



MEDIA STATEMENT

CRIMINAL JUSTICE BRANCH

April 14, 2014

14-08

No Charges Approved against Lakeland Mills Ltd.

Victoria – The Criminal Justice Branch, Ministry of Justice, announced today that no charges will be approved in relation to the fire and explosion on April 23, 2012 at a sawmill operated by Lakeland Mills Ltd. in Prince George. Tragically, two workers died and 22 others were injured as a result of this incident.

On February 19, 2014, WorkSafeBC (WSBC) formally submitted a Report to Crown Counsel to the Criminal Justice Branch for an assessment of whether charges under provincial legislation should be laid against Lakeland Mills Ltd. (Lakeland).

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 WSBC. 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.

While the Branch is satisfied that the Crown could prove the prohibited acts (or *actus reus*) underlying the offences recommended by WSBC, the Branch has also determined that Lakeland would likely succeed on a defence of due diligence. As a result, there is no substantial likelihood of conviction.

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 recognizes that the fire and explosion at the Lakeland mill has attracted significant public attention.

Branch Vision

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

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Crown Counsel are meeting today in Prince George with Lakeland workers and family members to notify them of the Branch decision. Additional private meetings will be held between Crown Counsel, and those affected, today and later in the week to assist them in understanding the reasons underlying the determination that no charges will be approved.

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Clear Statement

Explosion at the Lakeland Mill in Prince George

Introduction

The Criminal Justice Branch (CJB) has determined that no charges will be approved against Lakeland Mills Ltd. (Lakeland) for a fire and explosion that occurred at its Prince George sawmill on April 23, 2012. This incident resulted in the tragic death of two workers and injured 22 others.

Based on the evidence that would likely be available for presentation by Crown Counsel in court, CJB has concluded that there is no substantial likelihood of conviction against Lakeland.

WorkSafeBC (WSBC) has recommended that CJB consider approving four regulatory offences against Lakeland. They are all “strict liability” offences. To obtain a conviction for these offences, the Crown would need to prove two legal elements: (1) the act that is prohibited by each offence (otherwise known as the *actus reus*); and (2) the required mental element (otherwise known as the *mens rea*).

For strict liability offences, the *mens rea* is presumed to have been proved once the Crown establishes the *actus reus*. For the four offences recommended by WSBC, the presumed *mens rea* is negligence. However, an accused can rebut the presumption of negligence by relying on the defence of due diligence.

CJB is satisfied that the Crown could prove the *actus reus* of the offences recommended by WSBC. However, CJB has also determined that Lakeland would likely succeed on a defence of due diligence. As a result, there is no substantial likelihood of conviction.

This Clear Statement summarizes the reasons for CJB’s decision. Not all of the material that was reviewed or taken into consideration is addressed in the Statement; nor is the whole of CJB’s legal and factual analysis included. Rather, the Statement sets out the key reasons for the Branch’s conclusion.

On January 10, 2014, CJB released a Clear Statement on its decision to not approve charges for a fire and explosion(s) that occurred on January 22, 2012 at the Babine sawmill in Burns Lake. Since then, there has been considerable public dialogue about workplace safety, CJB’s role as a prosecution service and its charge assessment function, and the interaction between CJB and WSBC as an investigative agency. This dialogue appears to have been generated, at least in part, by the fact that CJB’s Clear Statement identified the impact of inadmissible and unexplored evidence on the potential for prosecution against Babine.

In releasing a Clear Statement, CJB has a responsibility as an independent prosecution service to be transparent, to accurately summarize the facts based on the material that was provided to it for charge assessment, and to set out the key reasons why charges have not been approved in a particular case. This includes identifying evidentiary difficulties that have factored into the charging decision after a thorough assessment of same. CJB’s responsibility for transparency exists regardless of whether the investigative agency consists of police or a regulatory body.

The Branch appreciates that the decision to not approve charges against Lakeland will have a significant impact on members of the public, particularly the families, friends and colleagues of

workers who were killed or injured in the explosion. The Branch understands the serious nature of the allegations made against Lakeland, the tragic consequences of the fire and explosion, and the devastation that it has brought to the families involved, as well as the Prince George community.

