

# **Babine Explosion Investigation:** *Fact Pattern and Recommendations*





February 6, 2014

Dear Premier Clark:

In January 2012, an explosion at the Babine Mill in Burns Lake, British Columbia claimed two lives and left many with serious injuries. The community has continued to grieve this loss, and to deal with the impacts of the explosion.

Since that time, the many responses of government have included a lengthy investigation by WorkSafeBC. That process came to a partial culmination on January 10, 2014 when the Criminal Justice Branch issued a Clear Statement outlining that no regulatory charges would be approved against Babine.

You have asked me to review this issue and establish the fact pattern that led to the decision by the Criminal Justice Branch. I have completed my report and attach it here.

As you will see and as you requested, I have included a set of recommendations meant to ensure there is no recurrence of the issues raised in connection with the investigation and the decision not to approve charges.

I look forward to your response to my recommendations.

Sincerely,

John Dyble  
Deputy Minister to the Premier,  
Cabinet Secretary and Head of the Public Service

# Document Overview

This document provides the fact pattern regarding issues raised as a result of the investigation by WorkSafeBC (WSBC) into the Jan. 20, 2012 explosion at the Babine Mill in Burns Lake, B.C. and the decision of the Criminal Justice Branch (CJB) not to approve regulatory charges against Babine Forest Products. In addition, I make recommendations to the Premier on actions arising from the lessons learned from the fact pattern.

This document is structured as follows:

**Scope/Mandate/Approach** *A description of the assignment and approach.*

**Context** *This section provides a discussion of the independent roles of WSBC and CJB, and discusses the range of possible charges and actions open for WSBC consideration in relation to an incident of this nature.*

**Fact Pattern** *The events leading up to the explosion, the conduct of the investigation, the delivery of a Report to Crown Counsel (RTCC) to CJB, and the ultimate resolution of the matter involve a very complex set of facts. An understanding of the key fact pattern is vital to identifying the lessons learned and the development of meaningful recommendations.*

**Discussion** *I have reviewed the circumstances related to the investigation and the RTCC and discuss them here.*

**Recommendations** *With the context and correct fact pattern established and understood, the recommendations provide a response to the specific issues that have been identified as requiring attention. These recommendations consider two areas: (a) addressing challenges in relation to major investigations; and (b) improving communications and information exchange between WSBC and CJB.*

*Len Doust, QC, has been retained to review the accuracy of legal points raised in this document, and his opinion is attached. I am recommending that Mr. Doust be further retained as an independent advisor, to ensure comprehensive follow-through of these recommendations, and to provide advice on further possible improvements.*

## Scope/Mandate/Approach

The Babine Mill explosion in Burns Lake on Jan. 20, 2012 was shocking and tragic. Two lives were lost, there were numerous serious injuries and the community continues to grieve. When government is confronted with such tragic events, response is required on multiple simultaneous levels – dealing with the immediate circumstances, working to prevent recurrence, helping those affected and ensuring that appropriate legal remedies are considered.

On Thursday, Jan. 16, 2014, Premier Christy Clark announced she had asked me, as Deputy Minister to the Premier, Cabinet Secretary and Head of the Public Service, to undertake analysis of the issues raised as a result of the investigation by WSBC into the incident. She asked that I establish the fact pattern and make recommendations. For the reasons discussed in this document, such a review does not and cannot extend to a review of the decision by CJB not to pursue regulatory charges.

In establishing the fact pattern I worked extensively with the Deputy Minister of Labour and the Deputy Attorney General. This approach allowed for a thorough consideration of the facts while respecting the independence of the agencies. Their contribution in turn reflected extensive engagement with agencies and staff within their purview. From those discussions I developed the fact pattern set out in this document, and I have confirmed that WSBC and CJB agree with its accuracy and completeness.

I have analyzed the fact pattern in light of the legal and constitutional framework that applies to the two organizations in order to develop the recommendations in the final section of this document.

The legal and constitutional context in this document has been provided by the Deputy Attorney General, and has further been independently confirmed by Len Doust, QC, a lawyer familiar with investigations and the justice system. Mr. Doust's opinion is attached as an appendix to this document.

An understanding of the legal context of WSBC and CJB is fundamental for a full examination of the fact pattern.

### ***Role of WSBC – WSBC Investigative and Statutory Framework***

Workplace safety is paramount, and preventing workplace injuries is the reason for legislation like the *Workers Compensation Act* and fundamental to the mandate of WSBC. The following summarizes the statutory framework for WSBC:

- *WSBC is the operating name of the Workers' Compensation Board of British Columbia, an independent statutory agency governed by a board of directors appointed by the Province of British Columbia.*
- *WSBC takes its mandate and authority from the Workers Compensation Act<sup>1</sup> and, although separate and distinct from government, it is accountable to the public through the provincial government<sup>2</sup>.*
- *Under its legislation, WSBC is given extensive powers. These include the power under section 88 to make any inquiry considered necessary and to require employer cooperation, and the power under section 185 to make certain warrantless seizures. The latter power is supplemented by the general requirement in section 186 that persons facilitate and not hinder inspections.*
- *WSBC has a dedicated team for the investigation of fatal and serious injury incidents in the workplace. These investigators are one of three disciplines – Certified Occupational Safety Officer; Certified Occupational Hygiene Officer or; Investigations Officer. WSBC has an established Special Provincial Constable Program that grants limited peace officer authority to its field investigators. These investigators require such authority to fulfill their mandate to conduct formal investigations in relation to fraud, misrepresentation and related offences under the Criminal Code of Canada, and claims-related violations under the Workers Compensation Act.*
- *Potential offences, whether under the Criminal Code or provincial legislation, are investigated by police or other investigative agencies that have the statutory authority to do so.*
- *All investigative agencies, including WSBC, may decide to submit the results of an investigation to CJB for charge assessment and possible prosecution. If so, they prepare and submit a Report to Crown Counsel (RTCC), which sets out the whole of the evidence they have gathered.*
- *The separation of the prosecution and investigative functions is a “well-established principle of the Canadian criminal justice system”<sup>3</sup>.*

1 RSBC 1996, c. 492

2 WorkSafeBC 2012 Annual Report, p. 4.

3 *R. v. Regan*, 2002 SCC 12, para.70

## Role of CJB

By law CJB is required to act independently of government in order to protect the public interest with impartiality. Prosecutorial decisions must be free from political interference, both real and apparent. In British Columbia, this is achieved through the following framework:

- *The Crown Counsel Act assigns charge approval authority to CJB for both criminal and provincial regulatory offences. This includes all offences that do not fall within the constitutional jurisdiction of the federal Attorney General.*
- *Crown Counsel assess charges using an accepted, well-established standard, which requires addressing both (1) whether there is a substantial likelihood of conviction based on the evidence gathered by the investigative agency, and (2) whether a prosecution is required in the public interest.*
- *In deciding whether there is a substantial likelihood of conviction, Crown Counsel must determine: (1) what material evidence is likely to be admissible; (2) the weight that is likely to be given to that evidence; and (3) the likelihood that viable, not speculative, defences will succeed.<sup>4</sup>*
- *Under CJB policy, a decision by individual Crown Counsel to not approve a charge can be “appealed” by the investigative agency that recommended a prosecution. On such an appeal, the Assistant Deputy Attorney General, Criminal Justice Branch, makes the final determination, unless directed in writing by the Deputy Attorney General or the Attorney General.*
- *There are strict limits on the ability to review a decision to approve, or not approve, a charge that is made by individual Crown Counsel. If the Deputy Attorney General or Attorney General directs CJB to change its decision on whether to approve charges in a particular case, the Crown Counsel Act requires that the direction be in writing and published in the Gazette. This ensures transparency and is a practice that has been used sparingly.*
- *Based on the above it should be clear that I am not undertaking a review of the CJB decision to not approve regulatory charges. As discussed above, CJB is constitutionally required to make decisions independently and free from any influence by government or public opinion. While there is provision in CJB policy for an investigative agency to “appeal” a CJB decision, in the case of the Babine decision WSBC has confirmed that it accepted the decision and chose not to appeal the CJB decision. Furthermore, in this case both the Deputy Attorney General and the Attorney General have declined to exercise their discretion to direct CJB in writing under the Crown Counsel Act.*

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4 The independent review of British Columbia’s charge assessment model in 2012 as part of the *Justice Reform Initiative* re-affirmed this approach as an appropriate model. In discharging their charge approval responsibilities, Crown Counsel are required, in the public interest, to conduct themselves independently of government, the investigative agency and the victim. The case law has established that they are constitutionally obliged to make their decisions objectively and free from external influence.

This independence is recognized at law as fundamental to the public interest. It advances “the public interest by enabling prosecutors to make discretionary decisions in fulfillment of their professional obligations without fear of judicial or political interference, thus fulfilling their *quasi*-judicial role as “ministers of justice””: *Miazga v. Kvello Estate*, 2009 SCC 51, para.47.

