



# The Lawsuit

MiningWatch Canada is filing a private prosecution to lay charges against the BC Government and Mount Polley Mine Corporation for violations of the Canadian Fisheries Act in connection with the 2014 tailings pond disaster.

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## Summary

On October 18, 2016, MiningWatch Canada filed a private prosecution against the B.C. government and the Mount Polley Mining Corporation for violations of the federal Fisheries Act in connection with the 2014 tailings pond disaster—the largest mine waste disaster in Canadian history.

MiningWatch claims that the massive 2014 spill was caused by the negligence of both the Province of B.C. and the Mount Polley Mining Corporation (MPMC), owned by Imperial Metals. As such, MPMC and the Province of B.C. are being charged for violating sections 35(1) and 36(3) the Fisheries Act, which prohibit ‘serious harm to fish’ and the deposit of ‘deleterious substances’ into fish-bearing waters that sustain commercial, recreational or aboriginal fisheries.

MiningWatch is taking action now because it is concerned that, almost two and a half years after the disaster, and despite clear evidence of impacts on waters, fish, and fish habitat, the Crown has failed to lay charges and enforce the Fisheries Act. It fears this inaction on the part of the Crown sends the wrong signal to the industry across the country and undermines public confidence in the capacity of our regulatory system to work in an effective and speedy manner to protect the environment.

Under specific provisions of the Canadian Criminal Code and the Fisheries Act, any citizen can initiate a private prosecution if he or she believes, on reasonable grounds, that a person has committed an indictable offence.

In other words, the legislation specifically provides an incentive for private persons to enforce federal laws like the Fisheries Act in order to ensure the protection of public resources, such fish and fish habitat, even if against the Federal or Provincial Crown. As stated in the *Public Prosecution Service of Canada Deskbook*, private prosecutions are “a valuable constitutional safeguard against inertia or partiality on the part of authorities.”

On August 4 2014, Mount Polley Mine's tailings dam collapsed and sent 25 million cubic metres (10 000 Olympic-size pools) of wastewater and mine waste solids into downstream waters, destroying or permanently affecting over **2 612 470 m<sup>2</sup>** of aquatic and riparian habitats—equivalent to washing away close to **2/3** of Stanley Park or **12 times** the size of VanDusen Botanical Garden in Vancouver.

Impact assessment reports of the spill commissioned by BC's Ministry of Environmental and MPMC itself indicate strong evidence of an impact to sediments, both physically and chemically, within Hazeltine Creek, Polley Lake and Quesnel Lake. Chemical impacts are most evident in elevated **copper** and **iron** (up to **24** times higher the pre-event concentrations), but also in concentrations of **arsenic**, **manganese**, **nickel** and **zinc**. In some instances, concentrations consistently exceeded provincial Sediment Quality Guidelines (and above background levels). For the year 2014, the **National Pollutant Release Inventory (NPRI)** reports that the Mount Polley Mine represented the largest emitter of certain pollutants in Canadian waters due to the tailings spill, including for copper, arsenic and manganese.

Studies also indicated **effects to benthic invertebrates**, which are also protected under the Fisheries Act. Effects are ranging from: 1) an absence of organisms, 2) lower density and taxon richness, and 3) limited differences in community composition.

MiningWatch has a legal team prepared to carry the case to full trial if necessary, but also recognizes that the cost and expense associated with prosecuting a case against a mining corporation and the Provincial Government can be immense. For this reason, MiningWatch will be asking for the Federal Crown to carry the prosecution forward—which can decide to take over the case, or not.

This legal action is supported by multiple local, provincial, and national groups, including West Coast Environmental Law Centre-Environmental Dispute Resolution Fund (main funder), Amnesty International Canada, First Nations Women Advocating for Responsible Mining, Concerned Citizens of Quesnel Lake, Quesnel River Watershed Alliance, Kamloops Physicians for the Environment Society, Kamloops Area Protection Association, Wilderness Committee, Sierra Club BC, Fair Mining Collaborative, Rivers Without Borders, British Columbia Environmental Network, Clayoquot Action, Alaska Clean Water Advocacy.

## The Lawyers

### **Lilina Lysenko Barrister & Solicitor**

Independent lawyer based out of Trail, BC, with several years of practice, including private prosecutions under the Fisheries Act (e.g. Lemon Creek fuel spill).

