



JUSTICE and DETERRENCE

**A PLAN FOR CRIMINAL ACCOUNTABILITY
IN WORKPLACE FATALITIES AND SERIOUS INJURIES**

BACKGROUND

THE WESTRAY COMMISSION

May 9, 2012, marked the 20 year anniversary of the Westray coal mine tragedy, when 26 miners were killed after methane gas ignited causing an explosion near Plymouth, Nova Scotia. Despite serious safety concerns raised by employees, union officials and government inspectors in the lead up, the company instituted few changes and this very preventable disaster occurred.

After the disaster, the police and provincial government failed to secure a conviction against the company or three of its managers. A Royal Commission of Inquiry was established to investigate the disaster. In 1998, the judge delivered a damning report of management greed and government incompetence. Justice K. Peter Richard, Commission of the Westray Mine Public Inquiry stated:

“The fundamental and basic responsibility for the safe operation of an undertaking, rests clearly with management... [M]anagement failed in this primary responsibility and the significance of that failure cannot be mitigated or diluted simply because others were derelict in their responsibilities.”

The report made over 80 findings and 74 recommendations. Most notable is recommendation #73:

“The Government of Canada, through the Department of Justice, should institute a study of the accountability of corporate executives and directors for the wrongful or negligent acts of the corporation and should introduce in the Parliament of Canada such amendments to legislation as are necessary to ensure that corporate executives and directors are held properly accountable for workplace safety.”

The findings of this Commission, along with the years of hard work by the Westray families and unions, led to the push for **Bill C-45**.

ADOPTION OF THE WESTRAY BILL

Finally, in 2004 Canada's 37th Parliament passed amendments to the *Criminal Code* in *Bill C-45* or the "*Westray Bill*" with unanimous support of all parties. *Bill C-45* amended Sections 22.1, 22.2 and 217.1 of the *Criminal Code* which revoked the antiquated legal principle of the "directing mind" of the corporation, established new legal duties for workplace health and safety, and provided new rules for attributing criminal liability to organizations, including corporations, their representatives and those who direct the work of others.

"Mr. Speaker, the passage of Bill C-45 represents the final step in the House in making significant reforms to the criminal law as it applies to all organizations. The bill has its origins in the terrible tragedy of the Westray mine explosion. All parties in the House co-operated in ensuring that the bill received high priority."

"Corporate Canada would be well advised to assess their current OH&S programs, training budgets and real commitment to workplace health and safety. An effective program, with clear communication demonstrated throughout the organization, is not only the way to ensure compliance with legal obligations, but more importantly it helps to ensure the health and safety of one's employees,"

Paul Macklin, Liberal MP and Parliamentary Secretary to the Minister of Justice and Attorney General of Canada on introducing Third Reading of Bill C-45 on October 27, 2003.

THE LAW

217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Criminal negligence

219. (1) Every one is criminally negligent who

- o (a) in doing anything, or
- o (b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

LACK OF PROSECUTION

In the eight years since the changes to the *Criminal Code* in 2004 over 7,000 workers have died across Canada (as per the Association of Workers' Compensation Boards of Canada http://awcbc.org/common/assets/nwisptables/fat_summary_jurisdiction.pdf). Of these deaths, and countless other serious injuries, only few cases have been investigated by police for possible criminal charges. Of those that have been investigated and criminally charged, only two cases have gone to trial and only one resulted in a conviction – so far, no one has gone to jail.

Across Canada, the labour movement has been campaigning to increase the awareness, education, training and political will necessary to ensure that the legislation is used and prosecutions proceed. Included in this is lobbying for a dedicated prosecutor in each province and territory. This prosecutor would become a 'specialist' in occupational health and safety cases, gaining greater understanding of corporate responsibilities under the **Occupational Health and Safety Act, Regulation** and the *Criminal Code* and therefore, we believe, be more equipped to properly determine the likelihood of conviction.

In addition, the Canadian Labour Congress (CLC) recently produced a guide to investigating corporate criminal negligence in the event of a serious injury or fatality in a workplace entitled "A Criminal Code Offence: Death & Injury at Work". This document highlights the unique nature of occupational health and safety cases through the lens of the *Criminal Code*, the necessity of concurrent, but separate, police and Workers' Compensation Board investigations, and establishes the need for specific training for police investigators in that regard.

The B.C. Federation of Labour, along with the families of the victims of these catastrophic workplace incidents, and the United Steelworkers have been at the forefront of this charge in BC – consistently calling for more criminal prosecutions and, ultimately, jail time for those responsible.

