

## The Road from Westray: A Predictable Path to Disaster?

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## The Road from Westray: A Predictable Path to Disaster?

MORE THAN A YEAR HAS PASSED since publication of *The Westray Story* (Report of the Westray Mine Public Inquiry, Justice K. Peter Richard, Commissioner, 1997). This report made scathing findings of fact about the hazardous operation of the mine during its short life and the failure of the government to regulate this dangerous activity properly. These findings were received favourably by a community already aware of the grim truth of Westray from prior investigative reports, books and the wide media coverage given to the inquiry's 76 days of hearings, at which 71 witnesses gave often gripping testimony about the events leading up to, and following, the disaster.<sup>1</sup>

The passage of time has provided an opportunity to reflect more dispassionately on that report, assessing both its strengths and weaknesses, and to consider more broadly its impact on the ideology and practice of occupational health and safety regulation in Nova Scotia. We need to consider the report's general influence, rather than just its effect on mine safety, because, under current economic conditions, it is doubtful that new underground coal mines will be opened in Nova Scotia in the foreseeable future and existing underground coal mining in Cape Breton (in any event, regulated by the federal government) is being wound down. Given this context, little would be accomplished by reforms limited to provincial underground coal-mine regulation, although the overwhelming majority of the Inquiry's recommendations are directed to just this specific end.

For this reason, as important as the Inquiry's findings of fact are, it is vital that we critically consider the theoretical framework that implicitly informed Justice K. Peter Richard's report and how that shaped his analysis of Westray and, more importantly, his recommendations for the reform of occupational health and safety regulation. The danger is that the genuine outrage expressed by the report, and felt by the community, will be misdirected into a series of reforms that may allow the conditions that produced Westray to be tragically and disastrously reproduced elsewhere.

Rarely has an inquiry into a disaster so vehemently condemned the practices of

1 The broad outline of the pattern of corporate recklessness and government inaction was revealed in press reports released within weeks of the disaster. At the risk of appearing immodest, my colleague Harry Glasbeek and I were able to piece much of this together in a working paper released six months after the disaster. Harry Glasbeek and Eric Tucker, "Death by Consensus: The Westray Story" (York University, Centre for Research on Work and Society, Working Paper Series, No. 3, November 1992), reprinted in David Frank and Gregory Kealey, eds., *Labour and Working-Class History in Atlantic Canada: A Reader* (St. John's, 1996). Also see Shaun Comish, *The Westray Tragedy* (Halifax, 1993) and Dean Jobb, *Calculated Risk* (Halifax, 1994).

both the private owners and the government regulators. Richard found that the management of Curragh Resources, owners of the Westray mine,

...created a workplace that fostered a disregard for worker safety. Westray management either dismissed fundamental safety hazards for those working under ground in the mine — including roof, dust, and gas conditions — or addressed them inadequately....Westray is a stark example of an operation where production demands violated basic and fundamental demands of safe mining practice....[M]anagement's drive for production, together with its disdain for safety, played a key role in the devastation of the Westray mine. (p. 135)

This finding is amply supported by a detailed review of the mine's development and operation. Although a number of feasibility studies were conducted by a number of would-be investors, a mine plan was never fully developed. Instead, Westray developers focused on monetary concerns, particularly obtaining generous federal and provincial government financing of the project to minimize their risk. Their fiscal risk aversion stood in stark contrast to the near complete disregard for the potential risks that the project posed for the lives and health of the underground miners.

This uncaring attitude manifested itself once the mining operation began. The report documents a long list of failures on the part of Westray management. Mine supervisors and miners were underqualified and inadequately trained, ventilation was poorly planned and badly executed, methane was allowed to accumulate at unsafe levels, coal dust was not treated to reduce its explosive potential, and the work organization did not provide miners with an effective means to communicate their health and safety concerns and have them addressed. Indeed, miners were made to understand that if they were not satisfied with their working conditions their only option was to quit (p. 185).

