

The dawn of corporate *criminal* responsibility



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More than eleven years after an explosion ripped through the Westray coal mine in Plymouth, Nova Scotia killing 26 miners and triggering a decade-long legal battle for victims' families, new federal legislation will make corporations, their management, directors and officers legally responsible for unsafe work environments.

Ottawa introduced legislation on June 12, 2003 holding corporations criminally responsible if they fail to provide a safe work environment. The bill requires employers to take "reasonable measures" to protect workers from "physical injury or harm," said then-federal Justice Minister Martin Cauchon. The legislation also provides tougher penalties for company officials who direct their employees to commit crimes to benefit the corporation, and for those who become aware of criminal activity in the workplace but do not take action to stop it. It gives employees the "right to be informed about hazards in the workplace, the right to participate in correcting those hazards, and the right to refuse dangerous work." Corporations could face fines of up to \$1 million if they are found responsible.

Bill C-45, An Act to Amend the Criminal Code (criminal liability of organizations) received Royal Assent on November 7, 2003. The enactment amends the Criminal Code to (a) establish rules for attributing to organizations, including corporations, criminal liability for the acts of their representatives; (b) establish a legal duty for all persons directing work to take reasonable steps to ensure the safety of workers and the public; (c) set out factors for courts to consider when sentencing an organization; and (d) provide optional conditions of probation that a court may impose on an organization.

The bill states that, "everyone 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".



It also says an organization is a party to an offence if a "representative" commits an offence while acting in the scope of their authority, and the senior officer(s) of the organization depart "markedly" from the standard of care that would have prevented the offence from occurring. Representatives include people with authority to make day-to-day decisions — directors, partners, employees, members, agents, or contractors of the organization.

When first introduced, Cauchon said the law was a "direct response to the Westray mine disaster", an incident for which no one was ever held criminally responsible, even though a subsequent inquiry laid blame on Westray's owner, management, and two Nova Scotia provincial government departments.

THE INCIDENT AT WESTRAY

At 5:18 a.m., May 9, 1992, a pocket of methane gas was ignited from what likely was a spark from a piece of equipment. The ignition caused a chain reaction explosion of methane and coal dust that

was so powerful, it blew off the roof of the mine entrance more than one mile above. Twenty-six men lost their lives. Eleven remain in the deeps to this day — their bodies unrecoverable due to the catastrophic damage caused by the blast.

Despite the findings of an inquiry which was highly critical of the mine's owner, managers and government overseers, and despite an extensive investiga-



tion by police and the Crown, no one was ever criminally prosecuted for their role in the disaster.

Curragh Resources Inc. initially was charged with 52 non-criminal counts of operating an unsafe mine, however the company went bankrupt in 1993. The charges then were dropped after a Nova Scotia judge criticized the way in which they were laid. The case went back to trial,

was dismissed again, and the Supreme Court of Canada ordered a new trial. Though two mine managers were charged with criminal negligence causing death and manslaughter, the trials collapsed when the Crown stayed proceedings, saying there was not enough evidence to proceed. This is despite the fact that the four volume inquiry document, which was published in December 1997, reported example upon example of mismanagement, violations of safety regulations and practices, and failures to protect the safety of workers.

One oft-quoted extract from the inquiry report, written by Mr. Justice Peter Richard, summed up his findings well: "...the Westray story is a complex mosaic of actions, omissions, mistakes, incompetence, apathy, cynicism, stupidity and neglect", and that, "Westray management failed in its primary responsibility, the safe operation of an underground coal mine..."

In 1993 victims' families, saddened by their losses and embittered by the lack of accountability for the disaster,

commenced an action under the Fatal Injuries Act, R.S.N.S. 1989, c.163. The Defendants were Curragh Inc., Clifford Frame, Gerald Phillips, Roger Parry, John B. Mitchell, James J. Hunt, Walter M. Bowen, Ralph G.M. Sultan, Joy Technologies Canada Inc., J.H. Fletcher and Company, the Attorney General of Canada and the Attorney General of Nova Scotia.

