BRITISH COLUMBIA | Prosecution Service

Media Statement

August 31, 2021 21-11

Stay of Proceedings directed in Criminal Negligence prosecution for 2009 workplace fatality near Toba Inlet

Victoria – The BC Prosecution Service (BCPS) announced today that a stay of proceedings has been entered in the case of *R. v. Peter Kiewit Sons ULC (Kiewit), Timothy Rule and Gerald Karjala*, Information #256056-1, Vancouver Provincial Court.

On May 31, 2019 the three accused were charged with criminal negligence causing death pursuant to section 220 of the *Criminal Code* with respect to the workplace death of Samuel Joseph Fitzpatrick on February 22, 2009. At the time of his death Mr. Fitzpatrick was working as a drill and blast crew scaler on a Kiewit hydroelectric project near Toba Inlet.

The case was initially investigated by WorkSafeBC in conjunction with the RCMP and the BC Coroners Service. After the conclusion of the WorkSafeBC proceedings in 2013 the police initiated a criminal investigation in 2014. The various investigations were lengthy and complex. Charges were approved and sworn on May 31, 2019. The matter was set for trial commencing on September 7, 2021. For the reasons that follow the charges have been stayed and the trial will not proceed.

The BCPS has recently determined that the available evidence no longer satisfies the charge assessment standard for the continued prosecution of the charged corporation and individuals for any criminal offence. As a consequence, a stay of proceedings was directed in the case.

In order to maintain confidence in the integrity of the criminal justice system, a Clear Statement explaining the reasons for not approving charges, or for staying approved charges, is made public in cases where the Assistant Deputy Attorney General determines that an explanation is warranted in the public interest. A clear statement explaining this decision in greater detail is attached to this media statement.

Media Contact: Dan McLaughlin
Communications Counsel
Daniel.McLaughlin@gov.bc.ca
250.387.5169

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Clear Statement

Background

On February 22, 2009, Samuel Joseph Fitzpatrick was hand drilling a large boulder to prepare it for blasting when he was struck and killed by a rock which rolled from a location upslope from him. A large quantity of loose material from blasting and clearing operations had accumulated on the slope. Such hazards were previously identified and there had been a previous near miss incident with falling rock. The theory at the time charges were initially assessed was that the company and management failed to sufficiently clear loose material from the area above Mr. Fitzpatrick and failed in allowing work to continue in the area above or upslope of Mr. Fitzpatrick before directing him to work in that location.

After reviewing the evidence senior Crown Counsel were satisfied that the standard for charge approval under the BCPS *Charge Assessment Guidelines* (CHA 1) was met and on May 31, 2019 the Information was sworn. The charge assessment guidelines that are applied by the BCPS in reviewing all RCCs are established in policy and are available at:

www.gov.bc.ca/charge-assessment-guidelines

The BCPS applies a two-part test to determine whether criminal charges will be approved, and a prosecution initiated. Crown Counsel must independently, objectively, and fairly measure all available evidence against a two-part test:

1. whether there is a substantial likelihood of conviction; and, if so,
2. whether the public interest requires a prosecution.

The reference to "likelihood" requires, at a minimum, that a conviction according to law is more likely than an acquittal. In this context, "substantial" refers not only to the probability of conviction but also to the objective strength or solidity of the evidence. A substantial likelihood of conviction exists if Crown Counsel is satisfied there is a strong and solid case of substance to present to the court.

In determining whether this test is satisfied, Crown Counsel must consider what material evidence is likely to be admissible and available at a trial; the objective reliability of the admissible evidence; and whether there are viable defences, or other legal or constitutional impediments to the prosecution, that remove any substantial likelihood of a conviction.

Under BCPS policy, the charge assessment standard continues to apply throughout the prosecution and Crown Counsel has an obligation to ensure that it continues to be met. Based on its review of this matter, the BCPS recently determined that the available evidence no longer satisfies the charge approval standard for a prosecution of any criminal offence. Accordingly, the BCPS entered a stay of proceedings.

