[16] Counsel for the Crown referred to the ***Sault Ste. Marie*** case as well as *R. v Gulf of Georgia Towing Co. Ltd.* (1979) 3 W.W.R. 84 and *R. v. Placer Developments* (1984) 13 C.E.L.R. 42 as authorities on the standard of care applicable. Since a guilty plea was entered there is no need to discuss these cases except to note that the high standard of care imposed was obviously a factor in the decision to enter the guilty plea.

Additional Fuel Spill Cases

[17] Finally Crown counsel referred to the following cases to assist the court in determining the appropriate financial penalty to be imposed on the Company.

Case	Citation	Pollutant	Fine	Maximum
MacMillan Bloedel	Unreported B.C Provincial Court No 1777 1989, Paradis, P.C.J.	1150-1200 gallons of gasoline	$15,000	$50,000
Justice Institute	Unreported B.C Provincial Court No. 25378-01 1997 Nimsick,P.C.J.	Small amount of fuel	$6,000	$300,000
Shell Products	Unreported B.C. Provincial Court No.43550 1992 Holmes P.C.J.	16,000 gallons of fuel	$65,000	$300,000
B.C. Rail	Unreported B.C. Provincial Court No.82811993 Walker P.C.J.	100 gallons diesel fuel	$15,000	$300,000
Westar Timber	Unreported B.C. Provincial Court No.7465 1993	600-3200 gallons of diesel fuel	$30,000	$300,000
Magic Construction	Unreported B.C. Provincial Court No.92540-01 1999	12,000 gallons of oil and PCB	$40,000	$300,000
Bayer	Unreported Ont Provincial Court No.000033 2000 Gale J.P	400 gallons of fuel oil	$50,000	$250,000-1,000,000
Royal Oak	Unreported B.C. Provincial Court No C8307F 2001 Brecknell P.C.J	Construction fill	$100,000	$300,000

[18] In support of the requested financial penalty of $100,000 counsel for the Crown emphasized the high standard of care required in the north and submitted that the prompt reporting, response and cleanup by the Company should not be considered as mitigating factors. They were neutral factors because the Company had a statutory duty to report and respond under sections 38 and 40

of the *Act*. If it failed to report and respond these facts would have been aggravating. He also pointed out that there is no legal requirement to prove environmental damage. Deterrence of other large and wealthy corporations who are contemplating the exploitation of the resources of Nunavut was a very important message to send out.

Defence

[19] Counsel for the Defence accepted the authorities on the purpose of environmental legislation and agreed with the imposition of a fine and payment order. However he submitted that the imposition of a financial penalty of $100,000 in applying of the principle of deterrence described in the *Cotton Felts* case would be too harsh.

[21] He agreed with Crown counsel that the best sentencing guide was the *United Keno Hill* case.

[22] In applying the sentencing principles of *United Keno Hill* he submitted that I should take into account the following facts:

(a) The Company has no previous convictions after operating the mine for 21 years.

(b) The Company accepted full responsibility.

(c) The spill occurred by a combination of neglect and a "conspiracy of circumstances" including high winds blowing in a direction that prevented the smell of fuel being detected, the problem of the runoff, the failure to secure the door, and failing to check sooner because of the lack of a vehicle.

(d) The ice conditions were such as to inhibit the disbursal of the diesel fuel.

(e) There is no risk of this happening again because of the closure of the mine.

(f) There was no design problem with the fuel tanks. The problem was the runoff accumulating in the containment area. It was being pumped out to protect the integrity of the fuel tanks. The fuel escaped because of the attempt of the Company to protect the fuel tanks and not the failure of the containment design.

(g) The quantity of the spill. Although the initial estimates were 5,000 to 10,000 litres there was other information that suggested a smaller amount of 1200 to 1500 litres. In addition there was a recovery of a

> significant amount with the result that 200 to 400 lites remained in the Crozier Straight. Converting this to gallons gives 45 to 100 gallons.

[23] While acknowledging the special problems with the arctic environment Defence counsel pointed out that there was only a small area impacted and only a small amount of fuel that found its way in Crozier Straight. He acknowledged that, while there is no need to prove actual harm to the environment, proof of harm is an aggravating factor. This case is about potential harm not actual harm.

[24] In support of the lack of harm he referred to the statement of the Government biologist at paragraph 57 above:

> The most toxic materials associated with the diesel fuel spill would likely have volatilized (evaporated) prior to reaching the aquatic environment, leaving very little residual material to leach into the waters of Crozier Strait.

