SUBMISSION

TO

WORKSAFEBC

AWAKENING THE LEVIATHAN

THE BC BUILDING TRADES POSITION

ON

OCCUPATIONAL HEALTH AND SAFETY INJUNCTIONS

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British Columbia and Yukon Territory
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For the laws of nature (as justice, equity, modesty, mercy, and, in sum, doing to others as we would be done to) of themselves, without the terror of some power, to cause them to be observed, are contrary to our natural passions, that carry us to partiality, pride, revenge and the like.

Thomas Hobbes

(*The Leviathan*, 1651)

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Introduction

The British Columbia Yukon Territory Building and Construction Trades Council represents fifteen building and construction unions. These unions uphold the rights and obligations of forty thousand highly skilled workers throughout the British Columbia and the Yukon who labour in a wide array of dangerous occupations, from specialized labourers to ironworkers, boilermakers, electricians, plasterers, sheet metal fabricators, roofers, and insulators. Given the hazardous nature of their work, the Council takes all matters relating to workers' health and safety with the utmost seriousness and welcomes the opportunity to comment on Workers' Compensation Board's proposed new policy on occupational health and safety injunctions.

While the Council is not opposed to the proposed new policy on OHS injunctions, it *is* critical of the focus on crafting policy direction for applying an exceptional legal remedy when the Board *already possesses the requisite statutory power to compel compliance but refuses to use it as effectively as it could*. Approaching the court for an injunction is a serious matter which can only, and should only, be used in extraordinary circumstances. On the other hand, if the statutory powers at the Board's disposal were exercised more effectively on a regular basis, fewer occasions where injunctions were necessary would arise. Until and unless the Board addresses this central issue, little will change in the compliance world.

The Board's proposed policy will assist officers in determining whether an injunction is necessary and appropriate in particular circumstances. However, more specificity with respect to the applicable legal tests and principles that the courts, particularly those in British Columbia, have employed when considering a request for an injunction is necessary. Knowledge of the ratio decidendi (i.e., the ground or reason of a decision) would better equip officers to evaluate their options when seeking prevention and enforcement, in both the short and long term. Indeed, if set out in a comprehensive manner, it would reveal for the officers the inherent limits of the court system, and, ideally, press them to employ their existing statutory powers under the Act more effectively.

Again, the real answer to countering the contravention of the *Workers Compensation Act*, the regulations, and orders that issue therefrom, is to fix significant penalty amounts that send an unequivocal message to *all employers* that putting workers' health and safety at risk will no longer be tolerated. Currently this is *not* the modus operandi at the Board. On the contrary, serious and repeated high-risk violations of the Act are commonly treated with kid-gloves. Not surprisingly, the result is a

business culture, particularly in the building and construction sector, that views the occasional penalty by the Workers' Compensation Board as "the cost of doing business". Countering this logic, as Hobbes advised over 300 years ago, will take a *paradigm shift* in how the Board compels employers to protect the health and safety of their workers.

Background

Under the existing workers' compensation system the Workers' Compensation Board has the statutory power to apply to the British Columbia Supreme Court to grant an injunction to restrain a person(s) or corporation from committing or continuing to commit a contravention of the occupational health and safety requirements. These injunctions are *secondary tools* that the court, at the WCB's formal request, can use to order a party to comply. As an exceptional remedy at law, however, injunctions are only employed by the Court when other measures have proven unsuccessful and stringent criteria are met.

Currently, WCB does not possess a policy clarifying the circumstances in which an injunction from the BC Supreme Court should be sought to uphold the occupational health and safety requirements. The Policy and Research Division has recently researched occupational health and safety policy directives, both in Canada and around the world, and is proposing a substantive policy directive.

