

**Canadian Institute of Resources Law  
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**Environmental Sentencing Policy  
in Alberta:  
A Critical Review**

**Chilenye Nwapi\***

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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)

\*Dr. Chilenye Nwapi is a Banting Postdoctoral Fellow in the Faculty of Law, University of Calgary. He holds a PhD from the University of British Columbia, an LLM from the University of Calgary, and an LLB from the Imo State University.

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All enquiries should be addressed to:

The Executive Director  
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)

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Toute demande de renseignement doit être adressée au:

Directeur exécutif  
Institut canadien du droit des ressources  
Murray Fraser Hall, pièce 3353  
Faculté de droit  
L'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)





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## 1.0 Introduction

The booming oil and gas industry in Alberta has not come without significant environmental costs to Albertans, especially since exploration and production activities began at the Alberta oil sands. These costs have been well captured in media reports, as well as in both the literature and the jurisprudence.<sup>1</sup> They include pollution of lands and public water supplies, endangering of public health, destruction of property and the ecosystem as well as destruction of provincial, national and global economies and the associated impact on future generations. No wonder they arouse public outrage and prompt demands for severe penalties. Furthermore, the offences producing these costs take diverse forms, including discharge of hazardous substances into the environment, lack of or inadequate cleanup of contaminated sites, and lack of or inadequate maintenance of potentially hazardous facilities that may result in well blowouts and consequent spills. And the entities that commit these offences are mostly corporations that come in all sizes, from small firms to large multinationals with a long chain of subsidiaries.<sup>2</sup> To address these environmental costs, the Alberta government has adopted a number of enforcement mechanisms designed to foster a compliance culture among entities whose activities have potential deleterious effects on the environment.<sup>3</sup> An important element of those enforcement mechanisms is sentencing. The purpose of this paper is to review the sentencing policy in environmental cases in Alberta with a view to identifying the underlying theoretical justifications, the prevailing sentencing options and the principles governing their application, and the factors that influence environmental sentencing in Alberta. The ultimate goal is to assess the application of the principles and factors to determine their usefulness and potential effectiveness. After analyzing the legal nature of environmental offences, the paper proceeds to analyze the theories informing environmental sentencing in Alberta. This is followed by a discussion of the available environmental sentencing options in Alberta and lastly by an analysis of the factors considered in the application of those options.

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<sup>1</sup> See, for instance, 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>>; Robert Kunzig, “The Canadian Oil Boom”, *National Geographic* (March 2009), online: National Geographic <<http://ngm.nationalgeographic.com/2009/03/canadian-oil-sands/kunzig-text/1>>; Cahal Milmo, “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>>; Nina Chestney, “Nobel winners urge EU leaders to back tar sands law”, *Reuters* (16 February 2012), online: Reuters <<http://www.reuters.com/article/2012/02/16/us-oil-sands-letter-idUSTRE81F0KV20120216>>. See also, Chilenye Nwapi, *A Review of the Environmental Enforcement Culture in Alberta in Relation to the Oil Sands*, Occasional Paper #40 (Calgary: Canadian Institute of Resources Law, 2013) at 1-2.

<sup>2</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>3</sup> For a discussion of these mechanisms, see Nwapi, *supra* note 1 at 11-21.

## 2.0 The Nature of Environmental Offences

Ascertaining the nature of environmental offences is important for sentencing purposes and for identifying the theoretical justifications for punishment. The accurate legal nature of environmental offences is not without controversy. In *R. v. Sault Ste. Marie (City)*, the Supreme Court of Canada described environmental offences as “public welfare offences” and distinguished them from “true crimes”,<sup>4</sup> the distinction between them being a matter of the level of moral turpitude required to commit them. This decision of the apex court has however not deterred some lower courts from regarding environmental offences as crimes. In *R. v. United Keno Hill Mines Limited*<sup>5</sup> — a landmark environmental case in Canada — for instance, Stuart C.J. of the Yukon Territorial Court stated emphatically that “[p]ollution is a crime”<sup>6</sup> and that “[t]he range of inherent criminality in pollution offences can be extreme.”<sup>7</sup> The learned judge stressed that “pollution offences must be approached as crimes, not as morally blameless technical breaches of a regulatory standard.”<sup>8</sup> Thus, the Law Reform Commission of Canada has concluded that “there does seem to be an ambivalence in the minds of judges as to whether environmental offences are morally reprehensible, so that the sentence must express repudiation, or morally neutral, so that deterrence is the governing factor, tempered by retribution only as a restraining force.”<sup>9</sup> While the Supreme Court decision unarguably carries higher precedential value, there is much weight in Stuart C.J.’s opinion which the Supreme Court decision may not upset. That weight arises from the fact that some environmental offences are deliberate acts that require high moral turpitude to be committed. On this Professor Franson is quoted to have written:

The existing law assumes that all polluters and all pollution problems are the same. They are not, of course, and perhaps we are to be faulted for not having developed some sort of classification scheme for analyzing environmental problems .... We talk about existing and valued industries, which might find it very difficult to abate their pollution problems; at the same time we talk about individuals who knowingly dump toxic chemicals in the dark of night, and we fail to distinguish between them.<sup>10</sup>

In fact, modern environmental legislation supports the view that some environmental offences may be the result of moral turpitude. Section 108 of Alberta’s *Environmental Protection and Enhancement Act* (EPEA),<sup>11</sup> for instance, provides that “[n]o person shall knowingly release or permit the release of a substance into the environment in an amount,

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<sup>4</sup> [1978] 2 SCR 1299 at 1302. See also, *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154.

<sup>5</sup> (1980), 10 CELR 43 [*United Keno Hills*].

<sup>6</sup> *Ibid* at 46.

<sup>7</sup> *Ibid* at 47.

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

<sup>9</sup> Gail Bunt & John Swaigen, *Sentencing in Environmental Cases: Protection of Life Series* (Ottawa: Law Reform Commission of Canada, 1985) at 40.

<sup>10</sup> See *ibid* at 3.

<sup>11</sup> RSA 2000, c E-12 [EPEA].

concentration or level or at a rate of release that is in excess of that expressly prescribed by an approval, a code of practice or the regulations.” The idea of “knowingly release or permit to release” speaks to moral turpitude. Similar recognition of the significance of moral turpitude in the creation of environmental offences can also be found in sections 227 and 228 of the Act. For instance, section 227(a) creates the offence of “knowingly” providing “false or misleading information pursuant to a requirement under this Act to provide information” while subsection (b) creates the offence of providing “false or misleading information pursuant to a requirement under this Act to provide information”. For a contravention of section 227(a), section 228(1)(a) imposes a fine of not more than \$100,000 or a maximum of two years imprisonment or both fine and imprisonment in the case of an individual and sub-subsection (b) imposes a maximum fine of \$1 million in the case of a corporation. However, for a contravention of section 227(b), section 228(2)(a) imposes of a maximum fine of \$50,000 in the case of an individual while sub-subsection (b) imposes a maximum fine of \$500,000 in the case of a corporation. The difference in the penalties for both contraventions reflects the varying degree of blameworthiness both contraventions attract.

On the relationship between sentencing and the characterization of conduct as a crime or as a regulatory offence, the Law Reform Commission opined that it is “unlikely” that such characterization “in any way increases the sentencing options available.”<sup>12</sup> It argued that broader options may be available for regulatory offences than for crimes, although the same range of sentencing options appears to be available for both kinds.<sup>13</sup> As will be seen later in this paper, however, recent trends in environmental sentencing in Alberta do not support the view that the characterization of environmental offences as regulatory offences bears no relation to the sentencing options used. It will be demonstrated that the theoretical justification for the sentencing options being used today in environmental cases is more consistent with the view that environmental offences are morally neutral than with the view that they are not. This is the key explanation for the increasing trend in the use of creative sentencing in environmental cases in Alberta in place of traditional fines.

In addition, not only do some environmental infractions require high moral turpitude to be committed, the risk and harm environmental infractions pose are varied and range from minor to extreme. This is well recognized in environmental legislation in Alberta. For instance, section 109 of EPEA provides that “[n]o person shall knowingly release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect.” Adverse

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<sup>12</sup> Bunt & Swaigen, *supra* note 9 at 7. Jaela Shockey has however argued that “whether environmental offences are viewed as morally repugnant or not will, to a great extent, determine the consequent theory of justification for sentencing environmental offences.” See also Jaela Shockey, “Morality Play: Sentencing Environmental Offences” (2006) at 4, online: Canadian Bar Association <<http://www.cba.org/cba/newsletters/pdf/ENV-Morality.pdf>>.

<sup>13</sup> Bunt & Swaigen, *ibid* at 7.

effect is defined under section 1 as “impairment of or damage to the environment, human health or safety or property”. This definition covers a wide range of effects some of which may be considered minor and some of which may be considered extreme, depending, for instance, on the sensitivity of the environment affected, the size of the human population whose health is affected, and the type and value of property affected. This legislative recognition of the difference in the severity of the effects environmental infractions may cause is one of the reasons for the disparity in the sentences awarded in environmental harms originating from the same or similar conduct.

### 3.0 Theoretical Justifications for Sentencing

A number of theories have been propounded in justification of criminal sentencing. These theories include: protection of the public, retribution, deterrence, restoration, and rehabilitation. The following discussion explains these theories in the context of their application to environmental sentencing.

