

ENVIRONMENTAL SENTENCING: MAKING THE BEST OF A BLUNT INSTRUMENT

Judge Barry Stuart

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 :



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You can't save the land apart from the people and to save either you must save both ... Wendell Berry ... the Great Work

Several times I have been abjectly frustrated and saddened by the failure of our legal system to effectively respond to environmental issues. Today I am optimistic, cautiously optimistic about, if not what the law is doing, certainly about what the law can do to:

- 1) Be an effective part of maintaining the difficult, but essential balance between economic development and environmental protection,
- 2) Enable citizens to directly participate in our shared fiduciary duty to protect the interests of current and future generations.

We need a good measure of optimism to inspire collaborative efforts in developing the reforms urgently required for the sentencing process to play an effective part in balancing environmental, economic and social objectives. One needs to begin this work by believing there is an important contribution for sentencing to make. I believe with some key changes there is. My optimism is fired by:

Progress – We have come a long way from United Keno Hill. Yes we have a way to go for the law to realize its full potential to contribute. Yes, it is important to recognize significant opposition may stand in the way of the reforms needed, but equally important to bear in mind how much has changed. Most reforms needed are within our reach, and some have been reached in other jurisdictions.

Environmental offences treated as serious crimes – Courts have begun to treat environmental offences as serious crimes. Environmental offences range from careless littering to premeditated actions that can cause greater harm than any other offence before the court. While the spectrum of penalties must line up to fit the huge spectrum of environmental offences, all must be recognized as criminal behavior not as merely bad personal habits or bad business practices.

Public trust – The principles of a public trust are beginning to permeate all actions to protect the environment. When we agree to allow individuals and corporations to undertake for profit activities that place at risk the health of our environment they take on a public trust to protect the crucial environmental interests of current and future generations. This public trust imposes a fiduciary duty to ensure all their actions are driven by the highest standard of due diligence to prevent harm. Corporations are expected to recognize that public trust responsibilities trump concerns about profit at every step of their activities. These responsibilities must be driven throughout the corporation from top to bottom from directors to field staff.

The fiduciary responsibilities of public trust fall upon all citizens. All parts of the sentencing process are beginning to reinforce these aspects of the public trust.

Collaborative partnerships – The complexity of the environmental challenges has fostered an appreciation that to meet these challenges hands and minds need to connect across many outdated separations based on laws, on debunked assumptions and on inane fights over jurisdictional responsibilities. Nor can the public persist in their 9-1-1 mentality of calling in experts to resolve problems. To be successful in the face of these complex challenges everyone needs to be actively involved. The era of abandoning our individual and shared responsibilities to experts has passed. Civic responsibility has never more been more important. Recent successful collaborative initiatives mark the way forward and demonstrate how processes can be designed to foster sharing both responsibility and power among many different interests whose respective histories have been dominated by either fighting with or ignoring each other.

Level playing field – All informed interests are much more aware that a level playing field, transparency and mutual respect serves everyone's best interests. This recognition is not solely derived from witnessing a burning bush and finding a new religion. In many quarters genuine soul searching has participated in changing perspectives. It matters less what motivated new perspectives than the fact that changes are occurring to move problem solving to more constructive modes.

While the power of local and global NGO's has not matched the growth of concentrated corporate power, the power and highly developed sophistication of NGO's has immensely increased their influence. Global communication networks enable information and reputations to travel the planet. This has removed the ability for two very different corporate faces, one on home grounds and one in foreign lands. What corporations do away from home follows them home to their governments and shareholders. All these changes have generated a growing awareness that a level playing field is not just good for the environment, but good for business.

Changes to the sentencing process – Developing more punitive criminal sanctions will not have as much impact on outcomes as getting the process right. Process is product. The outcome is determined more by the process used than by anything else. The process used determines whom and how people [and corporations] participate, their ongoing relationships, their ability to work together in developing and applying innovative measures, the breadth of what is addressed and their commitment to outcomes. Process determines whether the enormous energy in conflict is engaged constructively or destructively.