The Law

Section 198 of the *Workers Compensation Act* provides that:

> (1) On application of the Board and on being satisfied that there are reasonable grounds to believe that a person
>
> (a) has contravened or is likely to contravene this Part, the regulations or an order, or
>
> (b) has not complied or is unlikely to comply with this Part, the regulation or an
>
> order,the Supreme Court may grant an injunction restraining the person from continuing or committing the contravention or requiring the person to comply, as applicable.
>
> (2) An injunction under subsection (1) may be granted without notice to others if it is necessary to do so in order to protect the health or safety of workers.
>
> (3) A contravention of this Part, the regulations or an order may be restrained under subsection (1) whether or not a penalty or other remedy has been provided by this Part.

The Proposed Policy

The Board is proposing a policy that contains two factors: the first set of factors identifies circumstances when an injunction could be useful; the second set of factors provides guidance with respect to whether it is necessary and appropriate in the particular circumstances.

Under the preliminary factors, four circumstances when an injunction could be useful are identified, namely, when there is:

(a) failure to comply with a stop work order issued under section 191 of the *Act*;

(b) failure to comply with an order to stop using or stop supplying unsafe equipment under section 190 of the *Act*;

(c) failure to comply with an order other than one in (a) or (b) above; and

(d) repeated violation of the same, or similar, section of the *Act* or Regulation.

WCB notes that the policy does not prevent it from considering an injunction in other circumstances.

Since an injunction is an exceptional remedy to seek, there are a second set of factors to determine whether it is necessary and appropriate to pursue an injunction. The factors to consider are:

(a) the level of risk that might result from further non-compliance;

(b) the impact of the non-compliance on WCB's ability to carry out its health and safety mandate; and

(c) the effectiveness of other tools to obtain compliance in the circumstances.

In its discussion paper, the Board underscores a number of potential benefits of this policy. Generally, such a policy will assist the Board in determining when to consider an OHS injunction, and the appropriateness of pursuing an injunction in the circumstances. Moreover, as public awareness of this injunctive relief grows, employers and workers may be more amenable to complying with the law. Lastly, the policy does not limit the WCB's ability to pursue an injunction in any situations where the Court will grant one; nor does it prevent them from using other administrative penalties and prosecution.

The proposed policy is beneficial in a number of ways and, as such, is a positive contribution to existing policy directives. For example, the singling out of a failure to comply with a stop work order made pursuant to Section 191, as well as, the failure to comply with an order to stop using or supplying unsafe equipment under Section 190 of the Act is a good thing. So, too, is the all-inclusive provision which enables the WCB to consider any infraction of an order outside of those enumerated. Furthermore, repeated violations also get special mention in the policy directive, as they should.

The guidance provided by the second factors for determining whether it is necessary and appropriate to pursue an injunction will be moderately useful to WCB officers for a number of reasons. To begin with, as the Board points out, it will encourage officers to examine "the level of risk that might result from further non-compliance". It also directs the officer to consider the impact of non-compliance on the Board's overall mandate, not just the particular matter at hand. Finally, it encourages the officer, albeit in a general way, to reflect upon the effectiveness of other tools at his or her disposal that may obtain compliance more expeditiously.

Consequently, both factors in the policy directives are instructive and helpful. More could, however, be added to aid WCB decision-makers. The current construction of the policy directive lacks the necessary specificity to clarify the principles and guidelines the court will employ when considering an injunction. This is important for decision-makers because these guidelines can help them ascertain whether an injunction will help them achieve their goal or derail their efforts.

Guidelines for Granting Injunctions

While there is no principle of universal application when it comes to granting an interlocutory injunction, the most useful guidelines were set down by Lord Diplock of the House of Lords in *American Cyanamid Co* v. *Ethicon Ltd* [1975] A.C. 396. For all intents and purposes, these guidelines are still the leading source of the law. Generally speaking, this case established a threeprong test: first, the applicant must show that the claim presents a fair question to be tried, that is, the claim must have merit; secondly, the applicant must establish that irreparable harm will occur without the injunction; and thirdly, the balance of convenience must favour granting an injunction.

The utility of WCB's policy directive on OHS injunctions will be effectively strengthened if these principles are fleshed out in comprehensive detail in the body of the policy text.