### **Jeffrey Jones & Company**

Independent senior lawyer based out of Sointola, BC, with over 20 years of experience as a Crown prosecutor, including for environmental violations under the Fisheries Act.

### **Ethan Krindle Barrister & Solicitor**

Independent lawyer based out of Victoria, BC, with several years of experiences in environmental law, including with both Westcoast Environmental Law & Ecojustice.

## 1. Factual Background

Mount Polley Mine ("the Mine") is a copper and gold mine located in the Central Interior of British Columbia, approximately 65 km northeast of Williams Lake, near the community of Likely and on the traditional territories of the Xat'sull (Soda Creek) and T'exelc (Williams Lake Indian Band) Nations.

The Mine commenced production on June 13, 1997, and remained in operation until September 2001,

when operations were temporarily halted. Mining operations resumed in March 2005 and continued until August 2014, when the dam breached. It resumed partial production in mid-2015 and full production in mid-2016.

The Mine stored its tailings in a Tailings Storage Facility (TSF) located 3km southeast of the mill site. The TSF was a U-shaped earthen dam over 4km long and 50m high, and consisted of three embankments: the Main Embankment (ME), the South Embankment (SE), and the Perimeter Embankment (PE). The TSF served as a collection pond for mill tailings as well as mine runoff water.

The TSF was located above Hazeltine Creek, a local watercourse connected to Polley Lake at its upstream end and Quesnel Lake at its downstream end, as well as other connected watercourses such as Edney Creek.

Hazeltine Creek, Edney Creek, Polley Lake, Quesnel Lake and Quesnel River all contain fish habitat for one or more commercially significant species, such as Rainbow Trout and Chinook, Coho and Sockeye Salmon.

The Mine is owned and operated by Mount Polley Mining Corporation (MPMC). MPMC is a subsidiary of Imperial Metals Corporation, a Canadian mining company with its corporate head office in Vancouver, British Columbia.

MPMC engaged the services of outside engineering consultants to provide technical expertise in site investigation and structural design of the TSF. MPMC engaged three engineering consultants over the lifetime of the TSF. Knight Piésold (KP) was the Engineer of Record (EoR) for the TSF from the feasibility design stage through 2010. AMEC Foster Wheeler (AMEC) took over in January 2011, and was the EoR at the time of the dam breach. BCG Engineering Inc. (BCG) was intended to take over as EoR later in 2014.

On the night of August 3-4, 2014, the dam enclosing the TSF at Mount Polley Mine failed. Over the next 16 hours, the failure led to a progressive breach of the PE, releasing over 21 million cubic metres of water and mine tailings into the surrounding environment.

The debris flow entered Hazeltine Creek, scouring the channel and floodplain, and flowing upstream to Polley Lake and downstream to Quesnel Lake. A thick deposit of tailings plugged the entrance to Polley Lake, blocking the flow of water – this obstruction has come to be known as the “Polley Plug”.

The entrance to Edney Creek where it joins Hazeltine Creek was scoured, resulting in a 2m drop in elevation, and the downstream-most 850m of Edney Creek were affected by debris deposition.

Approximately 18.6 million m<sup>3</sup> of water and materials flowed into Quesnel Lake, some of which settled to the lake bottom and some of which remained suspended as “cloudy water” that returned to the surface of the lake in the late fall.

In December 2015, an investigation by the Chief Inspector of Mines concluded that the TSF failed because the embankment slid on a layer of lightly overconsolidated glaciolacustrine clay (the “Upper Glaciolacustrine Unit”, or “UGLU”) located approximately ten metres into the dam’s foundation. The UGLU had never been properly characterized by MPMC or its engineers.

The Chief Inspector also found that several other proximate causes contributed to the dam breach: the downstream slope of the dam was over-steep for its height; there was an unfilled excavation at the toe of the embankment; and there was an excess of supernatant water in the TSF combined with inadequate tailings beaches.

An independent investigation by the Independent Expert Engineering Investigation and Review Panel came to similar conclusions in January 2015.

In May 2016, “An Audit of Compliance and Enforcement of the Mining Sector” prepared by BC’s Auditor General state “[MEM] must ensure the mine is designed, built, operated and reclaimed to an acceptable standard.” BC’s Auditor General found that MEM failed to enforce the law or to apply its policies in connection to the slope design and water level of the TSF.

