SUPREME COURT OF YUKON

Citation: *R. v. Beets*, 2018 YKSC 21

Date: 20180426
S.C. No. 17-AP006
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

AND

ANTON BEETS and
TAMARACK INC.

APPELLANTS

Before: Mr. Justice L.F. Gower

Appearances:

Megan Seiling — Counsel for the Respondent
André W.L. Roothman — Counsel for the Appellants

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a summary conviction appeal. The appellants were convicted and sentenced for offences under the Yukon *Waters Act*, S.Y. 2003, c. 19 (the "*Act*"), arising from the deposit of gasoline onto water in a dredge pond adjacent to the Indian River, which is a tributary of the Yukon River, on October 3, 2014. The appeal is from both the convictions and the sentences. The appellant, Tamarack Inc. ("Tamarack") is a Yukon company engaged in placer mining near Dawson City, Yukon. Tamarack held the water licence for the mining claims on which the dredge pond was located. The appellant,

Anton Beets (“Beets”), is one of three directors of Tamarack, and was the boss in charge of the mine site where the incident occurred.

BACKGROUND FACTS

[2] Tamarack and Beets were tried before a Territorial Court Judge on April 18 and 19, 2017. Both appellants were found guilty on charges that they permitted the deposit of waste in the water in a water management area, and that they failed to report the said deposit, contrary to ss. 7(1)(a) and 7(3)(a) of the *Act*. Tamarack was additionally found guilty for failing to comply with the conditions of its water licence, specifically to not use fuel in a way that allows it to be deposited in waters, and to report any unauthorized discharge, contrary to s. 38(3)(a) of the *Act.* Written reasons for this decision can be found at *R. v. Beets,* 2017 YKTC 17.

[3] Tamarack and Beets had been featured in a television program produced by the Discovery Network, (the “Network”), entitled “Gold Rush”. Beets had appeared in approximately 88 episodes since season two and, at the time of the sentencing hearing on June 30, 2017, the show was in its seventh season. The episode, “Hundreds of Ounces” (the “episode”) was being filmed on the mine site at the time of the incident.

[4] On October 3, 2014, at the end of the workday, the dredge pond was being filled with water from an upstream reservoir in order to float a dredge located in the pond. Mark Favron, (“Favron”), a contract welder working on the mine site, decided on the spur of the moment to pour gasoline in the dredge pond, which was set alight by another employee. Just before doing this, he asked Beets if he had any problem with it, and Beets replied that he did not “give a fuck”. Favron poured about 1 to 1.5 gallons of gasoline on the water. When the other employee set it alight, one of the camera crew

started to film the incident and Beets was eventually featured in the scene saying the line “I told you guys, come hell or high water, didn’t I? How do you like that? Ha ha ha!”. It is unclear whether this was a line given to him by the production crew or whether he came up with it himself. The entire scene lasted about 30 seconds.

[5] The appellants’ counsel argued that the 30-second clip was not tendered for the truth of its contents and that the trial judge could not be sure that it had not been edited in order to place Beets in front of the burning dredge pond. However, what Beets said was not submitted for the truth of its contents, but simply for the fact that he said it. As well, Favron confirmed in his direct testimony that what the clip depicts reflects what he saw happening that day.[1]

[6] The episode was subsequently aired on the Discovery Network, which broadcasts in over 220 countries and was translated into many languages for that purpose. The episode had 2.17 million viewers in the United States alone when it was first viewed. The episode includes the scene showing Favron pouring gasoline on the water, the lighting of the gasoline, and Beets standing in front saying his line, against the background of the burning dredge pond. A short 30-second clip of the scene was subsequently used by the Network whenever the episode was advertised.

ISSUES

[7] The issues on this appeal are:

1) Did the trial judge err in finding that the legal maxim *de minimis non curat lex* does not apply to the facts of the case?

2) Did the trial judge err in finding that Tamarack is liable for the offences committed by Beets?

[1] Transcript, April 18, 2017, p. 23.

3) Did the trial judge err by failing to apply the rule against multiple convictions by convicting Tamarack on counts 3 and 4?

4) Did the trial judge err either in his assessment of the relevant sentencing factors, or by imposing sentences that are demonstrably unfit?

ANALYSIS

1) Did the trial judge err in finding that the legal maxim de minimis non curat lex (“de minimis”) does not apply to the facts of the case?

[8] It is undisputed that the standard of review for this question of mixed fact and law is “palpable and overriding error”: *Housen v. Nikolaisen*, 2002 SCC 33 (“*Housen*”), at para. 36.

[9] The maxim means that the law does not concern itself with trifles. The rationale behind the doctrine is to allow courts to relieve persons who have technically breached a statute from liability under that statute, i.e. where the irregularity or wrongdoing is of a very slight consequence, judicial policy does not intend that the infliction of a penalty should be inflexibly severe: *Peel (Region, Department of Public Health) v. Le Royal Resto and Lounge Inc.*, 2017 ONCJ 767 (“*Peel*”), at para. 57.

[10] The Supreme Court of Canada has yet to decide on whether the maxim can or cannot be used as a defence by accused persons in criminal or regulatory prosecutions, or when and for what purpose the doctrine can be used by an accused person at all: *Peel*, at para. 48. Accordingly, courts across the country have variously allowed the doctrine to be used as a defence, or have stated that it is not applicable

[11] The offences in the case at bar are within the category of regulatory or public welfare offences. They are also known as “strict liability” offences. As was stated in the leading Supreme Court case of *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299,

public welfare offences are not criminal in any real sense, but are prohibited in the public interest (at p. 1302-3). As such, they generally fall into a middle category between true criminal offences, where *mens rea* (guilty mind) must be proved, and absolute liability offences, where there is no defence of due diligence available (p. 1325). For strict liability offences, the prosecution must only prove beyond a reasonable doubt that the defendant committed the prohibited act ("*actus reus*"). At that point, the onus shifts to the defendant to establish on a balance of probabilities that it has a defence of reasonable care ("due diligence").[2]

[12] The Supreme Court did apply the maxim in *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 ("*Canadian Pacific*"), but not as a defence to a regulatory offence. Rather, it did so as an aid in interpreting the meaning of the legislation at issue. The accused had challenged the constitutionality of s. 13(1) (a) of the Ontario *Environmental Protection Act ("EPA")*, which prohibited the omission of contaminants that may impair the natural environment "for any use that can be made of it". The terms "impair" and "use" were not defined in the *EPA*. Gonthier J., for the majority, stated that the *de minimis* principle is closely related to the absurdity principle, by which the legislature is presumed not to have intended to attach penal consequences to trivial or minimal violations (para. 66). In the result, he concluded that there had to be "a degree of significance" consistent with the objective of environmental protection, both in relation to the impairment and the use which is impaired, in order to justify penal consequences. At

[2] There may also be other possible defences to strict liability prosecutions, which include: necessity; impossibility; mistake of fact; self-defence; lack of the requisite mental element; officially induced error;and *res judicata*: *Peel*, at para. 68.

