



**University of Calgary**

**PRISM: University of Calgary's Digital Repository**

---

Research Centres, Institutes, Projects and Units

Canadian Institute of Resources Law

---

2013-04-02

# A Review of the Environmental Enforcement Culture in Alberta in Relation to the Oil Sands

Nwapi, Dr. Chilenye

---

<http://hdl.handle.net/1880/49462>

working paper

---

*Downloaded from PRISM: <https://prism.ucalgary.ca>*

**Canadian Institute of Resources Law  
Institut canadien du droit des ressources**

**A Review of the Environmental  
Enforcement Culture in Alberta  
in Relation to the Oil Sands**

**Dr. Chilenye Nwapi**

CIRL Occasional Paper #40

March 2013

MFH 3353, Faculty of Law University of Calgary, Calgary, Alberta, Canada T2N 1N4  
Tel: (403) 220-3200 Fax: (403) 282-6182 E-mail: [cirl@ucalgary.ca](mailto:cirl@ucalgary.ca) Web: [www.cirl.ca](http://www.cirl.ca)

The Canadian Institute of Resources Law encourages the availability, dissemination and exchange of public information. You may copy, distribute, display, download and otherwise freely deal with this work on the following conditions:

- (1) You must acknowledge the source of this work,
- (2) You may not modify this work, and
- (3) You must not make commercial use of this work without the prior written permission of the author(s).

Copyright © 2013

## Canadian Institute of Resources Law

The Canadian Institute of Resources Law was incorporated in 1979 with a mandate to examine the legal aspects of both renewable and non-renewable resources. Its work falls into three interrelated areas: research, education, and publication.

The Institute has engaged in a wide variety of research projects, including studies on oil and gas, mining, forestry, water, electricity, the environment, Aboriginal rights, surface rights, and the trade of Canada's natural resources.

The education function of the Institute is pursued by sponsoring conferences and short courses on particular topical aspects of resources law, and through teaching in the Faculty of Law at the University of Calgary.

The major publication of the Institute is its ongoing looseleaf service, the *Canada Energy Law Service*, published in association with Carswell. The results of other Institute research are published as books and discussion papers. Manuscripts submitted by outside authors are considered. The Institute publishes a quarterly newsletter, *Resources*.

The Institute is supported by the Alberta Law Foundation, the Government of Canada, and the private sector. The members of the Board of Directors are appointed by the Faculty of Law at the University of Calgary and the President of the University of Calgary.

All enquiries should be addressed to:

Information Resources Officer  
Canadian Institute of Resources Law  
Murray Fraser Hall, Room 3353 (MFH 3353)  
Faculty of Law  
University of Calgary  
Calgary, Alberta, Canada T2N 1N4

Telephone: (403) 220-3200  
Facsimile: (403) 282-6182  
E-mail: [cirl@ucalgary.ca](mailto:cirl@ucalgary.ca)  
Website: [www.cirl.ca](http://www.cirl.ca)

## Institut canadien du droit des ressources

L'institut canadien du droit des ressources a été constitué en 1979 et a reçu pour mission d'étudier les aspects juridiques des ressources renouvelables et non renouvelables. Son travail porte sur trois domaines étroitement reliés entre eux, soit la recherche, l'enseignement et les publications.

L'institut a entrepris une vaste gamme de projets de recherche, notamment des études portant sur le pétrole et le gaz, l'exploitation des mines, l'exploitation forestière, les eaux, l'électricité, l'environnement, les droits des autochtones, les droits de surface et le commerce des ressources naturelles du Canada.

L'institut remplit ses fonctions éducatives en commanditant des conférences et des cours de courte durée sur des sujets d'actualité particuliers en droit des ressources et par le truchement de l'enseignement à la Faculté de droit de l'Université de Calgary.

La plus importante publication de l'institut est son service de publication continue à feuilles mobiles intitulé le *Canada Energy Law Service*, publié conjointement avec Carswell. L'institut publie également les résultats d'autres recherches sous forme de livres et de documents d'étude. Les manuscrits soumis par des auteurs de l'extérieur sont également considérés. L'institut publie un bulletin trimestriel intitulé *Resources*.

L'institut reçoit des subventions de la Alberta Law Foundation, du gouvernement du Canada et du secteur privé. Les membres du conseil d'administration sont nommés par la Faculté de droit de l'Université de Calgary et le recteur de l'Université de Calgary.

Toute demande de renseignement doit être adressée au:

Responsable de la documentation  
Institut canadien du droit des ressources  
Murray Fraser Hall, salle 3353 (MFH 3353)  
Faculté de droit  
Université de Calgary  
Calgary, Alberta, Canada T2N 1N4

Téléphone: (403) 220-3200  
Télécopieur: (403) 282-6182  
Courriel: [cirl@ucalgary.ca](mailto:cirl@ucalgary.ca)  
Site web: [www.cirl.ca](http://www.cirl.ca)

## Table of Contents

|   |     |
|---|-----|
| <i>Foreword</i> .....   | vii |
| <i>Acknowledgements</i> .....   | ix  |
| <i>Table of Abbreviations</i> .....   | xi  |
| <b>1.0. Introduction</b> .....  | 1   |
| <b>2.0. The Environmental Regulatory Architecture for Oil and Gas Operations in Alberta</b> ..... | 4   |
| <b>3.0. The Nature of Environmental Offences</b> .....  | 7   |
| <b>4.0. The Environmental Enforcement Techniques in Alberta</b> .....                             | 11  |
| 4.1. Administrative Penalties .....   | 11  |
| 4.2. Warnings .....   | 15  |
| 4.3. Orders.....  | 16  |
| 4.4. Criminal Prosecutions .....  | 16  |
| <b>5.0. Sentencing in Environmental Cases</b> .....   | 21  |
| 5.1. Statutory Framework for Sentencing in Environmental Cases .....                              | 23  |
| 5.1.1. Penalty Provisions.....  | 23  |
| 5.1.2. The Use of Creative Sentencing in Alberta .....  | 25  |
| 5.1.3. Principles Governing Sentencing in Environmental Prosecution.....                          | 32  |
| <b>6.0. Is Criminal Prosecution an Effective Method of Fighting Environmental Offences?</b> ..... | 36  |
| <b>7.0. The Position of Victims of Environmental Offences</b> .....                               | 39  |
| 7.1. Conceptualizing the Environmental Crime Victim.....  | 41  |
| 7.1.1. Environmental Victims vs Environmental Casualties .....                                    | 42  |
| 7.1.2. Environmental Injury or Environmental Suffering.....                                       | 43  |
| 7.2. Causation.....   | 44  |
| 7.3. Cultural Perspectives .....  | 45  |
| 7.4. The Legislative Scheme Addressing Crime Victims in Alberta.....                              | 46  |
| <b>8.0 Conclusion</b> .....   | 48  |
| <i>CIRL Publications</i> .....  | 51  |



## Foreword

Dr. Chilenye Nwapi is a legal Research Fellow at the Canadian Institute of Resources Law. He has a Ph.D. from the University of British Columbia, a LL.M. from the University of Calgary and a LL.B. from the Imo State University.

This paper was intended to deal exclusively with the legal and policy responses to environmental offences in relation to the Alberta oil sands. This was because oil sands development is currently the biggest environmental challenge in Alberta. However, it emerged in the course of research that environmental offences connected with the oil sands do not display any feature or present any particularly special challenges that make them unique from other environmental offences. It was also found unrealistic to sift through the plethora of environmental enforcement actions in Alberta to identify and concentrate only on those relating to the oil sands. This is not least because available data on environmental enforcement actions in Alberta frequently do not make clear whether the incident relates to the oil sands or not. Accordingly, while the main focus remains on environmental offences in the context of the oil sands, other environmental offences are equally referenced. However, conscious effort has been made to deal with the most remarkable oil sands-related cases.





## **Acknowledgements**

This research paper was funded by the Alberta Law Foundation. The generous support of the Foundation is gratefully acknowledged.



## Table of Abbreviations

|              |  |
|--------------|--|
| AER          | Alberta Energy Regulatory  |
| AIC          | Australian Institute of Criminology                                      |
| APR          | Administrative Penalty Regulation  |
| CACD         | Canadian Association of Chemical Distributors                            |
| <i>CEPA</i>  | <i>Canadian Environmental Protection Act</i>                             |
| <i>DGTHA</i> | <i>Dangerous Goods Transportation and Handling Act</i>                   |
| <i>EEA</i>   | <i>Environmental Enforcement Act</i>                                     |
| <i>EPEA</i>  | <i>Environmental Protection and Enhancement Act</i>                      |
| <i>ERCA</i>  | <i>Energy Resources Conservation Act</i>                                 |
| ERCB         | Energy Resources and Conservation Board                                  |
| ESRD         | Environment and Sustainable Resources Development                        |
| EU           | European Union   |
| ICCLRCJP     | International Centre for Criminal Law Reform and Criminal Justice Policy |
| <i>MBCA</i>  | <i>Migratory Birds Convention Act</i>                                    |
| NEB          | National Energy Board  |
| <i>REDA</i>  | <i>Responsible Energy Development Act</i>                                |
| US           | United States  |
| <i>VCA</i>   | <i>Victims of Crime Act</i>  |



## 1.0. Introduction

Alberta's oil sands<sup>1</sup> have been negatively in the news for years now. The extraction of oil from the oil sands has drawn harsh criticism from environmental activists, both within Canada and abroad. Articles with incendiary captions span the print media especially since *The New York Times* reported the investigations into the death of migrating waterfowl that landed on a tailings pond operated by Syncrude Canada Ltd.<sup>2</sup> The National Geographic featured a shocking vivid image of the environmental risks associated with the oil sands and captioned its article “The Canadian Oil Boom: Scraping Bottom”.<sup>3</sup> Another foreign media report described the oil sands as “the biggest environmental crime in history”<sup>4</sup> due to the extractive methods involved in the extraction of oil from tar sands.

These media reports have engendered increased public scrutiny of environmental enforcement in the oil sands. Environmentalists say there is growing scientific evidence that oil sands extraction and processing produces more carbon dioxide than conventional oil production.<sup>5</sup> Last February, a group of Nobel laureates urged European leaders to support the European Union (EU) proposal to categorize fuel from oil sands as “highly polluting”.<sup>6</sup> In their words, “[t]ar sand development is the fastest growing source of greenhouse gas emissions in Canada, and threatens the health of the planet.”<sup>7</sup> In a letter

---

<sup>1</sup> The term oil sands (also called tar sands) quite literally refer to “oil mixed with sand (and clay)”. It is an unconventional form of oil. Conventional oil is found in liquid state and then pumped out like water and then refined. But oil sands are found as bitumen — which has the “thickness of peanut butter.” Ezra Levant, *Ethical Oil: The Case for Canada's Oil Sands* (Toronto: McClelland & Stewart, 2010) at 8. Due to the depletion of conventional oil, scientists have turned to alternative forms of oil, like oil sands. But because oil sands are not in a liquid state and so not ready to be pumped out of the ground like water, the process of separating the oil from the sands in an environmentally friendly manner remains a scientific dilemma. See Levant, *ibid* at 9.

<sup>2</sup> Ian Austen, “Canadians Investigate Death of Ducks at Oil-Sands Project”, *The New York Times* (1 May 2008), online: The New York Times <<http://www.nytimes.com/2008/05/01/business/worldbusiness/01sands.html>> (last accessed 17 September 2012).

<sup>3</sup> Robert Kunzig, “The Canadian Oil Boom: Scraping Bottom”, *National Geographic* (March 2009), online: National Geographic <<http://ngm.nationalgeographic.com/2009/03/canadian-oil-sands/kunzig-text/1>> (last accessed 17 September 2012).

<sup>4</sup> See Cahal Milmo, “Canadian Wilderness set to be invaded by BP in an oil project dubbed ‘The biggest environmental crime in history’”, *The Independent* (10 December 2007), online: The Independent <<http://www.independent.co.uk/environment/the-biggest-environmental-crime-in-history-764102.html>> (last accessed 4 November 2012).

<sup>5</sup> Nina Chestney, “Nobel winners urge EU leaders to back oil sands law”, *Reuters* (16 February 2012), online: Reuters <<http://www.reuters.com/article/2012/02/16/us-oil-sands-letter-idUSTRE81F0KV20120216>> (last accessed 19 November 2012).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

to Canada's Prime Minister Stephen Harper, the laureates demanded that as the Prime Minister has called climate change one of mankind's biggest problems, he should translate his words into deeds by halting further expansion of the oil sands.<sup>8</sup> One observer has noted that even the "oil-obsessed" United States (US) deferred its plans for the Keystone XL pipeline that would have increased the amount of oil produced by Canada from the oil sands for transportation to the US.<sup>9</sup> Although the EU vote ended in a deadlock, due in large part to intense lobbying by Canada which threatened a trade war with the EU,<sup>10</sup> objections to the oil sands remain nevertheless, and there is no denial that the oil sands pose a severe threat to the environment. The Alberta and Canadian governments have repeatedly made the argument that the benefits of developing the oil sands, which have an estimated 173 billion barrels of proven recoverable reserves<sup>11</sup> — second only to Saudi Arabia in the world — outweigh the dangers of not shutting them down.<sup>12</sup> It has argued that measures are in place to reduce the threat posed by the oil sands and that new measures are continuously being fashioned towards that end. One of these measures is the creation of a *Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring*<sup>13</sup> in early 2012 to enhance environmental monitoring of the activities going on in the oil sands.

---

<sup>8</sup> Bob Weber, "Nobel laureates press Harper to oppose Alberta oil-sands expansion", *The Globe and Mail* (6 September 2012), online: The Globe and Mail <<http://m.theglobeandmail.com/news/politics/nobel-laureates-press-harper-to-oppose-alberta-oil-sands-expansion/article596088/?service=mobile>> (last accessed 19 November 2012).

<sup>9</sup> Chestney, *supra* note 5 (citing a statement by Franziska Achterberg, EU transport policy advisor at Greenpeace). See also "Nobel winners call on EU to support law classifying oilsands fuel as 'highly polluting'", *The Vancouver Sun* (16 February 2012) online: The Vancouver Sun <<http://www.vancouversun.com/business/Nobel+winners+call+support+classifying+oilsands+fuel+highly+polluting/6166169/story.html>> (last accessed 10 September 2012). See also "Keystone Not in National Interest, Feds Say" (18 January 2012) Hous Bus J, online: Houston Business Journal <<http://www.bizjournals.com/houston/news/2012/01/18/keystone-not-in-national-interest.html>> (stating that on 18 January 2012, President Obama denied approval of the Keystone XL Pipeline). The oil sands constitute 20% of US' oil imports, which makes Canada top exporter of oil to the US. And currently, the US is the only country where Canada exports its oil sands. See Andrew Nikiforuk, *Tar Sands, Dirty Oil and the Future of a Continent* (Vancouver: David Suzuki Foundation, 2008) at 2; Levant, *supra* note 1 at 9.

<sup>10</sup> Damian Carrington, "Canada threatens trade war with EU over tar sands", *The Guardian* (20 February 2012), online: The Guardian <<http://www.guardian.co.uk/environment/2012/feb/20/canada-eu-tar-sands>> (last accessed 10 September 2012).

<sup>11</sup> Alberta Energy, *Responsible Actions — A Plan for Alberta's Oil Sands* (February 2007) at 4, online: Alberta Energy <[http://www.energy.alberta.ca/pdf/OSSgoaResponsibleActions\\_web.pdf](http://www.energy.alberta.ca/pdf/OSSgoaResponsibleActions_web.pdf)> (last accessed 24 September 2012).

<sup>12</sup> *Ibid* at 5.

<sup>13</sup> Minister of the Environment, *Joint Canada/Alberta Implementation Plan for Oil Sands Monitoring* (19 October 2012), online: Environment Canada <[http://www.ec.gc.ca/Publications/47789FA4-67E0-4334-A850-15FFA1F8E8F2/COM1519\\_Final-OS-Plan\\_02.pdf](http://www.ec.gc.ca/Publications/47789FA4-67E0-4334-A850-15FFA1F8E8F2/COM1519_Final-OS-Plan_02.pdf)> (last accessed 27 September 2012).

The purpose of this paper is to review the environmental enforcement culture in Alberta with a view to ascertaining what mechanisms are in place in Alberta for responding to the commission of environmental offences, in the context of the oil sands, and the extent to which those mechanisms are being used.

For a comprehensive understanding of the environmental issues, a brief review of Alberta's environmental regulatory architecture for oil and gas operations generally is necessary. This is summarized in the next section and is quickly followed by a discussion of the nature of environmental offences. This discussion is necessary because of the focus on the criminal attributes of environmental wrongdoing. In section four, the environmental enforcement techniques available in Alberta are discussed, again with an emphasis on their application to the oil sands. Four basic enforcement techniques are considered: administrative penalties, orders, warnings and criminal prosecution.

An enforcement mechanism that does not take into account the need to provide a remedy to the victims of the offences it seeks to address, is incomplete, unbalanced and of limited policy value. Therefore the section that follows considers the position of victims of environmental offences in Alberta. What mechanisms are available in Alberta for providing a sense of justice and balance to victims of environmental offences? The last section summarizes the entire discussion in this paper.

The value of this paper is in both policy and law analysis. It is intended to provide suggestions for policy guidelines to regulators such as Alberta Environment and Sustainable Resources Development (ESRD) to encourage environmental compliance in relation both to the oil sands and to other industrial sectors that impact the environment in Alberta. One of the findings of this paper is the increased use of creative sentencing in environmental cases. While this trend is both innovative and commendable, and while the ESRD is making significant efforts to ensure that this innovative mechanism is successful, its effectiveness has suffered from certain constraints, including lack of competent experts to carry out some creative sentencing projects, and limits on the monitoring capacity of the ESRD, among others. By drawing attention to these issues, this paper will contribute to the more effective use of creative sentencing in Alberta. Attention is also drawn to the lack of adequate attention to victims of environmental offences in a province with significant environmental challenges from fossil fuel development. By highlighting this reality and considering the range of issues that arise in the context of environmental victimology, it is hoped that this paper will contribute to the formulation of policies that pay adequate attention to victims of environmental offences in Alberta.



