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sentencing in environmental cases

PROTECTION OF LIFE SERIES

STUDY PAPER

Canada

SENTENCING IN ENVIRONMENTAL CASES

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A Study Paper prepared for the

Law Reform Commission of Canada

by

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and
Gail Bunt

Une édition française de ce document
d'étude est disponible.
Son titre est:
LA DÉTERMINATION DE LA PEINE EN DROIT
DE L'ENVIRONNEMENT

Available by mail free of charge from:

Law Reform Commission of Canada
130 Albert St., 7th Floor
Ottawa, Canada
K1A 0L6

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Suite 310
Place du Canada
Montréal, Québec
H3B 2N2

Catalogue No. J32-3/37E
ISBN 0-662-13829-5

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Acknowledgments

We would like to express our appreciation to Ted Keyserlingk for his ongoing support and encouragement as well as for his helpful comments on this Paper.

We would also like to thank Simon Chester, David Hunter, Lynn Huestis, and Judge Barry D. Stuart for their insightful and thought-provoking comments and suggestions.

John Swaigen, Gail Bunt

Introduction

The past two decades have seen a proliferation of statutes designed to aid in the management and protection of the environment. The regulatory tools employed in these statutes include: permits which are subject to terms and conditions, and which are revocable if not complied with; the right of government agencies to issue orders to clean up, mitigate or repair damage; and outright prohibitions of certain conduct. Prosecution is one important method of enforcing these permits, orders and prohibitions.

Prosecution, a "blunt instrument" of the law, is not favoured by enforcement agencies as a primary technique for achieving compliance and it has become fashionable for academics to criticize it as ineffective. Nevertheless, there is considerable evidence that when charges are laid, prosecutions are effective. For one thing, the general public perceives prosecutions as appropriate action. Any enforcement agency that repeatedly refuses to prosecute is likely to lack credibility in the public eye. Secondly, it is our experience that polluters who have been recalcitrant and resistant to conciliatory approaches frequently change their attitude dramatically and make significant improvements in their operations between the time when charges are laid and the actual date of the trial.

However, the "bottom line," the true measure of the effectiveness of prosecutions for violation of environmental legislation, is not in laying charges or obtaining a conviction, but in the result of the conviction. The ultimate goals are to stop the offending behaviour, to clean up, mitigate or repair any damage that has been done to the environment and to prevent a recurrence of the offence. In addition to having the effect of "specific" deterrence, the prosecution should also deter others from engaging in similar behaviour. Sentencing can play an important role in achieving these objectives.

The prosecution also serves as notice to others who might be tempted to commit the same offence that the law exists, that it will be enforced, and that no advantage will be gained by breaking the law. Prosecutions also reinforce societal values. They provide a dramatic and visible demonstration of the government's will to protect certain values and an affirmation that the community continues to hold those values strongly. Failure to prosecute may be construed to imply the opposite and can contribute to the erosion of respect for the law and confusion about the validity of the values embodied in the law. The sentence imposed plays a vital role in achieving these goals, and even more so, in influencing the perception of the public about whether the prosecution has fulfilled these purposes.

In addition, prosecution and punishment are supposed to wipe the slate clean. Once a person has been convicted and has served his sentence, he has paid his "debt" to society and his past conduct is to a substantial degree "erased." However, prosecution does not adequately fulfill this function as long as victims of the offence remain uncompensated and any damage done to the environment remains unrepaired. There is, therefore, a strong argument that to be effective as a deterrent,

to reflect the gravity of the offence, to promote respect for the law, and to close the books on a pollution incident, prosecution should also result in restitution or compensation to any victims of the offence and restoration of the environment.

Sentencing has an important role to play in accomplishing each of these goals. It is recognized that the mere fact of prosecution may be more effective in achieving deterrence than the sentence itself. Nevertheless, the sentence is the most visible result of prosecution, the outcome by which the general public — rightly or wrongly — judges the success of a prosecution. Therefore, the outcome of the sentencing process is an important determinant of whether the public has respect for the legal system. Besides this, sentencing undoubtedly plays a role in accomplishing clean-up, deterrence, and recompense for victims. With substantial reform, it can play an even greater role.

Justice cannot be said, or be seen, to have been done until the offender has received an appropriate and effective sentence. Yet, it is questionable whether existing legislation provides the courts with the power to impose appropriate and effective sentences in environmental law cases. Many of the difficulties in sentencing in environmental cases flow from the wide range of offences encompassed by the term "environmental."

Environmental offences involve a wide range of activities, effects, and degrees of fault. The offence may range from actual pollution to merely carrying on an activity which has a potential to cause harm without first obtaining a required permit or filling out a required form. If actual pollution is involved, its effects may range from causing minor discomfort or temporary interruption in the use and enjoyment of property, to human death or the extinction of an entire animal or plant species. The act may have been deliberate, reckless, or negligent, or where the offence is one of absolute liability it may simply be the result of a reasonable error in judgment. These differences in the degree of fault or culpability have created conceptual problems.

Stuart J. recognized this when he stated in *R.* v. *United Keno Hill Mines Ltd.*:[1]

> The range of inherent criminality in pollution offences can be extreme. Actions may be negligent or premeditated and the ramifications may range from trivial littering offences to offences precipitating untold destruction to resources, property and in some cases death.

Stuart J. stated unequivocally that "pollution is a crime."[2] This contrasts markedly with the decision of the Supreme Court of Canada in *R.* v. *City of Sault Ste. Marie*, in which the court suggested that environmental offences are not crimes and are morally blameless because they fall into the category of "public welfare offences."[3]

As Keyserlingk has pointed out:

> From the pollution perspective the decision is particularly limited. Though primarily descriptive in this respect, it implies that it is really more, that the "is" can readily and without more consideration be "ought." Insofar as pollution offences tend to be found exclusively in the form of "public welfare" legislation, the picture presented by *Sault Ste. Marie* is at least accurate. But it implies that this is as it should be, that according to the *nature* of pollution offences they *are* and *should be* always and only regulatory offences. Not the slightest allusion is made to the possibility of serious harm or serious risk resulting from pollution activity, or that serious instances might seriously threaten a

> fundamental value such as our society's commitment to a clean and safe environment. There is no mention that by these tests some instances of pollution might be by their nature and effects, as opposed to simply where they are presently found in legislation, real crimes in the fullest sense.[4]

Nor, it might be added, is there any mention of the fact that although most pollution is accidental, some of it is deliberate.

Professor Franson has captured the problem neatly in the following passage:

> The existing law assumes that all polluters and all pollution problems are the same. They are not, of course, and perhaps we are to be faulted for not having developed some sort of classification scheme for analyzing environmental problems. The starting point in most disciplines is the creation of a taxonomy. We have no such taxonomy in environmental law. We talk about existing and valued industries, which might find it very difficult to abate their pollution problems; at the same time, we talk about individuals who knowingly dump toxic chemicals in the dark of night, and we fail to distinguish between them.[5]

The spectrum of risk and harm encompassed by environmental offences is as striking as the disparities in the mental element involved and the business conditions giving rise to offences. The substances discharged range from relatively harmless materials to highly toxic ones. Some of them are harmless under some conditions and dangerous under others. Some are suspected of being harmful, but the evidence is inconclusive. Others are currently believed to be harmless, but the evidence may prove in the long run to have been wrong. In respect to some, we admit our lack of knowledge. There are others whose innocuousness or danger the scientific community will assert with more certainty than may ultimately be warranted.

The provable harm arising from a violation may be harm not to any individual but to the public as a whole, or even harm to the environment in which it is difficult to "prove" any human interest. The diffuseness of such harm makes it difficult to establish the gravity of the offence, a key consideration in sentencing.

Where the harm is to specific members of the human community, it may range from mental distress and spiritual or aesthetic interests to deprivation of life or destruction of property. The latter lie in a field of clear values, as do criminal offences involving the protection of similar interests. The former, as the Supreme Court of Canada has pointed out, "lie in a field of conflicting values."[6]

Where there is damage to human health or substantial deprivation of income or property, or a substantial risk of this, it is easy to balance the competing interests. Where, however, the pollution causes a nuisance or annoyance, or where substantial damage may only result from sustained exposure to a chemical, this is more difficult. While the legislation gives the court the clear duty to convict, it offers no assistance in deciding how to balance concrete economic interests against intangible values in such cases.

Moreover, the comparison of the typical pollution offence brought before the courts, which involves no clear risk to health or property, with the potential death and destruction we associate with pollution, must create a downward pressure on sentences, and helps to explain why most fines are at the lower end of the range. Because of our inevitable lack of knowledge of the potential severity of risks which appear small, it is important to treat all pollution offences as serious. But a lack of ecological consciousness and scientific limitations on our ability to predict long-term

effects of incremental exposures to contaminants discourage judges, who must act on the basis of "evidence" from recognizing in their sentences the potential link between the narrow offence before them and its possible contribution to long-term devastation of health and environment.

Although they may not merit the highest fines, such matters as loss of enjoyment of property and interference with the normal conduct of business should be subject to substantial sanctions. Even though these interests must be weighed against the interest in protecting industrial and commercial activities and the difficulty in eliminating pollution from many industrial and commercial undertakings, it should not be forgotten that the most substantial single investments the ordinary person will make during his lifetime are his home, his cottage, his automobiles, and, if he is self-employed, his business. He will frequently have to borrow money to make these purchases, which means he will be paying for them for years, and ultimately they will cost him several times their purchase price. For the entrepreneur, his business may involve an even greater investment than his home, and its well-being is crucial to his well-being. Pollution which impairs a person's ability to carry on his business is a serious violation of his rights. Interference with these important aspects of daily life should not be dismissed as trivial even when it amounts to nuisance rather than serious harm to health or economic dislocation.

It should also be recognized that symptoms of discomfort such as eye, ear, nose and throat irritation, "colds," and sleeplessness associated with temporary exposure to small quantities of many chemicals, may be nature's way of warning us that these chemicals are more dangerous than we know. Even though a pollution offence causes no provable harm to health, we should not underestimate the possibility that discomfort is an indication of potential or actual, but unprovable, harm to health. The sentencing process should not be blind to the need for those of us involved in the justice system to do our best now, even in the absence of certainty, to protect future generations from harm.

Activities that contribute incrementally to the gradual deterioration of the environment, even when they cause no discernible direct harm to human interests, should also be treated seriously. Each actor must bear his share of the responsibility for any ultimate harm, if there is to be an effective deterrent to an eventual destruction which will harm human interests.

In creating offences for which people can be convicted without any *mens rea* or actual harm, we have taken steps to ensure that justice is blind to these considerations. However, we then ask the same court, in sentencing, to remove the blindfold and consider these same elements, and to weigh competing values without further guidance.

It is no wonder that the courts have difficulty in imposing suitable sentences. Not only does the range of environmental offences involve all the variables described above, but the entire range is often found within the same offence. Section 13 of Ontario's *Environmental Protection Act* provides, for example:

> 13. (1) Notwithstanding any other provision of this *Act* or the regulations, no person shall deposit, add, emit or discharge a contaminant or cause or permit the deposit, addition, emission or discharge of a contaminant into the natural environment that,

(a) causes or is likely to cause impairment of the quality of the natural environment for any use that can be made of it;

(b) causes or is likely to cause injury or damage to property or to plant or animal life;

(c) causes or is likely to cause harm or material discomfort to any person;

(d) adversely affects or is likely to adversely affect the health of any person;

(e) impairs or is likely to impair the safety of any person;

(f) renders or is likely to render any property or plant or animal life unfit for use by man;

(g) causes or is likely to cause loss of enjoyment of normal use of property; or

(h) interferes or is likely to interfere with the normal conduct of business.[7]

Not only does this catch a variety of categories of effects, but it also encompasses a wide spectrum of effects within each category. Nor, with the exception of subsection (2), which exempts the effects of manure stored or disposed of in accordance with normal farming practices (that is, farm smells that might bother residents in an agricultural area), does it make any distinction between sources, purposes or locations of discharges.

Article 20 of the *Environment Quality Act*, presents another example:

> No one may emit, deposit, issue or discharge or allow the emission, deposit, issuance or discharge into the environment of a contaminant in a greater quantity or concentration than that provided for by regulation of the Lieutenant Governor-in-Council.
>
> The same prohibition applies to the emission, deposit, issuance or discharge of any contaminant the presence of which in the environment is prohibited by regulation of the Lieutenant Governor-in-Council or is likely to affect the life, health, safety, welfare or comfort of human beings, or to cause damage to or otherwise impair the quality of the soil, vegetation, wildlife or property.

The only sentence permitted for most environmental offences is a fine. When an offence can encompass such a wide range of activities, effects, and degrees of fault, fines alone may not be adequate to cover all circumstances. Moreover, assuming a typical fine for a first offence can range from $1 to $5,000, as in the case of Ontario's *Environmental Protection Act*, such a fine structure has several inherent difficulties. When a single offence can involve such a wide range of seriousness in intent and outcome with no difference in the range of fines, the range may be both too broad and too narrow — too broad because the highest fines are out of proportion to the means of most offenders and the gravity of minor infractions, and too narrow because they do not reflect the extreme wealth of some offenders and the great gravity of a minority of flagrant offences.

