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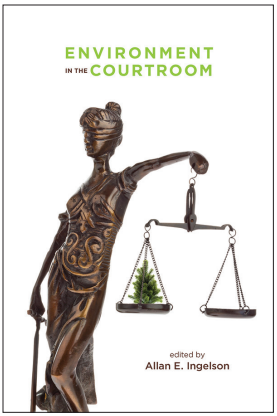

ENVIRONMENT IN THE COURTROOM

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Negotiating Sentences

PETER J. CRAIG

This chapter is admittedly not intended to be a treatise. It is primarily intended to highlight practical issues associated with negotiating sentences for environmental offences as a discussion guide for this broad topic among program attendees. The ancillary purposes are to assist practitioners in preparing for this process, and to provide a glimpse into the perspective of prosecutors in approaching particular cases.

1. The Legal Framework

A. First Principles—The *Criminal Code*—Pertinent Sentencing Provisions

In Nova Scotia, by operation of our provincial *Summary Proceedings Act*, the provisions of the *Criminal Code* apply to the prosecution of all provincial regulatory statutes. Specifically, the sentencing factors/considerations set out in sections 718, 718.1 and 718.2 apply and are superimposed upon the contextual sentencing principles for particular kinds of regulatory offences. A similar regime exists in most other Canadian jurisdictions (i.e. an omnibus-form provincial statute that incorporates by reference the pertinent sections of the *Criminal Code* and effectively establishes that the governing substantive and procedural summary proceedings *Code* provisions apply to the prosecution of provincial offences).

I am often reminded by judges I appear before of these *Code* sentencing provisions and their application to regulatory offences. I have made the mistake of fixating, almost exclusively, on sentencing factors/considerations that have emerged from various regulatory cases, only later to be advised by the court that they have to be viewed through the lens of the *Code* sections as well. I can't emphasize enough that practitioners should never lose sight of this:

Purpose

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;
(b) to deter the offender and other persons from committing offences;
(c) to separate offenders from society, where necessary;
(d) to assist in rehabilitating offenders;
(e) to provide reparations for harm done to victims or to the community; and
(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

    (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or any other similar factor,
    (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
        (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence, or

(vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the *Corrections and Conditional Release Act*

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

B. *The Environment Act* (N.S.) – Pertinent Sentencing Provisions

Penalty

159 (1) A person who commits an offence referred to in subsections 50(1), 61A(1), 61C(1), 67(1) or 68(1) or clauses 158(a), (e), (g) or (ga) is liable to a fine of not less than one thousand dollars and not more than one million dollars or to imprisonment for a period of not more than two years, or to both a fine and imprisonment.

(2) A person who commits an offence referred to in Section 32, subsection 50(2), Sections 55, 59 or 60, subsections 61A(2) or 61C(2),

Section 62, subsection 67(2), subsection 68(2), Sections 69, 71, 75, 76, 79, 83, 89, 115, 124 or 132 or clauses 158(b), (c), (d), (f), (h), (ha) or (hb) is liable to a fine of not more than one million dollars. . . .

(4) A person who commits an offence referred to in any other provision of this Act is liable to a fine of not more than five hundred thousand dollars.

Section 99 offence

159A (1) In this Section, "business" means

(a) a person authorized or entitled to carry on a trade, occupation, profession, service or venture with a view to a profit, including a partnership and a limited partnership; or

(b) a corporation.

(2) A business that commits an offence referred to in Section 99 is liable to a fine of not more than one hundred thousand dollars or the fine prescribed in the regulations.

(3) Notwithstanding clause 3(aj), a person, other than a business, who commits an offence referred to in Section 99 is liable to a fine of not more than ten thousand dollars or the fine prescribed in the regulations. (2006, c. 30, s. 47.)

161 Where a person is convicted of an offence under this Act and the court is satisfied that, as a result of the commission of the offence, monetary benefits accrued to the offender, the court may order the offender to pay, in addition to a fine under Section 159, a fine in an amount equal to the estimation of the court of the amount of those monetary benefits.