#### 3.1 Protection of the Public

One of the principal reasons for criminalization of some conduct is protection of the public. It is often the principal reason for the use of imprisonment in sentencing and is especially applied in sentencing for violent crimes. But it is not only through imprisonment that the goal of protection of the public can be accomplished. It can also be achieved through the adoption of the other theories — retribution, deterrence and reform.<sup>14</sup>

There is an indirect reference in the purpose provisions of the EPEA to the goal of protection of the public: “The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing ... [that] the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society”.<sup>15</sup> To a large extent the environment is equated with the public. Indeed, the mere characterization of environmental offences as “public welfare” offences indicates that protection of the public is the underlying reason for punishment. In *R. v. Van Waters & Rogers Ltd.*, the court explicitly cited protection of the public as an underlying theory of punishment.<sup>16</sup> And when considering the factors that determine the severity of punishment to be imposed, the courts do consider the nature of the harm that resulted from the offence. In assessing the nature of the harm, the courts take into account

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<sup>14</sup> *Ibid.*

<sup>15</sup> EPEA, *supra* note 11 at s 2(a).

<sup>16</sup> (1998), 220 AR 315 (Alta Prov Ct) at para 23 [*Van Waters*].

the population affected by the harm as well as the costs to the public of addressing the harm.<sup>17</sup> This is an implicit adoption of the protection of the public theory.

### 3.2 Retribution

Retribution addresses the moral culpability of the offender. The Supreme Court has endorsed retribution as a recognized theory of sentencing. In *R. v. Martineau*, the court stated that “punishment be meted out with regard to the level of moral blameworthiness of the offender.”<sup>18</sup> In *R. v. M. (CA)*, the court described retribution as “integrally woven into the existing principles of sentencing in Canadian law through the fundamental requirement that a sentence imposed be ‘just and appropriate’ under the circumstances.”<sup>19</sup> The court traced retribution to the principle of “fundamental justice” enshrined in section 7 of the *Canadian Charter of Rights and Freedoms*,<sup>20</sup> which requires the imposition of criminal liability only if an accused possesses a minimum “culpable mental state” in respect of the ingredients of the alleged offence.<sup>21</sup>

Retribution must be distinguished from vengeance. Vengeance is an arbitrary act actuated by “anger and emotion as a reprisal for harm inflicted upon oneself by that person.”<sup>22</sup> By contrast, retribution is based on the degree of the offender’s blameworthiness, taking into account the offender’s intent, the resulting harm and “the normative character of the offender’s conduct.”<sup>23</sup> Retribution thus reflects a principle of proportional measurement whose objective is to match the punishment with the crime and to impose no more than is proportionate to the crime.

Retribution is a recognized theory of sentencing in environmental legislation in Alberta. Under the EPEA, for instance, penalties for offences under the Act are imposed based on a number of factors which include the severity of the offence. The more severe the offence, the greater the penalty. Under section 228(1), for instance, a person who “knowingly” commits an offence enumerated under section 227 is liable, in the case of individuals, to a fine of not more than \$100,000 or to imprisonment for a period not exceeding two years or to both fine and imprisonment and, in the case of a corporation, to a maximum fine of \$1 million. However, a person who commits any of the same offences unknowingly is liable, in the case of an individual to a maximum fine of \$50,000 and, in the case of a corporation, to a maximum fine of \$500,000.<sup>24</sup> The existence of knowledge

<sup>17</sup> See *R v Terroco Industries Limited*, 2005 ABCA 141 at para 48 (CanLII) [*Terroco*].

<sup>18</sup> *R v Martineau*, [1990] 2 SCR 633 at 647 [*Martineau*].

<sup>19</sup> [1996] 1 SCR 500 at para 79 (rejecting the British Columbia Court of Appeals’ statement denouncing retribution as “a legitimate goal of sentencing”) [*R v M*].

<sup>20</sup> *Constitution Act 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, Part 1.

<sup>21</sup> *R v M*, *supra* note 19. See also, *Martineau*, *supra* note 18 at 645.

<sup>22</sup> *R v M*, *ibid* at para 80.

<sup>23</sup> *Ibid*.

<sup>24</sup> EPEA, *supra* note 11 at s 228(2).

is thus rightly regarded as the aggravating factor. To further match the sentence with the offence, section 229 provides a due diligence defence to any person who in relation to certain enumerated offences, proves, on a balance of probabilities, that they took all reasonable steps to prevent the commission of the offence. The defence is also available to a Minister, Government official, a member of council of a local authority or the chief administrative officer of a local authority, under whose direction a person commits an offence, but who can show that he or she took all reasonable steps to prevent the commission of the offence by that other person.<sup>25</sup>

Mirrors of the retributive theory can also be seen in the increased fines that are now recently being imposed on environmental offenders in Alberta. In *R. v. Syncrude Canada Ltd.*,<sup>26</sup> for instance, the court imposed a combined fine of \$3 million for both federal and provincial offences involving the death of about 1500 birds in a tailings pond operated by Syncrude. While it is not agreed as to whether this is the largest environmental fine ever imposed in Alberta or in Canada,<sup>27</sup> there is no debate that it is on the upper end of fines in Alberta and reflect current trends in environmental sentencing.

Shockey has argued for the adoption of the retributive theory of sentencing.<sup>28</sup> Shockey's argument is predicated on her view that environmental offences should be viewed not as morally neutral, but as morally wrong. But such sweeping characterization of all environmental offences unselfconsciously assumes that all environmental offences evince some moral turpitude on the part of the offender. That is not the case. And it flies in the face of the rationale for the doctrine of strict liability applied to many environmental offences. There is indeed nothing creditable about preferring one theory for all environmental sentencing. As the Supreme Court of Canada stated in *R. v. Lyons*, "[i]n a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender."<sup>29</sup> It is wrong to think that all environmental offences are of the same nature. While environmental offences defer from other offences, there are still internal differences within environmental offences. Those differences are created by the specific nature of each environmental offence, the degree of culpability of the offender. To create a preference for one sentencing theory that would preponderate over all other theories without regard to all the circumstances of the offence would be to ignore these undeniably important factors. A better view is that each individual offence should be allowed to dictate

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<sup>25</sup> *Ibid* at s 233.

<sup>26</sup> 2010 ABPC 229 (CanLII) [*Syncrude*].

<sup>27</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 Tétrault <[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>28</sup> Shockey, *supra* note 12 at 6.

<sup>29</sup> [1987] 2 SCR 309 at para 26.

the justification theory that should be applied. In any event, these justification theories are not mutually exclusive. It is possible that they can all be realized in a single case, through the use of the various sentencing options available. Thus, a judge can promote the goals of retribution by imposing high fines, after taken into consideration the degree of the offender's liability, the nature of the harm caused, as well as the potential impact of the fine on the corporation. The judge can equally promote the goals of deterrence in the same case by adopting a sentencing option, together with the fine, that is capable of shaming the offender, such as requiring the offender to publish the details of the sentence in a prescribed manner. The same judge can also promote the goals of restoration by adopting creative sentencing options that require a portion of the fine to be contributed to a project designed to remedy the environmental damage.

### 3.3 Rehabilitation

Rehabilitation emphasizes the need for punishment to contribute towards the reform of the offender. In other words, it is offender-focused. This is perhaps the most discredited theory of sentencing. The reason is borne from the experience that the criminal justice system, which mostly culminates in sentencing and incarceration or fine, scarcely leave people better than they were.<sup>30</sup> The idea of rehabilitation presupposes some moral turpitude on the part of the offender for which they are to be rehabilitated. Given that most environmental offences do not require moral turpitude to be committed, the application of this theory to environmental offences is very limited. It is even more limited by the fact that most environmental offences are committed by corporations rather than natural persons although the idea of “corporate rehabilitation” has been touted in some cases.<sup>31</sup> It is hard to imagine how the corporate propensity for profit — a main motivation for corporate environmental offences — can be cured. Equally hard to imagine is how a corporation can be cured of negligence through some therapy administered by a psychologist. As the Law Reform Commission points out, while corporations can be coerced into responsible behaviour, the conditions that make rehabilitation possible with natural persons, such as age, family, friends, etc, are lacking with corporations.<sup>32</sup>

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<sup>30</sup> Bunt & Swaigen, *supra* note 9 at 12.

<sup>31</sup> In *United Keno Hills*, Stuart CJ stated that “[i]f the Court is to properly assess the degree of sanctions required to effect the full rehabilitation of the offending corporation, the governing or guiding mind, in the person of senior executive officers, should be present and give evidence.” *United Keno Hills*, *supra* note 5 at 50. The learned judge appears to be saying that corporate rehabilitation can be effected through the rehabilitation of the senior officers of the corporation.

<sup>32</sup> Bunt & Swaigen, *supra* note 9 at 12-13.

### 3.4 Deterrence

The rationale behind deterrence is that since prosecution and sentencing occur after the offence has been committed and the damage is already done, any expectation of future protection of the public must come from the deterrence effects the sentence may have.<sup>33</sup> Studies show that while achieving deterrence is difficult, the deterrence effects of sentencing are strongest where detection of wrongdoing is significantly easy, particularly where sentencing is sufficiently severe and routinely enforced.<sup>34</sup>

Deterrence, both specific and general, is a well-recognized theory of sentencing. Specific deterrence refers to the deterrence of the specific offender whereas general deterrence refers to the deterrence effect of the sentence on other persons likely to commit the same offence. The general theme of the purpose provision section 2(i) of the EPEA which recognizes the polluter pays principle is deterrence in that it is to ensure that damage to the environment does not recur. In *Terroco*, the Alberta Court of Appeal stated that “the enforcement of [the EPEA] calls for a significant element of specific deterrence.”<sup>35</sup> Even in minor environmental offences, the courts have called for recognition of the need for some deterrence in sentencing.<sup>36</sup>

### 3.5 Restorative Justice

While rehabilitation is offender-focused, restorative justice is a victim-focused theory of sentencing because it is designed to restore the victim to their original position, as far as this is possible. Kathleen Daly provides insight into the rationale for restorative justice. She states that restorative justice “assumes that victims can be generous to those who have harmed them, that offenders can be apologetic and contrite for their behavior, that their respective ‘communities of care’ can take an active role of support and assistance, and that a facilitator can guide rational discussion and encourage consensual decision-making between parties with antagonistic interests.”<sup>37</sup> In the context of environmental offences the victim is often viewed as the environment, which often informs the application of the restorative theory. In *Terroco*, the court recognized the restorative theory when it stated that “[d]amage to property may be ameliorated by compensation provided that the compensation results in the restoration of the environment and not just a payment for putting the property in a permanent or long term state of environmental

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<sup>33</sup> Elaine Hughes, “Sentencing Environmental Offenders: Objectives and Principles” (1993) 4 JELP 185 at 187.

