

Enforcement of the *Workers Compensation Act*, Bill C-45, and Safe Practices in the Workplace: An Update in the Development of the Law

A Presentation to
FIOSA-MIOSA Safety Alliance of BC
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Outline

- Goal of the presentation is to highlight recent developments in the law in the following areas:
 1. Regulation and Enforcement of the *Workers Compensation Act*, BC
 2. Bill C-45 – Amendments to the *Criminal Code*
 - History of the “Westray” Bill
 - Recent case law
 3. Bill 14 – Anti-bullying and harassment legislation

U.S. COURTS

Judge accepts BP guilty plea, \$4B penalty

Eleven workers died on oil rig

MICHAEL KUNZELMAN

THE ASSOCIATED PRESS

NEW ORLEANS — Calling it “just punishment,” a U.S. judge has approved an agreement for BP PLC to plead guilty to manslaughter and other charges and pay a record \$4 billion in criminal penalties for the company’s role in the 2010 rig explosion and oil spill in the Gulf of Mexico.

In rendering her decision Tuesday, U.S. District Judge Sarah Vance acknowledged the risk that a trial could have resulted in a lower fine for BP.

Vance heard emotional testimony from relatives of 11 workers who died when BP’s blown-out Macondo well triggered an explosion on the Deepwater Horizon drilling rig and started the spill.

“I’ve heard and I truly understand your feelings and the losses you suffered,” she said.

Billy Anderson, whose 35-year-old son, Jason, of Midfield, Texas, died in the blast, recalled the trauma of watching the disaster play out on television.

“These men suffered a horrendous death,” he said. “They were basically cremated alive and not at their choice.”

BP agreed in November to plead guilty to charges involving the workers’ deaths and for lying to Congress about the size of the spill from its broken well, which spewed more than 200 million gallons of oil. Much of it ended up in the Gulf and

soiled the shorelines of several states. The company could have withdrawn from the agreement if Vance had rejected it.

BP America vice-president Luke Keller apologized to the relatives of the workers who died and for the spill’s environmental damage to the Gulf Coast.

“BP knows there is nothing we can say to diminish their loss,” he said. “The lives lost and those forever changed will stay with us. We are truly sorry.”

Courtney Kemp-Robertson, whose 27-year-old husband, Roy Wyatt Kemp, of Jonesville, La., died on the rig, said workers had referred to it as the “well from hell” before the explosion.

“By cutting corners, they gambled with the lives of 126 crew members to save a few dollars,” she told the judge before turning to address Keller. “They gambled and you lost.”

Vance told victims’ relatives who were in court that she read their “truly gut-wrenching” written statements and factored their words into her decision. She also said she believes BP executives should have personally apologized to family members long before Monday’s hearing.

“I think BP should have done that out of basic humanity,” she said.

The deal doesn’t resolve the federal government’s civil claims against BP. The company could pay billions more in penalties for environmental damage.

Vancouver Sun
Apr. 22/13

'I should be just bones'

Decade after suffering burns to 90 per cent of his body, Spencer Beach preaches workplace safety

JODIE SINNEMA
POSTMEDIA NEWS

EDMONTON

The remarkable man in the ball cap walked by holding a beer, and perhaps the most remarkable thing of all was, he seemed to blend in with the hockey crowd at Edmonton's Rexall Place.

Dr. Ted Tredget thought the man had some scarring on his face that suggested he had been burned.

"Didn't look like too much, because he was lost in the crowd," says Tredget, a plastic surgeon at the University of Alberta's Firefighters Burn Treatment Unit. "And then as he got closer, 'Hey, that's Spencer.'"

Spencer Beach, 39, a floor-layer-turned-professional-speaker was caught in a workplace explosion on April 24, 2003, that left him with his second-, third- and fourth-degree burns to 90 per cent of his body.

He lost his ears, much of his nose, 97 per cent of his sweat glands, his hair and some fingers. All of his skin and much of his fat tissue was burned, except small patches under his armpits and on his lower belly and groin, which were covered by his work belt, and on his knees, which were under knee pads, and on his feet.

His eyelids tightened and shrank, initially leaving his eyeballs bulging like golf balls. His lips were pulled back, baring his teeth.

"I looked like a Body Worlds exhibit," he wrote in his book, *In Case of Fire*. Tredget says he hardly recognized his former patient that night at the hockey game. "The thing is, he blended into the crowd," Tredget says. "That's really all you're trying to do, at least as a minimum, allow the guy to get back into life and just be somebody who doesn't attract a lot of attention."

A decade after his injuries, Beach does get a lot of attention, mostly positive. These days he supports his wife and two children by speaking on stage to hundreds of people each year about the explosion, workplace safety and personal responsibility.

"I wouldn't change what happened to me," says Beach, who still walks around corners and startles people with what he describes as his "monstrous" good looks.

"I do understand why people get scared. 'All people want to know is, what happened to me. And that's a very fair question, and there's nothing wrong with that question. It's not rude. It's not putting me down. It's not demeaning. It's just a question.'"

Beach lifts his T-shirt and shows off a six-pack chiselled by the flames, which burned the top layer of fat. He has since had his nipples reconstructed. "That is just one last thing people will whisper about," he says.

Beach was on his death bed when he first met Tredget. Rushed to the University of Alberta Hospital after the explosion, Beach was asked whether he wanted to live.



'I'm blessed,' says Spencer Beach, shown in 2006 with his wife, Tina, and their daughter, Amber.

"When you ask the patients, like I asked Spencer, they don't want to die," says Tredget, the director of the burn unit. "No one does, even if they're really badly injured. Young people don't want to die."

That was true of Beach, who was 29 at the time. Beach looked bad when he was wheeled in, Tredget says.

"I saw him because my colleague thought we should let him die because (the burn) was too big, and didn't think it was possible to get better," Tredget says.

Such an assessment wasn't wrong or ethically questionable, he says. "He was badly injured and not many places would try to help Spencer."

When Tredget testified at the fatality inquiry into the death of 90-year-old Jennie Nelson, who died in 2004 of burns to nearly one-quarter of her body after she was mechanically lowered into a nursing home tub in Edmonton, the doctor used a rough mathematical formula to estimate how likely a person is to die of their burns. Add their age to the percentage of the body burned.

For Nelson, it was 90 plus 25, or 115 per cent chance of death.