Continuing offence

162 Where an offence under this Act is committed or continued on more than one day, the person who committed the offence is liable to be convicted for a separate offence for each day on which the offence is committed.

Liability of directors and officers

164 Where a corporation commits an offence under this Act or the regulations, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the

violation of this Act or the regulations is guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted.

Court orders relating to penalty
166 (1) Where a person is convicted of an offence under this Act, in addition to any other penalty that may be imposed pursuant to this Act, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order

(a) prohibiting the offender from doing anything that may result in the continuation or repetition of the offence;
(b) directing the offender to take any action the court considers appropriate to remedy or prevent any adverse effect that results or may result from the act or omission that constituted the offence;
(c) directing the offender to publish, in the prescribed manner and at the cost of the offender, the facts relating to the conviction;
(d) directing the offender to notify any person aggrieved or affected by the conduct of the offender, of the facts relating to the conviction, in the prescribed manner and at the cost of the offender;
(e) directing the offender to post a bond or pay money into court in an amount that will ensure compliance with any order made pursuant to this Section;
(f) on application to the court by the Minister within three years after the date of conviction, directing the offender to submit to the Minister any information with respect to the conduct of the offender that the court considers appropriate in the circumstances;
(g) directing the offender to compensate the Minister, in whole or in part, for the cost of any remedial or preventive action that was carried out or caused to be carried out by the Government and was made necessary by the act or omission that constituted the offence;
(h) directing the offender to perform community service;
(ha) directing the offender to pay to the Minister the costs incurred by the Minister in carrying out the investigation of the offence;

(hb) directing the offender to dispose of the litter in a manner and within the time prescribed by the Minister;

(i) requiring the offender to comply with any other conditions the court considers appropriate in the circumstances for securing the good conduct of the offender and for preventing the offender from repeating the offence or committing other offences.

The sentencing provisions of the Nova Scotia *Environment Act* are similar to those found in many other jurisdictions. Yet there are some very significant subtleties. The first can be found in section 159. In addition to the creative sentencing options set out in section 166, which are available for any offence under the *Act* or subordinate regulations, subsections 159(1) and (2) provide different "traditional" sentencing thresholds for the respective offences enumerated therein. The offences enumerated in subsection 159(1) draw potential maximum fines of one million dollars; carry minimum fines of one thousand dollars; and are the only offences for which imprisonment (up to two years) can be imposed, which can occur in conjunction with the fines. The offences enumerated in subsection 159(2) draw a maximum fine of one million dollars (without a prescribed minimum penalty), and custody is not an available option.

Subsection 159(4) sets out a maximum fine of five hundred thousand dollars for any other offence under the *Act* or regulations thereunder, and again, custody is not an available option.

Subsection 159A sets up a separate littering fine regime. A "business," which includes a certain type of person, is subject to a maximum fine of one hundred thousand dollars pursuant to subsection 159A(2). All other persons are subject to a maximum fine of ten thousand dollars pursuant to subsection 159A(3).

As a humble prosecutor, I, possibly like many of you, muse from time to time about the policy rationale behind this regime, which restricts custody to a small array of offences and sets up a four- or five-tier fine structure.

Section 161 empowers a sentencing judge to impose an additional fine to those set out in section 159 equal to the estimated amount of monetary benefit a defendant incurs by commission of an offence.

Section 166 sets out a very broad and robust range of creative sentencing options following conviction of any offence under the *Act* or subordinate regulations, which includes subsection 166(1)(i):

(i) requiring the offender to comply with *any other conditions the court considers appropriate in the circumstances* for securing the

> good conduct of the offender and for preventing the offender from repeating the offence or committing other offences. [emphasis added]

I would draw your attention to the wording in subsection (1) "in addition to any other penalty that may be imposed pursuant to this Act." Several Nova Scotia judges, quite properly in my respectful view, have interpreted this strictly. This has meant, in cases where the global sentence was heavily weighted towards creative sentencing, that a nominal fine(s) was/were imposed as well in order to comply with this precondition.