## 2. Section 35(1) Fisheries Act: ‘Serious Harm to Fish’

Section 35(1) of the *Fisheries Act* prohibits causing “serious harm” to fish that are part of a commercial, recreational or Aboriginal fishery, or that support such a fishery. Serious harm to fish can include fish mortality, permanent alteration to fish habitat, or destruction of fish habitat.

*“No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery” - section 35(1)*

*“For the purposes of this Act, serious harm to fish is the death of fish or any permanent alteration to, or destruction of, fish habitat” - section 2(2)*

“Fish” are defined broadly by the *Act* to include: parts of fish; shellfish, crustaceans, marine animals and any parts of shellfish, crustaceans or marine animals, as well as their eggs, sperm, spawn, larvae, spat and juvenile stages.

“Fish habitat” is defined as “spawning grounds and any other areas, including nursery, rearing, food supply and migration areas, on which fish depend directly or indirectly in order to carry out their life processes.”

Although the *Act* does not define “permanent alteration to, or destruction of, fish habitat,” Fisheries and Oceans Canada sets out its understanding of these as “an alteration” or “an elimination” of fish habitat of a spatial scale, duration and intensity that limits, diminishes, or no longer allow fish to use such habitats in order to carry out one or more of their life processes, such as spawning, nursing, rearing, feeding, migrating.

### 2.1 Were there affected fish that are part of “a commercial, recreational or Aboriginal fishery”?

In 2015, SNC-Lavalin published a *Fish and Fish Habitat Impact Assessment* (FFHIA) for areas affected by the Mt. Polley spill. The FFHIA states that it focused on fish species that are part of commercial, recreational or aboriginal fisheries. The FFHIA indicates that the affected fish-bearing watercourses included together at least 20 different fish species, including: Sockeye, Coho, and Chinook Salmon, Kokanee, Rainbow Trout, Bull Trout, Lake Trout, Pygmy Whitefish, Mountain Whitefish, Lake Whitefish, and Burbot. Evidence demonstrates the fact that the Quesnel Lake watershed supports, or supported commercial, recreation or aboriginal fisheries.

### 2.2 Is there Evidence that the Mount Polley Spill Permanently Altered or Destroyed Fish Habitat?

#### **Hazeltine Creek**

The debris flow from the Mount Polley spill eroded the channel and floodplain of Hazeltine Creek over 9km in length, carving “a new valley, wider and deeper,” than ever observed before. Near the dam failure, tailings deposits in the Creek exceeded 3.5 m in some places. The SNC-Lavalin FFHIA Report estimates that approximately **62,616 m<sup>2</sup>** of aquatic habitat was permanently altered in Hazeltine Creek, as well as **717,249 m<sup>2</sup>** of riparian habitat along its banks. Sections of Hazeltine Creek are historical identified spawning areas for Rainbow Trout from Polley Lake, and are also considered important rearing habitat for juvenile Rainbow Trout. Fish species in the lower Hazeltine Creek also included: Sockeye, Coho and

Chinook Salmon, Kokanee, Mountain Whitefish, and Burbot. Golder Associates EIA Report concluded that the alterations to Hazeltine Creek were so severe that it did not bother studying biological effects on fish as Hazeltine Creek “was no longer a viable habitat following the dam failure.”

### **Edney Creek**

The downstream-most 850m of Edney Creek were affected by deposition from the debris flow. At the confluence of Edney and Hazeltine Creeks, the Edney Creek bed was scoured, resulting in a drop of about 2 m in elevation, creating a barrier to the free movement of fish from Quesnel Lake to Edney Creek. The SNC-Lavalin FFHIA Report estimates that approximately **2,390 m<sup>2</sup>** of aquatic habitat was altered in Edney Creek, as well as **20,215 m<sup>2</sup>** of riparian habitat. Although representing a relatively small proportion of the aquatic habitat in the Edney Creek watershed, the primary concern noted in the report was the obstruction to upstream migration, which could impact Rainbow Trout’s reproduction in this area. Fish species documented in Edney Creek include: Sockeye, Coho and Chinook Salmon, Rainbow Trout, Mountain Whitefish, and Burbot.

