

## Environmental Sentencing Policy in Alberta

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13 December 2014

## OUTLINE

- The Nature of Environmental Offences
- Theoretical Justifications for Sentencing
- Alternative Sentencing Options in Alberta
- Factors Influencing Environmental Sentencing

## THE NATURE OF ENVIRONMENTAL OFFENCES

- Environmental offences as “public welfare offences” and distinguished from “true crimes”
  - Level of moral turpitude required to commit them
  - However, some environmental offences are deliberate acts that require high moral turpitude to be committed
    - E.g., knowingly dumping toxic chemicals in the dark of night
    - Environmental legislation recognizes that high moral turpitude is required to commit certain environmental offences
      - By creating offences that require knowledge to be committed and creating higher fines for such offences

## THEORETICAL JUSTIFICATIONS FOR SENTENCING IN ENV'TAL CASES

- Protection of the public
- Retribution
- Deterrence
- Restoration
- Rehabilitation

## Protection of the public

- The principal reason for the use of imprisonment in sentencing
- Especially applied to violent crimes
- *Environmental Protection and Enhancement Act* makes an indirect reference to this goal:
  - “The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing ... [that] the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society”

## Retribution

- Addresses the moral culpability of the offender
  - punishment is meted out with regard to the level of moral blameworthiness of the offender”
  - Section 7 of the *Canadian Charter of Rights and Freedoms* requires the imposition of criminal liability only if an accused possesses a minimum “culpable mental state” – principle of “fundamental justice”

## Retribution (Cont'd)

- Retribution is not vengeance
  - Vengeance = an arbitrary act prompted by anger and emotion
  - Retribution = based on the degree of the offender's blameworthiness, taking into account his/her intent, the character of the conduct and the resulting harm
    - Match the punishment with the crime
      - Knowingly committing an offence = maximum fine of \$100,000 in the case of individuals
      - Committing the same offence = \$50,000 (EPEA, s 228(1))

## Rehabilitation

- Emphasizes the need for punishment to contribute towards the reform of the offender
- The most discredited theory of sentencing
  - The criminal justice system scarcely leaves people better than they were
- Rehabilitation presupposes some moral turpitude on the part of the offender, from which they are to be rehabilitated
  - But most environmental offences do not require moral turpitude
  - Can a corporation be rehabilitated?
    - What therapies can be administered to a corporation to cure its propensity for profit?

## Deterrence

- Since prosecution and sentencing occur after the offence has been committed and the damage is already done, any expectation of future protection of the public must come from the deterrence effects the sentence may have.
- Deterrence is strongest where detection of wrongdoing is significantly easy
- General deterrence
- Specific deterrence

## Restorative Justice

- Victim-focused – designed to restore the victim to their original position
- In environmental cases, the victim is often viewed as the environment
- Restorative sentencing takes the form of penalties intended to help restore the damaged environment

## SENTENCING OPTIONS IN ALBERTA

- Corrective Action Letters
- Administrative penalties
- Warnings
- Orders
- Penal sanctions (penalties following criminal prosecutions)

## Corrective Action Letters (CAL)

- Used to inform a person of their non-compliant behaviour and how to correct it
- Where there has been no loss to the Crown/public – revenue, damage to resources, or adverse env'tal damage
- Where the AESRD believes the party will comply voluntarily
- No penalty for non-compliance with a CAL

## Administrative Penalties

- Introduced in Alberta in 2005
- Address cases of relatively minor infractions with minimal env'tal impacts
- Come in the form of monetary penalties assessed and imposed by an env'tal regulator rather than a court or tribunal
- Viewed as a much fairer, quicker and cheaper way of dealing with relatively minor infractions
  - Rate of appeal of administrative penalties is very low
  - Certainty of punishment is more effective than severity of punishment
  - Maximum penalty is \$5000 while minimum is \$1000

## Administrative Penalties (Cont'd)

- Examples of offences attracting administrative penalties
  - Operating an activity without the required authorization
  - Failure to report a release of a substance that may have adverse effects
  - Release of substance into the environment beyond the permitted amount
  - Late submission of a required report, such as an emissions report