Prior to turning to the next topic, I feel I must acknowledge my own bias, lest I be viewed as a hypocrite: I am an unabashed proponent of and advocate for creative sentencing.

2. The Dialogue

To say the sentencing process is more art than science is not exactly relaying an insightful observation. I personally find the identification and application of notionally precedent sentencing decisions in environmental cases very challenging. To provide an example, the sentencing emphasis for separate defendants may be entirely different notwithstanding that they may be guilty of the same offence. In one case, the defendant may be a large, financially well-off company. In the next, the defendant may be a small, "mom & pop"–style corporate entity, barely surviving. In the next, it may involve an individual defendant (i.e. a real person), and one readily appreciates the range of financial wherewithal applicable here, which affects the viability and capacity to utilize various sentencing options in this context. Finally, superimpose on all these different scenarios an additional variable—whether your defendant is an incorrigible recidivist menace who has breached multiple administrative and court orders and otherwise been an enforcement nightmare for the investigators, OR whether your defendant has no negative enforcement history and is not "morally" culpable for a costly remediation event that culminated in a charge due to his/her/its status as an owner of property, perhaps solely. Finding precedent decisions, in my experience, on all fours with a present case has, indeed, been challenging.

I am always mindful of the purpose of the sentencing exercise in a regulatory prosecution. Environmental offences, like many others, are violations of public welfare legislation. I fully acknowledge the significance of deterrence, both general and specific in this context. But to my way of thinking, the focus of an environmental sentencing should be squarely placed on how deterrence

is achieved, while at the same time addressing remediation causally connected to an offence, if applicable, and also promoting public or industry education and awareness that could change behaviour. I do not see these as mutually exclusive objectives.

So, how does all this theory manifest itself when dealing with environmental offence sentence negotiation? Although our provincial Minister of Finance may occasionally not be enamoured with my approach, I typically do not place primary emphasis on fine quantum. At least as far as I am aware, fine revenue, in this province (and likely others) goes directly into the general revenue stream. Accordingly, it is not, in effect, targeted in any responsive way to an environmental offence. I believe that a fine should always be a component of a global sentence package. However, my point is, how big should the fine piece of this global sentence pie be, and as a result, should counsel be fixating on fine quantum exclusively when discussing sentence? In jurisdictions like Nova Scotia that provide a broad array of creative sentence alternatives, are funds and human resources better directed elsewhere, particularly if there is an unresolved remediation problem or significant educational/awareness need tied to the root cause of an offence?

My general approach when considering sentence discussion with counsel is to first educate myself about the offence and the defendant, and my principal conduit in these respects is always the investigator. I lean heavily on investigators to school me about enforcement issues connected to a geographic area or industry sectors. I know few prosecutors positioned to gauge these things themselves, and I certainly include myself with the majority. I will provide an example to illustrate the exercise, and I will fudge a little bit of detail to protect identifying any individuals or entities.

Suppose you are a woe-begotten prosecutor who shows up for work one day and there is a multi–banker box file on your desk. It is a case involving the owner of a commercial premises that has its own onsite sewage disposal system. The corporate owner has been charged with an offence under the *Environment Act* for violating terms and conditions of its system approval. The particulars of the charge involve effluent exceedences outflowing into the lake adjacent to the property. The investigation reveals that, quite commonly, the owner hired a certified consultant to design, install, and secure approval for the system, and has further retained the consultant to monitor the system and forward to the department the quarterly produced effluent level data that is a further condition of the approval.

The owner, once charged, takes responsive action and corrects the problem. The principal of the company tells the investigator that everyone working

in his industry essentially operates this end of their business the same way he does and virtually defers all compliance decisions and compliance filing responsibilities to consultants, for a commensurate fee, of course. The investigator tells you, the beleaguered prosecutor, when she calls you prior to the defendant's initial court date, that this is very typical, and, indeed, is something of a macro-enforcement/education issue. You, the noble warrior of justice, recognize that contracting out responsibility under the Act in this fashion certainly doesn't constitute due diligence, but you do also acknowledge the lesser degree of moral culpability on the part of this owner that the situation entails.

