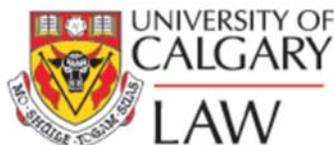


CREATIVE SENTENCING IN ENVIRONMENTAL PROSECUTIONS, THE CANADIAN EXPERIENCE: AN OVERVIEW*

John D. Cliffe, Q.C.

* This paper was prepared by John D. Cliffe, Q.C. of the Vancouver law firm of Cliffe Tobias for the Canadian Institute of Resources Law Symposium on Environmental Education for Judges and Court Practitioners, 21-22 February 2014, at Halifax.

A Symposium on
Environment in the Courtroom (III): Sentencing and Environmental Offences
February 21-22, 2014
Dalhousie University



This project was undertaken with the financial support of:



Ce projet a été réalisé avec l'appui financier de :



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

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

Copyright © 2014

Given that my paper is an overview I will base my comments upon my experience with creative sentencing in cases heard in the courts of British Columbia, Yukon, the Northwest Territories and Nunavut. I will also reference some Federal environmental legislation.

BACKGROUND

For obvious reasons the most important hearing in a criminal prosecution is sentence. The same is true in an environmental prosecution.

Coming clearly from the Supreme Court of Canada is the signal to the trial courts that sentencing offenders for violations of environmental statutes must be taken seriously: *R. v. City of Sault Ste. Marie*, (1978) 40 C.C.C. (2nd) 353 at 374; *Reference Re Section 94(2) of the Motor Vehicle Act*, (1986) 23 C.C.C. (3rd) 289 at 314; *R. v. Wholesale Travel Group Inc.*, (1991) 67 C.C.C. (3rd) 193 at 260; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at para. 55; *Attorney General of Canada v. Hydro Quebec*, (1997) 118 C.C.C. (3rd) 97 at 163-164; and *114957 Canada Ltee. (Spray Tech, Societe d'arrosage) v. Town of Hudson et al.*, (2001) 2 S.C.R. 241 at 248-249.

The Supreme Court of Canada has described the prevention of pollution of our lakes, rivers and streams as a matter of “great public concern”.¹ It has also stated that protection of the environment has “emerged as a fundamental value in Canadian society”.² In *Reference Re Section 94(2)*, *supra*, the majority of the Supreme Court of Canada in its analysis of the constitutionality of a provision of the British Columbia *Motor Vehicle Act* stated at 314:

Indeed, the public interest as regards “air and water pollution offences” requires that the guilty be dealt with firmly

In *R. v. Vac Daniels Ltd.*, (1997) 23 C.E.L.R. (N.S.) 127, the Nova Scotia Court of Appeal hearing sentence appeals by a corporate offender and its president upon their convictions under the provincial *Environmental Protection Act* acknowledged the seriousness of violating such legislation, and stated at 129:

... Violations of rules for the protection of the environment strike at the interests of all individuals and call for strongly deterrent penalties

In *R. v. Terroco Industries Ltd.*, (2005) 196 C.C.C. (3d) 293, the Alberta Court of Appeal considered a sentence appeal by a corporate offender in relation to a release of chlorine gas from a truck hauling liquid chemicals and stated that “sentencing principles for environmental offences require ‘a special approach’”.³

¹ *City of Sault Ste Marie*, *supra* at 374.

² *Canadian Pacific*, *supra* at para 55.

³ *Terroco*, *supra* at para 34.

Accordingly both Crown counsel and defence counsel should be familiar with the sentence or penalty provisions in the applicable environmental legislation and especially the so called “creative sentence” sections contained therein as well as other “creative” options. I pause to note that not all environmental legislation have creative sentence options.