[25] Applying the special considerations described at p. 47 of *United Keno Hill* Defence counsel submitted that the penalty should reflect the degree of damage inflicted. The actual damage was of limited harm and duration with the result that a substantial penalty would not be appropriate. The main concern was the potential of the diesel fuel in the soil to be released into the water at a later date. To address this potential the Company, on the recommendation of its expert Gardner Lee Limited, incurred substantial costs in removing the soil and depositing it at an appropriate dump site.

[26] The next step suggested by Defence counsel is to apply the considerations described by Judge Stewart at pp 49-52 of United Keno Hill as follows:

(a) Criminality of Conduct. There was no willful action as in *Panarctic Oils* In this case the spill was a pure accident and therefore less deserving of condemnation.

(b) Extent of Attempts to Comply. There was a diligent attempt by the Company to comply and it had a good relationship with the regulators The Company took the spill seriously and immediately invested considerable resources to attack the problem. The accident was an aberration looking at the history of the mine.

(c) Remorse. As noted by Judge Stewart actions speak louder than words. The speed and efficiency of the response of the Company was a strong indicator of remorse. The Company speedily and voluntarily reported the spill. The Mine Manager appeared in court and explained how the spill impacted the corporate environment and the embarrassment of the Company because of its good environmental record. Although there was a statutory obligation on the Company to

take immediate remedial steps the cleanup costs are a relevant consideration in considering the penalty.

(d) Size of the Corporation. It was acknowledged that the Company was a large mining company with significant resources. However the cleanup costs of $100,000 and the $30,000 financial penalty suggested by the Company would be far more than a licence fee and would accomplish the deterrence required. The $100,000 suggested by the Crown for a first offence would be off the scale and would distort the general punishment scheme envisioned by the Act.

(e) Profits Realized From Offence. There was no profit realized from the offence

(f) Criminal Record. The Company was a first offender and the suggested $30,000 financial penalty was reasonable in the circumstances to act as a deterrent. The co-operative attitude and early guilty plea were mitigating factors. All of the evidence in the agreed statement of facts on the impact of the environment came from the Company. The $100,000 suggested by the Crown is one third of the maximum and ought to applied to far worse cases than the case at bar.

[27] Counsel for the Company provided some useful comments on the cases provided by the Crown as follows:

(a) Echo Bay There was more fuel that entered the water in that case and the Company was criticized by the trial judge for failing to priorize its activities and put more effort into prevention. Despite this the Court imposed approximately one seventh or 14% of the maximum. It was submitted that this was a good guide for the court to follow in this case.

(b) Panarctic Oil. This case is totally distinguishable in that it involved willful dumping. The court imposed fines that were 65% and 85% of the maximum.

(c) Esso Resources. This oil spill of 22 cubic metres that spilled over 100 kilometres of the MacKenzie River resulted in no actual damage to the environment. The court imposed a fine of 8% of the maximum of $100,000 on a large wealthy corporation.

(d) City of Iqaluit. These five sewage spills of 540,000 litres resulted in a financial penalty of $90,000 which included a $25,000 payment order for manuals for City employees. Taking out the payment order which is unique to this case the financial penalty was 4.6% of the maximum for far more serious violations.

(e) Canadian Marine Drilling. In this case the company dumped the oil to save money. This was an aggravating factor in the sentence of 40% of the maximum.

(f) Shell Canada. This case involved a much larger spill by a large wealthy company that had 2 prior convictions. The $65,000 fine imposed was 4.6% of the maximum.

(g) Westar. This case is the closest on point in that it involved a comparable amount of fuel and cleanup costs. The maximum however was $1,000,000 and the court accepted a joint submission of a $30,000 fine.

(h) Magic Construction. This case is totally distinguishable in that the company was deceitful and motivated to save money. In spite of this fine was only $10,000 more than suggested by the Company.

(i) Bayer There was actual damage to the environment in that 8 ducks were killed. The cleanup costs were $100,000 and yet the fine was only $10,000 higher than the fine suggested by the Company.

(j) R. v. Commissioner of NWT. This case is once again totally distinguishable because the Government showed no remorse. The aggravating factors included prior failures of the lagoon, feeble attempts to address the problem plus higher standards for government agencies.

[28] Defence counsel submitted three additional cases for the consideration of the court that, it was submitted, were more on point than some of the Crown cases.

(a) In *R. v. Neptune Bulk Terminals (Canada) Ltd.* (2001) 37 C.E.L.R. 282 there was a spill of 26.6 metric tones of canola oil. The company notified the government authorities and deployed a small boom to minimize the effect of the spill. The company had a comprehensive site contingency plan but did not have any standard written operating procedures for loading of canola oil onto ships. The court imposed a $5000 fine and an order to pay $25,000 for conservation and protection of migratory birds.