The report was unable to determine conclusively the immediate cause of the explosion in the early morning hours of 9 May 1992, a fact that provided provincial prosecutors an excuse to stay the criminal charges against the mine manager, Gerald Phillips, and the underground supervisor, Roger Parry. But this reason for prosecutorial discretion is not sustained by the report's findings. The evidence marshalled in the report supports its theory that a spark from the continuous miner ignited methane accumulated in the mine and that this in turn triggered a coal dust explosion. Although the report found evidence that the methanometer on the continuous monitor was tampered with (to prevent it from automatically shutting down the miner if methane levels became dangerous), it rejected the conclusion that this tampering in any way caused the explosion (p. 227). Rather, the report concluded that the explosion occurred because mine management allowed dangerous levels of methane and untreated coal dust to accumulate, in violation of existing provincial safety laws. Had there been compliance with the law, there would not have been such a calamitous disaster. There was, then, sufficient evidence in the report to make a case that the reckless and often illegal operation of the mine led to the disaster and that this operation was, in part, under the control of the two accused.

The report also considered why Westray was able to operate a dangerous mine in violation of provincial law. Richard catalogued and harshly condemned the failure of

government regulators involved with the Westray project to exercise their legal powers to protect the miners. Again, Richard begins at the top. Former Premier Donald Cameron, the member for the riding in which the Westray mine was located, is justly vilified by Richard for his refusal to accept any responsibility for the Westray disaster. Richard characterizes his testimony, and that of others who blamed the miners for the explosion, as “self-serving, cynical and simplistic” (p. 222). Richard cites Cameron’s statement that “We enjoy the comfort of opinion without discomfort of thought” and then comments acidly: “The record will show that this quotation is as descriptive of the evidence and opinions voiced by Cameron as it is of the testimony given by many other witnesses at the Inquiry” (pp. 512-13). Although Richard did not find direct political interference with safety enforcement, he concluded that Cameron’s “aggressive pursuit of the Westray project may have sent a message to the bureaucracy, especially the inspectorate, that Westray was ‘special’ and ought to be treated as such” (p. 514). Finally, he found that Cameron, in acting against the advice of his officials, lacked a clear understanding of the acceptable level of political support that a minister or cabinet could provide for a project or of the relation between a minister and his department in dealing with such projects (pp. 521-2).

The two government departments most involved with Westray were Natural Resources and Labour. Although earlier accounts of the Westray disaster noted that the government officials and agencies that reviewed Westray plans failed to seriously consider whether coal could be mined safely, those accounts failed to note that the provincial Mineral Resources Act required the Minister of Natural Resources to be satisfied that a mining project would be safe before issuing a permit. In addition, any alteration to the mine plan required advance approval from the minister, which was to be given only if safety to life and property was preserved. The Inquiry carefully reviewed the role of Natural Resources and found that it either misunderstood or overlooked its overriding responsibility to ensure that Westray’s mine plans were inherently safe (p. 401). Moreover, after the mine began operation, the department probably knew of unapproved changes to the mine plan but failed to ensure compliance with the legislation (p. 448).

The failure of the Department of Labour to enforce the Coal Mine Protection Act and the Occupational Health and Safety Act was widely commented on before the Inquiry’s hearings, and the evidence gathered by the commission confirmed what we already knew:

*The Department of Labour, in general, and the inspectorate in particular, was markedly derelict in meeting its statutory responsibilities at the Westray mine.* (p. 629, emphasis in the original)

The report found that the inspectors lacked the training and experience to perform their role effectively and that they failed to receive adequate supervision and guidance. Inspections were always announced in advance and inspectors were accompanied and guided by management, preventing them from having open communication with miners and from seeing or appreciating the true state of underground operations. Finally, the orders the Department of Labour issued, most notably those requiring stone dusting that would have prevented an explosion, were not enforced.

These findings of fact provide a partial answer to the question of why the Westray mine exploded: mine management operated unsafely and government officials were lax in exercising their regulatory powers. But this still leaves open the questions of why mine management operated so dangerously and why government officials did not intervene to stop such unlawful behaviour. The answers to these questions are more difficult to derive directly from documentary and oral evidence. Rather, they depend, in part, on a theoretical understanding of the determinants of occupational health and safety conditions and of state action. On the one hand, we can view the “facts” of Westray as aberrational while, on the other, we can see them as exemplary of systemic problems. In reality, there is a continuum between these two positions, as well as a variety of ways or levels at which systemic problems are defined. The problem with the report is that, to the extent it does not view Westray as aberrational, it inadequately theorizes its systemic causes. This leads to recommendations that, even if followed, may not produce major improvements in health and safety performance.

