

BRITISH COLUMBIA PROVINCIAL COURT

R. v. WESTMIN RESOURCES LTD.

DAVIES, J.

Campbell River, August 1, 1985

Fisheries Act, R.S.C. 1970, c.F-14 as amended - Accused found guilty of offence under section 33(2), depositing a deleterious substance into water frequented by fish - Metal effluent into Myra Creek and Buttle Lake.

Sentencing - Mitigating factor - Rehabilitative efforts made by corporation in late 1981/82 - Indifference and neglect prior to and during the first five months of 1981 considered - \$80,000.00 fine levied.

The accused was charged with four counts of violating section 33(2) of the *Fisheries Act*, R.S.C. 1970, c.F.-14 as amended. The accused owns a mining operation where base metals are separated from tailings through a metallurgical process that includes the discharge of treated effluent into the Myra Creek and Buttle Lake. The operation had been in existence for a number of years prior to the laying of the four charges.

The evidence relied upon by the Crown primarily consisted of the results from two tests performed in January and May 1981. In the January test half of the fish placed in the effluent died while in the May test all of them died. In both tests, the control fish, that is, the fish which were in uncontaminated water, were not affected and survived.

Held, the Court found the accused guilty.

While the Defence satisfied the Court that there are other more precise but expensive methods of analysis, (i.e. the "flow-through analysis"), a Crown expert's testimony was accepted. Dr. Alderdice testified that the sampling and the testing of effluent and the conduct of the biopsy tests was done in a reasonable manner although the methods could be improved. Further, he testified that such tests were reliable.

The Court held that in passing sentence a Judge is required to consider "the protection of society, a deterrent to the accused and to others and where it is a person rather than a corporate entity, the rehabilitation of that person." Corporate rehabilitation where applicable is also a factor that should be considered.

The Court considered the great steps that had been taken by the corporation since late 1981 to address the rising metal level in Buttle Lake, through the installation of a pollution abatement system at an approximate cost of 14,000,000. However, the corporations' years of indifference and neglect prior to and during the first five months of 1981, prompted the Court to levy a fine of 20,000. on each count.

T.J. Bishop, for the Crown
Jon F. Tollestrup, for the Defence

DAVIES, Prov. Ct. J.

As a preamble, I have heard evidence in this matter earlier this year, on June 24th, 25th, 26th and 27th, and at the conclusion of the hearing requested that a transcript be prepared so that I could properly and hopefully with some leisure consider the extensive evidence prepared by both Counsel. That was done with the appreciated co-operation of the recording staff here in Campbell River. However, the pressure of work was such that I received the final volume yesterday and refrained from finalizing a decision until I had read all of it, feeling that it would be grossly unfair to do otherwise. That is my reason, gentlemen, why I will not be giving written Reasons for Judgment today but will be giving a decision but it will be oral, and as the end of it I will invite either Counsel to ask me to give any further reasons that they feel will be of assistance for Appellate purposes because one of your is, obviously, not going to be happy with my decision, which is a factor in all court cases.

Now, in the matter of Westmin Resources Limited formerly known as Western Mines Limited, the trial before me is by way of a re-trial pursuant to the order of the Honourable -- the Court of Appeal of British Columbia. The previous hearing before a brother judge was determined not on the merits of the issues but on a technicality which technicality was upheld by a County court and overruled by the Court of Appeal that ordered this new trial. I mention that as a reason for the long delay between the evidence which was heard in 1981 and the hearing in 1985.

I've been assisted in this matter by learned Counsel Mr. Tollestrup and Mr. Bishop who have conducted themselves in a manner that I consider worthy of comment. It was exemplary. The over-all competent courtesy displayed to each other and to the Court was appreciated. Certain admissions were made to avoid necessity of proof -- certain elements, and that again is appreciated.

The accused entity named as Westmin Resources Limited formerly known as Western Mines Limited is charged on four counts, identical save and except for the date. The first, count one alleged that on or about the 28th day of January, A.D., 1981, at or near Campbell River, British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance in water frequented by fish or in a place under conditions where such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter such water CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED.

Count 2 alleges identical conduct on the 24th day of February 1981.

Count 3 on the 1st day of March 1981 and

Count 4 on or about the 3rd day of May 1981.

The corporate entity had pursuant to Companies Act changed its name at the relevant period of time and that change of name was in part the reasons for a re-trial it made necessary because of decisions as to whether or not service on the proper entity had been made and whether or not it was necessary. That is no longer before me. It has been resolved and I am required to reach a decision on the merits.

The corporate entity, a mining and milling operation with head offices in Calgary, Alberta, operates a mine and mill and has for many years, some 60 miles from Campbell River on Vancouver Island -- ore removed from underground workings and the effluent in question, its water and elements from the mine and not from the mill. This effluent was

directed from the mine entrance or exit into a series of settling ponds so that hopefully heavy metals including zinc might settle on the bottom and only uncontaminated water be returned to nature. An overflow was built into one of these ponds. They were intended to direct and release excess water over capacity into nearby Myra Creek. Myra Creek flows into Buttle Lake headwaters of the Campbell River system which eventually disgorges into Discovery Passage. Such waters, are by admission, waters frequented by fish within the meaning of Section 33 of the Fisheries Act.

On each of the dates in question samples of effluent were taken interalia from a point just par to the effluent stream entering into Myra Creek. Samples were taken elsewhere for comparison purposes. Samples were taken on the date of the first alleged offence and the last one for biopsy purposes. I heard from Mr. Marken, a Fisheries officer with the Department of Fisheries and Oceans who told me that on January the 28th of 1981 he investigated the outfall from the settling pond at Myra Creek and described the path taken by mine water effluent. He also indicated existence of a mill, a crusher and concentration but I understood that effluent from such concentration does not form part of the effluent in the settling ponds in question. Pictures were taken that date by himself and marked as Exhibit 4 herein. They grapically indicate the contrast between the natural water upstream and the polluted water downstream.

The same technique of sampling was used by Mr. Marken and others on each of the dates of the alleged offences.

I was told by Dr. Alderdice, called as a witness for the Crown, that the sampling and the testing of effluent and the conduct of the biopsy tests was done in a reasonable manner although the methods could be improved.

A total of 40 fish were tested: 20 in each test, the first in the January 1981 effluent and then in the May effluent. In both of those tests all the control fishes, that is, fish which were in water uncontaminated, were not affected and survived. In the January test, a half of the fish tested in the effluent died. In the May, all of them died. This is what is called a static test. I stress that because learned Counsel for the Defence repeatedly made reference to the flow-through test referred to in the *1977 Metal Mining Liquid Effluent Guidelines*. Those Guidelines are, in effect, governing the conduct of mine operations, and the manner in which they should test effluence to be sure that the pollutant do not adversely affect the fish.

It was stressed that guidelines are not law -- they're merely recommendations to a mining corporate entity as to how they should protect themselves from action and how they should comply as corporate citizens with the requirements of protecting the environment.

The flow-through test is vastly more expensive and is, from the evidence that I have heard and accept from witnesses from both sides, more definitive and I presume would be of greater assistance to anybody who wanted to take action to stop a certain element from being a hazard.

Now, the manner which one test should be done, as far as I can see in logic, is not relevant to how a different type of test should be done. And as a great deal of time was spent on this matter by learned Counsel for the Defence and he extensively cross-examined, I must say that Defence has satisfied me that there are other more expensive and precise methods of analysis, namely, a flow-through analysis as opposed to the static

method used. For example, in testing for waters intended to be used in the fish hatchery where it would be essential that the purity be of the highest standards, such tests might well be essential to protect the fish therein, and as one test, which would indicate that the water was pure, might be inaccurate, replicate tests would be advised and might be essential to assure the safety of the fish in such a program.

Now, on that point, Dr. Alderdice satisfied me that for the purposes of determining whether or not the effluent in which the tests were done here was tested adequately, his opinion was that such tests were reliable for such purposes. The matter of stress on fish and such circumstances, in his opinion, while it would be there, it would be so slight as to not be of significant factor. Throughout it was urged upon me by learned Counsel for the Defence that only the results of samples taken on the four days in question should be considered, and I find considerable merit in his position, and generally I have followed him. I am, however concerned about another aspect, and that is the evidence of a witness, Dr. McLeay, called by the Defence. He told me words to the effect that in June of 1981 -- one month after the final test by the Crown -- he, at the request of the corporate entity did test effluent from the same ponds. He said that in the interval certain changes had been made and I am going to refer now to page 39 and 40 of Volume IV of the evidence heard on the 27th of June, 1985 and at page 39, line 11, certain questions in re-cross examination were put to Dr. McLeay by Mr. Bishop:

Q: Dr. McLeay, it's now come out that you've examined that particular effluent stream. Did you use test fluid of any kind including bioassays?

A: ...I'm not stalling. I'm actually seriously trying to --

Q: No no. Take your time. Think about the answer.

A: -- to recall....I just can't recall, I'm sorry.

Q: You can't recall whether you did any testing of the effluent? Or, well we're calling it an effluent -- the discharge from the Lynx settling ponds?

A: ...I have done some tests of the Lynx pond water. I am not sure of the exact sampling locations --

Q: All right

A: -- and that's why I'm having difficulty in responding to that.

Q: All right. When were those done -- those tests?

A: They were done in June 1981 as I recall.

