Court of Queen's Bench of Alberta

Citation: R. v. Centennial Zinc Plating Ltd., 2004 ABQB 211

Date: 20040317
Docket: 0205 50836 S1
Registry: Edmonton

Between:

Her Majesty the Queen

Appellant

- and -

Centennial Zinc Plating Ltd.

Respondent

Reasons for Judgment
of the
Honourable Mr. Justice Jack Watson

Appeal from the Sentence of
The Honourable Judge M.G. Stevens-Guille
Dated the 22nd day of April, 2003
Filed on the 10th day of June, 2003
Docket: 020550836P1

Table of Contents

1. Introduction

[1] The Crown has appealed to this Court from the sentencing decision of the Provincial Court wherein the Trial Judge imposed a fine of $125,000.00 upon the Respondent upon one Count under s. 98(2) of the *Environmental Protection and Enhancement Act*[1] (the *Act*) worded as follows:

> On or between September 1, 1993 and April 3, 2001, both dates inclusive, at or near Edmonton, in the Province of Alberta, did unlawfully release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect contrary to section 98(2) of the *Environmental Protection and Enhancement Act.*

[2] The Information was sworn on May 15, 2002. Perhaps relying on s. 35 of the *Interpretation Act*[2], no objection was raised by the Respondent that the date range for the Count embraced a period of time prior to the current *Act*.

---

[1] The Act upon which the Crown charge was based was the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 as amended. The current Act is the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 and has different section numbers. S. 98(2) then provided as follows: "98(2) No person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect."

[2] S. 35(1) of the *Interpretation Act*, R.S.A. 2000, c. I-8 provides as follows: "35(1) When an enactment is repealed in whole or in part, the repeal does not (a) revive an enactment or thing not in force or existing immediately before the time when the repeal takes effect, (b) affect the previous operation of the enactment so repealed or anything done or suffered under it, (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed, (d) affect any offence committed against or a contravention of the enactment so repealed, or any penalty, forfeiture or punishment incurred in respect of or under the enactment so repealed, or (e) affect any investigation, proceeding or remedy in respect of the right, privilege, obligation, liability, penalty, forfeiture or punishment." S. 35(2) of the *Act* provides as follows: "35(2) An investigation, proceeding or remedy described in subsection (1)(e) may be instituted, continued or enforced and the penalty, forfeiture or punishment imposed as if the enactment had not been repealed."

[3] Moreover, no submissions as to expiry of a time limitation were made to this Court under what was s. 212 of the 1992 *Act* and is now s. 226 of the current *Act*[3]. The reach of the Count back to May 15, 2000 took in facts sufficient to support the Count.

[4] The facts of the time period prior to the limitation were still relevant as context even if a separate Count for earlier time periods might have encountered a limitation problem. As pointed out in ***Arp***[4], even an acquittal might not necessarily eliminate the relevance and admissibility of particular contextual facts for present offences. *A fortiori*, facts prior to an expired limitation period may still be relevant and admissible as context to offences within the limitation period of a regulatory public welfare offence such as this.

[5] Indeed, where the offender is a corporation, it may be an interesting question as to whether prophylactic rules of evidence applicable in the trial context have to be the same for corporations as for an individual facing trial upon indictment. Unless they arise for the corporation in a representative manner affecting human beings, even *Charter* rights are understood against the reality that it is a corporation that is the Defendant that may be invoking the right: ***C.I.P. Inc.***[5] I do not need to address this interesting question here.

[6] S. 214(2)(b) of the *Act*, as it was in the 1990s, provided for a maximum fine for corporations of "not more than $500,000"[6]. The Crown recognized this as the current limit in their written and oral submissions to the Trial Judge and this Court. Accordingly, the fine disposition made by the Trial Judge was lawful. The appeal against the Trial Judge's fine disposition of the case, therefore, related to whether the sentence was "fit" or reflected errors in principle or factor. Crown Counsel cited six Alberta cases for comparison purposes on the *quantum* issue.

---

[3] S. 226 of the current *Act* provides as follows: "226 A prosecution for an offence under this Act may not be commenced more than 2 years after the later of (a) the date on which the offence was committed, or (b) the date on which evidence of the offence first came to the attention of the Director."

[4] R.v. Arp (Brian), [November 26, 1998] 3 S.C.R. 339, 129 C.C.C. (3d) 321, 20 C.R. (5th) 1, 232 N.R. 317, 114 B.C.A.C. 1, 186 W.A.C. 1, [1999] 5 W.W.R. 545, 58 B.C.L.R. (3d) 18, [1998] S.C.J. No. 82 (QL), 1998 CarswellBC 2545 (S.C.C. No. 26100). See paras. 76 to 78 per Cory J.

[5] R.v. C.I.P. Inc., [April 9, 1992] 1 S.C.R. 843, 135 N.R. 90, 71 C.C.C. (3d) 129, 12 C.R. (4th) 237, 52 O.A.C. 366, 9 C.R.R. (2d) 62, 7 C.O.H.S.C. 1, [1992] S.C.J. No. 34 (QL),1992 CarswellOnt 82 (S.C.C. No. 22025).

[6] S. 214 of S.A. 1992 c. E-13.3 was amended by: S.A. 1996, c. W-3.5 s. 175; S.A. 1996, c. 17, s. 49; S.A. 1997, c. 18, s. 6. See s. 228(4) of the present *Act*.

[7] A further key feature of the Crown appeal was the contention that the Trial Judge also erred in failing to make an order for "community service" pursuant to what it said was s. 234(1)(h) of the *Act*, which is the section number under the current *Act*[7]. The form of "community service" order that Crown Counsel sought was an order requiring the Respondent to fund a research and academic study project for which Crown Counsel cited seven examples of Alberta cases by way of precedent and interpretation of "community service".

[8] The Trial Judge did not make such a "community service" order. Both at trial and on appeal, the Respondent did not suggest that there was any legal or jurisdictional impediment to the Trial Judge making such an order – such as arising from principles of statutory construction. The Respondent, however, contended that the Trial Judge did not err in principle or factor, nor reach a demonstrably unfit result in the totality of the sanctions imposed, by declining to make such an order.

[9] Apart from urging that the Trial Judge's decision on that aspect reflected errors in principle or factor and made the total disposition plainly unfit, Crown Counsel also submitted that the Trial Judge erred in failing to give reasons for his ultimate decision not to do so under ***Sheppard***[8]. The Respondent pointed to comments of the Trial Judge on a prior adjournment date, plus such reasons as were provided on the final sentencing date, to dispute Crown Counsel's submission that the Trial Judge's reasons were inadequate to the point of error in principle.

2. Procedural Context

[10] The guilty plea by the Respondent apparently resulted in the cancellation of a trial which had been booked for two weeks in the Provincial Court[9]. In addition, the Crown withdrew 13 other Counts as against the Respondent and all 14 Counts against Industrial Plating (1981) Ltd., Peter Greenways and Leo Greenways, who were identified as principals of the Respondent. With moments of Court starting, the Trial Judge accepted the guilty plea of the Respondent without

---

7 S. 234(1)(h) of the present *Act* provides as follows: "234(1) When a person is convicted of an offence under this Act, in addition to any other penalty that may be imposed under this Act, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order having any or all of the following effects: ..... (h) directing the offender to perform community service." The provision in the *Act* as S.A. 1992 c. E-13.3 was s. 220(1)(h).

8 R.v. Sheppard (Colin), [March 21, 2002] 1 S.C.R. 869, 162 C.C.C. (3d) 298, 284 N.R. 342, 210 D.L.R. (4th) 608, 50 C.R. (5th) 104, 211 Nfld. & P.E.I.R. 50, 633 A.P.R. 50, [2002] S.C.J. No. 30 (QL), 2002 CarswellNfld 74 (S.C.C. No. 27439; 2002 SCC 26).

9 S.A.B., p. 1/16-22.

having heard any evidence[10] and summarily dismissed the Counts against the others without having heard any evidence or submissions about the withdrawal of the Counts by Crown Counsel[11].

[11] The Crown's ability to appeal the sentence dispositions in this instance arises under s. 18(1) of the *Provincial Offences Procedure Act*[12]. Procedurally, the appeal is comparable to an appeal as to a sentence imposed under the *Criminal Code of Canada* by virtue of s. 3 of the *Provincial Offences Procedure Act*[13]. S. 3 suggests the applicability of s. 822 of the *Criminal Code*, which itself embraces s. 687 of the *Criminal Code* setting out the role of appeal courts in relation to sentence dispositions respecting indictable offences[14].

