

## LEGAL AND POLICY RESPONSES TO ENVIRONMENTAL OFFENCES IN RELATION TO THE ALBERTA OIL SANDS

Article by Chilenye Nwapi ♦

### Introduction

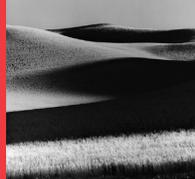
Media reports about the environmental effects of oil sands development have engendered public scrutiny of environmental enforcement in the Alberta oil sands. In an article captioned “The Canadian Oil Boom: Scraping Bottom”,<sup>1</sup> the National Geographic featured a horrific but vivid image of the environmental risks associated with the oil sands. Environmentalists say there is growing scientific evidence that oil sands extraction produces more carbon dioxide than traditional oil extractions produce.<sup>2</sup> Last February, a group of Nobel laureates urged European leaders to support European Union’s proposal to categorize fuel from oil sands as “highly polluting”.<sup>3</sup> In their words, “[t]ar sand development is the fastest growing source of greenhouse gas emissions in Canada, and threatens the health of the planet.”<sup>4</sup> In a letter to Canada’s Prime Minister Stephen Harper, the laureates demanded that as the Prime Minister has called climate change one of mankind’s biggest problems, he should translate his words into deeds by halting further expansion of the oil sands.<sup>5</sup> One observer has noted that even “oil-obsessed” United States deferred its plans for the Keystone XL pipeline that would have increased the amount of oil sands produced by Canada for onward transportation to the US.<sup>6</sup> Although the EU’s vote ended in a deadlock, due in large part to intense lobbying by Canada with threats of a trade war with the EU,<sup>7</sup> objections to the oil sands remain nevertheless.

The purpose of this article is to review the environmental enforcement culture in Alberta with a view to ascertaining what mechanisms are in place in Alberta for responding to the commission

of environmental offences, especially in the context of the oil sands, and the extent to which those mechanisms are being used.

### The Environmental Regulatory Architecture for Oil and Gas Operations in Alberta

The environmental regulatory architecture for oil and gas operations in Alberta is governed by federal, provincial and municipal laws and regulations and international and federal-provincial agreements in accordance with the *Constitution Act, 1867*.<sup>8</sup> While interprovincial and international matters are under federal jurisdiction, matters that are local to the provinces are under provincial jurisdiction. With respect to environmental protection, the Constitution Act is silent on which level of government has legislative jurisdiction. The Supreme Court of Canada has however decided that both the federal and provincial governments may enact environmental laws in respect of matters within their competence, provided the exercise of legislative power over the environment must relate to a head of power over which the particular level of government can legislate.<sup>9</sup> The court noted that local projects will fall under provincial jurisdiction, but that federal involvement will be permitted where the project affects an area of federal jurisdiction.<sup>10</sup> The federal criminal law power<sup>11</sup> has been identified as one of those heads of power allowing federal environmental regulation.<sup>12</sup> The peace, order and good government clause<sup>13</sup> is another.<sup>14</sup> In the event of conflict between a federal regulation and a provincial regulation,





however, the doctrine of paramountcy operates to give primacy to the federal regulation.

Given the concurrent jurisdiction of the federal and Alberta governments over environmental protection, both governments have jurisdiction to enforce their environmental laws with regard to environmental violations that occur in Alberta. They thus both can prosecute environmental offences that occur in relation to the Alberta oil sands. The offences are created under their respective environmental statutes. At the federal level, there are, among others, the following statutes: the *Environmental Enforcement Act*,<sup>15</sup> the *Fisheries Act*,<sup>16</sup> and the *Migratory Birds Convention Act*.<sup>17</sup> At the provincial level, the most remarkable statutes are the *Environmental Protection and Enhancement Act*<sup>18</sup> and the *Water Act*.<sup>19</sup> These statutes contain criminal and administrative sanctions for violations of environmental laws and regulations. They are the main enforcement tools for ensuring environmental compliance in Alberta.

### The Nature of Environmental Offences

Most environmental offences are classified as “regulatory offences”, or “quasi-crimes” that do not require proof of criminal intent. Discharges of pollutants are, for instance, generally regarded as regulatory or public welfare offences. Such offences are viewed as “less than truly criminal.”<sup>20</sup> In *R. v. Sault Ste. Marie (City)*, the Supreme Court of Canada affirmed that public welfare offences “are not criminal in any real sense but are prohibited in the public interest.”<sup>21</sup> Such offences are usually seen as an appendage to a larger regulatory framework rather than the main reason for the legislation. Their main purpose is not so much to punish the wrongful conduct as it is to ensure compliance with the regulation. In substance, the offences are of a civil nature even though they are enforced through the criminal justice process. They might well be regarded as a branch of administrative law admitting only of limited application of criminal law principles.<sup>22</sup>

Regulatory offences are generally regarded as “strict” or “absolute” liability offences. This contrasts with traditional crimes, where the presence of a guilty mind (*mens rea*), expressed in terms of intention or recklessness, is at their heart. The Supreme Court in *Sault Ste. Marie* used the term “true crimes” to characterize these traditional crimes.<sup>23</sup>

