
CORPORATE CRIMINAL NEGLIGENCE: NEW WAYS TO PROTECT EMPLOYEES' HEALTH AND SAFETY¹

By L. McGrady Q.C. & S. Deepak
McGrady, Baugh & Whyte, Lawyers
Vancouver, Canada

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Introduction

The focus for this paper is legislation commonly known as Bill C-45 (the Westray Bill).

In 1992, 26 coal miners died in a mine explosion in Nova Scotia. In the 13 years since that date, not a single member of management, and not a single owner, has ever been convicted of a *Criminal Code* offence. This is so despite the fact that evidence called during a subsequent inquiry demonstrated beyond a doubt that management was guilty of

¹ Earlier versions of this paper were delivered first to the Teamsters Canada Rail Conference Maintenance of Way Employees' Division By-Law Convention held November 5, 2005 in Calgary, AB; to members of the International Longshore Union on November 9, 2005, in Vancouver, BC; and to a Capilano College Labour Studies Program class held at the BC Teachers' Federation on November 16, 2005 in Vancouver, BC. The paper has been updated, particularly to take into account the three November 2005 *Getsco* decisions.

culpable behaviour. They deliberately chose to operate the mine knowing that the operation jeopardized the lives of the workforce.

It took unions, as well as members of the murdered miners' families, approximately 12 years to achieve the success of having this new legislation passed by the government. It has been in effect since March 31, 2004. However, after the initial burst of enthusiasm and interest for the new legislation immediately upon its passage, it has languished mostly unused for almost 2 years.

Domenico Fantini, a 68 year old on-the-job supervisor, was the first and thus far the only person charged with criminal negligence causing death under the new section. The charge related to the death of a worker in southern Ontario who was operating a mini-excavator to dig a 12-foot trench. The worker became trapped when the ground gave way. He succumbed to his injuries and died.

The charge was withdrawn in an apparent plea bargain where Fantini agreed to pay a fine of \$50,000 for contraventions of the *Ontario Occupational Health and Safety Act*.² The charge, although withdrawn, highlights the breadth of all those covered by the new section.

The purpose of this paper and this seminar is to familiarize you with the framework for health and safety enforcement in federally and provincially-regulated industries; to familiarize you with the provisions of section 217.1 (corporate criminal negligence); and take you step-by-step through the process of laying a charge yourself if the crown prosecutor and/or the police decline to do so.

Part II of the *Canada Labour Code* (the "Code") applies to employers and workers subject to federal jurisdiction in key sectors of the economy, including railway transport, air transport, highway transport, ferries, tunnels, bridges and canals, banks, pipelines, broadcasting, telecommunications, and other industries under federal jurisdiction.

Part III of the *Workers Compensation Act* (the "Act") applies to the provincial government and its agencies, every employer and worker whose occupational health and safety are ordinarily within the jurisdiction of the provincial government, and anyone else that the federal government submits to the application of the Part (section 108).

Despite various protections offered by provincial and federal legislation, the statistics suggest that employers are not always in compliance with their duty to protect the health and safety of employees. At times, the failure results in serious injury or death, which could have been avoided, and those responsible do likely get away with little or no consequence.

² *The Lawyers Weekly* (June 3, 2005), "First Criminal Charges Under Bill C-45 Mean Workplace Prosecution May be Rare"

Despite the protections, the result is that there are far too many accidents, injuries and fatalities in the workplace. Each year hundreds of workers are killed throughout Canada, on average over 800 deaths a year. Further, hundreds of thousands of workers are injured at work. These tragedies have profound social repercussions, not only on the individual families of these workers but on Canadian society, and economic repercussions in the billions of dollars.

Federal and British Columbia Occupational Health and Safety Legislation

Federal Legislation

The purposes of the *Code* are set out in section 122.1 as being “to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment” to which the Part applies.

In order to prevent accidents and injury to health, section 122.2 stipulates that such measures should consist of, first, the elimination of hazards and, then, the reduction of hazards. If that does not work, then preventative measure should consist of “personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees”.

Section 124 states that it is the duty of the employer to “ensure that the health and safety at work of every person employed by the employer is protected”. Subsequent provisions in the *Code* impose specific duties on the employer to fulfill certain obligations with respect to health and safety of employees and to keep safe the workplace, in general. The *Code* also imposes obligations on employees under section 126, including that an employee take all reasonable and necessary precautions to ensure his/her health and safety and the safety of other employees, and any person likely to be affected by the employee's acts or omissions, are protected. However, the employer still has the general duty to ensure that the health and safety of every employee are protected and that it fulfills its obligations under the *Code*.