---

10 S.A.B., p. 2/23-24.

11 S.A.B., p. 3/5-7.

12 S. 18(1) of the *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34 provides as follows: "18(1) The Minister of Justice and Attorney General, a prosecutor, a defendant or a person affected by a judgment, order or sentence to which this Act applies may appeal a judgment, order or sentence of a justice to the Court of Queen's Bench in the judicial district in which the trial was held."

13 S. 3 of the *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34 provides as follows: "3 Except to the extent that they are inconsistent with this Act and subject to the regulations, all provisions of the *Criminal Code (Canada)*, including the provisions in Part XV respecting search warrants, that are applicable in any manner to summary convictions and related proceedings apply in respect of every matter to which this Act applies."

14 S. 822(1) of the *Criminal Code* provides: "822(1) Where an appeal is taken under section 813 in respect of any conviction, acquittal, sentence, verdict or order, sections 683 to 689, with the exception of subsections 683(3) and 686(5), apply, with such modifications as the circumstances require." Also, s. 822(6), which applies to s. 822(4) as to trials *de novo*, specifically sets out language similar to s. 687 of the *Code*: "Where an appeal is taken under subsection (4) against sentence, the appeal court shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against and may, on such evidence, if any, as it thinks fit to require or receive, by order, (a) dismiss the appeal, or (b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted, and in making any order under paragraph (b), the appeal court may take into account any time spent in custody by the defendant as a result of the offence."

[12] Although the language of s. 18(1) is arguably somewhat less limiting than that in s. 687(1) of the *Criminal Code of Canada*[15] as interpreted in cases such as ***M. (C.A.)***[16], it has been generally accepted that sentence appeals to this Court from the Provincial Court should apply the principles in ***M. (C.A.)*** and ***Shropshire***[17] relative to the standard of review of such sentences. In that sense, deference is due to Trial Judges in the exercise of their judgment capacity respecting sentence.

[13] In ***M. (C.A.)***, Lamer C.J.C. wrote:

> 92 Appellate courts, of course, serve an important function in reviewing and minimizing the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada. See, e.g., ***R. v. Knife*** (1982), 16 Sask. R. 40 (C.A.), at p. 43; ***R. v. Wood*** (1979), 21 Crim. L.Q. 423 (Ont. C.A.), at p. 424; ***R. v. Mellstrom*** (1975), 22 C.C.C. (2d) 472 (Alta. C.A.), at p. 485; ***R. v. Morrissette*** (1970), 1 C.C.C. (2d) 307 (Sask. C.A.), at pp. 311-12; ***R. v. Baldhead***, [1966] 4 C.C.C. 183 (Sask. C.A.), at p. 187. But in exercising this role, courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. See ***Mellstrom***, ***Morrissette*** and ***Baldhead***. Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. For these reasons, consistent with the general standard of review we articulated in ***Shropshire***, I believe that a court of appeal should only intervene to

---

[15] S. 687(1) of the *Criminal Code* provides: "687(1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive, (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or (b) dismiss the appeal."

[16] R.v. M. (C.A.), [March 21, 1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327, 194 N.R. 321, 46 C.R. (4th) 269, 120 W.A.C. 81, 73 B.C.A.C. 81, [1996] S.C.J. No. 28 (QL), 1996 CarswellBC 1000 (S.C.C. No. 24027).

[17] R.v. Shropshire (Michael Thomas), [November 16, 1995] 4 S.C.R. 227, 102 C.C.C. (3d) 193, 43 C.R. (4th) 269, 129 D.L.R. (4th) 657, 188 N.R. 284,65 B.C.A.C. 37, 106 W.A.C. 37, 28 W.C.B. (2d) 516, [1995] S.C.J. No. 52 (QL), 1995 CarswellBC 906 (S.C.C. No. 24227).

> minimize the disparity of sentences where the sentence imposed by the trial judge *is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes*. [Emphasis added]

[14] In that respect, both Counsel attempted to delineate for the Trial Judge and for this Court a set of comparable cases. It seems that the Trial Judge regarded the comparator cases as not providing a clearly discernible range. I do not find error in the Trial Judge's interpretation of the situation of precedent in that sense. The *quanta* cover a fairly broad area.

[15] In the absence of a 'starting point' or other guideline approach designed by the Court of Appeal, it would be preferable for Trial Judges and this Court to follow a consistent approach connected with the elements and factors of relevance, reflecting due regard for the principles and concepts established at law and by the Legislature and Parliament.

[16] A suggestion of mine as to an approach for sentencing corporations appears in ***General Scrap***[18], but such is not authoritative in the same way a Court of Appeal judgment would be. Deference is still due to "front line" Trial Judges subject only to demonstrable unfitness, or significant error in principle or factor assessment.

3. Factual Context

Overview

[17] The Crown relied largely upon a detailed recital of fact allegations made to the Trial Judge with associated reports and documents. This Statement of Facts was ultimately accepted as the core of relevant facts[19], although Counsel for the Respondent sought to introduce further evidence and made factual allegations in his mitigation arguments.

---

[18] R.v. General Scrap Iron & Metals Ltd., (January 9, 2003) 322 A.R. 63, [2003] 5 W.W.R. 99, 11 Alta. L.R. (4th) 213, [2003] A.J. No. 13 (QL), 2003 CarswellAlta 19 (Alta. Q.B. No. 0068 41779 S1; 2003 ABQB 22), leave denied, R.v. General Scrap Iron & Metals Ltd., (April 3, 2003) 327 A.R. 84, 296 W.A.C. 84, [2003] A.J. No. 390 (QL), [2003] A.W.L.D. 273, 2003 CarswellAlta 436 (Alta. C.A. No. 0303-0028-A3; Russell J.A.). See paras. 24 to 52 of (2003) 322 A.R. 63.

[19] S.A.B., pp. 30/26-31/3.

[18] Crown Counsel also called as a witness Allan Lloyd Montpellier, ["Montpellier"] an investigator with Alberta Environment[20] who prepared and tendered a videotape of the site[21]. Crown Counsel also called as a witness David Lapp ["Lapp"] who was accepted as qualified in the subject of "reclamation and remediation", namely as to "cleaning up of contamination which could cause an adverse effect"[22]. Lapp characterized this case as "probably one of the worst that I've seen".

[19] There were, on the other hand, matters in mitigation alleged for the Respondent which are discussed below. A witness called for the Respondent was Leo Greenways, but his evidence seemingly was offered not in support of allegations in mitigation made by his Counsel, but to give opinion evidence as to the hazards of cyanide, for which Leo Greenways was not qualified to offer opinion.

[20] The Trial Judge did not find him to be qualified as such, so Counsel for the Respondent did not offer any further evidence through Leo Greenways while the latter was in the witness box. Crown Counsel's slight venture beyond the issue of qualifications was discouraged by the Trial Judge at that stage of the process. By virtue of the way this incident unfolded during a second appearance before the Trial Judge, the Trial Judge was left with no direct evidence of the financial capacity of the Respondent either to bear any particular fine or the cost of any "community service" order.

Circumstances of the Pollution and the Investigations

[21] In an investigation of metal plating operations in the Edmonton area the government officials discovered that over a period of eight years the Respondent had released cyanide and chrome VI compounds into the environment due to improper storage methods.

[22] Metal plating involves a pre-treatment, cleansing and rinsing of metal objects before plating which involves trichloroethylene and hydrochloric acid. The metal is then treated depending on the plating desired. The processes produce significant quantities of highly toxic waste, notably cyanide from zinc cyanide plating and hexavalent chrome from chrome plating. The greatest risk occurs at the pre-treatment phase and in the cleaning out of plating tanks.

[23] The risk from this was said to be quite significant. The solvents used such as acids can become contaminated with heavy metals. The acids and caustic soda themselves are risky.

---

[20] S.A.B., pp. 6/4-19/1. A *curriculum vitae* for Montpellier was included in the materials provided to the Trial Judge. As a district manager for compliance, Montpellier investigated between 20 and 30 matters annually.

[21] S.A.B., p. 11/21.

[22] S.A.B., pp. 19/15-20. Lapp had about 12 years with Alberta Environment.

Chrome platers may also allow spillage onto the shop floors. Processes such as "carbonate freezing" used to precipitate salts also have a by-product. Eventually the plating bath becomes ineffective due to the processes and the entire body of contaminant must be jettisoned. An alkaline chlorination process to remove cyanide from waste streams has its own risks.

[24] The Respondent was founded in 1967 by Peter Greenways, to do chrome electro-plating and zinc electro-plating. In 1981, he incorporated the second corporation, Industrial Plating (1981) Ltd. Plainly, Greenway had a lot of experience with this business even by 1993 when the former Industrial Monitoring Branch officials inspected his premises then at 6007 - 76 Avenue, Edmonton.