The legal action remained quiescent for several years. However, when the Province of Nova Scotia formally apologized for the accident in December 1997, and the families of the 26 expected the

apology to be followed up with some kind of compensation scheme, which never came, the action was rejuvenated.

On May 25, 1999, Ray Wagner, a lawyer representing the families of 19 of the 26 deceased miners, announced that, "after a period of dormancy, we intend to move forward with the litigation."

On October 29, 1999, families dropped legal proceedings against the mine's former owner, management and equipment



manufacturers, but forged ahead with their suit against the federal and provincial governments. According to Wagner, "Basically, the families are tired and they want a resolution," he said, noting the workers' compensation law makes it difficult to recover damages from the employer.

In December 2000, the province attempted to extricate itself from the lawsuit by using the argument that the miners were covered under Nova Scotia's Workers Compensation Act, which protects it, as an employer, from being sued.

Based on arguments heard on July 5, 2001, and in a decision released on August 10, the Nova Scotia Supreme Court ruled that the province had submitted to the Workers' Compensation Act, was therefore an employer within the meaning of the Act (though not the employer of the miners), and consequently could not be sued for compensation.

Within a few days, families of the deceased miners announced they would appeal the ruling. Wagner maintained the judge made mistakes in the law when issuing his ruling and that the province's Workers Compensation Act is ambiguous and provided good grounds for an appeal.

That appeal was heard by the Nova Scotia Court of Appeal on December 11, 2001. In a judgment delivered on January 16, 2002, the court upheld the Nova Scotia Supreme Court's ruling.

Lawyers for the families then filed a leave application with the Supreme Court of Canada to have an appeal heard in Canada's highest court. The Supreme Court announced the dismissal of the application on August 15, 2002, meaning that the Nova Scotia Court of Appeal's ruling would stand. As is traditional in these matters, the Supreme Court did not give a reason for its ruling.

Ray Wagner said the decision not to hear the appeal means the province will not have to answer for the tragedy.

So, after close to ten years of legal wrangling, no individual or entity was ever held responsible for the disaster, though two province of Nova Scotia mine inspectors lost their jobs.

From a monetary compensation standpoint, the province of Nova Scotia rejected several offers to settle the lawsuit out of court. The only money paid out by

the province was \$15,000 lump-sum payments to widows of Westray miners, monthly payments for dependent children, and lifetime payments of up to \$27,000 per year to replace lost wages, paid by the province's workers' compensation program.

CORPORATE CRIMINAL RESPONSIBILITY

In his 16 pages of recommendations, Westray inquest commissioner Mr. Justice Peter Richard concluded that tougher rules were needed on executive and director responsibility for situations like Westray, maintaining that such individuals should be made more responsible for unsafe working conditions.

The recommendation to the federal government to consider amendments of the Criminal Code is found on page 601 of the four-volume inquiry report, in a section entitled, "The Corporate Criminal?" Mr. Justice Richard was responding to a submission from the Steelworkers Union, representing the surviving miners of Westray. The Union submission (in Appendix 1 of the report) urged three initiatives:

- a new criminal offence "that would impose criminal liability on directors or other responsible corporate agents for failing to



ensure that their corporation maintained an appropriate standard of occupational health and safety in the workplace.

- a criminal offence for "corporate killing".
- additional provisions to the provincial "Occupational Health and Safety Act" to broaden liability of directors

and officers.

Mr. Justice Richard stated, "In the context of Westray, they deserve consideration. Only two Curragh (Westray) executives...voluntarily appeared at the Inquiry hearings. Their testimony was significant. Other involved Westray executives...have so far not given a public accounting for the stewardship of Westray. In my view, this lack of accountability indicates a weakness in our system. That weakness should not be permitted to persist."

Under Bill C-45, it largely won't.

More information on Bill C-45, An Act to Amend the Criminal Code (criminal liability of organizations), including a brief description on how the amendment changes current law, can be found at: <http://canada.justice.gc.ca/en/dept/pub/c45/>

