

When the Inquiry was first constituted, we estimated that it would require 18 to 24 months to complete the mandate. Aside from the delays caused by the numerous legal challenges and concomitant criminal proceedings, I soon concluded that this was an unrealistic time frame. Merely to acquire some appreciation of the functioning of the coal mining industry in general and an underground coal mine in particular required a commitment to prodigious reading and research by Inquiry staff, as the extensive bibliography of coal-related materials attests. The first part of this chapter addresses specific initiatives relating to the coal mining industry and the regulatory environment. Since the reasons for the lengthy delay in concluding this Inquiry may be lost with the passage of time, the second part of the chapter sets out in detail the factors that caused or contributed to that delay.

Mine Visits

After my appointment as commissioner, I needed to get some sense of the underground coal mining environment – to see how and where the coal miner works. After consultation with Inquiry counsel and mining experts, it appeared that the best means of doing so was to visit a number of coal mines, preferably those that operated in a similar manner to Westray, as well as to visit regulatory agencies and mining associations in Canada and the United States. During the course of the Inquiry, I toured three underground coal mines: the Skyline mine in Helper, Utah; Phalen, operated by the Cape Breton Development Corporation (Devco) in Sydney, Nova Scotia; and the Jim Walter Resources No. 4 Mine in Brookwood, Alabama. Inquiry counsel John Merrick and Jocelyn Campbell also had a familiarization tour of the Phalen mine. I shall relate my experiences, research, and discussions in some detail, as I have formed impressions and insights that have, in varying degrees, influenced my findings and recommendations in this Report. The Inquiry Rules of Practice and Procedure provide for this sort of flexibility.¹

The visits to the mines and to the regulatory agencies and mining organizations in both Canada and the United States proved to be most helpful in my understanding of the evidence at the hearings. In particular, they were valuable in providing a benchmark, or standard, by which to assess the performance at Westray as well as that of the Nova Scotia regulatory agencies.

¹ Section 2(5) of the Rules of Practice and Procedure for the Westray Mine Public Inquiry allows that “the Commissioner may receive evidence other than through public hearings as he, in his discretion, deems appropriate.”

Skyline Mine

Gerry Stephenson, one of the consultants retained in the early days of the Inquiry, had a good understanding of the history of Westray through the involvement of his company, Norwest Resource Consultants Ltd of Calgary, in the planning of the Pictou mine. He suggested that I visit a longwall mining operation in the northwest United States, and he put me in touch with Glen Zumwalt, general manager of the Skyline mine in the mountainous region of Utah, near Price. I arranged to visit the mine in early October 1992. Assistant manager Craig Hilton, a mining engineer, was my guide and instructor for the day.

I was given an orientation session on the layout and workings of the mine: the mine plan and the escape routes available in case of an emergency; the routing of the ventilation, from the surface forcing fan to the intake routes and the return routes; and the various emergency signalling devices, so I could find my way out of the mine even if I was unaccompanied.

From the mine plan, I could see that the Skyline mine is a mature mine with many miles of worked-out panels and headings. It is a typical U.S. double-entry longwall operation, with two parallel entries, or roadways, on each side of a proposed longwall panel.² The entries are driven – along with the required cross-cuts for ventilation, transportation, and escape purposes – with continuous miners, and the roof is secured using roof bolters; the development resembles a room-and-pillar operation on each side of the longwall. The development equipment is similar to that used at Westray. As Stephenson suggested, this sort of longwall operation provides insights into both the longwall and the room-and-pillar methods of mining.

My next indoctrination was a 45-minute instruction in the use of the self-rescuer and the Oxy 60 self-breather. I practised putting the self-rescuer on and then making the switch to the Oxy 60 while I held my breath; the mortal consequences of not holding my breath at this time were described in graphic terms.³

Then we started into the mine. Our destination was a working longwall face and a development area some 5 miles (8 km) into the side of the

² Canadian longwall mining is patterned after the British system and is single entry. The U.S. system of double or triple entry is designed to provide unobstructed escape ways and ventilation free of the conveyor roadway. The U.S. regulators did not like the idea of ventilation air passing over the conveyor belts. The ventilation requirements in the double- or triple-entry systems are similar to those in a room-and-pillar mining operation such as Westray. Figure 10.1 in Chapter 10, *Ground Control*, depicts a single-entry and a triple-entry longwall operation.

³ **Comment** This demonstration evokes comparison with the instruction (or lack of) at Westray, where some of the miners were issued a self-rescuer without any explanation of its use (see Chapter 4, *Training at Westray*). A review of the testimony suggests that I was given more instruction on safety measures at the Skyline mine than was the average new miner at Westray. When Inquiry counsel John Merrick entered the Westray mine after the explosion, he, too, was given only cursory safety instruction.

mountain and 2,000 feet (610 m) below the surface.⁴ The utility vehicle was specially modified with a fireproof ignition system, fire extinguishers, non-sparking starting capability, and other such devices to render it permissible for underground use in conformity with the requirements of 30 CFR, the applicable U.S. federal regulations.⁵ In mountain mining, the roadways can often be driven into the side of the mountain to the coal seam, so that there is no need of shafts or slopes. We simply drove into the side of the mountain on the level and travelled to the working faces along the various roadways carved by continuous miners. After driving about 15 minutes, we reached one of the working faces. Although the mine was completely dark, the headlights of the truck highlighted the roof and ribs, which were light grey – resembling the walls of a stucco house. This coloration was the result of stonedusting, and there was ample evidence of dust spreaders and bags of stonedust stored at various locations along the roadways. Although no stonedusting was done in that portion of the mine during my visit, I was informed that a large vehicle we had seen outside the portal (surface entrance to the mine) was the stonedusting machine. It was apparent that the dust had been sprayed onto the ribs and roof. When we alighted from the truck, the cool breeze from the ventilation system was palpable and the air was clear.

Our first stop was at the continuous miner, which was cutting new roadways in preparation for a longwall operation scheduled to start the following year. The continuous miner was much the same as that illustrated in photo 1 in Reference. The area – floor, ribs, and roof – was quite wet, the result of the spray from the continuous miner. When the continuous miner was cutting, a heavy fog rose from the drum, and it dampened the face and the conveyor where it met the shuttle car. The continuous miner can be operated from a seat on the machine or by remote control, with the operator standing to the rear or side of the machine. In this case, the operator was using the remote. The continuous miner is low, compact, and complex and can cut from 5,000 to 7,500 tonnes of coal a day. It can cut a drive about 8 feet (2.5 m) wide, and the cutting heads can rise to 8 feet. I was impressed with the apparent efficiency of the continuous miner, although Hilton said it was quite inefficient compared with the longwall operation.

Next we observed the bolting machine in operation. It appeared to be similar to the roof bolter shown in photo 5. It was a double bolter with a temporary roof support (TRS), a device that holds the roof in place while the bolting is being done. The rotary drill penetrates the roof or the rib to the desired depth. The bolts are similar to the rebar used in reinforced

⁴ Most of the numbers in this chapter were related to me in Imperial measurement. For the benefit of readers more familiar with the metric system, we provide the approximate SI values where applicable.

⁵ U.S. Office of the Federal Register, National Archives and Records Administration, *Code of Federal Regulations*, Title 30, Mineral Resources (Washington, DC, July 1996) [30 CFR]. Coal mines in the United States are regulated by Part 75 of 30 CFR, Mandatory Safety Standards – Underground Coal Mines.

concrete construction, but are threaded on one end. In this case, the bolt is inserted with a vinyl anchor that expands against the sides of the drill hole to keep the bolt in place. Once anchored, a 4-by-4-inch (10 cm square) steel plate is put over the end, and a nut is fixed on the threaded end of the bolt to lock the plate in firmly. Before the plate is fastened, a wire mesh is inserted under it to minimize the danger of falling roof particles. Although I learned later that 4 feet (1.2 m) is the normal distance between bolts, in this case the mine was using 5-foot (1.5 m) centres. Under favourable conditions, a good bolting crew can set up to 200 bolts in an 8-hour shift.

From the bolter, we travelled to the longwall operation – a trip that was quite extraordinary, at least in my experience. The shearer consists of two huge cutting wheels, which cut the coal to different depths. This particular shearer can cut to a height of 15 feet (4.6 m) and it travels along the working face for a distance of at least 1,000 feet (300 m). The cutters travel down the face and back, making two cuts in about 55 minutes. The loosened coal falls onto the conveyor belt and travels to the end of the face to another conveyor, which eventually carries it to the surface. The roof is held in place by huge hydraulically driven chocks that move towards the working face as the shearer cuts into the coal. As the chocks follow the shearer, the roof caves into the “gob,” or area from which the coal has been extracted. This particular longwall installation cost approximately US\$20 million and produces about 18,000 tons per shift. The foreman said the company was aiming for production of 20,000 tons. (I later learned from Hilton that this goal had been achieved.) The foreman carried two atmosphere monitors, which measure methane, carbon dioxide, and oxygen. The second of these monitors was used simply as a check and back-up for the first.

On leaving the mine, I was introduced to one employee whose sole job was to keep abreast of the various regulatory regimes and to ensure that the company is in compliance. I also spent some time with Ben Bringham, the safety officer for the mine. I was impressed with his interest in and dedication to all safety issues. He seemed to have authority in his area and indicated that senior management had a positive attitude towards safety. I understood from our conversation that the Skyline mine, in operation since the early 1970s, had a good safety record. My overall impression was that safety was a matter of paramount importance. The mine I visited was clean, stonedusted, and well equipped with first-aid safety stations and stores of stonedust. I learned from Hilton that the Skyline mine, as well as the other mines operated by this company, is non-union.

Phalen Mine – Devco

This visit was arranged by Roy MacLean, who accompanied me into the mine along with operations manager Sheldon Gouthro and general

manager Bobby Ross. Before entering the mine, I was given brief instruction on the use of the self-rescuer as well as the mine plan and layout.⁶ I was then outfitted with the usual mining gear, such as the self-rescuer, helmet, lamp, battery, and boots.

We travelled into the mine on a trip – a rail car driven by a cable. When we arrived at the mining level, we walked for about half an hour along the roadways to the No. 6 Cut. The ribs and roof of the mine were a light grey colour, the result of continual stonedusting. A large cylinder travelled on tracks along the roadways and blew the stonedust onto the ribs, roof, and floor of the mine. Methanometers at various locations along the roadways were monitored on the surface in the control room.

At Devco, bolts are used as the main roof support and are fixed with steel plates. The mesh at the Phalen mine is a heavy vinyl, held in place by the roof bolts. Wire cables are used for roof support when a higher penetration is necessary to obtain a good hold. These cables are 6 to 8 m long and are fed into the drilled hole; the securing end is formed in a sort of “birdcage” configuration, which is pumped with resin. As the resin hardens, the bulb formed will lock the cable into the solid roof. Along the roadways, roof support gauges called “tell-tale extensometers” measure the amount of sagging in the mine roof. The extensometer is simply a device hanging free in a hole and attached with a wire to the secure strata above the mine roof. If the roof begins to “work,” the extensometer will display a different coloured band. This change serves as a warning of weakness in the roof, and efforts are then made to secure the roof with further bolting or steel arches.

The Phalen mine is equipped with “passive” water barriers, which are a fire and explosion deterrent. (See figure 9.2 in Chapter 9, *Dust*, for an illustration of a typical water barrier installation.) The water barrier consists of a number of thin vinyl tubs (about the size of household laundry baskets), which are fixed to the roof of the mine on wooden frames. Their distance from the working face is calculated by the estimated length of time it would take for the shock wave of an explosion to develop. The baskets are fragile enough to fracture when the shock wave strikes them, and they will then dump a cascade of water into the air. This water will smother the flames following the shock wave and terminate the explosion. Although the water barriers would provide little protection for miners working at the face where an explosion is likely to originate, they do guard against the explosion propagating to other areas of the mine.⁷ A similar result could be achieved by the use of stonedust barriers, which work on the same principle as the water barriers but expel incombustible dust as the quenching agent.