[13] para. 66, he stated:

> …The absurdity, strict interpretation and de minimis principles assist in narrowing the scope of the expression "for any use that can be made of [the natural environment]," and determining the area of risk created by s. 13(1)(*a*) of the EPA. Where an accused has released a substance into the natural environment, the legal debate must focus on whether an actual or likely "use" of the "natural environment" has been "impaired" by the release of a "contaminant". This legal debate is clearly facilitated by the application of generally accepted interpretive principles. In particular, these principles demonstrate that s. 13(1)(*a*) does not attach penal consequences to trivial or minimal impairments of the natural environment, nor to the impairment of a use of the natural environment which is merely conceivable or imaginable. A degree of significance, consistent with the objective of environmental protection, must be found in relation to both the impairment, and the use which is impaired. (my emphasis)

[14] In the case at bar, defence counsel relied upon the above emphasized passage from *Canadian Pacific* as authority for the following submission. First, the amount of gasoline deposited in this case was relatively small, being 1 to 1.5 gallons. Second, the expert evidence tendered at trial by the Territorial Crown was that even if the spilled gasoline had not been combusted, “the impact of such an uncombusted amount … would have been minor”. Further, that by the time the contaminated water got to the Indian River, it likely would not have had “any impact” on fish habitat. Accordingly, says the defence, there was no degree of significance to the polluting effect of the gasoline.

[15] The problem with this argument, is that s. 7(1)(a) of the *Act* does not require the Territorial Crown to prove environmental harm. All it needs to prove, to make out the *actus reus* of the offence beyond a reasonable doubt, is that the appellants permitted “the deposit of waste in any waters in a water management area”. On this appeal, the

appellants took no issue with the fact that gasoline falls within the definition of "waste" under s. 1 of the *Act* (although they did so at trial):

> (a) any substance that, if added to water, would degrade or alter, or form part of a process of degradation or alteration of, the quality of the water to an extent that is detrimental to its use by people or by any animal, fish, or plant

[16] Section 7(1)(a) states:

> Subject to subsection (2) [not at issue in this case], except in accordance with the conditions of a [water] licence or as authorized by regulations made under paragraph 31(1)(n) [also not at issue in this case], no person shall deposit or permit the deposit of waste … in any waters in a water management area. (my emphasis)

As Crown counsel aptly put it in the appeal hearing, this provision means that it is an offence to deposit waste into water, but not that it is an offence to deposit waste into water *where there is a potential for environmental harm*. Indeed, none of the offences in the case at bar require proof of environmental harm. Once the Crown proved that the appellants permitted gasoline to be deposited into the dredge pond, the offence under s. 7(1)(a) was crystallized.

[17] Further, because the deposit of fuel into water was prohibited by a condition in Tamarack's water licence, the offence under s. 38(3)(a) of the *Act* also crystallized.

[18] Finally, because neither appellant reported the incident, as required by both the *Act* and the water licence, they were additionally liable under s. 7(3)(a) of the *Act*, and Tamarack was liable again under s. 38(3)(a) for breaching the related condition in its water licence.

[19] The other take-away from this analysis is that the act of setting the gasoline on fire is ultimately irrelevant, since the deposit of waste had already been committed by the time of the combustion occurred.

[20] In any event, returning to the case law on the *de minimis* principle, *Canadian Pacific* is not authority that the Supreme Court has accepted the principle as a defence. Rather, I repeat that the maxim was only used there as an interpretive aid.

[21] The Supreme Court and various lower-level courts have also touched upon the issue at other times, before and after *Canadian Pacific,* in different ways. For a greater appreciation of the nature of this debate, I will attempt to summarize the more relevant cases briefly.

[22] In *R. v. Webster*, [1981] O.J. No. 2455 (Dist. Ct.), Vannini J. held that the legal maxim is part of the common law of Ontario and that it applies to both civil causes of action and to offences created by provincial statute.

[23] In the Yukon case of *R. v. Placer Developments Ltd.*, [1984] Y.J. No. 19, Stuart J., of the Territorial Court, relying upon *R. v. McBurney* (1974), 15 C.C.C. (2d) 361 (B.C.S.C.), concluded that the principles of *de minimis*, in terms of the extent of environmental damage, are only relevant in sentencing.

[24] In *R. v. Hinchey*, [1996] 3 S.C.R. 1128, L'Heureux-Dubé J. endorsed the potential application of the doctrine as a defence to criminal culpability but, at the end of the day, she decided that it was not strictly necessary to decide that issue in the case.

[25] In *R. v. Croft*, 2003 NSCA 109 ("*Croft*"), Saunders J.A., speaking for the Nova Scotia Court of Appeal, was dealing with an offence under s. 78 of the federal *Fisheries Act* for possessing lobsters that were less than 82.5 millimetres long, contrary to

s. 57(2) of the *Atlantic Fishery Regulation*. The appellant, Croft, had caught 100-to-150 pounds of lobster. When his catch was inspected by fisheries officers, it was determined that he had six lobsters that were less than 82.5 millimetres. He was convicted at trial and was unsuccessful in his summary conviction appeal. Saunders J.A. affirmed both findings below, stating:

> 15 Neither do we see any error on the part of the [Summary Conviction Appeal] judge in affirming the trial judge's finding that the legal maxim *de minimis non curat lex* had no application to the circumstances of this case. We share that opinion. This is, as we have said, a strict liability offence. Moreover, it is one where compliance is measured in millimetres. Parliament has decided where it chooses to draw the line. In this sense it is much the same as imposing a limit of 80 mg of alcohol in 100 ml of blood in the *Criminal Code* provisions prohibiting the operation of a motor vehicle, vessel, aircraft or railway equipment while impaired. There is no tolerance or margin extended for "almost" or "close" compliance. The public interest in protecting our commercial fishery is hardly a trifling matter. The maxim has no application here. (my emphasis)

[26] In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 (“*Canadian Foundation*”), Arbour J. held that *de minimis* exists as a common-law defence preserved by s. 8(3) of the [*Criminal*] *Code* and falls within the courts’ discretion” (para. 203). However, it is important to remember that Arbour J. was one of three dissenting judges in that case.

[27] In *Canadian Foundation*, the Supreme Court upheld the constitutionality of s. 43 of the *Criminal Code*, which deals with the correction of children by force. McLachlan C.J.C., speaking for the majority, did not specifically state that *de minimis* could not be

used as a defence. Rather, all she said on the subject was:

> … As for the defence of *de minimis*, it is equally or more vague and difficult in application than the reasonableness defence offered by s. 43. (para. 44)

[28] In *R. v. Kubassek* (2004), 189 O.A.C. 339, the Ontario Court of Appeal assumed, for the purposes of the appeal that *de minimis* was an available principle for a defendant in a criminal case, but that the assault in that case did not fit the standard of triviality historically required.