<sup>34</sup> Elaine L Hughes & Larry A Reynolds, “Creative Sentencing and Environmental Protection” (2009) 19:2 J Env'tl L & Prac 105 at 109.

<sup>35</sup> *Supra* note 17 at para 54.

<sup>36</sup> *R v Lac Ste Anne County*, 2005 ABPC 26 at para 23 (CanLII).

<sup>37</sup> Kathleen Daly, “The Limits of Restorative Justice” in Dennis Sullivan & Larry Tifft, eds, *Handbook of Restorative Justice: A Global Perspective* (New York: Routledge, 2006) at 134.

damage.”<sup>38</sup> The courts have thus promoted the restorative theory by ordering offenders to clean up the environment damaged by their activities.<sup>39</sup>

## 4.0 Theoretical Justifications for Sentencing

Alberta has a package of environmental sentencing options, which vary between statutes and are not all available for all types of environmental infractions. Nor are they all open to be made by any court or tribunal. The array of sentencing options reflects both the difficulties of addressing environmental infractions effectively and a paradigm shift increasingly away from the offender toward the nature of the offence and the victim. The options are legion and may be grouped into four: (a) administrative penalties; (b) warnings; (c) orders; and (d) penal sanctions (penalties following criminal prosecutions). In strict sense, however, the concept of sentencing is applied only in relation to penal sanctions; but from a broader perspective, administrative penalties, warnings and orders can be regarded as forms of sentencing insofar as they emanate from prior determinations of culpability and are intended to compel the offender to do or forbear to do something they otherwise would not have done or forborne to do, although administrative penalties are more so than warnings and orders.

### 4.1 Administrative Penalties

Introduced in Alberta in 1995 through the passage of the EPEA, administrative penalties address cases of relatively minor infractions with minimal environmental impacts. As the Environment and Sustainable Resource Development (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>40</sup> They come in the form of monetary penalties assessed and imposed by an environmental regulator rather than a court or tribunal. Their monetary value reflects the fact that they are aimed at addressing relatively minor infractions.<sup>41</sup> Accordingly, the monetary value is generally lower than fines imposed following a prosecution. Administrative penalties are viewed as a much fairer, quicker and cheaper way of dealing with relatively minor infractions.<sup>42</sup> Compared to court decisions, studies show that the rate of appeal of administrative penalties is very

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<sup>38</sup> *Terroco*, *supra* note 17 at para 46.

<sup>39</sup> *Ibid.*

<sup>40</sup> Alberta Environment and Sustainable Resource Development, “Administrative Penalties: Facts at Your Finger Tips” (undated), online: Government of Alberta <<http://environment.alberta.ca/documents/Administrative-Penalties.pdf>>.

<sup>41</sup> LeRoy C Paddock, “Environmental Enforcement at the Turn of the Century” (1991) 21 *Envtl L* 1509 at 1518.

<sup>42</sup> *Ibid.* See also, Nwapi, *supra* note 1 at 12.

low.<sup>43</sup> Deterrence theorists also believe that certainty of punishment is more effective than sternness of punishment.<sup>44</sup>

Sections 237(1) of the EPEA sets out the framework for the use of administrative penalties in Alberta:

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 *Administrative Penalty Regulation (APR)*<sup>45</sup> made pursuant to the EPEA sets out the infractions for which an administrative penalty may be issued. The list of infractions shows that administrative penalties are used for relatively minor infractions that have minimal environmental impacts or “for contraventions that are forerunners to other contraventions that have an actual impact on the environment.”<sup>46</sup> The list includes:

- Operating an activity without the required authorization;
- Failure to report a release of a substance that may have adverse effects;
- Release of substance into the environment beyond the permitted amount;
- Operating an activity in breach of specified process requirements;
- Failure to report the contravention of an approval condition or limit; and/or
- Late submission of a required report, such as an emissions report.<sup>47</sup>

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<sup>43</sup> Chris Rolfe, “Administrative Monetary Penalties: A Tool for Ensuring Compliance” (Paper presented to the Canadian Council of ministers of Environmental Workshop on Economic Instruments, 24 January 1997), online: West Coast Environmental Law <<http://wcel.org/sites/default/files/publications/AdministrativeMonetaryPenalties.txt>>.

<sup>44</sup> CEPA Office, *Administrative Monetary Penalties: Their Potential Use in CEPA*, Reviewing CEPA: The Issues #14 (Ottawa: 1994), cited in Rolfe, *ibid*. See also Rolfe, *ibid* (arguing that “[a] violation is more likely to lead to a penalty in [an administrative penalty] system than a traditional criminal court system, both because [administrative 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 [administrative penalties].”).

<sup>45</sup> Alta Reg 23/2003 [APR].

<sup>46</sup> Nwapi, *supra* note 1 at 13.

<sup>47</sup> *Ibid* at Reg 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) & (3), 169-170, 176, 178, 179(1)-(2), 180-182, 188(1), 191-192, 209, 227(b)-(c), (e), (g), (i), and 251. See Nwapi, *supra* note 1 at 13.

The maximum penalty payable as an administrative penalty is \$5,000 for each contravention or for each day or part of a day that the contravention occurs or continues to occur.<sup>48</sup> The lowest penalty is \$1,000.<sup>49</sup> The actual penalty to be imposed depends on several factors, including the following: the importance of compliance to the regulatory regime under which the penalty is imposed; the degree of the offender's willfulness or negligence in the commission of the infraction; whether the offender took any mitigating steps after the commission of the offence; whether the offender has taken any steps to reduce the risk of the infraction occurring again in the future; whether the offender has a history of non-compliance; whether the offender benefited economically from the infraction; and any other factors the Compliance Director considers relevant.<sup>50</sup> Lastly, under section 237(3) of the EPEA, a person administratively penalized may not afterwards be subject to criminal prosecution in respect of the same infraction.

## 4.2 Warnings

If administrative penalties are issued for relatively minor infractions, warning letters are issued for infractions even more minor than those for which administrative penalties are issued. A warning letter does not impose any direct burden (such as payment of any penalty) on the person against whom it is issued. But it is truly a "warning" in the sense of a reprimand or rebuke, designed to engender compliance by the person against whom it is issued.<sup>51</sup> Warning letters are normally issued to first-time offenders and they form part of the compliance history of the person and are taken into account in future contraventions.<sup>52</sup> A recent review of Alberta's environmental enforcement reports shows that warning letters are the most frequently used environmental enforcement tool in Alberta.<sup>53</sup>

## 4.3 Orders

When immediate action is required to avoid a looming adverse environmental effect or to bring an existing adverse environmental effect to a halt, orders, instead of administrative penalties or warnings, are issued. In Alberta, there are three types of orders that may be issued, depending on the applicable statute. They are: (1) environmental protection orders, issued in relation to contraventions under the EPEA; (2) water management

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<sup>48</sup> APR, *supra* note 45 at Regs 3(1) & (3).

<sup>49</sup> *Ibid* at Reg 3(1).

<sup>50</sup> *Ibid* at Reg 3(2).

<sup>51</sup> Alberta Environment, "Compliance Assurance Program Summary", (undated), online: Government of Alberta <<https://external.sp.environment.gov.ab.ca/DocArc/compliance/ComplianceReports/ComplianceProgramBrochure-other.pdf>>.

<sup>52</sup> Nwapi, *supra* note 1 at 15.

<sup>53</sup> *Ibid*.

orders, issued in relation to contraventions under the *Water Act*,<sup>54</sup> and (3) enforcement orders, issued under both the EPEA and the *Water Act*, to compel a party to take steps to remedy an environmental contravention and, where appropriate, to require the party to take actions to prevent future contraventions. These orders may require the person against whom they are issued to prepare a remedial plan with timelines of implementation. They may also stipulate a time within which the order must be complied with. They may also require the person against whom they are issued to report periodically to the Compliance Manager or Director designated within the ESRD, all steps taken to comply with the order as well as the outcome of those steps.<sup>55</sup> A recent review of Alberta's environmental enforcement reports reveals that orders are "a common environmental enforcement tool in Alberta."<sup>56</sup>

#### 4.4 Penal Sanctions

As noted earlier, it is in the context of criminal prosecutions that sentencing is usually considered. An assortment of sentencing options is available in Alberta but can be grouped into two categories: fines and imprisonment and creative sentencing.<sup>57</sup> Courts are enjoined to explore the entire arsenal of sentencing options available under the relevant environmental legislation to achieve the goals of sentencing as indicated in the relevant legislation.<sup>58</sup>

##### 4.4.1 Fines and Imprisonment

Fines are the oldest form of sentencing option in environmental enforcement. Because most environmental prosecutions are against corporations (rather than individuals), imprisonment was, and even today is, rarely used. Imprisonment is reserved for more flagrant offences where it is necessary to go after the officers of a corporation in order to effectively address the root cause of the offence. Although fines are used in all types of offences, courts believe that the principles for the imposition of fines (or sentencing generally) in environmental cases require a "special approach".<sup>59</sup> The maximum fines available in Alberta under the EPEA are high, although they vary with the severity of the

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<sup>54</sup> RSA 2000, c W-3.

