]; British Columbia, *Workers Compensation Act*, R.S.B.C. 1979, c. 437 [hereinafter *B.C.*]; Canada, *Canada Labour Code*, R.S.C., c. L.1, as amended by S.C. 1977 - 78, c. 27: S.C. 1984, c. 39 [hereinafter *Canada*]; Manitoba, *The Workplace Safety and Health Act*, R.S.M. 1987, c. W210 [hereinafter *Manitoba*]; New Brunswick, *Occupational Health and Safety Act*, S.N.B. 1983, c. O-0.2 [hereinafter *New Brunswick*]; Newfoundland, *The Occupational Health and Safety Act*, S.Nfld. 1978, c. 23 [hereinafter *Newfoundland*]; Nova Scotia, *The Occupational Health and Safety Act*, R.S.N.S. 1989, c. 320 [hereinafter *Nova Scotia*]; Ontario, *Occupational Health and Safety Act*, R.S.O. 1980, c. 321 [hereinafter *Ontario*]; Prince Edward Island, *Occupational Health and Safety Act*, R.S.P.E.I. 1988, c. O-1 [hereinafter *P.E.I.*]; Quebec, *Act Respecting Occupational Health and Safety*, R.S.Q., c. S-2.1 and *Industrial Accidents and Occupational Diseases Act*, R.S.Q., c. A-3.001; Saskatchewan, *Occupational Health and Safety Act*, R.S.S. 1978, c. 0-1 [hereinafter *Saskatchewan*]; Yukon, *The Occupational Health and Safety Act*, R.S.Y.T. 1986, c. 123 [hereinafter *Yukon*]; Northwest Territories, *Safety Act*, R.S.N.W.T. 1974, c. S-1 [hereinafter *Northwest Territories*].

[63] For more details about the right to information see: Elihu D. Richter, "The Workers Right to Know: Obstacles, Ambiguities and Loopholes" (1981) Journal of Health, Politics, Policy and Law 339; Kenneth Lasch Smukler, "Individuals Safety Protests in the Non-Union Workplace: Hazardous Decisions Under Hazardous Conditions" (1984) 89 Dickinson Law Review 207; Elliot Leyton, *Dying Hard* (Toronto: McMillian, 1979); LLoyd Tataryn, *Dying for a Living* (Ottawa: Denean & Greenberg, 1979); Mendeloff, *supra*, note 1; Henry David Thoreau, Walden, "Occupational Health Risks and the Workers Right to Know" (1981) 90 Yale Law Journal 1792.

participation that economic efficiency can be achieved.[64]

Prior to the amending phase, since the law was mainly entrusted to the hands of the government and the employers, workers were relegated to a subservient position, not having any right to know what was happening in their workplace. They "did not have a right to know, a right to participate, a right to refuse, a right to inspection or any other common rights which are taken for granted today."[65]

This changed with the emergence of the internal-regulation and self-regulation theories. The statutes now acknowledged these rights and since employers were not apt to provide information voluntarily, seeing it as an infringement of their control, the legislation contained provisions which made the availability of certain kinds of information a legal necessity.[66] In essence the whole framework of self-regulation is dependent upon the ready availability of information and an informed and conscious workforce.

a. Employers' General Duties

The right to information, in most cases, is covered under the general duties of the employer. In certain statutes the right to provide workers with information is expressly stated,[67] while in the others it is covered by various complimentary provisions. The onus of providing this information has been laid on the various persons dealing with the production process, including the employer, the suppliers of materials/machinery and the administrative personnel. For example the Ontario statute stipulates that the employer shall post a copy of the Act at the workplace, provide the names and work locations of joint health and safety committee members, post a copy of the inspector's order or reports, provide on request an annual summary of workplace injury experience or health and safety

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[64] See: W. Kip Viscusi, *supra,* note 5.

[65] Michael D. Parson, "The Americanization of Canadian Occupational Health Standards: The Case of WHIMS" at 457.

[66] For details about Canada's right-to-know laws see: Paul Simon, *Hazardous Products: Canada's WHIMS Laws*, 2d ed. (Don Mills, Ontario: CCH Canadian, 1989); Richard Brown, *supra*, note 61 at 90.

[67] See: *Ontario*, sec. 14(2)(a), 14(2)(c) and 14(2)(h); *Alberta*, sec. 9(2)(b); *Nova Scotia*, sec. 34(1).

experience and work practices of similar industries, which the employer is aware of.[68]

Izumi Nash,[69] who has covered the use of this right under various jurisdictions and provides a comprehensive review of its application in his book the *Canadian Occupational Health and Safety Handbook*, cites an additional source of information as the governmental orders made by the inspecting authorities. These orders had initially been reserved for exclusive management review but are now required to be posted or brought to the notice of the workers, health and safety committee members or representatives.[70] This allows them to remain informed of all the actions being taken, including follow-up procedures, and in case of dissatisfaction with the process to undertake the initiation of appropriate steps. This could be in the form of an appeal for review, or in case the inspector does not direct any corrective action to be taken, an appeal to challenge such a decision.

The most basic of these rights are, however, still contained in the provisions which ensure that the workers receive proper training[71] for the performance of their duties, and that proper safety equipment is provided and maintained in a good condition.[72] Some of the statutes also provide for a compulsory written safety policy in establishments employing more than a certain number of people, which would contain information about the hazardous works[73] and set down the procedures and equipment to be used for safe operation.

b. Employer Duties Under WHIMS

The above provisions though recognising the right, were still restrained and limited in operation. It was only in 1988 with the introduction of WHIMS (Workplace Hazardous Material Information System) that the clear legal right to obtain information on potentially dangerous substances or materials, used or produced in a workplace, was practically

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[68] *CEH&S Guide, supra,* note 61 at 519.

[69] Michael Izumi Nash, *supra*, note 49 at 23 - 57.

[70] See: *Ontario*, sec. 14(2)(h).

[71] See: *New Brunswick*, sec. 9(2)(c); *Nova Scotia*, sec. 9(1); *Ontario*, sec. 14(2)(a), 14(2)(b), 15(1)(j); *Quebec*, sec. 50, 51(2), (3) and (9).

[72] See: *Quebec*, sec. 51(1), (7), (11); *Saskatchewan*, sec. 6 - 17; *Ontario*, sec. 14(1)(a), 14(1)(b), 14(1)(d).

[73] See: *New Brunswick*, sec. 8, 17(1).

recognised.[74] This system operates on a national level with the co-operation of both federal and provincial governments.[75] It seeks to establish

> "criteria to identify hazardous material and to provide information about them in the workplace...a cautionary labelling system for containers of hazardous material... worker education programmes...and a mechanism to protect sensitive proprietary information."[76]

In the resulting amendments, duties were placed upon all suppliers and producers to label all hazardous materials, to prepare and distribute material safety data sheets and supplier labels which are to identify hazardous substances including their properties, methods of treatment and emergency treatment procedures, and to train workers who are exposed to hazardous material in the course of their employment.[77]

A good example of the WHIMS provincial regulations and amendments can be seen in Ontario's Bill 79,[78] Bill 180[79] and Regulation 644/88,[80] passed to implement the WHIMS program. In combination these enactments provide for the maintenance of an inventory of all hazardous materials and physical agents present in a workplace,[81] proper

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[74] For a discussion on the development of WHIMS see: Michael Parson, *supra*, note 65.

[75] The enactments can be divided into two categories
a) Those dealing with the suppliers - dealt with under the federal law enacted under the trade and commerce power; and
b) Those dealing with employers and workers - dealt with through provincial law enacted under the legislative jurisdiction over occupational health and safety.
For details about the legislation see: *CES&H Guide, supra,* note 61 at 18013 - 18016.

[76] *Ibid.* at 18011.

[77] For a comprehensive elucidation of Ontario's Occupational Health and Safety law which would include WHIMS regulations see: *WHIMS: A Guide to the Legislation* (Ontario Ministry of Labour, May 1989) [hereinafter *WHIMS Guide*]; Michael Grossman, *The Law of Occupational Health and Safety in Ontario* (Toronto: Butterworths, 1988).

[78] "*An Act to amend the Occupational Health and Safety Act*", S.O. 1987, c. 29.

[79] "*An Act to amend the Occupational Health and Safety Act*", S.O. 1988, c. 58.

[80] Workplace Hazardous Material Information System (WHIMS) Regulation.

[81] *Ontario*, sec. 22(a).

labelling of all hazardous materials and their containers[82] and training and instruction of workers[83] (employees or non-employees) likely to be exposed to the hazardous materials or hazardous physical agents in the workplace, in consultation with the joint health and safety committee or representative.[84]

This right to information, however, has been balanced against the employers' right to protect sensitive and confidential trade information. By providing for exemptions[85] and the establishment of a new administrative tribunal, The Hazardous Materials Information Review Commission, to review claims for exemptions, the information available to workers is still controlled by economic considerations. These exemptions are supported by provisions which stipulate that information received in claims before the review board may not be disclosed[86] and a general prohibition to disclose information which has been granted exemption by the tribunal.[87] However in case of medical emergency, the information has to be released, though only to a "medical professional".[88]

It is interesting to note that the Act does not define "confidential business information" nor "trade secrets" leaving such important terms to be determined under the canons of common law.[89] Again, the criteria set for consideration in the grant of these exemptions[90] referring to terms such as "potential economic value", "material financial loss" and "material financial gain" fail to give substance to their general meanings as commonly understood.

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[82] *Ontario*, sec. 22(b). The suppliers are covered under sec. 22(f).

[83] *Ontario*, sec. 22(g).

[84] *Ontario*, sec. 22(g)(2).

[85] *Ontario*, sec. 22(e).

[86] *Ontario*, sec. 34(1)(aa).

[87] *Ontario*, sec. 34(1)(ba).

[88] *Ontario*, sec. 14(2)(aa) and 34(4). Also Regulation O. Reg. 644/88, s. 24.

[89] See: *WHIMS Guide, supra*, note 77 at 61.

[90] As contained in: *Hazardous Materials Information Review Regulations*, SOR/88-65, s. 3(1).

ii. The Right to Refuse Unsafe Work

The conception of a right to refuse unsafe work is not a recent legal development but finds recognition in the common law.[91] This recognition has never been challenged, but in practical terms its effect was not worth mention. When read along with an employer's right to dismiss without cause and explanation, the threat by an employee refusing to work carried along with it the consequence of unemployment. Subsequent litigation for breach of contract was hardly commensurate with the incurred loss, hence the disincentive to exercise the right.

Over a period of time, with the advent of collective bargaining and increased state intervention this right came to be vested in statute form, entitling individual exercise. Presently this right has been supported with complimentary rights of prohibiting employer reprisals and requiring continuous payments until the hazard is removed. This not only succeeds in protecting the worker, but also provides a financial incentive for corrective measures.[92]

a. The Substance of the Right

Although no two jurisdictions[93] contain the same description of the right, the general theme behind its adoption remains the same, "if the performance of a job would imperil the

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[91] As established in the case of *Priestly v. Fowler* (1837), 7 L.J.Ex. 42, 150 E.R. 1030. For details see: David Lewis, "The Right to Stop Work When in Imminent Danger" (1991) 14 The New Law Journal 283; I. Christie, *Employment Law in Canada* (Toronto: Butterworths, 1980).

[92] For a detailed review of this and other worker rights under occupational health and safety see: Richard Brown, *supra*, note 61 at 90; Michael Grossman, *supra*, note 77 in c. 8; Brain P. Smeenk & Karen E. Reynolds, *Work Refusal: Employees' Rights and Practical Advice for Employers* (Canadian Bar Association Ontario: Continuing Legal Education, May 26, 1990); Michael Izumi Nash, *supra*, note 49.

[93] The right is contained in the following sections: *Alberta*, sec. 27(1); *B.C.*, Reg. 374/79 (1979), s. 4.02 (1)(a)(b), 22, B.C. Gazette (Part II) 844, 25 Sept. 1979; *Manitoba*, sec. 43(1); *New Brunswick*, sec. 19 - 23; *Newfoundland*, sec. 8; *Nova Scotia*, sec. 22; *Ontario*, sec. 23(3); *P.E.I.*, sec. 20; *Quebec*, sec. 12, 13; *Saskatchewan*, sec. 26; *Northwest Territories*, sec. 14.1 (1); *Yukon*, sec. 14. The Alberta and B.C. regulations classify the right more in terms of a duty meaning that no worker is allowed to carry on unsafe work.

health and safety, a worker cannot be disciplined for refusing to do the job."[94] The cause for refusal is generally the existence of a "danger",[95] which as Richard Brown has cited, can be broken down into the components of - "the gravity of the harm and the probability that it will occur."[96]

As all harms or perceptions of harm are not of the same gravity, different weight has to be given to each after considering the nature of the particular harm. Every small fear that is only remotely connected with the work would not entitle the exercise of the right.[97] This is of particular concern where the very nature of the job has a particular degree of hazard associated with it, which can be said to be the normal hazard of doing that job, as in the case of firefighters. These dangers have been excluded from the scope of the provisions and are not deemed as "dangers".[98] Further the danger need not be to oneself alone, but may even relate to ones fellow workers,[99] and in some cases to another person, in or outside, the workplace.

The second component stipulates the probability of its occurrence, referred to in some statutes as "imminent danger".[100] In Re. Alan Miller,[101] the Canadian Labour

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[94] Michael Izumi Nash, *supra*, note 49 at 97. For a discussion of the reasoning behind adoption of the right see the decision of the Ontario Labour Relations Board in *Pharand et al. v. Inco Metal Co.*, (1980), 3 C.L.R.B. Rep. 194.

[95] The B.C. regulation, however, refers to an "undue hazard". See: *B.C.* Reg. 585/77, s. 8.24(1).

[96] Richard Brown, *supra*, note 61 at 97.

[97] The labour board decisions have reflected this by classifying them as matters of comfort and not safety. See: *Bonin et al. v. Inco Metal Co.*, (1980), O.L.R.B. Rep. 836; *Re Eastern Steelcasting and United Steelworkers, Local 8794* (1981), 28 L.A.C. (2d) 310.

[98] "The conditions of work are ordinary for the kind of work involved." *Ontario* and *Quebec* provide explicit exemptions from the right for these kinds of dangers. For details see: *Ontario*, sec. 23(1) and (2); *Quebec*, sec. 13. Also see: *Canada*, sec. 128(2); *Alberta*, sec. 27(2).

[99] *Canada, New Brunswick, Nova Scotia, P.E.I.*, and *Ontario* provide for the exercise of the right when it constitutes a danger to one's own safety or that of another employee. *Alberta* further expands it by covering anyone at the workplace (which could include visitors, or unborn children). *B.C., Manitoba, Newfoundland, Quebec* and *Saskatchewan*, however, go the full way and allow refusal for danger to self or another's health and safety.

[100] See: *Alberta*, sec. 27(1); *Newfoundland*, sec. 8.

[101] *Miller v. C.N.R.*, (1980), 2 C.L.R.B. Rep. 345 at 353.

Relations Board defined this as

> "A threat or injury to your health which is likely to happen at any moment without warning. This would usually refer to a situation where the injury might occur before the hazard has been removed."

This position has been adopted to allow the work to proceed uninterrupted during the time it takes to conduct an investigation. This prevents the workers from using the right as a bargaining measure to resolve long standing collective bargaining demands through the use of pressure tactics. However, the difference between exposure to dangerous situations and the development of harmful effects has been recognised. This is specifically so in cases of exposure to chemical substances where, even though no immediate harm may be apparent, the symptoms become visible after a certain time period, by then it being too late to provide relief.

However, the exercise of this right is not without its limitations. In certain circumstances and for certain specified occupations the right has been restricted. Some specified occupations are presumed to carry the risk as a normal one and upon acceptance of employment workers are assumed to have voluntarily accepted the risk. For example in Ontario, police, firefighters and persons employed in correctional facilities and medical establishments are not granted this right.[102] The exception also covers circumstances when work stoppage by one (or a few) workers could "put the life, health and well being of another in immediate danger".[103] Persons employed in essential services such as medical facilities would be covered by this exception. An additional area where exceptions to this right are created is the criminal law. Where refusal results in injury or the death of another person, prosecution could be launched for criminal negligence unless it could be proven that the harm to oneself was of sufficient gravity to justify refusal.[104]

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[102] See: *Ontario*, sec. 23(1) and (2). Also see: *The Crown in the Right of Ontario (Ministry of Community and Social Services)* (1988) O.L.R.B. Rep. Jan. 50.

[103] Michael Izumi Nash, *supra*, note 49 at 98. Also see: *Ontario*, sec. 23(2); *Quebec*, sec. 13.

[104] Michael Izumi Nash, *supra*, note 49 at 99.

In the exercise of this right most provisions rely upon the individual perceptions[105] of the employee; but for the cases where the danger is not imminent, it is the employee who forms the opinion whether the situation could be "dangerous" or cause an "undue hazard".[106] It is the formation of this opinion which constitutes the most ambiguous portion of the right. Since perceptions are very situation dependent, the task of determining the genuineness of the belief has been left to the adjudicating authorities. Ontario in this regard has adopted an objective standard of,

> "whether an average employee at the workplace having regard to his general training and experience and exercising normal and honest judgement would have reason to believe [the presence of an imminent danger]."[107]

B.C.[108] and Canada[109] have adopted a more subjective standard which takes into consideration the employees personal beliefs and fears. Factors such as familiarity with the job, experience, training, previous occurrences of unsafe acts or media influence are all considered. The guiding point is the genuine feeling of risk, and as long as this is not motivated by other considerations the right would be validly exercised.[110]

b. The Procedure for Exercise

In compliance with the procedural formalities, in all cases where the right is exercised

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[105] *Canada* and most of the other jurisdictions provide for a "reasonable cause to believe". *Manitoba*, sec. 43(1) cites "reasonable grounds to believe and does believe". *Alberta* and *Newfoundland*, cite it in the form of an express prohibition, imposing a duty to refuse in case of reasonable and probable grounds.

[106] See: *Camco Inc.*, (1985), O.L.R.B. Rep. Oct 1431; *Canadian Gypsum*, (1978) O.L.R.B. Rep. Oct 897; *The Corporation of the City of Toronto*, (1986) O.L.R.B. Rep. Dec 1834.

[107] As held in *Pharand et al. v. Inco Metal Co.*, (1980), 3 C.L.R.B. Rep. 194.

[108] As held in *Re Industrial Health and Safety Regulations* (1980), 5 W.C.R. 86, No. 329. However where reasonable grounds do not exist the refusal will not be upheld. See: *Re Industrial Health and Safety Regulations* (1982), W.C.R. 159, No. 349.

[109] As adopted in *Miller v. C.N.R.*, (1980), 2 C.L.R.B. Rep. 344.

[110] Michael Izumi Nash, *supra*, note 49 at 109; Richard Brown, *supra*, note 61 at 99.

the employee is required to notify the employer.[111] In cases where adequate steps are taken to rectify the fault and eliminate the risk, the employee is required to return to work. However in case of disagreement, a joint investigation is conducted to establish the facts.[112] Non-resolution at this stage or a continuous belief of danger entitles the worker to persist in refusal and leads to the intervention of the inspector, who after analysing the situation renders his decision. Though the decision of the inspector can be appealed, the employee is required to give due regard to that judgement, especially where that decision is supported by personal knowledge and experience.[113]

During this period the concerned employee(s) may be re-assigned to another job,[114] but the right to fill the vacancy caused by the refusal has been limited.[115] In addition, the employer is restrained from taking any discriminatory action against the worker concerned, and is required to maintain the rate of remuneration being paid prior to refusal.

iii. Joint Health and Safety Committees

Along with the right to information and the right to refuse unsafe work, the internal-responsibility system has been strengthened with the provision of joint workplace health and safety committees. Having accepted the principle that hazards are not the result of workers' accident proneness, but the result of environmental factors, the formation of these committees seeks to ensure that the workers are allowed a say in the control of that

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[111] In the Inco Metal decision the board dismissed the complaint as the employee had not mentioned safety concerns at the time of refusal. See: *Inco Metal Co*, (1980) O L.R.B. Rep. June 836. Also see: *Bulls Country Meats Limited*, (1984) O.L.R.B. Rep. Nov. 1549.

[112] *Canada, Manitoba* state "either with the person or someone representing him". *Ontario*, sec. 23(4) and *B.C.*, Reg. 585/77, S. 8.24(3), (4) provide for the worker to participate in this investigation. In other cases it is undertaken with the worker committee member, a representative or a trade union nominee.

[113] *Canadian Gypsum Construction*, (1978), O.L.R.B. Rep. 897.

[114] See: *New Brunswick*, sec. 22(1) and 23; *Newfoundland*, sec. 43(3) and (4); *Nova Scotia*, sec. 22(3), (3) and (5); *Ontario*, sec. 23(13); *Quebec*, sec. 14; *Saskatchewan*, sec. 2(f) and 26(2). Also see: *Canadian General Electric*, (1981), O.L.R.B. Rep. June 616; *Firestone Canada Inc.*, (1985), O.L.R.B. Rep. July 1044.