- *In cases that attract considerable public attention, CJB practice is to publicly explain its decision-making, including, in decisions to not approve charges, in a Clear Statement. This practice reflects the following considerations:*
  1. CJB policy encourages Crown Counsel, where appropriate, to communicate the reasons for a charge assessment to those affected by it.
  2. Under the *Freedom of Information and Protection of Privacy Act*, a public body cannot refuse to disclose the reasons for a “decision not to prosecute” to persons with a significant interest in the investigation, or members of the public when the fact of the investigation is made public (s.15(4)).
  3. In 1990, the Commissioner of the Discretion to Prosecute Inquiry recommended that for “high-profile cases of non-prosecution” where the investigation is publicly known, “a clear statement of the reasons for not prosecuting should be made to the public so as to maintain confidence in the integrity of the system.”

### ***Separation of Prosecution and Investigation Functions***

In law, investigative agencies are required to operate independently of prosecutors. In exercising these independent roles:

- *Investigative agencies, if they choose, are free to (and often do) contact CJB during the course of an investigation and seek legal advice.*
- *However, a prosecution agency does not and cannot lawfully direct investigations or dictate who should be investigated or what kind of evidence should be gathered. Investigators are required to make these choices in the independent exercise of their own discretion.*
- *Advice by CJB may involve reference to applicable Charter rights or other legal principles that impact the admissibility of evidence from a prosecution perspective. It may also identify, for the investigators, additional evidence that might assist in meeting the evidentiary standard of a “substantial likelihood of conviction.” This interaction between investigators and CJB occurs regularly – sometimes frequently – in the preparation and analysis of many RTCCs.*
- *There is no obligation for an investigative agency to seek advice from CJB or accept the advice that is given. This decision is left to the individual investigative agency.*

## ***Range of Possible Charges***

There is a range of possible consequences that can flow from an investigation of the kind conducted by WSBC. These include:

- *Charges under the Criminal Code of Canada.*
- *Regulatory charges under provincial law.*
- *Administrative penalties under the Workers Compensation Act.*

In the Babine case, neither the RCMP nor WSBC considered that there was an adequate basis for recommending criminal charges.

In contrast, regulatory charges under provincial law were considered and in fact recommended by WSBC in the RTCC. Many of the issues raised under a prosecution for a regulatory breach are the same as for criminal charges (for example, requirement of proof beyond a reasonable doubt, protections under the *Canadian Charter of Rights and Freedoms*, and legal requirements regarding the admissibility of evidence).

Administrative penalties have yet to be addressed but are within the discretion of WSBC. Since the matter of administrative penalties remains under consideration by WSBC, my document does not discuss this aspect.

## ***Discussion of the Ling and Jarvis test regarding the admissibility of evidence obtained during the course of an investigation.***

Ling and Jarvis are important legal cases that provide some of the framework around admissibility of evidence. Interpretation of this case law is an element of the interaction between WSBC and CJB. This is outlined in the fact pattern in the next section and in the discussion.

CJB has advised as follows:

- *In assessing charges, CJB considers the likely admissibility of evidence in court proceedings and the requirements regarding admissibility that continue to develop through court decisions. A significant development for regulatory investigations was the decision of the Supreme Court of Canada in 2002 in two cases – R. v. Ling<sup>5</sup> & R. v. Jarvis<sup>6</sup>.*
- *In both of these cases, what began as a taxpayer audit became an investigation for breaches of the Income Tax Act. The Supreme Court of Canada held that an individual is entitled to the same Charter of Rights and Freedoms and other protections when an audit becomes an investigation, as an individual who is faced with an investigation from the outset. Corporate accused are also entitled to protections in the gathering of evidence for alleged regulatory or criminal offences.*
- *Although they arose within the context of income tax matters, these rulings apply to all regulatory investigations, including matters of Occupational, Health and Safety (OH&S) that are investigated by WSBC.*

<sup>5</sup> [\(2002\), 169 C.C.C. \(3d\) 46](#)

<sup>6</sup> (2002), 169 C.C.C. (3d) 1



- *When engaged, the principles endorsed in these rulings can impact the admissibility of statements, as well as the admissibility of other evidence that is gathered by search and seizure. Violation of the principles may lead to a breach of the Charter of Rights and Freedoms and can provide the basis for the exclusion of evidence.*
- *When a regulatory authority exercises a warrantless inspection power, it must limit the use of that power to the purposes for which it was properly given. In the case of WSBC, this would include investigations to determine the cause of an event.*
- *Within the test established by the Ling & Jarvis cases, there is a point at which the dominant purpose of an investigation shifts from determining the cause of an event to collecting evidence for the purpose of establishing a regulatory offence.*
- *Warrantless, administrative inspection powers cannot be used to gather evidence for an investigation into possible regulatory charges once such an investigation has commenced.*
- *Using warrantless administrative authority to advance investigative interests will breach s.8 of the Charter once an adversarial relationship crystallizes between the person or company under inspection, and the inspector(s). In most cases, if all ingredients of an offence are reasonably thought to have occurred, it is likely that the investigation function is triggered and the stricter Charter-based rules established by the Ling and Jarvis cases for gathering evidence prevail. Although this trigger is often referred to as the “bright line” test, it can sometimes be difficult to ascertain.*
- *The Ling and Jarvis principles are applied on a case-by-case basis. The extent to which they are engaged in a particular case and the implications they carry for the admissibility of gathered evidence will be informed by the full context of the investigation. No two cases will be exactly alike.*
- *The implication of these cases is that any time an agency considers that regulatory charges are probable, or the nature of the agency’s inspection or investigation becomes, in fact, an investigation into regulatory wrongdoing, the necessary Charter and evidentiary precautions must be taken, and evidence collected prior to these precautions will face potential admissibility issues in a prosecution.*

## Fact Pattern

This section outlines the relevant key facts required to understand what took place in the Babine investigation.

### ***Pre-Babine Context:***

Prior to the Babine investigation and subsequent to the Nov. 2002 cases of Ling and Jarvis rulings:

- *Nov. 2002: The Supreme Court of Canada issued its rulings in R. v. Ling and R. v. Jarvis.*
- *2002 through 2013: The fact pattern indicates that for these years, WSBC submitted five OH&S-related RTCCs for charge assessment and possible prosecution (not including the Babine RTCC), and that CJB raised the issue of Ling and Jarvis in two of them<sup>7</sup>. Since the Ling & Jarvis cases were not decided until 2002, RTCCs submitted prior to 2002 would not have been assessed by CJB with Ling and Jarvis rigour.*
- *WSBC statements following the CJB Clear Statement in the Babine matter left an impression that WSBC had no prior knowledge of the Ling and Jarvis requirements. I have reviewed the fact pattern in detail and have confirmed that this is not correct. In fact the CEO of WSBC, David Anderson, has acknowledged to the Ministry of Labour: “We may have left the impression that Crown had never mentioned Ling and Jarvis to us. I am advised that lawyers in our organization are well aware of these and the other key cases on these issues.”*
- *In reviewing this with CJB, Ling & Jarvis admissibility issues were reviewed on numerous occasions with WSBC prior to delivery of the Babine RTCC. CJB provided training to WSBC on Ling and Jarvis issues. CJB also raised and discussed Ling and Jarvis with WSBC during the charge assessment for A-1 Mushroom Substratum Ltd. in 2010. Specifically, it queried whether the ‘bright line’ set out in those cases had been crossed, making certain statements inadmissible. In the mushroom case, CJB told WSBC that because of the admissibility concerns, it would make its charge assessment without reference to the statements. Charges were ultimately approved in light of the remainder of the evidence that was unaffected by Ling and Jarvis.*
- *August 2010: In a memo to CJB, a WSBC lawyer provided an opinion specifically analyzing the case law pertaining to Ling and Jarvis within the context of the regulatory framework specific to OH&S, and attempted to persuade CJB that the statements in the A-1 Mushroom case should be considered admissible at trial. The case was ultimately resolved by way of guilty pleas and did not go to trial. As such, the question of admissibility was rendered moot and it was not addressed further.*
- *The fact pattern is clear that differences of interpretation between WSBC and CJB regarding Ling and Jarvis were not resolved prior to the Babine investigation.*

<sup>7</sup> A-1 Mushroom Substratum Ltd. and an investigative file from 2004..