For Beach, that would be 29 plus 90, or 119 per cent chance of death.

"I'm at 10-plus extra years," Beach says. "The reality is, I should be just bones in the ground."

A third-generation floor-layer who had done his first job at age six for \$3 per hour, Beach worked as the "service guy" on a flooring crew that went into newly constructed houses to fix mistakes. He loved the job.

"I was sent in to make an unhappy situation a happy one," Beach says.

On April 24, 2003, he headed to a home in an Edmonton suburb. Blue vinyl was being installed in the linoleum had been installed in the house instead of beige, so Beach went with a supply of a highly flammable solvent called Roberts 1901, which transforms stubborn floor glue into



Spencer Beach, shown before the explosion, now describes his 'monstrous good looks.'

a mildly sticky goop so the linoleum comes off the wood sub-floor like a wet Band-Aid. Commonly called "901" in the industry, it can shorten the job by hours, even days, but its fumes are nauseatingly potent.

Beach and his work crew often phoned colleagues part way through their work day from what the boss called the "happy tub," having goofy conversations while light-headed and high as kites. That boss even had a vanity licence plate that said "K-BOOM," commemorating the time a trailer burned down while he used Roberts 1901.

He was later found guilty of failing to ensure Beach's safety, fined \$5,000 and required to donate \$35,000 to the University of Alberta's Firefighters' Burn Unit and another \$35,000 to the Alberta Cancer Society, because "901" is a known carcinogen.

Beach had already gone through four four-litre containers of the solvent and was almost done the job. No time, he thought, to reopen a door for ventilation that had been slammed shut by the wind, nor the garage door,

I wouldn't remember any pain, but I would remember torment.

SPENCER BEACH

which had closed behind an exiting contractor.

Seconds later, Beach heard an incredibly loud whistle, then was engulfed in flames he was later told measured 1,500 C instead of the usual 750 C of a house fire.

"That's the temperature they use to cremate bodies," he wrote in his book. "With that kind of heat, the nervous system shuts down. I wouldn't remember any pain, but I would remember torment. I would remember my skin bubbling and shrinking and tightening, and I would remember the sound of scorching hair and fabric."

The force of the explosion vacuum-sealed the exits until Beach found the willpower and strength to open the garage door and throw himself onto a pile of construction debris, his burning body lighting the garbage on fire.

"Who died because some stranger preferred beige linoleum to blue?" he remembers thinking, determined not to leave his pregnant wife a widow.

The worst danger in a burn unit is infection. Not only have severe burn victims lost skin that acts as a barrier to fungus and bacteria, they're immune systems are suppressed as a response to the trauma. Yet surgeons must expose even more tissue by cutting skin grafts from unburned areas to place overtop of exposed flesh.

The skin graft site must be allowed to heal at least two weeks before it grows another healthy layer that can be harvested. This happens over and over again. The bottom of Beach's feet

were ideal for repeated use.

Beach is comfortable telling people his new eyelids were rebuilt from his foreskin, since that skin is thin, soft and stretchy. Skin on his scrotum was used to rebuild the lower lids.

Tredget says harvest sites feel like second-degree burns and are the major reason burn patients need pain medication. Deep burns damage nerve endings and leave little sensation, he says. During the interim period when graft sites are healing, invaluable skin donations from dead people act as temporary Band-Aids. Fresh donations are a beautiful pink, Tredget says, and can blend into a patient so well they can sometimes be lost until, months later, the skin begins sloughing off.

Beach spent just over four months on his back in the burn unit, then the next four learning to sit in a wheelchair before a bed came open at a rehabilitation hospital in January 2004. He describes excruciating pain as therapists bent, stretched and strengthened him, tearing apart hardened scar tissue. If he suffered torment after the burn, the therapy was agony.

But while he still can't run — lack of sensation in his lower legs means uneven surfaces are dangerous — Beach drives his daughter to school in the mornings, has no medical handrails in his home, and suffers no chronic pain. "The burn patient can actually go from really bad pain to somebody who can be very functional," Tredget says.

Today, Beach says he misses his hands and finger dexterity the most. On the day of the explosion, he left his leather work gloves on the seat of his vehicle. Instead of dealing with sweaty hands, he ended up with hands barbecued from wrenching open a scalding garage door.

If that sounds gruesome, it was.

"These were highly skilled tools," Beach says, looking down at his upraised palms. Some of his fingers are webbed because of skin overgrowth during the healing process. He can easily shake a person's hand and cut up a breakfast orange for his wife, Tina. However, if he wants coffee, he has to grip the cup with both hands.

But after 37 surgeries, Beach says he doesn't want any more. Less they help him function better. His left pinky will remain attached with webbing to his fourth finger. His glasses will have to hug the sides of his head tightly, without ears to curl over.

"I will always know I'll look like I've lived through a fire," Beach says. "Am I notice it? Of course I notice it. Do I happy with it? No, I can never be happy with it, because there's always the comparison, always that who would-to-be person. But at the same time, do I regret it? No. I wouldn't change what happened to be, because 'I'm blessed. I've learned a lot about life the hard way, that I get to share with other people so they can benefit from my experiences.'"

Children often ask how old Beach is. "They always think I'm a senior citizen," says Beach, who now has a three-year-old son, Aiden, as well as nine-year-old Amber.

"One kid asked if I was a volcano explorer. I loved that one."

- **Statistics for 2011 in B.C.**
 - 142 workplace deaths from either injury or disease
 - 71 of those were from occupational disease
 - 2.9 million days lost from work to injury
 - The average age of the injured worker is 41
 - 13% of those injured are under 25 years
 - 17% of those injured are over 55 years

WorkSafeBC - Statistics

- **Types of injuries:**

1. Strains
2. Back Strains
3. Cuts
4. Contusions
5. Fractures

- 64% injured were men
- 36% injured were women

Enforcement of the WCA

- **2011**
 - 39,097 Health and Safety Inspections
 - 63,700 Health and Safety Orders written
 - 351 Penalties imposed
 - Totalling \$4.88 million in fines

Enforcement of the WCA

- **2012**
 - 260 Penalties imposed on 225 employers
 - Totalling \$2,909,967.52 in fines
 - 6 penalties involved fatalities
 - Highest penalty amount \$125,277
 - Lowest penalty amount \$700

Enforcement of the WCA

- **2012**

- Industry Classifications with the Most Penalties:
 - Steep Slope Roofing
 - Framing or Residential Forming
 - House or other Wood Frame General Contracting, Construction or Renovation Work
 - Asbestos Abatement or Mould Remediation
 - Low Slope Roofing

WorkSafeBC writes up hundreds of violations of asbestos safety rules every year; one company has been given \$280,000 in fines

GORDON HOEKSTRA

VANCOUVER SUN

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WorkSafeBC writes hundreds of violations a year against contractors who fail to protect workers from exposure to cancer-causing asbestos building materials.