[115] See: *Manitoba*, sec. 43(4), *Nova Scotia*, sec. 23, which provide for prohibition upon assigning another worker to the refused work unless informed of his predecessor's refusal. Also see: *Quebec*, sec. 14, 17, and 19; *Ontario*, sec. 23(11).

environment. At least in theory, the system strives for enhanced efficiency through self-regulation by providing the workers with an outlet and forcing the management to listen to their problems.[116] Accepted on a broader framework by labour, management and government, it is on questions of the actual delegation of powers to these committees where the differences occur.

a. Establishment of the Committee

The development of joint health and safety committees was expounded by Commissioner Ham in his report outlining the "internal-responsibility system".[117] In determining the internal-responsibility system Commissioner Ham saw the essentials as knowledge, contributive responsibility and direct responsibility. It was the acceptance of these guidelines, which led to the establishment of joint health and safety committees, with joint participation in regulating workplace conditions and authoritative decision making.

Today most jurisdictions require the establishment of these committees,[118] although in certain cases the establishment is discretionary.[119] In those jurisdictions where the establishment is mandatory, certain minimum criteria have been set, and it is only upon the fulfilment of these that the legal provisions requiring the establishment of the committee would apply.[120] In most cases the approach for the minimum criteria has been a mathematical one, whereby upon the employment of above a certain number of workers the

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[116] For details about joint health and safety committees see: Michael D. Parson, *supra*, note 65; Michael Grossman, *supra*, note 77 in c. 7; G.K. Bryce & P. Manga, "The Effectiveness of Health and Safety Committees" (1985) 40, No. 2 Industrial Relations/Relations Industrielles 257 - 282; *A Guide for Joint Health and Safety Committees and Representatives in the Workplace* (Toronto: Government of Ontario, 1983); Richard Brown, *supra*, note 61 at 93; Michael Izumi Nash, *supra*, note 49.

[117] *The Ham Commission Report, supra,* note 3.

[118] See: *B.C.*, Reg 585/77, s. 4.02; *Manitoba*, sec. 40(1); *Ontario*, sec. 8; *Saskatchewan*, sec. 24.1.

[119] *Alberta*, sec. 25, and *Newfoundland*, sec. 35, make the establishment subject to regulation or a notice from the Ministry of Labour.

[120] Most of the jurisdictions stipulate a minimum employment of 20 workers as a pre-requisite. *Saskatchewan*, however, requires 10. B.C. has classified industries into an 'A', 'B' or 'C' hazard pattern and as per the heading, the number upon which the provision becomes applicable varies. See: Reg 585/77. s. 4.02.

provisions would become applicable.[121] Quebec forms the only jurisdiction to have taken a different view by considering the risk factor of the employment and the interest shown by the union workers as prime criteria while still retaining the right to enforce compliance through notice by the Occupational Health and Safety Commission.[122]

All jurisdictions provide for at least half the members on the committees to be representatives of the employees, chosen by the workers or the trade unions.[123] The number of members of the committee is generally limited to a minimum of two and a maximum of twelve for the sake of maintaining efficiency. The meetings are to be held as decided by the committee themselves, subject to a minimum of once every quarter.[124] The proceedings at these meetings are required to be minuted and filed. The employer is prohibited from discriminating against any representative because of his membership and is required to grant time to the employee representatives to comply with his committee duties without loss of pay.[125]

b. The Committee's Functions

The most striking feature of these regulations is that the actual powers of the committee have not been made binding in nature. In the enforcement of their functions the management cedes no real power to the committee, as in most circumstances the veto is always retained by the management. The right and powers of the committees are merely advisory in nature and they possess no authoritative, enforcement power. In view of the advisory nature of their functioning, the limited scope of their authority and the restricted

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[121] This is subject to those jurisdictions where the establishment of committees is discretionary. See *supra*, note 119.

[122] See: *Quebec*, sec. 68 and 69.

[123] The general stipulation is that at least half the members should be from labour or that the management members should not exceed the labour members. See: *Alberta*, sec. 25(2) and (3); *B.C.*, sec. 4.04(1); *Ontario*, sec. 8(5); *P.E.I.*, sec. 18(3). Ontario has recently introduced the conception of a certified member i.e., one certified by the Workplace Health and Safety Agency. The requirement is that one member each from the management and labour sides, unless otherwise specified, should be certified members. See: *Ontario*, sec. 8(5f).

[124] The general norm is to hold the meetings once every month. See: *Canada*, sec. 135(7) and (8): Safety and Health Committees and Representatives Regulations, SOR/86-305, ss 5 and (1)-(3).

[125] See: *Canada*, sec. 135(9); *P.E.I.*, sec. 18(8); *Saskatchewan*, sec. 24 and 27.

base from which they operate it is not surprising that the functioning of these committees has been the subject of severe labour criticism.

In the performance of their duties the committees are generally authorized to identify hazardous situations and make recommendations for reform.[126] They provide the link between management and labour in the exercise of the right to information detailed earlier, and the communication of this information to the workers. Acting as information data bases, the emphasis is on increasing the knowledge of the worker and obtaining an increased participation in the decision making process at the workplace, at least where the decision has an important health and safety aspect.

Consultations and inspections form a regular part of the committee's activities and for that purpose the Act specifically authorises certain privileges.[127] In addition to these overviewing powers certain duties are specifically delegated to the committee, such as in Quebec,[128] where the committee may choose the physician in charge of health services, approve his health programme, design training and educational programmes and select and approve the appropriate protective devices. In the exercise of these functions the committee is under a similar duty to maintain confidentiality as required under the WHIMS regulations.[129]

In certain circumstances the law has provided for the members to act as individuals. In that capacity they do not deliberate as a group but merely establish the validity of the rules and assist in the internal-regulation of the workplace. Duties in this capacity include workplace inspection, accompanying the labour inspector on his visits, investigation of refusal to work situations, plus listening to and taking action on employees' complaints.[130]

An additional rung in this legislative hierarchy has been provided in the form of health

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[126] For details about committees' powers and duties see: Michael Izumi Nash, *supra*, note 49 in c. 17.

[127] For a typical list of the committees powers and duties see: *Canada*, s. 84.1(4) or sec. 40(7) of the Manitoba *Workplace Safety and Health Act*.

[128] See: *Quebec*, sec. 78.

[129] See Michael Grossman, *supra*, note 77 at 7 - 7 and *Ontario*, sec. 34.

[130] For illustration, see provisions contained in *Ontario*, sec. 8(8), 28(3), 8(9), S. 25, O Reg 714/82, ss 23(4)(a), 7.

and safety representatives, who are appointed in situations where a committee is not required.[131] In Quebec, however, this appointment is complimentary to the committee and both may exist concurrently. The powers and authority vested in these representatives closely resembles the committees and in most cases the nature of work done is the same.

CONCLUSION

After years of struggle to achieve control over the workplace the workers were given legislative support in achieving that objective. The belief was that a major victory had been won: now, finally, workers would be able to exercise their basic moral right of obtaining a say in the regulation of that environment which so affected their work conditions.[132] After viewing workers as the cause of occupational accidents and diseases, these rights recognised that health and safety hazards were substantially influenced by the work environment, and as this environment was under exclusive employer control the need for workers to obtain a say in the work process was essential.

The trend has been in favour of the internal-responsibility system and the pressure for reform is in favour of greater self-regulation and less state intervention. "Bring the worker back in" has been the phrase epitomised in recent legislation. This argument is supported by general corporate cries for deregulation and increased internal-responsibility. Increased efficiency and the cost-benefit analysis form the foundations for these arguments.

This shift in the regulatory ideology appears in sharp contrast to the approach taken in the 1981 report of the Economic Council of Canada which rejected deregulation in the field of occupational health and safety.

> "De-regulation has always been argued in economic incentive terms, but it is now seen as part of a basic ideology or politics of anti-government:..this may well be a passing phenomenon, brought on by a crisis in capital accumulation and production, but its passing may be a lengthy one which leaves scars of difficulties for us in the future."[133]

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[131] See: *Ontario*, sec. 7(1).

[132] J. Brown, "Occupational Health and Safety: The Importance of Worker Participation" (1978) 78 Labour Gazette 123.

[133] Craig Paterson, *supra*, note 14 at 18.

However to acknowledge the merits and demerits of any regulatory approach, it is necessary to observe its effects in practical operation. Detailed market studies and research projects are required, which only become available after the system has been in operation for a certain minimum amount of time.

Self-regulation as an alternative to state regulation is still a recent phenomenon and would thus require a longer gestation period before it can be effectively analyzed. But on the theoretical plane it is still possible to compare and evaluate it with the traditional administrative approach. For the sake of clarity, it should be stated that this does not imply that increased self-regulation is essentially a bad thing, but that complete and total reliance on any one approach in the absence of supportive state regulation, which is what is being advocated in some quarters and finding silent support from the employers, would simply be a return to the principles of laissez-faire, free market. In the presence of market irregularities which initially precipitated state intervention, and which are still as much if not more so in existence today, the complete removal of state support in the occupational health and safety sector could have disastrous consequences.

Just how far can self-regulation go, how much can it effectively do within its present structure? What if the present structure was further amended by providing for increased worker power. Would that help or would certain sectors still be beyond the capacity of exclusive self-regulation, requiring state intervention? Lastly, what then would be the role of the state in the process: should it pursue its present policy of time bound deregulation or should it retain some basis for intervention in determining conditions of work?

These questions need to be answered in order to determine the direction for future reform. In the following chapters the focus is on attempting to answer these questions. The next chapter proceeds on this pattern through a review of the limitations of the self-regulation ideology and suggests why it is that the internal-responsibility system cannot function effectively and efficiently in the absence of state administrative support.

CHAPTER THREE
LIMITATIONS TO SELF-REGULATION

INTRODUCTION

Deregulation is being projected as the current guiding ideology. From control over the economy to the administrative services, regulation, which in most cases is used in reference to state-regulation, has become a subject of discussion and criticism. Reflecting a desire to introduce greater market consciousness and response, the arguments for allowing market considerations to determine the outcome of human interactions are gaining increased influence. This strategy is of special significance in the industrial sector where the belief remains that the industry is capable of regulating itself and is quite willing to do so.

As a policy option, deregulation finds support from both the worker and employer lobbies, however, their distinct outlooks tend to give the direction of the proposed initiatives different directions. While the employers favour a reversion to the market considerations for determining employment relationships, workers favour a de-regulation of the regulatory powers separate from the market considerations. The labour perspective is to attain a de-regulation of the state's regulatory powers in favour of the workers so that they can ensure a more effective and efficient control over the production process. This is not necessarily achieved under market considerations. Having seen the limitations of the administrative approach they want an enhanced worker participation in workplace regulation and decision-making but at the same time they do not want the state to leave the field altogether. The emphasis is on retaining the state as a support structure while at the same time striving for increased self-regulation.

In the occupational health and safety field the drift towards de-regulation has already witnessed a decade of operation. With the wave of legislative initiatives in the 1970s the state's role in enforcement was made secondary to that of the established joint committees and the internal-responsibility system. The worker's position in the process was emphasised by making him a more active and influential partner in the workplace. In effect, government intervention had shifted from its initial political and public standards criteria of regulation towards allowing the parties a measure of internal self-regulation.

Seen at the time as a victory by labour, the initial euphoria at obtaining workplace control was to a significant extent misplaced, soon turning to discontentment at the limited nature of the rights and their inept enforcement.[1] Those very provisions which had established joint health and safety committees and increased worker participation became the subject of complaints and criticism. The reform trend has favoured the employers' desire for bringing the market considerations back into focus, with the result that once again the pressure for reform is being built up.

This period, then, has serious implications for occupational health and safety. The impetus for reform could lead in two different directions: on the one hand, it could lead to the establishment of a structure which would depend primarily upon the internal regulatory controls - the responsibility for reducing the risk being internalised to the workers and the employers. This would mean amendment of the present structure so as to grant greater worker participation i.e., a greater degree of self-regulation with an increased worker say in the process, and conversely a reduction in government intervention and regulation. On the other hand, the reform could re-emphasise the tripartite nature of the relationship with the need for worker, employer and state participation. The focus here would lie upon a more effective and pronounced, if not increased, state role for enforcement of the present statutes.

The following discussion attempts to analyze these different approaches and concludes that the retention of a tripartite structure for participation should be given primacy over the de-regulation policies currently being propagated. It is considered that the state role in occupational health and safety should be retained and in certain circumstances strengthened. The justification for this conclusion is found in the underlying limitations of the internal-

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[1] This discontent has been expressed through various mediums including reports of Commissions of Inquiry such as the *Report of the Royal Commission on Matters of Health and Safety Arising From the Use of Asbestos in Ontario*, vol. 2 (Toronto: The Commission, 1984)) (The Dupré Report). In the Dupré Report the Labour perspective was presented as viewing the internal-responsibility system as deceptive, in that it gave an impression of providing enhanced worker participation which, in terms of authority and responsibility, was illusionary. This fiction undermined the entire system allowing government and management to avoid the essential remedial action under guise of self-regulation. For further criticism of the internal-responsibility system see: Larry Gauthier, "Ontario's *Occupational Health and Safety Act* and the Internal Responsibility System: Is the Act Working?" (1984) 7 Canadian Community Journal 174; Richard Fidler, "The *Occupational Health and Safety Act* and the Internal Responsibility System" (1986) 24 Osgoode Hall Law Journal 315; Eric Tucker, "The Persistence of Market Regulation of Occupational Health and Safety: The Stillbirth of Voluntarism" in Geoff England, ed., *Essays in Labour Relations Law* (Don Mills, Ont.: CCH Canadian, 1986) 219 (hereinafter *Stillbirth*).

responsibility system. The ensuing discussion attempts to show that the divergent interests, disparity in bargaining power, inadequate infrastructural support and the lack of financial independence work against effective worker participation and in the absence of state support can lead to a subordination of the self-regulation system to the market forces. The above thesis, however, requires to be qualified by providing that both the internal-responsibility system and state regulation are interdependent and can only work in conditions of mutual support: the retention of a state role would not be at the cost of the worker participation but in support of it. The objective of providing a safe and healthy work environment in the most cost efficient and time conscious manner requires the present organisation to be re-structured including the state's assigned role.

Having viewed the conditions under which it became essential for the state to intervene to preserve the workers' health and safety and the subsequent shift in regulatory policy towards increased worker participation, the present analysis expounds on the limitations of the internal-regulation system and the reasons why it is so important to retain a state enforcement role in the field of occupational health and safety.

LIMITATIONS TO SELF-REGULATION

The very terms "internal-responsibility" and "self-regulation" suggest an image of independence. Employers and workers are seen as just any other parties in a contractual negotiating process, seeking to regulate their relations without the need of any third party intervention. The actual positioning is in fact quite to the contrary, with the very foundation of the workplace health and safety organisation depending upon the intervention and support of a third party, in this case the state.

In consideration of the market model it has generally been recognised that the individual worker-employer contract relation is at the disadvantage of the worker. The lack of bargaining strength, ability to withstand the time delay for determining alternative employment options coupled with insufficient information and mobility tilt the negotiating strength in favour of the employer. It was this recognised weakness in the individual bargaining strength of the worker which led to the sanctioning of labour collectivities, providing justification for the state to endorse labour combinations even when trade combinations were seen as anti-competitive. This imbalanced relationship is just as prevalent in the internal-responsibility system, although the impression sought to be projected

continues to be that of equality.

The perceived equality is not a creature of the internal strength of the parties but depends exclusively upon state support. The fact that the system operates and is guaranteed through statutory provisions illustrates the point. In the absence of statutory rights and the state enforcement mechanism the right to a safe and healthy workplace would revert to being controlled by the market-determined conditions and bargaining positions all at the cost of the workers' health and safety. Here the position taken by the unions is of significance as although on the one hand they are demanding increased worker participation, a more influential role in the decision making process, at the same time they not only want to retain a state presence but would want a more effective and stricter enforcement of the statutory provisions through state regulations.

Without state support, self-regulation as it exists today would lose much of its already limited area of influence. The system is essentially based and dependent upon state regulation and oversight. In the absence of statutorily mandated delegation of authority it is highly unlikely that the employer would voluntarily submit control over the production process to the workers. For example although the right to refuse unsafe work had existed under the common law it was not until the right obtained statutory recognition that workers were able to make a limited use of it provisions. Further one can see from the established industrial relation regimes the nature and importance of the state's presence in regulating the labour-management relationship. In the words of a U.S.W. official

> "The only real motivation behind whatever effectiveness it [self-regulation] had was the fear of legislation and the occasional public concerns which might have been aroused momentarily by a tragic accident or by a zealous muckraker."[2]

The pivotal role of the state in regulating occupational health and safety has found

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[2] U.S., Congress, House Committee on Education and Labor, "*Occupational Safety and Health Act of 1970* (Oversight and Proposed Amendments)," 92nd Cong., 2nd sess., 1973, 615, as quoted in Joseph V. Rees, *Reforming the Workplace* (Philadelphia: University of Pennsylvania Press, 1988) at 31.

recognition and support from various authorities.[3] In accepting the view of an essential state role, the present trend towards the granting of greater control to the parties without adequate state support would appear to contradict the earlier policy assumptions. This could in fact be seen as the re-emergence of market controls.[4] Although no one would deny the benefits of increased worker participation, in the practical application of statutory rights it needs to be ensured that deregulation is being directed at the parties in a manner which departs from the market balances rather than re-emphasising the market strengths and relationships.

As seen in the structure of the rights establishing the internal-responsibility system the approach is based upon two assumptions of fundamental importance. By presuming a common interest between management and labour on health and safety issues and an equality of position in their relationship the direction for reform has adopted a direction which in the absence of these assumptions could have been quite different. Since these assumptions are so essential to the system if deficiencies are shown in their adoption or they are shown to be false, as many argue, the very structure of the system would need to be re-examined. The following section deals with this argument and attempts to show how in the absence of these assumptions the internal-responsibility system, as it presently exists, could very well be used to subvert the occupational health and safety regulation to free market considerations.

A. THE POLICY ASSUMPTIONS

i. Identity of Interest

One of the primary assumptions behind the adoption of the internal-responsibility system has been the view that there is a common interest between labour and management

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[3] The importance of the state role in occupational health and safety finds reflection in the studies conducted by the Economic Council of Canada. See: Manga, Broyles & Reschenthaler, *Occupational Health and Safety: Issues and Alternatives* (Economic Council of Canada, Technical Report No. 6, 1981); Hushion, Ogilive Associates Limited, *An Assessment of the Effectiveness of Government Decision-Making Process in the Field of Occupational Health and Safety* (Economic Council of Canada, Technical Report No. 5, 1981).

[4] This is the view taken by Tucker who argues "..that much of the recent government intervention strengthens market regulation by facilitating and legitimating market exchange". For details see: *Stillbirth*, *supra*, note 1 at 220.

in promoting health and safety at the workplace. This principle, enunciated in most reports[5] recommending changes in the occupational health and safety area, has resulted in the amendments being directed towards the enhancement of cooperation between employers and workers in attaining a common goal. However, although propagating commonality of interest, the reports were not unmindful of the adversarial nature of the industrial relations and went to great lengths to emphasise that both sides should adopt a cooperative approach in matters of workplace hazards as opposed to stances taken on other bargaining issues.

The need to re-emphasise this point lay in the fact that there is no commonality of interest between workers and management, each side having opposing conceptions about how the solutions should be arranged.[6] Ashford has classified this conflict as the "clashing of self-interests that is characteristic of the management-labor relations on many issues."[7] This assumption of a common interest between workers and management in occupational health and safety has already been the subject of criticism,[8] and in fact the arguments are for a conflict, not commonality of interest.

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[5] This assumption was initially expounded by the Robens Report, whose views were accepted by the later Canadian reports. See for example the Ham Report at 121 where it states "Since both parties desire the good of the individual worker...." *Royal Commission on Health and Safety of Workers in Mines (1976) Report* (Toronto:Queen's Printer, 1976)(hereinafter *The Ham Commission Report*), as quoted in Fidler, *supra*, note 1 at 339. The more recent Burkett Report has strongly supported this assumption and has even gone so far as to identify internal disputes within the joint health and safety committees as being questions of inappropriate attitudes rather than as objective differences. For details see: *Report of the Joint Federal-Provincial Inquiry Commission into Safety in Mines and Mining Plants in Ontario, Towards Safe Production (1981)*,(hereinafter *The Burkett Commission Report*), vol. 1, at 94 - 93, as quoted in *Stillburth*, *supra*, note 1 at footnote 70.

[6] Illustration of this argument can be found in the case of the asbestos industry where despite knowledge of adverse health consequences and availability of substitute materials the industry continued to resist the adoption of protective measures. "The findings of the Beaudry Commission reflect [the] con- [illegible] disregard by management of any responsibility to provide information or adopt measures to [illegible]ntrol exposure." G.B. Reschenthaler, *Occupational Health and Safety in Canada: The Economics and [illegible]ree Case Studies* (Montreal: Institute for Research on Public Policy, 1979) at 12.