But in-between strict liability and *mens rea* offences, there is a distinct world of offences. In the words of Glanville Williams, “[t]here is a half-way house between *mens rea* and strict responsibility which has not yet

been properly utilized, and that is responsibility for negligence.”<sup>24</sup> The Supreme Court pointed out in *Sault Ste. Marie* that this half-way is occupied by “public welfare offences (within which category pollution offences fall)”.<sup>25</sup>

There are thus three categories of offences: (1) offences in which the prosecution must prove *mens rea*; (2) offences in which the prosecution is not required to prove *mens rea*, but in which the defence would avoid liability by proving that he took reasonable care to avoid the conduct amounting to the offence (the due diligence defence); and (3) offences of absolute liability that permit of no defence whatsoever once the *actus reus* is established.<sup>26</sup>

Public welfare offences, among which are environmental offences, *prima facie* fall under the second category. They would fall under the first category only where words like “willfully”, “with intent”, “knowledge” or “intentionally” are used in creating the offence.<sup>27</sup> In the absence of any of these words, and once the defence sets up the due diligence defence, the court considers what a reasonable person in the defence’s shoes would have done. Liability will not lie where the defence “reasonably believed in a mistaken set of facts” which, were it true, would render the conduct innocent, or where he took all reasonable measures to avoid the conduct complained of.<sup>28</sup>

In sum, environmental offences are a special category of offences that generally are neither strict liability nor require fault on the part of the accused. However, the accused can escape liability upon a showing of due diligence.

### The Environmental Enforcement Techniques in Alberta

A variety of enforcement mechanisms are available in Alberta to deal with environmental offences connected with the oil sands. These include administrative penalties, orders, warnings, and prosecutions. It is indeed rare that any government uses only one mechanism to deal with environmental offences.

**Administrative penalties** are monetary penalties assessed and imposed by an environmental regulator without prior recourse to a court or other tribunal. The system allows offences to be dealt with through an administrative process rather than the normal court system. The main reason for introducing administrative penalties was to address cases of minor infractions where the environmental impact was minimal. Administrative penalties were viewed as a more appropriate, fairer, faster and cheaper way of dealing





with such cases.<sup>29</sup> Apart from allowing penalties to be imposed without recourse to courts or other tribunals, the administrative penalty system also differs from prosecution and judicially imposed civil penalties in that it has a lower penalty ceiling than these.<sup>30</sup> In addition, conviction is not registered in relation to a person on whom administrative penalties have been imposed.<sup>31</sup> Like the judicial process, however, parties are given opportunity to present their position to the regulator before a decision is reached on the amount of the penalty. The regulator also informs the parties about the penalty assessment process.<sup>32</sup> It is believed that administrative penalties offer an effective means to deterring minor offences for being easier to impose. They are easier to impose because the standard of proof is on balance of probabilities. Empirical studies also show that the rate of appeal of administrative penalties is very low compared to appeals of court decisions.<sup>33</sup> And although administrative penalties are usually lower than criminal sanctions, deterrence theory shows that certainty of punishment is more effective than severity of punishment.<sup>34</sup>

AENV's compliance assessment report shows that within the last five years, administrative penalties have been issued 91 times. This indicates a drop in the number of administrative penalties issued. And it is difficult to discern from the report how many of the penalties related to the oil sands. But a few are obvious. In 2009, two were issued against Suncor Energy Inc and one was issued against Compass Group Ltd.<sup>35</sup> The latest AENV enforcement report released in November 2012 shows that between 1 July 2012 and 30 September 2012, five administrative penalties were issued, including one oil sands-related penalty issued against Syncrude Canada for failure to report the release of hydrogen sulphide and ammonia on 9 July 2010.<sup>36</sup>

**Warning letters** are issued to companies and individuals who have contravened provisions of an environmental statute or regulation, describing the contravention. The letter forms part of the compliance history of the company or individual and is taken into account if a contravention occurs in the future. Such warnings are issued for minor contraventions and are normally issued to first-time offenders. They are designed to prompt compliance by the company or individual to whom they are issued.<sup>37</sup>

**Orders** are issued when instant action is needed to avert or halt an adverse environmental effect. Three types of orders are issued in Alberta: (1) environmental protection orders; (2) water management orders; and (3) enforcement orders. Whereas environmental protection orders are issued with regard to contraventions under

the EPEA, water management orders are issued with regard to contraventions under the *Water Act*. Enforcement orders are issued to compel a party to take steps to remedy an environmental contravention and, where appropriate, to require the party to take actions to prevent future contraventions.<sup>38</sup> Enforcement orders can be issued under both the EPEA and the *Water Act*.