## Warnings

- Issued for infractions even more minor than those requiring administrative penalties, or where there's no potential for adverse effect
- Reprimand or rebuke, designed to engender compliance
- Usually issued to first-time offenders
- Forms the person's compliance record

## Orders

- When immediate action is required to avoid a looming adverse env'tal effect or to bring an existing adverse env'tal effect to a halt
- Types of orders:
  - Environmental protection orders
    - Issued in relation to contraventions under the EPEA
  - Water management orders
    - Issued in relation to contraventions under the *Water Act*
  - Enforcement orders
    - Issued under both the EPEA and the *Water Act*, to compel a party to take steps to remedy an environmental contravention and, where appropriate, to take actions to prevent future contraventions

## Penal Sanctions

- Fines and Imprisonment
- Creative Sentencing

## Fines and Imprisonment

- Fines are the oldest form of sentencing option in env'tal enforcement
- Imprisonment is reserved for more flagrant offences where it is necessary to go after the corporate officers in order to effectively address the root cause of the offence
- Courts believe that the principles for the imposition of fines in env'tal cases require a "special approach"
  - Offender's ability to pay a proposed fine
  - Fines must amount to "more than a licensing fee for illegal activity or the cost of doing business"
  - A policy towards increased fines in environmental cases in Alberta

## Creative Sentencing

- Intended to allow sentencing to reflect the nature and consequences of environmental offences
- Allows courts to order that funds be channeled to some cause beneficial to the community
  - or that the offender perform some other act that is in some way related to righting the wrong
    - or to tracing the root cause of the offence with a view to preventing its recurrence

## Creative Sentencing (Cont'd)

- Rationale for creative sentencing
  - rehabilitation of the environment
  - the need to address the root cause of the offence
  - the need to help right the wrong instead of having the money disappear in government coffers
  - victims' interests
  - prison decongestion
  - desire for humane punishment
  - “do-goodism”
  - enabling some good to come from bad
  - enabling the defendant to help others in its shoes in the same industry to avoid committing the offence

## Creative Sentencing (Cont'd)

- Advent of creative sentencing in Canada
  - Traced to a 1980 decision of the Yukon Territorial Court - *R v United Keno Hills Mine Ltd*, (1980) 10 CELR 43 (YTTC)
  - Introduced in Alberta in 1993 when the EPEA was originally enacted (s 234(1)) and has become “a major insignia of sentencing policy in Alberta”

## Creative Sentencing (Cont'd)

- Forms of Creative Sentencing
  - Those Designed to Improve or Preserve the State of the Environment –
    - E.g., orders to fund specific research projects directed towards finding better ways of preventing environmental destructions or finding more environmentally friendly ways of carrying out various kinds of activities
      - Canadian National Railway Company, for failure to take reasonable steps to repair, remedy and confine the effects of a substance, was ordered to pay, in addition to fine, \$280,000 to SAIT to develop an emergency response training course and for scholarships to students in the course

## Creative Sentencing (Cont'd)

- Those that Address the Root Cause of the Offence
  - E.g., orders to fund academic programs that investigate the causes of the type of infractions involved in the offence
    - \$250,000 went to fund the development of a curriculum for the Wildlife Management Technician Diploma Program at Keyano College in Fort McMurray
    - \$315,000 for a Regulatory Compliance Project at the University of Calgary – a project examining the organizational failures that lead to environmental offences

## Creative Sentencing (Cont'd)

- Those that are Truly Punitive in Nature
  - cases where the offender is prohibited from operating its business for a specified period of time
  - cases where the court takes away the fruits of the wrongdoing from the offender
    - Offender owned a turnip farm located near a river. Floodwaters from the river washed the farm's topsoil into the river. To stop the erosion and increase the amount of land it could use to grow turnips, the offender rechanneled the course of the river without prior approval from the relevant authority
      - » Ordered to pay a \$10,000 fine and to deliver \$90,000 worth of turnips to the Edmonton Food Bank over the course of four years

### Creative Sentencing (Cont'd)

- Restrictions on the acquisition and use of professional designations by environmental consultants who provided false or misleading environmental information against the provisions of the EPEA and the Water Act

### Creative Sentencing (cont'd)

- Guidelines Governing Creative Sentencing
  - A link between the violation and the project must be shown to exist
  - Principal beneficiary of the project must be the public
    - Alberta public must be the primary beneficiary of the project