## 2.0. The Environmental Regulatory Architecture for Oil and Gas Operations in Alberta

The environmental regulatory architecture for oil and gas operations in Alberta is governed by federal, provincial and municipal laws and regulations and international and federal-provincial agreements in accordance with the *Constitution Act, 1867*.<sup>14</sup> Generally, interprovincial and international matters are under federal jurisdiction while matters local to the provinces are under provincial jurisdiction. Each province is given authority over property and civil rights<sup>15</sup> and in respect of exploration for, and conservation and management of, non-renewable natural resources within such province.<sup>16</sup> However, the federal government has the authority to make laws regulating trade and commerce in interprovincial and international trade.<sup>17</sup> The federal government also has jurisdiction over matters in relation to “Indians, and lands reserved for Indians”,<sup>18</sup> which can result in federal involvement in oil sands projects that affect Aboriginal interests. At the time the *Constitution Act, 1867* was enacted, however, environmental protection was not considered and so not allocated to either level of government. However, the Supreme Court of Canada has decided that both the federal and provincial governments may enact environmental laws in respect of matters within their competence, provided the exercise of legislative power over the environment must relate to a head of power over which the particular level of government can legislate.<sup>19</sup> Canada’s highest court in the *Friends of the Oldman River Society v. Canada (Minister of Transport)* decision noted that local projects will fall under provincial jurisdiction, but that federal involvement will be permitted where the project affects an area of federal jurisdiction.<sup>20</sup> In the event of conflicting laws, however, the doctrine of paramountcy operates to give primacy to federal laws. The federal criminal law power<sup>21</sup> has been identified as one of those heads of power allowing federal environmental regulation.<sup>22</sup> The peace, order and good

---

<sup>14</sup> *Constitution Act, 1876* (UK), 30 & 31 Vict, c 3.

<sup>15</sup> *Ibid*, s 92(13).

<sup>16</sup> *Ibid*, s 92A(1).

<sup>17</sup> *Ibid*, s 91(2).

<sup>18</sup> *Ibid*, s 91(24).

<sup>19</sup> *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3. See also *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Constitution Act, 1876*, *supra* note 14, s 91(27).

<sup>22</sup> See Peter W Hogg, “Constitutional Authority Over Greenhouse Gas Emissions” (2009) 46:2 *Alta L Rev* 507 at 511 [Hogg, “Constitutional Authority”]; Peter W. Hogg, “A Question of Parliamentary Power: Criminal Law and the Control of Greenhouse Gas Emissions” (August 2008) 114 *CD Howe Institute Backgrounder* at 1, online: *CD Howe Institute* <[http://www.cdhowe.org/pdf/backgrounder\\_114.pdf](http://www.cdhowe.org/pdf/backgrounder_114.pdf)> (last accessed 14 November 2012).

government clause<sup>23</sup> is another.<sup>24</sup> The federal coast and inland fisheries power under section 91(12) of the *Constitution Act* can also ground federal environmental regulation. It follows that both levels of government have authority to regulate environmental issues relating to the development of the Alberta oil sands.

Accordingly, the environmental aspects of the oil sands in Alberta are regulated under both federal and provincial environmental legislation. Both have established boards and bodies that regulate the oil industry. These include, at the federal level, the National Energy Board (NEB), and, at the provincial level, the Alberta Energy Resources and Conservation Board (ERCB) which will be replaced by the Alberta Energy Regulator (AER) established under the *Responsible Energy Development Act (REDA)*<sup>25</sup> enacted in 2012 but which has not yet come into force, and the ESRD.

The NEB, with its head office in Calgary, Alberta, was established by the Canadian Parliament in 1959 to regulate the interprovincial and international aspects of oil, gas and electric utility industries.<sup>26</sup> It regulates the construction and operation of pipelines, energy development and trade. Its environmental responsibilities include ensuring that environmental protection is factored into the planning, construction, operation and abandonment of energy projects within its jurisdiction.<sup>27</sup>

The ERCB was established under Alberta's *Energy Resources Conservation Act (ERCA)*<sup>28</sup> to regulate the safe, responsible and efficient development of Alberta's energy resources, including oil, natural gas, oil sands, coal and pipelines. Its authorization is required at almost every step of the life of an energy project. It ensures pollution control and environmental conservation in the discovery, development and delivery of energy resources. When conflicts arise between companies and landowners, the ERCB steps in to settle the conflicts in a fair and balanced manner.<sup>29</sup> Thus, the ERCB functions as "an independent, quasi-judicial agency of the Government of Alberta ... [that] ensure[s] that the discovery, development and delivery of Alberta's energy resources take place in a manner that is fair, responsible and in the public interest."<sup>30</sup> With the repeal of the *ERCA*,

---

<sup>23</sup> *Constitution Act, 1876*, *supra* note 14, s 91.

<sup>24</sup> Hogg, "Constitutional Authority", *supra* note 22.

<sup>25</sup> SA 2012, c R-17.3, s 3(1) [*REDA*]. The Act repeals the *Energy Resources Conservation Act* that established the ERCB, and amends several other acts including the *Water Act*.

<sup>26</sup> See the *National Energy Board Act*, RSC 1985, c N-7.

<sup>27</sup> *Ibid* at ss 26, 28, 29 and 58.

<sup>28</sup> RSA 2000, c E-10 [*ERCA*].

<sup>29</sup> *Ibid*, s 2.

<sup>30</sup> ERCB, "About Us", online: ERCB <<http://www.ercb.ca/about-us>> (last accessed 26 September 2012).

under *REDA* and the consequent dissolution of the ERCB, these functions are now to be performed by the AER.<sup>31</sup>

The ESRD is the ministry in charge of environment in Alberta: the Ministry of Environment and Sustainable Resource Development. It is the government ministry that is “responsible for ensuring that oil sands operations undergo the appropriate environmental assessment under the ... EPEA.”<sup>32</sup> The Ministry has an oil sands information portal, which is a one-stop information source for those interested in knowing the environmental impacts of oil sands development in Alberta.<sup>33</sup> It is responsible for the Environmental Appeals Board — an independent board established to give Albertans an opportunity to contest certain environmental decisions made by the Environment Ministry. The Board facilitates the use of mediation in resolving environmental disputes in Alberta.<sup>34</sup>

Given the concurrent jurisdiction of the federal and Alberta governments over environmental protection, both governments have the jurisdiction to enforce their environmental laws with regard to environmental violations that occur in Alberta. They both can prosecute environmental offences that occur in relation to oil sands operations. Offences are created under their respective environmental statutes. At the federal level, there are, among others, the following statutes: the *Environmental Enforcement Act (EEA)*,<sup>35</sup> the *Fisheries Act*,<sup>36</sup> and the *Migratory Birds Convention Act*.<sup>37</sup> At the provincial level, the important statutes are the *Environmental Protection and Enhancement Act (EPEA)*<sup>38</sup> and the *Water Act*.<sup>39</sup> These statutes contain criminal and administrative

---

<sup>31</sup> See *REDA*, *supra* note 25 at ss 2 and 82.

<sup>32</sup> RJ (Jack) Thrasher, “Canadian Oil Sands Development and Cross-Border Ventures” (2007) 53 Rocky Mtn Min L Inst 2-1 § 2.03[3].

<sup>33</sup> Alberta Environment and Sustainable Resource Development, “About Us”, online: <<http://environment.alberta.ca/01549.html>> (last accessed 21 February 2013).

<sup>34</sup> See Environmental Appeals Board, “Welcome”, online: Environmental Appeals Board <<http://www.eab.gov.ab.ca>> (last accessed 25 September 2012).

<sup>35</sup> SC 2009, c 14 [*EEA*]. The *EEA* is omnibus legislation that amends the fines, sentencing provisions and enforcement tools of six acts administered by Environment Canada and three acts administered by Parks Canada. It also creates the *Environmental Violations Administrative Monetary Penalties Act*. It introduces a new fine scheme that more accurately reflects the seriousness of environmental offences so as to “achieve greater compliance and respect for Federal Environmental legislation.” Environment Canada, “Canada’s Environmental Enforcement Act”, online: Environment Canada, <<http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=2AAFD90B-1>> (last accessed 19 November 2012).

<sup>36</sup> RSC 1985, c F-14.

<sup>37</sup> 1994, SC 1994, c 22.

<sup>38</sup> RSA 2000, c E-12 [*EPEA*].

<sup>39</sup> RSA 2000, c W-3.

sanctions for violations of environmental laws and regulations. They are the main enforcement tools for ensuring environmental compliance in Alberta.

### 3.0. The Nature of Environmental Offences

Environmental offences take multifarious forms. They include the illegal dumping of hazardous waste and discharge of toxic waste directly into public waters. Industrial operations can pollute the land and public water supplies, endanger public health, destroy property value and the ecosystem and often cause irreparable harm to the environment. Such offences can have detrimental consequences on provincial and national economies and ultimately the global economy, and negatively impact on future generations. For this reason they evoke public outrage and trigger calls for severe sanctions.

In Alberta, numerous environmental offences emanate from the activities of corporations in the oil and gas industry. These industries utilize substances deleterious to the environment especially if improperly handled. The corporations come in all sizes, from small firms to more powerful multinationals. In addition to corporations, other organizations, such as criminal combines as well as individuals, can commit environmental offences.<sup>40</sup>

Most environmental offences are classified as “regulatory offences”, or “quasi-crimes” that do not require proof of criminal intent. Discharges of pollutants are, for instance, generally regarded as regulatory or public welfare offences. Such offences are viewed as “less than truly criminal.”<sup>41</sup> In *R. v. Sault Ste. Marie (City)*, the Supreme Court of Canada affirmed that public welfare offences “are not criminal in any real sense but are prohibited in the public interest.”<sup>42</sup> Such offences are usually seen as an appendage to a larger regulatory framework rather than the main reason for the legislation. Their main purpose is not so much to punish the wrongful act or omission as it is to ensure compliance with the legislation and regulations. In substance, the offences are of a quasi-criminal nature even though they are enforced through the criminal justice process. They might well be regarded as a branch of administrative law admitting only of limited application of criminal law principles.<sup>43</sup> Among such offences are pollution, traffic law violations, liquor law violations, and sales of impure food.

---

<sup>40</sup> Yingyi Situ-Liu & David Emmons, *Environmental Crime: The Criminal Justice System’s Role in Protecting the Environment* (Thousand Oaks, CA: Sage Publications, 2000) at 3.

<sup>41</sup> Richard Hyde, “What is ‘Regulatory Crime’? — An Examination of Academic, Judicial and Legislative Concepts” (2012) 4 Web JCLI 1.

<sup>42</sup> [1978] 2 SCR 1299 at 1303 [*Sault Ste Marie*].

<sup>43</sup> *Ibid.*

Regulatory offences are generally regarded as “strict” or “absolute” liability offences. This is in sharp contrast to traditional crimes, where the presence of a guilty mind (*mens rea*), expressed in terms of intention or recklessness, is at their heart. The Supreme Court in *Sault Ste. Marie* used the term “true crimes” to characterize traditional crimes.<sup>44</sup> The case itself related to an environmental charge accusing the City of Sault Ste Marie of discharging or causing or permitting to be discharged or deposited, materials into or on the bank shore of the Cannon Creek and Rook River. One of the issues presented to the Court was the applicability of *mens rea* standards to regulatory offences. The Court held that in prosecuting strict liability offences, proof of *mens rea* is not required of the prosecution.<sup>45</sup> That is to say, the very doing of the prohibited act constitutes the offence. It was no explanation that the accused engaged in the prohibited conduct with the best volition.

Balancing the need to protect the public from hazardous activities with the moral principle that no one should be punished for conduct that was no fault of theirs is a ongoing conflict in the field of regulatory offences. In support of a strict liability standard, it is argued that protection of the public interest requires a high standard of care on the part of those who engage in certain kinds of activities that could have deleterious effects on the public. If people knew that ignorance or mistake is no excuse, they would be motivated to take all necessary precautionary measures to avoid harm to the public.<sup>46</sup> Administrative efficiency affords another support for a strict liability standard for regulatory offences. Given the difficulty of proving the existence of a guilty mind in such offences and the sheer number of cases that come before the courts on a daily basis, to require the prosecution to prove fault would be very time and cost consuming.<sup>47</sup> These cases could result in docket congestion that in turn causes delays in the administration of justice. It is believed that “the social ends to be achieved are of such importance as to override the unfortunate by product of punishing those who may be free of moral turpitude.”<sup>48</sup> It is also argued that minor penalties are usually imposed for such regulatory infractions and that conviction for such offences does not attract the level of stigma that true crimes attract.<sup>49</sup> In the words of Professor Francis Sayre,

It is fundamentally unsound to convict a defendant for a crime involving a substantial term of imprisonment without giving him the opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent. If the public danger is widespread and serious, the practical situation can be met by shifting to the shoulders of the defendant the

---

<sup>44</sup> *Ibid* at 1304.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid* at 1311.

<sup>47</sup> *Ibid* at 1312.

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid*.

burden of proving a lack of guilty intent. But the traditional requirement of a *mens rea* as a requisite for criminality still constitutes a necessary and important safeguard in criminal proceedings and, except in the case of public welfare offences involving light penalties, should be scrupulously maintained.<sup>50</sup>

It is however doubtful that this last justification still holds true today given the increasingly high penalties handed to persons, especially corporations, found guilty of environmental offences.<sup>51</sup> In Alberta the maximum daily fine for contravention of *EPEA* for a corporation is \$1 million per day. The increasing media attention given to environmental violations, such as we saw in the case against Syncrude, weakens the view that such violations do not attract equal stigma with true crimes.

On the contrary, it is argued that strict liability violates a fundamental principle of criminal liability, the guilty mind. In a 1974 study of strict criminal liability, the Canadian Law Reform Commission concluded that “[o]n grounds of morality and justice, strict liability is intolerable. On grounds of practicability, it is essential.”<sup>52</sup> Jerome Hall regarded strict liability as an unjustifiable extension of legal liability, and would prefer a “separate code of ‘civil offenses’ requiring negligence and tried by administrative tribunals or civil courts”.<sup>53</sup> The claim that a high standard of care and attention results from criminal liability has also been challenged as empirically unfounded.<sup>54</sup> It has also been argued that the claim that the public interest is engaged by public welfare offences somewhat suggests that true crimes do not engage the public interest.<sup>55</sup> It has equally been asked in refutation: “If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach?”<sup>56</sup>

The Supreme Court of Canada, however, pointed out in *Sault Ste. Marie* that in between strict liability and *mens rea* offences, there is a distinct world of offences. As Glanville Williams has expressed it, “[t]here is a half-way house between *mens rea* and strict responsibility which has not yet been properly utilized, and that is responsibility for

---

<sup>50</sup> Francis Bowes Sayre, “Public Welfare Offences” (1933) 33:1 Colum L Rev 55 at 82-83.

<sup>51</sup> *EPEA*, *supra* note 38 at ss 228(1)(b) and 231.

<sup>52</sup> Law Reform Commission of Canada, *Studies in Strict Liability* (Ottawa: Information Canada, 1974) at 144 (stating at 11 that “whether or not strict liability should have any place in the criminal law, the law must be clarified so as to make it plain whether any given offence is one of strict liability”).

<sup>53</sup> Jerome Hall, *General Principles of Criminal Law*, 2<sup>nd</sup> ed (Indianapolis: Bobbs-Merrill, 1960) at 359.

<sup>54</sup> See *Sault Ste Marie*, *supra* note 42 at 1312.

<sup>55</sup> *Ibid* at 1313.

<sup>56</sup> Sayre, *supra* note 50.

negligence.”<sup>57</sup> The Court pointed out that this half-way is occupied by “public welfare offences (within which category pollution offences fall)”.<sup>58</sup>

There are thus three categories of offences: (1) offences in which the prosecution must prove *mens rea*; (2) offences in which the prosecution is not required to prove *mens rea*, but in which the defence would avoid liability by proving that he took reasonable care to avoid the conduct amounting to the offence (the due diligence defence); and (3) offences of absolute liability that permit of no defence whatsoever once the *actus reus* is established.<sup>59</sup>

Public welfare offences, among which are environmental offences, *prima facie* fall under the second category. They would fall under the first category only where words like “willfully”, “with intent”, “knowledge” or “intentionally” are used in creating the offence.<sup>60</sup> In the absence of any of these words, and once the defence sets up the due diligence defence, the court considers what a reasonable person in the defendant’s shoes would have done. Liability will not lie where the defence “reasonably believed in a mistaken set of facts” which, were it true, would render the conduct innocent, or where he took all reasonable measures to avoid the conduct complained of.<sup>61</sup>

Since the due diligence defence is available to the defence in public welfare offences, there can be no liability without fault in respect of environmental offences. However, it is not the duty of the prosecution to prove fault, but that of the defence to establish, on a balance of probability, the absence of fault in order to avoid liability.<sup>62</sup> For this reason, such offences are still loosely regarded as “strict liability” offences.<sup>63</sup>

The Court in *Sault Ste. Marie* followed the recommendations of the Law Reform Commission of Canada to the Minister of Justice in March 1976, wherein the Commission advised that (i) every offence outside the *Criminal Code* should be regarded as admitting a defence of due diligence; (ii) where intent or recklessness is not explicitly

---

<sup>57</sup> Glanville L Williams, *Criminal Law: The General Part*, 2<sup>nd</sup> ed (London: Stevens & Sons, 1961) at 262.

