

RECAPITULATION AND ALTERNATIVES – LESSONS LEARNED FROM A HYPOTHETICAL CASE STUDY

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OVERVIEW

The lessons learned from prior environmental cases, in the context of inspections through to investigations and prosecutions, are likely endless. This paper uses a hypothetical case study¹ as the lens through which to showcase some key lessons learned or “best practices” in working with regulators to bring a site into environmental compliance in difficult circumstances.

HYPOTHETICAL FACT SCENARIO

A company involved in the gold mining industry owns a mine site located in Remoteville, Canada. The company is in financial distress and the mine is in a non-operating, care and management state. During care and management, the staff at the mine is greatly reduced, leaving only a few individuals to handle the day-to-day management. Although not operating, the tailings ponds on the site continue to accumulate waters, due in part to ongoing precipitation which mixes with the tailings. The legal limits for the height of the tailings waters are close to exceedance, and, with the approaching spring thaw, there is a potential risk that the tailings will overflow and discharge to the natural environment.

Both provincial and federal inspectors conduct inspections and request updates on the status of the ponds, but, due to the company’s financial distress, communications with the regulators have broken down. Orders are issued to lower the tailings waters to a safe level. To comply with the orders and in an effort to lower the water levels, the company attempts to treat the water before releasing it to the environment, but discovers after the fact that the released waters failed the toxicity tests required pursuant to the *Metal Mining Effluent Regulations*.² Although the waters repeated failed the toxicity tests, the company continued to release the waters to the environment in an effort to continue to lower the water levels.

Due to the sudden onslaught of inclement weather, an inadvertent spill of 100,000 cubic metres of tailings waters occurs, and is not noticed by staff for many hours. It is possible that a nearby fish-bearing creek is impacted by the spill. Once noticed, it is reported to the appropriate authorities. The company experiences delays in its attempts to repair the tailings pond and remediate the natural environment, and does not follow the protocols outlined in its environmental management system (EMS) and emergency response plan relating to spills. An inspector visits the sites and documents are voluntarily provided.

¹ This case study is hypothetical, melding some of the facts from real environmental cases, either prosecuted to conclusion or currently under investigation, including the *Synchrude* “oily ducks” prosecution, the Mount Polley regulatory investigations, *R c Bloom Lake General Partner Ltd*, 2014 CarswellQue 14668, and *R v Stratabound Minerals Corp*, [2015] NBJ No 282 (NB Prov Ct) [*Stratabound Minerals*], among others.

² *Metal Mining Effluent Regulations*, SOR/2002-222 [MMERs], enacted pursuant to the *Fisheries Act*, RSC 1985, c F-14.

At some point, the inspection turns into an investigation. The inspector, wearing the hat of an investigator, requests interviews with employees, audio-records the interviews, and requests the production of further documentation, all of which is voluntarily provided in an attempt to cooperate with the investigation. The employee interviews are scheduled through the company representative and legal counsel, during company hours and on the company premises. Company legal counsel remains throughout the interviews.

Deeming the information provided by the company insufficient, the investigator arrives unannounced and without warning at the mine site, with police officers and a search warrant, seizing both specified documents and all documents in plain view, including potentially privileged records. The investigator insists that the search can continue as long as it takes to complete, i.e. to midnight or beyond. A prosecution is subsequently commenced against the company for the release of waters that failed the required toxicity tests and for the spill of 100,000 cubic metres of tailings waters to the environment, using the employee interviews as admissions against the company. While the investigation and prosecution are ongoing, the company continues to experience regular visits and requests for updates from the local inspector in order to continue to ensure the mine site, while in care and management, is in compliance.

LESSONS LEARNED AND BEST PRACTICES

1. Relationship with Regulators Must not be Allowed to Break Down

Breakdowns in communications with regulators – where there is a perception that the company is no longer being transparent in disclosing information to the regulators, in keeping the regulator updated, and in otherwise responding to questions – is often a red flag for more problems to come. If an inspector does not believe a company is being proactive and responsive, then the inspector will think it is necessary to move from voluntary abatement to mandatory compliance.

All jurisdictions take a ladder approach to enforcing compliance, with the first rung on the ladder being voluntary abatement in which regulators work to persuade companies to voluntarily comply with statutory prohibitions, regulatory limits and approval requirements. If voluntary abatement is not seen to be working, regulators will begin to use the compulsory enforcement tools available to them, including the broad statutory power of issuing orders or directions, forcing compliance.³ Once you are in the territory of the

³ See for example, Ontario Ministry of the Environment and Climate Change, *Compliance Policy Applying Abatement and Enforcement Tools*, May 2007, online: <<https://dr6j45jk9xcmk.cloudfront.net/documents/1098/60-applying-abatement-and-enforcement-tools-en.pdf>>. See also Environment and Climate Change Canada, *Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the Fisheries Act*, 2002, online: <<https://www.ec.gc.ca/Publications/default.asp?lang=En&xml=66448750-D3A2-4B5D-8278-543776ED7548>>.

regulator issuing orders, it is an uphill battle (but not impossible) to convince the regulator to return to voluntary compliance.

If a positive, working relationship can be maintained with the regulator, through an assigned, direct line of contact at the company working collaboratively with the abatement officer or inspector on solutions to achieve compliance, the abatement officer or inspector will want to continue to work with the company.

Examples of best practices include the following:

- Assigning one reliable, direct point of contact at the company to respond to an inspector or abatement officer's questions and requests for updates in a timely manner, who can develop a relationship of trust with the regulator. A company would be well-served by proactively seeking out an open relationship with the applicable inspector or abatement officer;
- Respond to inquiries and suggestions promptly and fully;
- Proactively update the inspector or abatement officer, without waiting for questions, on the status of the facility and its EMS;
- Establish open lines of communication with the abatement officer. Set up a written protocol for these communications, with weekly or monthly touch-points or "check-in's," as needed. If the manager assigned to regularly communicate with the inspector or abatement officer is not engendering the inspector's confidence, assign a new manager to that role;
- Take action and be seen to be taking action – i.e. continuous voluntary abatement and improvement measures where needed. If the company takes a positive, voluntary abatement step, update the regulator on the step taken;
- Report all discharges or spills, and, when in doubt, report;
- Generally, be a good corporate citizen;
- If the company is planning to cease operations, even on a temporary basis, as with a mine entering a care and management stage, reach out proactively to the regulator, and request a meeting in person to explain the situation, to assure the regulator that environmental obligations will be abided by during the cessation, and ask the regulator if it has any questions or particular concerns that it would like to see addressed. Use open communications to ward off the possibility of a knee-jerk reaction from the regulator, like an order, as a result of concerns that the company is not addressing environmental matters or is walking away from the site. In our experience, this transparency has resulted in a cooperative relationship, in which the regulators suggested making practical amendments to the company's mining permits to reduce the required monitoring and sampling for the duration of the care and management period, with specific requirements for if and when the mine resumed operations.