Since the beginning of 2010, WorkSafeBC has issued nearly 2,500 orders — the majority of them in the Lower Mainland — against construction companies that violated regulations designed to protect workers from exposure to asbestos.

During the three-year period, WorkSafeBC imposed 59 penalties totalling

\$490,719, according to data provided to The Vancouver Sun after a freedom-of-information request.

WorkSafeBC has been on a push to ferret out bad actors and created a special team of officers to inspect job sites in the Lower Mainland where asbestos was being removed.

While asbestos has largely been cleaned up in institutional and industrial buildings in British Columbia, the last danger zone is residential construction — particularly in the Lower Mainland, where older homes are being bulldozed to put up condos or bigger, more expensive houses.

Asbestos remains the single largest occupational killer in B.C.

The two biggest fines — released publicly today as part of WorkSafeBC's annual rollout of its penalty list — were handed out to one Vancouver-based repeat offender.

Skylite Building Maintenance was fined \$105,000 in two separate cases for putting workers' health at risk from potential exposure to asbestos, the second- and third-highest WorkSafeBC penalties in 2012.

By last summer, WorkSafeBC had issued 237 written orders dating back to 2009 against Skylite for violations of the Workers' Compensation Act of British Columbia and the Occupational Health and Safety Regulations, court documents show.

In the most extreme cases, the company had also been penalized 19 times for repeatedly exposing people to asbestos fibres or putting them at risk of exposure to asbestos fibres.

As of a few days ago, the company has made only one small payment of about \$1,100 toward the \$280,000 in fines it has racked up, according to WorkSafeBC officials.

Skylite Building Maintenance manager Mike Singh denies any wrongdoing and says he has been singled out by WorkSafeBC and persecuted because he is Indo-Canadian.

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General Duties under the WCA

- **Part 3 – Occupational Health and Safety**
- **General duties of employers**
- 115 (1) Every employer must
 - (a) ensure the health and safety of
 - (i) all workers working for that employer, and
 - (ii) any other workers present at a workplace at which that employer's work is being carried out, and
 - (b) comply with this Part, the regulations and any applicable orders.

General Duties under the WCA

- **General duties of workers**
- 116 (1) Every worker must
 - (a) take reasonable care to protect the worker's health and safety and the health and safety of other persons who may be affected by the worker's acts or omissions at work, and
 - (b) comply with this Part, the regulations and any applicable orders.

Miners

Enforcement Under the WCA

- **General authority to make orders – s.187**
 - To establish standards that must be met with respect to the prevention of work related accidents, injuries and illnesses
 - To require a person to take measures to ensure compliance with this Act
 - To require an employer to provide a medical monitoring program
 - To require an employer to obtain test or assessment results respecting any thing or procedure in or about a workplace
 - To require an employer to install and maintain first aid equipment
 - To do any other thing that the Board considers necessary for the prevention of work related accidents, injuries and illnesses

Enforcement under the WCA

- **Orders to Stop Work – s. 191**

The Board can order that work at the workplace stop if it has reasonable grounds to believe that an immediate danger exists that would likely result in serious injury, illness or death to a worker

Enforcement under the WCA

- **Administrative Penalties – S. 196**
- The Board may impose an administrative penalty on an employer if:
 - The employer has failed to take sufficient precautions for the prevention of work related injuries or illnesses
 - The employer has not complied with the Act, regulations or applicable order
 - The employer's workplace or working conditions are not safe

Enforcement under the WCA

- **Offences – s.213**

- A person who contravenes Part 3 of the Act, the regulations or an order, commits an offence
- If a corporation commits an offence, an officer, director or agent of the corporation who authorizes, permits or acquiesces in the commission of the offence also commits an offence

Enforcement under the WCA

- **Offences**

- General Penalties, s. 217

- First Conviction:

- » A fine of not more than \$652,774.38

- » In the case of a continuing offence, no more than \$32,638.75 for each day during which the offence continues after the first day

- » Imprisonment for a term not exceeding than 6 months

Enforcement under the WCA

- **Offences**

- General Penalties, s. 217

- Subsequent Conviction:

- » A fine of not more than \$1,305,548.74

- » In the case of a continuing offence, no more than \$65,277.44 for each day during which the offence continues after the first day

- » Imprisonment for a term not exceeding 12 months

Enforcement under the WCA

- **Policy – Criteria for Imposing Administrative Penalty**
- The Board will consider an administrative penalty:
 - The employer has committed a violation resulting in high risk of serious injury, serious illness or death
 - The employer has violated the same section of the Act or regulations on more than one occasion
 - Where the number of violations indicates a lack of commitment to compliance
 - An employer with reckless disregard, or knowingly violates the Act or regulations
 - The need to provide an incentive for compliance

Enforcement under the WCA

- **Defense of Due Diligence – s.196(3)**

An administrative penalty must not be imposed if an employer exercised due diligence to prevent the circumstances that violated the Act and regulations

Defense of Due Diligence

- What is meant by due diligence?
 - It is the level of judgment, care, prudence and activity a person would reasonably be expected to do under particular circumstances.
 - In an OH&S context, it means that employers must take all reasonable precautions to prevent injuries or accidents in the workplace

Defense of Due Diligence

- **How do you establish a due diligence program?**
 - Written OH&S policies, practices and procedures
 - Provide appropriate training and education
 - Train supervisors to ensure they are competent
 - Monitor the workplace and ensure employees are following the policies
 - Have an accident investigation and reporting system in place
 - Document in writing all the above steps

Relevant Cases

Weyerhaeuser

- WorkSafeBC imposed a fine of \$297,000
- The investigation concluded that the employer was aware of the hazards associated with this fatality, and had been for a long time