Q: All right.

A: I may be --

Q: Shortly after -- shortly after the sampling was done that was -- we've heard the evidence about.

A: -- It was -- well I'd like to qualify that though.

Q: Yes.

A: I know for a fact, Your Honour, that they were done after some major changes were made to the system. There were two modifications to the Lynx pond system, very close to the time of my studies, and before my studies. One was the introduction of lime to the treatment system and the second was the introduction of a substance called the alkaline chlorination effluent into the system.

DAVIES, J:

Could you tell me what effect either of those would have?

A: Ahm...well the lime was introduced, I believe, as a requirement by the Provincial Government - Ministry of the Environment with the intent of precipitating out any metals in solution, or for reducing the dissolved metal concentration. It is a -- lime is very commonly used for that purpose.

As to the alkaline chlorination effluent, it's my understanding that it previously discharged to Buttle Lake via a separate line -- a separate pipeline -- and the Ministry of the Environment instructed Westmin Resources Limited to rechannel that into the Lynx pond system. And I'm not aware of the reason for that diversion of flow. But it was -- it is a material that is -- it's a waste water that results during the processing of some of the ore and I believe cyanide is involved in the production method. So it is -- this material generated and ...

DAVIES, J:

Thank you.

MR. BISHOP:

Q: Who were you employed by at that time? Were you still at B.C. Research at the time you did those tests or had you set up your own consulting firm at that time?

A: I was still at B.C. Research. I set up my own consulting firm in October 1981.

And I now have read that to put things into context.

Q: All right. Those tests you did, did you do them at the request of Westmin Resources? Or was it -- was B.C. Research asked to do this by someone else?

A: Westmin Resources Limited.

Q: All right. What was the results of those tests as far as whether the -- you found the liquid in those settling ponds to be deleterious to fish?

A: I can honestly not recall what the results were. I do so many tests that it's not clear in my mind.

Q: All right. I have one more question: You were hired by Westmin Resources to come and assist at this trial, is that correct?

A: That's correct.

Now, those questions and answers were made in re-cross examination. Mr. Bishop opened the door for Mr. McLeay that might not have been opened for him in direct examination because it was of tests taken afterwards. However, it also gave Mr. McLeay an excellent opportunity to tell me, if he could, that those tests were satisfactory and there was now no problem that he could tell after his extensive tests. Well, I'm having difficulty with accepting that at its face value except for the purpose of drawing some conclusions. I find it difficult to accept that a Defense witness of Dr. McLeay's obvious competence, who took tests of the impugned system, within one month would have forgotten the results to those tests by himself on that effluent. It would be such a golden opportunity for him to have put in, 'Yes I did and it was perfect,' if he could, and honestly, do so. I'm satisfied that his honesty stopped him from doing that. I can only conclude that those tests would have tended to corroborate the evidence adduced by the Crown.

Now, the Defence in urging consideration of the Guidelines in 1977 also at the same time agreed that under certain sections of this Act -- the Fisheries Act -- the definition of deleterious substances would not be applicable and therefore, if zinc is in fact deleterious to fish, it would have to be established by the Crown.

As I stated earlier, I'm satisfied that those Guidelines are just that: to guide a mine in how to stay out of trouble and not to limit the manner in which the Fisheries officers should determine whether or not an offence has been committed.

I had, and permitted, extensive discussion of those Guidelines because, until the case was closed, I felt I might have raised the defence of due diligence that, inasmuch as there had been compliance with the Guidelines, they had done all possible to avoid contaminating the system. That was never suggested. Due diligence was never raised and I commend, on the circumstances before me, on the evidence before me, it couldn't be raised because there was none. It would have had to be new evidence that is not before me -- that's pure speculation.

I heard evidence, in fact, to the contrary form due diligence. The manager of the corporate entity -- or an officer of the corporate entity -- was called and stated that the system has been carrying on as long as the mine has been in existence.

Now, I've paid attention specifically to the exhibits that have been filed. I have read every one of the some 352, I believe, pages of the transcript. I do apologize to learned Counsel for the absence of written reasons but as I stated earlier, I just finished reading those at midnight, having received the last few pages at 11:30, and then had to start doing what I'm doing now. I thought it vastly more desirable that I not seek any further adjournments. And I'm not.

Now, the Defence has satisfied me that only certain elements, those which are capable of ionized -- of being adapted into the fishes' system -- are deleterious to them -- to the fisheries. In other words, a metal which cannot be absorbed into their system isn't going to hurt them. However, on the tests before me, I'm satisfied that whatever elements were in that water, whether it was zinc, copper or any of the other trace elements, killed fish. The substance doesn't have to kill a fish in order to be deleterious.

It can be deleterious to them if it adversely affects their welfare and wellbeing. But on each of the dates alleged, in the opinion of Dr. Alderdice, which opinion I'm accepting, the contents of the effluent stream would have been lethal to fish, according to the standards they apply. And, in fact, it was lethal to 15 out of 20 fishes who, in two separate tests were put into them.

I was told by witnesses for the Defence that the containers are subject to contamination by leaching, by improper cleaning and by contamination from sources other than the effluent put therein.

I'm satisfied from the evidence of the Crown that the vials used in this case, and the containers used, were handled in a proper workmanlike manner, and while anything is possible, that there is no reasonable, rational basis to assume that there was any contamination of those containers.

I'm satisfied from the totality of the evidence that no entity other than Westmin Resources formerly known as Westmin Mines had anything to do with the disturbing of the burden, the ore, or the contents of the ground in or about Myra Creek. Even the roads there are made out of their material. I therefore consider it academic whether the substance which obviously flowed into Myra Creek in that effluence came from underground, on the ground or any part of it, it was all completely under their control, and as the Guidelines had been mentioned and as I had to consider them in eventuality of a due diligence aspect, I don't know whether they were complied with or not. If they were complied with, I would have expected in that they require a testing by the mining operation itself at least once every three months, and there's more than three months between these two tests, that I would have heard results of such a biopsy and complete test with the flow-through method done by them had it happened and had it been in their favour. The absence of such evidence which would be readily available, and by the Guidelines should be available, is not before me.

My only regret in coming to the decision I'm forced to, is my respect for learned Counsel for the Defence, and it's never pleasant for Defence Counsel when the Judge finds against him. However, it's inevitable I have to make one of you gentlemen unhappy and I'm sorry it's you, sir.

On the totality of the evidence before me, I have no doubt, based on reason, that would allow me to acquit. I'm satisfied beyond any reasonable doubt that the corporate entity on all four cases was guilty as charged, and I so find them.

As to sentence, I'll hear the Crown as soon as the Crown wishes to be heard. And I'll hear the Defence as soon as the Defence wishes to be heard, in that order. I believe you're entitled to the last word on sentencing, Counsel.

(Editors note: Proceedings were adjourned over the lunch period).

...

(PROCEEDINGS RECONVENED)

DAVIES, J.:

Be seated please. I'll hear you, Mr. Bishop.

MR. BISHOP:

Yes, Your Honour, on the matter of sentence in this case, the penalty section is, of course, Section 33(5) paragraph b for a first offence the accused is liable to a fine not exceeding fifty thousand dollars (\$50,000.00), and this is a first offence. Westmin Resources has no prior record of any kind as far as I'm aware -- certainly not for pollution.

I would also note, Your Honour, it is open to the Court under Section 33(7) of the Act to impose duties upon the accused to correct a problem or to do work to prevent the reoccurrence of a problem, but I'm going to point out, and I'm sure my friend is going to point out, that is not, apparently, necessary in this case.

I am informed, Your Honour, that Westmin Resources, at some very considerable expense, has largely corrected the problem which was the subject of this case. By doing a number of works in and about the mine they have managed to reduce the levels of heavy metals being put into Myra Creek to the point where it is, apparently, at an acceptable level as far as I am aware.

I would, and I'm sure my friend will, expand on that very considerably. He knows much more about it than I do, I'm sure, as well. But I would like to point out, Your Honour, that the corrective measures which Westmin Resources took, apparently were taken after they were charged, and I would also note, Your Honour, that according to the evidence of the manager of the mine who gave evidence in this case, this effluent was being discharged into Myra Creek since the mine had been opened so that the corrective measures they took were taken quite a number of years after the problem first occurred.

DAVIES, J.:

When was the mine opened?

MR. BISHOP:

In the 60's. I don't know.

MR. TOLLESTRUP:

Nineteen 65, I think, Your Honour.

DAVIES, J.:

Thank you.

MR. BISHOP:

I would note, as well, Your Honour, and I think this is an important point, that the -- that Myra Creek and the waters it leads into are important waters in a number of respects. Buttle Lake was, at one time, a well-known freshwater fishery. But I would also note, Your Honour, that Buttle Lake was dammed in 19... the dam, I believe, was completed in 1958, and that may have had a significant impact on the fish in that lake. But nonetheless, the metals being discharged here were going into what was, as I say, a major freshwater sports fishery. Of course, downstream from Buttle Lake and the

Strathcona dam, the waters go into the Campbell River which, at its mouth, is a salmon river, and indeed of course, there's a major hatchery on the Quinsam which is a tributary of the Campbell River and the salmon have to come up through the Campbell River to get to the hatchery -- or to get into the Quinsam at all which is itself a major salmon spawning river. I would also note, Your Honour, that the Campbell River is the source of the water supply for the town of Campbell River. So on all respects, the waters into which this heavy metal was going were waters which one might call of concern from the point of view of fisheries, from the point of view of public health and from basically any point of view one can think of with respect to this sort of offence.