Often, the entire spectrum of causes and effects is encompassed by the same statutory provision, and subject to the same fine structure. This is the first dilemma faced by the judiciary. No attempt has been made by the legislative branch either to break down the wide range of conduct encompassed in a single provision into separate offences reflecting different degrees of gravity, or alternatively, to create sentencing structures which distinguish among the degrees of gravity of the violations and take into account the vast differences among offenders' abilities to pay. In short, the maximum fines are far too high for the minor violations and for

offenders who are not wealthy and far too low for the serious offences and wealthy offenders.

The second dilemma faced by the courts is that the vast majority of spills, emissions, and other offences that are brought before them: (1) are accidental; and/or (2) have little or no provable long-term impact on human health or the environment; and/or (3) are committed by individuals or small corporations whose ability to pay is limited.

In these kinds of cases, it becomes difficult to impose sentences that reflect the high maximum fines established by Parliament or the legislatures. These high penalties may have been established to impress upon constituents the concern of the politicians with environmental protection. Or they may have been intended to reflect the fact that *some* pollution is deliberate and extremely dangerous or deleterious. However, they do not reflect the everyday realities of incidents which the courts are asked to deal with. Therefore, the courts quite appropriately in such cases impose fines far below the maximums, but this has a negative effect of fuelling a public perception that polluters are being "let off easy."

A third problem is that fines alone, or even a combination of fines and incarceration, are not adequate to accomplish the purposes we have suggested sentencing should serve. While capable of punishing past behaviour, fines are ill-suited to deal with ongoing problems or with offenders who are so wealthy that no fine within the existing legislated limits can have a substantial financial impact on them, offenders who are so poor that they cannot be made to pay a substantial fine, offenders who have arranged their business affairs so that their assets and income are sheltered from the law, and offences in which pollution is an almost inevitable by-product of production methods.

A substantial component of this problem is the fact that pollution offences seldom fit the stereotypical "crime," and that pollution offenders are predominantly middle-class entrepreneurs and artificial constructs, namely corporations. Thus, environmental law is a microcosm of all the vexed questions of what is fair and effective in sanctioning corporate and white-collar crime.

Finally, arising out of these concerns are substantial conceptual problems which require discussion. There is no consensus on the appropriate sentencing principles or the factors to be taken into account in sentencing and the relevant weight to be given different principles or factors. Moreover, it is not clear whether offences which are "criminal" (whatever that means) must be treated differently than regulatory offences with respect to sentencing principles and factors. For example, is deterrence irreconcilable with retribution, as some commentators claim? Is punishment capable of achieving rehabilitation or deterrence in environmental cases? Can the victim be taken into account in sentencing, and if so, are there differences in the degree of consideration he can be accorded depending on whether the offence is categorized as "criminal" or "regulatory"?

These are questions that are fundamental to criminology and legal theory. In practice, the courts in environmental cases have generally been content merely to state that their sentences are based on "deterrence," without any articulated attempt to grapple with these underlying issues. Nevertheless, the underlying principles

adopted are important in determining whether the goals of prosecution are accomplished — that is, prevention, abatement, restoration of the environment, and restitution to victims, as well as punishment of offenders.

The purpose of this Paper is to examine the ongoing adaptation of sentencing case-law, and to make recommendations for law reform. The first part of this Paper is devoted to an examination of the principles according to which fines are currently being levied and specific factors taken into account in sentencing. We describe how these principles and factors are being applied in practice and express our views on whether these practices are appropriate. The second part examines the availability and potential utility of some existing but little-used tools, such as different ranges of fines to reflect different circumstances, probation, restitution or compensation, and performance guarantees.

We will suggest that it is clear that a broader range of penalties and a wider variety of sentencing tools must be fashioned to reflect the wide range of offenders and offences contemplated by environmental laws. It should be suggested at the outset that, for the most part, sentencing reform does not appear to depend on reform of the substantive law.[8] It is not necessary that deliberate and accidental action or high risk and low risk activities be made into separate offences in order to legislate distinctions between degrees of culpability, risk, and harm in sentencing. Moreover, although there may be merit in criminalizing certain conduct for reasons other than rationalizing sentencing options, there would appear to be no barrier to incorporating the full range of sentencing tools into provincial or federal public welfare legislation. It is unlikely that categorizing an offence as a "crime" in any way increases the sentencing options available.[9] In fact, the opposite may be true. It is arguable that wider options are available for regulatory or "civil" offences than criminal offences, although the best view appears to be that the same range of options is available for both kinds of offences.

PART I

Examination of Current Principles in Fining and Sentencing

I. General Sentencing Principles or Objectives

In spite of the enormous quantity and high quality of scholarly thought devoted to the subject of sentencing, there is still no general consensus on the theory of punishment that should or does animate our courts. According to Sir Rupert Cross:

> ... the behaviour of the Court is often justified by every theory of punishment; some sentences are only to be explained in the light of one theory, and much that happens is not attributable to any theory of punishment but to a variety of considerations most of which can be described as "expediency."[10]

There are four objectives which crop up in judgment after judgment in criminal cases: protection of the public, retribution, reform and rehabilitation, and deterrence.[11]

Scholars have questioned whether all of these objectives are appropriate ones, and how they can be reconciled with each other. If they are all appropriate considerations, but ones which are incompatible with each other, how do we choose between them or balance them. One debate centres around whether sentencing is "moral" or "utilitarian"; that is, it is based on the degree of opprobrium associated with the specific example of the offence, or based on what is needed to reduce its incidence. The question is particularly difficult in offences such as pollution, where the values to be protected are diverse and diffuse; where sentencing often involves the balancing of competing interests and values, all of which may be legitimate; and where the seriousness of the offence is essentially unknown and unknowable, because our knowledge of what is best for society is limited, as is our understanding of the causes and effects of harm to the environment and to human health.

Regardless of what the objectives *should be*, it is clear that each of them is recognized explicitly or can be seen implicitly in sentencing decisions rendered in environmental offences as well as in criminal cases.

A. Protection of the Public

In criminal cases, the phrases "protection of the public" and "protection of society" are used in several different ways. Protection of the public is sometimes

listed as one of several principles to be considered without any priority. It is sometimes used to describe those principles that put society's needs ahead of concern for the well-being of the offender, where the two appear to be irreconcilable. The prevalent use of the term is as the overall purpose of sentencing, to be accomplished by secondary objectives such as retribution, reform, and deterrence.

Frequent reference is made in environmental cases, as well, to the need for the protection of society.[12] Protection of society has been recognized when the courts have been conscientious to remind offenders that despite the absence of the violence and moral turpitude often associated with crime, environmental offences are serious because of the danger they pose to the public. As Dickson J. stated in *Sault Ste. Marie*:

> Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration.[13]
>
> ...
>
> Public welfare offences involve a shift of emphasis from the protection of individual interest to the protection of the public and social interests ....[14]

In recognizing that the public interest is paramount over the right of the individual to carry on activities that put the environment at risk, the *Sault Ste. Marie* case implicitly extends this principle to sentencing as well.

Pollution in particular has been described in the cases as "probably one of mankind's greatest enemies"[15] and "a very serious menace."[16] According to Stuart J.: "Pollution offences must be approached as crimes, not as morally blameless technical breaches of a regulatory standard."[17]

In environmental cases, therefore, the effect of the principle that the protection of society is paramount is to underline the serious nature of the offence and prevent its trivialization. It supports the use of strong deterrents and punishments even in the absence of serious harm to individuals or the environment. Perhaps its importance lies in supporting an environmental ethic which holds that "various elements of the community of earth [have] an intrinsic value rather than an instrumental or utilitarian one,"[18] and consequently, "decisions have become more significant because of the vastly increased capacity of human beings to influence the nature of their environment, seen most graphically in pollution of the air, water, sea, and land."[19] An acknowledgment of the paramountcy of societal over individual interests, especially when societal interests are considered from an ecocentric rather than an anthropocentric perspective, supports more substantial penalties. It forces a person to take responsibility for a substantial portion of the overall damage that acts like his can cause, even if his action alone does not trigger the ultimate damage. It recognizes that, in the case of environmental degradation, the whole harm is more than the sum of its parts.

R. v. *Krey* is an interesting example of the application of these principles. Mr. Krey was a young man from Germany who came to the Northwest Territories for the sole purpose of taking eggs from the nest of a gyrfalcon, an endangered species, for sale in his homeland, where such eggs could be sold for $80,000 each.

Exportation of the eggs is an offence under the federal *Export and Import Permits Act*. In struggling with the appropriate principles in sentencing for an offence where "some may argue ... there is no real victim, and there is no real impact on the community," Bourassa J. concluded that:

> The victim ... is the community of Frobisher Bay, in fact, the community of the Northwest Territories and indeed, the whole world. The accused was contributing to a further decline of an already endangered species of bird by his attempt to export those eggs. Here in the Northwest Territories, wildlife is an essential feature of life, and not only that, it is a treasured resource to be conserved, husbanded, protected and fostered, so it can continue to provide sustenance for the body and for the spirit in future ages as it has in past ages.
>
> ... [the offence] has a direct impact and a detrimental effect on the community by endangering the survival of the species, and depriving all of us of the joy of beholding and sharing our world with that species. That is the harm, which this law was designed to protect us from.[20]

The defendant was jailed for four months in addition to being ordered to pay a fine of $3,000.[21]

Thus, the courts have cited protection of the public as the purpose of sentencing in environmental cases. The need to protect the public may not have a quantifiable impact on the size of the fine, but it is clear that judges are bearing it in mind.

B. Retribution or Punishment

Retribution as a sentencing objective has passed through a period of disfavour in the courts.[22] While the courts have clearly rejected retribution in the sense of vengeance, however, retribution remains central to sentencing in the sense that many courts still feel that a sentence must be an expression of society's repudiation of certain kinds of conduct.

In this vein, Weiler offers a sense of the term "retribution" that reflects a great deal of current thinking in relation to economic crime in general and corporate crime in particular:

> A system of rules has been established, substantial compliance with which is necessary for a decent community life for all. Yet some are tempted to pursue their own private interests even though this involves a breach of that legal system. Accordingly, while taking the benefits of the self-restraint of others, they do not make the reciprocal sacrifice demanded of them. As a result they obtain an unfair advantage in the distribution of the benefits from life within that legal system. Punishment is necessary to remove that unjust enrichment from the offender and so secure a just equilibrium on behalf of those who were willing to be law abiding. I believe that it is the removal of this extra advantage from offenders, rather than the satisfaction of the sense of grievance of their victims, which is the chief rational support of this retributive justification of punishment.[23]

Expressed in Weiler's terms, the concept of retribution has a ring of fairness not only to the accused, but to the accused's competitors who have incurred the costs of operating responsibly.

Even if criminal offences and public welfare offences, as the Supreme Court of Canada suggested in the *Sault Ste. Marie* case, are fundamentally different from

each other in that the former are morally wrong and the latter are prohibited only because of their potential consequences, there is still a role for retribution in this "distributive justice" sense in environmental and other public welfare cases. Moreover, as Weiler acknowledges, there is no watertight dividing line between the two kinds of cases, as *Sault Ste. Marie* suggests, but they "shade imperceptibly one into the other." There is a descending scale of immorality, with extremely shocking behaviour and morally neutral behaviour only at the extremes. Much environmentally irresponsible behaviour, even though it is accidental, results in no actual harm to identifiable victims, and is undertaken in pursuit of legitimate financial or public objectives, still invokes the kind of distaste or "moral attitudes of resentment and indignation," which scholars associate with criminal behaviour.

There appears, therefore, to be a substantial role for punishment and denunciation of conduct in the sentencing of environmental offenders. Although this will usually be less important than deterrence in public welfare offences because the immorality of the offence is considerably less and the goal of prevention correspondingly greater than in criminal offences, the very fact that the conduct has been prohibited and a penal sanction attached, and that the authorities have chosen to enforce the law through prosecution rather than moral suasion or administrative remedies is an indication that the public feels there is a degree of opprobrium attached to the conduct in general and in the particular case. If deterrence were the only consideration, in most cases, administrative mechanisms would do just as well.

Retribution is frequently referred to in tax evasion cases, where it is considered a principal sentencing factor.[24] While the term "retribution" itself is absent, Loukidelis J. in *R.* v. *B.L.S. Sanitation* appeared to employ the concept in an environmental case:

> Failure to comply with the provisions of the statute will be visited by a penalty commensurate with the burden that they impose upon the public by their failure to comply with the terms of their permit and the statute.[25]

The Ontario Court of Appeal endorsed the concept of repudiation in its first attempt to set out principles of sentencing in public welfare cases since the *Sault Ste. Marie* decision was rendered. The court described repudiation as an aspect of general deterrence. In *R.* v. *Cotton Felts Ltd.*, an appeal of a sentence imposed for an occupational safety violation, the court described deterrence as having both a negative and a positive aspect. The negative aspect is "achieving compliance by threat of punishment." The positive aspect, which the court considered particularly applicable to public welfare offences, consists in "emphasizing community disapproval of an act, and branding it as reprehensible."[26]

There is a second sense in which retribution is used. The idea of balance and promotion also entails the idea that punishment should be no more than the offender deserves. If the moral repugnance of the offence is minimal, the punishment should be light. In other words, repudiation or "morality" can be a constraint on deterrence or "utility."

