CREATIVE SENTENCE NEGOTIATION: LOOKING BEYOND DETERRENCE

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When sentencing for environmental offences, it is important to begin with a recognition that "regulatory offences and crimes embody different concepts of fault".[1] In the regulatory context, the primary focus is the protection and advancement of public and societal interests and values — rather than punishment of the individual offender. Environment protection legislation is "directed to the prevention of future harm through the enforcement of minimum standards of conduct and care".[2]

Deterrence has therefore become the paramount sentencing principle for environmental offences. Fines have been a primary mechanism by which deterrence is addressed. The idea being that a substantial monetary penalty makes it more cost-effective for the potential offender to meet the applicable standard of care. However, taking a fine-centric approach may represent a missed opportunity. An effective sentence can accomplish more than deterrence. It can educate as to the importance of the underlying regulatory purpose and make a tangible contribution to the preservation and enhancement of the environment. The creative sentencing tools available in environmental protection legislation recognize that potential. They allow a sentence to be both an effective deterrent and a meaningful contribution to attaining the regulatory goal.

In the context of negotiating sentences for environmental offences, it can be useful to shift the focus from the deterrent/punitive aspects of a sentence to the opportunity to contribute to and advance the regulatory purpose. First, it can frame the discussion in terms more amenable to the offender's interests and concerns. Second, and more fundamentally, it can produce sentences that have both a meaningful deterrent impact and an identifiable societal benefit.

THE PARAMOUNTCY OF DETERRENCE

In *R. v. Hydro-Quebec*,[3] the Supreme Court of Canada emphasized the importance of environmental protection regulation:

> measures to combat the evils of pollution, there can be no doubt that these measures relate to a *public purpose of superordinate importance*, and one in which all levels of government and numerous organs of the international community have become increasingly engaged. In the opening passage of this Court's reasons in what is perhaps the leading case, *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 16-17, the matter is succinctly put this way:
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> > The protection of the environment has become one of the major challenges of our time. To respond to this challenge, governments and international organizations have been engaged in the creation of a wide variety of legislative schemes and administrative structures.

[1] *R v Wholesale Travel Group Inc* [1991] 3 SCR 154 at para 219.
[2] *Ibid* at para 219.
[3] *R v Hydro-Quebec* [1997] 3 SCR 213 at para 85 [*Hydro-Quebec*].

Prosecutions and, in particular, the sentencing process have an expressive function with respect to societal values and goals.[4] As noted by the Court in *R v. Domtar*:[5]

> The 1989 unreported case of *R. v. Shamrock Chemicals Ltd.* makes it clear that, "Prosecutions also reinforce societal values" and that … the sentence is the most visible result of prosecution, the outcome by which the general public — rightly or wrongly — judges the success of a prosecution. Therefore, the outcome of the sentencing process is an important determinant of whether the public has respect for the legal system.

Given the "superordinate importance" of environmental protection and the imperative to reinforce that societal value, it is not surprising that Courts have recognized the paramountcy of general deterrence when imposing sentences for environment offences.[6] The goal of sentencing in such cases "is to stop the polluting, repair any damage to the environment, warn others than such conduct will not be tolerated, and prevent repetition of such polluting practices".[7]

Environmental legislation is generally preventative in nature — designed to prohibit the creation of the risk of environmental harm. As noted in *R. v. Echo Bay Mines Ltd.*,[8] "we should always consider approaching the question of sentence not on what the damage in fact was, especially if it is minor, but on the potential for damage because the imposition of penalties is to ensure that the persons know that they must comply with the requirements of the law to avoid any potential harm".

In terms of quantifying an appropriate penalty, the well established principle is that a fine must be substantial enough to effectively warn others than the offence will not be tolerated and not be so low as to appear to be the mere cost of doing business or license fee for illegal activity.[9] As noted in *Terroco* (at para. 63), with respect to an appropriate fine, "it should be such that it is cheaper to comply than to offend …".

