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Environment in the Courtroom

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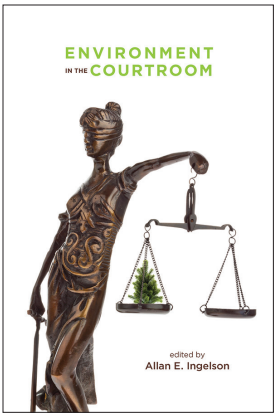

ENVIRONMENT IN THE COURTROOM

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Creative Environmental Sentences: The Corporate Perspective

ALLAN E. INGELSON

In a 2012 commentary, "Getting Creative with the Law," Dianne Saxe and Jackie Campbell consider the advantages of creative sentences, including the potential for corporate monies spent on projects to improve the environment and, through corporate involvement and sponsorship, to increase the prospect of environmental compliance in the future. The authors report that, in some cases, corporate offenders can make more valuable contributions to the environment than strictly monetary ones and the participation of corporations in "restoring the natural environment can help rehabilitate offenders, motivate them to care about issues, and set a good example to others."[1] Saxe and Campbell note that three decades ago the Province of Ontario was the leader in creative sentencing, but now federal, British Columbia, and Alberta prosecutors have assumed a national leadership role in creative environmental sentencing.[2]

Rapid and significant development of oil sands projects in recent years has prompted numerous federal and provincial environmental offences in which the courts in Alberta have approved a variety of creative sentences. Why are some corporations open to participating in joint submissions with the Crown for creative sentences? We will examine this question. In light of availability of information on recent creative sentences approved in the province during the last five years, we will examine the orders under which corporations are funding research and education, habitat preservation, water quality monitoring and protection, prohibitions on specified activities, and publication projects.

The Emergence of Creative Sentences in Canada

What are the objectives of creative environmental sentences in Canada? In the 1980 *Keno Hill*[3] judgment, Chief Justice Barry Stuart laid the foundation for

creative sentencing in Canada. The Chief Justice discussed "special considerations" when the court sentenced a major national mining corporation after it discharged waste above the amount allowed under its water licence, contrary to the *Northern Inland Waters Act*.[4] The court considered the following factors in determining the appropriate sentence: the "nature of the environment affected; the extent of injury (the degree of damage inflicted)";[5] the size, wealth, and power of the corporation;[6] the "criminality of the conduct"; "the extent of corporate attempts to comply; remorse; profits realized by the offence; the criminal record of the corporation."[7] Subsequently, the Environmental Damages Fund was created by the Canadian Government to direct monies paid for fines under statutes such as the *Migratory Birds Convention Act* (*MBCA*),[8] the *Fisheries Act*,[9] and the Canadian *Environmental Protection Act*[10] to fund environmental improvement projects rather than depositing such monies into the government's Consolidated Revenue Fund.[11]

Eighteen years after the *Keno Hill* decision, in another case arising from the unlawful release of a substance harmful to the environment, the Provincial Court of Alberta, in *R. v. Van Waters & Rogers Ltd*,[12] considered the following factors when determining the appropriate sentence:

1. Public protection, even in the absence of serious harm;
2. Denunciation of offenders;
3. Deterrence not rehabilitation;
4. Sole potential harm or risk arising from the offence is not a mitigating factor, but actual harm is an aggravating factor;
5. The absence of intent is not a mitigating factor, but willfulness or recklessness is an aggravating factor;
6. Profit or benefit from the environmental offence may be difficult to quantify, but should be considered when appropriate;
7. Imposing the maximum statutory penalty may be appropriate where there is intent, significant discharge, and a prior record;
8. The size and financial resources of the corporation should be considered;
9. Offender remorse needs to be determined (remorse of the offender to be evaluated by considering the corporation's actions, not words);
10. Compliance only after the fact should not be treated as too much of a mitigating factor;
11. Lax government enforcement is not a mitigating factor;

12. Previous convictions must be considered;
13. The availability of easy steps that could have been taken by the corporation to avoid pollution, or carrying on a hazardous activity knowing that pollution will be difficult to control, are both aggravating factors.[13]

In regard to the ninth factor, the conclusion that corporate remorse is to be evaluated based on the actions of the corporation, not words, can be one of the factors that encourages corporations in some cases to participate in the creative sentencing process.

