CORPORATE CRIMINAL NEGLIGENCE: NEW WAYS TO PROTECT EMPLOYEES' HEALTH AND SAFETY[1]

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

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Outline

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The charge was withdrawn in an apparent plea bargain where Fantini agreed to pay a fine of $50,000 for contraventions of the *Ontario Occupational Health and Safety Act*.[2] The charge, although withdrawn, highlights the breadth of all those covered by the new section.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

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[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
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> (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.
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> (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.
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> (3) A supervisor or employer receiving a report made under subsection (2) must immediately investigate the matter and
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> (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
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> (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.

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

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[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]

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[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.

For railway track maintenance workers, the trend appears to be that the number of injuries that resulted in time-loss is declining, but is still too high. In total, there were 1397 accepted claims that resulted in time lost from work from 1994 to 2003. From 1994 to 2003, the numbers appear as follows, respectively: 182, 193, 189, 137, 136, 160, 112, 89, 95, and 104.

The total number of fatalities accepted as work-related from 1994 to 2003 for railway track maintenance workers was 5 (1 death in each of the years 1999, 1997, 1996, 1995, and 1994).

The following statistics are specific to British Columbia. They reflect those claims accepted for short-term disability benefits (wage loss), long-term disability benefits (permanent disability) or survivor benefits. The statistics are for the years 1997 to 2004. The WCB cautions that the counts for injury-year 2004 are slightly less complete than the counts for the other years, but for all practical purposes they are on the same basis.[7] It is important to note that some of the occupations below are subject to Part II of the *Canada Labour Code*, federal occupational health and safety standards, such as truck drivers, longshore workers and cable workers.

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[7] The statistics can be found at http://www.worksafebc.com/publications/reports/statistics_reports/occupational_injuries/default.asp.

OCCUPATION	NUMBER OF INUJURIES (1997-2004)
Registered Nurses	10,507
Registered Nursing Assistants	3,608
Nurse Aides and Orderlies	19,506
Head Nurses and Supervisors	66
Medical Laboratory Technicians	615
Medical Laboratory Technologists	88
Medical Radiation Technologists	448
Medical Sonographers	50
Cardiology Technologists	34
Ambulance Attendants; Paramedics	3,275
Electricians – Not Industrial Power	4,077
Industrial Electricians	610
Power System Electricians	56
Electrical Mechanics	80
Electrical Power line, cable worker	427
Cable TV Service and Maintenance	1,020
Truck Drivers	19,372
Longshore Workers	4,460
Forest Technologist, Technician	901
Logging and Forestry Labourers	6335
Sawmill Machine Operators	3004
Lumber Graders and Related Inspector	686
Railway Carmen, Carwomen	248
Railway Yard, Locomotive Engineers	282
Railway Conductors; Breakmen	667
Railway Yard Workers	319
Railway Track Maintenance Workers	331

Many view fallers as having the most dangerous occupation in North America. Until August of 2005, there have been 250 fatalities in the BC forest industry for the previous 10 years, for an average of 25 per year. Fifty-nine of those were fallers.

In the Western Fallers Association Fact Sheet, they make the point that the 250 fatalities over a 10-year span are to be compared to the 107 deaths in the past 50 years for

Canadian peacekeepers in active duty missions, and the 83 deaths for Canadian police and peace officers in the last 10 years.[8]

For additional details of the 37 fatalities and 71 serious injuries in the BC forest sector up to the end of October 2005, see: "Stop the Killing 'Culture of Desperation' in BC's Forest Sector" (United Steelworkers Background Paper on BC's Forest Fatalities at www.uswa.ca/program/content/3054.php; accessed January 26, 2006). One of the best works on this issue is the paper, "A Crisis of Accidents – Not An Accidental Crisis", in the USWA Background Paper on BC's Forest Fatalities, updated to December 2005 on the USWA website referred to above.