The central theoretical problem is to develop a framework that explains the production of occupational injury, disease and death.<sup>2</sup> Richard implicitly dismisses frameworks generated from within the fields of psychology and micro-economics that tend to place the individual worker at the centre of their analysis, focusing respectively on personality and rational choice. Indeed, he condemns those who would blame the miners for causing Westray due to their carelessness. He never considers worth discussing a hypothetical argument that the miners rationally and voluntarily chose to assume the risks in the Westray mine in exchange for wages.

While it is clear that Richard’s theoretical framework focused on the employer and the government, not the worker, his understanding of what shapes their behaviour is less obvious. Crucial to any analysis of the production of risk in capitalist economies is the relation between safety and profit. In a competitive market economy, firms are under continuous pressure to maintain profitability. There is a systemic demand to put profits first. Of course, in some instances improved safety will be consistent with profit maximization, but in others it will not.

Where safety pays, the task of regulators is less difficult. They need to convince employers that it is in their own self-interest to adhere to certain standards. Poor performance, then, can be rectified through education and improved organizational awareness, commitment and competence. Workers can play an advisory role in that process, contributing their experience and knowledge of the production process.

Where safety does not pay, some kind of countervailing pressure is required to ensure that occupational health and safety conditions do not fall below socially acceptable levels. Inspection and enforcement of state standards is one response; empowering workers is another. The major problem with Richard’s analysis is that he never comes to grips with this crucial problem. Instead, he tries to make it disappear. The following passage from the frontispiece of the report is telling:

Once a mine is open, there begins the process of trade-off between production and safety. From the chief executive officer to the miner at the working face, the objective must be to operate the mine in a manner that

2 For an excellent discussion, see Theo Nichols, *The Sociology of Industrial Injury* (London, 1997).

ensures the personal safety of the worker over the economic imperatives of increased production. The two seemingly competing concepts — safety and production — must be so harmonized that they can co-exist without doing harm to each other. (p. viii)

Richard seems to want it every way. He begins by acknowledging conflict between production and safety, proceeds to insist that safety must come first, and then concludes by insisting that safety and production must be made compatible so that the conflict evaporates (thereby precluding, presumably, the need to put safety before production).

In the body of the report, this ambiguity tends to be resolved on the basis of the last formulation — except that it often goes one step further. Instead of addressing the problem of how to harmonize safety and production, it implicitly assumed that they *already* are in harmony. This has significant ramifications for the report's analysis of the problem and the prescriptions that it offers.

For example, the Westray story is characterized as one “of incompetence, of mismanagement, of bureaucratic bungling, of deceit, of ruthlessness, of cover-up, of apathy, of expediency, and of cynical indifference”. Harsh words, indeed, but the source of all this deviance, at least as far as mine management is concerned, is that “through either incompetence or ignorance, [it] lost sight of the basic tenet of coal mining: that safe mining is good business” (p. ix). If this is true, one has to assume — given the history of death, injury and disease in the coal mining industry in Pictou County and elsewhere — that coal mine operators, for some unknown reason, have been unusually incompetent and ignorant in the management of their affairs.

The report's analysis of the failings of the mine inspectors also tends towards a deviance perspective, as opposed to seeing a more systemic problem with the widely adopted internal responsibility model of regulation. Aside from the failings of individual inspectors, Richard placed much of the blame for the inspectors' inaction on the shoulders of Jack Noonan, the executive director of the Occupational Health and Safety (OHS) Division of the Department of Labour. In particular, it was his version of the internal responsibility system (IRS) that “was a major deterrent to effective enforcement of the safety regulations relating to underground coal mining” (p. 455).

According to Richard, Noonan's version was deficient because it emphasized the inspectors' role in persuading, educating, facilitating and assisting the workplace parties to develop the capacity to assume primary responsibility for health and safety (p. 471). This, the report says, is inconsistent with the approach to the IRS in other provinces, particularly Ontario which served as a model for Richard's analysis. In fact, the Noonan philosophy, of which Richard is so critical, is not radically different from the version of the IRS that is officially espoused in most other jurisdictions, including Ontario. For example, *Preventing Injury and Illness*, a policy paper issued by the Ontario Ministry of Labour in January 1998, states (p. 8) that: “The overall objective of the OHS system is to improve OHS performance...by providing motivation and support to individual workplaces in order that they may build a strong IRS and achieve self-reliance”.