## **The RTCC on Babine Forest Products:**

The key and relevant fact pattern subsequent to the Babine explosion is as follows:

- *Jan. 20, 2012: A fire and explosion(s) occurred at the Babine mill in Burns Lake, killing 2 workers and injuring 20 others. The RCMP attended and ultimately determined that criminal charges were not warranted.*
- *Jan. 26, 2012: Jurisdiction of the site was transferred from the RCMP once potential criminality was ruled out, first to the BC Coroners Service for the purpose of locating and removing all human remains, then to WSBC. Site access and examination by WSBC investigators was delayed 19 days until Feb. 9, 2012 due to on-site hazards, extreme winter weather conditions and requisite safety planning. WSBC remained on site until April 19, 2012.*
- *Oct. 25, 2012: WSBC senior management began to consider whether to refer the Babine file to CJB for prosecution. By this time, most of the evidence had already been gathered.*
- *Prior to Nov. 21, 2012: Director of Investigations Jeff Dolan presented the Senior Executive Committee of WSBC with an overview of all of the enforcement options available to WSBC at the conclusion of an OH&S investigation to determine cause. These ranged from no administrative penalty, to a warning letter, to a penalty (Category A, Category B, President's discretionary, or claims cost levies) or prosecution under the Workers Compensation Act, to charges under the Criminal Code of Canada (section 217.1).*
- *Nov. 21, 2012: WSBC President and CEO David Anderson decided that WSBC would refer the Babine matter to CJB for charge assessment. The decision was made following a detailed presentation of the case by the investigations team and a recommendation for prosecution of regulatory offences approved by the Director of Investigations.*
- *Nov. 29, 2012: WSBC announced that its investigations into Babine and a subsequent incident at Lakeland Mills on April 23, 2012, were complete. WSBC publicly outlined its next steps: to forward both files to CJB for determination of charges under the Workers Compensation Act.*
- *Prior to Nov. 29, 2012: WSBC investigators had not contacted CJB for the purpose of legal advice or consultation associated with the Babine investigations.*
- *January, 2013: In response to a request by WSBC, and subsequently by the Deputy Attorney General, B.C. Safety Authority (BCSA) decided not to release its full Babine report. This reflected CJB's concerns, conveyed to BCSA by the Deputy Attorney General, about possible harmful impacts on potential prosecutions. BCSA did release a recommendations report that provided summary information needed "to promote technical system safety improvements." BCSA is mandated to oversee the safe installation and operation of technical systems and equipment, and to reduce safety risks through assessment, education and outreach, enforcement, and research.*
- *March 12, 2013: A CJB Deputy Director and the WSBC Director of Investigations met to discuss preparation of a RTCC and charge assessment processes regarding the Babine investigation. In addition, they discussed best practices for future cases.*

- *March 26, April 9, and April 16, 2013: WSBC representatives met with members of the CJB charge assessment team for at least half a day on each of these dates to discuss the Babine file in detail. During these meetings, the evidence, admissibility tests and possible defences were discussed, including Ling and Jarvis issues, which were discussed at length. In preparation for the April 16, 2013 meeting, CJB sent WSBC background material to assist in understanding the requirements for the RTCC.*
- *WSBC notes that all of the evidence in question was seized between Jan. 2012 and April 2012 and the investigation concluded in Nov. 2012. Discussion that began in March of 2013 could not change the authorities under which the investigators made their seizure one year prior.*
- *June 28, 2013: CJB, in an email to WSBC, discussed potential challenges faced with the evidence and identified elements of the Ling and Jarvis issues that would need to be “fully addressed” in the Babine RTCC.*
- *Sept. 4, 2013: WSBC formally submitted the RTCC to CJB for an assessment of regulatory charges against Babine under the Workers Compensation Act. WSBC focused on potential charges under provincial legislation. WSBC did not recommend charges against any individuals, only the corporate entity.*
- *Nov. 8, 2013: The WSBC Director of Investigations and a CJB Deputy Director met to discuss the charge assessment process, and best practices for future cases.*
- *Nov. 21, 2013: CJB sent an email to WSBC setting out detailed inquiries on issues of concern in relation to the legal test from Ling and Jarvis.*
- *Nov. 29, 2013: WSBC responded to the inquiries and indicated that WSBC’s strategy had been to “collect all the evidence, then make a decision about pursuing charges against Babine.” This was a decision that fell within the independent discretion of WSBC.*
- *Dec. 17, 2013: CJB finalized its charge assessment decision, which took into account the Crown’s analysis on the admissibility of evidence that was seized by WSBC under section 185 of the Workers Compensation Act, within the context of the Ling and Jarvis framework.*
- *Dec. 17, 2013: During an all-day meeting, CJB reviewed its analysis of the RTCC and evidence in detail with WSBC and advised WSBC of its decision not to approve charges against Babine, subject to feedback and any further information that WSBC might wish to provide. CJB explained that the charge assessment took into account: a) the likely inadmissibility of evidence as a result of Ling and Jarvis issues; and b) the existence of unexplored and only partially explored avenues of investigation and evidence, resulting in an inability to prove the recommended charges and to effectively counter the defence of due diligence.*
- *Dec. 19, 2013: WSBC advised CJB that: a) it was conducting follow-up investigation on a few items; b) it understood the follow-up investigation would not change CJB’s decision not to approve charges, but was doing the follow up for the sake of completeness; and c) WSBC accepted CJB’s decision not to approve charges and would not appeal it under CJB policy<sup>8</sup>.*

8 CJB Policy includes an appeal mechanism where an investigative agency disagrees with a charge assessment decision—WSBC did not pursue the appeal in this case.

- *Jan. 10, 2014: CJB issued a Clear Statement outlining that no charges would be approved against Babine setting out the reasons for the decision. Two Crown Counsel attended personally in Burns Lake to meet with the families of the deceased and other victims to explain CJB's charge assessment decision.*
- *Prior to release of its Clear Statement, CJB provided a draft copy of the Clear Statement to WSBC for its review. WSBC contacted CJB and identified concerns that it had with parts of the Clear Statement. CJB took those concerns into account and, to the extent that it considered it fair, appropriate and in the public interest to do so, CJB revised the Clear Statement to address the concerns<sup>9</sup>.*
- *Jan. 10, 2014: WSBC issued a media statement in response to CJB's Clear Statement, outlining its concerns about the decision, particularly in relation to the method of its investigations over the past decade. WSBC supported its position by stating that since 1996, 31 cases referred to CJB using the same investigation methodology had been approved for charges, with 24 resulting in a conviction. This statement was misleading in how it characterized the situation. It failed to address the disagreement with CJB about the scope of application of Ling and Jarvis and left the impression that there was reason to be surprised by the CJB decision.*
- *WSBC has explained that its motive in issuing its statement was not to express concerns about the ultimate decision by CJB not to lay charges, but rather to provide an explanation of its investigative methodologies, authorities and history in order to maintain public confidence in WSBC's capability to conduct investigations.*
- *Jan. 16, 2014: WSBC publicly released its Incident Investigation Report (IIR) on the Babine incident.*
- *Jan. 16, 2014: BCSA publicly released its full report on the Babine incident.*
- *Jan. 21, 2014: The BC Coroner announced the intention to proceed with a public inquest.*

<sup>9</sup> WSBC have advised that they chose to accept the decision not to approve charges. WSBC did not take steps to appeal the decision as their understanding was that the decision turned on the application of the due diligence defence, which was based on a legal opinion that WSBC did not question. WSBC noted that it has not appealed any other decision where CJB has declined to approve charges.

## Discussion

In preparing this document, I recognize that WSBC is presently investigating a second explosion involving the Lakeland Mill in Prince George. I have avoided any discussion that would involve or could interfere, in any way, with that investigation.

As indicated earlier, the legal issues or opinions that I address in this document have been reviewed by Len Doust, QC, an experienced and highly respected lawyer in the private bar who is familiar with the role of investigators and prosecutors. This review expressly did not involve a reconsideration of the CJB decision to not approve charges, but rather considered my description of the legal and constitutional framework and the recommendations that I have provided. Mr. Doust's conclusion, included here as an appendix, is that this document accurately characterizes the roles of CJB and WSBC as well as the analysis provided.

Any review of two independent agencies (CJB and WSBC), as well as any recommendations made to the Premier, begins with the legal and constitutional framework that applies to both the CJB and WSBC. Each of CJB and WSBC must be both independent of government and seen to be independent of government. This is essential to ensuring that there is public confidence in the ability of these organizations to fulfil their statutory and (in the case of CJB) constitutional responsibilities free from any influence or interference.

In order to carry out its mandate, WSBC has been given extensive powers within its legislation, including seizure and compelled statements. Government considers these powers necessary to enable WSBC to obtain the information it needs to prevent future injuries. But when a workplace-safety matter moves from preventing future injuries through inspection and the investigation of cause, to investigation for potential regulatory offences, there is a necessary tension between the powers given to WSBC and the protections provided within the justice system that are intended to ensure fairness.

A person or corporation facing regulatory charges is not guilty unless the charges are proven "beyond a reasonable doubt." Citizens and corporations are protected by rules of evidence that govern the admissibility of information gathered by a state agency, and the *Canadian Charter of Rights and Freedoms*. Investigators and prosecutors working within the justice system are required to know and apply these protections. Although the justice system itself is adversarial, the role of prosecutor is that of a "minister of justice" and "officer of the court." Prosecutors are required to review the evidence in light of the protections afforded Canadian citizens and corporate accused, and in British Columbia, must only proceed with prosecutions which meet the dual requirements of (a) a substantial likelihood of conviction and (b) a prosecution is required in the public interest.

The Babine Mill investigation was a very significant and extensive operation. It extended over approximately 13 weeks and resulted in over 40,000 individual pieces of evidence. It was a massive undertaking. For the purpose of prevention of future injuries, it appears on the information known to me that it was undertaken appropriately. It is clear to me that both CJB and WSBC were acting with the appropriate motivation and in the public interest. For the purpose of regulatory investigation and prosecution, however, CJB had concerns that the investigative techniques, as used and applied within the context of this particular investigation, were not sufficient to overcome the protections afforded by Canadian courts and the *Canadian Charter of Rights and Freedoms*.