[7] Ashford, *Crisis in the Workplace: Occupational Disease and Injury* (Cambridge: MIT Press, 1976) at 5.

[8] For a comprehensive review see: Ashford, *supra*, note 7 at 333 - 359. Also see: Fidler, *supra*, note 1 at 339; *Stillburth*, *supra*, note 1 at 231 - 232; Manga, Broyles & Reschenthaler, *supra*, note 3 at 74 - 98 ; Anthony D. Woolf, "Robens Report - The Wrong Approach?" (1973) 2 The Industrial Law Journal 88; Phil James, "Reforming British Health and Safety Law: A Framework for Discussion" (1992) 21 The Industrial Law Journal 83.

In theory, this lack of a common interest can be explained as a measure of the management's choices for the use of scarce resources. In a free, unregulated market with assumptions of perfect labour mobility, information, full employment and rational behaviour the worker is expected to evaluate the risks entailed in each job and only agree to accept hazardous employment on the payment of adequate risk premiums.[9] As long as these premiums match the needs of the workers the hazardous jobs will continue to be performed. At the same time the employer can adopt two strategies: he can either continue to pay the risk premiums for performance of the hazardous jobs or he can invest capital in enhancing workplace safety thus reducing the need to pay the premiums. As long as the investment in hazard removal remains in excess of the risk premium, the employer would prefer to pay the premium rather than incur the additional costs for reduction in risk levels. "The firm will choose a level of investment in safety at which the marginal cost of reducing the injury rate equals the marginal saving from its reduction."[10]

However, the market's structural imperfections make it far more economical for the employer to pay the premiums than to invest in reducing the health and safety risks. The present market conditions fail to effectively balance the interests between workers and employers and in turn create conditions for employer discretion and domination. The lack of adequate and accurate information possessed by the workers, their inability to rank jobs on the basis of the risk-factors and their financial dependence upon the jobs create conditions which lead to a miscalculation of the health and safety costs.[11] Further, workers have a tendency to underestimate the workplace dangers and because of the latent health symptoms adopt a very short-term outlook of the occupational health and safety risks.[12] This reasoning receives support from the research conducted in risk premiums where the

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[9] The prevalence of risk premiums is a subject of controversy, although evidence does suggest that some form of financial premium is paid for hazardous jobs. For details see: G.B. Reschenthaler, *supra*, note 6; Viscusi, *Risk by Choice* (Cambridge: Harvard University Press, 1983) 98 - 106; Manga, Broyles & Reschenthaler, *supra*, note 3 at 71; Mendeloff, *Regulating Safety* (Cambridge: MIT Press, 1979) at 10; Ashford, *supra*, note 7 at 19.

[10] Manga, Broyles & Reschenthaler, *supra*, note 3 at 71.

[11] For more details on limitations of the capitalistic market and the consequential effect upon workers see: Charles Noble, *Liberalism at Work: The Rise and Fall of Occupational Health and Safety* (Philadelphia: Temple University Press, 1986) at 212.

[12] See: Ashford, *supra*, note 7 at 19.

argument stands that the premiums paid do not reflect the actual cost of the injuries or ill health but depend upon the capacity of the labour market.[13] The labour market's capacity does not justify the faith reposed in market controls. Since the market cost of reducing the injury rate is higher than the marginal savings from its reduction the interest of the employer is bound to be at conflict with the workers. In those circumstances adoption of the internal-responsibility system would be a mere reassertion of the market controls. In an ideal market situation the risk premiums may truly reflect the workers choice and costs of the injuries and ill health, but such ideal market situations do not exist.

Further the decision for investing in health and safety also necessitates a choice for replacing labour with capital and requires an evaluation of the supply and demand position for both. Although in certain situations efforts may be made on a voluntary basis to reduce occupational health and safety hazards because of the indirect costs involved such as medical bills etc.,[14] or conversely to increase productivity and market image, the general guideline would appear to remain based upon pure profit maximizing considerations. In those circumstances the employer would have little financial incentive to spend on the health and safety of the workers. Worker welfare and safety would only be seen in terms of its cost on production.[15] Employer interest will remain dominant over the worker demands for a safe and healthy workplace, and pursuant to that philosophy the desire to obtain profits would override the desire for a safe and healthy workplace.

The commonality of interest for investment in workplace safety comes only once the investment costs have fallen below the risk premiums.[16] Once common interest is established, enhanced worker participation does help to remove informational blockades.

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[13] For details see: G.B. Reschenthaler, *supra*, note 6; Viscusi, *supra*, note 9 at 98 - 106; Manga, Broyles & Reschenthaler, *supra*, note 3 at 71; Mendeloff, *supra*, note 9 at 10; Ashford, *supra*, note 7 at 19.

[14] For a discussion on these indirect costs and their effect upon the choice of incurring additional investment for reducing the workplace hazards see: Charles Noble, *supra*, note 11 at 70.

[15] Although this analysis ignores the social efficiency criteria for management decision making, it correctly portrays the private efficiency arguments.

[16] For details of how this rationale formed the background of workers compensation schemes see: Ashford, *supra*, note 7 at 18.

This could in some cases result in a re-evaluation of the investment costs,[17] which combined with increased worker knowledge, raise the costs of accidents through worker demands for enhanced risk premiums and better working conditions. However, these benefits are restricted to the large firms with relatively regular and stable employment structures and unionization rates.[18] This still leaves a major portion of the workforce to be subjected to the conflict of interest involved.

> "As long as there is a pool of readily available workers, little or no replacement costs, and no legal responsibility for harm befalling employees, firms will have little incentive to assume these costs by improving job safety, providing medical care, or adjusting output levels."[19]

Every additional method of increasing profits increases that conflict of interest. The introduction of new technologies and methods of production whose long-term effects are unknown point at one such consequence. It was on the basis of these market imperfections that government intervention had been justified in the first place. If the employers and workers had shared that common interest surely voluntary action on the part of the employer would have been more common and the need for government intervention to ensure a safe and healthy working condition rendered unnecessary. If market wages reflected the cost of risks being incurred surely the workers would not demand state intervention at the same time as they demand better conditions of work.

By the present reversion to self-regulation policies and a reliance on the parties to ensure maintenance of safe and healthy work conditions, in effect it is the economic market criteria which is being sanctioned, and in those circumstances the employer's desire to

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[17] In the conduct of the earlier cost-benefit analysis, the employer, from a lack of experience, skill and knowledge, may have over-estimated the investment costs or under-estimated the benefits derived from such improvements. The re-evaluation conducted pursuant to the information provided under the internal-responsibility system could lead to the conclusion that it would be far cheaper to invest in health and safety than incur the costs of the ill-effects.

[18] The relation of firm size, unionization and the nature of the employment relationship with occupational health and safety will be dealt with in a later discussion.

[19] Alan C. Monheit, "Background Papers on Industry's Changing Role in Health Care Delivery" in Richard H. Egdahl, ed., *Economic Implications of Employer-Provided Health Care* (New York: Springer-Verlog, 1977) at 182.

decrease costs, a socially desirable objective in itself, is sure to prevail over the need to ensure a safe and healthy work environment. This would be the case specially when considered against the market paradigm. Further, even if it was assumed that voluntary compliance would occur, would the levels of safety and health determined by the market be acceptable? As it is, complete reliance on the cost-benefit analysis in the determination of standards is being criticised;[20] would not the same criticism apply to the market determined levels of safety?

> "Natural inclination, therefore, and propaganda and persuasion, cannot be expected materially to improve safety performance against the pressures of the market unless adequate contrary pressures are exerted on industry from outside."[21]

It is only with the help of state initiatives at promoting and maintaining this common interest that the employer could be forced to adopt the necessary health and safety measures. The use of economic incentives, coercion, compulsion and regulation are some of the policy options available to the state in achieving this objective. State intervention would support the internal-responsibility system and provide the required incentives to ensure the provision of health and safety measures in situations where the employer views his interest as different from the worker.

ii. Perception of Equality

Another ground of criticism against the internal-responsibility system centres around the theories of its legitimizing the perceptions of equality and its deference to market controls. The proponents of these critiques[22] argue that the internal-responsibility system never intended to alter the prevailing power relations and merely sought to re-affirm the prevailing status quo of managerial autonomy in determining the conditions of work.

> "..The OSHA was not meant to shift the balance of power in the workplace to the worker side, either by granting actual decision-making power to joint health and

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[20] See discussion in previous chapter at note 20 and accompanying text.

[21] Anthony D. Woolf, *supra*, note 8 at 93.

[22] For details see: *Stillbirth*, *supra*, note 1 at 231; Fidler, *supra*, note 1 at 340.

safety committees or by turning government inspectors into interest arbitrators."[23]

Management has always been seen as playing the dominant role in the work place. By reason of being the owners of the means of production, they have ultimate authority in regard to the determination of alternative uses of capital, labour and material. Managerial discretion on these decisions has been seen as an exclusive prerogative. This managerial prerogative would include the right to make decisions in regard to the conditions of work including the work environment/health and safety issues. As Swinton states "Health and safety have traditionally been regarded as matters within management's prerogative..".[24] A similar opinion was shared by the committees recommending adoption of the internal-responsibility system as reflected in their attempts at retaining that dominant managerial role.[25] Hence the joint health and safety committees exercise only a consultative and advisory role and the workers' representatives and auditors have no powers of enforcement.[26]

What has, however, been achieved by these rights is the perception of equality between workers and employers. It is like a message which states that both are to be considered as equal partners in the production process and are to be given equal weight in the determination of workplace policies. By allowing for an increased worker role through consultation and recommendation the structure has fostered the appearance of both parties being on an equal footing and hence capable of regulating their work conditions through internal negotiation and regulation.

This view, though providing reasons for optimism, has a serious drawback in terms of practical enforcement. The consultative and advisory nature of the internal-responsibility

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[23] Katherine E. Swinton, "Enforcement of Occupational Health and Safety Legislation: The Role of the Internal Responsibility System" in Swan & Swinton, ed., *Studies in Labour Law* (Toronto: Butterworths, 1983) at 153.

[24] Katherine E. Swinton, *Ibid.*, at 148.

[25] "[Management must retain] the authority to define policies that govern the response to anomalous conditions and that power to provide physical and human resources to correct them...". *The Ham Commission Report*, at 148 as quoted in Fidler, *supra*, note 1 at 340. A similar attitude can be seen in *The Burkett Commission Report*.

[26] For a review of the statutory provisions, see chapter 2.

system retains employer control over the production process, even when at the cost of the workers' health and safety; the balance of effective power still favours the employers. This represents a major reversal in the philosophy which had led to state intervention in the free market. At that time it had been recognised that the parties were not equal, with workers needing state support in their favour to ensure the provision of minimum health and safety standards. Fear of prosecution and support of the state regulatory structure had worked to provide the workers with balancing power required at maintaining some semblance of equality. Notwithstanding the fact that the resulting legislation was inadequately enforced, the recognition of inequality had served to prevent the courts and other state institutions from compounding the problem. With the re-emergence of and the granting of legitimacy to the perceptions of equality between labour and capital, those institutions have once again been given the tools required to ensure that market controls dominate over policy requirements. This policy when combined with the assumption of an identity of interest attempts to legitimize the prevailing industrial hierarchy. Its familiar resemblance to the collective bargaining structures enhances the image of equality, while at the same time the absence of parallel collective rights, such as strikes and slow-downs help maintain the balance of power in favour of the management.

a. Grounds for State Inaction

An additional consequence to the common interest and presumption of equality assumptions is the clear preference given to the persuasion strategy for enforcing the residual state powers. The result is that workers are left without any real power under the internal-responsibility system while the state withdraws its already limited coercive support. The structure, as it presently exists, still retains a role for state regulation. Minimum standards of health and safety are still determined and enforced through the state's administrative regimes. In addition to these minimum standards the state provides the regulatory oversight to ensure compliance with enacted rules and is responsible for prosecuting any violations. It provides the punitive force required to ensure maintenance of statutory regulations.

However, in adopting the internal-responsibility system the state has been provided with the justification for abdicating responsibility. By shifting from direct intervention towards a predominant reliance on the internal-responsibility system, the state has left the workers

without any effective protection. In light of the deficient nature of the internal-responsibility rights and the imbalanced relationships at the workplace the workers are left without an option in case of employer resistance. The predominant stance taken by the state regulators remains one where they re-assert the responsibility of the employer and workers and direct that the matter be resolved in a cooperative manner within the internal-responsibility system. Although this aspect of state policy is also influenced by a lack of resources and procedural blockades, the express policy of reliance on the persuasion strategy renders the internal-responsibility system ineffective. Critics have viewed the state as backing away from its commitment to the internal-responsibility system by refusing the workers the enforcement support they require to make the system work.[27]

Traditionally, the policy guidelines for enforcing occupational health and safety enactments had favoured the persuasion over prosecution/punishment roles.[28] This philosophy now finds clear recognition through the internal-responsibility system.[29] The prime responsibility is now seen as resting upon the workers and employers who in cooperation are supposed to regulate the health and safety conditions at the workplace. In this manner the state has sought to avoid the expenditure of an expanded inspectorate while at the same ensuring that regulation moves from enforced compliance to ethical observance.[30]

The adoption of this strategy for enforcement is, however, dependent upon the assumptions of a common interest and equality between the workers and employers.[31] Only if these two assumptions are present would the mediational role envisaged for the inspectors

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[27] In support of this view see: Larry Gauthier, *supra*, note 1; *Stanley Gray v. L.J. Bergie* (1984), [1984] O.L.R.B. Rep. 177; *Not Yet Healthy Not Yet Safe* (Ontario: NDP Task Force on Occupational Health and Safety, 1983).

[28] See discussion in Chapter 1, note 57, Chapter 2, note 24 and accompanying texts.

[29] The adoption of this approach can be seen from the policy statement contained in Ontario's operating manual for health and safety where it states that "Employers and employees have the primary responsibility for occupational health and safety." For additional details see the case of *Stanley Gray v. L.J. Bergie* (1984), [1984] O L.R.B. Rep. 177 at 197.

[30] "As an Internal Responsibility System improves, the level of compliance will move from enforced compliance, through self-compliance to ethical compliance." *Ibid.*, at 197.

[31] See: Fidler, *supra*, note 1 at 342; *Stillburth*, *supra*, note 1 at 238.

have any beneficial value. However, as seen in the previous sections, this is not so; the workers and employers do not share an identical objective and the perception of equality is illusionary. In those circumstances the adoption of the persuasion strategy for enforcement would work against the interest of the workers.

The absence of state coercion and the inability of the worker to effectively replace that coercive power increases the employers' incentive to ignore the health and safety regulations. Although minimum standards and joint committees continue to provide educative support[32] practical compliance with the standards remains based upon the cost-benefit analysis. If the employer worked out that it was more beneficial to ignore the standards, without coercive regulation ensuring compliance becomes an uphill task. In the absence of enforced compliance it merely results in the re-statement of the market based levels of acceptance. In addition ignorance, calculated self-interest and the problem of being the first to comply in a competitive industry all provide persuasive grounds for non-compliance. This is especially true when compliance requires an initial investment, as in the case of non-unionised industries, which, already operating below the mandatory standards, would require larger initial investments to reach the uniform level of safety set. Here it is only the power of the state which can ensure compliance by imposing additional costs on the employer, making conformity an economical option.

On the other side of the argument it has been argued that "external enforcement was being unfairly judged since it has never in practise been properly utilized due to inadequate resources and an overly sympathetic approach to enforcement on the part of the inspectors."[33] Although complete equality can never be achieved in any relationship, with the present external circumstances determining the individual strength of each party, the employment relationship is heavily biased against the worker and in the absence of state support becomes completely one-sided. Even in circumstances where legislative power has sought to balance the workers' negotiating strength with that of the employer, such as in the

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[32] Tucker suggests that even in the absence of coercive power the internal-responsibility system may still serve an educative function by highlighting the occupational health and safety problems and in certain cases may result in the employer re-evaluating the costs-benefits of compliance. This may be in consequence of earlier under-estimation of benefits, over-estimation of costs or may be the result of better coordinated relations between labour and management. *Stillbirth*, *supra*, note 1 at 239.

[33] Phil James, *supra*, note 8 at 97.

collective bargaining regimes, a statutory oversight is necessary to take care of external influences and maintain the relationship on the desired path. In such circumstances what is required is a more comprehensive enforcement of the law through the external state agencies. This would not only serve to improve employer compliance with enacted regulations but also provide the essential support for the internal-regulation system. Phil James in recognising the importance of such external enforcement has suggested that "increasing the inspectorate's resources, changing enforcement policy and raising the penalties imposed where employers are found guilty of breaching the law" is the required reform policy that needs to be adopted.[34]

b. Negotiating Health and Safety

Another direct consequence of assuming equality and a common interest emerges in the direction which the reform initiatives take for ensuring the provision of health and safety at the workplace. In the absence of a conflict of interest and the presumption of equality the question merely becomes that of improving the availability of knowledge, technical skills, and establishing a structure under which the concerned parties, using the negotiation and persuasion strategies, can determine their work conditions. It was in furtherance of these objectives that joint health and safety committees were established. The system envisaged that once workers' problems were brought before such a committee, the employer out of a feeling of self-interest would attempt to eliminate the employment hazards, removing the need for external state regulation or coercion.[35] The objective behind the adoption of the internal-responsibility system was not to alter the power structure at the workplace,[36] but to provide informational support to the employers who, presuming the existence of a common interest, could utilise this information to reduce the employment hazards. Enhanced negotiations and adoption of the persuasion strategy for enforcement form important

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[34] Phil James, *supra*, note 8 at 97.

[35] The practical effect of this strategy can be seen in the statutes where beyond the issuance of a policy statement, in regard to what would be its guiding philosophy and the establishment of an organisational framework through which that policy is to function, the government has not specified what precisely it expects from the workers or the employers, the assumption being that since they had a common purpose the state only needed to bring the two together.

[36] See *supra*, note 23.

components of the assumption.[37]

Once again the assumptions of a common interest and equality in relationship have caused the reform policies to adopt a direction which undermines the workers position at the workplace. In light of the market's structural constraints, the workers' capacity to negotiate for reform is severely restrained. Although a distinction may be made in regard to the organised and unorganised labour forces the difference is only a matter of degree with both sectors facing similar limitations in their relationship with the employers.[38] In the absence of a common interest, inequality in negotiating power and an inadequate state support the chances are that employer interests will dominate.

The arguments on this front adopt the following pattern. Risk to a person's health and safety forms an intrinsic part of daily work.[39] Since the desire for a complete reduction of risk could only be achieved through complete prohibition of risk-prone work, not a politically, economically or socially feasible option, the acceptance of some measure of risk becomes necessary. This is not because hazardous work is desired, but because the worker is willing to accept some off-setting advantage in lieu of performance; in general terms, what can be referred to as the risk premium.[40] Keeping in mind the inviolable goal of health and safety and labour limitations for demanding appropriate premiums,[41] the determination of acceptable and tolerable levels of risk form the method chosen by the state for regulating the market in risk premiums. This in itself is a form of negotiation, except that all the parties concerned do not have a say in the limits determined: worker knowledge and power constraints restrict the main input to the employer and the state. In this situation it was the

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[37] Tucker, perceives the goal behind the adoption of these cooperative strategies to be the securance of consent to market regulation through an enhanced perception of equality, the promotion of a cohesion of interests and an encouragement to accept the market norms. In this regard he has cited the dynamics of Kelman's small group psychology to support his views. For details see: *Stillbirth*, *supra*, note 1 at 247 - 248.

[38] The special case of the organised workers will be dealt with in greater detail in the following section.

[39] For details on risk and the theories underlying its acceptance see: W. Kip Viscusi, *supra*, note 9 at 37.

[40] See: *supra*, note 9 and accompanying text.

[41] See: *supra*, note 13 and accompanying text.

state, however incompetently, which represented the workers' interest.

The internal-responsibility system is seeking to change that. The free market proponents argue for determining the health and safety standards themselves through negotiations, but limiting the input to the workers and the employers, the parties directly concerned.[42] The state's role in the process is sought to be sidelined The reasoning is based upon the assumption that workers can effectively represent their interest without state support. This assumption has serious limitations.

The strategy of negotiation forms the mainstay of the internal-responsibility system. Whether it is the joint health and safety committees or the safety representative, the policy emphasis is on negotiations. This, in spite of recognition of the fact that the worker-employer relationship is not a balanced one. In the absence of adequate knowledge, information, independence and equality in operation it would be highly inappropriate to let the workers negotiate all aspects of the work environment for some concerns are far too important to be determined by the parties' bargaining strengths. Negotiating in these areas would never achieve the desired results as the very term "negotiation" involves the notion of compromise.

