FACT SHEET

UNIFOR

OCCUPATIONAL HEALTH AND SAFETY

HARPER GOVERNMENT PUTS WORKERS LIVES AND COMMUNITIES AT RISK

On October 31, 2014 new provision in Canadian Labour Code governing the Right-To-Refuse comes into effect. Ever since the Ontario Factory Act of 1886 workers and their unions have struggled to remove workplace conditions that lead to injuries, illnesses, death and chronic diseases. In the modern era workers collective actions through their union have improved working conditions and reduced workplace injuries, illness, disease and death. We still have a long way to go, but the Harper Conservative's through their Bill C-4 are the first Canadian government to purposely reduce workplace protections and decease workplace safety and community safety.

How? The Harper Government has restricted and hand-cuffed workers right to refuse dangerous work that could harm themselves or others. As usual they did it through secrecy, ambushes, and faulty science. They secretly developed major changes to the Federal Occupational Safety and Health Act that reduces workers' rights and protections. Then, without consultation, the Harper government sprung these major changes on workers and their unions thorough the "Bill C-4 – Economic Action Plan 2013 Act" a large omnibus bill that is thicker than a phone book. Lastly, the Harper government created junk science and pulled out wrong and misleading non peer reviewed studies claiming a vast majority of work refusals did not find a "danger" under the then existing definition and therefore did not improve the workplace health and safety conditions.

Evan a major employer Law Firm agrees that the new Right -to– Refuse is a backward step.

> **"The amendments provide for a new definition of "danger" that is more restrictive and will no longer include potential hazards or conditions, or any current or future activity that could reasonably be expected to cause injury or illness. As a result, work refusals will only be justified where an employee is faced with imminent or serious threat to his or her life or health.**
>
> **Notably, the new, narrow definition of danger is similar to an earlier definition".**
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> *(NORTON ROSE FULBRIGHT, Legal Update October 2014; Federal employment and Labour.)*

There are three major changes:

- A new more archaic/restrictive definition of Danger.
- A more bureaucratic and paper based Right-to-Refuse process

- Creates a new avenue that allows the Minister of Labour the right to not investigate a refusal. This refusal to investigate cannot be appealed by the worker.

THE AMENDED DEFINITION OF "DANGER"

Workers in Canada have a right to refuse dangerous work as their last line of personal protection when faced with the choice between doing an activity that will injure or kill them.

Bill C-4 proposes to dramatically roll back the definition of what constitutes a "danger" currently found under subsection 122(1) of the Canada Labour Code Part II.

Subsection 176(2) of Bill C-4 eliminates the current definition of "danger".

Current:

> "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**;

Changing it to:

> "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;

This change means we have lost the concept of "future activities" in our definition of danger:

- removes the right to refuse based on danger as a potential occurrence (now all based on imminent or serious threat to life or health); which means that workers will have to be in harm's way before they can establish that their working conditions are dangerous
- removes the idea that workers deserve protection from activities or conditions that could cause them danger or disease in the future
- the threat to life or health has to be based on something that has to be happening almost immediately or very soon (no more based on the concept of potential hazard)

This new definition removes the concept of exposure to hazardous substances that are likely to "result in a chronic illness, or disease.

- Workers will likely not be able to claim protection from potential chronic or slow developing illnesses (exposure to carcinogens for example).
- Have potentially lost the right to refuse on exposure to friable asbestos, diesel fumes or any other cancer-causing chemicals with a latency period of any symptoms.

- even though diesel fumes have been recently recognized as a definite cancer-causing substance; we have lost health and safety rights for workers exposed to diesel exhaust (i.e. loading docks, heavy equipment operators)

The new definition also removes the concept of exposure to hazardous substances that are likely to result in damage to the reproductive system.

- Have lost the concept of "danger that included any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system (before any pregnancy).
- Have lost any recognition of hazards having an impact of the male or female reproductive system.

The previous definition of workplace "danger" also recognized that danger was present in chronic muscular skeletal injuries such as repetitive strain injuries. In fact, such injuries account for a sizeable portion of compensable worker's compensation claims across the country. With the stroke of a pen, this too has been eliminated as a dangerous condition under the new law.

The new definition of danger requires that the workplace pose a threat that is either "an imminent or serious threat…" We have some understanding of what the term 'imminent' means as this concept was found in legislation prior to the changes that were made in 2000.

