



# MEDIA STATEMENT

## CRIMINAL JUSTICE BRANCH

October 4, 2013

13-26

### **No Charges In Fatal Accident at Craigmont Mine**

**Victoria** – Following thorough reviews of the available evidence by three senior Crown Counsel, the Criminal Justice Branch of the Ministry of Justice (the Branch) has concluded that no criminal charges will be approved in connection with the death of a worker at the Craigmont Mine near Merritt.

On February 28, 2008, an equipment operator at the Craigmont Mine drowned when the excavator he was operating overturned into a sump filled with water. After reviewing the investigative report that was submitted to the Criminal Justice Branch by the R.C.M.P, including evidence resulting from an investigation conducted by the Ministry of Energy, Mines and Petroleum Resources, the Branch has determined that the available evidence does not support a substantial likelihood of conviction for criminal charges in relation to the incident.

A Clear Statement explaining the Branch's charge assessment is attached to this Media Statement. 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 Branch in high profile cases where the criminal investigation has become publicly known, so as to maintain confidence in the integrity of the system.

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***Courageous, Fair and Efficient – A Prosecution Service that has the Confidence of the Public.***

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### Summary of Charge Assessment

Following thorough reviews of the available evidence, the Criminal Justice Branch of the Ministry of Justice (the Branch) has concluded that no criminal charges will be approved in connection with the tragic death of a worker at the Craigmont Mine near Merritt in February 2008.

The investigative file was first received by the Branch on October 30, 2009. The file was returned to police on January 18, 2010 with a request for further information. The Branch required further information to complete a charge assessment. The file was resubmitted by police to the Branch in late July 2012. Over the course of the next 13 months, the file was reviewed by three senior Crown Counsel, one of which has particular expertise in workplace fatality prosecutions.

On February 28, 2008, John Wilson, drowned when the excavator he was operating overturned into a sump filled with water. After reviewing the investigative report that was submitted by the R.C.M.P, including evidence resulting from an investigation conducted by the Ministry of Energy, Mines and Petroleum Resources, the Branch has determined that the available evidence does not support a substantial likelihood of conviction for any criminal charges in relation to the incident.

To sustain a conviction for criminal negligence causing death against a corporate entity, a manager or an employment supervisor under the *Criminal Code*, the Crown must prove beyond a reasonable doubt a breach of the duty to protect a worker from bodily harm (Section 217.1 of the *Criminal Code*). It must also prove on the same standard that the breach was committed with a wanton or reckless disregard for the life or safety of the worker (Section 219(b) of the *Criminal Code*). Finally, the Crown must prove that the alleged breach caused the death. The Branch applies a two part test to determine whether criminal charges should be approved and a prosecution initiated:

1. there must be a substantial likelihood of conviction based on the evidence gathered by the investigating agency; and
2. a prosecution must be required in the public interest.

Under Branch policy, a substantial likelihood of conviction exists where Crown Counsel is satisfied there is a strong, solid case of substance to present to the court. To reach this conclusion, a prosecutor will consider whether the evidence gathered by the investigating agency is likely to be admissible in court; the weight that would likely be given to the admissible evidence by a judge or a jury; and the likelihood that viable, not speculative defences will succeed.

In making a charge decision, Crown Counsel must assess the evidence gathered by investigators in light of the legal elements of any criminal offence that may have been committed. Crown counsel must also remain aware of the presumption of innocence, the prosecution's burden of proof beyond a reasonable doubt, and the fact that under Canadian criminal law a reasonable doubt can arise from the evidence, the absence of evidence, inconsistencies in the evidence, or the credibility or reliability of one or more of the witnesses. The person or corporate entity accused of a crime does not have to prove that he or she did not

commit the crime. Rather, from beginning to end, the Crown bears the burden of proving beyond a reasonable doubt that an offence has been committed.

When reviewing this case, Crown Counsel considered the applicability of *Criminal Code* charges only. The provincial *Workers Compensation Act* and related regulations are not applicable to the mining sector.

The mining sector is governed under the *Mines Act*, and the *Health, Safety and Reclamation Code*. Under the Act the applicable limitation period for the laying of charges is six months. This limitation period had expired by the time that the Ministry of Energy, Mines and Petroleum Resources (as it then was), sent its report to the R.C.M.P. for an investigation of criminal negligence.

### **The Law on Criminal Negligence**

Concern has been expressed publicly in this case that the employer (including managers or supervisors) of Mr. Wilson may have been criminally negligent for an alleged failure to fulfill their responsibility to ensure a safe workplace.