[25] In 1994, the City of Edmonton asked the Respondent to install a dedicated monitoring device as part of a City program to monitor chrome operations. On June 13, 1995, an inspection confirmed a monitoring manhole had been installed to monitor the effluent, but no samples were then taken as the flow was low. The City inspector did express some concerns.

[26] On August 1, 1996, the City sent a notice to the Respondent indicating that the heavy metal concentration in the effluent exceeded a City by-law limit although it was not in excess of a provincial regulation at the time. The City followed up with another notice on September 25, 1996, and then a warning letter on February 13, 1997. Between May 26, 1998 and November 30, 1999, the City recorded 27 excesses on 7 separate dates relative to either cyanide or copper. Of these, 4 excesses were not only beyond the City limit but also the provincial limit.

[27] By letter dated May 30, 2000, the City advised the Respondent to enter into a compliance program by August 11, 2000, failing which a potential penalty of $1,000.00 per day would apply. The Respondent applied to enter that program on August 10, 2000 and was given to August 31, 2000, to provide technical information. On September 19, 2000, the City informed the Respondent that the technical information had not been provided.

[28] On October 5, 2000, City inspectors found excesses of the By-law in cyanide, zinc and copper. The cyanide excess also was past the provincial limit. On October 6, 2000, Alberta Environment and the City were involved in the metal plating investigation called the Metal Plate Initiative. To inform the businesses involved, an Information package was circulated outlining the storage and disposal requirements for hazardous waste to the Respondent and similar businesses.

[29] The covering letter with this package warned of possible charges under the *Act*, the Regulations, and the By-laws. On October 10, 2000, the Respondent acknowledged the October 6, 2000, package and asked for an extension of time to enter into the compliance program, of "a few more weeks". The letter acknowledged some of the prior history as well but asserted "time flies". The letter also mentioned a proposal from an engineer about ion exchange treatment.

[30] The City did not agree to any further extension and two violation tickets for penalties of $1,000.00 were issued on October 17, 2000, for the date of October 5, 2000. Alberta

Environment was informed of this decision by the City. The Respondent was given until November 4, 2000, to pay the fines voluntarily. The Respondent did not pay the fines.

[31] On March 7, 2001, the local newspapers, the Edmonton Journal and the Edmonton Sun published articles dealing with the prosecution of a competitor business called RHK Hydraulic Cylinder Services Ltd., at 11320 - 143 Street, Edmonton[23]. On March 14, 2001, the City issued two more tickets for waste release, the tickets returnable on April 30, 2001.

[32] On March 26, 2001, Montpellier met with Leo Greenways and inspected the premises. While he was there, City inspectors also arrived.

[33] A first area called Site 1 in Montpellier's inspection included the chrome plating shop where two chrome tanks placed over what appeared to be a sealed concrete sump. The wash off residue from this area could enter the storm sewer system, but Montpellier found no specific violation that day. He did notice what appeared to be Chrome VI residue in the sump, but could see no direct link between the sump and the storm sewer system.

[34] Leo Greenways did admit, however, that sometimes accumulated liquid in the sump would be pumped into the floor drain. Greenways asserted that the liquid was always "clear" however, and the colour presently viewed was "not normal". Greenways admitted no analysis was done.

[35] In the copper and zinc plating areas of the shop, the plating tanks were simply resting on the floor without secondary containment. Releases, if any, would flow into the sanitary sewer from this. There were also drums with plating solution stored without secondary containment. Sampling did not suggest, however, excess levels at that location.

[36] However, in Site 2 of the premises, Montpellier located three 4' by 6' by 4' tanks, one open to the air and two covered by a metal sheet, containing liquid and sludge cyanide waste. There was no secondary containment and no signage. He also found an open top drum of hydrochloric acid with signs of spillage. There were other drums of used oil with signs of spillage.

---

[23] R.v. RHK Hydraulic Cylinder Services Ltd., (March 7, 2001) (Alta. P.C.; Caffaro A.C.P.J.). A transcript of this case was included in the volume of authorities. By joint submission, that company was fined $40,000 on one Count, $10,000 on another Count, inclusive of the victim fine surcharge normally applicable in such cases, payable over 3 years. In addition, Counsel discussed an arrangement whereby the company would pay $50,000 over a two year period under a "creative sentencing order". In addition, Crown Counsel alleged costs of remediation and 'industry standard' superintendence of perhaps $100,000 also payable over time.

[37] In Site 3 of the area, Montpellier found a box-car sized container with 100 to 125 drums of crystalline zinc/cyanide. This material was leaching from the bottom due to rust of the container. Nearby were 50 to 75 drums of the same material simply stored on the ground. The drums were in poor condition and some had completely rusted out with crystals spilling on the ground.

[38] In Site 4, Montpellier found 30-40 drums of zinc/cyanide stored on pallets with no secondary containment or signage. Testing, which itself was risky due to the condition, found massive excess of regulatory limits as to numerous substances. Leo Greenways admitted that this material had been stored thus since operations commenced there. Montpellier advised Leo Greenways of his rights under the *Canadian Charter of Rights and Freedoms* and sought a statement. Leo Greenways asserted that he had tried to persuade his father Peter Greenways to take action on this but his father had declined to do so.

[39] Montpellier issued two notices of non-compliance telling Greenways to "immediately take all necessary steps to comply". Peter Greenways arrived and agreed to take "immediate action".

[40] On April 3, 2001, Montpellier returned to take videotapes, and also conduct sampling with protective gear. Nothing had changed since March 26, 2001. Further samples of large excesses, and even a fire risk were determined, as one liquid drum had a flash point of 46.28 degrees Celsius. A return visit of April 6, 2001, acquired further evidence the drums had been acquired over at least eight years, and shovelled manually by workers. Two workers interviewed seemed to have little or no knowledge of waste handling proprieties. Leo Greenways explained that they were 'working on a plan' but most methods were "very expensive".

[41] On April 12, 2001, a Notice of Investigation was sent to the Respondent. On April 17, 2001, Peter Greenways responded by conceding that they had not "immediately react as quick as we should have" but proposed that they had a plan to clean up in spring and summer of 2001. On April 18, 2001, Alberta Environment issued an environmental order.

[42] On April 25, 2001, a company called NewAlta removed used oil and hydrocarbon waste from the site, estimating this at 2,500 litres. On April 30, 2001, the Respondent paid the city fines. On May 7, 2001, the Respondent submitted a storage plan, essentially to put the containers in large tote bags to move them inside for the time being.

[43] On May 17, 2001, the Respondent hired a consultant to conduct sampling under the building. On June 5, 2001, Leo Greenways offered to Montpellier an explanation of the Respondent's practices and was essentially given an explanation involving recycling. None of this appears to have served much more than corporate convenience.

[44] On June 7, 2001, the Respondent began to repackage the waste in tote bags each containing approximately a metric ton of solid material. The sample results from nine of 15 such bags indicated excesses between 40 and 75 times the applicable criteria. The large container

itself had thus held over 15 metric tons of material, against a maximum of 10 metric tons for any storage. By July 12, 2001, this material was transported to the Ryley, Alberta, hazardous waste site. On August 1, 2001, the containers were also removed. No liquid waste was found at the site by August 12, 2001.

[45] In his testimony, Montpellier placed this case in the top three of 15 such investigations he had taken part in. He presented the video for the Trial Judge. In cross, Montpellier admitted that he had no knowledge beyond the "basics" in the electroplating business. He said there were 26 businesses like the Respondent's business in the Edmonton area[24].

[46] Montpellier agreed that he was not sure where the material might have been stored before the opening of the Ryley land fill site[25]. He estimated that it would cost approximately $100 to 150 per drum to remove the waste[26]. He also agreed that the Respondent had been "exemplary" with respect to the cleanup[27].

[47] David Lapp ("Lapp") the Crown's remediation expert offered evidence as to potential effects including that a fatal dose of cyanide was established in the United States at 1.52 parts per million. The Canadian authorities had accepted 8 parts per million for storage purposes. A soils result done by the private contractor for the Respondent suggested a contamination proportion of 119 parts per million in one particular area[28].

[48] Lapp noted that the company RHK did not have a cyanide issue – there the problem was chromium. However, he agreed that RHK had to dig down perhaps 45 feet and to excavate even within their building to remediate the situation[29] whereas the Respondent had to dig "very shallow, 30 centimetres" because chrome was "more mobile in soil"[30]. Shallow, however, was not "minor" because it made the cyanide accessible to earth worms and other local biologies.

Circumstances of the Respondent

---

[24] S.A.B., pp. 17/18-18/1.

[25] S.A.B., pp. 15/25-16/11.