### **Polley Lake**

The debris flow from the Mount Polley spill traveled upstream along Hazeltine Creek and entered Polley Lake at its outlet. The deposited tailings created a blockage at the outlet to Hazeltine Creek known as the “Polley Plug”. The SNC Lavalin FFHIA’s Report offers no estimates of how much linear shoreline or surface area of the lake bed was physically altered by the spill. However, the Polley Plug did block access to upper Hazeltine Creek, depriving the Polley Lake Rainbow Trout population of access to creek spawning habitat for at least one season. According to the SNC-Lavalin FFHIA Report, anadromous salmon were also unable to reach Polley Lake due to the new barrier created in Hazeltine Creek downstream.

### **Quesnel Lake**

The Mount Polley spill swept an estimated **18.6 million m<sup>3</sup>** of material into Quesnel Lake, primarily composed of solid and liquid mine waste tailings from the TSF, but also an estimated 1.2 million m<sup>3</sup> of native soils from Hazeltine Creek and other debris. Some of these materials settled over the lake bottom in deposits that may be up to 10 m thick in some places. The littoral zone of Quesnel Lake around the mouth of Hazeltine Creek was also scoured and/or buried as a result of the spill. SNC-Lavalin’s FFHIA Report estimates that approximately **94,394 m<sup>2</sup>** of the littoral area along the West Arm of Quesnel Lake was permanently altered by the Mount Polley spill. A 2012 aquatic habitat inventory of the West Arm had ranked approximately **51%** of the shoreline as having 'High' or 'Very High' juvenile habitat value, particularly around stream mouths (including the mouth of Hazeltine Creek) and gravel shores. The FFHIA Report estimates that approximately **15%** of the 'Very High' rated juvenile habitat in the West Arm was permanently altered by the Mount Polley spill. Approximately **1,81 km<sup>2</sup> (1 810 000 m<sup>2</sup>)** of lake bed habitat in the benthic zone was permanently altered as a result of the spill as a result of being covered by deposited materials. Resident salmonids use the benthic zone for rearing, forage and potential spawning habitat, as do benthic species such as Burbot. About 20 species of fish inhabit the littoral zone of Quesnel Lake.

## **3. Section 36(3) Fisheries Act: ‘Deleterious Substances’**

Section 36(3) of the Fisheries Act prohibits deposition of deleterious substances into waters frequented by fish:

*“...no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water” – section 36(3)*

**“Deleterious substance”** is defined by the Act as “any substance” or waste “water that contains a substance” that, if added to any fish-bearing water, “would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water.

### 3.1 Did the Spill Contain a “Deleterious Substance”?

According to the BC Chief Inspector of Mines’ report in 2015, tailings consist of 64% silt, 30% fine sand, and 6% clay. The **deposition of sediments** of this sort, while not inherently deleterious, have been treated as deleterious by the courts when introduced into fish-bearing waters in sufficient quantities.

In *R. v. The Queen in Right of British Columbia, 2006 BCPC 73* (CanLII), at paras. 355-356, sediment deposits that measured 11-22.5 cm thick were considered, based on expert testimony, to be sufficient to cause the death of living organisms and long-term impairment of habitat, and were therefore considered to be a deleterious substance (paras. 355-356). After the Mount Polley spill, sediment deposits at the bottom of Quesnel Lake may have been up to 10 metres thick in some places; within lower Hazeltine Creek sediment deposits were measured at 0.15-1.5m, and exceeded 3.5m in some places near the vicinity of the breach.

Also, **Minnow Environmental Inc.** produced a report titled Mount Polley Tailings Dam Failure Sediment Quality Impact Characterization for MPMC in 2015. This report examined the concentrations of various substances within the sediment of Hazeltine Creek and other nearby water bodies and compared them against baseline data from before the Mount Polley spill. It also assessed some of the toxicity effects or potential effects. Its findings include:

