Creative Sentencing and Environmental Protection

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Prosecution is one of many enforcement tools designed to secure compliance with environmental regulations. Where prosecution is chosen as a compliance strategy, the resulting sentence may be traditional—a fine or imprisonment—or “creative.” This article defines and describes existing creative sentencing options and outlines their potential use. It then goes on to examine the actual application of the sentencing statutes, looking both at the exercise of discretion by the Crown to pursue such sentences, and what types of orders the Courts have imposed. In so doing, we examine the extent to which creative sentences show promise in achieving greater environmental protection than do traditional sentences.

1. INTRODUCTION

To the disappointment of many, environmental law does not have as its focus the end of all environmental harm. Rather, it is about achieving a balance between the socio-economic benefits of modern industrial and
technological development, and the health and ecological costs that inevitably accompany such activities.\textsuperscript{1} In modern parlance, environmental law seeks to achieve sustainable development by controlling rates of resource depletion and levels of pollution discharges.\textsuperscript{2} The “correct” balance is implicitly or, often, explicitly determined by some form of cost-benefit analysis or risk assessment, in conjunction with government-industry negotiation and a degree of public consultation.\textsuperscript{3}

Early regulatory legislation sought to establish pollution control primarily through quantitative discharge standards, coupled with permits or licencing systems. Failure to comply resulted in the possibility of prosecution and moderate fines.\textsuperscript{4} In situations where quantitative standards were scientifically difficult or politically unpalatable to establish, early regulatory legislation would often include broadly defined normative standards prohibiting harm to the environment. Over the years, this approach has become more sophisticated, adding: additional preventive screening; a more risk-averse approach to setting standards; mechanisms to increase transparency, accountability and public participation; expanded liabilities for both intentional and negligent misconduct; and a broad variety of administrative and criminal compliance mechanisms.\textsuperscript{5}

Yet, notwithstanding the addition of these pollution prevention and precautionary principles, once a decision is made about the appropriate balance between environmental concerns and competing economic and social interests, the “permitted” pollution is still regulated by the same basic system with, in most cases, the same central goal of control, not elimination of environmental damage.\textsuperscript{6}


\textsuperscript{3} Ibid. at 4, 15; Boyd, supra note 1 at 251-60; Howlett, supra note 1 at 35.


\textsuperscript{5} See generally Boyd, supra note 1; Benidickson, supra note 2; Hunt, \textit{ibid.}

\textsuperscript{6} Benidickson, supra note 2 at ch. 1; Boyd, supra note 1 at ch. 6-10.
Thus, while modern environmental statutes might be somewhat more risk averse than in the past, particularly with respect to what pollutants to allow and under what conditions to allow them, for the vast majority of wastes, chemicals, industrial and technological products the core legislative approach taken by most Canadian jurisdictions is to continue to allow a degree of release and incur a corresponding degree of environmental harm. The aim when enforcing such legislation, therefore, is not to stop pollution, but to secure compliance with the specified standards, which have been chosen as reflective of the optimal social benefit, or at least a net public “good.”

If maintaining the net public welfare is the *raison d’être* of regulatory legislation, and this is achieved by securing compliance with regulatory standards, what is the role of prosecutions and sentencing in this process? In modern statutes, prosecution is one of a plethora of administrative and criminal compliance mechanisms that form an “enforcement ladder” or spectrum of gradually escalating enforcement activities designed to secure compliance with the prescribed standards. These enforcement activities range from negotiation and voluntary agreements, through various control orders, inspections, reporting requirements, and administrative penalties, and often including measures for fiscal incentives, tickets or civil (tort) suits. In general, the use of the criminal process via prosecution is seen to be the most severe enforcement option. Often, it is a last resort or “smart regulation” backstop mechanism to ensure compliance with a licence, an Act, or its Regulations. While overall enforcement of environmental law in Canada has often proved erratic and unsatisfactory,

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10 Hughes, *supra* note 8 at 186.

“strict enforcement” (prosecutions) continues to be a key part of any modern compliance strategy.12

Within this dominant paradigm, what does a prosecution and accompanying sentence hope to achieve? There is, of course, a large body of literature addressing the theoretical goals or objectives of sentencing—deterrent, retributive, rehabilitative or restorative—in relation to the criminal law in general,13 to regulatory offences more particularly,14 and to environmental offences specifically.15 Given that many environmental offenders are corporations, there is a cross-cutting thread of discussion regarding the ability of various types of enforcement activity, including criminal prosecution, to influence corporate behaviour.16 These debates rage internationally, not merely within Canada.17 Suffice it to say that Canadian courts have settled upon the need for pollution prevention via deterrence, and the need to generate societal respect for the regulatory process, as the most relevant objectives of environmental sentencing.18

The rationale is that since prosecutions occur after an offence, and the environmental damage is already done, any hope for the future protection of the public welfare needs to come from any deterrent effect of the sentence.19 Of particular importance is general deterrence:

General deterrence is of primary importance because only if polluters are deterred from future environmental harm will the sentence be preventative in nature, and only by preventing environmental damage can the potentially dangerous consequences to the public welfare be avoided.

While the sentence in any single case is unlikely to achieve general deterrence,20 studies suggest that where there is a degree of certainty of

12 Duncan, supra note 9 at 353-63.
14 See generally J. Swaigen, Regulatory Offences in Canada (Scarborough, Ont.: Carswell, 1992).
15 See generally Hughes, supra note 8 and Campbell, infra note 22.
17 See generally Campbell, infra note 22; see also J. Bates et al., Liability for Environmental Harm (Hampshire: LexisNexis UK, 2004); M. O’Hear, “Sentencing the green-collar offender” (Fall 2004) 95:1 J. Crim. L. & Criminology 133 (U.S.).
detection of any wrongdoing (such as adequate monitoring through inspection) then sufficiently severe legal sanctions that are routinely enforced and consistently imposed in a series of decisions, can increase the degree of compliance.\(^{21}\)

In addition to this preventive or deterrent function, prosecution and sentencing forms part of a “compliance culture” or, simply stated, fostering general respect for the law.\(^{22}\) Since a wide variety of compliance mechanisms exist, a strict enforcement response is often used in relation to more serious offences and offenders who flagrantly disregard their legal obligations.\(^{23}\) Thus, a sentence is often directed toward preserving the legitimacy and authority of a regulatory body and to hammer home some respect for the rule of law.\(^{24}\)

The harm to be wary of and to protect against is that to the [regulatory] process and system itself rather than the quality of the water in a particular lake. In this case, there is no harm to the environment, but there is harm inflicted upon the process of environmental protection.

Arguably then, effective enforcement activities can generate respect for the law, express societal disapproval of polluters, and thereby have an educational or moral impact on public beliefs, goals and attitudes. This normative effect then creates a situation in which environmental protection goals and compliance with regulatory rules have widespread social acceptance, resulting in less intervention to correct non-compliance.\(^{25}\) In short, strict enforcement helps create a situation in which those who breach environmental standards are not merely in technical breach of an unimportant rule, but rather are seen as engaged in actual malfeasance, crime or social harm.\(^{26}\)

In brief, sentences may be categorized as traditional (fines and imprisonment), creative (non-fine measures) or restorative (diversionary).

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\(^{23}\) Hughes, supra note 8 at 187-88; Campbell, \textit{ibid.} at 4.