In his 2004 analysis of creative sentencing, Gordon Scott Campbell discussed the role that "non-fine measures" such as beneficial environmental projects, public denunciation, and voluntary compliance measures can play in encouraging environmental compliance.[14] In 2009, Professor Elaine Hughes and Dr. Larry Reynolds examined the "options available" for creative sentences under federal and provincial legislation, including:

- the confiscation of profits from the commission of an environmental offence;
- ordering compensation for property losses;
- payment into trust funds to facilitate environmental restoration or research;
- prevention orders such as "mandatory employee training";
- "compliance with 'voluntary' codes such as ISO 14001 management systems";
- community service orders;
- publication and information orders; and
- probation.[15]

Hughes and Reynolds noted that publication orders were frequently used in combination with research funding, educational funding, prevention, or remedial orders. The authors discussed prerequisites for creative sentences in Canada, including that the corporate offender must accept responsibility for the offence and must be in a state of compliance with the environmental statute or regulation prior to the determination of the creative sentence; that the corporation cannot benefit from non-compliance with the law; and that the amount of the fine and funding for the creative sentencing project(s) must be significant and structured so as to be a deterrent to other potential offenders.[16]

Based on their review of federal and provincial legislation, the authors reported that "the largest group of potential orders set out in the statutes and used in practice, are orders to conduct specific projects of direct environmental benefit (whether remedial or preventive), usually by funding NGOs or government departments, and orders of a somewhat uncertain benefit to conduct research (again, often with educational NGO partners)."[17] Corporations fund these projects to satisfy the creative sentence. Projects are directed toward "achieving compliance with environmental standards through specific and general deterrence measures," specifically targeting both current and future environmental benefits. The types of sanctions that could be incorporated into creative sentences include prohibitions against specified activities, publication of facts pertaining to the offence, community service or actions intended to facilitate acceptable offender conduct, and funding for remedial action.

Creative Sentencing in Alberta

In 2003, Susan McRory, the Environmental Coordinator, Special Prosecutions for Alberta Justice, and Lynda Jenkins, Environmental Prosecutor, reported that creative sentencing had "become a significant feature of almost every environmental prosecution in the province."[18] One early example, from 2003, is *R. v. Canadian 88 Energy Corp*. The oil company was charged with releasing a substance at a rate or amount that could cause a significant adverse effect to the environment pursuant to subsection 98(2) of the *Alberta Environmental Protection and Enhancement Act* (*AEPEA*),[19] and for the unlawful deposit of a deleterious substance into water, contrary to subsection 36(3) of the *Fisheries Act*.[20] The corporation pled guilty to both charges and the court imposed a global sentence of $154,650, which included $15,000 in fines and surcharges.[21] The balance of the financial penalty was divided equally between the provincial and federal offences, and most of the money paid by the corporation was deposited into the federal Environmental Damages Fund to "achieve remediation and restoration of damages to the natural environment in a cost-effective way."[22] The court noted that the corporation was a first-time offender, a "model corporate citizen" that had accepted full responsibility for the environmental damage throughout the proceedings, had spent $2.5 million to date on clean-up costs, and was expected to continue working with Alberta Environment[23] for the next ten years to monitor and remediate the area.[24] In this early case, most of the money paid by the corporation was directed toward improving the environment.

Today, under subsection 234(1) of *AEPEA*, the courts in the province can take an innovative approach to sentencing by ordering that funds be used to pay for specific types of projects to improve the environment. The sentencing judge will decide the appropriate penalty in the case, and then determine the amount of money to be allocated for the project(s) that will benefit the public and the environment to be funded by the corporate offender. As a general rule, corporations are not allowed to deduct the cost of remediation from the total penalty.[25] McRory has noted that the trend in the province "has been a 50/50 split between the fine and the creative sentence, as advocated by the provincial Crown," and that some of the requirements for creative sentences include the following: deterrence is the prime objective of the creative sentence; the order must be punitive; there must be a connection between the offence and the project(s) funded as part of the creative sentence; and the project(s) must truly address the wrong.[26] Creative sentencing guidelines provide that the prime beneficiary of a creative sentencing project(s) funded by a corporation "must be the public."[27] In 2012, Alberta Environment and Sustainable Resource Development (AESRD)[28] and the Alberta Department of Justice reported that for the purpose of clarifying administrative responsibilities, now once an order has been adopted by the court "it is the responsibility of the environmental investigations liaison to ensure the order is performed as outlined in the court document; the order can extend up to three years or can be extended with permission of the court."[29]

Often there is a lack of detailed information about the factors that are considered by corporations in deciding whether or not to participate in creative sentencing. Even though the following cases and associated orders have no precedential value, they do provide insight into the types of recent innovative sentences agreed to by corporations. The selected nine creative sentences were approved by the courts in Alberta during the period 2009–2013. As provided under the terms of the creative sentences, corporations are funding a variety of innovative projects, including research and education projects, habitat preservation, water quality monitoring and environmental improvement, student bursaries, and scholarships.

