

Citation:



Date: ☀
File No: 36366-1
Registry: Campbell River

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

CERMAQ CANADA LTD.

**REASONS FOR SENTENCE
OF THE
HONOURABLE JUDGE CROCKETT**

Counsel for the Crown: J. Lawn
Counsel for the Defendant: R. Lonergan and K. Kaukinen
Place of Hearing: Campbell River, B.C.
Date of Hearing: November 26, 27, 29, 2019, December 19, 2019,
July 9, 2020, August 27, 2020, May 31, 2021,
August 25, 2021, October 1 and 28, 2021
Date of Judgment: November 30, 2021

[1] Cermaq Canada Ltd. ("Cermaq") has pleaded guilty to the following charge:

On or about March 5, 2017, in or near Raleigh Passage at or near the City of Campbell River, in the Province of British Columbia, they did unlawfully deposit or permit the deposit of a deleterious substance, to wit: diesel fuel, in water frequented by fish, to wit: Raleigh Passage, contrary to section 36(3) of the *Fisheries Act*, thereby committing an offence in contravention of section 40(2) of the *Fisheries Act*.

[2] That is a long way of saying that Cermaq accepts responsibility for diesel fuel escaping from their fish farm into the ocean.

[3] Cermaq pleaded guilty at an early opportunity.

[4] The issue before me is the appropriate penalty for Cermaq. The Crown seeks a fine of \$1,400,000. Cermaq proposes a fine of \$250,000. The mandatory minimum fine for this summary conviction offence is \$100,000, and the maximum is \$4,000,000.

[5] The Crown also seeks an order that my reasons be published on Cermaq's website for ninety days. Cermaq opposes this order because they have already posted an apology on their corporate website.

[6] Cermaq is a subsidiary of an international fish farming business, which in turn is a subsidiary of Mitsubishi Corporation. It is common ground that Cermaq is a profitable company, and could pay the fine proposed by the Crown.

[7] The primary question comes down to this: what is an appropriate fine for Cermaq for this offence?

Relevant Background Facts

[8] This sentencing proceeded by way of an agreed statement of facts, which has been filed as an exhibit in these proceedings. I will not go into all of the details of the facts, just those necessary for my decision. I also heard evidence from Mr. Brock Thomson, the Innovation Director for Cermaq, and three expert witnesses: Dr. Peter V. Hodson for the Crown, and Dr. Sundar Prasad and Dr. Doug Bright for Cermaq. The

experts testified on the issue of the harm, or potential for harm, to the environment from the offence.

[9] Cermaq operates salmon fish farms. On March 4 and 5, 2017, it operated a fish farm on the ocean near the Burdwood Group Islands in Raleigh Passage, off the east coast of Vancouver Island. The farm has since been decommissioned. The farm consisted of 14 net pens for salmon surrounded by floating walkways. At one end of the group of net pens was a feed barge which held the feeding system, a generator and fuel storage. On either side of the feed barge were two work floats which housed equipment and a fuel tank. At the other end of the group of net pens was a float house to accommodate staff.

[10] On the afternoon of March 4, 2017, at the relevant times leading up to this incident, there were two employees at the farm. One was a supervisor, and one was an employee. Neither are still employed by Cermaq. At 5:03 p.m., the employee decided to transfer fuel from the main storage tank to a smaller tank. Starting in November 2016, the employees needed to do fuel transfers more frequently due to an increased need for lighting in the pens to optimize the growth cycle of the salmon.

[11] In order to transfer fuel, the employee needed to hold and press a gas nozzle, in a manner similar to fuelling a car at a gas station.

[12] Cermaq trained all employees to be in control of the nozzle, and that they must not leave the fuelling station unattended. This employee and the supervisor acknowledged after the incident that they knew these rules.

[13] Cermaq posted fuelling station instructions at all locations where fuel was transferred. Those instructions included the following:

1. **NEVER** jam the fuelling handle open. Always be in control of the nozzle.
2. Never leave the fuelling station unattended while fuelling.