Sentencing is not an event, it is a part of a much larger process that begins before the case finds its way to court and continues long after the imposition of a sentence. What happens before and after court is as important as what happens in court. All stages of the process need to be supported and effective to achieve the core objectives of sentencing and to contribute to the larger regulatory processes governing economic, social and environmental issues.

There are more corporations than ever before carrying out activities that raise greater risks than ever before to the environment. In relative terms there are less resources invested in monitoring, investigating and prosecuting environmental activities than ever before. This is a recipe for disaster. There is unlikely to be less corporate activity and less risk to the environment in the future. Even more unlikely that in the future, government will increase investment in the resources needed to properly monitor activities and ensure compliance with environmental laws. Consequently, to create a reasonable prospect for high levels of deterrence and compliance, several changes are necessary.

SUGGESTED CHANGES

1. High Expectation of Apprehension – What will successfully, specifically and generally deter environmental offences? The harshness of a possible sentence does not top the list of successful deterrents in most studies. These studies repeatedly point to the likelihood of apprehension and the condemnation within one's personal community as more effective deterrent measures.

Creating a high expectation of apprehension currently requires a much greater investment in qualified enforcement officials in the field armed with the powers and resources to successfully detect, investigate and prosecute.

Certainly the outcome of a prosecution is integral to deterrence. A fierce bark and a feckless bite can undermine the effectiveness of creating a high expectation of apprehension. The current arsenal of penalties is almost capable of producing a scary bark, but the lack of resources to prosecute and the relative light nips on offenders undermine the current capacity of the legal system to effectively deter environmental crime.

2. Condemnation from professional and personal networks – is my hands down favorite deterrent. The power of family friends, colleagues and the business community to influence conduct has enormous potential to affect behavior, for fair or foul. I place enormous hope in the current press by corporations in many different fields to raise the bar on what constitutes good corporate practice. Yup, there are exceptions, most exceptions remain in the dark ages dominated by attitudes based on business no matter what or how it may operate is good for the country and community. Currently, corporations, corporate associations and corporate leaders are proactively raising their standards of practice by developing and pressing for best practices throughout many different business communities. In exemplary ways some corporations are voluntarily conducting their activities above the minimum requirements imposed by law.

Self-regulation alone is not enough, but without self-regulation, without peer pressure, without immediate community connections, primary reliance on government interventions will never be enough, no matter how much more public funds we dump into

failed criminal justice systems. We cannot punish our way to the level of environmental stewardship needed to serve this and future generations. Self-regulation is not a wistful dream, but a practical response that serves the best interests of corporations as well as the public. Corporations are promoting best practices in their field. They know more than any one else when other corporations are violating best practices and offending environmental laws. Their ability to press for best practices and compliant behavior within their industry is an invaluable resource to engage as an integral part of deterring and securing compliance. Their special privilege to use corporate structures and engage in activities that impose grave risks on people and environments comes with special obligations not just to take care in what they do but as well share in proactively ensuring others take care. The “state” cannot be everywhere all the time. We cannot afford to field enough government officials to effectively detect and prevent environmental offences. All citizens and all corporations have a fiduciary responsibility to establish personal standards of care and to proactively participate in preventing environmental offences.

There are many reasons why self-regulation serves the best interests of corporations:

- Getting rid of the bad apples in the barrel of any industry serves the best interests of all other apples in the barrel.
- Developing the certainty of a level playing field by ensuring universal compliance is a boon to all corporations.
- Attracting and keeping the very best employees is easier when the employees are proud to be a part of a corporation reputed for its responsible and ethical practices.
- Such reputations make it much easier to secure public and political support for their activities.

(Personal note – While I have boundless respect for the work of John Swaigen, I have yet to respond to his admonishment of my implicit belief expressed in Keno Hill that corporations have moral standards and do care for more than just bottom line goals. He warned me of the dangers of attributing anthropomorphic capacities to corporations. In my defense, I call on my experience in working with and against corporations that introduced me to corporate leaders who bare knuckled their way to change corporate behavior and to corporations that voluntarily raised the bar of good corporate citizenship. These and other experiences found my belief in the corporate community capacity to recognize their moral responsibility to lift their game to the level public trust requires. Never will corporate self-regulation no matter how responsible they become suffice. We have accorded corporations more power than ordinary citizens, and permitted them to carry out activities that risk lives and critical environments. Too much is at stake to make assumptions at either end of the trust spectrum – to trust all or distrust all. Trusting all is impractical, distrusting is unaffordable. Self-regulation is indispensable to finding an appropriate balance between private and public involvement.