I would note as well, Your Honour, that the mine is in a park -- is in a Provincial park -- and one might think therefore that great care should have been taken to avoid pollution or deleterious effects on the environment.

In the matter of penalty, Your Honour, I would note that the defendant is, at least by all reports, a large wealthy corporation.

I have a few cases to refer to, Your Honour, and I will refer them briefly. The first is the decision of the Court of Appeal in this case, and that is reported at 1985, 1 -- Western Weekly Reports. The report begins at page 30 and I'm going to refer to --

DAVIES, J.:

Just a moment please. That is the decisions of their Lordships of our Court of Appeal, Seaton, Craig and Hutcheon.

MR. BISHOP:

That's correct Your Honour.

DAVIES, J.:

I have read it.

MR. BISHOP:

I'm going to refer to a comment made by Mr. Justice Seaton at the very last -- one of the very last things that was said.

DAVIES, J.:

Yes.

MR. BISHOP:

He commented:

"I agreed with both of my brothers. The appeal is allowed and a new trial ordered. I express the suggestion to the accused that the community as a whole considers pollution to be a very important matter."

That was the passage I wish to refer the Court to, and I would submit that that is obviously so. Pollution is a matter of concern to everybody; of particular concern to the public.

As far as previous cases dealing with this section of this *Fisheries Act*, Your Honour, as far as sentencing in previous cases I have three cases I'm going to refer to briefly. The first is a case which was entitled *The Queen v. the Corporation of the District of North Vancouver* which was decided by His Honour Judge Layton in the Provincial Court on January 11th, 1982 in North Vancouver. The facts, as I have them in a digest, are as follows:

"Over the course of 16 months black leachate continued to enter Lynne Creek adjacent to the Premier Street landfill in North Vancouver from a wooden culvert south of the playing field. Extreme discolouration of the water of Lynne Creek was evident for a considerable distance downstream from the culvert. In addition, black leachate from the landfill was flowing down the road which borders Lynne Creek. Chemical analysis showed the toxic leachate contained levels of pollutants, ammonia, mercury, phenols and PCB's. Additionally, the dyke road used to transport heavy machinery and trucks was very muddy in places causing silt laden runoff water to be discharged into the creek. Samples of the water taken over the period of investigation showed high levels of toxicity to fish."

In that case, Your Honour, the Corporation of North Vancouver was charged with five counts and His Honour Judge Layton imposed a fine of ten thousand dollars (\$10,000.00) on the first count and thirty-five hundred dollars (\$3,500.00) on each of the subsequent counts. I might note, Your Honour, that the Corporation of North Vancouver apparently had no prior record for Fisheries offences.

The next case I'm going to refer to, Your Honour, is a case called *The Queen against Caroline Mines*, and that was a case decided by His Honour Judge Anderson in Langley in March 1984.

DAVIES, J.:

I'm sorry, the name again?

MR. BISHOP:

Caroline Mines.

DAVIES, J.:

Yes.

MR. BISHOP:

Yes. That was, as I say, Judge Anderson's case decided in Langley in March 1984. I might note, Your Honour, that that is presently under appeal to the County Court in New Westminster. However, there has been no decision on the appeal. The facts of the case are that Caroline Mines apparently operated a gold mine and mill in the Coquihalla valley east of Hope. As part of their process for extracting gold from their ore, cyanide or a cyanide compound was apparently used in the mill. Now in the mill they had a system for

extracting the cyanide from the effluent before it was released from the mill, however apparently the system simply did not work and they were convicted of nine counts, each relating to discharge of this toxic effluent on a separate day, and they were fined fifteen thousand dollars (\$15,000.00) on each count. I would note, Your Honour, that in that case there had apparently been a fish kill in the Coquihalla river. I should also point out that the effluent apparently discharged into a small stream which did not contain fish but that stream, in turn, went into another stream which did contain fish and that stream went into the Coquihalla River, and, as I say, there was a fish kill in the Coquihalla River.

And I would also note as Your Honour probably is well aware, the Coquihalla River is a significant fisheries river. Quite possibly not as important as the Campbell River but nonetheless a significant fisheries river.

The next case I would like to refer to, Your Honour, is a case called the *Queen v. Equity Silver Mines*. And that was decided by His Honour Judge Smythe in the Provincial Court in Smithers on June 20th, 1983. Again, there were charges under this section of the *Fisheries Act*. And the facts in that case were that apparently Equity Silver Mines had a waste rock dump and there was -- some iron compound was leaching from the waste rock dump. Now the leachate was going into a small creek that only on occasion had fish in it. Apparently on certain occasions when the water rose, this little creek would have fish in it. Nonetheless the leachate was, of course, toxic or deleterious to fish. Judge Smythe commented that even though the company had spent over a million dollars trying to correct the problem, and even though the creek into which the leachate was going was not a particularly significant fisheries body of water, that pollution was a very serious matter and he fined the company three thousand dollars (\$3,000.00) -- or sorry -- four thousand dollars (\$4,000.00) on each of three counts.

There are other cases of course on pollution. Those are a few that may be of assistance. The Crown's submission is that the facts in this case are somewhat similar to the facts in the Caroline Mines case in that we are dealing here with a significant level of pollution into a very significant body of water from a fisheries point of view.

As far as the effect of heavy metal effluent which was going into Myra Creek, I would note, Your Honour, that the evidence of one of the witnesses in the case was that there were trout and there were trout that were easy to trap or catch upstream from the effluent discharge but that downstream from the effluent discharge into Myra Creek there was no trout that he could locate and certainly it appeared to be suitable trout habitat so that apparently the effluent was having a very toxic impact upon the trout in the Myra Creek downstream from the effluent discharge. That's about all I have to say, Your Honour, thank you.

MR. TOLLESTRUP:

Your Honour, I'd like to have Mr. Montgomery, Vice-President of the accused corporation, give some evidence relating to sentence, if I may?

DAVIES, J.:

Certainly. Call him.

MR. TOLLESTRUP:

He's prepared a few slides that we are set up to show to the Court and expect his evidence shouldn't take more than about 10 minutes.

...

EXAMINATION IN CHIEF BY MR. TOLLESTRUP:

Q. Mr. Montgomery, just before we go to the slides, you are the Executive Vice-President and General Manager of the mining division of Westmin Resources Limited?

A. I am.

Q. And you have been employed by Westmin since September of 1981?

A. That's correct.

Q. And before that the bulk of your experience was with Noranda Mining Limited (Phonetic).

A. That's correct.

Q. Now would you go to the table and show the first slide please?

A. Your Honour, the slides that I'm going to use here were developed for other purposes: public information et cetera and therefore there's a lot of detail on them that I will not be using. But I am going to try to very quickly show you what has been achieved since the events in 1981 with respect to improvements in the environment.

So, very quickly, here we have the location of the mine at the south end of Buttle Lake. Buttle Lake here. I will refer to a bridge leading to Campbell River. It is located there. Here's Upper Campbell Lake; Lower Campbell Lake and Campbell River itself and Discovery Channel.

A little more detail again: the mine site here. This, Your Honour, is the area the taillings were discharged into --

...

MR. MONTGOMERY:

Very quickly then again, under this -- this is no longer taking place, it was changed in 1984 -- but taillings at the time of the event that's being -- were being discharged in this area of Buttle Lake on the bottom of the lake. Here is Myra Creek that we talked about, flowing through here. The mine site is up here.

Now subse . . the events that took place and were referred to in 1981 after the charges were laid, these are the ponds that were talked about. Lime was added to the water inflowing into that -- those -- ponds, and also this alkaline chlorination stream was

added. And water that was coming from the mine was collected and used in the processing water in the mill.

MR. TOLLESTRUP:

Now there's a diversion channel marked at the top.

A. Well I, yes I come to that.

MR. TOLLESTRUP:

All right.

A. Sorry Jon. Following that, the Company was looking at various aspects of the operation. This is a very narrow and steep-sided valley so it was decided to put a water diversion channel in this area so that waters coming down from the higher ground here would not enter the area of the operation but would be collected and brought down here and discharged into Myra Creek away from the operation. Water on this side -- and my slide doesn't cover that area -- but it did, also was brought in above the (indiscernible) area of operation.

Also, in 1981, a study group was put together, called the Buttle Lake Study Group. Representation on that study group was from the Federal Fisheries and the Federal Environmental Protection Service, from the Provincial one individual representing those two groups, one individual representing Provincial Waste Management and Provincial Fisheries, a representative from B.C. Research Council and a consultant hired by Westmin.

MR. TOLLESTRUP:

Q. Mr. Montgomery, what was the purpose of the new lime addition system?

A. The purpose of the new lime addition system was to treat these waters and to precipitate the dissolved metals in that stream, the low of which subsequently would lower, the water being discharged, and that is the area of the discharge -- that's where those samples were taken, Your Honour, entering Myra Creek. It was a chemical process -- you would call it that -- it raised the pH of the water, made it less acidic, as it comes up to a level the zinc is precipitated.