The *Code* contemplates an internal complaint process (section 127.1) and the right of an employee to refuse work if an employee has reasonable cause to believe that danger exists, with certain exceptions (section 128). For the purposes of addressing health and safety matters that apply to work, undertakings or businesses of employers who directly employ 300 or more employees, the *Code* mandates that the employer establish a workplace health and safety committee (section 134.1). A workplace health and safety committee is mandated for individual workplaces where 20 or more employees are employed, with certain exceptions (section 135). For workplaces where fewer than 20 employees are employed, or where the employer is not required to establish a workplace committee, the employer is obligated to appoint a health and safety representative for the workplace (section 136). The *Code* also contemplates the designation of regional health

and safety officers or health and safety officers with certain legislated powers of investigation and direction.

There are other provisions in the *Code* that offer some protection to workers; however, the ones described above are the more significant protections.

The *Canada Occupational Health and Safety Regulations* provide specific requirements, in greater detail, in an attempt to ensure a healthy and safe workplace.

Sections 148 to 154 address some of the offences and punishments for violations of the *Code*. Maximum financial penalties for offences under the *Code* range from \$100,000 to \$1,000,000, with a maximum term of imprisonment of not more than two years. A defence of "due care and diligence" is available under the *Code*. However, no proceeding in respect of an offence can be instituted except with the consent of the Minister or a person designated by the Minister.

British Columbia Legislation

The purposes of the *Act* are set out in section 107 as being "to benefit all citizens of British Columbia by promoting occupational health and safety and protecting workers and other persons present at workplaces from work-related risks to their health and safety".

Under section 111, it is the Workers' Compensation Board's mandate "to be concerned with occupational health and safety generally, and with the maintenance of reasonable standards for the protection of the health and safety of workers in British Columbia and the occupational environment in which they work".

Section 115 sets out the general duties of the employer, including that it is the duty of the employer to "ensure the health and safety of (i) all workers working for that employer, and (ii) any other workers present at a workplace at which the employer's work is being carried out". Section 116 sets out the general duties of the worker, including that "every worker must (a) take reasonable care to protect the worker's health and safety and the health and safety of other persons who may be affected by the worker's acts or omissions at work". Under section 117, supervisors are mandated to, for example, "(a) ensure the health and safety of all workers under the direct supervision of the supervisor" and "(b) be knowledgeable about this Part and those regulations applicable to the work being supervised". Employers, workers and supervisors must comply with Part III, the regulations, and any applicable orders. The *Act* also sets out the general duties of prime contractors, owners, suppliers, and directors and officers of a corporation (sections 118-121). Apart from the above, there are many other sections of Part III that attempt to ensure a safe and healthy workplace.

Division 5 of Part III is currently not in force. That division includes sections 141-149 that set out the right to refuse unsafe work and the procedure for refusing unsafe work. Currently, Part 3 of the *British Columbia Occupational Health and Safety Regulation* sets out the right to refuse work and the procedure for the refusal.³ Section 3.12 states:

3.12 Procedure for refusal

- (1) A person must not carry out or cause to be carried out any work process or operate or cause to be operated any tool, appliance or equipment if that person has reasonable cause to believe that to do so would create an undue hazard to the health and safety of any person.
- (2) A worker who refuses to carry out a work process or operate a tool, appliance or equipment pursuant to subsection (1) must immediately report the circumstances of the unsafe condition to his or her supervisor or employer.
- (3) A supervisor or employer receiving a report made under subsection (2) must immediately investigate the matter and
 - (a) ensure that any unsafe condition is remedied without delay, or
 - (b) if in his or her opinion the report is not valid, must so inform the person who made the report.
- (4) If the procedure under subsection (3) does not resolve the matter and the worker continues to refuse to carry out the work process or operate the tool, appliance or equipment, the supervisor or employer must investigate the matter in the presence of the worker who made the report and in the presence of
 - (a) a worker member of the joint committee,
 - (b) a worker who is selected by a trade union representing the worker, or
 - (c) if there is no joint committee or the worker is not represented by a trade union, any other reasonably available worker selected by the worker.
- (5) If the investigation under subsection (4) does not resolve the matter and the worker continues to refuse to carry out the work process or operate the tool, appliance or equipment, both the supervisor, or the employer, and the worker must immediately notify an officer, who must investigate the matter without undue delay and issue whatever orders are deemed necessary.