<sup>55</sup> See, for instance, Environmental Protection Order No EPO 2013-33/NR issued against Canadian Natural Resources Limited by the ESRD pursuant to the EPEA, 24 September 2013, online: ESRD <[http://esrd.alberta.ca/focus/compliance-assurance-program/compliance-enforcement/documents/CNRL\\_Primrose\\_EPO\\_20130924.pdf](http://esrd.alberta.ca/focus/compliance-assurance-program/compliance-enforcement/documents/CNRL_Primrose_EPO_20130924.pdf)>.

<sup>56</sup> Nwapi, *supra* note 1 at 16.

<sup>57</sup> Hughes and Reynolds add a third category termed "restorative" or "diversionary" sentencing. Hughes & Reynolds, *supra* note 34 at 109.

<sup>58</sup> *Terroco*, *supra* note 17 at para 57.

<sup>59</sup> *R v Kenaston Drilling (Arctic) Ltd* (1973), 41 DLR (3d) 252 (NWT SC).

harm caused by the offence,<sup>60</sup> indicating that the provincial legislature does not view low or nominal fines as meeting the goals of the EPEA. Although the factors that influence the actual fine to be imposed are discussed later under factors influencing environmental sentencing, it is useful to point out at this point that the offender's ability to pay a proposed fine is an important consideration in the imposition of fines. Since in Alberta, most environmental offences are committed by corporations in the oil and gas industry, many of which are large conglomerates and several of which are small corporations, courts are enjoined to impose fines that amount to "more than a licensing fee for illegal activity or the cost of doing business", given the financial size of the offender.<sup>61</sup> This, apparently, is to stimulate the deterrence effect of sentencing.

There appears to be a policy towards increased fines in environmental cases in Alberta. A 2011 survey showed a significant increase in total fines issued for prosecutions between 2000 and 2010.<sup>62</sup> While the increase was not uninterrupted, it is clear that the general trend reflects increased penalties. This movement towards increased fines is consistent with the trend in Canada. In 2009, the federal Parliament enacted the *Environmental Enforcement Act* (EEA)<sup>63</sup> which amended the fines, sentencing and enforcement provisions of nine separate environmental statutes and created the *Environmental Violations Administrative Monetary Penalties Act*,<sup>64</sup> which provides the authority to issue Administrative Monetary Penalties for less serious environmental infractions under several federal environmental statutes. During the legislative process that resulted in the enactment of the Act, Environment Canada took the view that the existing fines structure in most environmental statutes were antiquated and that the lack of a minimum fine scheme led courts to impose fines that were too low to prompt compliance or to reflect the level of public disapproval of the contravention.<sup>65</sup> The new fine scheme established under the EEA establishes a minimum fine structure for more serious offences (and no minimum for less serious offences) and increases the maximum fines available for all offences. It also establishes separate fine schemes for individuals, corporations and vessels and allows the doubling of fines for second and subsequent

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<sup>60</sup> See EPEA, *supra* note 11 at s 228.

<sup>61</sup> *Terroco*, *supra* note 17 at para 60.

<sup>62</sup> Stuart Chambers & Lisa Semenchuk, "Trends in Alberta Environmental Enforcement: Fines, Fowl and Finger-Pointing" (Paper delivered at the NEERLS Summit, Banff, 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)>.

<sup>63</sup> SC 2009, c 14 [EEA].

<sup>64</sup> SC 2009, c 14, s 126.

<sup>65</sup> Environment Canada, "Backgrounder – Environmental Enforcement Bill: New Penalties and Sentencing Provisions" (4 March 2009). See also Penny Becklumb, "Legislative Summary: Bill C-16: Environmental Enforcement Act", Parliamentary Information and Research Service, 1 April 2009 (Revised 19 June 2009), at 2, online: Parliament of Canada <<http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/40/2/c16-e.pdf>>.

offences. A fine less than the minimum is permitted only where imposing the minimum would cause undue financial hardship to the offender.<sup>66</sup>

The establishment of minimum fines contrasts with the scheme under Alberta's EPEA. Moreover, the federal scheme establishes higher fines than the EPEA. For instance, for individuals subject to more serious offences, a minimum fine of \$15,000 is created and a maximum fine of \$1 million (and/or imprisonment) whereas a summary conviction attracts minimum and maximum fines of \$5,000 and \$300,000 (and/or imprisonment) respectively. Under the EPEA, however, fines for more serious offences attract a maximum fine of \$100,000 (and/or imprisonment) for individuals. For a large revenue corporation, vessel or ship 7,500 tonnes deadweight or over, an indictment for more serious offences attracts minimum and maximum fines of \$500,000 and \$6 million respectively whereas summary conviction attracts \$100,000 and \$4 million minimum and maximum fines respectively. Similar offences under the EPEA attract a maximum fine of \$1 million. These go to show that compared to the federal regime, the provincial fine scheme for environmental cases in Alberta allows the imposition of significantly low fines. In the widely publicized case against Syncrude Canada Ltd. (discussed later) over the death of about 1500 birds in a tailings dam operated by Syncrude, in which the Alberta Provincial Court imposed a fine of \$3 million against Syncrude,<sup>67</sup> the largest part of the financial penalty was part of the creative sentencing order the court made in the case, and not fine in its traditional sense. The following table shows Alberta's sentencing history in environmental cases from 2008 to mid-2014, indicating the number of prosecutions and the amount of fines for each year as well as the number of administrative penalties and the amount of penalties imposed for each year.<sup>68</sup>

### Sentencing History

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

<sup>66</sup> Becklumb, *ibid* at 8.

<sup>67</sup> *Syncrude*, *supra* note 26.

<sup>68</sup> This data is culled from the compliance assurance report published periodically by the ESRD.

## 4.4.2 Creative Sentencing

### 4.4.2.1 Meaning and Origin in Alberta

Instead of requiring that the offender pay fines into government coffers or face imprisonment or both, creative sentencing allows the court to order that the funds be channeled to some cause benefit to the community or society at large or that the offender perform some other act that is in some way related to righting the wrong or to tracing the root cause of the offence with a view to preventing its recurrence. They are intended to allow sentencing to reflect the nature and consequences of environmental offences. Accordingly, creative sentencing is justified on the basis of the following: rehabilitation of the environment, the need to address the root cause of the offence, the need to help right the wrong instead of having the money disappear in general government coffers, and victims' interests.<sup>69</sup> Other important goals have also been identified, such as prison decongestion, desire for humane punishment, "do-goodism",<sup>70</sup> enabling some good to come from bad, and enabling the defendant to help others in its shoes in the same industry to avoid committing the offence.<sup>71</sup> As the Alberta Court of Appeal stated it, the "creative approach to sentencing assists the Court in structuring a sentence appropriate for the individual".<sup>72</sup>

The advent of creative sentencing in Canada is linked to the decision of the Yukon Territorial Court in *R. v. United Keno Hills Mine Ltd.*<sup>73</sup> Dissatisfied with the efficacy of fines in fostering responsible corporate behaviour, Stuart C.J. stated:

Fines alone will not mold law abiding corporate behavior. Fines are only one part of sentencing arsenal to foster responsible corporate behavior. 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>74</sup>

Rejecting the view that the harsher the fine the more likely compliance is assured, Stuart C.J. noted that "[f]ines are inadequate principally because fines are easily displaced and rarely affect the source of illegal behavior" and can be passed on to the

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<sup>69</sup> Eugene H Czajkoski & Laurin A Wollan, Jr, "Creative Sentencing: A Critical Analysis" (1986) 3:2 Justice Quarterly 215 at 221.

<sup>70</sup> *Ibid.* See also, Kelly Cryderman, "Paying the Price: 'Creative Sentencing' option angers family of wellsite victim", *Calgary Herald* (25 June 2010).

<sup>71</sup> Susan McRory & Lynda Jenkins, "Action Update: Creative Sentencing" (2003) 18:3 News Brief at 10, online: Environmental Law Centre <[http://www.elc.ab.ca/Content\\_Files/Files/NewsBriefs/Vol.18No.22003.pdf](http://www.elc.ab.ca/Content_Files/Files/NewsBriefs/Vol.18No.22003.pdf)>; Adam Driedzic, "Will Statoil's "creative sentence" prevent illegal water use?" Environmental Law Centre (Alberta) Blog (9 December 2011), online: Environmental Law Centre <<http://environmental-lawcentre.wordpress.com/2011/12/09/will-statoils-creative-sentence-prevent-illegal-water-use-by-oil-companies/>>.

<sup>72</sup> *R v Spina*, 1997 ABCA 235 at para 21 (CanLII).

<sup>73</sup> (1980) 10 CELR 43 at 52 (YTTC).

<sup>74</sup> *Ibid* at 52.

consumer or tax payer in the form of higher prices.<sup>75</sup> In relation to offences affecting the use of natural resources, the learned judge stated that:

[t]he use of criminal sanctions for resource management can promote cooperation but will never by itself resolve the polycentric conflicts in resource use. Effective criminal sanctions can provide leverage for prompt and universal cooperation in negotiating, implementing and operating comprehensive resource use management schemes.<sup>76</sup>

He compiled a list of ten “additional measures”<sup>77</sup> that can be explored during sentencing and expressed the “hope [that] other Judges may explore more creatively and courageously than I have.”<sup>78</sup> As will be seen, his recommendation that criminal sanctions that promote “cooperation in negotiating, implementing and operating comprehensive resource use management schemes” has shaped the use of creative sentencing in Alberta.