The BCPS recognizes that this case has attracted considerable public attention. The BCPS also appreciates the importance of transparency in maintaining public confidence in the administration of justice, accordingly this clear statement explaining the decision is being released.

Factual Background for the Charge Assessment

On February 22, 2009, while working as a drill/blast crew scaler on a Kiewit run-of-the river hydroelectric project near Toba Inlet, Fitzpatrick was struck in the head and killed by a large rock that rolled down from the slope above him as he was hand-drilling a boulder on the face of the cut to prepare it for blasting.

Fitzpatrick had been directed by his immediate supervisor to hand drill the boulder with a fellow scaler. Two excavators were working upslope from Fitzpatrick. One of the excavator operators (EO) spotted the rock (the Rock) moving down the slope and sounded the alarm on the radio but Fitzpatrick could not hear any warning and was killed.

On the morning prior to the fatality, February 21, 2009, there had been a serious near-miss incident when a rock had rolled down the same slope. The rolling rock was spotted by one member of the drill and blast crew and the earth works crew superintendent, Gerald Karjala, who warned the crews via radio. All workers in the area were able to move out of the way. No one was injured but a large piece of equipment was damaged.

After the near-miss, work was halted and Timothy Rule, the construction manager, chaired a safety shut-down meeting. A consensus was reached that the work could not continue in the same way (i.e., "stacking of work"), with excavators casting material down the slope above crews or equipment working on another heading.

History of Investigations and Swearing of Information

WorkSafeBC conducted an investigation and imposed a $250,000 penalty in March 2011 against Kiewit for reckless violations of Occupational Health and Safety (OHS) regulations that resulted in a death. The Workers Compensation Appeal Tribunal reduced the penalty to approximately $100,000.00 in March 2013, on the basis that it was not satisfied that Kiewit's conduct caused the fatality.

The RCMP assisted the BC Coroners Service and WorkSafeBC in 2009 but did not commence a criminal investigation until December 2014 following a complaint. The RCMP retained an experienced blaster and slope stabilization expert (the "First Expert"), to provide an expert opinion about industry standards and whether any personnel departed from the standards expected. The First Expert's opinion was that several of the personnel, including Rule and Karjala, were negligent in their conduct. The First Expert identified poor communication and lack of proper site coordination as

key factors that led to the fatality. The First Expert identified Rule as the person who should have been aware of the issues and taken measures to address them.

A Report to Crown Counsel (RCC) was submitted May 18, 2016 and returned to the RCMP at its request on July 2, 2016. A new RCC was re-submitted August 29, 2016. Follow-up investigation was completed by June 2017. Charge assessment was completed in November of 2017, but the Crown delayed the swearing of an Information to allow for steps to be taken to extradite Karjala, who had since moved to the United States of America. An information was sworn in May 2019. Court delays in the United States required the Crown to proceed with the trial of the other two accused.

The Law

Section 219 of the *Criminal Code* provides that everyone is criminally negligent who in doing anything or omitting to do anything that it is their duty to do shows wanton or reckless disregard for the lives or safety of other persons. This requires proof beyond a reasonable doubt that conduct is a 'marked and substantial departure' from the conduct of a prudent person in the particular circumstances.

Sections 22.1 and 217.1 of the *Criminal Code* (the so-called "Westray" amendments) expand the criminal liability of companies and their managers and supervisors for criminal negligence causing death by creating statutory duties. Section 22.1 exposes companies to criminal liability for the acts or omissions of directors, chief executives, and senior officers. A senior officer is a representative who plays an important role in the establishment of an organization's policies or is responsible for an important aspect of an organization's activities.

To convict a corporation of criminal negligence it is necessary to establish that one or more "representatives" (employees) either individually or collectively engaged in conduct that would make the representative(s) a party to the offence and the conduct of one or more "senior officers" (management) departed markedly from the standard of care that could reasonably be expected to prevent the representative(s) from being a party to the offence.

Though the Westray amendments expand criminal liability, they nonetheless require proof beyond a reasonable doubt of the originating conduct and of the misconduct of the senior officers, both on a 'marked and substantial departure' standard.