R. v. Suncor Energy (2009)[30]—Research and Education to Avoid Repeating the Offence

Suncor Energy (Suncor), Canada's largest energy company, publishes an annual report on its environmental, social, and economic performance.[31]

Operations at the Suncor Firebag *in situ* oil sands facility started in December 2003. The corporation's original plant design included vapor recovery units (VRUs) on all process water tanks at the facility. The design plans were later changed to remove VRUs on the water tanks after experience with another project suggested they were not required. The design change was not incorporated into the project application that had been submitted to the provincial government. After an investigation by Alberta Environment, the company was charged under subsections 227(e) and (b) of *AEPEA*, for breaching a statutory authorization, for failing to install equipment to control emissions of a hazardous substance, and failing to report that the equipment had not been installed as required by the project approval. On April 2, 2009, the company pled guilty to the two counts and paid a $675,000 fine. In addition, as corporate executives were interested in how the company could avoid repeating the offences and as part of its corporate social responsibility program, Suncor paid $315,000 to the University of Calgary for researchers to undertake a regulatory compliance research and education project. The researchers wrote a case study and Executive Briefing that were distributed at a two-day workshop offered to industry executives, managers, and regulators.[32] Suncor representatives participated in the workshop. The research project funded under the creative sentence revealed a failure in project management oversight. Based on 46 interviews with Suncor employees, regulators, and lawyers who were aware of the circumstances surrounding the environmental offences, along with a review of the associated documentation, the university researchers identified the following three "root causes" of the environmental offences:

1. The corporation had a weak management of change process;
2. The corporation had weak operational compliance tracking;
3. The corporation exhibited a weak culture of compliance.[33]

The researchers also identified contextual factors that magnified the root causes of the environmental offence, including industry turbulence, new technology, and a shortage of qualified personnel.[34]

In addition to funding management research to minimize the risk that the corporation would commit the offence again, another factor in Suncor participating in the creative sentence was its commitment to corporate social responsibility (CSR).[35] Some Canadian corporations are more concerned about CSR than others. In light of media scrutiny of oil sands operations, some corporations in the extractive industries sector consider that environmental

enhancement projects demonstrate CSR, and that the projects will support the social licence to operate over the long term. The International Institute for Sustainable Development states that "CSR promotes a vision of business accountability to a wide range of stakeholders, besides shareholders and investors. Key areas of concern for these corporations are environmental protection and the community and civil society in general, both now and in the future."[36] As part of its Report on Sustainability in 2009, Suncor Energy posted the following statement regarding the Firebag offences on its website:

> This incident should have never happened. We fell short of the expectations of regulators—and ourselves. There was a failure in management oversight, for which we take full responsibility. We have strengthened our project controls to prevent it from occurring again.[37]

This type of public admission and disclosure suggests that CSR was also a factor in the major energy corporation participating in the creative sentence. In addition to funding the regulatory compliance educational research project discussed above, pursuant to another term of the creative sentence, the corporation paid $75,000 into a college Endowment Fund to support an Environmental and Conservation and Sciences Program.

R. v. Syncrude Canada Ltd. (2010)[38]—Habitat Preservation

Habitat preservation was another type of project funded under the creative sentence. The environmental prosecution in this case garnered national and international media attention in 2010. Syncrude, an oil sands mining company, was charged under subsection 5.1(1) of the *Migratory Birds Convention Act* (*MBCA*)[39] for depositing substances harmful to migratory birds and under section 155 of *AEPEA*, for "failing to keep or store a hazardous substance in a manner that avoids contact with animals," after approximately 1,600 migratory birds died after landing on a mine tailings pond that contained clays, silt, and residual amounts of hydrocarbons.[40] As the oil sands mine is located along a migratory bird route, based on an environmental impact study, the corporation was aware that birds could land on the tailings pond as with other lakes in the area. Syncrude had previously deployed scarecrows and propane cannons, and employed other bird deterrent practices in previous years. The corporation mounted a vigorous defence, but the court concluded that the corporation had failed to take adequate measures to deter the birds from landing on the tailings

pond and ordered the corporation to pay a $300,000 fine under the *MBCA* and a $500,000 fine under *AEPEA*.[41] Pursuant to the terms of the creative sentence the corporation agreed to pay $2,200,000 to fund several projects that included a payment of $900,000 to the Alberta Conservation Association to purchase the Golden Ranches habitat.[42] In addition to funding habitat preservation, the corporation funded a $1,300,000 avian research project at the University of Alberta and paid $250,000 to fund curriculum development for a Wildlife Management Technician Diploma Program at a college in Fort McMurray, Alberta, to satisfy the conditions of the creative sentence.

