

## Creative Sentencing

### Part I - Overview

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#### Introduction

It has almost been ten years since the proclamation of the Alberta *Environmental Protection and Enhancement Act* and the introduction of the innovative sentencing option that we now call creative sentencing. Creative sentencing has become a significant feature of almost every environmental prosecution as illustrated by the penalties imposed over the last ten years:

<b>2002</b>	<b>\$502,423</b> - included \$202,955 in creative sentencing orders
<b>2001</b>	<b>\$419,500<sup>1</sup></b> - included \$163,000 in creative sentencing orders
<b>2000</b>	<b>\$279,692</b> - included \$232,200 in creative sentencing orders
<b>1999</b>	<b>\$410,450</b> - included \$103,750 in creative sentencing orders
<b>August 1997 to December 31, 1998</b>	<b>\$1,143,500</b> - included \$401,580 in creative sentencing orders
<b>April 1996 to July 1997</b>	<b>\$856,750</b> - included \$253,000 in creative sentencing orders
<b>September 1994 to March 31, 1996</b>	<b>\$83,850</b> (No creative sentencing orders as legislation allowing for such orders did not come into place until September 1993)
<b>August 9, 1993 to September 1994</b>	<b>\$223,150</b> (No creative sentencing orders as legislation allowing for such orders did not come into place until September 1993)

With the benefit of this experience, Alberta Justice and Alberta Environment held a workshop in February 2002 involving various stakeholders in such projects, hoping to establish a formal framework for developing, selecting and monitoring creative sentencing projects. The group made a number of unanimous recommendations and by March 2003 all of those recommendations were implemented.

This paper addresses some of the questions raised in that workshop and which are frequently asked of the Crown:

- What is creative sentencing?
- What are the aims and goals of creative sentencing?
- How do the Courts approach creative sentencing?
- What are the limitations on such projects from the perspective of the Crown?
- What are the dangers inherent in creative sentencing?
- What does the future hold?

### **What is creative sentencing?**

Section 234(1) of the *Environmental Protection and Enhancement Act* (the "Act") allows a judge sentencing a defendant for offences committed under that Act to take an innovative approach to sentencing by ordering that funds be dedicated to certain projects like research, education or improvements in industry standards. This is what has come to be referred to as "creative sentencing."

The proposed creative sentencing order must fall within the terms of section 234(1)(a) - (i) of the Act, or there is no jurisdiction for the judge to make such an order. What is often forgotten is that the sentencing judge is the ultimate decision maker, not the parties who bring the idea for creative sentencing to the court. Only if the judge accepts the recommendations of the parties, do they become part of the sentencing order.

It must be understood that creative sentencing is part of the punishment of an environmental offender after a finding of guilt. While there are statutorily recognized diversion programs available for *Criminal Code* offences, creative sentencing does not fall into that category. Many offenders are under the misapprehension that creative sentencing is more akin to an out of court settlement than a sentence.

Creative sentencing is not an alternative source of funding for environmental groups. Each project arises from the unique circumstances of the case.

Finally, creative sentencing can never amount to extortion in the sense of exchanging creative sentencing projects for withdrawal of the charges.

### **Aims and goals**

A theme that is repeated over and over again by the judiciary is that creative sentencing allows some good to come from bad, that something positive can be done after an environmental incident. Courts have described creative sentencing as "looking to the future" or as a way for defendants to help others in the same industry and in the same predicament to avoid committing further environmental offences. It is in this way that the creative sentence serves the interests of justice including the public interest.

### **How do the courts approach creative sentencing?**

First, based on the decision of Judge Fradsham in *R. v. Van Waters and Rogers Ltd.*<sup>2</sup>, the sentencing judge determines the appropriate total penalty based on the circumstances of the case. Then, the judge considers whether and what amount of money should be available for creative sentencing projects.

Second, generally speaking, the case law suggests that one cannot deduct clean up costs from the total penalty. (*R. v. Van Waters & Rogers Ltd.*<sup>3</sup>, *R. v. Chem-Security (Alberta) Ltd.*<sup>4</sup>)

Third, the trend in Alberta has been a fifty-fifty split between a fine and creative sentencing as advocated by the provincial Crown. In other jurisdictions and at the federal level, the creative sentencing portion of the offence may constitute up to 90% of the total penalty.

Finally, courts have encouraged the Crown to seek an order under section 234(1)(g) to have the defendant pay for the costs of remedial or preventative action carried out by the Government.

### **What are the limitations on such projects from the perspective of the Crown?**

The Crown has established guidelines as to when a recommendation will be made to the judge to consider creative sentencing and which types of projects and groups should be eligible for creative sentencing funds. These guidelines were initially based in part upon the State of California experience where creative sentencing has been an important feature in environmental sentencing for over twenty years. Alberta has since developed its own approach to creative sentencing.

### **The Alberta experience**

Judicial commentary on creative sentencing, Crown experience in dealing with these sentences, and a survey conducted after the fact to judge the success of each particular project has pointed to two major factors that tend to affect the success of a creative sentence from the Crown's point of view:

1. The most successful projects attempted to address the root cause of the offence.
2. The least successful projects were those where the accused was not truly remorseful, considered creative sentencing to be the lesser of two evils, and continued to take the position that they should not have been convicted in the first place.

Importantly, to date there have not been any repeat offenders in cases where creative sentencing was imposed.

Notwithstanding their popularity and impact, these projects are hugely labor intensive, requiring skills not found in a single individual. There tend to be technical questions that arise in assessing the appropriateness of a project that require an expert's assessment. Effective (and considerable) investigation is necessary in order to determine whether the defendant is actually gaining a secret benefit by funding a project. Someone with the ability and information necessary to do an audit is required to determine whether in fact, the money has been spent according to the terms of the order.

These experiences and the substantial dollar value associated with these projects prompted the Assistant Deputy Minister for Alberta Justice to hold the February 2002 workshop. Provincial prosecutors, Alberta Environment, federal prosecutors, Environment Canada, defense counsel, and past and potential recipients of creative sentencing funds were all represented. At the conclusion of the two-day workshop the participants made a number of unanimous recommendations. Since some of these

recommendations required additional manpower, Alberta Justice, Alberta Treasury and Alberta Environment worked together to ensure that all of the recommendations of the workshop were implemented.

Part II of this article will be printed in the next issue of *News Brief*.

- <sup>1</sup> Including provincial files prosecuted by the federal Department of Justice because of conflicts.
- <sup>2</sup> (3 June 1998) Calgary 61444667P10101 (Alta. Prov. Ct.).
- <sup>3</sup> *Ibid.*
- <sup>4</sup> (1998) 29 C.E.L.R. (N.S.) 60 (Alta. Prov. Ct.).