The Merit Test

In 1975 Lord Diplock opined that the proper merit test was whether there was a serious issue to be tried. All levels of the courts in British Columbia have entrenched this principle in their jurisprudence. On many occasions the courts have said that an interlocutory application is not the time to determine the merits of a case; that is to say, the threshold should be a low one. If the case is not obviously frivolous, the Court will normally proceed to the irreparable harm and balance of convenience tests.

Irreparable Harm

In a recent case heard by the British Columbia Court of Appeal which upheld an earlier decision of Justice Brenner of the BC Supreme Court, the principle of irreparable harm was articulated in great detail. According to Justice Brenner:

> The harm the applicant must demonstrate is harm that cannot be compensated in money damages. It is not the amount of the damages but their character the court must consider. If the damage suffered, even if great, can be compensated by a recoverable monetary

> award against the unsuccessful party, an injunction will ordinarily be refused. However if the damages are of a nature that will be impossible to assess, then irreparable harm will have been demonstrated. The issue here is whether the damages the plaintiffs will suffer between now and trial are capable of assessment by the court.

In his reason, Justice Brenner reviewed three recent decisions by the Federal Court of Appeal, namely: *Imperial Chemical Industries plc* v. *Apotex Inc*. (1989), 27 C.P.R. (3d) 345 (Fed. C.A.); *Nature Co*. v. *Sci-Tech Educational Inc.* (1992), 41 C.P.R. (3d) 359 (Fed. C.A.); and *Centre Inc. Ltd.* v. *National Hockey League* (1994), 53 C.P.R. (3d) 34 (Fed. C.A.). All of these cases emphasized that irreparable harm is harm in respect of which the damages recoverable at law would not be an adequate remedy, and that the evidence as to irreparable harm must be clear and not speculative.

Balance of Convenience

Historically, the balance of convenience examination is the most critical issue. The test boils down to weighing all the circumstances and asking common sense questions. What will be the effect on the applicant if the injunction is not issued? What will be the effect on the respondent if it is? Where does the balance lie? This is the ultimate question the Court must resolve. According to the British Columbia Legal Education Society, the courts have increasingly considered the public interest when making this determination. However, the ongoing WCB appeal of *WCB* v. *Arthur Moore DBA AM Environmental* (discussed below) suggests otherwise.

David Bean states in the ninth edition of his seminal work *The Law of Injunctions*: "By definition, once the investigation has reached this third stage, the decision of the court, whether in favour of or against an injunction, will inevitably involve some disadvantage to one or the other side which damages cannot compensate. The extent of this "incompensatable disadvantage" either way is a significant factor in determining the balance of inconvenience. Where, for example, in a restraint of trade case, an injunction would have deprived the defendant of his job, this was held to be more serious than the prejudice caused to the claimants by the defendant's continuing to work for a rival firm pending trial."

Status Quo

While not a formal guideline, the importance of timeliness and retaining the status quo was noted by Lord Diplock in *American Cyanamid* when he said "where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo". In many cases, prompt action may mean that the preservation of the status quo favours the claimant because the defendant's actions are still emerging into the light of day. Conversely, if the defendant's questionable actions have been going on for some time, he may be able to argue that retaining the status quo favours him in spite of the egregious nature of the activity. The point is clear: officers need to realize that time is of the essence when when considering using Section 198 of the Act.

Limits of Injunctive Relief

Despite the "exceptional remedy" that an interlocutory injunction may provide in emergency situations, Board officers should be aware of their limits.

WCB began using OHS injunctions in 2008, and since that time have requested an injunction from the Court on only three occasions. If we juxtapose this number against the myriad orders, stop work orders, and penalties that WCB has issued over the last five years, a yawning gap opens up between injunctions and infractions. Specifically, while only three injunctions have been sought over the last several years, orders have increased from 46,846 in 2006 to 75,063 in 2010; stop work orders have increased from 30 to 81 during the same period; and the number of penalties jumped from 75 to 256 between 2006 and 2010. This data suggests that additional compliance tools, including injunctions, should be pursued by WCB officers. And so they should.