[14] The employee, on this occasion, started the fuelling process. He tied the nozzle with a rope so that the fuel would continue to come out, and he did not have to hold it in

place. The fuel was pumped by an electric pump. The employee connected the electric pump to a running forklift to keep the pump's battery charged to maintain power to the pump. It was estimated that the fuel transfer would take approximately three hours.

[15] The employee left the fuelling station to do other duties. Later that evening, over dinner in the living quarters, the employee told his supervisor that he had the fuel pump going. The supervisor told the employee that they only needed a bit of fuel, so he should shut it off. The employee said he would take care of it. After dinner, the employee attended to some other duties, but did not shut off the fuel pump. Eventually, both the employee and the supervisor went to bed. They both forgot about the fuel pump.

[16] Sometime between 5:30 p.m. on March 4, and 4:00 a.m. on March 5, 2017, the small storage tank became full and began to overflow into the ocean. The supervisor awoke around 4:00 a.m. on March 5 and could smell diesel. He went outside and discovered the spill. He immediately shut off the fuel and took appropriate steps to deploy the emergency spill response equipment on site. He contacted the Coast Guard and sought further emergency response assistance from Cermaq. Cermaq supplied additional spill response materials from other farm sites and from Campbell River. The Coast Guard provided further spill response equipment.

[17] Officials from the BC Ministry of Environment attended the fish farm. They and the Coast Guard told Cermaq to retain Western Canada Marine Response Corporation, an organization that provides response to oil spills. Cermaq immediately hired Western Canada Marine Response Corporation to lead the cleanup efforts.

[18] The Coast Guard and Ministry of Environment also implemented an Incident Command System. Under this Incident Command System, they appointed a unified command made up of members of Cermaq, Ministry of Environment, the Coast Guard (later replaced by Environment Canada) and the two neighbouring First Nations, Kwikwasut'inuxw Haxwa'mis First Nation and Dzawada'enuxw First Nation. The unified command coordinated the cleanup response. One part of the unified command was labelled the Environmental Unit.

[19] Cermaq hired Strategic Natural Resources, an environmental consultant, to provide advice to the unified command. At the request of the First Nations, Cermaq also hired and paid for Pacificus Biological Services to provide independent environmental consulting services to the First Nations.

[20] Western Canada Marine Response Corporation coordinated the fuel recovery over seven days. Of the 84.2 km of shoreline surveyed, no oil was found on 83.75 km of shoreline, and trace amounts were found on .45 km of shoreline. The final survey report prepared under the Western Canada Marine Response Corporation concluded that no shorelines required treatment.

[21] Within 48 hours of the spill, the unified command implemented what they called an opportunistic sampling plan. They took samples of water, soil and tissues from potentially affected beaches.

[22] The environmental consultants, Strategic Natural Resources and Pacificus Biological Services, conducted what was referred to as an ephemeral sampling plan. Between March 15 and April 1, 2017, they took samples from areas between zero and 17 km from the fish farm. Pacificus Biological Services concluded that water and sediment samples were below established Federal and Provincial guidelines for the relevant toxins, so no further sampling was required. However, some members of the Environmental Unit still had concerns about the potential impact of the spill. So Cermaq conducted more samples in July and September 2017. As a result of those samples, the Health Product and Food Branch of Canada concluded that it would not be necessary to limit consumption of clams from the potentially impacted areas.

[23] In addition, Pacificus Biological Services conducted tests on the salmon in the net pens at the farm itself. No salmon died. Based on tests which included sensory analysis, meaning smell, and tissue residue analysis, there was no evidence that the fuel spilled in the pens had any impact on the health of the fish. All of the salmon were eventually processed and sold.

[24] The Coast Guard estimated that approximately 522 litres of marine diesel overflowed from the tank. They based their estimate on the sounding and capacity of the main tank and the smaller tank, and the consumption of fuel.

[25] The environmental cleanup concluded after seven days. Cermaq provided the absorbents used in the cleanup to Hetherington Industries to determine how much marine diesel was recovered. Hetherington Industries estimated that 550 litres (+/- 5%) was recovered.

[26] On March 6, 2017, the National Aerial Surveillance Program (NASP) operated by the Coast Guard estimated the volume of the spill to be a minimum of 62.5 litres. On March 8, 2017, the NASP overflight estimated the volume of oil to be .5 litres.