The defendant's counsel speaks to you on the arraignment date (i.e. the initial court appearance in answer to the charge). He is kicking the tires a little bit, and seeks your position on sentence if an early guilty plea is forthcoming. The parties agree to adjourn the defendant's plea for a month or so to allow discussions to occur in the interim.

You arrange a meeting with the investigator the following week. She elaborates on her case a little more. She has found the defendant, in the person of its principal, to have been very cooperative with the investigation and to have taken practical responsibility for the offence. What is more, this person is an active member of a *bona fide* provincial industry association that works periodically with the department and that encompasses most of the businesses carrying on similar operations in the province. The investigator elaborates further about the very tangible enforcement need to educate members of this industry about the practice of delegating statutory responsibility under the Act to consultants, which in her opinion is widespread and prevalent throughout the entire province.

You, the savvy prosecutor, quickly deduce that perhaps this is a case tailor-made for creative sentencing options. You kick this around some more with the investigator. She tells you that this industry association has an annual general meeting every spring that draws virtually all of the large number of its members together under one roof. Her department participates in some form of educational initiative at almost every one of these AGMs, which the department sees as a unique opportunity to get the most bang for its buck, and she is of the view that this would be an ideal forum for a creative sentence presentation about this case.

So, you, the not-so-commensurately-paid quasi–Minister of Justice, are now armed to discuss sentence further with the defendant's counsel. Prior to doing so, however, as you would for any type of offence, you research how similar offences have been treated by the courts in this province and throughout the country. This process quickly reveals that fines have been the overwhelmingly

most common sentencing tool utilized, given that historically this was the only option available. Essentially, this process provides you with a broad fine range within which these precedent cases fell.

You then write the defendant's counsel and communicate your position on plea resolution and *joint* sentence recommendation. You use the fine range as a guide for the defendant's global financial penalty, so to speak, as you will be proposing several creative sentence initiatives for which there will be a hard cost to the defendant attached. You propose that the defendant:

- Fund a presentation at the industry association AGM in the amount of $5,000 that will reflect the circumstances of this offence. The form and content of the presentation will be mutually agreed on in advance as between the defendant and the investigating department, and will be presented by the principal of the company;
- Make a donation to a local Watercourse Preservation Society in the amount of $5,000;
- Publish the circumstances of the offence in a media outlet(s) mutually agreed as between the defendant and the department, with the content also to be mutually agreed, the total approximate cost of which shall be $5,000; and
- Pay a fine in the amount of $500.

Lest anyone get the wrong impression, the amounts noted above are not intended to reflect the actual fine range/global sentence package cost for an offence of this sort in this province, but are for illustration purposes only.

You will inevitably receive a call from defence counsel shortly following receipt of your letter wondering what all this means, and fairly inquiring about some of the logistics associated with these sentence initiatives. You will explain to counsel that the figures you have selected were not plucked out of thin air. Assuming counsel has researched the fine range, you will be able to easily demonstrate to your friend that the total cost associated with these initiatives falls well within the fine range for an offence of this nature, and also credits the defendant for the mitigation value of an early guilty plea.

As something of a carrot for the defendant, you mention to counsel, without holding yourself out as an authority on the following points by any means, that the defendant may be able to take accounting and tax benefits from a sentence structured in this fashion, as opposed to one that is predicated on a fine only. This is not a concern for you, as the global sentence range is maintained

regardless of how a particular sentence is structured, and you urge counsel to have the defendant get advice from its professional financial advisors.

The next step in the process, of course, will be for defence counsel to confer with and advise the defendant, and receive instructions.

My experience with this negotiating process, and particularly utilizing creative sentencing, has been overwhelmingly positive. Counsel see that judges in this province appear to be embracing this exercise, notwithstanding that the process may entail some supervisory jurisdiction on their part through the life of the sentence order. My respectful observation is that judges view these types of sentences as more directly responsive to the offence, and more congruent with the sentencing principles for public welfare offences than sentences based on fines only.

So, the question becomes, why not approach the process this way?