



ENVIRONMENT IN THE COURTROOM

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Environmental Non-Governmental Organizations and Creative Sentencing: Perspectives and Roles

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Introduction

This chapter addresses the perspectives and roles of environmental non-governmental organizations (ENGOS) in relation to creative sentencing for environmental offences in Canada. It includes an initial overview of ENGOS and why they have a role in the enforcement arena, as well as a brief discussion of the scope of creative sentencing. The balance of the chapter covers two different aspects of ENGO involvement in creative sentencing: as monitor and “watchdog” of the effectiveness of environmental enforcement, and as a potential or actual recipient of proceeds of a creative sentence.

ENGOS and Environmental Enforcement: The What and Why

The term “ENGO” is shorthand in the environmental sector (an area laden with jargon and acronyms) for “environmental non-governmental organization,” a rather bureaucratic and awkward attempt to identify and categorize a range of organizations and interests that often defy categorization. In relation to environmental regulation, virtually anyone who is neither a regulator nor a regulated party could be an ENGO, though the term tends to refer to non-profit groups focused on some aspect of the environment.

While mainstream media and popular belief often depict Canadian ENGOS as highly sophisticated, well resourced, global activist conglomerates intent on blocking economic development, the actual context is far different.

Table 29.1 | Geographic Area Served

<i>Geographic area served</i>	<i>Percentage of total Canadian ENGOs</i>
Local	57%
Regional (within a province/territory)	27%
One province/territory	10%
More than one province/territory	2%
National	3%

An extensive study carried out by Statistics Canada in 2003 shows a different and much more nuanced scenario.¹ Based on that data, there were estimated to be 4,424 environmental organizations active in Canada, which is 2.7 percent of the total number of non-profit organizations in Canada (161,227). As illustrated in table 29.1, the vast majority of these environmental organizations serve focused local interests.

For those organizations, the average annual revenue was \$256,000, as compared to average annual revenue for Canadian non-profits in all sectors of \$692,000. Nearly 70 percent of ENGOs reviewed in the study had no paid staff; half of staffed ENGOs had only 1–4 staff members.²

Environmental organizations also address a wide range of issues, though very few deal with the whole gamut of environmental matters within one organization. Alberta-specific surveying in 2003–4 showed that ENGOs in that province worked on wildlife and wilderness; water pollution; public land management; water quantity; climate change; habitat protection; and energy efficiency and conservation, among many other matters.³

There are a number of factors that support a role for ENGOs in relation to environmental enforcement. As discussed above, many deal specifically with local issues and thus have specialized interest, knowledge, and expertise to bring to bear in relation to offences within their geographic and subject areas. Among the broad range of Canadian ENGOs are at least half a dozen focusing on law as a means of environmental protection.⁴ Canadians generally depend on non-profit organizations (usually non-governmental) to provide assistance to Canadian society as a whole.⁵ In addition, citizens generally feel that opinions expressed by charities “on issues of public concern have value because they represent a public interest perspective.”⁶ It can be argued that in many instances, ENGOs act as a proxy for the public in addressing the public interest aspect of environmental issues.

The Scope of Creative Sentencing

In considering the ENGO perspective on creative sentencing, one must be mindful that the scope of creative sentencing in environmental offences extends beyond monetary payments. Since 1993, Alberta courts have had broad discretion to impose orders in addition to prescribed fines or imprisonment for environmental convictions.⁷ This can include:

- Prohibiting actions;
- Directing remedial or preventative action;
- Requiring publication or notification of conviction-related facts;
- Requiring deposit of security against compliance or reimbursement of government expenses related to the offence;
- Directing performance of community service; or
- Imposing any other conditions to secure good conduct and prevent other offences.