Q. And the purpose of the alkaline chlorination system?

A. The alkaline chlorination system was just another effluent that was a strongly basic substance and assisted in adding to the precipitation of the metals. Originally it had followed the tailings line with the discharge that I showed you where the tailings were just being deposited in Buttle Lake.

If I can get -- getting back to the study group?

A. Yes, yes please.

Q. The study group was requested to study the conditions that had led to the rising metal levels in Buttle Lake that had been recorded by Waste

Management and the Provincial Fisheries. They had been sampling at that Gold River bridge that I pointed out, in the early 70's. And in the late 70's and early 80's the levels were rising in Buttle Lake. So we commissioned this group and said, 'go out and try to determine the source of these rising levels of dissolved zinc in the lake.

Q. When you say "we commissioned this group . . ." who do you mean?

A. Westmin.

Q. And who paid for the study?

A. Westmin.

Q. And what was the approximate cost?

A. If I may use my notes?

MR. TOLLESTRUP:

May I lead the witness here, Your Honour?

DAVIES, J.:

Yes.

MR. TOLLESTRUP:

Q. I suggest, Mr. Montgomery, that it was about eight hundred and forty thousand dollars (\$840,000.00)?

A. It was.

Q. Correct?

A. It was eight hundred and forty thousand (840,000.00). That study was a three-phase study. It was carried on over about a period of a year and a half. But in the early study they looked at the conditions in the area of the tailings in the south end of Buttle Lake, in a couple of adjacent watersheds and in the Myra Creek watershed and very briefly they came with -- to the conclusion that there was a substantial quantity of dissolved metal getting into the lake from Myra Creek.

Q. And what was the conclusion as to the source of that metal?

A. Well they came up the stream then and started sampling on their way up, and as they came into this area of the creek here, they ran into substantially increased levels of dissolved zinc -- right in that area.

Q. And did they trace it to a source?

A. Yes. Further research lead us to these waste dumps and a phenomenon known as bacterial leaching was taking place whereby bacteria were -- live on acidic -- or on sulphide type rocks in the appropriate periods of the year were creating an acidic condition. The acid was attacking the small amounts of metals that were in the waste dumps. Water from precipitation and from subsurface sources was coming down through here, picking up that metal which has now been put into solution by the acids, bringing it out and it was coming up into the creek, some of it in surface but largely in almost springlike occurrence, right there in the creek.

Q. And so was a system developed to deal with that problem?

A. Yes there was. It -- these things have to be developed for each occurrence because none -- no two -- are exactly alike. And I think my next slide will show what they did. Oh no.' This next slide, Your Honour, just shows these particular ponds from which the samples were taken, the stream from the mill comes in here, the chlorine and the off-line chlorination stream have been added there; these are precipitate ponds in which the precipitation takes place, and the discharge was there.

Q. Now that's --

A. In 1981 we expanded that -- okay?

Now that again just brings us back -- it's the same slide and I don't have any further need to use that slide at the moment.

So the next step it was realized that these are -- this is the same area in which the water was coming down through these waste dumps -- we have to adjust that a little better -- and a system with a buried perforated pipeline was installed in here. The purpose of that was to intercept this water coming down from the waste dump, collected at pumping station, bring it back to this area where lime was added, bring it across Myra Creek into a series of ponds here where there would be time for the metals to be precipitated, and then the discharge to the creek.

This is just a schematic slide to show what we were trying to achieve. Water coming this way to be collected in these perforated pipes. Our idea was to create a hydraulic barrier. Well below the lake or the stream level which unfortunately's off the side of this slide, we wanted to have a slight inflow from the creek, create this barrier and try and get all the water, and this is just a schematic of the method that was used to control the levels of water so that could be achieved.

When we look at it in the photograph, that manhole that I showed you the schematic of, these are the manholes along the line of the pipe. This is the pumphouse, and we were able to control the level of the water in each of these sections to achieve what we were trying to do with -- trapping of waters.

DAVIES, J.:

When were they installed?

- A. That didn't get in until the -- it was done during the summer and fall of 1982 and started to operate about late October, and I'll show you some of the results of that.

Again, that's the same --

DAVIES, J.:

Before you do that, when was -- it was completed in October of '82, when was it started?

- A. It -- we -- it was started in November, November/December of '82, Your Honour. There had to be some modifications made of it as after --

DAVIES, J.:

I'm sorry, you told me it was working in October of '82.

- A. October. And then it was in full operations from all of -- from thereon in.

DAVIES, J.:

But when was work started on it -- commenced?

- A. It was commenced in the spring of 1982.

DAVIES, J.:

Thank you. And one other question: when were you aware of the problem that you're now trying to resolve?

- A. When?

DAVIES, J.:

Yes.

- A. In -- I am going from memory -- it would have been late '81 or early '82 when the Buttle Lake Study Group got to the point and said, 'There's where the stuff's coming from.'

DAVIES, J.:

Thank you. Go ahead.

- A. Fine. Just a further diagram. Here is where this pipeline came back from the area that I showed you where the pumphouse was located. Here we were catching additional surface water, adding lime in this area and bringing across the stream. There is the pipe bridge and the pipeline bringing it across the stream.

And discharge get into these new settling ponds, enters here, moves over and it's a divided stream so that each of these ponds comes down to here, and is discharged to Myra Creek in this area. The sludge, which is the precipitation that is made in that area, is now added to the flow of tailings which is the waste product from a mill, contains the finely divided waste material rock and is deposited on land in the -- in an area -- and we won't go into that this afternoon.

Now, I want to show you the results of the first two months of this system which was a very experimental system but we decided to put it in with the preliminary information we had, and we were successful in getting a system that worked. I would also like to point out that these scales are different. We have a zero to eight hundred scale in here, and zero to sixty scale here, and we're talking about kilograms per day of zinc that was contained in the effluent.

Now this is the levels during that period of the material that was going in to be treated. This is the level of the effluent on discharge. And if we compare those two we come along with and the level of efficiency that was being achieved, and in most of the cases we were in the high 90's. A couple of occasions here where we had excessive rainfall, that being one of them, when our lime addition system is not adequate, and subsequently at that point we'd had a bag adding system, we had to go to a bulk system with automatic controls on it.

Now --

MR. TOLLESTRUP:

Q. Is the lime addition system now able to deal with heavy runoff situations?

A. Yes. The lime addition system -- add -- treats all of the water now. It treats the water that comes, that is collected from the tailings area because that material precipitates out or settles out. We treat all the water.

Now this is a graph, Your Honour, showing which is of information that is produced by Provincial Waste Management and it shows what was happening to the dissolved zinc that was entering -- the levels of it -- entering Buttle Lake, starting back in the 70's, and you see this rise coming in here. And this is 1981 here when things were changed. And this now shows what has been achieved over to the first samples for 1985. I stress these are Provincial Government figures -- data -- and you can see that the high level that we are -- highest levels we are now at, are similar to those in 1971 and so are the lows. Now we expect it to go down a little further than that but I'm very pleased with that result because it does show that the things we have done have had effect in getting those levels down.

DAVIES, J.:

When was the information that attributed to the year '71 through to '81 available to your corporate entity -- the fact that the zinc was rising until the year that these offences took place?

A. Well where I think -- I can't answer that because I didn't join the company until after this had all occurred.

DAVIES, J.:

I appreciate that and I was going to commend you on later but --

A. But that's public information. It's issued annually at this time, and we get it -- they -- they send it to us.

DAVIES, J.:

I'm going to ask you later why on earth you waited so long to do something about it? And I don't mean you personally because I appreciate that since you got there you've probably done a lot.

A. Well I can't answer that, but if you wish my answer, I was hired because I had had experience in this field.

DAVIES, J.:

Thank you.

A. I had come from a mine in Ireland where we had --

DAVIES, J.:

You see, I'm concerned with why it was allowed to carry on for so long, for sentencing purposes, just as I'm concerned with what you've done about it since to assist in remedying the situation.

A. Sure.

DAVIES, J.:

Thank you. Keep that in mind. Go ahead.

A. Mmm mm. And essentially I don't think I have anything more. Well, that was the end, Jon, but all of the work -- okay, go ahead.

Q. I just have one question. The level that -- showing in that slide is -- conforms with your permit?

A. Yes.

Q. And it's about .04 milligrams per liter?

A. I think it's point -- yeh.

Q. And your permit is .05?

A. Yeh.

MR. TOLLESTRUP:

I think that's all, Your Honour, unless you have -- that is --

DAVIES, J.:

Mr. Bishop, do you wish to ask any questions?

MR. BISHOP:

Yes I just have a couple of questions of Mr. Montgomery.

DAVIES, J.:

You can sit down again if you like, sir.

A. Fine thanks. I'll turn this off.

CROSS EXAMINATION BY MR. BISHOP

Q. Mr. Montgomery, what is your -- what is your area of education and experience? Are you a mining engineer or --

A. I'm a mining engineer.

Q. Mining engineer, okay. Is it fair to say that Western Mines, as it was then, and later Westmin Resources, saved very very large sums of money by not having to install corrective measures earlier - say when the mine first opened -- or when the heavy metal problem first become apparent around 1975?

A. Well, it's again difficult to answer directly when you were not involved at the time.

Q. Yes.

A. Many of the things that we are now using have been developed in recent years in mining on a world-wide basis. So that what we are doing now, we're up in the forefront of the mines in the world that are doing these pollution abatement and have found these things. Certainly it cost us money.