This is not just about justice for the victims and their families. It is our firm conviction that until corporate criminal negligence is taken seriously; until corporate representatives are sentenced to jail time due to their criminal negligence; these preventable and tragic deaths and serious injuries will continue to occur.



B.C. FEDERATION OF LABOUR

RECOMMENDATIONS

The B.C. Federation of Labour has identified three key deficiencies that we believe, based on historical experience, have contributed to an absence of criminal prosecutions. The following three recommendations require few incremental resources and will ensure that in every case of a workplace fatality, the victims and their families will have the real opportunity to see justice served.

These recommendations must be accompanied by a culture in policing and prosecution that views criminal prosecution in cases of negligence causing death or serious injury as an important deterrent, and necessary for the carriage of justice.

1. DEDICATE A CROWN PROSECUTOR TO DEAL WITH WORKPLACE FATALITY & SERIOUS INJURY CASES.

The dedicated prosecutor will become an expert in reviewing these investigations against Section 217.1 of the Criminal Code and, therefore, more accurately determining the likelihood of conviction.

2. TRAIN POLICE SERVICES ON SECTION 217.1 OF THE CRIMINAL CODE.

This will ensure that police understand the law and know what to look for in workplace fatality and serious injury cases in order to collect the best evidence to support the Crown Counsel's decision making.

(see the CLC guide "A Criminal Code Offence: Death & Injury at Work" <http://www.canadianlabour.ca/sites/default/files/death-and-injury-at-work-en.pdf>)

3. MANDATORY POLICE INVESTIGATIONS OF ALL WORKPLACE FATALITIES AND SERIOUS INJURIES.

Police investigations are necessary in order to determine if criminal negligence exists, as they are trained to collect and weigh criminal evidence. These investigations must be separate from the OHS regulatory investigation, but can be done in collaboration.



B.C. FEDERATION OF LABOUR

INCIDENTS IN BC

Lyle Hewer

SAWMILL WORKER, WEYERHAEUSER (USW LOCAL 1-3567)

Lyle Hewer, 55 years old, died horrifically in November 2004 after being trapped and asphyxiated by debris in a hopper connected to a hog - a machine that converts wood waste to chips. He was rushed to Royal Columbian Hospital where he succumbed to injuries.

Hewer died from injuries incurred after following a supervisor's request to work under conditions the employer knew were hazardous. In 2007, the WCB finished their investigation and concluded that Weyerhaeuser violated the OHS regulations "willfully or with reckless disregard" and had a high level of knowledge of the hazards faced by Lyle.

The police investigated and recommended criminal charges, but the Crown Counsel determined there was insufficient evidence to proceed. In March 2010, the USW launched a private prosecution and the Provincial Court ruled that there was sufficient evidence in March 2011. In August 2011, the Crown Counsel took conduct of the prosecution and concluded that there was no substantial likelihood of conviction.

Outcome: Charges stayed

Fine – Employer - \$297,000 (OHS Regulation)

Abbotsford Farm Workers

15 PASSENGER VAN CRASH (2007)

Sarbjit Kaur Sidhu, 31, Amarjit Kaur Bal, 52, and Sukhvinder Kaur Punia, 46, were killed on the morning of March 7, 2007 travelling to work in a 15-passenger van; the remaining 14 workers were injured.

The 15-passenger van was overloaded, carrying 17 people, had only two seat belts, and wooden benches had replaced the stock seats. It was being driven

dangerously by the van's owner, a labour contractor, who did not have the proper driving license. Following their investigation, the Police recommended 8 charges under the *Motor Vehicle Act (MVA)* and 33 criminal charges including 3 counts of criminal negligence causing death. The driver pled guilty to 2 charges under the *MVA* and the Crown Counsel dropped all the remaining charges.

Outcome: Fine - Drive \$2,000; 1 year driving suspension.

Fine – Employer -\$69,000 (OHS Regulation - unpaid)

The families were outraged by this lack of justice and worked with the Federation to call for a Coroner's Inquest into the incident. In 2009 a Coroner's Inquest was held and the jury investigating the crash made 18 recommendations aimed at cleaning up the unsafe working conditions farm workers face. The government has ignored or side-stepped many of the recommendations.

Outcome: 18 Coroner's Jury Recommendations

John Wilson

MINER, CRAIGMONT MINE (USW LOCAL 7619) (2008)

John Wilson was 62 years old when he drowned on February 28, 2008 while working for Craigmont Mines near Merritt, BC. John was working in an excavator that tumbled into a tailings pond. John was trapped inside the cab of the sinking excavator as it had been modified with bars across the safety exit hatch. John's co-workers fought to save him by keeping his head above water for as long as possible, even inserting a hose into his mouth as the cab filled with water.