[27] I asked counsel how it is that 522 litres spilled but 550 litres were recovered, and I was advised that both of these numbers are the best estimates they have. Given these agreed facts, in combination with the NASP estimates, I conclude that the vast majority of the marine diesel was recovered from the environment within four days, or perhaps less.

[28] Prior to the spill, Cermaq held several certifications related to environmental and aquaculture management, which required audits by third parties.

[29] After the incident, Cermaq implemented material changes to its practices and procedures at the fish farm to address the underlying causes that led to the offence and to prevent similar incidents in the future. Cermaq realized that because of the need for more lighting for the salmon's current life cycle, the demand for fuel transfers increased beyond the original system's design. Simply put, it required the employees to do more fuel transfers than originally contemplated. Cermaq reconfigured the fuelling system by plumbing an electric generator to the larger tank, thereby eliminating the need for fuel transfers. They made a similar change to the system at another fish farm. Cermaq also added spill kits and spill booms sufficient to encompass the feed barge, which was the site of the fuel spill.

[30] In addition, in 2018, Cermaq reviewed its fuel handling policies and practices. Cermaq hired Strategic Natural Resource Consultants to advise the company on risk management for use and handling of potentially harmful substances, development of policies and procedures, and staff training for spill preparedness.

[31] Cermaq is acknowledged to have cooperated fully with the investigation of the spill. Cermaq also paid for all the costs incurred under the Incident Command System. Those costs were approximately \$885,000.

The Law

[32] Both parties agree on the general law to apply to a sentencing of this nature. They disagree on its application, particularly on two points: how to characterize the culpability of Cermaq, and the extent of the harm, or potential for harm, to fish. It is also common ground that the principles of sentence set out in sections 718 and following of the *Criminal Code* apply to this sentencing.

[33] As set out in the submissions of the Crown, the primary sentencing objectives for *Fisheries Act* offences are summarized in *R. v. Schafhauser*, 2017 BCSC 2287 at paragraph 11:

11 The *Fisheries Act* is regulatory legislation designed to protect and preserve a valuable resource and any contravention of it must be taken seriously. Accordingly, the predominant sentencing consideration must be deterrence, both specifically of the accused and generally of other members of the public who are inclined to act in the same manner. Penalties must be sufficiently severe to communicate to the accused that there is a high risk associated with their illegal activities both for the resource they are affecting and to themselves for their conduct ... [citations omitted]

[34] Both parties also agree that I must apply the sentencing principles set out in *R. v. Terroco Industries Ltd.*, 2005 ABCA 141, which was recognized as the leading case on the principles of sentencing for environmental offences by our court of appeal in *R. v. Brown*, 2010 BCCA 225. The principles identified in *Terroco* are: (1) culpability, (2) prior records and past involvement with the authorities, (3) acceptance of responsibility, (4) damage/harm and (5) deterrence.

Culpability

[35] The mental element for the offence charged is due diligence. Culpability in a given case is a sliding scale. It goes from what could be characterized as a near miss of due diligence, to a deliberate intention to commit the offence. Cermaq submits this is a “near miss” situation. The Crown characterizes this case as between the two ends of the scale, but certainly much higher than a “near miss”.

[36] The Crown submits that because Cermaq was able to easily rectify the situation after the fact with a modification to their system, this is evidence that they could, and should, have made the same modification to prevent the spill.

[37] This, in essence, is admitted by Cermaq. Cermaq admits that they lacked due diligence by failing to recognize that the increased need for fuel should have alerted them to a need to change their system to accommodate that need. They did make that change after the spill.

[38] However, prior to the spill, they did have a system and training in place, and signs posted about how employees were to conduct fuel transfers. Both the employee involved and the supervisor admitted that they were aware of the proper procedure, and deliberately did not follow it (in the case of the employee), or acquiesced to it (in the case of the supervisor).

[39] Cermaq had a reporting system in place so employees could alert the company to issues that needed to be resolved. No employee reported a concern with the increased need for fuel transfers.

[40] In short, Cermaq’s position is that the need to reconfigure the fuelling system was not readily apparent to the company, although, in hindsight, they should have identified that need in order to prevent employees deliberately defeating the system in place.