In Part 2 of this article, we will provide a brief overview of the various sentencing alternatives as they developed in environmental law. Part 3 describes the existing creative sentencing statutes, along with some comment on their potential uses. Thereafter, we will examine the actual application of these statutes both federally and within the Province of Alberta. This will be accomplished by describing the procedures and policies of the Crown in pursuing such sentences (Part 4) and then by examining the sentencing orders of the Courts of those jurisdictions (Part 5). We conclude with some thoughts about the degree to which creative sentencing shows promise for moving beyond the traditional deterrence and compliance goals of environmental sentencing, and the role of the Crown and courts in achieving future progress.

At the outset, it is perhaps worth noting that our focus is on the practical—what is happening within Canadian courts right now. In so doing, our approach has been to examine documents available within the public domain, including decided cases from Alberta and under federal statutes, and to glean what we can from the limited supporting literature which currently exists in this area. One of the greatest impediments to research in this area is that a great deal of information about the use of creative sentences is not in the public domain. Nevertheless, if the use of creative sentences is to expand, or if they in fact can serve deterrent and other functions, it is important to describe, publicize and where possible provide analysis with respect to such proceedings. Thus, at a very pragmatic level, there is value in documenting and where possible providing commentary on the creative sentencing processes and outcomes to date.

2. AN OVERVIEW OF SENTENCING ALTERNATIVES

As mentioned previously, early pollution control statutes often employed a fine as the primary sentencing option (with imprisonment also being often available but rarely used). The size of the fine was then crafted to attempt to achieve deterrence,\(^{27}\) taking into account such factors as the gravity of the offence (risk of harm versus cost of taking precautions, degree and magnitude of risk, actual damage and the nature of the environment) and the degree of responsibility of the offender (“criminality” or degree of disrespect for the law).\(^{28}\) Aggravating and mitigating factors

\(^{27}\) Berger, supra note 19 at ¶ 7.10; R. v. Cotton Felts, supra note 25.

\(^{28}\) Hughes, supra note 8 at 188-92; R. v. Kenaston Drilling (Arctic) Ltd., (1973), 1973 CarswellNWT 20, 12 C.C.C. (2d) 383 (N.W.T. S.C.); Libman, supra note 24 at 11-12; Berger, supra note 19 at ch. 7; R. v. Terroco Industries 2005 CarswellAlta 430, 2005
that could be considered included: prior record of environmental miscon-
duct; profits realized by the offence; the size, wealth and nature of the
offender; pollution control and compliance efforts; remedial efforts; and
degree of demonstrated remorse. Some modern statutes specifically
require sentencing courts to take such factors into account. The availa-
bility of a solution (technology), and the need for a degree of uniformity
in sentences (precedents) may also be considered by sentencing courts.

Despite the availability of prosecutions and traditional sentences
(fines and imprisonment) in even the earliest pollution control statutes,
routine enforcement and compliance was rarely achieved. Strict enforce-
ment via the criminal process was often avoided in favour of negotiation,
in part due to the expense and time commitment involved in court actions
and in part due to problems associated with regulatory legislation. Other
deficiencies in the early legislation, such as the ability of persons to hide
behind the corporate veil or insolvency proceedings, were identified. A
debate developed over the relative merits of amending and improving
administrative compliance mechanisms, versus reforming quasi-criminal
strict enforcement mechanisms.

In the result, by the late 1980s a variety of improvements were made
to both administrative and quasi-criminal compliance mechanisms. On
the quasi-criminal side, sentencing options in particular were broadened
in two ways. First, the traditional option of a fine was revamped to include
higher maximum fines, daily offence provisions, and profit-stripping
fines. Imprisonment was either added as an option to deal with deliberate
and flagrant offenders, or made more flexible via hybrid offence provi-
sions and the ability to pursue directors and officers as parties to corporate

ABCA 141(Alta. C.A.); J. Swaigen and G. Bunt, Sentencing in Environmental Cases
(Ottawa: LRCC, 1985).

29 Hughes, supra note 8 at 192-96; R. v. Van Waters & Rogers Ltd., supra note 18; R. v.
United Keno Hill Mines Ltd., supra note 26; J. Mallet, “Court of Appeal Clarifies
Sentencing Principles for Environmental Offences” (2005) 20:2 Environmental Law
Centre NewsBrief at 8-11.

30 CEPA 99, supra note 9, s. 287; Canada Shipping Act, R.S.C. 1985, c. 5-9, s. 664(2).

31 Berger, supra note 19 at ¶ 7.110.

32 R. v. Fraser Inc. 1993 CarswellNB 442, 139 N.B.R. (2d) 125 (N.B. Prov. Ct.) as cited in
Libman, supra note 24 at 11-14.

33 Boyd, supra note 1 at 270.

34 Webb, supra note 1 at 24-33.

35 On corporate environmental liability, see generally Bowden & Quigley, supra note 4.

36 Ibid. See also LRCC, supra note 26; Benidickson, supra note 2 at 147-51; L. Duncan,

37 Benidickson, supra note 2 at 157; Webb, supra note 1 at 32; Berger, supra note 19 at ¶
When coupled with a more vigorous prosecution policy, there is some evidence that compliance did improve.39

Second, the so-called “creative” options or “non-fine measures” were added to the statutes. These include: licence revocation; forfeiture of property; restitution; prohibition, remedial and prevention orders; modifications to business operations; research orders; notification and publication orders; information orders; community service; probation; compensation; and performance bonds.40 Most recently, a third option—diversion processes—has also been added, such as absolute and conditional discharges, the use of restorative justice techniques (e.g., sentencing circles) and so-called “alternative measures” or EPAMS—a process by which sentencing is avoided if a negotiated compliance agreement is fulfilled.41

Despite these modern additions, by all reports fines are still used more frequently than any other sentence for environmental offences.42 Courts continue to apply “the classical [“economics”] theory of non-compliance behaviour choice as a balancing act between benefits gained through non-compliance versus costs of being caught,” in which “fines alone are said to be sufficient to achieve compliance.”43 Yet, lack of rigorous enforcement continues to be a problem,44 and penalties have often been low.45 Numerous authors have concluded that “fines are only one part of a necessary sentencing arsenal.”46 While lack of familiarity with regulatory regimes by judges is sometimes blamed for the failure to use creative sentencing more frequently, lack of prosecutorial expertise and resources

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38 Berger, supra note 19 at ¶ 7.305-7.369.59; Hughes & Graydon, ibid. at 302.
40 Benidickson, supra note 2 at 158-60; Hughes & Graydon, supra note 37 at 302-307; Campbell, supra note 22 at 19.
42 Berger, supra note 19 at ¶ 7.10; Libman, supra note 24 at 11-29.
44 Boyd, supra note 1 at 237-45. The number of enforcement officers “in the field” is often staggeringly low. This accounts for the emphasis which some enforcement agencies place on “self-reporting” provisions within some statutes.
45 Boyd, supra note 1 at 270-71; Unger, supra note 43 at 4-7. Fines may also be tax deductible: Berger, supra note 19 at ¶ 7.229.50.
46 Libman, supra note 24 at 11-29; Boyd, supra note 1 at 270.
may also be a contributing factor. In addition, it is unclear whether creative sentencing will actually produce better environmental outcomes than traditional fines, although as we shall see, at least in theory:

Crown, defence and court have a unique opportunity to craft sentences that directly benefit the environment and community, in a way that applies the offender’s attention and resources to the immediate public welfare, rather than the government’s general revenue funds.