Citizens, corporations and governments need to be actively involved to punish the bad, terminate ugly and reward good corporate behavior.)

3. Private Prosecutions – Long before we delegated so much responsibilities to police and government agencies all citizens shared the responsibility to “*keep the King’s peace*”. Private prosecutions harken back to the time when citizens were encouraged to help the King keep peace in the land. Fisheries Act regulations encourage citizens to prosecute by awarding half of any fine imposed by the court to the private prosecutor. Half of maximum fines of \$500,000 for every day an offence is committed, could be much more than chump change.

Curiously, the government counters this legislative encouragement by exercising their power to intervene [supposedly in the public interest!] and then regularly terminates the prosecution. In light of the significant lack of funding to support enough prosecutors and enforcement officers to monitor and secure the level of compliance necessary to protect the environment, citizens are desperately needed to help keep the Queen’s peace.

In addition to removing unreasonable restrictions on private prosecutions, many other initiatives are necessary to invite and encourage citizens to become actively engaged in all aspects of decisions affecting our shared environment. Simple legislation such as the Michigan Environmental Act invests citizens with the ability to question any decision that fails to accord reasonable care in actions that impact the environment.

Specific changes:

- Remove exclusive discretion of government to intervene in a private prosecution unless the court approves.
- Require courts to provide reasons if a government intervention is approved.
- Subject all fines secured in a private prosecution to first pay the private prosecutors costs and the remaining fine shared equally among the private prosecutor, enforcement agency involved and any victim whose damages [determined by court] have not been adequately covered by any other court order or by any other source.
- Create by legislation an ability for private citizens to initiate private prosecutions of all environmental offences.

4. Independence of Prosecutors – Most environmental crimes involve directly or indirectly government interests and often investments. In the ongoing debate over whether prosecutors should be vested with the same level of independence as judges, some crimes like environmental offences readily tip the scales to warrant carving out unfettered independence for prosecutors to act independently and be seen to do so. **In all prosecutions involving a perceived government conflict of interest prosecutors be given clear independence to prosecute.**

5. Respecting and including victims – rendering all phases of the process, particularly plea-bargaining transparent, respects the interests of victims and the public. Victims need to have a voice. Affected communities need to have a voice. Respecting their interests by including their voice significantly assists the court in *getting it right*. Without the victim being directly engaged, the court is left with common assumptions of what best respects the interests of victims. Victims can have very different interests. Only their direct and supported involvement reveals their primary and unique interests. Victim impact statements are dated and unable to respond to changes in the process. Most important, without victim participation offenders rarely appreciate the full nature of harm caused by their actions. In many respects, a victim's perspective enhances the ability of the outcome to achieve many of the core sentencing objectives. A victim should never be pressured to participate in any way, but the opportunity should be open at any time and supported.

6. Assessing damages – Leaving assessment of who is a victim and the full measure of their damages exclusively to civil courts assumes civil actions will follow. This imposes both delay and process costs upon victims of environmental offences. The criminal court should in the very least take stock of who has been harmed and the extent of the harm. Failing to do so leaves offenders to make their own assessment, which may be woefully minimal and thereby prevent the offender from coming to terms with the full magnitude of their responsibilities. As important, failing to measure the harm, disrespects the interests of the victim to be fully heard and understood.

Courts should be empowered to order an assessment of who has been harmed and the extent of their harm. The offender should be responsible for the cost of the study and the court responsible to set reasonable guidelines for the scope of the study. There is no good reason to justify an offender having the fortuitous benefit of his harm being difficult to track. The extent of harm in environmental cases is as important in sentencing as assessing harm in assault causing bodily harm cases. Guidelines will be needed to avoid extensive hearings in criminal courts.