[41] The Crown also submits that Mr. Thomson was alerted to the use of a rope to tie off the fuel nozzle on a prior occasion on August 11, 2015. At that time, Mr. Thomson

removed the rope, spoke to the employee (who was not the same employee as the one involved in the offence before the court) about proper procedure, and, together with the employee, made an incident report. Mr. Thomson also spoke with the supervisor at the time, who was the same supervisor involved in the offence before the court. This is evidence that Cermaq did know that there was a problem that needed to be addressed.

[42] Cermaq's response is that Mr. Thomson did identify the problem and resolved it on that occasion. Cermaq admits that the company's failure to recognize the potential for this course of conduct to persist is part of their acceptance of responsibility, and lack of due diligence.

[43] I agree with Cermaq's characterization of the company's conduct. They had systems in place to prevent spills. Their systems should have been better. They are now better. But this incident must also be taken in the context of the steps they did take to prevent the risk of spills. There has never been another spill of diesel at any other of Cermaq's farms, before or after this incident. They held certifications that required third party audits in relation to environmental management systems and aquaculture practices. They met the criteria for several International Organization for Standardization (ISO) certificates. They had spill cleanup materials on site. They responded immediately and effectively to the spill. They had systems, practices and procedures in place, including the rules about fuelling at the fuelling station. They trained their employees and supervisors, and the employee and supervisor in this incident acknowledged they understood the proper procedure. Cermaq had a reporting system in place for employees to advise of any issues. In fact, the supervisor in this case used that very system just days before the incident to report an unrelated concern about the fuelling system. Both the employee and the supervisor deliberately acted in contravention of their training and posted procedures.

[44] Cermaq, as the employer, accepts responsibility for the acts of its employees, who contravened its own practices. I agree with Cermaq that its culpability should be considered on the lower end of the scale. However, I would not place culpability as low as a "near miss", given that the company had to have been aware that when it

increased the lighting in the pens, they would use more fuel. That knowledge should have triggered contemplation of their existing fuel system, particularly since Cermaq was aware, through Mr. Thomson, that an employee had bypassed the safe fuelling procedures in the past by use of a rope.

Damage/Harm and Potential for Harm

[45] As previously stated, I heard evidence from three experts: Dr. Peter V. Hodson, an expert on the toxicity of chemicals to fish and the impact of chemicals on aquatic ecosystems with specific reference to petroleum hydrocarbons; Dr. Sundar Prasad, an expert in coastal and ocean engineering, including physical oceanography and fluid mechanics; and, Dr. Doug Bright, an expert in ecotoxicology and environmental chemistry. All of these experts testified on the issue of the harm, or potential for harm, to the environment, from the spill.

[46] I could spend a long time summarizing the evidence of all three of these experts. It is common ground that marine diesel contains elements that are harmful to fish. It is a “deleterious substance” as set out in the charge, and as defined in the *Fisheries Act*. The more problematic issue is, did the amount of marine diesel that ultimately made its way into the environment, harm the marine environment, or have the potential to harm fish or other organisms?

[47] Harm and the potential for harm are scientific concepts, but proof of them is a legal concept. Ultimately, the expert evidence is inconclusive on the extent of the potential for harm, or harm to the marine environment. This is through no fault of any of the experts. They could only work with the data available to them. It is simply not possible to measure the impact of the marine diesel on all organisms. No one observed any dead fish, including the salmon in the pens. The amount of harmful substances in organisms such as clams quickly dissipated to the point there was no health risk for consumers.

[48] I conclude from Dr. Bright’s testimony that the greatest potential for harm was on herring roe that would likely be in the area of the spill. Dr. Hodson also testified that the

salmon at the farm dove deep into their pens, which he concluded was avoidance behaviour. The Crown submits that such avoidance shows that the diesel had a negative effect on the salmon (i.e., harm). While the farmed salmon are not indigenous to the area, their behaviour shows that other fish in the area could be similarly affected.