### Creative Sentencing (Cont'd)

- Avoid conflicts of interest (potential or actual) between the offender and the recipient of the fund
- Recipient must be not-for-profit organization
  - Universities, colleges and research institutes have been the highest beneficiaries

### Creative Sentencing (Cont'd)

- Principles Governing Creative Sentencing
  - The Totality Principle
    - Court is required to look at the totality of the sentence to avoid imposing a disproportionately severe sentence on the offender
      - First step is to determine the total penalty to be imposed on the offender
      - No set ratio for determining what portion of a sentence should be allocated to creative sentencing and what portion should go to fine

### Creative Sentencing (Cont'd)

- Fitting the Sentence to the Offence
  - Clear connection between the conduct underlying the offence and the cause the sentence is intended to promote or support
    - An offence related to water pollution cannot result in creative sentencing requiring the offender to support research in air pollution

### FACTORS INFLUENCING ENVIRONMENTAL SENTENCING

- The Nature of the Harm
  - The existence (actual or potential), degree and duration of the harm, nature of the harm-causing substance, where the harm occurred, the costs and efforts required to address the harm
- The Degree of Culpability
  - Intent generally an aggravating factor
  - Due diligence a defence for unintentional infractions
  - Foreseeability of harm is relevant
  - Existence of previous convictions may indicate recklessness

- Criminal History of the Offender
  - Previous criminal record may indicate that the offender is more interested in profits than in compliance
  - For corporations, the criminal history of the officers has been held relevant
  - Not only actual criminal history, but also the general conduct of the offender
    - Any previous warnings are reckoned with

- Acceptance of Culpability
  - Remorsefulness
    - An early guilty plea
    - admission of responsibility as soon as the offender is advised
    - Steps to mitigate the harm after discovering the harm
    - voluntary reporting of the violation
  - Existence of previous convictions is relevant
  - Cooperation with investigators

- Size of the Offender
  - The offender's ability to pay any fine to be imposed
  - More frequently considered in relation to corporate offenders
  - Meaningfulness of a fine depends on how much is the fine and the wealth of the offender
  - Higher standard of care might be expected of a larger corporation than of a smaller one

## Sentencing History

Year	Fines from Prosecution	Administrative Penalties
2013/2014	# of convictions – <b>11</b> Total Fines – <b>\$692,250</b>	# of penalties – <b>102</b> Total Penalties <b>\$701,711.57</b>
2012	# of convictions – <b>3</b> Total Fines – <b>\$200,000</b>	# of penalties – <b>19</b> Total Penalties - <b>\$113,400</b>
2011	# of convictions – <b>11</b> Total Fines – <b>\$1,040,000</b>	# of penalties – <b>11</b> Total Penalties – <b>\$100,500</b>
2010	# of convictions – <b>16</b> Total Fines – <b>\$869,270</b>	# of penalties – <b>30</b> Total Penalties - <b>\$210,500</b>
2009	# of convictions – <b>17</b> Total Fines – <b>\$1,481,000</b>	# of penalties – <b>23</b> Total Penalties – <b>\$118,500</b>
2008	# of convictions – <b>4</b> Total Fines – <b>\$12,000</b>	# of penalties – <b>12</b> Total Penalties – <b>\$83,000</b>
<b>Total</b>	<b>Total: 62/\$4,394,520</b>	<b>Total: 197/\$1,327,611.57</b>

## Creative Sentencing as Proportion of Total Sentence

Year	Total Penalties	CS Component	CS as % of total
2013	\$622,250	\$156,120	25%
2012	\$380,000	\$140,000	37%
2011	\$1,042,012	\$523,000	50%
2010	\$3,532,170	\$2,893,500	82%
2009	\$1,489,575	\$990,000	66%
2008	\$14,305	\$0	0%
2007	\$677,100	\$256,000	38%
2006	\$549,702	\$419,402	76%
2005	\$987,419	\$560,843	57%
1996-2004	\$4,280,518	\$1,618,378	37%
<b>Total</b>	<b>\$13,575,051</b>	<b>\$7,557,243</b>	<b>56%</b>