[26] S.A.B., p. 16/16-18.

[27] S.A.B., p. 17/16-17.

[28] S.A.B., p. 20/7-22/18.

[29] S.A.B., p. 27/1-8.

[30] S.A.B., p. 27/12-25.

[49] In cross, Lapp accepted as reasonable the following expenses claimed by the Respondent for remediation: $13,392.75 [chemical removal]; $23,179.78 [site assessment]; $23,052.06 [soil removal]; $24,786.15 [waste water treatment]; $10,000.00 [operating procedure changes]; $32,000.00 [containment], for a total cost of $168,410.74[31]. Moreover, Crown Counsel accepted in writing that the clean up had been "exemplary" and the current measures established by the Respondent had resulted in "a zero discharge situation".

[50] As mentioned above, Counsel for the Respondent did not lead any evidence as to the capacity of the Respondent either to bear a fine or the cost of a community service order. At a second appearance before the Trial Judge, the Respondent's Counsel did make the unsworn assertion that "it's a small company, it's three employees"[32].

[51] Counsel followed that assertion with reference to the guilty plea and the saving of a long trial, which the Trial Judge acknowledged as worthy of credit. I do not detect in what the Trial Judge said there that he specifically accepted or did not accept Counsel's assertion about the size of the Respondent, which of itself said little about its financial condition. On the other hand, the Trial Judge did see a video from which he might have drawn some inferences, perhaps.

[52] On appeal, Counsel for the Crown contended that from the point of view of mitigation, there was no evidence of incapacity of the Respondent to pay a larger fine or the cost of a community service order. According to the Crown, the Respondent had not established – arguably under s. 724(3) of the *Criminal Code* as applied to the situation by the *Provincial Offences Procedure Act* – any current financial condition which would be material to the sanction calculus[33].

[53] On the contrary, Crown Counsel had in her written material to the Trial Judge included an assertion that "the company had the financial means to invest in proper disposal" and the "company had never budgeted for disposal costs". The Trial Judge's final reasons do not directly respond to this, but earlier remarks by the Trial Judge suggest he found he had no evidence of the

---

31 S.A.B., p. 28/5-29/7. An Exhibit S-2 was filed for the Respondent setting out remediation costs.

32 S.A.B., p. 71/14-15.

33 S. 724(1) of the Code speaks to relying on *agreed* facts: "724(1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender." Absent agreement, the onus of proof of facts rests with the Crown beyond a reasonable doubt of facts in proof of offence or aggravation of penalty. The onus of proof of facts solely in mitigation rests with the Defendant under s. 724(3)(b) and (d) of the *Code*.

financial condition of the Respondent either way so he could not consider that a factor of moment.

4. First Phase of Proceedings before the Trial Judge

[54] During the submissions of Crown Counsel, the Trial Judge inquired as to whether the remediation steps taken by the Respondent would already cover what a "creative sentencing order" – by which was meant the "community service" under s. 234(1)(h) of the *Act* – would accomplish notably because one case cited as a comparator involved a fine of $10,000 and $40,000 of a "creative sentencing order" which appears to have largely been to remedy the problem[34].

[55] Crown Counsel submitted to the Trial Judge that the creative sentencing in that *other* case was unusual, and distinguishable. Crown Counsel asserted that, in principle, the fine should be the sanction for the offence together with the imposition of a further sanction for some future benefit to society or the environment. Crown Counsel said the reparation of the particular site was mandatory and the costs associated with it were therefore not a mitigating factor in sanction terms. Nonetheless, she appeared to concede that voluntary steps beneficial to society which *exceeded* the requirements of cleanup, however, might be relevant in mitigation[35].

[56] Counsel for the Respondent contended at the trial level that the Respondent was not really warned until October of 2000, and was unable to address the problem prior to the Ryley site opening. Counsel suggested the seriousness of the offence was low as "the pollution was minimal" and that there was no "subterfuge". He contended that the RHK case[36] was more serious.

[57] The Respondent's submissions at trial in those regards are not persuasive in mitigation. The pollution was not minimal. The seeming indifference by the Respondent's operators to various official interventions until pressed to the last point makes the absence of "subterfuge" a matter of little substance. It does not appear that the Trial Judge attached much weight to these aspects of the Respondent's position.

[58] Counsel for the Respondent also compared various cases placed before the Trial Judge in terms of their monetary penalties and creative sentence options. When adding allegations as to efforts by the Respondent at disposal during sentencing submissions, the Trial Judge expressed concern that the allegations of the Respondent's Counsel had not been forthcoming during the

---

[34] S.A.B., pp. 47/7-48/13.

[35] S.A.B., pp. 49/1-50/16.

[36] Footnote 23.

fact submission stage of the process. Also, as to the comparison of other cases, the Trial Judge characterized part of them as "sort of a here's the pot calling the kettle [black]" situation.

[59] At any rate, the Trial Judge then informed Counsel that he would defer judgment to a later date.

5. Second Phase of Proceedings before the Trial Judge

[60] During the second appearance, Counsel for the Respondent sought to present evidence from Leo Greenways as to his opinion respecting the risks of sodium cyanide. After a *voir dire* to determine if Leo Greenways was qualified to offer such opinion evidence, the Trial Judge found him unqualified[37]. Even as explained, the substance of his opinion seemed at least partly a matter of uneducated gossip in the electro-plating industry. No dispute as to the Trial Judge's exclusion of this opinion evidence was raised on appeal before this Court.

[61] Crown Counsel added that the fact that Leo Greenways seemed to regard himself as qualified to assess the hazards of sodium cyanide was "a very common misunderstanding of many of the offenders who appear before the Court in environmental matters" and was, if anything, an aggravating factor in sentencing. In this instance, the Trial Judge does not appear to have taken this in aggravation.

[62] It was open to the Trial Judge to decide what to make of that situation. There was ample evidence that the Respondent's misconduct stretched over a significant period and involved huge quantities of ill-stored material that even the most undiscerning eye would not have considered environmentally friendly.

[63] Scientific ignorance would not be mitigating in such a situation, particularly in light of the interest expressed by the authorities. However, whether it was aggravating or not would depend on the overall circumstances and be within a Trial Judge's realm of assessment, although recklessness or wilful blindness would exacerbate the offence. The Trial Judge did agree that he would give the Respondent credit for the guilty plea[38].

[64] At the end of submissions during this second phase, the Trial Judge then proceeded to give what appear to be reasons for judgment as to sentence. After referring to the apparent condition of the Respondent's site as "appalling" his remarks included the following:

> The issue before me, however, is a little larger than that, and perhaps even different. It is not whether it is visually appalling but it is whether, on the evidence

---

37 S.A.B., pp.70/5-10.

38 S.A.B., pp. 71/20-22.

of people like Mr. Montpellier and Mr. Lapp, the effect or potential effect on the environment is appalling.

And in my view, listening to their evidence which is not really challenged here, it is potentially at the high end of the scale because of the nature of the deleterious substances involved, cyanide compounds and Chromium B, chromium compound, and the volumes involved, which were large when one compares them with volumes considered in the other cases that were put before me, which have resulted in charges since the Act was amended in 1993 to raise the maximum fine for corporations from $25,000.00 an offence to $500,000.00 per offence.

The point of all of that is simply this; that the Legislature must be taken to have considered that a maximum fine of $25,000.00 was not sufficient to provide the kind of deterrent to other people who carry on businesses involving hazardous waste so as to convince them that if they are so socially irresponsible as to make their decision on a cost benefit basis, they will be making a cost benefit analysis mistake, because if they are charged and convicted, or plead guilty as happened here and as usually happens, the cost to them in terms of a fine and any other order that the Court can make will make any savings which they thought they were making by not spending the money to be in compliance over the years, will all be lost to them, and more. Unless a fine fits into that category, then the purpose of the Act and enforcement of the Act is lost, because it just becomes kind of a cost in your balance sheet, and if it is not a high enough cost, why bother, why not take the chance.

In this case, starting in about 1993 right up until the second inspection in April of 2001, the requirements of the Act were just simply ignored by the senior management of this family operation, who is not the Mr. Greenways who is here today it would seem. Just decided not to spend the money or be bothered, and in doing so, what it would have cost to have complied starting in 1993 on the information before me, is far less than what it now costs. Because in not complying, materials got into the environment, into the soil, thorough (sic) drums that were stored inadequately with no secondary containment, which has cost them a great deal of money to this point to rectify.