Compensation has been an integral and effective part of many traditional processes to deal with harmful behavior. However, there is a fundamental difference in how compensation is used traditionally from how it is used in criminal courts. In Papua New Guinea, compensation is called *sorry money*. Traditional compensation payments are carried out through ceremonies designed to mend broken relationships. Compensation is an important part of the ceremony, but more important are the public offering and acceptance of an apology to mark new peaceful beginnings of relationships among the families and communities of the victim and offender.

Many losses cannot be translated into money nor compensated by money. In these cases money cannot repair relationships and create new beginnings. Traditional ceremonies increase the remedial capacity of compensation. We have learned and have much more to learn from traditional practices about the importance of ceremonies in improving the outcomes in our sentencing processes. Our court ceremonies are dominated by strategies

to win or minimize responsibilities, and rather than rebuild lives, connections and relationships, our ceremonies can make the prospects for new beginnings worse.

7. Timely Reviews of Court Orders – Timely reviews to adjust court orders to changes reward progress by reducing stringent conditions or punishing breaches by taking corrective actions that are essential to secure the full and beneficial use of probation and court orders. Reviews can be expensive. Whenever possible the offender should pay part or all the costs to review and supervise court orders. These orders reduce reliance on jail terms, redress conditions that cause crime and address many other important sentencing objectives. Paying for the costs motivates an offender to diligently obey the order to achieve an early termination.

8. Triage – A triage is needed at the front door and throughout the sentencing process to determine what at all times is the best process to handle the issues raised in sentencing. All cases are very unique and in different ways, at different stages in the sentencing process, significant changes will happen. The process must remain flexible to engage the appropriate process that fits the changing circumstances. For instance an accused may for a variety of reasons deny responsibility at the outset. At any time, for a host of different reasons an initial denial may be replaced by a full acceptance of responsibility reinforced by genuine contrition. Changes of this magnitude warrant a triage to consider the best next steps in the process.

Hospitals depend on front door triage to refer patients to the appropriate response. Public funds are squandered if without a triage a surgeon handles every case. In the court process we squander public funds every day by sending all sentencing cases to a formal court hearing presided over by a judge. There are many different less expensive and more effective options to consider in matching environmental offences to an appropriate process.

Possible options:

- Formal court process
- Restorative justice process within formal justice process
- Restorative justice process within community
- Combined community and court process.

Within these options the parties with the help of facilitators or process managers have designed many creative processes. In each process, a judge may be engaged in many different ways. The judge may retain control, may play a very minor role, or may simply be called upon if a judicial remedy is an integral part of a consensus proposal or be engaged to determine any outstanding issue that fails to be resolved by consensus.

9. Restorative Justice – These processes are ideally suited for environmental offences particularly for more serious offences if:

- 1) Offender accepts full responsibility and agrees to participate;
- 2) Case returns to court if offender fails to earnestly participate or agreement is not reached;
- 3) Outcomes in more serious cases are included in a binding court order;
- 4) Triage used to assess appropriateness of restorative justice not left solely to the prosecutor, but includes enforcement official, defense counsel, offender, community justice representative, and victims;
- 5) All participants in a triage/assessment are informed and understand restorative process;
- 6) A qualified restorative justice practitioner is available to manage the process.

Too often a restorative process is not considered or rejected because the advantages of a restorative process are not fully appreciated by the parties. The advantages are too many to address here. A sample of some key advantages illustrates how these processes are better suited to realize key environmental sentencing objectives.

Flexibility – Sentencing environmental offences can raise complex issues, involve ongoing relationships among the victims, government agencies and the offender, and require several years to implement, review and adjust the sentence plan. Restorative processes, particularly peacemaking circles can be adapted to fit the particular circumstances of each case. Court involvement can be retained in many different ways, and all Court remedies, including jail terms can be added to the extensive range of remedies restorative processes can muster.

Problem solving – Restorative processes shift the focus from legal issues to social, economic and environmental issues, from past behavior to future behavior and from symptoms to underlying causes. Courts generally do not, but restorative processes usually do, develop a collaborative process to understand why the offence happened, how to prevent further offences, what can be done to prevent further offences, and what is needed to successfully implement outcomes. Almost always the outcome embraces issues far beyond the narrow confines of legally defined issues. Restorative processes through collaborative dialogues generate innovative outcomes rarely anticipated by participants.