In recent times, however, there has been an attempt to change enforcement culture in Alberta from **prosecution-as-a-last-resort** enforcement tool to **prosecution-as-an-enforcement** tool. AENV's annual assessment enforcement reports show that between 2008 and 2012, 51 environmental prosecutions have been concluded.<sup>39</sup> While it is not clear from the reports how many of the prosecutions related to the oil sands, at least six oil sands-related prosecutions are discernible: one against Syncrude, four against Suncor Energy and one against Compass Group Ltd. The most remarkable of them was the prosecution of Syncrude.<sup>40</sup> The case related to the death in April 2008 of about 1600 waterfowls on an oil sands tailings pond operated by Syncrude Canada along the Athabasca River, north of Fort McMurray. The river was on a pathway travelled by migratory birds. Influences like weather or fatigue might cause migratory birds to find a resting abode and a tailings pond located under the birds' flyway is an attractive place for the birds, especially in early spring as the warm bitumen in the pond prevents snow from settling on the pond.<sup>41</sup> Unsuspecting birds that presumably sought rest in the ponds were trapped. A concerned individual telephoned Todd Powell, a Senior Wildlife Biologist for the Alberta Province regarding a number of birds that had landed on Syncrude Canada's Aurora Settling Basin. An investigation that ensued revealed that hundreds of migratory birds were trapped in bitumen on the surface of the Basin. Nearly all the birds were dead. Although Syncrude had bird deterrence techniques, such as sound cannons, those techniques evidently proved ineffective on this occasion. Jeh Custer of Sierra Club of Canada commenced a private prosecution of Syncrude. This prosecution was eventually taken over by the Crown when Provincial authorities charged Syncrude in 2009 with a contravention of section 155 of the EPEA. Federal charges were also brought against Syncrude under section 5.1 of the *Migratory Birds Convention Act*.<sup>42</sup> Syncrude pleaded not guilty to all the charges and a trial that lasted for eight weeks ensued. The trial was focused largely on whether Syncrude did enough to deter birds from landing on the Basin.

The principal issue was whether Syncrude took all reasonable steps to prevent the death of the birds. The court reviewed Syncrude's efforts to prevent the birds





from landing on the ponds, other alternatives available to Syncrude, the prevailing industry standards in deterring migratory birds from landing on such ponds, the reasonable foreseeability of the circumstances leading to the landing of the birds on the ponds, the complexity of the circumstance, economic considerations, and the gravity of the offence. The court received evidence of what a minimum bird deterrence measure would be like, evidence of a decline in Syncrude's bird deterrence measures, as well as evidence that the sound cannon measures, which were Syncrude's deterrence mechanism, were not functioning at the tailings pond at the time of the incident.<sup>43</sup> On these facts, the court held that the due diligence defence was unavailable to Syncrude.<sup>44</sup>

The sentence included a \$300,000 fine under the federal charge and a \$500,000 fine under the provincial charge. The rest was made up of creative sentencing (discussed later). On the whole, Syncrude paid \$3 million. This penalty, while opinions defer as to whether this was the largest environmental penalty ever imposed in Canada,<sup>45</sup> it certainly was on the upper end and mirrors the current sentencing trend in Canada.

However, enforcement activities in Alberta appear to have recently been on the decrease. This is evident in the five-year enforcement history reviewed in this article. We saw a sharp drop in the number of concluded enforcement activities from 160 in 2010 to 115 in 2012. While, however, this may not accurately reflect the actual enforcement activities within the period since a number of cases are still pending, it does speak unfavourably about the pace of enforcement.

### Sentencing in Environmental Cases

Alberta's environmental enforcement policy adopts the polluter pays principle. This is contained in the purpose section of the EPEA.<sup>46</sup> The general trend is towards increased sanctions for environmental offences. A 2011 survey showed a significant rise in total penalties issued in completed prosecutions between 2000 and 2010.<sup>47</sup> While the rise was not uninterrupted, the general it is clear that the general trend remained increased penalties. In most cases, however, the cases proceed on the basis of a plea bargain under which the offender pleads guilty and there is a joint submission by the offender and the Crown on the appropriate sanction. Usually, the court accepts the plea bargain and the joint submission and issues its decision without giving reasons explaining the basis for the sanctions imposed. In some other cases that are fought through to the end, after the offender has been adjudged guilty, the offender

and the Crown agree on the appropriate penalty and file a joint submission on sentencing. Again, the court usually accepts the joint submission and issues its sentencing decision without explaining the principles guiding the determination of the penalty handed down. The *Syncrude* case offered an example of this. However, because of the absence of a detailed ruling that considers the myriad of factors that govern sentencing, these cases do not advance the jurisprudence on sentencing. Unless one knows what factors the Crown and the offender considered in arriving at the terms — how much of that information the Crown and the offender will agree to divulge remains in doubt — the cases have little precedential value. But even if the Crown and the offender agree to divulge the principles considered, that would not constitute a precedent.

**Creative sentencing** has become a major insignia of the sentencing policy in Alberta. It has been said that it now "accounts for almost 90% of the increasingly hefty fines" imposed for workplace deaths or serious injury convictions.<sup>48</sup> Under the EPEA, creative sentencing has been an environmental compliance option in Alberta since 1993. Most of the categories of sentencing listed under section 234(1) are forms of creative sentencing. It is at the discretion of the court to choose from the list the form of sentencing it considers most appropriate in the case. Creative sentencing is intended to make penalties more meaningful and to benefit the environment. It has a huge potential to not only punish an environmental offender but also to fix the environmental damage and to prevent future harms.<sup>49</sup> The purpose is to "have some good come from the bad."<sup>50</sup>

Historically, creative sentencing in environmental cases in Alberta is geared towards supporting several types of projects that benefit the environment. They include: establishing or funding research institutes focused on the kind of environmental harm caused by the infraction in question in the case, funding specific projects, supporting specific environmental projects, and establishment of corporate environmental audits and environmental management systems. In choosing the specific type of creative sentencing, the court considers the nature of the offence and the surrounding circumstances.<sup>51</sup> Usually, however, the terms of the creative sentencing order are agreed upon by the Crown and the offender and then presented to the judge for approval. The judge usually adopts the order, with a relatively casual reference to the offence in relation to which the order is made.