In Alberta, creative sentencing was introduced in 1993 when the EPEA was originally enacted. Section 234(1) of the EPEA allows the court to make an order to any of the following effects, having regard to the nature of the offence and the circumstances of 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 cost, 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 cost;
- (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 cost 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;

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<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid* at 55.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid* at 57.

- (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>79</sup>

These provisions are identical with section 148 of the Alberta *Water Act*.<sup>80</sup>

The EPEA recognizes that after a sentencing order has been made, the circumstances of the offender may change to such an extent as to warrant reconsideration of the sentence imposed. Section 236(1) of the Act therefore empowers the court to vary a sentencing order if it considers that the offender's circumstances have changed to such an extent as to warrant a variation. It sets out the possible variation orders that the court can make, as follows:

- (a) an order changing the original order or the conditions specified in it;
- (b) an order relieving the offender absolutely or partially from compliance with any or all of the order;
- (c) an order reducing the period for which the original order is to remain in effect;
- (d) an order extending the period for which the original order is to remain in effect for an additional period not to exceed one year.

Before making any of the above orders, the court may hear from any interested persons, most typically, the victims.

Since Alberta's adoption of creative sentencing in 1993, creative sentencing has become "a major insignia of sentencing policy in Alberta."<sup>81</sup> Some of the earliest Alberta environmental cases incorporating creative sentencing include *R. v. Dow Chemical Canada Inc.*,<sup>82</sup> *R. v. Inland Cement Ltd.*<sup>83</sup> and *Van Waters*.<sup>84</sup> In 2012, creative sentencing constituted 37 per cent of all penalties connected with environmental offences in

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<sup>79</sup> EPEA, *supra* note 11 at s 234(1).

<sup>80</sup> *Supra* note 54.

<sup>81</sup> Nwapi, *supra* note 1.

<sup>82</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>83</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>84</sup> *Supra* note 16.

Alberta.<sup>85</sup> This represented a drop from the previous three years, which were (2011) 50 per cent, (2010) 82 per cent and (2009) 65 per cent.<sup>86</sup>

It must be noted, however, that a creative sentencing order must be authorized by the relevant statute and in the case of offences under the EPEA must fall within the ambit of section 234(1) of the EPEA, otherwise the court lacks jurisdiction to provide one. In the Ontario Court of Appeal case, *R. v. Imperial Oil*,<sup>87</sup> Imperial Oil had been convicted of discharging sludge into a river. The trial court imposed fines on Imperial Oil and added an order directing Imperial Oil to pay each of two local school boards to provide education on pollution. The Ontario Court of Appeal set aside the latter order on the basis that there was no statutory authority to impose such an order.<sup>88</sup> Even when the creative sentence was agreed upon by the Crown and the offender and subsequently submitted to the court, the court must satisfy itself that the terms of the agreement are not inconsistent with the terms of section 234(1) of the EPEA. Thus, it is still a decision of the judge and cannot be seen as an out of court settlement.<sup>89</sup>

#### 4.4.2.2 Forms of Creative Sentencing

Creative sentencing takes a variety of forms. As can be deciphered from section 234(1) of the EPEA, they include the following: an order to remedy or prevent any harm to the environment that results or may result from the offence; order directing publication, by the offender and at the offender's cost, the facts relating to the conviction; order directing the offender to notify victims of the offence of the facts relating to the conviction; order directing the offender to submit information regarding their conduct that the court considers appropriate in the circumstances, to the Minister; order for community service; and order requiring the offender to comply with any other conditions necessary, in the opinion of the court, for securing the good conduct of the offender and for preventing the offender from repeating the same offence or committing other offences.<sup>90</sup> It is at the judge's discretion to choose from the list, a form of sentence it considers most suitable to the individual case. For analytical purposes, these various forms can be classified into three: those designed to improve or preserve the state of the environment, those that address the root cause of the offence, and those that are truly punitive in nature for the

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<sup>85</sup> See "Creative Sentencing – A Short History" (unpublished) paper written by the environmental prosecution unit of the Alberta Environment and Sustainable Resource Development and on file with the author. Out of a total penalty of \$380,000, \$140,000 was composed of creative sentencing.

<sup>86</sup> *Ibid.* In 2008, however, no creative sentence was issued.

<sup>87</sup> 1997 CanLII 952 (ON CA).

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

<sup>89</sup> McRory and Jenkins have observed that "[m]any offenders are under the misapprehension that creative sentencing is more akin to an out of court settlement than a sentence." McRory & Jenkins, *supra* note 71.

<sup>90</sup> See also *Water Act*, *supra* note 54.

“worst case” scenarios.<sup>91</sup> There may of course be some creative sentences that cannot fit perfectly into any of these categories, e.g., suspended sentences.<sup>92</sup> A more detailed filtering will go beyond the scope of this paper, which is not based solely on creative sentencing. However, some scholars have done a more extensive study of creative sentencing.<sup>93</sup>

#### 4.4.2.2.1 Those Designed to Improve or Preserve the State of the Environment

Creative sentences designed to improve the state of the environment come by way of orders to fund specific research projects directed towards finding better ways of preventing environmental destruction or finding more environmentally friendly ways of carrying out various kinds of activities. In a case against the Canadian National Railway Company the failure to take reasonable steps to repair, remedy and confine the effects of a substance, the company was ordered to pay, in addition to a fine, \$280,000 to the Southern Alberta Institute of Technology for the development of an emergency response training course and for scholarships to students in the course.<sup>94</sup> The course is intended to equip students with the skills to respond to emergencies to prevent serious environmental destruction. In another case against Harvest Operations Corp, the company was ordered to pay \$49,000 to Ducks Unlimited Canada (in addition to a \$21,000 fine) for a wetlands restoration project.<sup>95</sup> A creative penalty of \$75,000 was levied against PrimeWest Energy Inc to be paid to Alberta Stream Watch Conservation Coalition, for the purpose of funding a habitat restoration project<sup>96</sup> also falls under this category.

#### 4.4.2.2.2 Those that Address the Root Cause of the Offence

Creative sentences that trace the root cause of an offence come by way of orders to fund academic programs that investigate the causes of the type of infractions involved in the offence with a view to discovering how to prevent a recurrence of the infraction. In

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<sup>91</sup> Alberta Environment and Sustainable Resource Development & Alberta Justice and Solicitor General, *Creative Sentencing in Alberta: 2012 Report*, at 3, online: ESRD <<http://environment.gov.ab.ca/info/library/8831.pdf>>.

<sup>92</sup> Suspended sentences, though rare, are not unheard of in environmental cases. In *Lac Ste Anne County*, the Alberta Provincial Court suggested that suspended sentences be reserved “for those rare cases where the breach is for all intents and purposes a technical one.” *Supra* note 36 at para 20.

<sup>93</sup> See, in particular, Hughes & Reynolds, *supra* note 34.

<sup>94</sup> ESRD, *Creative Sentencing in Alberta: 2013 Report*, at 11 and 14, online: ESRD <<http://esrd.alberta.ca/focus/compliance-assurance-program/environmental-protection-commission-reports/documents/creative-sentencing-report-2013.pdf>>.

<sup>95</sup> *Ibid* at 12.

<sup>96</sup> *Ibid* at 13.

*Syncrude*,<sup>97</sup> Syncrude's failure to take reasonable steps to prevent migratory birds from landing on its tailings pond resulted in the death of about 1500 birds in April 2008. Federal and provincial charges resulted in a \$3 million fine against Syncrude out of which \$250,000 went to fund the development of a curriculum for the Wildlife Management Technician Diploma Program at Keyano College in Fort McMurray.<sup>98</sup>

In 2009, Suncor was prosecuted for non-compliance offences that occurred between September 2005 and January 2007 at its Millennium Lodge, near Fort McMurray. The Alberta Provincial Court ordered Suncor to pay, *inter alia*, \$315,000 for a Regulatory Compliance Project at the University of Calgary. This project examined the organizational failures that lead to environmental offences, with a view to developing better regulatory compliance mechanism for corporations in the oil and gas industry.

#### 4.4.2.2.3 Those that are Truly Punitive in Nature

Creative sentences falling under this category include cases where the offender is prohibited from operating its business for a specified period of time. It also includes cases where the court takes away the fruits of the wrongdoing from the offender. In *R. v. Hillsight Vegetables Inc.*,<sup>99</sup> the offender owned a turnip farm located near a river. Floodwaters from the river washed the farm's topsoil into the river. To stop the erosion and increase the amount of land it could use to grow turnips, the offender rechanneled the course of the river without prior approval from the relevant authority. The offender plead guilty to violations of the *Fisheries Act* and the *Water Act* and was sentenced to pay a \$10,000 fine and to deliver \$90,000 worth of turnips to the Edmonton Food Bank over the course of four years. Since the offender's motive in diverting the river course was to increase its turnip production, by sentencing it to supply a substantial amount of turnips to a food bank, the court apparently intended to strip the offender of any benefits it might have obtained from the violation. This was clearly punitive and may be regarded as an order to perform community service under section 234(1)(h) of the EPEA because of the purely public welfare nature of what the offender was commanded to do. It has been argued that this type of community service may not be "desirable" since it does not bring any "net benefits to the environment."<sup>100</sup> However, viewing creative sentencing orders in environmental cases only in terms of net benefits to the environment would be restrictive and would improperly ignore other important goals that are related to underlying motive of the offence. Thus, in *R. v. Centennial Zinc Plating Ltd.*, the Court of Queen's Bench of Alberta noted that "[t]he Legislature has balanced various elements of the public interest and has provided for the possibility of a 'community' service to come from an offender

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<sup>97</sup> *Supra* note 26.