<sup>58</sup> *Sault Ste Marie*, *supra* note 42 at 1313.

<sup>59</sup> *Ibid* at 1327.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid*.

<sup>62</sup> *Ibid*.

<sup>63</sup> Hyde has argued that strict liability is “a tendency shared by many regulatory offences” rather than an absolute feature of every regulatory offence. Hyde, *supra* note 41 at 4.

required, the burden of proof should be on the defendant to establish such a defence; and that (iii) such a defence should be established on a balance of probabilities.<sup>64</sup>

The due diligence defence in environmental cases is now codified under section 229 of the *EPEA*: “No person shall be convicted of an offence under section 61, 67, 75, 76, 79, 88, 108(2), 109(2), 110(1) or (2), 111, 112, 137, 148, 149, 155, 157, 163, 169, 170, 173, 176, 188, 191, 192, 209, 227(b), (c), (e), (g) or (i) or 251 if that person establishes on a balance of probabilities that the person took all reasonable steps to prevent its commission.” The offences under these sections range from reporting violations to exceeding emission limits and sundry other offences. It has also been codified under section 24 of the *Dangerous Goods Transportation and Handling Act*: “Except where section 14 applies, it is a defence to a charge under any provision of this Act for the accused to establish that it took all reasonable measures to comply with that provision or with this Act generally.”<sup>65</sup>

In sum, environmental offences are a special category of offences that generally are neither strict liability nor require fault on the part of the accused. However, the accused can escape liability upon demonstrating due diligence.

## 4.0. The Environmental Enforcement Techniques in Alberta

It has been said that Alberta’s environmental protection standards are among the most stringent in the world.<sup>66</sup> A look at Alberta’s enforcement culture reveals that its techniques towards accountability for environmental violations take one of four forms: administrative penalties, warnings, orders and criminal prosecution. Of these, attention will be focused mainly on criminal prosecution since it is the one that attracts the severest penalty and public attention.

### 4.1. Administrative Penalties

Administrative penalties are monetary penalties assessed and imposed by an environmental regulator without prior recourse to a court or other tribunal. The system allows offences to be dealt with through an administrative process rather than the normal court system. The main reason for introducing administrative penalties is to address cases

---

<sup>64</sup> Law Reform Commission of Canada, *supra* note 52 at 32.

<sup>65</sup> *Dangerous Goods Transportation and Handling Act*, SA 1998, c D-3.5.

<sup>66</sup> Alberta J Hudec & Joni R Paulus, “Current Environmental Regulation of the Alberta Oil and Gas Industry and Emerging Issues” (1990) 28 *Alta L Rev* 171 at 173.



of minor infractions where the environmental impact is minimal. Administrative penalties are viewed as a more appropriate, fairer, faster and cheaper way of dealing with such cases.<sup>67</sup> Apart from allowing penalties to be imposed without recourse to courts or other tribunals, the administrative penalty system also differs from a prosecution and judicially imposed civil penalties in that it has a lower penalty ceiling than the latter.<sup>68</sup> In addition, conviction is not registered in relation to a person on whom administrative penalties have been imposed.<sup>69</sup> Like the judicial process, however, parties are given the opportunity to present their position to the regulator before a decision is reached on the amount of the penalty. The regulator also informs the parties about the penalty assessment process.<sup>70</sup> It is believed that administrative penalties offer an effective means to deter minor offences as they are easier to impose because the standard of proof is on a balance of probabilities. Empirical studies also show that the rate of appeal of administrative penalties is very low compared to court decisions.<sup>71</sup> Although administrative penalties are usually less than criminal sanctions, deterrence theory shows that certainty of punishment is more effective than severity of punishment.<sup>72</sup> The administrative penalty approach has been adopted by other provinces including British Columbia, New Brunswick, Newfoundland, Nova Scotia, Ontario and Saskatchewan.

In Alberta, administrative penalties were introduced in 1995 following the passage of *EPEA*. Sections 237 and 238 of the Act, together with the *Administrative Penalty*

---

<sup>67</sup> LeRoy C Paddock, “Environmental Enforcement at the Turn of the Century” (1991) 21 *Env’t L* 1509 at 1518; Law Reform Commission of Saskatchewan, “Administrative Penalties Consultation Paper” (June 2009) at 3, online: Law Reform Commission of Saskatchewan <<http://www.lawreformcommission.sk.ca/adminpens.pdf>> (last accessed 26 September 2012); Jillian Flett, “Administering Environmental Administrative Penalties: Alberta’s Experience” (2000) 15:1 *News Brief*, online: Environmental Law Centre <<http://www.elc.ab.ca/pages/Publications/PreviousIssue.aspx?id=438>> (last accessed 26 September 2012).

<sup>68</sup> Paddock, *ibid.*

<sup>69</sup> Law Reform Commission of Saskatchewan, *supra* note 67.

<sup>70</sup> Flett, *supra* note 67.

<sup>71</sup> Chris Rolfe, “Administrative Monetary Penalties: A Tool for Ensuring Compliance” (Paper delivered at the Canadian Council of Ministers of Environmental Workshop on Economic Instruments, 24 January 1997), online: West Coast Environmental Law Association <<http://wcel.org/sites/default/files/publications/AdministrativeMonetaryPenalties.txt>> (last accessed 26 September 2012).

<sup>72</sup> Environment Canada, *Administrative Monetary Penalties: Their Potential Use in CEPA*, Reviewing CEPA: The Issues Report #14 (Ottawa: Environmental Protection Service, 1994), cited in Rolfe, *ibid.* See also Rolfe, *ibid.* (arguing that “[a] violation is more likely to lead to a penalty in [a monetary penalty] system than a traditional criminal court system, both because [monetary penalties] are more frequently used and less frequently appealed. Also, because of differences in the rules of evidence, the use of the ‘balance of probabilities’ test for liability and the removal of the due diligence defence, the chances of penalty imposition are usually assumed to be greater for [monetary penalties].”).

*Regulation (APR)*<sup>73</sup> made pursuant thereto, provide for the use of administrative penalties. Section 237(1) of the Act sets out the general framework:

Where the Director [designated for administering administrative penalties] is of the opinion that a person has contravened a provision of this Act that is specified for the purposes of this section in the regulations, the Director may, subject to the regulations, by notice in writing given to that person require that person to pay to the Government an administrative penalty in the amount set out in the notice for each contravention.

The *APR* sets out in its Schedule the infractions for which an administrative penalty may be issued. They include:

- 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 amount permitted under a regulation or authorization;
- Operating an activity in breach of process requirements specified in a regulation or authorization;
- Failure to report the contravention of an approval condition or limit; and/or
- Late submission of a required report (e.g. monthly or annual emissions report).<sup>74</sup>

The above list indicates that administrative penalties are used for relatively minor contraventions that have minimal environmental impacts or for contraventions that are forerunners to other contraventions that have an actual impact on the environment. As ESRD puts it, “[a]dministrative penalties are most appropriate for contraventions that are more serious than those for warning letters, but less serious than those that are prosecuted.”<sup>75</sup>

Under section 237(3) of the *EPEA*, a violator subjected to an administrative penalty may not be charged with an offence in respect of that contravention. It follows that

---

<sup>73</sup> Alta Reg 23/2003 [*APR*].

<sup>74</sup> *Ibid*, s 2(1) and the Schedule thereto. These infractions are contained in various provisions of the *EPEA*: ss 61, 67(1), 75(1), 76, 79, 83.1, 88.1, 88.2, 108(2), 109(2), 110(1), 111-112, 137-138, 148-149, 155, 157, 163(1) and (3), 169-170, 176, 178, 179(1)-(2), 180-182, 188(1), 191-192, 209, 227(b)-(c), (e), (g), (i) and 251.

<sup>75</sup> Government of Alberta, “Administrative Penalties: Facts at Your Finger Tips”, online: Government of Alberta <<http://environment.alberta.ca/documents/Administrative-Penalties.pdf>> (last accessed 21 February 2013).

administrative penalties and quasi-criminal prosecutions cannot go hand in glove in relation to the same infraction.

The procedure for issuing administrative penalties is as follows: After the Compliance Manager has done a preliminary assessment of the penalty, he/she sends a written notice to the party alleged to have committed the infractions. The notice must contain the particulars of the contravention, the amount of the administrative penalty, the date by which it is to be paid, and the availability of a right of appeal.<sup>76</sup> This notice gives the party an opportunity to cause the Compliance Manager to review the administrative penalty and the facts on which it is based. The party may present information he/she considers relevant to the alleged infraction and the assessment. If, after consideration of the party's presentation, the Compliance Manager finds that an administrative penalty is required, he/she makes a final assessment of the penalty and sends a notice to that effect to the party.<sup>77</sup> Regulation 4 of the *APR* requires that the penalty be paid within 30 days. The maximum penalty payable is \$5000 for each contravention or for each day or part of a day the contravention occurs or continues to occur.<sup>78</sup> The lowest penalty is \$1,000.<sup>79</sup> The factors that determine the actual penalty to be imposed include: the importance of compliance to the regulatory scheme, the degree of willfulness or negligence in the infraction, whether any mitigating steps were taken by the party, whether the party has taken any steps to prevent future occurrence of the infraction, whether the party has a history of non-compliance, whether the party benefited economically from the infraction, and any other factors the Compliance Director considers relevant.<sup>80</sup> Lastly, as already hinted at, the administrative penalty is appealable, and under the current regime an appeal can go to the Environmental Appeal Board;<sup>81</sup> however, when *REDA* comes into force, appeals, described thereunder as "regulatory appeals", shall go to the Regulator.<sup>82</sup> The Regulator shall conduct the decision appeal with or without a hearing and make final determinations regarding the administrative penalty.<sup>83</sup>

Since the introduction of administrative penalties in Alberta in 1995, there has been no noticeable drop in the number of criminal prosecutions. On the contrary, prosecution has been on the increase. This suggests that administrative penalties did replace prosecutions, but to complement it. In 2000, the Environmental Law Centre reported that

---

<sup>76</sup> *APR*, *supra* note 73, s 2(2).

<sup>77</sup> *ESRD*, *supra* note 75.

<sup>78</sup> *APR*, *supra* note 73 at ss 3(1) and (3).

<sup>79</sup> *Ibid*, s 3(1).

<sup>80</sup> *Ibid*, s 3(2).

<sup>81</sup> *Ibid*, s 2(2)(d).

<sup>82</sup> *REDA*, *supra* note 25 at ss 36-38.

<sup>83</sup> *Ibid* at s 40.

in the first five years of the introduction of administrative penalties, there was an increase in criminal prosecutions of environmental offences, with the number of charges under the *EPEA* being 391, resulting in over \$1.9 million in fines. During the same period, 112 administrative penalties were issued, resulting in penalties more than \$645,000.<sup>84</sup> However, ESRD's compliance assessment report shows that within the last five years, administrative penalties have been issued 91 times. This indicates a drop in the number of administrative penalties issued. It is difficult to discern from the report how many of the penalties are related to the oil sands, however a few are obvious. In 2009 two were issued against Suncor Energy Inc and one was issued against Compass Group Ltd.<sup>85</sup> The latest ESRD enforcement report released in November 2012 shows that between July 1, 2012 and September 30, 2012, five administrative penalties were issued, including one oil sands-related penalty against Syncrude Canada for the failure to report the release of hydrogen sulphide and ammonia on July 9, 2010.<sup>86</sup> Since it is difficult to discern the number of administrative penalties relating to the oil sands, one cannot deny, based on this recent report, that there is an increase in oil sands-related administrative penalties.

## 4.2. Warnings

Warning letters are issued to companies and individuals that contravened provisions of an environmental statute or regulation. The letter forms part of the compliance history of the company or individual and is taken into account if a contravention occurs in the future. Such warnings are issued for minor contraventions and are normally issued to first-time offenders. They are designed to prompt compliance by the company or individual to whom they are issued.<sup>87</sup>

A review of Alberta's environmental enforcement reports shows that between January 2008 and November 2012, 234 warnings were issued, including one against Suncor Energy Inc in 2009 related to the oil sands. The report shows that warnings are the most frequently used environmental enforcement tool in Alberta, at least within the five-year period reviewed.

---

<sup>84</sup> Flett, *supra* note 67.

<sup>85</sup> See the table at 21 *infra*.

<sup>86</sup> Government of Alberta, *Enforcement of the Environmental Protection and Enhancement Act and the Water Act: 1 July 2012-30 September 2012* (November 2012), online: ESRD <<http://environment.gov.ab.ca/info/library/8706.pdf>> (last accessed 5 December 2012).

<sup>87</sup> Alberta Environment, "Compliance Assurance Program" [nd], online: Government of Alberta <<https://external.sp.environment.gov.ab.ca/DocArc/compliance/ComplianceReports/ComplianceProgramBrochure-other.pdf>> (last accessed 30 October 2012).

### 4.3. Orders

Orders are issued when instant action is needed to avert or halt an adverse environmental effect. Three types of orders are issued in Alberta: (1) environmental protection orders; (2) water management orders; and (3) enforcement orders. Whereas environmental protection orders are issued with regard to contraventions under the *EPEA*, water management orders are issued with regard to contraventions under the *Water Act*. Enforcement orders are issued to compel a party to take steps to remedy an environmental contravention and, where appropriate, to require the party to take actions to prevent future contraventions.<sup>88</sup> Enforcement orders can be issued under both the *EPEA* and the *Water Act*.

Orders are a common environmental enforcement tool in Alberta. Within the past five years, about 231 orders have been issued.<sup>89</sup> These include 34 enforcement orders, 192 environmental protection orders and five environmental management orders.<sup>90</sup> It is, again, however not clear from the annual compliance report of the ESRD how many of these orders are related to environmental contraventions in the oil sands.

### 4.4. Criminal Prosecutions

Although both the Canadian Parliament and Alberta's Provincial Legislature have routinely included criminal sanctions in each of the major environmental laws they have enacted, their criminal enforcement programs remained essentially inactive until the past decade. There certainly had been instances of criminal prosecution, but its use was rather unsystematic. The Alberta Government devoted its resources principally to defending its implementation of its statutory obligations under the various environmental laws against legal challenges by the environmental community.

In recent years, however, there has been an attempt to change the enforcement culture in Alberta from prosecution-as-a-last-resort enforcement tool to prosecution-as-an-enforcement tool. The province's annual assessment enforcement reports show that between 2008 and 2012, 51 environmental prosecutions have been concluded.<sup>91</sup> While it is not clear from the reports how many of the prosecutions related to the oil sands, at least six oil sands-related prosecutions are obvious: one against Syncrude, four against Suncor Energy and one against Compass Group Ltd. The most remarkable of them was the prosecution of Syncrude.<sup>92</sup> The case arose from the death in April 2008 of about 1600

---

<sup>88</sup> *Ibid.*

<sup>89</sup> See the table at 21 *infra*.

<sup>90</sup> *Ibid.*

<sup>91</sup> See the table at 21 *infra*.

<sup>92</sup> *R v Syncrude Canada Ltd*, 2010 ABPC 229 [*Syncrude*].

birds on an oil sands tailings pond operated by Syncrude Canada along the Athabasca River, north of Fort McMurray. The river was on a pathway travelled by migratory birds. Influences like weather or fatigue can cause migratory birds to find a resting place and a tailings pond located under the birds' flyway is attractive to the birds, especially in early spring as the warm bitumen in the pond prevents snow from settling on the pond.<sup>93</sup> Unsuspecting birds that presumably sought rest on the ponds were trapped in the oily water. A concerned individual telephoned Todd Powell, the Senior Wildlife Biologist for the Government of Alberta regarding a number of birds that had landed on Syncrude Canada's Aurora Settling Basin. An investigation that ensued revealed that hundreds of migratory birds were trapped in bitumen on the surface of the basin. Nearly all the birds were dead. Although Syncrude had bird deterrence systems, such as sound cannons, those mechanisms evidently proved ineffective. They were not functioning. Jeh Custer of the Sierra Club of Canada commenced a private prosecution of Syncrude, and the prosecution was eventually taken over by the Crown when Provincial authorities charged Syncrude in 2009 with contravening section 155 of the *EPEA*. Federal charges were also brought against Syncrude under section 5.1 of the *Migratory Birds Convention Act*.<sup>94</sup> Syncrude plead not guilty to all the charges and a trial that lasted for eight weeks ensued. The trial was focused largely on whether Syncrude did enough to deter the birds from landing on the tailings pond.

Section 155 of the *EPEA* reads: "A person who keeps, stores or transports a hazardous substance or pesticide shall do so in a manner that ensures that the hazardous substance or pesticide does not directly or indirectly come into contact with or contaminate any animals, plants, food or drink." Section 5.1 of the *Migratory Birds Convention Act* reads: "No person or vessel shall deposit a substance that is harmful to migratory birds, or permit such a substance to be deposited, in waters or an area frequented by migratory birds or in a place from which the substance may enter such waters or such an area."

The Alberta Provincial Court found that Syncrude had deposited bitumen on its Aurora tailings pond; that bitumen is toxic to birds, bringing bitumen under the definition of hazardous substances under the statutes; that the pond was located on the flyway of the migratory birds; that the pond was in an area frequented by birds; and that bitumen "came into contact with" the birds.<sup>95</sup> Syncrude's argument was that the expression "come into contact with" used under section 155 of the *EPEA* requires that the bitumen come to the birds, and not the birds to the bitumen. In effect, when the birds fly to the bitumen, the section does not apply. The court rejected this argument on the basis that such an

---

<sup>93</sup> Shaun Fluker, "R v Syncrude Canada: A Clash of Bitumen and Birds" (2011) 49:1 Alta L Rev 237 at 237.