[29] In *R. v. Williams Operating Corp.* (2008), 39 C.E.L.R. (3d) 66 (Ont. S.C.J.), Platana J. held that the *de minimis* defence did not apply at all to public welfare or strict liability offences.

[30] In *R. v. Juneja*, 2009 ONCJ 572, Duncan J. pointed out that there have been no cases rejecting the legal availability of *de minimis* in appropriate circumstances, and that therefore the authority "is therefore unanimous, though not substantial, in favour of the doctrine" (at paras. 11 to 16).

[31] In *R. v. Superior Custom Trailers Ltd.*, 2009 ONCJ 740, Valente J., of the Ontario Court of Justice, on a summary conviction appeal from a decision of a justice of the peace, noted that the *de minimis* doctrine has been a matter of considerable debate in this country (paras. 34 and 38). After a review of some of the leading cases from the Supreme Court, which I have noted above, Valente J. seemed willing to consider the application of the doctrine as a defence to a charge of emitting dust in breach of a condition of a certificate of approval, contrary to the Ontario *Environmental Protection Act*. In that sense, the facts of the case are somewhat analogous to the offence at bar of failing to prevent the deposit of fuel into water in breach of a condition of the water

licence. However, at the end of the day, Valente J. decided that the *de minimis* defence was not applicable because the breach, although it did not cause an actual adverse effect, had been going on for a number of years and could not be characterized as "trivial" (paras. 41 and 53). Interestingly, Valente J. also concluded that the justice of the peace was in error in finding that application of the *de minimis* principle was restricted to sentencing only.

[32] In *R. v. Ferreira*, 2014 ONCJ 21, ODonnell J. applied the *de minimis* defence in a criminal assault case, emphasizing that, despite its long roots in the common law, the doctrine's availability and scope in Canadian common law are not well-defined, nor is there clear appellate guidance as to the availability or unavailability of the doctrine.

[33] In *Peel*, decided in 2017, Quon J.P. undertook an extensive review of the case law in this area. He also relied extensively on an academic article by Professor Martin Olszynski, entitled "*Ancient Maxim, Modern Problems: De Minimus, Cumulative Environmental Effects and Risk- Based Regulation*", (2015) 40:2 Queen's L.J. 705 – 740. In that case, the accused was charged under the *Smoke Free Ontario Act*, for allowing tobacco to be lit in an enclosed workplace. In the result, Quon J.P. concluded that the *de minimis* maxim could be raised as a defence to that strict liability offence.

[34] More importantly, for present purposes, Quon J.P. also adopted the two-part test proposed by Professor Olszynski for whether or not the principle of *de minimis* applies to a given set of facts. The test is based upon the language used in the foundational *de minimis* case of *"Reward" (The), Re,* (1818), 2 Dods. 265 (Eng. Adm. Ct.) ("*Reward*"), where Sir William Scott held:

> … Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be

> inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might be properly overlooked. …

[35] The first part of the test requires determining whether the offence at issue is minimal or trivial, i.e. a mere trifle. If the offence is not a trifle, the test ends there, as the *de minimis* principle is only relevant for trivial conduct. If however, the offence is a mere trifle, the analysis turns to the second part of the test which is whether the combined or cumulative effects of the offence, if continued in practice, could potentially interfere or undermine the legislature's objectives in promulgating the relevant regulatory regime. If they would, the *de minimis* principle will not apply. Quon J.P. summarized the test at para. 64, as follows:

> For the test Professor Olszynski explains, at paras. 43 to 46, that the first part of the maxim asks whether the offence ("the deviation") seems minimal ("a mere trifle"). If it does not appear to be a trivial breach then the inquiry is at an end. But, if the alleged breach does appear to be trivial, then the analysis turns to the potential for the combined or cumulative effects of such deviations ("if continued in practice") to interfere or undermine ("weigh... on") the legislature's objectives in promulgating the relevant regulatory regime ("the public interest"). In addition, Professor Olszynski explains that the goal of this two-step *de minimis* inquiry is to identify conduct that the regulatory regime may ignore ("might properly be overlooked") while still attaining its legislative objective …

[36] Applying that test to the case at bar, Crown counsel submits that the trial judge correctly concluded (at para. 54 of his reasons) that the deposit of gasoline on the dredge pond was "not insignificant", and therefore the *de minimis* defence did not apply. Counsel further submits that this conclusion is supported by the evidence of the Crown's expert, who testified that gasoline is a complex mixture of hundreds of hydrocarbons, including organic and inorganic additives, many of which have toxic or

carcinogenic properties. The expert further testified that gasoline has been shown to be an animal carcinogen and has components that are listed as toxic substances in the *Canadian Environmental Protection Act.* Further, because these components are toxic to both human and ecological receptors, they are also regulated under the Yukon *Contaminated Sites Regulation* (O.I.C. 2002/171) ("*C.S.R.*"). In addition, the expert provided evidence that when gasoline pools on the surface of water, it becomes a light nonaqueous phase liquid ("NAPL"). The Crown's expert testified that the *C.S.R.* establishes the standard for NAPLs as "not present" for all water uses. Therefore, according to the Crown, a site is considered contaminated "the instant a NAPL is introduced to water". In other words, there is a zero tolerance for the presence of gasoline in a water system. The presence of a light NAPL on the surface of the water body may also inhibit the exchange of gases and nutrients between the water body and the atmosphere, which are processes that are critical to aquatic life. Finally, as was recognized by the trial judge, because gasoline is lighter than water, the hydrocarbons would not have settled in the system of settling areas between the dredge pond and the Indian River (para. 54).

[37] I conclude that the trial judge made no palpable and overriding error in finding that the deposit of gasoline on the dredge pond was "not insignificant". Accordingly, the deposit is not a mere trifle and the inquiry into whether *de minimis* applied ended there.

[38] However, if I am proven wrong in this conclusion, I agree with Crown counsel that the appellants cannot pass the second part of the *de minimis* test. That is because gasoline has the potential to accumulate. If the appellants were not found liable and punished for the deposit of 1 to 1.5 gallons of gasoline on the dredge pond, and if that

conduct was “continued in practice” (*Reward*), I am satisfied that it would undermine the legislature’s objectives in enacting the *Waters Act,* which are to protect and regulate the use of Yukon waters and prevent their contamination by wastes. This is not a situation, as suggested by the appellants’ counsel, of 0 + 0 + 0 = 0.

[39] Further, this was an intentional act that was done for the sake of entertainment. As Favron testified, he did it “for fun”. In addition, the act has been widely televised and presumably has significant entertainment appeal, as the 30-second clip has been repeatedly used as advertisement for the episode “Hundreds of Ounces”.

[40] If the appellants are not held accountable for this conduct, the deterrent objective of the *Waters Act*, i.e. the public interest, would be undermined. Their actions have amplified the potential to influence public perceptions and behaviour. The resulting message to the public would be that it is appropriate, for the sake of entertainment, to pour gasoline on water and light it on fire.