⁶ The instruction was less intense than at either the Skyline mine or the Jim Walter Resources complex – perhaps because I was being accompanied by an experienced Devco mining engineer in the person of Roy MacLean.

⁷ In the case of the Westray mine, water barriers (or stonedust barriers) might have quenched the fire and explosion before it reached the mains and propagated into the North and Southeast sections.

The working face of the Phalen mine is 5 to 6 km from the portal. It is approximately 3 km out under the Atlantic Ocean – 200 m below sea level. The longwall operation I observed at the face was similar to that at the Skyline mine, the difference being that Phalen is a single-entry mine, with the longwall panel, at 260 m, considerably shorter. The roadways at Phalen and other Devco mines are driven by Dosco Roadheaders.⁸

At the face, the coal is extracted with two shearers, one cutting low into the face and the other high. It takes about one hour to complete a cut. As the shearers cut into the coal face, the coal is deposited on a conveyor, which takes it out to one end of the longwall and onto another conveyor for transport to the surface. The miners are protected by chock-shield supports – heavy steel canopies supported by piston-like devices called props – which extend the length of the face and advance with the shearers as they cut into the face. As this entire assembly advances into the face of the coal panel, the unsupported and fragmented mine roof will simply collapse into the gob. Longwall mining requires high capital expenditure, but the method results in high productivity. Geologically, it requires a fairly wide deposit of coal that is largely unfaulted and level. Because of the dip and the faulting in the Foord seam at Pictou, the longwall system was not recommended.

One aspect of the Phalen visit stands out in my mind and has caused me some concern: the conduct of a couple of the union officials. Although I did not know their names, they were described to me as either safety committee members or union officials. In any event, their confrontational attitude towards management was, in my view, unacceptable. I had the impression that these people were using questionable safety concerns to harass the mine managers. At the time I thought it might have been an isolated, albeit unfortunate incident, but I now sense that it may be symptomatic of a deeper and more institutionalized malaise. This impression was subsequently reinforced by a report commissioned by Natural Resources Canada. The following comment was cited as an example of a problem isolated by mine management as an impediment to any improvement in operating performance: “Safety disputes, often without merit, cause frequent cessations of work and are used as a tool against management, who are then held virtually powerless.”⁹

I mention this incident here because it was just one of several factors that influenced my findings and resulting recommendations respecting the composition and functioning of mine safety committees.

⁸ The Roadheader is a continuous miner that is able to cut variable-width roadways with an arch-shaped cross-section.

⁹ John T. Boyd Company, “Technical and Operational Assessment of Cape Breton Development Corporation, report to Natural Resources Canada (1996), p. 5-7. The report gives another example, similar to the conduct I witnessed: “Boyd observed a spurious claim of the presence of gas to halt work in a heading. Methane had been detected in an isolated area in a roof bolt hole, and it was promptly diluted back into the mine atmosphere. A certified mine examiner confirmed that the area was safe to work. However, the crew refused to return to their assigned tasks” (5-13–5-14).

Jim Walter Resources, Inc., No. 4 Mine

This visit was arguably the most productive of my three mine tours – a function more of my own knowledge and experience than any deficiency in the other mining organizations. I visited JWR in June 1996, after most of the Inquiry hearings had occurred, so I had a much clearer idea than in my other mine visits of coal mining and the particular problems with which I had to deal.

My visit to the JWR complex at Brookwood, Alabama (about 30 miles from Birmingham), was arranged through Charles Dixon, senior vice-president, mining engineering. On arrival, I met with Willis Coates, manager of safety and training. Coates had received his mine manager's training with the British Coal Board and then immigrated to Canada, where he served in a management role at the underground coal mine in Grande Cache, Alberta, and worked with Roger Parry, Bob Parry, and John Bates. He had high regard for Bates, and was positive in his assessment of Bob Parry's competence. I was impressed with his wide-ranging mining knowledge as well as his obvious commitment to mine safety. Coates was not unfamiliar with the Westray Inquiry, since a Canadian acquaintance had provided him with several of the videotapes of the proceedings. For the early part of my visit to the mine, Coates, Dale Byram, and Ralph Ausborn discussed various institutional aspects of JWR. The complex had five active underground coal mines with more than 2,400 underground personnel, plus supervisory and administrative staff. The mine workers are represented by the United Mine Workers of America. Following this brief discussion, I went with Ausborn for instruction in the self-contained self-rescuer (SCSR). I viewed a Mine Safety and Health Administration (MSHA) video and was given a step-by-step demonstration on the use of the SCSR. Finally, I was required to put the mask on in the approved manner.

The self-rescuer in use at JWR is model CSE SR-100. It is the most advanced model I have been exposed to and has an independent supply of oxygen. It requires about 20 seconds of installation and activation time, after which it can keep a person breathing for approximately one hour. It can operate in an oxygen-deficient atmosphere. The self-rescuers at Skyline, Phalen, and Westray were the catalytic type, which require sufficient oxygen in the ambient mine air to sustain life. (At Westray, all the oxygen in the mine had been consumed by the rolling methane fire and subsequent explosion.¹⁰) It would appear that the CSE SR-100 is the next generation of self-rescuers, offering greater safety than the catalytic variety.

After this orientation process, I accompanied Coates to JWR No. 4 Mine – located several miles from the training facility – where I was introduced to Reggie Lamons, longwall area manager, and Wyatt

¹⁰ Reg Brookes was "doubtful" that the self-rescuers would have provided any protection at all to the miners in Southwest 2 (Hearing transcript, vol. 11, p. 2047).

Andrews, safety supervisor. I was shown the mine plans and the several emergency escape routes. I was outfitted in miner's garb, including a lamp and a tag. This mine has a three-tiered tracking system for people going underground – sign in/sign out, tagging, and lamp numbers. All three identify the person.¹¹

We were ready to enter the mine. When asked, I indicated that my preference was to view the room-and-pillar operation, which is basically the way that the double- or triple-entry system is developed. Both the continuous miner and the roof bolter are used in this development phase, which makes it similar to the Westray process. Access to all JWR mines is by shaft, and transportation underground is by diesel-powered rail cars. The diesel fuel is taken into the mine in 500-gallon (1,900 L) tanks constructed for underground use, and is then transferred to smaller containers that appear much heavier than above-ground storage containers. The tanks are placed in the roadways several hundred feet from the working face of the mine. I saw no evidence of 45-gallon drums. All material is transported into the mine on the shaft elevator and distributed first by rail and then by diesel-powered rubber-tired and flameproof Scooptrams, which take supplies to the working face as required.

As we travelled into the mine, I was impressed by the uniform white or light-grey colour around me. There was ample evidence of stonedust on the ribs, roof, and floor of the mine, and bulk dust carriers and stacks of stonedust bags were located at almost every cross-cut. There was also a pipeline that carried stonedust along the roadways. The Scooptrams were equipped with permanent dust hoppers for blowing dust onto the working face. During our drive to the mine face, I noticed that the mine roof was quite smooth, with little sign of overbreaks. The ribs showed signs of shedding, presumably from stresses in the coal; for safety reasons, I was directed to walk in the centre of the roadway. I also noted fairly heavy bubbling on the wet portions of the roadway and ribs, and was informed that it was methane coming out of the coal. JWR operates in a known gassy coal area, the Black Warrior Basin. I was later told by Dixon that JWR's underground employees are indoctrinated in the dangers of methane at the mine, not only as a fire and an explosion source but also as an oxygen replacement. As in all coal mines, ventilation is the first defence against methane dangers.

When we arrived at the working face, a Joy continuous miner was in operation cutting out the roadway. It appeared to be identical to the machines used at Westray and was controlled by remote operation. The operator stood, with his controls, towards the rear of the continuous miner. As the continuous miner sumped into the face, a shuttle car was loaded from the continuous miner conveyor. This operation took about 45 seconds, and then the shuttle car travelled to the feeder-breaker, where the coal was loaded onto a conveyor for transport to the surface. The continuous miner operates with two shuttle cars, and little time is lost

¹¹ Westray did not have *any* tracking system.

between loads. Brattice curtains, rather than auxiliary fans and tubing, are used to direct the ventilating air onto the face. The brattice is placed about 4 feet (1.2 m) from one rib, and by using a cantilevered roof hanger (much the same as a drapery track), it can be placed within 5 feet (1.5 m) of the face. The air is drawn across the face, picking up methane and dust, and then it passes down the 4-foot passage to the next cross-cut. The whole arrangement impressed me as a skilful use of brattice in an exhaust ventilation system. I noticed that the air travelled at such velocity that the breeze was palpable. Coates said that a deflector brattice cloth or other similar device removed any accumulating methane from roof cavities. In this mine, they worked two seams, with about 24 inches (60 cm) of sandstone between. They mined both seams and the sandstone in order to ensure a good sandstone roof for bolting.

From the continuous miner working face, we moved through the cross-cut to another roadway, which was being bolted. The equipment appeared much like that used at Westray – double bolters with protective canopy and automatic temporary roof support. The bolting was done with 4-foot mechanical bolts for the roof and 7-foot bolts for the ribs – driven at 4-foot centres. The rib bolts are driven at an angle into the rib and upward to the roof. From the bolter, we went to the feeder-breaker, where coal from the shuttle car is dumped. The feeder-breaker transports the coal onto the conveyor and, while doing so, breaks the coal into smaller pieces. This is the only place where I noticed an accumulation of coal dust and pieces, all of which was very wet. I was surprised at the rapid speed with which the conveyor carries the coal. From the feeder-breaker, we moved through a cross-cut, across a roadway, and through a personnel door to where a methane-drilling operation was being carried out.

JWR and the local natural gas utility formed Black Warrior Methane Corp. (BWMC) as a joint venture to recover the vast quantities of methane and introduce it into the surface natural gas distribution system in Alabama. BWMC uses three methods of methane extraction: vertical drilling for pre-mining degasification, horizontal drilling into the longwall panel during mining, and vertical drilling into the gob after mining. At this time, I observed the horizontal drilling operation. Holes are drilled into the coal panel to a distance of about 800 feet (250 m). A plastic pipe with slit holes is inserted into the hole to keep it open. The pipe is then hooked up to an underground gathering system and the gas is drawn to the surface. I placed my hand over the end of the pipe and I could feel the pressure of the methane being liberated from the coal. Coates told me that this methane averaged about 98 per cent purity. At the JWR mining complex at Brookwood, BWMC exhausts about 60 million cubic feet (1.7 million m³) of methane into the atmosphere each day and captures a further 40 million cubic feet (1.1 million m³) commercially for surface processing and sale.

On the second day of my visit, Gerry Sanders, president of Black Warrior Methane Corp. provided me with a tour of the de-methanization project. It appears that BWMC is on the leading edge of extraction

technology, as our brief example will illustrate. In the pre-mining phase, the company drills into the seam (or seams) and then injects nitrogen foam into the borehole under great pressure. This process fractures the surrounding coal seams and permits greater release of methane. The fractures are pumped with a very fine sand, which keeps the fractures open and permits a continuous flow of gas. Without the fracturing process, the returns would not be commercially significant. The company will commence gas extraction five to seven years in advance of mining, so that a large measure of the resident methane will have been extracted once mining begins. Methane extraction from the gob usually lasts about two years, the first-year return being significant, followed by a gradual decline in production until the return becomes commercially unsustainable. The program is so effective that BWMC is marketing its technology on a consultative basis to other mining operations. Dixon told me that without the benefits of degasification, the coal mining operation might not be financially viable, since ventilation would be prohibitively expensive.