Weyerhaeuser

- Occurred on November 17, 2004
- Worker was killed when he was engulfed by wood waste material while cleaning out a “hog” machine at a sawmill
- He had climbed inside to manually remove waste-wood products when the hog became plugged
- A “hog” is a “confined space” as defined by the OH&S regulations

Weyerhaeuser

- WorkSafe concluded that W had been aware of safety hazards associated with the hog and that workers were exposed for several years
- 12 individuals in management or supervisory roles were aware the process for cleaning the hog posed significant risk, but the employer made no significant changes to address the risk until after the fatality

Weyerhaeuser

- WorkSafe calculates the amount of an administrative penalty using a formula that is based primarily on the size of the employer (the assessable payroll), and may increase the size of the penalty when certain factors are present
- WorkSafe determined that all these factors existed in this case, and the fine was increased

Relevant Cases

R. v. A-1 Mushroom Substratum Ltd, 2011 BCPC 458

- Very tragic case where 3 men died and 2 suffered permanent brain damage
- A-1 pled guilty as an employer:
 - For failing to ensure the health and safety of its workers and workers other than its own workers
 - For failing to provide their workers with information, instruction and training
 - For failing to ensure that all confined space hazards were eliminated or minimized and that work was performed in a safe manner

R. v. A-1 Mushroom Substratum Ltd

- Two individual men, as officers and directors of A-1 pled guilty for failing to ensure that A-1 complied with the regulations and the WCA
- One supervisor pled guilty for failing to ensure the health and safety of workers under his direct supervision, contrary to the WCA

R. v. A-1 Mushroom Substratum Ltd

- The corporate accused, A-1 and H.V. Truong Ltd. operated a commercial industrial facility to grow mushrooms for sale
- There were pumps and a tank as part of the composting process that were covered by a small shed and when the pipes clogged, two workers entered the pumping shed to unclog the pipe
- When they released the valve on the pipe, a large amount of hydrogen sulphide gas was released into the enclosed space in the pump shed.

R. v. A-1 Mushroom Substratum Ltd

- The risks associated with the enclosed pump shed had not occurred to those in management
- None of the management or workers had any formal health or safety training and no formal health and safety regime had been organized
- No formal employee safety meetings or instruction sessions relating to safety were held at the mushroom farm

R. v. A-1 Mushroom Substratum Ltd

- The Court considered the sentencing principles of deterrence, denunciation and protection of the public as provided for in the *CCC* and the *WCA*.
- Even though A-1 was bankrupt, the Court imposed a fine of \$200,000 on A-1, and \$120,000 on H.V. Truong, the other corporate accused.
- There were personal fines of \$15,000 and \$5,000 for two directors of the corporations
- \$10,000 fine for a supervisor of the employees

Alberta Case - Sinopec Shanghai Engineering Company Ltd.

- Corporate guilty plea
- Largest workplace fine in Alberta history for oil giant's role in the death of two Chinese workers
- A Canadian subsidiary of Chinese state-owned oil giant Sinopec was ordered to pay \$1.5 million in penalties for failing to ensure the safety of two Chinese workers killed in a 2007 tank collapse at a work site in northern Alberta.

Conclusions

- The Courts are establishing some very high watermarks with respect to fines, especially in cases of serious and flagrant violations and wilful disregard of health and safety issues
- Employers need to educate and train senior officers and supervisors about their OH&S duties
- Create pre-emptive due diligence policies and procedures to help mitigate the risk

Introduction to Bill C-45

- The regulation and enforcement of occupational health and safety (OH&S) has traditionally fallen solely within the legislative scope of the provinces
- The enactment of Bill C-45 brought the sphere of OH&S into the federal, criminal law domain
- It received Royal Assent in 2003, and was proclaimed in force on March 31, 2004

Introduction to Bill C-45

- The purpose of Bill C-45 was:
 - To modernize the law and make organizations more accountable for workplace negligence
 - To expand the legal duties placed on organizations to take reasonable steps to prevent workplace accidents
 - To increase the potential for criminal liability against organizations that fail to prevent serious and negative public health and safety incidents

The Westray Tragedy

- Bill C-45 arose as a response to the Westray Coal Mine disaster that occurred in the village of Plymouth, Nova Scotia on May 9, 1992
- 26 miners were instantly killed when an explosion occurred in the depth of the coal mine
- A public inquiry was held to determine whether the tragic event “was or was not preventable.”

The Westray Tragedy

- Mr. Justice Richard released his report on the Westray Disaster in December, 1997
- He determined that the tragedy “was predictable, and therefore, preventable”
- It was “an accident waiting to happen”

The Westray Tragedy

- In the Executive Summary to his Report, Mr. Justice Richard said this about the Westray management:
 - It had a mind-set favoured expediency over intelligent planning
 - It trivialized safety concerns
 - It had a disdain for safety and appeared to regard safety-conscious workers as wimps in the organization

The Westray Tragedy

- The Report found there had been numerous problems with the mine prior to the fatal explosion:
 - Basic, critical safety measures was not done, or only done on a sporadic, volunteer basis
 - The ventilation system in the mine was woefully inadequate
 - Governmental departments did not discharge its duties with competence or diligence

The Westray Tragedy

- Problems with the mine, continued:
 - The Department of Labour neglected its duties to enforce the requirements of the *Coal Mines Regulation Act* and the *Occupational Health and Safety Act*
 - There were misunderstandings with respect to the concept of ministerial responsibility
 - The company was derelict in training its workers properly, and there was no training program appropriate to the needs of the mine

The Westray Tragedy

- Problems with the operation of the mine, continued:
 - Management ignored or encouraged a series of hazardous or illegal practices in ways that violated conditions set by the Department of Labour
 - Management did not instil a safety mentality in its workforce, and the safety policy it laid out was never promoted or enforced

Westray Conclusions

- In its conclusion, the Report stated:
 - The fundamental and basic responsibility for the safe operation of an underground coal mine, and indeed of any industrial undertaking, rests clearly with management...
 - Westray management failed in this primary responsibility, and the significance of that failure cannot be mitigated or diluted simply because others were derelict in their responsibility

Westray Recommendations

- Among the many recommendations, the Westray Report looked at corporate accountability:
 - Recommendation 73 states:
 - » The Government of Canada, through the Department of Justice, should institute a study of the accountability of corporate executives and directors for the wrongful or negligent acts of the corporation and should introduce in the Parliament of Canada such amendments to legislation as are necessary to ensure that corporate executives and directors are held properly accountable for workplace safety.