Q. Yes.

A. In the overall if we take all of the things pertaining to the environment in this project which has cost us about two hundred and fifty-million dollars (\$250,000,000.00) is what we've expended in the last few years up in that site, approximately fourteen --

Q. Excuse me. I want to clarify that

A. Yeh.

Q. Maybe you were just about to clarify it. Go ahead.

- A. Approximately fourteen million dollars (\$14,000,000.00) of that is pertaining to environmental improvements.
- Q. I see. Okay. Isn't it true to say though that by not doing that until 1981 and after the company saved a very large sum of money because had the money been expended earlier, of course, it would not have had the benefit of keeping the money in its pocket and so on?
- A. Well to give you a quick answer: I would think that the cost for the lime that is used for treating at the level they were at -- of production -- might have amounted to a -- remember, it's ballpark figures without -- done on it -- twenty-five thousand dollars (\$25,000.00) a year.
- Q. Mmm mm.
- A. It wasn't hundreds of thousands.
- Q. No.
- A. But there would have been a capital cost, and again, it would have been a smaller system because we put a system in for an operation that's three times larger.
- Q. I see. Okay. Just a couple of other things, Mr. Montgomery, you yourself were a member of the -- I'm sorry -- what did you call the Board or panel that --
- A. Of that -- the Buttle Lake Study Group?
- Q. Yes.
- A. No sir. I was not. We had no staff members on that.
- Q. Oh I see.
- A. We were represented by Mr. Jackson who was a consultant. He was not a member of our staff.
- Q. Oh I see. Okay. The Judge asked you this question earlier and you -- you didn't seem to have an answer but I just wanted to be -- to see really whether you do. Do you know whether the Company was aware, about 1975 or 1976, that suddenly heavy metal levels in Buttle Lake were beginning to rise significantly?
- A. No-one has ever stated to me that they did but I -- that information that I showed in that last slide was public information.
- Q. I see.
- A. So.

Q. And isn't it also true, Mr. Montgomery, and aren't you aware of it, that in fact a number of people in this area expressed concerns about possible pollution before the mine was ever started?

A. I was told that after I joined the Company, yes.

MR. BISHOP:

All right, thank you. That's all I have to ask.

MR. TOLLESTRUP:

A couple of questions --

DAVIES, J.:

Any point you wish to elaborate upon through your witness?

MR. TOLLESTRUP:

Thank you Your Honour.

RE-EXAMINATION IN CHIEF BY MR. TOLLESTRUP:

Q. You mentioned the figure of two hundred and fifty million (250,000,000), Mr. Montgomery, that is the amount that has been expended on opening the new HW Mine --

A. That's right.

Q. -- and includes the fourteen million ((14,000,000) for environmental improvements?

A. That's correct. It also includes thirty million (30,000,000) of interest charges, just to be specific (indiscernible).

Q. Now the mine, I believe, pre-existed the park. Is that correct?

A. Mineral claims pre-existed the park. The mine did not.

Q. Now --

A. Mineral claims go back to 1917 -- the earliest ones.

MR. TOLLESTRUP:

I think the rest of what I need to say, Your Honour, is a matter of argument.

DAVIES, J.:

Yes, well perhaps you'd reserve it anyway, because I intend to ask a few questions and I'll --

MR. TOLLESTRUP:

Sure.

DAVIES, J.:

-- give both of you an opportunity to ask any questions that may arise from mine.

MR. TOLLESTRUP:

Thank you.

EXAMINATION BY DAVIES, J.:

Q. Sir, I'm now going to say what I indicated I would say earlier, that I'm impressed with your personal efforts and your obvious confidence in improving a sad situation when you took over. And that is to your credit and the Corporate credit. I am concerned, however, with the many many years that preceded that under circumstances which, frankly, I find appalling. I've looked at the pictures which just to a layman would indicate that anybody who even glanced at those streams on about January of '81 would have been aware that there was a potential problem and it was being -- it was analyzed and it was obviously deleterious to fish. And yet, there's no material difference between the samples taken then and those taken in May of the same year. I think it would be -- for purposes of guilt or innocence, I couldn't consider whether or not it was carrying on from day to day between there but as for sentencing it would boggle my mind that it's just something that happened to go up and up on those four days coincidentally when it was being tested. It flies in the face of common sense. Now, you've shown me graphs indicating a peeking at about '81 of pollutants attributable directly to Westmin Resources or the predecessor Western Mines. I've been advised that this was a matter of grave concern to people in the area as the pollution of a lake. Can you give me any suggestion of a reason that I should consider to the credit of the company why on earth somebody didn't check this out keeping in mind that your learned Counsel has brought to my attention guidelines that indicate that every three months an effluent sample should be taken and presumably done. Can I assume from this that the guidelines were not being followed? Or if they were, could you give me the results of their tests?

A. Well, if I may comment, Your Honour, I think we have to realize that the major source of the increase of zinc level in Buttle Lake was not the discharge from the effluent pond. It was the discharge from the waste (indiscernible)

Q. I appreciate that point but it would all came (sic) from Westmin Resources --

A. That's right.

Q. -- and enough came from that stream, on the samples that I tested, to also be deleterious to fish.

A. Mmm mm.

- Q. Now, it's obvious to me as a layman; I'm just wondering if I'm seeing things that aren't there in those pictures. Why on earth would any person of your competence -- maybe I'm assuming something -- your predecessor in office simply take a look at that and say, ' This looks pretty cruddy, you'd better check it,' because if it was, I'd like to know the results of those tests?
- A. Again, I don't have that information, Your Honour --
- Q. You see I get the impression, sir, and I'm going to give you and your learned Counsel an opportunity to correct me on it -- that up until approximately when you took over and these cases were before the Court, there was a progression of added contaminants into that lake that was known to Westmin Resources. And so far as I can see, except in taking studies and looking at it, nothing was done until after the four counts that I have to sentence on. Later -- you satisfied me that you've done a very workmanlike job of reducing it. But the question is, under the general heading of detriment to others, why for those many many years wasn't such an obvious -- and if it wasn't obvious please tell me -- such an obvious contamination of a source allowed to continue?
- A. The only comment I can make, Your Honour, not having the information and not being present, is that those things can vary over a period of time based on the experience we now see that -- and we have to -- had to automate the controls so that we are having readings all of the times telling us of the condition of the water before it goes in so that we can make the treatment applicable to the condition that has been there --
- Q. No, that isn't the point. The point is, that for year after year after year the general knowledge -- and you said the official documents --
- A. Yeh.
- Q. -- more and more zinc pollutant was going into that lake, and until you took over, in effect, nothing seems to have been done about it to seriously find out how to stop it, or even to attempt to stop it --
- A. Mmm mm.
- Q. -- you indicated that you spent fourteen million dollars (\$14,000,000.00) on I think you said improving the environment.
- A. Improving the environment, yeh.
- Q. Well, how on earth could you improve the environment as to what it was before you started operation -- you, the Corporate entity -- in that area? I understand it was a pristine valley, clean with no pollutants to talk of. How can you say that you've improved it by getting some of the -- by putting less into it?
- A. Your Honour, it's quite possible that there were metals being dissolved by nature. I'm not willing to do -- we don't have any base line studies to go back to. But we find metals by going up streams --

Q. Well we do have upstream -- upstream tests on Myra Creek which indicates it's minimal as of the test period that I'm dealing with.

A. -- Yeh. Mmm mm.

Q. Fine.

A. Okay.

Q. And there's no -- nothing to suggest it was different anywhere else.

A. I find it very difficult to answer --

Q. I thank you sir. I'm -- perhaps I'm getting into a field that I should be hearing your Counsel on. But I wanted you to have any opportunity and to ask you enough questions so that your lawyer would realize what's concerning me. Thank you. Any questions arising from mine.

MR. TOLLESTRUP:

None for me, Your Honour.

DAVIES, J.:

And any last submission from the Crown before I -- because Mr. Tollestrup's going to be heard last.

MR. BISHOP:

No Your Honour --

DAVIES, J.:

Thank you, then I'll hear the Defence and --

MR. BISHOP:

-- I don't think I have anything more to say.

DAVIES, J.:

-- final submission as to sentence.

Thank you sir.

MR. MONTGOMERY:

Thank you.

(WITNESS EXCUSED)

DAVIES, J.:

Oh, before you go, sir, I think the smartest thing that Westmin did was to get you from Noranda (phonetic). Thank you for coming.

MR. TOLLESTRUP:

Mmm mm. Your Honour, I think this has to be put into context in terms of time.

DAVIES, J.:

Yes.

MR. TOLLESTRUP:

We're talking about offences that were alleged in --

DAVIES, J.:

January, February, March and May of sev . .

MR. TOLLESTRUP:

1981. Yes.

DAVIES, J.:

. . . enty one, right?

MR. TOLLESTRUP:

The slide that show the information from 1975 on --

DAVIES, J.:

Yes.

MR. TOLLESTRUP:

-- may have been developed from data that was not available in 1981.

DAVIES, J.:

That's rather interesting. How do they go back and get it then?

MR. TOLLESTRUP:

Well I'm suggesting to Your Honour that that may have become available through the Buttle Lake Study Committee.

DAVIES, J.:

Been available -- information that was obtained in '75 doesn't become available until '81? Please.