During my visit to the JWR complex, I asked a series of pointed questions that I had taken with me after consultation with Inquiry counsel and research staff. As a result of these discussions, I can make the following observations about how mining is conducted at the JWR complex:

- Methane drainage from the gob after depillaring in a room-and-pillar operation can be effectively done.
- In the mining cycle, the rock, coal particles, coal dust, and other materials are pushed into the face after mining and roof bolting, and the continuous miner will load this material with the coal to be taken out. The area is then thoroughly stonedusted before the continuous miner moves back in for the next cut.
- Materials are brought to the working face of the mine in rubber-tired flameproof diesel Scooptrams after being off-loaded from the track vehicles. The Scooptrams are equipped with nitrogen starters.
- Stonedusting is an ongoing process at these mines. This impression is based on the layer of stonedust on the walls and ribs as well as the amount immediately available for distribution.¹²

Mine Safety and Health Administration

I made three visits to the Mine Safety and Health Administration (MSHA) facilities of the U.S. Department of Labor, including a two-day introduction to the National Mine Health and Safety Academy at Beckley, West Virginia. I also had innumerable phone conferences with many of the MSHA staff I met during those visits. Throughout the Inquiry, MSHA personnel were unfailingly helpful. In fact, they were so enthusiastic in the

¹² The overall impression from these and other observations at the JWR complex is that an effective safety administration is in place. Incidentally, no one I spoke to had any idea what was meant by the internal responsibility system. It was not a familiar term.

offers of assistance that I came away in an extreme condition of information overload.

During my first visit to the MSHA head offices at Arlington, Virginia, I met with the assistant secretary of labor for mine safety and health, Davitt McAteer, and his assistant Ed Hugler. McAteer assured me of the cooperation of his administration, and seemed to be sincerely dedicated to the improvement of mine safety. I received a legislative overview of the coal mining regulations in the United States from Madison McCulloch, deputy administrator for coal mine safety and health. At the time of my visit, there were about 55,000 underground miners in the United States, down from a high of half a million. Mechanization and decreased demand for coal were cited as the principal reasons for this decline. I had meetings with Glenn Tinney and Lee Smith, both mine safety and health specialists, Jim Oakes, a supervisory specialist, and Leighton Farley of special investigations. In the course of my meetings, I received a substantial amount of material detailing the work of MSHA and outlining many of its programs and processes.¹³

MSHA administers mine regulations for both underground and surface mining in the United States. Many states have relinquished their regulatory control over the mining industry and have voluntarily given it to MSHA. Several states maintain a skeletal regulatory presence, while others have comprehensive regulatory regimes that work in tandem with the federal system. States such as Kentucky, Virginia, and West Virginia – all high-volume coal mining states – have full systems. There appears to be a conscious effort to cooperate at all levels so as to avoid duplicating services and regulations. McCulloch told me that the death toll from underground mining accidents decreased steadily as the regulations were tightened. The major industry complaint is that operators think the strict regulations lessen their competitive edge in the world coal market.

Following the two-day visit to Arlington, I proceeded on to Beckley for two days of familiarization with the operations of the academy. This school, under the direction of superintendent Tom Kessler, is devoted largely to mine safety, as well as being a centre for inspector training. The academy also provides courses for underground coal miners. Several miners and mine union officials from Nova Scotia have attended the various mine-safety refresher courses conducted there. It is a self-contained complex with its own dormitories and dining facilities, so participants do not have to go off campus during their stay.

I spent the first morning with Jim Rutherford, the chief of engineering services from a nearby MSHA district office and an expert in mine safety regulations. At various times, he has been seconded to the governments of Russia and China to study mine operations and to draft safety regulations. We had a wide-ranging discussion on the mine regulations, safety practices, and accident investigations that constitute a large part of his responsibilities. We discussed room-and-pillar mining operations and

¹³ See the bibliography in Reference.

several aspects of mine ventilation. Rutherford was generally opposed to the use of booster fans, since he feels they encourage the installation of an inadequate main fan system. Booster fans may be acceptable in the United Kingdom and other European countries where the mines have a long history and have developed far beyond the initial plans. The same considerations do not exist in North America, where mines can be adequately planned at the beginning.

After a meeting with Kessler, I spent the afternoon with two representatives from the West Virginia mines inspection office (William Willis and Tyrone Coleman) and a United Mine Workers of America (UMWA) safety representative (Rick Glover of District 17 UMWA). The entire time was taken up with discussions on the West Virginian safety regulations and the state rescue program. Willis is in charge of rescue coordination. Because of the large number of mines and miners in West Virginia, the state has a well-planned rescue program, involving teams from each of the mines, central mine accident equipment depots, central rescue control, and coordinated accident response. Accident response priorities are based on distance from the accident scene – the closer the rescue team to the accident, the higher the response priority. Coleman observed that most improvements to mine safety regulations are “disaster motivated,” but the state is making a conscious effort to review safety concerns and regulations in anticipation of accidents. One of the safety committees of which Glover is a member has this responsibility. The committee meets once a month and reviews all accident reports from mines throughout the state. The composition of the committee is interesting: two representatives from the UMWA, one union member from a union not affiliated with coal mining, two representatives from the coal mine operators, and one person not associated with the industry. The chairman of the committee is independent of both the union and the mine operator.

I began the following day with a classroom lecture by Dave Friley, an instructor in mine safety. He reviewed all the mine-rescue apparatus, including self-contained breathing devices such as the Oxy 60, and demonstrated the various types and makes of mine-rescue apparatus. He included the Draeger oxygen system in his review. Friley said that all this rescue gear was based on underwater technology. Next, he demonstrated the various types of air-testing apparatus, of which three main types are commonly used underground: the methanometer, the methanometer plus oxygen, and the methanometer plus oxygen and carbon monoxide. The most common device used underground is the methane/oxygen tester; rescue crews would be equipped with the methane/oxygen/carbon monoxide tester. Each device is tested for accuracy before it enters the mine by exposing it to known quantities of the relevant gases.

I was then given a tour by Dennis Hartsog of the firefighting training centre at the academy. For training purposes, propane is used to simulate methane. Following this visit, I went with Cliff Lindsay, a mining engineer, for a tour of the Mine Simulation Laboratory. This above-

ground facility covers approximately one acre under one roof and contains a simulation of a room-and-pillar mine complete with mock-ups of various items of mining equipment, such as bolters, continuous miners, feeder-breakers, and Scooptrams. It is capable of producing a non-toxic smoke to simulate a mine fire for rescue training. I understood that this laboratory is very much in demand for training mine-rescue teams.

During my second visit to the MSHA head offices in Arlington, I met with Cheryl McGill, a supervisory mine safety and health specialist. McGill worked as a coal miner in Kentucky and then went back to university, where she gained a BSc in mine management. She was employed in management for several years before joining MSHA as an inspector. She walked me through the entire routine of the MSHA inspector and provided me with a copy of the manual that serves as a guide to the inspector.

First, the mine inspector will thoroughly review the mine plans for the mine to be inspected and will then go to the mine – unannounced – and proceed with the inspection. As a rule, an inspector will do four inspections per quarter and, depending on the size of the mine, could take more than a month for one inspection. As an example, she said that the inspection at a mine complex like Jim Walter Resources in Brookwood could take the entire quarter to complete. The inspector is empowered to issue citations as violations are noted. The citations carry a fine. In issuing the citation, the inspector has some discretion with respect to the time allowed to remedy the default. This “abatement” time usually does not extend beyond one shift. If a problem of a specialized nature, such as ventilation, electricity, or ground control, is encountered, the inspector may call in the services of a specialist in that field to assist in the inspection and offer advice to the inspector and the operator. In addition, the inspector may order the shutdown of all or a portion of the mine if the violation constitutes a real safety hazard. In the event that a citation is contested by the mine operator, a hearing is held before an administrative judge of the federal Mine Safety and Health Review Commission, a specialized administrative tribunal.

Later I met with McGill, Bob Elam (deputy administrator for field operations, coal mine safety and health), and Madison McCulloch. We discussed the administration of MSHA and the general manner in which 30 CFR is enforced by the agency. We talked about mine accident investigations and the reporting of such investigations. Generally, a mine accident is investigated by a panel of MSHA specialists, who may enlist the assistance of other experts as the need arises.¹⁴

Generally speaking, I was impressed by the MSHA organization and the manner in which it promotes safety in mining. I have heard criticisms of the administration, but that is probably normal for an inspectorate that employs more than 1,000 mine inspectors to enforce a very detailed set of

¹⁴ Several MSHA reports of mine accident investigations are listed in the bibliography in Reference.

mining regulations. One criticism is that some operators allegedly have slush funds out of which they pay the inevitable minor fines that seem to accompany every inspection. Another comment is that, since the MSHA inspectors are not qualified professionals, they tend to use the "checklist" approach and cannot understand the big picture. In some states, the conflicting jurisdictions between the state authorities and MSHA cause confusion for the operators. Another criticism is that MSHA seems too receptive to complaints filed by mine union officials, even when it is obvious that the complaint is questionable and was probably prompted by an unrelated union/management squabble.

Canada Centre for Mineral and Energy Technology

The staff of the Canada Centre for Mineral and Energy Technology (CANMET) invited me to tour their facilities. These visits were arranged through the cooperation of Dr John Udd, director of the Mining Research Laboratories at Bells Corners, near Ottawa, and Dave Forrester, manager of the Cape Breton Coal Research Laboratory.

At the Sydney laboratory (the only CANMET laboratory devoted to coal), I had discussions with staff and viewed demonstrations of various aspects of coal mining. My tour guides for the various segments were Gary Bonnell, methane specialist, Dan Kennedy, research scientist (methane, coal dust, and stonedust), Peter Cain, structure and strata specialist, and George Klinowski, ventilation and mine environment specialist. During this tour, I was exposed to a dramatic demonstration of the relationship between methane and coal dust, and witnessed how the dust increases the intensity of an underground explosion. I was so impressed that I prevailed on Forrester to arrange for a repeat demonstration during the Inquiry hearings at Stellarton.¹⁵

Staff at the coal laboratory test and develop coal mine materials. They test a variety of roof bolts, such as the bird's-nest cable bolt and the nut-nest cable bolt, along with various methods for measuring mine gases and smoke to detect those areas that might not be safe during mine evacuation. I was given a demonstration of the use of baffles, which deflect ventilating air into roof cavities to remove accumulated methane. I also saw examples of the venturi method of dispersing gases. The laboratory produces the "tell-tale" extensometer that I later saw installed in the Phalen mine for measuring roof movement. Forrester told me that the original of these devices was imported from the United Kingdom at considerable expense. The Sydney coal laboratory improved on the design and was able to produce a better product for considerably less cost. The simplicity of the extensometer makes it a practical and trouble-free device.

At Bells Corners, I was given a tour of the facility by Dr Udd and George Lobay, a certification officer. The Inquiry's equipment and materials consultant, John Bossert, was a senior engineer at this laboratory

¹⁵ This demonstration is described in Chapter 9, Dust.

before he became a consultant. One of the major functions of this facility, insofar as coal mining is concerned, is the testing and certification of explosion-proof electrical and diesel equipment. While at the facility, I was given a demonstration of how electrical equipment is tested for explosion-proof certification.

Canadian Regulatory Agencies and Mining Associations

During the course of the Inquiry, I had the opportunity to meet with officials and representatives of several organizations associated with coal mining. The organizations included the Mine Safety and Health Branch of the BC Ministry of Energy, Mines, and Petroleum Resources; the Mining Association of British Columbia; the Coal Mining Association of Canada; the Energy Resources Conservation Board, Coal Division; the Ontario Mining Association; and the Mining Health and Safety Division of the Occupational Health and Safety Branch, Ontario Department of Labour. As with other mining interests with which I met, I was always gratified by the cooperation offered. I was also impressed with how closely knit the mining industry is.