3. EXISTING LEGISLATION: CREATIVE SENTENCING OPTIONS

A 2005 survey of federal and provincial statutes revealed that a wide variety of environmental legislation now contains some form of creative sentencing provision. However, the survey also indicated that there is no real uniformity in federal and provincial regulatory schemes. In the federal sphere, the most comprehensive creative sentencing provisions are found in the *Fisheries Act* and the *Canadian Environmental Protection Act, 1999*. Most provinces have incorporated at least some creative sentencing options into their core environmental legislation as well.

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48 Hughes & Graydon, *supra* note 37 at 305; see also Campbell, *supra* note 22.

49 K. Melnyk, “Legislation List: Statutes that Provide for Creative Sentencing” (2005, unpublished, available from the authors). This was a survey of federal and provincial statutes (all provinces and territories except Nunavut). It covered all major legislation in the environmental and natural resource areas (broadly defined to include parks and agriculture). The survey attempted to identify which statutes contained creative sentencing provisions and which did not. It also did some comparisons between statutes as to the types of provisions available (in tabular form), focusing on five jurisdictions: Federal, Alberta, B.C., Ontario and Quebec. For example, in the federal realm, 33 statutes were identified that had modern sentencing options in the Acts themselves, while another 30 relevant Acts were surveyed that did not contain such provisions. (Note that the applicability of legislation such as the *Contraventions Act* was not included in the scope of the survey.) Similarly, in Alberta 19 statutes were identified that contained creative sentencing, while another 33 did not.


At the outset, it is worth noting that creative sentences are generally available “in addition to any other punishment that may be imposed,” subject to the limits implied by the totality principle. Normally they are still combined with a fine.

In brief, the following options are amongst those most frequently available in Canadian statutes:

(a) Removal of Benefits

Statutes may contain provisions which either confiscate the profits realized by commission of the offence (i.e., a “profit-stripping” fine), or authorize the forfeiture of property used in its commission. The latter can be used in cases such as wildlife infractions, to decrease the likelihood of repetition of the offence (e.g. seizure of traps, firearms) or to remove potential profits (e.g., poached wildlife parts).

(b) Restitution as Compensation

Property losses that result from the commission of an offence may result in a sentencing order for payment of compensation. Additionally, the Crown can usually be compensated for any costs incurred by it during its cleanup or remediation. A sentencing order for restitution is unlikely to be used very often, as administrative mechanisms to order it usually precede prosecutions, and are taken into account simply as mitigation measures during sentencing.

Compensation for personal injury is generally recoverable only via civil (tort) actions.
(c) Licence Revocations and Prohibition Orders

Most statutes give the sentencing court the ability to order an offender to stop any action that may result in the continuation or repetition of the offence.61 Again, however, administrative orders to the same effect would generally have preceded prosecution. If an offender has been fined, some provincial statutes authorize licence suspensions until the fine is paid.62

(d) Trust Funds, Research Orders and the EDF

Some statutes permit the sentencing court to impose a financial penalty on an offender either to conduct ecological research,63 or to pay the funds into some particular trust fund with conservation goals.64

Federally, the government has established the Environmental Damages Fund (EDF) for this purpose.65 The EDF is a special holding or trust account administered by Environment Canada.66 It is designed to take money from either civil judgments or regulatory sentences, and expend those funds on environmental repair in the location where the damage occurred, often in partnership with eligible non-governmental organizations.67 In addition to environmental restoration, the funds can be used for research or for education (e.g. funding scholarships).68 This type of penalty is particularly useful if technical solutions to environmental problems need additional development, or where supervision and administration of the Court order requires expertise that could be provided by an NGO partner. However, there is also a danger of “further research” producing no real benefit, and thus such orders can amount to simply retaining the status quo.

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61 CEPA 99, supra note 9, s. 291(1)(a); AEPEA, supra note 51, s. 234(1)(a).
62 Berger, supra note 19 at ¶ 7.490, 7.500.
63 CEPA 99, supra note 9, s. 291(1)(n). Creative sentencing authority under provincial law can also be used to direct money into the federal programs such as the EDF, infra note 65 and accompanying text.
64 Environmental Management Act, S.B.C. 2003, c. 53, s. 127(1)(e).
67 Wruck, supra note 65 at 120.
68 Ibid.; see also Berger, supra note 19 at ¶ 7.570-7.578, 7.770-7.865.7.
(e) Remedial and Prevention Orders

As an alternative to paying money into some type of restoration project, most environmental statutes permit the sentencing judge to require the offender either to take direct action to remedy any harm or, where it is clear what steps need to be taken to prevent future harm, to order the defendant to take such steps. The two types of order generally emerge from a single statutory provision, and thus will be discussed together.

The time and expense involved in remedial orders or orders to conduct “beneficial environmental projects” can vary greatly. As a general rule, the undertaking ordered will be “reasonably related to the organization’s criminal conduct and achievement of at least one of the objectives of sentencing.” It is a desirable form of sentence in theory as it requires offenders to take direct responsibility for the consequences of their actions and to direct their resources to environmental protection per se, although in practice, as was the case with prohibition or restitution orders, most often remedial action is ordered using administrative powers prior to engagement of the criminal process. Thus, the Crown normally treats the remedial action as a minimum expectation, while resort to prosecution and sentencing is a subsequent, super-added, punishment.

Nevertheless, when particular types of preventive action are clearly warranted, the option of a prevention order seems to be a useful alternative. Examples of preventive sentences include: creating emergency response plans; mandatory employee training; compliance with “voluntary” codes such as ISO 14001 management systems; and performance of environmental audits. Such measures require the offender to use either consultants, or their own expertise, to remove internal barriers to compliance. However, supervision of such an order, to ensure it is completed in a timely fashion, that it is done competently, and that it is not simply doing what the offender planned to do already for its own benefit, can

69 CEPA 99, supra note 9, s. 291(1)(b); AEPEA, supra note 51, s. 234(1)(b).
70 Campbell, supra note 22 at 22.
71 Hughes & Graydon, supra note 37 at 303-304; also Campbell, supra note 22 at 24-25; Berger, supra note 19 at ¶ 7.740-7.760, 7.913-7.914. Some statutes have separately stated powers to order offenders to create pollution prevention plans (e.g. CEPA, supra note 9, s. 291(1)(c)), to monitor (ibid. s. 291(1)(d)), to implement environmental management systems (ibid., s. 291(1)(e)), and to conduct environmental audits (ibid., s. 291(1)(f)).
72 Hughes & Graydon, supra note 37 at 304.
prove problematic, and can potentially create an onerous workload for government personnel.73

(f) Community Service Orders

In a similar vein, statutes frequently authorize courts to order community service.74 This is particularly useful if cleanup or direct remediation is either impossible, or beyond the defendants’ means, yet the offenders’ expertise could result in a related environmental or public benefit.75 Ideally, there should be some “nexus” between the offence and the community project.76

Defining the type of benefit that is appropriate can, however, prove controversial. The recent Hillsight Vegetables case provides one example.77 In that case, farmers committed a violation of the federal Fisheries Act78 and the provincial Water Act79 by diverting a water course without a permit, which then led to increased salinization of the water.80 The creative sentence required the accused to provide 92,000 pounds of turnips to a food bank over a four year period.81 Arguably, this sentence is directly related to the cause or motivation for the offence. It occurred due to a desire to increase production and by removing this excess, the creative sentence operates similarly to a profit-stripping fine.82 Certainly, a public

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73 S. McRory, “Assessment of Creative Sentencing Projects 1993-2006 aka ‘The Good, The Bad and the Ugly’” (2006, Alberta Justice, unpublished). The original study by the author was an internal government document intended for use by Alberta Justice personnel only. Due to privacy and confidentiality concerns, that document is not available outside the department. The version released to the authors was a version “intended for a broader audience” that does not identify the accused persons; it is nevertheless not published nor generally available as only limited use may be made of its contents with express permission of the author. The study was a review of 13 years worth of closed files in which creative sentencing had been used, and was an evaluation by the author that identified what she considered to be “the successful and unsuccessful aspects of various creative sentencing projects,” including compliance problems and the apparent reasons why some sentences failed to achieve a successful outcome.

