

Mount Polley Litigation Summary

It has been well over two years since the breach of a tailings dam at the Mount Polley Mine in central British Columbia led to the release of millions of cubic litres of mining waste into the Quesnel and Fraser River watersheds. The affected communities are still seeking justice for the harms the dam failure caused. They and other interested parties have initiated lawsuits in connection with the mine disaster.

Obtaining a judicial remedy through the courts can sometimes be the only option for victims and communities that have suffered harm. In other instances, merely launching a lawsuit may compel defendants to enter into negotiations with victims and provide compensation to them through out-of-court settlements. This is in order to avoid costly litigation.

In August 2016, representatives of a number of First Nations launched three separate lawsuits against the Imperial Metals Corporation, which owned and operated the mine, and related companies. They are seeking damages for harms to their rights and interests, including fishing rights. The lawsuits also name the B.C. government as a defendant, alleging inadequate inspection and regulation of the Mount Polley mine. One of the lawsuits additionally names the mine's engineers of record as defendants.

At this time, the Indigenous representatives who have launched these three lawsuits have filed their notices of claim with the court but have not yet served the defendants with the notices, which is the next step required in the litigation process. If the plaintiffs decide to proceed with the litigation, and the cases reach trial, the process is likely to be time-consuming and financially and emotionally costly. The risk of losing the cases brings with it the possibility of being ordered to pay the legal costs expended by the defendants. On the other hand, victory in court would not only provide justice to the affected communities but could also deliver a strong message to the mining industry and to the provincial government that mines must be designed, operated, and overseen in line with Canada's human rights obligations.

For their part, the mining companies that owned and operated the Mount Polley Mine are attempting to recover the money they have allegedly lost and may still lose as a result of the disaster. In July 2016 they initiated a lawsuit against the mine's engineers of record, claiming that the engineering companies' flawed mine designs were the cause of the dam breach. The defendant engineering companies have themselves attempted to attribute the blame to third parties that they have added to the lawsuit, including another engineering company and the provincial government, and have also launched a counterclaim against the plaintiff mining companies. If this lawsuit proceeds to trial, the evidence may reveal which of the parties were ultimately responsible for the dam failure.

As well, in October 2016, MiningWatch Canada initiated a private prosecution against one of the mining companies and the B.C. government in connection with the mine waste spill for alleged violations of the *Fisheries Act*. The federal prosecutor has stayed the proceedings, partly on the basis that three different government agencies are currently investigating the disaster. It remains to be seen whether any of these agencies will impose fines or lay charges in connection with their investigations into this matter.

These lawsuits and the potential future prosecutions may serve as crucial tools for affirming and protecting these communities' rights and interests and holding the appropriate entities accountable for this harmful mining disaster.

Summary of Legal Cases Related to the Mount Polley Mine disaster – May 2017

1. Imperial Metals Corporation v Knight Piésold Ltd

Vancouver Law Courts, File #166102

*Summary covers all pleadings filed as of May 10, 2017.

Plaintiffs (Defendants by Counterclaim):

- Mining companies, which own and operate the Mount Polley Mine:
 - Imperial Metals Corporation (IMC)
 - Bethlehem Resources Corporation
 - Mount Polley Mining Corporation (MPMC)

Defendants:

- Engineers of record for the Mount Polley Mine:
 - Knight Piésold Ltd. (KP)
 - AMEC:
 - Amec Earth & Environmental, a division of Amec Americas Limited - Amec Ameriques Limitee
 - Amec Americas Limited
 - Amec Foster Wheeler Americas Limited

Third Party Defendants:

- BGC Engineering Inc. (BGC)
- Her Majesty the Queen in Right of the Province of British Columbia
- AMEC
- KP

Plaintiffs' Claim:

- The plaintiff mining companies launched an action in breach of contract, negligence, and negligent misrepresentation against the engineers of record, alleging that the breach of a dam enclosing a tailings storage facility (TSF) at the Mount Polley Mine was the result of flawed designs of the TSF by KP and AMEC.
- According to the plaintiffs, the TSF was designed and monitored by KP and AMEC at all material times, with AMEC adopting and amending KP's design. The plaintiffs claim that MPMC constructed and operated the TSF in accordance with the defendants' designs and representations.

