Canadian Association for Research on Work and Health
CARWH
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Association canadienne de Recherche en Santé au Travail

December 13, 2013

Honourable Kellie Leitch,
Minister of Labour,
House of Commons,
Ottawa, ON
K1A 0A6

Dear Minister Leitch:

There are more than a million federal employees and thousands of companies in Canada in sectors such as railways, shipping, pipelines and mining who will be affected by the changes proposed to the Canada Labour Code occupational health and safety provisions in Bill C-4, the omnibus budget bill. I am writing to you today on behalf of the elected board of the Canadian Association for Research on Work and Health and at the request of our membership to comment on these proposed changes, the rationale provided for them by the government, the process involved in generating these proposed changes, and their potential consequences for federally regulated employees in Canada.

The Canadian Association for Research on Work and Health (CARWH) is a non-profit association of researchers in Canada whose work focuses on the prevention and management of ill health, disability, and injury associated with work activities and environments. Its mission is to "enhance and promote research on work health, safety, and well-being in Canada and to advocate for research that fosters a better understanding of how work and work environments may be altered to improve the health, safety, and well-being of Canadians." http://www.carwh.ca/about/default.html

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According to testimony by Mr. Kin Choi, Assistant Deputy Minister, Labour Program, Compliance, Operations and Program Development, Department of Human Resources and Skills Development to the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, the proposed changes have three main objectives:
1) to strengthen the internal responsibility system;
2) to clarify the definition of danger; and
3) to confer to the Minister of Labour the authority to delegate powers, duties, and functions to health and safety officers
(http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6312085&Language=E&Mode=1&Parl=41&Ses=2 ).

We speak, below, to the proposed changes, to each of these objectives and outline our related concerns about the process that generated the proposed changes and their potential to contribute to greater risk of particular kinds of injury and illness, under-reporting and deterioration of regulatory effectiveness with regard to exposure to hazards causing both short term and long term adverse consequences to workers.

The current Labour Code occupational health and safety provision, sec. 122.1, states: "'danger' means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system." http://laws-lois.justice.gc.ca/eng/acts/L-2/page-53.html#h-47

Under Bill C-4 this definition of danger is replaced with the following text: "'danger' means any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered."

Members of the board of CARWH believe the proposed amended definition of danger is much weaker in its protection of workers including particularly those exposed to chemicals, because it removes reference to chronic and reproductive illness. It also weakens the protection of workers from other types of exposures that could result in chronic conditions, such as work-related musculoskeletal disorders (repetitive strain injuries), occupational allergies and asthma, and occupational diseases, including

various types of cancer, with long latency periods. The new definition implies that work-related threats to health are only important to regulate if they are 'an imminent or serious threat to the life or health of a person exposed to it'. While there is space in the phrasing (with reference to 'serious') to include risks that are not imminent, this is less transparent to workplace parties than the existing phrasing, and thus the proposed change will increase confusion rather than provide clarification.

CARWH member, Canada Research Chair Katherine Lippel presented to the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities on November 21st. She raised a number of concerns about the proposed changes to the Canada Labour Code including concerns about the way courts would interpret the change in the definition of 'danger'. The government is suggesting nothing has been lost in terms of worker protection with the change in the definition but she maintains that the courts and workplace parties who have the task of applying the legislation will operate on the presumption that a change in the definition implies a change of meaning. Professor Lippel is concerned that the new definition of 'danger' being proposed is unclear and this will lead to confusion among workplace parties and in the courts. She also noted in her comments to the Standing Committee that the removal of 'reproductive hazards' from the definition systematically excludes males who are not covered by provisions for pregnant workers. It was also noted that reproductive hazards to females who are trying to conceive will no longer be included within the purview of the legislation.

We share Professor Lippel's and others' concern that the proposed changes to the definition of 'danger' in Bill C-4 do not make it clearer (a stated objective of the government) and may well contribute to a reduction in work refusals that could contribute in the future to increased risk of injury and particularly occupational disease among workers who fall under the Canada Labour Code.