[41] Crown counsel submitted in the alternative that *de minimis* should not apply as a defence to the offences in any event, because they are strict liability offences which require no proof of environmental harm. I agree that the offences do not require proof of environmental harm. However, I would not go so far as to say, as the Nova Scotia Court of Appeal appears to have done in *Croft,* that *de minimis* is never available to one charged with a strict liability offence.

[42] This was no accident. The appellants cannot maintain that, despite their best efforts, a relatively small amount of gasoline was inadvertently deposited in the dredge pond. Consequently, for the reasons above, I have concluded that the *de minimis*

defence is not available to the appellants. However, my conclusion in this regard is very much dependent upon the facts of this case.

2) Did the trial judge err in finding that Tamarack is liable for the offences committed by Beets?

[43] Once again, it is not disputed that the standard of review for this question of mixed fact and law is whether the conduct committed a palpable and overriding error in finding that Tamarack was liable for the offences committed by Beets: *Housen*. I refer to counts one and two of the four count information, where Tamarack was convicted and sentenced under s. 7 of the *Waters Act.*

[44] Here, the trial judge essentially found Tamarack liable for the actions of Beets due to the corporate identification doctrine. Under that doctrine, the actions and intent of one of the directing minds of the corporation, such as a director, are deemed to be the actions or intent of the corporation itself. The liability of the corporation is primary and not vicarious: *R. v. Glenshiel Towing Co.*, 2001 BCCA 417 ("*Glenshiel*"), at para. 27.

[45] The trial judge placed great stock in the fact that Beets was one of three directors of Tamarack and consequently "a directing mind of the corporation" (para. 34). He also seems to have dismissed the defence argument that Tamarack is not sufficiently connected to the actions of Beets, because Favron, who engineered the deposit of gasoline, was employed by Beets at the time and not by Tamarack. Even if that were so, the trial judge said that Beets was acting not only in his own capacity, as boss towards Favron, but also in his capacity as a director of Tamarack and the person responsible for ensuring that the company complied with its water licence while

conducting mining activity on the site:

> [30] Mr. Beets is a director of Tamarack, Inc. and was present at the time of Mr. Favron's actions.
>
> [31] In *Dredge & Dock*, the Court referred to Granville Williams' text on Criminal Law, where he stated:
>
> > ...the director or other controlling officer will almost always be a co-perpetrator of or accessory in the offence...
>
> [32] Mr. Beets was the face of Tamarack, Inc. at this mining operation. Not only was he the site boss, he represented the company in his role as director. Mr. Beets' apparent tacit agreement with Mr. Favron's proposed course of conduct, places Mr. Beets in the accessory to the offence category.
>
> …
>
> [36] Additionally, even if Mr. Favron was not technically an employee of Tamarack, Inc., Mr. Beets, as already described, was in a dual role at the work site. His decision to refrain from preventing Mr. Favron's pouring of gasoline in the pond was equally the decision of Tamarack, Inc. (my emphasis)

[46] Since the trial, however, Crown counsel has discovered the *Glenshiel* case from the British Columbia Court of Appeal, cited just above, which states that the corporate identification doctrine is not applicable to strict liability offences (para. 28). If that is so, then there is no need to concern one’s self with whether the corporation is liable through the actions of a directing mind. Rather, it would appear that the liability is primary once the Crown proves the corporation committed the *actus reus* of the offence, unless the corporation demonstrates due diligence. B.C. Court of Appeal decisions are very persuasive in this jurisdiction, as the members of that Court principally compose the Court of Appeal of Yukon.

[47] In this case, Crown counsel says the mining operation was being conducted under the authority of the water licence, which was held by Tamarack. The person in charge of the operation on-site was Beets, who was one of three directors of Tamarack. Accordingly, Tamarack is liable for activities and offences that took place under its water licence, unless it demonstrates due diligence, which it has not done in this case.

[48] However, in the event that I am misunderstanding the implications of *Glenshiel,* I will go on to deal with the Crown's argument on the corporate identification issue. This was in response to the appellants' argument that there was no proof Beets was acting in the interests of Tamarack. In this regard, the appellants rely upon *R. v. Canadian Dredge & Dock Co*., [1985] 1 S.C.R. 662 ("*Canadian Dredge*"), where the Supreme Court held, at para. 65, that:

> … the outer limit of the delegation [corporate identification] doctrine is reached and exceeded when the directing mind ceases completely to act, in fact or in substance, in the interests of the corporation. …

This must mean, submits the appellants' counsel, that the directing mind was acting "lawfully" in the interests of the corporation, therefore, since Beets was not doing so at the time of the deposit of the gasoline, Tamarack cannot be held liable for his conduct.

[49] Here, Crown counsel submits firstly that the trial judge was correct in concluding that Beets was a directing mind of Tamarack, both by virtue of him being a director of the company and by being the boss on the work site. Further, the mining operation was taking place under the authority of the water licence issued to Tamarack. In addition, Tamarack is presumed to know what is happening on its mine site, and is assumed to have consented to that operation taking place, especially since one of its directors, Beets, was the supervisor representing Tamarack on the site. As well, Beets, as a

director of Tamarack, is presumed to have known that he was acting under the authority of Tamarack's water licence. Therefore, it was reasonable for the trial judge to infer, that as a director, Beets had the authority to control operations at the site, including the authority to prevent Favron from depositing gasoline on the dredge pond. In addition, given the evidence that Favron was employed directly by Beets, it was also reasonable for the trial judge to have referred to Beets as acting "in a dual role at the worksite", i.e. in his personal capacity as Favron's employer and in his corporate capacity as director and mine site supervisor for Tamarack.

[50] As for the appellants' argument that Beets was not acting in the interests of Tamarack, Crown counsel says that *Canadian Dredge* requires proof that the directing mind was actually acting against the interests of the corporation in order for the doctrine of identification to cease operating. In particular, she points to the continuation of the paragraph which I just quoted above:

> 65 In my view, the outer limit of the delegation doctrine is reached and exceeded when the directing mind ceases completely to act, in fact or in substance, in the interests of the corporation. Where this entails fraudulent action, nothing is gained from speaking of fraud in whole or in part because fraud is fraud. What I take to be the distinction raised by the question is where all of the activities of the directing mind are directed **against the interests of the corporation with a view to damaging that corporation**, whether or not the result is beneficial economically to the directing mind, that may be said to be fraud on the corporation. Similarly, but not so importantly, a benefit to the directing mind in single transactions or in a minor part of the activities of the directing mind is in reality quite different from benefit in the sense that the directing mind intended that the corporation should not benefit from any of its activities in its undertaking. A benefit of course can, unlike fraud, be in whole or in part, but the better standard in my view is established when benefit is associated with fraud. The same test then applies. Where the directing mind conceives and designs a plan and then