Where the courts speak in terms of deterrence, but impose low fines, it is likely that they are actually motivated by this aspect of retribution. Since many violations result in little actual damage, sentencing on the basis of deterrence would lead to

higher fines in such cases on the basis of the potential results and the risk imposed, while emphasis on the actual result of the individual violation would result in a lower fine. When Stuart J. in *United Keno Hill Mines Ltd.* states, for example, that "when the essentially uncontradicted company evidence indicated minimal environmental damage a substantial penalty is inappropriate,"[27] he appears to be measuring the penalty in terms of retribution rather than deterrence, although an important aspect of his statement is chastisement of the Crown for failing to lead any evidence of the actual or potential harm.

Nowhere is this tension between retribution and deterrence more apparent than in environmental law. It is for this reason that the distinctions suggested by commentators such as Franson and Keyserlingk are so important.

C. Rehabilitation and Reform

The utilitarian approach to punishment, which is currently in favour in criminal cases, involves considerable emphasis on the potential for crime reduction through rehabilitation of the criminal. When individuals are involved, this goal has the ring of common sense. However, like many matters of "common sense," closer examination reveals evidence that the criminal process often has little success in rehabilitating criminals.

Since no one has ever claimed that individuals who pollute do so out of compulsion or sickness, it is unlikely that rehabilitation has any significant role in environmental cases in any event. Pollution usually arises out of business activities, either through carelessness or in an attempt to save or make money. In either case, it is unlikely that any rehabilitation is possible in the sense of treatment, psychological insight, or changing motivation. Deterrence, not rehabilitation, is the goal.

In relation to corporate polluters, the goal of rehabilitation does not even have the apparent virtue of common sense to commend it. Stuart J. in *R.* v. *United Keno Hill Mines Ltd.* considered the need to rehabilitate the corporate environmental offender,[28] as did Dnieper J. in the lower court decision in *R.* v. *The Canada Metal Co. Ltd.*[29] The concept of corporate rehabilitation has also cropped up in trade cases, for example in *R.* v. *Hoffmann-La Roche Ltd. (No. 2).*[30] However, talk of rehabilitating a corporation has a most peculiar ring. The central purpose of the corporation is profit. How can you "cure" the corporate compulsion to show a profit? Corporations are incapable of psychological testing, vocational training, psychiatric treatment, religious instruction, or membership in Alcoholics Anonymous. One wonders what the courts mean by rehabilitation in the corporate context. There is no doubt that corporations can be coerced or pressured into changing policies and practices and revising systems and structures, or that actual or potential reductions in revenue through fines, court orders or bad publicity can encourage such restructuring. Corporations can be encouraged to conduct their operations in more socially responsible ways. However, the factors associated with the possibility of rehabilitation in human beings, such as age, family environments, friends, mentors, employment stability and degree of criminal experience, have little

or no relevance in the context of corporations. If the notion of rehabilitation is to have any application at all to corporations, further explanation and definition are needed that attempt to avoid anthropomorphic metaphors. In the environmental and trade-offence context it is likely that the courts have been using rehabilitation as a synonym for deterrence. There is little doubt that corporations can be deterred from polluting, even if they cannot be rehabilitated. We suggest that terms such as rehabilitation should be restricted to human offenders and methods of correcting, reforming or otherwise changing corporate conduct are more appropriately discussed in the context of deterrence.

D. Deterrence

The higher courts have treated deterrence as the paramount consideration in criminal cases. While there is growing skepticism regarding the capacity of criminal sanctions to deter street criminals, there is by and large a consensus on the efficacy of deterrence, both individual and general, in white-collar crime. The ultimate corporate purpose is to turn a profit. Corporations employ accountants and legal counsel who attempt to weigh the financial consequences of any given action. Corporate officers are unlikely to engage in activities that they think will be unprofitable. Corporations are probably economically irrational only to the extent that they are mismanaged.[31]

In the analagous areas of trade offences and tax evasion, deterrence is the major sentencing objective. The classic statement with respect to deterrence, repeated in a number of subsequent cases[32] is that the fine "must not be a licence fee, something capable of being regarded as a probable cost of, or necessary risk in doing business in the manner in question."[33] This sentiment was echoed in more pointed language by Linden J. in *Hoffmann-La Roche*: "[T]here must be a substantial sting to the fine. It cannot be a mere slap on the wrist."[34] That the courts are not indulging in empty rhetoric in trade cases is evidenced by fines of six and seven figures.

Although the amounts are less impressive in environmental offences, partly because of the lower statutory maximums, it is clear that the same emphasis is placed on deterrence. Numerous environmental cases have cited the statement of Morrow J. in *R.* v. *Kenaston Drilling (Arctic) Limited*:

> Where the economic rewards are big enough persons or corporations will only be encouraged to take what might be termed a calculated risk. It seems to me that the courts should deal with this type of offence with resolution, should stress the deterrent, viz., the high cost, in the hope that the chance will not be taken because it is too costly.[35]

In *Le Procureur Général de la Province de Québec* c. *New Brunswick International Paper Co.*, Cloutier J. affirmed that deterrence (*l'exemplarité*) is a predominant criterion of sentencing under the *Environment Quality Act*, adding [TRANSLATION] "without meaning to make a scapegoat of the offender, the punishment must be of a nature that would dissuade those who might be tempted to initiate this reprehensible conduct."[36]

Even where there is only one other operator in the area who is capable of the same sort of violation, general deterrence should be considered with regard to the wide purposes of the statute to control various kinds of pollution.[37] Where the maximum possible fine is insufficient to deter the offender in question because of its size and wealth, imposition of the maximum may be nevertheless justified because of its deterrent effect on others.[38] This is an important principle, since the maximum fines for many pollution offences are obviously too low to have any financial impact on large corporations. However, since the vast majority of polluters are small businesses,[39] more important in the day-to-day practice of environmental law is the fact that the courts will sometimes impose substantial fines, in an attempt to deter others, on defendants upon whom they would otherwise be tempted to impose low or nominal fines, because of their limited ability to pay or the apparent lack of need for specific deterrence.

However, the leading statements of the principle of deterrence in environmental, as in other cases, indicate that the courts impose limits on the degree to which general deterrence can override individual case considerations. Although deterrence is the paramount principle, it is not the *only* principle at work: "[T]o achieve effective general deterrence, the fines imposed ... must be substantial and exemplary, *but not crippling or vindictive*."[40] [Emphasis added] Thus, the principles applied by the courts appear to be deterrence tempered by retribution as a constraining principle, even though retribution is seldom mentioned.

Deciding whether environmental offences are inherently immoral or merely proscribed because of their potential effects is, therefore, theoretically important in determining the correct principles of sentencing. If morality doesn't enter into the picture, then it might follow that sentencing is purely utilitarian, and perhaps the courts should place even greater emphasis on general deterrence, with less concern over whether substantial harm was, or could have been, caused. Applying the principles in the *Sault Ste. Marie* case to sentencing could lead to this conclusion. If the purpose of public welfare offences is to promote higher standards and to "keep businessmen up to the mark," and private interests are subordinated to social concerns, then it is arguable that the only limit on sentence should be what the offender can afford to pay. Conversely, if there is a moral element to regulatory offences, then sentences might be made higher than required for specific deterrence on the basis of the "criminality" of the offence, or lower than required for general deterrence on the basis of the lack of immorality or harm.

The basic rule in environmental cases, as in other cases, is that "without being harsh, the fine must be substantial enough to warn others that the offence will not be tolerated. It must not appear to be a mere licence fee for illegal activity."[41]

In fact, the fines in many environmental cases do appear to the public to be a "mere licence fee." There are several reasons for this:

1. Because of difficulties in obtaining the information and getting it before the court, prosecutors are often not in a position to provide evidence of the savings or gain arising from the offence or the offender's wealth.

2. As we have stated, the typical pollution offence brought before the courts and the typical offender bear little resemblance to society's vision of pollution as a global menace and polluters as midnight skulkers.
3. The maximum fines under all but a few statutes are so low that they cannot have any real financial impact on large corporations or reflect the gravity of the worst offences.
4. Large fines may not always be the appropriate means of obtaining general or specific deterrence, but they are often the only sentencing tool available.
5. While there is much broader consensus that prosecution results in deterrence in "instrumental" offences than there is that criminal sanctions are effective in deterring "expressive" ones,[42] little is known about the role of the penalty in contributing to this deterrence, or the kind or degree of penalty that will result in deterrence without being unduly harsh. In these "instrumental" offences, the probability of prosecution and the timing of the charges, trial, and sentencing may play as great or greater a role than the penalty.
6. The public is often unaware of considerations that went into determining the size of the fine, such as expenditures made by the offender to prevent recurrence of the offence or voluntary compensation to victims.

In fact, there is a serious disparity of opinions among the groups who view the sentencing process from different perspectives. A resident of a community subject to widespread pollution described a $17,000 fine against one company as "a slap on the wrist."[43] Workers exposed to noxious chemicals in a case where the company was fined $14,500 said they were disappointed the fines weren't larger.[44] There is an element of truth to this. While sentences should not be unduly harsh, they should not be painless. A company with an annual income in the millions of dollars and assets in the billions cannot feel a fine in the low thousands.

On the other hand, defendants and their counsel frequently assert that the true cost is in legal fees, which may greatly exceed the fine. As environmental trials tend to be lengthy, there is some truth to this.

Still other corporate officials argue that bad publicity, harm to the public image of the corporation, and deflection of the energies of personnel from "productive" work to management of the legal "problem" is in itself a substantial punishment. This is probably what J. N. Mulvaney, Director of Legal Services for the Ontario Ministry of the Environment, meant when he stated: "I have the feeling that most industries prefer to avoid prosecution for a number of reasons and a fine is just one of them."[45]

Regulators sometimes feel that if abatement has been achieved as a result of the prosecutions, for example, if pollution equipment has been installed, or the company has shut down or relocated offending operations, the fine is irrelevant. In fact, they sometimes feel that a high fine may be counter-productive, in that it may further strain relations between the enforcement officials or reduce the resources available to the offender for environmental improvement.

To some extent, these differing opinions of the adequacy of present sentences reflect a different view of the nature of regulatory offences. As Fisse states: "People often react to corporate offenders not merely as impersonal harm-producing forces

but as responsible, blameworthy agents."[46] Polls show that the public views regulatory offences as criminal,[47] while the offenders and sometimes the regulators see these offences as morally neutral activities with unfortunate side-effects requiring some control.

The public's concern about low fines also reflects a general self-fulfilling belief that the courts are too lenient, which is encouraged by slanted and that incomplete reporting of sentences by the media.[48] The public's view that environmental offences are grave and blameworthy may cause it to discount any sanction other than a high fine or imprisonment as being "soft."

Thus, the public's perception that environmental sanctions are too lenient is based partly on reality and partly on misconceptions. In fact, our experience has been that offenders often respond to prosecution by making substantial improvements even when faced with small fines. Thus, prosecution does provide "specific" deterrence. Whether it also results in general deterrence is questionable, and potential exposure to higher fines may be important in this respect. Regardless of the accuracy of this perception of undue leniency, it must be dealt with or it will result in erosion of respect for environmental laws and their enforcement.

To the extent that these conflicting views reflect conflicting interests, they may not be reconcilable. To the extent that they can be reconciled, this may be achieved by a combination of (a) public education to bring about an understanding that the size of a fine is not always the most accurate reflection of the success of a prosecution, (b) education of judges and Crowns, (c) law reform to ensure higher fines where these are warranted, and (d) greater use of innovative alternatives to fines in the sentencing process — alternatives that may have a more lasting impact on offenders than a fine.

II. Specific Sentencing Factors

The courts have made few attempts in criminal cases, and even fewer in environmental cases, to articulate the relationship between underlying objectives such as retribution and deterrence and the relative weight to be given to them in different kinds of cases. The courts have dealt with difficulty in applying abstract theory to concrete cases by enumerating specific sentencing factors which are intended to reflect these broader goals, although they have stopped short of explaining how and why they feel these factors relate to the underlying objectives. Several attempts have been made to enumerate these factors in criminal cases,[49] but it is only recently that the courts have attempted to develop a similar "shopping list" for environmental cases.[50] What is noteworthy is that, both in setting out general principles and in enumerating specific factors, the courts have recognized that a different approach may be needed in environmental cases and that traditional

principles and factors may have limited application, particularly when the polluters are corporations.