However, in every case, including those involving death or serious bodily injury, CJB has a constitutional obligation to conduct a charge assessment in a fair and objective manner, realistically assessing the admissibility of evidence that may be gathered by an investigative agency, its relevance and the likely weight that would be assigned to it in court. This is the approach that has been taken by Crown Counsel in the Lakeland matter.

Summary of the Lakeland Charge Assessment

On April 23, 2012, there was a fire and explosion at Lakeland sawmill in Prince George. Two workers were killed and 22 others were injured. The mill was badly damaged.

Three days later, WSBC took control of the mill site to determine the cause of the explosion. WSBC remained on the site until May 30, 2012. During this time, WSBC interviewed witnesses, seized exhibits, took photographs and made observations of the site. It re-entered the site on August 25 and 26, 2012, seizing further exhibits and taking other actions. It also retained an outside expert on fire investigations to provide WSBC with an opinion on the cause of the explosion. Once WSBC completed its work, it reviewed the material that it gathered to determine next steps.

WSBC did not consult with CJB during the course of its work on the Lakeland site, or seek advice on evidentiary rules that might apply if the matter ultimately led to a prosecution. As a regulatory and investigative agency, WSBC manages itself independently from CJB and makes its own decisions on how to examine, inspect or investigate workplace incidents.

The separation of investigative and prosecution roles is a well-established principle of the Canadian criminal justice system. When requested, CJB may provide legal advice to an investigative agency. However, CJB cannot direct the conduct of investigations. Nor does CJB have supervisory authority over investigations. The prosecution service must, at all times, remain neutral.

On November 29, 2012, WSBC announced that it would prepare and forward a Report to Crown Counsel (RTCC) to CJB for a decision on whether charges should be approved against Lakeland. In British Columbia, CJB has statutory authority on behalf of the provincial Attorney General to decide whether the evidence gathered by an investigative agency provides a sufficient basis for charges and a prosecution.

A completed RTCC was provided to CJB on February 19, 2014. WSBC recommended that Lakeland be charged with four offences under provincial legislation. It did not recommend charges of criminal negligence under the *Criminal Code*. A two year statutory limitation period applies to the charges proposed by WSBC. The last possible date on which these offences could be charged, and an Information sworn, is April 22, 2014. An "Information" is the charging document that formally initiates a prosecution.

Two of the recommended offences involve alleged violations of the *Workers Compensation Act* (WCA). The other two involve alleged violations of the *Occupational Health and Safety Regulations* (OHSR). All four offences are known as "regulatory" offences. A conviction results in a fine. Where the accused is a corporate entity, there is no possibility of a jail term. The specific charges recommended by WSBC were as follow:

- Failing to ensure the health and safety of workers (WCA, s.115(1))

- Failing to remedy hazardous workplace conditions (WCA, s.115(2)(a))
- Failing to prevent the hazardous accumulation of material (OHSR 4.41)
- Failing to safely remove combustible dust (OHSR 5.81)

The maximum, cumulative fine that would be available against Lakeland if all of these offences were approved by CJB, and successfully prosecuted, would be approximately \$2.6 million. While CJB has identified the maximum penalty possible under the provincial legislation, this is but one factor that a judge would consider. When a prosecution is initiated, and a conviction entered, it is the sentencing judge who decides what penalty would actually be appropriate in the particular circumstances of a case.

When CJB receives a RTCC from an investigative agency, whether it comes from police or an agency like WSBC, the Branch reviews the entirety of the file that is brought to it. It goes through all of the evidence that was gathered by the agency. It reviews the proposed offences, their legal requirements and it makes sure that it fully understands what the Crown would be required to prove in order to make out the offence(s) in court and obtain a conviction. The Crown must be able to prove each alleged offence beyond a reasonable doubt. This is true whether a proposed offence is under provincial legislation or the *Criminal Code*. Persons that are charged with an offence, including corporate entities, are constitutionally presumed innocent until proved guilty by the Crown.

In deciding whether charges should be approved, CJB also assesses the likely admissibility of the evidence gathered by the investigative agency so that it knows what Crown Counsel could rely upon in court. It also considers viable, not speculative defences that might be raised by the person or the corporate entity that is said to have committed an offence. This forms an important part of the overall charge assessment. Before initiating a prosecution, CJB must be satisfied that it has a viable prosecution based on evidence that would reasonably be available to it in court.