> executes it whereby the corporation is intentionally defrauded, and when this is the substantial part of the regular activities of the directing mind in his office, then it is unrealistic in the extreme to consider that the manager is the directing mind of the corporation. His entire energies are, in such a case, directed to the destruction of the undertaking of the corporation. When he crosses that line he ceases to be the directing mind and the doctrine of identification ceases to operate. The same reasoning and terminology can be applied to the concept of benefits.
>
> 66 Where the criminal act is totally in fraud of the corporate employer and where the act is intended to and does result in benefit exclusively to the employee-manager, the employee-directing mind, from the outset of the design and execution of the criminal plan, ceases to be a directing mind of the corporation and consequently his acts could not be attributed to the corporation under the identification doctrine. This might be true as well on the American approach through respondeat superior. Whether this is so or not, in my view the identification doctrine only operates where the Crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company. (my emphasis)

[51] Thus, argues the Crown, it is not every illegal act that is committed by a directing mind which causes the corporate identification doctrine to cease operating. Indeed, if that were the case then corporations would almost never be found liable. Rather, what is required, in order for a directing mind to separate him or herself from the corporation, is evidence that the directing mind was actually acting against the interests of the corporation. I agree with this argument and take from the passage just cited that the Supreme Court was discussing a very high threshold of what would constitute sufficient actions against the interests of the corporation to nullify the identification doctrine.

[52] In the case at bar, Crown counsel also says that there was no reason for the trial judge to conclude that Beets was acting against Tamarack's interests in allowing the

deposit of gasoline. This is because, in order for Beets to continue operating on that mine site, he required a water licence. Therefore, there was a presumed relationship of cooperation between Beets and Tamarack, and there was no reason for the trial judge to infer that, when Beets authorized the deposit of gasoline, he was intending to step outside his role as a director of Tamarack in order to harm the company. Even though Beets exercised his authority poorly, that does not mean that Tamarack is thereafter not liable for his decisions

[53] Further, it is at least arguable that both Beets and Tamarack have received some benefit from their notoriety in this widely publicized television series. In Tamarack's case, its celebrity status might well improve relations with financiers, mining equipment suppliers, and even fellow miners. In addition, it is conceivable that prospective employees might be attracted to such a notorious company. Thus, to the extent that Beets' actions, by design or result were to Tamarack's benefit, is a further reason for the corporate identification doctrine to continue to operate.

[54] In the result on this issue, I am not persuaded that the trial judge committed any palpable or overriding error in finding Tamarack liable for the offences committed by Beets.

3) Did the trial judge err by failing to apply the rule against multiple convictions by convicting Tamarack on counts 3 and 4?

[55] The appellants take no issue with the Crown's position that this ground of appeal is a question of law and, accordingly, the standard of review is correctness.

[56] The rule against multiple convictions arises from the case of *R. v. Kienapple*, [1975] 1 S.C.R. 729 ("*Kienapple*"). It operates to bar multiple convictions where more than one charge arises out of the same delict, consisting of a single criminal act

committed in circumstances where the offences alleged are comprised of the same, or substantially the same, facts and elements. Simply put, if the offences stem from the same act and have a common element or elements, then *Kienapple* should apply: *R. v. Prince*, [1986] 2 S.C.R. 480 ("*Prince*"), at para. 29.

[57] Two criteria must be satisfied. There must be both a factual nexus as well as a legal nexus between the relevant charges: *Prince*, at para. 26.

[58] A factual nexus exists where the offences arise from the same act. In the case at bar, the act of depositing fuel as a waste upon the water in the dredge pond is the same act giving rise to both the offence under Count #1, contrary to s. 7(1)(a) of the *Waters Act,* and the offence under Count #3, contrary to s. 38(3)(a) of the *Act.* Further, the act of failing to report the deposit is the same act giving rise to both the offence under Count #2, contrary to s. 7(3)(a) of the *Act*, and the offence under Count #4, contrary to s. 38(3)(a) of the *Act.* Accordingly, the Crown concedes that there is a factual nexus between Counts # 1 and 3, as well as between Counts # 2 and 4, and that the first part of the *Kienapple* test is met in both cases.

[59] However, the Crown submits that there is no legal nexus between the two pairs of charges. The legal nexus inquiry was dealt with by the Ontario Court of Appeal in *R. v. Kinnear* (2005), 199 O.A.C. 323. There, the Court concluded that, if the offences target different societal interests, different victims, or prohibit different consequences, it cannot be said that the distinctions between the offences amount to nothing more than a different way of committing the same wrong. In other words, the existence of any of these three factors will defeat any claim that different offences have a sufficient legal

nexus to warrant the application of the *Kienapple* rule:

> 37 In *Prince* at pp. 49-51, Dickson C.J.C. provided guidance as to the situations in which there will be a sufficient legal nexus to justify the application of the *Kienapple* rule. He described three categories of cases where the legal nexus between offences will be established. I need not repeat those categories here. In essence, each presents a situation in which the offences charged do not describe different criminal wrongs, but instead describe different ways of committing the same criminal wrong.
>
> 38 Dickson C.J.C. in *Prince* at pp. 51-54 further elucidated the legal nexus inquiry by referring to three factors that will defeat any claim that different offences have a sufficient legal nexus to warrant the application of the *Kienapple* rule. These factors do bear repeating in these reasons. First, where the offences are designed to protect different societal interests, convictions for both offences will not offend the *Kienapple* rule. Second, where the offences allege personal violence against different victims, *Kienapple* will not foreclose convictions for offences relating to each victim. Third, where the offences proscribe different consequences, the *Kienapple* rule will not bar multiple convictions.
>
> 39 I think the three factors identified in *Prince* as severing any possible legal nexus between offences provide further support for the view that the crucial distinction for the purposes of the application of *Kienapple* rule is between different wrongs and the same wrong committed in different ways. <u>If the offences target different societal interests, different victims, or prohibit different consequences, it cannot be said that the distinctions between the offences amount to nothing more than a different way of committing the same wrong</u>. (my emphasis)

[60] Section 7(1)(a) of the *Waters Act* states:

> 7(1) Subject to subsection (2), except in accordance with the conditions of a [water] licence, or as authorized by regulations made under paragraph 31(1)(n), no person shall deposit or permit the deposit of waste
>
> (a) in any waters in a water management area
>
> …

[61] Section 7(3)(a) of the *Act* states:

> (3) Where waste is deposited in contravention of this section, every person who
>
> (a) owns the waste or has the charge, management, or control of it …
>
> shall forthwith, in accordance with the regulations made under paragraph 31(1)(o), report the deposit to an inspector designated under subsection 33(1).

[62] Section 38(3)(a) states:

> (3) A licensee who holds a type B licence who
>
> (a) contravenes or fails to comply with any condition of the licence, where the contravention or failure to comply does not constitute an offence under section 39 …
>
> is guilty of an offence and liable on summary conviction to a fine of up to $15,000 or to imprisonment for a term of up to six months, or to both.