- **In Hazeltine Creek, arsenic, copper, iron and nickel in sediment** were elevated above pre-event concentrations and were greater than Sediment Quality Guidelines (SQG) for the protection of aquatic life. Copper was the most substantially elevated, with mean concentrations up to **fifteen times** pre-event concentrations.
- **In Polley Lake, copper and iron in sediment** were above sediment quality guidelines concentrations and higher than reference concentrations. Deep-area sediments showed elevated **arsenic** and **copper**, with one area also showing **elevated zinc**.
- **The Quesnel Lake littoral zone showed arsenic, copper, iron and manganese in sediment** at levels above SQG and higher than reference concentrations. **Copper** was the most elevated, at more than **24 times** the pre-event reference concentration. In the Quesnel Lake profundal zone, copper was also found to be above guideline levels and reference concentrations.
- Overall, the results of the interim assessment indicate that there is **strong evidence of an impact to sediments, both physically and chemically**, within Hazeltine Creek and within portions of Polley Lake and Quesnel Lake. Chemical impacts are most evident in elevated copper and iron, but also in moderately elevated concentrations of arsenic, manganese, nickel and zinc. For **copper**, sediments in the failure-affected aquatic environments were consistently exceeding provincial Sediment Quality Guidelines, and several times higher than reference concentrations. Both **copper and iron** occurred at concentrations greater than SQG’s “probable effect” levels, which indicate concentrations with a potential to adversely affect aquatic life.
- Benthic invertebrate community assessment also indicated **effects to benthic invertebrates** in a number of areas, ranging from: 1) an absence of organisms, 2) lower density and taxon richness, and 3) limited differences in community composition. Analysis of sediment-dwelling benthic invertebrate communities indicated **fewer invertebrates and lower diversity** in Hazeltine Creek, Polley Lake, and areas of Quesnel Lake that were influenced by the dam failure. Standard toxicity test organisms were evaluated under laboratory conditions to determine if sediment-dwelling



organisms could survive and grow normally. **In several samples, these organisms did not survive or grow as successfully** as those exposed to reference sediment.

These findings were corroborated to a large extent with those of the BC Ministry of Environment's memo "Quesnel Lake Sediment Quality for samples collected May 21, 22 and 25, 2015 compared to Working Sediment Quality Guidelines" (April 26 2016), which indicate **multiple exceedances of contaminant concentrations**:

- above the Upper limits of the Working Sediments Quality Guideline (WSQG) for **arsenic, copper, iron, and manganese**, and
- above the WSQG's Lower limits for **nickel and zinc**.

While concentrations found between the WSQG's Lower & Upper limits are occasionally associated with adverse biological effect, concentrations above the Upper SWQG are described as "frequently associated with adverse biological effects".

For the year 2014, the National Pollutant Release Inventory (NPRI) reports that the **Mount Polley Mine represented the largest emitter of multiple pollutants in Canadian waters** due to the tailings spill, including:

- **20,724 tonnes** or **96.6%** of all the **copper** released in Canadian waters in 2014 by 431 facilities;
- **259.1 tonnes** or **96.1%** of all the **arsenic** released in Canadian waters in 2014 by 296 facilities;
- **14,842 tonnes** or **92.0%** of all the **manganese** released in Canadian waters in 2014 by 496 facilities;

According to the NPRI data, the Mount Polley spill contributed to a **1,051%, 2,285%, and 35,657% increases in pollutant levels** released into Canadian waters in 2014 when compared to 2013, respectively for **manganese, arsenic and copper**. Data for iron was not available on NPRI.

## 4. Section 78.6 Fisheries Act: 'Defence of Due Diligence'?

Sections 35(1) and 36(3) of the Fisheries Act are "strict liability" offences. This means that the prosecution does not need to show *mens rea*, or that the accused intentionally or knowingly committed the offence, but only that the accused did the prohibited act.

Once this is shown, the burden shifts to the accused to show on a balance of probabilities that he or she was not at fault, that he or she took all reasonable care to avoid committing the offence, or that he or she reasonably believed in the existence of facts that, if true, would render his or her conduct innocent. This is known as the defence of "due diligence" as set in section 78.6 of the Fisheries Act.

### 4.1 Did MPMC Exercise All Due Diligence to Prevent the Mount Polley Spill?

The Chief Inspector of Mines' (CIM) report found that many aspects of MPMC's conduct and that of its engineering consultants fell below the level of prudent industry norms or best practices. The CIM carried out a root cause analysis to evaluate the cause of the breach and spill, and found two direct causes and two proximate causes, all of which could have been avoided with proper actions on the part of MPMC:

1. a structural failure of the embankment caused by sliding of the dam on a unrecognized clay/silt layer, referred to as the upper glaciolacustrine unit ("UGLU");
2. insufficient tailings beaches and surplus water in the tailings storage facility (TSF).
3. an open sub-excavation at the embankment toe; and
4. the geometry of the embankment (too steep / too high).