When settlements are concluded they form stop-gap arrangements depending upon the present negotiating strength and involve the making of compromises which do not base the relationship on a sound foundation. The compromise, whether based upon personal or social needs, is made in favour of a particular side depending upon the relative bargaining strength at the time of the negotiations. In this regard the workers are mostly at a disadvantage. The worker is at too much of a disadvantage from economic and social pressures to conduct effective negotiations. In considering the market model, one can see that the individual bargaining strength of the worker would mostly be subservient to that of the employer. This gives strength to the statement that "health and safety is negotiable" but not necessarily in favour of the employee. The Beaudry Committee's findings in this context are particularly relevant -

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[42] Baram presents the use of nongovernmental industrial standards established through consensus as a viable alternative to state regulation. For details see: Michael S. Baram, *Alternatives to Regulation* (Lexington: D.C. Heath and Company, 1982) c. 3.

> "..their position is simple: they want to continue to make their living in the jobs they presently hold and at the same time have healthier working conditions....the compromises which result from negotiations cannot lead to the elimination of the risk of industrial diseases."[43]

How can a worker whose only concern lies in maintaining employment and a continuous source of financial support, be capable of effective and balanced negotiations? His inadequate knowledge and information about both the visible and hidden health and safety hazards renders him at a disadvantage even before he enters into the negotiations.

Even the supporters of the internal-responsibility system accept that such negotiations would only be beneficial in unionised undertakings, where the employer is cooperative and doesn't have to incur additional costs or fear intrusion in his decision making authority/prerogative, thus removing a major portion of the workforce from the purview of the policy coverage, leaving them without adequate protection.[44] Further, even in the unionised organisations, the present structure of bargaining is based upon an adversarial footing requiring costly confrontation both in terms of time and money to resolve disputes. This brings up the argument of interest and motivation. The dynamics of bargaining and the negotiating ploys used during the process can compromise effective solutions for health and safety issues which may otherwise have been acceptable to both parties.

> "The question of whether a health hazard exists is another source of industrial conflict. Once a problem has been identified, the finding of a solution and costs of control rests with the company. This again produces misunderstandings between unions and management when controls are costly or take longer than anticipated to be developed or implemented."[45]

This confrontational relationship can be funnelled down into the health and safety structures and prevent effective worker participation or the systematic review/evaluation of

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[43] Graham William, "Health Hazards - Confrontation Issues on the Job" in *Are Health and Safety Negotiable?* (Montreal: McGill Industrial Relations Centre, 1978) at 83.

[44] See: Katherine E. Swinton, *supra*, note 23 at 172.

[45] Graham William, *supra*, note 43 at 72.

established protection measures.[46] It was on consideration of these factors that OSHA was seen as an area distinct from collective bargaining. Human life was recognised as being more important than to be bargained away at the cost of a pay raise The philosophy of the reports which first outlined the internal-responsibility system was highlighted by the statements where they expressly wish to separate the two areas, even to the extent of the joint committee members not having to be union representatives Additional concerns were expressed on the provision of standards of care which would apply uniformly over different workplaces, irrespective of the individual union bargaining position, and also coverage of the non-unionised and the small scale firms. The established minimum standards recognised that unequal bargaining position and sought to ensure that certain levels of safety were maintained.

When proponents of the internal-responsibility system counter these statements with arguments for increased worker participation the prior discussion on the policy assumptions and the persuasion method of state regulation go to emphasise the fact that what is being sought is an increase in employer domination through negotiations This reasoning ties in with the analysis proposing re-emergence of market controls. The structure is directed towards negotiating settlements, while not seriously questioning management's exclusive discretion over the methods of production, the workers have no real say as their role is only advisory.[47]

In the absence of the state regulatory oversight the employers could still play upon the workers' economic weaknesses and take advantage of their inadequate knowledge and foresight. The absence of any real decision making or influencing power in the internal-responsibility system doesn't help the worker much. By allowing the workers to negotiate without giving them an appropriate say in the matter would only re-emphasise market controls, and although one could argue that state backing would still be available, as discussed, that too becomes subverted under the internal-responsibility system to be used in support of market regulation.

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[46] "[The internal-responsibility system] is viewed with suspicion as to its potential for abuse and misuse, especially where poor labour management relations exist." Hushion, Ogilve Associates Limited, *supra*, note 3 at 35.

[47] For criticism on the advisory nature of the rights see. H. Glasbeek & S Rowland, "Are Killing and Injuring at Work Crimes?" (1979) 17 Osgoode Hall Law Journal 506 at 517.

Although this represents the worst case scenario the influence of imbalanced labour-management relations can be detrimental to workplace health and safety. In those circumstances the desire to provide a standard level of protection, uniformity and coverage over the non-unionised sector including firms with weak or irresponsible unions, can only be achieved through the external enforcement of statutory standards. On this basis, the rationale for free market negotiations between workers and the employers to develop acceptable health and safety levels is seriously flawed.[48] It is only under regulated conditions that health and safety issues are capable of forming a part of the negotiated settlement. In view of these considerations it would be detrimental to rely on negotiating strategies for obtaining healthy and safe work environments.

c. The Special Case of Unionised Undertakings

Under the current arguments unions occupy a special position. Since the organised workers are better equipped to deal with the health and safety concerns, the assumption of equality tends to have a relatively different effect upon their relationship with the employers. Although the clear line between worker organisation and the maintenance of proper health and safety facilities at the workplace has still to be effectively detailed through research, one could also say that unionisation does have a positive effect upon the balance of power at the workplace.[49] The logic behind this assumption is based upon the premise that unions enhance worker equality, and have the capacity to obtain de facto control over the work-floor, including participation in the decision making process.

To the extent unionisation has taken hold it has achieved a relative degree of success. In practise "unions have de facto become the prime instrument for workforce involvement."[50] Besides affecting particular workplace conditions these unions have taken up the cause of labour on a collective basis and have formed the driving force behind a

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[48] For further criticism of the negotiation model see: Emile Boudreau, "Health Hazards - - Confrontation Issues on the Job" in *Are Health and Safety Negotiable?* (Montreal: McGill Industrial Relations Centre, 1978) 79.

[49] For support see: Sandra Dawson, et al., *Safety at Work: The Limits of Self-Regulation* (Cambridge: Cambridge University Press, 1988) at 259. Also see: Phil James, *supra*, note 8 at 94.

[50] Sandra Dawson, *Ibid.* at 259.

majority of the reform movements, including those in occupational health and safety.[51] In this regard the unions' collective strength, past experience with such issues and internal policy structure, which focuses on issues such as information, training and increased health and safety at work, give it a more favoured chance of achieving results than an unorganised workforce. By providing the workers with the platform through which to channel their grievances and the presence of statute-supported collective negotiating power, the unions provide the workers with a potent and effective method to obtain health and safety reform. The presence of an organised union structure allows the worker to obtain essential information about health and safety concerns, to better organise and elect representatives to the joint health and safety committees, to provide effective support in obtaining desired changes and a more effective exercise of the workers' statutory rights without fear of reprisals.

In the presence of a union at the workplace worker action essentially gets channelled through its organisation and irrespective of statutory policy the issues are bound to find reflection in the collective bargaining negotiations.[52] In addition the need for regular and punitive enforcement also decreases as the internal negotiating power of the two parties is somewhat more balanced. It is only in the presence of a strong union that the persuasion strategy can find some justification as can be seen in countries which do have strong unions, for example Sweden. The unions play the role of an adversary with greater negotiating strength and ability to compel reform than that possessed by an individual worker.

However, despite its benefits, the fact remains that union coverage is grossly unrepresentative of the labour force, still leaving more than 60% (a majority) of the workers to be governed by their individual negotiating strength and market control.[53] In those sectors the relationship is still dominated by the employer, who retains the responsibility for

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[51] For details of the unions role in the occupational health and safety sector see: Joseph F. Follmann, Jr., *The Economics of Industrial Health: History, Theory, Practice* (New York: AMACOM, 1978) c.15.

[52] For details about the effect of unions on the strategy chosen see: Steven Kelman, "Enforcement of Occupational Safety and Health Regulations: A Comparison of Sweden and American Practices" in Keith Hawkins & John M. Thomas, ed., *Enforcing Regulation* (Kluwer: Nijhoff Publishing, 1984).

[53] Approximately 39% of workers in the non-agricultural sector belong to labour unions. Source: *The Canadian Labour Climate*, Labour Canada, 1987.

inculcating awareness about health and safety issues, providing information to improve compliance with established standards and determining and maintaining a health and safety policy. The reliance on the internal-responsibility system in such circumstances merely strengthens the hands of the employer and in the absence of employer concern could allow the system to be subverted towards the attainment of economic benefits at the cost of the workers' health and safety.

Even in the sectors where unionization exists, the unions' internal limitations hamper the effective pursuit of health and safety policies. This reasoning is supported by the fact that health and safety issues usually occur during the term of the negotiated agreement when strikes are prohibited. In such situations if the employer chooses to ignore the committee's recommendations and is not bound to comply under any statutory regulation the only option available is to bring the issue up at the next collective negotiations. Besides ruling out a major portion of the workforce, as less than 60% of the workforce is represented by a union, this results in health and safety issues being clumped with other union demands and could result in them being overshadowed or being traded-off, compromising important worker concerns. The constant struggle to retain the support of the worker-members requires the union, in certain circumstances, to function much as a political party, making compromises and pursuing strategies which are not always beneficial. Its financial limitations prevent it from ensuring availability of the kind of research and information input which is essential for effective worker participation. Although unions are presently attempting to overcome these hurdles and increasing their awareness of the health and safety aspects of the work environment, they lack the financial and infrastructural support to make the required headway, especially in those sectors where the rate of unionization is low.

These factors stress the need for state intervention more so in non-unionized sectors but also in the unionized sector. The state established and monitored regulatory structure in these areas would help enhance the workers' ability to press for improvement in health and safety while at the same time providing an incentive for worker organisations.

This should not be taken to imply that joint committees and worker participation have no beneficial value, for they do provide a useful function in enhancing the flow of information and allowing the workers a means of highlighting their grievances or suggesting solutions. These benefits however are heavily dependent upon a conception of common interest between the employer and the workers to improve the working conditions. In the

absence of such common interest the committees' efficiency and working would be seriously affected. As that common interest is already a question of dispute, when demands for improvements in health and safety come at the cost of the employers' desire for greater profits, it is still the market forces which determine the outcome.

What is required is to provide the workers with greater power to effect workplace reform and obtain a decisive say in the workplace decision making process. The recommendations of the joint health and safety committees should be made more binding in nature and the workers' right to refuse unsafe work should be expanded to include collective shut-downs. Worker participation in the decision making process especially in relation to health and safety concerns should be stipulated and their access to relevant health and safety information should be improved. Equality without the capacity to enforce one's recommendations is surely not what the workers were striving for. Here it is only the use of real and effective power in the hands of the state or the workers which would provide the balancing factor to maintain safety at work.

B. SITUATIONAL COMPLEXITIES

Having suggested why it might not be in the interest of the employer to establish health and safety provisions unless in conformity with the economic analysis, the attention then reverts to examine how effectively the workers can use the established framework for improving the working conditions. As seen, the core of the self-regulation system centres around effective worker participation. The participation in turn is a product of the surrounding environment. Adequate knowledge, capacity, motivation - along with the responsibility and authority to effect improvement - all depend upon the conditions prevalent in that particular situation. Similarly the attitudes of employers, towards the workplace hazards, is the product of a variety of influences which differ from situation to situation.

These influencing factors are a product of the environment which in certain circumstances is beyond the control of both worker and employer. Nothing either can do would affect the situation. In those circumstances the internal-responsibility system develops serious drawbacks, with state intervention forming the only effective method for retaining some semblance of order. Some of those external influences, which limit worker participation in the internal-responsibility system, are detailed below.

i. Organisation Size

Size of the organisation is an important factor which influences the operation of the internal-responsibility system.[54] For a moment even if we are to assume that there exists a commonality of interest between labour and management on issues of occupational health and safety, it would only be the presence of adequate knowledge about solutions and the availability of resources which could help translate the concern into action. In addition, the employer must have some organisational stability, which would allow the responsibility and authority for such functions to be effectively delegated in addition to adequate financial resources to tackle the deficient areas effectively.

The size of the firm is an important issue in such an analysis. This importance arises from the fact that the organisational structure and market behaviour of smaller firms is based upon different factors. A detailed study into the nature of different firm sizes and their response to changes in economic and social conditions would be required to understand the correlation between size and health; however, a brief review has been made for the purpose of this thesis.

Firstly, the organisational structure of firms is dependent upon their size. Large firms are more liable to have formalised and hierarchical management structures with clear lines of delegated responsibility. The employment of specialised and technically informed personnel with adequate delegated authority in their individual areas is more likely in such cases. On the other hand the smaller firm is apt to have a more personalised system of control and the presence of a relatively informal managerial structure. This is often accompanied by a resistance to the delegation of responsibility and the employment of specialised personnel. In the absence of specialised personnel and departments, the decision-making process becomes increasingly based upon the personal knowledge and perceptions of the owner-directors, who give more weight to the immediate economic concerns than to long term strategies. This also implies that the level of knowledge about statutory requirements, health and safety provisions, benefits and costs, and the establishment of procedural control systems would be lower in comparison to the larger concerns.

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[54] For details of this argument see Sandra Dawson, *supra*, note 49 at 176 and 260; Ashford, *supra*, note 7 at 366; Follman, *supra*, note 51 in c. 20.

The labour management relationship in such firms is handled on a more informal and paternalistic plane, and the rate of unionisation is low. In the absence of an organised workforce, since the negotiating strength clearly favours the employer, compliance with regulations or decisions for improving health and safety conditions are purely dependent upon the employer's attitude. This imbalance increases the resistance of such small-firm employers towards external regulation and intervention through the state or labour organisations

On the economic front, the firm operating at a lower fiscal scale is bound to be more concerned about any additional expense which does not provide a proportionate financial return. The financial viability of the smaller firms is more closely related to the prevailing economic situation than that of the larger firms who are better able to absorb the market fluctuations. Consequently in times of financial uncertainty the formal organisational structures get even more blurred and the need to conserve resources becomes the prime objective.

Besides the internal constraints of smaller firms, the presence of a fragmented industry increases the supervision cost of the regulatory agencies. In the absence of a union and organised worker efforts, state supervision provides an inadequate regulatory oversight for improving the conditions of work. State supervision constrained by financial and policy consideration is more likely to target the unionised sector and the larger employers than the smaller firms.[55] Although the level of regulation may increase in the case of higher-risk sectors, the sheer manpower and financial costs involved render effective supervision impractical.

This inadequate supervision increases the chances that a smaller firm will fail to comply with registration or reporting requirements. Failure to report accidents or health and safety problems, unless faced with serious consequences or brought to public attention, accentuate the workplace risk. The nature of risk in these cases need not be of a serious kind, as the firms may be located in low-risk sectors such as services where the overall accident rate is low, but neglect and non-compliance of standards still violates the workers' right to a safe work environment.

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[55] For statistical data in support of this view see: *Stillburth*, *supra*, note 1 at 233 and 234.

The adoption of the internal-responsibility system in such smaller firms, which are already hampered by inadequate knowledge, resources, worker organisation and employer concern, leaves workers' welfare at the discretion of the employer. In the absence of effective supervision and prosecution this makes the maintenance of safety at the workplace a difficult task. Reliance on employers and workers to observe ethical compliance of health and safety provisions in the face of the above mentioned limitations is highly unreasonable.

ii. The Attitudinal Bias

As discussed in the previous chapter, it was only after a long period of research and study that responsibility for accidents and injuries shifted from the worker to the employer. Now, as a new outlook is being projected, the tardiness of the process has highlighted the extent that misconceptions are impressed upon the ideologies of each class. Although, considering the imbalanced worker-employer relationship, it cannot be recommended to negotiate on issues of occupational health and safety, at the practical level, the labour-management relationship mandates temporary solutions. The interdependent nature of the relationship promotes compromise and short-term dispute resolution. In such cases, besides the theoretical arguments, one has to consider the practical implications of a change in policy and take into account the influences it would generate at the grass-root levels of the relationship.

The employer-employee relationship has always been seen as confrontational, each seeking to further his self-interests which are divergent in nature. The adversarial nature of the relationship is best visible in the collective bargaining structures where each side sees a concession in terms of a victory or loss irrespective of the economic, social or human arguments. Even as the relationship is presently evolving to one of mutual cooperation, partly as a result of the changing character of the workforce which is attaining higher levels of education and specialisation in combination with an increased flexibility and understanding on the employer's part, the ingrained distrust towards each other, the attitudinal bias, still determines the outcome of their interaction. Each side views the other as seeking to retain something which lawfully belongs to them. In such circumstances the fears and feelings of mistrust, brought about through personal experience or media publicity, tend to guide the relationship, preempting the making of rational and canvassed decisions. In the unionised

sector this results in head-on confrontations which, although initially costly, at least help in establishing a foundation for future cooperation. In the unorganised sector, however, the old paternalistic attitude remains. Any demand for reform is seen as a sign of brewing trouble and quickly dealt with, usually through measures which target the persons seeking reform rather than the problematic area itself.

The conflicting roles which have been assumed by each side over the past decades are not likely to be removed in the recent future. It will require a lot of pressure, education and understanding besides the essential time factor before the ingrained fears and doubts are removed or even diminished. The role of the state in such a situation becomes of essence as it is the perceived neutral,[56] seeking to achieve a harmonious industrial climate which is beneficial to both labour and capital. The state's intervention to regulate in such circumstances can also be depicted as mediational in nature - seeking to mediate the two ideologies and help the parties in overcoming their attitudinal biases.

iii. Nature and Form of Employment

When the relevance of environmental influences upon the hazards in work was first recognised, it signified an important shift in the occupational health and safety policy. The recognition of the environment as a contributory factor in occupational safety was partly a result of the fast changing nature of the production process. This change has not been restricted to methods and technologies of production alone, but can also be seen in employment relationships. An increase in the complexity of business and the expanding scope of legal structures for regulating employment contracts has led to a growth of different forms of employment relationships. Some of these, such as part-time employment, self-employment, employee-like persons and sub-contracting are of special interest in implementing the occupational health and safety reforms.

The legal regulation of these relationships poses a peculiar problem. Most statutory provisions concerning occupational health and safety depend upon the existence of an employment contract. The employer is held responsible for the health and safety of his

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[56] Although some would argue about state neutrality with any intervention being merely in support of or to re-enforce the capitalistic market, the benefits of state intervention are recognisable. Besides those which are listed in the present review the very fact that labour has continued to press for the retention of a strong state presence enhances the arguments of at least a limited benefit being derived.

"employee". In the absence of an employment contract, the above stated persons would be removed from the purview of the legislation even though the employer could continue to determine their work environment. Particularly prevalent in sectors characterised by a high degree of specialisation or individual work operations, these relationships pose a practical and legal problem in relation to the attachment of responsibility for health and safety maintenance or the establishment of control and supervisory structures. Who is responsible for the health and safety of sub-contractors or self-employed workers in industries such as computers, insurance, marketing, transport and most significantly construction?

This grey area in assigning responsibility exists not from the view of administration alone, but also concerns the practical application of health and safety policies on the work floor. For illustration, consider the case of a construction site where different sub-contractors are working simultaneously.[57] The presence of different groups of workers, employed by several employers, all working in close proximity, in a dangerous and hazardous situation will surely generate the problems of coordination and control. Different employers may have different policy guidelines resulting in the presence of an uneven health and safety organisation. In turn, the relative ignorance about each others' preparedness would allow the workers to make false assumptions about safety which could result in an increased health and safety risk. Besides the short-term safety aspect of the problems, the health risks are of greater concern as detrimental effects are only visible after a delayed period of time. Although efforts to enhance coordination and uniformity may be undertaken, the fact remains that the enforcement of health and safety regulations in such situations will be a difficult, time-consuming, and costly task.

These employment relationships also bring into focus the motivational aspect for enhancing health and safety at work. In the absence of a long-term relationship what would be the motivation to invest in the health and safety of part-time or contractual workers? Viewed from another angle, the absence of this responsibility may form the very reason for adoption of these relationships in the first place. It would certainly make more sense to contract-out for the disposal of hazardous substances than bear the cost of investing in equipment or the risk of having to pay compensation in case of adverse effects.

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[57] For additional details on the construction industry and its peculiar problems, including sub-contracting, see: Joseph V. Rees, *supra*, note 2 at 196.

In the absence of motivation for improving the work conditions and the established health and safety framework, the need for external enforcement gains ground over self-regulation. Rather than incur investment for the short duration of the relationship, the employer's propensity to exert an increased market pressure to maintain the status quo causes the internal-responsibility system to be biased in his favour. Here it is only through the strict imposition of external standards that the employer could be forced to internalise the costs for promoting a safer workplace.

The contractual nature of the relationship also supports third party intervention, especially in case of sub-contracting where it could serve to bring uniformity and an increased coordination and cooperation in the operations. While it is possible for the state to legislatively define relationships in such a manner as to include or exclude certain persons, forcing the employer to bear the responsibility for certain relationships, the internal-responsibility system cannot operate in a similar manner. The financial disincentive towards incurring additional costs is too strong to resist. The presence of an external and independent regulatory agency providing the required supervision would go further in improving the conditions of work than the internal-responsibility system. The significance of this limitation in the internal-responsibility system gains ground when seen against the expanding nature of these relationships, which seek to cover an expanded section of the workforce and industrial employment.

iv. Internal Coordination and Cooperation

The present industrial structure has made production a very complex and inter-dependent operation. With increased specialisation, breaking down of the national barriers and the advances in communication and transportation, the manufacturing sector has shifted from the single unit style of operation towards one which is the integration of a number of firms and units. Production occurs at different sites, each performing different roles but all contributing towards the final product.