[49] At the end of the day, there was potential for harm to some organisms, but I conclude that it was minor. I go back to the fact that the estimated amount of marine diesel recovered exceeds the estimate of the spill. The salmon in the pens who were trapped in closest proximity to the spill were, in the long term, unaffected by the marine diesel and were ultimately sold.

[50] The reduced potential for harm is due to the considerable efforts of the various agencies involved in the cleanup. As I have already summarized, Cermaq cooperated with and paid for those efforts.

Prior Record and Past Involvement with the Authorities

[51] Cermaq has no prior record, and no prior involvement with the authorities.

Acceptance of Responsibility

[52] I have already referred to Cermaq accepting responsibility by entering an early plea of guilty. Cermaq acknowledges their failure of due diligence, by not recognizing that the increased need for fuel should have triggered them to evaluate their fuelling system to ensure employees would not defeat that system. I accept that Cermaq is sincerely remorseful for this offence. I will add at this juncture that several representatives of Cermaq attended throughout the ten days of this sentencing hearing, some of which was conducted in person, and some remotely.

Deterrence

[53] I must consider specific deterrence, of Cermaq itself, and general deterrence, of other companies engaged in fish farming, or, even more generally, companies with operations which handle fuels or toxic substances which have the potential to be released into fish-bearing water.

[54] Cermaq provided an immediate and extensive response to clean up the spill. They have already paid over \$800,000 to clean up the spill, which included devoting considerable time and human resources to that effort. They have incurred the cost and time of this sentencing. They modified the fuelling system of the original fish farm and another similar farm to prevent a reoccurrence of the event. The company hired consultants to review their fuelling handling policies and practices, and implemented their recommendations moving forward. Cermaq posted an apology on the company website. This decision will be public.

[55] I was provided submissions about Cermaq's efforts to create a positive corporate reputation in the community, and in particular with the First Nations in whose territory it operates. For example, they employ approximately 250 employees, mostly from the local communities and First Nations, and support local suppliers, businesses and trades. The company participates in environmental initiatives, such as the clean up of local beaches. They provide sponsorships for local sports teams and community events, spending in excess of \$500,000 per year on community initiatives.

[56] It is reasonable to infer that Cermaq's corporate reputation has been damaged by its commission of this offence.

[57] In conclusion, there has been no suggestion, from the date of the offence and throughout this sentencing, that Cermaq has been anything other than remorseful, and dedicated to remediating the spill and preventing its recurrence. I am satisfied that Cermaq sincerely regrets this incident and would not view a fine, in any amount, as simply the cost of doing business.

Amount of the Fine

[58] The Crown submits that the fine ought to be \$1.4 million, not just based on her submission that Cermaq's culpability is high, and the Crown has proved harm, or, in the alternative, potential for harm to fish. In addition, she submits that when Parliament increased the fine range for corporations for summary conviction offences in November 2013, that was a message to courts that previous fines were inadequate, and fines from

that date ought to be increased. The change in November 2013 went from a range of no minimum to \$300,000 to a range of \$100,000 minimum to \$4,000,000 maximum for summary conviction offences.

[59] In addition, the Crown submits that the ability for Cermaq to pay must be considered, because the amount of fines that might deter a small business will differ from those that will deter a large and wealthy corporation. A fine should be sufficiently high to deter the corporation, small or large, from repeating the behaviour.

[60] Both counsel cited cases to assist me in determining the appropriate range. It is difficult to draw analogies to previous cases, since each offence and offender is unique. I will refer to some of the cases I found most helpful.

[61] In a recent case out of the Alberta Provincial Court, *R. v. Gibson Energy ULC*, 2021 ABPC 124, Gibson Energy was convicted after a trial of two offences related to depositing a deleterious substance under the *Fisheries Act*. A catastrophic breakdown of the company's fire suppression system led to the release of over 30 million litres of chlorinated municipal tap water into the North Saskatchewan River for approximately 45 hours. The company was unable to shut off the water due to serious design flaws and maintenance issues in the system. The company was found not to be duly diligent because of its negligent design and maintenance of its system, and failure to take all reasonable measures to counteract, mitigate, or remedy the impacts of the release of the water into the river. There was no evidence of dead fish. Gibson Energy was fined \$1.1 million on one count and \$400,000 on the other.