In addition to directing funds to various research, education, and restoration projects and requiring publication of apologies, the Alberta courts have more recently used this discretion to impose time-limited restrictions on the acquisition and use of specified professional designations by offenders in three separate convictions for providing false information.⁸

More recently, the federal government amended nine environmental Acts, providing the courts a similar range of powers to make additional orders at sentencing.⁹ These amendments also create a common structured approach to assessing fines and provide enforcement principles and aggravating factors to be taken into account in setting penalties. The *Fisheries Act* has included powers enabling the courts to make additional orders at sentencing since 1991.¹⁰

Assessing Enforcement Effectiveness

A key role that ENGOs can play in relation to creative sentencing and environmental enforcement is as a monitor and assessor of the success and effectiveness of enforcement efforts. In some instances this role may be very specific and localized, for example, where an ENGO is the complainant who has initiated the enforcement process and has a very direct interest in the outcome. This may arise from a “traditional” complaint to environmental regulators, direct citizen initiation of a regulatory investigation,¹¹ or bringing a private prosecution. In a private prosecution, it would be open to the ENGO

as prosecutor to submit a creative sentencing proposal following a conviction, where enabled by the relevant legislation. In situations where the investigation and prosecution have been carried by the government, an ENGO could seek to provide relevant information on behalf of the environment for use at sentencing through contact with the prosecutor or investigators.

ENGOS may also have a broader, higher-level interest in monitoring and assessing the effectiveness of environmental enforcement, including creative sentencing. While the motivations for and uses of such assessments may be as diverse as the spectrum of Canadian ENGOS, likely purposes include measuring performance of the relevant environmental regulatory system determining the contribution of enforcement to environmental protection.

A key concern for ENGOS involved in these activities is access to relevant information and data, which can vary between jurisdictions and relevant legislation. For example, Alberta Environment and Sustainable Resource Development has a relatively broad approach to making environmental information publicly accessible, enabled by legislation and ministerial order.¹² However, information related to an open or ongoing investigation or proceeding cannot be publicly released.¹³ Reporting of compliance and enforcement under the *Environmental Protection and Enhancement Act* and *Water Act* is publicly available on an annual (1993–2007) and quarterly (2002–present) basis.¹⁴ These reports provide insight into enforcement action for a particular time period, but data has not been publicly aggregated to show trends over the longer term.

In relation to creative sentencing, Alberta has issued annual reports for the past two years to provide greater transparency and public accountability, on the basis that creative sentences divert funds that would otherwise flow to the province's general revenue.¹⁵ These reports describe ongoing creative sentence projects and provide financial data on creative sentencing as a proportion of total fines assessed in relation to environmental offences. Since late 2011, the ministry also posts creative sentencing orders and related press releases on its website.¹⁶ At the federal level, Environment Canada provides online links to press releases on convictions where fines are directed to the Environmental Damages Fund.¹⁷ However, it is not clear whether this service provides information on all creative sentences issued under federal environmental legislation. Aggregated or cumulative data does not appear to be readily available.

ENGOS as Beneficiaries of Creative Sentences

ENGOS can be more directly involved as beneficiaries of creative sentences. Keeping in mind the broad scope of legislated sentencing powers discussed

above, ENGOS could receive benefit in non-monetary ways, such as through provision of goods or services. For example, creative sentences in Alberta have included the following:

- Directing an agricultural producer to provide turnips (valued at nearly \$90,000) to the Edmonton Food Bank for distribution within Edmonton and to other northern Alberta food banks;¹⁸
- Requiring a convicted individual to perform 200 hours of community service for the public works department of a specified municipality;¹⁹ and
- Directing a sod producer to provide sod (valued at approximately \$55,000) to Habitat for Humanity and three municipalities in the region of the offence.²⁰

However, payments of money under creative sentences have been the most common means of benefiting ENGOS and other organizations. The balance of this chapter will discuss two Canadian models for implementing monetary creative sentences and offer observations from the recipient of an early creative sentence.

GRANT MODE

The Environmental Damages Fund (EDF) was created by the federal government in 1995 to provide a mechanism to distribute funds from creative sentences. It is a specified purpose account that is maintained apart from federal general revenues. Monies are directed to the EDF primarily through fines and other court-ordered payments but can also be contributed through negotiated settlements, such as Environmental Protection Alternative Measures under the *Canadian Environmental Protection Act, 1999* or voluntary payments.²¹ As a result of amendments by the *Environmental Enforcement Act*, fines for convictions under nine different federal environmental statutes must now be credited to the EDF.²² Though the bulk of funds flowing into the EDF are court-directed, it is the federal government, rather than the courts, that makes the ultimate decisions on payment of these funds. The courts have discretion to specify a person or organization to whom a fine should be paid from the EDF, but this takes the form of a recommendation to the Minister of Environment.²³

Funds within the EDF are accessed by successful project applicants, similar to many other granting programs and bodies throughout Canada. The categories of eligible applicants include:

- Non-governmental organizations;
- Academic institutions;
- Aboriginal groups; and
- Provincial, territorial and municipal governments.

