



MEDIA STATEMENT

CRIMINAL JUSTICE BRANCH

January 10, 2014

14-01

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

Branch Vision

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

Office of the
Assistant Deputy Attorney General
Criminal Justice Branch
Ministry of Justice

Mailing Address:
PO Box 9276 Stn Prov Govt
Victoria, BC V8W 9J7

Office Location:
9th Floor, 1001 Douglas Street
Victoria, BC V8W 9J7
Telephone: (250) 387-3840
Fax: (250) 387-0090

and affected family members today and in the coming days, to address questions they may have in relation to the charge assessment.

Media Contact: Neil MacKenzie
Communications Counsel
Criminal Justice Branch
(250) 387-5169

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www.justicebc.ca/en/cjis/index.html

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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.