[63] Initially, I was inclined to think that there was a significant legal nexus between the offences under ss. 7(1)(a) and 38(3)(a) of the *Act.* That is because both offences contemplate a water licence holder, such as Tamarack, being liable for depositing waste into waters in contravention of their water licence. In other words, for that class of persons, both individual and corporate, who hold water licences, the depositing of waste in contravention of their water licence can give rise to convictions for both offences.

[64] However, upon further reflection, I am persuaded that there are sufficient differences between the two offences to defeat the operation of the rule against multiple convictions:

1) Section 7(1)(a) applies not only to water licence holders but also to corporations or individuals who do not hold a water licence, but

nevertheless deposit waste into water in a water management area. Indeed, this was the basis for Beets being found liable for Counts # 1 and # 2.

2) Section 38(3)(a), on the other hand, applies only to water licence holders holding a type B licence.

3) Section 7(1)(a) also could apply to an offender who is not a licensee, but is otherwise authorized by regulations made under paragraph 31(1)(n) of the *Act*, if that person or corporation were to exceed the limits of those regulations.

4) Finally, it is arguable that these two different offence provisions are designed to protect different societal interests. Section 7(1)(a) is seemingly targeted towards preventing the pollution of waters by waste in a general sense. The maximum penalty under s. 7(1)(a) is a $100,000 fine, or imprisonment for one year, or both. Thus, it is evident that this offence is considered by the Yukon legislature to be far more serious than s. 38(3)(a), which has a maximum penalty of a $15,000 fine, or imprisonment for six months, or both. It is also evident that the latter offence is intended to ensure that water licence holders comply with their licences. Indeed, the entire scheme of the *Waters Act* allows persons and corporations conducting placer mining operations, for example, to deposit wastes, such as mining effluent into Yukon waters, providing that they do not exceed certain limits. In exchange for that privilege, the legislature expects such operators to comply with their licences, or face prosecution

> under s. 38(1)(a) of the *Act*. In this way, convictions under this offence provision serve as a deterrent to other placer miners to comply with the limits in their respective licences.

[65] There is even less of a legal nexus between the two offences for failing to report the deposit of waste or an unauthorized discharge. Section 7(3)(a) requires that everyone who has deposited waste contrary to that section:

> shall forthwith, in accordance with the regulations made under paragraph 31(1)(o), report the deposit to an inspector designated under subsection 33(1) … .

[66] The condition of Tamarack's water licence, which I understand deals with the reporting issue, contains significantly different particulars as to who is to be contacted, when and how:

> 41. The Licensee shall immediately contact the 24-hour Yukon Spill Report number (867) 667-7244, and implement the Spill Contingency Plan should a spill or unauthorized discharge occur. A detailed written report on any such event including, but not limited to, dates, quantities, parameters, causes and other relevant details and explanations shall be submitted to the [Water] Board no later than 10 days after its occurrence.

[67] The trial judge relied upon *R. v. Heaney,* 2013 BCCA 177, from the British Columbia Court of Appeal and included the following quote from Bennett J.A., at para. 61 of his reasons:

> In determining whether the *Kienapple* principle applies, the focus is not on common elements between the offences, but <u>whether there are any additional or distinguishing elements</u> … (para. 23) (my emphasis)

[68] The trial judge also observed that a single act of an accused can involve two or more delicts against society which bear little or no connection to one another. The

example he used as an analogy is where an individual on a probation order with a condition to keep the peace and be of good behaviour subsequently commits an assault. That person can then be found guilty of both breach of probation and the assault. This example was also used by Dickson C.J.C. in *Prince*, at para. 28, along with several others.

[69] He then concluded, at para. 68, as follows:

> The licence to which Tamarack, Inc. is subject obliges it to follow each and every condition, and its failure to do so may result in a prosecution. In my view, the lack of compliance by Tamarack, Inc. with the terms of this licence is an additional and distinct element which renders the *Kienapple* principle inapplicable in the circumstances of this case. (my emphasis)

[70] I am satisfied that the trial judge was correct in this conclusion.

4) Did the trial judge err either in his assessment of the relevant sentencing factors, or by imposing sentences that are demonstrably unfit?

[71] The standard of review on an appeal from a sentence was addressed at some length by the Supreme Court of Canada in *R v. Lacasse*, 2015 SCC 64 ("*Lacasse*"), at paras. 36 through 55. The analysis begins with the observation that appellate courts may not lightly intervene, as trial judges have a broad discretion to impose the sentence they consider appropriate within the limits established by law. The Supreme Court stated that an appellate court may not intervene unless it is convinced that the sentence is not fit, that is to say that the sentence is found to be clearly unreasonable. Trial courts are entitled to considerable deference. Absent an error in principle, failure to consider a relevant factor or an over-emphasis of the appropriate factors, a court of appeal should only intervene if the sentence is demonstrably unfit. Although an appellate court might entertain a different opinion than the trial court, that will generally not constitute an error

of law. In other words, the Court cautioned that an appellate court may not intervene simply because it would have weighed the relevant factors differently. In general, there is a very high threshold in determining whether a sentence is demonstrably unfit. In particular, the principle of parity of sentences is secondary to the fundamental principle of proportionality, i.e. a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Finally, the Supreme Court confirmed that sentencing is an inherently individualized process.

[72] In this case, Beets was fined $4,000 on Count #1 and $2,000 on Count #2, for a total of $6,000. Tamarack was fined $10,000 on Count #1, $5,000 on Count #2, $5,000 on Count #3 and $5,000 on Count #4, for a total of $25,000. The reasons for sentence can be found at *R. v. Tamarack, Inc.,* 2017 YKTC 40.

[73] In a prior proceeding, Favron pled guilty to depositing waste into water in a water management area and failing to report the deposit of such waste. On a joint submission, he was sentenced to pay fines of $1,000 and $500, respectively, plus a 15 percent fine surcharge, for a total of $1,725.

[74] The appellants' counsel began his submissions in this area by stating that the fundamental principle of sentencing is that similar offenders committing similar offences in similar circumstances should receive similar sentences. In this regard he was pointing to the significant disparity between the sentences imposed on Favron and those imposed on the appellants. However, the flaw in this submission is that it deals with the principle of "parity" in sentencing, which the Supreme Court in *Lacasse* clearly stated is "secondary" to the fundamental principle of proportionality.

[75] The appellants' counsel takes no issue with the principles of sentencing for environmental offences, which the trial judge derived from *R. v. United Keno Hill Mines Ltd.*, [1980] Y.J. No. 10 (T.C.) and *R. v. Terroco Industries Ltd.*, 2005 ABCA 141 ("*Terroco*"). Combining the language from those two cases, those principles are essentially:

1) the criminality of the conduct/culpability of the offender;
2) the nature of the environmental damage/harm;
3) the extent of attempts to comply;
4) remorse/acceptance of responsibility;
5) the size of the corporate offender;
6) benefits realized by the offence;
7) offender's prior record and past involvement with the authorities; and
8) deterrence.

[76] I will deal with each of these in more or less the same order as the trial judge.