In a nutshell, the regulator does not need to be treated as a company's "enemy," but as someone who can work with the company to achieve workable solutions.

2. Due Diligence Must be Achieved and Seen to be Achieved – Paper, Paper, Paper

All environmental practitioners speak of the importance of due diligence. Due diligence is not merely about doing appropriate due diligence; it is about being seen to be doing appropriate due diligence. As lawyers, we continually advise companies to “paper” what they are doing – to create a clear paper trail to demonstrate that the company was duly diligent at all times, both before the incident, during the incident and after, to demonstrate to the regulator that the company did everything reasonable to prevent the incident but also everything reasonable to minimize the potential adverse effects and to prevent the incident from happening again.

As the Supreme Court of Canada stated in *R v Sault Ste Marie*,⁴ an accused may have a due diligence defence if it can prove, on a balance of probabilities, that it had (i) a reasonable belief in a mistake in fact which, if true, would render the act or omission innocent, or (ii) “exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.”⁵ However, as the court in *Bata Industries* recounted, “[t]he cases interpreting the phrase ‘all reasonable care’ indicate that the wording does not require that all steps be taken, only those that could be reasonably expected in the circumstances. The case law makes no distinction between ‘all reasonable care’ and ‘reasonable care’. The degree of reasonable care to be exercised is dependent upon the circumstances of the case.”⁶

One key element of a due diligence defence will be whether the company in question had a proper EMS and whether that EMS was implemented and followed – i.e. whether reasonable steps were taken to ensure the effective operation of whatever system the company has in place.⁷ If such an EMS is not in place, or is not followed, a company may be hard-pressed to prove it was duly diligent.

In the above hypothetical case study, would a regulator or the courts consider that the company was duly diligent? On the one hand, the company continued to try to abide by its environmental obligations, and was working to address environmental risks. On the other hand, although it was foreseeable that, during a non-operating state, environmental incidents could still occur, the company reduced its staff to a number that could not

⁴ *R v Sault Ste Marie*, [1978] 2 SCR 1299 (SCC) [*Sault Ste Marie*].

⁵ *Ibid* at 1331, as repeatedly cited in various cases, including *R v Bata Industries Ltd*, 1992 CanLII 7721 [*Bata Industries*].

⁶ *Bata Industries*, *ibid*.

⁷ *Ibid*. In *Bata*, the Court found a failing in due diligence, since “Bata did not establish a proper system to prevent the commission of the offence, nor did they take reasonable steps to ensure the effective operation of whatever system they had. They simply allowed the barrels to sit, rust and eventually disintegrate.”

apparently cope with the work load required to ensure the safety of the mine during care and management. Moreover, when the incident occurred, the company, despite having an EMS and emergency response plan in place, failed to adhere to its EMS and did not act quickly enough to remediate the situation.

As this hypothetical case study shows, having an EMS in place does not guarantee that, when an incident occurs, the company will be found to have been duly diligent. Additionally, EMS and emergency response plans must be comprehensive and be able to capture potentially harmful activities that are within the reasonable scope of the company's business. For example, in *R v Canadian Tire Corp.*,⁸ the company was convicted of importing banned CFCs in bar fridges for resale. Although the company had in place an EMS, the EMS did not ensure only CFC-free fridges would be imported. As a result, the EMS was not comprehensive and did not address all areas of potential non-compliance. Therefore, a company's EMS needs to be continually reviewed and updated, the employees need to be regularly trained in the procedures outlined in the EMS, and the company should, among other things, conduct spot checks to ensure that the EMS is followed.

Reasonable Care and Due Diligence does not mean Superhuman Efforts or Perfection

It is important to remember that, as found in *R v Courtaulds Fibres*,⁹ “[r]easonable care and due diligence do not mean superhuman efforts. They mean a high standard of awareness and decisive, prompt and continuing action. To demand more, would, in my view, move a strict liability offence dangerously close to one of absolute liability.”¹⁰ The Court in *R v Syncrude*,¹¹ adopted these trite principles of due diligence and stressed that Syncrude was “not required to show that it took all *possible or imaginable* steps to avoid liability, and was not required to achieve a standard of perfection”; rather, “[t]he conduct of the accused is assessed against that of a reasonable person in similar circumstances.”¹²

What constitutes “all reasonable care in the circumstances” demands an examination of various factors; there is no single comprehensive list of appropriate considerations for all cases. Every case must be decided on its own facts. In *R v Commander Business Furniture*

⁸ *R v Canadian Tire Corp Ltd*, 2004 CanLII 4462 (ONSC).

⁹ *R v Courtaulds Fibres* (1992), 76 CCC (3d) 68; [1992] OJ No 1972 (QL).

¹⁰ *Ibid* at 7-8 (QL). The Court found Courtaulds Fibres to have been duly diligent: “Admittedly, this was an aging plant, and needed immediate attention. No one could seriously suggest that all of the environmental ills of this Company could be addressed in 11 months. However, I conclude that such a period, given the continuing, and earnest, and widespread efforts of the Company to address its environmental problems, does prove that the Company used all reasonable care, and exercised due diligence with reference to the spills we are dealing with. Reasonable care and due diligence do not mean superhuman efforts. They mean a high standard of awareness and decisive, prompt, and continuing action. To demand more, would, in my view, move a strict liability offence dangerously close to one of absolute liability.”

¹¹ *R v Syncrude*, 2010 ABCP 229 [*Syncrude Trial Decision*].