Relief Sought:

- The plaintiffs allege that they have suffered the following damages: lost profits; incursion of fixed costs; costs in obtaining permits; reconstruction costs; costs in complying with regulatory orders; costs in defending and resolving third party claims; costs payable to government agencies; and losses by IMC in relation to its shares and funds in MPMC.
- The plaintiffs are seeking damages; interest; legal costs; and indemnification for costs arising in relation to third party claims, regulatory compliance, and paying government agencies.

Defendants' Responses to Civil Claim:

- AMEC and KP have each filed responses in which they deny the plaintiffs' allegations, attribute fault to each other, the plaintiffs, and third parties, and rely on contractual clauses excluding and limiting their own liability.

Third Party Notices:

- AMEC brought a third party claim against BGC.
 - AMEC claims that any losses suffered by the plaintiff mining companies were caused or contributed to by BGC's negligence, negligent misrepresentations, breaches of duty, and breaches of contract.
 - According to AMEC, BGC was in the process of assuming full engineering responsibility for the TSF at the time of its collapse.
 - AMEC is seeking contribution and indemnity from BGC for any amount the Court may find owing from AMEC to the plaintiffs (as well as interest and legal costs).
- KP brought a third party claim against the Province.
 - KP claims that any losses suffered by the plaintiffs were caused or contributed to by the Province's negligent acts, errors, omissions, representations, and/or fault.
 - The Ministry of Energy and Mines (MEM) regulates the design, construction, and operation of mining facilities. KP claims that MEM failed to exercise its investigatory and enforcement powers in relation to the Mount Polley Mine. Further, KP alleges that the Province negligently represented to the plaintiffs that the TSF was being designed, constructed, and operated in accordance with the applicable regulatory standards. KP also claims that MEM failed to respond adequately to KP's warnings that the plaintiffs were in breach of their regulatory obligations.
 - KP is seeking contribution and indemnity from the Province for any amount the Court may find owing from KP to the plaintiffs (as well as legal costs).
- AMEC brought a third party claim against the Province.
 - AMEC claims that any losses suffered by the plaintiffs were caused or contributed to by the Province's negligence, negligent misrepresentations, and breaches of duty.
 - AMEC claims that MEM failed to exercise its inspection and enforcement powers in relation to the Mount Polley Mine. Further, AMEC alleges that the Province

negligently represented to the plaintiffs and to AMEC that the TSF was being designed, constructed, and operated in accordance with the applicable regulatory standards and claims that the Province failed to warn AMEC of safety concerns.

- AMEC is seeking contribution and indemnity from the Province for any amount the Court may find owing from AMEC to the plaintiffs (as well as interest and legal costs).
- KP brought a third party claim against AMEC and BGC.
 - KP claims that any losses suffered by the plaintiffs were caused or contributed to by the breaches of contract or negligent acts, errors, or omissions of AMEC and/or BGC.
 - KP alleges that after KP ceased performing engineering services for the Mount Polley Mine, AMEC and/or BGC performed engineering services and prepared designs that differed significantly from KP's mine designs.
 - KP is seeking contribution and indemnity from AMEC and BGC for any amount the Court may find owing from KP to the plaintiffs (as well as legal costs).
- AMEC brought a third party claim against KP.
 - AMEC claims that any losses suffered by the plaintiffs were caused or contributed to by KP's negligence, negligent misrepresentations, breaches of duty, and breaches of contract.
 - AMEC is seeking contribution and indemnity from KP for any amount the Court may find owing from AMEC to the plaintiffs (as well as interest and legal costs).

BGC's Responses to the Third Party Notices of AMEC and KP:

- BGC has filed responses denying the defendants' allegations and attributing fault to the plaintiffs, the defendants, and the Province.
- BGC further relies on clauses in its contracts with the plaintiffs excluding and limiting BGC's liability as well as on a settlement amount that BGC already paid to the plaintiffs in 2016.

Counterclaims:

- AMEC brought a counterclaim against MPMC.
 - AMEC claims that any losses suffered by IMC were caused or contributed to by MPMC's negligence and breaches of duty.
 - AMEC alleges that MPMC negligently made numerous departures from approved designs and failed to consistently monitor and report on mine operations.
 - AMEC is seeking contribution and indemnity from MPMC for any amount the Court may find owing from AMEC to IMC (as well as interest and legal costs).
- KP brought a counterclaim against the three plaintiff mining companies.
 - KP claims that any losses suffered by the plaintiffs were caused or contributed to by the plaintiffs' own negligent acts or omissions and/or breaches of statutory obligations.

- KP is seeking contribution and indemnity from each of the plaintiffs with respect to any liability that plaintiff may have to the other plaintiffs (as well as legal costs).

