

## NOT THE COST OF DOING BUSINESS: DETERRENCE AND DENUNCIATION CONSIDERATIONS MEAN INDIVIDUALS AND ORGANIZATIONS CAN FACE SERIOUS CONSEQUENCES FOR WORKPLACE SAFETY VIOLATIONS

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In 2021, there were 1,081 work-related fatalities in Canada.<sup>1</sup> The construction industry had the highest number of fatalities, 212.<sup>2</sup> According to the Association of Workers' Compensation Boards of Canada, workers in the construction industry submitted 28,721 claims for lost time due to injury.<sup>3</sup> Serious injuries and fatalities are devastating for workers and their families. They also place employers at risk of liability.

Many organizations are aware that they may have orders issued against them and fines imposed for contravening British Columbia's *Occupation Health and Safety Regulations* (the "**Regulations**") or *Worker's Compensation Act* (the "**Act**"); however, some organizations may consider such fines as 'the cost of doing business' and continue operations in violation of the *Regulations* or the *Act*. Courts are loathe to accept this laissez-faire attitude towards worker safety, and may impose stiff fines, or even imprisonment, on owners and organizations, in an effort to denounce and deter such behaviour. In the most serious cases, organizations, or those directing the work of others, may find themselves facing criminal charges.

This article considers two cases where parties faced

significant penalties for unsafe work site conditions. *Workers' Compensation Board v. G & D* is a civil case where the owner and his organization were found in civil contempt for continued violations of the *Regulations* and the *Act*.<sup>4</sup> Along with having to pay a fine, the owner was incarcerated for 14 days despite no injuries occurring as a result of the violations.<sup>5</sup>

*R. v. Detour Gold Corporation* is a case where one catastrophic accident led to an organization pleading guilty to criminal negligence causing death and being ordered to pay a multi-million dollar fine despite several mitigating factors.<sup>6</sup>

These cases illustrate that: 1) continued violations of workplace safety legislation can lead to serious penalties under the *Act* and *Regulations* even if no accidents resulted from the violations; and 2) one criminally negligent act may be enough for an individual or organization to face criminal penalties.

### CIVIL LIABILITY

The regulatory regime in British Columbia allows for enforcement action against organizations that contravene the *Act* and/or the *Regulations*. This article and the following case focuses on one of the more

severe penalties that may be imposed, which is an order requiring compliance with the *Act* or *Regulations*. This penalty is severe because, if the order is violated, it may result in the non-complying party being punished for contempt under the Rule 22-8 of the *Supreme Court Civil Rules*.<sup>7</sup> Under Rule 22-8, “punishment must be exercised by an order of committal or by imposition of a fine or both”.

In simplified terms, an owner or organization who contravenes a court order requiring compliance with the *Act* or *Regulations* may face fines, incarceration, or both.

*Workers’ Compensation Board of British Columbia v. G & D Construction Ltd.* is an example of a case where the owner and organization, together the “**Respondents**”, were punished for contempt. After the second finding of contempt, the organization was fined and the owner was incarcerated for 14 days.<sup>8</sup> These consequences were imposed on the owner and organization even though no accidents actually occurred as a result of their violations of the *Act* and *Regulations*.

A brief summary of the facts is as follows:

- the organization provided framing services on residential projects;<sup>9</sup>
- on multiple occasions, the Workers’ Compensation Board (“**WCB**”) found the Respondents to be in breach of the *Act* and *Regulations*, including with regard to the obligation of employers to ensure that a fall protection system is used when work is being done at certain heights;<sup>10</sup>
- the WCB imposed administrative penalties, but the violations continued;<sup>11</sup>
- the continued violations resulted in an order prohibiting the Respondents, from continuing or committing contraventions of the *Act* and the

*Regulations* and requiring the owner and organization to comply with the *Act* and *Regulations*.<sup>12</sup> As noted above, this order was significant as it made the Respondents liable for civil contempt if they breached the order;

- the Respondents continued to violate the *Act* and the *Regulations* and were accordingly found to be in contempt and fined;<sup>13</sup>
- a few months after the Respondents were found in contempt, another workplace investigation found the Respondents were continuing to breach the *Act* and *Regulations* at multiple job sites;<sup>14</sup>
- no workers were injured (at least no worker submitted a WCB claim for an injury)<sup>15</sup>; and
- the WCB applied to the BC Supreme Court (“**BCSC**”) for a second finding of contempt.

The BCSC found the Respondents in contempt for a second time. The Respondent’s lawyer argued that the breaches were “small infractions” that were “quickly remedied” and that an appropriate sentence would be a “moderate fine”.<sup>16</sup> The BCSC disagreed.

The BCSC found that the owner had engaged in contemptuous conduct because it considered “such conduct to be in his financial interest”<sup>17</sup> and had “treat [ed] the fines to date as the cost of doing business”.<sup>18</sup> In doing so, the BCSC found that the owner put the organization’s workers “at risk of harm, show[ed] disrespect to the court and created the appearance of operating with impunity”.<sup>19</sup> The BCSC refused to consider the lack of accidents as a mitigating factor as it could not be considered “more than simple good luck”.<sup>20</sup>

The BCSC concluded that “a penalty that goes beyond monetary [was] required”.<sup>21</sup> The organization was fined \$25,000 (in addition to administrative penalties). The

owner was sentenced to a 14-day period of incarceration.<sup>22</sup>

The Respondents were lucky that their actions did not result in the death of one or more of their workers. If it had, they may have been prosecuted for criminal negligence causing death.