Counsel should also be familiar with the relevant principles of and factors relating to sentence set out in the common law and the applicable legislation: *R. v. United Keno Mines Ltd.*, (1980) 10 C.E.L.R. 43; *R. v. Cotton Felts Ltd.*, (1982) 2 C.C.C. (3rd) 287; *R. v. Shamrock Chemicals Limited and Samuel John Shirley*, unreported decision, Ontario Provincial Offences Court, St. Thomas, Ontario, 13 February 1989; *Terroco, supra*; and *R. v. Northwest Territories Power Corporation*, 2011 NWTTC 03.⁴

The courts have stated many times that deterrence is the paramount principle of sentencing in prosecutions of environmental offences. In *Terroco, supra*, the Alberta Court of Appeal stated at paragraph 53:

A key component of sentences imposed for breaches of environmental protection statutes should be specific and general deterrence

In addition counsel should be aware of different approaches to sentencing depending upon the where the offence occurred and the nature of the environment impacted or potentially impacted by the offence. The courts in northern Canada have adopted such an approach: *R. v. Kenaston Drilling (Arctic) Ltd.*, (1973), 12 C.C.C. (2nd) 383 at 386; *United Keno Hill Mines, supra* at 47-48; *R. v. Esso Resources Canada Ltd.*, (1983) N.W.T.R. 59 at 64; and *R. v. City of Iqaluit*, unreported decision, File No. 08-01-693, Nunavut Court of Justice, 8 August 2002, at paras. 8-10.

In *City of Iqaluit, supra*, the court sentenced a municipal government for release of untreated sewage into arctic marine waters, and stated at paragraphs 9 and 10:

... Experience has shown that damage to an arctic environment is easier to prevent, than it is to repair. All of these circumstances suggest that the commission of an environmental offence in the arctic region should attract severe penalties, penalties commensurate not only with the elevated risk of environmental damage, but with the high costs associated with rehabilitation of the affected areas.

In Nunavut, corporate citizens who knowingly engage in activities that have the potential to cause damage to an arctic environment are “stewards” of the lands and waters upon which they operate. They have a duty when undertaking such a venture to exercise a high standard of care. This duty is owed to the many Inuit and non-Inuit residents who stand to be directly affected by the damage or destruction of wildlife or marine habitat.

⁴ See also the sentencing considerations/factors listed in ss 718, 718.1, 718.2(b) and 718.21, *Criminal Code* and for example, s 50.91, *Antarctic Environmental Protection Act*; ss 287 and 287.1, *Canadian Environmental Protection Act, 1999*; ss 13(4.1), *Migratory Birds Convention Act, 1994*; and s 102, *Species at Risk Act*.

Other principles and factors relevant to sentencing environmental offenders include but are not limited to the maximum penalty provided for in the applicable legislation, the purpose of the legislation, criminality of conduct, culpability, resulting damage to the environment, the potential for damage to the environment, clean-up and remediation of the affected environment, timing of reporting to government authorities, cooperation with government investigators, acceptance of responsibility, genuineness of remorse, the standard of care required in the instant case, extent of attempts to comply with the applicable legislation, prior record of conviction and compliance, profit or benefit realized by the offence, financial worth of the offender, and in the case of a corporation its size, and parity.⁵

“CREATIVE SENTENCING” DEFINED

Creative sentencing in the context of environmental prosecutions refers to a sentence or that part of a sentence imposed upon an offender which does not include a fine or imprisonment. In this regard the following is relevant.

Since the late 1980s sentence provisions in environmental legislation have been amended to include an array of so called “creative sentence” options. Common to most legislative creative sentence schemes is the option for the court in addition to any other punishment imposed to make orders of prohibition, direction or requirement upon having regard to the nature of the offence and the circumstances surrounding its commission.

In addition the *Criminal Code* has been amended to permit the making of probation orders in the case of offending corporation.⁶ Pursuant to subsection 34(2) of the *Interpretation Act* the provisions of the *Criminal Code* in relation to probation orders are applicable to Federal environmental legislation unless otherwise stated in that legislation.

Further Crown counsel and defence counsel are thinking more creatively with respect to what should be an appropriate sentence disposition in any given case.

Finally the imposition of a creative sentence is not something new. However, the number of times it was done prior to aforementioned legislative changes was few.

BEFORE THE CURRENT CREATIVE SENTENCE PROVISIONS

Generally, prior to the enactment of the creative sentence provisions now found in many Federal environmental protection statutes penalties were traditional ones, namely fines and

⁵ *United Keno Hill Mines*, *supra* at 47-52; *Shamrock*, *supra* at 3-9; *Terroco*, *supra* at paras 35-65; and *Northwest Territories Power Corporation*, *supra* at paras 14-47, 92, 105 & 107.