<sup>94</sup> *Syncrude*, supra note 90 at para 1.

<sup>95</sup> *Ibid* at paras 84-96.

interpretation would defeat the purpose of the statute, which is to protect the environment.

Syncrude also raised a number of other defences, including due diligence, impossibility, Act of God, abuse of process, and *de minimus*.<sup>96</sup> On the due diligence defence, the issue was whether Syncrude took all reasonable steps to prevent the death of the birds. The court reviewed Syncrude's efforts to prevent the birds from landing on the ponds, other alternatives available to Syncrude, the prevailing industry standards in deterring migratory birds from landing on such ponds, the reasonable foreseeability of the circumstances leading to the landing of the birds on the ponds, the complexity of the circumstance, economic considerations, and the gravity of the offence. The court received evidence of what a minimum bird deterrence measure would be like, evidence of a decline in Syncrude's bird deterrence measures, as well as evidence that the sound cannon measures, which were Syncrude's deterrence mechanism, were not functioning at the tailings pond at the time of the incident.<sup>97</sup> On these facts, the court held that Syncrude was unsuccessful with its due diligence defence.<sup>98</sup>

The abuse of process defence was predicated on the argument that a party which conducts an activity authorized by the appropriate regulatory body cannot be prosecuted for such conduct. Syncrude argued that it had complied with the terms of its regulatory license to operate the tailings pond and that its conviction from the death of the birds must rest on a finding that it did not comply with the terms of its licence.<sup>99</sup>

The test for abuse of process was described by the Supreme Court of Canada in *R v Jewitt*<sup>100</sup> in which the court adopted the following words of the Ontario Court of Appeal in *R. v. Young*:<sup>101</sup> "there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings".<sup>102</sup> In *Abitibi Paper Company Limited and the Queen*,<sup>103</sup> the Ontario Court of Appeal ruled that in a regulatory context, where due to representations by a senior government official, the accused reasonably believed that if it took certain remedial action by a specified date

---

<sup>96</sup> *Ibid* at para 50.

<sup>97</sup> *Ibid* at paras 20-34.

<sup>98</sup> *Ibid* at para 128.

<sup>99</sup> *Ibid* at para 142.

<sup>100</sup> [1985] 2 SCR 128 [*Jewitt*].

<sup>101</sup> (1984), 40 CR (3d) 289.

<sup>102</sup> *Jewitt*, *supra* note 98 at 136-137.

<sup>103</sup> (1979), 24 OR (2d) 742 (Ont CA).

there would be no prosecution and the accused acted within that specified time, prosecution of the accused for not acting earlier would be an abuse of process. In *R. v. Boise Cascade Canada Ltd.*,<sup>104</sup> the Ontario Court of Appeal again held that the permit issued to the accused to build roads and construct water crossings did not give the accused a licence to pollute or shield it against liability for poor construction that caused excessive deposits of sediments.<sup>105</sup>

The Alberta Provincial Court in *Syncrude* considered the above decision and other cases and ruled that the abuse of process defence was not available to Syncrude. It stated that there was nothing in the licences and approvals granted to Syncrude which indicated that if Syncrude simply complied with the terms of its licences and approvals, its bird deterrent programs would be deemed as evidence of due diligence.<sup>106</sup> The court also considered the *de minimis* defence and ruled that Syncrude's failure to take reasonable steps to deter migratory waterfowl from landing on its tailings pond "was not at all trivial."<sup>107</sup> It found Syncrude guilty as charged and accepted the terms of a sentencing agreement agreed to by Syncrude and the provincial and federal prosecutors.

The sentence included a \$300,000 fine under the federal charge and a \$500,000 fine under the provincial charge. The balance was based on creative sentencing (discussed later). On the whole, Syncrude paid \$3 million dollars. While opinions defer as to whether this is the largest environmental penalty ever imposed in Canada,<sup>108</sup> it certainly is on the upper end and mirrors the current sentencing trend in Canada.

Both the Governments of Canada and Alberta have expressed satisfaction with the verdict and sentence. In his response to the verdict, federal Environment Minister Jim Prentice stated "[w]hat happened with the duck incident in the oilsands was completely unacceptable, it was an embarrassment to Canada when it took place, and so, the severity of the fine really reflects that."<sup>109</sup> Alberta Energy Minister Ron Liepert stated: "This whole process ... shows that if there is a breach of an environmental regulation or

---

<sup>104</sup> (1995), 24 OR (3d) 483.

<sup>105</sup> *Ibid* at para 23.

<sup>106</sup> *Syncrude*, *supra* note 90 at para 150.

<sup>107</sup> *Ibid* at para 165.

<sup>108</sup> See Jefferies Cameron, "Unconventional Bridges Over Troubled Water — Lessons to be Learned from the Canadian Oil Sands as the United States Moves to Develop the Natural Gas of the Marcellus Shale Play" (2012) 33 Energy LJ 75 at 89-90, footnote 115 (calling this the largest environmental fine in Canada). Nicholas Hughes, "Syncrude — \$3 Million Creative Sentence" (29 October 2010), online: McCarthy Tetrault <[http://www.mccarthy.ca/article\\_detail.aspx?id=5142](http://www.mccarthy.ca/article_detail.aspx?id=5142)> (last accessed 1 December 2012) (stating that this is not the largest penalty ever imposed in Canada for an environmental offence).

<sup>109</sup> CBC News, "Syncrude to pay \$3M penalty for duck deaths" (22 October 2010), online: CBC <<http://www.cbc.ca/news/canada/edmonton/story/2010/10/22/edmonton-syncrude-dead-ducks-sentencing.html>> (last accessed 28 September 2012).



legislation, that we are prepared to take action. We did and the process unfolded and this is the culmination of it.”<sup>110</sup> Greenpeace campaigner Mike Hudema, however, viewed the sentence as “a slap on the wrist” of a multi-billion dollar company.<sup>111</sup> He would have preferred a levy on each duck that perished in the tailings pond.<sup>112</sup>

Suncor Energy Inc. has been the subject of several oil sands prosecutions in connection with its operations in Fort McMurray. In one case, Suncor’s offence arose from the failure to install pollution abatement equipment and the failure to provide information to ESRD in relation to Suncor’s Firebag facility near Fort McMurray. Its Firebag facility is an in-situ bitumen extraction project, using steam injection to recover bitumen from the oil sands. Suncor had failed to install the pollution control equipment in 2006, a requirement contained in the approval issued it for oil production. Subsequent investigations by ESRD revealed that Suncor failed to make this failure to install the equipment known to ESRD. Although no discernible environmental or public health effects arose from Suncor’s conduct, the failure to observe the terms of the approval issued it, as well as the failure to report the failure to observe them, was a violation of section 227 of *EPEA*.

Another prosecution involved Suncor and its camp operator Compass Group Canada Ltd. from offences that occurred between September 10, 2005 and January 1, 2007 at Suncor’s Millennium Lodge near Fort McMurray. In February 2006, Alberta Environment launched an investigation in response to reports of non-compliance at Suncor’s wastewater facilities. The investigations revealed falsification of information and mismanagement of the Millennium Lodge and another facility, resulting in the release of an unknown amount of partially-treated wastewater into the Athabasca River. While further investigation and monitoring determined there was no discernible environmental impact and no risk to public health, and while the investigations did not show that Suncor and Compass Group were aware of the false information — R & D McCabe, a subcontractor hired by Compass Group had orchestrated the false information. A number of violations of monthly limits for Total Suspended Solids and the failure to report those violations were apparent, in contravention of section 227 of the *EPEA*. The subcontractor plead guilty to the offence. Suncor was penalized for failing to properly supervise the Compass Group (its camp operator) and was fined \$175,000 while the Compass Group was fined \$225,000.<sup>113</sup>

---

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> Government of Alberta, Information Bulletin, “Suncor and Compass Group penalized for environmental violations at wastewater facility” (2 April 2009), online: Government of Alberta <<http://alberta.ca/acn/200904/2563667F539E3-01B1-2B2C-218356AB51447128.html>> (last accessed 8 November 2012).

**Alberta's Environmental Enforcement History over a  
Five-Year Period: 2008-2012<sup>114</sup>**

|              | Administrative<br>Penalties | Enforcement<br>Orders | Environmental<br>Protection<br>Orders | Prosecutions | Warning<br>Letters<br>and Field<br>Warnings | Water<br>Management<br>Orders | <b>Total</b> |
|--------------|-----------------------------|-----------------------|---------------------------------------|--------------|---|-------------------------------|--------------|
| 2012         | 15                          | 5                     | 53                                    | 3            | 37  | 2                             | <b>115</b>   |
| 2011         | 11                          | 4                     | 50                                    | 11           | 54  | 0                             | <b>130</b>   |
| 2010         | 30                          | 6                     | 65                                    | 16           | 43  | 0                             | <b>160</b>   |
| 2009         | 23                          | 8                     | 10                                    | 17           | 65  | 3                             | <b>126</b>   |
| 2008         | 12                          | 11                    | 14                                    | 4            | 64  | 0                             | <b>105</b>   |
| <b>Total</b> | <b>91</b>                   | <b>34</b>             | <b>192</b>                            | <b>51</b>    | <b>243</b>                                  | <b>5</b>                      | <b>616</b>   |

## 5.0. Sentencing in Environmental Cases

Alberta's environmental enforcement policy and law incorporates the polluter pays principle, as outlined in the purposes section of the *EPEA*.<sup>115</sup> In 1985, the Law Reform Commission of Canada published *Sentencing in Environmental Cases*<sup>116</sup> wherein it reviewed existing sentencing principles in Canada and called for reforms that would provide more effective sanctions. It enumerated the following five mutually inclusive principles: protection of the public, retribution or punishment, rehabilitation and reform, deterrence, and the extent of potential and actual damage.<sup>117</sup> The report affirmed the paramountcy of societal values in environmental cases and opined that this "supports the use of strong deterrents and punishments even in the absence of serious harm to individuals or the environment."<sup>118</sup> It states that retribution is central to sentencing in that

---

<sup>114</sup> The table consists of cases that have been concluded. Especially for 2012, many cases are still pending. The total of the Enforcement Orders and Environmental Protection Orders includes, respectively, Amended Enforcement Orders and Amended Environmental Protection Orders. These data were gathered from the ESRD's Annual and Quarterly Reports of Compliance Assessment Enforcement Reports available at <<http://environment.alberta.ca/01292.html>> (last accessed 6 December 2012). This information contained in this table is as it is by 10 December 2012.

<sup>115</sup> The purpose of the Act is contained in section 2. Section 2(i) speaks to "the responsibility of polluters to pay for the costs of their actions."

<sup>116</sup> John Swaigen & Gail Bunt, *Sentencing in Environmental Cases* (Ottawa: Law Reform Commission of Canada, 1985).

<sup>117</sup> *Ibid* at 10-21.

<sup>118</sup> *Ibid* at 9.

“a sentence must be an expression of society's repudiation of certain kinds of conduct.”<sup>119</sup> If deterrence were the only consideration in sentencing, the report observes that administrative mechanisms might just be enough.<sup>120</sup> The report, however, downplays the significance of rehabilitation (“in the sense of treatment, psychological insight, or changing motivation”) in environmental sentencing, and regards deterrence, rather than rehabilitation as the goal.<sup>121</sup> Lastly, the report suggests that the court should take into account the extent of harm to the common good, the consequences of the harm for those within proximity, and the costs borne by the public.<sup>122</sup>

In 2009, the federal Parliament indicated its intention to increase penalties available for environmental offences by passing the *EEA*.<sup>123</sup> During the legislative process that resulted in the enactment of the Act, Environment Canada took the view that the existing fines in many environmental statutes were dated and that the lack of a minimum fine structure led courts to impose fines that were too low “to act as a strong deterrent or to express public denunciation of environmental infractions.”<sup>124</sup> The government noted that corporate offenders might view low fines as part of the cost of doing business and that higher fines would reflect the egregiousness of environmental offences.<sup>125</sup>

Similarly, the trend in Alberta is towards increased sanctions for environmental offences. A 2011 survey showed a significant increase in total penalties issued for prosecutions between 2000 and 2010.<sup>126</sup> While the increase was not uninterrupted, it is clear that the general trend reflects increased penalties. In most cases, however, the cases proceed on the basis of a plea bargain under which an offender pleads guilty and there is a joint submission by the offender and the Crown on the appropriate sanction. Usually, the court accepts the plea bargain and the joint submission. It issues its decision without giving reasons that explain the basis for the sanctions imposed. This was the case in the *Suncor* prosecution. In some other cases that are fought through to the end, after the

---

<sup>119</sup> *Ibid* at 10.

<sup>120</sup> *Ibid* at 11.

<sup>121</sup> *Ibid* at 12-13.

<sup>122</sup> *Ibid* at 17-21.

<sup>123</sup> *Supra* note 35.

<sup>124</sup> Environment Canada, “Backgrounder — Environmental Enforcement Bill: New Penalties and Sentencing Provisions” (4 March 2009), online: Environment Canada <<http://www.ec.gc.ca/default.asp?lang=en&n=714D9AAE-1&news=20D9CEF0-0991-4A6F-A12E-FC132BDF06CA>> (last accessed 25 September 2012).

<sup>125</sup> *Ibid*.

<sup>126</sup> Stuart Chambers & Lisa Semenchuk, “Trends in Alberta Environmental Enforcement: Fines, Fowl and Finger-Pointing” (Paper delivered at the 2011 Annual National Environment, Energy and Resources Law Summit — Water and the Law: Allocation, Trade, Use and Protection, Banff, 7-9 April 2011) at 5, online: Canadian Bar Association <[http://www.cba.org/cba/cle/PDF/ENV11\\_SemenchukChambers\\_Paper.pdf](http://www.cba.org/cba/cle/PDF/ENV11_SemenchukChambers_Paper.pdf)> (last accessed 1 December 2012).

offender has been judged guilty, the offender and the Crown agree on the appropriate penalty and file a joint submission on sentencing. Again, the court usually accepts the joint submission and issues its sentencing decision without explaining the principles that guide the determination of the penalty. The *Syncrude* case offers an example of this. However, because of the absence of a detailed ruling that considers the myriad of factors that govern sentencing, these cases do not advance the jurisprudence on sentencing. Unless one knows what factors the Crown and the offender considered in arriving at the terms — how much of that information the Crown and the offender will agree to divulge remains in doubt — the cases have little precedential value. But even if the Crown and the offender agree to divulge the principles considered, that would not constitute a precedent.

## **5.1. Statutory Framework for Sentencing in Environmental Cases**

### **5.1.1. Penalty Provisions**

The penalty provisions of most provincial and federal environmental statutes are wide-ranging. The following penalty provisions in *EPEA* allow the court to make an order to any of the following effects, having regard to the nature of the offence and the circumstances surrounding its commission:

- (a) prohibiting the offender from doing anything that may result in the continuation or repetition of the offence;
- (b) directing the offender to take any action the court considers appropriate to remedy or prevent any harm to the environment that results or may result from the act or omission that constituted the offence;
- (c) directing the offender to publish, in the prescribed manner and at the offender's expense, the facts relating to the conviction;
- (d) directing the offender to notify any person aggrieved or affected by the offender's conduct of the facts relating to the conviction, in the prescribed manner and at the offender's expense;
- (e) directing the offender to post a bond or pay money into court in an amount that will ensure compliance with any order made pursuant to this section;
- (f) on application to the court by the Minister made within 3 years after the date of conviction, directing the offender to submit to the Minister any information with respect to the conduct of the offender that the court considers appropriate in the circumstances;
- (g) directing the offender to compensate the Minister, in whole or in part, for the expense of any remedial or preventive action that was carried out or caused to be carried out by the Government and was made necessary by the act or omission that constituted the offence;

- (h) directing the offender to perform community service;
- (i) requiring the offender to comply with any other conditions the court considers appropriate in the circumstances for securing the offender's good conduct and for preventing the offender from repeating the same offence or committing other offences.<sup>127</sup>

The above provisions are identical with the provisions of section 148 of the Alberta *Water Act*. In certain cases involving individual offenders, imprisonment is an option.<sup>128</sup>

Various provisions of *EPEA* provide fine limits for various offences. The limits vary, depending on whether the case involves an individual offender or a corporate offender. For instance, a person who contravenes an environmental protection order is liable to a fine not exceeding \$50,000 if that person is an individual, and \$1 million per day if that person is a corporation.<sup>129</sup> Where the offender acquired monetary benefits from the commission of the offence, the court may order the offender to pay, in addition to the fine prescribed under section 228, a fine equal to the court's estimate of the amount of monetary benefit that accrued to the offender.<sup>130</sup>

Traditionally, fines are given as "just deserts" to the offenders for the environmental harm they have caused. The idea behind the just desert model is to fit the punishment to the crime.<sup>131</sup> But it is becoming increasingly common lately for courts to impose "creative sentences" either alone or in combination with other forms of sentences, but most often in combination with other sentencing options. Rather than having the fines paid into government coffers, they are channeled to some cause beneficial to the community or to society as a whole. Among the principles underlying creative sentencing are: prison overcrowding, interests of the victims, desire for humane punishment, rehabilitation, "do-goodism", the need to help right the wrong instead of having the money disappear in government coffers, and the need to address the root cause of the offence.<sup>132</sup>

---

<sup>127</sup> *EPEA*, *supra* note 38, s 234(1).

<sup>128</sup> See, e.g. *ibid*, s 228(1)(a) (prescribing a fine of \$100,000 or imprisonment for a period not exceeding two years, or both, for a person who commits an offence referred to in section 60, 87, 108(1), 109(1) or 227(a), (d), (f) or (h)).