Charge assessments are completed in accordance with publicly available Charge Assessment Guidelines (CHA 1). These Guidelines stipulate that 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. A substantial likelihood of conviction exists where Crown Counsel is satisfied that there is a strong, solid case of substance to present in court.

To approve charges, it is not enough for Crown Counsel to say, based on the available evidence, that the person or corporate entity accused of an offence committed a wrongful act, or failed to take steps to prevent something dangerous from happening. Instead, Crown Counsel must be satisfied that there is a substantial likelihood of conviction for an identifiable regulatory or criminal offence in light of the required legal elements that must be proved. The fact that something may have been preventable does not, by itself, provide the basis for a prosecution.

The charge assessment in this case was conducted by a team of 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. They carefully considered the material that was provided by WSBC, had ongoing communications with WSBC's Director of Investigations during the process, and personally met with or spoke to WSBC investigators on more than one occasion to ensure that they had a solid understanding of the evidence. Follow-up questions were posed to WSBC on specific issues and in response to these questions, additional material was gathered by WSBC and presented to CJB.

As was the case with the Babine charge assessment, Crown Counsel ultimately concluded that the manner in which WSBC conducted parts of its examination of the Lakeland mill site would

likely render some evidence that it gathered from the site inadmissible in court. It is important to note, however, that by itself this fact did not determine the outcome of the charge assessment.

The prosecutors were satisfied, based on the available evidence, that the Crown could prove the *actus reus* of the offences recommended by WSBC. However, Crown Counsel also determined that Lakeland would likely succeed on a defence of due diligence. As a result, there is no substantial likelihood of a conviction and no charges will be approved.

Discussion of the Evidence and Applicable Legal Principles

A. Theories of the Cause of the Fire and Explosion

1. In the RTCC, WSBC advanced a primary theory for the fire and explosion at Lakeland. Opinions were produced for WSBC by an outside and an in-house expert. Key points include the following:
 - A fire started in the northeast section of the sawmill, igniting airborne combustible sawdust.
 - The WSBC expert identifies the ignition source as a gear reducer that was attached to a conveyor belt motor located in the basement. His opinion is that the gear reducer fan jammed into its shroud. The shaft continued to spin at a high speed, rotating against its collar. The resulting friction generated heat, which ignited airborne combustible sawdust adjacent to the motor and the gear reducer.
 - The outside expert agrees that airborne combustible sawdust was the fuel for the initial fire and explosion. He also agrees that the gear reducer is the most probable ignition source. However, he says that the ignition source could have been on the operating level rather than in the basement. He is unable to come to a firm conclusion because explosions cause tremendous damage, tending to obscure the point of origin by destroying other possible ignition sources.
 - The two experts generally agree on the course of the fire and explosion. They say that once the airborne combustible sawdust first ignited, a fireball spread through the sawmill. The pressure wave at the front end of the fireball lofted sawdust that had settled on horizontal surfaces throughout the mill. This, in turn, generated additional fuel for the fire and resulted in secondary, more violent explosions.
2. The B.C. Safety Authority examined the Lakeland mill site after the fire and explosion, and identified electrical equipment violations. However, it was unable to say that any of these violations was the ignition source for the incident that occurred on April 23, 2012.

B. Conduct of the Investigation and the Admissibility of Evidence

3. No search warrants were obtained by WSBC during the initial investigation in 2012. For reasons similar to those outlined in CJB's Clear Statement on the Babine investigation, including the Supreme Court of Canada's 2002 decisions in *R. v. Ling* and *R. v. Jarvis*, the Branch has concluded that the manner in which WSBC conducted parts of its examination of the Lakeland site would likely render some evidence that it gathered inadmissible in court.
4. The inadmissibility of this evidence leaves the Crown unable to establish details surrounding the factual cause of the fire and explosion, including the specific mechanics of the fire and explosion that have been advanced by the experts referred to in paragraph 1, above.