¹² *Ibid* at para 99.

Inc,¹³ the court provided a lengthy list of factors that could be taken into consideration to determine the defence of due diligence:

- 1) the nature and gravity of the adverse effect;
- 2) the foreseeability of the effect, including abnormal sensitivities;¹⁴
- 3) the alternative solutions available;¹⁵
- 4) legislative or regulatory compliance;
- 5) industry standards;
- 6) the character of the neighbourhood;
- 7) what efforts have been made to address the problem;
- 8) over what period of time, and promptness of response;
- 9) matters beyond the control of the accused, including technological limitations;
- 10) skill levels expected of the accused;
- 11) complexities involved;
- 12) preventative systems;
- 13) economic considerations;
- 14) actions of officials.”¹⁶

Considering the element of financial distress in our hypothetical case study, it is important to consider to what extent courts take a company’s financial situation into consideration when assessing due diligence. The Court in *Commander Furniture* examined the relevant economic considerations (factor #13 above), and ultimately concluded that, while cost alone cannot be determinative of due diligence, “the economics of various alternative solutions is one consideration which must be weighed along with all the other factors in assessing due diligence.”¹⁷ However, as eloquently put by the Court in *Bata Industries* in its sentencing decision, the paramount objective of environmental protection must be

¹³ *R v Commander Business Furniture Inc* (1992), 9 CELR (NS) 185 (Ont Prov Div) at 212; [1992] OJ No 2904 at 19 (QL) [*Commander Business Furniture*].

¹⁴ As the court in *Syncrude Trial Decision* stated, a person “is only required to take steps to avoid that which it can reasonably foresee” (para 120).

¹⁵ As the court in *Syncrude Trial Decision* explained, “[r]easonableness of care is often best measured by comparing what was done against what could have been done. The reasonableness of alternatives the accused knew or ought to have known were available is a primary measure of due diligence. To successfully plead the defence of reasonable care the accused must establish on a balance of probabilities there were no reasonable feasible alternatives that might have avoided or minimized injury to others” (para 116, citing *R v Gonder* (1981), 62 CCC (2d) 326; 1981 CarswellYukon 8 (YT Terr Ct) at para 25).

¹⁶ *Commander Business Furniture*, *supra* note 13 at 19 (QL). See also *Syncrude Trial Decision*, *supra* note 11 at para 100. Regarding the last factor (“actions of officials”), the Court in *Commander Business Furniture* explained as follows at 23 (QL): “In my view, the advice, actions of lack thereof, and opinions of government officials are factors to consider in assessing the accused’s knowledge of the problem and the solutions. However, the responsibility to know the subject matter and take reasonable and timely action still rests upon the accused. Similarly, it is my opinion that where advice, actions and opinions of consultants or experts have been sought, they are a factor to consider in assessing the accused’s knowledge. However, the accused alone is still expected to acquire an appropriate level of expertise in the circumstances and to act with due diligence. An accused cannot hide behind one opinion in the face of other reliable evidence which reasonably leads to a contrary conclusion.”

¹⁷ *Ibid* at 21 (QL).

heeded: “[t]he message they receive from this sentence must be that even in this bleakest of financial times, the environment must not be a sacrificial lamb on the altar of corporate survival.”¹⁸

Generally, courts will take a pragmatic approach in applying the factor of economic considerations in assessing whether the due diligence standard was met in the circumstances – by acknowledging that economic factors cannot be ignored or the examination of due diligence will lack the required “air of reality.” That said, courts will strive to balance the need to protect the environment and the costs of those protective measures. The former will generally outweigh the latter when the potential harm to the environment is grave. The Court in *Commander Furniture* explained the analysis as follows:

In my view, the degree of control that an accused can exercise over a problem must have an air of reality and therefore must include some consideration of cost. The cases generally accept that industrial standards are relevant in determining what steps are reasonable. In my view, economic factors are fundamental to determining what a particular industry will adopt as its standard. If industrial standards are relevant then so too must be economic considerations.

Having said that, economic concerns must be properly balanced against other factors. For example, phasing in an operational change which will both protect the environment and the economic viability of a company may be duly diligent in all the circumstances. It is difficult to imagine that any industrial standards or reasonable person would support a non-phased-in approach which would destroy a company when a realistic phased-in timely approach would have reasonable success over a reasonable period of time and thereby accommodate both interests. On the other hand, if a phased-in approach that complied with the industry standard would destroy the environment or cause a risk of serious harm, no cost would be too great. The degree or level of harm or adverse effect must therefore be reasonably balanced with economic considerations and the other factors set out earlier for a due diligence defence.¹⁹

¹⁸ *Ibid*, citing *Bata Industries*, *supra* note 5 at 21 (QL).

¹⁹ *Ibid* at 22 (QL) (emphasis added). At page 20 (QL), the Court quoted from John Swaigen in *Regulatory Offences in Canada, Liability and Defences* at 119, in support of its position that economic factors are relevant: “Certainly, a company cannot choose to deliberately violate a law, regardless of the harsh economic impacts that may result from compliance. However, the cost of taking steps to prevent violations can be taken into account in determining the standard of care required to establish due diligence. A distinction may be drawn between commencing an activity knowing that it may entail a risk of non-compliance, and continuing an activity commenced without such awareness once the possibility of non-compliance becomes apparent. In the latter case, it is suggested that the assessment of the reasonableness of ceasing the activity may involve a balancing of the potential harm to the public or the environment from continuing the activity, and the harm to the enterprise from ceasing it. Some industrial processes cannot be shut down suddenly without risk of injuring employees, destruction of large quantities of product or raw materials, damage to equipment, or lengthy delay in recommencing operation. Once a person knows that his activities are violating the law, or is forewarned of the likelihood that these activities will culminate in violations, there is a heavy onus on that person to make whatever expenditures are needed to cease or prevent violations. But the amount of money that must be spent depends on how foreseeable and serious the harm is. The costs incurred to anticipate and prevent violations is proportional to the risk. The higher and more foreseeable the risk, the greater the

In our hypothetical case study, the company is striving to abide by its environmental obligations in very difficult circumstances, where it simply does not have the funding or resources to implement all possible corrective or alternative measures, nor does it have time on its side with the approaching spring thaw. As a result, the company chooses what it views as the feasible solution in the circumstances to bring the site into compliance: treating and releasing waters to the environment. The treatment system, however, does not work as expected, and is, ultimately, not enough to prevent an inadvertent spill in extreme weather. Whether this would be enough to constitute due diligence in the circumstances would be the subject of close scrutiny.