As important as it is to gather all affected interests to collaboratively develop sentencing plans that effectively repair harm, it is more important before activities placing environments at risk begin, to gather together all affected interests to collaboratively develop ways to prevent harm.

Changing perspectives – Nothing in my experience has been more effective in enhancing an offender's appreciation of the harm they have caused than directly facing victims and

personally responding. These difficult exchanges forge new understanding and genuine contrition. I have never witnessed in court a genuine transformation of an offender that moves offenders beyond accepting responsibility to earnestly seek ways to prove contrition and change behavior. Such experiences are common in restorative processes. If changing the behavior of offenders and addressing in a respectful manner the harm to victims is important, direct interaction in a restorative process readily surpasses the ability of courts to achieve these goals. As important, study after study reveals higher victim satisfaction with restorative processes than formal court experiences.

Processing advantages – Restorative processes usually take less time to begin, and reach outcomes. They are less expensive to run. Because all participants contribute to the outcome, all feel a pride of ownership in what was achieved. Shared ownership in turn generates a shared commitment to make it work. The parties, having directly participated, have an intimate understanding of the underlying spirit and purpose of the agreement and thereby can readily make adjustments to respond to changes in circumstances and reward progress.

Inclusive – Including all affected interests in a process that respects all voices improves mutual understanding, trust and respect for differences. Generating functional as opposed to dysfunctional relationships, characteristic at the beginning of most environmental sentencing processes, is often the most important outcome of these processes. Improved relationships are essential to work through the ongoing issues among the parties during the life of any project posing a risk to the environment. Improved relationships are invaluable in preventing recidivism.

10. Special Environmental Court – Judges, prosecutors, clerks and probation officers knowledgeable and skilled in all matters relating to environmental crimes could contribute on many fronts to improving how environmental cases are handled.

- 1) *Unique knowledge* – Environmental trials and sentencing often require very specialized knowledge to appreciate the complex circumstances surrounding the factual basis of the crime and raise unique evidentiary and substantive legal issues. Processing these cases through specialized hands will reduce time and legal errors and build coherent jurisprudence on substantive, evidentiary and sentencing laws. It took the Courts a decade of education to abandon old attitudes and practices in dealing with impaired driving, spousal assaults and in respecting the needs of victims. Professionals whose work regularly involves environmental offences can develop better insights and more effective responses to the unique challenges of environmental offences.
- 2) *Time* – Environmental matters particularly complex cases in both trials and sentencing can take a long time to process. A court dedicated to these matters can reduce the case processing time and reduce the detrimental effect of bouncing environmental matters from date to date in a busy general purpose court.

Sentencing environmental offenders confronts a complex and often conflicting set of objectives. The essential contributions the sentencing process makes directly and indirectly to protecting environmental health and to ensuring businesses posing grave risks operate within the safety boundaries defined by law calls for time, special knowledge and careful attention to crafting sentences that are effective and constructive.

- 3) *Innovative Outcomes* – The need to fit the process to the fuss is particularly compelling in environmental cases. An environmental court can begin to explore, experiment and develop innovative alternative processes for handling different cases in ways that achieve the most effective outcomes in each case.

In the very least, if not a specialized court, then judges, prosecutors, probation officers and process managers should be trained and assigned to handle most environmental cases in each jurisdiction. Judges have begun to demonstrate in their sentencing practices recognition of the serious nature of environmental offences. But studies reveal judges remain reluctant to call on severe sentences to rebuke serious environmental offences. A special court or specially trained judges might rectify this reluctance.

Prosecution is a blunt instrument. Prosecutions are essential to generate credibility in any compliance regime and to draw clear lines of significant consequences around initiatives to negotiate settlements or rely upon alternative measures. A full range of appropriate remedies and investing time and care in designing a sentence to fit the special needs of each case can significantly sharpen the effectiveness of prosecutions.