But seeking injunctive relief is only a fraction of the compliance and enforcement solution because they too are fraught with problems. A brief review of *Workers Compensation Board* v. *Arthur Moore doing business as AM Environmental* 2011 BCSC 459 (Docket S105044), one of the few cases where WCB has sought injunctive relief from the Court, underscores the complex legal machinations that can emerge when WCB takes the court route.

In this case, the Workers' Compensation Board brought an application pursuant to Supreme Court Rule 22-8 for an order to find Arthur Moore in contempt of court for contravening the Act. On August 26, 2010, Justice Greyell, as a result of a petition brought by the Board, issued the following order pursuant to Section 198 of the Act:

> Arthur Moore, doing business as AM Environmental, is restrained from doing business in the asbestos abatement business and the demolition or drywall removal business, and without limiting the generality of the foregoing, from providing hazardous material inspections and reports, environmental assessments, hazardous materials surveys and testing, asbestos abatement services or testing, until further order of the Court.

To set the stage, the Board wisely submitted information about work-related deaths in British Columbia from the myriad health and safety risks in the construction industry. Of particular relevance was the data on fatalities caused by asbestos, a building material that causes the lung disease asbestosis as well as a form of cancer called mesothelioma. This hazardous substance is now restricted in Canada, but still exists in many buildings erected prior to restrictions being imposed. According to the Board's report, over the last decade or so, *one out of every two work-related fatalities among workers 50 or more years old was linked to asbestos*. Moreover, "in the mid-1990's, asbestos-related diseases became the number one occupational killer in B.C., and have remained so to date…. For the past five years, on average there were more than 50 fatalities each year resulting from work-related asbestos exposure."

In the petition before Justice Greyall, the Board led *uncontested* affidavit evidence that painted less than a glowing picture of Mr. Moore's enterprising business behavior. Not only did Mr. Moore instruct dozens of his workers to remove the asbestos-laden drywall from buildings without protective equipment; not only did he lack the requisite qualifications as an inspector; and not only was no analysis done on the drywall samples that were "approved" according to his ingenious lab report forgeries. That was only the tip of the iceberg. In his effort to boost his bottom-line, Mr. Moore operated under several different business names – AM Environmental, Tri-City Hazmat, BC Hazmat, and Surrey Hazmat – thereby enabling him to move unfettered and incognito from one egregious act to another. It worked famously. Between February 18 and May 26, 2010, the Board documented no less than eight incidents where Moore engaged in his "admirable" calling of putting vulnerable workers lives at risk.

After reviewing the Board's uncontested evidence of Moore's egregious behavior, the Court turned its mind to the applicable legal principles. Given the specifics of the case, Judge Watchuk was compelled to delve into the *law of contempt*, proceedings for which are quasi-criminal in nature. As such, the applicant must meet the criminal burden of proof, that is, "beyond a reasonable doubt" (as opposed to the civil burden of proof which is on "a balance of probabilities"). Quoting Madam Justice Smith in *Jackson* v. *Honey*, 2009 BCCA 112, the judge underlined (literally) that the "facts in support of a finding of contempt must establish, beyond a reasonable doubt, that the contemnor <u>willfully disobeyed a court order that was clear and precise in meaning</u>".

Did Mr. Moore disobey an order that was clear and precise in meaning? Not according to Judge Watchuk. "An individual cannot", Watchuk admonished the WCB, "be punished or jailed for breaching an ambiguous order where that ambiguity prevents a clear finding of contempt". For the Judge the ambiguity in the injunction was that either Mr. Moore was restrained, or Moore doing business as AM Environmental was restrained.

