

INJUSTICE AT WESTRAY: A CASE HISTORY REPEATING ITSELF

by Eric Tucker

The events surrounding the explosion that killed 26 miners on the morning of May 9, 1992, at the Westray mine in Pictou County, Nova Scotia, reveal starkly the inadequacy of the justice system, broadly conceived, in protecting the lives and health of Canadian workers. First we witnessed the results of its failure to prevent the creation of unacceptably hazardous conditions, and now we are seeing its ineffective response to a disaster that may leave other workers to suffer a similar fate.

Although there still has not been an official determination of the causes of the Westray mine disaster, ample evidence points to the failure of the governments of Canada and Nova Scotia to identify health and safety in the mine as a top priority. Dean Jobb, an investigative reporter with the *Halifax Chronicle-Herald*, has documented this neglect in his book, *Calculated Risk*. Neither level of government insisted, as a condition of their financial participation, that Curragh Resources Inc., the mine's owner and developer, establish that coal could be safely mined, despite a long history of mine disasters dating back to the nineteenth century. Once work began, the provincial department of labour did not vigorously enforce its own health and safety laws, even though repeated and ongoing violations endangered the lives of the underground miners.

A MASSIVE REGULATORY FAILURE

This massive regulatory failure was not an isolated event. Canadian governments never require would-be entrepreneurs to establish that

they can conduct their activities without endangering their employees, even when those governments provide financial assistance. Furthermore, the practice of enforcing health and safety laws through "gentle persuasion" is deeply rooted and pervasive.

The enormity of the resulting injustice can be measured by the toll it takes on the lives and health of Canadian workers. Seven to eight hundred workers are killed and over half a million suffer disabling injuries or illnesses annually as a result

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of their work. Moreover, these figures compiled by workers' compensation boards seriously underestimate the actual totals for a variety of reasons including under-reporting, difficulties in establishing the work-relatedness of the harm suffered, and gaps in coverage.

How, then, does our justice system respond to the occupational health and safety disasters that inevitably materialize? Again, the events at Westray exemplify, in dramatic fashion, deep-seated problems.

When a highway traffic accident results in a fatality or serious injury, an investigation is immediately undertaken to determine whether charges should be laid pursuant to provincial highway traffic legislation or, in cases of more egre-

gious misconduct, under the *Criminal Code*. Drivers frequently are prosecuted.

The same is not true when workers are killed or injured on the job. In the case of the Westray disaster, days passed before it dawned on any official that an investigation into potential wrongdoing was required or that the Westray offices needed to be secured. We are unlikely ever to know what documents were shredded in the interim.

Charges under the provincial health and safety laws were laid just before the limitation period expired, but they were dropped subsequently to clear the way for Gerald Phillips, the mine manager, Roger Parry the underground manager, and Curragh Resources Inc. to be charged with manslaughter and criminal negligence.

THE LIMITS OF CRIMINAL JUSTICE

While prosecutions under health and safety laws are relatively uncommon, criminal charges are truly rare. Indeed, to date, research has identified only eight other instances in the twentieth century in which employers have been charged in work-related deaths. It was not surprising, therefore, that the prosecution attracted great publicity.

Why are employers not routinely prosecuted when they make decisions about the conduct of their operations that recklessly or heedlessly expose workers to the risk of harm? While crude class bias may play a role, more subtle influences also are at work. The legal system has long

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been influenced by deep-rooted assumptions about the source and nature of workplace hazards. First and foremost is the belief that workers implicitly, but genuinely, consent to the risks to which they are exposed through their contracts of employment. The courts applied this assumption to deny workers compensation under the common law: now it blurs the legal perception of employers' responsibility for the hazardous workplace conditions they create.

A second assumption is that hazardous conditions are the unfortunate, but inevitable, result of socially useful activities like coal mining. Consequently, it would be wrong to criminalize risk-taking by "legitimate" entrepreneurs, even when it results in enormous harm. At worst, these are regulatory offences.

There are also more "practical" reasons for not prosecuting criminally. Convictions are difficult to obtain against corporations and white-collar defendants. Responsibility for particular actions can be fragmented and shifted within complex organizations. The activities that constitute the crime typically occur over a longer time frame, thus making it more difficult to build and prove a case. Because criminal charges will be taken very seriously by the accused, a strong legal defence is likely to be mounted, including careful scrutiny of any legal errors committed by the police and prosecution.

The Westray accused had little difficulty finding such mistakes. Earlier, errors were made in handling evidence so that it had to be returned, but, ultimately, it was the failure to disclose crucial evidence that resulted in the charges being stayed this June. Whether this resulted from skulduggery, disorgani-

zation or incompetence is not known, but the inability to obtain a conviction is not exceptional. Only one has been obtained in a health and safety criminal prosecution, when Brazeau Collieries was convicted of manslaughter after a methane gas explosion in its Alberta mine killed 29 workers in 1941. For that crime, a fine of \$5,000 was levied.

CAN WE LEARN FROM THESE MISTAKES?

The criminal justice system, clearly, fails to deter this kind of misconduct, but can we learn from our mistakes? Public inquiries with a broad mandate to determine "what went wrong" and to make recommendations to avoid similar disasters in the future are commonly established in the aftermath of major health and safety disasters. Such an inquiry was established six days after the Westray disaster, but, more than three years later, hearings still have not been held and are not expected to begin until later this fall.

The major reason for this delay is the increasingly complex legal environment surrounding inquiries into matters that may involve criminal behaviour. The inquiry was stayed by the Nova Scotia court in September 1992 because it encroached on the federal criminal law power and was *ultra vires*. Although this finding was reversed on appeal, the stay was not lifted because of a concern that public hearings by the inquiry before the criminal charges were heard could infringe the accused's right to be presumed innocent and to receive a fair and impartial hearing. The stay was finally lifted by the Supreme Court of Canada in May 1995, on the basis that once the accused had elected trial by judge alone, there was no danger of pre-judgment. Although the decision served the interests of judges by presenting them as demigods, it failed to provide any guidance on

the constitutional questions raised by the case. As a result, public officials confront a serious dilemma. Until criminal prosecutions are ruled out or completed, it may not be possible to proceed with a public inquiry. Because of the delay, not only may workers continue to face hazardous conditions, but the likelihood of the government implementing an inquiry's recommendations may be reduced because it no longer is under the same level of political pressure to take remedial action.

Legal complexity, however, is only part of the problem. The depressing cycle of disasters, inquiries and more disasters suggests more fundamental limitations. Public inquiries tend to focus on the most immediate, technical causes of disasters; more systemic causes, including political-economic pressures operating on employers, governments and workers, are typically ignored or marginalized. As a result, despite the broad mandate of public inquiries, their recommendations tend to be narrow and fail to address the broader context that may very well become the context of future disasters.

In sum, the justice system has responded poorly to occupational health and safety disasters in the past. Tragically, history is repeating itself in the aftermath of Westray disaster.

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