In an old 1984 decision, in a case between Bell Canada and Labour Canada, the Canada Labour Relations Board concluded that 'imminent danger' is a situation of high probability, that something out of the ordinary which will be injurious to the individual's safety and/or health is so likely to occur almost immediately and without warning, that the individual should withdraw themselves from the scene.

We can assume that the use of the term 'imminent' in the present definition will be given a similar interpretation, and that the threat to life of health has to be based on something that has to be happening almost immediately.

The government maintains that this new definition does not, reduce worker's rights. However, including the word "imminent" potentially has the effect of confusing the issue and introduces the idea that workers do not deserve protection from activities or conditions that could cause them illness in the future. That is to say, the threat to life or health has to be based on something that has to be happening almost immediately or very soon after the exposure to the hazard.

As well, by altering the definition of danger, workers will need to argue that a "serious" health effect would be incurred by performing a task or using the equipment. Current usage of the right to refuse does not require such evidence.

How the concept of 'serious threat to life of health' will be interpreted is not known at this time. In the meantime, workers' health and safety will hang in the balance, dangling on the meaning attached to that one word.

It is a fundamental principle of statutory interpretation that an amendment is considered to do just that: amend the existing law. It is assumed that the intention of the legislature when it changes the wording of a law is to change its original meaning. In fact, it would be nonsensical to amend a law and expect that it will not affect a change.

In the last thirteen years valuable jurisprudence interpreting the definition of "danger" has evolved. This jurisprudence, including judgments from the Federal Court of Appeal, provides valuable guidance to all stakeholders about what constitutes danger in the workplace. This jurisprudence will have little value once the definition of danger is fundamentally altered.

*New - A More Paper Driven Right to Refuse Process (steps)

1. An Initial investigation by the employer and the employee: written report. (Canada Labour Code, new section 128(7.1))

2. Health and safety committee investigation: written report to the employer. (Canada Labour Code, new section 128(10.1))

3. Employer can submit new facts to the health and safety committee and ask them to consider amending their report. (Canada Labour Code, new section 128(10.2))

4. Employer who is in receipt of the report from the health and safety committee can consider three options: "danger", "no danger" or "no right to refuse" based on the fact that these are normal conditions of employment or the refusal puts the life of someone else in danger. (Canada Labour Code, new section 128(13))

5. Continued refusal by the worker: reports to be provided to the Minister and interestingly includes both the initial employer report and the health and safety committee report. (Canada Labour Code, new section 128(16))

6. Investigation of the Refusal by the Minister of Labour. (Canada Labour Code, new section 129)

7. The Minister to determine if an investigation is warranted. The Minister can refer the continued refusal to another Part of the Canada Labour Code (Part I or Part III) or even another investigation established under another Act of Parliament. (Canada Labour Code, new section 129(1))

8. New test for the continued refusal to be considered: The Minister may decide not to investigate if the matter is "trivial, frivolous or vexatious" or if the continued refusal is considered by the Minister to be "in bad faith". (Canada Labour Code, new section 129(1)).

9. The Minister is then required to inform in writing, the employee and the employer. The employer must then inform the members of the committee. (Canada Labour Code, new section 129(1.1))

10. Once informed of the Minister's decision not to proceed, the employee cannot continue to refuse to work. (Canada Labour Code, new section 129(1.2)).

11. If the Minister decides to proceed, the refusal process continues. (Canada Labour Code, new section 129(1.3)).

12. Investigation may include the employee, the employer or an employee representative chosen by the employee. (Canada Labour Code, new section 129(1.4) -This sub-section is similar to the previous requirements found in section 129 (1)).

13. The Minister will check for previous investigations in relation to the same employer or involving the same issues. (Canada Labour Code, new section 129(3.1)).

14. The Minister will issue a written decision to the employer and the employee considering three options: "danger", "no danger" or "no right to refuse" based on the fact that these are normal conditions of employment or the refusal puts the life of someone else in danger. (Canada Labour Code, new section 129(4)).

Fewer Rights for Workers More Power to the Minister of Labour

The Labour Movement with the leadership of Unifor's founding Unions, the CEP and the CAW, first started working on the package of amendments to the Canada Labour Code, Part II in 1993.

Bill C-12, an act to amend the Canada Labour Code, Part II, was proclaimed on September 30, 2000. Seven long years had passed since we first started working on the proposed amendments to the Canada Labour Code, Part II.

The changes to the Code were achieved after extensive discussions and most of the items were reached by consensus at the legislative review committee where hundreds of proposals were put forth by union, management and government representatives.