5. As with the Babine investigation, WSBC did not use major case management methodology in its approach to the Lakeland site. CJB recognizes that use of this methodology is not legally required. However, it is a recommended best practice for major incidents as it can produce a more focused exploration of potentially relevant evidence. A focused, comprehensive and organized investigative approach can better provide the evidentiary foundation needed to prove the essential legal elements of a proposed offence, and to challenge defences that may be asserted by the accused, including the defence of due diligence.
6. In this particular case, a number of areas of potentially relevant evidence were left unexplored. This included (but is not limited to) direct evidence on the state of knowledge by Lakeland directors, officers and members of management in relation to sawdust conditions at the mill and/or the fire and explosion hazard presented by those conditions; employee and other persons' observations of dust conditions specific to date of the fire and explosion (as opposed to other occasions); and industry standards and best practices for mitigating sawdust-related hazards, for comparison with actual measures that were implemented by Lakeland.
7. Notwithstanding these issues, Crown Counsel was satisfied that the admissible evidence contained in the RTCC provided a sufficient factual underpinning to prove the *actus reus* of WSBC's proposed regulatory offences. This evidence is capable of proving that there was accumulated sawdust in the Lakeland mill at the time of the incident on April 23, and that sawdust was a significant source of fuel for the fire and explosion. In light of the fact that:
 - the sawmill ignited, burned and exploded;
 - accumulated sawdust was a known factor in the fire and explosion; and,
 - workers were killed and injured,

the Crown could prove the underlying factual elements of the prohibited act (or *actus reus*) that is captured by each of the four offences.

8. However, in determining whether there is a substantial likelihood of conviction, Crown Counsel must also consider viable, not speculative defences. The regulatory charges that were recommended by WSBC involve strict liability offences. As such, Crown Counsel was obliged to assess the defence of due diligence as it might apply to Lakeland.

C. The Defence of Due Diligence

9. With strict liability offences, once the Crown has proved the *actus reus* of the offence, a trial judge will presume that the *mens rea* was also present. In this case, the presumed *mens rea* would be based in negligence. However, an accused can rebut the presumption of negligence by relying on the defence of due diligence. When advancing this defence, the accused bears the burden of proof on a balance of probabilities.
10. Under Canadian law, the defence of due diligence has two branches: "foreseeability" and "reasonable measures". An accused may show that he or she (or in the case of a corporation, the directing minds) did not foresee, and could not reasonably have foreseen, the hazard. Alternatively, an accused may show that it took reasonable measures to prevent the hazard from occurring.

Foreseeability

11. In a publicly released statement on November 29, 2012, a spokesperson for Lakeland stated the following: "There are defences under the [Workers Compensation] Act that are available to us, and we will be examining them closely, of course, if necessary." From this

statement, it can be anticipated that the company would raise the defence of due diligence if charged with the offences recommended by WSBC.

12. In Canada, the courts have held that employers are not required to guard against that which is “unexpected, unknown or beyond any expectation”. They have also cautioned that “the wisdom gained by hindsight is not necessarily reflective of reasonableness prior to the incident”.
13. The evidence contained in the RTCC is capable of establishing that Lakeland had experienced fires in settled dust; as such, it knew that settled sawdust could cause spot fires given the many sources of sparks and heat that are inherent in sawmill operations. The evidence also shows that Lakeland knew that if sparks entered the baghouse, they could ignite airborne combustible sawdust within the baghouse and this, in turn, could lead to an internal explosion. Baghouse filter systems are used to extract airborne wood dust particles from the air in the workplace environment. The evidence can also establish that Lakeland knew airborne sawdust could pose respiratory hazards.
14. However, on the material gathered by WSBC, Lakeland would likely be able to show that it did not foresee, and could not reasonably have foreseen, the sawdust-related fire and explosion hazard that caused the incident of April 23, 2012.
15. Moreover, the RTCC does not contain sufficient evidence from which the Crown could effectively challenge this assertion in court. A number of areas of potentially relevant evidence were left unexplored. This included (but is not limited to) direct evidence on the state of knowledge by Lakeland directors, officers and members of management in relation to sawdust conditions at the mill and/or the fire and explosion hazard presented by those conditions.
16. No one piece of evidence that was gathered by WSBC is determinative in assessing the viability of a due diligence defence on behalf of Lakeland. However, the RTCC contains material that is directly relevant to the overall consideration, particularly with respect to the issue of foreseeability.
17. The RTCC indicates that as far back as 1999, there were fires at Lakeland. However, these fires were of a significantly different nature than the fire and explosion that occurred on April 23, 2012, and far less serious.
18. On January 19, 2012, three months before the fire and explosion, Lakeland experienced an equipment malfunction at a headrig that caused sparks which set fire to sawdust on the headrig. Although no workers were injured, the fire is reported to have involved a column of burning sawdust that rose to the ceiling. One witness described it as a ball that “went straight up”. Others described it as a “poof” that then “died off”, and a “big ball of flame” that “burned down fairly quickly”. This incident also involved a dozen or more spot fires in the vicinity of the headrig. The fires were extinguished by mill workers.
19. The RTCC reveals that during the time it had control of the Lakeland mill site, WSBC compelled Lakeland to produce an Accident/Incident Investigation Report that had been prepared on the January fire by internal investigators for Lakeland. The Report indicates that “sparks ignited dust in the air”. However, the witness descriptions of the actual incident vary and, on some aspects, are in conflict. On the available evidence as a whole, Crown Counsel has determined that even if the Accident/Incident investigation Report could be admitted into evidence at a trial, it would not be possible to show, with any degree of factual certainty, that the January 2012 fire involved the burning of airborne combustible sawdust, as opposed to a relatively large fire of settled sawdust.