Perhaps the crux of the difference is less a matter of the goal, but of the means used to achieve it. Tensions have always abounded within the IRS model in this regard, but

two in particular are relevant to this discussion. The first is over the role of the external responsibility system in its relation to the IRS. Governments and employers have typically favoured a “gentle persuasion” approach, in which the inspectors encourage and educate the workplace parties to work cooperatively through the institutions of the IRS to meet, indeed surpass, regulatory requirements. This approach is justified on the basis that rational employers want to comply with the law because, after all, safety is good business. Inspectors do not act as safety police with a mandate to detect and investigate unlawful behaviour, and government uses formal enforcement measures sparingly, only when other, less coercive, measures have failed. Prosecution is a last resort, only to be attempted after a worker has been seriously injured or killed as the result of a violation. Despite Richard’s protestations to the contrary, the actions of the Westray inspectors were not inconsistent with the mainstream IRS vision.

Workers, trade unions and, sometimes, the inspectors themselves have argued for a more vigorous approach to enforcement, based on the view that there are a significant number of employers who resist complying with the law because they do not believe, at least in some cases, it is in their financial self-interest to do so. For example, in Ontario, the model jurisdiction according to Richard, the inspectors, through their union, formally complained in 1986 that senior officials in the Ministry of Labour were thwarting enforcement. An inquiry exonerated the ministry on the basis that its conduct had to be evaluated “on the basis that the IRS prevails”.<sup>3</sup> Nonetheless, dissatisfaction with the level of enforcement has persisted.

Richard does recognize the uneasy place of enforcement within the IRS model. Indeed, at one point, he identifies the lack of emphasis on regulation “at least in the early stages of the IRS” (p. 472) as a weakness of the system. Moreover, he condemns the provincial inspectors for using the IRS to divert attention from its responsibilities (p. 477) which, presumably, include using the Department of Labour’s powers to ensure that unsafe conditions are not allowed to persist. The problem, however, is that Richard’s acceptance of the IRS model, and the premises that support it, lead him to underestimate the difficulty for inspectors of adopting an “uncompromising position on strict compliance” (p. 605). It is telling that Richard makes no specific recommendation to increase the level of enforcement of occupational health and safety law.

The report, however, does call for more officers’ and directors’ accountability, under provincial health and safety and, possibly, federal criminal law, for the failure to maintain safe workplaces (p. 601). This is a welcome recommendation, even if it appears almost as an afterthought, tacked to the end of the Report as a response to the brief submitted by the United Steelworkers of America. But it is not clear that the main impediment to prosecution is the inadequacy of existing legislation. Often, the chief stumbling block is the unwillingness of law enforcement officials to deploy these instruments against corporate directors, officers and managers engaged in the pursuit of profit. Government officials tend to see wrong-doing in this context as a

3 G. G. McKenzie and J. I. Laskin, *Report on the Administration of the Occupational Health and Safety Act* (Ontario, 1987), vol. I, p. xx.



civil problem for which damages are the appropriate remedy, even when physical harm has been inflicted on the victims. For example, the manufacturers of the Dalkon shield and the producers of asbestos products have never been charged with any offence, despite their reckless endangerment of the users of their products.

The prosecution of Westray, Phillips and Parry represented a break from this pattern, but the decision of the provincial prosecution service in June 1998 to stay the criminal charges constituted a return to the well-established pattern. The justification that they offered for this measure is hard to square with the mass of evidence compiled by Richard showing that it was the accumulation of gas and coal dust that was responsible for the explosion, even though the source of ignition could not be precisely ascertained. Moreover, this rationale leaves unexplained why charges were laid in the first place and why the government fought all the way to the Supreme Court of Canada for the right to reinstate the charges after the trial judge stayed the proceedings because of a lack of proper disclosure by the Crown.