⁶ See s 732.1(3.1), *Criminal Code*.

imprisonment.⁷ A sentence of imprisonment was rarely resorted to and as a result fines tended to be the most common disposition.

With respect to Federal legislation, probation for corporate offenders was not available given the then wording of the *Criminal Code: Her Majesty the Queen v. Echo Bay Mines Ltd.*, Memorandum of Judgment, Appeal #545, Court of Appeal of the Northwest Territories, 11 March 1985; and *R. v. Mainland Sawmills Ltd.*, unreported decision, File # 11016C, Vancouver Registry, Provincial Court of British Columbia, 7 September 1990.⁸

As stated above creative sentencing provisions were few and of limited application, an example of which was subsection 41(2) of the *Fisheries Act* (formerly subsection 33(7)), now repealed and replaced by section 79.2, which gave a court discretion to make an order to refrain or take action in addition to any other penalty imposed by it.⁹ The provision stated in part:

... the court may ... order that person to refrain from committing the activity that constitutes the offence or to cease to carry on any activity specified in the order the carrying on of which, in the opinion of the court, will or is likely to result in the commission of a further offence *or take such action specified in the order as, in the opinion of the court, will or is likely to prevent the commission of a further offence* (emphasis added).

There are not many examples of this provision being used. In *R. v. Canadian Marine Drilling Ltd.*, [1984] N.W.T.R. 48, Bourassa T.C.J., described the section as being “virtually unused” but a “potentially far-reaching and effective sentencing tool”.¹⁰ Bourassa, T.C.J. interpreted the scope of the section and stated at 55:

... through this section, a convicting court may intervene in the internal and external operations of a corporation. In fact, it may be able to pierce the corporate veil in significant way if, “in the opinion of the court, [its actions] will or [are] likely to prevent the commission of any further offence”.

In proper circumstances, this section may perhaps be used for orders such as restitution, compensation, affirmative action, clean-up or even an order to a defendant to restock a body of water with fish, all, of course, provided that the order prevents or will likely prevent further offence by the defendant. It would appear to me that such an order making a defendant liable financially for damage wrought as a result of its activities could have a significant and positive effect as a deterrent.

I note that the Court’s above words in *Canadian Marine Drilling, supra*, foreshadowed the use of the creative sentence provisions now contained in many Federal and Provincial

⁷ It should be noted that some Provincial/Territorial *Offence* legislation did provide for collateral orders including probation to be made upon sentencing; *Shamrock Chemicals, supra* at 13-14.

⁸ Although I have been advised that there were some exceptions by consent of the parties in cases decided in the Territorial Court of Yukon.

⁹ This provision was applicable to the deleterious substance and destruction of fish habitat prohibitions contained in the *Fisheries Act*.

¹⁰ *Canadian Marine Drilling, supra* at 55.

environmental protections statutes that became law in the late 1980s, early 1990s and thereafter.

Having perhaps a cynical view of the effect of a fine and a desire that sentences in environmental prosecutions be more meaningful, some Crown counsel and defence counsel in British Columbia, began to convince the courts to use this provision creatively, although some say in a “tortured” fashion to make orders, for example to construct road ditching and a settlement pond, to hydro-seed, remove log jams and to rip rap;¹¹ construct a compliant wood treatment dip tank at a sawmill;¹² pay monies for an environmental enhancement program to restore fish populations, implement a fish tagging program and improve fish habitat;¹³ make improvements to a fuel tank farm;¹⁴ remove 200m of track and do environment enhancement work;¹⁵ pay monies to Fisheries and Oceans Canada for use in the management and operation of a salmon enhancement hatchery operated by members of a First Nation;¹⁶ and pay monies to a non-profit organization operating a salmon hatchery.¹⁷

Subsection 41(2) (formerly subsection 33(8)) of the *Fisheries Act* was applied by the courts elsewhere in Canada: *R. v. Robinsons’ Trucking Ltd.*, (1985) 14 C.E.L.R. 90 (NWTTC)¹⁸ and *R. v. Enheat Inc.*, unreported decision, Amherst, Provincial Court of Nova Scotia, 13 November 1985.¹⁹

¹¹ *R v Jackson Bros Logging Co Ltd*, unreported decision, No CC810445, Vancouver Registry, County Court of Vancouver, 6 September 1983.