<sup>98</sup> Environment Canada, "\$3M Award Imposed as Syncrude Canada Ltd Convicted of Violating Environmental Laws" (22 October 2010).

<sup>99</sup> [2005] AJ No 1916.

<sup>100</sup> Hughes & Reynolds, *supra* note 34 at 118.

who has contributed to what is essentially a ‘community’ problem, namely, despoiling of the environment shared by Albertans.”<sup>101</sup> The court pointed out that the community service provision is not necessarily intended to have a remedial effect, i.e. to repair the specific damage done by the offender, but as “additional to case-specific repair penalties. In its service of the wider public interest, the provision is not limited to a specific parochial purpose.”<sup>102</sup> In *Hillsight*, there was evidence that direct remediation of the damage could aggravate the damage and that with time the landscape would be restored by natural processes. This suggests that the type of community service order the court issued was probably the most creative sentence the court could have issued.

Creative sentencing has also been used punitively to impose restrictions on the acquisition and use of professional designations by environmental consultants who provided false or misleading environmental information against the provisions of the EPEA and the Water Act.<sup>103</sup> The consultants were further ordered to publish accounts of their offence in the Environmental Services Association of Alberta Weekly News.<sup>104</sup> Also, in *R. v. Johal and RJS Investments*, the accused were found guilty of violations relating to recycling of beverage containers and were placed on three-year probation and ordered to publish an advertisement of the conviction.<sup>105</sup> Ordering the offender to speak to a public gathering composed of members of the industry has also been used in place of publication of the offence and conviction.<sup>106</sup> According to Hughes and Reynolds, these types of cases appeared to have involved some “bad practice” that needed to be stopped, and while the suspension/prohibition orders were aimed at specific deterrence, the publication orders were aimed at general deterrence.<sup>107</sup>

#### 4.4.2.3 Guidelines Governing Creative Sentencing

In the beginning, Alberta had no guidelines for the application of creative sentencing. The courts, prosecutors and offenders relied on guidelines developed by the State of California.<sup>108</sup> As stated in the ESRD 2012 report on creative sentencing, the guidelines are as follows:

- The offender must accept responsibility for their conduct. Since creative sentencing is available for guilty and non-guilty pleas, it follows that this acceptance of responsibility may occur after a guilty verdict has been delivered.

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<sup>101</sup> 2004 ABQB 211 at para 106 (CanLII) [*Centennial Zinc*].

<sup>102</sup> *Ibid* at para 108.

<sup>103</sup> *R v Brown*; *R v Buoy*; and *R v Ulliak*. Details of these cases are contained in *Creative Sentencing in Alberta: 2013 Report*, *supra* note 94 at 10 & 14.

<sup>104</sup> *Ibid*.

<sup>105</sup> (12 November 1996) unreported (Alta Prov Ct) (cited in Hughes & Reynolds, *supra* note 34 at 127).

<sup>106</sup> *R v Leddy Exploration*, No 060589462-P1 (Alta Prov Ct), 23 April 2007.

<sup>107</sup> Hughes & Reynolds, *supra* note 34 at 127.

<sup>108</sup> *Creative Sentencing in Alberta: 2012 Report*, *supra* note 91.

- The cost of the project must be in addition to a traditional fine and must be such can strip the offender of any economic or competitive advantage they might have gained as a result of the offence.
- Not all projects qualify for creative sentencing. A nexus between the violation and the project must be shown to exist. The reason is to enable the benefits of the project to truly address the harm caused by the offence. An offence relating to air pollution, for instance, would ordinarily not produce a creative sentencing project dealing with water pollution. The project must either improve the environment or reduce the level of risk to the public.
- The principal beneficiary of the project must be the public. The Alberta public must be the primary beneficiary of the project, and the public within the locality of the offence must be the primary consideration.
- Projects that merely reflect that the corporation adopts “sound business practices” are not eligible. The project must result in a “concrete, tangible and measurable result.”
- In deciding what projects to be approved, conflicts of interest (potential or actual) between the offender and the recipient of the fund or executor of the project as well as between the recipient of the fund and the Crown or the investigating officer or agency must be avoided.
- Not all persons qualify to receive creative sentencing funds. Government agencies or departments do not qualify. A recipient must be a not-for-profit organization, which must submit itself to investigations regarding their viability and accountability. Universities, colleges and research institutes have been the highest beneficiaries.<sup>109</sup>

#### 4.4.2.4 Principles Governing Creative Sentencing

It is difficult to extrapolate from the cases any specific set of principles governing the application of creative sentencing. This is because most creative sentencing cases in Alberta have typically proceeded on the basis of a plea bargain, that involves a joint submission by the Crown and the offender on the appropriate creative sentence to be delivered. The court usually accepts the plea bargain and the joint submission and then issues its decision without explaining the principles informing the specific sentence imposed, whether in its nature or in its extent. The lack of a detailed ruling explaining the factors considered in the determination of the sentence renders the cases of little or no

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<sup>109</sup> *Ibid* at 3-4. See also, *Guidelines for Creative Sentencing Projects*, prepared by the Environmental Prosecutor, Specialized Prosecutions Branch of the AENV (undated) (on file with the author).

precedential value. And even if the Crown and the offender decide to disclose the factors they considered in determining the agreed-upon sentence that would still be unhelpful from a precedent perspective.<sup>110</sup> However, two principles can be identified: the totality principle and the need to fit the sentence with the offence.

#### 4.4.2.4.1 The Totality Principle

Creative sentences are generally available to the court in combination with fines or any other punishment the court may impose. The court is required to look at the totality of the sentence to avoid imposing a disproportionately severe sentence on the offender. This is known as the “totality principle”. In *R. v. M. (CA)*, the Supreme Court of Canada defined the principle as requiring “a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender.”<sup>111</sup> In *R. v. Great White Holdings Ltd.*, the Alberta Court of Appeal stated that “courts should apply this totality principle both to fines in the strict sense, and also to a combination of fines and special statutory penalties designed either to confiscate profits or to redress harm”.<sup>112</sup> As the court put it in *R. v. Ewanchuk*, “[a]t the end of the day, the question here is whether the global sentence imposed is a fit one.”<sup>113</sup>

The totality principle was applied in the context of creative sentencing in *Van Waters*. Following a guilty plea regarding an unlawful release of chemicals into the environment by the accused corporation, the Crown and the corporation agreed to a creative sentencing order. However, there were other issues relating to what credit the corporation should receive for the costs incurred in carrying out the terms of the proposed creative sentencing order. The Crown argued that any credit given to the corporation under the creative sentencing order would have the effect of reducing the fine imposed on the corporation, 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>114</sup> The Crown argued that credit should be given only for things that were “really necessary for compliance with the Creative Sentencing Order” and in fact were necessitated by such compliance. But for things that the accused would have to do “in any event”, the Crown argued that credit should not be given.<sup>115</sup>

The court began by noting that sentencing is not “an exercise in arithmetic” and that to treat it as “exact science” may plunge the court into “a protracted cost analysis and

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<sup>110</sup> Nwapi, *supra* note 1 at 23.

<sup>111</sup> [1996] 1 SCR 500 at para 42.

<sup>112</sup> 47 Alta LR (4th) 233 (2005), 2005 ABCA 188 at para 30 (CanLII).

<sup>113</sup> 2010 ABCA 298 at para 15 (CanLII).

<sup>114</sup> *Ibid* at para 16.

<sup>115</sup> *Ibid*.

audit.”<sup>116</sup> The court added that such an approach would establish a “hierarchy” of sentences, putting the creative component of a penalty above the fine component of the same penalty.<sup>117</sup> The right approach, according to the court, is “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 Creative Sentencing Order and the fine) ought to be.”<sup>118</sup> This entails a consideration of the relationship between the creative sentencing component and the fine component of the penalty. Support for this is found in 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. *Van Waters* stated that the provision does not render creative sentencing superior to other penalties.<sup>119</sup> It regarded the sentencing as a “unitary process” in which the court must take a panoramic view of the sentencing instead of adopting a two-stage process of determining one component of the sentence (such as the creative sentencing component) and thereafter determining the appropriate amount of fine to be imposed.<sup>120</sup>

On the question of whether the costs of performing acts the accused would have to perform in any event, or is under a legal obligation to perform, the Court of Queen’s Bench of Alberta has held that the cost of cleaning up a site damaged by the environmental offence cannot be deducted from the overall penalty or warrant a mitigation of the penalty. This is because the offender’s duty to clean up the site is required by law independent of the prosecution of the offence.<sup>121</sup> Where, however, the offender has, in cleaning up the site, gone beyond what the law requires it to do, such “special effort” may be considered especially since it reflects “an improved attitude” on the part of the offender.<sup>122</sup> The court, however emphasized that “the repair cost of prior damage, however, is not mitigating either by itself, nor as a reason not to deploy section 234(1)(h) of the [EPEA].”<sup>123</sup>

Before imposing a creative sentence, the first step the court takes is to determine the total penalty to be imposed on the offender, based on the overall circumstances of the offence.<sup>124</sup> As far as the case law is concerned, there is no set ratio for determining what

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<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid* at para 17.

<sup>118</sup> *Ibid* at para 20.

<sup>119</sup> *Ibid* at para 19.

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

<sup>121</sup> *Centennial Zinc, supra* note 101 at para 109.

<sup>122</sup> *Ibid* at para 111.