[62] In *R. v. Cimco Refrigeration and University of British Columbia* (21 June 2019), Richmond 60501-1 (BCPC) (UBC sentence upheld on appeal: 2020 BCSC 1126), liquid and vapour ammonia was poured into a storm drain near an ice rink. Samples of the substance four hours later showed it was 304 times the toxicity level for fish. Investigators found 70 dead fish in the following days. Cimco pleaded guilty part way through the trial and Crown and defence agreed on a joint submission of a fine of \$800,000. UBC went to trial and was found guilty after a lengthy trial. The court found UBC's culpability higher than Cimco's, based on UBC's failure to have proper training

policies at the arena for safe handling of deleterious substances. The court imposed a \$1.15 million fine on UBC.

[63] Most sentencing cases under the *Fisheries Act* are resolved by joint submission. Both counsel cited a number of cases in which the courts accepted joint submissions. I have reviewed those cases, but they are, as counsel concede, of limited utility. One case that has some similarities to this case is *R. v. Teck Coal Limited* (5 October 2017), Sparwood 32307-1 (BCPC). Teck Coal pleaded guilty to three counts of depositing a deleterious substance, the same offence as in this case. The court accepted the joint submission of a \$475,000 fine for each count. In that case, the effluent from Teck Coal's water treatment plant exceeded safe concentrations and entered into a creek, killing fish. Teck Coal's reporting system had delays, so the lethal concentration was not discovered until after three deposits had already occurred. The court characterized the offence as a "systems failure". Teck Coal reported the incident, cooperated with and paid for the cleanup, and invested considerable sums in remediating their systems and training employees. Teck Coal had no prior record. As in this case, the court found culpability at the lower end. Judge Doerksen went on to state:

What is important is how, of course, the corporation deals with these incidents after the fact, and it certainly has done, it appears, everything that it could do to rectify it and to do its best to ensure it will not happen again.

[64] This sentiment applies equally to Cermaq.

Decision

[65] I have reviewed all of the factors in the *Terroco* case. While the seriousness of the incident cannot be understated, I conclude that:

1. Cermaq's culpability is at the lower end of the scale, but is more than a "near miss";
2. Cermaq has no prior record or past past involvement with the authorities;
3. Cermaq has accepted responsibility and is sincerely remorseful;
4. The Crown has not proven harm and the potential for harm was low.

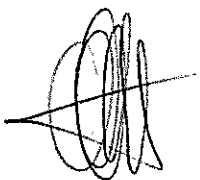
[66] As I have cited above, the law is clear that the predominant sentencing consideration for offences of this nature is deterrence of both Cermaq and others. I conclude that the consequences of this incident to Cermaq to date, including the monetary cost and damage to its reputation, go a long way to impress upon Cermaq the need to ensure its systems and training are sufficient to prevent similar offences in the future. Nevertheless, I must impose a fine in keeping with Cermaq's corporate size and relative financial means, so the fine could not be seen by Cermaq, or other companies that operate in the marine environment, as simply the cost of doing business. I agree with the Crown that general deterrence is particularly important in the context of the fish farming industry which operates directly upon the ocean.

[67] The imposition of a fine is not a science. In addition to the above listed factors, I have considered sentences imposed by other courts for similar offences, in an effort to address the principles of proportionality and parity of sentence.

[68] I conclude that an appropriate fine in all of the circumstances is \$500,000.

[69] I will also make an order, as requested by the Crown, that Cermaq publish this decision on its website for 90 days, pursuant to s. 79.2(c) of the *Fisheries Act*. In light of my view of Cermaq's corporate character, I do not see this as particularly punitive for Cermaq, but more in the nature of Cermaq's responsibility to let the community know the facts and the consequences of this offence. These reasons will also be posted on the Provincial Court of British Columbia website.

[70] I would like to end these reasons by expressing my appreciation for the professionalism of all counsel on this case: Ms. Lawn, Mr. Lonergan, and Ms. Kaukinen. My reasons do not do justice to the exceptional work that went into the presentation of the evidence and submissions by all three counsel.



The Honourable Judge Crockett
Provincial Court of British Columbia