Ineligible groups can partner with eligible applicants to apply for funding, though offenders cannot apply for use of funds they paid.²⁴ Proposed projects must fit within one or more of these categories: restoration; improvement of environmental quality; research and development; and education and awareness. Restoration has been designated as the highest funding priority.²⁵ Funds are made available for applications on a geographic basis, usually linked to the specific province or territory from which a fine payment originated. Some funds are made available on a broader regional basis.²⁶ There are usually use restrictions imposed on the available funds, which indicate any parameters related to types of projects, subject matters or geographic siting. Successful project applicants must enter into a funding agreement with Environment Canada and must provide both activity and financial reporting during the project and at project completion.

CASE-SPECIFIC COURT ORDER MODEL

In Alberta, the creative sentence has become a well-used tool in the environmental enforcement toolbox. Since 1996, 78 creative sentences have been imposed by the Alberta Provincial Court under the *Environmental Protection and Enhancement Act* and *Water Act*. A significant majority of these sentences have been monetary awards for a range of projects.

Guidelines for consideration and selection of creative sentencing projects were formalized in 2002.²⁷ They cover the following topic areas:

- Prerequisites;
- Aims and objectives of creative sentencing;
- Limitations on eligible projects;
- Limitations for eligible recipients; and
- Administrative limitations (conflict of interest; financial accountability).

Key elements include deterrence; punishment of the offender; and public benefit through either environmental improvement or reduction of risk to the public. There must also be a logical link between the offence and the project

to ensure that the project benefits address the wrong caused by the offence. Geographic links are often considered, as well. Eligible recipients must be non-profit organizations, unless there is no non-profit capable of delivering the project under consideration. Recipients are investigated before sentencing with respect to their organizational viability and financial accountability, as well as to ensure there is no actual or perceived conflict of interest with the accused, the Crown or the investigating agency. Recipients sign an agreement with the Crown committing to fulfill obligations imposed in the sentencing order.²⁸

An investigator within Alberta Environment and Sustainable Resource Development is responsible for the creative sentencing program and works closely with environmental prosecutors within Alberta Justice. The investigator researches possible projects for creative sentence consideration, investigates potential recipients, and maintains oversight and accountability of creative sentencing projects.

In practice, almost all creative sentencing projects have come before the Alberta courts as joint sentencing proposals submitted following a guilty plea. The broad types of projects that have been directed by creative sentence are as follows (in descending order):

- Education (public; professional/industry; post-secondary);
- Research (predominantly post-secondary);
- Publication of facts of offence or apology;
- Stop or compliance orders or similar restrictions on activities;
- Environmental improvement;
- Environmental restoration;
- Certification;
- Government reimbursement for investigation costs;
- Bursaries or scholarships;
- Victim surcharges;
- Community service;
- Provision of goods or services.

Commendable effort has been invested by the Alberta government in building and maintaining the creative sentencing program. The program was championed for nearly two decades by an environmental prosecutor and has had involvement and oversight by an environmental investigator for over a decade. There have been two workshops (2002 and 2013) with participants in the

creative sentencing process to obtain feedback and improve the programs, as well as at least one survey of creative sentencing participants. In 2011, Alberta Environment and Sustainable Resource Development began steps to provide more public information on creative sentencing, including posting creative sentencing orders online and publishing annual creative sentencing reports.

OBSERVATIONS OF A CREATIVE SENTENCE RECIPIENT

In late 1996, my organization, the Environmental Law Centre (ELC), became one of two recipients of Alberta's first creative sentence under environmental legislation. Dow Chemical Canada Inc. pled guilty to three offences under the *Environmental Protection and Enhancement Act* related to a leak of chlorofluorocarbons from its manufacturing facility near Fort Saskatchewan, Alberta.²⁹ In addition to imposing a \$50,000 fine, the Provincial Court directed Dow to pay \$75,000 into a trust account for the ELC to support a public education project on community-based air quality monitoring in Fort Saskatchewan and a further \$75,000 into a separate trust account for the University of Alberta Faculty of Engineering to support an air quality research project.