At each of these production facilities the process involves not only the health and safety of the particular plant workers, but also of those who will then receive the resultant product and further process or utilize it as raw material. In the ultimate stage it is the consumer who bears the effects of the health and safety risks generated at each facility. Hence the consequences of the risks are no longer matters of local concern, but get

transferred right down the chain to the consumer, leaving their effect at each of the intermediate stages.

In such circumstances it becomes essential to maintain a degree of cooperation and linkage between these various stages In practical terms it would be very difficult for one link in the chain to regulate the entire process as control is eliminated through breaks in the contractual relationships. How could an employee working on a V.D U. determine the health and safety policies of the V.D.U. manufacturers?[58]

In addition, the various players in the occupational health and safety arena are not all connected and conversant with the others They have very little, if any, knowledge of the others' advances, set-backs or problems The various agencies and occupations which could help to prevent or limit the health and safety risks are operating at different levels with little or no coordination and cooperation between them. For example the environmentalists, the medical practitioners, the industrial hygienists, the occupational physicians, the scientists etc , are all connected in some direct or indirect way with health and safety, but each has a focused and narrow area of specialisation on which he concentrates his efforts In the absence of a coordinating influence, each pulls in his own direction even though they may all be working for the common objective.

To achieve long-term across-the-board advances, all the various connected occupations need to be brought together under one policy guideline. The work needs to be coordinated so as to eliminate duplication and obtain the benefits of a joint inter-disciplinary effort. Similarly, all the links in the production process need to be coordinated so that the risks are controlled at each step; regulation should not be limited to a particular process, the effect it could have further down the chain should also be considered.

All these are roles which are just not feasible when operating from the internal-responsibility platform. The internal-responsibility system would concentrate upon the immediate and peculiar nature of the concern, irrespective of its consequences on a national or industrial basis. It is impossible for one firm, and economically detrimental for a combination of employers, to seek to coordinate the activities of all the concerned

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[58] One could answer this by the arguments of the market pressure but market pressure only operates on certain assumptions, one of which is knowledge which may not be readily available. On the other hand in industries where alternatives are not readily available as in the case of nuclear plants the process would still have to be performed irrespective of the risks involved

occupations This objective can only be achieved through the regulatory structure of the state. The internal-responsibility system is not designed for determining such broad policy guidelines or operating upon such an extensive basis, its limited benefits being confined to the internal regulation of single facilities.

v. The Health Concern

The term "safety" is used in reference to those hazards which are of an immediate and violent nature causing physical harm to the person concerned. The hazard is usually associated with the industrial equipment or physical environment of the workplace.[59] Proper care and training in work performance along with adequate equipment can have a significant effect in reducing these safety risks Having an immediate and direct effect upon the worker, safety hazards constitute the major reason for occupational health and safety complaints.

Health hazards on the other hand are more concerned with the physical and biological agents present in the workplace Health hazards in the workplace can lead to diseases and sickness which need not have any immediate symptoms. The long latency periods and influencing external factors create hurdles in diagnosing, preventing or even determining the cause of these ill effects. These factors when combined with the irreversible nature of the damage makes health hazards as much, if not more, dangerous than safety concerns.

However, the focus of attention has remained on the safety aspect of the problem, undermining the health risks. The cause of this has been partly the result of inadequate information and partly the employers' resistance to internalising the long term costs of health and safety. This aspect of the problem assumes significant proportions when viewed in relation to the internal-responsibility system. It is much easier for the workers to recognise safety hazards, as these often relate to the physical environment, something which a naked eye can perceive. An unfenced machine or an unprotected cat walk are hazards anybody would classify as dangerous to the safety of those who come in contact with them, but the situation is different for toxic chemicals or dangerous substances which are used in the production process. Here the exact nature of the danger depends upon the availability of information. One would have to know the acceptable levels of pollution, or the properties

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[59] Ashford, *supra*, note 7 at 9.

of the chemicals and their effect upon the human body to classify them as being hazardous. Besides knowledge, the work environment would require continuous monitoring to ensure that the levels of hazardous substances in the environment are in conformity with the established standards if any

For correctly identifying the risk, extensive research has to be conducted and conclusive proof of ill effects concluded before a health risk will be declared In most cases this research has not been done or cannot be done to the level which could provide conclusive answers In those circumstances the decision goes beyond the strict analysis of the research data and involves the judgment of the concerned parties The scientists in this regard are naturally cautious and hesitant to commit themselves and in turn emphasise the need for additional research before clear positions emerge. The speed with which new chemical substances and compounds come into the production process and the numerous external factors which can influence the research results also contribute to this reticence This lack of clarity can be used as an excuse for justifying lower standards or postponement of action until the availability of more conclusive evidence [60]

In addition this process of research and experimentation requires both time and money, the discretion of whose use forms a part of the employer prerogative.[61] Today a major portion of the research is conducted through employer funding Although it would be wrong to say that there is a calculated employer design to subvert the availability of factual information, the organisation of research funding makes employer bias a natural component of the process.

Even in the presence of proof, the employer is not sure to internalise the cost for providing protection against the health risks.[62] Since the effects of these hazards are spread over a long period of time it serves the employer's interest to shift that burden onto

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[60] See: Hushion, Ogilvie Associates Limited, *supra*, note 3 at 22 - 23.

[61] In the Canadian context the total spending on research and development does not provide any encouraging figures. Canada ranks 17th amongst 23 Industrial countries in the ratio of spending on research and development to gross domestic product Canada spends only 1.3% of GDP on R&D compared to 2.5% by countries such as the U S and Japan The proportion of such spending which accounts for occupational health and safety would be miniscular. Source *OECD* 1988-1990

[62] ". the employer dislikes "internalising" costs whose benefits do not appear to accrue sufficiently to the employer." Ashford, *supra*, note 7 at 5.

the society and continue to maintain the firm's short-term profitability. Further, the competitive nature of the industry prevents any one firm from taking the lead or incurring additional costs in the absence of the others following suit. The ready availability of alternative materials to replace the hazardous substances and the effects of a price increase upon market demand as a consequence of the additional investment are also influencing concerns. All these factors can clearly be seen under the internal-responsibility system.

The only deterrent in such situations is state intervention. The state has the capacity to intervene in support of the worker and force the firms to internalise their health and safety costs, making the price of the products truly representative of the social and economical costs of production. Through external enforcement and provision of the required informational support, the state can balance the short-term ideology of the workers against the profit maximization policy of the employers. State support for research and development in occupational health and safety can help provide and maintain an independent source of health information. This does not imply that the state has to maintain a direct presence in terms of being responsible for the research, but means the provision of financial and infrastructural support to either independent or labour supported agencies. In the absence of this support the workers just do not have the resources and capability to achieve the desired results.

vi. Technological Changes

The paradox of industrialisation is that in order to achieve more efficient means of production, technological and product innovations have become a necessity even though they may result in an increased health and safety risk to the workers. Technological advancement brings in its wake additional health and safety problems which result from the use of new and untested chemicals and machines. Besides being subjected to these unrecognised hazards, the continuous changes occurring in the workplace contribute to workplace stress, requiring the workforce to remain in a perpetual state of training and specialisation. The speed with which such new technologies are developed and the economic considerations which require their early adoption prevent adequate time and research being devoted towards the testing of their effects upon the human organisation. Health concerns are of special significance as the latent nature of their symptoms prevent early detection.

The worker plays a conflicting role in this process. On one hand, a stable and progressive economy is essential for the maintenance of employment levels. Technological innovations form an important part of that strategy. On the other hand, it is these very advances which contribute towards increasing the health and safety risk of employment. If the workers are to demand a more comprehensive and detailed testing of the developing technologies, it could mean the reduced competitiveness of the firm and an ultimate loss of employment; if they are to accept the developments without any comment they put their lives at stake. Inadequate information and the capacity to decipher that incomprehensible mass of technical information into practically comprehensible terms also contributes towards enhancing worker impotence.

Although unions make an attempt at softening the rigours of such technological change, their internal financial and organisational constraints make this a difficult task. In addition, the fact that unions account for less than 39% of the labour force leaves a majority of the workers in the hands of the market forces. In those circumstances it is only through state intervention that effective regulatory structures can be established, applying across the economy and ensuring a uniform structure for review. It is only the state which can regulate the induction of new technologies and make pre-induction testing and approval mandatory. Further, with an increase in the scope of business and the importation of technologies from other countries it is only at state levels that international agreements can be negotiated and international regulatory structures established. By maintaining facilities for the testing of such new technologies the welfare of the worker could be retained without sacrificing economic progress. The state role in these circumstances is of sufficient importance to operate over and above the internal-responsibility system.

vii. Influence of Economic Conditions

Health and safety risks are a part of the production process. As the risks are a derivative of the work environment, production decisions such as the manner and speed of production are influential factors affecting the working conditions. Production decisions, however, are not at the discretion of the employer, but depend upon the market conditions of supply and demand and have to remain in step with the changing market patterns - the demand for the products determining the what, when, and how of the production process. The market which until now had mostly been seen on a national basis is increasingly

attaining an international character. A consequence of this internationalisation is the ability of firms to locate production facilities in any part of the world. In reaching a decision on location, the criteria evaluated includes the statutes providing for health and safety provisions. As provisions for health and safety constitute an investment consideration involving a cost outlay, unless balanced by other considerations a strict regulatory structure could influence the decision to locate elsewhere.[63] In the long run this has a detrimental effect upon the economic situation influencing the country's choice of strategy for implementing health and safety policies.

> "[Although] the impact of occupational health and safety regulations on international competitiveness is difficult to estimate....there is little doubt that regulatory actions have the potential to seriously undermine the competitive positions of domestic industries."[64]

This is of greater concern in the developing countries whose economies are directly linked with the more progressive nations and who lack the ability to withstand any fluctuation in the global market. In addition, their dependence on foreign investment and imports to sustain economic development renders them susceptible to being used as dumping grounds for the hazardous substances and machinery which, because of regulations in the countries of origin, have been rendered unusable.[65]

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[63] A study prepared by Labour Canada, comparing the labour legislation of three countries, shows why, in the absence of other considerations, it might be more beneficial for the employers to set up production facilities in Mexico. See: *Comparison of Labour Legislation of General Application in Canada, The United States and Mexico* (Labour Canada, March 1991). For practical illustration, one could take the case of the Maquiladora zone in Mexico which has grown 400% since 1982. It presently [1990 figures] employs half a million workers and grew by 75,000 in 1989. During the same period Canadian manufacturing sector shrunk by over 1,50,000 workers. Canadian companies investing in this region laid off 15000 workers in the last year and a half. Bruce Campbell, *Ten Reasons Why Canada Should Not Enter Into a Trilateral Free Trade Agreement With the United States and Mexico* (Ottawa: Canadian Centre for Policy Alternatives, 1990).

[64] G.B. Reschenthaler, *supra*, note 6 at 67.

[65] For details on the world economy, international trade and occupational health and safety see: Vincente Navarro & Daniel M. Berman, ed., *Health and Work under Capitalism* (New York: Baywood Publishing, 1983).

In addition, this globalization of the markets renders the country's economy wide open to external effects and renders it more susceptible to the forces of recession and depression.[66] In such cases economic circumstances have an influential effect upon the methods and environment of production. In times of recession the shortage of capital may cause the employer to cut back on expenditure. The scarcity of capital generates internal competition for scarce resources resulting in each cost-incurring process being re-analyzed in terms of the cost-benefit analysis. The normal reaction in these situations is to contain all costs, with labour costs in particular, and increase productivity. Employment patterns may shift from full-time employment to the hiring of part-time or temporary workers. Personnel employed in specialised areas not directly contributing towards the earnings, such as those engaged in health and safety research and regulation, may be laid-off, increasing the operating pressure on the total workforce. At the same time the demand for an increase in productivity creates the atmosphere which is associated with an increased accident rate.

The economic pressures are not felt by the employer alone, having an equal effect upon the labour force. In situations of increasing unemployment the worker's prime concern becomes that of retaining his employment. Considerations of an increasing health and safety risk are relegated to the background forming part of the long term evaluations but playing no part in the short term considerations. The tolerance of unsafe and unhealthy conditions increases and the fear of discipline or dismissal stifles any internal dynamics that may still operate.

A similar pressure is felt by the government, which faces the dual task of reviving the economy as well as protecting the health and safety of the workforce. In these circumstances the temptation to compromise on health and safety issues receives a heavy impetus, as curtailing expenditure on detailed supervision not only saves scarce resources but also allows the production sector just that much more lee-way in increasing their competitiveness. At the same time the diminished labour pressure also favours a political decision in favour of the employer, allowing the government to take the strategy of persuasion a step further, all at the cost of the workers' health and safety.

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[66] Recession has been defined as a recurring period of decline in total output, income, employment and trade, usually lasting from six months to an year and marked by widespread contractions in many sectors of the economy, while a depression is a depression that is major in both scale and duration. Source: *National Bureau of Economic Research*, Cambridge, Mass.

Hard economic times raise the question about the effectiveness of the internal-responsibility system. As seen in the previous sections, the system is heavily dependent upon employer cooperation and worker organisation and ability. All these factors receive serious setbacks in times of recession. When faced with arguments of a choice between safety and employment the workers are likely to choose the former. Further, the resulting job losses have a detrimental effect upon the labour organisations and it becomes difficult for them to maintain the same negotiating position or to effectively support the maintenance of internal health and safety networks. Programmes for enhancing health and safety through increased information flow, training and research all face the consequences of depleted resources.

Dawson, Willman, Branford and Clinton in their study on self-regulation in the United Kingdom argue on a similar basis in regard to the effects of economic downturns. Although their studies cite the effects as being more pervasive than direct, the negative consequences are clear. The study suggests that it is not necessary for the effects of recession to be translated into the making of direct choices between safety and capital but that the "infrastructure which supports effective safety management appears slowly to disintegrate."[67] The diminished negotiating strength and desire for financial security of the workers can allow the internal-responsibility system to be subordinated to market control.

CONCLUSION

The choice of strategies in regulating occupational health and safety range from one extreme of complete state regulation to the other extreme of complete voluntary self-regulation. Both these extremes are inappropriate for practical adoption, the solution lying somewhere in between. Even though in the earlier discussion limitations of self-regulation have been detailed they do not lead us to propose the complete abandonment of internal-responsibility. Regulation in occupational health and safety requires a role for each of the three parties, i.e., the management, the workers and the state. Operating at different levels and stages of the process, the interaction and participation of all these parties, can effectively enhance the health and safety environment at the workplace.

The above section brings out the conclusion that self-regulation can be effective, but only if adequately supported and resourced by the state. Limitations in the conception of a

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[67] Sandra Dawson, *supra*, note 49 at 258.

common interest signify that development and maintenance of effective internal-regulatory structures is not a "natural" phenomenon in a deregulated market, government intervention forming the essential catalyst for obtaining the desired objectives. This essential role of the state gains importance in particular situations such as the small-firm sector, the non-unionised workplaces, sub-contracting, and other such employment relationships. In addition, when regulation requires the making of policy decisions at the national or international levels, or requires the outlay of large sums of capital with delayed rate of returns, such as for research, provision of information, coordination and cooperation, it is only the state which can provide the required input. Although some limitations can never find an optimum solution and would be visible in every form of regulation strategy the objective of attaining the ideal structure requires that the process of reform be continued.

Once it is accepted that there is a central role for the government and its agencies in the regulation of occupational health and safety the analysis then shifts away from justifying state intervention towards determining the proper position the state should occupy in the process. Since it has already been accepted that excessive state intervention is not the alternative, the solution lying in the determination of an appropriate mix between self and state regulation, what then needs to be determined is the nature and extent of the state's role in regulating occupational health and safety.

CHAPTER FOUR
THE STATE ROLE IN OCCUPATIONAL HEALTH AND SAFETY

INTRODUCTION

The previous chapter on the limits of self-regulation has clearly brought out the assertion that the internal-responsibility system mandates a tripartite structure, with a need for employer, employee and state participation. The emerging conclusions suggest that self-regulation, though an appreciable advancement in promoting health and safety, can only be effective if supported by the state's regulatory structure. In absence of the assumptions of a common interest and equality in bargaining power it is unlikely that the internal-regulatory system could develop naturally. The internal health and safety organisation would still require the state's financial, informational, technical and coercive support to be of any value. While it can be assumed that there is no pre-determined ill faith or a conspiracy on the employers' part at increasing the health and safety risks, the economics of production and the situational complexities make such deterioration a natural consequence. In the face of inadequate knowledge, capacity, motivation and adverse influence of economic factors, it is only the presence of the state with its ability to enforce compliance that ensures the maintenance of acceptable conditions at the workplace. On the other hand one does have to admit that excessive reliance on formal legalism does not produce the most effective results.

So what is the appropriate mix between state intervention and self-regulation? What exactly is the state supposed to do to ensure that self-regulation works? The precise answer to these questions has eluded policy makers and would continue to do so as the proposed solutions in each case confront a different aspect of the problem. Because of the varied nature of the risks which are determined by time, place, industry and a variety of such factors, no one role can be put forward as the solution to all regulatory problems. The key, as Rees has rightly said, lies in "matching [the] regulatory tools to the regulatory problem."[1]

It is not my intention to provide a conclusive answer to these questions, nor is it possible to do so. The varying nature of the problem and the influencing factors make that

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[1] Joseph V. Rees, *Reforming the Workplace: A Study of Self-Regulation in Occupational Safety* (Philadelphia: University of Pennsylvania Press, 1988) at 194.

a difficult, if not impossible, task. However, a discussion of possible state initiatives can be attempted. The following chapter is about the state and its role in the regulation of occupational health and safety. The attempt is to show how by use of regulatory pluralism as the operating strategy the state could help promote and support the internal-responsibility system, while at the same time ensure that the participants remain accountable for their actions.

REGULATORY PLURALISM

From the start this study has viewed the regulatory process as a combined effort of the interacting social fields. Instead of relying upon either the state-centred stance of legal centralism or the complete deregulation of the enforcement process the approach projected has been that of "regulatory pluralism".[2] In recognising the benefits of self-regulation and increased worker participation the prevalence of private regulatory structures at the workplace has been acknowledged. Since the influence of these semi-autonomous social fields substantially affects the final outcome of reform policies, a greater appreciation and understanding of the indigenous workplace regulatory systems needs to be undertaken. The interaction of the parties, both public and private, creates a structure of interdependence and mutual influence through which the health and safety reforms could be effectively channelled. To achieve a better understanding of this reasoning first the state's functioning as a semi-autonomous social field needs to be understood.

When seen from a pluralistic perspective the state forms only one of the many semi-autonomous social fields which contribute as independent participants in the internal worker-management relationship. This ideology of seeing the state as an independent actor forms an evolution of the traditional pluralistic theory, which saw government policy more as a combination of various economic interests and social movements which vied with one another to determine and influence the final outcome.[3] The traditional norm did not recognise the state as being an autonomous field in itself, with the capacity to effect and

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[2] The term has been used by Joseph Rees in his studies on the working of the Cooperative Compliance Program undertaken by the Occupational Health and Safety Administration in California. For details see: Joseph V. Rees, *Ibid.* at ix.

[3] Joseph V. Rees, *supra*, note 1 at 4. Also see: David P. McCaffrey, *OSHA and the Politics of Health Regulation* (New York: Plenum Press, 1982) c. 1.

influence policy. These theories, however, could not explain why in certain situations the initiatives exceeded the demands, or why the states themselves pioneered certain initiatives in the absence of demands from pressure groups. The relative autonomy of the state's decision making capacity, especially when faced with opposing group pressure, brought into focus the ability of the state to act as an independent entity in the formulation and pursuit of its own goals.

i. The State as an Interacting Social Field

The term "semi-autonomous social field" owes its origin to Sally Falk Moore[4] who used it when attempting to describe the prevalence of a network of relationships and groupings which, through interaction and inter-relation, formulate and observe norms or rules for governing their relations without the influence of state centralist law.[5] These social fields were referred to as semi-autonomous as they were not the creatures of any express state ordering but resulted from the internal bonding and relationships, their rules and norms not having the coercive force of state enforcement, but that of internal regulatory enforcement.

If a sub-set came to be guided by its internal structural setting and as a result was to exercise independence in its decision making behaviour, behave in an inflexible manner and obtain direction from the constituents of its organisation rather than be influenced by external interests, the existence of a social field can be said to be established. This social field, however, as all other such fields, would remain influenced by external influences and respond to interaction and networking but would also retain a certain level of autonomy and identity which allows it to behave as a semi-independent party in the regulatory process.

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[4] For details see: S. Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7 Law & Soc. R. 719; S. Falk Moore, *Law as Process - An Anthropological Approach* (London: Routledge & Kegan Paul, 1978).