Culpability

[77] The appellants' counsel submits that the trial judge erred when he stated that Beets "abdicated both his managerial responsibility and his corporate responsibility as a principal of Tamarack" (para. 11 of his reasons for sentence). This is because Tamarack was separately punished for its involvement with the incident. Therefore, says counsel, it should not have been considered an aggravating circumstance in sentencing Beets, that he abdicated both his personal responsibility as the site supervisor and his corporate responsibility in representing Tamarack.

[78] The trial judge also found here that the incident was "clearly neither inadvertent nor accidental" (para. 12). However, the appellants' counsel submits that the trial judge did not properly recognize that this was not a case of an ongoing environmental discharge over a period of time, as in many of the precedent cases. Rather, the event was unplanned and short-lived.

[79] I am not so sure it cannot fairly be said that the trial judge viewed Beets' abdication of his corporate responsibility as a principal of Tamarack as an aggravating circumstance. Certainly, nowhere in his reasons did he say that he viewed both Beets and Tamarack as "equally culpable", as suggested by the Crown. Rather, I view the trial judge's statement in this regard as simply a finding of fact, which is supported by the evidence. Beets was acting in a dual role on the mine site, both as site supervisor and Favron's employer, as well as a director and representative of Tamarack. The trial judge did not err in making this finding.

[80] As for the appellants' complaint that the incident was unplanned and short-lived, the flipside of that coin is that Beets knowingly permitted the incident to happen and made the choice not to act. This was also done in circumstances where it was reasonably foreseeable that the pouring of gasoline onto the waters in the dredge pond could have been in violation of Tamarack's water licence. It would have been very easy for Beets to have simply said "no" to Favron, and prevented the entire incident. Rather, he responded apathetically that he did not "give a fuck", and then enthusiastically became involved with the scene once the camera was rolling.

[81] In my view, this conduct supported the trial judge's conclusion that the culpability of Beets and Tamarack was "in the mid-range on the spectrum".

Environmental Damage

[82] Here, the appellants' counsel submits that the trial judge was completely wrong in concluding that the environmental damage was "on the lower end of the spectrum". In particular, the trial judge stated at para. 13:

> … Although the harm was not ascertainable, the evidence established that the combustion of gasoline and water may lead to dangerous by-products entering the water system.

[83] This conclusion, says counsel, ignores the evidence of the Crown's expert when asked on cross-examination whether, after the fire burned out, the concentration of remaining pollutants "would not have had any impact by the time that the water got to the Indian River … ?" The expert replied, "That's likely to be the case".[3]

[84] In some ways, this argument is similar to the unsuccessful one made by the appellants under the *de minimis* issue regarding the extent of the environmental harm. In any event, I reject it again for the following reasons. First, while I agree that the trial judge may have gone a little far in talking about dangerous by-products entering the water system, he did acknowledge that the harm was "not ascertainable", i.e. not capable of positive determination or measurement. Second, he also used the tentative word "may" in talking about pollutants entering the water system. Third, the argument ignores the evidence of the toxic nature of gasoline, which I discussed above. Finally, the trial judge acknowledged that the absence of ascertainable harm is not a mitigating factor, but merely a neutral one, relying upon the *Terroco* decision, at para. 47.

[3] Transcript, April 18, 2017, p. 41.

Remorse

[85] The appellants' counsel submits that when he described the incident at the sentencing hearing as a "storm in a teacup", the trial judge, at para. 18 of his reasons, used this as an indication of Beets' lack of remorse. In my view, this submission requires a bit of mind-reading in terms of what the trial judge was thinking. I do not read the passage as faulting Beets for the submissions of his lawyer, although it would not have been improper for the trial judge to have assumed that that submission was based on the nature of Beets' instructions to counsel.

[86] Counsel further argued that the trial judge's reference to Beets' "active participation in the filming of this environmental offence by going in front of the cameras while the dredge pond fire burned" was an inappropriate consideration to support his conclusion that there was no remorse. I disagree.

[87] In any event, the arguments of appellants' counsel here are indeed nothing more than a tempest in a teacup, as there was no evidence of remorse from either appellant, and the trial judge made no error in addressing this factor.

Deterrence

[88] Here, the trial judge recognized that the primary purpose in sentencing for environmental offences is deterrence, both general and specific (para. 19). He also stated, in his reasons:

> [20] A fine should not be perceived either by the offender or the general public as a cost of doing business. In other words, while the penalty must be fair, it must also have some impact on the offenders. Where, as here, the environmental infractions under scrutiny were broadcast widely to a large viewership, the need for both specific and general deterrence is an important factor.

[89] The appellants' counsel takes issue with the trial judge's reference to "the cost of doing business". That is because this was not a situation where the offenders were disregarding their environmental responsibilities over a period of time with the intention of saving costs, as is the case in many of the precedents. Rather, he submits that this was a very isolated incident, flowing from a spontaneous act of bad judgment, with no significant harmful consequences. Further, it was not committed during the normal mining operations. Finally, it was only by chance that it was caught on camera, because the film crew had finished filming for the day when it happened.

[90] I agree with all of these submissions. However, they do not support the implied suggestion by counsel that this somehow undermines the need for specific and general deterrence.

[91] In particular, the appellants' counsel submitted that the fact the incident was broadcast is of no relevance. I disagree. In my view, the fact that the incident was widely broadcast does justify significant importance being placed upon general deterrence, specifically for the purpose of deterring others from committing similar acts for entertainment purposes.

[92] The appellants' counsel further submitted that, because of the uniqueness of this situation and the fact that similar incidents have not occurred in the past, it is unlikely that similar incidents will occur in the future, thus reducing the need for denunciation and specific deterrence. I generally agree that this argument supports the view that the need for specific deterrence is reduced, but not the need for denunciation.

[93] Further, this argument is countered by the principle that the absence of remorse should logically lead to a greater need for specific deterrence. This was addressed by the Alberta Court of Appeal in *Terroco*, as follows:

> 56 When considering specific deterrence sentencing judges should consider many of the factors I have already outlined. For example, the degree of remorse informs the need for specific deterrence. An offender that takes responsibility for its actions and cooperates with the authorities is on a different footing than an offender that increases its culpability by, for example, attempting a surreptitious cleanup of a spill to avoid civil and penal consequences. (my emphasis)

In this case there was no evidence of remorse by either appellant and consequently there is a significant need for specific deterrence. This is especially the case for Beets, because he knew the incident was being filmed and let it happen nonetheless.

[94] In my view, there is nothing in what the trial judge said regarding deterrence which was clearly unreasonable.

Size of the Corporation

[95] The appellants' counsel does not dispute the finding of the trial judge that Tamarack is one of the largest privately held placer companies in the Yukon. Rather, his complaint is that the trial judge inferred from the fact that Tamarack possesses 337 placer claims, each of which requires a work expenditure, or payment in lieu, of at least $200 a year per claim to keep each claim in good standing, that Tamarack spends over $67,000 a year to maintain these claims. Counsel says that there was no evidence to support that inference.