<sup>129</sup> *Ibid*, s 230.

<sup>130</sup> *Ibid*.

<sup>131</sup> Eugene H Czajkoski & Laurin A Wollan Jr, "Creative Sentencing: A Critical Analysis" (1986) 3:2 Justice Quarterly 215 at 221.

<sup>132</sup> *Ibid*; Kelly Cryderman, "Paying the Price: 'Creative Sentencing' option angers family of wellsite victim", *Calgary Herald* (25 June 2010), online: Calgary Herald <<http://www.calgaryherald.com/business/PAYING+PRICE+Creative+sentencing+option+angers+family+wellsite+victim/3098118/story.html>> (last accessed 6 November 2012).

Creative sentencing has become a major insignia of sentencing policy in Alberta. It has been reported that creative sentencing now “accounts for almost 90% of the increasingly hefty fines” imposed for workplace deaths or serious injury convictions.<sup>133</sup> Under *EPEA*, creative sentencing has been an environmental compliance option in Alberta since 1993. In 2012, creative sentencing constituted 37 percent of penalties imposed in environmental cases in Alberta.<sup>134</sup> Most of the categories of sentencing listed under section 234(1)<sup>135</sup> are forms of creative sentencing. It is at the discretion of the court to choose from the list, a form of sentencing it considers most appropriate in the case. Creative sentencing is intended to make penalties more meaningful and to benefit the environment. It has a significant potential to not only punish an environmental offender but also to fix the environmental damage and to prevent future harms.<sup>136</sup> The purpose is to “have some good come from the bad.”<sup>137</sup>

### 5.1.2. *The Use of Creative Sentencing in Alberta*

Historically, the advent of creative sentencing in Canada can be traced to the statement of Stuart C.J. in the 1980 decision *R. v. United Keno Hills Mine Ltd.*<sup>138</sup> Stuart J. disagreed with the use of substantial fines as the principal tool for assuring corporate compliance with regulations:

Fines alone will not mould law abiding corporate behaviour. Fines are only one part of sentencing arsenal to foster responsible corporate behaviour. A greater spectrum of sentencing options is required to ensure effective deterrence and prevent illegal economic advantages accruing to corporations willing to risk apprehension and swallow harsh fines as operating costs.<sup>139</sup>

The inadequacy of fines he noted, is “principally because fines are easily displaced and rarely affect the source of illegal behavior.”<sup>140</sup> He assembled a list of ten “additional measures”<sup>141</sup> and stated: “I hope other Judges may explore more creatively and

---

<sup>133</sup> *Ibid.*

<sup>134</sup> See “Creative Sentencing — A Short History” [unpublished, written by the environmental prosecution unit of the ESRD and on file with the author] [“Creative Sentencing”].

<sup>135</sup> See the accompanying text to footnote 122.

<sup>136</sup> Adam Driedzic, “Will Statoil’s ‘creative sentence’ prevent illegal water use?” (9 December 2011), online: Environmental Law Centre, <<http://environmentallawcentre.wordpress.com/2011/12/09/will-statoils-creative-sentence-prevent-illegal-water-use-by-oil-companies/>> (last accessed 20 November 2012).

<sup>137</sup> *Ibid.*

<sup>138</sup> (1980), 10 CELR 43 (YTTC).

<sup>139</sup> *Ibid* at 52.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid* at 55.

courageously than I have.”<sup>142</sup> Section 234(1) of *EPEA* (cited earlier) adopted almost all of Stuart C.J.’s recommendations.

Some of the earliest Alberta environmental cases incorporating creative sentencing include *R. v. Dow Chemical Canada Inc.*,<sup>143</sup> *R. v. Inland Cement Ltd.*,<sup>144</sup> and *R. v. Van Waters & Rogers Ltd.*<sup>145</sup> *Van Waters* concerned an unlawful release of chemicals into the environment. The accused corporation plead guilty. The court’s task was to determine the appropriate sentence to be imposed. Both the accused and the Crown had agreed to a creative sentencing order. There were other subsidiary issues relating to what credit was to be given to the accused for remedial measures it had intended to take under the terms of the creative sentencing order the accused had jointly proposed with the Crown. The Crown expressed the concern that any credit given to the accused under the creative sentencing order would have the practical effect of reducing the fine imposed on the accused, and that such a reduction would amount “to a diversion of public funds from the General Revenue Account of the government to tasks performed by the accused as part of the Creative Sentencing Order.”<sup>146</sup> The Crown argued that it was essential that those things for which the accused would be given credit were really necessary for compliance with the creative sentencing order and in fact were necessitated by such compliance. By implication, for things that the accused would have to do “in any event”, credit should not be given.<sup>147</sup> In addressing this concern, the court considered the relationship between the creative sentencing component of a penalty and the fine component of the same penalty. The court referred to the wording of section 234(1)(i) which states that “when a person is convicted of an offence under this Act, in addition to any other penalty that may be imposed under this Act, the court, may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order” requiring the accused to comply with certain conditions (the court may impose) designed to remedy the damage caused by the offence, and prevent the subsequent commission of the offence. The court stated that the provision does not place creative sentencing above other penalties, but rather requires the court “to consider the circumstances of the offence and offender and the applicable sentencing principles, and determine what the sentence as a whole (i.e. the

---

<sup>142</sup> *Ibid* at 57.

<sup>143</sup> (1996), 23 CELR (NS) 108 (Alta Prov Ct) (accused was found to have released chlorofluorocarbons into the atmosphere and was ordered to contribute \$150,000 to the University of Alberta in addition to a \$50,000 fine).

<sup>144</sup> (6 December 1996), Doc 51364156P10101-0110 (Alta Prov Ct) (accused exceeded its licensed emission limit and was ordered to contribute \$100,000 to the University of Alberta in addition to a \$45,000 fine).

<sup>145</sup> 220 AR 315 (1998) (Alta Prov Ct) [*Van Waters*].

<sup>146</sup> *Ibid* at para 16.

<sup>147</sup> *Ibid*.

Creative Sentencing Order and the fine) ought to be.”<sup>148</sup> It regarded the sentencing as a “unitary process” in which the court must take a global view of the sentencing and not to determine one component of the sentence (such as the creative sentencing component) and thereafter “embark on a second stage of determining the amount of the appropriate fine.”<sup>149</sup> After dealing with this subsidiary issue, the court adopted the terms of the creative sentencing order agreed upon by the accused and the Crown.

Creative sentencing in environmental cases in Alberta is geared towards supporting several types of projects that benefit the environment. They fall into three main categories: those designed to improve the state of the environment, those that address the root cause of the offence with a view to prevention, and those that are truly punitive in nature for the “worst case” scenarios.<sup>150</sup> They include: establishing or funding research institutes focused on the kind of environmental harm caused by the infraction in question in the case, funding specific projects, supporting specific environmental projects, and establishment of corporate environmental audits and environmental management systems. In choosing the specific type of creative sentencing, the court considers the nature of the offence and the surrounding circumstances.<sup>151</sup> Usually, however, the terms of the creative sentencing order are agreed upon by the Crown and the offender and then presented to the judge for approval. The judge usually adopts the order, with a relatively casual reference to the offence in relation to which the order is made.

The most notable creative sentencing decision in Alberta was in a Statoil prosecution in which 97 percent of the fine went to creative sentencing. Statoil was fined \$190,000, out of which \$185,000 was to go to a trust account to be held by the Canadian Association of Petroleum Producers for the sole purpose of funding an online training project titled, “Surface Water Diversion for the Oil and Gas Industry — Best Practices”.<sup>152</sup> The sentencing order stated that “the course and supporting materials shall be available online and accessible to oil and gas industry participants to educate employees on best practices for compliance with regulatory requirements for surface water diversion in Alberta.”<sup>153</sup>

---

<sup>148</sup> *Ibid* at para 20.

<sup>149</sup> *Ibid*.

<sup>150</sup> “Creative Sentencing”, *supra* note 132 at 1.

<sup>151</sup> Brenda Heelan Powel, “Let’s Be a Little More Creative: Creative Sentencing in Alberta” (2001) 16:2 News Brief, online: Environmental Law Centre <<http://www.elc.ab.ca/pages/Publications/NewsBrief.aspx?id=490>> (last accessed 20 November 2012).

<sup>152</sup> See *The Queen v Statoil Canada Ltd*, No 110222833P1 (31 October 2011), online: Alberta Environment <<http://environment.alberta.ca/documents/Statoil-Cda-Ltd-Charge-Creative-Sentencing-Order.pdf>> (last accessed 20 November 2012).

<sup>153</sup> *Ibid*, Appendix A.



In a different prosecution against Syncrude, the oil developer agreed to pay \$1.3 million to fund research on avian protection at the University of Alberta; \$900,000 to the Alberta Conservation Association to acquire lands for the Golden Ranches Waterfowl Habitat Project; \$300,000 to the federal Environmental Damages Fund;<sup>154</sup> and \$250,000 to fund the development of a curriculum for the Wildlife Management Technician Diploma Program at Keyano College in Fort McMurray.<sup>155</sup>

In a 2009 prosecution of Suncor over non-compliance offences that occurred between 10 September 2005 and 1 January 2007, the Alberta Provincial Court ordered the oil company to pay \$315,000 for a Regulatory Compliance Project at the University of Calgary, a project that was examining the organizational failures that lead to the environmental offences. The publicized project aimed at the importance of improved environmental regulatory compliance for corporations in the oil and gas industry. Suncor was also ordered to pay \$75,000 to Keyano College to establish a scholarship program for students in the College's Environmental Conservation Science. Only a small part of the penalty was to be paid as fine. In another case against Suncor and its camp operator Compass Group, both defendants were ordered to contribute a sum of \$300,000 to the Alberta Waste and Waste Water Operators Association. The Association used the funds to update operator training course materials, finance a new water and wastewater operator scholarship and subsidize operator training courses and seminars to encourage attendance of operators from small rural public facilities.<sup>156</sup>

In *Van Waters*, the creative sentencing order included the offender retaining a named firm to conduct six environmental projects, which included environmental audits, environmental risk assessments, environmental management systems assessments, a spills prevention and emergency response training system for its personnel, and an environmental awareness workshop for the chemical distribution industry in Alberta, its customers and suppliers, environmental protection agencies of the provincial government, and interested faculty members and graduate students in environmental studies at the University of Calgary, among other things.<sup>157</sup> Van Waters was also ordered to pay \$10,000 to the Product Stewardship Fund of the Canadian Association of

---

<sup>154</sup> This Fund is administered by the Government of Canada and was created to provide the courts with an option to direct monetary penalties to invest in and restore the environment. It helps ensure polluters take responsibility for their conduct and enforces the polluter-pays principle.

<sup>155</sup> Environment Canada, News Release, "\$3 Million Award Imposed as Syncrude Canada Ltd. Convicted of Violating Environmental Laws" (22 October 2010), online: Environment Canada <<http://www.ec.gc.ca/default.asp?lang=En&n=714D9AAE-1&news=5D3B3033-40C2-490A-934A-5650D5A67049>> (last accessed 1 December 2012).

<sup>156</sup> Government of Alberta, Information Bulletin, "Suncor and Compass Group penalized for environmental violations at wastewater facility" (2 April 2009), online: Government of Alberta <<http://alberta.ca/acn/200904/2563667F539E3-01B1-2B2C-218356AB51447128.html>> (last accessed 8 November 2012).

<sup>157</sup> *Van Waters*, *supra* note 143 at 15.

Chemical Distributors (CACD) to be used for the purpose of educating and training employees of CACD's Alberta member companies to discharge their company's Product Stewardship outreach obligations under their company's commitments to Responsible Distribution for the chemical products they handle, use and distribute in Alberta.<sup>158</sup>

While creative sentencing continues to gain popularity in the province, it cannot be imposed unless authorized by statute. In *R. v. Imperial Oil*,<sup>159</sup> the oil company had been convicted of discharging sludge into a river. The trial court imposed fines totaling \$25,000, including an order directing Imperial Oil to pay two local school boards to provide education on pollution. This order to pay was set aside on appeal on the basis that there was no statutory basis to impose such an order.<sup>160</sup>

For its part, the federal government has been supportive of the use of creative sentencing for environmental offences. The Environmental Damages Fund established in 1995 and administered by Environment Canada can be used in relation to seven federal statutes, including the *Fisheries Act*,<sup>161</sup> the *Canadian Environmental Protection Act (CEPA)*, the *Species at Risk Act*,<sup>162</sup> the *Migratory Birds Convention Act (MBCA)*, and the *Canadian Shipping Act*.<sup>163</sup> The Fund reflects the polluter pays principle to ensure that those who cause harm to the environment take responsibility for their conduct. It provides a mechanism for channeling funds received from fines, court orders and voluntary payments to priority projects that will benefit the environment. Priority is given to projects that restore the natural environment and conserve wild life in the region where the environmental incident occurred, as well as research and development related to environmental improvement. How the Fund operates is that Environment Canada requests project proposals from eligible groups — which include non-governmental organizations, universities and other academic institutions, aboriginal groups and provinces, territories and municipalities — and ensures that approved projects are executed in a cost-effective, technically realistic and scientifically sound manner.<sup>164</sup> Part of the creative sentencing fines imposed on Syncrude Canada for the federal offences was channeled into this Fund.

---

<sup>158</sup> *Ibid.*

<sup>159</sup> (2000), 148 CCC (3d) 367.

<sup>160</sup> *Ibid.*

<sup>161</sup> RSC 1985, c F-14.

<sup>162</sup> SC 2002, c 29.

<sup>163</sup> SC 1992, c 31.

<sup>164</sup> See Environment Canada, "Environmental Damages Fund Factsheets" (November 2010), online: Environment Canada <<http://www.ec.gc.ca/edf-fde/default.asp?lang=En&n=149C847C-1>> (last accessed 6 November 2012).

One criticism that may be leveled against creative sentencing in Alberta is that it does not appear to invite input from interested persons in the creative sentencing decision. As the terms of the creative sentence are usually agreed upon between the Crown and the offender, the victim cannot influence the decision regarding how the money is used. In one occupational health case, the victim was engulfed by a natural gas flash fire in 2004 while working atop a service rig platform operated by Special Services Inc, an oil services firm at the Petro-Canada site in Sylvan Lake, Alberta. He died from his injuries and the court fined Special Services \$425,000. This is the largest workplace safety fine in the history of the province. The money was allocated to trade schools and charitable organizations. Some of it was used to fund scholarships for occupational health students at the Northern Alberta Institute of Technology. About one-third of the money was to support an oil and gas scholarship. The parents of the deceased were enraged that part of the fine would “promote the oilfield that killed [their] son.”<sup>165</sup> Where, however, the creative sentencing decision is the product of a full sentencing hearing and not one agreed upon secretly by the accused and the Crown, it appears that victims’ views on what the funds should be used for can be considered.

A *Calgary Herald* investigation has revealed that corporations that pay creative sentencing fines often have scholarships named after them or have their names listed as “donors” in the universities and institutes that receive the money.<sup>166</sup> While the sentencing fines might not have been used to support the specific scholarships that the corporate convicts might be funding at the institution, the money might be seen by the students and researchers that use them as part of the corporation’s social responsibility program. There is need for more innovation in the use of creative sentencing to avoid adverse public perceptions. In one environmental case, funds were meant to be used to promote the Environmental Crime Watch program in Fort Saskatchewan. The manual that was to accompany a course created for that purpose was published as a textbook without reference to the source of the funding.<sup>167</sup>

*Calgary Herald* investigations also reveal an “alarming” lack of oversight on the fines that companies are ordered to pay.<sup>168</sup> In another occupational health case, two construction workers were injured in Airdrie, Alberta after raising a scaffold pole in 2004. One of them lost his arm while the other lost his leg after receiving an electric shock. The

---

<sup>165</sup> Kelly Cryderman, “Paying the Price: ‘Creative sentencing’ option angers family of wellsite victim”, *Calgary Herald* (25 June 2010), online: *Calgary Herald* <<http://www.calgaryherald.com/business/PAYING+PRICE+Creative+sentencing+option+angers+family+wellsite+victim/3098118/story.html>> (last accessed 20 November 2012).

<sup>166</sup> *Ibid.*

<sup>167</sup> See paper, “Assessment of Creative Sentencing Projects 1993-2006: AKA The Good, the Bad, and the Ugly”, sent to the author by the Environmental Prosecutor, Specialized Prosecution Branch of the ESRD [nd] at 18.

<sup>168</sup> Cryderman, *supra* note 163.

company plead guilty for failing to ensure that adequate safety measures were in place for the workers. It was fined \$75,000, much of it to be paid in installments to the burn unit of Foothills Hospital. According to Jason Kurtz, the owner of the firm, “the total was \$75,000 — \$5,000 to the Crown and \$70,000 to a charity of my choice. And I picked the Foothills burn unit, because the staff are amazing there.”<sup>169</sup> Mr Kurtz paid some installments but then stopped paying because he was not sure his money was going to the burn unit and the government was not asking about his payment.<sup>170</sup> This lack of government monitoring hinders the realization of the goals of creative sentencing.