Justice K. Peter Richard, “The Westray Story: A Predicable Path to Disaster” (December 1, 1997), online: [http://www.gov.ns.ca/lae/pubs/westray/ \[“Westray Report”\]](http://www.gov.ns.ca/lae/pubs/westray/ [“Westray Report”]).

Bill C-45 – s. 217.1 of CCC

- Bill C-45 amended the *Criminal Code*
- It incorporated s.217.1 which lays out a specific duty related to workplace health and safety that did not exist before:

217.1 Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task

S. 217.1 of the CCC

- S.217.1 clarified the existence of a legal duty to prevent bodily harm to a person in the workplace
- It also facilitated the application of *criminal negligence* to a *corporation or organization*
- Potential liability is expanded not only to include designated personnel such as supervisors, officers and directors of a corporation, but also now a broader range of persons, such as foremen, leadhands, co-workers and independent contractors

S. 217.1 of the CCC

- S.217.1 expands the reach of criminal liability to a wider range of entities, not just corporations
- S.217.1 applies to “organizations,” defined as:
 - s.2 (a) A public body, body corporate, society, company, firm, partnership, trade union or municipality, or
 - (b) An association of persons that
 - (i) is created for a common purpose,
 - (ii) has an operational structure, and
 - (iii) holds itself out to the public as an association of persons.

S. 217.1 of the CCC

- S.217.1 focuses more on the nature and quality of the association
- Therefore, a partnership or sole proprietorship can still be held accountable under this section
- Criminal liability will no longer depend on whether the actions were committed or authorized by the directing mind of the corporation

Senior officers & Representatives

- S.22.1 of the CC defines two overlapping groups of individuals whose conduct could form the basis of a criminal offence attributable to the organization
- A “Senior Officer” is a person who plays an important role in organizational policy-making or managing the organization’s activities
- A “Representative” includes almost everyone who works for, or is affiliated with the organization, and includes directors, employees, members, partners, agents or contractors

Senior officers & Representatives



- The focus is on the *function* of the individual, rather than on any particular title
- Directors, the CEO and the CFO of a corporation are automatically “senior officers”
 - A corporation charged with an offence cannot argue that these individuals had no real role in setting policy or managing the organization, and therefore, were not senior officers

Convictions under 217.1 of the CCC

- To get a conviction, the Crown must prove beyond a reasonable doubt both the commission of the prohibited act and the requisite guilty mind
- The Crown must show that the physical act was committed by a representative of the organization
- The representative must be acting within the scope of their employment at the time of the alleged crime

Convictions under 217.1 of the CCC



- Criminal Negligence:
 - The court must determine whether an individual acted so carelessly or with such reckless disregard for the safety of others as to deserve criminal punishment
 - For an organization, the Crown will have to show that employees of the organization committed the act and that a senior officer should have taken reasonable steps to prevent them from doing so

Convictions under the CCC

- Under Bill-C45, an organization is responsible for the negligent acts or omissions of its representative
- It must be proven that the senior officers (management) responsible for the activities relevant to the offence, departed markedly from the standard of care reasonably expected, by not preventing the activity
- Two or more representatives can be combined to constitute the offence; therefore, it is not necessary that a single person commit the entire act

Punishment under s.718.21

- The CCC provides for fines when corporations are convicted of crimes
- For serious crimes, the CCC already provides no limit on the fine that can be imposed on an organization
- The gravity of the crime is considered in sentencing

Factors that Determine Fine Levels



- New sentencing factors for organizations, under Bill C-45, s.718.21 CCC:
 - **Moral blameworthiness**
 - **Public interest**

Factors that Determine Fine Levels



- Other new sentencing factors, continued :
 - **Prospects of rehabilitation**
 - **Restitution**

Relevant Case Law

- ***R. v. Fantini*, [2005] O.J. No. 2361**
 - 68 yr-old construction supervisor / contractor was charged under Bill C-45
 - He was supervising two workers repairing a drainage trench in the foundation of a home when it collapsed
 - One worker died of asphyxiation
 - The trench had not been sloped properly
 - The victim was not wearing safety boots or protective headgear as proscribed by the regulations

R. v. Fantini, continued...

- The criminal charge was dropped and Fantini pled guilty to violations under the Ontario OHSA
- Fantini was fined \$50,000 under the OHSA
 - \$25,000 for the trench being improperly sloped;
 - \$20,000 for no headgear;
 - \$5,000 for improper footwear + victim surcharge

Relevant Case Law – First Conviction Guilty Plea March 17, 2008



- ***R. c. Transpavé, 2008 QCCQ 1598***
 - Company manufactured paving stones
 - 23 yr-old male was killed when he was crushed to death in 2005
 - The safety device had been disabled for some time prior to the incident
 - Transpavé pleaded guilty under s. 217.1 CCC
 - The penalty imposed was a \$100,000 fine + \$10,000 Victim Surcharge

R. c. Transpavé, continued...

- Judge gave detailed reasons for the penalty amount:
 - Transpavé admitted that it failed in its duty to:
 - Foresee the operational risks of the safety device of this machinery being deactivated
 - Put in place appropriate safety measures to minimize the risk of this type of workplace incident;
 - Adequately train its employees on safe workplace practices
 - Properly direct and instruct its employees with regard to the safety device on the machine

R. c. Transpavé, continued...

- But, the Court also took into account these mitigating factors as per s.718.21 CCC:
 - No one was aware the safety device was disconnected
 - It is a family company deriving no economic advantage from the offence
 - There were no previous fines or OH&S convictions
 - There were safety policies and regulations in place
 - There was a Health and Safety Committee in place
 - It spent over \$750,000 to bring its plants to a higher safety standard
 - The \$100,000 fine would not bankrupt the company

Relevant Case Law

- ***R. v. Scrocca*, 2010 QCCQ 8218**
 - A male was killed in June 2006 when a backhoe, being driven by his employer, Mr. Scrocca, failed to brake while heading down a slope, struck the worker, and pinned him against the low wall that was being built
 - The backhoe had been purchased in 1976 and had not undergone any regular maintenance
 - The backhoe was in poor mechanical condition