[5] The term "centralist law" refers to rules and norms as proclaimed through the parliamentary structures and courts. These laws possess state support and are enforced through the state's administrative structure with the use of coercive power if required. The term "social laws" refers to internally generated rules of conduct which, in the absence of state coercive power, are enforced through the internal dynamics of the social fields. This separation of state and social law is done to clarify the different rules and norms prevalent in society, with the state laws being only a sub-set of the established structure.

The state, which is an abstract identity and in practise is comprised of its agencies or sub-sets, in terms of this analysis could also be classified as such a social field.[6]

> "One cannot see the state just as the expression of class interests, without recognising that such an expression requires an organisation which, since it cannot be other than a social network of people, exists in its own right and possesses interests of its own."[7]

This argument is not based upon any clearly drawn lines demarcating where the field of the state begins or ends, but refers to its various organisational structures which have a tendency to operate as distinct social fields. If one was to consider the process of law making, taking into account the parties involved including the state organisations, the different agencies are apt to behave differently because of their structural settings.

The boundaries of the state social field are a derivative of the external pressures, as such pressures promote internal solidarity and encourage the constituents to lay a greater emphasis on the promotion of autonomy and reputation. The external pressure on the organisation promotes resistance, which as a consequence of limited rationality, technological incompetence and an attitude of finding "a" solution rather than "the" optimum solution can force the direction of response adopted to differ from that being suggested by the pressure groups. In addition, the tendency to avoid uncertainty and innovation, preference for the established structures and likeliness of the leaders to give direction to the organisation from their own ideological viewpoint, help form the agency into a separate social field. In its operation this social field shows a relative degree of autonomy. Having been established as the body for determining the state laws the state social field does not limit the input to external sources alone, but also provides its own autonomous influences. It forms a source

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[6] See Theda Skocpol, "Bringing the State Back In: Strategies of Analysis in Current Research" in Peter B. Evans, Rueschemeyer & Skocpol, eds, *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985) 3; David P. McCaffery, *supra*, note 3; Harry Arthurs, "Understanding Labour Law: The Debate over 'Industrial Pluralism'" (1985) Current Legal Problems 83 at 91.

[7] F. H. Cardoso, "On the Characterization of Authoritarian Regimes in Latin America" in D. Collier, ed., *The New Authoritarianism in Latin America* (Princeton: Princeton University Press, 1979) at 51, as quoted in D. Rueschemeyer & Peter B. Evans, "The State and Economic Transformation: Towards an Analysis of the Conditions Underlying Effective Intervention" in Evans, Rueschemeyer & Skocpol, eds, *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985).

for state as well as non-state law.[8]

Still it would be inappropriate to suggest that the autonomy is complete. The social field only remains semi-autonomous, still depending upon the prevalence of certain factors to exercise autonomous initiative.[9] The collectivities of state officials who comprise the social field of the state, insulated from the economic and social pressures, are apt to be influenced by considerations such as the necessity to maintain domestic order, organisational resources, long-term consequences and human considerations. The influence exercised at different levels can produce a variety of outcomes. Besides the internal organisational dynamics, the influence of national and international structures force the making of decisions in spite of indifference or resistance from the other social fields.

ii. The Rationality of State Action

Autonomy is essential for effective state intervention.[10] The state must be in a position to evaluate the available information in a rational manner and if need be, make decisions which sacrifice the interests of certain sections in the interest of an over-all benefit. However, while accepting the state as an independent actor in regulating occupational health and safety, sceptics have questioned the capacity of the state to make rational and autonomous decisions. The dependency of the state on a minimum of economic activity for financing and maintaining its operations renders it susceptible to market controls. This economic dependence ensures that capitalist interests will retain a say in even the most autonomous of states, making complete substitution of the dominant interest an extreme eventuality. Further, the argument goes that the ability of the state managers should not be over-estimated, and their desire for self-legitimation and self-preservation should be taken into consideration. Even if state officials have access to additional information and resources,

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[8] This fact has been supported by authors such as, Harry Arthurs. See: H.W. Arthurs, *Without the Law: Legal Pluralism and Administrative Justice in Nineteenth Century England* (Toronto: University of Toronto Press, 1985); Harry Arthurs, *supra*, note 6 at note 29.

[9] For a better understanding of the determinants of states' autonomy and state capability see: Evans, Rueschemeyer & Skocpol, "On the Road towards a More Adequate Understanding of the State" in Peter B. Evans, Rueschemeyer & Skocpol, eds, *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985) 347 at 350.

[10] Theda Skocpol, *supra*, note 6 at 9.

these factors alone are not sufficient to merit the claim that they have obtained all the relevant information and knowledge required to make rational and informed decisions.[11]

Although such arguments are of relevance and must be kept in mind, one cannot completely dismiss the state's role on such a basis. Even if only partially successful, the state does retain the capacity to address problems beyond the reach of the workers or the employers. The problems faced in state action relate more to a lack of internal cohesion and coordination, hence requiring a better understanding of the state's role and objective in the process. Once the objectives, means and desired results are earmarked, the regulatory organisations can be made to work on the established guidelines in a cooperative and coordinated manner.

This is also supported by the fact that no state action is ever completely autonomous, every action does favour some interested group and in that context can said to have been influenced. In addition, the action is bound to reflect the desire to maintain and increase the political advantage, social control and reinforce the authority of the persons who formulated the decisions. However, this does not necessarily imply that the consequences will be detrimental, for even in such situations a minimum advantage can be obtained. It has generally been seen that when the state is forced into taking action against the subordinate interests it also becomes more willing to take on the dominant class.[12] The resultant action against both subordinate and dominant interests increases its autonomy and in the long run allows it to use the relative insulation from external pressure to pursue autonomous policies. The presence of even a semi-autonomous structure can establish the required base to build upon, allowing structural changes to be made to increase autonomous operation.[13]

If it can be ensured that the state's action is based upon adequate knowledge and supported by sufficient resources notwithstanding the possibility that the ultimate effect may be fragmented, inefficient or at cross-purposes, the chances are that it would improve the working conditions and help formulate long-term strategies transcending the narrow short -

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[11] Theda Skocpol, *supra*, note 6 at 14.

[12] D. Rueschemeyer & Peter B. Evans, *supra*, note 7 at 63.

[13] For comments on the state's autonomous role and recommendations on how that autonomy could be enhanced see: D. Rueschemeyer & Peter B. Evans, *supra*, note 7 at 63; Evans, Rueschemeyer & Skocpol, *supra*, note 9 at 350.

term outlooks of the other social groups involved. Even if these conflicting worker and entrepreneurial pressures do not increase state autonomy they would increase the chances of internal compromise amongst the contenders with the state acting as the mediator.

In review even if it assumed that state autonomy is not a permanent feature of any state structure and tends to shift with time, place and situation; a crisis precipitating the need for official and administrative initiative which in normal times remains dormant and subdued, the need to establish social structures that facilitate the presence of such autonomous conditions remains essential for effective state intervention.

POLICY RECOMMENDATIONS

State intervention, witnessed now for over a hundred years, has remained submerged in critiques and prescriptions. Arguments about what the government should and should not do have remained at the forefront of policy discussion. The proposed direction for state action changes significantly with a change in ideology. For some the state is a support structure for the capitalist market, while for others it serves the role of the protector of universal welfare principles. Still, in most countries, some form of state intervention can be found. The state continues to play an important part in establishing, maintaining and regulating public economies and welfare structures in defiance of the almost unanimous advice of the free-market economists regarding the inefficiencies and disadvantages of excessive state regulation.[14] These interventions have time and again found justificatory support and have to an extent helped dispel the fantasy of a vanishing state, but fears of absolute despotism, sponsored repression and extreme subjugation remain persuasive and continue to restrain and limit state involvement. The state's present dominant role has evolved and remained so because of its capacity to deal with certain situations requiring external intervention.

As is evident from the number of different approaches suggested for state intervention, it would be simplistic to recommend any one as being the most meritorious as each is suited to a particular situation. Complete or even predominant reliance on any one approach, be it the adoption of the standard based regulation or adoption of economic incentives for

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[14] For recognition of the state's important role as a participant in all major disciplines see: Theda Skocpol, *supra*, note 6.

promoting health and safety, would be inappropriate. What is required is flexibility in the choice of the policy instrument so that the solution may fit the problem. The state's attitude should not be for the selection of one strategy, but the use of a variety to complement each other in finding the most efficient and practical solution. In this regard cooperation, self-regulation, persuasion and prosecution are all options which remain available to be used when needed. Rees in referring to this flexible regulatory enforcement has emphasised that what forms the most critical part of the analysis is not which strategy needs to be adopted, but when that strategy is adopted.[15] The dynamic nature of the work relationships and the rapidly changing production methods require the state's intervention strategies to correspond to the altered situation.

However, certain state activities in promoting health and safety are fundamental in terms of their support and benefit. In situations where the workers do not have the financial security or are ignorant about the nature and extent of risk they face, it is only the state's *suo moto* intervention which can prevent the employer from ignoring these risks. State intervention compels the employer to internalise the cost of health and safety risks into their production costs. Keeping in mind these general categorisations, the following review covers some of the desired areas for state action in the regulation of occupational health and safety. It is not meant to suggest that the following are the sole policy options available or that they are mutually exclusive in nature. In fact quite to the contrary, overlap amongst them is not only unavoidable but desirable.

A. Strategies for Regulation

One of the main criticisms of the internal-responsibility system has been the inadequate state role in providing coercive support to the workers in the exercise of their rights.[16] The

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[15] Joseph V. Rees, *supra*, note 1 at 12.

[16] For support of this view Larry Gauthiers, "Ontario Occupational Health and Safety Act and the Internal Responsibility System: Is the Act Working?" (1984) 7 Canadian Comm. L. J. 174; Richard Fidler, "The Occupational Health and Safety Act and the Internal Responsibility System" (1986) 24 Osgoode Hall Law Journal 315; Eric Tucker, "The Persistence of Market Regulation of Occupational Health and Safety. The Stillbirth of Voluntarism" in *Essays in Labour Relations Law* (Don Mills, Ont.: CCH Canadian, 1984) 219 [hereinafter *Stillbirth*], Phil James, "Reforming British Health and Safety Law: A Framework of Discussion" (1992) 21 The Industrial Law Journal 83, Sandra Dawson, et al., *Safety at Work: The Limits of Self-Regulation* (Cambridge. Cambridge University Press, 1988).

workers have come to view the internal-responsibility system as a conscious effort to bring the market forces of regulation back into the policy considerations.[17] The benefits have remained restricted to the organisations where the workers already hold a proportionate share of the negotiating power. This does not in any way suggest that such negotiating power is used in bargaining for health and safety issues, but shows that the existence of that power allows the worker coercive strength to compel workplace reform or just a more free and uninhibited exercise of the existing statutory rights. Another way of putting the same idea is that in the absence of voluntary compliance and identity of interest, for any legislative policy to be successful the state must be willing to enforce it through the use of its coercive power. Regretfully that has not been the case in occupational health and safety. In fact the internal-responsibility system has been used as an excuse to reduce the level of state inspections and orders.

One fact that has emerged clearly from self-regulation's past decade of operation is the continuous need for state support. The limitations outlined in chapter 5, emphasise this fact. Even when the need for a greater worker participation and internal-regulation has been recognised, the structural difficulties in the system prevent complete reliance on the employer-worker responses. The system still leaves an important role for the state to play in terms of inspections and prosecutions, however, the need is also to make the administrative structure more responsive and accessible. The following policy recommendations would help in this direction.

i. Decentralisation

When earlier the state was referred to as a semi-autonomous social field which had an interlinked relationship with the employment situation and a potentially influential effect upon its conduct, it had been assumed that the state organisation itself was operating with adequate resources, knowledge, coordination and coherence. However, in the internal operation of the state organisations these assumed prerequisites are dependent upon the structure chosen. The choice of an organisational structure is of concern as in certain cases

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[17] This forms the conclusion of the NDP Task Force Report on occupational health and safety. For details see: *Not Yet Healthy Not Yet Safe* (Ontario: NDP Task Force on Occupational Health and Safety, 1983). Also see: *Report of the Royal Commission on Matters of Health and Safety Arising From the Use of Asbestos in Ontario* (Toronto: The Commission, 1984) (The Dupré Report); *Stillbirth, supra*, note 16 at 238.

the state requires decentralisation to obtain maximum efficiency.[18] A highly centralised structure could cause problems of hierarchy, loss of information, delays and wastage.

This is particularly relevant in the case of occupational health and safety where practical knowledge of the workplace, day to day dealings with the concerns, changing nature of the risks and the need for regular follow-ups make the lowest level of the organisation the most influential. Subordination to a centralized chain of command with a top-down flow of directives deprives those most able to provide the practical solutions of any chance of participation. In addition, by removing the initiative to indulge in effective decision making the inspectors in such cases get bogged down in the performance of routine and administrative enforcements and are unable to make use of the information about the particular conditions available to them.

The delegation of power in such cases is critical not only to retain a practical efficiency in operation but also because of the very political nature of the regulation process. In the presence of a highly centralised bureaucracy, the organisation loses its ability to conduct individual negotiations with conflicting interests and also the opportunity to build support and self-reliance at the worker levels. Decentralisation and an increased delegation of decision making power to the lower levels of the structure increases the ability of the worker to demand immediate solutions at the individual levels, and even in unionised firms ensures that the remedy suits the problem. By bringing the state closer to the worker it assures a greater accessibility and promotes confidence in the state structures.

However, at the same time decentralisation can also create administrative problems of uniformity, coordination and ease of individual domination by the dominant class particularly in areas where worker knowledge and response have not attained the desired level of development. The training, education and personality traits of the inspectors become important factors in such cases, and their ignorance, especially on health issues, are drawbacks which undermine the unique contribution of the process. Although in a more favoured position to evaluate the long-term considerations the state managers, from a lack of knowledge and the support of a developed and efficient bureaucratic structure, may show more concern for political and personal gains rather than the pursuit of ideological goals.

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[18] For a comprehensive discussion on the decentralization aspect for effective state intervention see: D. Rueschemeyer & Peter B. Evans, *supra*, note 7 at 55.

These restrictions gain ground with the increase in state functions and the expanded structures which require an increasing supply of economic support.

These assertions may be true in the sense that operating from a limited information and knowledge base and seeking to promote economic development and stability the inspection staff does support the market, but to say that it is completely dominated by capitalist concerns would be an exaggeration. How else would one explain the numerous social welfare and public concern legislation which operate at the cost of the dominant class interests? It would have to be admitted that the state administration does reflect autonomy in its operation, although the nature and extent of such autonomy is a product of the prevailing circumstances. These assumptions are made on the qualification that autonomy will always remain a relative concept and even in the most modern and advanced states will remain subject to the influence of the dominant interests. On the other hand having inspectors who still retain a level of autonomy is certainly a better option than complete reliance on worker-employer regulation.

Once these limits of decentralisation are understood it remains possible to strive for a positive correlation between decentralisation and regulation. The objective is to obtain the right balance between the two structures. In this regard, the prevalence of unionisation at the workplace, the relative size of the firm and future trends in that direction, the economic situation and capability of the state regulatory organisations are all relevant considerations. One option would be to establish a dual line of control, with one structure being more attuned to the broader considerations and operating from a more centralised structure, while the other would obtain input from that central structure and respond to the practical necessities at the firm level. The division of powers would be made on the area of influence and the issues involved. The problems of financial control and internal coordination would, however, subsist and needs to be dealt with. Mention needs to be made here regarding the promotion of group objectives and motivation. The presence of a distinct identity and group status in the organisation, if matched with the intellectual capability, can effectively counter the drawbacks of decentralisation making it a beneficial option.

ii. Prosecution

Traditionally the state regulatory strategy has supported the persuasive strategy over the prosecutorial. The reason for the adoption of the prosecutorial approach were not so much the co-option or intimidation of the inspectors but the need to make the most optimal use of the available resources.[19] "In doing so they [were] reflecting the reality of the political, economic and social environment in which they operate...".[20] Whatever were the justifications in the past, the present trend favours a higher level of prosecutions.[21]

This assertion is justified on the grounds of a failure of the voluntary model for compliance. Although voluntary compliance is recognised as being more effective than enforcement, to bring the parties towards a self-motivated compliance remains a difficult task. In the absence of a common interest between the workers and employers and an equality in their relationship it is the employer who retains control over the market sanctions and the power to enforce his decision. In view of this imbalanced relationship, criminal sanctions, imposed through the state's enforcement structure provide an effective incentive for employer compliance. The imposition of criminal penalties, including exemplary fines, make compliance an economical alternative. Arguments about the cost-effectiveness of an enlarged inspectorate are valid considerations, but when weighed against the costs of the health and safety risks being generated, can easily be rationalised. In this regard the need to expand the state's enforcement staff forms one of the suggestions. At the same time the existing regulations need to be drafted to facilitate prosecutions. Clear language, mandatory sentences and fines, a clear legislative intent and an increase in prosecutions would force the employers to comply with the health and safety regulations.

In considering the merits of the persuasion strategy it would appear that the approach has some rationale but those considerations do not apply in all circumstances, a distinction needs to be made on the levels at which each strategy needs to be applied. In the specific case of the small and unorganised sectors where the workers suffer from a lack of internal

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[19] For details see: Harry Arthurs, *supra*, note 8.

[20] H.J. Glasbeek, "A Role for Criminal Sanctions in Occupational Health and Safety" in *Meredith Memorial Lectures, 1988* (Cowansville: Yvon Blais, 1989) 125 at 139.

[21] For the debate on the use of criminal sanctions See: Glasbeek and Rowlands, "Are Injuring and Killing at Work Crimes?" (1979) 17 Osgoode Hall Law Journal 506; *Stillborth, supra*, note 16 at 241.

cohesion and ability it is only the use of coercive and prosecutorial force which provides an incentive for compliance. Admittedly the prosecution process has its limitations but in the presence of a continuous onslaught on the workers, the use of force can find no better justification. The fact that needs to be brought out is that voluntary disregard of statutory regulations or violations which result from employer carelessness and negligence are serious criminal offenses and could result in the imposition of heavy fines and imprisonment. The imposition of "egregious" penalties which are exemplary in nature or the introduction of corporate or industry-wide fines which transfer the benefits to the entire industry and not limit them to single units are other policy options.

The fact of the situation remains that occupational health and safety are important public issues and in spite of the benefits of the internal-responsibility system cannot be left at the complete control of the market forces. Even when the need for increasing the power, participation and self-regulation of the workers are being realised, it is also becoming clear that without state support those advantages would soon be lost.[22] The supportive nature of the state role highlights the inspection and prosecutorial powers in the hands of the state and the need for them to be more effectively and efficiently exercised.

iii. Inspection

State inspections traditionally have been used as regulating programmes to identify hazards, set standards and related procedures to eliminate and control such hazards, establish control structures and monitor the effectiveness of these structures to ensure effectiveness.[23] Admittedly the process tends to be cost-heavy and bureaucratic. The state's present financial accountability makes it more difficult to invest money without justifying the cost. The occupational health and safety field has, however, shown a positive justification for

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[22] Michael D. Parsons, "Worker Participation in Occupational Health and Safety: Lessons from the Canadian Experience" (1988) 13 Labor Studies Journal 22 at 32.

[23] For more details on inspections see: International Labour Organisation, *Report of the Tripartite Mission on the Effectiveness of Labour Inspection in the United Kingdom* (Geneva: International Labour Office, 1982); Worker's Compensation Board of B. C., *Report on the Effectiveness of Accident Prevention Inspections* (December, 1975) (Chair: K. Mason); R.S. Smith, "The Impact of OSHA Inspections on Manufacturing Injury Rates" (1978) 14 Journal of Human Resources 145; D.P. McCaffery, "An Assessment of OSHA's Recent Effects on Injury Rates" (1983) Journal of Human Resources 144; Sandra Dawson, *supra*, note 16 at 207.

an increased investment in state regulation.[24] The focus for concern needs to be on making the regulation cost-efficient and effective rather than reducing it altogether.

For the conduct of an effective inspection, the state will have to increase the budgetary resources available for occupational health and safety.[25] Although over the years with an increase in public awareness and worker concern those allocations have witnessed an increase, the situation still fails to meet the need of the day. The number of inspectors available still remains grossly disproportionate to the number of establishments and workers to be regulated. When compared to the state's spending in other less important fields this brings out the lack of commitment which the state has shown towards enforcing regulations on health and safety.[26]

The increase in resources would allow the inspection staff to be more comprehensive in their efforts and provide better support to the internal-responsibility system.[27] To maintain the pressure on the employers and obtain worker confidence an increase in spot inspections conducted on a random basis could be undertaken in addition to the regular planned inspections. Pre-operation checks of special equipment, new equipment inspection and critical part inspections conducted in a regular and efficient manner could significantly reduce the workplace safety risks. Beside the safety aspect, the inspectors need to focus on the health risks through provisions for adequate testing and monitoring of the work environment.