MR. TOLLESTRUP:

No, I'm saying that it wasn't OBTAINED in 1975. That the -- although the data was there --

DAVIES, J.:

Yeh?

MR. TOLLESTRUP:

-- no-one had done a study, costing approximately a million dollars (\$1,000,000.00) to put all of that data together and be able to come up with this kind of information. And so --

DAVIES, J.:

Just stop a moment: if in three years -- I'll take just a short period -- if in three years you get a rising that should be a warning to somebody'd better look at it. And that's what I have from those graphs.

MR. TOLLESTRUP:

Yes.

DAVIES, J.:

Thank you. Go ahead.

MR. TOLLESTRUP:

And the other -- the other submission I have on the graph is that there is no evidence that the source of that rising metal level in Buttle Lake was entirely from the mine. There was evidence given through Dr. Clark and I think through either Dr. McLeay -- yes I think it must have been Dr. McLeay, that there were other contributing sources -- natural sources -- to metal levels in Buttle Lake. The charges that this Court is concerned with are depositing deleterious substances on certain dates. Now, if you -- as Your Honour suggested -- it flies in the face of commonsense to say that the sources through the mine did not contribute to say that the sources through the mine did not contribute in some degree to the rising levels but, in my submission, this Court cannot conclude that the totality of the rising metal levels can be laid at the doorstep of Westmin Resources. And I draw the distinction between depositing a dele --

DAVIES, J.:

Well, let's put it this way. Since Western Mines stopped doing it, it's gone right back down.

MR. TOLLESTRUP:

-- Well since they --

DAVIES, J.:

And that's a factor I have to consider.

MR. TOLLESTRUP:

-- Oh yes.

DAVIES, J.:

Then go ahead.

MR. TOLLESTRUP:

I don't quarrel with that but there is still some there and it may or may not be coming from a natural source. But again, I say that --

DAVIES, J.:

Let's put it in its kindest light. Let's presume that there is a percentage from natural sources -- the natural sources that were there have been there since time immemorial and I presume will continue. But, when Western Mines, in an effort to reduce its obvious -- to stand up to its Corporate responsibilities did what I was told, down came the lime. So that indicates to me that that which they remedied -- had previously remedied -- been a factor and the factor is what I am going to consider for sentencing purposes.

MR. TOLLESTRUP:

All right. Now, may I emphasize, Your Honour, that Mr. Montgomery said that the conclusions of the Buttle Lake Study Committee were made known in early 1981, and that work on the system to correct the problem began in the spring of 1981, and that it was put into place in November of 1981.

DAVIES, J.:

Mmm huh uh -- that wasn't the impression I got. I thought he said spring of '82.

MR. MONTGOMERY:

Eighty-two.

MR. TOLLESTRUP:

Was it '82?

MR. MONTGOMERY:

Eighty-one was the testing year. (Indiscernible).

MR. TOLLESTRUP:

Yes, I'm sorry. I'm sorry. The testing year was '81. The conclusion I -- my note says the conclusions were not known until early '82. Then the work began shortly thereafter and it was put into place by October/November of '82. So that once they knew precisely what the problem was, i.e. the leaching from the waste rock dump, they commenced immediately to correct it. And again here, Your Honour, I emphasize the difference between knowing that a problem exists and knowing what the source of the problem is. Mr. Montgomery says that the conclusion of this study was that the majority -- and we agree, not all -- of the heavy metal depositing came through the bacterial leaching from the waste rock dump. And that -- the knowledge that that was the main source did not come to light until the conclusion of the Buttle Lake Study Committee which was early '82 and then the work was begun right after that. And in the last four years they've spent fourteen millions dollars (\$14,000,000.00) developing what, in my submission, is a state of the art system to deal with the disruption to the environment that any mining activity creates. I submit, Your Honour, that it flies in the face of common sense and reason to think that man can disturb the earth in the way that it is disturbed through mining activity without disrupting the environment, and the responsibility -- the Corporate responsibility -- is to minimize the effect upon the environment.

DAVIES, J.:

Yes.

MR. TOLLESTRUP:

And I, my submission is, that once the cause of the problem was known my client acted quickly, and at great expense. And I submit, Your Honour, that it's going a bit -- it's getting a bit tangential to place too much emphasis on what happened before they knew exactly what the problem was.

I emphasize also that --

DAVIES, J.:

They knew what the problem was all along -- they may not know the cause of it.

MR. TOLLESTRUP:

All right.

DAVIES, J.:

The problem was too much effluent getting into Buttle Lake, period. Coming from their workings. Wasn't it?

MR. TOLLESTRUP:

The problem was a rising metal level, Your Honour, --

DAVIES, J.:

Mmm mm.

MR. TOLLESTRUP:

-- and I get back to this: there's no evidence of fish kill. There's no evidence of any harm to the fisheries other than in the bioassays and you've heard a lot of evidence about --

DAVIES, J.:

Yes.

MR. TOLLESTRUP:

-- how conclusive those bioassays were, but there is no evidence of any fish kill in the water system. And there was a substantial amount of evidence that these metals are not harmful except in a particular form, so that even though you have a rising metal content, in the absence of any damage to the fishery there is -- there's cause for alarm but it's not the kind of alarm that would go off in peoples' minds if all of a sudden they were finding dead fish -- if there was some concrete evidence that there was damage to the fishery. Now, my friend has said that the people were concerned when the mine went in about the environment -- well that happens wherever a mine goes. I would be --

DAVIES, J.:

If you put the tailings into a lake that I'm now told -- and I didn't have this before me at the trial -- that is what, source of water supply, I don't find it at all unusual people would be concerned. I now understand that there's cyanide going in there as well, in, I hope, extremely minute quantities.

MR. TOLLESTRUP:

Well the cyanide is in an enclosed system, Your Honour.

DAVIES, J.:

No, the cyanide's going into the -- the cyanide treatment is going into those ponds, I was told. That's one of the changes that was made.

MR. TOLLESTRUP:

Yes.

DAVIES, J.:

Mmm mm. And it goes from there -- if it doesn't stay there, it ends up in Buttle Lake via Myra Creek again.

MR. TOLLESTRUP:

But it stays in the sediment pond, Your Honour.

DAVIES, J.:

I haven't been told that.

MR. TOLLESTRUP:

Well, but you also haven't been told that there's any evidence of cyanide going into the Buttle Lake water system.

DAVIES, J.:

Not but I have -- I have that cyanide is now being introduced into the settling ponds.

MR. TOLLESTRUP:

Yes.

DAVIES, J.:

And added to the effluent there.

MR. TOLLESTRUP:

Yes but surely that's not a factor that Your Honour can take into account in the sentencing unless it's getting into the Buttle Lake water system.

DAVIES, J.:

No I don't think that I can consider what they're doing now. There's no evidence that that was there at the time at the alleged offences that I found took place. They're no longer alleged.

MR. TOLLESTRUP:

Yes.

DAVIES, J.:

Right. But, if I'm going to give you credit for putting lime in to reduce it -- and I intend to do -- why shouldn't I also consider the other items you've put in there that may not be so helpful to the air? (sic)

MR. TOLLESTRUP:

Well perhaps just to clear that point up it might be useful if I were to recall Mr. Montgomery, because I think he can explain the presence of the cyanide and the fact that it is put in there not through the milling or mining process, it's put in there as a solution to part of the environmental problem.

DAVIES, J.:

Oh?

MR. TOLLESTRUP:

Would you mind if I just call --

DAVIES, J.:

I don't mind at all.

MR. TOLLESTRUP:

-- recall --

DAVIES, J.:

You have -- I'm going to give you also . . all the leeway you want, subject to your catching your plane. And even if you don't, that's your option.

MR. TOLLESTRUP:

There are other planes, Your Honour.

DAVIES, J.:

I've taken the position, a thing as long as this -- especially where I find against the Defence, the Defence has as long as the Defence wants to put any evidence it wants before me. Proceed.

MR. TOLLESTRUP:

Thank you, Your Honour.

DAVIES, J.:

You're still under oath, obviously.

RE-EXAMINATION IN CHIEF BY MR. TOLLESTRUP:

Q. Would you please explain to His Honour the presence of cyanide and what its purpose is, Mr. Montgomery?

A. Well first of all I have to say that it is part of the metallurgical process --

Q. All right.

A. -- of separating metals in the mill.

DAVIES, J.:

That I -- that I perhaps had suspect -- I shouldn't say that. Let's put it this way: I was a lawyer for 14 years before I became a judge and I have some knowledge of mining. Go ahead.

A. It is used, to be technical, as a depressant to keep the pyrate from not floating. We do not want (indiscernible) when we're separating pyrate from other metals. Pyrate is an iron sulfite.

MR. TOLLESTRUP:

Q. And how is the presence of cyanide dealt with in the system, eventually?

A. That effluent from that particular portion of the processing was collected and is taken out and is chlorinated and that's why it's called an alkaline chlorinated stream. It is a -- there is -- chlorine is injected in a negatious form into that stream and that kills -- the cyanide becomes another compound -- I was going to say a cyanate -- there may be somebody else here that can tell me exactly what it is. But cyanide as cyanide is a very sensitive chemical but when it becomes a cyanate or another chemical compound -- it may be occurring in this case; I don't know the chemical things that go on; it becomes a very inert and it is not a problem. Cyanate is not a problem but cyanide surely is. The alkaline chlorinide -- chlorinated stream -- is to get rid of the cyanide and have it in another form where it is inert.