11. Sentencing Tools – Achieving unique environmental sentencing objectives calls for a different perception of offences, a different use of traditional sentencing tools and some new tools. The ability of any penalty to deter criminal activity is related to the kind of criminal activity sought to be deterred. For environmental offences, my three most effective deterrent penalties are stop and control orders, full restitution orders, and activity bans.

Stop and Control Orders – The mere mention of resorting to these options in a sentencing hearing changes the perspective of offenders from *let's get this over with ... just tell me the fine amount so I can get on with my business ...* to *... now you have my attention ... can you do that!*

These are the trump cards that immediately grab the attention of the worst environmental criminals. No other legal response to environmental offenders has the same clout to:

- Deter environmental crimes
- Turn on a dime offending behavior to remedial actions
- Bring offenders or potential offenders to the table to explore non-offending alternatives.

Recommendations:

- 1) Stop and control orders should be applicable to all environmental offences. Guidelines need to be developed to govern their use to prevent misuse of such a powerful remedy. Stop orders are particularly last resort and emergency responses.
- 2) Inputs from victims, relevant agencies and the offender should be heard to tailor their use to fit the nature of the offence and to minimize unnecessary economic harm to the offender and to others dependent on the offender's operation.
- 3) Offenders are required to pay the costs of monitoring control or stop orders and of working out the conditions to remove these orders.
- 4) Court retains a supervisory responsibility, but having set down guidelines only participates upon the request of any party. The negotiations of conditions governing orders are left to be worked out against court guidelines with the assistance of a skilled process manager, appointed by the court, paid for by the offender and reporting only to the judge.

Activity Bans – The environmental penalty regime must include significant personal consequences. Money is just money. For many environmental offenders losing money is just part of doing business and has little personal stigma or lasting personal consequence. The probable sentence must on many fronts make the risk of offending much more than just a bad business decision.

License bans have proved their value in deterring offences [impaired driving ... drive drunk, lose your privilege to drive, dangerous use of a firearm, lose your privilege to use a firearm], and in promoting responsible behavior in many different professions [violate a professional code of conduct, lose your privilege to practice your profession].

The use of a ban is simple and serves as a powerful deterrent. A corporation breaching the public trust implicit in the approval to carry out activities that place the public or environment at risk should face the prospect of a ban from operating in fragile environments, or from carrying on similar activities anywhere.

Executives of corporations are trained as professionals, vested with the responsibilities of a professional, call themselves professionals and use the significant advantages of a corporate structure to carry out their profession. If they breach their professional and fiduciary responsibilities by committing environmental offences, they should be liable to a ban from working in a corporation or in their profession ... Abuse of the privilege loses the privilege.

An employee, manager, or director whose actions or failure to act relates to the commission of the offence should be liable to similar bans.

Responsible corporations working hard to earn the trust of the public and governments will support bans that remove the bad apples from the barrel.

12. Rewarding Good Behavior – An environmental sentencing process with the appropriate resources, tools and skilled personnel can make a vital contribution to our generation's fiduciary responsibilities to steward the environment for future generations. To effectively carry out these responsibilities, processes to ensure bad behavior is held accountable and punished are essential. As, if not more essential, are processes that celebrate and reward good behavior. Providing a regime of incentives rewarding good behavior has many advantages over punishing bad behavior.

- More flexible and responsive to changing management priorities;
- Easier and less expensive to employ [prosecution can be inordinately expensive];
- Respond in a more timely manner;
- While many violations cannot be prosecuted for many different reasons, most exemplary practices can be rewarded;
- Can be applied to individuals, groups and be geographic specific;
- Add value directly to any activity;
- Do not require legislative changes;
- Can be used by local, regional and national organizations.

Courts cannot hand out future get out of jail free cards as rewards to good corporate citizens, but can recognize a history of sterling corporate citizenship as a prominent mitigating circumstance in sentencing. Incentives can be particularly effective in engaging public responsibility to keep the Queen's peace by encouraging efforts to detect and report offending behavior.

CONCLUSION

There is no conclusion to a work in progress. Work on improving environmental sentencing will hopefully always be in progress. A collaborative effort among all affected interests is necessary to build the essential contribution sentencing can make to the larger processes governing private and public activities placing the environment at risk.