

# Criminal Charges for Workplace Accidents

Differences between:  
regulatory and criminal investigations  
and prosecutions

Michael McGovern, Senior Legal Counsel



A decorative background graphic consisting of a network of light blue dots connected by thin lines, resembling a molecular structure or a data network, positioned at the top of the slide.

# Background

Common Law provides different standards of proof for different types of cases:

## **Civil Actions**

- Balance of probabilities

## **Criminal Prosecutions**

- Beyond a reasonable doubt

## **Strict Liability Prosecutions**

- Beyond a reasonable doubt but no need to prove mens rea (guilty mind)



## Background (continued)

Criminal convictions require that the Crown prove two distinct elements:

### Actus Reas

- The physical act or negligence giving rise to the crime

### Mens Rea

- The “guilty mind” or intent to commit the offence

**Note:** In criminal negligence cases there is no intent to commit the offence, so the Crown needs to prove a gross absence of care such as a wanton and reckless disregard for the lives or safety of others.

# History of Criminal Code Amendments

- On May 9, 1992, an underground explosion occurred at the Westray Mine in Plymouth, Nova Scotia
- 26 miners were killed in the explosion
- 52 OHS charges were laid against the company and four managers – all OHS charges were eventually withdrawn
- Two mine managers were each charged with 26 counts of manslaughter under the Criminal Code



# History of Criminal Code Amendments (continued)



- The criminal charges were eventually stayed by the court due to Crown disclosure issues
- The failure to secure any convictions exposed flaws in the Criminal Code as it applies to crimes committed by corporations.
- The federal government undertook to review and amend the Code as necessary

## Bill C-45, 2003



The government introduced a Bill to amend the Criminal Code

- Updated definitions
- Codified rules for attributing criminal liability to organizations
- Set out sentencing considerations
- Allowed for probation conditions to be imposed

# Inclusion of Legal Safeguards for Workers



During the development of what would become Bill C-45, the United Steelworkers lobbied government to include a provision clarifying that persons who direct work have obligations to those workers (real and corporate)



The lobbying efforts were successful and resulted in the addition of section 217.1 to the Criminal Code:

- 217.1 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.

# Not Intended to Displace Provincial Jurisdiction



It is important to note that when enacting these Criminal Code amendments, the government specifically stated that the 217.1 amendment was not intended to displace provincial OHS jurisdiction



The background information for the Bill and Minister's comments stated the government's intention that this amendment only apply to the most egregious offences where regulatory sanctions were not sufficient



# Practical Application

- Police attend all workplace accidents (911 response)
- Police look for evidence of crimes – sabotage, assault, etc.
- If no evidence of an obvious crime, police turn the scene and investigation over to WorkSafeNB
- Police forces throughout Canada, including the RCMP, have limited knowledge of or experience with section 217.1



## Practical Application (continued)

- WorkSafeNB investigators conduct a thorough investigation – criminal negligence is a possibility they explore in every investigation
- Legal Counsel is involved
- If evidence of criminal negligence is found, police are contacted



## Practical Application (continued)

- WorkSafeNB staff meet with senior police officials to go through the evidence and why we believe there could be a criminal offence
- Crown is involved early
- Police conduct their own investigation
- Police get a warrant to seize WorkSafeNB's investigation file (with the assistance of WorkSafeNB)



# Application to Specific New Brunswick Case



- On August 16, 2018, a fatality occurred at a construction site in Fredericton
- A young worker was killed when a device holding back a large volume of water in a pipe failed
- As OHS investigation progressed, we had internal discussions regarding criminal negligence
- Due to the uncertainty around criminal charges and the OHS limitation period, WorkSafeNB laid OHS charges
- Started discussions with police/Crown on criminal charges

# Application to Specific New Brunswick Case (continued)



- OHS charges were stayed under the Provincial Offences Procedure Act (note that this is not a judicial stay)
- Supervisor's trial was held recently with the verdict to be delivered on June 5, 2023
- Employer's trial not yet scheduled

# Penalties

## Employer:

- No limit on fine
- Probation (restitution, establish policies, inform employees of policies)
- Inform the public of the offence, sentence, and remedial measures

## Supervisor:

- Maximum penalty for a fatality is life in prison
- Maximum penalty for injury is 10 years in prison
- Prison sentence of some term is almost certain for the supervisor



## How has 217.1 been used in Canada since 2003?



- Initially, Ontario and Québec laid 217.1 charges frequently
- Many of these early charges were eventually withdrawn (recall that Criminal Code charges are more difficult to prove, and Parliament's intent was that these would only apply to the most serious offences)



## Statistics as of 2022

- 10 successful convictions (seven corporations, three individuals)
- 4 acquittals
- 3 judicial stays
- 5 withdrawals
- 1 case active (NS)





## Criticisms



- Organized labour, particularly the United Steelworkers, want to see more criminal charges laid and higher penalties
- WorkSafeNB – Health and Safety Investigators and Legal Counsel – consider the possible presence of criminal negligence in all investigations but are mindful of the higher standard of proof and intent of the legislation
- There is now a better understanding of criminal negligence in workplace accidents by New Brunswick police forces and Crown Prosecutors



## The conviction

- On June 5, 2023, Jason King was convicted of criminal negligence causing death
- Justice Thomas Christie of the Court of King's Bench, made the following findings in reaching his decision:
  - “In my view, the standard expected of a reasonable site supervisor on a construction site of this type must include, at a minimum, that the supervisor had familiarized themselves with the legislated duties that were binding upon them as set out in the *Act* and the *Regulations*.”