As the CJB Clear Statement sets out, there were a number of issues that led to the decision not to approve charges. While the admissibility of evidence was one of the issues, others identified by CJB in the Clear Statement included: 1) challenges with the WSBC expert evidence, both with the fact that the internal and external expert did not agree on the cause of the explosion and the lack of a definitive conclusion (the experts limited their conclusion to “likely” cause); 2) a strong due diligence defence, arising in part from recent WSBC inspections which had not identified explosion or fire as a risk, and in part from actions that the employer was taking to address the dust situation; and 3) challenges arising from unexplored avenues of investigative inquiry.

The facts have confirmed to my satisfaction that, in relation to the Babine investigation, CJB did not adopt new and unexpected requirements for charge assessment. As the discussion of the fact pattern demonstrates, CJB applied the same charge assessment standard that it applies to all cases.

The recommendations provided for the Premier’s consideration have been discussed with both CJB and WSBC. I am confident that, should the Premier accept these recommendations, they will contribute to a more effective approach to future major investigations within the workplace context.

Reviewing the fact pattern it is clear that this was a very complex matter. Immediately following the explosion there were many different areas that WSBC was required to address, including a determination as to whether there were measures required to avoid a similar event at other mills in British Columbia. WSBC adopted its customary evidence-gathering methods, including the use of its statutory authority to compel production of evidence without search warrants. It may be that this approach was accentuated by the existence of a difference in view between CJB and WSBC legal counsel regarding the application of the Ling & Jarvis requirements. However, as the investigators, it was the responsibility of WSBC to ensure that it properly understood the rules of evidence and, if clarification was needed from CJB, to request it. Instead, the difference in views and its implications for the exercise of WSBC’s statutory search power was not resolved and the evidence obtained by WSBC in pursuing its assessment to determine the cause of the explosion, based on CJB’s analysis, did not meet the test for admissibility in a regulatory prosecution. The unresolved disagreement on the application of Ling & Jarvis to WSBC’s investigative practices demonstrates the need to ensure that such issues are escalated and addressed. I will address this issue below, in my recommendations.

It is important to remember however that a decision to proceed with charges depends on the entirety of the evidence and its likely admissibility, as well as an assessment of viable defences. As CJB indicated in its Clear Statement, even taking the admissibility issue into consideration, there remained a factual underpinning for regulatory charges that could have been pursued, but which were not pursued due to the strength of the potential due diligence defence and other challenges identified in the Clear Statement.

Finally, the fact pattern indicates a lack of processes for effective internal communications at WSBC. One clear indication of this is evident in public comments by WSBC representatives following the publication of CJB’s decision.

## Recommendations

Based on the above, I am recommending the following areas for improvement. I am also recommending that Mr. Doust be retained as an independent advisor to support implementation of these recommendations and ongoing improvements as he sees fit.

My recommendations fall into four categories:

1. Measures to improve interaction between investigating and prosecuting agencies
2. Improvement of policies, procedures and communications within WSBC
3. Enhanced training and improved working relationships
4. Moving forward

### ***1. Measures to improve interaction between investigating and prosecuting agencies***

Improvements are needed in the interaction between WSBC and CJB. The following are recommended to address this issue:

- ***WSBC and Police Services Memorandum of Understanding:*** Work should be completed to update the MOU currently in place between WSBC and police services. The purpose of this MOU is to coordinate jurisdiction when investigating an incident. While it is understood an updated draft is currently in circulation among police offices, WSBC should discuss with its partners whether further updates and improvements can be incorporated that reflect lessons learned in this case.
- ***CJB and WSBC Memorandum of Understanding:*** WSBC should enter into a Memorandum of Understanding with CJB on the specific issues of disclosure and preparation of a RTCC, similar to the MOU that has already been developed and is in place between CJB and police agencies across the province. While respecting the independent roles of these two organizations, the MOU should address key issues, including the need for a mechanism to ensure that issues or disagreements on the application of fundamental legal principles, or otherwise, can be identified in a timely fashion and appropriately resolved, or escalated to senior levels in the organizations if necessary. Similar to the current MOU with police agencies, the WSBC MOU should also offer guidance on the preparation of effective RTCCs for charge assessment purposes.
- ***Enhanced co-operation:*** WSBC and CJB should both commit to enhancing the co-operative working relationship between them to ensure that WSBC is better equipped with the information it needs to make informed decisions on how to prepare and refer a RTCC.
- ***Legal advice during investigations:*** WSBC should work with CJB to develop a means of appropriately consulting and obtaining legal advice during major incidents, without placing CJB in the position of “directing” the investigation (which is prohibited at law). Through this mechanism, outstanding issues related to understanding of the application of Ling and Jarvis can be addressed.



- **Major case management model and senior prosecutor availability:** *In alignment with a Major Case Management Model that CJB implemented in Dec. 2012, which brings a project management approach to its largest prosecutions, the Branch should re-commit to making its prosecutors with expertise in Occupational, Health and Safety matters available to WSBC investigators for early and ongoing consultation and legal advice in the course of significant investigations.*
- **Regular Informational Meetings:** *CJB and WSBC should hold twice-annual informational meetings between CJB's Director of Appeals and Special Prosecutions and/or designate, and the Director of Investigations for WSBC and/or designate, to discuss new developments in the law governing the investigation and prosecution of Occupational, Health and Safety matters, and/or issues of concern that either party has in relation to files that are brought to CJB for charge assessment. The purpose of these meetings will be to build upon and support the ongoing, co-operative working relationship between CJB and WSBC, and to facilitate constructive information sharing on a regular basis.*

## **2. Improvement of policies, procedures and communications within WSBC**

The fact pattern demonstrated a lack of processes for internal communication at WSBC. This must be addressed through new and updated procedures and approaches and through targeted training.

As an independent organization, the Board of WSBC should task the CEO with undertaking an effort to address internal communications issues and to report back to the board on the measures taken and their effectiveness.

Based on the WSBC communications that emerged at and after CJB's Clear Statement, and the apparent difference in perspective on an important legal issue, it is apparent that improvements are required to WSBC investigative policies and procedures and to processes to ensure effective information sharing.

## **3. Enhanced training and improved working relationships**

I have confirmed with the Deputy Attorney General that CJB has committed to take the following steps specific to WSBC, again with a view to enhancing the co-operative working relationship between the two organizations and providing WSBC with assistance on legal issues:

- **Training materials:** *CJB will provide WSBC with a package of training materials on disclosure and the preparation of RTCCs that has recently been produced and distributed to police agencies across the province.*
- **Investigations protocol review and input:** *CJB has been provided with a copy of the Memorandum of Understanding Respecting the Investigation of Workplace Fatalities and Serious Injuries that WSBC has been developing with police on the process/protocol to be followed in workplace investigations. CJB should review the MOU from a prosecution perspective and provide input on whether any parts of it present difficulty for the admissibility of evidence at potential prosecutions. If necessary, CJB should make suggestions for improvement of the MOU, including in respect of addressing and clarifying when there is an area of disagreement.*

- **Educational seminars and training:** *CJB is prepared to make its Crown Counsel available to WSBC for the purpose of educational seminars and training where desired, including (but not limited to): the role of the BC Prosecution Service; its charge assessment policy; preparation of a RTCC; significant developments in substantive and procedural law relating to regulatory investigations and prosecutions; and the applicability of the Supreme Court of Canada's 2002 decisions in R. v. Jarvis (2002), 169 C.C.C. (3d) 1 and R. v. Ling (2002), 169 C.C.C. (3d) 46 to Occupational, Health and Safety inspections and investigations.*

In addition to these measures I recommend the following:

- **WSBC investigative practices:** *WSBC should consider a comprehensive review of its current inspection and investigative practices in light of governing legal principles, including the development of best practices for regulatory investigations in significant Occupational, Health and Safety matters. This review should reflect the importance of developing an effective approach to major incidents that carry the realistic potential for investigation and prosecution. For example, WSBC may wish to consider the adoption of a major case investigative approach to these incidents to ensure that evidence gathered by WSBC meets the evidentiary requirements for a prosecution.*

#### **4. Moving forward**

In order to ensure the most complete approach possible to the issues raised in this document, I asked that Leonard Doust QC, as independent advisor, verify the accuracy of legal issues and opinions expressed.

I recommend that Mr. Doust's mandate be extended to ensure thorough implementation of these recommendations, as well as to provide advice on further improvements. Specifically, I recommend the following mandate::

- *Review implementation of the recommendations made in this document with the Deputy Minister of Labour and Deputy Attorney General at a time agreed upon, and report back to me as appropriate; and*
- *Advise of other recommendations that may flow from implementation.*

## MEDIA STATEMENT

January 10, 2014

### ***No Charges Approved against Babine Forest Products***

Victoria – The Criminal Justice Branch, Ministry of Justice, announced today that no criminal or regulatory charges will be approved in relation to the explosion(s) and fire that destroyed the Babine Forest Products sawmill at Burns Lake, on January 20, 2012.

On September 4, 2013, WorkSafeBC formally submitted a Report to Crown Counsel to the Criminal Justice Branch for an assessment on whether charges under provincial legislation should be laid against Babine Forest Products arising out of the incident, in which two workers died and 20 more were injured.