20. An officer from the Prince George Fire Rescue Service (PGFRS) attended Lakeland on both November 29, 2011 and March 7, 2012. On November 29, he toured the mill with a maintenance supervisor. The officer subsequently sent a letter to Lakeland, directing that "Building and machinery surfaces shall be kept clean of accumulations of combustible dusts". In response to this letter, Lakeland is reported to have taken steps to remediate combustible dust accumulation.

21. Following the further inspection on March 7, 2012 (which occurred after the January 2012 fire involving the headrig), the same PGFRS officer sent Lakeland another letter which stated, in part:

The efforts to reduce the amount of accumulated fine wood dust on the building and machinery surfaces did not go unnoticed. The unacceptable amounts of dust that was present during the Fire Inspection on November 29, 2011 have been significantly reduced.

22. In the five years preceding the 2012 explosion, WSBC frequently attended the Lakeland site to conduct inspections. According to the RTCC, between April 23, 2007 and April 23, 2012, WSBC issued 36 inspection reports and cited Lakeland for 15 violations; however, none of these violations related to sawdust. Nor did WSBC issue any warning letters or administrative penalties to Lakeland for sawdust issues during this same timeframe.

23. On February 3, 2012, an anonymous Lakeland worker is reported to have phoned WSBC to complain of an excessive build-up of sawdust on horizontal surfaces at the mill. The caller also said that only one person was assigned to clean-up. The caller expressed concern about "the large amount of sawdust" "turning [Lakeland] into the next Burns Lake sawmill".

24. On February 6, 2012, two WSBC officers attended Lakeland to investigate this complaint. Lakeland informed WSBC that it had sustained a fire the day before. The fire occurred in Lakeland's baghouse when sawdust was ignited by the heat of halogen lights that were used by workers who were cleaning built-up dust from around the baghouse socks.

25. As a result of the inspection, a WSBC officer prepared an Inspection Report which states as follows:

We discussed the wood dust observed throughout the mill. At the time of inspection, the airborne concentration appears to be below the exposure limit (non-allergenic wood dust EL= 2.5 mg/m³) in the work areas visited. There are accumulations of piles of wood dust in various areas of the mill. We reviewed the requirement to prevent the accumulation of hazardous amounts of wood dust.

26. The officer who prepared this Report attended a one-day Combustible Dust Hazard Awareness Workshop in 2010, which included training on "Identifying, Evaluating, and Controlling the Hazard". Topics included measures to prevent dust explosions.

27. This officer had also been involved in the inspection or investigation of three combustible dust fires that occurred in British Columbia prior to the Babine and Lakeland explosions. As a result of the officer's involvement, the officer was informed by a WSBC engineer of NFPA 664, which establishes a *Standard for the Prevention of Fires and Explosions in Wood processing and Woodworking Facilities*. NFPA 664 was prepared by the National Fire Prevention Association, an international organization that develops, publishes, and disseminates codes and standards intended to minimize the possibility and effects of fire and other risks.