The above case, however, was an occupational health case which was not prosecuted by the environmental unit of Alberta Justice which works in close collaboration with the ESRD. Findings reveal that the unit has a full time investigator charged with monitoring the implementation of creative sentencing in environmental cases. A paper called, “Assessment of Creative Sentencing Projects 1993-2006: AKA the Good, the Bad, and the Ugly”, written by the unit details the implementation of creative sentencing within the study period.<sup>171</sup> The paper reveals that a lot is being done by the unit to monitor the implementation of creative sentencing in Alberta, and describes what is considered “the successful and unsuccessful aspects of creative sentencing projects.”<sup>172</sup> The unit must be commended. Notwithstanding the foregoing, the paper also reveals that there have been cases where offenders have failed to comply with the terms of the order either due to the lack of experts to implement a creative sentencing program or limitations on the monitoring system or for reasons beyond the control of the monitoring system. In one case which concerned a program (designed for First Nations) to test game meat to prove that it was safe for consumption, the program failed due to lack of experts within the ESRD to develop such a program.<sup>173</sup> Although the program was finally completed through the use of external experts, this was several years after the order was made. Lack of experts has sometimes led to the use of incompetent personnel.<sup>174</sup> In some cases, the accused refused to comply with the order and beyond its jurisdiction, the unit had difficulty prompting compliance.<sup>175</sup> In connection with a project intended to fund research into air pollution technology, difficulty or disagreement relating to the choice of

---

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> *Supra* note 165. This paper was sent to this author by the head of the unit and is on file with the author.

<sup>172</sup> *Ibid* at 2.

<sup>173</sup> *Ibid* at 9.

<sup>174</sup> *Ibid* at 11.

<sup>175</sup> *Ibid* at 10.

the specific project led to a compromise that produced a scholarship that did not advance the specified goals of the order.<sup>176</sup>

### 5.1.3. Principles Governing Sentencing in Environmental Prosecution

The principles governing sentencing in environmental prosecutions seem to have been developed more by the courts than in statutes. One of the best-known prosecutions is the decision of the Alberta Court of Appeal in *R. v. Terroco Industries Ltd.*<sup>177</sup> The defendant corporation was charged under *EPEA* with causing or permitting the release of a substance in an amount or level or at a rate that may cause a significant adverse effect, in contravention of section 98(2) of the Act. The defendant was also charged with breaching section 19(a) of the *Dangerous Goods Transportation and Handling Act (DGTHA)*,<sup>178</sup> that states “a person shall not handle, offer for transportation or transport any dangerous goods unless the person complies with all applicable safety requirements.” A mistake in mixing two incompatible substances in a single tank of a transport truck resulted in the escape into the atmosphere of chlorine gas from the pop valve of the truck, causing serious respiratory injury to the driver of another truck who was at the site. After the incident, the truck driver drove to a well site where he and other representatives of the corporate defendant decided to perform an acid wash. They pumped the mixture into the well. Unfortunately, the mixture infused the seals on the truck’s pumping mechanism and approximately one barrel of the mixture sprayed onto the ground near the well.<sup>179</sup>

The trial court dismissed the defendant’s due diligence defence and in assessing the appropriate sentence, stated: “The extent of potential and actual damage must be assessed. The injury to James McInnes who inhaled some of the chlorine gas will no doubt be dealt with in another forum. Although there were other people in the area there appears to be no other human physical damage. Fortunately the chlorine gas dissipated quickly.”<sup>180</sup> It pegged the appropriate penalty at \$50,000 for the *EPEA* offence and \$5,000 for the *DGTHA* offence. The defendant appealed the conviction while the prosecution appealed the sentence. The Court affirmed the conviction and increase the amount to \$150,000 for the *EPEA* offence and \$15,000 for the *DGTHA* offence.<sup>181</sup> Both the defendant and the prosecution appealed to the Alberta Court of Appeal.

---

<sup>176</sup> *Ibid* at 12.

<sup>177</sup> [2006] 1 WWR 572 [*Terroco*].

<sup>178</sup> SA 1998, c D-3.5 [*DGTHA*].

<sup>179</sup> *Terroco*, *supra* note 175 at paras 6-10.

<sup>180</sup> *Ibid* at para 17.

<sup>181</sup> *Ibid* at para 19.

The Alberta Court of Appeal considered sentencing principles in other environmental cases. It adopted a principle stated by Morrow J. of the Supreme Court of the Northwest Territory in *R. v. Kenaston Drilling (Arctic) Ltd.*<sup>182</sup> that sentencing principles in environmental offences require “a special approach.”<sup>183</sup> Although the Court of Appeal indicated that it would limit its analysis to the principles that applied to the specific case before it, it did in fact consider, directly or indirectly, general principles in jurisprudence including culpability, previous records and past involvement of the defendant with the authorities, acceptance of responsibility, the nature and extent of harm caused, and deterrence. These principles are incorporated, in one form or the other, in the various environmental statutes applicable in Alberta.

Culpability, for instance, is related to the *EPEA* provision that the maximum sentence for intentional acts is double that for unintentional acts. Offences which involve recklessness will call for more severe penalties than those involving a mere lack of due diligence. The more reckless the offender, the more severe the penalty. Conversely, the more diligent the offender, the smaller the penalty.<sup>184</sup> This factor will also influence the choice of penalty where a range of penalties are available for a particular offence. In determining culpability, the failure to take reasonable remedial steps after discovery of the harm is an aggravating factor. The degree of reasonable foreseeability of the harm is also a culpability factor.<sup>185</sup> The court is required to make a rigorous assessment of the event to determine the degree of culpability. The judge critically examines the facts and endeavours to place the offender “at an appropriate point on the sliding scale of culpability ranging from offences where due diligence was a near miss to those where the Crown’s ability to establish intent to release is a near miss.”<sup>186</sup>

The conduct of the offender is a consideration. If the offender had previously been warned by the authorities but ignored those warnings, or if it can be shown that the offender is more concerned about profit than compliance, that can be an aggravating factor in sentencing.<sup>187</sup>

Environmental offences are often expensive to prove due to the extensive scientific investigations required to establish the offender’s guilt. Acceptance of responsibility through the entering of a guilty plea is therefore a mitigating factor.<sup>188</sup> This is obviously

---

<sup>182</sup> (1973), 41 DLR (3d) 252.

<sup>183</sup> *Ibid* at para 34.

<sup>184</sup> *Ibid* at para 35.

<sup>185</sup> *Ibid* at 35. See also *R v Canadian MDF Products Co* (2002), 316 AR 228; *R v Fiesta Party Rentals (1984) Ltd*, [2000] AJ No 1679.

<sup>186</sup> *Terroco*, *supra* note 175 at para 37.

<sup>187</sup> *Ibid* at para 38. See also *R v Centennial Zinc Plating Ltd* (2004), 353 AR 300.

<sup>188</sup> *Terroco*, *supra* note 175 at para 39.

because a guilty plea saves the Crown significant costs. Such a guilty plea is also relevant in the rehabilitation of the offender, for a remorseless offender is more likely to reoffend than a remorseful offender. A guilty plea is also relevant in providing succor to the victims of the offence. Whether the offender is remorseful or not, and to what degree the offender is or is not, can be assessed by whether the offender has been previously convicted for the same or similar offence. The offender's conduct after the incident may also be indicative of its degree of remorse. Did the oil company report the incident to the authorities? Were remedial steps taken after it discovered the incident? Did the oil company cooperate in the investigation with the authorities?<sup>189</sup> In its sentencing verdict in the *Suncor* case, the court took into account the fact that the oil company plead guilty to the charges.

The degree of harm, actual or potential, is a relevant sentencing factor. Thus, where actual harm is established, the penalty will be more severe than when no actual harm occurred but the infraction had been committed.<sup>190</sup> This is because actual harm entails remedial costs. Efforts made by the offender to mitigate the harm will be factored in. But the absence of harm is not itself a mitigating factor, but instead a neutral one.<sup>191</sup> The irreparability of the damage is an aggravating factor. The potential for harm is relevant, and the greater the potential the more aggravating the factor. The potential for harm speaks to the probability of risk, and is considered based on the nature of the activity, the closeness of the site to area residents, and the probable scale of damage if the risk materializes.<sup>192</sup>

In *Syncrude*, although the oil company and the Crown agreed to the sentencing terms, which the court later approved, the extent of damage in the incident — the death of hundreds of migratory birds — must have been decisive in the aggravated nature of the agreed upon penalties. There was no discernible environmental impact or risk to public health in the prosecution of Suncor and the Compass Group. Although this would not have been a mitigating factor in the sentencing, it certainly was not an aggravating factor but it would have contributed, in practical terms, to keeping the penalty in check.

Lastly, the sentencing judge in an environmental case is guided by the need to deter the further commission of the offence. In *Terroco*, the court stressed that the enforcement of *EPEA* “calls for a significant element of specific deterrence.”<sup>193</sup> The deterrence element can be found not only in the purpose provisions of the statute, but also in the fact

---

<sup>189</sup> *Ibid* at para 41-43.

<sup>190</sup> *Ibid* at para 45. See also *R v Goodstone* (1999), 232 AR 243.

<sup>191</sup> *R v Domtar Specialty Fine Papers, a Division of Domtar Inc* (2001), 39 CELR (NS) 56 at para 117 (Ont SCJ); Van Waters, *supra* note 143.

<sup>192</sup> *R v Chem-Security (Alberta) Ltd* (1998), 233 AR 289 at paras 12-14.

<sup>193</sup> *Terroco*, *supra* note 175 at para 54.

that the maximum penalty allowance available to the court for most environmental offences is quite high. Deterrence considerations invariably require a consideration of all the principles already mentioned. When the offender profited from the offence, deterrence prompts a court to order the maximum penalty or something close to it, in addition to an order requiring forfeiture of the profits. But it is not only the offender that is to be deterred. The penalty should deter other potential offenders, who are likely to commit the offence. As most environmental offences in Alberta, especially in connection with the oil sands development and operations are likely to be committed by wealthy and powerful companies, the sentencing judge should also focus on deterring other corporations operating in the oil sands. As the court in *Terroco* stated, “[t]he starting point for sentencing a corporate offender must be such that the fine imposed appears to be more than a licensing fee for illegal activity or the cost of doing business”.<sup>194</sup> The financial position of the corporation plays a role in the deterrence principle, without being decisive or even necessarily a major factor.<sup>195</sup> A fit sentence should be such that it would be cheaper to comply “than to offend and it must be meaningful to the offender by securing and holding its attention”.<sup>196</sup> Deterrence would also inform the type of penalty that will be imposed when the statute prescribes a range of penalties for the particular offence.

With regard to creative sentencing, additional guidelines are followed. While creative sentencing is available for guilty and non-guilty pleas, the offender must accept responsibility for its conduct before creative sentencing can be issued. In determining the projects to be carried out, certain factors are considered. There must be a link between the violation and the project, such that the benefits of the project truly address the harm caused by the offence. An offence relating to air pollution would not produce a creative sentencing project dealing with land degradation. The project must either improve the environment or reduce the level of risk to the public. Thus the principal beneficiary of the project must be the public. Projects that merely reflect that the corporation adopts “sound business practices” are not eligible. The Alberta public must be the beneficiary of the project and the public within the locale of the offence is the primary target. The project must result in a concrete, tangible and measurable result. It must “clearly exceed current industry standards”. There must be no conflict of interest — actual or perceived — between the accused and the recipient of the fund for the purpose of executing the project, and between the recipient of the fund and the Crown or the investigating officer/agency. All recipients of the fund must be not-for-profit organizations (rather than government agencies or departments) which must submit to investigations as to their

---

<sup>194</sup> *Ibid* at para 60.

<sup>195</sup> *Ibid* at para 62.

<sup>196</sup> *Ibid* at para 63. See also *R v Gulf Canada* (1987), 2 CELR (NS) 261 (NWT Terr Ct).



viability and accountability. Universities, colleges and research institutes are usually eligible recipients.<sup>197</sup>

## 6.0. Is Criminal Prosecution an Effective Method of Fighting Environmental Offences?

There is academic debate as to whether prosecution is an effective regime in environmental protection. Advocates of criminal prosecution argue that prosecution creates a certain perception that captures the seriousness of environmental abuses and that a regulatory approach diminishes this seriousness.<sup>198</sup> They argue that the rarity of prosecutions and the prevalence of “soft” regulation reflect a lack of political will on the part of the regulators mark “the rise of neo-liberalism than any inherent unsuitability” of criminal prosecution of environmental misconduct.<sup>199</sup> Criminal prosecution is especially suitable as a last resort for dealing with recalcitrant violators and its value lies in “reweighting the bargaining process in favour of the administrative agency.”<sup>200</sup> Accordingly, it facilitates the negotiation of even higher standards that can better protect the environment.

On the other hand, opponents contest the moral basis of using criminal sanctions against environmental offences, in light of the fact that environmental offences generally do not require fault. Michael Woods and Richard Macrory have argued, for instance, against the “‘wholesale’ use of strict liability in environmental criminal law ... This can lead to indignation on the part of businesses which are found ‘guilty’ of offences without having a real sense of moral fault, or an inclination to treat such offences akin to a business overhead because guilt is applied automatically.”<sup>201</sup> But this argument does not go to the effectiveness of criminal sanctions. More relevant arguments suggest that consensual or cooperative mechanisms are more effective in promoting compliance with

---

<sup>197</sup> See *Guidelines for Creative Sentencing Projects*, prepared by the Environmental Prosecutor, Specialized Prosecutions Branch of the ESRD [nd] and on file with the author.

<sup>198</sup> D Farrier, “In Search of Real Criminal Law” in T Bonyhady, ed, *Environmental Protection and Legal Challenge* (Sidney: The Federation Press, 1992) at 87.

<sup>199</sup> See Eileen Skinnider, *Victims of Environmental Crime — Mapping the Issues* (Vancouver: International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLRCJP), March 2011) at 21, online: ICCLRCJP <<http://www.icclr.law.ubc.ca/files/2011/Victims%20of%20Environmental%20Crime.pdf>> (last accessed 18 September 2012).

<sup>200</sup> Farrier, *supra* note 196 at 87.

<sup>201</sup> Michael Woods & Richard Macrory, *Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach* (London: Centre for Law and the Environment, 2003) at 2.8.

environmental laws and regulations.<sup>202</sup> They highlight the difficulties of applying criminal law in environmental cases, in particular, issues of causation and the challenges in prosecuting corporate crimes (since most of the most serious environmental crimes are committed by corporations). The process of integrating environmental values into rules of law is said to have proven “most difficult” in the area of criminal law.<sup>203</sup> Actual prosecutions are few and there are also concerns about whether criminal prosecution is producing the desired goal of greater environmental protection.<sup>204</sup>

While there appears to be no empirical study chronicling the effectiveness of using criminal prosecution to fight environmental offences, there is general dissatisfaction with what is seen as the failure of regulation based on a consensual relationship between the regulator and the regulated. Consensual regulation entails “a process of bargaining, negotiation and compromise carried out between the regulator and the regulated.”<sup>205</sup>

It is also remarkable that most persons charged with environmental offences in Alberta have entered guilty pleas, thus relieving the prosecution of the burden of proving issues like causation. The prevalence of guilty pleas may be explained by the fact that most environmental prosecutions have involved cases of high public interest due to the extent of harm to the environment caused by the conduct in question.

However, the very question of whether criminal prosecution has proven effective is not one that can be answered in yes-or-no terms. This is not least because of the limited range of environmental offences targeted by criminal prosecutors.

There has been evidence of a substantial rise in criminal prosecution of environmental crimes in Alberta within the last decade.<sup>206</sup> Many of these prosecutions have been successful in that either the alleged offenders are found guilty or they themselves enter guilty pleas. Even the cases where the alleged offenders were acquitted are not without significance. The larger and indirect impact of litigation is well known in socio legal literature and applies both to civil lawsuits and criminal prosecution.<sup>207</sup> The penalties

---

<sup>202</sup> Nicola Pain, “Criminal Law and Environmental Protection — Overview of Issues and Themes” in Neil Gunningham, Jennifer Norberry & Sandra McKillop, eds, *Environmental Crime: Proceedings of a Conference held on 1-3 September 1993, Hobart, Australia* (Canberra: Australian Institute of Criminology [AIC], 1995) at 20, online: AIC <<http://www.aic.gov.au/en/publications/previous%20series/proceedings/1-27/~media/publications/proceedings/26/pain.pdf>> (last accessed 18 September 2012).

<sup>203</sup> Richard J Lazarus, “Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime” (1994) 27 *Loy LA L Rev* 867 at 867.

<sup>204</sup> Pain, *supra* note 200.

<sup>205</sup> *Ibid.*

<sup>206</sup> Chambers & Semenchuk, *supra* note 124 at 2.

<sup>207</sup> See, for instance, Michael McCann, *Rights at Work: Pay Equity and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994) at 4 (observing that pay “equity activists have

imposed have been on the rise. But has increased prosecution translated to an improved environment? To answer this question one must look at the character of the criminal defendants in environmental prosecutions. Most of the major environmental prosecutions have involved corporate defendants. As Nicola Pain has argued, “if laws are in some way seeking to change behaviour, it is ... corporate values amongst others that must be changed to ensure adequate environmental protection.”<sup>208</sup> Criminal sanctions must do more than punish misconduct; they must demand change. Whether or not they demand change would however depend on the nature of the sanctions.

Brent Fisse and John Braithwaite have examined the capacity of different types of sanctions to alter corporate conduct in a number of fields, including the environment. They argue that if a corporation is seen as a value maximizing entity, then sanctions that target corporate values, whether they be profit or reputation, should be used as they would have more deterrent effect than sanctions that simply want to punish non-compliance.<sup>209</sup> This has led Pain to suggest that sanctions like “court-ordered adverse publicity, community service and stock dilution through equity fines (with a redirection of the shares to environmental interest groups) should be considered as new criminal sanctions.”<sup>210</sup> Funding community projects that promote the environment may be regarded as community service, but it is not clear how “court-ordered adverse publicity” can be carried out. Such a sanction is even morally suspect.