R. v. Statoil Canada Ltd. (2011)[43]—Online Training for Best Industry Practices to Avoid Future Prosecutions

In October 2011, Statoil Canada Ltd. pled guilty to contravening the "terms or conditions" of a Temporary Diversion Licence contrary to subsection 142(1)(e) of the Alberta *Water Act*.[44] A water use report submitted to Alberta Environment by the oil sands operator did not include an estimate of the volume of water that had been diverted for use in its drilling operations. The corporation admitted that the estimated volume of water that it had diverted daily had not been recorded, nor did its employees record the water level from the lake as required.[45] In addition, the corporation had not used the screen size stipulated in the licence, a provincial regulatory requirement designed to protect the fish population. The company was fined $5,000 and, as a term of the creative sentence, required to pay $185,000 to fund the development of an online training project called "Surface Water Diversion for the Oil and Gas Industry – Best Practices."[46] The purpose of the project was to "provide a clear and concise guide to surface water diversion" to educate oil and gas industry operators and reduce the possibility that Statoil and other industry members would commit the offence in the future.[47] It was a condition of the creative sentence that one of the project stakeholders, the Canadian Association of Petroleum Producers (CAPP),[48] host, along with Statoil, a learning presentation targeted at industry operators and include on its website an online portal for a period of three years from the date of the creative sentencing order.[49]

R. v. Devon Canada Corporation (2011)[50]—Bursary for Students

During August 2011, Devon Canada Corporation was convicted under subsections 142(1)(i) and 142(1)(b) of the *Water Act*,[51] for not reporting a water crossing in its construction proposal for a pipeline. The oil company was subject to a global fine of $85,000, with $25,000 allocated to the fine and $60,000 paid to

create a bursary for students in a Land and Water Resources diploma program at an Alberta college.

R. v. All-Can Engineering and Surveys Ltd. (2012)[52]—Educating Industry Association Members

The engineering firm pled guilty to failing to provide information to the provincial government about a watercourse crossing required under subsection 142(1)(b) of the *Water Act*.[53] In addition to paying a fine of $10,000, under the terms of creative sentence, the company paid $40,000 into a trust account to fund a research project to be carried out by researchers at the University of Calgary, designed to increase compliance with the *Water Act* by industry members.[54] The research project included an incident investigation under which university researchers will "systematically gather and analyze information" regarding the events that led to the offence committed by the engineering firm, "for the purpose of identifying causes and making recommendations to prevent the incident from happening again."[55] In addition to data collection and synthesis, researchers will "develop best practices for ensuring environmental compliance."[56] The terms of the creative sentence require broad communication of the project findings to the provincial land surveying association.

R. v. Permolex Ltd. (2012)[57]—Environmental Monitoring to Improve Water Quality

The corporation pled guilty to contravening a "term or condition" of an approval issued pursuant to *AEPEA*.[58] The approval required the corporation to discharge wastewater into the city sanitary sewer system in accordance with the municipal requirements and only emit effluent streams to the atmosphere from an ethanol scrubber exhaust vent indicated in the Permolex application. The corporation failed to comply with two conditions of the approval and pled guilty to both counts. The main reason the corporation did not comply with the above conditions was its failure to ensure that a qualified process engineer was working at its facility. The company addressed the problem by hiring a professional process engineer and agreeing to continue "to pay for the services of a qualified professional for the maximum time provided" under *AEPEA*, which was three years from the date of the order.[59] In addition to paying $50,000 in fines ($25,000 for each count), one condition of the creative sentence requires the corporation to pay $100,000 to fund the Red Deer River Storm Water Project.[60] One of the main objectives of the project was to improve the quality of the water in the river by implementing a new integrated water management

approach under which the city would monitor water quality. Part of the funds paid by Permolex were used to pay a consulting company retained by the municipality to prepare a report that provided information on the chemical content and aquatic life present in the river, upstream and downstream from the municipal wastewater treatment plant. The $200,000, three-year project created by the municipal government to improve the quality of the river water was originally to be funded strictly by taxpayers. As a result of the corporate funding stipulated in the creative sentence, there was a significant reduction in the expense of the water management program to local taxpayers.

R. v. Stephen Brown (2013)[61]—Environmental Consulting Companies, A Stop Order, and Article Publication in Weekly News

The withdrawal of water from unlicensed water bodies has the potential to injure ecosystems.[62] A large pipeline corporation was constructing a new pipeline in Alberta at an estimated cost of $1.8 billion. Several corporations and individuals were retained by the pipeline corporation to assist with the project. One of the individuals hired as a consultant on the project was Stephen Brown, the principal of Brownstone Environmental Services Ltd. Mr. Brown, who had experience with pipeline projects, was training to become a professional agrologist in BC. He had been working long hours and created a false Temporary Diversion Licence (TDL) to facilitate water extraction from a water body for the pipeline project. The "false TDL looked official on its face," and Mr. Brown "delivered a copy of the false TDL to the relevant pipeline company employee," who "sent a copy of the false TDL to an AESRD investigator who had requested it."[63]