We believe that in the field of environmental law, looking at specific sentencing factors mentioned by the courts is generally more useful in deciding what motivates the courts and what the shortcomings of their approach might be, than an inquiry into the philosophical assumptions underlying statements of general principles. In the environmental field, with the possible exception of the *United Keno* decision, the courts have evinced no interest in developing a formal schema, and none is suggested here. However, the following are the factors which have been considered relevant in environmental cases taken, as the courts have tended to take them, one at a time. The sentencing factors are described in some detail and their validity or usefulness in the environmental context is evaluated in order to provide a framework for later recommendations.

A. Extent of the Potential and Actual Damage

Environmental cases put the courts in the difficult position of having to impose a sentence in the context of uncertainty about the degree of risk inherent in the offence or the amount of damage caused, since any damage may be latent or cumulative. In the face of this uncertainty, some courts are willing to impose substantial sentences, while others hold out for proof of substantial risk or harm. The difference, it might be suggested, lies in the ecological consciousness of the judge. Ecological consciousness is an ability to see past the obvious and immediate conflicting interests, for example, the right to carry on a business versus the right to use and enjoy property free from inconvenience and discomfort. It requires an understanding that everything in the environment is interdependent, and that harm to one aspect of the environment, no matter how insignificant it might seem or how unrelated to human concerns it might appear, has the potential to accumulate and ultimately to diminish the diversity and strength of the ecosystem. Some judges have this consciousness; some do not.

As we have stated above, in environmental regulation the behaviours prohibited are so diverse and the scope of the possible harms covered by some offences so wide that it is difficult for a court to determine where a particular infraction falls in the scheme of things.

Some courts, in taking a deterrent approach, have stressed the need to impose substantial penalties in the absence of actual damage. Other courts, taking an approach more consistent with what we have described as retribution, have placed much more emphasis on the results of the infraction — the actual damage caused — and have been reluctant to impose substantial penalties in the absence of long-term harm to health, property or the environment.

The line of cases emphasizing the need for substantial penalties without proof of harm begins with *Kenaston*, in which the court suggested that the appropriate basis for imposing a substantial penalty is not the actual harm, but the risk of harm. This approach has found favour with many courts and continues to be cited regularly. The

validity of this approach is underlined by the observation that actual damage cannot be the appropriate test since damage is not an element of many environmental offences.[51] The Territorial Court of the Northwest Territories has ruled that absence of evidence of environmental damage "is not a critical or significant factor."[52]

However, while purporting to take into account the dictum in *Kenaston* that the test is "less a concern of what the damage was, but more a concern of what it might have been," many courts have been reluctant to impose high fines in the absence of actual damage.[53]

As mentioned at the outset, the vast majority of pollution incidents cause no substantial or permanent harm to the environment or to human health — at least no discernable or provable harm. There is no question that this lack of actual injury imposes a general downward pressure on the quantum of sentences. In our experience, although the courts often do not articulate this concern, the lack of quantifiable damage in environmental cases weighs heavily in their sentencing.

The *United Keno* case has given support to this preoccupation with proved damage in stating that "when the essentially uncontradicted company evidence indicated minimal environmental damage a substantial penalty is inappropriate,"[54] although the case might better be read to stand for the proposition that the Crown has a duty to show potential damage if the court is to be in a position to counter-balance defence evidence of the lack of actual damage. In Québec, *Piette* c. *Choinière*[55] is the only case we have found where the court declared its power to take into account the absence of actual harm to the environment in rendering sentence. In other cases, the Québec courts have treated actual damage as an aggravating factor.

There are three separate aspects to the harm or damage factor: the harm done to the common good; the consequences for those in the vicinity; and, the costs borne by the public as a result of the offence.

(1) Harm to the Common Good

It is very difficult to quantify "harm to the common good." The effects of pollution may not be immediately measurable, or they may be measurable even in the long run only in global terms. An increased incidence of cancer in the population or a decline in the range of fish species in a lake over a period of years are examples of global measures of pollution. The damage may not be measurable at all. Where environmental damage is irreversible, as in the case of contaminants which enter the food chain and whose deleterious effects persist indefinitely, each act of pollution causes an incremental reduction in the quality of life for both present and future generations.

The delicate balancing act the courts must accomplish is to impose upon each offender a substantial share of responsibility for the ultimate degradation to which his conduct must contribute, without requiring him to shoulder disproportionate blame for harm which may be caused by others or may never come to pass. Many courts have been willing to attempt this.

Despite the unquantifiable nature of this kind of harm, the courts are taking it into account. In levying a $2,000 fine against a company for driving across tundra,

the court in *R.* v. *Kenaston Drilling (Arctic) Ltd.*[56] adverted to the dependence of the Inuit people's way of life on preservation of the tundra in its natural state. The court held that the test is "less a concern of what the damage was, but more a concern of what it might have been."[57] In other words, potential as well as actual harm is relevant. Furthermore, the court may look at what the cumulative effect would be if others were to behave in the same way. The court in *R.* v. *The Vessel "City of Guildford"*[58] refused to consider the effects of a single oil spill as not serious, in view of the number of ships using the waterway on a regular basis.

The most eloquent expression of the principle is stated in the *Panarctic* case:

> [T]he destruction of any ecosystem is a gradual process, effected by cumulative acts — a death by a thousand cuts, as it were. Each offender is as responsible for the total harm as the last one, who triggers the end. The first offender can't be allowed to escape with only nominal consequences because his input is not as readily apparent.[59]

The sensitivity of the ecosystem affected by the pollution will also be considered. In the words of Stuart J:

> A unique ecological area supporting rare flora and fauna, a high-use recreational watershed, or an essential wildlife habitat, are environments calling on users to exercise special care. Any injury to such areas must be more severely condemned than environmental damage to less sensitive areas.[60]

The court held that "if the damage is irreparable, extensive, persistent or has numerous consequential adverse effects, the penalty must be severe."[61]

Frequently however, the courts have discounted potential damage, and placed an emphasis on the need to show long-term harm. The attitude that if you can't measure it, it doesn't exist, is summed up in a British Columbia *Fisheries Act* decision:

> Nature provides abundantly — the environment has survived forest fires, cave-ins, and earthquakes from time immemorial; rivers have been diverted from their courses; human and animal populations have been decimated by plague, flood, fire and famine. But life survives and returns; it seems little more is required beyond reasonable monitoring from time to time, when nature may on rare occasions seem to be getting the worst in the fight for survival.
>
> When an irreconcilable conflict of interests develops between man and his environment, then the interest of man of necessity must be deemed to be paramount.[62]

(2) Consequences for Those in the Vicinity

While it might seem inconsistent to consider harm to the environment itself or to the common good but not harm to specific individuals, this latter point has seldom been directly confronted in either criminal or environmental cases. In the traditional criminal context, there is divided authority. Keith Devlin indicates in *Sentencing Offenders in Magistrates' Courts*[63] that the treatment by the English courts of attempts, which are much less heavily penalized than are full offences, although the maximum sentence and the *mens rea* are the same, suggests that the consequences are being taken into account. However, he questions whether this should be the case and uses as an example driving offences where there is no intent to injure but where the lack of care sufficient to ground the offence is small, while the consequences

themselves may be very grave. He suggests that the consequences are subsumed by the factor "gravity of the offence" and should not be given separate weight.

Sir Rupert Cross in *The English Sentencing System*,[64] speaking in the traditional criminal context, proposes that we focus on the amount of harm *intended*. But intent may be of little relevance in environmental cases. (See discussion, *infra*.) A middle ground was taken in *R.* v. *Mellstrom* in which a youth ran amok with a car, driving into a crowd of pedestrians and killing three people. The court stated that:

> While the enormity of the tragic consequences of an offence is a factor to be taken into consideration it must not be permitted to *unduly* distort the consideration of the court as to the appropriate sentence ...[65] [Emphasis added]

and that the death of three people should have no more effect on sentence than the death of one. If the case does reject consequences as a sentencing factor, it can be distinguished on the basis that the loss of even a single human life is so significant and tragic that it renders numbers superfluous. Direct support for the consideration of consequences as a factor is to be found in *R.* v. *Webb*, an Australian case, in which the court was held to be entitled to have regard to any "detrimental, prejudicial, or deleterious effect" on the victim.[66]

The rule that emerges from the cases appears to be that effects on victims can be taken into account, but should not be given undue weight, especially where the range of harm associated with an offence is great.[67] The Ontario Court of Appeal has recently endorsed consideration of actual effects on victims in criminal cases[68] and both potential and actual effects in public welfare cases.[69] The Québec courts have taken into account the fact that the residents of a town had been carrying water to their homes for two years as a result of a pollution in the river similar to the offence committed by the defendant (discharging manure to the river) in one case,[70] and in another case, imposed a fine of $10,000 because the defendant's discharge of manure to a river had forced one neighbour to spend $6,000 to construct a private aquaduct and had deprived other neighbours of drinking water and water for their livestock for a long period of time.[71]

It seems, then, that it is open to the courts to treat actual effects as an aggravating factor when only potential or probable effects are sufficient for conviction. For example, the courts consider irritation suffered by neighbours from dust or odours. The fine of $15,000 imposed on Tricil Limited of Mississauga, Ontario, after the company burned oil containing PCBs, appears to have recognized residents' complaints of odours, nausea, headaches and ear, nose, and respiratory ailments.[72]

In *R.* v. *Nacan Products Ltd.*,[73] Dnieper J. took into account similar symptoms occurring as a result of a chemical spill in imposing the maximum fine.

(3) Costs Borne by the Public

Since many environmental offences are matters of negligence, it is significant that the common law of negligence is not yet settled as to the extent to which those

who cause accidental harm have responsibility to reimburse public authorities for expenses which are due to their carelessness.[74] An argument can be made that the public has already paid for such services through taxes, and that reimbursing public authorities is not within the foreseeable ambit of risk. On the other hand, deterrence and the internalization of social costs favour imposition of such expenses on the polluter.

In addition to the forms of harm discussed above, the direct costs of remedying the offender's failure to comply with the law have been considered in at least one case. In *B.L.S. Sanitation*,[75] Loukedelis J. held that the fine should be commensurate with the burden imposed on the public. He levied a fine very close to the estimated cost of hiring contractors to remedy the accused's breach.

The extent to which damage and cost of repair can be taken into account will depend upon the evidence before the court. Where such evidence has been introduced on the liability issue, there will be no problem. Where it has not, Stuart J. suggests that the burden of adducing it is on the Crown.[76] The Crown appears to have no statutory role in the sentencing process, and the extent to which the Crown can and should take part in sentencing has been controversial in the past.[77] However, it seems to be a clearly established practice in Canada today for the Crown to make submissions as to sentence and lead evidence in support of them if necessary.[78]

To establish the gravity of the offence it is important that prosecutors call evidence of the potential and actual harm to the public welfare both in general and with reference to particular victims. The sort of evidence that would be called in a nuisance action could play a significant role in sentencing. John McLaren suggests the following as witnesses:

- chemists, as to level of contaminant;
- public health officials, as to incidence of respiratory diseases in the area;
- realtors, as to decline in property values;
- doctors with experience examining and treating patients from the area.[79]

He also quotes from Donnelly Hadden, in his article "Presenting the Air Pollution Case,"[80] who suggests calling lay witnesses to describe their observations of: the smell, feel and look of the pollution; the effects on their breathing and visibility; and, the discomfort caused by it. Such evidence could be relatively easy to adduce under the relaxed and informal rules of a sentencing hearing, as long as facts are not disputed. If submissions are disputed, they must be proved beyond a reasonable doubt, and sentencing hearings can become a lengthy, rigorous process.[81]

It is submitted that if public welfare offences are "preventive" and their purpose is to set high standards, no actual damage should be necessary to attract substantial penalties. The degree of risk or potential harm inherent in the activity should be the primary criterion for a substantial penalty, and actual harm an aggravating factor. This view is reinforced by the fact that actual harm is not an element of many environmental offences. Where conviction can be based on a mere possibility or a likelihood of harm, the fact that no serious harm resulted should not necessarily lead to an inconsequential penalty. Nor, where the most important concern is cumulative, long-term harm which may affect everyone, should the absence of specific victims be given undue weight.

B. Intent

In traditional criminal law, the offender's intent has a considerable effect on the sentence, and during the 1970s lack of intent played an important role as a mitigating factor in environmental cases. Even today, judges frequently refer to the lack of *mens rea* as a mitigating factor. There is no doubt that the accidental nature of most environmental offences that come before the courts exerts a downward force on the size of the fines.

It is submitted that in environmental cases, lack of *mens rea* should not be a mitigating factor. The Supreme Court of Canada decision in *Sault Ste. Marie*, marked a watershed in the role of *mens rea*. Unless a pollution statute expressly either includes or excludes both *mens rea* and negligence, the offence is likely to be considered one of strict liability. The essence of liability is negligence. Intent is not an ingredient of the offence, nor is lack of intent a defence. The accused may absolve himself by showing that he exercised reasonable care or made a reasonable mistake of fact, but whether his conduct was deliberate or reckless is irrelevant on the question of liability, except to negate a defence of due diligence.