At the BC Mine Health and Safety Branch, I met with Tom Carter, mine safety manager, and Bob Bone, district manager and occupational health and safety engineer (the only inspector with an underground coal mine – Quinsam Coal Corporation – in his jurisdiction). We had a wide-ranging discussion of many topics relating to safety, inspection, and regulation of underground coal mining. Carter expressed concern over the typical human attitude, “out of sight, out of mind.” When the memory of an event such as Westray is fresh, the interest in safety improvements is keen. As time passes, however, these imperatives lose some of their immediacy. We must find a way to offset this tendency. I came away from this meeting with three key reminders. First, the coal mine inspectorate must engage qualified coal mining engineers, who can deal with mine management on an equal level and not be sidetracked or overpowered. Second, the mine safety regulations must be enforced; there is no room for non-compliance. Management arguments to the effect that “you are going to put people out of work just because of that” should not be given any credence. To provide the necessary incentive for compliance, the regulator should immediately shut down the operation until the defect is remedied. Third, complacency is one of the main problems in safety regulation. As long as there are no serious accidents or injuries, workers tend to ignore basic safety requirements.¹⁶

According to Carter, the BC regulations permit the regulator to retain consultants, such as strata control engineers or ventilation engineers to review company plans, at the expense of the mining company. This may

¹⁶ For an insightful and novel approach to the way people relate to safety matters – or their corollary, risk – see Gerald J.S. Wilde, *Target Risk* (Toronto: PDE Publications, and Castor & Columba, 1994).

be a useful provision, especially in a small province like Nova Scotia, where there may not be sufficient activity to warrant full-time expert consulting staff.¹⁷

The Mining Association of British Columbia is the mine operators' organization. Its main focus is surface mining, since there is only one underground coal mine in the province, the Quinsam mine at Campbell River on Vancouver Island. I met with Hall Chamberlin, coordinator of applied research for the association. At a later date, I had the opportunity to meet with Gary Livingstone, executive director. Chamberlin, a mining engineer, has a long association with the underground coal mining industry; he also worked with Devco for a considerable period on a consulting basis. At our meeting, he made several useful observations. He believes that mine safety training and mine operations training are generally synonymous – a miner is trained to operate *safely* in the mine environment. He feels that hard-rock miners lack an appreciation of the dangers inherent in coal mining and should have complete training in underground coal mining before being permitted to work in a coal mine.¹⁸ He agrees with Carter that the mine inspector must be a mining engineer, and for the same reasons.

Livingstone and I discussed the corporate aspects of the mining association, as well as the interest that the mining industry has generally in the Westray proceedings. Mining personnel are most interested in the final Report and in any findings and recommendations that may be applicable generally.

The Coal Mining Association of Canada has its headquarters in Calgary, Alberta. The association is largely devoted to surface mining, since most of its members are engaged in the surface mining of coal. At the time of my visit, there were only three operating underground coal mines in Canada: Devco, Quinsam, and Grande Cache. I met with Don Downing, who had recently been appointed executive director of the association, along with W.S. Hunter, a mining engineer. At the time of our meeting, Curragh Resources Inc. had already gone into receivership, and I expressed concern that the coal mine operators would not have any input at the Inquiry. Later, I invited the association to make whatever submissions it wished on behalf of operators generally. That invitation was declined.

The regulation of all energy resources in the province of Alberta is under the aegis of the Energy Resources Conservation Board. Understandably, its principal area of interest is oil and oil sands. The board does have a coal division, since there are several open-pit mines in Alberta as well as the combined open-pit and underground operation at Grande Cache. I met with Bob Paterson, director of the coal division, and Barry Munro, deputy director of the occupational health and safety division. Our

¹⁷ **Comment** The spectre of this added expense may prompt the operator to provide more comprehensive and thoughtful planning in the first instance.

¹⁸ This was one point that seemed to have been ignored or overlooked in practice at Westray.

discussions ranged over the general area of mine safety regulations and their enforcement in Alberta.

One of the first mining-related visits that I made was to Toronto to meet with officials of the Ontario Mining Association and the Ontario Department of Labour, Occupational Health and Safety Branch. I went in the company of Roy MacLean, who helped me to understand some of the more complex issues discussed.

Bruce Campbell (now retired) was the manager, technical services, of the Ontario Mining Association. He was succeeded by Michael Green, who assumed the post of executive director. Campbell is a knowledgeable mining expert whose forte is mine safety. Before our meeting in the spring, he had presented an excellent paper on mine safety to the 1993 Minesafe International Conference in Australia. He provided me with copies of all the papers given at the conference that related to mine safety or underground coal mining. Although Ontario has no underground coal mining, this general exposure to safety and training techniques was most informative.

Our meeting at the Ontario Ministry of Labour was arranged through the cooperation of Mary Tate, director of occupational health and safety. She introduced us to Ian Plummer, mining engineer and provincial coordinator of mining, Occupational Health and Safety Branch, whose principal office is in Sudbury. Plummer has been of great assistance to the Inquiry, and I have had occasion to call on him several times for information and advice. He is an energetic exponent of the internal responsibility system (IRS). After the commentary on IRS during the hearings, I was somewhat sceptical as to its efficacy. I recall making a comment at one time that it appeared to be a mechanism whereby the inspectorate could avoid performing its role. I am grateful to Plummer for instructing me on the proper application of IRS and for his assistance in formulating that portion of this Report.¹⁹

Conclusion

I have had briefer but productive encounters with many other mining people, in Canada,²⁰ the United States, South Africa, and the United Kingdom. I acknowledge their contributions with sincere thanks and with gratitude for their support and cooperation.

My visits to the various mining operations and my meeting with the many people intimately involved with underground mine safety were extremely beneficial to me in my role as a Commissioner of Inquiry. Through these encounters, I learned to recognize the elements of safe mining practices, effective mine management, and competent regulation. I was able to develop a standard by which to gauge the performance of Westray and the regulatory agencies involved. I gained much of the

¹⁹ See Chapter 12, Department of Labour, for a full discussion of the IRS.

²⁰ Including the Coal Mines Inspection Branch of Labour Canada.

knowledge necessary to make recommendations for safer mining practices in Nova Scotia.

Legal Environment

The Inquiry has had a turbulent history since its inception in May 1992. Delays, occasioned principally by constitutional challenges, moved the commencement of the public hearings from the original date of 19 October 1992 to 6 November 1995.

Formative Period

On 15 May 1992, by Order in Council 92-504,²¹ a Commission of Inquiry was established pursuant to the *Public Inquiries Act* of Nova Scotia²² to inquire into the circumstances of the explosion and to report and make recommendations. I was appointed as sole commissioner of the Inquiry just six days after the explosion that took the lives of the 26 miners. In hindsight, one may speculate whether the Inquiry was established prematurely. The search for the victims had just been called off, and there was much confusion and disarray at the mine site, as well as in the various agencies involved. Government departments and the Royal Canadian Mounted Police (RCMP) were preoccupied with their own investigations, at the site and elsewhere. Now, another agency, the Inquiry, was being introduced. I will have more to say on this question later in the chapter.

The initial organizational problems were daunting, particularly in a province where public inquiries are not common and useful precedents are limited. For the first several days, Gail Salsbury, executive assistant to Chief Justice Lorne Clarke, gave considerable administrative help and dealt with the media. I was able to assemble a competent staff quite quickly, thanks in part to the cooperation of Darrel Pink, executive director of the Nova Scotia Barrister's Society. Pink consented to the secondment of Kerry Oliver from the society to serve as executive secretary (chief administrator) to the Inquiry. Oliver's experience and administrative ability were invaluable during the formative stages, but she returned to the society after the Inquiry became mired in legal and constitutional wrangles. On 20 May, I had discussions with John Merrick, a senior member of the law firm Flinn Merrick, who agreed to join the Inquiry as counsel. On 22 May, I secured the services of Brenda McGilvray, a records librarian, who agreed to manage the documentation for the Inquiry. During these formative days I also availed myself of several publications relating to public inquiries in Canada²³ and had

²¹ See the Order in Council, reproduced as Appendix A.

²² RSNS 1989, c. 372.

²³ A. Paul Pross, Innis Christie, and John A. Yogis, *Commission of Inquiry* (Agincourt, Ont. Carswell Publications, 1990); Ontario Law Reform Commission (OLRC), *Report on Public Inquiries* (Toronto, 1992); Alberta Law Reform Institute, *Public Inquiries* (Edmonton, 1991); Russel J. Anthony and Alastair R. Lubas, *A Handbook on the Conduct of Public Inquiries in Canada* (Toronto: Butterworth, 1985).

discussions with several of my colleagues, in Nova Scotia and in Ontario, about the organization, conduct, and structure of public inquiries.²⁴

Allegations of Document Shredding

On 20 May 1992, allegations were made in the provincial legislature that documents had been shredded at the Westray offices during the 16 May weekend.²⁵ The attorney general immediately moved to secure the site and ordered the RCMP to take charge. I discussed the matter with Merrick, who reported to me on 22 May. Merrick received assurances from the company counsel that no documents of relevance to the Inquiry or to any other investigation had been destroyed. This assurance was subsequently confirmed by the RCMP investigation, conducted by Corporal C.A. Fidler. On Sunday, 24 May, I attended at the Westray site and spoke to Constable Doucet of the RCMP, who assured me that the area was secured in compliance with the order of the attorney general. On 25 May, the Inquiry ordered the company and various agencies of the provincial and federal governments to deliver all Westray documentation to the Inquiry. That same day, McGilvray began work on managing the Inquiry documents – a task that turned into a most formidable undertaking.

The RCMP investigation and report on the shredding allegations were apparently prompted by misinformation that formed the basis of comments in the legislature by then provincial NDP leader Alexa McDonough. According to the report, the allegations stemmed from comments made by John Kane of Truro about a conversation he had had with a Westray employee. Kane expressed concern that material relevant to this investigation may have been destroyed. When the Westray employee was interviewed, however, her version in no way corroborated Kane's comments. In addition, 23 persons, described in the RCMP report as "possibly knowing something about the allegations of shredding," were interviewed and their statements taken, but "not one person gave any evidence of any documents being shredded that could be construed as evidence being destroyed." In concluding the report, Fidler stated:

During the week of the rescue operations, 9–16 May inclusive, there were News Releases being drafted and re-drafted by four different individuals which compiled a stack of papers. Management were making notes on notepads for debriefings of the Draegermen. These notes were also shredded after the Draegermen's reports were drafted. Furthermore, death announcements were being drafted ahead of time. Seeing these documents were sensitive, they were put in a box marked "for shredding." These were the only documents known to be shredded and were shredded so they wouldn't get disseminated around. None of these documents pertained to

²⁴ Justices Samuel G.M. Grange (Royal Commission of Inquiry into Certain Deaths at the Hospital for Sick Children and Related Matters), Lloyd W. Houlden (Patti Starr Inquiry), and Horace Krever (Commission of Inquiry on the Blood System in Canada) of the Ontario Court of Appeal; and Justice Gordon L.S. Hart (Royal Commission, Inquiry, and Formal Investigation into the Circumstances Surrounding the Grounding of Steam Tanker Arrow).

²⁵ Alexa McDonough, Nova Scotia, Legislative Assembly, *Debates*, 20 May 1992, p. 9317.

records of the Mine. . . . [I]f any documents were destroyed, we were unable to uncover any evidence to support the allegations that have been made.²⁶

During the course of the several document reviews undertaken by Inquiry staff, there was nothing to indicate that any relevant documents had been destroyed.