<sup>123</sup> *Ibid.*

<sup>124</sup> *R v Jovnic Ltd*, 2011 ABPC 62 at para 4 (CanLII) [*Jovnic*].

portion of a sentence should be allocated to creative sentencing and what portion should go to fine. In 2003, McRory and Jenkins reported that the trend in Alberta was “a fifty-fifty split between a fine and creative sentencing”.<sup>125</sup> However, if this was the case, it certainly no longer is. In *The Queen v. Statoil Canada Ltd.*,<sup>126</sup> for instance, 97 percent of the financial penalty was allocated to creative sentencing (\$190,000 out of the \$185,000 financial penalty went to fund an online training project that would address the causes of the offence). In *Synchrude*, out of the \$3 million fine imposed on Synchrude, \$1.3 million went to fund research on avian protection at the University of Alberta; \$900,000 went to the Alberta Conservation Association to acquire lands for the Golden Ranches Waterfowl Habitat Project; \$300,000 went to the federal Environmental Damages Fund;<sup>127</sup> and \$250,000 went to fund the development of a curriculum for a Wildlife Management Technician Diploma program at Keyano College in Fort McMurray.<sup>128</sup> More than 90 per cent of the sentence thus went to creative sentencing. And in one 2009 case against Suncor and its camp operator Compass Group Canada Ltd. over non-compliance, offences that occurred between 2005 and 2007 at Suncor’s Millennium Lodge in Fort McMurray, “only a small part of the penalty was to be paid as fine.”<sup>129</sup> The table below reflects the proportion of creative sentence relative to regular fines in environmental cases in Alberta from 1996 to 2013.<sup>130</sup>

#### Creative Sentencing as Proportion of Total Sentence

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

<sup>125</sup> *Supra* note 71.

<sup>126</sup> No 110222833P1, 31 October 2011, online: Environment Alberta <<http://environment.alberta.ca/documents/Statoil-Cda-Ltd-Charge-Creative-Sentencing-Order.pdf>>.

<sup>127</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>128</sup> Environment Canada, *supra* note 98.

<sup>129</sup> Nwapi, *supra* note 1 at 28.

<sup>130</sup> See *Creative Sentencing in Alberta: 2013 Report*, *supra* note 94 at 8.

#### 4.4.2.4.2 Fitting the Sentence to the Offence

There must be a clear connection between the conduct underlying the offence and the cause the sentence is intended to address. If the offender is to be asked to pay money to a research institution, the money must be for research connected with the conduct underlying the specific type of environmental infraction. For instance, an offence related to water pollution cannot result in creative sentencing requiring the offender to support research in air pollution. In *R. v. ECL Environmental Services Ltd.*,<sup>131</sup> An environmental services company was hired to collect and neutralize some 3,400 litres of sodium hydroxide solution. While the company's workers were loading the solution into a tanker, the tanker began to fail, spilling about 111 litres of the solution onto the ground. The company was charged for violations of the EPEA and the *Dangerous Goods Transportation and Handling Act*.<sup>132</sup> The court imposed a \$55,000 fine on the company but rejected a creative sentencing proposal by the Crown that would have involved paying money to support a program at Mount Royal College (as it then was). While the case does not disclose the nature of the program at Mount Royal, it is clear from the judgment that the court's rejection of the creative sentencing proposal was partly because the connection between the program and the offence was "a little bit tenuous" and partly because there was no serious and long-term consequence from the spill.

## 5.0 Factors Influencing Environmental Sentencing

Regardless of the sentencing option the court chooses, the determination of the actual sentence is based on a number of factors designed to ensure that the goals of the relevant environmental statute are met. Those factors include: the nature of the harm, the degree of the offender's culpability, the criminal history of the offender, the offender's acceptance of responsibility, the offender's attempt to mitigate the harm caused by their conduct, and the size of the offender, i.e. the offender's ability to fulfil the obligations imposed under the proposed sentence. In applying these factors in any particular case, the court is enjoined to avoid over-emphasizing the significance of any individual factor.<sup>133</sup>

### 5.1 The Nature of the Harm

The nature of the harm caused by the environmental infraction is a fully recognized factor in environmental sentencing. In considering the nature of the harm, the court looks at the existence (actual or potential), degree and duration of the harm. The nature of the

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<sup>131</sup> [2003] AJ No 1700.

<sup>132</sup> RSA 2000, c D-4.

<sup>133</sup> *R v Lefebvre*, 1999 ABQB 523 at para 18 (CanLII).

substance causing the harm is equally relevant. Release of high-risk substances, such as PCBs were released, would therefore be regarded as an aggravating factor.<sup>134</sup> Considered also is the question of where the harm occurred, i.e. whether the harm is to the environment, to property, to a person or to all of these.<sup>135</sup> In considering the existence of harm, actual harm is viewed as an aggravating factor, especially where the harm is “readily foreseeable”.<sup>136</sup> This approach to actual harm seems more consistent with the retributive theory of sentencing. And even where the harm is not easily identifiable, that cannot constitute a mitigating factor, but a neutral factor.<sup>137</sup> The rationale for this is that environmental harm may be latent or cumulative and may begin to manifest a long time after the occurrence of the event. In the case of potential harm, the higher the potential the greater the penalty warranted.<sup>138</sup> Potential harm is punishable because environmental offences are designed not only to prevent the occurrence of actual harm but also to prevent the creation of environmental risks.<sup>139</sup> In *Lac Ste Anne County*, the court stressed that an “appropriate deterrent element in sentence will remind the offender that the whole purpose of this kind of legislation is to encourage compliance beforehand so that the very possibility of environmental accidents may thereby be reduced.”<sup>140</sup> In fact, many environmental offences, such as offences related to commencing an activity without first obtaining the necessary permit, do not address actual harm but are targeted specifically at the creation of the risk of harm. The potential for harm is determined by the nature of the harm-causing activity or product, the sensitivity of the environment to be affected and its proximity to human population, and the likely enormity of harm that will be caused should the risk materialize.<sup>141</sup> This approach of not regarding absence of actual harm as a mitigating factor seems more consistent with the deterrent theory since it is underlain by a desire to deter any attempt to cause actual harm. In *Van Waters*, the court stressed that “[i]f that risk [of environmental harm] is created, even if it does not come to pass, a serious offence has occurred.”<sup>142</sup> Lastly, in considering the nature of the harm, the costs and efforts required to address the harm or to ameliorate its effects are to be taken into account.<sup>143</sup>

## 5.2 The Degree of Culpability

The significance of the degree of the offender’s culpability is reflected in the sentencing

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<sup>134</sup> *R v Chem-Security (Alberta) Ltd*, 1998 ABPC 96 at para 12 (CanLII) [*Chem-Security*].

<sup>135</sup> *Terroco*, *supra* note 17 at para 45.

<sup>136</sup> *Ibid*. See also, *R v Goodstone*, 232 AR 243, 1999 ABCA 110; *R v DeSousa*, [1992] 2 SCR 944.

<sup>137</sup> *Terroco*, *supra* note 17 at para 47.

<sup>138</sup> *Ibid* at para 48.

<sup>139</sup> *Van Waters*, *supra* note 16 at para 28.

<sup>140</sup> *Supra* note 36 at para 20.

<sup>141</sup> *Terroco*, *supra* note 17 at para 48; *Chem-Security supra* note 134 at paras 12-14.

<sup>142</sup> *Van Waters*, *supra* note 16 at para 28.

<sup>143</sup> *Ibid* at para 27.

provisions of the EPEA, which provides maximum penalties for intentional acts that are twice the maximum penalties for unintentional acts.<sup>144</sup> This recognition of the significance of culpability is further reflected in the creation of the due diligence defence for offences committed through unintentional acts.<sup>145</sup> The underlying rationale is that there are certain harms that would occur without any fault of the accused. If the accused can show that they exercised due diligence in the conduct of their activity, they cannot be fairly punished for the harm that results in spite of their due care. It is therefore a matter of the degree of care the accused took to ensure the harm did not occur. This is why the accidental character of most environmental offences has a downward influence on the amount of fines.<sup>146</sup>

In *Terroco*, culpability was regarded as a “dominant factor.”<sup>147</sup> The court stated that the offender’s “degree of carelessness” is a relevant factor in the consideration of culpability and that due diligence is to be measured “on a sliding scale”: the more diligent the offender, the lower the sentence; the less the higher.<sup>148</sup> In *R. v. Fiesta Party Rentals (1984) Ltd.*, the court stated that “[w]here the level of negligence is gross or the consequences of the breach are serious, as in a worker’s death, the fines should be higher.”<sup>149</sup> Where the harm was foreseeable but the offender failed to take the necessary measures to prevent the risk from materializing, this would exert an upward pull on culpability.<sup>150</sup> In assessing the degree of culpability, the existence of previous convictions may indicate recklessness on the part of the offender.

The Canadian Law Reform Commission has opined that lack of intent should not be regarded as a mitigating factor in environmental cases, but rather a neutral factor.<sup>151</sup> The Commission suggests, however, that intent should play a role in sentencing only as an aggravating factor (where it is present).<sup>152</sup> There is considerable logic in this approach. As the Commission argues, the “gravamen” of environmental offences is negligence, not intent.<sup>153</sup> However, there is still some room for considering absence of intent as a mitigating factor. Most environmental offences today have both intentional and negligence (or unintentional) versions. For instance, section 227(a) and (b) of the EPEA respectively creates the offence of “knowingly provid[ing] false or misleading information” and the offence of “provid[ing] false or misleading information” required to

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<sup>144</sup> EPEA, *supra* note 11 at s 228.

<sup>145</sup> *Ibid* at s 229.

<sup>146</sup> Bunt & Swaigen, *supra* note 9 at 22.

<sup>147</sup> *Terroco*, *supra* note 17 at para 35.

<sup>148</sup> *Ibid*.

<sup>149</sup> [2000] AJ No 1679 at 8.