The point is that they did not do anything after, in October of 2000 they, as did the other 25 businesses in electroplating in this city, received a full information package from Environment Alberta explaining what was necessary and what the problems were, which presumably they ignored, because nothing was done. And then there was an inspection on March 26th when Mr. Montpellier observed sort of not a good situation, but not the worst he had seen inside the shop, but in the back yard one of the worst he had ever seen, of which I saw pictures. And it was a totally, in my view, irresponsible exercise in the back yard in terms of storing what are hazardous waste materials, and a great quantity of them. Nothing was done between Mr. Montpellier's first inspection on the 26th of March, 2001 and the next week. It is just a week, that must be remembered. And at the end of the day

> an order was made for compliance. It was not complied with until after Mr. Montpellier brings Mr. Greenways Jr. to the opinion that they now have to comply, the company does.
>
> The evidence then is, is that they cleaned up the site. That's Mr. Montpellier's evidence, and I think Mr. Lapp's as well. The material before me contained in Exhibit 2 is that once they did decide to address the problem, they have to this point apparently spent over $150,000.00. The number is 168, but I will call it over $150,000.00. That same report suggests to complete the work over time will cost them, or could cost another $150,000.00.
>
> What the Court ought to be doing, in my view, is twofold. Firstly, it ought to be doing something which ensures that the problem as affects the environment is fixed. That is if, by order or otherwise, that to whatever extent this operation is or could, as it is presently operated and set up, become a threat to the environment, that has got to be corrected, and corrected as soon as possible.
>
> Secondly, in these matters of violations of environment legislation the Court must, by way of denunciation of those who do not comply, and deterrence of them so that they will not do that again, and perhaps most importantly deterrence of other businesses, whether in the electroplating business or any other business that is involved with hazardous waste, they will get the message that it is going to be so costly not to comply, if you are not thinking of complying out of corporate responsibility alone, that you do not want to go there.[39]

[65] As he thus ruminated aloud regarding the matter, the Trial Judge made it clear that he did not think that the submission of Crown Counsel – which he characterized as a submission for a "really impressive order of $400,000" – was persuasive, although he agreed it would get "a lot of people's attention".

[66] The Trial Judge, in the course of determining that he would once again defer the matter of sentencing, opined that the Respondent and the environmental authorities had not – as in other cases – worked out a remedial order that was "all packaged up" for the Court.

[67] Accordingly, he decided to adjourn the sentencing to allow the Respondent and those authorities to "get together and decide what is necessary to completely fix the problem and that is, bring the company into complete compliance". As thus expressed, in light of the facts provided to that point, Counsel might be forgiven for not being entirely certain what the Trial Judge was asking them to do at that stage.

[68] Before adjourning to permit this to occur, the Trial Judge also forthrightly indicated again that "it is quite frankly not going to be a fine such as the Crown seeks, it is going to be a fine that

---

[39] S.A.B., pp. 74/6-77/14.

they may need time to pay". The Trial Judge was being frank about his present inclinations, but providing Counsel with an opportunity to prepare and make further submissions.

[69] Significantly, the comments of the Trial Judge made in this second phase were partly incorporated into his ultimate decision by Counsel for the Respondent in suggesting that the Trial Judge did give sufficient reasons for his ultimate disposition of the matter. In that sense, the Respondent does not appear to object to the fairness of what happened at this second stage.

[70] In closing this second phase of the proceedings, the Trial Judge clarified that if the parties were unable to come to an agreement, he would expect them to "provide their positions with respect to any order which environmental authorities think is necessary". In explaining this he added that he was not purporting to "exercise judicial blackmail"[40] to cause the Respondent to "agree to anything". Absent agreement, he would "hear submissions about it and I will make or not make such order to such extent involving such amount of money as it seems to me is proper, in addition to such fine as I decide to levy"[41].

[71] After Counsel retired to get an agreeable date and returned, the Trial Judge continued with further comment about what he thought as to penalty:

> What I am asking Counsel to do is if they come to some agreement, that it be provided to me in advance of that date. If they cannot come to an agreement, they provide to me their positions with respect to any order which environmental authorities think is necessary. And there may be some dispute about that, because the evidence in this matter is that $168,000.00 worth of work was voluntarily done. And quite frankly, my own view is it is the total financial penalty on a prosecution for non-compliance, which is a combination of a fine and the court ordered cost of being brought into compliance which has to be thought about, and to the extent that there has not been voluntary compliance, then that would become part of the court order presumably. But some credit has to be given for that, because at the end of the day it is – if the object is to deter people from making a business decision not to comply, to make that the total financial consequences of not complying unacceptable as a business decision. So those are my views in any event, Counsel.[42]

[72] The Trial Judge went on to mention another provision of the *Act* which had no application to the situation, and he then further said:

---

[40] S.A.B., pp. 80/2-4.

[41] S.A.B., pp. 81/4-7.

[42] S.A.B., pp. 82/4-22.

> There is no evidence, as happens in some cases, that this company is so large, so wealthy, and has done so well that that is a factor in how much I ought to order be paid, because something less than that would be meaningless to somebody that big and wealthy. There is also no evidence in the other direction such as perhaps existed in R.H.K. at some level, that a total financial consequence beyond a certain level with either put the company out of business or cripple it. I do not have any evidence of that. So that is not going to be a factor either way in my mind.[43]

[73] The Trial Judge also expressed some curiosity as to the maximum penalties provided for in the *Act*. The Trial Judge's observations there can be set aside as no appeal ground is set on them.

5. Third Phase of Proceedings before the Trial Judge

[74] During the third phase of the proceedings, the Trial Judge once again seemed to say that the purpose of the creative sentencing option was "a remedial order, a fix". Crown Counsel said that remedial orders such as seemed to be in the Trial Judge's mind were a different matter than the creative sentencing option, but the Trial Judge responded:

> THE COURT: Well, let us not get at cross-purposes here. The Act providers that I, as the judge, may in addition to imposing a fine, make an order –
>
> MS. MCRORY: Yes, Sir.
>
> THE COURT: – which I call a remedial order, a judicial remedial order, which is a judicial order aside from the civil aspects of what your Department does directly, which in combination with the fine is what I considered to be the so-called creative sentencing.
>
> Mc MCRORY: Well, your Honour, what I looked at –
>
> THE COURT: So long as we understand what I say when I say remedial order. I understand what you mean when you say creative sentencing. It is that the judge sits up here and says right, well, the sentence will not be just a fine, it will be a fine and something that he thinks is necessary to fix the problem, put some part of the money that he is going to order the accused to pay directly into the problem rather than into the general revenues of the Province of Alberta.[44]

[75] At that point, Crown Counsel seems to have desisted from directly attempting to persuade the Trial Judge that he had, in my view wrongly, narrowed the focus of the "community service"

---

[43] S.A.B., pp. 82/27-83/9.

[44] S.A.B., pp. 86/13-87/15.

element of the sanction provision of the *Act*. It is not, in my view, an impediment to this Crown appeal that Crown Counsel did not repeat specifically that the community service concept was different from the definition that the Trial Judge seized upon. The Trial Judge said he had read the transcript of the second phase of the proceedings before him. While Crown Counsel might have persevered, it does not disable the Crown right of appeal that she did not.

[76] Crown Counsel informed the Trial Judge that government representatives had met with Leo Greenways, the principal of the company, to work out a possible creative sentencing package on the matter. This had not resulted in a joint submission to that purpose.

[77] Crown Counsel suggested that a larger view be taken of the matter and she proposed that the company be required to contribute to a research project by which it might be determined what sort of micro-organisms might be "capable of in a sense naturally dealing with the cyanide". Crown Counsel was not talking about particular repair to the Respondent's work site, but was talking about a longer term approach to environmental improvement or rectification.

[78] Her particular proposal was for a fund to be established of approximately $50,000.00 per year for a total of about $200,000.00 for a Master's student or Ph.D. candidate to conduct such research at the University of Alberta under supervision of an assistant professor in the Soil Bio-chemistry Department and a representative of Alberta Environment who was also a soil scientist.

[79] Crown Counsel submitted that this proposal would be in addition to a basic fine of $75,000.00 for the offence itself. The $200,000.00 was based on $150,000.00 for the student/researcher and $50,000.00 for the analytical work. Crown Counsel suggested that if the Trial Judge was uncomfortable with the total figure, they might go back to the University to see if they would settle for a lower figure for the overall project.

[80] The Trial Judge said this proposal "sounds so interesting". He remarked:

> It sounds so interesting, and it is kind of too bad that the other places where funding for really interesting projects come from does not seem to have showed up, and everybody is asking for the courts to fill that gap. Maybe there is some merit to it."[45]

[81] Crown Counsel confirmed in answer to an inquiry of the Trial Judge that the burden of this proposal would be borne by the Respondent alone, as she did not anticipate any other cyanide pollution cases coming forward to share the cost of this research. She did say that $200,000.00 was the original estimate from the University, hinting that the University might adjust its aspirations.