The courts might bear in mind that the impossibility of proving intent was one of the reasons for the development of strict and absolute liability. Corporate decisions are taken behind closed doors. The only witnesses, corporate employees, are unlikely to come forward. No examination for discovery is available to the Crown. If the corporation claims innocent intent, and the offence was not so flagrant as to make intent obvious, the Crown will rarely be in a position to counter the claim.

Because of conflicting authority on this point prior to *Sault Ste. Marie*, and because of the need to relieve against the harshness of absolute liability, the polluter's innocuous or merely careless intent was often considered in mitigation of sentence. Now that the minimum requirement for conviction is absence of due diligence, however, the gravamen of a strict liability offence is carelessness itself. If carelessness is sufficient for conviction, should the mere fact that the offence was accidental warrant preferential treatment? It is questionable whether lack of deliberation or lack of moral turpitude ought to continue to be considered in mitigation of sentence. A more logical approach at this juncture would be to consider intent only at the other end of the spectrum, that is, wilfulness or recklessness as an aggravating factor.[82] Although there is no authority directly on this point, *dicta* in *R. v. United Keno Hill Mines Ltd.* are consistent with this suggestion.[83]

C. Savings or Gain Derived from the Offence: "Fruits of the Crime"

If a fine is to be effective in achieving the objectives of retribution and deterrence, it must at least approximate the dollar value of the fruits of the crime. Forer suggests that even a fine that is merely equivalent to the cost of compliance "gives the corporations the option of fighting or complying with no real penalty for failure to comply."[84] It might be argued that the expense and inconvenience of

defending a prosecution, added to a fine equal to the cost of compliance, would tip the scales in favour of compliance. But because of political pressures on government and the understaffing of government agencies, corporations are aware that the likelihood of prosecution is low. This approach may, therefore, merely present the corporation with an attractive gamble. A fine that exceeds the illicit benefit by some significant amount would appear to be justified in the name of deterrence. This factor is well recognized in tax cases and trade offences. In tax cases, for example, a fine is levied in addition to assessment of the tax evaded. The Ontario Court of Appeal in *R.* v. *Browning*,[85] levied a $10,000 fine expressly calculated to deprive the company of its net profit attributable to a trade offence.

In Working Papers 5 and 6 on *Restitution and Compensation* and *Fines*, the Law Reform Commission of Canada points out that depriving offenders of the fruits of their crimes should assist in discouraging criminal activity.[86] In Working Paper 16 on *Criminal Responsibility for Group Action*,[87] however, the Commission discourages the use of the fine to strip the corporation of illegal gains, advocating that this be done only through restitution or some as yet non-existent separate mechanism. The suggestion has great merit. A specific measurement of the ill-gotten gain with a super-added fine would probably result in a higher quantum as well as a more equitable and logical distribution of the proceeds of the prosecution. Until a formal schema for restitution is adopted, however, the fine should include an amount in excess of the ill-gotten gains.

This factor has limited application in environmental cases. As stated above, most cases that reach the courts involve accidental pollution, such as spills out of the ordinary course of events. Ongoing, routine emissions are usually dealt with through a negotiating process involving issuing orders, persuading companies to enter into formal or informal abatement programs voluntarily, or imposing terms or conditions in permits to carry out activities that cause pollution. When a spill or discharge is accidental, it is difficult to make a case that any profit was intended or achieved.

Even when an offence involves ongoing emissions, difficult engineering and accounting questions arise in attempting to determine how much money a company saved by not carrying on its business in a different manner. The question is one of opinion evidence by expensive expert witnesses. With the low maximum fines, the cost to the Crown of retaining forensic accountants to pour over the company's books prior to sentencing is difficult to justify.[88]

In practice, companies often argue that, at least in the case of accidental spills, they have lost money, since valuable product or raw materials have been wasted. However, there are cases when offenders profit from their offences; for example, by choosing to delay affordable abatement measures in favour of other corporate goals such as expansion or higher production. There are some occasions when ill-gotten gains can be quantified relatively easily. For example, when a hauler retained to take industrial waste to a suitable landfill site dumps it in a farmer's field instead; if the quantity and nature of the waste is known, it is possible to compute the transportation and disposal costs the hauler avoided. Even then, the prosecution faces evidentiary problems. If the only suitable site for disposal of the waste is in the United States (as is the case for many hazardous materials), the Crown must bear

the cost of bringing the site operator to the sentencing hearing, or of arranging to take commission evidence at the operator's locale, where procedural machinery exists to accomplish this. Morever, the site operator must agree to appear voluntarily (perhaps as a paid expert witness) as he is not subject to a subpoena issued by a Canadian court for two reasons: his nexus to the case is not sufficient to justify the use of compulsion to bring him before the court, and the subpoena has no effect in a foreign country.

The obvious approach of having a provincial officer obtain a quotation from the operator and present it in court suffers from the equally obvious defect that the officer's evidence would be hearsay.

In short, the difficulty of proving a cause-and-effect relationship between pollution and profit and of quantifying the savings or gain, limits the value of this factor in environmental cases. Nevertheless, the authors submit that the courts should be receptive to this approach in appropriate cases.

This approach was argued by the Crown in *B.L.S. Sanitation*[89] and was favourably commented on in *United Keno*,[90] where Stuart J. suggested practical ways of dealing with the evidentiary problems. The judge in *B.L.S. Sanitation* shied away from basing the fine on ill-gotten gains, stating only that "I am not entirely convinced that this type of case is appropriate to it." Perhaps the real reason was that there was no evidence before the court of the company's profit from refusal to comply. If this was so, however, the court need not have condemned the approach itself.

Stuart J. on the other hand, would make the amount of illegally realized windfall a minimum fine. He would place the onus of establishing the quantum on the corporation, since it is privy to the information. If information were not forthcoming, he would rely on any reasonable estimate from the Crown, or on evidence from competitors.

D. The "Worst Case"

In environmental, as in criminal cases, the maximum fine is to be reserved for the worst possible cases.[91] However, this does not mean that the maximum sentence can never be imposed because it is always possible to imagine a worse violation or a more callous offender than the one before the court.

It has been suggested that an offender whose conduct approaches wilful blindness, who permits discharge of a very large quantity of highly toxic matter, and who has been convicted previously of a similar offence falls within the "worst case" and merits the maximum fine.[92]

The factors that move a situation towards the worst case include surreptitiousness,[93] deliberateness, recklessness, attitude, and disregard for instructions of environmental authorities.[94]

E. Ability to Pay

In the case of an individual person, the courts must always take into account his or her ability to pay. When sentence is passed on an individual, legislation frequently provides for a term of imprisonment to be prescribed in default of payment. Since imprisonment for debt is to be avoided except in exceptional circumstances, the magnitude of the fine levied on an individual person must bear some reasonable relationship to his ability to pay. This presents a problem in the case of the offender who has little means but has committed a very serious offence, an issue which we will discuss below.

In the case of individual persons in environmental cases, the courts rarely state explicitly that they are basing quantum on ability to pay, but as we will discuss below, there is no doubt that this is one of the key factors, as evidenced by the fact that on average, smaller fines are imposed on individual persons and family corporations than on large corporations when they commit similar offences.[95]

It is submitted that the difference between the means of small offenders and the substantial maximum fines which courts are exhorted to keep in mind in setting quantum,[96] helps to fuel the public perception that fines are too low. People see offenders who have committed very serious offences "getting off" with low fines.

Since most polluters who come to trial are small businesses, the courts are frequently faced with the question of ability to pay. There is no doubt that acts that would result in large penalties if committed by wealthy corporations bring far smaller penalties because of the circumstances of most small business offenders. It is only the prosecutors' frequent reminders that the higher courts have ruled that general deterrence must be taken into account which keeps fines against small polluters as high as they are. The solution to this dilemma, it is submitted, lies in fashioning alternative remedies which allow a court to impose a stringent penalty without inflicting undue financial hardship. Such alternatives are discussed in Part II.

In the case of corporations, there is generally no explicit discussion in the case-law of ability to pay. It usually takes the form of discussion of the size and wealth of the corporation.

F. Size and Wealth of the Corporation

The size and wealth of a corporation are factors frequently mentioned in sentencing.[97] These factors usually come into play in relation to ability to pay, and the requirement of providing deterrence (that is, the fine should not be a licence to pollute). It is possible, however, that the judges also have in mind the principle that a higher standard of care might be expected of a larger corporation, and that the punishment to a corporation which has the resources to avoid pollution and fails to do so should be more severe than the punishment to a company lacking such resources. If the courts are thinking this way, they are not articulating it.

On the other hand, with regard to corporations, the courts have expressed reluctance to impose a fine that will drive the company into liquidation.[98] Although the courts, as mentioned, are reluctant to impose a fine on an individual person beyond his ability to pay, leading to his imprisonment in default, it is questionable whether the large corporation is in an analogous situation.

There is no rule of law that a corporation that is undercapitalized to meet its obligations, be they contractual, tortious, or criminal, is entitled to salvation from the consequences of its own acts. In fact, the opposite is true. A contract that cannot be carried out within the law is void or voidable as being contrary to public policy. If the fine warranted by the gravity of the offence is one the company cannot pay, a choice must be made between the company's interests and the broader public interest. The court in *R.* v. *The Canada Metal Co. Ltd.* stated that "in public welfare offences, the protection of the public is paramount to individual interests."[99] The ultimate balancing of environmental damage against the economic benefit of commercial enterprise involves policy choices that are within the purview of the legislature. But the courts will no doubt continue to be sensitive to the economic repercussions of sentencing on the corporation.

In this regard, a factor that cannot be ignored is that environmental cases are initiated, and initial appeals are heard, in the lowest courts. These courts are based in the community where the offence occurs, and the judges are intimately aware of the social and economic fabric of the community. They are likely to show more concern with the economic welfare of local businesses than the higher courts.

For example, in *R.* v. *O. E. MacDougall Liquid Waste Sales and Systems Limited*[100] and *R.* v. *Direct Winters Transport Limited*,[101] the two companies were charged with different offences arising out of the same incident involving unlawful transportation of liquid industrial waste. The illegal method was developed by MacDougall, which used Direct as the instrument for carrying it out. Direct, a large national trucking company, pleaded guilty and threw itself on the mercy of the court. It was fined $1,500. MacDougall, a small local company, put the Crown to the expense of a trial in which the evidence it introduced went primarily to mitigation of sentence rather than to defence. It was given a suspended sentence. On appeal of this sentence, the county court raised the fine to $500. The Crown had asked for a sentence at least equivalent to that of Direct, but the court made reference, as had the lower court, to the fact that this was a local company.

The higher courts would probably give less weight to local economic factors, but as long as the vast majority of environmental cases begin and end in the lower courts, local economics and local pride will be a factor in many sentencing decisions.

The converse of this line of reasoning is that too small a fine may have no impact on a large corporation. It may be regarded as a mere licence fee and have no deterrent effect. But more than this, the large corporation may have a greater capacity to deflect or absorb a fine. The courts have frequently recognized this, either explicitly or implicitly by imposing higher fines on larger corporations.

There is no question that the fines available under most environmental statutes are so low that even if the maximum were imposed it would be perceived as a mere licence. It will be submitted in Part II that the fines must be raised for large

corporations. Difficult policy decisions arise if large fines are contemplated. Our courts are just beginning to grapple with the problem in environmental cases, because until recently fines have generally been low. The Law Reform Commission of Canada takes the position that the true impact of the penalty is felt not by the corporation itself, which is described as a "mindless, lifeless symbol" but rather by the people within the corporation who may have a claim on the sum levied. The Commission cautions that attention should be paid to the special character of the corporation because of repercussions throughout "the economic matrix."[102] The Ontario Court of Appeal appears to have implicitly adopted this reasoning in *R.* v. *Van's Gifts and Books Ltd.*,[103] an obscenity case, when it reduced the fine to reflect the family ownership of the corporation. The result was equivalent to lifting the corporate veil to confer an indirect benefit on shareholders — something the courts have refused to do in civil cases.

It remains to be seen whether the corporate veil will be similarly lifted, as logical consistency would require, to impose an increased fine on a small corporation with ties to a much larger one. This is an important issue, particularly in a branch-plant economy like Canada's in which a small company with an unfamiliar name may well be a subsidiary of a much larger company, possibly one of the multinationals.[104]

In such cases, the small company may have few assets and little income. While it is in law a separate legal entity, in practice it may have little autonomy from its parent company. In particular, the parent company may impose spending limits. These companies often cannot make large expenditures on environmental control or occupational health and safety without approval of the parent company.

Under such circumstances it might be argued that it would be unfair to take into account resources of the parent company that are not available to the defendant company in deciding quantum of sentence, as they do not adequately reflect either the defendant's means or its degree of culpability. As a practical matter, however, no real deterrence is possible unless the parent company knows that it must accept some financial responsibility for the illegal activities of its subsidiaries. The court must be in a position to trace corporate connections to prevent wealthy corporations from hiding behind "dummy" corporations set up to shield them from responsibility for ventures involving great risk to health and environment. Assessment of ability to pay must be based on the wealth of the corporation or individuals ultimately initiating or controlling the offending conduct.