The deluge of paper that arrived in direct response to the 25 May order resulted in the Inquiry taking possession of more than a quarter of a million documents. This volume raised an immediate need for secure storage and proper document indexing and review in preparation for the hearings. Arrangements were made for 24-hour supervision of the documents until they were secured in the Inquiry premises.²⁷ A staff of three law clerks under McGilvray's direction spent the summer and early fall cataloguing the documents, generating an index of some 1,600 pages. The cataloguing and indexing of documents has been a continuing effort and has been both time consuming and tedious.²⁸

Gearing Up for the Hearings

During this preparatory stage, Inquiry counsel and mining consultants interviewed some 120 miners and draegermen (mine-rescue personnel). Concurrently, other legal counsel and coal mining experts were reviewing the documents to determine their relevance.

At this point, I would like to digress briefly to pay individual tribute to Inquiry counsel and staff for the professional, proficient, and dedicated manner in which they acquitted themselves during all phases of the Inquiry hearings, including the report-writing phase. John Merrick, QC, as Inquiry counsel and Jocelyn Campbell as associate counsel demonstrated consummate skill in preparing for the hearings and in conducting the examination of the many witnesses. Nothing was left to chance, and the hearings were managed in an orderly and logical manner. They both acquired a considerable depth of understanding of a very complex subject, and this knowledge, in turn, helped to get all relevant evidence on the record.

I have been consistently impressed by the cool efficiency and professionalism that Inquiry chief administrator Deirdre Williams-Cooper brought to the Inquiry. She managed the logistical and administrative matters effectively, always keeping a sharp eye on the costs. She worked effectively with the editors, graphic designers, and printers in producing the Report. In an Inquiry that relied heavily on computers to manage document inventory, transcripts, and general administration, her skill with

²⁶ Undated five-page RCMP report, prepared by Corporal C.A. Fidler, pp. 4–5.

²⁷ The RCMP was already maintaining the Westray premises and contents under 24-hour security.

²⁸ On 11 September 1992, members of the RCMP, aided by a search warrant, seized a large number of documents from the Inquiry office. This visit was not a surprise; indeed, we were given ample notice and were able to make mutually convenient arrangements. After getting advice from legal counsel about the validity of the search warrants, we released the documents. By prior arrangement, the Inquiry maintained all the documents intact, either by providing copies to the RCMP or by retaining copies at the Inquiry.

computers was a major asset. I am pleased that Bill MacDonald, former deputy minister of justice and now provincial court judge, consented to her secondment to the Inquiry.

Cynthia Yazbek, who left the Inquiry at the end of May 1997 to pursue her legal career, served as director of research for two years. Her writing skills, research ability, and dedication were invaluable to the Inquiry. She developed a depth of understanding of the objects of the Inquiry, and an ability to relate the evidence to the terms of reference.

Ena MacDonald, now a practising lawyer in Halifax, assumed the role of document coordinator at a late stage in the Inquiry and rose to the challenge in an exemplary fashion. With the support and assistance of Cynthia Isenor, she managed the massive document inventory with a degree of efficiency that made it appear easy. I was considerably impressed by the manner in which these document managers seemed to anticipate the requirements of counsel and helped the hearings to proceed in a seamless fashion.

Lana Rafuse managed the Inquiry databases at the Halifax office and acted, during the hearings, as a backup for the Inquiry staff at Stellarton. She made a significant contribution to the Report through her depth of knowledge of the databases.

Wendy Smith, as the Inquiry word-processing expert, is largely responsible for the illustration and the in-house typesetting and page layout of the Report. Her proficiency and resourcefulness were of great assistance in this task.

I have singled out those Inquiry personnel who were at the Inquiry during the hearings and the writing of the Report. This selection is not meant to denigrate the contribution of those who served on the Inquiry since its inception. Because of the lengthy delays occasioned by the various court challenges, there was a substantial turnover of Inquiry staff. I have nothing but praise for all those who devoted their talents to the work of the Inquiry – and I thank each of them.

On 29 and 30 June 1992, a status hearing was held at the Nova Scotia Community College in Stellarton. At that hearing, applications were received from interested parties wishing to have standing (status) before the Inquiry. Applications were also entertained from parties to whom standing was granted but who, for reasons of need, required public funding.²⁹

The summer and early fall of 1992 were largely given over to planning and preparation for public hearings scheduled to commence in Stellarton on 19 October 1992. Suitable facilities for the hearings were secured at the Nova Scotia Museum of Industry. During the summer months there was much activity involving Curragh Resources Inc., the RCMP, and the Department of Labour over efforts to re-enter the mine for further investigations. Particularly contentious was the company's proposal that certain sections of the mine be flooded to restore stability. Mining experts

²⁹ See Appendix D for a list of the parties with status.

engaged by the Inquiry were consulted about the technical and safety aspects of re-entry into the mine. After deliberation, and on the recommendations of the Inquiry team of mining experts, I concluded that any information, evidence, or other advantage that might be gained by re-entering the mine were far outweighed by the serious risks attendant on such a venture.

Constitutional Challenge

On 18 September 1992, the Inquiry received notice that several members of Curragh management were about to mount a challenge to the constitutionality of the Inquiry and to seek an order staying its proceedings. Thus began a lengthy legal process, which lasted for more than two and one-half years. Because the Inquiry hearings were scheduled to commence on 19 October 1992, counsel for the various management people made application to the Nova Scotia Supreme Court for an order delaying the public hearings until the constitutional issues were resolved. The application was heard by Chief Justice Constance Glube and was granted on 30 September 1992.

To muddy the waters further, provincial prosecutors appeared in court in New Glasgow on 5 October 1992 and laid some 52 charges under the *Coal Mines Regulation Act*³⁰ and the *Occupational Health and Safety Act*³¹ against Curragh Resources Inc. and various members of its management team. Parenthetically, 34 of these charges were stayed by the public prosecutor on 10 December 1992, and the remaining 18 charges were dispatched in similar fashion on 3 March 1993, presumably to clear the way for the laying of criminal charges against Gerald Phillips, Roger Parry, and Curragh.

The constitutional challenge and stay application was heard on 2, 3, and 4 November 1992 before Chief Justice Glube. On 13 November 1992, the chief justice filed a decision in which she found that the Terms of Reference were *ultra vires*, or outside the constitutional powers of, the province of Nova Scotia and, consequently, that the Inquiry was unconstitutional. In so finding, the chief justice said:

I find that the present terms of reference have as their dominant purpose and effect, the assignment of, at the least, "suspected" criminal liability, in addition to quasi-criminal and civil liability to named or identifiable persons, therefore, although there may be some provincial overlap, in pith and substance they encroach on the federal criminal law and procedure powers pursuant to s. 91(27) of the *Constitution Act*, 1867. I find the Order in Council and s. 67(e) of the *Coal Mines Regulation Act* are *ultra vires* the Province of Nova Scotia.³²

The decision of the chief justice was immediately appealed by the United Steelworkers of America, the union representing the surviving

³⁰ RSNS 1989, c. 73.

³¹ RSNS 1989, c. 320.

³² *Phillips et al. v. Richard, J.* (1992) 116 NSR (2nd) at 57.

miners of Westray. This appeal was joined by the Inquiry and by the Westray Families' Group. The Nova Scotia Court of Appeal heard the appeal on 11 December 1992. Chief Justice Clarke, recognizing the public urgency of the matter, secured the agreement of the parties to expedite the appeal, which was heard before the appeal period had expired.

In the meantime, the Westray Families' Group had started several initiatives quite independent of the Inquiry. In response to an application by Curragh, the group applied for, and was granted, an interim injunction prohibiting the flooding of the mine, though it abandoned this application before the date set for the hearing on 22 December 1992. The Westray Families' Group also pressed the Department of Labour to launch an underground search for evidence. On 6 January 1993, the Department of Labour gave final approval to Curragh for the flooding of the southwest section of the mine.

On 19 January 1993, the Court of Appeal filed its decision, in which the decision of the chief justice was overturned and the constitutional efficacy of the Inquiry was restored. Justice Doane Hallett, writing for the court, said:

I am of the opinion that the learned Chief Justice erred in declaring the Order in Council *ultra vires* the Province. It is clear that she equated the purpose and effects of the Terms of Reference as being similar to the purpose and effect of the terms of reference under consideration in *Starr et al. v. Houlden* (1990), 68 D.L.R. (4th) 641.³³

He went on to say:

The Order in Council appointing Justice Richard to inquire into the Westray Mine disaster contains a very different mandate than that given to Mr. Justice Houlden who was directed to inquire into whether Ms. Starr and others, in effect, committed specific criminal offences. The Order in Council empowering Mr. Justice Richard does not direct him to inquire into the conduct of the respondents and whether they were criminally negligent. He is directed to conduct a wide-ranging inquiry which includes investigation, of the role of, not only the managers and supervisory personnel at the mine, but inspectors of the Department of Labour charged with the responsibility of monitoring the operation of the mine. He is directed to inquire into the geological structure in the area where the mine is located, and whether neglect caused or contributed to the explosion. By implication he is to inquire into and report on the adequacy of the existing legislation regulating coal mines. He is empowered to inquire into "all other matters relating to the establishment and operation of the mine"; to report and make recommendations.³⁴

The Court of Appeal did, however, order that the Inquiry not proceed with public hearings until

- (a) the charges against four of the respondents under the *Occupational Health and Safety Act* are disposed of by a trial court or stayed; and
- (b) criminal charges (if any are laid against any of the respondents arising

³³ *Phillips et al. v. Richard, J.* 117 NSR (2nd) at 223.

³⁴ At 224–25.

out of the explosion of May 9, 1992) are disposed of by a trial court or a decision is made not to lay any criminal charges against any of the respondents.³⁵

In ordering a temporary stay, the court said:

In reaching my opinion that a temporary stay of the public hearings should be granted I have attempted to balance the interests of the state in determining what caused the explosion and how similar tragedies might be avoided in the future against the four respondents' *Charter* rights to silence and to fair trials. As the respondents' liberty is at risk the interests of those individuals must prevail over those of the state. This can be accommodated by the postponement of the Inquiry.³⁶

In the course of his decision, Justice Hallett reviewed the history and the scope of public inquiries in Canada as well as in England. He noted that the practice in England is that charges will not be laid based on evidence given at a public inquiry.³⁷ He further reviewed what appears to be the opposite practice in Canada, as well as the study that had been completed by the Ontario Law Reform Commission.³⁸ He concluded:

There is a great deal of merit in a regime which requires a government to either lay charges or conduct a public inquiry but not to do both except with the safeguards proposed by the Ontario Law Reform Commission.³⁹

The Ontario Law Reform Commission had recommended that a person not be required to testify or produce evidence before a public inquiry in relation to any matter in which information has been laid against that person and has not been finally disposed of. The commission also had recommended the prohibition on the use of evidence taken at a public inquiry in any subsequent proceeding.⁴⁰ The Supreme Court of Canada, in the trilogy of cases released in the spring of 1995,⁴¹ addressed these concerns and established guidelines for the protection of *Charter* rights in situations such as this one.

Following the filing of the Appeal Court decision, a meeting was called of Inquiry counsel and all counsel for the parties to discuss the implications of the decision as it pertained to the ongoing work of the Inquiry. In order to reduce costs, I directed funded counsel to refrain from doing any further work unless specifically requested by me or Inquiry counsel. Assurances were given that ample lead time would be allowed once the way was cleared for the Inquiry to proceed with public hearings. Matters relating to confidentiality and security of documents and the preparation of exhibit books were also discussed.

³⁵ At 260.

³⁶ At 258.

³⁷ At 247.

³⁸ Ontario Law Reform Commission, *Report on Public Inquiries* (Toronto: Queen's Printer, 1992), 247–48.

³⁹ OLRC, *Report*, 250.

⁴⁰ OLRC, *Report*, 214.