(b) In *R. v. Imperial Oil* (1999) 36 C.E.L.R. (N.S.) 286 8200 cubic metres of toxic oil refinery effluent was discharged into Burrard Inlet. There was a design flaw in the drainage and sewage system and the company had two prior convictions There was minimal environmental damage and a total financial penalty of $40,000 imposed on a large wealthy corporation.

(c) In R. v. Tahkuna (2002) 44 C.E.L.R. (N.S.) 251 1000 litres of marine gas were spilled in the harbour of Harbour Grace Nfld. because a valve had been inadvertently left open. A fine of $20,000 was imposed out a possible maximum of $250,000.

Analysis

[29] I adopt and apply the comments of my brother Justice Kilpatrick in the Iqaluit sewage lagoon case on the profound fragility of the arctic environment and the need for severe penalties. I repeat his comments from above:

> All of these circumstances suggest that the commission of environmental offence in an arctic region should attract severe penalties, penalties commensurate not only with the elevated risk of environmental damage, but with the high costs associated with rehabilitation of the effective areas.
>
> In Nunavut, corporate citizens who knowingly engage in activities that have the potential to cause damage to an arctic environment are "stewards" of the lands and waters upon which they operate. They have a duty when undertaking such a venture to exercise a high standard of care. This duty is owed to the many Inuit and non-Inuit residents who stand to be directly affected by the damage or destruction of wildlife or marine habitat.

[30] On the other hand one cannot ignore the interests of the residents of Nunavut and Canada in the development of the natural resources of the Territory and all the benefits that flow from these developments. The orderly exploitation of these natural resources helps pay for the heavily subsidized infrastructure and government services provided to all three Territories. The imposition of financial penalties that are disproportionate to the crime and out of proportion to that of the south, after making allowances for the north, would only succeed in discouraging the development of the resources by good corporate citizens. The sentencing objective is to deter those companies that demonstrate a cavalier attitude to environment damage and treat fines as a licence fee of doing business. Those offenders like Panarctic Oils must feel the full brunt of the law. In that case Judge Bourassa noted at p.146 the attitude of the management of the company.

> The dumping involved far more than the odd employee. In my findings, it was a gross violation by the upper supervisory levels of the defendant corporation's employees. The dumping that was involved in these offences was foreseeable; the problems with the airstrip were foreseeable, and they were preventable. The court is not in any way dealing with unknown factors. The actions of the defendant corporations were simply a matter of housekeeping. The situation as contrasted with many of the cases cited to me by counsel where there has been a mechanical or technological failure or a mixup in authorities or permits. The dumping, as I have stated, was strictly a housekeeping arrangement.

[31] Striking a balance between these two objectives requires careful analysis of the facts of each case to determine where the case fits in the sentencing spectrum. Application of the *United Keno Hill* principles was carried out by many

of the judges in the cases submitted to the court. (Shamrock, Echo Bay, Panarctic, Esso Resources, Westar, Magic Construction, Nepune, Imperial Oil). I as well have found them of great assistance to structure the analysis.

(a) Damage to the Environment. There was minimal damage to the environment. As noted by the Government biologist:

> The most toxic materials associated with the diesel fuel spill would likely have volatilized (evaporated) prior to reaching the aquatic environment, leaving very little residual material to leach into the waters of Crozier Strait.

(b) Criminality of the Conduct. The spill in this case was the result of an accidental conspiracy of circumstances that likely would never happen again. The Company had written policies and procedures in place that covered nearly every contingency except this one. The spill occurred as the company was transferring fuel from one tank to another to make room for a different type of diesel fuel rather than from the ship to the tanks. All necessary precautions to contain a spill were in place. The tanks were located within a gravel and till bermed area lined with an impermeable membrane designed to contain any fuel spills within the fuel tank farm. If the spill had come from one of the tanks it would have been contained. Unfortunately the containment berm was not designed to deal with excess surface runoff. As a result this water entered the containment area and had to be pumped out from time to time. The person given this task went about his job in diligent fashion blissfully unaware of the leak in the line taking the fuel from one tank to the other. The conspiracy of circumstances was the wind direction and velocity and the lack of a vehicle at the critical time. This case is at the opposite end of the spectrum from the Panarctic and Magic Construction cases.

(c) Extent of the Attempts to Comply. There was a diligent attempt to comply and the Company had a good relationship with the regulators. The Company took the spill seriously and immediately invested considerable resources to attack the problem. The accident was an aberration looking at the history of the mine.

(d) Remorse. It is absolutely clear from the evidence of Mr. Knapp that this accident was a great embarrassment to a corporate structure that took great pride in its environment record. As he stated:

> A. Well, we view it with both regret and
> embarrassment, regret because, as I expressed earlier,
> both corporately as well as locally with Polaris
> themselves, we were justifiably proud of what had been
> an exceptional environmental and safety operating
> record.