Based on the evidence that would likely be available for presentation by Crown Counsel in court, the Branch has concluded that there is no substantial likelihood of conviction for any of the regulatory offences recommended by WorkSafeBC. The charge assessment analysis included consideration of a viable defence of due diligence.

The decision, which is explained in greater detail in the attached Clear Statement, follows an extensive and thorough review of the available evidence by senior Crown Counsel. In keeping with the recommendation of Commissioner Stephen Owen, QC following the Discretion to Prosecute Inquiry (1990), a Clear Statement of the reasons for not prosecuting is sometimes made public by the Criminal Justice Branch in high profile cases where the investigation has become publicly known, so as to maintain confidence in the integrity of the system. The Branch appreciates that the explosion(s) and fire at the Babine sawmill continues to attract significant public interest, and had a substantial impact on the Burns Lake community.

Crown Counsel are meeting today in Burns Lake with the injured workers and with the families of the two workers who died in this tragic incident to advise them of the decision to not approve charges. Additional private meetings will be held with injured workers and affected family members today and in the coming days, to address questions they may have in relation to the charge assessment.

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January 10, 2014

### ***No Charges Approved against Babine Forest Products Clear Statement***

#### **Executive Summary**

On January 20, 2012, a fire and explosion, or series of explosions, occurred at a sawmill in Burns Lake that was owned by Babine Forest Products (Babine). Two workers were killed and 20 were injured, some very seriously. The sawmill was destroyed. The impact on the community has been substantial.

WorkSafeBC (WSBC) spearheaded an inspection/investigation of the incident. WSBC retained control of the site until April 18, 2012, during which time inspectors, investigators and others interviewed witnesses, seized exhibits, took photographs and made observations of the scene. WSBC retained an outside fire investigation expert to provide an opinion on the cause of the incident.

Investigative agencies are responsible for gathering the evidence that the Criminal Justice Branch (CJB) considers in assessing whether there is a sufficient basis to approve charges. When an investigative agency concludes an investigation, it may submit a Report to Crown Counsel (RTCC) to CJB for a determination on whether its charge assessment standard is met. CJB is not an investigative agency.

On September 4, 2013, WSBC formally submitted an RTCC to CJB for an assessment on whether charges should be laid against Babine. Before then, WSBC publicly confirmed that its RTCC would only recommend that the CJB consider provincial, regulatory charges; namely, offences under the *Workers Compensation Act* (WCA) and the related Occupational Health and Safety Regulation (OHSR). The RTCC recommended charges against Babine as a corporate entity, and not against any individual officers or employees of the company. Finally, WSBC did not recommend that CJB consider charges under the Criminal Code of Canada.

Notwithstanding the tragic nature of the incident and its significant consequences, CJB was required, as it is in all cases, to conduct a charge assessment in a fair and objective manner, based on the evidence as presented by WSBC, the essential legal elements of any offences that might apply to the incident, and the rules of evidence that would govern at a trial if charges were approved. The standard of proof for a regulatory offence under provincial legislation is the same as the standard of proof for an offence under the Criminal Code. If charges are approved, the prosecution bears the burden of proving the alleged offence beyond a reasonable doubt.

Under CJB policy (CHA 1), charges will only be approved where Crown Counsel is satisfied that the evidence gathered by the investigative agency provides a substantial likelihood of conviction, and if so, that a prosecution is required in the public interest.

Applying this standard to the RTCC received from WSBC, the CJB has determined that no charges will be approved against Babine. Based on the evidence that would likely be available for presentation by Crown Counsel in court, there is no substantial likelihood of conviction for any of the regulatory offences recommended by WSBC.

The charge assessment was conducted by senior Crown Counsel with knowledge of the applicable legislation, the relevant case law and the legal and evidentiary issues that can arise in cases involving workplace fatalities and injuries. Crown Counsel conducting the charge assessment reviewed the complete material provided by WSBC, had ongoing communications with WSBC during the process, and met with investigators several times to ensure that the prosecutors had a solid understanding of the available evidence. They thoroughly assessed its admissibility, as well as any defences that could reasonably arise on behalf of Babine. In deciding whether there is a substantial likelihood of conviction, Crown Counsel must consider any viable defences that could be asserted by a defendant should charges be approved.

CJB has advised WSBC of the decision to not approve charges in this case, and has extensively briefed WSBC on the factors taken into account by CJB in reaching its decision. A copy of this Clear

Statement was provided to WSBC in advance of its release date, and WSBC was made aware of the fact that the CJB would be releasing the Statement publicly.

Crown Counsel has concluded that the manner in which WSBC conducted parts of its inspection/ investigation would likely render significant evidence that it gathered inadmissible in court. Notwithstanding that fact, Crown Counsel was satisfied that the remainder of the available and admissible evidence provides a sufficient factual underpinning for a number of potential offences under provincial legislation.

However, the charge assessment process does not end there. As noted, in deciding whether there is a substantial likelihood of conviction, Crown Counsel must consider any viable defences that could be asserted by a defendant. On the whole of the available evidence as presented in the RTCC, Crown Counsel determined that the defence of due diligence would reasonably be open to Babine and, in light of that fact, it cannot be said there is a substantial likelihood of a conviction on any of the charges recommended by WSBC.

## Discussion

The Discussion contains a general overview of the evidence presented in the RTCC and the principal components of the assessment completed by Crown Counsel. Not every piece of evidence that was gathered by WSBC is addressed; nor is the whole of the CJB analysis included. The purpose of the Discussion is to provide sufficient information for members of the public to understand, generally, the information considered by Crown Counsel and the key components of the CJB's decision.

### A. Theories of the Cause of Fire and Explosion(s)

1. In the RTCC provided for charge assessment, WSBC advanced a number of theories for the ignition, fire and explosion(s). Opinions were prepared for WSBC by both an outside and an in-house expert. The theories of these experts differ in some respects. Key points that emerge from the expert opinions include the following:
  - *A fire ignited in the basement of the sawmill, setting fire to airborne combustible sawdust. Sawdust accumulation had become a challenge for Babine after it started milling beetle-killed wood in late 2010. Milling beetle-killed wood produces much more dust, and finer dust, than milling green wood.*
  - *The outside expert says that airborne combustible sawdust could have been ignited by any of the following: an open flame, metal halide lights, hot surfaces, electric arcs, motor control centre panels, static, or friction. He concludes that it is not possible to point to a specific ignition source. He identified a rectangular "ignition probability zone" in the basement.*
  - *The in-house WSBC expert identified the ignition source as an electric motor with a gear reducer set. His theory is that there was a friction fire in the space enclosed by a guard covering this equipment. The guard was ill-fitting and sparks from the friction fire ignited sawdust which had collected inside the guard. This led to the ignition of airborne combustible dust outside the motor. While the motor was located in the basement, it did not lie within the "ignition probability zone" identified by the outside expert.*

- *Once the fire started, the two experts generally agree on its course. They say that, once the airborne combustible dust in the basement caught fire and exploded, a fireball created by the initial dust explosion spread through the mill. One mechanism involved was the lofting of settled dust by the initial explosion and fire and the spreading fireball. Once that dust was lofted into the air, it burned, probably quite violently.*
  - *Both experts largely express their opinions in the language of probability, a potential challenge in a prosecution given the burden on the Crown of proof beyond a reasonable doubt.*
2. The RTCC also contained evidence suggesting that, in addition to sawdust, the fire was fueled by natural gas flowing through a regulator damaged in the initial fire and hot thermal oil pouring into the fire from a broken overhead pipe. In fact, although natural gas was eliminated by WSBC and the B.C. Safety Authority as a cause of the explosion, another expert offered an opinion early in the investigation that the explosion was caused by gas.

### **B. The Conduct of the Investigation in Support of These Theories, and the Admissibility of Evidence**

3. WSBC administers the WCA for the Ministry of Labour. Among other things, the WCA gives WSBC legal authority to set and enforce occupational health and safety standards, as well as assess employers and collect funds to operate WSBC. WSBC serves both a safety-compliance inspection function, and a regulatory investigation and enforcement function. In its investigative and enforcement capacity, WSBC may address non-compliance issues by way of monetary administrative penalties, or forward an RTCC to the CJB for possible prosecution.
4. At the time of its inquiries into the Babine incident, WSBC was not using any standard major case management methodology. This approach left important issues partially or wholly unexamined.
5. The admissibility of evidence is a factor which Crown Counsel must assess in any charging decision. Challenges to the admissibility of evidence may arise from the manner in which evidence has been collected, including whether there has been compliance with the *Charter of Rights and Freedoms*, or with other statutory and legal requirements.
6. In accordance with its practice at the time, WSBC's approach in this case was to collect the evidence, then make a decision on how best to proceed, including a determination on whether to forward a RTCC to the CJB for charge assessment and possible prosecution. Within the specific context of the Babine investigation, this approach has significant implications for the legal admissibility of evidence gathered by WSBC.
7. WSBC's examination of the fire site, and the related inquiries, were all conducted as a safety-compliance inspection rather than as an investigation into possible criminal or regulatory enforcement. Thus, for example, WSBC did not obtain a search warrant authorizing search and seizure at the Babine site, even after its officers formed reasonable grounds to believe Babine had violated the WCA and OHSR. Similarly, when officers interviewed the president of Babine, they did not provide him with any Charter of Rights warning or caution.