¹² *R v CIP Inc*, unreported decision, File No 12680, Campbell River Registry, Provincial Court of British Columbia, 16 December 1986.

¹³ *R v MacMillan Bloedel Limited*, unreported decision, File No 1777, Masset Registry, Provincial Court of British Columbia, 31 May 1989.

¹⁴ *R v Shell Canada Products Limited*, unreported decision, File No 23343, Richmond Registry Provincial Court of British Columbia, 27 June 1989.

¹⁵ *R v British Columbia Railway Company and BC Rail*, unreported decision, File No 6339, Squamish Registry, Provincial Court of British Columbia, 25 January 1990.

¹⁶ *R v Rivers Inlet Resort Ltd*, entered order, File No 49576T2, Vancouver Registry, Provincial Court of British Columbia, 29 May 1992.

¹⁷ *R v District of Surrey*, unreported decision, File No 52955, Surrey Registry, Provincial Court of British Columbia, 13 January 1992.

¹⁸ The offender was ordered to equip all of its tanker trucks with spill response equipment, designate a corporate officer as an on-scene commander for future oil spills and designate and train an environmental response team.

¹⁹ The offender was ordered to submit to the Department of the Environment a management strategy for dealing with spent chemicals, works to be done with respect to its process chemicals and contaminated rinse waters and develop procedures with respect to monitoring and reporting for liquid effluents.

Notwithstanding some use by the Courts of this provision most sentences for convictions under the fish habitat protection and pollution prevention Part of the *Fisheries Act* remained fines imposed upon corporate offenders.

THE SCOPE OF CREATIVE SENTENCING

With respect to sentencing under Federal environmental legislation the scope of creative sentencing is broad often permitting sentences that embrace a number of penalties, including court orders,²⁰ additional fines to compensate for accrued monetary benefits resulting from the offence,²¹ cancellation of permits and licences and prohibition of application for same²² and forfeiture of seized property.²³

I will focus on court orders which are effective creative sentence options for a number of reasons.

One, specific provisions like those cited above provide numerous options for ordered prohibition, direction and requirement.

For example, the sentencing Court may order prohibition of any activity that could continue or repeat the offence; direct the offender to take action to remedy or avoid environmental harm resulting from the offence; direct the offender to conduct environmental monitoring; direct publication of the circumstances of the offence; direct payment of money to the Government or any person as compensation for costs of remediation and preventative action incurred by the Government; direct payment of compensation; require the offender to surrender permits or authorizations; prohibit the offender from applying for such permits or authorizations; direct community service be performed; direct payment of money to the Government for promoting environmental protection and conservation; direct the offender to pay money for scholarships for students enrolled in environmental studies; and direct the offender to post a bond to ensure compliance with orders made.

Second, such provisions usually contain a “basket order” that is an order which the court may make requiring the offender to comply with “any other conditions that the court

²⁰ See for example: s 66, *Antarctic Environmental Protection Act*; s 193, *Canada Shipping Act, 2001*; s 291, *Canadian Environmental Protection Act, 1999*; s 79.2, *Fisheries Act*; s 16, *Migratory Birds Convention Act, 1994*; s 105, *Species at Risk Act*; s 34, *Transportation of Dangerous Goods Act, 1992*; and s 22(6), *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*.

²¹ See for example: s 50.7, *Antarctic Environmental Protection Act*; s 274.1, *Canadian Environmental Protection Act, 1999*; s 79, *Fisheries Act*; s 13(5), *Migratory Birds Convention Act, 1994*; and s 97(6), *Species at Risk Act*.

²² See for example: s 66 (5), *Antarctic Environmental Protection Act*; s 291(5), *Canadian Environmental Protection Act, 1999*; s 79.1, *Fisheries Act*; and s 18.22, *Migratory Birds Convention Act, 1994*.

²³ See for example: s 24, *Arctic Waters Pollution Prevention Act*; ss 41-42, *Antarctic Environmental Protection Act*; ss 230-231, *Canadian Environmental Protection Act, 1999*; s 72, *Fisheries Act*; s 14, *Migratory Birds Convention Act, 1994*; and s 103, *Species at Risk Act*.

considers appropriate” to ensure the good conduct of the offender and to deter the offender from committing further offences.²⁴ Accordingly, counsel and Court are not unduly restricted in their consideration as to what should be an appropriate order or orders.