[82] In response, Counsel for the Respondent contended that the company principal asserted that the site had been cleaned up and that contemplated efforts that "would result in a better work

---

[45] S.A.B., pp. 95/23-96/2.

environment and cheaper waste water treatment" would cost about $50,000.00 as part of a total cost of approximately $150,000.00 contemplated for a new system. Counsel for the Respondent contended that "what he's done definitely mitigates the sentence substantially"[46].

[83] The Trial Judge appeared to infer that some of this "enhances the value of his operation". Accordingly, he indicated to the Respondent's Counsel that he was thinking beyond that prospect of the situation of the Respondent. The Respondent, according to his Counsel, seemed to resist Crown Counsel's suggestion as a "waste of money" as it would not affect his particular operation[47].

[84] In this context, it can be recalled that Leo Greenways had been offered as an expert having approximately 20 years experience with electroplating. It can also be noted that problems had been extant since 1993. The Respondent's principal may thus have continued with a subjective point of view about the nature of the problem, its solution and the overall implications.

[85] Perhaps to address some of the Respondent's concerns – and perhaps to address the Trial Judge's comment about the 'general revenue' – Crown Counsel proposed that the creative sentencing solution would be tax deductible, seemingly relying upon authority. She said:

> MS. MCRORY: Just very briefly, Sir. The fine and the creative sentencing is tax deductible. The Supreme Court of Canada, about three years ago, came out and said fines, even on environmental matters, are tax deductible. So that's one thing you should be aware of.
>
> THE COURT: That means that I pay some of it, Ms. McRory, –
>
> MS. MCRORY: I know, I know.
>
> THE COURT: – because I am taxpayer.
>
> MS. MCRORY – And we actually have – I know the feds are working towards amending the legislation, because that does seem somewhat unfair.[48]

---

[46] S.A.B., pp. 95/23-96/2.

[47] S.A.B., pp. 100/19-20.

[48] S.A.B., pp. 102/9-20.

[86] This submission by Crown Counsel and whatever the Trial Judge might have taken from it is not free from controversy. If Crown Counsel was referring to ***65302***[49], Crown Counsel's reading of the case is open to question. The Supreme Court there said in ***65302*** that under the then provisions of the *Income Tax Act*[50], an expense which is incurred *for the purpose of gaining or producing business income*, was deductible and its characterization as a fine or penalty did not, in that context, transform it from being an expense to something else.

[87] The core of the ***65302*** case was statutory interpretation not public policy, with the Court applying that particular deference to Parliament's wording in the *Income Tax Act* mindful that "The Act is a complex statute through which Parliament seeks to balance a myriad of principles."[51]

[88] A fine and / or a community service order with financial implications imposed under the present provincial *Act* would not seem to be plainly within the ***65302*** definition. Nor was any information provided to the Trial Judge or this Court to advise whether the *Income Tax Act* has been amended. As for work done voluntarily by the Respondent to improve their business operations as proposed by Counsel for the Respondent, I am happy to leave it to the legal and tax advisers for the Respondent to opine to the Respondent as to what that means for tax purposes.

[89] At any rate, Crown Counsel returned to her earlier theme and submitted to the Trial Judge that the cleanup cost was essentially irrelevant since the land for the Respondent was valueless without the cleanup. In other words, said Crown Counsel, costs of rehabilitation of the premises were inevitable and thus not particularly informative as to sanction.

[90] In the end result, after retiring to consider his decision, the Trial Judge ruled as follows:

> I have read through the sentencing submission for Centennial Zinc Plating, and I have reviewed again the penalties provision of the *Environmental Protection and Enhancement Act* which provides, firstly under Section 228(2), for fines which

---

[49] 65302 British Columbia Ltd. v. The Queen, [November 25, 1999] 3 S.C.R. 804, 99 D.T.C. 5799 (Eng.), 99 D.T.C. 5814 (Fr.), [2000] 1 W.W.R. 195, 179 D.L.R. (4th) 577, 69 B.C.L.R. (3d) 201, [2000] 1 C.T.C. 57, 248 N.R. 216, [1999] S.C.J. No. 69 (QL), 1999 CarswellNat 2222 (S.C.C. No. 26352).

[50] The *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[51] Shell Canada Ltd. v. R., [October 15, 1999] 3 S.C.R. 622, 1999 CarswellNat 1808, (sub nom. Shell Canada Ltd. v. Canada), 178 D.L.R. (4th) 26, 99 D.T.C. 5669 (Eng.), 99 D.T.C. 5682 (Fr.), (sub nom. Minister of National Revenue v. Shell Canada Ltd.) 247 N.R. 19, [1999] 4 C.T.C. 313, (sub nom. Shell Canada Ltd. v. Canada) 1999 CarswellNat 1809, [1999] S.C.J. No. 30 (QL) (S.C.C. No. 26596), at para. 43 per McLachlin J. as she then was.

would apply in this case. The range of fine is, in the case of a corporation, to a fine of not more than $500,000.00.

I have reviewed as well Section 230 which provides for an additional fine where monetary benefits are acquired by the offender. There has been no evidence upon which I could base that sort of an additional penalty in this case.

There are other provisions under a heading in Section 234 called Court Orders Relating to Penalty. I have reviewed those, given the submissions this morning. Firstly, there is a provision under 234(1)(a) where I may prohibit the offender from doing anything that may result in the continuation or repetition of the offence. Everything I have heard this morning suggests to me that that kind of an order would be maybe nice, but it has not been asked for by the Crown, and I do not propose to make that order.

(b) talks about directing the offender to take any action the Court considers appropriate to remedy or prevent any harm to the environment that results or may result from the act or omission that constituted the offence. Well, that is what I had in mind when I talk about remedial orders. It seems to me that what is contemplated in that provision, and all that it has contemplated, is something that must relate to the offence, onto the effects of the offence or what might have been the effects of the offence. I am not sure if that opens the door, if that is the section that I have been asked to use, to an order directing funds to go into research, particularly research which may not necessarily have a direct tangible result relating to this offence. I can direct the offender to notify any person that – or to publish, rather, in a prescribed manner at the offender's cost, the facts relating to the conviction, directing the offender to notify the person aggrieved or affected by the offender's conduct of the facts relating to the conviction in the prescribed manner, and at the offender's cost.

I am rather of the view that, given the press coverage that has existed, at least to this point, about these kind of matters once they get into court, and this one as well, that that is not necessary. The facts are going to be all over the newspaper, and adequately so, and reported by a professional reporter. I am not going to make direction, or either of those directions, as well.

I can provide in such an order that the offender post a bond or pay money into court in an amount that would ensure compliance with any order made pursuant to this section. That has to do with, in my view, if I make an order such as the one perhaps suggested that I provide that the offender pay or secure $200,000.00 towards this research project at the University of Alberta, I can secure it under that section.

Subsection (g) does not seem to apply in my view. It provides that I may direct the offender to compensate the Minister, in whole or in part, for the cost of any remedial or preventative action that was carried out or caused to be carried out by the government, and was made necessary by the act or omission that constituted the offence. There is nothing before me that seems to bring that into play. If there was, it is certainly an order that ought to be made, because part of the problem we are dealing with here is to try and relate the penalty both to the offence, and to get the penalty, where it is money, somewhere where it will do – will address the general problem rather than just vanish into general revenue. And judges always would like to do that. We hear submissions often from prosecutions involving statutes such as this, or indeed even from people involved in motor vehicle offences that come before us, that what we ought to be doing if we can is directing the fines – we will just call them fines for the moment – towards the danger that the conduct that amounted to the offence brings on; so that it would be nice if we could, instead of directing heavy *Motor Vehicle Act* fines into the general revenue, direct them off to somewhere like the Alberta Motor Association's research projects. Well, we cannot do that.

At the end of the day – well, I can also direct the offender to perform community service. I am not quite sure under which of these various specific authorities I am being asked to direct the offender to provide $200,000.00 for the research project that was described to me.

It seems to me that the Environmental Protection and Enhancement authority ought to give some thought to providing for an ongoing fund which would go to enhance the protection of the environment by research, and in particularly by research I suppose, so that when these matters come before the courts we do not have to wrestle with a particular request which always gets us into the problem that it goes to somebody who is identified to us, to the University of Alberta, to an individual working there. That creates problems, it creates the same kind of problem as me making an order, which I suppose might make some sense here and in other cases, providing some of the financial penalty go somewhere like the sewage treatment plant at the City of Edmonton, or for – to help them do a better job of monitoring this if a better job needs to be done in reacting to it.