> The action names Arthur Moore doing business as AM Environmental as the Respondent. If the commas are interpreted as parentheses, and the Injunction meant to enjoin Mr. Moore personally, then the contempt is proven beyond a reasonable doubt. If the commas are intended as a restriction on the generality of the name Arthur Moore, then there is no contempt as Arthur Moore doing business as AM Environmental has not been proven to have breached the Injunction.

Thus, the learned judge opined that the import of the ambiguity was that the Board did not present evidence that Moore continued the prohibited activities while doing business as AM Environmental following the injunction granted by Mr. Justice Greyell. "There is evidence", Judge Watchuk reasoned, "that Mr. Moore knows of the injunction. *There is no evidence of his understanding of its meaning or scope!"* (Italics and exclamation mark added.)

This kind of legal nonsense is what the Workers' Compensation Board opens itself up to when it enters the court system. Contrary to common sense and serving the public interest, the issue, according to Watchuk, is not whether vulnerable workers' lives are put a risk, but whether the comma is properly

placed! Despite copious amounts of data showing the alarming health risks and fatality rates caused by asbestos, the judge, following years of sacred legal precedent and procedure, deemed it appropriate to deny the injunction on a technicality. Fortunately, the Board is appealing Judge Watchuk's decision. The expense of so doing, however, is a burden on the public purse, and the outcome is far from certain. As we know, reason does not always prevail in the courts.

The point of the matter is that injunctions are not a silver bullet and the Board must look elsewhere if vulnerable workers are to be protected. Our view at the Council is that the Board need not look far. As noted at the outset, the Board already possesses considerable statutory authority to compel employers – especially those in the building and construction sector where work is intrinsically dangerous – to obey the law. But they must *exercise* the power they have been granted by the legislature.

Lack of Meaningful Penalties

When the Council scrutinizes the administrative penalties the Board imposes on employers in the construction and manufacturing sector who infringe the law, we are shocked by the little value they place on workers' lives. The so-called "historic compromise" has itself been compromised by the Board granting business a criminal leniency, giving employers a green light to commit the egregious offences over and over again.

Section 196 of the *Workers Compensation Act* provides that the Board may, by order, impose an administrative penalty on an employer if it considers that (a) the employer failed to take sufficient precautions for the prevention of work related injuries or illnesses; (b) the employer did not comply with the statute, the regulation, or order; or (c) the employer's workplace or working conditions are not safe. Under this same provision the BC Legislature has empowered the Board to impose administrative penalties up to $565,329.86. This is a heavy compliance hammer – the government and therefore the Board (Hobbes' Leviathan) *does* possess the requisite statutory power to compel compliance. But is it using it?

The Council is quite aware that both the number and amount of WCB's administrative penalties have risen over the last five years. While the number of penalties dropped precipitously in the first five years of the BC Liberals mandate, they grew in 2007 to 221, then dropped again in 2008, but continued their upward swing in 2009 to 211 penalties, and to 256 in 2010. Penalty amounts grew as well: for the years 2006, 2007, 2008, 2009 and 2010, WCB generated $1,599,329, $4,256,516, $2,617,646, $4,454,347, and $3,136,898, respectively. These numbers, however, are meaningless if absented from their context: *the number and nature of the penalties*.

The Council is also aware that WCB likes to annually publish its *Top 10 Enforcement Penalties* to showcase the high penalties the employers are paying for infringing the Act. For the most recent period for which the data was gathered, 2010, the top ten penalties averaged $86,673 and went as high as $145,046 (*Penfolds Roofing Inc*.). Not surprisingly, however, these top ten reports are more rhetorical than substantive; the substantial penalties they list are the exceptions, not the rule.

For starters, while WCB gathered a sum of $3,136,898 in 2010 for infractions of the Act, this translates into an average penalty of only $12,254. This is not a lot of money for putting workers' lives at risk, and many of the penalties are far lower. Take, for example, the case of the construction company John Kenneth Sutton whose worker suffered fatal injuries by falling about 6 meters (20 ft) to the ground from the edge of an unguarded roof. Not only did the firm fail to ensure his fall protection system was employed, it didn't provide him with the requisite safety information, instruction, training, or supervision. For these multiple infractions – contraventions that cost this worker his life - the Board penalized the company $3,250.