While creative sentencing continues to gain popularity, it cannot be imposed unless authorized by statute. In *R. v. Imperial Oil*,<sup>52</sup> Imperial Oil had been convicted of





discharging sludge into a river. The trial court imposed fines totaling \$25,000, including an order directing Imperial Oil to make contributions to two local school boards for education respecting pollution. This order to make contribution was set aside on appeal on the basis that there was no statutory basis to impose such an order.<sup>53</sup>

One criticism that may be leveled against Alberta's creative sentencing is that it does not appear to invite input from interested persons in the creative sentencing decision. As the terms of the creative sentencing are usually agreed upon between the Crown and the offender, the offender may have more say, while the victim has no say, in where the money goes. In one occupational health case, the victim was engulfed by a natural gas flash fire in 2004 while working atop a service rig platform operated by Special Services Inc, an oil services firm at the Petro-Canada site in Sylvan Lake, Alberta. He died from injuries sustained there. The court fined Special Services \$425,000 — the largest workplace safety fine in the history of the province. This money was to go to trade schools and charitable organizations. Some of it was to go to fund scholarships for occupational health students in Northern Alberta Institute of Technology. About one-third of the money was to go to support an oil and gas scholarship. The parents of the deceased were enraged that part of the fine would "promote the oilfield that killed [their] son."<sup>54</sup>

A Calgary Herald investigation revealed an "alarming" lack of oversight on the fines that companies are ordered to pay and that corporations that pay the creative sentencing fines often have scholarships named after them or have their names listed as "donors" in the universities and institutes that receive the money.<sup>55</sup> While the sentencing fines might not have been used to support the specific scholarships that the corporate convicts might be funding in the institution, the money might be seen by the students and researchers that use them as part of the corporation's social responsibility program. There is thus need for more creativity in the use of creative sentencing to avoid adverse public perceptions.

### **The Position of Victims of Environmental Offences**

A recent environmental victimology study funded by the Department of Justice Canada, the Law Foundation of British Columbia and the International Centre for Criminal Law Reform and Criminal Justice Policy found that virtually nothing has been written about the plight of victims of environmental offences in Canada.<sup>56</sup>

In a sense, though, this is unsurprising in that the concept of environmental crime remains an emerging field in legal discourse. In fact, the topic of victims' rights generally is not one that has received extensive academic treatment in Canadian legal discourse. A 2001 report on victims of crimes prepared for the Department of Justice Canada stated that "Canadian scholars have taken little interest in the topic of victims' rights", whereas "at the international level, especially in the US, the topic has been explored ad nauseam, and the available literature would fill a small auditorium."<sup>57</sup> This situation is paradoxical given the proliferation of victim service agencies in Canada. A 2007-2008 Victim Services Survey estimated that there were about 939 victim service agencies across Canada. Majority of these comprised government agencies while a relatively small number comprised self-identified non-governmental or community-based organizations. The majority of victims who received services for the period were victims of violent crimes.<sup>58</sup> From every indication in the survey, however, none had dealt with an environmental crime victimization incident. Yet, environmental crime victimization remains a stark reality in Alberta and Canada.

And the issue of environmental victimization is fraught with conceptual and practical difficulties. Environmental victimization presents unique problems owing to the inherent nature of environmental harms that makes it, all too often, difficult to establish a nexus between the harm and those who claim to have been affected by it. Apart from environmental crimes being diverse in their nature and impact, it rarely happens that they occur within a well-defined boundary. Their impacts spread far and wide, thus making it difficult to identify all those affected by the crimes. The issue of causation presents the most extreme form of this problem. The most notable example of this is global warming.

The legislative scheme for addressing the plight of crime victims in Alberta is contained primarily in the Alberta *Victims of Crime Act*.<sup>59</sup> The Act defines a victim in three respects: (1) with respect to financial benefits, a person who is injured as a direct result of an act or omission; (2) with respect to a death benefit, a person who is injured as a result of an act or omission; and (3) with respect to a program, a person who suffers loss or injury as the result of the commission of an offence.<sup>60</sup> The Act outlines a number of principles that apply to the treatment of crime victims. These include: cautious, compassionate and respectful treatment of victims; respect for the privacy of victims; prompt payment of financial benefits to victims for the injuries they have suffered; and provision of information to victims regarding the criminal justice process and victims' role





and opportunities to participate in that process; and consideration for the needs, concerns and diversity of victims.<sup>61</sup>