A related concern is the basis for the claim used to justify this change. The justification for this and other sweeping changes to the Labour Code, according to the media, is that: "between 2000 and 2010, eighty per cent of refusals to work were found to be situations of no danger. These requests put a huge strain on resources. And it means our health and safety officers...can't concentrate on the areas where they really should be. Minister Leitch argued a clearer definition of danger will help free up those officers to do more proactive interventions." (http://www.cbc.ca/news/politics/proposed-labour-code-changes-worry-safety-advocates-1.2434214)

As you are no doubt aware, this statistic has been challenged by several parties to the discussion of these changes (see for example, http://www.cbc.ca/news/politics/psac-claims-government-officials-misled-mps-on-worker-safety-1.2442736). There are questions about its reliability that have not been adequately addressed by members of the department in their testimony to the Standing Committee and they are not, at this point, verifiable. In her testimony to the Standing Committee, Professor Lippel raised concerns about the "80%" statistic mentioned above. She points out that these data relate only to those cases that make it to the inspectorate as opposed to all cases, most of which would be settled before the inspectorate is brought in. This leads her to conclude that only the more complex cases make it to the inspectorate and thus these are not representative of right to refuse cases, and that a change in the definition could send a message to workplace parties that cases that had been settled under the old legislation, thanks to consensus between workplace parties, will henceforth no longer be settled, given the more restrictive definition provided in the new legislation.

As argued by Chris Aylward of the Public Service Alliance of Canada in his testimony to the Standing Committee, "Decisions of no danger don't mean there isn't a problem. Decisions of no danger could just mean that the danger was less serious. In many cases, decisions of no danger were also accompanied by directions written to employers to comply with the law. In other cases, employers were asked to give assurances of voluntary compliance. In the last two years, more than 5,000 assurances for voluntary compliance have been issued per year. The link between these assurances and decisions of no danger is what this committee really needs to consider."

In terms of the objective of strengthening the internal responsibility system, Professor Lippel reminded the Standing Committee that the internal responsibility system works badly in non-unionized workplaces and where there is considerable job insecurity – and that many of the workers who fall under the Canada Labour Code are in this situation (including temporary agency workers). This calls into question an explicit intent of the changes which is to enhance the role of the internal responsibility system in dealing with workplace exposures. Research done by Canadian researchers and CARWH members Wayne Lewchuk, Ellen MacEachen and Katherine Lippel and others on the internal responsibility system has highlighted ways it does not adequately protect the occupational health of temporary agency workers and many precarious workers more generally. A recent systematic review of the prevention incentives of insurance and regulatory mechanisms for occupational health and safety (Tompa, Trevithick and McLeod, 2007) found that there is strong evidence that specific deterrence in the form

of citations and penalties does indeed reduce injuries pointing to the limits of the internal responsibility system.

Part of the justification for the changes is the need to free up the time available to inspectors to engage in prevention rather than supporting further down-sizing in the inspectorate (testimony to the Standing Committee suggests considerable down-sizing has already occurred). Prevention is important but responding to work refusals may well play a key role in prevention by opening up the possibility of identifying a range of risk factors in a particular environment and of directing the attention of inspectors to look at other similar environments to see if these hazards exist. In other words, inspections triggered by work refusals can contribute to prevention at multiple levels both through coercion and the sharing of information, as argued by American researchers Scholz and Gray (1997).

Concerns have also been raised, appropriately, about the overall process that appears to have triggered and informed the proposed changes to the legislation including the possibility that this process violates Canada's commitment through its ratification of ILO Convention 187 "to undertake measures in full consultation with stakeholders through tripartite processes." According to Chris Aylward of the Public Service Alliance of Canada, "The regulatory review committee, a tripartite body that addresses emerging health and safety concerns in the federal sector, has received no complaints about the administration of the code, nor has the minister's advisory committee or the labour operations practice committee."
http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6321678&Language=E&Mode=1&Parl=41&Ses=2.

Testimony to the Standing Committee on November 21st from both the employer association (Federally Regulated Employers – Transportation and Communications – FETCO) and union representatives showed that neither party had been consulted about these proposed changes to the Canada Labour Code prior to Bill C-4 being introduced to parliament. FETCO representatives who presented to the Standing Committee indicated they support the proposed changes as bringing federal legislation more into line with provincial legislation and because the proposed changes strengthen the internal responsibility system. However, both representatives of labour and employers affirmed the importance and value of the tripartite process that has been in place for some years. FETCO also confirmed that they had not requested these changes.