At the end of the day my view is this: While I invited all of this, I am not satisfied that the authorities provided for, and the facts in this case, are such that I should make this kind – the kind of order that is requested. Rather than that, I am simply going to impose a fine.

I am surprised that Revenue Canada does what we are trying not to do, and that is to have fines for quasi-criminal conduct be, from a tax point of view anyway, just a cost of doing business. If that is so, that is so.

> The fine in this case, taking everything into account, and what I said before about the need to deter others, will be $125,000.00.

[91] From this decision, it seems reasonable to infer that the Trial Judge was looking at specific subsections of s. 234(1) of the *Act*, but it is not clear that the Trial Judge accurately addressed his mind to the "community service" option, which Crown Counsel invoked in support of the contention that there ought to be a monetary penalty to support university research.

[92] Moreover, the Trial Judge – in harmony with his earlier reference to remedial orders – opted to talk about s. 234(1)(b) of the *Act*, which did authorize the Trial Judge to direct "the offender to take any action the court considers appropriate to remedy or prevent any harm to the environment that results or may result from the act or omission that constituted the offence".

6. Issues on Appeal

[93] As noted above, the Crown contended that the Trial Judge erred in principle in failing to make an order for community service under s. 234(1)(h) of the *Act* and erred in principle in imposing a sentence that "was not demonstrably fit". As a supplement to these positions, Crown Counsel submitted that the Trial Judge failed to give adequate reasons for his decision.

[94] The Respondent contended that the Trial Judge did not in his final judgment "exclude" resort to community service under s. 234(1)(h) of the *Act* and that his earlier remarks on earlier occasions shed light on his reasons why he did not elect to fashion a sanction which included that type of disposition. Accordingly, the Respondent would compose the reasons of the Trial Judge as a whole to infer that he weighed that option and rejected it in favour of a fine.

[95] As for the magnitude of the fine and disposition thereby, the Respondent urged that there was nothing demonstrably "unfit" about it and that the Crown position, in a sense, reversed the standard of review. The Respondent generally contended that the Trial Judge's reasons were sufficient.

7. Analysis

Standard of Review

[96] Counsel for the Respondent was correct that the standard review is not whether the sentence is "demonstrably fit" but whether it is "demonstrably unfit", or reflects error in principle, or involves significant over-weighting or under-weighting of a material factor.

[97] Error in principle in this sense can include errors of law or jurisdiction, or misconception of principles of general application to all cases, or concepts of general application to cases of this type and circumstances.

[98] Unfitness in this sense relates largely to (1) whether there is substantial disaccord between the sentence and any perceptible and acceptable pattern of sanctions for comparable sentences such as also is reflected in s. 718(1)[52] and s. 718(2)(b)[53] of the *Criminal Code*, and / or (2) whether the sentence is so clearly inadequate or excessive as to militate in favour of intervention regardless of comparisons with other cases, tariffs, guidelines or trends. Unfitness is not limited to the former notion because sentence standards cannot be frozen in time.

[99] Before addressing whether the sentence herein was demonstrably unfit, the question of 'reasons for judgment' and its effect on the question of error in principle should be addressed. Of itself, the inadequacy of reasons as to sentence is not itself an error in principle touching the sentence directly. The inadequacy of reasons, however, may reveal or may justify the inference that the sentence involves an error in principle.

The Trial Judge's Reasons

[100] The Respondent invoked the line of authority such as ***Burns***[54] relative to inferring from what he said that this Trial Judge considered what was necessary and basic to the decision to be made. Whatever the case law may say about reasons, Parliament has spoken, and provided that at least the structural reasons are obligatory: s. 726.2 of the *Criminal Code*[55].

[101] In this instance, I agree with the Respondent's Counsel that the fairest way to evaluate the reasons of the Trial Judge is by reference to his remarks at each of the phases of the proceedings below. It seems clear to me that the Trial Judge intended his remarks particularly at the second phase to form part of the entirety of his reasons.

---

[52] S. 718.1 of the *Code* provides as follows: "718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." The marginal note for s. 718.1 this calls this the "fundamental principle".

[53] S. 718.2(b) of the *Code* provides as follows: "718.2 A court that imposes a sentence shall also take into consideration the following principles: .... (b) sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;".

[54] R.v. Burns (Robert Howard), [April 14, 1994] 1 S.C.R. 656, 29 C.R. (4th) 113, 89 C.C.C. (3d) 193, 165 N.R. 374, 42 B.C.A.C. 161, 67 W.A.C. 161, 23 W.C.B. (2d) 211, 1994 CarswellBC 576 (S.C.C. No. 23115).

[55] S. 726.2 of the *Code* provides as follows: "726.2 When imposing a sentence, a court shall state the terms of the sentence imposed, and the reasons for it, and enter those terms and reasons into the record of the proceedings."

[102] Bearing that in mind, I am not moved to characterize the last set of remarks as merely a Potemkin Village[56] version of judicial disquisition even though it recites the provisions and the Trial Judge's reaction to them without explaining very much.

Community Service Orders

[103] The reasons taken as a whole reveal, nevertheless, that the Trial Judge misconceived the Crown's submission as to s. 234(1)(h) and misconceived the objective of that provision.

[104] The Legislature of Alberta can be taken to have enacted s. 234(1)(h) as a remedial provision which, like other legislation, is worthy of respectful consideration: s. 10 of the *Interpretation Act*[57]. The context here includes the fact that the Respondent is a corporation so it is not necessary for me to interpret the words for human offenders. The language of s. 234(1)(h) is discretionary in either instance.

[105] The section's wording is broad, but "community service" has not been argued here to be an expression so vague as to surpass legal debate. The words of the provision should be read "in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the Legislature]"[58].

[106] In that light, s. 234(1)(h) can be read to provide for a discretion on the part of a Trial Judge to impose upon a corporate offender a second sanction in addition to a basic punitive sanction for the offence. The Legislature has balanced various elements of the public interest and has provided for the possibility of a "community" service to come from an offender who has contributed to what is essentially a "community" problem, namely, despoiling of the environment shared by Albertans.

---

[56] Admiral Grigori Aleksandrovich Potemkin [1739-1791] who had elaborate fake villages constructed for Catherine the Great's tours of the Ukraine and the Crimea.

[57] S. 10 of the *Interpretation Act* provides as follows: "10. An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects."

[58] This language from E.A. Driedger in *Construction of Statutes* (2nd ed., 1983), at p. 87 has been cited very frequently, and perseveres despite the occurrence of longer expressions of the principle in two later editions of the text now edited by Ruth Sullivan: see e.g. Bell ExpressVu Limited Partnership - v. - Richard Rex, Richard Rex, c.o.b. as 'Can-Am Satellites', et al., [April 26, 2002] 2 S.C.R. 559, 212 D.L.R. (4th) 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 287 N.R. 248, 166 B.C.A.C. 1, 271 W.A.C. 1, [2002] S.C.J. No. 43 (QL), 2002 CarswellBC 851 (S.C.C. No. 28227; 2002 SCC 42) at para. 26.

[107] It would not have been for the Trial Judge to question the Legislature's wisdom in choosing to create such a supplementary sanction on the basis that the ultimate funder of such social policy initiatives would be the public purse. To be fair to the Trial Judge, it is not clear that he was suggesting that the Legislature would not have the right to assign at least an aliquot share of the cost of such future looking initiatives to corporate offenders. He had before him a number of cases provided by the Crown as to "packages" where Trial Judges were invited to approve such arrangements.

[108] However, it was, error for the Trial Judge to effectively characterize s. 234(1)(h) as having a 'remedial' effect nearly redundant to other provisions of the *Act* to which he made reference. Variously in his reasons he seems to have attributed to the "community service" option the connotation that it was to repair the specific damage done by the offender although he did mention at the end what Crown Counsel was proposing as being interesting. Read in context, the community service provision is additional to case-specific repair penalties. In its service of the wider public interest, the provision is not limited to a specific parochial purpose.

Cleaning Up as Mitigation

[109] Connected with his interpretation of the community service provision, the Trial Judge also erred, in my view, in seemingly finding the cost of repairs to the Respondent's land and premises to be either deductible from or in mitigation of the overall penalty to some degree if not totally.

[110] The Respondent's duty to clean up the site was required by law quite apart from the prosecution of this matter. The Respondent's land value has presumably appreciated by reason of the cleanup, although it is not necessary to so find to dismiss the relevance of the repair costs here. Setting aside the tax implications – as to which Crown Counsel's point seems incorrect – the Respondent had the commercial benefit of years of non-compliance before being forced to repair the not insignificant damage caused to the environment.