74 CEPA 99, supra note 9, s. 291(1)(d); AEPEA, supra note 51, s. 234(1)(b).

75 Hughes & Graydon, supra note 37 at 305-306; Campbell, supra note 22 at 23.

76 Campbell, supra note 22 at 22.


78 Fisheries Act, supra note 50.


80 Hillsight transcript, supra note 77 at 5-7.


82 Hillsight transcript, supra note 77 at 7-8.
welfare benefit was provided. On the other hand, arguably this type of community service order is not desirable, as it did not involve any net benefit to the environment. While the evidence in Hillsight suggested that direct remediation could increase the damage and that natural processes would eventually restore the landscape,83 according to this stricter view of sentencing objectives a more desirable order would then have been to require some other environmental restoration project within the watershed. Certainly, the lack of criteria in Canadian law by which to assess whether a given project has a sufficient nexus to an offence has resulted in some criticism in the literature.84

(g) Notification, Publication and Information Orders

Another option in many environmental statutes is the ability of the court to require the offender to provide data to affected individuals, the community at large, or to the Crown.85

A notification order86 can ensure that affected persons receive information about pollution in a timely manner so that medical advice or compensation can be pursued. It also has an educative function, increasing awareness of environmental rules.87

Publication orders,88 on the other hand, are intended to achieve a deterrent effect via adverse publicity. The offender submits a paid advertisement or article setting out the facts of the case that led to their conviction with the idea that “better consumer protection and a market-driven financial incentive” to improve operations will be achieved by such disclosure.89 As well, publication in professional bulletins, to expose the infractions to the offender’s peers, is thought to have a useful effect on industry-wide risk management, and even on the development of stricter industry standards.90

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83 Ibid. at 6.
84 Campbell, supra note 22 at 22; Libman, supra note 24 at 11-65.
85 Hughes & Graydon, supra note 37 at 304-305.
86 CEPA 99, supra note 9, s. 291(1)(h); AEPEA, supra note 51, s. 234(1)(d).
87 McRory, supra note 73.
88 CEPA 99, supra note 9 s. 291(1)(g); AEPEA, supra note 51, s. 234(1)(c).
89 Hughes & Graydon, supra note 37 at 305; Campbell, supra note 22 at 26-27; Cohen, supra note 8 at 10250. They are not, however, coerced apologies, which would likely be contrary to the Charter of Rights: Hughes & Graydon, ibid. at 305; Berger, supra note 19 at ¶ 7.890-7.905.
90 McRory, supra note 73.
Information orders\textsuperscript{91} occupy a slightly different role, as they are generally not made at the time of sentencing. Rather, they allow the Crown to do supervision and follow-up, collecting information post-conviction, to check for any repetition of the offence or failure to comply with the terms of a sentence.\textsuperscript{92} These cause a practical difficulty for many enforcement agencies as they are often not equipped to maintain a watch on the convicted party for an extended period following sentencing. Court orders can also be drafted to grant leave to return for directions, if conditions set forth cannot be satisfied.\textsuperscript{93}

(h) Performance Bonds or Guarantees

Under some enactments, offenders may be required to post a performance bond, pay monies into court, or provide an irrevocable letter of guarantee.\textsuperscript{94} These funds help secure compliance with other aspects of the sentence, as they are forfeited if non-compliance occurs. Funds can also be put into lawyers’ trust accounts when a creative sentence is negotiated, to ensure compliance with the order (if accepted by the Court).\textsuperscript{95}

(i) Suspended Sentences and “Probation”

Some Acts permit the Court to suspend sentences of fines or imprisonment, and make a sentencing order alone.\textsuperscript{96} The court is also given a general power to order an offender “to comply with such other reasonable conditions as the Court considers appropriate and just in the circumstances for securing the offender’s good conduct and for preventing the offender from repeating the same offence or committing other offences.”\textsuperscript{97} The effect of such an order is equivalent to placing an offender on probation and is potentially broad enough to require a corporation to even change its business practices.\textsuperscript{98} If the “probation” order is breached, the Court

\textsuperscript{91} CEPA 99, supra note 9, s. 291(1)(j); AEPEA, supra note 51, s. 234(1)(f).
\textsuperscript{92} Hughes & Graydon, supra note 37 at 305.
\textsuperscript{93} Hillsight order, supra note 81 is an example.
\textsuperscript{94} Hughes & Graydon, supra note 37 at 307; Berger, supra note 19 at ¶ 7.866-7.873; CEPA 99, supra note 9, s. 291(1)(i); AEPEA, supra note 51, s. 234(1)(e).
\textsuperscript{95} McRory, supra note 73.
\textsuperscript{96} CEPA 99, supra note 9, s. 289(1); Berger, supra note 19 at ¶ 7.516.
\textsuperscript{97} CEPA 99, supra note 9, s. 291(1)(g); AEPEA, supra note 51, s. 234(1)(i).
\textsuperscript{98} In some jurisdictions criminal procedure statutes and statutes that govern the jurisdiction of the Courts also authorize probation orders. See generally Libman, supra note 24 at 11-44 to 11-49; Campbell, supra note 22 at 19-22.
may revoke the sentence and impose an alternative. “Probation” could be used in cases where rehabilitation of the offender is the main goal (e.g. with first offenders).

(j) Ticketing and Diversion Processes

In addition to traditional sentences (fines, imprisonment) and creative sentences, there are various sentencing diversion processes available in some Acts. The three main options are ticketing, absolute and conditional discharges and EPAMs. These form part of the available enforcement ladder but are not to be confused with creative sentences, which result in a criminal record of conviction, and accordingly do not form part of the present study.