It has also been argued that shifting sanctions to individuals within the corporation, such as directors and managers, may not achieve the desired change in corporate behaviour because with “the organizational divorce of responsibility for past offences from responsibility for future compliance”, corporate change may end with the transfer of the individual in question to another department within the corporation or “to some corporate Siberia”.<sup>211</sup> In some cases too, the individual sanctioned may not be in a position to affect the desired change in the corporation, but simply happens to be the one implicated in the misconduct. It may also happen that the corporation is willing to deliberately shield the individuals implicated. The individual may be transferred overseas beyond the reach of local law. Although extradition treaties might be invoked to secure the appearance of the individual for prosecution, not every offence is extraditable. Even

---

derived substantial power from legal tactics despite only limited judicial support”); Jeffrey Davis, *Justice Across Borders: The Struggle for Human Rights in U.S. Courts* (New York: Cambridge University Press, 2009) at 290-295; Ann-Marie Slaughter & David Bosco, “Plaintiff’s Diplomacy” (2000) 79 *Foreign Aff* 102.

<sup>208</sup> *Ibid* at 25.

<sup>209</sup> Brent Fisse & John Braithwaite, “The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability” (1988) 11 *Sydney L Rev* 468 at 497.

<sup>210</sup> Pain, *supra* note 200 at 25.

<sup>211</sup> Fisse & Braithwaite, *supra* note 207 at 497-498.

where the offence is extraditable, the costs of securing extradition are frequently too great.<sup>212</sup>

Fisse and Braithwaite conclude that corporate liability provides a stronger incentive to alter corporate behaviour than individual liability.<sup>213</sup> But they favour an integrated approach that targets both the corporation and individuals within the corporation who are implicated in the wrongdoing. This appears to be the policy in the prosecution of environmental offences in Alberta.

Criminal law certainly has its limits as a regulatory tool. It is less flexible than civil and administrative sanctions. But the most debilitating weakness of the criminal law might be the lack of political will to prosecute. The worst environmental offenders in Canada consist of powerful corporations and Crown corporations. It is unlikely that a provincial government will readily prosecute a Crown corporation whether federally or provincially owned. Such a move will amount to one arm of the government prosecuting another arm of the same government. An integrated approach consisting of civil/administrative and criminal sanctions would seem more appropriate and does actually exist in most jurisdictions, including Alberta. Civil and administrative sanctions apply to environmental offences in *EPEA* while criminal law can be used to address the most egregious ones.

## 7.0. The Position of Victims of Environmental Offences

A recent environmental victimology study funded by the Department of Justice Canada, the Law Foundation of British Columbia and the International Centre for Criminal Law Reform and Criminal Justice Policy found that virtually nothing has been written about the plight of victims of environmental offences in Canada.<sup>214</sup> In a sense, though, this is not surprising in that the concept of environmental crime remains an emerging field in legal discourse. It is also likely because environmental crime is generally perceived as “victimless”, which in turn explains why governments and the environmental law enforcement community have difficulty finding the proper responses to environmental crimes. In another sense, however, this is quite surprising given the acknowledged deleterious effects of environmental crimes on the victims, the efforts of Canadian environmental activists and the media to draw attention to the commission of environmental crimes in Canada by mining and oil and gas corporations operating in Canada (especially in connection with the oil sands), and the prevalence of environmental

---

<sup>212</sup> *Ibid* at 498.

<sup>213</sup> *Ibid*.

<sup>214</sup> See, Eileen, *supra* note 197.

legislation in Canada. At the international level, with few exceptions, multilateral environmental agreements place emphasis on the responsibility of States rather than the plight of victims.<sup>215</sup> Current endeavours, both in Canada and internationally, have focused on “protecting the environment”, with very little attention to addressing the actual suffering of the human victims.

In fact, the topic of victims’ rights generally is not one that has received extensive academic treatment in Canadian legal discourse. A 2001 report on victims of crimes prepared for the Department of Justice Canada states that “Canadian scholars have taken little interest in the topic of victims’ rights”, whereas “at the international level, especially in the US, the topic has been explored ad nauseam, and the available literature would fill a small auditorium.”<sup>216</sup> This situation is paradoxical given the proliferation of victim service agencies in Canada. A 2007/2008 Victim Services Survey estimated that there were about 939 victim service agencies across Canada. The majority of these consisted of government agencies while a relatively small number comprised self-identified non-governmental or community-based organizations. The majority of victims who received services for the period were victims of violent crimes.<sup>217</sup> From every indication in the survey, however, none had dealt with an environmental crime victimization incident. Yet, environmental crime victimization remains a stark reality in Alberta and the balance of Canada.

But while legal scholarship on crime victims in Canada remains lean, both the federal and provincial governments have taken policy and legislative initiatives to address the plight of crime victims. At a meeting in 2003, federal, provincial and territorial Justice Ministers endorsed the Canadian Statement of Basic Principles of Justice for Victims of Crimes to “guide the development of policies, programs and legislation related to victims of crimes” and, more specifically, to “guide the treatment of crime victims, particularly

---

<sup>215</sup> The most remarkable exception is perhaps the *Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters*, 25 June 1998, 38 ILM 515 (1999), which requires the involvement of “the public concerned” in environmental decisions.

<sup>216</sup> Alan N Young, *The Role of the Victim in the Criminal Process: A Literature of Review — 1989 to 1999*, Victims of Crime Research Series (Ottawa: Policy Centre for Victims Issues, Research and Statistics Division, August 2001) at 1, online: Department of Justice <[http://www.justice.gc.ca/eng/pi/rs/rep-rap/2000/r00\\_vic20/r00\\_vic20.pdf](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2000/r00_vic20/r00_vic20.pdf)> (last accessed 4 October 2012).

<sup>217</sup> See Julie Suavé, “Victim Services in Canada: Results from the Victim Services Survey, 2007/2008” (2010) 3 Victims of Crime Research Digest 26 at 28. This data roughly reflects the result of previous surveys. See, for instance, Jodi-Anne Brzozowski, “Victim Services in Canada, 2005/2006” (2007) 27:7 Juristat at 3-4, online: Statistics Canada <[http://dsp-psd.pwgsc.gc.ca/collection\\_2007/statcan/85-002-X/85-002-XIE2007007.pdf](http://dsp-psd.pwgsc.gc.ca/collection_2007/statcan/85-002-X/85-002-XIE2007007.pdf)> (last accessed 4 October 2012). See also Maire Gannon & Karen Mihorean, “Criminal Victimization in Canada, 2004” (2005) 25:7 Juristat, online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/85-002-x2005007-eng.pdf>> (last accessed 4 October 2012).

during the criminal justice process.”<sup>218</sup> The Statement called for the consideration of “the needs, concerns and diversity of victims” in the criminal justice process and in the development and delivery of programs and services intended to promote the fair treatment of victims.<sup>219</sup> It called for the incorporation of the principles into federal, provincial and territorial legislation and programs. However, there is a sharp bias in the resulting policy and legislative endeavours in favour of certain types of victims, namely, victims of domestic violence, victims of sexual offences, and child, young and elderly victims. Addressed below are the issues that arise in the subject of environmental victimization. These are followed by an analysis of the legislative scheme in Alberta for addressing the plight of crime victims with a view to seeing how the scheme might fit into the position of victims of environmental crimes.

### 7.1. Conceptualizing the Environmental Crime Victim

While the question of determining crime victims generally presents problems, environmental crimes present unique problems owing to the inherent nature of environmental harms that makes it, all too often, difficult to establish a nexus between the harm and those who claim to have been affected by it. Apart from environmental crimes being diverse in their nature and impact, it rarely happens that they occur within a well-defined boundary, thus making it difficult to identify all those affected by the crimes. The most notable example of this is global warming.

But even when environmental crimes occur within a well-defined boundary, their impacts frequently spread far and wide, transcending national borders in many cases. This is seen starkly in cases of nuclear explosion. The Chernobyl disaster, for example, considered the worst nuclear power plant accident in history, sent a plume of radioactive radiation into the atmosphere that enveloped much of Europe. In many cases, the impact of environmental crimes is felt much later as their deleterious effects may begin to manifest several years after the disaster. In such cases, victims may not be aware that they have been victimized. This may be contrasted with crimes like assault and murder which are not obscured from the victim once they are committed. This makes the identification of victims of environmental crime initially impossible and in the end almost always. In the worst case scenarios, which are not rare, the impacts are permanent.

There is the problem of identifying who the victims are. To begin with, many victims *will not* identify themselves as such for cultural and/or religious reasons. For instance, some cultures believe that environmental disasters are *karmaic* reactions. An Indian who

---

<sup>218</sup> See Department of Justice, “Canadian Statement of Basic Principles of Justice for Victims of Crimes, 2003”, online: Department of Justice <<http://www.justice.gc.ca/eng/pi/pcvi-cpcv/pub/03/princ.html>>.

<sup>219</sup> *Ibid* at Principle 9.

attributed lead poisoning to karma is one example.<sup>220</sup> Some Mormons have also been reported to have considered health problems arising from nuclear testing as “a necessary sacrifice for the good of the state.”<sup>221</sup> Relying on self-identification will exclude these persons from the category of victims.

Even if self-identification is accepted as a basis for according victim status, there are people who *cannot* self-identify. People who suffer severe brain damage from lead poisoning, as well as unborn children, may not be able to identify themselves as victims due to the resulting impairment.<sup>222</sup> Their situation may be worsened by the fact that governmental authorities will not acknowledge the victimization of their subjects. In regard to the Chernobyl disaster, it is widely held that governments of European States did not demand redress to avoid setting precedents that might later be applied to them.<sup>223</sup>

In addition to the problem of identification, there are terminological problems associated with the identification of crime victims. Certain terminologies, often used interchangeably, that may pose analytical problems to the understanding of environmental victimization pervade the literature. It is important to be sensitive to the differences, even if subtle, between such terminologies.

### **7.1.1. Environmental Victims vs Environmental Casualties**

Christopher Williams suggests that it is important to distinguish environmental victims from environmental casualties. He describes casualties as “those who suffer from natural disasters.”<sup>224</sup> Whereas “casualties” embody the idea of “*chance*”, without a human agent necessitating it, “victims” carries the notion of “a *deliberate or reckless human act*” or “omission” being at the root of the causation.<sup>225</sup> This distinction is useful, but care must be taken to ensure that when some human act or omission triggers or contributes to the severity of natural disasters or exacerbates the injury, those injured by such disasters are not regarded simply as casualties but as victims, even if only to the extent — if it can be ascertained — to which human acts or omissions were contributory.

Peter Penz has provided an alternative and no less useful perspective to Williams’ victim/casualty divide. He defines victims as “people who are or have been harmed by

---

<sup>220</sup> Christopher Williams, “An Environmental Victimology” in Christopher Williams, ed, *Environmental Victims: New Risks, New Injustice* (London: Earthscan, 1998) at 4.

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*

<sup>223</sup> *Ibid.*

<sup>224</sup> Williams, *supra* note 218 at 6.

<sup>225</sup> *Ibid.*

the processes that emanate from the natural environment, are mediated by it, or impair access to it, without being fully compensated for such harm.”<sup>226</sup> His definition deviates from Williams in that it does not require human agency as a necessary trigger of the environmental harm. Those who are harmed by earthquakes, floods or hurricanes are to be regarded as victims.<sup>227</sup> According to Penz, these people should be regarded as environmental victims in order “to provide scope for an obligation of states to assist this category of victims.”<sup>228</sup> In other words, if those who are harmed by natural disasters are excluded from the category of victims, governments may feel less responsible and obligated to provide them assistance. One problem with this categorization is that it does not seem to contemplate the nature of legal remedies that victims can rightfully seek through the judicial process (criminal and civil) and in whom *legal* responsibility (as opposed to *social* or *humanitarian* responsibility) lies to provide those remedies. What the State may provide for victims of natural disasters is humanitarian assistance and not compensation. Since the State is not the cause of the natural disasters, the victims cannot seek legal accountability from the State; and since there is no such thing as a right to humanitarian assistance, the State is not under legal obligation to provide humanitarian assistance to the victims. That said, Penz’s broad definition of victims is useful for the purposes of engaging State social responsibility to provide humanitarian assistance to its citizens harmed by natural disasters.

### **7.1.2. Environmental Injury or Environmental Suffering**

It may be useful to identify an appropriate way of describing the outcome of environmental victimization. Two terms are often used interchangeably and insensitively: “injury” and “suffering”. Injury is defined as “any effect that results in altered structure or impaired function, or represents the beginnings of a sequence of events leading to altered structure or function.”<sup>229</sup> Suffering, however, relates to a more general experience that does not necessarily connote an injury that may be tolerable.<sup>230</sup> Injury is therefore more specific and will be more legally useful in describing environmental victimization. The importance of this distinction has been used to analyze the situation in many poor countries where people are asked by their governments to endure some level of

---

<sup>226</sup> Peter Penz, “Environmental Victims and State Sovereignty: A Normative Analysis” in Williams, *supra* note 218 at 29.

<sup>227</sup> *Ibid.*

<sup>228</sup> *Ibid.*

<sup>229</sup> See E Chivian et al, *Critical Condition: Human Health and the Environment* (Cambridge, MA: MIT Press, 1993) at 15.

<sup>230</sup> Williams, *supra* note 218 at 7.



environmental suffering as their sacrifice for the economic development of their country.<sup>231</sup>

## 7.2. Causation

Causation is central to environmental victimization. Environmental law adopts a “reasonably foreseeable” standard to address the question of liability for environmental harm. This standard resonates with Williams’ distinction between casualty and victim, attributing to the victim a notion of “a deliberate or reckless act” or “omission”. The distinction between “deliberate” and “reckless” is important. While “deliberate” speaks to *willed* outcome, “reckless” relates to *unwilled* outcome, but one that could have been foreseen if only the perpetrator cared. Much environmental harm is the result of reckless conduct. How to legally determine recklessness is one of the most difficult issues encountered in environmental victimization.

Furthermore, environmental causation is usually indirect. It is indirect in the sense that it is not the environment itself that is the cause, but some human conduct (speaking in the context of this paper) which mediates the cause through the environment.<sup>232</sup> Current law has provided us with such terms as “proximate cause”, “immediate cause”, “substantial cause”, “operating cause”, “continuing cause”, etc. These terms reflect the law’s conceptualization of the relationship between cause and effect.

Legal philosophy provides an alternative approach that may be applied to environmental causation. HLA Hart & AM Honore raise important causal questions. They compare the usefulness of these two questions: “Was the harm the consequence of the wrongful act?” and “Was the wrongful act the cause of the harm?” They state that they prefer the first formulation because “[i]t is not the case ... that when some harm is attributed to an act or event as its consequence this act or event will always be described as the cause of the harm.”<sup>233</sup> An example of this may be found in environmental victimization involving an oil spill that destroyed the farmland of an arable community, which leads to starvation, which in turn leads to malnutrition and in turn again to a high incidence of disability in the community. Framing the causal question as: “Did the spill cause the disability?” may be problematic. But framing it as: “Did the disability result from the spill?” may be easier to accept.<sup>234</sup>

---

<sup>231</sup> *Ibid.*

<sup>232</sup> *Ibid* at 8.

<sup>233</sup> HLA Hart & AM Honore, *Causation in the Law*, 2<sup>nd</sup> ed (Oxford: Oxford University Press, 1985) at 135.

<sup>234</sup> Williams, *supra* note 218 at 9.

Williams suggests a definition of environmental causation in terms of “the *presence* or *absence* of environmental factors.”<sup>235</sup> Under this approach, environmental causes of victimization will fall into four categories: (1) the *presence* of environmental agents caused by a positive act, e.g. the presence of methylisocyanate caused by an act of polluting and poisoning; (2) the *presence* of environmental agents caused by an omission to act, e.g. the presence of excess lead in water supplies caused by an omission to provide safe drinking water; (3) the *absence* of environmental agents caused by a positive act, e.g. the absence of food and micronutrients leading to malnutrition and brain injury resulting from land degradation caused by the act of dumping toxic waste; and (4) the *absence* of environmental agents caused by an omission to act, e.g. the absence of iodine caused by an omission to iodize salt in accordance with law.<sup>236</sup> The following definition is derived from these formulations: “An ‘environmental cause’ of victimization ‘is the presence or absence of ... environmental factors, resulting from individual or collective human act or omission, over any time-scale, of which the consequence is human injury.’”<sup>237</sup>

### 7.3. Cultural Perspectives

Due to differing cultural perspectives on the use of the environment, a participatory (or, better said, consensual) approach to environmental victimization is important. Some indigenous or tribal communities may feel more victimized by a fire outbreak that “desecrates” their traditional shrine forest than by a massive industrial development that destroys their parks. In a case study of Oloma — a fishing community in the Niger Delta region of Nigeria known for their belief in the existence of water spirits — Alicia Fentiman reports the concern of the community about the impact of gas flaring on their water spirits as well as the impact of a government take-over of their lands (via the *Land Use Act* of 1978) on their access to their sacred shrines used for sacrifices.<sup>238</sup> These events were distressing to the community because the community believed that its identity, stability and prosperity were dependent on its participation in a series of ritual sacrifices to the water spirits.<sup>239</sup> The significance of this is that not only should the physical and psychological impact of environmental externalities be acknowledged, their

---

<sup>235</sup> *Ibid.*

<sup>236</sup> *Ibid.*

<sup>237</sup> *Ibid.*

<sup>238</sup> Alicia Fentiman, “The Anthropology of Oil: The Impact of the Oil Industry on a Fishing Community in the Niger Delta” in Williams, *supra* note 218 at 84.

<sup>239</sup> *Ibid* at 83.

“metaphysical” impact is important too.<sup>240</sup> The metaphysical impact cannot be appreciated from the outside, but by interacting with the victims.