⁴¹ *BC Securities Commission v. Branch* [1995] 2 SCR 3; *Phillips v. Nova Scotia Commission of Inquiry into Westray Mine Tragedy* [1995] 2 SCR 97; *R. v. S.* [1995] 1 SCR 451.

At this meeting, counsel for the union representing miners urged the Inquiry to proceed with other matters relevant to the Terms of Reference, including a review of legislation. Counsel followed up on this suggestion by writing to the Inquiry, giving cogent reasons why such a direction of effort would be both timely and productive. I directed Inquiry counsel and associate counsel to review this request in the context of the Terms of Reference and the order granted by the Appeal Court.

Legislative Review

We decided that continuing research and a legislative review would not contravene the strictures placed on the Inquiry by the Court of Appeal. Research involved the study of underground coal mining and a review of material on the various technologies used, such as longwall and room-and-pillar mining. The results of some of this research is interspersed throughout this Report, especially in the chapters on ventilation and ground control, and in Chapter 14, The Legislation. The legislative review involved research into the legislative regimes of eight other jurisdictions: Alberta, British Columbia, Ontario, Canada, the United States, Australia, South Africa, and the United Kingdom.

Generally, there are two main approaches to the regulation of underground coal mines, one exemplified by the legislative regime in the United Kingdom, the other by the regime in the United States. The UK approach (similar to that in British Columbia, Alberta, and Ontario) seems to favour the use of professional mining engineers as inspectors who exercise some degree of discretion within a rather general legislative framework.⁴² In the United States, the mine inspectorate comprises technicians trained at the National Mine Health and Safety Academy in Beckley, West Virginia, who carry out their inspection duties within a very detailed and specific regulatory framework, the *Code of Federal Regulations*. Nova Scotia adopted neither approach, but had a very general (if not archaic) legislative regime administered by an untrained and largely incompetent inspectorate.⁴³

Since the UK system is dependent on highly qualified and professional inspectors, and since there seems to be a dearth of such professionals in Nova Scotia, this Report favours the approach of the United States – very detailed regulations, with trained technicians backed by professionals on a consultative basis where practical.

⁴² To qualify as a mine inspector in the United Kingdom, the applicant must have a professional designation as a mining engineer and must have served as an underground coal mine manager.

⁴³ Devco, being a federal undertaking was regulated under the *Coal Mines (CBDC) Occupational Safety and Health Regulations*. There is a federal mine inspectorate based in Sydney, NS.

Criminal Charges

Once John Pearson, director of public prosecutions, moved on 3 March 1993 to stay the 18 remaining provincial charges against Curragh Resources Inc. and some of its managers, the only remaining bar to the Inquiry proceeding with public hearings was the ongoing criminal investigation by the RCMP.

On 20 April 1993, in a somewhat unprecedented move, the RCMP held a press conference at the Plymouth fire hall. The RCMP announced that criminal charges had been laid against Gerald Phillips, Roger Parry, and Curragh Resources Inc. The charges included allegations of causing death by criminal negligence and manslaughter, pursuant to sections 220 and 222(5) of the *Criminal Code*, respectively.

Now, to move slightly out of sequence: The criminal charges were challenged by counsel for Curragh and the other accused. In mid-July 1993, Provincial Court Judge Patrick Curran quashed the indictments on the grounds that they were too general. He indicated that the charges, as laid, deprived the accused of the opportunity to prepare a proper answer and defence. Redrafted charges were laid several days later. These indictments were more particular in citing violations of provincial safety legislation, and they withstood a further challenge by the accused. Preliminary hearings were scheduled to begin in March 1994. Curragh did not appear at that arraignment, and the court deemed that the company had elected trial by judge and jury. A preliminary hearing, therefore, was to be held.

Supreme Court of Canada

The combined effect of the stay of the provincial charges and the laying of the criminal charges prompted the Inquiry to move to reassess its position vis-à-vis an appeal to the Supreme Court of Canada. Commission counsel met with counsel for the United Steelworkers. With the stay of the many and pervasive provincial charges, counsel felt that the first prohibition of the Appeal Court had been discharged and there remained only the criminal charges. Counsel were of the view that there were now sufficient areas in which the Inquiry could hear evidence without endangering the *Charter* rights of the accused. The Inquiry mandate, as set out in section (e) of the Terms of Reference, would be largely unimpaired by criminal proceedings, as would the section dealing with the “establishment” of the mine (section g). After much discussion with Inquiry counsel, we decided that an appeal to the Supreme Court of Canada would be warranted at this time. In further discussion, we decided that it would be more appropriate if the union filed original notice of an appeal and the Inquiry joined it. Counsel for the union were approached, and they agreed to take the initial procedural step of applying for an extension of the time to apply for leave to appeal.

Justice Beverly McLachlin heard the application on 18 June 1993 and extended the time for making application for leave. In so ordering, she

stressed the importance of the Inquiry and the sense of public urgency in having the matters resolved expeditiously. The judge also ordered that costs to counsel for the managers opposing the application be paid by the Inquiry on a solicitor-client basis.

In response to the order granting the extension of the time limit for filing the application for leave to appeal, the leave application was filed with the Supreme Court of Canada on 28 June 1993. The joint application for leave to cross-appeal was filed on behalf of Gerald Phillips, Roger Parry, Glyn Jones, Arnold Smith, Robert Parry, Brian Palmer, and Kevin Atherton on 14 September 1993. The cross-appeal was based on the findings of the Nova Scotia Court of Appeal that the Order in Council constituting the Inquiry was *intra vires*, or within the power of, the province of Nova Scotia and a proper exercise of the legislative powers of the province. In effect, the cross-appeal sought to restore the ruling of the chief justice that the Order in Council was *ultra vires* the province. The relevant parts of the application state:

2. (1) That the Nova Scotia Court of Appeal erred in law in determining that the Order in Council No. 92-504, dated the 15th day of May, 1992, appointing the Honourable Justice K. Peter Richard a Commissioner under the *Public Inquiries Act* and a Special Examiner under the *Coal Mines Regulation Act* is *intra vires* the Province of Nova Scotia.
- (2) That the Nova Scotia Court of Appeal erred in law in determining that s. 67(e) of the *Coal Mines Regulation Act*, is *intra vires* the Province of Nova Scotia.

On 9 December 1993, a panel of three justices of the Supreme Court of Canada granted leave to appeal and dismissed the cross-appeal. The dismissal of the cross-appeal affirmed the ruling of the Nova Scotia Court of Appeal that the Inquiry was constitutionally valid and that the Order in Council establishing the Westray Mine Public Inquiry was *intra vires* the province of Nova Scotia. The Supreme Court of Canada confirmed that the chief justice erred in holding that the Order in Council constituting the Inquiry exceeded the constitutional powers of the province.

In granting leave to appeal, the Supreme Court of Canada ordered that notice of the appeal be given to all the provincial attorneys general, since the matter was of national importance. In the result, the attorneys general of Manitoba, British Columbia, Saskatchewan, and Quebec filed interventions and took an active role in the appeal. The principal thrust of the several interventions was directed towards refuting the appellant union's argument that accused persons in criminal proceedings could not be compellable witnesses before a public inquiry. The memorandum of argument of the applicant stated in part:

Gerald Phillips and Roger Parry have been charged under the *Criminal Code* for actions related to the explosion at Westray. The Applicant accepts the principle expressed by this Honourable Court in *Batary v. Attorney General of Saskatchewan*, [1965] S.C.R. 465 and agrees they are not compellable witnesses before the Inquiry. As the Applicant submits in its

Application for Leave to Appeal, the Westray Mine Public Inquiry can proceed without violating the rights of these two accused persons.”⁴⁴

The hearing before the full bench of the Supreme Court of Canada was held on 31 May and 1 June 1994. At the Inquiry, we were optimistic that the Court would deal with the matter with alacrity, given the national importance of the issues, as alluded to by Justice McLachlin, and the fact that other jurisdictions were vitally interested in the outcome of this appeal. However, such was not to be.

Criminal Proceedings: Continued

In the meantime, the criminal proceedings against Phillips, Parry, and Curragh Resources Inc. were moving slowly towards trial. The crown preferred an indictment, thus obviating the need for a preliminary inquiry. In early 1994, the crown counsel assigned to prosecute the case requested reassignment. A new prosecution team under the direction of Herman Felderhof was put in place. There was delay and controversy involving the applications by Phillips and Parry for funding to mount an adequate defence to the charges. After numerous court appearances and directives from the bench, Parry was successful in his application, while Phillips was denied funding on the basis of his own financial worth. A legal-aid team headed by Anne Malick was assigned to defend Parry.

In the summer of 1994, after the appeal hearing at the Supreme Court of Canada, the accused Phillips and Parry re-elected trial before judge alone, rather than judge and jury. By this time, Curragh Resources Inc. had gone into receivership in Ontario and was no longer represented. The criminal trial commenced in early February 1995. From the outset, the trial was plagued with problems relating to disclosure of documents and other relevant evidence. Defence counsel repeatedly charged the crown with failure to comply with disclosure rules, alleging that the accused were being seriously prejudiced. The presiding judge, Justice Robert Anderson, expressed his disapproval of the crown’s conduct in this regard.

Justice Anderson finally complained to the acting director of public prosecutions, Martin Herschorn, about the lack of disclosure. This complaint gave rise to an application by the crown for a mistrial, based on the appearance of bias by the trial judge against the crown. This application caused a delay in the proceedings of several weeks. On 14 March 1995, the trial judge dismissed the application, and, on 5 April, the Supreme Court of Canada, in an emergency application for leave to appeal, sided with the trial judge and criticized the crown for making this “interlocutory” application. The continuing problems with disclosure at the criminal trial gave rise to suggestions that counsel for the accused would make an application for a stay of proceedings based on the inability of the accused to receive a fair trial.

⁴⁴ At paragraph 45.

The federal inquiry rules of practice provide for the introduction of statements and relevant evidence from other proceedings as evidence before an inquiry. On this basis, I embarked on a review of the evidence at the criminal trial, with a view to accepting the relevant portions and so avoid having to re-examine those witnesses before the Inquiry.

Supreme Court of Canada Decides

The Supreme Court of Canada's decision on the resumption of the public hearings of the Inquiry was released on 4 May 1995.⁴⁵ Although the Court unanimously allowed the appeal, it was divided 5–3–1 on the reasons. The five-judge majority based its decision on the fact that “[t]he foundation on which the stay of the Westray Inquiry was based has disappeared in that the accused persons elected trial by judge alone and the trial has started. The appeal was argued, however, on the assumption that the criminal trial would be by judge and jury.” Unfortunately, the reasoning of the majority offers little guidance on the important questions of the *Charter* rights of the accused and the issue of compellability of the two accused before the Inquiry. Three of the judges, led by Justice Peter Cory, did offer very sound and reasonable guidelines to any public inquiry faced with concurrent criminal proceedings. Citing the two recent decisions of *R. v. S.* and the *British Columbia Securities Commission v. Branch*, the judges concluded that ample protection is afforded to an accused in such circumstances. In paragraph 97, Justice Cory set out some of the choices open to the government and the risks attendant on them. Then, in paragraph 98, the following passage appears:

In oral argument before this Court, the Attorney General of Nova Scotia acknowledged the risks in proceeding immediately with a full inquiry. He nonetheless stated that his government considered the immediate resumption of the Inquiry to be of such overriding importance to the community that it is willing to accept the risk that the criminal prosecutions may be adversely affected or even stayed as a result of the Inquiry proceedings. The government is almost certainly better placed than the courts to assess the need for and the value of the Inquiry.