2. Louie, Chief v Mount Polley Mining Corporation

Vancouver Law Courts, File #167023

*As of April 19, 2017, the defendants have not filed a response to civil claim. They most likely have not yet been served by the plaintiffs with the notice of civil claim.

Plaintiffs:

- Chief Ann Louie on her own behalf and on behalf of all members of the Williams Lake Indian Band
- Chief Donna Dixon on her own behalf and on behalf of all members of the Soda Creek Indian Band

Defendants:

- Corporate Defendants, which owned or operated the Mount Polley Mine:
 - Mount Polley Mining Corporation
 - Imperial Metals Corporation
 - Imperial Energy Inc.
 - Bethlehem Resources Corporation
- Her Majesty the Queen in Right of the Province of British Columbia

Summary of Claim:

- The plaintiffs launched an action in nuisance, trespass, public nuisance, and negligence and under a strict liability rule against the corporate defendants, and in negligence against the Province, alleging that the breach of a dam at the Mount Polley Mine resulted in the release of dangerous and harmful substances into their traditional territories.
- The plaintiffs allege that the breach of the dam was caused by deficiencies in the construction and operation of the dam, the tailings storage facility, and other mine operations. They claim that the corporate defendants' mine design was flawed, that they did not follow the mine design, and that they did not adequately manage the mine site.
- Further, the plaintiffs claim that the Province caused or contributed to the deficiencies in the mine by failing to meet reasonable standards of inspection and regulation. The Minister of the Environment and the Minister of Energy and Mines had the power to enforce the corporate defendants' compliance with applicable statutes and regulations and with permits issued to the corporate defendants under these laws.

Relief Sought:

- The plaintiffs are seeking damages for harm done to their rights and interests. They allege that they suffered damage to their Aboriginal interests; negative impacts on water quality, flora, fauna, and fish; harm to their health and comfort; and costs in responding to and investigating the breach.
- They are seeking general damages; special damages; interest on damages; and legal costs.

3. St'at'imc Chiefs Council on Behalf of the St'at'imc v Mount Polley Mining Corporation

Vancouver Law Courts, File #167024

*As of April 26, 2017, the defendants have not filed a response to civil claim. They most likely have not yet been served by the plaintiffs with the notice of civil claim.

Plaintiffs:

- St'at'imc Chiefs Council on Behalf of the St'at'imc, including Chief Susan James on her own behalf and on behalf of all members of Xwisten, Chief Darrel Bob Sr. on his own behalf and on behalf of all members of Xazl'ip, Chief Kevin Whitney on his own behalf and on behalf of all members of T'it'q'et, Chief Michelle Edwards on her own behalf and on behalf of all members of Sekw'el'was, Chief Francis Alec on his own behalf and on behalf of all members of Ts'kw'aylaxw, and Chief Larry Casper on his own behalf and on behalf of all members of Tsal'alh

Defendants:

- Corporate Defendants, which owned or operated the Mount Polley Mine:
 - Mount Polley Mining Corporation
 - Imperial Metals Corporation
 - Imperial Energy Inc.
 - Bethlehem Resources Corporation
- Her Majesty the Queen in Right of the Province of British Columbia

Summary of Claim:

- The plaintiffs launched an action in nuisance, trespass, public nuisance, and negligence and under a strict liability rule against the corporate defendants, and in negligence against the Province, alleging that the breach of a dam at the Mount Polley Mine resulted in the release of dangerous and harmful substances into the Fraser River watershed.
- The plaintiffs allege that the breach of the dam was caused by deficiencies in the construction and operation of the dam, the tailings storage facility, and other mine operations. They claim that the corporate defendants' mine design was flawed, that they did not follow the mine design, and that they did not adequately manage the mine site.

- Further, the plaintiffs claim that the Province caused or contributed to the deficiencies in the mine by failing to meet reasonable standards of inspection and regulation. The Minister of the Environment and the Minister of Energy and Mines had the power to enforce the corporate defendants' compliance with applicable statutes and regulations and with permits issued to the corporate defendants under these laws.

Relief Sought:

- The plaintiffs are seeking damages for harm done to their rights and interests. They allege that they suffered damage to their Aboriginal interests; negative impacts on water quality, flora, fauna, and fish; harm to their health and comfort; and costs in responding to and investigating the breach.
- They are seeking general damages; special damages; interest on damages; and legal costs.