A related proposed change to the Canada Labour Code is the proposed repeal of subsection 127.1(7), a provision that gives the joint health and safety committee the power to stop dangerous work. Given this and the fact that these health and safety committees have representatives from both sides and are the foundation of the internal responsibility system, it is unclear how the proposed changes are, as claimed by the government, going to strengthen that system.

According to testimony by Hassan Yussuff, from the Canadian Labour Congress, before the Standing Committee,

> "Changes in clause 180 of Bill C-4 would remove many of the powers of health and safety officers to review or investigate complaints and recommend remedial actions from employers to stop intolerable conditions. These changes would transfer powers to the minister instead, thus creating a new time-consuming bureaucratic hurdle. Many decisions will now be exercised through political direction, at the whim of the politicians of the day.
>
> Subclause 182(1) would give power to the minister to not undertake an investigation, and provides no avenue of appeal for the worker.
>
> Subclause 181(2) would transfer the employer's responsibility to initiate formal investigations over to the workplace health and safety committee, or to the health and safety representative. Ironically, subclause 181(1) of the bill repeals the very part of the code that currently empowers the health and safety committee to require employers to stop dangerous activities until rectified.
>
> Therefore, more responsibilities would now be vested in the committees while at the same time eliminating its powers to effectively act. The linchpin in the authority of health and safety officers to investigate is thus undermined by the new discretionary power vested in the minister.
>
> To a large extent the bill eliminates the flexibility in the current law that takes into account the diverse dimensions of federal workplaces. The new provisions would eliminate flexibility in responding to dangerous work, and introduces the possibility of unnecessary delays."
> http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6321678&Language=E&Mode=1&Parl=41&Ses=2

Under the new legislation the employer will prepare a written report as will the workplace committee. The employer can then provide further information and request reconsideration and make a decision notifying the worker in writing if they disagree with the employee. If the worker continues to refuse, the employer will notify the minister and provide a report and the minister will decide whether to continue. There is a risk, as was argued by Sari Sairanen, the Director of Health, Safety and Environment for the private-sector union Unifor in her testimony to the Committee, that this complex process and related risk of discipline to the worker will result in a loss of focus and capacity to deal with the immediacy of the risk of danger to the worker. As she suggests, the minister is not necessarily neutral or trained in OHS – why would the minister be the last point of appeal?
http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6312085&Language=E&Mode=1&Parl=41&Ses=2

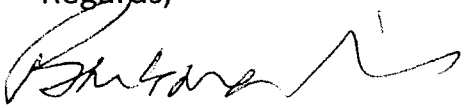
The proposed change in subsection 129(1) would give the Minister unilateral power to decide that a continued work refusal is "trivial, frivolous or vexatious" or in "bad faith." This change is of particular concern not only because the Minister is someone who – as noted previously - is likely unfamiliar with both the specifics of the individual work refusal and the broader field of OHS and because there appears to be no requirement that the Minister provide evidence or facts to support her/his decision.

Professor Lippel also expressed, in our view, valid concerns that if inspectors are appointed by the Minister, this will affect their autonomy and job security and thus their ability to act independently in response to the adjudication of workplace refusals. After all, for these inspectors, the government is both their employer and the employer (direct or indirect) of many of the workers who are concerned about their occupational health. Changes that enhance the potential for political intervention in the hiring, firing and training of these inspectors is likely to contribute to job insecurity and undermine their security to make orders in relation to their government employers.
http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6321678&Language=E&Mode=1&Parl=41&Ses=2

The government has justified the need for these changes and claims they will not negatively affect OHS by evidence of reductions, since 2000, in lost time injuries in Canada. However, as argued by Sari Sairenen, the number of fatalities in Canada has remained relatively constant over the same period calling into question the suggestion that the main problem with OHS in the country is frivolous use of the right to refuse on the part of Canadian workers. Changes in the world of work have contributed to a

reduction in violent incidents, but this does not mean that health hazards have disappeared, or that the risks of hazardous exposures to contaminants causing disease or birth defects have been eliminated from Canadian workplaces.

Regards,



Barbara Neis, Ph.D. FRSC
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on behalf of the CARWH Board.

Cc:
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Elizabeth May, MP for Saanich – Gulf Islands