### ***Failure to recognize the clay layer***

The CIM observed that the unrecognized UGLU layer was directly tied to a failure of the MPMC, and/or its consultants, to properly investigate the perimeter embankment foundation soils. In particular, the CIM noted that:

- site investigations did not meet generally accepted standards of practice;
- there was a lack of adequate geotechnical characterization of soils at depth;
- there was a failure to review and properly characterize the foundation soils, even with multiple opportunities to do so; and

As a result, neither the potential presence of the UGLU layer, nor its strength, was taken into account in any stability analyses of the dam structure, which led to an intrinsically erroneously calculated factor of safety. The assumed degree of certainty regarding the stability of the Perimeter Embankment was therefore not supported by a robust understanding of the foundation characteristics—which was imprudent.

### ***Surplus of water and insufficient beaches***

The CIM observed that the conditions caused by surplus water in the TSF and insufficient tailings beaches was tied to multiple failures on the part of MPMC to properly predict and manage water and tailings disposals. More specifically, the CIM observed that:

- an adequate water management plan did not exist;
- MPMC failed in its management of the water balance with respect to long term planning;
- there was no dam safety manager with the knowledge, skills, and abilities to be accountable for management of the TSF;
- there was no qualified individual responsible for the water balance;
- MPMC did not adequately characterize the risk of surplus supernatant water, which had been compounding since the Mine reopened in 2005;
- several piezometers were accidentally destroyed during construction, or not functioning;
- despite chronic water surplus being recognized by senior management, there was a lack of action to obtain water treatment infrastructure in a timely manner to address the water surplus;
- As recognized by the MPMC's consultant, without beaches, the TSF was essentially converted into a water-retaining structure, with characteristics quite different from the initial design;
- throughout the lifetime of the Mine TSF, design documents called for the establishment and maintenance of beaches along all embankments—which was not done properly.
- MPMC did not have a tailings deposition plan integrated with the water balance, which would have demonstrated that construction of a beach was not possible as the increasing water inflow volumes would continuously “over-ride” the beach;
- the problem with surplus water hampering the ability to maintain tailings beaches began at least as early as 2011, with an even earlier Dam Safety Inspection (in 2010) stipulated that beaches of at least 10 m must be present, and to be re-established within two weeks.
- The requirement to adhere to the mine permit conditions establishing beaches along all embankments was also reiterated by Knight Piesold engineers.

### ***Open sub-excavation at the embankment toe***

With regards to the open excavation, the CIM noted:

- the absence of construction procedures for the foundation sub-excavation procedure, and general absence of formal application of existing construction procedures;
- these absences, or failure to apply any existing documented guidance, left the excavation open and untended for eight months, until the time of the failure and the breach;



- MPMC did not provide the Ministry with notification of the buttress sub-excavation or submit an application for a *Mines Act* permit amendment for the departure from the approved work;
- accurate and detailed TSF construction reports were not maintained, which would have supplied critical information to the engineer of record (to perceive a risk of the open sub-excavation) and to the Ministry (to assist in the analysis of the nature of the organizational control failure).

### ***Embankment too steep, too high***

With regard to the geometry of the perimeter embankment, the CIM noted that:

- the steepness of the downstream slope was too steep and the height of the embankment too high compared to original design;
- increasing production at the Mine coupled with increasing water surplus conditions required dam raises that outstripped MPMC's ability to maintain the original 2H:1V slope;

### ***Failures in overall MPMC's management***

The CIM observed several failures in the overall management of the Mine. The CIM noted that it was the responsibility of MPMC to maintain a safe structure, irrespective of the company's reliance on external geotechnical engineering expertise, and MPMC did not meet this responsibility. Particular management failures of MPMC included the following:

- MPMC did not identify or manage risks associated with changing engineers of record;
- MPMC did not recognize the risk of the excavation for the buttress foundation, nor the fact that it was a substantial departure from the approved work plan; and
- concerns regarding surplus water, steep slope, dam construction material availability, buttress sub-excavation, and supervision were identified by employees but not elevated for action by MPMC management.