It appeared at this point that the way was now cleared for the Inquiry to proceed with the public hearings originally slated to begin on 19 October 1992. As a further assurance, I engaged the services of Duncan Beveridge, a well-respected criminal lawyer, to review the decision and give his opinion as to the practicality of proceeding with the Inquiry. After a careful review of the Supreme Court of Canada decision and of the other decisions referred to, he concluded:

I have considered the problems that could arise for the conduct of the trial from the concurrent operation of the Inquiry. It is my considered opinion

⁴⁵ *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR.

that there is no legitimate legal justification for suspending the commencement and conduct of the Inquiry.⁴⁶

In the result, on 9 May 1995 – some three years after the Westray mine disaster – I announced that the Inquiry “would get on with the business of fulfilling its mandate.”

The government of Nova Scotia had other ideas. The attorney general, Bill Gillis, informed me that he intended to ask the Governor in Council to amend the Terms of Reference of the Inquiry to prohibit public hearings before the criminal trial had concluded. The minister said that there should be no risk, however small, of derailing the criminal proceedings. I felt that this stand was an unwarranted interference with the business of the Inquiry. It further troubled me in light of the strong contrary representations that the attorney general had made before the Supreme Court of Canada. The Inquiry made a very pointed and strong submission to the Governor in Council, apparently to no avail. On 11 May 1995, the Terms of Reference of the Westray Mine Public Inquiry were amended to add the following sentence: “No evidence may be heard by the Westray Public Inquiry until all evidence at the related criminal trial is heard.”

In commenting on the amendment in the legislature that day, the attorney general said, in part:

[I]t has been the *consistent position* of this government that, although both the trial and public inquiry are very important in providing answers to the questions beyond the Westray explosion, the criminal prosecution takes precedence over the inquiry. . . . we recognize that there is undeniable risk to the Westray criminal trial if the prosecution and the public inquiry hear evidence simultaneously.⁴⁷

I find it difficult to reconcile that statement with the position urged on the Supreme Court of Canada by counsel for the attorney general as referred to by Justice Cory.

Stay of Criminal Proceedings

Just before the release of the Supreme Court of Canada decision, defence counsel in the criminal proceedings made good their threat and applied for a stay of the criminal proceedings. This application was heard in Pictou, Nova Scotia, commencing 23 May 1995. The hearing lasted for nine days. Evidence respecting document disclosure was adduced, including suggestions that documents had been purposely retained by the Department of Labour in spite of the Inquiry order to take possession of all documents. Justice Anderson rendered his decision on 9 June, in which he ordered a stay of the criminal proceedings.

The grant of the stay of the criminal proceedings meant, among other things, that the Inquiry could proceed. Both the minister of justice and the premier confirmed through the media my own understanding that any

⁴⁶ Letter to John Merrick, 8 May 1995.

⁴⁷ Hon. William Gillis, Nova Scotia, Legislative Assembly, *Debates*, 11 May 1995, pp. 1734–35. Emphasis added.

appeal of the stay order would not have any impact on the start-up of the Inquiry. (Indeed, a Notice of Appeal was filed by the crown, and this appeal was heard from 29 November to 1 December 1995. The Court of Appeal, by oral decision, reversed the decision of Justice Anderson and ordered a new trial. The appeal of the matter was set down by Chief Justice Antonio Lamer and heard on 26 November 1996. By decision dated 20 March 1997, the Supreme Court of Canada dismissed the appeal and confirmed the order for a new trial.)

With the grant of the stay, the resources of the Inquiry were immediately directed to preparing for the opening of hearings. Strategy meetings with staff and counsel were convoked, and Inquiry counsel met on several occasions with counsel for parties. I announced that hearings would commence on 6 November 1995 at the Museum of Industry in Stellarton.

More Document Chasing

Inquiry counsel had continued to have difficulty in getting possession of the documents that remained with Curragh Resources Inc. and the federal government. Notice of a Show Cause Hearing had been given on 2 April 1993 to ascertain why these documents had not been delivered. As a result, a substantial number of federal documents were delivered to the Inquiry on 12 April, and eight boxes of company documents on 19 April. By the end of April, the Inquiry had also received lists of those documents for which privilege was claimed.

The incessant wrangling at the criminal trial respecting document disclosure left me less than confident that my order of 25 May 1992 had been answered fully. Questions arose about the determination of relevancy and whether the order applied to documents generated after the date of the order. There were also questions about a large cache of material placed in “dead” storage in Toronto by the receivers of Curragh Resources Inc. It had been our impression that these documents were accounting records and copies of other materials that had already been forwarded to the Inquiry. With what I then regarded as an excess of caution, I instructed the records librarian to attend at the Toronto storage facility to make a preliminary assessment of these documents. From this cursory review, she reported that the documents required further study, and they were moved to the Inquiry office at Halifax. Further investigation revealed that some portion of this cache might be new to the Inquiry, so a full “relevance” check was conducted. These additional documents were catalogued and entered into the Inquiry database.

In the hope of finally putting the document question to rest, and to restore public confidence, a preliminary hearing was scheduled for 12 and 13 July 1995 at the Immigration Court in Halifax. Witnesses from the government of Canada and the provincial departments of Labour and Justice appeared voluntarily, as did staff sergeant Ches MacDonald, the chief investigating officer for the RCMP (criminal investigation). Gerald

Phillips, who acknowledged having a quantity of Westray documents, was invited to attend at this hearing, but, through his counsel Gordon Kelly, he declined. At that time, Phillips was a resident of Florida; the Inquiry's jurisdiction to enforce any order is limited to the province of Nova Scotia.⁴⁸ I immediately instructed one of the legal research staff of the Inquiry to canvass this matter, which is more fully addressed below. A full transcript of the hearing on the document issue is recorded in the Inquiry documentation. In the result, intensive searches were conducted and new material was delivered up to the Inquiry. With the exception of documents for which solicitor-client privilege or cabinet confidentiality was claimed, I was at that point fairly confident that the Inquiry had all the documentary material to which it was legally entitled.⁴⁹ This confidence was premature, since the Inquiry was later informed that Bruce MacIntosh, former counsel for Curragh, had possession of a large quantity of documents. After several abortive attempts to take possession of these documents, we held a further hearing on 22 September 1995. The hearing was necessitated by the objections of the counsel for Phillips and Parry in the criminal trial, arguing that all these documents were subject to solicitor-client privilege and should not be released to the Inquiry. After hearing arguments from counsel, I granted an order directed to MacIntosh to produce a list of the documents in his possession. After extensive negotiation, MacIntosh cooperated, and any new documents received from him were added to the Inquiry database. The document issue was finally put to rest.

Run-up to the Hearings

On the weekend of 16 September 1995, Inquiry counsel, in preparation for the November hearings, convened a meeting of the Inquiry experts for a review and an update. It had been some three years since their first reports. Those in attendance were John Bossert (equipment and materials), Dr Miklos Salamon (rock mechanics), Dr Malcolm McPherson (ventilation), Reg Brookes (explosions), and Adrian Golbey (financial planning). The experts, who were provided in advance with additional materials, met extensively with counsel and conferred among themselves over a three-day weekend. The Monday following that weekend was set aside to provide other counsel and party representatives with the opportunity to meet with the experts. The parties were advised that they could question the several experts on their opinions and their fields of expertise. The meeting with the experts developed into a useful session, with counsel and representatives of the several unions in attendance, along with counsel for the attorney general.

⁴⁸ An initiative was undertaken during the summer of 1995 respecting the attendance of witnesses living outside Nova Scotia.

⁴⁹ The provincial minister of justice, Bill Gillis, waived the confidentiality claim on a number of documents, and they were subsequently delivered to the Inquiry.

Hearings

The hearings continued throughout the winter and spring, ending on 11 July 1996 after some 76 days of testimony. (See Appendices G and I for complete lists of Inquiry witnesses and interviewees, respectively.) The parties with status made final submissions orally to the Inquiry on 22 July 1996.

Quest for Witnesses

As earlier indicated, the matter of recalcitrant witnesses who were out of the legal jurisdiction of the Inquiry (i.e., outside the province of Nova Scotia) did not surface until the document hearings in June 1995. On the advice of Inquiry counsel, it was decided not to actively pursue those Curragh managers who were currently facing criminal charges.⁵⁰ Subpoenas were sent to several out-of-province witnesses, with the explanation that they were not enforceable but that attendance at the hearing would be valuable. Clifford Frame and Marvin Pelley, chief executive officer and senior vice-president, respectively, gave every indication that they would resist any efforts to compel their appearance before this Inquiry.⁵¹ In contrast with Colin Benner and Graham Clow, Pelley seems to be taking his marching orders from Frame.⁵²

After several discussions, we decided to call upon the minister of justice for Canada, Allan Rock, for the assistance of the federal government. Our strategy was to request a federal mandate *solely* for the purpose of ensuring the attendance of witnesses who were outside our provincial jurisdiction. I contacted the minister's executive assistant, who recommended that the Inquiry write to the minister detailing our proposal. The details of the proposal sent to the minister on 11 August 1995 are set out in the following three paragraphs.

Since this is a provincial inquiry, any order requiring the attendance of witnesses will only be effectual within Nova Scotia. I suspect that many of the Westray Mine executives who have relevant evidence to give to this Inquiry will not voluntarily appear. One such executive has indicated, through counsel, that he would not respond to any order served upon him outside the province of Nova Scotia. With all the related companies in various stages of receivership, there would be very little incentive for any

⁵⁰ Gerald Phillips and Roger Parry were both given subpoenas and were invited, through their respective counsel, to attend voluntarily at the hearings.

⁵¹ **Comment** This response is in stark contrast to earlier statements made by Frame, who, as chief executive officer, was ultimately responsible for the safe operation of Westray. Frame pledged his support to the Inquiry in a press release on 15 May 1992: "We will devote our energy and our resources to cooperating fully with this Inquiry." It seems that the only thing that has changed since that comment is the realization by Frame that he has much to answer for. By his obdurate resistance to Inquiry attempts to compel his appearance, Frame conveys a denial of any burden or duty of accountability.

⁵² **Comment** As is now well known, both Colin Benner and Graham Clow appeared, at their own expense and without counsel, to provide very insightful and sensitive testimony. Their inclusion into the Westray executive team brought much needed managerial and technical expertise. Unfortunately, their involvement came too late. Benner did not get involved until April 1992. Clow's efforts to find an answer to the ground control problems and to remedy previous planning and management mistakes ended with the events of 9 May 1992.

of them to appear. The same may be true of many of the miners who have taken up new careers and established new lives in other areas of Canada.

In order that this Inquiry is able to get all relevant evidence and witnesses before it, I feel it is necessary for it to have some power to compel the attendance of witnesses. The only realistic way that this can be done is for the Government of Canada to provide a mandate to this Inquiry under the terms of the *Inquiries Act*.

I feel there is sufficient reason for the Governor-in-Council to "deem it expedient to cause an inquiry into . . . the conduct of any part of the public business . . ." The Government of Canada placed itself at risk by guaranteeing a loan of some \$80 million. Shortly after the disaster, the Government of Canada was required to make good on its guarantee. There is also some indication that there was some question as to the economic or technical viability of the project. . . . This seems to place the matter clearly within the contemplation of S.2 of the *Inquiries Act*. It seems much more practical to resolve this issue at this time rather than face it when the hearings are in progress.

A copy of the letter was forwarded to the Nova Scotia minister of justice, Bill Gillis, who also wrote indicating his support for the proposal of the Inquiry. On 24 August 1995, Gillis wrote, in part:

I am writing in support of the Commissioner in his effort to seek additional authority beyond that which the Government of Nova Scotia can grant to the Commissioner so as to ensure that all relevant parties are subject to the Commissioner's compulsion, if need be, by way of an appropriate mandate under the *Inquiries Act*, or in any other manner attendance of non-residents can reasonably and effectually be compelled.