28. NFPA 664, which was not mandatory in British Columbia at the time of the Lakeland explosion, contains technical information that can assist in better understanding, and appreciating, the mechanical aspects of sawdust-related hazards, particularly airborne sawdust hazards.

29. If called upon to testify at a trial, the RTCC says that the WSBC officer:

- did not believe there was a widespread problem of excessive dust in the Lakeland sawmill;
- felt there were isolated areas where dust accumulated and, based on the officer's knowledge at the time, believed that these were in lower risk areas;
- from discussion with two mill employees, felt that they were actively trying to manage these areas; and
- felt that the situation did not warrant issuing an order against Lakeland during the February 6, 2012 inspection.

30. The evidence of the other WSBC officer who attended Lakeland on February 6, 2012 is as follows:

I did not observe a violation of excessive dust. My experience with Lakeland Mills has [been] that it was a clean mill in comparison to others. My observations that day were that Lakeland had the typical accumulations of dust on the floor around and under waste conveyors. I noted that the mill appeared to be below its normal level of cleanliness and my discussion with the employer representative related the condition to the ongoing construction project and taxing of resources due to the recently added third shift.

31. These observations, and conversations with Lakeland, occurred less than three months before the fire and explosion on April 23. Although it is Lakeland's legal responsibility, as an employer, to adequately protect against safety hazards in the workplace and to take all reasonable measures in that regard, the observations made by, and instructions or advice provided by a government regulatory body in direct interaction with Lakeland are a relevant factor in assessing the viability of a due diligence defence.

32. Based on the evidence provided in the RTCC, Lakeland can be expected to point to the February 6, 2012 WSBC inspection and argue that if an officer with training and previous involvement in settled and airborne combustible dust inspections or investigations did not identify a fire and explosion hazard, then Lakeland cannot reasonably be expected to have foreseen the sawdust-related fire and explosion hazard that caused the incident of April 23, 2012.

33. On April 12, 2012, Lakeland arranged for a tour of its mill complex by an industrial vacuum wholesaler and one of its distributors. The distributor's representative says that at the time of the visit, he warned Lakeland of the risk for an explosion; however, according to the RTCC, other people who were present on the tour, including two individuals who were not mill employees, deny that the comment was made or say that they do not recall it being made. In these circumstances, it is unlikely that the Crown could rely on this alleged statement to challenge an assertion by Lakeland that it did not foresee, or could not reasonably have foreseen, the sawdust-related fire and explosion hazard of April 23, 2012.

34. On February 23, 2012, an insurance company performed a risk assessment at Lakeland. The company prepared a report dated April 3, 2012 and set out its findings. Other than the caution that hot work operations may result in burning embers or sparks igniting combustible materials, which could result in open flames long after work was completed, the report sounded no other specific warnings about the potential for sawdust fires and explosions.