### ***MPMC in violations of BC's Mines Act, Code, and Permits?***

MiningWatch Canada is of the opinion that the above-mentioned failures demonstrate that MPMC might also be in violations of BC's Mines Act, Code, or Mine permit terms and conditions. More specifically:

1. Failure to retain a manager with appropriate expertise, and failure by MPMC to take all reasonable measures to comply with legal requirements—violation of:
  - a. *Mines Act*, ss. 21, 22, 24; and
  - b. *Health, Safety and Reclamation Code for Mines in British Columbia* ("Code"), ss. 1.1.2, 6.1.1.
2. Failure to construct the TSF in accordance with the design—violation of:
  - a. *Mines Act*, s. 10(8);
  - b. Code, ss. 1.1.2, 6.1.1, 10.1.11; and
  - c. Mine Permit M-200 amendment, August 9, 2013.
3. Failure to maintain a site-wide water balance and appropriate site water management—violation of:
  - a. *Mines Act*, s. 10(8);
  - b. Code, s. 1.1.2; and
  - c. Mine Permit M-200 amendments, August 15, 2011, June 29, 2012, June 25, 2013.
4. Failure to maintain tailings beaches—violation of:
  - a. *Mines Act*, s. 15(6)(a); and
  - b. Code, ss. 1.1.2, 10.1.11.

As such, MiningWatch Canada cannot explain why the BC Chief Inspector of mines decided not to

forward the case to the BC Crown Prosecutor for a general assessment of potential charges.

## 5. The BC Government as Co-responsible for the Spill?

In the *Supreme Court of Canada in R. v. Sault Ste. Marie, [1978] 2 SCR 1299*, Mr. Justice Dickson expressed the importance in relation to public welfare offences—such as pollution offences—that “*the protection of societal interests requires a high standard of care and attention on the part of those who follow certain pursuits and such persons are more likely to be stimulated to maintain those standards if they know that ignorance or mistake will not excuse them*”. And when referring to the municipality of Sault Ste. Marie, the court held that: “*If [the municipality] can and should control the activity at the point where pollution occurs, then it is responsible for the pollution*”.

The Province of BC, and specifically the Ministry of Energy and Mines (MEM), was involved in controlling the design, construction and operation of the mine through its investigation and permitting process. Both the Province and MPMC were aware of the fact that the TSF was not constructed according to design, and the MEM had raised this as an issue on several occasions prior to the failure.

Further, in the *Supreme Court of Canada Kamloops (City of) v Nielsen, [1984] 2 S.C.R.*, the court found that it is possible to sue governments for lack of proper enforcement of its policies.

As stated in “*An Audit of Compliance and Enforcement of the Mining Sector*” prepared by **BC’s Auditor General in May, 2016**, “[MEM] must ensure the mine is designed, built, operated and reclaimed to an acceptable standard.” BC’s Auditor General found that MEM failed to enforce the law or to apply its policies, at the very least in connection to the slope design and water level of the TSF. As such, it appears that the Province is equally responsible for the failure through its inability and/or unwillingness to enforce the applicable laws and regulations. Here are some excerpts from her report:

*“The Stage 5 design, approved by MEM in 2006, allowed the amended design to include a steeper “interim slope” of 1.4 horizontal to 1 vertical (1.4H:1V) for the Main and Perimeter embankments. The mine operator stated that this interim 1.4H:1V slope would be returned to the more moderate 2H:1V slope once the stage 5 lift was completed. We expected that MEM would have ensured compliance with this permitted design – the return to a 2H:1V slope. Instead, the mine operator never flattened the slope, and MEM continued to approve subsequent dam raises [...] MEM’s inspection procedures require at least one geotechnical inspection per year; however, no such inspection were carried out for 2009, 2010 and 2011. The result was that the steep slope was allowed to persist, reaching a level that was described by the panel as “unprecedented”... As the regulator, it was MEM’s responsibility to ensure that the dam was being built as designed, including with the intended embankment slope. This, MEM did not do.”*

–BC Auditor General, May 2016 (pp.71-72)