#### 7.4. The Legislative Scheme Addressing Crime Victims in Alberta

The legislative scheme for addressing the plight of crime victims in Alberta is contained primarily in the Alberta *Victims of Crime Act* (VCA).<sup>241</sup> The Act defines a victim in three respects: (1) with respect to financial benefits, a person who is injured as a direct result of an act or omission; (2) with respect to a death benefit, a person who is injured as a result of an act or omission; (3) with respect to a program, a person who suffers loss or injury as the result of the commission of an offence.<sup>242</sup> The Act outlines a number of principles that apply to the treatment of crime victims. These include: cautious, compassionate and respectful treatment of victims; respect for the privacy of victims; prompt payment of financial benefits to victims for the injuries they have suffered; provision of information to victims regarding the criminal justice process and the victims’ role and opportunities to participate in that process; and consideration for the needs, concerns and diversity of victims;<sup>243</sup>

The Act creates a Victims of Crime Fund into which money from the victim fine surcharge collected under the Act, the *Criminal Code* and the *Victims Restitution and Compensation Payment Act*<sup>244</sup> are paid.<sup>245</sup> Money paid into this Fund is used to fund programs that benefit victims of crime and to take care of expenses related to the administration of the Fund.<sup>246</sup>

Persons eligible to benefit from the Fund are victims whose injury was “the direct result of an act or omission that occurred in Alberta and that is one of the offences under the *Criminal Code* ....”<sup>247</sup> Precluded are victims who are convicted of an offence arising

---

<sup>240</sup> *Ibid.*

<sup>241</sup> RSA 2000, c V-3 [VCA].

<sup>242</sup> *Ibid.*, s 1(1).

<sup>243</sup> *Ibid.*, s 2(1).

<sup>244</sup> SA 2001, c V-3.5. This Act relates principally to property victims and empowers the Minister to commence legal action against any person, with respect to property alleged to have been acquired by illegal means, to, among other things, obtain restitution or compensation for property victims, remove financial incentives to the commission of illegal acts, and to prevent property that has been acquired by illegal means from being used for illegal purposes in the future. *Ibid.*, s 3(1).

<sup>245</sup> *Ibid.*, s 9.

<sup>246</sup> *Ibid.*, s 10.

<sup>247</sup> *Ibid.*, s 12(1).

from the event that produced the injury.<sup>248</sup> It follows that victims of non-*Criminal Code* offences, such as victims of offences created under special environmental statutes, such as *EPEA* and the *Water Act*, are not eligible to benefit from the Fund. This provision mirrors the definition of victims under section 1(1)(1): “victim means with respect to financial benefits, a person who is injured as a direct result of an act or omission described in section 12(1) of the Act” — that is, offences under the *Criminal Code*. Unless the environmental offence is pigeonholed into an offence under the *Criminal Code*, the victims are precluded from benefiting from the Fund.<sup>249</sup> But since most environmental offences are contained in specific environmental statutes, this is another testimony to the neglect that victims of environmental offences have suffered in Alberta.

However, there are other provisions of the VCA that appear to apply to victims of offences generally, regardless of the enactment. One such provision is the imposition of a surcharge on persons convicted of an offence. Section 8(1) of the Act provides that “[i]f a fine is imposed on a person who is convicted of an offence under an enactment, the person must pay a surcharge unless (a) the offence is a contravention of a municipal bylaw or a Metis settlement bylaw, or (b) the offence is excluded from the application of this section by the regulations [made under the Act].” Perhaps ironically, however, the proceeds of the surcharge must be deposited into the Fund created under the VCA regardless of the enactment under which the offence is prosecuted.<sup>250</sup> In addition, any payment made in relation to the offence by the person convicted shall be applied first to the fulfillment of the surcharge.<sup>251</sup>

This lacuna in the VCA is filled to some extent by the *EPEA*. Section 235 of *EPEA* provides for compensation to a person who suffered loss or damage to property as a result of an environmental offence prosecuted under the Act. The person in whose favour such an order is made may seek enforcement of the order as though it were a product of civil proceedings. The provision merely empowers, but does not mandate the court sentencing a person found guilty of an environmental offence to make the compensatory order in favour of the victim of the offence. The court makes the compensatory order upon application by the victim.<sup>252</sup>

---

<sup>248</sup> *Ibid*, s 12(2).

<sup>249</sup> The offences of common nuisance and criminal negligence respectively under sections 180 and 219 of the *Criminal Code* may support the prosecution of environmental offences. Because of the vague wordings of these provisions, the *Criminal Code* is seen as ill-suited for the prosecution of environmental offences. See, Swaigen & Blunt, *supra* note 114.

<sup>250</sup> *Ibid*, s 8(5).

<sup>251</sup> *Ibid*, s 8(4).

<sup>252</sup> *EPEA*, *supra* note 38, ss 235(1)-(2).

It is remarkable, however, that the above provision speaks only to “damage to property”. A victim can therefore be compensated only for damage to his property. He cannot be compensated under the provision for damage to his health arising from the environmental offence in question. This is a serious restriction on the right of victims of environmental offences.

The *EPEA* does not contain any guidelines on the treatment of victims. But it appears that there is no inhibition to the application of the principles under section 2(1) of the *VCA* to the treatment of victims of offences under other enactments, such as environmental offences under the *EPEA*. These principles include the provision of information to victims regarding the criminal justice process and the modalities for their participation in that process, information about available victim impact services, the consideration of the views and concerns of victims in the criminal justice process, consideration of the needs and diversity of victims, and information about how victims may ventilate their concerns when they believe that these principles have been circumvented.

In sum, the existing regulatory scheme for addressing crime victims in Alberta is ill suited for addressing victims of environmental crimes. This speaks to the need for either an amendment to the existing scheme or the creation of a special scheme that is attuned to the needs of victims of environmental crimes. Such a scheme would take into account the unique nature of environmental harms and the variety of victims that a single environmental incident can affect.

## 8.0. Conclusion

Public interest in the enforcement of environmental laws in relation to the Alberta oil sands has been on the increase. The increase in interest is related to the public attention environmental issues in the oil sands have generated both nationally and internationally. Certain trends emerge from this study: A variety of enforcement mechanisms are available in Alberta to deal with environmental offences connected with the oil sands. These include administrative penalties, orders, warnings, and prosecutions. It is indeed rare that any government uses only one mechanism to deal with environmental offences. However, enforcement activities in Alberta appear to have recently been on the decrease. This is evident in the five-year enforcement history reviewed in this paper. We saw a sharp drop in the number of concluded enforcement activities from 160 in 2010 to 115 in 2012. While this may not accurately reflect the actual enforcement activities within the period since a number of cases are still pending, it does speak unfavourably about the pace of enforcement.

There is a clear policy towards increased penalties. Creative sentencing is now the norm. And while this is innovative and commendable, and while the ESRD is doing a

great deal in this regard, creative sentencing has suffered a number of constraints, including the lack of competent experts to carry out the creative sentencing projects and limits on the monitoring capacity of the ESRD to ensure that the projects are carried through. While the use of prosecution to deal with environmental offences has been questioned, there is greater consensus that prosecution should be seen as an important part of an integrated mechanism for the enforcement of environmental offences. It is argued that prosecution should be reserved for the enforcement of more serious environmental infractions while the other mechanisms, that is, administrative penalties, orders and warnings may be used to deal with less serious infractions.

But it is perhaps in connection with the welfare of victims of environmental offences that the policy and legal framework in Alberta appears to have paid the most inadequate attention. Existing laws on the rights of crime victims were designed outside the context of victims of environmental offences. Civil remedies are therefore the most viable option for victims of environmental offences. The Alberta VCA as it currently stands today is ill suited for victims of environmental offences. But whatever was the rationale for the provision of victim rights under the VCA for certain categories of offences, would also justify the extension of those rights to victims of environmental offences. Victims of environmental offences deserve equal protection. The special nature of environmental offences, which necessitated the enactment of specialized statutes to deal with them, probably calls for a victim statute tailored to the needs of victims of environmental offences. Amending the VCA, or expanding the victim provisions of the *EPEA* to incorporate some of the provisions of the VCA, is also another possible way of dealing with the problem. It is an issue that deserves attention by the Alberta government.



# CIRL Publications

## Occasional Papers

**A Review of the Environmental Enforcement Culture in Alberta in Relation to the Oil Sands**

*Dr. Chilenye Nwapi*

**\$20.00 sc**  
(Free online) 2013 49 pp.  
Occasional Paper #40

**Using Strategic Environmental Assessments to Guide Oil and Gas Exploration Decisions in the Beaufort Sea: Lessons Learned from Atlantic Canada**

*Meinhard Doelle, Nigel Bankes and Louie Porta*

**\$15.00 sc**  
(Free online) 2012 27 pp.  
Occasional Paper #39

**Sharing Land Stewardship in Alberta: The Role of Aboriginal Peoples**

*David Laidlaw and Monique M. Passelac-Ross*

**\$20.00 sc**  
(Free online) 2011 53 pp.  
Occasional Paper #38

**Assessing Where Renewable Energy and Energy Efficiency Stand in Alberta Policy and Government Organization**

*Michael M. Wenig*

**\$15.00 sc**  
(Free online) 2011 40 pp.  
Occasional Paper #37

**The “Public Interest” in Section 3 of Alberta’s Energy Resources**

**Conservation Act: Where Do We Stand and Where Do We Go From Here?**

*Cecilia A. Low*

**\$15.00 sc**  
(Free online) 2011 41 pp.  
Occasional Paper #36

**Water Stewardship in the Lower Athabasca Rivers: Is the Alberta Government Paying Attention to Aboriginal Rights to Water?**

*Monique Passelac-Ross and Karin Buss*

**\$20.00 sc**  
(Free online) 2011 61 pp.  
Occasional Paper #35

**Public Participation in Energy and Natural Resources Development: A Theory and Criteria for Evaluation**

*Rebeca Macias*

**\$20.00 sc**  
(Free online) 2010 52 pp.  
Occasional Paper #34

For a complete list of Occasional papers, see CIRL’s website: [www.cirl.ca](http://www.cirl.ca)

## Canadian Wildlife Law Project Papers

**Wildlife Management Beyond Wildlife Laws**

*Arlene J. Kwasniak*

**\$10.00 sc**  
2006 27 pp.  
Wildlife Law Paper #7

**Wildlife Stewardship**

*Arlene J. Kwasniak*

**\$10.00 sc**  
2006 19 pp.  
Wildlife Law Paper #6

**Legal and Economic Tools and Other Incentives to Achieve Wildlife Goals**

*Arlene J. Kwasniak*

**\$10.00 sc**  
2006 25 pp.  
Wildlife Law Paper #5

For a complete list of Canadian Wildlife Law Project papers, see CIRL’s website: [www.cirl.ca](http://www.cirl.ca)

## Human Rights and Resource Development Project Papers

**Public Access to Information in the Oil and Gas Development Process**

*Linda McKay-Panos*

**\$20.00 sc**  
(Free online) 2007 118 pp.  
Human Rights Paper #6



**The Potential Application of Human Rights Law to Oil and Gas Development in Alberta: A Synopsis**  
*Nickie Vlavianos*

**\$20.00 sc**  
(Free online) 2006 70 pp.  
Human Rights Paper #5

**Protecting Environmental and Health Rights in Africa: Mechanisms for Enforcement**  
*Ibironke Odumosu*

**\$20.00 sc**  
(Free online) 2006 78 pp.  
Human Rights Paper #4

For a complete list of Human Rights and Resource Development Project papers, see CIRL's website: [www.cirl.ca](http://www.cirl.ca)

## Books and Reports

**Environmental Agreements in Canada: Aboriginal Participation, EIA Follow-Up and Environmental Management of Major Projects**  
*Ciaran O'Faircheallaigh*

**\$35.00 sc**  
2006 217 pp.  
ISBN-13 978-0-919269-50-7

**A Guide to Impact and Benefits Agreements**  
*Steven A. Kennett*

**\$35.00 sc**  
1999 120 pp.  
ISBN-13 978-0-919269-48-4

**Forest Management in Canada**  
*Monique Ross*

**\$20.00 sc**  
1995 388 pp.  
ISBN-13 978-0-919269-42-2

**Canadian Law of Mining**  
*Barry J. Barton*

**\$20.00 hc**  
1993 522 pp.  
ISBN-13 978-0-919269-39-2

**The Framework of Water Rights Legislation in Canada**  
*David R. Percy*

**\$20.00 sc**  
1988 103 pp.  
ISBN-13 978-0-919269-21-7

**Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights**  
*Richard H. Bartlett*

**\$30.00 sc**  
1988 237 pp.  
ISBN-13 978-0-919269-23-1

For a complete list of Books and Reports, see CIRL's website: [www.cirl.ca](http://www.cirl.ca)

## Conference Proceedings

**Resource Development and the Mackenzie Valley Resource Management Act: The New Regime**  
*John Donihee (Contributing Editor), Jeff Gilmour and Doug Burch*

**\$20.00 sc**  
2000 281 pp.  
ISBN-13 978-0-919269-49-1

**Mineral Exploration and Mine Development in Nunavut: Working with the New Regulatory Regime**  
*Michael J. Hardin and John Donihee, eds.*

**\$15.00 sc**  
1998 160 pp.  
ISBN-13 978-0-919269-46-0

For a complete list of Conference Proceedings, see CIRL's website: [www.cirl.ca](http://www.cirl.ca)

## Other Publications

**Resources: The Newsletter of the Canadian Institute of Resources Law**

**Free online**  
Quarterly  
ISSN 0714-6918

**Annual Report**

**Free online**  
sc

## Available from Carswell

### Canada Energy Law Services

Canada Energy Law Service (Federal) · 2 vols. · 0-88820-409-4 (Publication #20154)

Canada Energy Law Service (Alberta) · 1 vol. · 0-88820-410-8 (Publication #20162)

Canada Energy Law Service (Full Service) · 3 vols. · (Publication #20146)

#### Order from:

Carswell  
Thomson Professional Publishing  
One Corporate Plaza  
2075 Kennedy Road  
Toronto, Ontario M1T 3V4  
Canada

#### For more information, call Customer Relations:

(Toll Free Canada & US) 1.800.387.5164

(Toronto & Int'l) 416.609.3800

(Toll Free Canada) Fax: 1.877.750.9041

Fax: 416.298.5082

Customer Relations: [customerrelations@carswell.com](mailto:customerrelations@carswell.com)

Website: [www.carswell.com](http://www.carswell.com)

Website Inquiries: [comments@carswell.com](mailto:comments@carswell.com)

## CIRL Order Information

All book order enquiries should be directed to:

Canadian Institute of Resources Law  
Murray Fraser Hall, Room 3353 (MFH 3353)  
University of Calgary  
Calgary, Alberta, Canada T2N 1N4  
Tel 403.220.3200; Fax 403.282.6182  
E-mail [cirl@ucalgary.ca](mailto:cirl@ucalgary.ca) Website [www.cirl.ca](http://www.cirl.ca)

### Business Hours

0830 to 1630 (MST except MDT March-November)

### Discount Policy for Bookstores and Book Wholesalers

20% on 1 to 4 books

40% on 5 or more books

### GST/HST

All Canadian orders are subject to the Goods and Services Tax (GST) or the Harmonized Sales Tax (HST) for participating provinces. If GST exempt, please indicate in writing. CIRL's GST Registration No. 11883 3508 RT.

### Payment Terms

Net 60 days.

- Payment or numbered, authorized purchase order must accompany all orders.
- MasterCard or Visa account number with expiry date will be accepted.

### Shipping

Please allow two to four weeks for delivery.

### Return Policy

(Applies ONLY to bookstores and book wholesalers.)

All books may be returned for credit within one year of the invoice date, provided that they are in a clean and resaleable condition. Please write for permission to return books and supply original invoice numbers and discounts. Returns must be shipped prepaid. Defective books are replaceable at no charge.

### Please note:

- All books are softcover unless otherwise noted
- All prices are subject to change without notice
- Make cheque or money order payable to the *University of Calgary*

# CIRL Order Form

## Method of Payment

Payment or purchase order must accompany order.  
Please make cheques payable to **University of Calgary**

- Cheque       Money Order  
 Visa       MasterCard

Please return completed order form to:

**Canadian Institute of Resources Law**  
 MFH 3353, Faculty of Law  
 University of Calgary  
 Calgary, Alberta, Canada T2N 1N4  
 Tel 403.220-3200; Fax 403.282.6182  
 E-mail [cirl@ucalgary.ca](mailto:cirl@ucalgary.ca);  
 Website [www.cirl.ca](http://www.cirl.ca)

Credit Card Number \_\_\_\_\_  
 Expiry Date \_\_\_\_\_  
 Cardholder Name \_\_\_\_\_  
 Daytime Telephone \_\_\_\_\_  
  
 Name \_\_\_\_\_  
 Company Name \_\_\_\_\_  
 Address \_\_\_\_\_  
 City \_\_\_\_\_ Province/State \_\_\_\_\_  
 Postal/Zip Code \_\_\_\_\_ Country \_\_\_\_\_

Please send me the following books

| Title  | Quantity | Price | Subtotal |
|--|----------|-------|----------|
|  |          |       |          |
|  |          |       |          |
|  |          |       |          |
|  |          |       |          |
| <b>Subtotal</b>  |          |       |          |
| <b>Add Shipping and Handling*</b>  |          |       |          |
| <b>Add GST/HST for orders placed in Canada</b> (CIRL GST No. 11883 3508 RT ) |          |       |          |
| <b>Total</b> (All prices subject to change without notice)                   |          |       |          |

### \*Add Shipping and Handling

Within Canada: first book \$5.00; each additional book \$2.00

Outside Canada: first book \$10.00; each additional book \$4.00

March 2013