R. v. Scrocca, continued...

- A mechanical expert was brought in to inspect the backhoe:
 - He had to break the master cylinder cap containing the brake oil
- The expert also found 14 additional defects of varying dangerousness
- The expert concluded the vehicle was unsafe and its maintenance had been neglected by Mr. Scrocca

R. v. Scrocca, continued...

- Between 1976 – 2006, Mr. Scrocca only brought the backhoe to a professional mechanic when major problems arose
- The last brake repair had been done more than 5 years prior to the incident
- He only did cursory inspections each fall and minor repairs himself
- He did not know if all four brakes were working; he had no reason to suspect a major defect

R. v. Scrocca, continued...

- This case deals with criminal negligence under s. 219 of the *CCC* and is not officially a Bill C-45 case
- However, the Court refers to s.217.1 of the *CCC*, and confirms the duty imposed on everyone who is responsible for any work to take the necessary steps to ensure the safety of others
- It is instructive in terms of reminding employers the criminal negligence provisions carry a real risk of accountability that can lead to severe fines and even jail time for individuals

R. v. Scrocca, continued...

- The Court found Mr. Scrocca guilty of criminal negligence under s. 219 of the CCC which states:

219. (1) Every one is criminally negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

Definition of “*duty*”

(2) For the purposes of this section, “*duty*” means a duty imposed by law.

R. v. Scrocca, continued...

- The Court emphasized in its reasons that criminal negligence is an offence based on a fault resulting from recklessness as opposed to intent to commit an offence
- The fact that the defendant did not intend for the brakes to fail, or did not know that they would fail does not matter

R. v. Scrocca, continued...

- The Court found Mr. Scrocca had a duty to ensure the backhoe could be used without risk of endangering the safety of others
- The Court found Mr. Scrocca's conduct to constitute a marked and substantial departure:
 - A prudent person would be aware of the risks of a faulty brake system in a heavy vehicle, and the importance of frequent inspections
 - It was not reasonable to go several years without doing a thorough inspection of the brake system

R. v. Scrocca, continued...

- A moderately prudent person would not refrain from doing a more thorough inspection of the master cylinder for brake oil because they could not unscrew a cap
- Mr. Scrocca demonstrated laxity, even blindness and showed a flagrant lack of diligence
- The court imposed a conditional sentence of imprisonment of 2 years less a day, served in the community, with conditions including a curfew

Relevant Case Law – More Guilty Pleas

- ***R. v. Metron Construction Corp, 2012 ONCJ 506***
 - Christmas Eve, 2009, five men fell from the 14th floor scaffolding
 - Four men died, and one was seriously injured
 - Five of the six men were not using proper safety equipment

R. v. Metron Construction Corp –

- The Ministry of Labour laid 61 charges pursuant to the *OHSA*
- The Police charged Metron Construction, its President and a supervisor with four counts of criminal negligence causing death and one count of criminal negligence causing serious harm under the *Criminal Code*

R. v. Metron Construction Corp – Guilty Plea Under s.217.1 CCC

- On June 15, 2012, Metron Construction entered a guilty plea to one charge of criminal negligence causing death under the CC, as amended by Bill C-45
- Its President pleaded guilty to four contraventions of Ontario's *OHS*A
 - Each charge alleged that the President failed, as a company director, to ensure that Metron complied with the OHS A and its regulations.

R. v. Metron Construction Corp – Guilty Plea Under s.217.1 CCC

- On July 13, 2012, the Court imposed fines on Metron and its President, Joel Swartz
- The Court imposed a fine of \$200,000 + the Victim Surcharge of 15% or \$30,000 against Metron

Total = \$342,000

- The Court fined the President \$90,000 (\$22,500 per charge) + Victim Surcharge

R. v. Metron Construction Corp – Guilty Plea Under s.217.1 CCC

- This case is historic in that it represents the first corporate guilty plea in Ontario under the *CCC* as amended by Bill C-45
- It also set a high watermark for a sentence against any individual under an OHS statute in Canada

Forthcoming Bill C-45 Case?

- ***R. v. Kazenelson, 2013 ONCJ 63***
 - Preliminary Inquiry
 - February 1, 2012, Mr. Kazenelson was committed for trial for criminal negligence causing death and criminal negligence causing bodily harm in the collapse of the swing stage on December 24, 2009
 - Kazenelson was hired by Metron Construction as the supervisor / manager in charge of the balcony reconstruction project

R. v. Kazenelson

- He was tasked with hiring workers, including experienced foreman
- He would be paid 25% of the profit made on the project
- He was responsible for buying materials and equipment, including the swing stages
- He was to ensure they were properly assembled, installed and used
- He was responsible for managing and inspecting the job site



R. v. Kazenelson

- It was Kazenelson's responsibility to ensure workers had the necessary training and qualifications and to ensure safe work conditions
- Court in committing Kazenelson to trial states:
 - It is clear that the accused, in law, had the duty to take reasonable steps for protection of his workers, under s.217.1 of the Code, and to ensure that they worked in compliance with the Regulation to the OHSA...

R. v. Kazenelson

- Here, the Crown only needed to provide sufficient evidence of each of the components of the offence such that a properly instructed jury could reasonably find guilt
- In the Court's view, evidence of his failure to ensure that all workers were tied to lifelines was sufficient proof of criminal negligence causing death and injury to warrant committal for trial

Other Recent Bill C-45 Cases

- ***Weyerhaeuser***

- November 2004 - A worker died when debris fell on him as he tried to clear a jam in a hog plugged with wood
- Worksafe BC investigated
- New Westminster Police investigated, and forwarded a report to the Crown in September 2006 recommending a charge under s.217.1 CCC of criminal negligence causing death
- The Criminal Justice Branch concluded there was no substantial likelihood of conviction and declined to proceed with the criminal charges

Weyerhaeuser

- Unhappy with the Crown's decision, the United Steelworker's Union decided to bring a private prosecution on the worker's behalf
- August 24, 2011 - after an additional comprehensive review, the Crown again concluded that the prosecution should not proceed and ordered a stay

R. v. Millenium Crane Rentals

- April 2009, a male died when he was doing sewage work in an excavated hole at a landfill site and a crane tipped back into the hole
- The crane's operator and the owner were each charged under the CCC
- In March 2011, Ontario Crown withdrew criminal charges