Three, unless provided otherwise in the legislation such orders do not have a financial limit.²⁵ Accordingly the offender’s expenditure upon compliance with the order could exceed the maximum legislated fine: *Robinsons’ Trucking, supra* at 93; and *Northwest Territories Power Corporation, supra* at paras. 10, 101 and 102.

Four, such orders can be varied by the court and accordingly there is flexibility. In this regard it is common, but not always, that the enabling legislation has provisions for either or both the Crown and the offender to make application to the court to vary the order made because of a change in circumstances.²⁶ Variation may include changes in the order, relieving the person bound by order of further compliance with it or extending or decreasing the term of the order.

In *R. v. City of Dawson*, (2004) 10 C.E.L.R. (3d) 197, an application jointly by the Crown and the offender pursuant to section 79.5 of the *Fisheries Act* to vary an order made under section 79.2 of the *Fisheries Act* requiring construction of a sewage treatment plant was granted and the term of the order extended in view of significantly higher capital costs, an increase in the projected annual operating and maintenance costs of the proposed plant and a change in the financial circumstances of the City.²⁷

Five, such orders are enforceable. In this regard, it is common, but not always that the enabling legislation has created an offence for non-compliance with a creative sentence order made under the legislation.²⁸ In the absence of such a provision resort can be made to section 126 of the *Criminal Code* which creates an offence for disobeying a lawful order made by a court other than an order to pay money.

²⁴ See for example: s 66(1)(n), *Antarctic Environmental Protection Act*; s 193(e), *Canada Shipping Act, 2001*; s 291(1)(q), *Canadian Environmental Protection Act, 1999*; s 79.2(i), *Fisheries Act*; s 16(1)(h), *Migratory Birds Convention Act, 1994*; s 105(k), *Species at Risk Act*; and s 22(6)(h), *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*.

²⁵ See for example s 34(3) of the *Transportation of Dangerous Goods Act, 1992*, that limits expenditure to \$1 million for a single offence in relation to orders made under s 34.

²⁶ See for example: ss 67-68, *Antarctic Environmental Protection Act*; ss 293-294, *Canadian Environmental Protection Act, 1999*; s 79.5, *Fisheries Act*; and ss 16(4)-(6), *Migratory Birds Convention Act, 1994*. There is no such provision in the *Species at Risk Act*, *Transportation of Dangerous Goods Act, 1992* and the *Wild Animal and Plant Protection and Regulation of international and interprovincial Trade Act*.

²⁷ Further applications to the Court pursuant to s 79.5 of the *Fisheries Act* to vary this order were made and granted before compliance with the order was met.

²⁸ See for example: s 50(1)(c), *Antarctic Environmental Protection Act*; s 272(1)(j), *Canadian Environmental Protection Act, 1999*; s 79.6, *Fisheries Act*; s 13(1)(c), *Migratory Birds Convention Act, 1994*; and s 34(4), *Transportation of Dangerous Goods Act, 1992*.

Six, as stated above the probation provisions of the *Criminal Code* are applicable to proceedings under Federal environmental legislation unless otherwise stated in the applicable statute. As a result environmental legislation that does not contain creative sentencing provisions such as the above mentioned court orders, counsel and the Courts may consider the use of a probation order to facilitate a creative sentence.²⁹

Like creative sentence court orders, probation orders are subject to being varied by the Court upon application by the Crown or the offender.³⁰ Probation orders are enforceable by way of prosecution for breach of the order pursuant to section 733.1 of the *Criminal Code*.