35. An officer with the United Steel Workers Union reported to WSBC investigators that there were more union issues at Lakeland “than any of the other ones”. He said that the Union received complaints from workers about cleaning at the mill and that this issue was brought to Lakeland’s attention. When WSBC pursued this matter with the Union, it was advised by way of an email dated November 5, 2012, that: “from January 1, 2009 – April 23, 2012 for Lakeland Mills . . . there is no documentation or records relating to worker complaints regarding working conditions”.
36. In the RTCC, there is evidence from several witnesses relaying concerns about accumulations of sawdust at Lakeland over time. This includes observations of dust build-up on pipes, beams, the walls and machinery. For example, WSBC investigators were told that 1/8 inch of sawdust would accumulate on hand rails every two hours. A Lakeland employee reported that he saw piles of sawdust in the basement some six feet high. The roof of a computer room was described as having accumulated dust that was an inch thick. Another worker described a constant haze of sawdust in the upper atmosphere of the mill. An employee said that a person “couldn’t breathe” when walking through the area with the slasher saws. Yet another employee reported sawdust accumulations of at least two to four inches deep.
37. However, at the same time, there is also evidence in the RTCC that Lakeland was taking steps to manage sawdust accumulations and that conditions were improving in the months leading up to the explosion on April 23. One employee reported that clean-up in the basement improved about three months before the explosion, as extra people were assigned to clean up. As a result, there was not much sawdust in the basement. Another worker reported that things had “really improved”. A Lakeland employee reported that the air quality was improving after January 2012 and that “visibility in the mill was way better” on April 23, 2012. Someone who toured the Lakeland mill on April 20 or 21, 2012, later described it as a “well-run clean plant”. One of the workers reported that after January 2012, clean-up “was starting to get better”. Lakeland was described as cleaner than most sawmills. An employee said he felt the mill was quite safe and just before the April 23 explosion, the mill had been shut down for five minutes, the windows were open and the air was clear.
38. This is a sampling of evidence contained in the RTCC and does not set out the whole of the evidence. Crown Counsel concluded, after reading all of the witness statements gathered by WSBC, that although there was evidence of accumulation and airborne sawdust, the preponderance of the eyewitness evidence spoke to relatively good, albeit imperfect, sawdust conditions on the evening of the fire and explosion.
39. Moreover, the preponderance of the evidence is also to the effect that the sawdust-related fire and explosion hazard that caused the Lakeland incident of April 23, 2012 was unknown to both the sawmill industry in British Columbia and to WSBC prior to the Babine and Lakeland incidents. A statement taken from an officer with the PGFRS put it this way: “I know there was a hazard. Did I know how bad it was? I was naïve like probably the rest of the whole industry. And every other inspector in all of Canada”.
40. According to the RTCC, following the January 2012 incident at Babine, industry representatives, including the safety manager for Lakeland’s parent company, Sinclar Group Forest Products Ltd., took active steps to learn the cause of the Babine explosion and sought information on that point from WSBC. A meeting was held with WSBC on March 15, 2012. The evidence about what took place at the meeting indicates that WSBC was unable to specify the cause of the Babine explosion, or provide the persons in attendance with definitive guidance on standards or measures that should be put in place to guard against a similar fate.

41. Numerous documents on the WSBC website, such as Bulletins, Investigations Updates, Reference and Resource Documents, and Directive Orders, along with the anticipated evidence of WSBC officers (noted earlier), provide Lakeland with a reasonable basis from which to argue that the April 23 fire and explosion was brought about by a previously unrecognized hazard.
42. The Lakeland fire and explosion had already occurred when WSBC issued *Guideline G5.81* to the sawmill industry, which is specific to combustible dust. According to the RTCC, prior to this date there were no WSBC policies, standards or guidelines in place under OHSR 5.81, which imposes an obligation on employers to safely remove combustible dust that collects in a building or structure, or on machinery or equipment, before its accumulation could cause a fire or explosion.
43. The B.C. Safety Authority also examined the Lakeland site. Its report makes reference to the fact that wood dust can have explosion and fire hazard characteristics that are similar to other known dusts that are identified as combustible dusts in the Canadian Electrical Code. However, as a whole, the report is reasonably open to an interpretation that prior to the Babine and Lakeland incidents, the sawmill industry did not generally know of the explosive potential of wood dust suspended in the atmosphere, notwithstanding the reference to the US Occupational Safety and Health Administration having made such a connection at an unspecified earlier point in time.
44. The statements of some WSBC employees, as contained in the RTCC, indicate that it was not until after the Babine and Lakeland fire and explosions had occurred that a full appreciation of sawdust-related hazards was realized. As one WSBC officer noted:
 - Dust explosions within wood processing that Officers knew about had all occurred in closed piping or vessels such as dust collectors. It was not recognized that a hazard for explosion could exist in areas of the mill such as production lines. Officers would not have associated the placement of machinery or conveyors as “containment” which would elevate the risk of an explosion.
 - Fires in a sawmill were an accepted occurrence. Both industry and WorksafeBC would not have identified imminent hazards relating to fires.
45. A media statement released by WSBC following CJB’s January 2014 Clear Statement on the Babine matter is consistent with this view: “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”.
46. On the whole of the evidence in the RTCC, Crown Counsel determined that Lakeland would likely succeed on a defence of due diligence on the basis that it did not foresee, or could not reasonably have foreseen, the sawdust-related fire and explosion hazard that caused the incident of April 23, 2012.
47. Moreover, the RTCC does not contain sufficient evidence from which the Crown could effectively challenge this assertion in court.