When assessing the sufficiency of a sentence for deterrent purposes, the factors to be considered are equally well established. They include the nature of the environment; the extent of the injury; the criminality or blameworthiness of the conduct; the extent of attempts to comply; remorse; size of the corporation or offending party; profits realized by the offence and the existence of any prior convictions.[10]

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[4] G Campbell, "Fostering a Compliance Culture Through Creative Sentencing for Environmental Offences" (2004) 9 Can Crim L Rev 1.
[5] *R v Domtar* [1998] OJ No 6408 (CJ) at para 5 [*Domtar*].
[6] *Domtar*, *ibid* at para 4; *R v Cottonfelts* (1982) 2 CCC (3d) 287 at 295 [*Cottonfelts*].
[7] *R v Weldwood Canada Ltd* [1999] BCJ No 2242 (PC) at para 34.
[8] *R v Echo Bay Mines Ltd* [1993] NWTJ No 44 at para 11.
[9] *R v Terroco Industries Ltd* [2005] ABCA 141 at para 60 [*Terroco*]; *Cottonfelts*, *supra* note 6.
[10] *R v United Keno Hill Mines Ltd* (1980) 1 YR 299 [*United Keno Hill Mines*]; *Domtar*, *supra* note 5.

AN OPPORTUNITY TO DO MORE

While fines have been a primary tool by which to address deterrence in sentencing for environmental offences, at least as far back as 1980, there has been a recognition that fines alone may not be the most effective means of correcting environmental harm and deterring future offences.[11] A "special approach" is required.[12] Some commentators have suggested that general deterrence and punishment should be secondary to remediation and rehabilitation in the regulatory context.[13] Others suggest sentencing — particularly the corporate offender — "should look beyond deterrence and seize the opportunity for corporate rehabilitation and the broader public interest."[14] Whether or not such approaches are consistent with established sentencing principles, both recognize that focussing solely on deterrence may be a "missed opportunity"[15] to use the sentencing process to advance the underlying regulatory goal and associated societal interests.

In response, virtually all Federal environmental legislation now includes a broad spectrum of "creative sentencing" tools to effectively address environmental offences. Some of the more commonly employed "creative sentencing" tools include prohibition orders, publication orders, orders to conduct or fund research, orders to fund educational projects, orders directed toward improvement of internal corporate operations and practices and remedial orders funding specific environmental reclamation/improvement projects.[16]

These "creative sentencing" tools can and have been used to effectively address the paramount sentencing goal of deterrence. They also provide an opportunity to move beyond deterrence and make tangible contributions to the restoration, preservation, and enhancement of the environment. As noted by *Hughes* and *Reynolds* in their article entitled *Creative Sentencing and Environment Protection*,[17] "the potential is there, however, to use creative sentencing for larger goals of direct environmental benefit where the 'polluter pays' …"

NEGOTIATING A "CREATIVE SENTENCE"

From the Crown perspective, when negotiating sentence for environmental offences,

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[11] *United Keno Hill Mines*, *ibid*.
[12] *Terroco*, *supra* note 9 at para 34.
[13] S Verhulst, "Legislating a Principled Approach to Sentencing in Relation to Regulatory Offences" (2008) 12 Can Crim L Rev 281.
[14] N Keith, "Sentencing the Corporate Offender: From Deterrence to Corporate Social Responsibility" (July 2010) 56 Crim LQ 294.
[15] *Ibid* at 310.
[16] EL Hughes & Dr LA Reynolds, "Creative Sentencing and Environmental Protection" (2009) 19:2 J Envtl L & Prac 105.
[17] *Ibid*.

there are a number of considerations in determining the appropriateness of a "creative sentence".

Fundamentally, the global penalty must be sufficient to represent a meaningful deterrent both to the defendant and others. Beyond that, there must be a nexus or connection between the offence and the proposed creative sentencing measure — both with respect to the nature of the environmental harm and, preferably, the location where the offence occurred. The primary focus should be producing a tangible or identifiable societal benefit.

During sentence negotiation, framing the issue as an opportunity to contribute to and advance the regulatory purpose — rather than an exercise in deterrence and punishment — can be effective. In a sense, it allows the Defendant to participate in and contribute to the achievement of the regulatory goal — i.e. environmental protection and enhancement. This can characterize the process in terms more amenable to the offender's interests and concerns. More fundamentally, it can produce sentences that have both a meaningful deterrent impact and a societal benefit.

There are many examples of this approach producing sentences that have meaningful deterrent value and tangible societal benefit. In the Atlantic Region, several cases illustrate the point.