Weyerhaeuser & Millenium Crane

- These cases show that while the provisions under the CCC are appropriate in some cases, they will not be applicable in every case that involves worker fatalities
- Criminal cases require a higher burden of proof (beyond a reasonable doubt) with regard to proving criminal negligence, even with regard to tragic workplace incidents

Other Recent Bill C-45 Cases

- However, the case of Metron shows that an organization could potentially be found to be criminally liable based on the actions of an individual employee
- In Metron, the Court stated that the new CCC provisions clearly extend the attribution of criminal corporate liability to the actions of midlevel managers (such as the site supervisor)

Conclusions

- Although the risk of criminal prosecutions is small, in cases of serious workplace accidents, be aware that both police and OHS officers will attend the scene to investigate
- Employers can mitigate the risk of criminal prosecutions
 - Training
 - Senior management need to react to information regarding non-compliance and safety issues
 - Knowledge of OHS standards and legislation by senior management

Conclusions

- Employers can mitigate the risk of criminal prosecutions, continued...
 - Performance of work area inspections
 - Identification of workplace hazards
 - Written health and safety policies and procedures, and Codes of Conduct
- Employers should be aware of the reporting requirements under OHS law to ensure documents, evidence, the scene, etc...are all preserved and that WorkSafe BC is notified when required
- However, do keep in mind that employers' substantive rights will differ with respect to a criminal investigation by police

Bill 14

Amendment to the Workers' Compensation Act

[Compensation for Bullying & Harassment]

Introduction

- Bill 14 has expanded the coverage of claims for mental disorders in BC
- Recognizes the importance of psychologically healthy workplaces
- Recognizes the growing awareness of mental health issues and concerns in the modern workplace

Outline

1. Bill 14
2. Further Developments
3. The National Standard of Canada for Psychological Health and Safety in the Workplace

1. Bill 14

Out with the old...

- Former section 5.1: “Mental Stress”
 - Limited to acute reaction to sudden and traumatic events
 - Fairly Narrow

...and in with the new

- New section 5.1: “Mental *Disorder*”
 - Broader
 - Two categories of activity
 - Reaction to traumatic event
 - » “acute” requirement removed
 - A single or series of cumulative work-place stressors incl. Bullying & Harassment
 - The latter has caused Bill 14 to be referred to as the Workplace Anti-Bullying bill.

The Legislation

- **5.1 (1)** Subject to subsection (2), a worker is entitled to compensation for a mental disorder that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental disorder
 - (a) either
 - (i) is a reaction to one or more traumatic events arising out of and in the course of the worker's employment, or
 - (ii) is predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment,

- (b) is diagnosed by a psychiatrist or psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and

- (c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

Resource Guides

- Rehabilitation Services & Claims Manual #C3-13.00
- Interim Practice Directive #C3-3
- Other resources on WorkSafeBC's Website:
<http://www2.worksafebc.com/Topics/workplacementalhealth/introduction.asp?reportID=36882>

Rehabilitation Services & Claims Manual #C3-13.00

- Decision-making principles for determining a worker's entitlement to compensation under s. 5.1
 - DSM Diagnosis
 - One or more events, or one or cumulative stressors
 - What is “traumatic” or “significant”
 - Causation

Interim Practice Directive

- January 2, 2013
- Clarifies terms in s. 5.1 and breaks down the section in further detail than the Manual.

What does it mean?

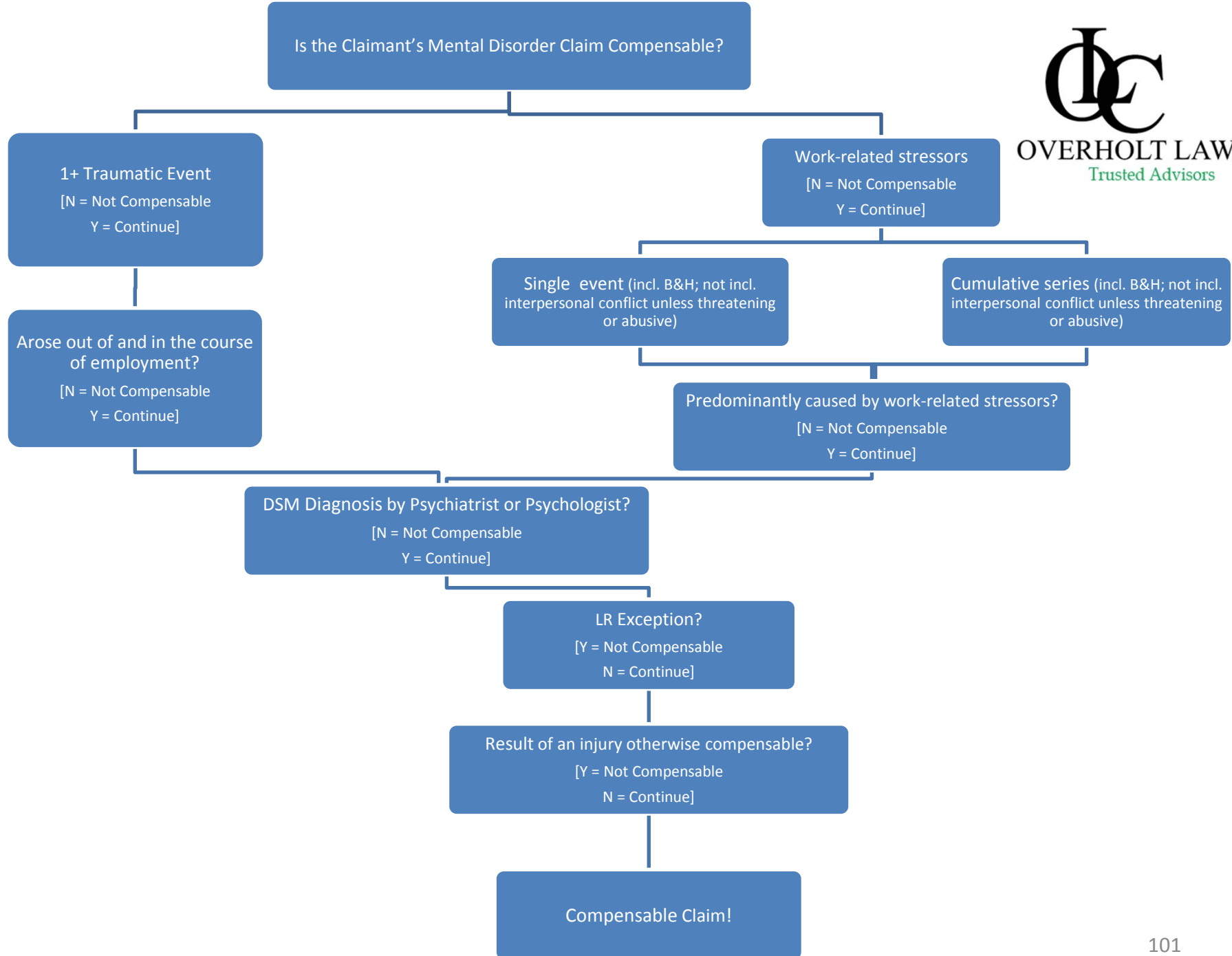
- More claims
- Workplace investigations are crucial and expected
- Expect further policy developments from WorksafeBC, including an update to their *Prevention Manual*
- Expect further legislative developments