Criminal Code Section 217.1

Although federal and provincial legislation provides for various prevention provisions to reduce accidents and injury, the enforcement and penalty mechanisms do not have the "teeth" needed to require employers to be more diligent to prevent injury and deaths to a greater degree. *Criminal Code* section 217.1 may provide the impetus to reduce the number of injuries and fatalities.

Section 217.1 states:

> Duty of persons directing work – 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.

The definition of "everyone" now includes a corporation.

What is required under this section is that those who undertake or have the authority to direct how another person does work or performs tasks must take *reasonable* steps to prevent bodily harm to anyone, including the person directed, arising from the work or risk. In general terms, the section requires individuals not to create, through authority or direction, dangerous situations apt to cause bodily harm to those directed or others. The duty created by section 217.1 is a "duty" within section 219(2) of the *Criminal Code*. The failure to perform the duty may be criminal negligence under section 219(1(b), if the failure amounts to a wanton or reckless disregard for the lives or safety of others.[9]

Section 217.1 works in conjunction with the prohibition against criminal negligence in section 219(1). That section provides:

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[8] Available at www.bcforestsafe.org/pdf/wfafactsheet.pdf; accessed January 26, 2006

[9] See David Watt & Michelle Fuerst, The 2006 Annotated Tremeear's Criminal Code (Thomson, Carswell)

Criminal Negligence

Everyone is criminally negligent who

(a) in doing anything, or
(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.

A breach of section 217.1, if it causes death, can result in imprisonment for life. If the breach causes bodily harm, it can result in an imprisonment term of not more than 10 years. Fines for corporations can run up to $100,000 for a summary conviction and no maximums are established for indictable offences.

The following points illustrate the ways in which the use of the *Criminal Code* sections constitutes an improvement over Part III prosecutions:

(1) It is no longer necessary to prove beyond a reasonable doubt that a senior member of a company with policy-making authority (the directing mind, or the guiding mind, of the organization) has committed the criminal offence.

(2) In order to establish both the necessary physical and mental elements of this *Criminal Code* offence, it is no longer necessary to demonstrate or to prove the existence of both elements in the same individual.

(3) In establishing the physical component of the crime, we can now look to the conduct of all employees, agents, contractors and, in some circumstances, even sub-contractors.

(4) The mental element of the offence (*mens rea*) will now be attributable to the corporation through the aggregate fault of the organization's senior officers, which include management with operational as well as policy-making authority.

(5) The corporation will be guilty in any of these circumstances:

   (i) where a senior officer is a party to the offence;

   (ii) where a senior officer has knowledge of the commission of the offence by other employees of the corporation and fails to take all reasonable steps to prevent the offence.

(6) Due diligence is no longer a defence.

(7) The consent of the Attorney General or the approval of the Board, provincially, is no longer required.

(8) The maximum penalty is increased to life imprisonment, from 2 years (federally) and 1 year (provincially).

A number of points must be made about the combined operation of the new corporate criminal negligence section (217.1) and the traditional criminal negligence section (219):

(1) They apply to all organizations and individuals, including unions and employees/members of unions. It is important to emphasize this point, although culpability on the part of an individual employee is rare.

(2) Mere proof of a breach of some duty imposed by law is not adequate in order to support a conviction for criminal negligence. There must be wanton or reckless disregard for lives or safety.

(3) The test for criminal negligence is *whether there has been a marked departure from the standard of the reasonable person.*

(4) The proof of wilful blindness to the threat, in light of the gravity of the risk assumed, is sufficient.

(5) There is no distinction in principle between acts of commission and acts of omission.

(6) The objective test must be applied in determining criminal negligence, since it is the corporation's conduct that must be examined.

(7) Malice or intent in the sense of a mind directed to a purpose is not an element of the offence that must be proven.

(8) Criminal negligence requires both the conduct addressed by the objective test and a subjective mental element, which is the minimal intent of awareness of the prohibited risk or wilful blindness to the risk.

(9) It is not required to prove intention or deliberation. Indifference in the sense of a negative state of mind will suffice.