Reasonable Measures

48. In light of CJB’s determination that Lakeland would likely succeed on the first branch of the due diligence defence (the “foreseeability” branch), it is not necessary for the Clear Statement to also address the evidence relevant to assessing the reasonableness of

measures that Lakeland implemented to address accumulated sawdust hazards. To succeed on a defence of due diligence, the accused need only establish that it meets the test under one of the two branches.

49. Suffice to say that according to the RTCC, after the Babine fire and explosion occurred, Lakeland made enquiries aimed at seeking greater expert information on sawdust-related hazards; implemented extra measures to ensure that its headrigs were clean, and after a fire on a large headrig, shut down the mill so that it could be cleaned; instructed its human resources coordinator to look for additional information through industry contacts to see what other mills were doing in response to sawdust-related hazards; increased personnel that were assigned to blow down and clean-up; created a “cleanup plan” for implementation in February 2012 that included increased resourcing; increased proactive observations by the mill’s safety committee; and spent a lot of time servicing and repairing the baghouses to make sure they were operating properly.
50. After a WSBC inspection of the Lakeland mill in February 2012, Lakeland also explored industrial vacuuming options. Representatives of Northwind Air Systems toured the mill. Shortly after the tour, the purchase of a vacuum system was approved for Lakeland. According to a Northwind representative, this was considered an unusually fast response by Lakeland’s parent company. Ordinarily, it can take up to a year for a company to approve this kind of a purchase.

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51. WSBC did not recommend that CJB consider charges of criminal negligence under the *Criminal Code*. After reviewing the entirety of the evidence presented in the RTCC, CJB agrees with WSBC that the available evidence did not provide a basis on which to recommend charges under the *Criminal Code*.
52. Since CJB issued its Clear Statement on the Babine explosion, it has been suggested that the Branch has a policy to not approve charges against employers for workplace fatalities and injuries. This is not correct. As with all other RTCCs that come to CJB for possible prosecution, such cases are individually and impartially assessed in light of the specific evidence available, the required elements of the proposed offences and the applicable legal principles. The analytic approach that is brought to the evidence is the same in all cases.
53. In response to the 1992 Westray Mine disaster in Nova Scotia, Parliament added new sections to the *Criminal Code*. These sections:
 - make corporations criminally liable for the actions of directors, chief executives, and senior officers who oversee day-to-day operations of a corporation;
 - expand the definition of “everyone” to include “organization”; and
 - impose an explicit legal duty on those who undertake, or have the authority to direct how another person does work, to take reasonable steps to prevent bodily harm to that person, or others, arising from that work.
54. The “Westray Bill” did not create new substantive offences; nor did it change the test for criminal negligence. The Bill imposed a legal duty on those who direct workplaces, and an individual or corporate entity that fails in the duty may be found criminally negligent.
55. However, not all acts are criminal, even when they result in tragic, even fatal consequences. Mere carelessness, or breach of legal duty, will not necessarily support a criminal proceeding. In order to obtain a conviction for criminal negligence under the *Criminal Code*,

the Crown must be able to prove beyond a reasonable doubt that the conduct of a particular accused person or corporate entity showed a wanton or reckless disregard for the lives or safety of other persons, and that the conduct was a marked and substantial departure from the standard of care of a reasonable person in such circumstances. The test to establish criminal negligence is an onerous one.

Conclusion

56. To approve charges, it is not enough for Crown Counsel to say, based on the available evidence, that the person or corporate entity accused of an offence committed a wrongful act, or failed to take steps to prevent something dangerous from happening. Instead, Crown Counsel must be satisfied that there is a substantial likelihood of conviction for an identifiable regulatory or criminal offence in light of the required legal elements that must be proved. The fact that something may have been preventable does not, by itself, provide the basis for a prosecution.
57. Based on the evidence that likely would be available to Crown Counsel in court, the charge assessment team was satisfied that the Crown could prove the *actus reus* of the four regulatory offences recommended by WSBC. However, Crown Counsel also determined that Lakeland would likely succeed on a defence of due diligence. As a result, there is no substantial likelihood of a conviction and no charges will be approved.

Criminal Justice Branch
Ministry of Justice
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