[96] I agree that there was no such evidence, apart from the submission of Crown counsel at the sentencing hearing. It may be that the trial judge overstepped himself somewhat in assuming that Tamarack would spend $67,000 a year to maintain its

claims. On the other hand, I believe I can take judicial notice of the fact that the alternative to paying $200 to the Mining Recorder for each claim in each year is that the claim holder can swear a statutory declaration verifying that roughly $200 worth of work has been done on the claim in the preceding year. Accordingly, whether Tamarack actually pays out $67,000 in cash each year to maintain its claims, or whether it pays some amount of cash and conducts some amount of work worth at least $200 on each claim, in the end Tamarack must either pay to keep claims alive or perform work in lieu, of roughly the same value, and the total value of the cash payments and work in lieu would be about $67,000.

[97] It is also apparent from viewing the video that Tamarack possesses and operates a significant number of pieces of heavy equipment, such as excavators, dozers, rock trucks, trailers and sluice machines.

[98] As I understand it, the point of considering the size of the corporation is to ensure that whatever penalty is imposed is having a genuine deterrent impact upon it. As I will come to in a moment, while different judges may come up with different fine amounts, a total of $25,000 in fines imposed against Tamarack is proportionate to its size and apparent means. Indeed, I presume that one of the reasons for this appeal is that Tamarack has felt the pinch of those fines.

[99] Further, both Beets and Tamarack could have made submissions to the trial judge as to their ability to pay a fine, but neither appellant did so.

[100] The trial judge committed no error here.

Offenders' Record

[101] The trial judge properly recognized that neither Beets nor Tamarack has a prior record for environmental offences. I did not understand the appellants' counsel to take any issue in this regard. Indeed, he submitted that there is no evidence that there have even been prior breaches of the water licence by Tamarack, which is important, given its large corporate size and the number of claims it owns.

Benefit of this Activity

[102] Here, the Crown does not allege that either appellant received any direct financial benefit from this incident and in particular, from the fact that it was widely broadcasted to a large viewership. Nevertheless, the trial judge did find that Beets, in particular, as one of the stars of the "Gold Rush" television show would have benefited in some fashion or other (para. 26), although there was no way to "accurately quantify" the benefit (para. 23). He also made the following statements:

> [24] Although it is argued that neither Mr. Beets nor Tamarack, Inc. had any control over the production of the television episode, including what footage was used, there also was no evidence presented that either attempted to dissuade the production personnel from airing this footage. As a result, the Gold Rush episode sensationalized the illegal dumping and lighting of fuel in the dredge pond.
>
> [25] Based on the dramatic fashion in which this incident was presented in the television episode, it may be inferred that the sensationalized footage was employed in order to make for "good television".

It is certainly correct for the trial judge to have concluded that there was no attempt by either appellant to dissuade the production company from airing the particular footage where the gasoline was set alight. Given the fact that the footage was used extensively in subsequent advertisements for the episode "Hundreds of Ounces", one could infer

that both Beets and Tamarack, for whatever reason, enjoyed the notoriety of being featured in the clip.

[103] Further, as I suggested earlier, it would not be entirely speculative to infer that Tamarack would receive some benefit through its fame resulting from the broadcast of the incident, as part of the overall episode and series. For example, such benefits might include more favourable treatment by financiers, mining equipment suppliers or even fellow miners. They might also include advantages with respect to its ability to hire new personnel who wish to work for such a notorious company.

Extent of Attempts to Comply

[104] This factor was addressed briefly by the trial judge in dealing with the issue of culpability. He recognized that Tamarack had not established any training program for employees dealing with fuels, or those who might have access to fuels, nor any defined method to combat fuel spills. This conclusion is supported by the evidence of Favron.[4]

Overall Fitness of the Sentences

[105] The trial judge began his examination of the case law by recognizing that environmental pollution cases, the circumstances are often quite unique and can be considered on its own merits (para. 27). He then went through a series of cases, which I found to be largely distinguishable because in virtually every case there were guilty pleas and involved joint submissions. The same was true for Favron's sentencing.

[106] One case that did bear some similarities to the case at bar was addressed by the trial judge as follows:

> [37] In the case of *R. v. Teck Cominco Metals Ltd.*, 2003 NUCJ 5, the defendant company pleaded guilty to having permitted the deposit of diesel fuel, a deleterious substance

[4] Transcript, April 18, 2017, p. 24.

> to fish, in a place where it might enter waters frequented by fish, contrary to the *Fisheries Act*. The incident leading to the prosecution consisted of a fuel leak which occurred when diesel was being transferred between two tanks. The leak resulted in a significant amount of diesel mixing with rainwater. Some of the diesel water mixture subsequently entered the waters of Crozier Strait, however, there was minimal damage to the environment. Teck Cominco had a solid environmental and safety operating record and no previous convictions.
>
> [38] The sentencing Court imposed a $5,000 fine and ordered the company to pay $25,000 to the Crown to promote fish and fish habitat in Nunavut. (my emphasis)

[107] Another case that caught my attention on the appeal, but was not referred to by the trial judge, is an unreported decision by Ruddy J., of the Territorial Court, dated May 17, 2017.[5] The case involves some similarities to the one at bar, as well as a number of differences. First, it is a Yukon case, in the same general geographic area as the case at bar. The offenders there were No Name Resources Inc. and Cameron Johnson. I am informed by Crown counsel that Johnson was the director of No Name, which was a small family-run placer mining operation in the Dawson Mining District. There was an accidental breach of a settlement pond that allowed a significant discharge of effluent into a tributary that eventually flowed into the Indian River. Johnson took quick steps to shut down the operation in order to fix the breach. There was no significant environmental harm. Johnson pled guilty on behalf of his company and himself and exhibited remorse. There was also a joint submission on the penalty. In addition, the Court received evidence about the company's, and Johnson's, ability to pay, which was limited. The company was fined a total of $15,000 for two breaches of its water licence and Johnson was fined $5,000, for a total of $20,000.

[5] Court File # 16-11342.

[108] In the case at bar, I repeat that Beets was fined a total of $6,000, and Tamarack a total of $25,000, for a grand total of $31,000. Given the fact that Tamarack was found to be one of the largest privately held placer mining companies in the Yukon, those fines appear to be within the range which is appropriate.

[109] It is important to remember here, as set out in *Lacasse*, that for a sentence to be considered unfit, it must be found to be "clearly unreasonable". I do not find that to be the case here. Further, I do not find that the trial judge committed any error in principle, failed to consider a relevant factor, or overemphasized any appropriate factors. While I might have imposed lower fines for some of the offences, I am cautioned by *Lacasse* that although an appellate court might entertain a different opinion as to the most appropriate sentence, that difference will generally not constitute an error of law justifying interference. In other words, it is not open to me to substitute my discretion for that of the trial judge.

CONCLUSION

[110] The appeal against the convictions and sentences is dismissed.

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GOWER J.