It is necessary in the conduct of the inspection that the parties concerned are involved. This is where the health and safety committee and the safety representatives can be of assistance. As they are better aware of the practical problems and deal with the risks on a day-to-day basis, the relationship between the state regulatory staff and the internal health and safety organisation of the firm is of the utmost importance. In the presence of an inter-

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[24] See J. Braithwaite, *To Punish or Persuade* (Albany: University of New York, 1985) ch 4.

[25] For support on this view see: Phil James, *supra*, note 16 at 97.

[26] For example in Ontario there is provision for only 312 inspectors who are supposed to regulate more than 3.5 million workers in 178,194 establishments. H.J. Glasbeek, *supra*, note 20 at 136.

[27] For a discussion on how to conduct an effective inspection see: Kevin A. Stewart, *Effective Workplace Inspections* (Canadian Centre for Occupational Health and Safety, 1989).

related, two-way relationship the two could learn to depend upon each other for informational and enforcement support providing a more cost-efficient and effective structure. By involving the workers in the inspection process and making available to them all the concerned information it would help increase their level of understanding and provide them with a chance to help in the establishment and monitoring of the control structures.

An informed and knowledgeable worker participation could also lead to an inspection schedule which is more efficient and responsive to the worker needs. By obtaining feedback from the workplace and responding to the worker demands the inspection staff could distribute their workload in a manner which takes into account the level of regular inspection required. This form of regulation has, however, higher chances of success in organised workplaces where the workers have sufficient power and capability to exercise their rights than in smaller workplaces. In smaller more unorganised workplaces, regular inspections remain the only option.

iv. The Special Case of the Unorganised Sector

The present rate of unionisation in the Canadian workforce is only 39%,[28] still leaving the majority of workers to depend upon their individual bargaining strategies to effect workplace reform.[29] Even when it is recognised that in certain extremely hazardous industries, such as mining and construction, it was these very issues which prompted unionisation, it is also the case that a greater number of emerging hazardous occupations remain outside the purview of the organised sectors. In addition, the success of the unions has largely been confined to the relatively bigger establishments which are already more structurally balanced to deal with the health and safety issues.

In conditions where a larger portion is employed in the unorganised sector and then further sub-categorised in the smaller firms, the chances of employer domination and market control is extremely high. While unions do attempt to equalise their gains and ultimately the improvements obtained at the organised workplaces do filter down to the unorganised establishments, the pace of the process is pathetically slow and the proportionate harm being

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[28] Source: *The Canadian Labour Climate* (Labour Canada, 1987).

[29] For a comprehensive discussion of the special problems of unorganised workers see: Ashford, *Crisis in the Workplace* (Cambridge: MIT Press, 1976) at 373. Also see: Sandra Dawson, *supra*, note 16 at 259.

suffered unacceptable.

The state in dealing with this section of the workforce has a special and leading role to play. As one of the prime drawbacks of the unorganised sector is the lack of adequate informational and technical support this should form the prime focus. Having already discussed the need for providing information in an earlier section, it need only be emphasised that the primary target should be the unorganised sector, for besides the state they possess no other means to obtain such support. Although the unions will continue to play a part in promoting the general cause of the worker their slow rate of progress and internal constraints make it futile to depend completely upon them to provide the lead role. A possible solution to remedy this could be to facilitate the unions in equalising the gains obtained. The state could provide legal support for the accepted conditions making it mandatory for the entire industry or sector to comply.

At the state's level, the emphasis on targeting the unorganised sector could be achieved through specific programs which are designed for the unorganised workers. An increase in informational services, bringing the total workforce under the preview of the Occupational Health and Safety Act, mandatory appointment of committees or representatives in each establishment, providing free legal services, an increased access to the state's administrative structure, educational programmes, training sessions and statutory requirements for maintaining and filing of returns are some of the ways in which these programs could work.

Mention needs to be made here of the state's enforcement strategy, which data suggests concentrates more on the organised rather than the unorganised sectors.[30] As already mentioned, the state needs to retain its presence in supporting occupational health and safety through its coercive influence and for that purpose an increased attention in the small firm and unorganised sectors is required. The organised workers are more capable of self-regulation and possess relatively better structural support to obtain employer compliance. The unorganised workers lack such essentials and hence require the state's support and oversight to prevent them from being completely regulated on the market criteria. With the help of the state regulatory enforcement it would be easier for these workers to attempt internal-regulation, and in case of blockades use the state's presence to obtain the desired reforms. Still this does not imply that the sole catalyst for state intervention should be

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[30] For support see: *Stillborth*, *supra*, note 16 at 243.

worker demands, for in some situations those may not be forthcoming. Here it is the state's internal capability for intervention which needs to be exercised.

v. The Special Case of the Small Firms

As detailed in the previous chapter, the size of an organisation has peculiar influences on the health and safety risks present at the workplace.[31] The inability of the workers employed at such workplaces to obtain information and the internal administration, organisation and financial vulnerability of the firms increase the chances that the priority given to the health and safety issues is going to be overridden by the other financial concerns. Even if an attempt is made to decrease the workplace risks the initial costs could be too high for the firm to meet. In such a situation, if unassisted the firm is liable to ignore the health and safety concerns altogether and no amount of internal-regulation would make any difference.

The state in coming to their assistance can provide the necessary financial and structural support to re-affirm the balance. In addition to the previously suggested policy options, the state could provide the smaller more vulnerable firms with special assistance in terms of financial support to meet the cost of capital investments. When combined with an increase in informational support and technical consultative services the firm could be helped to overcome their internal disabilities. In this regard the suggestion for maintenance of group health services would provide an economic and practical solution.

The point which needs to be re-emphasised is that because of their size, financial constraints and limited worker organisation the smaller firms pose a greater health and safety threat than the larger establishments even if operating in comparatively less hazardous environments. The state needs to devote more attention to these firms for without that regulatory and supportive influence their internal capability to achieve workplace reform becomes seriously distorted.

B. Policy Instruments for Regulation

If one is to accept the argument that commonality of interest between workers and management is a determinant of the economic analysis then it would be logical to attempt

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[31] Also see: Ashford, *supra*, note 29 at 366.

to control that economic situation and insure compliance with health and safety regulations in spite of the conflict of interest. Since external economic pressures are important influences on the firm and the incentives to transfer the cost for providing health and safety facilities onto the society outweigh the deterrents, the problem of forcing the firm to internalise the costs is an important part of the state's policy. An initial attempt on this score has been made through the worker compensation schemes, but that relates more with the post-harm situation. While the compensation schemes have provided some benefit by raising the slogan of "safety pays" they are not as desirable and cost effective as prevention. For reasons detailed in chapter 3, the market on its own is not bound to internalise these costs nor provide for preventive measures. Deficiencies in the knowledge of health and safety risks, the short-term outlook, the discounting attitude of the employer and the variety of social, cultural, psychological and environmental pressures on the workers which convince them to accept the risk as an inevitable part of the job emphasize the need for state policy initiatives. This is sought to be achieved primarily through two policy instruments.

i. Legislative Standards

Standards refer to the established guidelines which require certain aspects of the environment to be regulated and maintained at specified limits. Similarly, they specify restrictions on the use of certain types of equipment without specified safeguards and the maintenance of certain facilities at the workplace for maintaining and promoting worker health and safety. For example standards regulate the level of noise which is acceptable, the maximum number of workers which can work in a workplace in proportion to the space available, lighting, ventilation etc. Enforced by the use of penalties and force they provide the coercive dimension for ensuring compliance with health and safety regulations.[32]

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[32] For details on standards and their enforcement strategies see: Ray Bentes, *Canadian Occupational Health and Safety Standards: A Discussion Paper* (Canadian Centre for Occupational Health and Safety); G.B. Reschenthaler, *Occupational Health and Safety in Canada: The Economics and Three Case Studies* (Montreal: Institute for Research on Public Policy, 1979); Mendeloff, *Regulating Safety* (Cambridge: MIT Press, 1979).

The drawback in the use of this policy instrument is in relation to the methods by which these standards are established and enforced.[33] As the standards are used for very specific hazards, they face the restrictions of scientific evaluation and over-regulation. The absence of conclusive evidence of harmful effect, the limited research being conducted and the speed with which new materials are being introduced into the production process, make the regulatory response very limited in scope. Since a certain level of risk is classified as acceptable to ensure the provision of essential services the criteria for determining that acceptable level presents an opportunity for abuse. Also, the standards are a product of the state's law-making process and suffer from all the administrative and bureaucratic limitations inherent in that process. Requiring the use of coercive force and a regulatory oversight to ensure the enforcement of the standards again brings into question the cost-effectiveness of extensive and enforced regulation by a third party external to the workplace.[34]

For a better operation of the standards as a policy option, it is essential that the limits of bureaucratic, legal and enforcement costs be recognised and attempts be made to adapt the system towards reducing these costs and inefficiencies. Out of date and obsolete standards need to be continuously updated and where not required done away with. On-site advice and consultation needs to be more accessible so as to make the standards more suitable for the individual establishment and a continuous monitoring system needs to be established which not only targets the large unionised or more hazardous organisations but also responds to the lesser more trivial dangers at the smaller workplaces. In this connection, the need for worker education and knowledge with the capability of internal monitoring and detection of violation comes into consideration. Although complete reliance on the worker to detect non-compliance would be inappropriate, in larger firms with higher unionisation rates an increased dependence on the internal-responsibility system could be attempted. This

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[33] For details about the determination and enforcement of standards see: Hushion, Oglive Associates Limited, *An Assessment of the Effectiveness of the Government Decision-Making Process in the Field of Occupational Health and Safety* (Economic Council of Canada: Technical Report No. 5, 1981); Eric Tucker, "The Determination of Occupational Health and Safety Standards in Ontario, 1860 - 1982: From Market to Politics of..." (1984) 29 McGill Law Journal 260; Evan E. Anderson, "Regulation of Workers Safety Through Standard Setting: Effectiveness, Insights and Alternatives" (1986) 37 Labor Law Journal 731.

[34] For a discussion on the disadvantages of the standards approach including further references see: Manga, Broyles & Reschenthaler, *Occupational Health and Safety: Issues and Alternatives* (Economic Council of Canada: Technical Report No. 6) at 285.

would free scarce resources for a better and more efficient regulation of the smaller firms.

In spite of the benefits the practical problem of enforcement does lead one to believe that unless the parties voluntarily adopt and comply with the standards, administrative enforcement could be a difficult task. To further this spirit of voluntary compliance it would serve the interests of the persons formulating the standards to obtain the input of the parties concerned;[35] when the standard has been established on a consensus the chances of its voluntary adoption increase. In addition, the state could promote the use of industrial standards established through direct consultation of the parties concerned on matters which are not of sufficient gravity to require absolute limits. Starting from the plant level, where the workers and employers operating through the joint health and safety committees could establish proprietary standards for the single firm, to the industry level, where persons with a variety of interests could participate in recommending the adoption of industry-wide standards. In furtherance of this suggestion an advisory board could be established at the provincial level which would on receiving a general consensus on the desirability of a particular standard promulgate the regulatory guidelines.[36]

Although off and on the standard approach remains the subject of criticism, until an effective alternative is found this approach remains an important strategy for workplace improvement.[37] State attempts at streamlining the system for establishment and regulation of these standards and the use of this strategy in addition to other policy instruments could increase the efficiency of state intervention.

ii. Economic Incentives

The other policy alternative in promoting and maintaining a common interest between

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[35] For support on this suggestion see: Michael S. Baram, *Alternatives to Regulation* (Lexington: D.C. Heath and Company, 1982) c. 3; Ashford, *supra*, note 29 at 497.

[36] For further details about the use of nongovernmental standards and the application implications see: Baram, *Ibid.* at 55.

[37] In this regard the study conducted by the Economic Council of Canada recommended that "the government should rely much less on the standards approach to reduce injury than it would hitherto, if and only if other instruments are implemented." For details see: Manga, Broyles & Reschenthaler, *supra*, note 34 at 285.

workers and employers is through the use of economic incentives.[38] By decreasing the costs for promoting health and safety, or conversely by increasing the cost of health and safety accidents, the state can create a financial incentive for the employer to voluntarily take the initiative in improving the work environment. Traditionally this form of state intervention has been restricted to the adoption of workers compensation schemes, which operating on the pattern of financial contributions helped balance the economic analysis in favour of risk prevention.

Although an increased state intervention in the market is bound to raise criticism from the hard core proponents of the free market, the case of occupational health and safety provides a sufficiently important objective to justify such policies. The state's role on this front can be seen as providing economic incentives and financial subsidies to assist the firms in meeting the economic costs of health and safety promotion. This assistance need not be given in direct form, but can also be channelled through the subsidising of research facilities, information agencies, firms involved in the manufacture of health and safety monitoring and protection equipment etc. The provision of tax and budgetary incentives offers another alternative.[39] The importance of this form of state support has yet to obtain adequate recognition, but the potential for use remains unlimited.

Another form of economic influence which could provide an incentive is the state's procurement power.[40] The state is involved annually, directly and indirectly, in the procurement of millions of dollars worth of goods and services. In addition, the state also holds responsibility for the issuance of contracts and sub-contracts, grants and loans, all of which provide it with an extraordinary power through which to influence the internal policies of the recipients. The state's ability to attach conditions and blacklist applicants can be used as persuasive threats to ensure compliance with health and safety guidelines.

Differences in the nature and form of incentives may require the adoption of a variety of measures to be used as an interrelated group. A proposal for one such sub-section has

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[38] See: Donald S. Dewee, "Economic Incentives for Controlling Industrial Disease: The Asbestos Case" (1986) 15 Journal of Legal Studies 289; Ashford, *supra*, note 29 at 19.

[39] Baram makes another suggestion in terms of providing government-subsidized insurance in high risk areas, such as at nuclear energy facilities. For details see: Baram, *supra*, note 35 at 83.

[40] For more details on this suggestion see: Michael S. Baram, *supra*, note 35 at 109.

been made in the form of an "injury tax", which would provide a monetary penalty for each injury sustained during the work process.[41] These and other incentives can help provide the state with the desired leverage to promote and maintain the common interest between workers and the management.

C. Equating the Power Relations

In the previous chapter one of the main grounds for criticism against the internal-responsibility system was its dependence on the presence of equality amongst the workers and employers. The traditional view had seen workplace control to be the sole prerogative of the employer and although the subsequent legislative initiatives have recognised the need for cooperation and joint responsibility, they did little in practice to equate the relationships at the power level. The statutes now require the establishment of joint health and safety committees and recognise certain individual rights such as the right to refuse unsafe work and the right to information. However, the structural inequality between the participants and the limited scope of the legal rights continue to reflect the employer's dominance. Although the acknowledgement of equality is an important gain for the workforce, unless that perception is translated into reality through state support the system stands a fair chance of being subverted in the name of equal power.

As the relationship is and has been prone towards employer domination, the state should ensure that the workers are provided with the necessary support, legal and structural, to attain an increased equality in the relationship. In addition to the provision of information and knowledge, as discussed in the following section, the state in furtherance of its objective of enhancing the workers' power could provide them with more effective legal rights. This does not mean the provision of additional legislative provisions or an expansion in the bureaucratic structure but only refers to making the existing rights more practical and effective. Since it is through the legislated rights granting access to information, establishment of joint health and safety committees and the right to refuse unsafe work that the state has sought to equate the parties, suggestions on how these rights could be effectively used in furtherance of that purpose forms the basis for this section.

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[41] See: R.S. Smith, "The Feasibility of an 'Injury Tax' Approach to Occupational Safety" Law and Contemporary Problems (Summer/Autumn) 730 - 744. Quoted in Manga, Broyles & Reschenthaler, *supra*, note 34 at 281.

i. Joint Health and Safety Committees

Joint labour-management committees are one form of worker participation that was chosen in the internal-responsibility system. In spite of their many benefits, the working of these committees has remained bogged down by the limited scope of their authority and the restricted base from which they operate. As detailed in chapter 2, the committees are only mandated in workplaces employing above a certain minimum number of employees. Even there, their activities are restricted by legal boundaries and their recommendations remain only advisory in nature. Keeping in view the advisory nature of their functioning and the limited knowledge and informational base from which they operate, it is not surprising that their functioning has been heavily criticised.[42]

Regardless of the actual operation of the committees, data has shown that the presence of the committee at a workplace is to a large extent dependent upon the rate of unionisation at the workplace.[43] This relationship between unions and the committees indicates that, firstly, the chances of there being a committee at a workplace are higher in unionised establishments and, secondly, the effectiveness of their activities is to large extent dependent upon such worker organisations. In view of the minority of unionised workplaces, the fact remains that the chances of there being a committee or the available committee being effective in a majority of the workplaces remains slight. The problem is also aggravated by the large number of small to medium firms which operate below the limits set for establishing the committees.

The solution in this regard has been suggested in the form of enhancing the committees' operational power.[44] By providing the committee with real powers of enforcement, such as the power to shut down unsafe operations,[45] a greater access to technical information, enhanced inspection powers including the power to demand external

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[42] See: Larry Gauthiers, *supra*, note 16; Richard Fidler, *supra*, note 16; Richard Brown, "Canadian Occupational Health and Safety Legislation" (1982) 20 Osgoode Hall Law Journal 315.

[43] *Stillburth, supra*, note 16 at 233.

[44] See: Michael D. Parsons, *supra*, note 22.

[45] See: Larry Gauthiers, *supra*, note 16 at 181; Richard Fidler, *supra*, note 16 at 349.

testing or monitoring besides being allowed to conduct the same on its own,[46] the functioning of the committees can be made more responsive to the risks at the workplace. To attain the desired level of effectiveness the committee needs to play a more important role in the decision making process, especially in policy decisions which are to have a long-term effect upon the health and safety of the workers, such as the setting up of production facilities, its design etc., These additional powers need to be granted in conjunction with state's informational and prosecutorial support. To ensure that the benefits of the committees are not restricted to the large-scale organised sectors alone, the coverage of the Occupational Health and Safety Act should be extended to all the workplaces irrespective of the number of employees, though in smaller establishments instead of the committee a safety representative could be appointed with similar powers of enforcement.[47]

ii. The Right to Information

The availability of adequate information and knowledge forms a prerequisite for the exercise of any statutory right. If a worker is not able to recognise or identify hazardous situations, how can it be expected that he would refuse to perform that work or refer the matter to the joint health and safety committee? It is only in the presence of information and knowledge that the available legal instruments can be utilized. Beside the need to generate and disseminate information by the conduct of research, certain levels of information are already available, but because of employer interests and the natural tendency to retain complete autonomy over the decision-making process are not made available to the worker. In recognition of this reluctance on the employer's part to divulge such essential information, the establishment of statutory rights became essential. However, the practical operation of these rights remains deficient.[48]

The very structure of these rights operates against the workers. Firstly the worker is expected to initiate the disclosure by making a request for information. In the absence of

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[46] See: Richard Fidler, *supra*, note 16 at 349.

[47] *Ibid.*

[48] For drawbacks in the existing right to information see: Elihu D. Richter, "The Worker's Right to Know: Obstacles, Ambiguities and Loopholes" (1981) 6 J.H.P.P. L. at 339; Richard Brown, *supra*, note 42 at 91.

such a request the information that is made available is bound to reflect just what the employer wants to convey, and furthermore will be presented in a manner intended to reduce the actual value of its content. How can a worker in the absence of external support be expected to know what to ask or know about the authenticity of the obtained data? In situations where information is given, voluntarily or in compliance with legislative requirements, it does not provide sufficient content or clarity to be fully comprehensible. The mere statement that smoking is dangerous can only have a limited effect, but if personal effect could be detailed the level of understanding would increase dramatically. The information needs to be supported with the results of the conducted research and illustrated through medical effects presented in a manner which ensures personal relatability. This deficiency is further highlighted in the case of health hazards where the latent nature of the effects can result in undermining the gravity of the risk. Even in cases where the provision of information has been legislatively required, the use of confidentiality clauses and statutory exceptions containing broad and undefined terms such as "potential economic value", "material financial gain" and "material financial loss" can act as effective barriers to disclosure.[49]

State support forms the only means through which these limitations can be tackled. The recently adopted WHIMS structure illustrates the level at which such polices need to be adopted and the pivotal role the state has in making these effective. However, knowledge about the identity of a material or its components is not sufficient unless the workers are also made to realise the effects, immediate and long-term, which such substances can produce. In this regard, beside the role of the state in generating and distributing information, what is needed is to provide proper regulations for employer disclosure. By increasing the responsibility of the employer to obtain and disseminate relevant information it would not only increase the workers' capability in identifying hazards and demanding reform but would also serve to heighten the employers' awareness of the problem. Providing the workers with access to their own experts, regular monitoring of the environment, receipt of information on present advances and research being conducted, disclosure of in-house studies and reports of investigation and inspections, availability of inspectors' reports or compliance orders and workmen compensation board data sheets provide some of the means

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[49] For reference to these terms in Ontario's legislative policy see: Chapter 2 note 89 - 90.

through which this can be achieved.