The Teachings of Syncrude

Veering from a company's established procedures and reducing staff and resources can be viewed as a lack of due diligence

The case of *R v Syncrude Canada Ltd*²⁰ provides an apt example of what type of conduct a court could consider to demonstrate a failing in due diligence, judging the accused “on the basis of the information available to it at the time of the alleged offence.”²¹ In *Syncrude*, the company was convicted for failing to store hazardous substances away from animals and migratory birds, and failing to take reasonable steps to deter birds from landing in its tailings ponds, which resulted in the death of 1600 birds.

The ultimate question for Syncrude was whether it took all reasonable steps to ensure that waterfowl would not be contaminated in its tailings pond.²² And the ultimate issue was with Syncrude's lack of a proper preventative system. The existing documents outlining the procedures for preventative measures were not comprehensive, and Syncrude had significantly cut back in previous years on the number of bird deterrents. Specifically, Syncrude had a Waterfowl Protection Plan with employees tasked to the Bird and Environmental Team (BET), but the employees had no formal training in dealing with wildlife and there was no formal schedule for the deployment of deterrents to birds landing in the tailings. In fact, resources and deterrents available for the BET team's use were not as strong as in prior years, and staff had been significantly reduced.²³

expenditures the public may reasonably expect an enterprise to incur to reduce, or eliminate it, and vice versa” (emphasis added).

²⁰ *Syncrude, Trial Decision, supra* note 10.

²¹ *Ibid* at para 96, citing *R v MacMillan Bloedel Ltd*, 2002 BCCA 510 (BCCA).

²² *Ibid* at para 101. There was no evidence of any mistake of fact in Syncrude's situation; the court found that Syncrude should have known that the proscribed conduct would occur as it was reasonable foreseeable that birds could land in the tailings pond (para 97).

²³ *Ibid* at paras 23-28.

As a result, Syncrude was sentenced to pay a total of \$3 million in a combination of fines and payments to conservation organizations.²⁴ Thus, with respect to our hypothetical case study, a court would scrutinize whether the company's reductions in staff, while the site is in care and management, is a factor supporting a lack of due diligence.

A Recent Lesson in Tailings Due Diligence

A company "in over its head"

A recent October 2015 decision by the New Brunswick court, *R v Stratabound Minerals Corp*,²⁵ provides an example of the application of due diligence principles in a similar situation to our hypothetical case study. Stratabound was having financial difficulties and facing dissolution. It also faced a situation where the treatment system for the mining effluent was not working and toxicity tests were failing, but the ponds were dangerously increasing in water levels. To prevent an overflow, Stratabound deliberately released about 2 million litres of treated water, in the face of repeated, consecutive toxicity test failures that had not been redressed. The release again proved fatal to fish. The Court explained the situation as follows:

On May 16th, Stratabound notified Environment Canada that their holding cells, polishing pond and the open pit were reaching a critical stage, that they were almost full of rain water. At this sentencing hearing, the Stratabound representative related to the Court that the problem emanated from a significant rainfall amount over the course of three days in May of 2013. On May 24th, due to the anticipated heavy rain forecasted for the weekend, Stratabound was under pressure to discharge mine effluent in order to increase their on-site storage capacity. Failure to do so would risk the possibility of an uncontrolled overflow from the open pit. Environment Canada, as mentioned, had been notified of the situation. Stratabound told them they were to release effluent on May 24th. On that day, the mine was inspected in order to ensure compliance with the MMER's. Mine effluent was observed leaving the property in the eastern corner of the site via a drainage ditch adjacent to the previous pit location at the lower sump area. This effluent was being discharged into a marsh which eventually led to the Portage River. Mine effluent samples were collected by Environment Canada inspectors at this location. The volume of deleterious effluent discharged from the mine site on May 24th was not quantified but tests were conducted on the samples collected. At full strength, the effluent was highly toxic to fish. Even when diluted to 6.25 percent, it was considered a deleterious substance as 60 percent of exposed fish died in that diluted concentration. ...²⁶

The court convicted and sentenced Stratabound Minerals to a fine of about \$75,000 for breaches of the *MMERs* and the *Fisheries Act*, including the unlawful deposit of mine effluent on three occasions. The fine imposed could have been much higher had the amended minimum/maximum fine structure of the current *Fisheries Act* applied (as the

²⁴ *R v Syncrude Ltd* (22 October 2010), St Albert No 09015792226P1 (ABPC, Criminal Division).

²⁵ *Stratabound Minerals*, *supra* note 1.

²⁶ *Ibid* at para 17.

events in question occurred before the amendments).²⁷ Although no actual proof of harm to the environment had been demonstrated, the potential for harm was significant and that was enough to justify the conviction.

The *Stratabound Minerals* decision provides a lens through which to study how prosecutors and courts generally approach these types of cases, and the type of factors they take into consideration in sentencing. The Court found the company negligent, but not reckless. The company did not deliberately set out to harm the environment; rather, the acts “arose in the context of a company without a great deal of experience in actual mining operations, strenuously attempting to raise needed funds to further their continuing mining exploration activities and getting caught up in something beyond their ability to rectify.”²⁸ In short, according to the court, the company simply could not cope.²⁹ The decision highlights that inexperience, a lack of preparedness, a lack of foresight and a lack of funds can create the perfect storm when grappling with “the enormous job” of protecting the environment.