99 CEPA 99, supra note 9 at s. 289(2).
101 Ticketing is one such option. See E. Hughes, Ticketing for Environmental Offences” (2005) 20:3 ELC NewsBrief 11-13. Instead of a traditional process of prosecution (the laying of an information, etc.) an abbreviated procedure is used for enforcement. Neither imprisonment nor criminal record can result; there is a financial penalty only. Such schemes may be contained directly in an environmental statute (e.g. CEPA 99, supra note 9, s. 310) or under an enactment such as the Contraventions Act, supra note 9, which makes the procedure available for a variety of regulatory offences. They are used mostly for offences of a minor nature where little scientific expertise is needed (e.g. enforcing rules in parks), and are seen as unsuitable for pollution infractions that require complex evidentiary collection and evaluation. Alternatively, administrative penalties may be preferred. See generally J. Flagal, “AMPs: the next logical step in Environmental Regulatory Law” (1998) 10:3 Legal Emissions 7; C. Rolfe and L. Nowlan, Economic Instruments and the Environment: Selected Legal Issues (Vancouver: West Coast Env. L. Res. Foundation, 1993).
102 Absolute and conditional discharges may also be available (e.g. CEPA 99, supra note 9, s. 288). A discharge as a remedy is usually related to creative sentencing i.e., the accused is discharged on condition that they comply with the terms of a creative sentencing order. See Hughes & Graydon, supra note 37 at 306. Discharges are granted only if not contrary to the public interest, and in the best interests of the accused, and therefore are often a way of diverting first time offenders, or those whose offence was relatively minor, away from the full force of the criminal process. Ibid.; Berger, supra note 19 at ¶ 7.515.
103 Finally, offenders may be diverted from the sentencing process by “EPAMs” or environmental protection alternative measures (e.g. CEPA 99, supra note 9, s. 295). This is simply a form of negotiated compliance agreement. However, if breached, the offender can be brought back into the normal criminal process and sentenced, which in theory creates a great deal of enforceability to an EPAM that was historically absent from negotiated agreements. See generally L. Howie, “Thinking Outside the Box: Environmental Protection Alternative Measures” (2007) 18 J.E.L.P. 87.
4. APPLICATION OF THE CURRENT LEGISLATION: PROCESS AND POLICIES

Given the availability of a wide range of creative sentencing options, a number of interesting issues arise. These include: a) how often are creative sentences used? b) for what type of offence or offender will the Crown consider a creative sentencing option? c) what process is used? d) what policies or objectives does the Crown seek to achieve? e) what types of creative sentences are actually being imposed? and perhaps most importantly, f) what outcomes are being achieved that could not be reached using traditional sentences such as fines?

Examination of these issues is often difficult. In part, as previously mentioned, this is because much of the information about creative sentences is not in the public domain. Creative sentences are often part of a resolution agreement rather than a sentencing hearing, negotiated between the prosecution and the offender. This is of necessity a closed-door process. The parties then appear before the Court with an agreed statement of facts to jointly present a recommendation for sentencing. If accepted by the judge the decision is often an oral one from the Bench. If a written decision is given, it is uncontested, perceived to be of lesser precedent value, and therefore unreported. Publicly available written records are most often limited to the agreed statement of facts, the transcript of the hearing, and the order of the Court.104 In a number of cases examined by the authors, only the actual Court order was available.

A second impediment to an investigation of creative sentencing is that the use of creative sentences is variable from province to province, between federal and provincial regulators and even federally from region to region. The reasons for this are unclear, but the willingness and creativity of individual prosecutors (and the openness of defence counsel to negotiation) seems to play a key role. In the result, to the extent data is available, some jurisdictions seem to be undertaking a great deal of creative sentencing, while others are not, and there is no real discernable pattern or policy between these extremes.

For the purposes of this study we chose two sample jurisdictions actively involved in creative sentencing as illustrative: the Province of Alberta and the federal Department of Justice Canada (now Public Prosecution Service of Canada). These jurisdictions were chosen due to avail-

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ability of data and active use of creative sentencing and, accordingly, were not intended to be a representative nor random sample in any statistical sense.

Alberta has a general enforcement and compliance policy for environmental offences, but its approach to creative sentencing has been detailed to some extent in the form of additional written guidelines. Originally guided by creative sentencing practices in California, the Alberta Crown began using creative sentencing in the mid-1990’s after the enactment of the EPEA. The core section of the Act is s. 234, which authorizes prohibition, remedial, prevention, publication, notification, community services and probation orders, as well as performance bonds, compensation for Crown costs and information orders. While the Act does authorize other actions such as forfeiture, these are not generally included in the provincial Crown’s definition of creative sentencing. Statistics gathered by Alberta Justice over the years show that creative sentences are now “a significant feature” of the majority of successful environmental prosecutions in the province, with the creative sentencing component of the total monetary penalty imposed by Alberta courts ranging from 25-97 per cent. It has been reported that the trend in both Canada and the U.S. is for “at least 50 per cent of the overall monetary penalty” to go into creative sentencing options and a 2003 report on Alberta’s practices suggested “the trend in Alberta has been a fifty-fifty split between a fine and creative sentencing,” while elsewhere (including federally) the creative sentencing portion “may constitute up to 90 per cent of the total.”

Over time, with prosecutorial experience and some key judicial decisions, Alberta’s initial policy has been fleshed out. A workshop in February 2002 resulted in a more detailed process and set of guidelines

107 AEPEA, supra note 51; see also Water Act, supra note 79, that contains identical provisions.
108 AEPEA, supra note 51, s. 207.
109 McRory & Jenkins, supra note 105 at 8.
110 McRory & Jenkins, supra note 105; McRory, supra note 106 at 2.
111 McRory, supra note 106.
112 Berger, supra note 19 at ¶ 7.865.7.
113 McRory & Jenkins, supra note 105 at 10.
being developed.\textsuperscript{115} The creative sentencing process is initiated by the prosecutor, who puts together a project-specific committee for each file. The prosecutor assigns an investigator, who will investigate the offence, examines the background of the offenders and collects evidence. The investigator also assists in securing scientific experts, as needed, to join the committee. If third parties such as NGO’s are to receive funds to administer as a result of the sentence, auditors may be brought in to ensure financial accountability. If follow-up and administration of the sentence cannot be done by the investigator alone, a government administrator or supervisor may be needed and assigned.\textsuperscript{116}

Not every case can or will be considered for creative sentencing, nor will every proposal fit into the intended goals of the process. Alberta’s position is that creative sentences must meet certain guidelines in four categories:\textsuperscript{117} a) the situation must meet its prerequisites; b) the sentence must be directed toward specified objectives; c) if funds go to third parties they must meet certain eligibility requirements; and d) there must be resources in place to properly administer the project. The full guidelines are reproduced in Appendix A. In brief, some key components include:

- Offenders must otherwise be in compliance with environmental regulations.
- The creative sentence is always in addition to a fine, not in substitution.
- The objective is deterrence.
- The sentence must be a punishment, not of some secret benefit to the offender:

  ...funds must not be used to pay for what the accused should already have done in terms of clean up, compliance with the law, or compliance with current industry standards.\textsuperscript{118}

Additionally,

- There must be a nexus between the offence and the project proposed in the sentence.
- The goal of the project must be environmental improvements or reduced risk.
- The general public must be the primary beneficiary.
- The project must have a tangible and obvious benefit that adds to environmental quality.
- Third party NGO recipients of funds must not be in a conflict of interest and should meet viability requirements.
- Accountability for the funds must be maintained either via trust funds or sufficient Court-ordered supervision.