3 And also, it impacted, in some small measure, the
4 relationship that we had with the regulatory
5 environmental monitoring bodies involved in the
6 preparation of a closure reclamation plan.
7 We had established an extremely good rapport with
8 the various regulators, and include Department of
9 Fisheries and Oceans, as well as the Nunavut Water
10 Board, and they were extremely complimentary on the
11 proactive stances and measures that we were both taking
12 to implement the plan, as well as the way in which we
13 were approaching community relationships, and we feel
14 that we took a definite step backwards by our failure
15 to prevent this occurrence.

The actions of the Company in reporting the spill, the speed and efficiency of the response and the appearance of Mr. Knapp to explain the impact of the spill on the corporate structure leave no doubt in mind about the remorse felt by him and the Teck Cominco corporate group. It has an excellent environment record and has achieved any rehabilitation that was necessary. The spill in addition to costing $100,000 has resulted in changes in the corporate response to this type of problem. As explained by Mr. Knapp in cross-examination:

A I can't speak for the specific measures taken
23 at other operations or facilities. They are, by
24 nature, unique to themselves.
25 However, I can state categorically from firsthand
1 knowledge that this matter received very high attention
2 throughout the entire corporate ladder, and that it was
3 used as a case study throughout our Loss Control
4 Department as an exercise or case study in failures
5 with respect to communications, safeguards and other
6 such measures.
7 Q. And as a result of those case studies,
8 has anything changed, to your knowledge, within the
9 procedural, operational ends within Teck Cominco
10 Metals Ltd.?
11 A. Again, I can't speak to the specifics, but I
12 can state with confidence that, yes, that would have
13 been the case, because there were some definite
14 shortcomings with respect to the way Polaris handled
15 the situation or allowed the situation to develop, and
16 I have no doubt that those measures were taken. There
17 is --
18 Q. Well --
19 A. If I can continue
20 Q. Please do.
21 A There is an environmental audit team
22 comprised of individuals from many operations
23 throughout the corporate ranks, and those individuals
24 gather and tour all of Teck Cominco's industrial
25 facilities on a regular basis, and fuel tank farm

1 management, fuel transfer procedures and general spill

response requirements are extremely high on their list of issues.

(e) Size of the Corporation. The Company has significant assets and has experienced a positive cash flow over the life of the mine. The environment record of the corporate group is exemplary. This embarrassing spill is not being treated as cost of doing business. Any financial penalty will not be regarded as a slap on the wrist. In my view there is genuine corporate contrition.

(f) Profits Realized by the Offence. There were no profits from the offence.

(g) Criminal Record. The Company has no previous convictions despite being in continuous operation for 21 years. This fact is consistent with the general corporate attitude to environmental issues.

Conclusion

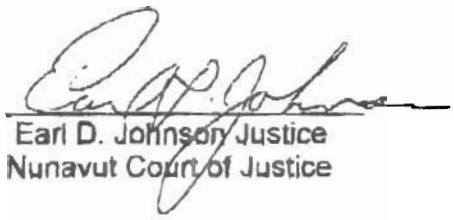
[32] In my view the offence committed by the Company is at the bottom end of the spectrum and I can do no better than to adopt the words of Judge Stewart at p.59 in *United Keno Hill*:

> The Crown cannot rely on the simple fact of a violation and request the Court to impose a substantial penalty in the face of principally uncontradicted corporate evidence on many key relevant sentencing considerations. Unquestionably the company did not do enough. Unquestionably the company could have done more. This failure resulted in the charges before the Court. Each violation must be examined on its own merits. In this case the evidence marginally suggests any condemnable corporate behaviour. The evidence, with minor exceptions, portrays a corporation diligently trying to be a good corporate citizen.

[33] The financial penalty proposed by the Company is consistent with the comparable cases of *Westar, Neptune* and *Echo Bay* and the sentencing findings set out above. I accordingly impose a fine of $5,000 under section 40(2) and order that the Company pay the amount of $25,000 to the Crown under section 79.2 (f) of the *Act* to be used to promote fish and fish habitat in Nunavut.

[34] I would like to thank counsel for their comprehensive sentencing materials and co-operation in the preparation of the agreed statement of facts.

Dated at Iqaluit this 29th day of September, 2003.



Earl D. Johnson Justice
Nunavut Court of Justice

Counsel for the Crown: John Cliffe

Counsel for the Company: R. Michael Tourigny

Court File No.2000-08-26

IN THE NUNAVUT COURT OF JUSTICE

Between:

HER MAJESTY THE QUEEN

- and -

TECK COMINCO METALS LTD.

SENTENCING JUDGMENT

THE HONOURABLE JUSTICE E. JOHNSON