Some take-aways from the *Stratabound Minerals* decision are as follows:

- *Unexpected or extreme weather will not excuse a lack of due diligence:* As the court stated, “[i]t is of no consequence that the water was polluted prior to their starting up operations. It is also of no consequence that more rain fell than could have been predicted during their mining operations. The vagaries of nature do not excuse non-compliance with strict regulatory directives intended to protect our environment.”³⁰
- A lack of preparedness and inexperience is not necessarily an excuse – a company is generally expected to have the necessary expertise to operate, and if they don’t have this expertise, the company can hire experts to assist. Companies need to recognize when they are “in over their heads” and get help: “Undoubtedly Stratabound was aware of its responsibilities in regards to water treatment. They attempted to comply with them. They were communicating with the on-site Environmental Monitoring and Compliance Officer who was actually at the mine site. They attempted to correct the problem. They utilised the chemicals destined to manage the settling process and modify the pH content of the water at the site prior to discharge, but these chemicals did not correct the toxic metals content in the effluent. To use the vernacular, in my opinion they were simply “in over their

²⁷ As a result of the *Environmental Enforcement Act*, the *Fisheries Act* and other federal legislation were amended to include stiffer minimum and maximum fines. For instance, for a breach of the Act, a corporation could face a minimum fine of \$500,000 and a maximum fine of \$6 million for an indictable offence, or a minimum fine of \$100,000 and a maximum fine of \$4 million on summary conviction (s 40(2)).

²⁸ *Ibid* at para 23.

²⁹ *Ibid*.

³⁰ *Ibid*.

- heads” and couldn’t cope. I would classify this offence as one of negligence and disregard brought about by lack of experience and lack of prudence ...”³¹
- *No proof of actual harm to the environment is needed for a conviction:* “To summarize then, Stratabound, a company experienced in the mining industry but relatively inexperienced in actual mining operations, committed a serious offence by discharging mining effluent that had the potential to be very harmful to the environment. No actual proof of harm has been demonstrated or alleged.”³²

As outlined above in discussing the factor of economic considerations addressed in *Commander Furniture*, a company’s finances or financial distress will be considered by the courts when examining due diligence, but a lack of funds does not necessarily excuse a violation of environmental obligations. Financial distress can, however, also be a factor taken into account in sentencing. The court in *Stratabound Minerals* confirmed that the “financial position of the company is always taken into consideration by the Court in sentencing, as part of a group of factors considered.”³³

Recognizing that Stratabound was in financial distress, the Court still held that the principle of general deterrence – i.e. sending a message to other mining companies in similar situations – justified imposing the fine in the circumstances. Although the company was on the financial brink and a fine against the company may not achieve much as far as the company was concerned, the polluter pays principle prevailed: “The message must be clear: flagrant abuse of the environment resulting in harm or potential harm is not to be tolerated because the protection of the environment is essential to the health and well-being of all creatures and plants living on this planet. Polluters must pay for the cost of their illegal actions.”³⁴

It is possible a court could deem the company in our hypothetical fact scenario as “in over its head,” akin to Stratabound Minerals, since the company could not fix the water treatment system or arrive at an alternative solution, and continued to release waters knowing the waters were likely toxic.

Lessons Learned from Mount Polley

New recommendations could affect future standards of care for due diligence

Recently, on December 17, 2015, the Chief Inspector of Mines for British Columbia’s Ministry of Energy and Mines (MEM) completed its 16-month investigation into the August 4, 2014 tailings pond breach at the Mount Polley Mine in British Columbia, and

³¹ *Ibid* at paras 25-26.

³² *Ibid* at paras 47-48.

³³ *Ibid* at para 41.

³⁴ *Ibid* at paras 41-42.

released its investigation decision.³⁵ The Mount Polley breach released 10 million cubic meters of water and 4.5 million cubic metres of sediment into Polley Lake, triggering an environmental emergency situation.

The Chief Inspector determined that MEM would not prosecute the Mount Polley Mining Corporation (MPMC) for violations of environmental legislation.³⁶ MEM's investigation team had conducted approximately 100 interviews and had reviewed over 100,000 pages of documents going back to 1989; it was the largest and most-complex investigation ever conducted in British Columbia.³⁷

Although MEM found that MPMC had conducted inadequate water management in respect of its tailings pond, had failed to conduct adequate studies and site investigations of the perimeter embankment foundation for the tailings pond, and had failed to operate using best available practices, operations of the mine site were not, at the time, in contravention of any regulation, in part, because there were no specific guidelines or regulatory requirements in place for water management at mine sites. The Chief Inspector of Mines concluded that “weak practices ... do not constitute a legal contravention of existing mining legislation.”³⁸

Although the Mount Polley tailings breach did not result in a MEM prosecution, the Chief Inspector of Mines made 19 recommendations directed at mining operators, the mining industry, professional organizations and the government regulators to prevent such incidents in the future and “to build a safer, more sustainable industry.”³⁹ These recommendations may impact the standard of due diligence applied to mining companies in the future, not only in British Columbia but in other provinces or federally. The British Columbia government plans to work with industry and professional organizations to

³⁵ *Decision and Reasons for Decision of the Chief Inspector of Mines on whether to submit a Report to Crown Counsel to assess if charges should be laid and a prosecution commenced for contravention of the Mines Act*, Chief Inspector of Mines, signed 8 December 2015, online: <http://mssi.nrs.gov.bc.ca/1_CIMMountPolley/T0229_TAR431_ANALYSIS_Decision%20DocumentCIM_20151208.pdf>.

³⁶ *Ibid* at 1 of 4. The British Columbia Conservation Officer Service (COS) is still conducting its investigation into the Mount Polley accident, based on compliance with the Ministry of Environment legislation, and it is possible that the COS investigation may find non-compliance that warrants a prosecution. Environment Canada also opened an investigation on 4 August 2014, which is being conducted jointly with the British Columbia Ministry of Environment, COS and Major Investigations Unit. Environment Canada's investigation focusses on alleged violations of the *MMERs* and the *Fisheries Act*.

³⁷ Ministry of Energy and Mines, News Release, “Government takes action on Chief Inspector of Mines' Recommendations” (17 December 2015) at 1 [*News Release*], online: <<https://news.gov.bc.ca/releases/2015MEM0030-002119>>.

³⁸ *Ibid*, *Backgrounder 1, Findings of the Chief Inspector*, at 1-2. In summary, the Chief Inspector of Mines' decision found that MPMC “failed to effectively manage water at the mine site and in the TSF. An adequate water management plan did not exist, there was no qualified individual responsible for water balance in the TSF, and MPMC did not adequately characterize the risk of surplus supernatant water, which had been compounding since the mine reopened in 2005.”