\textsuperscript{115} McRory & Jenkins, \textit{supra} note 105; McRory, \textit{supra} note 106 at Appendix B.
\textsuperscript{116} The province has also made use of the federal EDF as a means to administer creative sentences.
\textsuperscript{117} McRory, \textit{supra} note 106 at Appendix A; McRory & Jenkins, \textit{supra} note 105 at 8, 10.
\textsuperscript{118} McRory & Jenkins, \textit{ibid.} at 10.
Enforceability of any creative sentence is always an issue. Under the Alberta statute, as previously noted, information orders can be obtained and performance bonds can be ordered.119 Contempt of court proceedings can be used. However, unlike CEPA,120 the provincial Act does not specify that breach of the order constitutes a new offence, although the offender can be ordered to re-appear and the order can be varied.121 Interestingly, to date there have been no repeat offenders in cases where creative sentences were used,122 although there have certainly been cases of non-compliance with the orders themselves.123

The federal process, in contrast, is somewhat less formalized than the Alberta approach. As is the case with Alberta statutes, federal Acts such as CEPA 99 and the Fisheries Act are accompanied by general enforcement and compliance policies.124 Using CEPA as an example, the policy outlines when prosecution will be pursued125 and when diversion programs such as EPAM’s will be used.126 The policy on “penalties and court orders upon conviction” is unremarkable, suggesting penalties be requested which are “proportionate to the nature and gravity of the offence,”127 and notes that guidelines for sentencing criteria are contained in the Act itself.128 There are, however, guidelines as to when various types of creative sentences should be requested by prosecutors.129 Prohibition orders are recommended for repeat offenders, remedial orders where the environmental damage is correctable, and community service orders when the whole community is affected by the offence. Options that are more specific include ordering monitoring of cases where there was serious damage to see if eventual recovery takes place, and ordering funds paid to NGO’s or educational institutions where more awareness

119 AEPEA, supra note 51, s. 234(1)(e)(f).
120 CEPA 99, supra note 9, s. 272.
121 AEPEA, supra note 51, s. 234.
122 McRory, supra note 106 at 5; McRory & Jenkins, supra note 105 at 10.
123 McRory, supra note 73.
125 CEPA policy, ibid. at 29.
126 Ibid. at 30.
127 Ibid. at 32.
128 CEPA 99, supra note 9, s. 287.
129 CEPA Policy, supra note 124 at 34.
or knowledge is needed. The policy also notes that non-compliance with such creative sentencing orders can be enforced via a civil suit for recovery of monies spent, contempt proceedings, or a new prosecution (as a violation of a creative sentence under CEPA 99 constitutes a new offence).

In practice, therefore, the federal enforcement and compliance policies place considerable reliance on prosecutorial discretion. First, there is a preference to direct the creative sentence toward a project of direct environmental benefit to the general locale where the offence took place. Second, it is seen as desirable that the creative sentence have a logical nexus to the nature of the offence. For example, it is desirable for an offence of “...harmfully altering, disrupting or destroying fish habitat...” pursuant to s. 35(1) of the Fisheries Act to generate a creative sentence which is directly connected to fish habitat. Alternatives might include restoration of previously harmed habitat or the creation of new habitat. Third, whenever possible process should directly involve the offender. Specifically, the offender (or a highly placed executive if the offender is a corporation) should be personally engaged in creative sentencing discussions with the federal Crown. Finally, as noted previously, the creative sentence portion of the total monetary penalty in federal cases has tended to be as much as 90 per cent.

Many aspects of the federal process and policies are similar to the Alberta model, and many of the same challenges have been encountered. First and foremost are the difficulties associated with the administration of creative sentences such as environmental restoration projects. The federal solution has been the creation of the EDF, which as is noted previously, is a fund devoted to the administration of such projects. Of particular note is the ability of the EDF to partner with NGO’s who can use their expertise to develop and supervise projects. As with Alberta, a key element in the use of creative sentences is a willing prosecutor who sees the value of getting the offender’s undivided attention by working closely with the investigator and that offender in what can be a lengthy and complex process. The approach, as with the Province, is to treat the need to remediate the damage as a minimum expectation, while the creative sentence must clearly constitute an additional penalty of some type, with no hidden benefits. Federally, it is also seen as one mechanism to get a recalcitrant offender into compliance with legal requirements and

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130 Ibid.
132 McRory & Jenkins, supra note 105 at 10.
industry standards. Thus it is seen as a tool which can be used against reluctant or “worst” offenders, not only those who are otherwise in compliance and who accept responsibility for their misconduct. In this respect, the federal approach differs quite markedly from the Alberta guidelines.

5. APPLICATION OF THE CURRENT LEGISLATION: PRACTICE

What sort of orders have actually emerged from this process? With only a limited amount of information available in the public domain, no comprehensive answer to that question is readily available. However, by using a collection of public documents from Alberta Justice and from Justice Canada,\textsuperscript{133} as well as supporting literature,\textsuperscript{134} the authors were able to use a case study approach to develop some comments about the way in which creative sentencing is being used in Canada.

Despite the wide variety of creative sentencing options theoretically available (i.e., listed in the statutes), in practice only six general categories of orders seem to have been made in our sample group. In order from least to most common, these are:

1. prohibition orders
2. publication orders
3. orders to conduct or fund research
4. orders to fund educational projects
5. prevention orders directed toward improvement of internal corporate operations
6. remedial orders to fund specific environmental reclamation and improvement projects with NGO partners.

Occasionally some type of performance guarantee or community service order will accompany one of these sentences.

(a) Prohibition Orders

There are only a few cases, all provincial, of individuals and corporations being simply prohibited from an activity (“shall not apply pesti-
cies,”135 “shall not allow or permit or direct any current or future agent or employee to handle hazardous wastes”).136 Little information is available about these cases and no conclusions can usefully be drawn.

(b) Publication Orders

Publication orders have been used more frequently, under both the federal *Fisheries Act* and EPEA. Interestingly, publication of the facts of the conviction has almost always been accompanied by some type of community service order or probation order.137

One interesting example is *R. v. Canadian Horizontal Drilling Inc.*,138 a *Fisheries Act* violation where a deleterious substance was deposited into a creek. In addition to a fine, the offender was required to provide funds to hire an expert consultant, to fund a habitat restoration project through the EDF and to adopt and implement industry guidelines. It was then ordered to publish (as an article or advertisement) a three page article that was drafted in advance and attached as part of the Court order.

A second interesting case is *R. v. Johal and RJS Investments*,139 which involved beverage container recycling violations. In addition to publishing an advertisement of the conviction, the offenders were placed on probation for three years and required during that time to keep specified records and post signage.

A related approach is to have the offender speak to an industry gathering rather than publish an article. This occurred in the recent case of *R. v. Leddy Exploration*.140

Although there are few cases in this category, it seems that all involve some type of specific “bad practice” that needs to be stopped, and therefore a service or probation aspect is directed toward specific deterrence, while

139 (November 12, 1996) unreported (Alta. P.C.).
140 Supra note 131.
the publication aspect moves the remedy toward more general deterrence within the community or industry. The actual articles have either been published in a community newspaper, serving a public notification purpose, or in an industry-related magazine, presumably serving an educative function and therefore impacting risk management decisions.