[111] In my view, situations where the cost of clean up should be considered a mitigating factor in sentencing do not include a case like this. There may be merit in considering special effort taken by the Respondent to go beyond what the law requires, not only on a cost-calculus basis but for its reflection of an improved attitude by the Respondent. The repair cost of prior damage, however, is not mitigating either by itself, nor as a reason not to deploy s. 234(1)(h) of the *Act*.

[112] For one thing, it is difficult to see how either denunciation of the offence or deterrence for others of similar inclination could be achieved by a disposition that makes the corporation do what it was supposed to do in the first place, and what it would have to do whether or not prosecuted. Indeed, the opposite effect is more likely: to deduct the cost would depreciate the offence and deflect the necessary punition. Deterrent fines are not designed solely to make a statement to the offender after the fact, but to deter others before the fact.

[113] Similarly, the rehabilitation of the particular offender would not be achieved by a disposition which would encourage the offender to wait until prosecution before taking the necessary steps to comply with the law. That is what the Respondent did in this instance. His approach would be almost vindicated by such a sentencing approach. Rehabilitation contemplates a change of future behaviour, not condonation of the illegal past behaviour.

Circumstances of the Respondent

[114] The Trial Judge was not in error to opine that he had no information on which to discern the possible impact of a community service order and fine of the magnitude proposed by Crown Counsel upon the Respondent. In my view, the onus does not fall to the Crown to prove that a particular corporate offender does or does not have a particular financial status. It is wise for the Crown to offer evidence on the point if the corporate offender has substantial means, but this did not mean that the Crown had to prove the Respondent's financial situation here.

[115] On the other hand, the failure of the Respondent to lead hard evidence on the point does not invite an 'adverse inference' in this context, such as (a) that the Respondent profited considerably from the offence, or (b) that the Respondent is despite its appearance quite a successful business well able to pay fines and other costs. While there may be a situation where some sort of inference might be in order, the Trial Judge had before him a videotape of the premises. From that and the material provided, he could reasonably infer that this was a business in a medium range – neither destitute or wobbly nor broadly affluent.

[116] In any event, the financial status of a corporate offender is, as noted in ***United Keno***[59] and ***General Scrap***, one of a fairly large group of factors. It is not in itself necessarily major let alone decisive. Indeed, a Trial Judge should be cautious about associating the penalty more with the means of the offender than the particulars of the offence.

[117] Such an approach might encourage poorer corporations to be oblivious to legal duties, and encourage well-to-do corporations to simply inventory the cost. It could also lead to some unusual comparisons as to 'bigness' of corporations, since some of the cases cited by Crown Counsel were municipalities and institutions of higher learning. Such an approach would also lose sight of the need for the sentence to be "fit" to the offence as well as the offender.

[118] It is not clear in this instance what, if any, effect the Trial Judge assigned to the position of the Respondent although he seems to have considered the matter neutral as he so indicated during the second phase of the proceedings.

Effect of the Errors in Principle

---

[59] R.v. United Keno Hill Mines Limited, (October 31, 1980) 10 C.E.L.R. 43 (Y.T.T.C.).

[119] From the foregoing, it follows that the Trial Judge's sentencing reasoning is afflicted with error in principle as to the interpretation and application of s. 234(1)(h), and also, it appears, error in principle as to credit for remedy steps required to repair the site.

[120] Nonetheless, it remains to be considered whether the errors in principle were material to the outcome. Crown Counsel proposed a total disposition of $275,000.00 which she would have allocated as $75,000.00 for a fine, and $200,000.00 for the community service. Despite Crown Counsel's suggestion that the University might consider something less, the proposition offered did not imply much space for discretion. The Trial Judge concluded that a fine of $125,000.00 was adequate for the fine and no community service order was appropriate.

[121] Crown Counsel and the Trial Judge were probably both considering the matter globally, as proposed in ***Van Waters***[60]. Setting off the fine against the community service order is not mandatory, but I cannot fine a global approach to be necessarily wrong either.

[122] If the Trial Judge had started in his mind from a fine of $275,000.00 and deducted the cost of past repair to some degree, in order to achieve the resultant $125,000.00, this would indicate that the error in principle was material to the outcome.

[123] If the Trial Judge had started from a fine of $275,000.00 and deducted the proposed cost of *future* improvements to the property by the Respondent beyond the law's requisites, he would not have made the same error in principle, although one might question the sufficiency of evidence in support of the proposed deduction.

[124] If the Trial Judge simply had decided not to impose a total fine of $275,000.00 on the grounds that, being more than half of the maximum available, it was too high under all the circumstances, it would be difficult to characterize the errors in principle as being material.

[125] In attempting to discern whether a fine of $125,000.00 is unfit having regard to other cases cited – which I elect not to summarize in detail here – I cannot disagree with the Trial Judge that the cases do not shed light on any established range or tariff. Indeed, most of them involved joint submissions or the like, thus offering not a lot of scope for judicial contribution to the process.

[126] While acceptance of a joint submission remains a judicial decision, it is difficult – particularly in light of the authority that seems lately to restrict the discretion of judges to refuse joint submissions within the range of the reasonable[61] – to characterize acceptance of the joint

---

[60] R.v. Van Waters & Rogers Ltd., (June 3, 1998) 220 A.R. 315 (Alta. P.C. No. 6144667-P10101).

[61] See for example R.v. Hoang (Cuong) et al., (April 3, 2001) 277 A.R. 342, 242 W.A.C. 342, 153 C.C.C. (3d) 317, (2001 ABCA 87; Alta. C.A. Nos. 19137 &

submission as being a precedent of the same sort as a considered judgment with reasons as provided for under s. 726.2 of the *Criminal Code*.

[127] Though a Trial Judge is always free to indicate concerns to Counsel and ask for more explanation before adjudicating for or against the joint submission[62], it is hard to construe a decision which accepts a joint submission as much more than a finding that the joint submission was within the realm of the reasonable. As such, a judgment like that is not much of a marker to set either starting point, or a tariff range. It is more of an example than a precedent.

[128] Crown Counsel, quite fairly, did not suggest that any of the cases was on all fours, nor dominating the issue.

Summary of the Analysis

[129] In light of the facts here and the cases provided, I would, were I the Trial Judge, have imposed a greater total sanction, including both a fine and a community service order as proposed by Crown Counsel, though not necessarily in the amount proposed by Crown Counsel. In my view the offence was quite serious. The only significant mitigating feature made out by evidence or circumstances was the guilty plea, although it nets out at little mitigation in light of the overpowering case for the Crown and the fact that the Crown dropped most of the Counts and released the two human Defendants.

[130] Nevertheless, I do not see the utility in being more specific about the fine and order that would have been appropriate to me because it still falls to me to remember that I am not to approach sentencing on a *de novo* basis.

[131] After considering the record carefully, I am not persuaded that the errors in principle by the Trial Judge really had anything to do with his fundamental view of the matter. A judge's decision is assessed more by what it does than by what it says: ***Southam Inc.***[63].

19124); *quaere* – R.v. Tkachuk (Eldon Arthur), (October 10, 2001) 159 C.C.C. (3d) 434, 293 A.R. 171, 257 W.A.C. 171, 17 M.V.R. (4th) 4 (Alta. C.A. No. 0003-0295-A; 2001 ABCA 243).

62 R.v. C. (G.W.), (December 22, 2000) 150 C.C.C. (3d) 513, 277 A.R. 20, 242 W.A.C. 20, [2001] 5 W.W.R. 230, 89 Alta. L.R. (3d) 217 [2000] A.J. No. 1585 (QL) (2000 ABCA 333; Alta. C.A. No. 0003-0073-A).

63 Southam Inc., et al, v. Canada (Director of Investigation and Research), [March 20, 1997] 1 S.C.R. 748, 209 N.R. 20, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, 50 Admin. L.R. (2d) 199, [1996] S.C.J. No. 116 (QL), 1997 CarswellNat 368 (S.C.C. No. 24915).

[132] Ultimately the Trial Judge concluded that a fine of $125,000.00 was sufficient for the offence, and the position of the offender was not taken in mitigation. Against this, I am not persuaded that there is a discernible range of sentence or a patent unfitness about the sentence to require intervention on appeal.

[133] In the result, I am not persuaded that I am entitled to interfere with the sentence.

8. Conclusion

[134] The appeal, accordingly, is dismissed.

Heard on the 20th day of February, 2004.
Dated at the City of Edmonton, Alberta this 16th day of March, 2004.

Jack Watson
J.C.Q.B.A.

Appearances:

Ms. Susan McRory
Agent for the Attorney General
Special Prosecutions Branch
for the Appellant

Ms. Shannon K.C. Prithipaul
Gunn & Prithipaul
for the Respondent