³⁹ *News Release*, *supra* note 37 at 1.

implement the recommendations, and anticipates that this implementation work will be completed by spring 2017. It remains to be seen the extent to which the recommendations will be implemented by companies and regulators alike, but it may be wise for mining companies to heed some of the recommendations.

Key recommendations include:

- All mines with tailings storage facilities (TSFs) will be required to have a designated mine dam safety manager and a designated individual to oversee the mine's water balance and water management plan. "[A]ny mine with a tailings storage facility (TSF) should have a qualified individual designated as a mine safety manager responsible for oversight of planning, design, operation, construction and maintenance, and surveillance of the TSF, and associated site-wide water management."⁴⁰
- Mines with TSFs will be required to have water management plans designed by a qualified professional;
- The mine manager should ensure the operation, maintenance and surveillance manual for the TSFs, required by British Columbia's Health, Safety and Reclamation Code for all impoundments, adheres to applicable Canadian Dam Association and Mining Association of Canada guidelines;
- The mine manager must ensure that the Mine Emergency Response Plan adheres to applicable regulations, is maintained on a regular basis to ensure currency, incorporates appropriate response measures to emergencies including those involving the TSF, and is written and distributed in such format as to serve as a procedural guide during an emergency or other event;
- All mine personnel should be educated in the recognition of conditions and events that could impact TSF safety or contravene applicable permit conditions and regulations;
- Independent technical review boards will be required for all mines with TSFs;
- The Association of Professional Engineers and Geoscientists of BC, the Mining Association of Canada, and the Canadian Dam Association should update and strengthen guidelines and standards of practice including those specific to TSF design and management, dam safety and construction;
- The regulator should consider and incorporate as appropriate guidelines from these external associations, as applicable;
- The regulator should establish a dedicated investigation, compliance and enforcement team within MEM, led by a new deputy chief inspector of mines;
- To strengthen records management and improve openness and transparency around design, construction and operation, the government will establish a formal documentation management system for all TSFs from development to post-closure; and

⁴⁰ *Ibid*; *Backgrounder 2, Chief Inspector of Mines' recommendations at 1 [Backgrounder 2]*.

- The stakeholders should foster innovations in the mining sector that improve current technologies in tailings processing, dewatering and discharge water treatment.⁴¹

Due Diligence – Looking Forward

Companies, like the mining company in our case study, will be judged against their knowledge and the industry standards in place at the time of the incident in question. However, the fall-out from Mount Polley may affect the assessment of the standard of care that a reasonable person must meet in the circumstances going forward. The Mount Polley recommendations may be seen as new standards which mining companies should meet to demonstrate due diligence, both within British Columbia and beyond. To what extent the recommendations will be adopted remains to be seen. Mining companies, however, should pay heed to some of the recommendations and consider to what extent the best practices or principles espoused in the recommendations can be adopted.

Regardless of the particular industry, the first line of offence is a good defence – if you are thinking about how to be duly diligent and what constitutes reasonable steps in the circumstances, remember to ensure a sufficient paper trail of due diligence is readily available for disclosure to the regulator when needed.

3. Know the Difference between Inspections and Investigations and How It Impacts Rights

The company in the above case study entered the murky waters of an inspection-turned-investigation. It is important to understand the difference between an investigation and an inspection and how this could impact a company's rights. An inspection, on the one hand, requires cooperation – a company cannot obstruct an inspector or abatement officer carrying out his/her inspection powers. In Ontario, it is an offence to obstruct a provincial officer in the performance of his/her statutory duties.⁴²

On the other hand, during an investigation, a company has certain rights that it would not otherwise have during an inspection, including the right, should it want to assert it, not to cooperate. Key to an investigation is its purpose: an investigation is undertaken when the investigator has reasonable and probable grounds that an offence has occurred and the investigator is seeking to gather evidence of that offence.⁴³

⁴¹ *News Release, supra* note 37 at 1-2. For all recommendations see *Backgrounder 2, ibid* at 1-3.

⁴² For example, see s 184 of Ontario's *Environmental Protection Act*, RSO 1990, c E.19. "Obstruction" means making it more difficult for the provincial officer to carry out his/her statutory duties; it need not be a positive action. It can be failing to do something that the provincial officer requests.

⁴³ Stanley D Berger, *The Prosecution and Defence of Environmental Offences* (Toronto: Canada Law Book, 2015) at 3-56 to 3-58 and 3-62.

Added to the confusion is that inspections can become investigations and lead to a prosecution when, during an inspection, a provincial officer acquires evidence which gives her “reasonable and probable grounds” to believe an offence has been committed. Another difficulty arises from the fact that an investigator can access and make use of any incriminating information previously collected, prior to the commencement of the investigation, by an inspector. However, once an investigation is underway, the inspection can continue in parallel but the inspector can no longer share the fruits of the inspection with the “investigative side”.⁴⁴

In contrast to inspectors, investigators cannot use statutory “inspection” powers (i.e. to enter buildings, examine records, take samples) without consent or a search warrant. Once armed with a search warrant, the investigator can generally seize anything permitted by the warrant but also anything in “plain view” if she reasonably believes it is evidence of an offence.⁴⁵ As a result, companies should take care not to leave sensitive or potentially incriminating or otherwise sensitive or confidential documents in plain view.

A simple way to deal with this confusion, when asked by an environmental officer to consent to or otherwise schedule a visit to the facility, is to ask the officer if the visit is for the purpose of an inspection or an investigation. In other words, ask the officer if she has reasonable and probable grounds that an offence has been committed, if she is doing an investigation or inspection, and if you are compelled to answer her questions. It is also advisable to contact your lawyer, whether that be in-house or external counsel, to get advice on how to respond to the officer.

Other papers submitted for this Symposium will no doubt discuss in some depth the differences between inspections and investigations, and the powers available to environmental officers during the conduct of each. Below is a summary table that explains, at a high level, the differences between inspections and investigations.

⁴⁴ Berger, *ibid* at 3-58.

⁴⁵ See for example s 160 of Ontario’s *Environmental Protection Act*, *supra* note 42.