³ See Appeal Division Decision No. 2001-2562 and Appeal Division Decision No. 2002-0458 for further reading on the refusal to perform unsafe work and discriminatory action. The decisions can be found at: http://www.worksafebc.com/publications/wc_reporter/assets/pdf/2001_2562.pdf and http://www.worksafebc.com/publications/wc_reporter/assets/pdf/2002_0458.pdf

The Guidelines under section 3.12 state:

G3.12 Refusal of unsafe work

Issued August 1, 1999

An officer investigating a situation under section 3.12(5) of the *OHS Regulation* will:

- (1) Interview the worker or workers refusing to work and the employer's representative to obtain all available information regarding the situation.
- (2) Inspect the site of the reported hazard.
- (3) Issue an inspection report specific to the site or subject of the reported hazard. If an undue hazard exists, the officer will issue a "stop work" order under section 187, 190 or 191 of the *Workers Compensation Act*, depending on the nature and seriousness of the hazard. If no immediate danger or undue hazard is observed, the body of the inspection report will note "An investigation of a work refusal under section 3.12 has not identified an undue hazard."
- (4) Discuss with the worker(s) refusing to work and the employer's representative the results of the investigation and ensure both understand the procedure for resolving work refusals under section 3.12. The officer will advise the parties of the requirement of section 3.13 of the *OHS Regulation* that "A worker must not be subject to discriminatory action as defined in section 150 of Part 3 of the *Workers Compensation Act* because the worker has acted in compliance with section 3.12 or an order made by an officer".
- (5) If a violation is observed at the employer's operation in an area separate from the site or subject of the refusal to work, or is observed at the site or subject of the reported hazard but the violation is not considered an immediate danger or an undue hazard, the officer will issue the orders on a separate inspection report.

The minimum requirements for occupational health and safety in British Columbia are set out in the *Act*, the *Regulation* (which provides specific requirements in greater detail), the *Hazardous Products Act* (federal legislation that is administered under section 114 of the *Act*, which applies to persons who deal with WHMIS-controlled products in the workplace and those who supply the products), the WCB Prevention Manual (which sets out the policies of the WCB with respect to the *Act* and the *Regulation*), and the Guidelines which are intended to assist with providing ways of complying with the *Act* and the *Regulation*.⁴

⁴ For a good overview of occupational health and safety law in British Columbia and links to the legislation, policies and information on the guidelines, see the following website:
<http://regulation.healthandsafetycentre.org/s/Introduction.asp#About%20the%20Occupational%20Health%20and%20Safety%20Regulation>.

Division 15 of Part III, sections 213 to 220, addresses some of the offences and penalties for violations of Part III, the regulations or orders. In the case of a first conviction, imprisonment up to 6 months, a fine, or both, may be imposed. A fine may be to a maximum of \$568,574.03, and in the case of a continuing offence a further fine of not more than \$28,428.72 for each day during which the offence continues after the first day. On a subsequent conviction, imprisonment up to 12 months, a fine, or both, may be imposed. The fine may not be more than \$1,137,148.05, and in the case of a continuing offence not more than \$56,857.40 for each day during which the offence continues after the first day. Amongst others, the penalties may include additional fines for any monetary benefits accrued, community service, etc. A defence of "due diligence" is available under Part III, section 215, and under section 214 an Information in respect of an offence may only be laid with the approval of the Board.

Statistics

The Association of Workers' Compensation Boards of Canada ("AWCBC") compiles statistics from WCBs throughout Canada. Statistics can be reviewed on the AWCBC website or a request may be made for statistics specifically required.

The AWCBC statistics state that across Canada, from 1982 to 2003, work injuries and diseases that resulted in time-loss from work totalled 10,269,264. The numbers of injuries appear to be declining over the years. For example, from 1996 to 2003, the numbers were between 348,854 and 392,502, whereas from 1982 to 1995, the numbers were between 410,464 and 620,979. Because these statistics reflect only claims that resulted in time-loss from work, the actual numbers of work-related injuries are significantly higher. For example, on average, there are close to 300,000 workplace injuries each year in Ontario, with about 100,000 of them to be considered "serious" where time is lost from work. The estimated cost to the Ontario economy alone is \$12-billion, factoring in lost productivity, retraining and rehiring, equipment damage, and insurance expenses.⁵

The number of fatalities across Canada appears to be on the rise. In the last eleven years in which statistics have been kept (there are no current statistics for 2004 or 2005 available from the AWCBC), from 1993 to 2003, fatalities, accepted as work-related, across Canada totalled 9,050. That is approximately 823 work-related deaths a year, and over 2 work-related deaths a day. In 1993, the total number of work-related deaths was 758, and for 2003 the total shot up to 963, or just over 27 percent. The trend for fatalities in the workplace is that the numbers are significantly rising. The following are the fatalities from 1993 to 2003, respectively: 758, 725, 748, 703, 833, 798, 787, 882, 919, 934, and 963.⁶

⁵ Lancaster House, "Ontario Clamping Down on Safety Violators – Worst Offenders to be Given 'Last Chance' to Improve", Labour Law – Issue No. 89.

⁶ These statistics can be found at AWCBC website at http://www.awcbc.org/english/NWISP_Stats.htm.