Original Crown Theory

At initial charge assessment, the Crown theory was that the excavator operator (the EO), moved his excavator to a position above the drill and blast crew and disturbed the loose material that had been piled previously near the treeline. The Rock later moved from that loose material and killed Fitzpatrick. The EO's action would have been in contravention of the rule to not "stack

work" imposed after the safety shut down meeting following the near-miss the day before. This initial theory was based on the evidence available at the time, which included the opinion of the First Expert.

The available evidence appeared to show that the earthworks crew and the drill and blast crew were operating independently from each other and that their work plans were not being properly coordinated. If so, the EO would not have been aware of the presence of the lower crew.

The available evidence indicated that the most likely cause of the unstable rock being dislodged was a combination of rain, gravity, thawing, and the vibrations from the excavator and the drilling. Under the initial Crown theory, after the near-miss incident of February 21, 2009, Kiewit owed a duty to the workers to take reasonable steps to avoid a similar incident from occurring. The company failed to supervise and coordinate the work in a manner that could have prevented Fitzpatrick's death by:

> a) allowing stacked work to continue between the earthworks crew and the drill and blast crew (where one team works directly above another team), and by
>
> b) not properly managing the loose material on site.

On the Crown theory, the construction manager (Rule), did not ensure effective communication and coordination between the earthworks crew above and the drill and blast crew below and did not take appropriate remedial action following the near miss of February 21, 2009; and the earthworks superintendent (Karjala), failed to ensure that the earthworks crew was not working in a stacked position above the drill and blast crew and failed to properly manage loose material on the slope.

Expert Evidence

Death of First Expert and Replacement

The Crown's original blasting expert, the First Expert, died in April 2021. A second expert ("Second Expert") was retained in early July of 2021. Both experts were experienced, highly qualified, and well placed to provide appropriate opinions. The Second Expert provided a replacement expert opinion on July 15, 2021, which is significantly different from the opinion of the First Expert.

Key Differences in Expert Evidence

The key differences in the expert opinions are as follows:

- On the issue of causation, the First Expert had opined that the actions of the EO's excavator would have produced enough ground vibration to trigger movement of a loose rock sitting on the slope.

- The Second Expert posited two main theories for the source of the rock fall: (1) natural freeze-thaw loosening up of material above (the primary theory); (2) EO's work close to the material, of which, it turns out, there is no evidence. Although the Second Expert agreed that the vibrations could have been a factor if the rock fall had originated from an area much closer to EO's equipment, there is no clear evidence that the EO's equipment was in fact closer to the area where the rock may have originated. The expected testimony of witnesses appears to put that the EO was in an entirely different location.

- The Second Expert also agrees there is a possibility that the rock could have originated from the unworked area above and beyond the tree line, where the vibrations of the EO's equipment would have had no impact.

- On the issue of the sufficiency of the workplan, the First Expert opined that the overall workplan for this site was faulty, because the areas above the work areas had not been properly cleared before work resumed below. The Second Expert also opined that industry standard is to work from the "top down" but did not express an opinion on workplans, noting that documents should have existed for a staged excavation plan, which would need to be reviewed to determine if the overall plan was faulty. Pre-trial witness interviews revealed that these documents did in fact exist, but they were never obtained during the investigation and are not available to the Crown.

- The First Expert opined that the earthworks crew work on February 22 was in direct contravention of the decisions that had been made at the February 21 safety meeting. The Second Expert also assumed that the rule against "stacked work" had been established but noted that the working position of the EO with his excavator above the scalers and drillers at a markedly flatter grade might - to those on site - have been considered a sufficient distance so as not to constitute a "stacked" working condition. The Second Expert's opinion is that the rock would have had to gain momentum before reaching the flatter area above the crest, and that a rock of that size was unlikely to roll at a flatter 15 to 20 percent grade which makes the EO's positioning less problematic.

- The experts disagreed on which Kiewit supervisors were responsible for the worksite and operational deficiencies. The First Expert's opinion was much more forceful and was based on their opinion of industry practice. They specifically identified Karjala and Rule as having been negligent.