After the deception was discovered by the large pipeline corporation and the environmental consulting company that had retained his firm, "Mr. Brown was terminated by the environmental consulting company."[64] Subsequently, Mr. Brown informed a pipeline corporation employee that "he blew it"[65] and provided the following statement to the AESRD investigator: "I just used a copy of the other ones that I had received on previous projects" (to create the false TDL)[66] He informed the AESRD investigator "that the decision to make the false document was his alone and that no one else was aware of what he had done."[67] As part of the AESRD investigation, a senior employee with the environmental consulting company, asked to comment about "the pressures faced by Mr. Brown," stated, "I think" people like Mr. Brown "are under quite a bit of pressure in the field to get things done quickly; the contractor wants to keep moving, and contractors are not always very good at thinking ahead. And

so I think the contractor wasn't thinking far enough ahead about water, and they got to a point where they wanted water, and they wanted it now."[68] Mr. Brown pled guilty to Count 2 under section 142(1)(a) of the *Water Act* for providing a "false or misleading" document, and "all remaining charges against Mr. Brown and Brownstone Environmental Services Ltd." were withdrawn.[69]

Under the terms of the creative sentence, Mr. Brown was fined $1,000 and ordered to pay $9,000 to the RiverWatch Institute of Alberta, a charitable organization, to operate the RiverWatch Education Project. This project is designed to inform junior and senior high school students about the quality of river water and to motivate them "to protect and manage water quality for the benefit of wildlife, safe drinking water and recreation."[70] In addition, Mr. Brown was ordered "not to take any steps, for the period of one year, to pursue any designation" as a professional agrologist or agrology technologist in BC "or the equivalent professional designations in Alberta" and to "arrange for the publication of an article in the Environmental Services Association of Alberta's Weekly News" about the incident.[71] The creative sentence in this case was approved by the Provincial Court, as it satisfied the following "key criteria," and fell within the following creative environmental sentencing guidelines:

(1) There is a direct connection between the violation and the project;
(2) The project will benefit the environment;
(3) There is a geographic connection between the project and the offence;
(4) The project will benefit the public;
(5) There is no conflict of interest between the recipient of the funds, either the offender, the Crown, or the investigating agency; and
(6) The environmental enhancement project is to be carried out by a non-profit organization.[72]

R. v. Grizzly Oil Sands ULC (2013)[73]—Habitat Improvement

The defendant oil sands exploration company, Grizzly Oil Sands ULC, failed to comply with the requirements of a temporary water diversion licence issued under the Alberta *Water Act*.[74] After conducting routine water use inspections regarding some of the company's exploration programs, provincial government inspectors questioned the validity of the information submitted on behalf of the company. Corporate executives were unaware that an independent contractor had prepared a false report to be submitted to the Alberta Government regarding the volume of surface water that had been diverted to carry out an

exploration program. Immediately after learning that the contractor had prepared the false report, the services contract was terminated and the company reported the incident to the appropriate provincial government department. In 2013, the company pled guilty to contravening subsection 142(1) of the *Water Act* in light of the clear failure to satisfy the terms of the TDL. The Crown prosecutor and defence counsel made a joint submission to the Provincial Court for a creative sentence that provides funding for a habitat conservation project "to grow and establish plants of traditional aboriginal value in wetland habitat."[75] The Crown submitted that the project fell within the Guidelines for Creative Sentencing Projects, as it satisfied the following key criteria:

(1) There was a direct connection between the offence and the project;
(2) The project would benefit the public and produce concrete, tangible results;
(3) The functionally non-profit organization was the most qualified organization to carry out the project;
(4) There was no conflict of interest between the recipient organization, the corporate offender, the Crown, or the investigating agency.[76]

The court accepted the proposed creative sentence and, in addition to imposing a fine of $9,312, ordered the corporation to pay $90,688 into a trust account "for the sole purpose of funding the Wetland Boreal Plant Revegetation Project."[77] Another example of a case in which habitat restoration was funded pursuant to a creative sentence arose after Harvest Operations Corp. contravened subsection 109(2) of *AEPEA* by releasing or allowing the release of a substance into the environment in an amount, concentration, or level that might harm the environment.[78] The court ordered the payment of a $21,000 fine and a payment of $49,000 to Ducks Unlimited Canada to fund a wetland restoration project.[79]

R. v. Plains Midstream Canada ULC (2014)[80]—Habitat Improvement

The defendant company, Plains Midstream Canada ULC, owned and operated the Rainbow Pipeline.[81] The pipeline leaked 28,000 barrels of oil into a marshy muskeg area.[82] The court ruled that the company had failed to take all reasonable measures to repair, remedy, and confine the effects of the oil, contrary to section 112(1)(a)(i) of *AEPEA*. It therefore committed an offence contrary to section 227(j) of *AEPEA*.[83] In addition to imposing a fine of $225,000, the court ordered the company to pay an additional $225,000 to satisy a creative

sentencing order that was jointly proposed by the Crown and defence counsel.[84] The proposed sentence included projects that were designed to conserve or enhance habitat in the Peace River area. It directed that funding would be provided: (a) to enhance access to Joker Lake, reducing the environmental impacts to the access points that anglers use; (b) to purchase, rehabilitate, and enhance the Reinwood conservation site near Deadwood; and (c) for other high-value riparian, lakeside, or marsh habitat conservation projects in the Peace River Area.[85]