INSPECTIONS	INVESTIGATIONS
CARRIED OUT BY AN INSPECTOR OR PO (ABATEMENT OFFICER)	ALSO CARRIED OUT BY AN INSPECTOR OR PO (BUT WITH MOECC, USUALLY FORMER POLICE OFFICER OR TRAINED INVESTIGATOR FROM IEB)
COMPLIANCE ORIENTED AND INFORMATION GATHER – USED TO CONDUCT FIELD AUDITS, SECURE EVIDENCE AT SCENE, ACHIEVE IMMEDIATE “VOLUNTARY COMPLIANCE”, ISSUE ORDERS, IMPOSE ADMINISTRATIVE PENALTIES, ISSUE POA “TICKETS”	TO INVESTIGATE VIOLATIONS OF LEGISLATION AND LAY QUASI-CRIMINAL CHARGES
NO WARRANT IS NECESSARY WHERE THE PREDOMINANT PURPOSE OF THE VISIT IS AN “INSPECTION”	GENERALLY, WARRANT IS REQUIRED IF THE PREDOMINANT PURPOSE OF THE VISIT IS AN “INVESTIGATION”
PO RELIES ON THEIR STATUTORY INSPECTION POWERS TO TOUR PREMISES, DEMAND DOCUMENTS AND INTERVIEW WITNESSES	PO MUST CAUTION WITNESS THAT THEY COULD BE CHARGED; ONCE CAUTIONED, NO OBLIGATION TO GIVE STATEMENT/DOCUMENTS – NO STATUTORY INVESTIGATION POWERS

In our hypothetical case study, it appears that the mining company did not treat the inspections any differently than the investigation, which may not have served the company well in preventing the investigation from escalating.

4. Know the Consequences of Employee Interviews so you can Make an Informed Decision

If an inspector or investigator asks to interview an employee, it is important to understand the potential consequences of that interview in order that you can make an informed decision as to how that interview should be conducted, and, in the context of an investigation, whether it should happen at all. Employee interviews can expose a company and its directors and officers to serious liability. Also, the employee could be suspected of committing an offence, or become a suspect at a later point, and could be charged personally, and, as such, needs to understand those potential consequences. The investigator should appropriately caution the employee in such a situation.

Given the potential conflicts of interests between employees and the company, the biggest mistake companies can make is to try to “go it alone” without legal advice from a lawyer who has specialized environmental expertise. From the moment the accident or potential violation occurs, or the investigator comes knocking, the company should get legal advice on how best to respond. Every fact situation is different, but your lawyer can make sure you follow the lessons learned from other cases.

Your lawyer can assist you in dealing with the investigator by:

- Communicating with the investigator directly, which allows the company to avoid admissions and strategic errors such as consenting to “voluntary” interviews unless compelled or properly prepared;
- Underscoring with the investigator how seriously the company is treating the event under investigation;
- Gathering the company’s defences and advocating the company’s position with the investigator from day one;
- Convincing the investigator that the company was duly diligent;
- Convincing the investigator that even if the company was not duly diligent, the company no longer needs to be deterred with a fine because the problem has been corrected;
- Organizing and controlling the company’s disclosure to the investigator;
- Organizing and controlling the company’s interviews given to the investigator;
- Arranging independent legal counsel for employees and ensuring the independent legal counsel is properly briefed;
- If charges are laid, reaching a reasonable settlement with the Crown prosecutor, if a settlement is in the company’s best interests.

The case of *R v Syncrude Canada Ltd*⁴⁶ provides yet another “lessons learned” in the murky territory of employee interviews. Investigators obtained several statements from individuals identified as employees of Syncrude. Only the company was charged, and a *voir dire* was held to determine the admissibility of a statement made by the employees as evidence against the company. The court ruled that, in order for such a statement to be admitted as the company’s statement, the statement must have been made by a person who was an agent or employee of the company at the time it was made and the statement must have been made within the scope of the agent or employee’s authority.⁴⁷ The defence had submitted that since the employee had never been told that his statement could be used as a statement of the company, the statement could not be used as evidence of the company’s operating mind.

The Court concluded that there was evidence on a balance of probabilities that the person interviewed was an employee of Syncrude at the time the statement was made and that the statement was reasonably related to the discharge of his duties for Syncrude. The Court also concluded that the statements were reliable, adopting the principle that it is unlikely an agent, while still employed by the principal, would make statements against the principal’s interests unless it were true.⁴⁸ As such, the statement was admissible against the company without the Crown having to call the employee to testify.

⁴⁶ *R v Syncrude Canada Ltd*, 2010 ABPC 123, Alberta Provincial Court [*Syncrude – Admissibility Decision*].

⁴⁷ *Ibid* at para 20.

⁴⁸ *Ibid* at para 39.

Understanding what was allowed to happen in *Syncrude* assists in distilling the lessons learned. The Court arrived at its conclusion to admit the employee's statement as the company's statement, in part, because of the following factors:

- The employee interview was arranged by representatives of Syncrude including Syncrude's legal counsel.
- Syncrude's legal counsel was present during the interview (which was formal and recorded) and signed a document acknowledging that an investigation was underway and that she acted as counsel for both Syncrude and the employees.
- Syncrude had been formally notified by letter that Alberta Environment was undertaking an investigation, and was aware of the purpose of the meetings and interview requests. The employee, management and corporate legal counsel knew that the interview was part of the investigation with potentially serious consequences for Syncrude.⁴⁹

Significantly, the Court dismissed the defence's complaint that the investigators never cautioned or warned the employee that his statements could be used as evidence against the company or treated as the company's statement.⁵⁰ Rather, the Court relied on the fact that there was no evidence the employee or corporate counsel were ever told that the statement would *not* be used as a statement of the company.

In dismissing this complaint, the Court concluded that the confession rule in criminal matters (i.e. the rule that statements must be freely and voluntarily made with the absence of inducements, policy trickery, threats or promises) does not apply directly or by analogy to determine the admissibility of admissions of a corporation. According to *Syncrude*, there is no authority to suggest that the rule applies to an admission attributed to a corporation. Unlike an individual, a corporation does not have the benefit of the right to life, liberty or security of the person under section 7 (and its guarantee of the right to silence) or the right against self-incrimination under section 11(c) of the *Canadian Charter of Rights and Freedoms*.⁵¹

The treatment of employee statements as statements attributable to the corporate accused fits within the legislative scheme for environmental offences. In most environmental legislation, such as the *Fisheries Act*, offences committed by an employee or agent of the

⁴⁹ *Ibid* at para 10.