Fact is, at WCB, the *rule* is to set penalties as low as possible for the benefit of capital. And the Board has operationalized this rule by drafting *Prevention Policy D12-196-6* and compelling WCB officers to apply it. The policy table set out below shows the applicable quantum for penalties "where there is (i) a serious injury or illness or death; or (ii) high risk of serious injury or illness or death; or (iii) non-compliance was willful or with reckless disregard".

Assessable Payroll Range	Penalty Amount Range	Maximum Quantum [1]
Up to $500,000	2.5% of payroll, or $2,500, whichever is greater.	$2,500-$12,500, whichever is greater.
$500,001 – $1,000,000	$12,500 + 2.25% of payroll over $500,000	$23,750
$1,000,001 - $1,500,000	$23,750 + 2.0% of payroll over $1,000,000	$33,750
$1,500,001 - $2,000,000	$33,750 + 1.75% of payroll over $1,500,000	$42,500
$2,000,001 - $2,500,000	$42,500 + 1.5% of payroll over $2,000,000	$50,000
$2,500,001 - $3,000,000	$50,000 + 1.25% of payroll over $2,500,000	$56,250
$3,000,001 - $3,500,000	$56,250 + 1.0% of payroll over $3,000,000	$61,250
$3,500,001 - $4,000,000	$61,250 + .75% of payroll over $3,500,000	$65,000
$4,000,001 - $4,500,000	$65,000 + .5% of payroll over $4,000,000	$67,500
$4,500,001 - $5,000,000	$67,500 + .25% of payroll over $4,500,000	$68,750
Over $5,000,000	$68,750 + .125% of payroll over $5,000,000, or $75,000, whichever is less.	$68,750 to $75,000, whichever is greater.

The formula for calculating the quantum underscores an overwhelming bias in the favor of business and an egregious disregard for the health and safety of vulnerable workers. Specifically, the WCB's formula

[1] The author has added this column to underline the maximum quantum available under the Board's formula.

is based on the viability of the firm, that is to say, the degree to which the business will be financially constrained by the penalty. For the Board, the pivotal issue is *not* the nature of the employers' actions which put the worker's life in danger, nor the extent of the worker's serious injury or illness. It doesn't even matter if the contravention of the Act led to the death of the worker! What is important (in fact it appears to be the only criteria) is the infringing company's "assessable payroll range". By using such a formula the Board has brought the commodification of human life to a new low.

Similarly, the amounts set out in the penalty table speak volumes. Although the critical and oftentimes life-changing nature of a serious injury or illness or death is self-evident to most people, it has escaped the Board's notice. A summary glance at the administrative penalties imposed by WCB over the last several years bears this out.

- An unnamed company (0583690 BC Ltd) in Prince George was fined $2,125 when one of their workers lost his leg when he climbed into equipment that was housing a saw. Although the equipment was turned off, the blades had not come to rest.
- For repeated non-compliance with the fall-protection requirements this list of companies was charged the following amounts: Peter Funk, a construction company from Surrey, was charged $2,500; Aztech Home Sales Ltd from Merritt was charged $3,428; Nelson Stanley Hanson of Courtenay was penalized $2,731; Coast To Coast Roofing & Rubbish Removal Ltd received a penalty of $2,500; and Specialty Roofing Ltd was fined $3,500.
- For three violations within a seven-month period pertaining to the failure to provide a stairway comprised of at least framing, treads, and a handrail to each floor before construction of the next floor or deck surface was undertaken, Gurinder Chohan Construction of Surrey was charged $2,500.
- A roofer working for Harold David Gaucher sustained serious injuries from falling 3 meters from a roof, then striking another roof before falling another 6 meters onto a concrete basement floor. The employer had failed to ensure the worker used fall protection equipment. Quantum: $2,500
- For repeated violations of failing to ensure the health and safety of its workers, W.A. Allen Custom Contracting Ltd was fined $3,250.
- John Kenneth Sutton, a construction company situated in Chase noted earlier, was fined a total of $3,250 on May 3, 2010, for failing to ensure the use of fall protection as well as provide the worker with the requisite information, instruction, training, and supervision to ensure his safety. As a result, the worker suffered fatal injuries from falling about 6 meters to the ground from the edge of an unguarded roof.