(c) Research Orders to Conduct Studies

Orders to conduct or fund research are more common and have been made both federally and provincially. These orders generally take the form of an order to fund a specific type of research project, and thus the funds are sent in trust to a particular university, and specify which researchers will administer the funds.\footnote{Examples include \textit{R. v. Chem Security}, supra note 114; \textit{R. v. Agrium Inc.}, (March 18, 1999) unreported (Alta. P.C.); \textit{R. v. Shell Canada Products} (February 21, 2003) unreported (Alta. Prov. Ct.); \textit{R. v. Edmonton (City)} (April 30, 2002) unreported (Alta. P.C.); \textit{R. v. Conoco Phillips} (March 6, 2007) unreported (Alta. P.C.).} Limitations on the use of the trust fund are specified (e.g. maximum overhead costs), and parameters for the type of project being funded are set (although the details may be left up to the expert administrators to approve).\footnote{See for example the order in \textit{R. v. Edmonton (City)}, \textit{ibid.}} Occasionally, the funding has been sent to a specific government department to conduct data analysis or an inventory,\footnote{\textit{R. v. Huskey Oil Operations} (June 23, 2003) unreported (Alta. P.C.).} or to an NGO.\footnote{\textit{R. v. Dow Chemical Canada Inc.} (November 18, 1996) unreported (Alta. P.C.)—this case funded an NGO in the development of a community monitoring program for air quality.} If problems arise, leave is generally provided to return to Court for further directions.

There are known risks to funding research projects, of course. One is that there may be no tangible nor useful result at the end of the project. Second, “further study” can be used as an excuse to delay any real change to the \textit{status quo}. Finally, there is even the possibility that offenders may try to direct research funds into projects which benefit their business, rather than producing a more general environmental or public benefit. Thus, prior to use of research orders, there will be an investigative burden on the Crown to secure expert advice about the actual benefits of any proposed research project.

Research projects also create a difficulty in that projects which meet the requisite criteria are seldom available ‘off the shelf.’ They require time to develop, which may not be available in the sentencing process.

Federal regulators have addressed this problem through the EDF, which
will take money not earmarked by the Court for a specific project, and
direct it to an unspecified project which meets relevant criteria.

(d) Research Orders to Fund Educational Projects

Another frequent type of order is an order directed toward educational
goals. Again, such orders have been made both federally and provincially.
The most common form of these orders is to order either the accused,\(^\text{145}\) an educational institution,\(^\text{146}\) or an industry association\(^\text{147}\) to develop and deliver a course, seminar or curriculum/teaching tool on topics such as environmental awareness, or training in proper industry practices or safety procedures. However, there have also been orders such as endowment of a graduate student award\(^\text{148}\) and delivery of a presentation to an industry association conference\(^\text{149}\) that fall into this category as well.

If the materials are being developed by a third party, quality control
of the materials could be an issue. One could anticipate that Crown
supervision of the order could become onerous for supervisory staff.\(^\text{150}\) In addition, there is no guarantee that courses will be adequately attended,
nor attended by a useful target audience, except perhaps in the case of
training delivered to employees.

(e) Prevention Orders Directed Toward Improvement of Internal
Corporate Operations

Another type of order which appears to be used quite frequently is to
require the offender to engage in practices to improve its internal opera-
tions.

There appear to be three approaches in current use. First, there are
several cases in which companies have been ordered to develop and
implement an environmental management system (EMS).\(^\text{151}\) A variation
on this is to order that a consultant be hired to bring some aspect of


\(^{150}\) McRory, supra note 73.

corporate management (e.g. employee training) up to an existing EMS standard, such as ISO 14001 (without actually requiring certification).\textsuperscript{152}

Second, there are several cases in which an order has been made that an offender prepare an employee training manual, or conduct internal audits or risk assessments and then construct facilities and prepare response plans and employee training programs in accordance with the results of those studies.\textsuperscript{153} There is clearly potential here for improved business practices to result in the prevention of future environmental harm.

Third, the court may order a change in corporation operations, such as the construction of infrastructure. A recent example is found in \textit{R. v. Town of Beaverlodge}, where a municipality was convicted of depositing a deleterious substance (sewage) into water frequented by fish contrary to s. 36(3) of the \textit{Fisheries Act}. As part of a creative sentencing package, the town was ordered to upgrade its wastewater treatment facility.\textsuperscript{154}

\textbf{(f) Remedial Orders to Fund Specific Projects With NGO Partners}

The final category of creative sentencing order and the most frequently used in our sample, was an order to fund a specific project (other than research). These orders fell into three major categories: a) orders for the accused to take action (e.g. conduct remediation work),\textsuperscript{155} b) orders for the accused to fund an NGO (where the NGO then actually conducts a specific project),\textsuperscript{156} and c) orders to give the funds in trust to thegov-

\begin{footnotesize}
\begin{enumerate}
\item Provincial Court of Alberta Information No. 080485295 P1 (August 27, 2008).
ernment to oversee a project, either directly (in the case of a number of *Fisheries Act* cases where the DFO received the funds in trust)\(^{157}\) or via the EDF (Environment Canada).\(^{158}\) These orders seem particularly popular in cases involving the federal Crown. Such remedial work may simply repair the environmental damage done, or may go further and require additional remediation or enhancement of degraded areas.

### 6. ASSESSMENT AND FUTURE DIRECTIONS

What can be said about the use of creative sentencing in Canada to date? To reiterate the earlier discussion, in theory the main goal is to achieve compliance with environmental standards through specific and general deterrence measures. Specific deterrence could be achieved through remedial and prevention orders, prohibition orders, and measures that remove any benefits from offenders; in practice we see various prevention orders used that direct the offenders to improve their internal management systems (environmental management systems, employee training) as well as prohibition orders. In addition, community service is sometimes ordered, although unfortunately without any clear nexus to the environmental offence in some cases. General deterrence seems most readily touched by publication orders. In practice not only have publication orders been used to good effect but various orders related to educational funding also seem to have potential as part of creating a compliance culture.

Interestingly however, the largest group of potential orders set out in the statutes and used in practice, are orders to conduct specific projects of direct environmental benefit (whether remedial or preventive), usually by funding NGO’s or government departments, and orders of a somewhat uncertain benefit to conduct research (again, often with educational NGO partners). While the offender may not undertake the actual project—these orders often simply provide funding to NGO’s who then manage the enterprise—when properly constructed there is arguably considerable specific deterrent effect beyond that of a similarly-sized fine, in that many such projects are the result of substantial direct consultation between the

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Crown and the offender. This personal engagement of the offender in the sentencing process is perceived by prosecutors as providing specific deterrence effects which would not be achievable through a simple fine. (On the other hand, if the workload is being passed over and the offender need not develop any expertise nor devote personnel to the task at hand, there is always a danger an offender could try to evade responsibility via such an order.)

Significantly, however, creative sentencing is moving beyond traditional sentencing objectives by providing a direct environmental benefit (which may well extend beyond simply remediation at a minimum standard, and instead require improvements or enhancements) i.e., the sentence takes us beyond just “deterrence.” If we think of the environment as “the victim” of the crime, we can perhaps see some parallels with modern victim’s rights objectives159 that seek to have victim impacts taken into account in the sentencing process. Certainly, the actual and potential environmental damage and the uniqueness and sensitivity of the impacted ecosystem are all relevant aggravating factors.160

What, then, of the modern movement in criminal sentencing toward restorative justice? Is this a concept which can or should extend to environmental “victims”? Restorative justice has been defined as:161

...an approach to accountability for crime based on the restoration of balanced social relations and repatriation of criminal harm that is rooted in values of equality, mutual respect and concern, and that uses deliberative processes involving crime victims, offenders, their respective supporters and representatives of the broader community under the guidance of authorized and skilled facilitators.