8. While suitable for the purposes of a safety compliance inspection, this approach did not adequately take into account the legal requirements for the collection of evidence that apply when it is understood that the evidence gathered by an agency may subsequently be used for the purposes of prosecution. Failing to comply with these requirements can result in evidence not being admissible in a prosecution. An inspection is a means of ensuring compliance with legislation; an investigation is a means of gathering evidence of non-compliance with that same legislation. "Investigators" possess constrained and restricted powers, which are further subject to the *Charter of Rights and Freedoms* and evidentiary rules that generally do not apply to inspections.
9. Determining whether or when an inspection has become an investigation can be a legally complex issue. CJB has concluded within the context of this case that what began as an inspection by WSBC following the fire and explosion(s), in fact evolved into an investigation with the potential for regulatory charges. Taking into account the relevant case law, Crown Counsel has concluded that a trial court would likely rule as inadmissible significant evidence that was collected by WSBC after the matter had evolved from being an inspection to an investigation.

### **C. Impact of the Unexplored and Inadmissible Evidence on a Potential Prosecution**

10. The evidentiary deficiencies resulting from unexplored avenues of inquiry and the likely inadmissibility of evidence gathered by WSBC:
  - *Negatively impact the availability of evidence that is required to prove the recommended charges;*
  - *Constrain the scope of the factual basis which the Crown could rely upon to underpin a prosecution of the alleged unlawful acts; and*
  - *Hinder the Crown's ability to respond to defences that would likely be advanced by Babine in the event of a prosecution.*

### **D. Potential for Charges Based on the Admissible Evidence**

11. The detailed theories on causation advanced by WSBC in the RTCC include the opinion that following ignition and explosion of airborne combustible sawdust in the basement, a fire ball expanded through the mill, resulting in the lofting of settled dust and a much larger secondary explosion. CJB has concluded that the evidence gathered by WSBC that would likely be ruled admissible in court does not support the detailed theories to the standard of proof beyond a reasonable doubt.
12. Without the whole of the evidence gathered by WSBC available for use in court, Crown Counsel would not be able to prove the mechanics of the fire and explosion(s), including the ignition source.
13. The remaining, admissible evidence does support, to the standard of proof beyond a reasonable doubt, a theory that there was sawdust in the mill at the time of ignition and that the sawdust was at least one fuel for the fire. This evidence is summarized as follows:

- *At the time of the incident, there was an accumulation of sawdust in the sawmill. The preponderance of the evidence is that dust conditions in the mill were relatively good, but imperfect, at the time of the incident.*
  - *It is obvious that Babine workers were killed and injured in the workplace in this incident. Similarly, there is no real issue that workers of other employers were at the employer's workplace on the day of the incident, and were exposed to the same hazards as the employer's workers.*
  - *Given that the sawmill ignited, burned and exploded; accumulated sawdust was one factor in the fire; and workers were killed and injured, the Crown would likely be able to prove the underlying factual elements of the alleged unlawful acts.*
14. This evidence provides a factual basis to support a prima facie case on four regulatory charges:
- *Failing to prevent hazardous accumulation of material, contrary to OHSR 4.41;*
  - *Failing to safely remove combustible dust, contrary to OHSR 5.81;*
  - *Failing to ensure the health and safety of workers, contrary to the WCA, s. 115(1); and*
  - *Failing to remedy hazardous workplace conditions, contrary to WCA, s. 115(2)*
15. However, as noted at the start of the Clear Statement, the charge assessment standard that is applied by the CJB requires that Crown Counsel consider the likelihood that viable, not speculative, defences will succeed. Within the context of the Babine case and strict liability offences, this includes the defence of due diligence.

#### **E. The Defence of Due Diligence**

16. All of the regulatory charges recommended by WSBC are strict liability offences, for which the Crown need prove only the prohibited act. Upon proof of the prohibited act, a finder of fact (the trial judge) presumes that the necessary mental element of the offence was present (in this case, negligence). However, with a strict liability offence, an accused can rebut the presumption of negligence using the due diligence defence. In advancing this defence, an accused bears the burden of proof to the standard of a balance of probabilities.
17. Under Canadian law, the due diligence defence has two branches. First, an accused may argue that he or she (or in the case of a corporation, its directing minds) did not know and could not reasonably have known of the risk posed by a situation (the "foreseeability" branch). Second, an accused may argue that, whatever its state of knowledge as to the risk, it nonetheless took reasonable measures to mitigate the risk (the "reasonable measures" branch.)

#### **F. Foreseeability Branch of Due Diligence Defence**

18. Relevant to the foreseeability branch of the due diligence defence, Babine has stated publicly: "To the knowledge of (Babine), the concentration of dust in the air in the sawmill was not sufficient to pose a hazard of a dust explosion . . . prior to the January 20, 2012 accident". Babine has also stated: "Tragically, the scope of the hazard was not fully understood before the events of 2012".



19. In assessing the first branch of the due diligence defence in prior cases, the courts have held that an accused should not be required to anticipate every possible failure. For example, the courts have held that the phrase “all due diligence” means “an area of precaution sufficient to prevent the foreseeable but not the unforeseen, unexpected or unintended”. Similarly, the courts have said that employers are not required to guard against that which is “unexpected, unknown or beyond any expectation”. Finally, on this point, the courts have cautioned that “the wisdom gained by hindsight is not necessarily reflective of reasonableness prior to the incident”.
20. The available evidence reviewed by CJB does not contain material establishing that the directing minds of Babine knew or ought reasonably to have known of the full extent of the hazards of combustible sawdust. Were such evidence available, the prosecution could use it to rebut any suggestion, by Babine, that no directing mind knew or could reasonably have known of the hazard.
21. In Crown Counsels’ view, Babine can be shown to have foreseen that settled sawdust could cause spot fires, given the many sources of sparks and heat inherent in sawmill operations and the fact that it had already experienced such fires in settled dust. The Crown could also prove, at a trial, that Babine was aware of the risk of relatively small, contained dust explosions in equipment like unpressurized electrical panels. Babine was aware, as well, that sparks entering its baghouse had the potential to set off dust fires and explosions within the baghouse if the safety features of the baghouse were not properly maintained. Baghouse filter systems are used to extract airborne wood dust particles from the air in the workplace environment. Finally, the evidence would establish that Babine knew airborne sawdust could pose respiratory hazards.
22. However, Babine would likely be able to establish that it did not foresee and could not reasonably have foreseen that sawdust could cause a catastrophic explosion of the nature that occurred on January 20, 2012.
23. In seeking to establish due diligence, Babine could additionally be expected to rely on evidence that WSBC performed its own testing of dust levels at the sawmill in the fall of 2011, and dust levels at that time were not reported by WSBC to be at a level to create a risk of explosion. WSBC testing of the air in the sawmill in the fall of 2011 confirmed that certain small areas of the sawmill were dusty enough to warrant the mandated use of masks as a mitigation technique for respiratory health and safety. WSBC requested that the employer ensure that masks were provided to employees working in those areas by January 30, 2012, and Babine had reportedly already directed that appropriate masks be purchased before the accident occurred on January 20, 2012. After the dust testing by WSBC in the fall of 2011, WSBC raised no concern that dust levels in the Babine mill posed a risk of explosion.
24. In light of these circumstances, CJB has concluded that Babine would likely succeed on the foreseeability branch of the due diligence defence. In other words, on the admissible evidence reported in the RTCC, Babine would likely be able to establish, on a balance of probabilities that it did not know, and could not reasonably have foreseen that sawdust could cause a catastrophic fire and explosion of the nature that occurred on January 20, 2012.

25. As noted, the due diligence defence rebuts the presumption of negligence in a strict liability offence. In the Babine case, the Crown would not be able to prove the offences recommended by WSBC beyond a reasonable doubt without the benefit of the presumption.

### **Reasonable Measures Branch of the Due Diligence Defence**

26. To ensure a complete analysis of the question of viable defences, Crown Counsel also considered whether Babine could succeed on the second branch of the due diligence defence, namely, that it took reasonable measures to mitigate risk.
27. The courts have cautioned that an employer must take all reasonable steps to avoid harm, but this does not mean that it must “take all conceivable steps”.
28. Crown Counsel considered several questions in assessing whether Babine could establish, on a balance of probabilities, that it took reasonable risk mitigation measures:
- *What steps did management take to mitigate the problem?*
  - *How did that compare to other mills operating in British Columbia or at least in British Columbia mills that were milling beetle-killed wood in 2011 and 2012?*
  - *What different and/or additional steps would the prosecution say Babine should have taken?*
29. Based on the available evidence as provided in the RTCC, there are at least seven ways of mitigating the hazards posed by sawdust:
- *Using dust expulsion systems effectively, for example exhaust fans;*
  - *Installing dust accumulation prevention systems, for example covers on machinery and pressurization of electrical panels;*
  - *Using dust collection systems like vacuuming;*
  - *Using misters to remove dust from the air;*
  - *Alternating the milling of beetle-killed wood and green wood;*
  - *Performing manual clean-up; and*
  - *Imposing stop work periods (in conjunction with clean-up).*
30. There is evidence that Babine implemented a series of additional dust mitigation measures starting almost immediately after it began milling beetle-killed wood in 2010. The measures taken by Babine covered all seven categories listed above, including: circulation and implementation of a formal Safety Policy, safety monitoring and inspections by different safety groups or committees, deployment of increasingly frequent and ever larger clean-up crews, vacuuming by an outside service provider, blow downs of surface dust, use of large exhaust fans when feasible, installation of misters, subsequent addition of extra misters over barkers and canter lines, use of open windows and doors when possible, infrared scanning for hot spots, the use of a FLIR gun to locate hot spots, and pressurization of motor control centre (electrical) panels (which had accumulated dust and had led to a spark-induced fire and small explosion

on February 23, 2011). The steps Babine was taking to mitigate dust accumulation continued up to the date of the incident, January 20, 2012.