As noted, to sustain a conviction for criminal negligence causing death against a corporate entity, a manager or an employment supervisor under the *Criminal Code*, the Crown must prove beyond a reasonable doubt a breach of the duty to protect a worker from bodily harm (Section 217.1 of the *Criminal Code*). It must also prove on the same standard that the breach was committed with a wanton or reckless disregard for the life or safety of the worker (Section 219(b) of the *Criminal Code*). Finally, the Crown must establish that the alleged breach caused the death.

### **The Investigation and Circumstances Surrounding the Incident**

On February 28, 2008, Mr. Wilson was operating a John Deere excavator, in a low lying area on the mine site. The excavator's cab had a single door that was the only way to enter or exit the cab. In an emergency, the only other possible exit points were a hatch in the roof of the cab or the windows. However, a bush guard that protected the cab from falling objects had a metal pin that prevented the roof hatch from opening wide enough to be used as an exit, and included screens over the windows.

The bush guard may originally have been put in place to accommodate use of the excavator in the logging industry. However, according to the evidence, similar window screens were put on a tractor in use at the Craigmont mine after a metal shackle came through an unprotected window and nearly struck the operator. The bush guard therefore appeared to also afford potential safety benefits in the context of a mining operation.

On the day in question, Mr. Wilson's responsibilities consisted of moving power poles for installation at various locations in the mine. This involved dragging the poles over a roadway in the lower pit area.

A sump had been dug in this area sometime the previous fall to gather run-off water and keep the lower pit and roadway safe and visible. When work began on February 28, the sump had very little water in it and was visible; however, over the course of the day due to the run-off level the sump filled and overflowed, covering a large area of the lower pit including the roadway area being used by Mr. Wilson to move the poles.

The evidence indicates that Mr. Wilson was directed by his supervisor to build a new roadway in order to avoid the old roadway and the water. Sometime after receiving this direction, Mr. Wilson was seen washing the track of his excavator in an area of the floodwater, an action that

was contrary to mine policy. He was then seen moving his excavator in the direction of the sump, contrary to the earlier direction.

Within a few moments, a co-worker saw Mr. Wilson's machine overturned in the sump. It is unknown precisely how or why the excavator overturned. A co-worker called for the supervisor to radio for help. He then ran to Mr. Wilson's location and climbed onto the excavator. Two mine employees attempted to find a way to remove Mr. Wilson from the excavator; however, it had overturned onto the doorway, therefore blocking normal access. While the access hatch in the bush guard could be opened, the underlying cab access hatch was blocked by the pin on the exterior guard. Workers were also unable to break open a rear window on the cab.

It is clear from the evidence that the bush guard prevented use of the roof hatch as an alternative means of exiting the excavator's cab. It is not clear, from the evidence as a whole, whether the loss of this means of egress factually contributed to Mr. Wilson's death, in whole or in part.

It is furthermore not possible to prove on the available evidence that the mine manager was aware of the inability to use the roof hatch and did nothing to correct it. A training and safety committee was in place at the mine. A review of committee records shows no mention of the bush guard being formally raised or considered as a safety issue.

The autopsy report attributes the cause of Mr. Wilson's death to drowning. The Crown is unable to prove that Mr. Wilson was conscious at any point after the machine overturned. Based on the available evidence, it is possible that Mr. Wilson succumbed to drowning before anyone had reached the excavator in attempts to rescue him. The evidence is not definitive. Mr. Wilson was non-responsive throughout the time his co-workers tried to help him escape and breathe.

The evidence reveals that the mine's sump pond was not designed by a qualified professional to accepted engineering standards, and that the mine had not conducted a previously ordered survey of the mine site. However, the evidence does not establish that either a survey or a better designed pond would have avoided whatever circumstances resulted in the excavator overturning.

The evidence also reveals that the mine did not have an emergency response team in place at the time of the incident involving Mr. Wilson. However, such a team was not legally required given the limited number of employees on the mine site at the time of the accident. The evidence also does not establish that the presence of such a team would have prevented the death of Mr. Wilson.

After reviewing the whole of the available evidence, in light of the legal elements of proof that the prosecution would have to establish to sustain a conviction for criminal offences in this case, the Branch has concluded that there is no substantial likelihood of conviction against the Craigmont mine as a corporate entity, a manager or a supervisor of Mr. Wilson.

On the evidence submitted by the R.C.M.P., the prosecution would be unable to prove a breach of duty, a wanton or reckless disregard for life or safety, or that any breach – if it existed – factually contributed to Mr. Wilson's tragic death.