We have no case law yet decided under this section to guide us as to when charges may be laid, and when they would be a waste of time. However, there are cases from other non-workplace situations that do provide some guidelines. Here are some illustrations of probable violations of sections 217.1 and 219:

Untrained Employee

A supervisor orders an employee to perform a task. The supervisor knows the employee is not trained to perform the task. The task involves considerable danger – to the knowledge of the supervisor.

The employee refuses to perform the task; the supervisor demands that he do so, and threatens discipline if he does not.

The employee performs the work and is seriously injured.

Short Crew

The supervisor orders a crew to perform work. There are only 3 in the crew and they are all required to perform high-risk work.

Normal safety standards require a crew of 5. The supervisor knows of this and knows of the risk. The supervisor orders them to perform the work with a crew of 3. One of the crew is seriously injured.

Defective Equipment

The supervisor orders an employee to use a piece of equipment he knows is defective, and therefore dangerous. The employee has no knowledge of the defect. The employee is seriously injured.

Dangerous Working Conditions

The supervisor sends a crew to perform work in an area that is covered by ice in spots, and during a high wind, with limited visibility. The supervisor is aware of the weather conditions, and that forecasts call for them to worsen.

The supervisor does not warn the employees or delay the work. He expresses the view that the work must be done that day.

A member of the crew is seriously injured.

In my view, all of these cases could result in a conviction for causing bodily injury by criminal negligence.

***Getsco Technical Services Inc.*, J.E. Dorsey, Arbitrator (October 13, 2003), Award No. A-194/03**

Included in your materials is a copy of *Getsco Technical Services Inc.* v. *International Brotherhood of Boilermakers, Lodge 359*. The section 99 application by the company was dismissed by the BC Labour Relations Board (BCLRB No. B203/2004). The decision is available on the Board's website: http://www.lrb.bc.ca/.

The arbitration decision that we have provided you with is a somewhat intimidating 91-page document. However, we have added the pagination to the index provided by the arbitrator. We urge you to take the time to read the case in detail.

The central issue was exposure to thallium compounds in the course of maintenance work that Teck Cominco had subcontracted to a local firm, which in turn had subcontracted to a U.S. firm. Cominco had clearly been aware of the toxic effects of thallium possibly as early as 1986, but certainly in early-1998 (paragraph 43). The prime contractor, a local contractor, West Kootenay Mechanical, was also found to be aware of the presence of thallium (paragraph 44).

The maintenance work involved repairing the inside walls of the boilers, rebuilding the electric furnace roof, and mechanical work at the site (paragraph 45).

Ten employees refused to work in the boilers under OHS Regulation 3.12 (paragraph 307). It was only while they were waiting to be interviewed in the trailer on the site that they discovered a confidential company document, referred to throughout the arbitration as Document 3827. The company had never disclosed the document to the union, nor made the information in the document known to the workers. That was so despite obligations under the Workers' Compensation legislation and regulations to do so.

The document showed that thallium could have acute effects. It could be fatal if it was inhaled, swallowed or absorbed through the skin. It could cause blindness. It targeted all the major organs. Its most common symptom was hair loss. It could also manifest itself in swelling of the feet and legs, vomiting, mental confusion, partial paralysis of the legs, angina-like pains, and so on (paragraph 310).

There were a total of five refusals to work over a period of time from August 16 to August 22, 2001. Members of management dealt with the workers' complaints by calling them sissies and whiners, and asking if they wanted someone to hold their hand (paragraphs 270 & 282).

The company had repeatedly assured them that the amount of thallium present was negligible and the employees need not worry about it (paragraph 274). At various times, the company also tried to blame the boilermakers, and also suggested that the readings

were so high that the samples must have been tampered with. It also accused them of "playing games" (paragraph 277).

The company repeatedly assured the workers that the company was in compliance with all OH&S regulations, and that the boilermakers ought to return to work (paragraph 279).

Another company official speculated that the workers' illness had been caused by the local forest fires (paragraph 302), or that they were not following the proper hygiene procedures (paragraph 303).