The Act creates a Victims of Crime Fund into which moneys from victim fine surcharge collected under the Act, under the *Criminal Code* and under the *Victims Restitution and Compensation Payment Act*<sup>62</sup> are paid.<sup>63</sup> Money paid into this Fund is used to fund programs that benefit victims of crime and to take care of expenses related to the administration of the Fund.<sup>64</sup> Persons eligible to benefit from the Fund are victims whose injury was “the direct result of an act or omission that occurred in Alberta and that is one of the offences under the *Criminal Code* ...”<sup>65</sup> Precluded are victims who are convicted of an offence arising from the event that produced the injury.<sup>66</sup>

It follows that victims of non-*Criminal Code* offences, such as victims of offences created under special environmental statutes, such as the EPEA and the Water Act, are not eligible to benefit from the Fund. This provision mirrors the definition of victims under section 1(l)(1): “victim means with respect to financial benefits, a person who is injured as a direct result of an act or omission described in section 12(1) of the Act” — that is, offences under the *Criminal Code*. Unless the environmental offence is pigeonholed into an offence under the *Criminal Code*, the victims are precluded from benefiting from the Fund.<sup>67</sup> But since most environmental offences are contained in specific environmental statutes, this testifies to the neglect that victims of environmental offences have suffered in Alberta.

## Conclusion

Public interest in the enforcement of environmental laws in relation to the Alberta Oil sands has been on the increase. This interest is related to the public attention environmental issues in the oil sands have generated both nationally and internationally. Certain trends emerge from this study: A variety of enforcement mechanisms are available in Alberta to deal with environmental offences connected with the oil sands. These include administrative penalties, orders, warnings, and prosecutions.

There is a clear policy towards increased penalties. Creative sentencing in environmental cases is now the norm. But while this trend is both innovative and commendable, there is need for more creativity in its use. It has suffered from lack of effective monitoring to

ensure that the fines are paid and used for the purposes for which they are meant.

But it is perhaps in connection with the welfare of victims of environmental offences that the policy and legal framework in Alberta appears to have paid the most inadequate attention. Existing laws on the rights of crime victims were designed outside the context of victims of environmental offences. Civil remedies are therefore the most viable option for victims of environmental offences. The VCA — the main statute dealing with the rights of victims of crimes — as it currently stands is ill suited for victims of environmental offences. This is, among other reasons, because of the restricted application of the Act to certain categories of offences, the narrow definition of “victim” under the Act and the category of victims who can benefit from the Victims of Crime Fund established under the Act. But whatever was the rationale for the provision of victim rights under the Act for certain categories of offences would also justify the extension of those rights to victims of environmental offences. Victims of environmental offences deserve equal protection. The special nature of environmental offences, which necessitated the enactment of specialized statutes to deal with them, probably calls for a victim statute tailored to the needs of victims of environmental offences. Amending the VCA, or expanding the victim provisions of the EPEA to incorporate some of the provisions of the VCA, is also another possible way of dealing with the problem. It is an issue that is deserving of the interest of the Albertan government.

The values of this article lie in both policy and law. It is intended to provide policy guidance to governmental authorities like the Alberta Environment (AENV) on the enforcement of environmental compliance in relation both to the oil sands and to other sectors that impact on the environment in Alberta. By drawing attention to the reality of lack of effective monitoring of the implementation of creative sentencing, for instance, this article hopes to contribute to the effective use of creative sentencing in Alberta. In addition, an enforcement mechanism that does not take into account the need to provide a remedy to the victims of the offences it seeks to address is incomplete, unbalanced and of limited policy value. Attention is therefore drawn to the lack of adequate attention to victims of environmental offences in a province that has the biggest environmental challenge in the country. By highlighting this reality and considering the range of issues that arise in the context of environmental victimology, it is hoped that this article will contribute to the formulation of policies that pay adequate attention to victims of environmental offences in Alberta.