- The Second Expert's opinions on this point, based on a review of Kiewit's own internal policies and manuals as well as the witness statements, was that it should have been the responsibility of the two site foremen and two superintendents (Karjala and a second superintendent) to ensure the safety measures and control plans were implemented on site. The Second Expert also attributed some fault to the Project Safety personnel.

- The First Expert placed responsibility on Rule to recognize that the job hazards on site were not being addressed. The Second Expert's opinion was that it was reasonable for Rule, as the Construction Manager, to delegate the responsibility of workplan coordination to the superintendents on site.

Key Changes in Non-Expert Witness Evidence

Following consultations with Crown Counsel, in late July 2021, the Second Expert provided the Crown with a list of specific questions to ask witnesses in pretrial interviews, on the basis that the answers could affect the strength of their opinion. The resulting answers from the witnesses have materially affected the charge assessment, leading to the conclusion that the charge assessment standard was no longer met, and that the information should be stayed.

Some of the witnesses were not able to recall events with much detail. Some witnesses provided more detail or clarified points in previous statements which amounted to substantive changes on key points. After the pretrial interviews, the Crown trial team determined that many of the key facts that the Crown had relied upon in the initial charge assessment against all three accused and even many relied upon by the Second Expert cannot be established on the evidence at trial. Examples include:

- The Second Expert relied on the fact that the EO had been working near the tree line above the drillers in the morning before the fatality, thereby loosening that material, possibly in contravention of the non-stacking rule that flowed from the safety shutdown the day before. It appears the EO was operating on flatter terrain to the right of where the deceased was working. The evidence cannot establish there was stacking of the work crews.

- The Second Expert relied on the change in weather and temperature as a significant development that was not acted upon. The evidence available now does not establish that the weather changes were that significant.

- With the benefit of the pretrial interviews, it is clear now that daily and weekly joint planning meetings were occurring at Rule's direction and with his input, and superintendents and foremen regularly communicated with each other on site, thereby undermining a key aspect of the theory regarding the charges against Rule.

- None of the experienced workers who looked at the slope above where Fitzpatrick was working have indicated that they considered the material above the crest to be a safety concern on the day in question. Just as expressed opinions about a worksite being unsafe are relevant to whether the supervisor's conduct is a marked departure from the norm, informed opinions that the site is safe may be a factor a supervisor can consider.

- The evidence about the likely source of the rock is equivocal and does not establish with the required certainty that the rock originated from areas that Kiewit had previously worked. The evidence indicates it could have originated from above the tree line outside of the work area. In particular, the expected evidence from the EO, previously thought to have established that the rock started rolling from the worksite, was in fact that the rock was rolling through the worksite without the EO being able to say where it started.

- The evidence is at best equivocal as to whether the rock that killed Fitzpatrick was previously blasted rock given the witnesses' inability to recognize the rock fragments from photographs taken at the site of the fatality. The rock fragments were not available for assessment by either of the Crown's experts. On the available evidence, the Crown cannot disprove that the rock originated from a non-worked area above the tree line.

The memories of witness have degraded significantly. As noted above, there was a delay of almost six years in initiating an RCMP investigation (February 2009 to December 2014) and another two-and-a-half years until the Crown had all the material it needed from police. Several Crown witnesses remain employed by Kiewit or contracted as consultants and their recollections are limited or self-serving. The inconsistencies in witness accounts present a barrier to the Crown presenting a cogent version of events.

Cumulatively, these changes mean there is no longer a substantial likelihood of a conviction since the Crown cannot definitively exclude the possibility that the rockfall was a random event originating outside of the work zone.

The evidence available now is not capable of proving essential elements of the offences charged against each of the accused. In making this assessment Crown Counsel have not only considered their original theory but also all possible alternative theories and methods of proof.

Concluding Comments

Crown Counsel are obliged to continually assess the viability of all prosecutions. In this instance, the death of the main Crown expert, the nature and content of the replacement opinion, changes in the anticipated testimony of witnesses, and additional information received during pre-trial interviews, have all led to the conclusion that the charge assessment standard can no longer be met, and the information must be stayed. This was done on August 31, 2021.