The Law Reform Commission seems to regard it as somehow unfair for shareholders, and employees who are entitled to share in corporate profits, to suffer for acts in which they did not participate. But this argument raises an image of the shareholder as one of the three monkeys: See no evil; hear no evil; speak no evil. Shareholders, no matter how small their interest or how little control they have over corporate policy, should not expect to reap the dividends of good corporate management and yet be insulated from the costs of corporate irresponsibility. Perhaps it is not unreasonable to consider that even small shareholders are often among the more affluent members of our society, the class that is best able to live up

to its economic responsibilities. The average person in Canada today does not have a stock portfolio to worry about.[105]

W. B. Fisse[106] also expresses concern for the consumer to whom fines may be passed on. But if fines are large enough to exceed the cost of compliance, they should deter competitors from following a similar course. Consumers should, in theory, find goods available at lower prices from law-abiding firms which do not need to pass on fines.

The Law Reform Commission states that:

> ... the possibility exists of developing a formula for corporations to equalize the marginal deprivation imposed on each corporation by a fine in relation to such factors as profits, total assets, and ability to deflect the impact of the fine.[107]

Proper consideration of corporate size and wealth requires evidence. The necessary information will sometimes be accessible to the Crown, since many corporations are by law required to make public reports. Private or closely held corporations, on the other hand, often need not make such filings nor need they reveal the identities of their owners. Even where the information is available, it may not be in a form that is admissible as evidence. Some rules of evidence may have to be changed to allow use of the information. Indicators which the court might consider in assessing the size and wealth of the corporation are taxable income, total capital,[108] "profits, assets, current financial status, and characteristics of the relevant market...."[109]

Apart from the evidentiary problems, the argument that criminal courts are ill-equipped to deal with such matters is unpersuasive: they do so in trade cases and in cases of complex commercial fraud involving individual persons. Difficult though the issues, both substantive and evidentiary, may be in this area, the courts have indicated a readiness to address them if given the opportunity.[110]

G. Anthropomorphic Factors

In environmental cases, as in white-collar crime, the courts have appropriated the language of street crime and attribute human characteristics to businesses. They frequently make reference to corporate "character," "attitude,"[111] and "remorse" as factors in sentencing. These traits are intuited from the company's previous activities and preventive or remedial steps it has taken prior to sentencing.

(1) Corporate Character

The claim that the offender is a "good corporate citizen" is often urged upon the court as a mitigating factor. It received judicial notice in *R.* v. *Giant Yellowknife Mines Ltd.*[112] and in *R.* v. *Canada Cellulose Co.*[113] The court in *Hoffmann-La Roche*[114] waxed eloquent on behalf of the accused, reciting its clean criminal record, the usefulness of its products and its free drug program for indigents. While it would be unrealistic to deny that corporate enterprise can ever be beneficial to society in

other than purely economic ways, claims to good corporate character warrant close scrutiny. Neither court cited here attempted to define what it meant by the concept.

Character in a human being is relevant to sentencing because it is believed to be a product of heredity, environment, or both, and to be in some sense fixed and predictable. A person's past behaviour can be used as a basis on which to make predictions about future conduct. There is little in the conduct of a corporation, however, that is necessarily fixed or immutable. Its policies are subject to change: with turnover in its directors, officers, and senior personnel; with the initiatives of its competitors; and, with its current profit-and-loss picture. A certain cynicism concerning corporate altruism is called for. Charitable programs may be motivated by the desire to boost sales indirectly or to acquire tax write-offs. Any act for which profit is the main motivation is surely, at the very best, morally neutral.

If by "good corporate citizen" the courts really mean that the defendant has no criminal record or has made significant efforts at co-operation and control of pollution, more direct consideration might be given under headings "I" and "L," *infra*.

Damage to the corporate image from prosecution is also a favourite claim of defence counsel, and received consideration in *Giant Yellowknife*.[115] The court pointed out that the company would have difficulty operating its mine in a climate of hostile public opinion. But studies of newspaper coverage of corporate prosecutions indicate that moral opprobrium or tarnishing of the corporate image as a deterrent is ineffective because of poor reporting and the neutral language used.[116] Corporations that deal only with other businesses, that sell through subsidiaries, or whose products are not associated in the public mind with a corporate name, may suffer no ill effects at all. Hoffmann-La Roche, for example, manufactures a large number of drugs which are purchased by prescription under generic or brand names that bear no connection in the minds of the consumers who pay for them to their manufacturers. Fisse suggests that formal publicity sanctions might be more effective, but notes that the impact cannot be controlled and may be neutralized by counter-publicity.[117]

The Law Reform Commission of Canada would require the company to notify shareholders of: the prosecution; the nature of the offence; and, the sanction.[118] However, in light of the lack of success shareholders had in the 1970s in dissuading Canadian corporations from investing in Brazil, or from supporting apartheid in South Africa, and in the 1980s in passing resolutions regarding control of acid rain at shareholders' meetings of Inco Ltd., one wonders how effective even this approach would be.

(2) Contrition or Remorse

As in street crime and trade cases, remorse or contrition has been recognized as a mitigating factor in environmental cases. Conversely, an absence of remorse is probably an aggravating factor.

However, there is a danger of giving too low a fine by attributing such human motives to corporations. Corporations cannot feel remorse. The individuals running

them can, and sometimes do. But it is almost impossible for a court to determine on the basis of statements by defence counsel or corporate executives at the sentencing hearing whether remorse is genuine. Moreover, environmental offences often result from numerous small omissions at various levels in the corporation. The remorse of the official who attends before the court does not necessarily reflect attitudes toward the offence throughout the corporation.

In *United Keno*,[119] Stuart J. attempted to come to grips with this problem by focussing on corporate actions rather than words. While suggesting that indications of genuine regret are relevant to the determination of the degree of sanction needed to achieve corporate "rehabilitation," he suggested that the sincerity of expressions of regret can be gauged by the speed and efficiency of corporate action to rectify the problem, by voluntary reporting of the violation to authorities, and by the personal appearance of senior corporate executives before the court to state the company's regret and outline plans to avoid recurrence of the offence. In contrast, Bourassa J. in *Panarctic*[120] placed little weight on the appearance of a corporate executive as "it is only proper that the defendant have a human representative present at its sentencing."

Before *United Keno*, corporations were usually represented solely by counsel at sentencing hearings. Since Stuart J.'s decision, the appearance of managers or executives has become a formula, and may mean nothing more than that counsel has read the *United Keno* decision.[121] Read together, it is submitted that the two decisions mean that remorse is to be gauged primarily by actions. Production of a human spokesperson will be a factor, but only a minor one, as the public has a right to expect this. The position of the spokesperson within the corporation and his ability to ensure that any promises he makes to the court are kept will be relevant to the extent that his presence indicates corporate contrition. In general, the higher he is in the corporation or the more closely he was involved with the commission of the offence, the more weight should be given to his presence. Similarly, whether he testifies under oath and makes himself subject to cross-examination, submits future plans in writing, and whether such plans are vague and general or specific and detailed should be taken into account. Conversely, the failure to produce a person within the corporation should be an indication of a lack of remorse and treated as an aggravating factor.

We submit that the concept of corporate personality is not to be confused with possession of human qualities, and that the courts ought to be leery of indulging in anthropomorphic attribution. Corporations are not human beings writ large. The individual's thirst for money is tempered by other values and constraints on opportunity. The corporation is an instrument designed expressly to overcome the constraints on opportunity and its institutional systems are often designed to override other individual human values that conflict with the goal of maximizing profit. It is trite sociology that people in groups do things they would not do alone. One of the effects of subordination of individual human motivation to corporate goals, Stone suggests, is a "reduced sense of responsibility for one's own acts that occurs when men are brought together into large institutional frameworks."[122] Stone points out "the law's failure to search out and take into account special features of business

corporations as actors that make the problem of controlling them a problem distinct from that of controlling human beings."

The objection to anthropomorphic language is that it obscures these differences and, to the extent that language shapes our perception of reality, impedes the discovery of the solutions to deterring corporations from ravaging the environment.

H. Guilty Plea

As in criminal cases, the courts treat guilty pleas in environmental cases as mitigating factors.[123] There are two reasons for this: the money saved, and the plea as an indication of contrition.

There is no doubt that guilty pleas save the public a lot of money. Environmental prosecutions tend to be exceptionally complex, time-consuming and expensive. Investigation involves the use of laboratory facilities and of personnel who possess technical expertise. The site where the pollution occurred may be remote and costly to reach. At trial, experts must be called to testify to the continuity of exhibits and to explain scientific tests and technology. When the defence of due diligence is raised, the Crown must rebut it with evidence of what a reasonable system of control would have been. This also requires the use of expert witnesses. Often the only experts in the vicinity work for the defendant, so that the Crown must bring in its own experts from outside the area. Frequently, the prosecuting agency does not have staff with the necessary expertise, and must retain outside consultants at great expense. The cost to the taxpayer of the investigation alone in *R.* v. *Cyprus-Anvil*[124] was $18,000.

Consequently, some appreciation of a guilty plea may be reflected in the fine. This will not be so, however, where the accused knows that it has been "inescapably caught,"[125] as occurred in *Cyprus-Anvil* where a very large quantity of sodium cyanide of very high toxicity was released into the mine's tailings pond over a long period, and as occurred in *R.* v. *Canadian Industries Limited.*[126] Avoidance of a lengthy and expensive trial was cited, *inter alia*, as a mitigating factor in *R.* v. *York Sanitation Co. Ltd.*[127]

We suggest that in addition to the qualification that guilty pleas will not be considered mitigating factors where the accused pleaded guilty only because it has been inescapably caught, the courts should give less credit to guilty pleas in cases where the plea is left to the last minute when the decision as to how the accused would plead was made, or could easily have been made, at an earlier date.

This is not to suggest that failure to enter a plea at an earlier date should be considered an aggravating factor. An accused is innocent until proven guilty. It would be a serious interference with his civil liberties to penalize him for exercising his right to remain silent until the date of the trial.

However, the reality is that by the trial date in a complex environmental case, thousands of man-hours and dollars will have been spent on trial preparation. This expenditure may exceed by far the time and cost of the trial itself. In many cases, the defendant or its counsel has been aware for a long time, or could have been aware

with timely attention to the matter, that there was no defence on the merits. Delay in advising the Crown of the intention to plead guilty may merely be a result of a lack of attention to the matter, or a deliberate attempt to delay plea bargaining until just before trial. By that time the holes that exist in every case are looming largest in the mind of the prosecutor and he is psychologically most vulnerable to negotiating a lower sentence.

If the courts were to make explicit reference to their reluctance to treat guilty pleas as mitigating factors in cases where an early communication to the Crown could have resulted in substantial savings of public funds, defence counsel would undoubtedly take note. This might save large sums wasted on unnecessary trial preparation. In the absence of such judicial pronouncements, there is little to counterbalance the natural tendency to procrastinate.

This is not a suggestion that any person who has a defence on the merits should abandon it on the basis of economic expediency, or that it is wrong to take advantage of technical defences or the right to put the Crown to the strict proof of its case. Moreover, defence counsel should take as long as they need to explore fully the strengths and weaknesses of their client's case before giving their final advice. However, neither is it wrong for a court, it is submitted, when a defendant chooses to enter its guilty plea at the eleventh hour, to take into account public funds thrown away on unnecessary trial preparation, should the Crown make submissions to this effect and the defence fail to put forward a convincing case that a decision could not reasonably have been reached earlier.

We have already indicated what we think about the idea of corporate "remorse." We also submit that the courts should not be overwhelmed with gratitude for the generous gesture in saving the taxpayers time and money. In the corporate community, the decision to plead guilty is frequently, if not always, purely an economic one. The company may wish to avoid the cost of experts and lawyers, hide evidence that would come out at trial, or avoid adverse publicity. Although the court is never told of these motives, corporate counsel are often frank with the prosecutor in stating this during plea negotiations. In fact, frequently the branch plant personnel continue to feel they have done nothing wrong and wish to defend the case, but they are overruled by a head office in a distant city or a different country, more concerned with the overall profit picture, corporate image, or good relations with regulatory agencies than with the feelings of the people immediately responsible for the offence.

What we are saying, perhaps, is that a guilty plea should be a neutral factor in environmental cases unless there is some compelling evidence to show that it really indicates remorse. Where a defendant has allowed the Crown to spend a lot of public money before putting his mind to whether he has a defence or before communicating his intentions to the Crown, this does not indicate remorse. Proof that such delay was unnecessary would be very difficult, but no more difficult than proving whether a guilty plea was motivated by remorse or by a realization that the defendant had been inescapably caught. For example, a failure by defence counsel to return Crown counsel's telephone calls or acknowledge correspondence might be considered lack of diligence by the defendant in the absence of any appropriate explanation.

The difficulty with our suggestion is that the defendant's right to be presumed innocent until proved guilty and to use all legitimate avenues and take all the time he needs to defend himself has been taken to mean that, while the Crown has a duty to provide disclosure and not to take the defendant by surprise, the defendant has no concomitant duties. As long as this is so, it is difficult to establish any standards of conduct against which to weigh the pretrial behaviour of defendants.