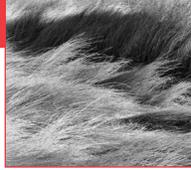


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## Notes

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2. “Nobel winners urge EU leaders to back oil sands law”, *Reuters* (16 February 2012), online: Reuters, <<http://www.reuters.com/article/2012/02/16/us-oil-sands-letter-idUSTRE81F0KV20120216>> (last accessed 19 November 2012) [*Reuters*].
3. *Ibid.*
4. *Ibid.*
5. “Nobel laureates press Harper to oppose Alberta oil-sands expansion”, *The Globe and Mail* (6 September 2012), online: The Globe and Mail, <<http://m.theglobeandmail.com/news/politics/nobel-laureates-press-harper-to-oppose-alberta-oil-sands-expansion/article596088/?service=mobile>> (last accessed 19 November 2012).
6. *Reuters*, *supra* note 2 (citing a statement by Franziska Achterberg, EU transport policy advisor at Greenpeace). See also “Nobel winners call on EU to support law classifying oilsands fuel as ‘highly polluting’”, *The Vancouver Sun* (16 February 2012) online: The Vancouver Sun, <<http://www.vancouver-sun.com/business/Nobel+winners+call+support+classifying+oilsands+fuel+highly+polluting/6166169/story.html>> (last accessed 10 September 2012). See also “Keystone Not in National Interest, Feds Say” (January 2012) Hous Bus J, online: Houston Business Journal, <<http://www.bizjournals.com/houston/news/2012/01/18/keystone-not-in-national-interest.html>> (stating that on 18 January 2012, President Obama denied approval of the Keystone XL Pipeline). The oil sands constitute 20% of US’ oil imports, which makes Canada top exporter of oil to the US. And currently, the US is the only country where Canada exports its oil sands. See Andrew Nikiforuk, *Tar Sands, Dirty Oil and the Future of a Continent* (Vancouver: David Suzuki Foundation, 2008) at 2.
7. Damian Carrington, “Canada threatens trade war with EU over tar sands”, *The Guardian* (20 February 2012), online: The Guardian, <<http://www.guardian.co.uk/environment/2012/feb/20/canada-eu-tar-sands>> (last accessed 10 September 2012).
8. *Constitution Act, 1876*, UK, 30 & 31 Victoria, c 3.
9. *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3.
10. *Ibid.*
11. *Constitution Act, 1876*, *supra* note 8, s 91(27).
12. See Peter W Hogg, “Constitutional Authority Over Greenhouse Gas Emissions” (2009) 46:2 *Alta L Rev* 507 at 511 [Hogg, “Constitutional Authority”]; Hogg, “A Question of Parliamentary Power: Criminal Law and the Control of Greenhouse Gas Emissions”, CD Howe Institute Backgrounder 114 (August 2008) at 1, online: CD Howe Institute, <[http://www.cdhowe.org/pdf/backgrounder\\_114.pdf](http://www.cdhowe.org/pdf/backgrounder_114.pdf)> (last accessed 14 November 2012).
13. *Constitution Act, 1876*, *supra* note 8 at s 91.
14. Hogg, “Constitutional Authority”, *supra* note 12.
15. SC 2009, c 14 [EEA]. The EEA is omnibus legislation that amends the fines, sentencing provisions and enforcement tools of six acts administered by Environment Canada and three acts administered by Parks Canada. It also creates the *Environmental Violations Administrative Monetary Penalties Act*. It introduces a new fine scheme that more accurately reflects the seriousness of environmental offences so as to “achieve greater compliance and respect for Federal Environmental legislation.” Environment Canada, “Canada’s Environmental Enforcement Act”, online: Environment Canada, <<http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=2AAFD90B-1>> (last accessed 19 November 2012).
16. RSC 1985, c F-14.
17. 1994, SC 1994, c 22.
18. RSA 2000, c E-12 [EPEA].
19. RSA 2000, c W-3.
20. Richard Hyde, “What is ‘Regulatory Crime’? — An Examination of Academic, Judicial and Legislative Concepts” (2012) 4 *Web JCLI* 1.
21. [1978] 2 SCR 1299 at 1303 [*Sault Ste Marie*].
22. *Ibid.*
23. *Ibid* at 1304.
24. Glanville Williams, *Criminal Law: The General Part*, 2d ed (London: Stevens & Sons, 1953) at 262.
25. *Sault Ste Marie*, *supra* note 21 at 1313.
26. *Ibid* at 1327.
27. *Ibid.*
28. *Ibid.*
29. LeRoy C Paddock, “Environmental Enforcement at the Turn of the Century” (1991) 21 *Env’tl L* 1509 at