The order was pleasant, though unanticipated, news to the ELC. There had been neither advance notice to the ELC nor any consultation by or discussions with the court or counsel involved. It is important to note that the project was not in any foisted on the ELC; it was part of a multi-module program that the ELC had been carrying out at the time. Until the court order, the Fort Saskatchewan module had been unfunded and the ELC had been pursuing various grant applications. It is likely that this project came to the attention of the Crown and defence counsel through a contact on the ELC board of directors who had links to Dow.

That there had been no pre-sentencing discussion with the ELC created some logistical challenges to be managed. The order directed an annual audit of financial records related to the trust account. To reduce expenses and maximize the amount of funds to be applied to the actual project work, the ELC had to work through the Crown and defence counsel to get permission from the court to have the ELC's annual organizational financial audit also encompass the audit of the trust account.

In addition, the amount ordered was actually more than had been budgeted to carry out the project. Faced with a surplus of funds at the end of project activity in Fort Saskatchewan, the ELC consulted with Crown and defence counsel and ultimately had defence counsel obtain a variation to the order allowing the surplus funds to be applied to an independent evaluation of all

modules of the program. Because the ELC had not been a party to the original court order, we could not independently initiate either of these applications to vary the order.

Approximately five years after the project was completed, we discovered a communication gap between the ELC and Crown counsel. ELC management had directed staff carrying out the project to only refer to the funding as being from an order of the Provincial Court of Alberta, with no direct references to Dow. In the early 2000s, an Alberta Justice assessment report of creative sentencing indicated that the Crown felt the ELC project had been a failure, which was a shock to us, as the project had achieved the public education and outreach aims we had set. Follow-up with Crown counsel revealed that their assessment arose from the perception that the project had not provided a sufficient punitive element, likely due to our refraining from any direct mention of Dow's creative sentence in our public communications on the project.

It appears that these challenges, which are perhaps inevitable when being the first of any initiative, have since been addressed in Alberta's creative sentencing program. As discussed above, recipients of creative sentences are reviewed pre-sentence and must sign an agreement related to compliance with the anticipated order. ENGOs and other likely recipients are made aware in advance if their projects will be proposed as part of a creative sentencing order.³⁰ Sentencing orders also provide more direction in relation to project and financial reporting and no longer require audits of the trust funds. In relation to acknowledgement of funding sources, orders now generally provide that the final project report, which will be in the public domain, "will identify as the genesis of the fund, the conviction entered against [name of offender]."³¹ One of the remaining challenges may be to find effective ways to bring ENGOs together with Crown and defence counsel and investigators to raise awareness of projects and initiatives meriting consideration for creative sentence support. The most recent workshop on creative sentencing advised the Alberta government to seek more project ideas from non-governmental organizations.³²

Conclusion

The history of sentencing in environmental matters, particularly in this province [Alberta], has shown an increasing trend toward greater emphasis on the creative penalty. And in that regard, I tend to think of environmental prosecutions as essentially being in the forefront of restorative justice. In no area, either of criminal or quasi-criminal law, has there been such a thrust toward turning the penalty for

the wrongdoing into something that will actually do some good in and of itself, and in these environmental areas, particularly for the environment.³³

As observed above in 2013 by Judge Jacques of the Alberta Provincial Court, creative sentencing has taken significant strides in entrenching a restorative aspect in environmental enforcement. Moving ahead, ENGOS have a continued and growing role to play. Their grassroots work, direct environmental experience, and resulting expertise all offer the enforcement process a valuable resource in ensuring positive results for the environment and the public interest. Involvement of ENGOS, both directly in implementation of creative sentences and as a means of bringing a public perspective to review, assessment, measurement, and improvement of environmental enforcement systems, can only help in meeting the increasing demand for social licence for activities that affect the environment.