⁵⁰ Investigators acknowledged that they did not warn the employee during the interview that his statements would be regarded as the statements of Syncrude.

⁵¹ *Ibid* at paras 28-33, citing *Irwin Toy Ltd c Quebec (Procureur general)*, [1989] 1 SCR 927 (SCC) at para 96; *BC (Securities Commission) v Branch*, [1995] 2 SCR 3 (SCC) at paras 39-40. A British Columbia court recently agreed that the confusions rule does not apply to corporate admissions (*R v Gwaii Wood Products Ltd*, 2015 BCPC 248, para 9).

corporation are sufficient proof of the offence by the employer, principal, and owner. statements made by an employee or principal are attributable to the corporate accused.⁵²

In our hypothetical scenario, the mining company permitted the investigator to interview and audio-record its employees, in the presence of company legal counsel during company hours and on company premises, similar to what was done in *Syncrude*. Should a court deem the employees to be agents of the company and acting within the scope of their employment or authority, then a court would likely similarly permit these employee interviews to be tendered as statements of the company in a prosecution. Knowing the potential end game before allowing such employee interviews is critical to making an informed choice regarding next steps.

5. When the Investigator Shows Up with a Search Warrant – Be Ready

In the above case study, the execution of the search warrant was unexpected, particularly when the company had been cooperative with the investigator prior to the search. However, once a search is underway, the company cannot obstruct or impede the search, and must let it proceed. To minimize the disruption of such a search warrant and to protect your legal rights, companies need to be ready in advance for the possibility of a search warrant by working with its personnel and legal counsel to ensure that everyone knows what can happen and what should not happen during a search and the limits of an investigator's search warrant powers. In my colleague Mr. Coop's paper, he outlines in some detail the protocol and checklists that a company can implement to assist in getting them ready for the possibility of search warrant.

In Ontario, for instance, it is important to understand that a warrant for such an environmental search must be obtained from a Justice of the Peace under section 158 of the *Provincial Offences Act*, and that the Act, like the *Criminal Code*, contains certain inherent limitations in the scope of authority granted by the warrant. For instance, the warrant must be executed between 6 a.m. and 9 p.m.⁵³ If an officer is ignoring these rules, it is important to get a lawyer involved to speak to the officer and ensure the officer is following the law in conducting the search and paper your objections on the conduct of the search. Be mindful of the limits placed on officers carrying out such warrants, and speak to your lawyer.

⁵² For example, see s 78.3 of the *Fisheries Act*; *R v Gwaii Wood Products Ltd*, 2015 BCPC 292, para 61.

⁵³ *Provincial Offences Act*, RSO 1990, c P.33, s 158(3). *Criminal Code of Canada*, RSC 1985, c C-46, s 488: The section states that, "a warrant issued under section 487 or 487.1 shall be executed by day ...", and day is defined as "the period between six o'clock in the forenoon and nine o'clock in the afternoon of the same day." However a search warrant "authorize[ing] [the police] to enter the said place or premises between the hours of 5:15 p.m. on Aug. 10, 2002 to 8:00 p.m. on Aug. 10, 2002" does not necessarily mean the police must vacate the premises by 8:00 pm if their search is not completed. They must enter during the time specified and can then remain a reasonable time to complete their search and seizure (*R v Cardinal*, [2003] BCJ No 2598, 2003 BCSC 158 (BCSC)).

Also, one should verify that the warrant has not expired. An expired warrant should be treated as of no force or effect, and a new valid search warrant has to be obtained.⁵⁴

If the officers purport to bend the rules applicable to search warrants, paper in writing your objections relating to the way in which the warrant was conducted, so that you can raise the appropriate objections in court should the matter proceed to prosecution.

It is also helpful to ask the officers to provide the company with a copy of the sworn information or supporting affidavit that was submitted when the warrant was taken out. Sometimes this request is denied. If the information is not made available when the warrant is served and the officer refuses to provide the information to you, have a search done of the court file. If the court file is sealed, consider bringing a motion for a court order that a copy of the information or affidavit be unsealed and be made available.⁵⁵

The seizure of potentially privileged documents presents a challenge. Generally speaking, it is good advice to inform the officers, upon their arrival with the warrant, of the names of the law firms and lawyers, and in-house counsel, working with the company, so that documentation involving those law firms or lawyers can be protected from disclosure. Follow up this information with a written letter setting out the assertions of privilege, requesting that any such documents not be seized, and, if seized, demanding that they be placed under seal and not opened or read by anyone at the regulator or any third party. If the officers proceed to seize privileged documents, again paper the objections in writing to the seizure, identifying the seized privileged items where possible, and ask that they remain sealed and not be opened or read. Also, request that the seized privileged items be returned to the company as soon as possible, and, if not returned, ultimately seek a final ruling from a Court regarding their privileged status, if necessary.

CONCLUSION

Using the lens of the hypothetical case study, the object of this paper was to outline some key lessons learned or best practices, based on some high profile cases and developing standards, particularly in the mining context. Of course, one cannot purport to deal with the endless array of lessons learned and the thousands of cases dealing with environmental violations and due diligence. This paper provides the “tip of the iceberg,” and hopefully peaks your interest in the complex issues presented when a company grapples with the regulator and deals with inspections, investigations and prosecutions.

⁵⁴ A search warrant on which the date has expired cannot be revived by the police officer requesting and the justice granting a change of date on the warrant. The officer’s only recourse is to apply for a new warrant (*R v Jamieson*, [1989] NSJ No 158, 48 CCC (3d) 287 (NSCA)).

⁵⁵ At common law access to the search warrant information, since it is a judicial act, is a presumptive right once the search warrant has been executed and a seizure made (*Nova Scotia (Attorney General) v MacIntyre*, [1982] SCJ No 1, 65 CCC (2d) 129 (SCC)).