- 1518; Law Reform Commission of Saskatchewan (LRCS), “Administrative Penalties Consultation Paper” (June 2009) at 3, online: LRCS, <<http://www.lawreformcommission.sk.ca/adminpens.pdf>> (last accessed 26 September 2012); Jillian Flett, “Administering Environmental Administrative Penalties: Alberta’s Experience” (2000) 15:1 Previous Issues, online: Environmental Law Centre, <<http://www.elc.ab.ca/pages/Publications/PreviousIssue.aspx?id=438>> (last accessed 26 September 2012).
30. LeRoy, *supra* note 29.
31. LRCS, *supra* note 29.
32. Flett, *supra* note 29.
33. Chris Rolfe, “Administrative Monetary Penalties: A Tool for Ensuring Compliance”, Paper presented to the Canadian Council of ministers of Environmental Workshop on Economic Instruments, 24 January 1997, online: West Coast Environmental Law Association, <<http://wcel.org/sites/default/files/publications/AdministrativeMonetaryPenalties.txt>> (last accessed 26 September 2012).
34. Environment Canada, *Administrative Monetary Penalties: Their Potential Use in CEPA*, (Number 14 of the Reviewing CEPA, the Issues Report series, Ottawa, 1994), cited in Rolfe, *ibid*. See also Rolfe, *ibid* (arguing that “[a] violation is more likely to lead to a penalty in [a monetary penalty] system than a traditional criminal court system, both because [monetary penalties] are more frequently used and less frequently appealed. Also, because of differences in the rules of evidence, the use of the “balance of probabilities” test for liability and the removal of the due diligence defence, the chances of penalty imposition are usually assumed to be greater for [monetary penalties].”).
35. These data were gathered from the AENV’s Annual and Quarterly Reports of Compliance Assessment Enforcement Reports available at: <<http://environment.alberta.ca/01292.html>> (last accessed 6 December 2012).
36. AENV, Enforcement of the *Environmental Protection and Enhancement Act* and the *Water Act*: 1 July 2012-30 September 2012, November 2012, online: AENV, <<http://environment.gov.ab.ca/info/library/8706.pdf>> (last accessed 5 December 2012).
37. Alberta Environment, “Compliance Assurance Program”, (undated), online: Government of Alberta, <<https://external.sp.environment.gov.ab.ca/DocArc/compliance/ComplianceReports/ComplianceProgramBrochure-other.pdf>> (last accessed 30 October 2012).
38. *Ibid*.
39. See AENV’s Annual and Quarterly Reports of Compliance Assessment Enforcement Reports, *supra* note 36.
40. *R v Syncrude Canada Ltd*, 2010 ABPC 229 (25 June 2010) [*Syncrude*].
41. Shaun Fluker, “*R v Syncrude Canada*: A Clash of Bitumen and birds” (2011) 49:1 Alta L Rev 237 at 237.
42. *Syncrude*, *supra* note 40 at para 1.
43. *Ibid* at paras 20-34.
44. *Ibid* at para 128.
45. See Jefferies Cameron, “Unconventional Bridges Over Troubled Water — Lessons to be Learned from the Canadian Oil Sands as the United States Moves to Develop the Natural Gas of the Marcellus Shale Play” (2012) 33: Energy LJ 75 at 89-90 footnote 115 (calling this the largest environmental fine in Canada). Nicholas Hughes, “Syncrude — \$3m Creative Sentence”, 29 October 2010, online: McCarthy Tetrault, <[http://www.mccarthy.ca/article\\_detail.aspx?id=5142](http://www.mccarthy.ca/article_detail.aspx?id=5142)> (last accessed 1 December 2012) (stating that this is not the largest penalty ever imposed in Canada for an environmental offence).
46. The purpose of the Act is contained in section 2. Section 2(i) speaks to “the responsibility of polluters to pay for the costs of their actions”.
47. Stuart Chambers & Lisa Semenchuk, “Trends in Alberta Environmental Enforcement: Fines, Fowl and Finger-Pointing”, NEERLS Summit, Banff 2011, at 5, online: Canadian Bar Association, <[http://www.cba.org/cba/cle/PDF/ENV11\\_SemenchukChambers\\_Paper.pdf](http://www.cba.org/cba/cle/PDF/ENV11_SemenchukChambers_Paper.pdf)> (last accessed 1 December 2012).
48. *Ibid*.
49. Adam Driedzic, “Will Statoil’s ‘creative sentence’ prevent illegal water use?”, Environmental Law Centre, 9 December 2011, online: Environmental Law Centre, <<http://environmentallawcentre.wordpress.com/2011/12/09/will-statoils-creative-sentence-prevent-illegal-water-use-by-oil-companies/>> (last accessed 20 November 2012).
50. *Ibid*.
51. Brenda Heelan Powel, “Let’s Be a Little More Creative: Creative Sentencing in Alberta” (2001) 16:2 News Brief, online: Environmental Law Centre, <<http://www.elc.ab.ca/pages/Publications/NewsBrief.aspx?id=490>> (last accessed 20 November 2012).
52. (2000) 148 CCC (3d) 367.
53. *Ibid*.
54. Kelly Cryderman, “Paying the Price: ‘Creative sentencing’ option angers family of wellsite victim”,



- Calgary Herald* (25 June 2010), online: *Calgary Herald*, <<http://www.calgaryherald.com/business/PAYING+PRICE+Creative+sentencing+option+angers+family+wellsite+victim/3098118/story.html>> (last accessed 20 November 2012).
55. *Ibid.*
56. See, Eileen Skinnider, "Victims of Environmental Crime — Mapping the Issues", the International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLRCJP) March 2011 at 21, online: ICCLRCJP, <<http://www.icclr.law.ubc.ca/files/2011/Victims%20of%20Environmental%20Crime.pdf>> (last accessed 18 September 2012).
57. Alan N Young, *The Role of the Victim in the Criminal Process: A Literature of Review — 1989-1999*, August 2001 at 1, online: Department of Justice Canada, <[http://www.justice.gc.ca/eng/pi/rs/rep-rap/2000/rr00\\_vic20/rr00\\_vic20.pdf](http://www.justice.gc.ca/eng/pi/rs/rep-rap/2000/rr00_vic20/rr00_vic20.pdf)> (last accessed 4 October 2012).
58. See Julie Suavé, "Victim Services in Canada: Results from the Victim Services Survey, 2007/2008" (2010) 3 *Victims of Crime Research Digest* 26 at 28. This data roughly reflects the result of previous surveys. See, for instance, Jodi-Anne Brzozowski, "Victim Services in Canada, 2005/2006" (2007) 27:7 *Juristat* at 3-4, Statistics Canada, Catalogue no 85-002-XIE, Ottawa, online: Statistics Canada, <[http://dsp-psd.pwgsc.gc.ca/collection\\_2007/statcan/85-002-X/85-002-XIE2007007.pdf](http://dsp-psd.pwgsc.gc.ca/collection_2007/statcan/85-002-X/85-002-XIE2007007.pdf)> (last accessed 4 October 2012). See also Maire Gannon & Karen Mihorean, "Criminal Victimization in Canada, 2004" (2005) 25:7 *Juristat*, Statistics Canada Catalogue no 85-002-XPE, Ottawa, online: Statistics Canada, <<http://www.statcan.gc.ca/pub/85-002-x/85-002-x2005007-eng.pdf>> (last accessed 4 October 2012).
59. RSA 2000, c V-3 [VCA].
60. *Ibid.*, s 1(l).
61. *Ibid.*, s 2(1).
62. SA 2001, c V-3.5. This Act relates principally to property victims and empowers the Minister to commence legal action against any person, with respect to property alleged to have been acquired by illegal means, to, among other things, obtain restitution or compensation for property victims, remove financial incentives to the commission of illegal acts, and to prevent property that has been acquired by illegal means from being used for illegal purposes in the future. *Ibid.*, s 3(1).
63. *Ibid.*, s 9.
64. *Ibid.*, s 10.
65. *Ibid.*, s 12(1).
66. *Ibid.*, s 12(2).
67. The offences of common nuisance and criminal