The Ministry of Mines investigated and found that the employer failed to fulfill their responsibility to ensure a safe workplace, including failing to ensure the equipment was safe for workers to operate; failing to do a land survey prior to the start of spring operations and failing to educate workers about the emergency procedures for the site.

The Ministry of Mines sent the file to the RCMP to investigate. In early 2012, the RCMP recommended criminal charges to the Crown Counsel. In 2013, Crown Counsel determined that no charges would be laid as there was no substantial likelihood of conviction. In addition, no administrative fines were levied as the Ministry of Mines must levy a fine within six months of the incident occurrence.

Outcome: No criminal Charges Laid.

No Fine.

5 Mushroom Farm Workers

LANGLEY MUSHROOM COMPOSTING TRAGEDY (2008)

On September 5, 2008, five farmworkers were exposed to hydrogen sulphide and low oxygen conditions in the confined space of the mushroom composting pump house. Ut Van Tran, 35, Han Duc Pham, 47, and “Jimmy” Chi Wai Chan died, while Michael Phan and Thang Tchen were left with permanent brain damage. These men were all fathers of school aged children – thirteen (13) in all.

The WCB took two (2) years to complete their investigation and the evidence supported that the owner was willfully and grievously negligent. The owners had no safety program in place at the farm. They provided no safety training for their workers. They failed to properly supervise the workers. They took none of the precautions needed when employees are required to work in a confined space. And the list goes on.

The WCB recommended 29 charges under the OHS Regulation. Although initially on the scene, the Police did not investigate this tragic incident for possible criminal negligence. In the fall of 2011, the owners and supervisor pled guilty to 10 and the Crown Counsel dropped the remaining 19 charges and recommended a fine, no jail time.

**Outcome: Fines: Owner - \$15,000, Supervisor - \$10,000, Director - \$5,000,
A1 Mushroom - \$200,000 (unpaid), H.V. Truong -- \$120,000**

A Coroner’s Inquest was held into this tragic incident in May 2012 in response to the persistence of the families and the Federation demanding changes that would ensure that this very preventable tragedy would never recur.

Outcome: 15 Coroner’s Jury Recommendations

Sam Fitzpatrick

ROCK SCALER, KIEWIT, TOBA INLET (2009)

On February 22, 2009, Sam Fitzpatrick, a 24 year old rock scaler, died while working on the construction of a large hydroelectric project at Toba Inlet when a large rock struck him as it rolled down a slope into his work area. Sam and three other workers had been assigned to work on the slope even though the employer was aware that work was being done above them – one of those other workers was Sam’s own brother.

The WCB investigation found that supervisors assigned work in hazardous areas even though the unsafe conditions were routinely identified and evident – clearly negligent behavior. The WCB imposed an administrative penalty which Kiewit appealed to the Review Division. The WCB Review Officer confirmed that Kiewit had acted with reckless disregard (gross negligence) and that the cause of the fatal incident and the violations of the regulation were glaring or obvious and upheld the penalty.

The police did not perform a full investigation of this incident as the supervisor had not “intentionally” pushed the rock onto Sam – missing the opportunity to investigate corporate criminal negligence. The WCB did not forward this file to the Crown Prosecutor’s office for consideration of criminal charges.

Outcome: Fine - Prime Contractor \$250,000

Dozens of Unknown Workers

ASBESTOS EXPOSURE ARTHUR MOORE CASE (2010)

Arthur Moore, an asbestos and drywall removing contractor, repeatedly, and knowingly, exposed his workers to deadly asbestos fibers without protection. Most of Moore’s workers were under 18, some as young as 14, and were told to run if WCB inspectors showed up.

The WCB had repeatedly ordered Moore, persistently tracking him down under various company aliases, to stop work, including levying fines against him. Finally, after violating a court injunction to stop performing this unsafe work, Moore was sentenced to 60 days in jail for contempt of court.

60 days in jail is not justice for willfully handing these workers a potential death sentence. Asbestos-related diseases often take at least 20 years to materialize and remain the leading cause of work related fatalities each year in BC.

Outcome: Jail - 60 days (contempt of court)

ASBESTOS EXPOSURE SINGH CASE (2013)

Mike and Shawn Singh, owners of Seattle Environmental Consulting and Skylite Building Maintenance Ltd., both asbestos abatement companies, repeatedly and wilfully exposed workers to deadly asbestos fibers without protection.