Now, the reason that that chlorinated stream was added, I believe -- and I wasn't with the Company at the time -- was it was another strongly basic substance which would help to precipitate the metals. That's my understanding of why that was added.

Q. And once the cyanide was treated with alkaline chlorination then the whole was then discharged into the settlement ponds?

A. It went into those Lynx settlement ponds that we showed you the pictures of and then subsequently was discharged to Myra Creek.

Q. But before that happened the toxic effect --

A. Previous to that it was discharged with the taillings in Buttle Lake directly --

Q. Yes.

A. -- after treatment with the chlorine.

Q. Right. And after treatment by the alkaline chlorination the toxic effect --

A. Mmm mm.

Q. -- of the cyanide was neutralized.

A. It was -- yes, it has never been a -- brought to my attention at any time -- that we had cyanide levels that were of concern -- that I'm aware of. I've never heard of cyanide being a concern.

MR. TOLLESTRUP:

His Honour may have questions arising on that.

EXAMINATION BY THE COURT:

Q. My questions obviously arose from the evidence of Dr. McLeay where he first brought to my attention the changes that were made, and you may be able to assist me I feel that all people -- all honest people -- and I heard here commented that the honesty of witnesses before me is not an issue -- frequently suffer from what I call self-hypnosis. If, for example, you ask a person who has just run a red light, which is a stupid thing to do, he ran that red light and he sees it and it's still red he says, 'I did,' but if you later say, 'You ran a red light, that's a stupid thing to do,' he's not a stupid person, therefore he didn't do it, and I think after a little while he'd pass a lie detector test. And this is by way of the problem that I had with the evidence of Dr. McLeay when he told me that he couldn't remember the results of tests that he did in June of 1981 when he was asked not the results of such but was there a deleterious substance to fish found. I found that difficult to accept because it was -- if it was good, it's the sort of thing you'd remember if you were an expert coming to Court and one month after the cases it would certainly be a mitigating factor -- he says, 'Look, we just checked it afterwards.' Do YOU know the results of the biopsy tests that were done pursuant to the Guidelines as required in June of 1981?

A. No Your Honour I do not.

Q. Do you know whether or not they were ever done during the period that I'm concerned with which is January through till --

A. I do not, Your Honour.

Q. (Indiscernible) the four days that are in that period?

A. I do not, Your Honour.

MR. TOLLESTRUP:

Your Honour, could I interject here?

DAVIES, J.:

Yeh.

MR. TOLLESTRUP:

You read the portions of that transcript earlier and it's my recollection that -- the kinds of testing that my friend asked Dr. MacLeay about were not identified. That is, was he testing for the existence of metals or was it a bioassay test that he was asked about.

DAVIES, J.:

No. The question was, "All right, what was the results of those tests as far as whether you found the liquid in those settling ponds to be deleterious to fish?" was the question.

MR. TOLLESTRUP:

So I simply make this point then --

DAVIES, J.:

So I thought the answer would be, 'Yes it wasn't,' or 'Yes it was but,' or something but I have come to the conclusion -- and I'm saying it on the record for Appellate purposes -- that when the time span is so close and nobody including this gentleman can tell me those results that the results would not have supported the Defence position.

MR. TOLLESTRUP:

Well I -- I simply make this observation that if he was talking about a bioassay test and that wasn't identified, then Dr. MacLeay could have had a clear -- he would have remembered --

DAVIES, J.:

What's he supposed to be doing? --

MR. TOLLESTRUP:

-- whether fish were killed --

DAVIES, J.:

-- He said he went in there at the request -- to do tests -- if it was pursuant to the Guidelines isn't he required to do a flow-through test every three months for somebody?

MR. TOLLESTRUP:

Well he may have just been doing a metals test though, that's my point.

DAVIES, J.:

Well why didn't he say so?

MR. TOLLESTRUP:

I don't know.

DAVIES, J.:

He was a long ways from being articulate.

MR. TOLLESTRUP:

Well in fact, I know the answer to that but that's not going to help Your Honour at this point.

DAVIES, J.:

Mmm. Mmm mm. If you known whether or not they were complying with the Guidelines throughout, I think it's a factor. You don't have to tell me, of course if they weren't but I'll say this: it's a double-edged sword. Either they complied with the Guidelines -- which is not a part of this charge -- but it's a factor I'd consider in mitigation as a partial defence of due diligence. If they did take the tests and they were negative, that is, they showed that they were -- confirmed the position taken by the Crown -- then I rather question the statement made by one of your witnesses, this is an exercise in truth -- I'm paraphrasing.

MR. TOLLESTRUP:

Well, I don't want to get into the position of giving evidence but I --

DAVIES, J.:

No. I -- thank you --

MR. TOLLESTRUP:

-- but I do underst . .

DAVIES, J.:

-- Is there anything you wish to add? You see, I have assumed, because you raised the Guidelines, that I should consider them, only in respect to sentencing. And that's why I kept right out of that but now we're at the sentencing stage.

MR. TOLLESTRUP:

Yes. Well just to -- just to follow through on that Dr. McLeay business: Dr. MacLeay couldn't remember when he was asked on the stand what kind of test he did in June, whether it was a bioassay or metals test. In fact, he later told me that it was a metals test and that the results as best he could remember were that the readings at Myra Falls were high. Now, that is downstream of the waste rock dump and it was as a result of the high readings at Myra Falls that their attention was directed toward the waste rock dump.

DAVIES, J.:

You see, perhaps I'm being overly simplistic, but if I was a representative of a multi-million dollar corporate entity and I had evidence heard against me in Court indicating that I was not a good corporate citizen because I was polluting a stream, I would have certainly made sure that if there was any hope that there was an error in that, that I'd be able to come to Court and say, 'Well I would like to point out that with due diligence we checked the following and we found the following, and we did the test the way we said you should have done it.' You see, I haven't heard any word about that at all but I do notice from the Guidelines it's required to be done every three months, and there's a lot of three months' periods prior to this good gentleman taking over the management of the Company.

MR. TOLLESTRUP:

Well, Your Honour, a deliberate decision was made in respect to that because of the wording of the Act. It says, "depositing a deleterious substance" on a particular day.

DAVIES, J.:

Mmm mm.

MR TOLLESTRUP:

The only way that we can answer that would be to have made our own tests on those days.

DAVIES, J.:

Mmm mm.

MR. TOLLESTRUP:

It seemed to us it's the other side of the coin, if you will: on the one hand I'm trying to limit the evidence that the Crown adduces to those days so that we can deal with those charges.

DAVIES, J.:

Yeh.

MR. TOLLESTRUP:

If it's irrelevant for him to bring evidence about other days, it's irrelevant for me to bring positive evidence about other days. If I could have --

DAVIES, J.:

Well if that could --

MR. TOLLESTRUP:

-- said we did a test on January --

DAVIES, J.:

-- No no, I'm not following you, Counsel. You, like all lawyers, enter in the picture after the deed is done and try to make the best light of it -- that's your job and I'm not being sarcastic. There is -- you don't have to prove your client's innocence. You have to make sure the Crown doesn't prove their guilt. Unfortunately the Crown did. The issue though is this: if there was any desire by the Corporate entity in -- we'll take the February testing -- to determine when that stuff was up there, that it was not putting out deleterious substances, to simply check with the Fisheries Department, to say, 'Look, the stuff is gushing out over the top. I understand you're coming up to test it,' or 'Are you coming up to test it? Because if you do, we'd like to test it at the same time so we'll run ours through pretty complicated tests and we'll have evidence so we really know if it is or it isn't.' Hopefully, if it's pollutants, they'll do something to stop it. I, earlier, averted to replicate tests which I feel are essential to determine the purity of water going into a fisheries because you're putting captive fish in a concentrated form in water that has to be just better than good -- as good as you can possibly get it. So one test that showed that that is good shouldn't be definitive. There should be about ten tests that show it's good before they should put fish into it -- in my opinion only -- however, if on that first or second -- first test -- all the fish die, I'd suggest that source of water should be rejected forthwith. Now, they're quite different standards. Here, the Corporate entity has a duty under the bylines -- Guidelines -- as you point to me, to cause testing to be done and how that testing should be done: it should be done every three months. I'm satisfied if it had been done it wouldn't be here in front of me. If they'd complied with the results, they'd have rectified it and sometime between '77 and January of '81. That's all I have to say on the subject but I thought you should know that before you close your case.

MR. TOLLESTRUP:

The -- I think there is no evidence that -- that the results of the first test on January 28th were made known to the accused before the fourth test on May the 3rd.

DAVIES, J.:

Thank you.

MR. TOLLESTRUP:

My friend made a point that there were fish upstream of this outflow from the settling ponds but none found below that outfall, and I say that there could be a simple explanation for that, that the cloudy water caused an avoidance reaction --

DAVIES, J.:

Mmm mm.

MR. TOLLESTRUP:

-- Your Honour knows that when silt and debris and so on is dumped into a stream the first thing the fish will do is try to avoid it if there's some place else to go. So I don't think that --

DAVIES, J.:

When do you think they do that?

MR. TOLLESTRUP:

Well I -- I seem --

DAVIES, J.:

Because they're not worried about the scenery.