The Crown submitted that the proposed creative sentence satisfied the main criteria in the guidelines for creative sentencing projects. The primary criteria included the following: a geographic connection between the offence and the creative sentencing projects; the projects would benefit the environment by conserving habitat with important ecological functions, such as filtering of water, retention of flood waters, and reduction in ecological effects of anglers accessing accessing fishing sites; and the projects would benefit the public by creating cleaner water supplies and habitat, and improve fisheries access.[86] There was no conflict of interest between the recipient of the creative sentencing funds (Alberta Conservation Association [ACA]) and the parties to the case.[87] To satisfy the creative sentencing order, the court ordered the company to deposit $225,000 into a trust account, which the ACA would use within three years to conserve habitat in the Peace River Area.[88] At the time of the sentence, the ACA was in the process of purchasing valuable and disappearing ecotypes in the province for conservation purposes.[89]

R. v. Sonic Oilfield Service Ltd. (2015)[90]—Educational Waste Management Mobile Application

The company operated an oilfield trucking business in Alberta.[91] On June 9, 2011, a Sonic driver transported hydrocarbon condensate to one of its facilities and transferred the liquid to a storage tank.[92] In the process of discarding residual condensate, the liquid spilled onto an open industrial yard area at the facility.[93] A contract welder then inadvertently ignited condensate vapours, causing a flame-based explosion.[94] The Provincial Court of Alberta ruled that the company had disposed of the liquid waste contrary to section 176 of *AEPEA*, which requires waste to be disposed of properly in a container and transported to an appropriate waste treatment facilitiy.[95] The company also contravened section 227(j) of *AEPEA*.[96] In addition to requiring the company to pay a $50,000 fine, the court imposed a creative sentence pursuant to section 234(1) of *AEPEA*.[97] The court ordered the company to pay $200,000 to a

local municipality, the City of Medicine Hat, to be held in trust to fund a "Safe Waste Mobile Application."[98] One of the conditions of the creative sentence was that a municipal general manager had to authorize all expenditures from the trust account.[99] In addition, the proposed web application would support Android and Apple mobile and tablet devices and be downloadable for free via online application stores.[100] Further, municipalities would be encouraged to provide links to the application as part of their general awareness and public outreach activities.[101] The application would be used to educate the public about the appropriate disposal of liquid waste.[102] Specifically, it would explain what happens to liquid wastes when they are improperly discharged in an urban setting, including the environmental impacts and impacts to municipal infrastructure related to those discharges.[103]

R. v. Canadian Natural Resources Limited (2016)[104]—Research Project

Canadian Natural Resources Limited (CNRL) operates the Horizon Oil Sands Facility, north of Fort McMurray.[105] On January 24, 2009, the facility began producing synthetic crude oil.[106] Hydrogen sulfide (H_2S) is a hazardous substance extracted at the facility.[107] A sulfur recovery unit at the facility was designed to capture and convert H_2S into less toxic substances.[108] In the event the equipment failed, a flare stack was to be employed to combust any excess H_2S.[109] On May 28, 2010, the sulfur recovery unit at the facility failed, and contrary to section 227(j) of *AEPEA*, the company did not immediately report the release to the provincial environmental department.[110] More than two years later, on August 2, 2012, the facility sulfur recovery unit failed again, contrary to a condition of the facility approval and section 227(e) of *AEPEA*.[111] As a result of the two statutory violations, the company paid a total financial penalty of $500,000; of that amount $425,000 was allocated to a creative sentencing project in which University of Calgary researchers would analyze the toxicological impact of different chemicals in the air in and around the area affected by the H_2S release.[112]

The Crown submitted that the project fell within the guidelines for creative sentencing projects by meeting the following core criteria: The project would benefit the environment by: (a) determining if current air quality measurements generate sufficient data to perform human based toxicological research; (b) recommending what changes would be necessary to generate sufficient data or recommending what types of toxicological analysis can be undertaken using existing data; and (c) potentially undertaking further analysis to ascertain the potential human health aspects of chemicals in the air in and around Fort MacKay.[113] The project would benefit the public because this was the first

case in which this type of human-based research would be undertaken in the area and province.[114] In addition, there was no reasonably perceived conflict of interest between the researcher and the parties to the case.[115] There was a geographic connection between the research project and the incident, as the H_2S release occurred in the same region.[116] After approving the proposed creative sentence, the court ordered the company to deposit the research funds into an Alberta Energy Regulator trust account to be used for the purpose of funding the University of Calgary research project.[117]