31. There is evidence that cold weather generally led to exhaust fans being turned off and doors and windows being closed in the sawmill. However, there is conflicting evidence as to the status of exhaust fans and windows on the day of the fire and explosion(s).
32. There is evidence indicating that in the week before the incident, extra measures and coincidences greatly ameliorated the dust problem. The mill processed green wood for much of the week, including the day of the incident. There were equipment problems due to cold weather, resulting in lower production. Exhaust fans were run intermittently to keep the air moving in the plant despite cold weather conditions. The baghouse was running, although its capacity was diminished by its undersize and, perhaps, by internal ice formation. The day before the incident, all production stopped and all workers were assigned to clean-up, including the basement, which is suspected to have contained the site of ignition.
33. While evidence varies as to the degree of sawdust build-up in the mill, most workers reported that dust conditions in the sawmill in the week leading up to and on the day of the fire, including airborne sawdust conditions, were as good as or better than they had been since the mill started processing beetle-killed wood, for example, as “cleaner than usual”, “fairly clean”, “pretty clean”, and “down to the minimal it’s going to get.” One worker noted that “it was normal to always (have) a certain amount of sawdust in the work environment”.
34. A WSBC officer who regularly inspected Babine and other sawmills in the area reported that Babine’s dust conditions were about the same as those in the other regional mills.
35. Evidence that Babine’s dust mitigation measures were inadequate, or that Babine failed to take appropriate measures after certain incidents, would be relevant to its likelihood of success on the reasonable measures branch of the due diligence defence. The evidence reviewed by CJB does not contain any material establishing Babine failed to take reasonable steps to mitigate those risks of which it was aware, or ought reasonably to have foreseen. Were such evidence available, the prosecution could use it to rebut a defence based on the second branch of the due diligence defence. To that extent, the Crown’s ability to rebut a defence based on the reasonable measures branch is diminished.
36. In light of these circumstances, CJB has concluded that, in addition to likely succeeding on the first branch of the due diligence defence, Babine would also likely be able to satisfy the second branch of the due diligence defence by proving that it took reasonable measures to mitigate those hazards which it foresaw, or reasonably ought to have foreseen.

## Conclusion

As noted, in accordance with CJB policy, criminal or regulatory charges will only be approved where Crown Counsel is satisfied that the evidence gathered by the investigative agency provides a substantial likelihood of conviction, and if so, that a prosecution is required in the public interest.

Applying this standard to the RTCC received from WSBC, the CJB has determined that no charges will be approved against Babine. Based on the evidence that would likely be available for

presentation by Crown Counsel in court, there is no substantial likelihood of conviction for any criminal offences, or the regulatory offences recommended by WSBC.

CJB's analysis of the material provided by WSBC involved complex and highly nuanced questions of fact and law. The decision to not approve charges is based on the reviewing Crown Counsels' analysis of the evidence that was collected and reported by WSBC unique to its Babine inspection-investigation, as well as the applicable legislation, the relevant case law and the legal and evidentiary issues that can arise in cases involving workplace fatalities and injuries.

As noted in this Clear Statement, the charge assessment process included an analysis of the admissibility of evidence and an assessment of the likelihood of a successful defence of due diligence. These are both issues which Crown Counsel must properly take into account in determining whether there is a substantial likelihood of conviction on the available evidence as a whole.

Burns Lake, British Columbia, 10th Jan. 2014

## ***Crown Announces No Charges against Babine Forest Products***

WorkSafeBC Speaks to Families and Workers

Jeff Dolan, Director of Investigations, WorkSafeBC

I would like to begin by thanking the community of Burns Lake and specifically the families of Mr. Charlie and Mr. Luggi and every worker and family affected by this tragedy for the opportunity to speak with you today.

Crown has communicated its Clear Statement that no charges will be approved against Babine Forest Products (Babine) following the Jan. 20, 2012 explosion and fire that killed 2 workers and injured many others. A two year process with two distinct phases has led us to this point.

WorkSafeBC as the investigative agency was responsible for gathering the evidence. Following our investigation Crown Counsel considered that evidence to assess whether it is sufficient to approve charges.

This morning Crown outlined their process for considering the evidence gathered by an investigative agency in assessing whether there is sufficient basis to approve charges and has also clearly stated their reasons for not approving charges against Babine.

I am here today to speak for WorkSafeBC about the investigation and next steps.

Before I proceed, it is important that I reinforce that today's announcement will not in any way affect the existing claims of anyone in this room or anyone else affected by the Babine incident. If you have any questions regarding your claim please contact your claim manager.

Charges are only approved where Crown Counsel is satisfied that (1) the evidence gathered by the investigative agency provides a substantial likelihood of conviction, and if so, that (2) a prosecution is required in the public interest.

Crown has stated there is no substantial likelihood of conviction for any of the regulatory offences recommended following the WorkSafeBC investigation of the Babine incident citing two reasons:

1. The inadmissibility of some of the evidence gathered by investigators, and
2. The defence of due diligence

Crown has concluded that the manner with which investigators gathered some of the evidence under the authority of the *Workers Compensation Act* (the *Act*) would likely render it inadmissible in court.

Notwithstanding that fact, Crown Counsel was satisfied that the remainder of the available and admissible evidence provides a sufficient factual underpinning for a number of potential offences under provincial legislation.

The remaining admissible evidence does support, to the standard of proof beyond a reasonable doubt, (i) a theory that there was sawdust in the mill at the time of ignition and that the sawdust was at least one fuel for the fire; (ii) at the time of the incident, there was an accumulation of

sawdust in the sawmill. The preponderance of the evidence is that dust conditions in the mill were relatively good, but imperfect, at the time of the incident; (iii) the evidence shows that Babine workers were killed and injured in the workplace in this incident.

Given that the sawmill ignited, burned and exploded, accumulated sawdust was one factor in the fire, and workers were killed and injured; Crown has stated that they would likely be able to prove the underlying factual elements of the alleged unlawful acts.

This evidence provides a factual basis to support a case on four regulatory charges:

- *Failing to prevent hazardous accumulation of material, contrary to OHSR 4.41;*
- *Failing to safely remove combustible dust, contrary to OHSR 5.81;*
- *Failing to ensure the health and safety of workers, contrary to the WCA, s.115(1);and*
- *Failing to remedy hazardous workplace conditions, contrary to WCA s.115(2)*

(‘OHSR’ Occupational Health and Safety Regulation; ‘WCA’ *Workers Compensation Act*)

The Crown has, however, concluded that the defence of due diligence and its branches of foreseeability and reasonable measures would reasonably be open to the employer and as a result there is no substantial likelihood of a conviction on any of the charges recommended by WorkSafeBC.

In addition to outlining the assessment of the evidence and how Crown arrived at its decision, the clear statement provides comment on the investigative theories of the cause of the explosion and fire. I will not be commenting on these theories for two reasons:

1. The detailed investigation report into the explosion and fire at the Babine will be released during the week of Jan. 13, 2014; first to the Luggi and Charlie families and the injured workers prior to a public release that same day.
2. Now that Crown has decided that no charges will be approved against Babine, WorkSafeBC investigators are considering appropriate orders and the next steps under the act, including the possibility of recommending an administrative penalty against Babine.

For these two reasons it is not appropriate for me to comment on the due diligence defence, since it can be raised by the employer should they request a review of any orders or penalty issued to them.

I would however like to speak to Crown’s statements regarding the admissibility of evidence collected during the course of this investigation.

WorkSafeBC respects the fact that Crown thoroughly assessed the admissibility of all of the evidence presented to them, as well as any defences that could reasonably arise on behalf of Babine.

WorkSafeBC appreciates the fact that in deciding whether there is a substantial likelihood of conviction, Crown must consider any viable defences that could be asserted by a defendant should charges be approved.

My reason for speaking to the admissibility of evidence is to preserve the public’s trust in our investigations, which WorkSafeBC has worked very hard to earn, and to maintain public confidence in our investigations.

WorkSafeBC responds to and investigates all reported workplace incidents that result in serious injury or death of a worker to determine the cause and underlying factors that led to the incident.

Our officers conduct investigations under the authority of the *Workers Compensation Act* (the 'Act').

Under the *Act*, a WorkSafeBC officer has the authority to enter a workplace and conduct an investigation for the purpose of ascertaining the facts and circumstances of a work related incident, injury, illness or death. This regularly includes the taking of photographs and other recordings. Officers can, and most often do, require that a workplace or part of a workplace remain undisturbed for a reasonable period of time until the examination is complete.