In September 2012, WCB was granted a court order that prohibited the Singhs and Seattle Environmental Consulting from putting persons at risk of exposure to asbestos. In the seven months following the court order, the Singhs and their businesses continued to expose workers – including providing falsified clearance certificates for home demolition and improperly removing asbestos from homes – resulting in 51 further orders. Since 2009, the WCB documented at least 290 violations by the two companies and they have racked up over \$340,000 in (unpaid) penalties.

After hearing WCB's 900-page submission of evidence, in 2013, the judge found the Singhs in contempt of court. Of note, Singh had nine projects underway doing asbestos removal while sitting in front of the judge.

Outcome: Fine - Owner (Mike)/Company \$10,000

Fine – Owner (Mike's son, Shawn) \$5,000

NH/mp/km
cope378
1000-12rep-nh-ohs-justiceanddeterrence.indd

HISTORY OF “CHARGES”

YEAR	PROVINCE	INCIDENT	CHARGED	OUTCOME
2004	Ontario	R. v. Fantini Worker digging a trench under supervisor’s direction killed when trench collapsed.	Supervisor	2005 - <i>charged under 217.1</i> Pled guilty to OSHA violation Criminal charges withdrawn Fined \$50,000
2004	BC	R. v. Weyerhaeuser Worker asphyxiated while clearing clogged debris from a hog in the sawmill. WCB found management violated OHS regulations “willfully or with reckless disregard” and had a high level of knowledge of the hazards faced by Lyle Hewer.	Employer Manager	2007 - Police recommended criminal charges Crown dropped re insufficient evidence: Fined \$297,000 (under WCB OHS Regulation) 2010 - USW launched private prosecution 2011 - Provincial court rules sufficient evidence 2011 - Charges stayed , no substantial likelihood of conviction
2005	Quebec	R. c. Transpave Inc. Worker was crushed by cement-block packing machine. Safety system has been disabled without the knowledge of the employer or its senior officers.	Employer	2008 - <i>charged under 217.1</i> Employer plead guilty to criminal negligence causing death and regulatory offences Fined \$100,000
2005	Quebec	R. c. Hritchuk Two workers seriously burned after using a hand-crafted fuel pump. Equipment had been broken for years.	Employer Manager	2007 - <i>charged under 217.1</i> 2012 - pled guilty to 1 count of criminal negligence causing bodily harm Fined \$15,000 (Employer under OHS regulation) Manager - Absolute Discharge
2006	Quebec	R. c. Scrocca Worker killed when pinned by backhoe driven by owner. Backhoe brakes were at less than 30%. Backhoe had not been serviced in 5 years.	Owner	2010 - <i>Charged & convicted under 217.1 (trial)</i> Owner received a conditional sentence of 2 years less a day to be served in the community

YEAR	PROVINCE	INCIDENT	CHARGED	OUTCOME
2006	Quebec	R. c. Gagnier/Lemieux Worker killed and three others injured when train collided with track maintenance vehicles.	Train operator Foreman	2010 - <i>charged under 217.1 (trial)</i> Acquitted of all criminal charges
2006	BC	R. v. Lilgert Two passengers killed when BC Ferry "Queen of the North" sank off the north coast of BC	Ferry Officer (Worker)	2010 - <i>charged under 217.1 (trial)</i> 2013 - sentenced to 4 years for 2 counts of criminal negligence causing death.
2008	BC	Craigmont Mine Worker died when the excavator overturned into a water-filled sump.	Owner Company	2013 - Crown decided no charges would be laid. No fines.
2009	Ontario	R. v. Millennium Crane Rentals Crane fell into the hole crushing a worker to death. Crane found not to be in safe operating condition and was being operated without a proper license.	Crane Owner Operator	2010 - <i>charged under 217.1</i> 2011 - charges withdrawn , no reasonable prospect of conviction. Fined \$70,000 under Ontario OHSR and convicted.
2009	Ontario	R. v. Metron Construction 5 migrant workers fell 13 stories after swing stage scaffold they were working on broke, killing four workers and seriously injuring one.	President Company	2010 - <i>charged under 217.1</i> 2012 - pled guilty to 1 count of criminal negligence President pled guilty to 4 breaches under OHS Act Company fined \$200,000 + 25% victim fine surcharge President fined \$90,000 + 25% victim fine surcharge 2013 - Court of Appeal tripled penalty to Company \$750,000
2011	Ontario	R. v. Peck Nursing home resident died as a result of a fall while being moved by a personal support worker.	Worker	2011 - <i>charged under 217.1</i> Charges withdrawn , no reasonable prospect of conviction