NOTES

- 1 National Survey of Nonprofit and Voluntary Organizations (Statistics Canada, 2003). Details on various reports related to this survey can be accessed online at Imagine Canada Research <<http://sectorsource.ca/research-and-impact/sector-research/imagine-canada-research>> under the heading “National Survey of Nonprofit and Voluntary Organizations.”
- 2 Data from the National Survey of Nonprofit and Voluntary Organizations specific to environmental organizations was compiled in *A Profile of Environmental Nonprofit & Voluntary Organizations in Canada* (Toronto: Canadian Environmental Grantmakers Network, 2004).
- 3 *Maximizing Effectiveness: An Assessment of Environmental Priorities and Voluntary Sector Capacity Needs in Alberta* (Calgary: Alberta Ecotrust, 2004) at 14, online: Alberta Ecotrust <<http://www.albertaecotrust.com/docs/maximizing-effectiveness-summary-2005.pdf>>.
- 4 These include the author’s organization, the Environmental Law Centre <<http://www.elc.ab.ca/>>, as well as Canadian Environmental Law Association <<http://www.cela.ca/>>; Ecojustice <<http://www.ecojustice.ca/>>; University of Victoria Environmental Law Centre <<http://www.elc.uvic.ca/>>; West Coast Environmental Law <<http://www.wcel.org/>>; and East Coast Environmental Law <<http://www.ecelaw.ca/>>.
- 5 *Talking About Charities 2013: Canadians’ Opinions on Charities and Issues Affecting Charities* (Edmonton: The Muttart Foundation, 2013), online: The Muttart Foundation <<https://www.muttart.org/wp-content/uploads/2015/11/3.-Talking-About-Charities-Full-Report-2013.pdf>>. Ninety-three percent (93%) of those surveyed agree that charities are important to Canadians and eighty-eight percent (88%) agree that charities generally improve our quality of life: see *ibid* at 22, Fig 4.1.1. Note that not all Canadian ENGOS are charities; Alberta surveying showed

- 52% of surveyed ENGOs were registered charities. See *Maximizing Effectiveness*, *supra* note 3 at 14.
- 6 *Talking About Charities 2013*, *ibid* at 85–86.
 - 7 *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, s 234; *Water Act*, RSA 2000, c W-3, s 148.
 - 8 *R v Brown*; *R v Buoy*; *R v Ulliak*. Details of these and other creative sentencing orders are available in *Creative Sentencing in Alberta: 2013 Report* (Edmonton: Alberta Environment and Sustainable Resource Development, 2014) at Appendix II, online: Alberta Environment and Sustainable Resource Development <<http://aep.alberta.ca/about-us/compliance-assurance-program/creative-sentencing/documents/CreativeSentencingAlberta-2013.pdf>>. Some Alberta creative sentencing orders can also be accessed online. See, e.g., the creative sentencing order in *R v Mather* (Alberta Provincial Court, 8 April 2013), online: Alberta Environment and Sustainable Resource Development <<http://aep.alberta.ca/about-us/compliance-assurance-program/compliance-enforcement/operations-division-prosecutions/documents/MatherCSO-Apro8-2013.pdf>>.
 - 9 *Environmental Enforcement Act*, SC 2009, c 14. The Acts amended by this Act are: *Antarctic Environmental Protection Act*; *Canada National Marine Conservation Areas Act*; *Canada National Parks Act*; *Canada Wildlife Act*; *Canadian Environmental Protection Act, 1999*; *International River Improvements Act*; *Migratory Birds Convention Act, 1994*; *Saguenay-St Lawrence Marine Park Act*; and *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*.
 - 10 *Fisheries Act*, RSC 1985, c F-14, s 79.2.
 - 11 In Alberta, citizens are able to trigger government investigation of environmental offences by filing a declaration: see *Environmental Protection and Enhancement Act*, *supra* note 7, ss 196–197.
 - 12 *Environmental Protection and Enhancement Act*, *supra* note 7, s 35; *Water Act*, *supra* note 7, s 152.1; Ministerial Order 02/2010: “Designation of Public Information Under the *Environmental Protection and Enhancement Act*”, online: Alberta Environment and Sustainable Resource Development <http://environment.alberta.ca/documents/Ministerial_Order_02-2010.pdf>.
 - 13 *Environmental Protection and Enhancement Act*, *supra* note 7, s 35(9) and Ministerial Order 02/2010, *ibid*.
 - 14 Online: Alberta Environment and Sustainable Resource Development, Annual and Quarterly Reports – Compliance Assessment Enforcement Reports <<http://environment.alberta.ca/01292.html>>.
 - 15 See *Creative Sentencing in Alberta: 2012 Report* (Edmonton: Alberta Environment and Sustainable Resource Development, 2013) at 1, online: Alberta Environment and Sustainable Resource Development <<https://open.alberta.ca/dataset/76948f36-d2c3-462c-b70f-20de6ee2e728/resource/91dbcbd9-fdd4-4ae9-8951-197fc2541cae/download/2013-creative-sentencing-report-2012-2013-03-14.pdf>>. Also see *Creative Sentencing in Alberta: 2013 Report*, *supra* note 8.
 - 16 These orders are usually summarized in the ministry’s annual reports, such as the 2012 and 2013 reports cited in this chapter.
 - 17 Online: Environment Canada, Environmental Damages Fund, Legal Precedents <<http://www.ec.gc.ca/edf-fde/default.asp?lang=En&n=F6B9CA63-1>>.
 - 18 *R v Hillsight Vegetables Inc* (Alberta Provincial Court, 2005). See *Enforcement of the Environmental Protection and Enhancement Act and Water Act, 1 Oct 2005 – 31 Dec 2005* (Edmonton: Alberta Environment, 2006) at 10, online: Alberta Environment and Sustainable Resource Development <<https://exts2.aep.alberta.ca/DocArc/>>