4. *Members of the Tl'esqox (Toosey Indian Band) v Amec Foster Wheeler Americas Limited – Amec Foster Wheeler Ameriques Limited*

Vancouver Law Courts, File #167087

*As of April 26, 2017, the defendants have not filed a response to civil claim. They most likely have not yet been served by the plaintiffs with the notice of civil claim.

Plaintiffs:

- The Tsilhqot'in National Government
- Bernie Elkins (a.k.a. Bernie Mack), on his own behalf and on behalf of all other members of the Tsilhqot'in nation and the ?Esdilagh First Nation (Alexandria Band)
- Francis Laceese, on his own behalf and on behalf of all other members of the Tsilhqot'in Nation and the Tl'esqox (Toosey Indian Band)

Defendants:

- Mining companies, which own and operate the Mount Polley Mine:
 - Imperial Metals Corporation
 - Mount Polley Mining Corporation
 - Bethlehem Resources Corporation
- Engineers of record for the Mount Polley Mine:
 - Knight Piesold Ltd.
 - AMEC:
 - Amec Earth & Environmental, a division of Amec Americas Limited - Amec Ameriques Limitee
 - Amec Americas Limited
 - Amec Foster Wheeler Americas Limited - Amec Foster Wheeler Ameriques Limitee
- Her Majesty the Queen in Right of the Province of British Columbia

Summary of Claim:

- The plaintiffs launched an action against the mining companies in private nuisance, public nuisance, and negligence as well as under the *Fisheries Act* and under a strict liability rule, and against the engineers of record and the Province in negligence and under the *Fisheries Act*, alleging that the breach of a dam enclosing a tailings storage facility (TSF) at the Mount Polley Mine resulted in the release of deleterious substances into the Fraser River watershed.
- The plaintiffs allege that the breach of the dam was caused by deficiencies in the construction and operation of the dam, the TSF, and other mine operations. They claim that the designs by the engineers of record for the TSF and its subsequent raises were flawed, as was the construction of the TSF by the mining companies, and that the mining companies did not adequately manage the mine site.
- Further, the plaintiffs claim that the Province failed to meet reasonable standards of inspection and regulation. The Ministry of Energy and Mines had the power to enforce compliance with the *Mines Act* and applicable regulations and with permits issued to the mining companies under these laws. The plaintiffs allege the Ministry failed to require the mining companies and the engineers of record to build and operate the dam in accordance with its design requirements.

Relief Sought:

- The plaintiffs allege that the TSF breach threatened the public's health, safety, and comfort and that the plaintiffs suffered special damages, including interference with their right to fish and with their Aboriginal rights and title.
- The plaintiffs are seeking damages; compensation for loss of fishing income; interest; and legal costs.

5. Ugo Lapointe v Mount Polley Mining Corporation and Her Majesty the Queen in Right of British Columbia

Williams Lake Law Courts, File #34472-1

Informant:

- Ugo Lapointe, MiningWatch Canada, Canada Program Coordinator

Accused:

- Mount Polley Mining Corporation (MPMC)
- Her Majesty the Queen in Right of British Columbia

Charges and Allegations:

- Ugo Lapointe of MiningWatch Canada initiated a private prosecution against MPMC and the Province in connection with the mine waste spill that resulted from the breach of a dam at the Mount Polley Mine.
- The charges allege violations of the *Fisheries Act*, which prohibits “serious harm to fish” and the deposit of “deleterious substances” into fish-bearing waters that sustain commercial, recreational, or aboriginal fisheries.
- MiningWatch claims that the spill was caused by the negligence of both MPMC and the Province.
- MiningWatch was concerned that the Crown had failed to lay charges and enforce the *Fisheries Act*.

Result:

- A process hearing on the prosecution was adjourned after the federal prosecutor directed a stay of proceedings. The prosecutor was of the opinion there was no reasonable prospect of conviction against the two parties with the materials presented by the informant. Further, he argued it was not in the public’s interest to continue a private prosecution because there was an ongoing comprehensive investigation being conducted by three different agencies (the B.C. Conservation Officer Service, Environment Canada, and Fisheries and Oceans Canada).
- The Provincial Court accepted the stay of proceedings.

Costs:

- MiningWatch sought legal costs, arguing that it brought the case in the public interest and that the prosecutor’s decision to stay the proceedings prior to receiving all of the evidence was unacceptable.
- A written judgement regarding costs was to be delivered to both parties by April 26, 2017.