In *R. v. Corner Brook Pulp and Paper Ltd.*,[18] the Defendant was charged with depositing a deleterious substance into waters frequented by fish contrary to subsection 36(3) of the *Fisheries Act*. The charge related to the discharge of acutely lethal effluent from the company's pulp and paper mill into the adjacent marine environment (Humber Arm). There was evidence that the quality of the impacted marine environment had been seriously diminished by the ongoing effluent deposits. The "creative sentence" imposed on the Defendant included a $500,000 fine; an order that $50,000 be directed to the Corner Brook Stream Development Corporation for purposes of related environmental restoration and enhancement projects; that $75,000 be directed to West Viking College in Corner Brook for the establishment of scholarships in its Resources Technology Program; and $125,000 be directed to Sir Wilfred Grenfell College, Memorial University, for the creation of scholarships in its Bachelor of Environmental Science Program. In addition, the Defendant was ordered to complete the construction of an effluent treatment plant within a specified period. Satisfactory completion of the treatment effluent plant was secured by way of an "Irrevocable Letter of Guarantee" in the amount of $500,000 deposited with the presiding Court.

In *R. v. City of Moncton*,[19] the City was charged with violating subsection 36(3) of the *Fisheries Act*. The charge related to the deposit of toxic leachate from a landfill site

[18] *R v Corner Brook Pulp and Paper Ltd*, 1996 NLPC.
[19] *R v City of Moncton*, 2003 NBPC.

operated by the City into the adjacent Petitcodiac River. The "creative sentence" imposed included a $10,000 fine, an order that an additional $5,000 be directed to the Environmental Damages Fund[20] that an additional $25,000 be directed to the Jonathan Creek Committee to be used for purposes of restoration and enhancement of the impacted environment; and the Defendant was ordered to implement all requirements of the "Jonathan Creek – Petitcodiac River Remedial Plan" within a specified period. The cost of implementation of the "Remedial Plan" was estimated at approximately $400,000.

In *R. v. Fox Harbour Developments Ltd.*,[21] the Defendant was charged with two counts of carrying out works that resulted in the harmful alteration, disruption, and destruction of fish habitat contrary to subsection 35(1) of the *Fisheries Act*. The offence seriously damaged near shore lobster habitat. In that case, the sentence imposed included a fine of $35,000; an order that an additional $130,000 be directed to DFO Oceans and Habitat Branch, to be used for the assessment, restoration and enhancement of the lobster habitat impacted by the violation; and an additional $15,000 be directed to DFO Conservation and Protection Branch for the conduct of educational seminars for students and industry representatives in the region in relation to conservation and protection of fish habitat.

More recently, in *R. v. Kelly Cove Salmon Ltd.*,[22] the Defendant was charged with two counts of violating subsection 36(3) of the *Fisheries Act*. The offence involved the deposit of a toxic pesticide into the Bay of Fundy over an extended period during the course of the Defendant's aquaculture operations. The sentence imposed included fines totalling $100,000; an order that $250,000 be directed to the University of New Brunswick for purposes of creating a "UNB Environmental Studies Scholarship"; an additional $100,000 be directed to the University of New Brunswick and allocated by the "Dean of Science, Applied Science and Engineering" in support of environmental studies and research projects relating to the fishery and aquaculture industry in the Bay of Fundy Region; and an additional $50,000 be directed to the Environmental Damages Fund for the restoration and enhancement of fish habitat in the impacted area.

In each of the above-noted cases, the sentences imposed were the result of negotiated sentence agreements which were jointly recommended to the sentencing Court. All represent an attempt to set a meaningful deterrent in relation to significant environmental offences — while at the same time making a tangible contribution to the restoration and enhancement of the environment and its future protection. The idea was to look beyond deterrence to achieve an identifiable societal benefit.

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[20] The *Environmental Damages Fund* (EDF) is a special holding or trust account administered by Environment Canada. The EDF receives monies via court order made pursuant to sentencing provisions in various federal environmental legislation and allocates funds for purposes of environmental restoration, enhancement and research projects. Eligible recipients include non-governmental organizations, universities, aboriginal groups and provinces, territories or municipalities.

[21] *R v Fox Harbour Developments Ltd*, 2004 NSPC.

[22] *R v Kelly Cove Salmon Ltd*, 2013 NBPC.

CONCLUSION

In my experience, approaching sentencing discussions as an opportunity rather than a blunt instrument has worked both from the Crown and Defence point-of-view. Not surprisingly, it tends to produce agreement. More importantly, it results in sentences that enhance public confidence in the process by producing identifiable societal benefits, rather than simply directing monies to general government coffers.

Viewed as an opportunity to advance environmental stewardship as a "fundamental value"[23] in our society, a creative sentence can make contributions well beyond the deterrence and punishment of a particular offender.

[23] *Hydro-Quebec*, *supra* note 3.