negligence respectively under ss 180 and 219 of the Criminal Code may support the prosecution of environmental offences. Because of the vague wordings of these provisions, the Criminal Code is seen as ill-suited for the prosecution of environmental offences. See, John Swaigen & Gail Bunt, *Sentencing in Environmental Cases* (Ottawa: Law Reform Commission of Canada, 1985).

*A full version of this paper is forthcoming as an Occasional Paper, "Legal and Policy Responses to Environmental Offences in Relation to the Alberta Oil Sands", published by the Canadian Institute of Resources Law, Faculty of Law, University of Calgary.*

## WHAT'S HAPPENING IN CIRL?

**On October 15**, Nickie Vlavianos participated via videoconferencing in a workshop organized by Natural Resources Canada on Canada's offshore oil and gas liability framework.

**Research Fellow Orijei Onuma** has completed her paper on legal approaches to sustainable development of natural gas in Alberta and Nigeria. The paper examines how theoretical concepts of sustainable development can be adapted and incorporated into legislation and regulations applicable to gas development in Alberta. The evolution of gas regulation in the province and the challenges surrounding conservation are discussed.

**Professors Allan Ingelson and Nickie Vlavianos** completed updates to Volume I (Alberta) and Volume II (Federal) of the Canada Energy Law Service (Thomson Carswell). The first volume covers recent decisions and regulatory developments including issues pertinent to the jurisdiction of the Energy Resources Conservation Board. The second volume considers recent federal regulatory developments including issues relevant to the jurisdiction of the National Energy Board, including significant amendments to federal statutes.

**On November 2**, Research Fellows, Astrid Kalkbrenner and Chilenye Nwapi, attended an educational workshop in Calgary on Small Modular Reactor (SMR) Designs and Regulations which was convened by the Canadian Nuclear Association.



## WHAT'S HAPPENING IN CIRL? (CONT.)

**On November 7**, CIRL hosted a presentation to law students sponsored by the Association of International Petroleum Negotiators (AIPN).

**On November 8**, CIRL offered a one-day oil and gas contracts law course at the University of Calgary. This course is designed for non-lawyers in the oil and gas industry who work extensively with contracts. For further information on the course please contact the course coordinator Sue Parsons at (403) 220-3200 or sparsons[at]ucalgary.ca.

**On November 15**, Nickie Vlavianos commented on the proposed legislation to enact a single regulator for energy development in Alberta. See Nickie Vlavianos, "An Overview of Bill 2 — What are the changes? What are the issues?", online: <http://ablawg.ca>.

**On the morning of November 20**, a free seminar on the *Canadian Environmental Assessment Act, 2012*, and changes to the *Fisheries Act*, the *National Energy Board Act* and proposed changes to the *Navigable Waters Protection Act*, was held at the University of Calgary Downtown Campus. This seminar was part of the Cenovus Continuing Legal Education Program. Presentations were made by Professors Ingelson, Lucas and Vlavianos. In the afternoon, a second free seminar on the Environmental Assessment of Major Mineral Projects in Australia and Canada was offered to members of the public by Professor Mascher at the main university campus.

**Research Fellow Rob Omura** completed his paper on "Strategies for Cleaning Up Contaminated Sites in Alberta" in December.

**On December 10**, Professor Ingelson participated in a workshop in Calgary called "Canada in the Pacific Century", sponsored by the Canadian Council of Chief Executives and the School of Public Policy, University of Calgary. Attendees included the Honourable John Manley, the Honourable Ken Hughes, Minister of Energy, Government of Alberta, Grand Chief Edward John, Political Executive, First Nations Summit, and Ellis Ross, Chief Councillor of the Haisla Nation, Kitamaat Village, B.C.

**On December 12**, Research Associates Monique Passelac-Ross and David Laidlaw attended a workshop in Calgary on "Alberta's Aboriginal consultation policy: Launching a clear road forward". Representatives of the Alberta, Saskatchewan and British Columbia Governments were present.

**Research Fellow Dr. Chilenye Nwapi** completed his paper on environmental prosecutions in the context of Alberta oil sands development.

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The Institute was incorporated on the basis of a proposal prepared by a study team convened by the Faculty of Law at the University of Calgary. The Institute works in close association with the Faculty of Law. It is managed by its own Board of Directors and has a separate affiliation agreement with the University of Calgary.

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