MR. TOLLESTRUP:

-- Well --

DAVIES, J.:

They do it because I think -- I suggest they do it because they think it might be unhealthy to stay there.

MR. TOLLESTRUP:

Well perhaps not though, Your Honour.

DAVIES, J.:

Thank you.

MR. TOLLESTRUP:

Ah you're --

DAVIES, J.:

Unhealthy or unable to see food --

MR. TOLLESTRUP:

-- asking me --

DAVIES, J.:

-- that's not good for them either.

MR. TOLLESTRUP:

-- You're asking me to think like a fish. If --

DAVIES, J.:

Well.

MR. TOLLESTRUP:

-- If the water's cloudy perhaps they can't see what they're feeding on.

DAVIES, J.:

It's a high standard for us. I don't know that I could achieve that standard.

MR. MONTGOMERY:

Your Honour, may I add something?

DAVIES, J.:

I think I have to -- I say I think I have to think for fish if not -- go ahead.

MR. MONTGOMERY:

Go up into the Stewart area and see some of the discharges from the glaciers there and you'll wonder how they can -- there's so much silt in the water that the salmon are running up that you can't understand how they get there. I'm sure some of our other people will have had that --

DAVIES, J.:

You mean in the Salmon River? I believe it's the Salmon River there, isn't it?

MR. MONTGOMERY:

It's the Salmon River.

DAVIES, J.:

Yes, I've fished it.

MR. MONTGOMERY:

The Salmon River -- you've seen that material, it's --

MR. TOLLESTRUP:

I think you will --

DAVIES, J.:

I commented about the mining. The first job I had out of the high school was with Silbac Premier (phonetic) in the panhandle. Go ahead.

MR. MONTGOMERY:

Okay, no problem. I shouldn't have added that but I thought I would.

MR. TOLLESTRUP:

Just to conclude my submissions then, Your Honour, the -- there is no evidence of any damage to the fishery or any evidence of fish kill. I think that's important.

There have been no other charges and no other convictions relating to -- well obviously, there can't have been convictions if there'd been no other charges -- relating to the -- relating to this section of the *Fisheries Act* or any other matter relating to polluting the environment against my client. It's a first offence. In my submission, they have been exemplary corporate citizens since early 1981, late 1981 and --

DAVIES, J.:

With you on that: late.

MR. TOLLESTRUP:

-- and that they've done everything reasonably possible to correct what they discovered was a serious problem, and the evidence of Mr. Montgomery today is that they HAVE corrected the problem -- that the amount of zinc that is being discharged into the lake, IF harmful at all, is in such minute quantities that --

DAVIES, J.:

I keep saying I wasn't going to interrupt and I keep breaking my work. I'm sorry. You've stressed how much they've spent. Would you mind telling me how much they made? This is not a benevolent society. They spend money to make money, I assume.

MR. TOLLESTRUP:

Oh yes I'm sure, Your Honour.

DAVIES, J.:

All right. They spent that much -- how much did they take out of the area?

MR. TOLLESTRUP:

Well I'm not sure that's a fair question, Your Honour.

DAVIES, J.:

Oh. If -- well if you're going to say you're spending money to keep the stream so that you can operate I think it's only fair to know how much you make by keeping the right to work there. If something hadn't been done presumably sooner or later that mine would have to have been closed down, so I presume they want to keep it open so they can make money. If you don't think it's fair for me to know how much they make, under the other heading I'm going to ask another question: what is their ability to pay a fine?

MR TOLLESTRUP:

Well I'm sure -- I'm sure that I can rely upon Your Honour's good judgment to impose a fine that they will be able to pay.

DAVIES, J.:

The law requires me to. The most I can fine them is two hundred thousand dollars (\$200,000.00).

MR. TOLLESTRUP:

Yes.

DAVIES, J.:

And I'm sure they can pay that. But you're asking to impose something less, and I'm going to ask you why should I.

MR. TOLLESTRUP:

Well, Your Honour, I've given you my submissions --

DAVIES, J.:

Thank you.

MR. TOLLESTRUP:

-- and I've asked Mr. Montgomery to appear here before you today to indicate what the accused has done. I'm not aware that -- of a principle that says they should be fined more if they can pay more.

DAVIES, J.:

That is not the principle. They should not -- a fine should not be imposed that is not within their means or ability to pay -- it's quite the reverse.

MR. TOLLESTRUP:

Yes. Well I think on the basis of the authorities even my friend submitted, Your Honour, that this should not be a situation where the maximum fine is imposed.

DAVIES, J.:

Thank you.

MR. TOLLESTRUP:

I --

DAVIES, J.:

You don't need to stress that. I don't think it's a matter where the maximum fine should be imposed in keeping with justice, but I don't believe minimal fines such as were suggested by those other courts are adequate either. Go ahead on that basis.

MR. TOLLESTRUP:

Well Your Honour, I think they're -- as I say -- that the highest case that my friend submitted to you was one in the Coquihalla River where there had been fish kill, and those were -- there were nine counts, I believe, and the fine imposed there was fifteen thousand dollars in each case.

DAVIES, J.:

Mmm mm.

MR. TOLLESTRUP:

Now I say that there has been no fish kill here that Your Honour's deliberations, in my respectful submission, should be confined to the deposit of deleterious substance and not to the pollution because there is no evidence of pollution in that broader sense --

DAVIES, J.:

Thank you -- you're correct.

MR. TOLLESTRUP:

-- and so in my submission I would think a nominal fine in each case would be appropriate and I -- my concluding comment is that, of the four counts, there were only two that related to bioassays. And in my submission, the two that were not related to bioassays --

DAVIES, J.:

I know. And only two of them was there evidence of bioassays.

MR. TOLLESTRUP:

Yes.

DAVIES, J.:

A little different. Go ahead.

MR. TOLLESTRUP:

Yes -- January 28th and May 3rd --

DAVIES, J.:

Yes.

MR. TOLLESTRUP:

-- each had bioassay tests. The others did not. I think that should be taken into consideration in imposing sentence. Thank you, Your Honour.

DAVIES, J.:

Thank you. I think it would be appropriate if we take a five . . . when do you have to leave here to get your plane?

MR. TOLLESTRUP:

Our plane is, I think, at 2:20, Your Honour.

DAVIES, J.:

Fine. We'll take a 15 minute adjournment so that I can consider these last few remarks that were made -- and reach my sentence decision.

(PROCEEDINGS ADJOURNED)

(PROCEEDINGS RECONVENED)

DAVIES, J.:

Be seated gentlemen.

As we've had an adjournment and as the human mind frequently thinks of things during that time, I now, before passing sentence ask either Counsel for the last time, do you have anything you wish to add?

SENTENCING

In passing sentence the Judge is required to consider the protection of society, a deterrent to the accused and to others and where it is a person rather than a corporate entity, the rehabilitation of that person. I will make reference to rehabilitation in the corporate sense in a moment, as I think that too is a factor that should be considered.

Evidence heard today as to sentence was directed to the efforts made by the corporate entity in late 1981/82 after the incidents took place that have been in issue

before me. I was, and stated, favourably impressed with the present manager of the corporate entity. I would add to that I am reasonably satisfied that he was brought in to clear up a mess and is doing a good job at it. The efforts being made by the corporate entity are commendable and reflect at long last a proper concern for the area, and it is a factor to be considered in mitigation as with the rehabilitation of any other person.

Since late 1981 great steps have been taken to minimize the problem. However, just as I consider such conduct to the corporate credit so must I consider the years of indifference and neglect prior to and during the first five months of 1981. I do not wish to be considered as saying that the corporate entity deliberately deposited such substances but their casual disregard is tantamount to willful blindness. Fines -- and I've been advised and knew in any event -- the maximum fined on each charge is fifty thousand dollars (\$50,000.00). Maximum is principles of sentencing that I will now apply -- maximum sentences should be imposed only in maximum sets of circumstances, and rarely then are they, in fact, imposed. The fines should be (1) that will discourage repetition of such conduct not only by this Company but by others. It should be a fine that reflects the concern expressed by the Appellate Court cited to me by learned Counsel for the Crown; the remarks I refer to are those of His Lordship Mr. Justice Seaton which I had read as part of my preparation when I took over this case. I will add, and I think it proper to do so, apart from the section read in by learned Counsel for the Crown, there's another paragraph. I'm going to read that into the record:

"I would hope that on the retrial . ."

and I'm reading now from page 9 of the actual order of their Lordships and the appeal that made this trial necessary, he said:

"I would hope that on the retrial the accused too would think that it to be so . ."

that is, that the society considers pollution to be a very important matter:

"and would face its responsibilities to deal with this matter on its merits. I think the way in which this matter has progressed does not bring credit to those involved."

I must, in fairness to learned Counsel for the Defence, state that he has certainly complied with the directions of the Appellate Court. He has dealt with this in a responsible manner and has dealt with it on its merits. And I commend him for following the comments made by His Lordship.

I have to keep in mind that these are -- there's no Kienapple principle applicable here. That is, that each are separate charges that should be dealt with as such. And I have to keep in mind when I am imposing sentencing the totality of the sentence would result. For those reasons, I assess a fine and order the corporate entity to pay a fine of twenty thousand dollars (\$20,000.00) on each count, keeping in mind the totality, that is: eighty thousand dollars (\$80,000.00).