R. v. Apache Canada Ltd. (2016)[118]—Research Project

Apache Canada Ltd. owned and operated pipelines in Alberta.[119] On October 25, 2013,[120] and again on January 21, 2014,[121] pipelines operated by the company failed. The first pipeline failure resulted in the release of 1,813 cubic metres of oilfield-produced water, and the second pipeline failure facilitated the release of 1,978 cubic metres of produced water.[122] The company was charged with failing to protect a reinforced composite pipeline from damage on October 25, 2013, contrary to section 9(3) of the *Pipeline Rules*, thereby commiting an offence under section 52(2)(a) of the *Pipeline Act*.[123] The company was also charged with allowing a release into the environment on January 21, 2014 that "causes or may cause a significant adverse effect" contrary to section 109(2) of *AEPEA*.[124] This constituted an offence under section 227(j) of *AEPEA*.[125] The company pled guilty to both offences on September 30, 2016.[126]

The court ordered the company to pay a total financial penalty of $350,000; $160,000 allocated to the 2013 release and $190,000 for the second release.[127] A joint submission was made by the Crown and defence counsel for the company to fund a creative sentencing project called the "Use of Seed Priming and Biochar to Improve the Reclamation Performance of Alberta Native Species in Salt-Affected Soils" in the amount of $305,077.50[128] Alberta Innovates would be the organization that would carry out the research project, to be directed toward remediating salt-affected soil.[129] Salt water spills are a common problem at oil and gas wellsites in Alberta.

The Crown submitted that the project fell within the guidelines for creative sentencing projects by satisfying the following key criteria: there was a geographic connection, because the project would address remediation of salt-affected soils in the area affected by the offences, northwest Alberta;[130] the project would benefit the environment because it would improve scientific understanding of how salt affects soils at wellsites and how these soils can be more effectively remediated by using native plants than by sending the contaminated soil to a landfill;[131] the project would benefit the public by helping

to ensure that less clean topsoil, which is a finite resource, will be needed to remediate recurring water pipeline breaks;[132] and there was no apparent conflict of interest between Alberta Innovates and the parties to the case.[133]

Conclusion

There are a variety of factors that influence whether or not some corporate executives agree to creative sentences. Some executives are simply interested in making the environmental offence disappear and paying a fine. These executives may be concerned about publicity surrounding the offence and the additional legal costs of participating in a joint submission for a creative sentence. In other cases, executives have concluded that creative sentences afford an opportunity to reduce the risk that the corporation may repeat the offence and are interested in funding environmental enhancement projects that benefit the public and demonstrate corporate social responsibility.

Chief Justice Stuart has noted that professional condemnation of undesirable corporate activities can be a significant deterrent to corporations that commit environmental offences. Corporate legal expenses in proceeding to trial can be significant, and rather than just paying a fine some corporate executives would like to have some input as to how significant funds are spent and are interested in supporting environmental improvement projects. As was noted in *R. v. Keno Hill* and *R. v. Waters*, offender remorse is one of the factors to be considered in determining the amount of a fine, and remorse needs to be evaluated based on the offender's actions, not on its words. The reactions of corporate executives to the option of creative sentencing can also be influenced by the corporation's financial situation and corporate priorities, interest in minimizing the risk that the corporation may repeat the offence, and interest in CSR and the social licence to operate. Most of the corporations in Alberta that we have considered have substantial financial resources to fund creative sentencing projects, in particular for research and education.

Chief Justice Stuart has alluded to the role of incentives in encouraging environmental compliance. One incentive for corporations in the cases that have been discussed is minimizing corporate risk. In three of the eight cases in the following creative sentencing update table (Table 28.1), projects directed toward management research, regulatory compliance, and education have been funded. In addition to satisfying the minimum sentencing criteria developed by the provincial government, these projects incorporate a perceived corporate benefit, specifically minimizing the risk that the corporation will repeat the offence in the future. I submit that this is a factor which encourages corporate support for creative sentences that include this type of project.