We respectfully submit, however, that it does not follow from these rights that it is legitimate for the defendant to sit back and wait for the Crown to make a mistake or to delay for the sake of delay if he wants the court to exercise a purely discretionary power of granting leniency on the basis of his guilty plea. The solution may lie in establishing guidelines for conduct which the defendant need not follow, and which will not be taken into account in determining his guilt or innocence, but which he must follow if he wants his guilty plea considered in mitigation. For example, defendant's counsel might be told that evidence that they were actively exploring defences throughout the period between issuance of the summons and the date set for trial would be evidence of good faith, whereas evidence that an expert was retained a few days before trial and advised the company it had little chance of success would mitigate against a lowering of the fine. A showing that defence counsel had communicated possible defences to the Crown expeditiously and that the Crown had not convincingly rebutted them might also evidence good faith. There is nothing inconsistent with fairness in establishing such guidelines because they address themselves only to the conditions under which the court will exercise a discretion and not to any fundamental right of the defendant.

I. Co-operation and Expenditures

The courts appear to be particularly mindful, in environmental cases, that the ultimate goal of the legislation is the reduction in pollution, not punishment *alone*. Thus, efforts to prevent the offence from occurring or to remedy the effects of a company's breach and to prevent repetition will be treated as mitigating factors.

The result of well-intended but ineffective preventive measures, co-operation and mitigation of harm after the fact is not to reduce the fine to a low or nominal one. Taking into account preventive and remedial measures, the courts tend to impose fines in the middle of the range for large corporations, and order fines of $1,000 or more for individual persons and small corporations. In each of the cases described below, the maximum possible fine for each count was $5,000.

(1) In Reporting, Clean-up and Control of Pollution: After the Fact

The court in *Canadian Industries Limited*[128] was impressed by the fact that the accused voluntarily reported a copper sulphate spill that would otherwise have gone undetected by the government. The company was extremely co-operative in the investigation, flying government officials over the site in a company airplane. As a

result, a fine of only $1,000 was imposed. Similarly, efforts by Canada Tungsten Mining Corp. Ltd. to consult with, and act upon, the advice of government officials, and their expenditure of $39,000 to bring the problem under control, resulted in a lighter-than-average penalty.[129] The acceptance by the company of a more expensive solution, over a less expensive but more hazardous one, was cited in *Canada Cellulose*.[130]

The personal appearance by corporate executives to outline plans to avoid future repetition is considered important by Stuart J.[131] However, unless such statements are presented as a formal undertaking to the court, preferably in writing, or incorporated into a court order (where this is possible), a court might be wise to bear in mind the dictum that the road to hell is paved with good intentions.

In *Cyprus-Anvil*,[132] the maximum fine of $5,000 was reduced on appeal to $4,500 in consideration of the fact that after the discharge, the company had made repairs promptly and had co-operated with the authorities. In *Plant National*,[133] the company made expenditures for pollution control and completed the installation of a pollution control system between the date of conviction and the date of sentencing. On this basis, it argued for a fine of $500. However, on the basis of general deterrence, the court accepted the Crown's recommendation that the fine be $1,000.

There can be no greater assurance that an offence will not be repeated than relocation or cessation of offending operations. In *R.* v. *Metal Flo*,[134] the company was charged with five counts of causing excessive vibrations in a residential area and one count of operating without a required approval. By the time the matter reached court, the company was in the process of relocating its entire operation to a rural site with no immediate neighbours and installing controls to minimize vibration. On a guilty plea, the court accepted the Crown's recommendation for a fine of $200 on each count, a total of $1,200. In *R.* v. *Tricil*,[135] by the time of sentencing, abatement had been achieved by the company's discontinuing the offending aspects of its operations. It was fined $15,000 ($3,000 on each of five counts). In *R.* v. *Festival Sales and Products Ltd.*,[136] the company gave the court a formal undertaking to discontinue the offending operations and was fined $2,000. In *R.* v. *Russell*,[137] a fine of $2,500 was upheld on appeal against a farmer who permitted a discharge of pig manure into a stream, even though he had since given up farming. Indeed, the highest fine ever levied in Ontario, and the highest under the *Fisheries Act* up to that time, $64,000, was levied against a company that proposed to close the offending plant "before long."[138]

Thus, even when companies relocate or shut down offending operations, fines have still been in four figures.

(2) On Pollution Control: Before the Fact

Courts often treat past pollution control efforts and expenditures as mitigating factors regardless of whether they related to the area of operations that caused the problem which is the subject of the case. In *R.* v. *American Can of Canada Limited*,[139] the court noted that while the company was sometimes negligent and

indifferent to the consequences of its actions, it had also taken some positive steps to control the pollution. Some of these steps were found to be unsatisfactory or unworkable and were abandoned. The court imposed the highest total fine up to that time: $64,000 (sixteen counts at $4,000 each). In *R.* v. *Barnes*,[140] the company had made substantial expenditures in attempts to reduce a dust problem. It was fined $2,500. In *R.* v. *The Canada Metal Co. Ltd.*,[141] the company pleaded guilty to two counts of emitting lead into the air and sentence was suspended, on the basis of an agreed statement of facts which acknowledged that the company had: co-operated with the Ontario Ministry of the Environment; complied with control orders; agreed to the need for upgrading their existing pollution control equipment; and, ordered better equipment, the delivery of which had been delayed until after the event. On appeal, on the basis of the same facts, the penalty was raised to $5,000 with costs against the company fixed at $500. In *R.* v. *Holmes Foundry*,[142] the court imposed a fine of $3,500 for a second conviction, stating that it assumed it was virtually impossible to operate a foundry without emitting some dust and that the company was "making a fairly realistic approach to solving their problem."

One court has recently injected a note of caution in respect to the use of co-operation and expenditures as mitigating factors. In *R.* v. *Echo Bay Mines Ltd.*,[143] Northwest Territories Territorial Court Judge Peter Ayotte warned that "there must be a limit to how far [the conduct and good character of a defendant] can go to reduce the penalty imposed."

With respect to activities before the event, His Honour stated:

> [I]t is especially important in cases such as this for the Court to be mindful of the harm sought to be prevented by the legislation involved and not to dilute the force of the law by placing too much emphasis on matters which are after all only marginally relevant to the substance of the charge. To do otherwise would be to encourage a very low standard of compliance. Too much emphasis, for example, on other efforts in the environmental field in determining sentence will encourage corporations to pick and choose those areas of their operations where time and effort will be spent to comply in the knowledge that the penalty for non-compliance in other areas will thereby be substantially reduced. The dangers of such an approach are well-exemplified by this case where time and money were expended by the defendant on the dismantling and disposal of abandoned structures while ignoring repairs to and inspection of a fuel handling system known to be less than desirable. While the former efforts are laudable, they can have only a limited effect on the penalty for neglecting a fuel handling system whose malfunction could potentially have much greater and more permanent effect on the environment than the presence of abandoned structures on the mine property.[144]

With respect to remedial activities he added:

> Similarly, while the response to the spill and the subsequent plans and efforts to upgrade and change the fuel handling system show a serious concern to prevent any future occurrences such as this, they are after the fact, as it were. This legislation is not intended to encourage compliance *after* an environmental mishap but rather to demand compliance *before* those mishaps occur so as to prevent them.[145] [Emphasis in original]

Conversely, corporations that allow pollution to persist over long periods without attempting to remedy the problem[146] or proceed to pollute in the face of warnings of illegality[147] can expect large fines.

J. *Laxity of Government Agencies*

Particularly in recent cases, the courts have been reducing sentences as a result of government negligence or laxity. In *R.* v. *Suncor Inc.*, an Alberta Provincial Court fined the company $8,000 for a violation of section 33 of the *Fisheries Act* by depositing grease and oil into the Athabasca River. The maximum fine is $50,000. Horrocks J. stated that he took into consideration the Alberta government's failure to control violations by the company over the past fifteen years. "If the government watchdogs aren't going to get worried" he stated, "then there doesn't seem to be a need for the company to get worried."[148] In *R.* v. *Wilby and Smithaniuk*, Wilby advised a government official of the nature and location of a dock he intended to build. The official raised no objections, made no visit to the site and made no record of the contact, leaving Wilby with the impression that he had oral permission to proceed and that this was adequate. Later, Wilby and a neighbour who had relied on Wilby's contact and a letter he had previously received from a different government agency were charged under the *Fisheries Act* with constructing the dock without a permit. In fining the defendants $10 each, Collingwood J. expressed astonishment at the government's "apparent lack of system or procedure to effectively accommodate incoming enquiries."[149]

Sad to say, there is a real need for the courts to protect even the guilty, in some way, from government laxity and incompetence, and sentencing mitigation is a good way to do it. Nevertheless, the courts should exercise great caution in making such judgments. They should distinguish between a mere failure to prosecute vigorously all offences, and turning a blind eye to offences which agencies know are occurring, and actively misleading defendants.

Stuart J. has suggested that:

> If the responsible government agency is not pressing for compliance, or is actually encouraging non-compliance through tacit or explicit agreements to permit non-compliant operations, the corporation cannot be severely faulted.[150]

A similar approach was taken in *R.* v. *Spataro Cheese Products*.[151] O'Connor J. had previously rejected this approach in *R.* v. *Cyprus-Anvil*.[152] He held that:

> The primary responsibility for the proper design, construction, inspection and maintenance of the retaining wall rested with the defendant company. Nothing in the legislation nor the fact that the government inspectors did not register any complaint concerning any weakness or fault in the retaining wall, diminishes the company's responsibility ....

Similar arguments were rejected in the *B.L.S. Sanitation* case.[153]

The approach is of doubtful value for policy reasons. Polluters should not be encouraged to stall for time through protracted consultations and negotiations with government agencies where the requirements of the statute are clear.

Nor is the court in a position to evaluate the adequacy of the resources available to enforcement agencies for purposes of "pressing for compliance." (See note 150, *supra.*) In cases where the agency is, in the words of Stuart J., "actually encouraging non-compliance through agreements to permit non-compliant operations," the

defence of abuse of process, and possibly similar defences based on the *Canadian Charter of Rights and Freedoms*, are available.

Unless the government has given actual assurance that the conduct was acceptable, laxity of enforcement should usually be a neutral or a minor factor. Laxity in enforcement will often result in the outcome of prosecution being a first conviction, rather than being a second or subsequent one, which would carry a higher fine. The leniency normally accorded first offenders should be sufficient mitigation in most cases.

K. Reasonableness of Standards

A related issue, the reasonableness of the statutory standard, was dealt with in a highly questionable manner in *United Keno*:

> It is nevertheless relevant to consider corporate evidence of the excessive nature of environmental regulations. In the absence of evidence suggesting that reasonable environmental management is fostered by the imposed standards, some mitigation in sentencing is appropriate where the company is striving to meet the standards. In this case, the evidence substantially favoured the corporation's view that the standards were excessive and were not designed to serve any articulated environmental management scheme.[154]

The proposition that the standard itself can be put on trial is objectionable on political science, legal, and scientific grounds. The prosecutor cannot be presumed to know the purpose for which a standard was set or judge its scientific validity so that he can speak to, or call evidence on, these matters. Public servants within different branches of the same agency may not even agree. Nor are civil servants or the courts in a good position to read the minds of the legislature or Cabinet which passed an Act or promulgated a standard.

As for ecological considerations, the proposition does not take into account the degree of subjectivity and uncertainty that is inherent in any political-scientific judgment about the degree of risk or margin of safety that is appropriate. Judgments must be made and acted upon. The choice to prohibit or restrict activity must be made in the absence of absolute certainty about many factors, including: persistence and toxicity of contaminants, their synergistic and cumulative effects, latency periods for illness, ranges of susceptibility of human beings subjected to exposure, pathways of pollutants' migration, and the assimilative capacity of the environment.

The courts can play a limited salutary role in acting as a watchdog as long as the principle of parliamentary sovereignty is respected. While the courts cannot refuse to impose a conviction on the basis of harsh laws, their views can be made known through the sentencing process. However, this power should be exercised with extreme caution. There is a danger that such value-judgments can be highly idiosyncratic. It is submitted that what Stuart J. meant was that the standard had an oppressive effect in this particular case. It is unlikely that the court intended to substitute its views for the collective wisdom of the legislative arm of government, which has available to it a wider data base in establishing a standard than does the

court in applying it in a single case. Any questions about the standard itself should be expressed in sentencing only after the court has heard enough cases under the standard to be sure of its ground.