Some examples of court orders made under creative sentence provisions include: orders made pursuant to section 664.1 of the *Canada Shipping Act* (the predecessor to section 193 of the *Canada Shipping Act, 2001*) to, pay monies to Environment Canada to research and study the conservation and protection of marine birds and habitat;³¹ orders made pursuant to section 291 of the *Canadian Environmental Protection Act, 1999* to, pay monies to Environment Canada to be spent on research into the effects of marine pollutants on birds which research was to be conducted at the university level;³² orders made pursuant to section 79.2 of the *Fisheries Act* to, construct and operate a sewage treatment plant whose effluent meets the requirements of section 36(3) of the *Fisheries Act*;³³ construct and operate a effluent treatment plant, file with the court an irrevocable letter of guarantee in the sum of \$500,000 to ensure such construction, pay monies for environmental improvement purposes, fund a scholarship in resources technology and environmental science;³⁴ pay monies to Fisheries and Oceans Canada to promote the conservation and protection of fish and fish habitat;³⁵ pay monies to Fisheries and Oceans Canada to fund a river restoration project and a classroom fish incubation facility at a local school;³⁶ pay monies to Fisheries and Oceans Canada to be spent at the direction of their community adviser for a storm drain marking program and enhance riparian vegetation along a local

²⁹ See also ss 732.1(3)(h) and (3.1)(g), *Criminal Code* which give the Court discretion respectively in the cases of human offenders and organization to prescribe “other reasonable conditions” the Court considers desirable.

³⁰ See s 732.2(3), *Criminal Code*.

³¹ *R v Motor Vessel “Cape Benat”*, unreported decision, File No 131190, Vancouver Registry, Provincial Court of British Columbia, 21 October 2003; and *R v Motor Vessel “Andre”*, unreported decision, File No 47249-1, North Vancouver Registry, Provincial Court of British Columbia, 21 November 2007.

³² *R v Champion Shipping A/S et al*, unreported decision, File No 157673-1, Victoria Registry, Provincial Court of British Columbia, 25 January 2013.

³³ *R v City of Dawson* (2003) 50 CELR (NS) 99.

³⁴ *R v Corner Brook Pulp and Paper Limited*, entered order, Corner Brook, Provincial Court of Newfoundland, 14 May 1996.

³⁵ *Northwest Territories Power Corporation, supra*.

³⁶ *R v City of Dawson et al*, unreported decision, File Nos TC 95-11049 & TC 95-11050, Whitehorse Registry, Territorial Court of Yukon, 19 January 1996.

creek;³⁷ remove a boulder pile from an intertidal zone, plant salt marsh vegetation and pay monies to Fisheries and Oceans Canada for use in fish and fish habitat conservation and protection projects;³⁸ pay monies to Fisheries and Oceans Canada for the purposes of conservation, protection and enhancement of fish and fish habitat;³⁹ re-vegetate impacted stream bank, conduct an assessment of a pollution control center alarm system, and pay monies to Fisheries and Oceans Canada for the purposes of conservation, protection and enhancement of fish and fish habitat in a local watershed;⁴⁰ removal of crushed rock from foreshore under the supervision of a qualified person and pay monies to Fisheries and Oceans Canada for the purposes of conservation and protection of fish and fish habitat at a local lake;⁴¹ orders made pursuant to section 16 of the *Migratory Birds Convention Act, 1994* to, pay monies to Environment Canada to acquire oiled bird rehabilitation equipment, to develop and present training on oiled bird rehabilitation and fund research concerning oiled birds,⁴² pay monies to Environment Canada for the conservation and protection of migratory birds,⁴³ orders made pursuant to subsection 22(6) of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* to, pay monies to TRAFFIC of the World Wildlife Fund (WWF) Canada, for the operation of its wildlife trade monitoring network;⁴⁴ pay monies to further plant and animal DNA research;⁴⁵ and pay monies to Environment Canada for public education purposes and to a local aquarium for compensation for expenditures to care for the animals seized.⁴⁶

³⁷ *R v Town of Gibsons*, unreported decision, File No 11797, Sechelt Registry, Provincial Court of British Columbia, 26 November 2001.

³⁸ *R v Vito Ialungo and Vito's Service Ltd*, unreported decision, File No 12961C2, Sechelt Registry, Provincial Court of British Columbia, 17 March 2003.

³⁹ *R v Cameron Logging Ltd*, unreported decision, File No 13040-1, Powell River Registry, Provincial Court of British Columbia, 3 March 2004.

⁴⁰ *R v District of Kitimat*, unreported decision, File Nos 23306-1 and 23318-1, Terrace Registry, Provincial Court of British Columbia, 7 September 2004.