Table 28.1 | Alberta Creative Sentencing Update for Environment Offences

Offence	*Company*	*Fine*	*Project Funding*
AEPEA, ss. 227(e) & (b)	*R. v. Suncor Energy* (2009)	$675,000	$390,000 – Education for Regulatory Compliance and Scholarship
AEPEA, s. 155; *MBCA*, s. 5.1(1)	*R. v. Syncrude Canada Ltd.* (2010)	$800,000	$2,450,000 – Habitat preservation; research; and curriculum development
Water Act, ss. 142(1)(i) & 142(1)(b)	*R. v. Devon Canada Corporation* (2011)	$25,000	$60,000 – Student bursary
Water Act, s. 142(1)(e)	*R. v. Statoil Canada Ltd.* (2011)	$5,000	$185,000 – Education for Regulatory Compliance – Best Industry Practices
AEPEA, s. 227(e)	*R. v. Permolex* (2012)	$50,000	$100,000 – Water quality monitoring
Water Act, s. 142(1)(b)	*R. v. All-Can Engineering and Surveys Ltd.* (2012)	$10,000	$40,000 – Education for Regulatory Compliance
Water Act, s. 142(1)(a)	*R. v. Stephen Brown Brownstone Environmental Services Ltd.* (2013)	$1,000	$9,000 – Stop order; Article publication in Alberta's Weekly News; and water education project
Water Act, s. 142(1)	*R. v. Grizzly Oil Sands ULC* (2013)	$9,312	$90,688 – Plant revegetation and education project
AEPEA, ss. 112(1)(a)(i) & 227(j)	*R. v. Plains Midstream Canada ULC* (2014)	$225,000	$225,000 – Habitat Conservation and Enhancement
AEPEA, ss. 176 & 227(j)	*R. v. Sonic Oilfield Service Ltd.* (2016)	$50,000	$200,000 – Educational Waste Management Mobile Application
AEPEA, ss. 227(e) & (j)	*R. v. Canadian Natural Resources Limited* (2016)	$75,000	$425,000- H2S Research Project
AEPEA ss. 109(2) & 227(j)	*R. v. Apache Canada Ltd.* (2016)	$44,922.50	$305,077.50 – Reclamation of salt-affected soils research project
Pipeline Act, s.52(2)(a) & *Pipeline Rules* c. 9(3)			

As indicated in Table 28.1, under the terms of its creative sentence, Suncor Energy in 2009 funded a research and educational project to minimize the risk that the corporation would repeat the environmental offence, and to educate industry operators about the project results. In addition, the corporation

created an endowment fund for an environmental education program consistent with its reported commitment to CSR and sustainability. In 2011, Statoil funded an online industry training project to foster increased environmental compliance and to reduce the risk that other industry members will commit the same offence in the future. All-Can Engineering & Surveys Ltd., in 2012, funded a research and education project with a similar objective to the one funded by Suncor Energy in 2009. The project is designed to identify the cause(s) of the environmental offence and to reduce the risk that the corporation and other industry members will commit the offence in the future. These research and education projects are beneficial to the corporations, the public, and the environment.

All of the cases considered in this chapter incorporate projects that contribute to an improved environment or programs designed to prevent environmental degradation. These types of projects can demonstrate corporate social responsibility, and therefore I submit that corporate social responsibility and the social licence to operate are other factors that encourage some corporations to participate in the creative sentencing option that may be available in some cases. Finally, the following economic factors may influence whether a corporation decides to just pay a fine(s) or pay both a fine and a financial penalty to fund environmental enhancement project(s) incorporated into a creative sentence: the financial resources of the corporation; trial costs; withdrawal of additional charges and avoiding the costs of additional litigation; the costs of participating in the development of a joint submission for the proposed creative sentence; potential maximum fine(s) for the offence(s); payment of a smaller fine for an offence along with a financial penalty paid to fund the project(s); the potential tax deductibility of project funding in creative sentences; and the inability of the corporation to deduct fines. Risk minimization, corporate social responsibility, and the economic factors that we have discussed explain why some corporations in Alberta are selecting this innovative sentencing option in some cases.

NOTES

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5 *Keno*, *supra* note 3, paras 12–13.
6 *Ibid*, para 17.
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8 SC 1994, c 22.
9 RSC 1985, c F-14.
10 SC 1999, c 33
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13 *Ibid*, paras 23–39.
14 Gordon Scott Campbell, "Fostering a Compliance Culture through Creative Sentencing for Environmental Offences" (2004) 9 Can Crim LR 1 at 19.
15 *Ibid* at 114–119.
16 E Hughes & L Reynolds, "Creative Sentencing and Environmental Protection" (2008) 19 J Envtl L & Prac 105–137.
17 *Ibid* at 131. The authors identified six categories in which the environmental creative sentences tend to fall: prohibition orders; publication orders; orders to conduct or fund research; orders to fund educational projects; prevention orders directed toward improvement of internal corporate operations; and remedial orders to fund specific environmental reclamation and improvement projects with non-governmental organizations (NGO) parties.
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20 RSC 1985, c F-14.
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22 Appendix II to the Order.
23 Now Alberta Environment and Parks (AEP).
24 *Canadian 88 Energy Corp*, *supra* note 19 at para 5.
25 *VanWaters & Rogers Ltd*, *supra* note 12; *R v Chem-Security (Alberta) Ltd* (1998), 29 CELR (NS) 60 (Alta Prov Ct).
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