A second point of conflict within the IRS model concerns the role of worker participation. Typically, workers are given a right to know, a right to participate and an individual right to refuse unsafe work. Their role is defined as “contributory”, and they are not given decision-making authority. In addition, because governments view occupational health and safety as an area of common employer-employee interest, they have not seen the need to address the question of imbalances in power between workers and employers. Indeed, according to the IRS model, adversarial relations are destructive to the proper functioning of the system and should be strongly discouraged.<sup>4</sup> This view has been challenged by many health and safety activists who have argued that a weakness of the IRS is that workers lack the necessary power to ensure that employers comply with their legal responsibilities and to protect themselves when faced with unsafe conditions. Adversarial strategies, they argue, are sometimes necessary in a system in which profit and safety may conflict. Since the IRS model was first implemented, workers have fought to expand their power within the system, but have met with limited success, largely due to the vociferous opposition of employers who have resisted conceding control over production.

Richard’s discussion of these issues is particularly disappointing, especially given the history of the Westray mine and the inability the non-unionized miners to exert any influence in the IRS. But, because Westray is constructed as deviant, Richard does not see unequal power relations in the workplace as a systemic problem that needs redress. Instead, he adopts the view that adversarial behaviour is pathological and is caused by trade unions using health and safety issues to achieve other ends. In support of this conclusion, Richard cites as unacceptable the confrontational attitude of union officials he observed at Devco’s Phalen mine in Cape Breton (p. 568). To isolate occupational health and safety from industrial relations, Richard recommends that the legislation be amended to prohibit a person who is, or has been in the last year, a member of the executive of an employee organization from being a member of the

4 *Report of the Royal Commission on the Health and Safety of Workers in Mines* (James M. Ham, Commissioner, Ministry of the Attorney General, Ontario, 1976); Joint Federal Provincial Inquiry Commission into Safety in Mines and Mining Plants in Ontario, *Towards Safe Production* (Kevin Burkett, Commissioner, 1981).



joint health and safety committee (p. 510).

The problem with Richard's conclusion is that the evidence does not support his contention that adversarial approaches are undesirable. For example, a study of joint health and safety committees in Ontario and Quebec found that "adversarial relations between management and labour formed part of a factor which was associated with lower injury rates in unionized work places".<sup>5</sup> What this suggests is that, contrary to official wisdom, cooperation in achieving good occupational health and safety outcomes cannot be assumed as the normal condition, deriving from a natural commonality of interests among workers and employers. Power and influence matter, and a confrontational attitude might be justified when faced with employer resistance. Richard recognizes this, if only partially and implicitly, by suggesting that the disaster might have been avoided had the Westray miners gained certification of the United Mine Workers of America as a result of the vote held in January 1992 (p. 607). However, he fails to develop this insight in his report and makes no recommendations to strengthen worker rights in the IRS.

*The Westray Story* maps out a path to disaster but, like all exercises in cartography, provides only a partial representation of reality. The route that Richard describes is filled with people who exhibit a lack of concern for the safety of workers: mine developers anxious to secure government funding; politicians keen to attract investment in their ridings, but unwilling to be accountable for the consequences; government regulators lacking the training and motivation to effectively exercise their statutory power to protect the public; and mine operators keen to produce coal immediately, whatever the risk. Richard criticizes them all in appropriately harsh terms. For this he is to be commended. Past commissions of inquiry have been much less forthcoming in this regard.

But the map of what went wrong is constructed from a flawed survey of the terrain. Richard uncritically accepts conventional occupational health and safety wisdom. In his view, the path to disaster was caused by a deviation from the IRS model; it was not the consequence of its normal operation. As a result, despite his outrage, Richard found nothing fundamentally wrong with the system. We just have to get back on track. This way of thinking about Westray has resulted in a series of recommendations which the Nova Scotia government has accepted wholeheartedly and promised to implement.<sup>6</sup>

Undoubtedly, some improvements will result from the recommendations of Justice Richard's report, even though it has failed to interrogate crucial assumptions. To the extent those assumptions are flawed, a different map of the road to disaster needs to be drawn. A more accurate map of the road to Westray would indicate that the disaster is not found down a sideroad, but that it was a predictable destination on the main highway. The report would have us continue down this road, but at what cost and at whose expense?

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5 Carolyn Tuohy and Marcel Simard, "The Impact of Joint Health and Safety Committees in Ontario and Quebec" (a study prepared for the Canadian Association of Administrators of Labour Law, January 1993).

6 *Westray A Plan of Action* (Government of Nova Scotia, December, 1997).