Like any bargaining process, each side brings a list of proposed amendments. Using a consensus building approach, some proposed amendments are kept, some are changed; many are simply dropped.

FETCO proposed the following amendment in August 1993

"No employee may exercise the right to refuse dangerous work in a frivolous, vexatious or abusive manner."

Of interest is the employer proposal (FETCO - Federally Regulated Employers - Transportation and Communications) on the right-to-refuse.

This proposal was unanimously put aside by the working group and was not part of Bill C-12 in June of 2000.

In October 2013, Bill C-4 was tabled in parliament with a wide range of amendments to the Canada Labour Code Part II being proposed by the Minister of Labour. Most amendments roll back important gains made by workers over the last decades and favor employers' perspectives over workers.

This time, there was no formal consultation with workers, employers or even with the federal health and safety inspectors.

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.

However, Bill C-4 included a new test for a refusal to work dangerous work.

> *The Minister may decide not to investigate if the matter is "trivial, frivolous or vexatious" or if the continued refusal is considered by the Minister to be "in bad faith". (new section 129(1)). (S.182(1)). This decision by the Minister cannot be appealed by the worker.*

The 1993 FETCO proposal was included almost word for word in Bill C-4. Now the Minister of Labour can without an investigation at all quash a workers right to refused. Another example of the Harper Government attack on workers, their families and our communities.

HOW BILL C-4 CHANGES THE HEALTH AND SAFETY LANDSCAPE

Workers

⇒ Creates confusion on how/if to exercise the right to refuse.

⇒ Raises important questions for workers regarding the definition of danger. For example; what does the definition of Danger actually include? What is meant by "imminent danger and serious threats to life?" Does this mean we have to work in dangerous situations if the danger isn't "imminent?"

⇒ Will mean that it is important for workers to know who sits on the joint health and safety committee as they now have a crucial role in investigating the refusal to work.

⇒ The Minister determines if an investigation is warranted. Once informed of the Minister's decision not to proceed, the worker cannot continue to refuse to work and there is no appeal mechanism.

⇒ Will instill fear of discipline if workers use their right to refuse (minister can determine that the right to refuse is "trivial, frivolous or vexatious" or if the continued refusal is considered by the Minister to be done "in bad faith").

⇒ The relationship between workers and the Labour Canada inspectors will be significantly changed.

⇒ The power balance in the workplace has significantly shifted in favor of the employer.

Workplaces

⇒ There is very little information from the government on how Bill C-4 impacts health and safety in the workplace.

⇒ Some management representatives are spreading misinformation that often goes unchallenged (i.e. workers have no right to refuse dangerous work and denying accident reports to the health and safety committees).

⇒ Training needs to be revisited and committee members will need to be trained urgently.

⇒ Fewer workplace investigations and inspections will take place in the workplace, by an actual inspector (virtual investigations).

⇒ Some employers will use intimidation tactics to suppress the use of any health and safety rights by workers (already seeing this in some workplaces).

⇒ The government will require inspectors to issue assurances of voluntary compliances rather than issuing directions to the employer (this trend will now be even more significant).

Unions

⇒ Unions will have to ensure that there is a union health and safety representative or a health and safety committee in every workplace.

⇒ Unions will have to ensure that they have a knowledgeable representative on the joint health and safety committee that will support workers.

⇒ Unions will have to ensure that they have a union health and safety representatives from the committee present for investigations (taking into account shift work, various worksites, etc.)

⇒ Health and safety training may not include any union input even if the hazard prevention regulations require joint development of the health and safety education program.

⇒ Unions will need to challenge in federal courts key decisions by the government to clarify some of the new language in the law.

⇒ The power balance in the workplace has significantly shifted in favor of the employer.

Interpretations, Policies and Guidelines (IPGs)

IPGs are intended to ensure that legislation is interpreted consistently and that programs are delivered effectively across the country by Labour Program employees trained in interpretation of regulatory requirements.

IPG-004 (Revised): Participation of the Work Place Health and Safety Committee or Representative

http://www.labour.gc.ca/eng/resources/ipg/004.shtml

IPG- 062 (Revised): Definition of Danger

http://www.labour.gc.ca/eng/resources/ipg/062.shtml

IPG- 070 (New): Danger as a Normal Condition of Employment

http://www.labour.gc.ca/eng/resources/ipg/070.shtml

IPG-083 (New): Complaint is Trivial, Frivolous, Vexatious or Made in Bad Faith

http://www.labour.gc.ca/eng/resources/ipg/083.shtml

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