It is a voluntary process in which an offender accepts responsibility for wrongdoing, and it has arguably reduced recidivism rates while achieving “high rates of offender compliance with sanctions as well as high rates of satisfaction for victims.”162 Thus, restorative sanctions are “intended to reconcile and repair the harm caused by an offence.”163

In environmental statutes, measures such as discharges and “alternative measures” have been added in order to provide the ability to divert

160 Hughes, supra note 8 at 188-92.
162 Ibid. at 941.
163 Manson, supra note 159 at 372.
offenders from the sentencing process. To move in this direction would clearly go beyond the realm of creative sentences, as it removes the offender from the criminal process entirely, “to another forum where they are not convicted or found guilty, and are not sentenced.” However, in the environmental realm, it is unclear that restorative techniques will be of particular interest due at least in part to the deep distrust of industry that environmental representatives maintain; problems such as agency capture, the dominance of economic and industrial interests in policy development, and lack of true public participation mechanisms in environmental law create enormous obstacles to creating the type of volunteer community that is needed for restorative justice techniques to succeed. If experiments with environmental mediation can offer any insights, it is clear that bringing environmental offenders and “victims” to the same table may do nothing except reveal exactly how far apart their views are. It is also unclear whether “the environment” as victim would have any needs that parallel the benefits of a restorative approach to a human victim (e.g. the emotional need to forgive). If environmental restoration can be completed by a creative sentence, there seems to be no “victim benefit” to be derived by moving further to a restorative approach, unless personal injuries to present or future human victims are also part of the circumstances of individual cases.

Is the Crown justified in taking a more active approach to the care of environmental “victims”? Certainly, the Courts seem open to such developments. In *Hydro Quebec* the Supreme Court of Canada held that environmental stewardship, even in the absence of harm to human health, is a “fundamental value” in our society and a proper subject of the criminal law *per se*. Numerous other SCC cases have reiterated this notion.

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164 For example, CEPA 99, *supra* note 9, s. 295.
165 *Manson, supra* note 159, c. 9 “Sentencing Options” at 209.
166 *Boyd, supra* note 1, ch. 9.
168 *Archibald, supra* note 161 at 946.
169 In a similar vein, it has been argued that environmental “rights” are not needed, as we can achieve any potential benefits through more modest changes to existing laws. See P. Elder, “Legal Rights for Nature—The Wrong Answer to the Right(s) Question” (1984) 22 Osgoode Hall L.J. 285.
that environmental protection is a fundamental value within Canada, and more recently the Court has noted that:

If justice is to be done to the environment, it will often fall to the Attorney General, invoking both statutory and common law remedies, to protect the public interest.

Indeed, in the civil context, the Crown’s role toward environmental protection has been recently described as part of its parens patriae jurisdiction; it may act as a representative of the public to enforce the public interest in an unspoiled environment.

At a minimum, therefore, the Courts seem prepared to recognize that the Crown is the “holder of inalienable ‘public rights’ in the environment and certain common resources...accompanied by the procedural right of the Attorney General to give for their protection...as parens patriae”, and have recognized that this raises a number of important issues, including inter alia the potential liability of the Crown if it fails to act, and the enforceability of any fiduciary obligations involved. Coupled with its comments in the regulatory context, it seems clear the Supreme Court is open to entertaining the idea of an expanded fiduciary role for the Crown in environmental cases.

The legislatures have moved toward creative sentencing and the Courts have moved towards its use in fulfillment of the traditional sentencing goals of specific and general deterrence. The potential is there, however, to use creative sentencing for larger goals of direct environmental benefit where the “polluter pays,” and in so doing to take steps toward fulfilling an expanded role for the Crown to act as parens patriae, or to enlarge its fiduciary role toward the protection of the public interest.

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174 Ibid. at para. 9.
175 Ibid. at para. 64. See also S. Elgie & A. Lintner, “The Supreme Courts’ Canfor Decision” (2005) 38 U.B.C. L. Rev. 223.
176 Canfor, supra note 173 at para. 76.
177 Ibid. at ¶ 81.
178 DeMarco, supra note 170 at 184.
One might, in closing, add one further observation. The directions suggested by the SCC are all founded in existing statutory and common law concepts, and to date are based on a deliberate expansion of those concepts in a step-by-step fashion.\textsuperscript{180} Thus, they are a far cry from more radical theoretical concepts such as environmental rights.\textsuperscript{181} Will they be enough? Can we use this expanded potential to reach the root causes of environmental degradation? While increasing the effectiveness of the Courts in environmental litigation is arguably a positive and necessary step,\textsuperscript{182} it is unclear that reforms such as creative sentencing can truly reach some key causes of environmental degradation, such as overpopulation and excessive consumption.\textsuperscript{183} Nevertheless, by reaching beyond the traditional goal of “mere compliance,” the Crown and Courts are moving in a positive direction where, at a minimum, restoration of environmental quality helps prevent the foreclosure of future options, one community at a time.

\begin{itemize}
  \item \textsuperscript{180} See \textit{Hydro Quebec}, supra note 171 (criminal) and \textit{Canfor}, supra note 173 (civil).
  \item \textsuperscript{181} E. Hughes & D. Iyalomhe, “Substantive Environmental Rights in Canada” (1998-99) 30:2 Ottawa L. Rev. 229.
  \item \textsuperscript{182} Boyd, supra note 1 at 267-72; see also Elgie & Lintner, supra note 175.
  \item \textsuperscript{183} Boyd., supra note 1, ch. 10.
\end{itemize}
Appendix A

Amended Creative Sentencing Guidelines

(Alberta Justice, 2007)

PRE-REQUISITES

• Prior to considering any creative sentencing project, the accused must establish that he is in compliance with existing legislation and that systems are in place to ensure continued compliance.
• As a general rule, the cost of the project must be in addition to a substantial monetary penalty. The penalty must remove any economic advantage or any competitive advantage that accrued to the accused by reason of the commission of the offence.
• Although creative sentencing ought to be available for guilty and not guilty pleas, the offender must accept responsibility.

LIMITATIONS FOR ELIGIBLE PROJECTS

• Deterrence should be the primary objective and the yardstick by which the success of such projects is measured.
• The order must be punitive in nature.
• There must be a nexus or connection between the violation and the project such that the benefits truly address the wrong that was done.
• A critical component of the project is that it must either improve the environment or reduce the level of risk to the public.
• The main beneficiary of the project must be the public. A project that would be undertaken by any Company as a “sound business practice” would not be eligible.
• The “public” must in the first instance be the citizens of Alberta.
• The project must result in a concrete, tangible and measurable result, both in the short term and the long term.
• That result must be a “value added” benefit to the environment.
• The benefit must be obvious so that the public standards that the benefit accrues to the public or the environment and not the accused.
• Any projects must clearly exceed current industry standards.
Limitations for Eligible Recipients

- There must be no actual or perceived conflict of interest between the accused and the recipient of the fund.
- All recipients must be not-for-profit organizations.
- All recipients must submit to an investigation as to their viability and accountability.

Administrative Limitations

- There must be no actual or perceived conflict of interest between the recipient of the fund and the Crown or the investigating agency.
- There must be accountability in the sense of control over the funds, either through the mechanism of a trust account as was employed in the Inland, Cutbank and Dow cases or alternatively, great specificity in the order and high degree of control exercised by the Court. (Van Waters and Coolsprings Dairy Farm).