## The conviction

- “In addition, one should expect that the reasonable supervisor would have familiarized themselves with any site-specific safety plan. Furthermore, the reasonable site supervisor would have familiarized themselves with the basic manufacturer’s instructions regarding the safe use of equipment used on the site. These are the basic, fundamental elements of what I find to be the minimally acceptable standard of conduct for a supervisor in the circumstances of Mr. King.”
- “... in my view, any failure to meet those basic fundamental elements would, by its very nature, represent a marked and substantial departure from this acceptable minimum standard.”



## The conviction

- Justice Christie relied on a Supreme Court of Canada case on negligence in assessing the defence that Mr. King was not properly trained:
  - “short of incapacity to appreciate the risk or the incapacity to avoid creating it, personal attributes such as age, experience and education are not relevant. The standard against which the conduct must be measured is always the same.”



## The conviction

- “I can find no evidence that [Mr. King] followed, in any useful way, any of the provisions which the law required him to follow. He had a duty to run his worksite in conformity to those legislative provisions.”
- “... [Mr. King’s] plan to rely on having someone ‘pull him out’ in the case of the emergency shows, and I so find, a wanton and reckless disregard for Mr. Henderson’s life and safety
- “...to have failed to adhere to any common sense safety precautions, or the basic manufacturer’s directions for use of the plug, or the legislative requirements for confined space work shows, I find, a wanton and reckless disregard for Mr. Henderson’s safety.”



## The conviction

- “[Mr. King’s] failure to even inform himself of the legal duties he had as a site supervisor, and to acquaint himself with the site safety requirements, shows a failure to meet even the minimum standard expected of a reasonable site supervisor.”
- “...a reasonable site supervisor must make themselves aware of the legal duties that are imposed upon a person with their authority in the workplace.”
- “The death of Mr. Henderson resulted from a failure of Mr. King to know what he should do, and a failure to do what he should have known he had to do.”



## The conviction

- Justice Christie's final ruling was:
  - "Based on my findings above, I confirm that Mr. King's actions were a significant contributing cause of Mr. Henderson's death. In addition, the omissions and failure to comply with the requirements of the Act and regulations represent a failure to meet even the minimum standard of conduct expected of a reasonable site supervisor. Taken together, the lack of Mr. King's legislative compliance, lack of attention to the site safety manual, failure to heed the obvious safety direction of the plug's manufacturer, a rescue plan which did not in any way address the significance of the foreseeable threat of the circumstances in which Mr. Henderson was placed by Mr. King, all show a marked and substantial departure from a minimum standard and a wanton and reckless disregard for Mr. Henderson's safety."



## The conviction

- The ruling in this case has attracted national attention
- In my assessment, the decision clearly enunciates a supervisor's responsibility for health and safety to his or her employees
- Supervisors in all workplaces should be aware of this decision and aware of their obligations





## The sentence

- On September 12, 2023, Justice Christie delivered his sentence following Mr. King's conviction
- The Court heard A victim Impact statements from 13 people, including Mr. Henderson's mother and brother (the brother who had been present when his younger brother died)
- The Court addressed the facts found at trial, the applicable law, and sentencing principles
- The Court also considered a pre-sentence report regarding Mr. King, which the Court describes as positive



## The sentence

- The Court considered aggravating factors as well, including a prior conviction for manslaughter in 2006, which, the Court stated, "is indicative of his disregard for human life."
- In sentencing Mr. King, the Court relied primarily on the Kazenelson case from Ontario. In that case, the defendant was sentenced to 3.5 years in prison
- The Court recognized that the Kazenelson case could not be applied directly since that defendant was convicted of criminal negligence causing the death of four employees



## The sentence

- In applying the Kazenelson decision, the court also took into account that Kazenelson did not have any prior criminal convictions as did Mr. King
- The Crown requested a sentence of three years in prison while the defence requested a sentence of 12 to 18 months consisting of house arrest and probation
- The Court recognized that the Kazenelson case could not be applied directly since that defendant was convicted of criminal negligence causing the death of four employees, but that Kazenelson did not have the prior criminal convictions as Mr. King does



## The sentence

- Justice Christie made the final comment on sentence:
- “In consideration of the arguments submitted by counsel, and the evidence I have received on sentencing which included your prior defendant history report, and keeping in mind the principles of proportionality, parity, denunciation and deterrence, it is the sentence of this court that you serve a term of imprisonment I set at 3 years.”



## The appeal

- Several days after being sentenced, Mr. King filed an appeal with the Court of Appeal of his conviction
- The primary grounds of appeal appear to be that the Court erred in admitting a statement Mr. King made to WorkSafeNB investigators and that the Court erred in failing to establish the required standard required of a reasonable supervisor but still held Mr. King to that unknown standard
- As of this writing, October 4, 2023, Mr. King is scheduled for a bail hearing on October 16, 2023. It is almost certain that bail will be granted awaiting an appeal



# History

- If the Court of Appeal upholds Mr. King's conviction, this will only be the third case of criminal negligence causing death against an individual in Canada:
  - 2010 – R. v. Scrocca – Quebec, following a 2006 death, two-year conditional sentence
  - 2018 – R. v. Kazenelson – Ontario, Following four deaths and one injury in 2009, sentenced to 3.5 years in prison
  - 2023 – R. v. King, New Brunswick
- A fourth decision against an individual convicted of criminal negligence causing death in a workplace fatality is due to be handed down on December 29, 2023 – R. v. Gooch, Nova Scotia



# Questions & Feedback