*“MEM did not enforce the development of an adequate tailings beach... The Dam Safety Review in 2006 noted a lack of adequate beach development that represented “a deficiency that should be rectified as soon as practical.” The report further explained at length that adequate beaches along all the embankments are generally considered an integral requirement of the design. The report included a recommendation for the mine to “aggressively create a beach.” In 2008, a MEM geotechnical inspector identified the lack of tailings beach at the Main Embankment. It was noted as a deficiency that contravened the permitted design, and an enforcement order was issued [...]. We did not find evidence that MEM followed up on the order from the 2008 inspection report. Two years later, in the 2010 Annual Dam Safety Inspection Report sent to MEM, the mine operator was reminded of the beach deficiency, again, by the EOR [...] We did not find evidence that MEM enforced the 2010 recommendation of the EOR. No further MEM inspections took place until 2012. As the regulator, it was MEM’s responsibility to ensure that the dam was being built as designed, including with the intended tailings beach. MEM did not provide adequate oversight and enforce the requirement to consistently maintain a wide tailings beach against all the embankments.”*

The Auditor General, on pages 9, 66, and 76 of her report, also indicated that MEM inspections did not meet their policy. These inspections, had they occurred in accordance with MEM’s policy, would have alerted MEM that MPMC was not building or operating the tailings dam to the permitted design “and was raising the dam without any long-term planning”.

## 6. Private Prosecution under the Fisheries Act

The Fisheries Act authorizes, under Criminal Code law, **any citizen** to initiate a private prosecution if he or she believes, on reasonable grounds, that a person has committed an indictable offense.

The legislature has specifically created an incentive for private persons to enforce the Fisheries Act **to ensure the protection of public resources such as fish and fish habitat**, even if against the Federal and Provincial Crown. The *Public Prosecution Service of Canada Deskbook* notes that private prosecutions are “**a valuable constitutional safeguard against inertia or partiality on the part of authorities.**”

**Private prosecutions have successfully been used in the past in order to bring Fisheries Act violations to the Crown counsel in BC.** In 2009, biologist Alexandra Morton laid private charges against fish farm company Marine Harvest Canada for illegal possession of wild juvenile salmon. The Department of Justice took over the case in 2012 and Marine Harvest plead guilty. More recently, in 2014, private charges against Executive Fuel Flight Services Ltd. were approved in relation to a spill of 33,000 litres of jet fuel into Lemon Creek. The federal Crown took over the case and a trial is tentatively scheduled to begin in December, 2016.

There are, however, **several potential downsides** to private prosecutions in the context of Fisheries Act violations. These may include the difficulty of obtaining some of the necessary evidence; the expense of conducting the prosecution for a person; and the possibility that the Crown may simply stay the charges.

### **Process forward**

Under Section 507.1 of the Criminal Code, a justice who receives a private information must refer it to a provincial court judge or designated justice, to consider whether to compel the appearance of the accused. A hearing is then held at which the judge or designated justice hears the allegations of the informant and the evidence of witnesses, and decides whether to issue a summons or warrant. The private informant must establish a prima facie case, meaning that they must show that there is “some evidence” on all of the essential elements of the offence.

The Crown must be notified of the hearing and given a copy of the private information. Crown counsel may then attend the hearing, cross-examine and call witnesses, and present any relevant evidence. If, as a result of the hearing, the judge or designated justice decides to issue a summons or warrant, **the Crown has the option of intervening in the proceedings and either taking over conduct of the prosecution or withdrawing the charges.**

The Deskbook suggests that Crown prosecutors should stay a private prosecution if there is insufficient evidence to show a reasonable likelihood of conviction, or if the prosecution is contrary to the public interest. **If the charges are well-founded, Crown counsel must then decide whether to take over the prosecution or allow it to proceed on its own.** This decision is made on a case-by-case basis. Relevant considerations include the seriousness of the offence and whether the private prosecutor lacks the capacity or funding to effectively carry the case forward.

While MiningWatch has a legal team committed to carry the case to full trial, it also recognizes that the cost and expense associated with prosecuting a case against a large mining corporation and the

Provincial Government can be immense. For this reason, **MiningWatch will be asking for the Federal Crown to carry the prosecution forward in the hope that it will accept and use all of the means and resources at its disposal to do so.**

## 7. Potential Sanctions & Penalties

Under subsections 40(1) and 40(2) of the *Fisheries Act*, a person who contravenes subsections 35(1) and/or 36(3) is guilty of an offence. If the person is a corporation, it is liable on conviction on indictment to a fine of **\$500,000 to \$6,000,000** for a first offence, or \$1,000,000 to \$12,000,000 for a second or subsequent offence. Therefore, the maximum fine that could be applied in this case would be **\$12,000,000** if the defendants are found guilty of both charges, or more if one of the alleged offences is a second offence.

## 8. Main References

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