On 19 September 1995, Rock wrote to the Inquiry declining to support our request for the assistance set out in the 11 August letter. In rejecting our request the minister said, in part:

I can understand your interest in ensuring that all relevant evidence is available to your inquiry and your concerns that some witnesses may be unwilling to testify before the Commission. The Government cannot, however, support your request for an appointment as a Commissioner under Part I of the federal *Inquiries Act* in order to facilitate the calling of witnesses.

As you know, this legislation is concerned with inquiries into matters within federal jurisdiction. Although there have been recent instances where commissions have been established concurrently under the *Inquiries Act*, and its provincial counterparts, the federal *Inquiries Act* has been used in situations where the matters investigated fell within the shared responsibility of both levels of government. The subject matter of your inquiry, which is mine safety and the tragic accident which took the lives of the miners, falls exclusively within provincial jurisdiction. Any incidental federal aspects of your inquiry are not sufficient to warrant the establishment of a federal inquiry. It is also the Government's view that, as matter of policy, this legislation should not be used to correct a procedural problem *which might be dealt with more appropriately by other means*. [Emphasis added.]

I was deeply disappointed at this response. It was my view, and it still is, that the involvement of the federal government to this limited extent is a reasonable and practical solution to what has come to be a costly and

complex problem. The minister said that this is a procedural problem “which might be dealt with more appropriately by other means.” He did not elaborate on what was meant by “other means.” As will be seen, these “other means” are costly, time consuming, and uncertain. It seems to me that the federal government would not be compromising itself if it established the precedent of cooperation with a province on an issue such as this. If otherwise recalcitrant witnesses were put on notice that they could be subject to the considerable powers of the federal government in securing their attendance at provincial inquiries, they might be more cooperative.

On receipt of the refusal letter from the minister of justice, Inquiry legal staff immediately commenced research to determine the existence of the other means. This process was delayed somewhat by preparation for the opening of the Inquiry hearings on 6 November 1995. By mid-November, the research was completed and it became clear that Nova Scotia did not have legislation to assist in our efforts to secure witnesses from outside the jurisdiction. Nova Scotia, Prince Edward Island, and Quebec were the only provinces in Canada that had not passed an interprovincial subpoenas act. On 27 November 1995, the Inquiry forwarded a copy of our research memorandum on the subject to the province’s deputy minister of justice with a request for legislative assistance. The request was favourably received, but it was too late to bring the matter before the fall sittings of the Legislative Assembly.

The Inquiry continued to attempt to serve the provincial subpoenas on Clifford Frame and Marvin Pelley, although the subpoenas were not legally enforceable outside Nova Scotia. Inquiry counsel felt that the potential witnesses might be willing to take advantage of an opportunity to present their evidence to the Inquiry. Frame’s legal agents said that he intended to withhold any cooperation with the Inquiry, and Frame even refused to divulge his address. Subsequent attempts to serve Frame were unsuccessful, although the Toronto process server was able to effect service on Pelley.

In the meantime, the spring 1996 sittings of the Nova Scotia Legislative Assembly had opened and the interprovincial subpoena matter was reactivated. Inquiry legal researchers worked along with the legislative counsel’s office to get the act drafted and moved through the various procedural steps. On 23 April 1996, the *Interprovincial Subpoena Act* was passed, along with a regulation under that act that designated this Commission of Inquiry as a court for the purposes of that act. We were aware of the fact that commissions of inquiry were not specifically designated as “courts” under existing legislation in most other provinces.

A request was made to the province of Nova Scotia to amend the Order in Council to authorize the Commissioner to request the assistance of the Supreme Court of Nova Scotia to secure the examination of witnesses outside the province. This amendment would give the Inquiry some basis for an application pursuant to Nova Scotia’s *Civil Procedure Rule 32* in addition to the *Interprovincial Subpoena Act*. As a result, the

Inquiry had two avenues of approach respecting the service of enforceable subpoenas.

An application was heard by the Supreme Court of Nova Scotia on 31 May 1996 for a certificate, pursuant to the newly proclaimed *Interprovincial Subpoena Act*, stating that the attendance of Pelley, Frame, and Trevor Eagles was necessary for the purposes of the Inquiry.⁵³ At the same time, an application was made for a Letter of Request pursuant to *Civil Procedure Rule 32*. The applications were granted by Justice Merlin Nunn after he determined that the requirements of the two procedures had been followed. On 7 June 1996, a Notice of Application was filed with the court in Ontario, but it was adjourned. On 15 July 1996, Frame and Pelley filed a notice appealing the ruling of Justice Nunn and seeking other remedies. In the result, Nunn observed that this was new legislation and everyone was trying to deal with it in the context of no prior judicial rulings or guidance.

Since that time, the whole question has been the subject of several applications, including the right to conduct an examination for discovery of Inquiry counsel Campbell, production of Inquiry documents, production of Inquiry transcripts, and other procedural matters.

An application granted by Justice Jamie Saunders on 4 September 1996 was appealed to the Nova Scotia Court of Appeal. This appeal was scheduled to be heard on 18 November 1996 but was delayed because of inadvertence.⁵⁴ On 13 December 1996, the appeal of Frame and Pelley was dismissed. Further applications were scheduled to be heard by Saunders on 31 January 1997.

In a thoughtful and well-reasoned decision, Saunders granted the dual applications of the Inquiry, which opened the way for an application to the Ontario court. Counsel for Frame and Pelley later indicated that the Saunders decision would not be appealed and that an application in Ontario would be vehemently opposed. Inquiry counsel in Toronto were instructed to proceed with the application, which was finally set for hearing on 12 June 1997. The hearing lasted three days, after which the trial judge, Justice Sheard of the Ontario court, reserved decision. On 17 July 1997, Sheard delivered an oral decision in which he granted the applications of the Inquiry.⁵⁵ At page seven of his decision, he referred to the decision of Saunders:

In a carefully considered decision given orally on February 3, Justice Saunders concluded that the evidence of Messrs Frame and Pelley is both necessary to the due adjudication of the proceeding (the Westray Mine Public Inquiry) and, in relation to the nature and importance of the proceeding, is reasonable and essential to the due administration of justice

⁵³ Trevor Eagles, after being represented by his counsel Robert Barnes at the application hearing, voluntarily appeared before the Inquiry and gave his evidence.

⁵⁴ Appellant's counsel had included a transcript of the decision of Saunders, which had been marked "unofficial decision." The Court of Appeal found that the transcript was not sufficient because it was neither an order of the court nor a signed decision.

⁵⁵ *The Honourable Mr Justice K. Peter Richard . . . v. Clifford Frame and Marvin Pelley* (transcript).

in Nova Scotia. Justice Saunders related those conclusions to nine broad subjects:

1. How and under what circumstances did Curragh and Mr Frame become interested in the Westray project, and was any assistance given to Curragh or Mr Frame in its negotiations with Suncor for the rights to the project?
2. To what extent was the company under financial pressure to produce coal to the end of 1992 and did such pressure have any impact on the safe running of the mine?
3. Did the delay in obtaining a federal government loan guarantee cause or contribute to financial pressure on the company, and did political support for the project cause Mr Frame to take an intransigent position in the negotiations, which contributed to the delay?
4. When and why was the decision made to purchase the major mining equipment and to what extent did the selection of the equipment influence the method of mining?
5. Were Messrs Frame or Pelley aware of the refusal of the Department and of the views expressed by Mr Phelan and, if so, what action, if any, did they take in response?
6. To what extent were Mr Frame and Mr Pelley involved in decisions relating to planning the layout of the mine?
7. Were Messrs Frame and Pelley aware of such orders and, if so, what action did they take or cause to occur as a result of these orders?
8. Did Messrs Frame and Pelley consider Mr Phillips to be “untouchable” and, if so, for what reasons and was that a cause of the lack of any earlier attempts by Mr Frame or Mr Pelley to investigate potential problems at the mine?
9. Did Messrs Frame and Pelley or the company receive any reports, opinions or views from such consultants as to the cause of the explosion and, if so, what were such reports, opinions or views?

On February 27, in accordance with his decision, Justice Saunders signed a certificate that he is persuaded that the appearance of Clifford Frame and Marvin Pelley as witnesses in the Westray Mine Inquiry is necessary for the due adjudication of the proceeding and is reasonable and essential to the due administration of justice in the Province of Nova Scotia.

In granting the applications of the Inquiry, Justice Sheard limited the document production requested to “documents that bear on the nine questions [delineated by Saunders].”⁵⁶

Predictably, counsel for Frame and Pelley filed a Notice of Appeal on 24 July 1997 in which they appealed just about everything Sheard said in his decision. A hearing to set a date for this appeal took place on 5 September 1997 in Toronto. As is his practice, Frame took advantage of this occasion to again make spurious comments to the press from his “safe haven” somewhere in Ontario.⁵⁷ As this Report goes to print, the appeal is

⁵⁶ At 25–26.

⁵⁷ *Halifax Chronicle-Herald*, 6 September 1997. In an interview with the paper, Frame said, “They [the Inquiry] just want to label me. . . . They’re probably not even interested in what I have to say.” **Comment** Clearly, Clifford Frame appears motivated by a desire to preserve what remains of an already badly tarnished reputation as a businessman and mining entrepreneur. This is the only reasonable conclusion that may be drawn from his conduct as reported in the press.

set down for hearing before the Ontario Court of Appeal on 17 February 1998. Following the hearing of this appeal, the Ontario court could reserve its decision for some time. After disposition of the matter at that level with a result unfavourable to Frame and Pelley, there is the reasonable presumption (based on past conduct) that application may be made for leave to appeal to the Supreme Court of Canada. It could take several more months for that application to be heard.⁵⁸

After much consideration, I have decided to complete this Report at this time without hearing directly from several Westray executives. They have all been invited to attend at hearings, and they have all steadfastly refused. Phillips and Frame have elected to fire off the occasional salvo from their respective home bases. At the close of the hearings, I indicated that I could and would draw adverse inferences from the refusal of any witness to appear and give evidence at this Inquiry. The voluminous documentary evidence on file, including much material written by various Curragh and Westray executives and the plethora of testimony, provides an opportunity to draw such adverse inferences.

The Corporate Criminal?

The recalcitrance of Frame and Pelley, the virtual evaporation of Curragh Inc., and the aborted criminal trial of Phillips and Parry have renewed concerns about the accountability of corporations and their executives. These concerns have been succinctly expressed in a supplemental brief to this Inquiry from the United Steelworkers of America, a party to the Inquiry. The union urges that I take three rather bold initiatives:

- Recommend the creation of a new criminal offence “that would impose criminal liability on directors or other responsible corporate agents for failing to ensure that their corporation maintained an appropriate standard of occupational health and safety in the workplace.”
- Recommend the creation of the offence of “corporate killing.”
- Recommend the adding of provisions to the *Occupational Health and Safety Act* that would broaden the liability of directors and officers for offences under the act to “prevent such individuals from hiding behind the corporate veil when their corporations violate health and safety legislation.”⁵⁹

These are broad and wide-ranging proposals that require study and research beyond the scope of this Inquiry. In the context of Westray, they do deserve consideration. Only two Curragh (Westray) executives, Colin Benner and Graham Clow, voluntarily appeared at the Inquiry hearings. Their testimony was significant. Other involved Westray executives such as Clifford Frame, Marvin Pelley, and Gerald Phillips have so far not given a public accounting for their stewardship of Westray. In my view,

⁵⁸ All of these efforts were in pursuit of the “other means” alluded to by Justice Minister Rock in his 19 September 1996 letter.

⁵⁹ Correspondence from David Roberts, 29 August 1997.

this lack of accountability indicates a weakness in our system. That weakness should not be permitted to persist.

RECOMMENDATIONS

- 73 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.
 - 74 The province of Nova Scotia should review its occupational health and safety legislation and take whatever steps necessary to ensure that officers and directors of corporations doing business in this province are held properly accountable for the failure of the corporation to secure and maintain a safe workplace.
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