## CRIMINAL LIABILITY

In 2004, the federal government amended the *Criminal Code*<sup>23</sup> to enact criminal negligence provisions in section 219 and codify a legal duty of care from those who direct the work of others to those workers in section 217. These provisions enable prosecutors to attribute criminal liability to organizations, their representatives, and those who direct the work of others.

These amendments to the *Criminal Code* are referred to as the 'Westray' amendments as the impetus for their passage was the 1992 Westray coal mine disaster, wherein 26 miners died as a result of an explosion caused by a build-up of methane and coal dust.<sup>24</sup> During the inquiry that followed, Justice Peters found, among other things, a blatant disregard for health and safety regulations on the part of the organization, that workers who expressed concerns were intimidated and threatened, and that the organization prioritized production over safety.<sup>25</sup>

Since 2004, only 9 criminal prosecutions brought under the Westray amendments have resulted in convictions or guilty pleas.<sup>26</sup> Some of these cases involved an ongoing course of negligent conduct; however, it is important to note that such a pattern is not required.

In *R. v. Detour Gold Corporation*, Detour Gold Corporation pled guilty to a single count of criminal negligence causing death.<sup>27</sup> The death occurred after a worker tasked with repairing an InLine Leach Reactor was

exposed to hazardous levels of cyanide.<sup>28</sup> The worker did not have proper protective equipment or training, and the emergency personnel on-site were not properly trained to assist individuals who had been exposed to cyanide.<sup>29</sup> Detour admitted to having "misapplied its focus toward safety" by focusing on risks associated with possible cyanide gas leakage as opposed to liquid cyanide poisoning.<sup>30</sup>

Detour had no prior record under the *Criminal Code*, nor did it have any history of violations under the *Occupational Health and Safety Act*.<sup>31</sup> In considering the case, the Ontario Court of Justice noted several possible mitigating factors, such as the corporation's history of good corporate citizenship, its immediate changes to its maintenance program, and its willingness to provide restitution to the worker's widow<sup>32</sup>; however, it still ordered Detour to pay in excess of \$2.5 million dollars in fines, penalties and surcharges.<sup>33</sup> This case illustrates that one negligent act that results in catastrophe may be sufficient for an organization, or an individual directing workers in that organization, to face criminal charges.

Both *R. v. Detour Gold Corporation* and *Workers' Compensation Board of British Columbia v. G & D Construction Ltd.* illustrate the perils of ignoring workplace safety. Organizations and owners would do well to remember that neither repeated violations nor a workplace injury is required for an organization to face significant civil, or even criminal, penalties and that those who view fines as the 'cost of doing business' might end up paying more than anticipated, whether financially or reputationally, or both.

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## Footnotes:

1. Association of Workers' Compensation Boards of Canada, *National Work Injury/Disease Statistics Program*, online: <<https://awcbc.org/en/statistics/>> [<https://ezproxy.library.und.edu/login?url=https://awcbc.org/en/statistics/> ]
2. *Ibid*
3. *Ibid*
4. 2022 BCSC 976 [*"Second Contempt Decision"*].
5. *Ibid* at para 57.
6. 2017 ONCJ 954 [*"Detour"*].
7. B.C. Reg. 168/2009.
8. *Workers' Compensation Board v. G & D*, *supra* note 4 at para 57.
9. *Ibid* at para 8.
10. *Workers' Compensation Board v. G & D* 2020 BCSC 1770 at para 1 [*"First Contempt Decision"*].
11. *Ibid*.
12. *Ibid*.
13. *Ibid* at para 6.
14. *Second Contempt Decision*, *supra* note 4 at paras 14-21.
15. *Ibid* at para 22.
16. *Ibid* at para 34.
17. *Ibid* at para 53.
18. *Ibid* at para 56.
19. *Ibid* at para 56.
20. *Ibid* at para 46.
21. *Ibid* at para 56.
22. *Ibid* at para 57.
23. R.S.C., 1985, c. C-46.
24. "Westray Legal Brief" (23 June 2022), online: *United Steelworkers* <<https://usw.ca/resources/westray-legal-brief/#:~:text=As%20of%20early%202022%2C%20there,Sentences%20have%20been%20relatively%20minor>> [<https://ezproxy.library.und.edu/login?url=https://usw.ca/resources/westray-legal-brief/#:~:text=As%20of%20early%202022%2C%20there,Sentences%20have%20been%20relatively%20minor>].
25. *Ibid*.
26. *Ibid*.
27. *Detour*, *supra* note 6 at para 2.
28. *Ibid* at paras 6-12.
29. *Ibid*.
30. *Ibid* at paras 23.
31. *Ibid* at para 21.
32. *Ibid* at paras 27, 30 and 35.
33. *Ibid* at para 51.



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Sara completed her law studies at Peter A. Allard School of Law at the University of British Columbia. She was called to the Bar of Ontario in 2018, after spending two years post-graduation working abroad in London, England as a legal advisor to a cyber security company. She hopes to use her experience and passion for local government to deliver outstanding legal advice to her clients as her practice continues to grow.

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