<sup>150</sup> *R v Canadian MDF Products Co*, 2002 ABPC 82 at para 63 (CanLII). See also, *Terroco*, *supra* note 17 at para 36 (“failure to take simple and inexpensive steps to avoid the unwanted consequence prior to the contamination is an aggravating factor”).

<sup>151</sup> Bunt & Swaigen, *supra* note 9 at 22.

<sup>152</sup> *Ibid*.

<sup>153</sup> *Ibid*.

be provided under the Act. For the latter version of the offence, it is logical to not regard lack of intent as a mitigating factor since the presence of intent would automatically place the offence under the first version. And for the first version, intent should retain a role in the consideration of sentencing to allow the courts to impose higher penalties for more intentional acts than they would for less intentional acts. Thus, the egregiousness of the conduct would be assessed by the degree of willfulness of the conduct, so that the less wilful the less the penalty. And the degree of willfulness can be assessed by considering any previous convictions, any profits the offender made from the conduct, etc.

### 5.3 Criminal History of the Offender

The previous criminal record of the offender is deemed an indication that the offender is more interested in profits than in compliance.<sup>154</sup> For that reason more severe penalties are imposed on offenders with previous records of conviction. It appears that in the case of corporate offenders, it is not only the criminal history of the corporation that is considered, but also that of the human actors of the corporation. Thus in *Jovnic*, the court viewed as an aggravating factor the fact that the sole director and another officer of the corporate offender had been previously involved in EPEA violations.<sup>155</sup>

While this factor speaks to the actual criminal record, it has been extended to the general conduct of the offender, and is not limited to the fact of criminal conviction. Thus in *Terroco*, the court regarded it an aggravating factor where it can be shown that the offender had been cautioned regarding its conduct but continued, even in the absence of a prior criminal record.<sup>156</sup> But mere absence of a criminal record is not regarded as a mitigating factor by instead a neutral factor. By the same token, a company with a good record of self-monitoring will more likely receive a reduced sentence.<sup>157</sup> Also, where the offender is shown to be a good corporate citizen, that can weigh in favour of mitigation. However, claims of good corporate citizenship may call for some level of scrutiny, for acts that portray a corporation as a good corporate citizen may have been motivated by deep-rooted economic reasons. Such acts may be better viewed as “morally neutral.”<sup>158</sup>

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<sup>154</sup> *Terroco*, *supra* note 17 at para 38; *Van Waters*, *supra* note 16 at para 38. See also, Bunt & Swaigen, *ibid* at 38 (stating that “[t]his factor appears to be treated no differently than in traditional criminal cases. Lack of a previous record is a mitigating factor. Conversely, subsequent offences usually attract substantially higher fines, and are a factor in determining the ‘worst case.’”).

<sup>155</sup> *Jovnic*, *supra* note 124 at para 42.

<sup>156</sup> *Terroco*, *supra* note 17 at para 38.

<sup>157</sup> *Chem-Security*, *supra* note 134 at para 27.

<sup>158</sup> Bunt & Swaigen, *supra* note 9 at 27.

## 5.4 Acceptance of Culpability

Acceptance of culpability, associated with a feeling of remorse over the conduct, has been recognized as a mitigating factor. This acceptance can be demonstrated by an early guilty plea<sup>159</sup> or by admission of responsibility as soon as the offender is advised.<sup>160</sup> In *R. v. Jovnic Ltd.*, the fact that the company indicated at the onset that it would plead guilty was regarded as a mitigating factor, which, together with other factors, resulted in a fine of \$200,000 for an offence whose maximum potential amount was \$1 million.<sup>161</sup> Part of the reason for accepting this as a mitigating factor is that it reduces the cost of investigation to establish the guilt of the alleged offender. Moreover, an offender who does not realize the nature and effect of their conduct is more likely to re-offend than one who realizes. As with the assessment of the degree of the offender's culpability, previous convictions as well as any warnings that the authorities may have issued the offender are taken into account since the existence of previous convictions may question the offender's sincerity in acceptance of culpability.<sup>162</sup> In *R. v. Lac Ste Anne County*, the court considered the offender's guilty plea and cooperation with investigators in the assessment of remorse.<sup>163</sup> A company's investments in safety training of employees, its voluntary reporting of the violation, even the corporate executive's personal appearance in court are all taken into account.<sup>164</sup> Considered also is the conduct of the offender after the offence has been committed. Efforts to immediately mitigate the harm would most likely indicate a feeling of remorse.<sup>165</sup> In *Chem-Security*, as soon as the offender became apprised of the offence, it did not hesitate to shut down the transformer furnace from which the PCBs and other harm-causing substances were released and did not reopen it. The court regarded this as acceptance of responsibility.<sup>166</sup> Conversely, where the offender takes no steps to mitigate the harm after discovering the harm, that failure would be treated as an aggravating factor.

## 5.5 Size of the Offender

Size of the offender speaks to the financial capacity of the offender and is more frequently considered in relation to corporate offenders. There is little jurisprudential discussion of the significance of this factor. Without any discussion of the factor, the court in *Van Waters* simply adopted the following passage from the Law Reform Commission of Canada's *Sentencing in Environmental Cases*: "The size and wealth of a

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<sup>159</sup> *Terroco*, *supra* note 17 at para 39.

<sup>160</sup> *R v Thompson Agricultural Aviation Ltd*, 2002 ABPC 76 at para 29 (CanLII).

<sup>161</sup> *Jovnic*, *supra* note 124 at para 40.

<sup>162</sup> *Terroco*, *supra* note 17 at para 40.

<sup>163</sup> *Supra* note 36 at para 23.

<sup>164</sup> *R v Alberta Public Works*, 2001 ABPC 151 at para 24 (CanLII).

<sup>165</sup> *Terroco*, *supra* note 17 at para 42.

<sup>166</sup> *Chem-Security*, *supra* note 134 at para 25.

corporation is a factor frequently mentioned in sentencing. These factors usually come into play in relation to the ability to pay, and the requirement of providing deterrence (that is, the fine should not be a licence to pollute).<sup>167</sup> This factor is thus related to the offender's ability to pay any fine to be imposed. Implicit in the factor is therefore the principle that the wealthier the offender the more aggravated the offence will be considered and the higher should the fine be. But the courts have not said so explicitly. In *Jovnic*, the court was unwilling to characterize the wealth of the corporate offender as an aggravating factor, but was ready to state explicitly that it is "a proper consideration in determining the appropriate amount of a fine in order to make that fine meaningful."<sup>168</sup> This suggests that the meaningfulness of a fine is dependent on how much the fine is and the wealth of the offender on whom it is to be imposed. It has also been suggested that a "higher standard of care might be expected of a larger corporation" than of a smaller one and that a large corporation which has the resources to avoid environmental harm but fails to do so deserves greater punishment than small corporations which lack the resources.<sup>169</sup> In the case of public companies, however, the courts may consider the public policy implications of higher fines on corporations, large or small. Thus, as the Law Reform Commission puts it:

If the fine warranted by the gravity of the offence is one the company cannot pay, a choice must be made between the company's interests and the broader public interest. ... The ultimate balancing of environmental damage against the economic benefit of commercial enterprise involves policy choices that are within the purview of the legislature. But the courts will no doubt continue to be sensitive to the economic repercussions of sentencing on the corporation.<sup>170</sup>

However, the courts have cautioned against placing much emphasis on the size of the offender. According to the courts, "associating the penalty more with the wealth of the offender than with the nature of the offence [m]ight encourage poorer corporations to be oblivious to legal duties, and encourage well-to-do corporations to simply inventory the cost."<sup>171</sup> It could also result in "unusual comparisons as to 'bigness' of corporations" and would overlook "the need for the sentence to be 'fit' to the offence as well as the offender."<sup>172</sup>

However, given that most of the most remarkable environmental violations that occur in Alberta are committed by wealthy oil and gas corporations, fitting the penalty with the size of the offender should be a major consideration in order to realize the penological goal of deterrence. The current maximum fine of \$1 million under the EPEA would look very much like a slap on the wrist to the energy companies — a mere licence to pollute.

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<sup>167</sup> *Van Waters*, *supra* note 16 at para 33.

<sup>168</sup> *Jovnic*, *supra* note 124 at para 41.

<sup>169</sup> *Bunt & Swaigen*, *supra* note 9 at 25.

<sup>170</sup> *Ibid* at 26.

<sup>171</sup> *Centennial Zinc*, *supra* note 101 at paras 116-117.

<sup>172</sup> *Ibid* at para 117.

## 6.0 Conclusion

Alberta's sentencing policy is founded on a number of principles, namely, protection of the public, retribution, deterrence, and restoration. Although rehabilitation has been touted as a valid environmental sentencing principle, given that most environmental cases in Alberta are against corporate entities rather than individuals, the significance of rehabilitation is virtually nil. These principles are implemented through the introduction of alternative sentencing mechanisms that allow the courts to order a person to publicize their commission of the offence, to carry out specified projects for the restoration or enhancement of the environment or to support research efforts directed at finding better and more efficient ways of protecting the environment. In addition, there appears to be a deliberate policy toward increased fines in a global sense, i.e. in the sense of the totality of traditional fines and creative sentencing. Although the maximum fines available in Alberta are still significantly lower than those under federal environmental legislation, the Alberta courts appear to be increasing the amount of the fines they impose within the limits allowed by law. In deciding what penalty to impose, the courts consider a myriad of factors, such as the nature of the harm, culpability, acceptance of responsibility, and the offender's criminal record and size. None of these factors is controlling; the ultimate decision depends on the specific circumstances of each. The goal in the application of these factors is to realize the objectives encapsulated in the sentencing principles mentioned above. With the range of sentencing options, the question of how they translate into particular sentencing outcomes calls for close and continued inquiry.

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