Many of the violations of this type and quantum range are defined by the WCB as "repeated high-risk violations".

To repeat, issuing penalties with a high quantum and, therefore, a consequential deterrent impact, is *not* the standard operating procedure at the WCB. On the contrary, despite the self-congratulatory *Top 10 Enforcement Penalties* highlighted by the Board each year, the majority of penalties (i.e., the *rule* as

opposed to the *exception*) are unjustifiably low. Under the *Freedom of Information and Protection of Privacy Act,* the Council requested information as to the number of WCB's penalties issued in the construction industry for $5,000 or less from 2000 to 2010. The findings set out in the table below show, sixty-two percent (62%) of the penalties issued by WCB in the construction sector – one of the most dangerous sectors in the provincial economy – were $5,000 or below from 2000 to 2010.[2] Action, as always, speaks louder than words. The Board's actions in this regard reveal an unsavory favourtism for business and a callous disregard for the health and safety of workers.

Year Penalty Imposed	Total Penalties in Construction Sector	Penalties $5,000 or less
2000	135	105
2001	84	56
2002	63	39
2003	19	14
2004	44	26
2005	44	24
2006	40	27
2007	146	90
2008	93	45
2009	156	89
2010	195	117
	1,019	**632**

Conclusion

Section 196 of the *Workers Compensation Act* empowers the Workers Compensation Board to impose significant administrative penalties on employers who fail to protect the health and safety of vulnerable workers. Despite this fact, employers are egregiously and repeatedly contravening the Act because they know they can prudently square the cost of penalties with the maximum profit. And the maximization of profit for most businesses is "Job Number 1". Unfortunately, the Board has become partial to this business approach and, as a result, workers' lives are being put at risk. We witness this by scrutinizing WCB's penalty assessment table that uses the logic of business viability (i.e., profitability) to calculate the penalty quantum; we witness this by reviewing insignificant fines that are being issued for repeated, high risk violations; and we witness this in a wide range of the Board's policy directives and decisions with respect to compensation, assessment, and rehabilitation.

The Council supports the drafting of a Board policy to facilitate the interpretation of Section 198 of the *Workers Compensation Act* for officers seeking injunctions to uphold occupational health and safety requirements. Clearly there is a need for increased compliance tools. The proposed policy will assist

[2] Details listed for penalties prior to 2009 are based on the data that was originally entered at the time the penalty was recommended and may not reflect the final outcome of the penalty as issues may change in the process of imposing the penalty or on review or appeal.

officers in their deliberations with respect to the appropriateness of injunctions, and possibly improve compliance when the word gets out that the Board is actively seeking injunctive relief for the most serious infractions. That said, the Council thinks the proposed policy lacks the necessary specificity required to clarify the principles and guidelines that the court employs when considering injunction applications. Such guidelines may empower officers to better evaluate when an injunction will help or hinder them. The Council also thinks (and our analysis confirms) that seeking an injunction is a highly complex and legalistic matter, one that can easily result in failure as the case of *WCB* v. *Arthur Moore dba AM Environmental* illustrates.

To improve compliance the Board must use the statutory powers it already possesses more effectively. The Board should assign significant penalties for significant offences and thereby send an unequivocal message to employers that health and safety infractions will not be tolerated. A first step in this process is for the Board to draft a new prevention policy empowering WCB officers to exercise their statutory powers to issue substantial and therefore significant penalties. Only by so doing, as Hobbes counseled, will a paradigm shift in compliance take place.

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