The company assured the employees that the document they had discovered (Document 3827) did not apply to their work area (paragraph 338).

Management was described as arrogant. One in particular complained about having to be called in the middle of the night. He suggested that the reason why the men were getting sick was because they all ate at the same low-grade restaurant (paragraph 347).

Initially, the company refused to disclose the test readings from urine samples of the workers to the union because they were confidential to each employee (paragraph 352).

On August 29, Teck Cominco issued a press release assuring the workers and the community that there were unlikely to be any long-term adverse health effects from the thallium exposure.

The Workers' Compensation Board ultimately issued a number of orders and recommended sanctions (paragraph 418 and following).

If you have limited time, you may want to turn to page 86 and review the analysis and decision of the arbitration board. It is absolutely compelling reading.

In preparing for the course, I spoke with Mr. G.F. Culhane, counsel for the union and the employees throughout. He described the working environment as a "dangerous chemical soup". He said that of the workers involved, five were dead so far of brain cancer or related illnesses. He said it was very difficult to prove the degree to which this incident had actually caused the cancer. All five died within a year of the incident, one within one month. I had a telephone interview with Mr. Culhane on November 16, 2005.

There are many lessons to be learned from the tragedy of the *Getsco* case. Perhaps the most important one is to never accept at face value what the employer tells you. It is vital to insist on complete disclosure, and then independent verification. It was clear that in this case, Teck Cominco – surely one of the most powerful and prestigious employers in the country – coldly lied about events leading up to this tragedy. For the analysis and decision, see paragraph 441, page 149. In particular, see paragraph 474 and following.

Another vital lesson to be learned for union representatives from this incident is to trust their membership. In this case, the alarm was first set off by union members, repeatedly. They faced initial scepticism from virtually everyone, but persisted as their circumstances became more and more aggravated. It is of fundamental importance that we accept that it would be an extremely unusual case for a member to mislead a union representative about their legitimate concerns over health and safety issues.

A third important lesson is the value of collective agreement language, and the important role that the union can and ought to play in similar circumstances. Collective agreement language can be used most effectively in conjunction with health and safety regulations, but it is the employee representative in the union that must be the first recourse in the circumstances.

There were three additional awards delivered in the *Getsco* case, all with the same style of cause. The second award was by J.M. MacIntyre and dealt with forced dismissal: [2003] B.C.C.A.A.A. No. 394 (Prof. J.M. MacIntyre, November 20, 2003); [2005] B.C.C.A.A.A. No. 251 (J.E. Dorsey, November 28, 2005) (Six American employees); [2005] B.C.C.A.A.A. No. 252 (J.E. Dorsey, November 28, 2005) (Remedy Award).

Lessons from Convictions for Economic Offences

There is a growing consensus that it is time that company management faced the prospects of a serious criminal charge, followed by a substantial jail term, for serious *Criminal Code* workplace safety violations. Certainly, that is the growing trend in the United States.

There is a growing body of evidence that the courts' approach to using criminal or quasi-criminal sanctions for economic offences against corporate executives and managers has changed significantly in the post-Enron and WorldCom world. Perhaps one of the best recent examples came from a decision by Khawly J. in Ontario in the case of *Regina* v. *Andrew Rankin*. Rankin was an investment banker widely described as a "Bay Street star". On October 27, 2005, he was sentenced to 6 months in jail for illegally passing stock tips to a friend with respect to imminent corporate takeovers. At the time, he was a managing director of RBC Dominion Securities Inc. He had been convicted in July of 2005 of leaking information to a friend on 10 corporate deals involving clients of the brokerage unit of the Royal Bank of Canada over a 3-year period, from 1999 to 2001[10].

Surely, if corporate management can expect 6 months in jail for an economic crime, greater punishment ought to be expected from the courts for management misconduct resulting in serious injury or death to an employee. See "Top Ten Corporate Criminals of The Decade", a Buenos Aires Argentina-based website which selects the top 100 corporate felons of the decade based on surveys conducted by major business

[10] *Globe and Mail*, October 28, 2005