Although it is a little idealistic to assume that through legislative provisions the employer could be forced to divulge what he seeks to conceal, the enhancement of workers' power and the creation of an atmosphere where information can be demanded and obtained should go a long way in enhancing the workers' position in the employment relationship.

iii. The Right to Refuse Unsafe Work

The statutory right to refuse unsafe work has formed another method through which the state has sought to alter the power relations at the workplace. The right has existed in the common law for quite some time, but the diminished chances of success and the relatively high cost of enforcement in terms of job loss discouraged its practical exercise. This deterrent was also to some extent based upon the theories of a voluntary assumption of risk. Work hazards were seen as being normal to the job and the worker on an assumption of full knowledge and rationality was believed to have voluntarily accepted the employment along with the risks involved.

The same principle now finds recognition in the statutory right with the creation of an exception which restricts the right's application in circumstances where the risk is seen as being normal to the job. The presence of such arbitral standards which measure "normal" risk and determine whether the worker had a reasonable belief of risk still operate against a free and fair exercise of the right. Inadequate information and the fear of reprisals are additional contributory factors undermining the efficiency of the right. The criteria for resolving a dispute of whether the right was validly exercised or not may have changed since the common law but the scope remains the same.[50]

Since work refusal is only practical when reasonable grounds exist to justify such refusal, the right provides only a limited tool in the hands of the workers. To ensure a more effective exercise the state has to provide more subjective standards for evaluation of the employees' beliefs. Subject to reasonable limitations his personal fears and feelings must be taken into consideration. The use of the joint health and safety committee for determining the validity of such beliefs or deciding upon the risks involved could provide an effective

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[50] For additional criticism of the right to refuse unsafe work see: *Stillbirth, supra,* note 16 at 234; Richard Brown, "The Right to Refuse Unsafe Work" (1983) 17 U. B. C. L. Rev. 1.

alternative. The worker should be allowed to refuse work not only from fear of personal job hazard but also from the risk created by another's job. As certain hazards are not individual specific but affect the complete workplace, strikes on the issues of health and safety should be allowed. However, to prevent an abuse of this right the right to strike should only arise after the normal complaint procedure has failed to resolve the dispute. The provisions preventing lay-off or other such reprisals need to be expanded to cover other workers involved in the process which because of the refusal may have to be shut down and hence could suffer similar reprisals.[51] Provisions in regard to the payment of salary even when employees are laid off, as exist in Quebec, would serve to strengthen the right.

In the exercise of the right, the role of the state's regulatory officers also comes into consideration, as it is mainly on their decision that the validity of the exercise is decided. In this regard, if the employees were to be provided with a greater power to request inspection from the state or the committee,[52] it would help remove the informational short-fall and the Hobson's choice dilemma which the employee faces when confronted with a dangerous situation.[53]

The effective use of the above stated right, when seen in combination with those requiring the provision of information and the establishment of committees, could provide the worker with an enhanced workplace leverage to demand a reduction of the health and safety risks. Although complete equality is not possible and can never be achieved, by assigning the responsibility for health and safety to the workers and providing them with the authority to back it up, the state could help establish a better balance between the concerned parties. The need for state intervention has time and again been expressed but the point of emphasis remains the effective nature of that intervention. Merely issuing policy statements recognising worker-management equality would not help provide effective solutions. Express intervention and the provision of balancing rights are needed to ensure that such equality is actually attained in practice.

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[51] See: *Stillburth, supra*, note 16 at 235.

[52] Richard Brown, *supra*, note 42 at 101.

[53] Richard Brown in referring to this dilemma explains it as "refuse and seek statutory protection - which may be denied at worst or awarded belatedly at best - or continue to work with no right to force an inquiry by an inspector." Richard Brown, *supra*, note 42 at 102.

D. The State as an Educator and Information Source

In the previous chapter it was suggested that on the assumption of a common interest between labour and management the present trends in reform showed the need for enhanced cooperation and mutual accommodation. The analysis in such situations saw the drawbacks more in terms of inadequate information and the necessity for improved education rather than an adversarial outlook. Although the presence of such a common interest has become a question of dispute most authorities would accept that adequate knowledge and information are essential components of both systems of regulation.[54] Even the most ardent free market proponents agree that the market fails to provide an adequate level of such information, especially in the case of the worker.[55]

In such situations the state role assumes significance, as the structural bias against sufficient worker knowledge (and employer ignorance to a somewhat lesser extent) can only be remedied with external state support. The state's role within the system becomes that of ensuring the availability and generation of an adequate and comprehensible supply of health and safety information. This can be achieved through the subsidising of research facilities, providing support to labour for the dissemination of information and providing statutory requirements which ensure greater access to information held by the employer. In addition the government itself contains a substantial power of disclosure through the public agencies and by means of adverse publicity can effectively bring the public pressure to bear on the deviant parties.[56] By ensuring availability of sufficient and reliable information and public condemnation of activities which constitute a health and safety risk the state can provide effective support to the workers in promoting health and safety.

i. The Generation of Information

Considering the resources required to obtain relatively authenticated results, the latent nature of the symptoms in the case of health research and the rate at which new substances are being developed or combinations being tried, generating information for every aspect of

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[54] See: Ashford, *supra*, note 29 at 15.

[55] For details see: W. Kip Viscusi, *Risk by Choice* (Cambridge: Harvard University Press, 1983).

[56] For further information on this aspect of government influence see: Michael S. Baram, *supra*, note 35 at 119.

the workplace risk is not a very practical proposition. This does not mean that the task should be given up as hopeless, but goes to show the magnitude of the problem and the amount of resources, time and participation that would be required.[57] Sadly, research on occupational health and safety to date has not received the attention it deserves. The state too has withheld its hand and the major sources continue to be the management-supported research facilities. Although it would be incorrect to portray the information generated from such research as biased or unreliable, management's association with the projects and its discretion over the nature and direction of research could influence the results obtained, while the subjective perceptions created by such involvement could lead the workers to view such information with a level of distrust, irrespective of the scientific facts.

An increased state role in the generation of risk information is essential to ensure that the process is speeded up and retains an autonomous image. In this regard, support can come through the direct funding of private research facilities or the establishment of state research institutions. Universities and medical research establishments provide the other sources. The establishment of a research fund with contributions from the government, the employers and the workers has also been mooted and could provide an alternative option. Further, an increased emphasis needs to be given to emerging health hazards which are a consequence of the relationship between workers and environmental influences. Psychological and emotional problems are emerging as the occupational hazards of the century and in view of the paucity of medical research require increased research in those sectors. Developing technologies and new substances require priority attention as by controlling and regulating their introduction, a long term solution to the health and safety risks becomes more attainable.[58]

Even when the barriers of employee mobility, inadequate background data and the confidential nature of certain information continues to hamper effective research, the state's administrative structure and financial capabilities place it in a better position than participants in generating the relevant information. It is evident that constraints for effective generation of information are many and will remain. What is needed is leadership and the

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[57] For a more comprehensive review of the informational aspects in the health and safety arena see: Ashford, *supra*, note 29 at 15, 96, and 482.

[58] Ashford, *supra*, note 29 at 16.

will to work in spite of such limitations.

ii. Distribution of Information

In the presence of an adequate supply of health and safety information, the problem then becomes that of distribution. If the persons most concerned and affected by the health and safety risks remain uninformed or ignorant about the dangers, it would be of little use to generate such information or provide elaborate schemes for prevention. The problem lies not only in ensuring that the information reaches the concerned parties, but also that they understand and appreciate the gravity and value of its content. The style of presentation and the message sought to be conveyed both have to be fashioned at a level comprehensible to the listener.[59]

The unstructured level at which information is presently generated creates an unequal access, allowing vested interests the opportunity to withhold or distort damaging information. This conversion of vital and essential information into a bargaining and political tool to be used by those with greater access in favour of their personal and short-term interests constitutes a serious limitation in effecting improvements at the workplace. In addition, the intricate web of legal rights which allow confidentiality and the withholding of certain essential data illustrate the point that ensuring efficient distribution is not a matter best left to market determinants.[60] The problem is serious and the resultant damage of sufficient gravity to warrant state intervention and support.

The state's role in distribution of information applies with equal importance to workers, employers, professionals and the public although the greatest emphasis needs to remain on worker education. For the workers the scope of coverage could be categorised under three headings:

a) Worker education and information in respect of their legal rights, including the processes through which such rights can be exercised.
b) The distribution of technical information regarding the risks prevalent at the workplace.
c) Training of the workers for more effective recognition, prevention and monitoring of the

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[59] For details about worker problems in understanding the available information see: Elihu D. Richter, *supra*, note 48.

[60] See: Ashford, *supra*, note 29 at 16.

potential hazards.[61]

The second two categories are of significance as it is only in the presence of a trained and knowledgable workforce that the demands for reform would obtain the desired results. Also the worker's ability to exercise his statutory rights and the working of the joint health and safety committees are to a great extent dependent upon the availability of informational support.

The distribution of information should not be restricted to the direct methods alone as a week or two of training or the provision of safety and health literature is not sufficient to improve the situation. However, it would permit a more efficient monitoring of the situation and provide better feedback for future regulation and research. In addition, the knowledge obtained would ensure that in case of doubt or perceived risk the worker or employer would be more likely to ask for professional advice. In this manner there would be an increase in regulatory demands coming from within the workplace rather than complete reliance on periodical inspections to remedy risk-prone conditions.

In addition to seeing that the generated information is effectively distributed, the state also has a responsibility to ensure that the available information is then put to effective use. In relation to the workplace, this translates into policies of persuasion and prosecution. In regard to employer decision-making an added effort is required as in spite of the available information some employers may choose to ignore the dangerous nature of the process or despite available alternative materials and safety equipment may refuse to effect the necessary changes. In those situations an important objective of public policy becomes the creation of public awareness and the promotion of concern through the generation of risk information and public condemnation of the parties' actions. The state's administrative machinery is ideally suited for this purpose and could have effective consequences if used in the right manner. In the present age of increased public awareness, the adverse publicity can have serious consequences for the concerned employers and force them to make voluntary changes even where strict and extensive regulations have failed.

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[61] See: Ashford, *supra*, note 29 at 482.

E. Manpower Development

Occupational health and safety has evolved from being seen as a mere sub-issue in the business world to a field in itself. Characterised by the need for a high degree of expertise in areas ranging from medicine to engineering the manpower requirements of this field are cause for serious concern.[62] The serious deficiencies in the existing manpower availability emphasise the need for development of a long-term manpower policy which could help provide the industry with the number of skilled and technically-capable personnel so essential for enhancing the workplace health and safety. The manpower needs in the occupational health and safety field can be classified into four categories -

a. Enforcement personnel.
b. Researchers who help identify and monitor the risk at the workplace.
c. Personnel involved in preventing and protecting the worker from the health and safety risks including those who treat the workers from the ill effects of exposure to those risks.
d. Persons who can teach and communicate the skills needed in each of the previous sub-sections.[63]

The creation of an adequate supply of professionals in each of the above categories involves a substantial period of time, as the learning curve in each category is structured in relation to the level of specialisation required. Ensuring the provision of a sufficient number of trained personnel would require changes in the educational and social structures, something which can only be done at the state level. Policy decisions on the choice of intellectual capability required, the time period of training, the responsibility for incurring the cost of such education, the financial incentives and returns which the professionals would require and desire, the re-training schedules and the generation of a class status in addition to the motivational and commitment issues are all important considerations which the state needs to determine.

The state in this area can help by establishing a broader policy guideline to restructure the present imbalance and helping in the generation of an adequate supply of occupational health and safety personnel. As the field is covered by a vast number of disciplines and requires the coordinated expertise of various professionals, the required structural reforms are only possible if undertaken at the state level. Keeping in mind the false images of an

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[62] Ashford, *supra*, note 29 at 426.

[63] *Ibid.* at 426.

adequate supply that the market generates as compared to the socially desirable needs, the state should seek to increase the availability of trained personnel while at the same time ensuring that the industry responds to the increased supply. In rejecting the common interest and equality assumptions and viewing the shift towards increased worker participation it is going to be these professionals who would provide the informational and technical support to the state and the industry. For that purpose it is also essential that their neutrality be ensured, as bias in favour of any one party could undermine the desired objectives. Infusing in them the motivation and commitments, the desire should be for the creation of a separate class which operating from its status position could retain a measure of autonomy in decision making.

The measures to achieve this objective of manpower development could be directed through increasing the subsidization of health and safety education, increasing the availability of training programmes, providing training grants and supporting unions in their efforts at increasing their knowledge of health and safety issues. By increasing public awareness and ensuring a better regulation of the statutory norms the state could create a ripple effect to increase the demand for such professionals. Mandatory staffing policies and increased worker awareness would itself create the promotion of career opportunities which are essential to enhance the status and future of a professional field.

The legislated standards, government attention and public awareness are already creating the conditions which could increase the demand for such professionals. What remains is to ensure that the supply meets the demand. The market alone is incapable of ensuring the availability of a sufficient number of capable and skilled personnel or when available to ensure that they are effectively distributed. The reluctance of the employers and the inability of the workers to invest the resources necessary in generating such manpower resources have caused the situation to further deteriorate. Even the government has lagged behind in its role of supporting the manpower development. What little support has been provided has concentrated on the safety aspect of the problem as that has generally received more attention even in the legislated initiatives. The disregard shown to the health sector, by both industry and the government, has contributed to an already-distorted manpower market.

On the whole, the state's role for occupational health and safety manpower development cannot be overstated. The need for a coordinated multi-disciplinary effort is

essential in reducing the workplace risks and the state could provide the necessary guiding authority to bring that about.

F. Legislative Initiatives in Related Areas

Any form of state activity can be related to occupational health and safety but some areas find a closer, more direct, relation than others, such as the environment, product safety and public health fields.[64] Legislative initiatives in these areas can provide an effective means of controlling the levels of workplace risk.

The environment and its importance in our lives has found new recognition with the increased public awareness. The state has traditionally played an important role in environment control but that role has seen significant changes in recent years. State regulation of the air, water and natural resources form only a part of the comprehensive state involvement in the environmental field. All such state regulation has an influential effect upon the industrial health and safety policy. The inter-disciplinary influence is not restricted to the environmental field alone but can transverse across all lines of state regulation from product safety to economic policy. To provide another example in the specific case of consumer protection legislation, the state is under constant pressure to protect the health of those who will ultimately consume the products. Accordingly, extensive state responsibility has been assumed for regulating the effectiveness of drugs, the safety of food stuffs, medical equipment and many other such products, all of which affect the occupational health and safety concerns of the workers. Unfortunately inter-jurisdictional problems and internal coordination and cooperation between the various agencies is not always at the most efficient levels. Regulations at cross purposes, duplication and bureaucratic enforcement polices can complicate issues and cause a wastage of scarce resources. With an increase in specialisation this may only illustrate a small aspect of what we may see in the future.

What is required is the promotion of common policy outlines with clear objectives and a system of internal control. A clarity of objectives would provide these agencies with the common ground they require for coordinated action. As the state is responsible for the

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[64] For a discussion on these related fields see: Joseph F. Follman, Jr., *The Economics of Industrial Health: History, Theory, Practice* (New York: AMACOM, 1978) 211.

conduct of these agencies, it then becomes the responsibility of the state to ensure the clarity and direction in action. Effective and clear policy guidelines and regulation could ensure better cooperation and coordination amongst these players. Of special importance are those involved in the public health efforts as in the absence of preventive controls it is they who bear the full brunt of the increased social health problem. Since the overall purpose of the public health programme is to reduce unnecessary illness, their relation to industrial health and safety is self-evident.

An increased state effort in these related areas and better coordination of those involved in general environment concerns with those interested in the specific work environments can prevent duplication and wastage of resources. This would also provide a pool of inter-disciplinary intellectual resource which would work more efficiently at providing solutions for the intricate health and safety problems.

CONCLUSION

In conclusion we can safely say that, although there is a growing willing and recognition of the benefits of an increased delegation of responsibility and authority in the regulation of occupational health and safety, the need for strong state enforcement remains. The state's interest in preventing and compensating for occupational health and safety hazards has important and legitimate justifications. The structure demands participation from workers, employers and the state, however, the exact nature and instruments for such participation remain the subjects of controversy.

CONCLUSION

In the preceding chapters an attempt has been made to obtain a measure of clarity on the state's role in the regulation of occupational health and safety. It becomes clear that in regulating or promoting reform at the workplace the issues involved assume a broader focus than economic considerations alone Ethical, social, psychological and political questions are as much a part of the debate as the economic aspects though the degree of consideration given to each factor may vary with each situation. Similarly in projecting the need for a state role in the administrative regime the attempt is not to promote the state centralist law as the sole alternative but the perspective presented is that of regulatory pluralism.

Even when a majority of the opinions have seen state regulation in terms of an increase in progressive rule making and external regulation, the present study while acknowledging the benefits of these strategies also recognises the need for enhanced worker-employer participation. In rejecting both extremes of complete state domination and complete replacement of the state in occupational health and safety regulation the emphasis is on a better coordination and cooperation between the public and private regulatory structures, with each providing support to the other. Although it would be naive to assume that an ideal system could be established which would satisfy all interests, the process of continuous improvements and attempts to move a step closer to that ideal provide impetus for re-evaluation of the present policies. In relation to workers' health and safety the importance of any measure to make the structure more effective and efficient cannot be understated.

As seen in chapters 1 and 2 on obtaining sufficient justification for intervention in the private market sphere the state in adopting a purely administrative approach failed to provide the required support for reducing the workplace hazards. Problems in regard to the economics, enforcement constraints, procedures adopted in formulation of rules, advances in the marketplace and a lack of information and capability helped prompt the need to re-evaluate the state administrative strategy and promote greater self-reliance amongst the participants. This change in thinking was also supported by the need to promote the workers' authority to deal with the practical problems of the workplace which required daily and continuous oversight. The process of transformation was marked by the adoption of the

statutory rights mandating the establishment of the joint health and safety committees, the right to information and the right to refuse unsafe work. However the process of shifting from one strategy for enforcement to another can often lead to undesirable results.

In chapter 3 the discussion brought out the fact that the internal-responsibility system is faced with certain structural limitations which restrict its influence to certain areas. In consideration of the limited nature of the worker-employer capability and outlooks the need for formulation of broader policies and strategies justified the retention of a state presence. Besides these general considerations, the inability of the workers to make the system work in the presence of employer incentives for non-compliance, emphasises the state's essential role. Even as the need for enhancing worker participation remains an important objective the fact has also come to be recognised that the state too constitutes an important player in the field of occupational health and safety. In addition to providing essential support to the workers, in promoting equality and an identity of interest in their relationship with the management, the state as a social field itself provides an independent and powerful influence on the employers' decision making process. In that context state actions provide a useful tool for enhancing the health and safety at the workplace. The need, as expressed earlier, is for viewing the regulatory system as a cooperative process involving all three parties concerned and not as the first step in replacing state regulation with self-regulation as is presently being done.

Adoption and promotion of the self-regulatory ideology has caused the traditional role models of the participants to face alteration. This alteration has affected not only the employers and the workers but the state as well. Here the need is for extreme caution as in the absence of regulatory clarity the fluid and transitional nature of the reform process can not only produce undesirable results but can also undermine the gains attained in the past. Each of the participants in the occupational health and safety process bear the responsibility for ensuring that the pace of workplace reform receives the momentum it deserves.

Employers have one of the most significant roles to play as they bear the responsibility of the workplace risks. Besides the economic costs the employers are increasingly becoming aware of the non-economic consequences of a high-risk workplace. Changes in attitude towards accident causation and labour as a production input in general have prompted an increased commitment towards the health and safety programmes at the workplace. In addition the shifts in the nature of the risks which now affect not only the firm's workers but

get transferred to the public have caused the issues to receive wide public attention and have awakened management to the reality that they too can fall prey to the hazards which they create. In spite of these limited advancements a majority of employers still fail to respond positively to the voluntary compliance measures. Short-term economic considerations, structural imbalances, inadequate information sources and nature and form of the organisations still present significant hurdles in promoting voluntary compliance.

Workers, who have till now remained relatively inactive, also have a significant role to play. Besides demands over the wage rates and economic incentives, health and safety concerns form an important part of the employment demands. However, factors such as inadequate information, knowledge, capacity and motivation continue to support employer domination of the relationship. In the absence of collective negotiating power the focus time and again forces them to turn towards the state for regulatory support. Even in situations where they possess sufficient organisational strength external complexities compel reliance on the state's support.

The role of the state in such circumstances is of considerable significance. Even though the exact nature of the state actions would depend to a considerable extent on the degree of voluntary compliance by the employers, or the strength of the workers in certain situations, the state retains the sole capacity for effective action. Its wider area of influence and expanded outlook allow it certain regulatory advantages not available to the other participants. Even then the extent and nature of the state's intervention remains the subject of dispute. Questions about the cost of such intervention, its effect upon the competitiveness of the concerns, its influence on the economic situations of the country, unemployment and the provision of essential services continue to elude effective solutions. The conclusion, however, remains that the state's role in occupational health and safety retains its legitimacy.

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