⁴¹ *R v John Seibold, Dennis Levasseur and Imperial Concrete Floors Ltd*, unreported decision, File No 11720, Sechelt Registry, Provincial Court of British Columbia, 23 October 2000.

⁴² *R v West Coast Reduction Ltd*, unreported decision, File No C35883-01, Vancouver Registry, Provincial Court of British Columbia, 1 October 1998.

⁴³ *R v Neptune Bulk Terminals (Canada) Ltd*, unreported decision, File No 36550, North Vancouver Registry, Provincial Court of British Columbia, 26 March 2001.

⁴⁴ *R v Yuk Ming Ho*, unreported decision, File No 51252, Richmond Registry, Provincial Court of British Columbia, 11 October 2007.

⁴⁵ *R v Sun 2006 Import & Export Ltd et al*, unreported decision, File No 202133-1, Vancouver Registry, Provincial Court of British Columbia, 6 December 2010.

⁴⁶ *R v Kenneth Grant Howard*, unreported decision, File No 144890-1, Surrey Registry, Provincial Court of British Columbia, 25 October 2005.

RELATED CREATIVE OPTIONS

Two options that may be considered as “distant relatives” to creative sentencing are worth comment.

First, although uncommon, are works or actions completed by the offender after being charged but before sentence is imposed which works or actions would have been the equivalent of conditions of a creative sentence court order. The intention here is at the sentence hearing defence counsel makes submissions to the court to the effect that such works or actions are really part of sentence and therefore penalty, usually a fine, should be mitigated. This option is relevant in the case of a prosecution under an environmental statute that does not contain creative sentence provisions.⁴⁷

Second, is an alternative measures/diversion agreement which can be entered into by consent of the parties or pursuant to legislative provision. With respect to the latter, the *Canadian Environmental Protection Act, 1999*⁴⁸ and the *Species at Risk Act*⁴⁹ provide for alternative measures agreements. It should be noted that section 717 of the *Criminal Code* also provides for such measures.

An alternative measures/diversion agreement is just that, namely, it is an agreement between the Crown and the offender to deal with the offence other than by way of prosecution, or in other words “out of court”.

Whether entered into between the Crown and the offender by consent or pursuant to the aforementioned legislation, such agreements generally are in writing and include an acknowledgment of responsibility for the offence by the offender and various conditions including remediation of impacted environment, changes to operating procedures and a donation to an environmental community group. In addition, there is usually a condition contained therein that if the offender does not comply with the agreement the prosecution can be reinstated in the case of an offender entering into such an agreement while charged or commenced in the case of an offender who has yet to be charged.

It should be noted that such agreements are rare.

SOME PRACTICE TIPS

It has been my experience that many of the environmental prosecutions I have handled have ultimately resolved themselves by way of a guilty plea. In many of those cases counsel

⁴⁷ There is some precedent for this option being the matter of *R v Boart Longyear*, unreported decision, Territorial Court of the Northwest Territories, Hay River Registry, a prosecution under the *Northwest Territories Water Act*, a statute without creative sentence provisions.

⁴⁸ See ss 295-309.

⁴⁹ See ss 108-119.

have made a joint sentence submission in support of a creative sentence based upon an agreed statement of facts.

Whether a creative sentence is the subject of a joint submission or its imposition is contested, counsel must ensure that their respective positions are based on the circumstances of the case and grounded in the principles and factors stated above so that the court can be guided to a reasonable sentence disposition.

With respect to creative sentencing and in particular court orders, I recommend the following:

1. Counsel should thoroughly research the available creative sentence options.
2. For the Crown, consult the investigators local to the offence and the Government technical experts as to what would be an appropriate disposition.
3. For the defence, consult your client and its experts in the same regard. Don't be shy. Contact the Crown's investigators and experts.
4. Always keep in mind the circumstances of the offence.
5. If possible, draft and file an agreed statement of facts.
6. Proportionality and parity cannot be forgotten.
7. Consider the ability of the offender to comply with the creative sentence. Can they afford it? Can they comply with it?
8. Draft a workable, enforceable and reasonable court order. Sometimes simple is best!
9. Last, but most important, ensure that both counsel are communicating with each other and if possible, have come to agreement with respect to the form and content of the proposed court order.