- compliance/ComplianceReports/2005-10-2005-12-Quarterlyreport_Oct-Dec2005.pdf>.
- 19 *R v Wonnacott* (Alberta Provincial Court, 1998).
 - 20 *R v The Manderley Corporation* (Alberta Provincial Court, 2005). See *Enforcement of the Environmental Protection and Enhancement Act and Water Act, 1 Apr 2005 – 30 Jun 2005* (Edmonton: Alberta Environment, 2005) at 11, online: Alberta Environment and Sustainable Resource Development <https://exts2.aep.alberta.ca/DocArc/compliance/ComplianceReports/2005-04-2005-06-QuarterlyReport_Apr-Jun2005.pdf>.
 - 21 Online: Environment Canada, Environmental Damages Fund, Legal Community <<http://www.ec.gc.ca/edf-fde/default.asp?lang=En&n=A82326FE-1#recommending>>.
 - 22 See *supra* note 9.
 - 23 See, e.g., *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, s 294.1(2).
 - 24 See online: Environment Canada, Environmental Damages Fund, Potential Applicants <<http://www.ec.gc.ca/edf-fde/default.asp?lang=En&n=C7C99D1F-1>>.
 - 25 See online: Environment Canada, Environmental Damages Fund <<http://www.ec.gc.ca/edf-fde/default.asp?lang=En&n=BD1220D8-1>>.
 - 26 See online: Environment Canada, Environmental Damages Fund, Available Funds <<http://www.ec.gc.ca/edf-fde/default.asp?lang=En&n=137DC913-1>>.
 - 27 Susan McRory & Lynda Jenkins, “Creative Sentencing: Part II – Outcome of Workshop” (2003) 18:3 Environmental Law Centre NewsBrief at 8, online: Environmental Law Centre <http://www.elc.ab.ca/Content_Files/Files/NewsBriefs/Vol.18No.32003.pdf>.
 - 28 *Creative Sentencing in Alberta: 2012 Report, supra* note 15 at 4.
 - 29 *R v Dow Chemical Canada Inc* (1996) 23 CELR (NS) 108 (Alta Prov Ct). Note that this reporting does not reproduce the actual creative sentence order.
 - 30 Personal communication with Hanneke Brooymans, Environmental Investigations Liaison, Alberta Environment and Sustainable Resource Development (17 January 2014).
 - 31 For an example, see the creative sentencing order in *R v Mather, supra* note 8.
 - 32 *Creative Sentencing in Alberta: 2013 Report, supra* note 8 at 3.
 - 33 Per Jacques J, Alberta Provincial Court, March 2013, as cited in *Creative Sentencing in Alberta: 2013 Report, ibid* at 2.