The *Act* further allows for officers to employ the appropriate equipment, methods and external expertise for conducting their examination of materials, debris, equipment, machinery or other things at that place. Officers may remove samples and conduct further tests of machines, materials or other things found at that place.

The *Act* states that, when conducting an investigation, an officer may require that records (e.g. of training, inspection, Occupational Health and Safety meetings) be produced so that they may be inspected and copied. Officers may also question or interview persons regarding matters that may be relevant to the incident being investigated.

For at least the past decade, WorkSafeBC officers have conducted investigations of fatal and/or serious injury incidents at workplaces under the authorities that I have just listed. This includes the Babine investigation.

At the time of the Babine explosion, WorkSafeBC conducted its investigation using a methodology that involves collecting information from various sources to understand the facts and circumstances of the incident and analyzing that information to identify causal and underlying factors that led to the incident.

Our officers attended the Babine site within hours of the explosion and fire and remained at the site for 13 weeks, conducting one of, if not the largest, scene examination in the history of WorkSafeBC and the province.

In the case of Babine the investigation also applied the principles set out in the National Fire Protection Association (NFPA) 921, Guide for Fire and Explosion Investigations, including:

- *Securing and examining the incident site – officers were on site for 10 weeks (after waiting approx. 3 weeks for safe access)*
- *Taking notes and (14,000) photographs*
- *Securing and examining in excess of 700 exhibits including any equipment involved, documentation and other things*
- *Interviewing over 100 mill workers, management and other persons with relevant information*
- *Establishing the origin of the explosion and the ignition source*
- *Identifying blast and thermal damage*

- *Developing different hypotheses to explain the explosion*
- *Testing these hypotheses to eliminate them or confirm their validity*
- *Conducting tests of materials or equipment that may have contributed to the incident*

Analysis of the data included:

- *Determining a sequence of events that led to the explosion*
- *Examining the contributory events for unsafe acts and conditions*
- *Exploring the underlying factors that made the unsafe acts or conditions possible*
- *Identifying health and safety deficiencies*

The analysis was conducted by a team of 30 people over the course of 10 months and experts and laboratories in B.C., Eastern Canada and the USA were also enlisted to assist with the analysis.

Under the authority of the *Workers Compensation Act* this evolving investigative methodology has been employed by WorkSafeBC for at least the past decade to investigate major workplace incidents, including the multiple fatality confined space incident at a Langley Mushroom Farm in 2008, which led to *Workers Compensation Act* charges being approved by Crown Counsel in 2010 and ultimately led to a conviction in 2011.

Since April 2012 the evolving WorkSafeBC investigative methodology has progressively adopted the theories and methodologies of major case management referenced by Crown.

As the causes and underlying factors of an incident are identified WorkSafeBC has the responsibility to inform the public and make recommendations to the affected industry that may serve to prevent future injury, disease or death.

Beginning in May of 2012, as we slowly began to understand what may have occurred at Babine, and by that point the Lakeland Mills sawmill, WorkSafeBC began to publicly share its findings with workers, their families, industry and other stakeholders.

At the conclusion of an investigation officers will identify any violations of the *Act* and OHSR. The Babine investigation was concluded in late Nov. of 2012, at which time investigators turned their minds to identifying possible violations of the *Act* and OHSR based on the complete information available to them.

Under the *Act* employers can be fined or penalized for violations of the *Act* or OHSR for failure to take sufficient precautions to prevent work-related injury or for having an unsafe workplace or working conditions.

Reserved for the most serious workplace incidents, an employer may also be prosecuted in provincial court for a violation of the *Workers Compensation Act* or OHSR. WorkSafeBC will pursue a prosecution where the circumstances are such that the public interest in protecting worker health and safety is better served by that process over administrative remedies.



In late Nov. 2012, after considering all of the available facts of the circumstances that led to the Babine explosion and fire, a Report to Crown Counsel was submitted for consideration of charges under the *Workers Compensation Act*.

In Sept. of last year this evidence was ultimately organized into a final electronic Report to Crown Counsel comprised of tens of thousands of pages of evidence for consideration of charges.

WorkSafeBC accepts Crown Counsel's decision that no charges will be approved against Babine. We also acknowledge the reasons set out in the Clear Statement including the opinion of Crown Counsel with respect to challenges to the admissibility of evidence that may have arisen from the manner in which evidence was collected, including whether there was compliance with the *Charter of Rights and Freedoms*, or with other statutory and legal requirements.

Prior to the Babine investigation Crown Counsel approved charges in 31 cases between 1996 and 2010, 24 of which resulted in a conviction.

In the 31 cases WorkSafeBC investigators gathered and submitted evidence to Crown Counsel using the WorkSafeBC investigation methodologies and authorities granted by the *Workers Compensation Act*.

Looking ahead WorkSafeBC respects the evolution of the legal requirements, including the application of the *Charter of Rights and Freedoms*, evidentiary rules, and relevant case law that must be considered when conducting workplace incident investigations that may ultimately result in a referral to Crown Counsel for prosecution.

### **Next Steps**

The Babine Incident Investigation Report will be released during the week of Jan. 13th, 2014.

WorkSafeBC subject matter experts, critical incident response specialists and counselors will be in the community, or elsewhere as required, to meet with the families and injured workers.

The Investigation Report will be made available on the [worksafebc.com](http://worksafebc.com) website later that same day.

At present, WorkSafeBC investigators and legal officers are considering the Act and Regulation and any appropriate responses including orders and the possibility of recommending an administrative penalty.

I have no more information for you at this time. You will be contacted early next week by members of our staff who will explain how you will be receiving a copy of our Investigation report. As well, arrangements will be made for you to meet with our investigators to review the report if you so wish.

I may be able to answer some of your questions, but, as I have said, I will not be able to speak to the due diligence defence identified by Crown Counsel as this is a matter to be considered and evaluated in our administrative penalty considerations.

We will share more information with you regarding possible orders and penalties against the employer following the release of the Investigation Report.

Thank You.

## Appendix – Opinion from Len Doust QC

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February 6, 2014

**Attention: Mr. John Dyble,  
Deputy Minister to the Premier**

Dear Mr. Dyble:

**Re: Review by Deputy Minister to Premier of the fact pattern related to the  
Babine Mill explosion, and recommendations**

I understand that you have been asked by the Premier to provide a summary of the fact pattern regarding issues raised as a result of the investigation by WorkSafeBC (WSBC) into the January 20, 2012 explosion at the Babine Mill in Burns Lake, B.C. and the decision of the Criminal Justice Branch (CJB) not to approve regulatory charges against Babine Forest Products.

In addition, you have been asked to make recommendations to the Premier on actions arising from the lessons learned from the fact pattern.

You have provided me with a copy of your document entitled "*Babine Explosion Investigation: Fact Pattern and Recommendations*" and have asked that I independently confirm the correctness of the legal and constitutional context described in the document. This has involved consideration by me of the legal issues and opinions expressed in the document. I have paid most particular regard to the independent roles of Crown Counsel and WorkSafeBC in connection with an investigation into British Columbia and the decisions of Crown Counsel regarding regulatory charges founded on the investigation.

You have also asked me whether a public inquiry could result in a reconsideration of the decision by Crown Counsel not to approve the regulatory charges for prosecution. I can confirm, as you have indicated in your document, that there is very clear case law (see *Attorney General of British Columbia v. William H. Davies, Q.C., Commissioner 2009*, unanimous judgment of the British Columbia Court of Appeal) confirming that a decision of crown counsel to approve or not approve charges is not a proper subject for review in a public inquiry.

You have also recommended my being retained as an independent advisor to support the implementation of your recommendations and ongoing improvements in such manner as I see fit, I have confirmed that I will accept that retainer. You have advised

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that the purpose of this latter retainer is to ensure thorough implementation of the recommendations, as well as to enable me to provide advice on further improvements if required. To carry out the additional mandate you have asked, and I have agreed:

1. To review implementation of the recommendations made in this document with the Deputy Minister of Labour and Deputy Attorney General at a time to be agreed upon, and report back to you as appropriate; and
2. To advise you of other recommendations that may flow from implementation.

#### CONCLUSION

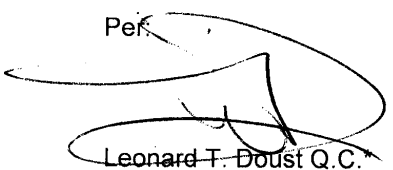
My conclusion after reviewing your document "*Babine Explosion Investigation: Fact Pattern and Recommendations*" is that it is accurate in the manner that it characterizes the roles of CJB and WSBC as well as in relation to the legal and constitutional context described in the document. In reaching this conclusion I have given consideration to the legal issues and opinions expressed in the document as well as the independent roles of Crown Counsel and WorkSafeBC in connection with an investigation in British Columbia and decisions regarding regulatory charges.

With respect to your recommendations and the role that you have asked that I take in implementation, I can confirm my view that the recommendations address the issues in an effective and appropriate manner.

Sincerely,

McCarthy Tétrault LLP

Per



Leonard T. Doust Q.C.\*

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