In Summary:

- Mental Disorders will be compensable where:
 1. Reaction to 1+ traumatic events, and
 2. Arose out of and in the course of the worker's employment; OR
 3. Caused by a work-related stressor, including bullying or harassment, or
 4. Caused by a cumulative series of significant work-related stressors, and
 5. Is predominantly caused by 3 & 4.

In Summary, cont'd

- Mental Disorders will not be compensable under ss. 5.1 where where:
 1. It arose from an injury for which the worker is otherwise entitled to compensation in the *Act*
 2. No DSM Diagnosis by a psychiatrist or psychologist (as defined)
 3. LR Exception applies (unless threatening or abusive)
 4. Interpersonal conflicts (unless they are threatening or abusive)
 5. Arose primarily from non-work related stressors¹⁰⁰



2. Further Developments

Further Developments

- Bill M 212 - Workplace Bullying Prevention Act, 2012
 - Legislation proposed by the BC NDP Party for the last couple years
 - Last re-introduced in February 2013
 - Includes a definition of harassment: “any conduct, comment, display, action or gesture that
 - a) adversely affects a worker’s psychological or physical well-being, or
 - b) the actor knew or reasonably ought to have known would cause a worker to be humiliated or intimidated.”

Further Developments

- More WorkSafeBC materials:
 - Policies and a tool kit in development

3. The National Standard of Canada for Psychological Health and Safety in the Workplace

National Standard

- Published in January 2013
- Commissioned by the Mental Health Commission of Canada
- Stand-alone document
- Voluntary
- First of its kind (in the world)

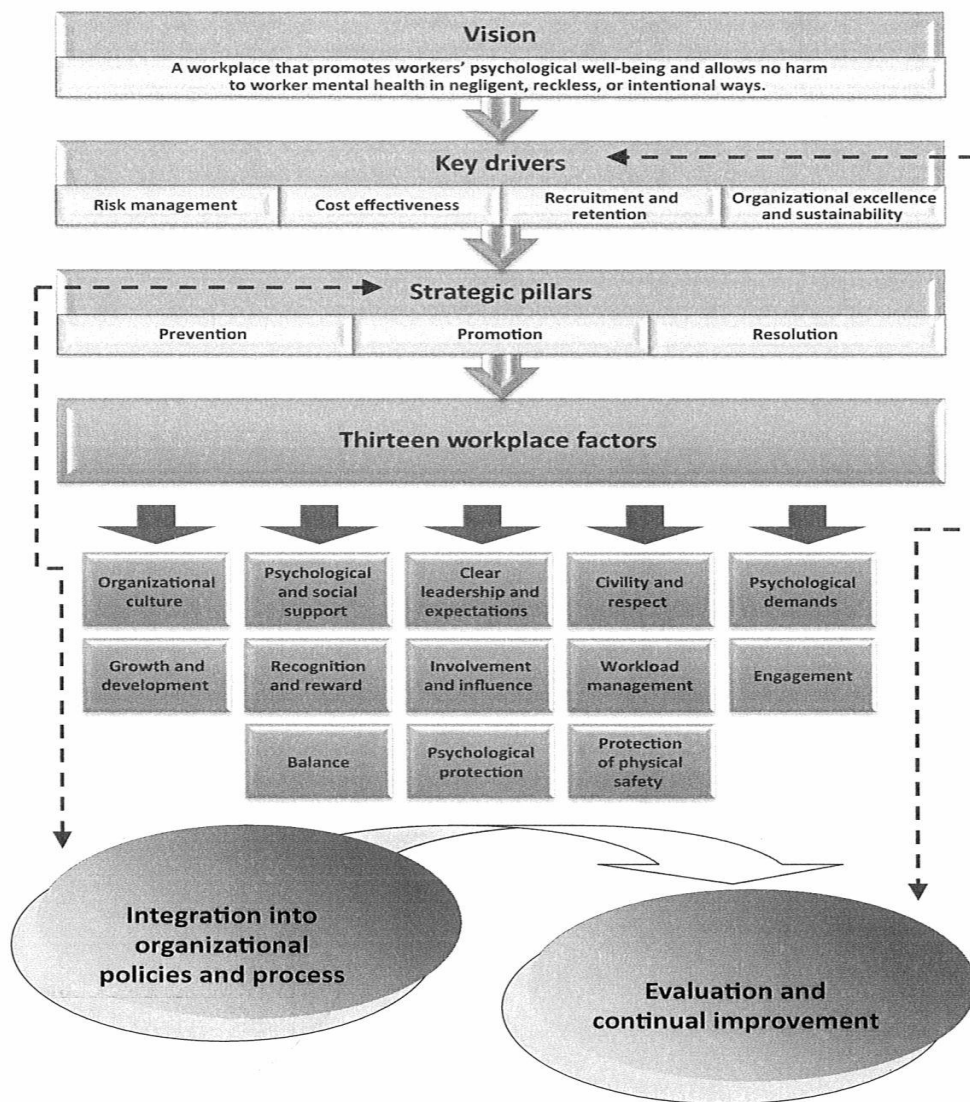


Figure A.1
Model of a planned approach to address thirteen workplace factors known to impact psychological health
(See Clause A.4.)

Bill 14/Mental Health Summary



- Evolving area with further developments forthcoming
- Emphasizes the business case for investing in healthy workplaces and smart human resource policies

Questions?

Thank you for attending

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