L. Prior Convictions

This factor appears to be treated no differently than in traditional criminal cases. Lack of a previous record is a mitigating factor. Conversely, subsequent offences usually attract substantially higher fines, and are a factor in determining the "worst case."[155]

M. Tax Consequences of the Fine

If pollution fines are tax-deductible, the actual impact of the fine on the offender may be much less than the court intended it to be. This factor does not appear to have been addressed as yet in any environmental case. However, the issue of deductability of fines in regulatory offences arose in *Day and Ross* v. *R.*,[156] a tax case. There the court held that $65,000 in fines incurred by a corporation for overweight trucks was tax-deductible as a business expense because the fines were incurred for the purpose of earning income, and were not outrageous transgressions of public policy. The case is discussed by Neil Brooks in "Computation of Business Income — Deductibility of Fines."[157] He examines various possible rationales for the decision, and notes that the result of the *Day and Ross* approach will be that the taxpayer will consider the tax savings in deciding whether the risk of conviction, if he commits an offence, justifies the profits. However, it appears to be Revenue Canada's practice to disallow fines as deductions.[158] In addition, there is authority contrary to *Day and Ross* v. *R.* and the decision may not stand. If it does, it may be proper for the courts to consider tax savings in assessing the size of the fine necessary to accomplish deterrence.

N. Dismissal of Employees Responsible for the Offence

A favourite submission of defence counsel is that the employee or employees responsible for the offence have been dismissed, or more cryptically, "are no longer with the company." We do not know of any case in which the courts have given effect to such submissions, perhaps because they have no way of knowing whether this change in personnel has resulted in a higher standard of corporate conduct or merely means the company has found a convenient scapegoat.

Of course, the court can attempt to determine: whether the employee was acting on his own or following instructions by receiving evidence of the lines of authority in place at the time of the offence; corporate policies and practices; the instructions

issued to the employees; the amount of training given by the company to employees; and, the appropriateness of the amount of discretion given to the employee. However, this entails serious difficulties. First, there is substantial danger of fabrication or exaggeration by company representatives, as the Crown is unlikely to be in a position to counter any such evidence except by evidence from the fired employee, which will often be unreliable or, even if it is reliable, perceived to be unreliable. Corporate responsibility, especially in large companies, is diffuse. Although people think of authority as formal and hierarchical, authority within large organizations is frequently horizontal as well as vertical, and informal as well as formal. Several departments may have been involved in the offence. The employee may have been given conflicting messages by the company. His formal instructions may have been to give environmental protection priority; but the pressures placed on him by his peers and superiors may dictate putting production first.

It cannot be over-emphasized that corporations and corporate responsibility have no objective reality. They are constructs invented to fulfil social purposes. The "directing mind and will" of the corporation, corporate "*mens rea*," the corporation as a "person" are legal fictions created to accomplish certain goals. For this reason, the approach to sentencing when this issue is raised should be a practical approach designed to achieve general and specific deterrence without excessive concern about ephemera such as placing responsibility upon a single person within the corporation. It is submitted that the approach taken by the Ontario Court of Appeal in *R. v. Adam Clark Co. Ltd.*[159] is the correct one when a court is faced with such issues. In a case involving charges of giving secret commissions contrary to subsection 383(3) of the *Criminal Code*, by the time of sentencing the employees who committed the act had left the company, the activity had ceased, and the company had been purchased by a new group of shareholders having no knowledge of the illegal activities. The court ruled that:

> [A]lthough the fact that the present shareholders were not involved in the commission of the offences is a relevant factor to be considered in deciding the amount of the fines, this does not obviate the need for a sentence that will act as deterrent to others and make it clear to corporations that they must properly supervise their employees in the performance of their duties.

O. Ease or Difficulty of Preventing Pollution

While there is little direct authority on point, it would seem reasonable to assume that if there are simple and inexpensive steps that could have prevented pollution, the failure to take them should be an aggravating factor. Conversely, the courts have taken into account the difficulty of controlling some pollution in certain operations, while holding that this should not be given undue weight.[160] If a company chooses to carry on difficult and hazardous activities, it must assume responsibility for them. It is submitted that where a person *knows* he is engaging in operations which are difficult to control, and fails to take all the possible steps to avoid pollution, he is even more culpable than a person carrying on less difficult activities.

He has breached a higher standard of care. Under these circumstances, knowledge of difficulty is an aggravating, rather than a mitigating factor.

P. The Social Utility of Enterprises

The value of business activities to the community is recognized, but does not justify putting profit before people. In the words of Dnieper J.:

> Our society, of course, needs the manufacturer of products made by like corporations and enterprises, yet such manufacturing cannot be done at the expense of others. The responsibility must lie upon the manufacturer to ensure that others do not pay the price of such enterprise.[161]

III. Is There a Special Approach to Sentencing in Environmental Cases?

A. Discussion

Several cases have suggested, expressly or implicitly, that sentencing in public welfare cases generally, and environmental cases specifically, requires a different approach from sentencing in criminal cases.[162] As the discussion above illustrates, there does seem to be an ambivalence in the minds of judges as to whether environmental offences are morally reprehensible, so that the sentence must express repudiation, or morally neutral, so that deterrence is the governing factor, tempered by retribution only as a restraining force. If one views negligence as morally neutral, then perhaps the sole purposes of punishment are to remove the unfair advantage the law-breaker has obtained by ignoring the rules and to deter him and others from breaking the rules. The retribution in the sense of a "punitive" sanction on top of the deterrent one would be limited or non-existent. However, is negligence in fact morally neutral, or is there instead a range of immorality from morally neutral to criminal within public welfare offences? Does carelessness with dioxin carry the same moral weight as carelessness with dust from a granary? Or to adopt Weiler's example,[163] is illegal parking in a student parking lot the same as illegal parking which blocks the emergency entrance to a hospital? Probably there is no dichotomy between offences *mala per se* and *mala prohibitum*, but a continuum of conduct in which a balance must be found in each case between the moral and the utilitarian approach. The most important distinctions do not appear to be between "criminal" offences and "regulatory" offences, but between "expressive" and "instrumental" offences, between "omission" and "commission," between "street crime" and "white-collar crimes," and between "corporate" offenders and "individual" offenders.

However, the most important differences in sentencing are practical rather than theoretical considerations that flow from factors such as the fact that most polluters are corporations rather than human beings and that the risk of pollution is inherent in many otherwise socially useful activities and can be difficult or close to impossible to control.

Pollution offences are closely analagous to white-collar corporate crime. More can be learned about the special nature of environmental offences and more useful ideas for innovative and effective sanctions can be gleaned from the literature about corporate crime than from any other source. The problems in sentencing corporations in some respects flow from the failure of the substantive law to come to grips with the special nature of corporations. Corporations can structure their affairs so that everyone and no one can be proved responsible in law. The prosecutor is often faced with the difficult decision whether to prosecute a low-level employee, a senior officer, or the corporation itself. Prosecution of each may be rendered impractical by evidentiary rules. Conviction of one may preclude conviction of the others. If both individuals and the corporation are convicted, the court may be reluctant to levy a penalty against both of them.

Effective deterrence may require conviction and penalties against both the corporation and the people within it. If the individual person alone is penalized, the corporation can hide behind the "bad apple" theory of responsibility. The corporation then has no "record" and is not subject to higher fines for subsequent offences.

If the corporation alone is convicted, this also creates problems. Occasionally, there really is a bad apple in senior management or ownership. The bad apple may move from corporation to corporation without ever attracting any personal legal responsibility. A more frequent problem is the empty corporate shell, against which a fine may be levied, but from which it cannot be collected.

Achieving an appropriate distribution of quasi-criminal responsibility between corporate entities and their human "agents" will require some substantive law reform. This would alleviate some problems in sentencing. However, not all the sentencing problems that arise from dealing with corporations can be solved by creating joint and several individual-corporate liability. There is also, as Stone suggests, a need for institutional reforms to make the corporation less susceptible to being used as a tool for subordinating human values to economics and for reducing individual responsibility for antisocial actions.[164]

A second difference between traditional sentencing considerations and sentencing in environmental cases arises from the difficulty of completely eliminating some kinds of pollution.

Pollution is frequently the by-product of legitimate activities from which the public benefits. These activities cause pollution because they produce wastes, for which no perfect and infallible reduction, recycling, storage or disposal methodology yet exists.

On the one hand, the courts recognize the special importance of the fight against pollution and the need for special efforts to protect our fragile environment and restore previous damage. There is an implicit, if not explicit, recognition that although such damage is often indirect, cumulative and gradual, the long-term effects can only be prevented by halting the individual incidents that produce it.

> The fight against such pollution is not confined to this Province. It is national and international as well. It is probably one of mankind's greatest enemies and man has declared war against it by such a prohibitory and regulatory statute as the *Ontario Water Resources Commission Act*.
>
> Because of this the deterrent aspect must be taken into consideration in determining an appropriate penalty to impose upon one who offends against a prohibitory provision of that Act, not only to deter the particular offender from committing this offence against man again, but to deter others as well.[165]

On the other hand, the courts realize that this long-term potential threat must be balanced against immediate technological and economic realities, in sentencing if not in convicting.

In *R.* v. *North Vancouver*,[166] the District of North Vancouver operated a sewage pumping station adjacent to Hastings Creek, which has a salmon run. The station's system for dealing with emergency overflows was a planned temporary discharge of sewage into the creek. The pumping station was designed so that the only alternative to this would be a back-up of sewage into homes or onto streets, causing a public health hazard.

The court recognized (at page 158) that for the purpose of protecting human health, the system had been designed "to do precisely that which is prohibited by the *Fisheries Act*," that it was operated in accordance with accepted engineering practices, and that alternative technology might be unavailable or prohibitively expensive.

It suggested that where pollution results from the planned operation of an elaborate and costly system already in place, there are three sentencing options, depending on the availability of reasonable alternatives:

> 1) If there is no known technology to replace that which by its very operation violates environmental legislation, it would be absurd to impose any fine at all....
>
> 2) If there exists the possibility for a change to the system, but one which is not in general use and is, as yet, generally unproven at least in this jurisdiction, the Court should consider a penalty which will, in effect, force further investigation into that alternative or others....
>
> 3) If there exists known technology which is in widespread use elsewhere, which is within the financial capabilities of the defendant, and which has been avoided in the past on the grounds of budgetary priorities, the penalty should be substantial enough to express the Court's disapprobation and force a change in the defendant's priorities.[167]

While we have stated that there do not appear to be any fundamental differences between sentencing principles in traditional criminal cases and public welfare offences, there is a difference in emphasis which may be reflected in sentencing.

The offence based on negligence appears to lend itself more to general deterrence, to consideration of actual and potential damage, to the role of the

victim, and to a wider array of sanctions aimed at prevention and restitution or compensation.

While there appears to be no insurmountable barrier to such considerations in criminal law, the development of these considerations in offences of negligence may be accelerated by the shift in focus from *mens rea* to risk of harm as the central element of the offence. Such statements as those quoted above from the *Sault Ste. Marie* case and the statement in *Cotton Felts* that "[t]o a very large extent the enforcement of such [public welfare] statutes is achieved by fines imposed on offending corporations"[168] may provide fertile soil for more substantial and more varied penalties.

The characterization of public welfare offences as civil rather than criminal may also support procedural innovations in sentencing. It is generally recognized that where the stigma of criminality does not attach to an offence and where the liberty of the individual is not at stake, there is room for relaxation of stringent criminal procedures. Thus, for example, while in criminal cases the Crown must disclose its case but the accused may maintain absolute silence and search warrants are needed to obtain evidence, in civil matters mutual discovery and production of documents are considered unexceptionable. Similarly, the differences may justify reversals of onus in evidentiary matters that would be unacceptable in criminal cases. For example, recognizing that the complexity of corporate structure, business arrangements and pollution control systems make it impossible for the Crown to prove negligence, the Supreme Court has shifted the onus of proving reasonable care to the defendant. The same fact (that the corporation is generally the only one that has the means of proving its size and wealth, profits realized by the offence, and the costs and benefits of compliance with the statute), might support changes in sentencing procedure such as: (a) a shift in the onus of proof of ability to pay, or illegal gain, to the defendant; (b) discovery by the crown; or (c) a separate trial of the quantum issue before a different court official than the trial judge (similar to the use of a master in civil proceedings).

The characterization of public welfare offences as civil might also provide additional support to the use of the sentencing process to provide compensation or restitution to victims. The force of arguments that the criminal courts are "not a collection agency" is blunted by the characterization of these offences as "civil," since in the traditional sense of the word, civil action implies in addition to a system of righting wrongs, a method of providing redress through injunctions and damages.

In summary, in characterizing public welfare offences as civil, thus departing from criminal procedure, and importing the common law doctrine of negligence as the test of liability, the courts and the legislatures have blurred the distinction between criminal and civil responsibility. Since there is no longer any magic in these labels, both procedures and remedies should evolve on their own merits to meet the needs of the community.

Once we depart from the magic of labels, it is not far to a realization that putting the onus on the defendant, who in effect, petitions the court for clemency on

sentencing to show why he deserves it, is not to force him to incriminate himself or otherwise interfere with fundamental rights and freedoms. He has the right to remain silent, but in response the court has the right to assume he can afford to pay any amount up to the maximum fine set by statute. Similarly, the fairness of taking into account the victims in sentencing is also self-apparent in our submission. We doubt that the determinants lie in the words "civil" and "criminal," but if they do, then the characterization of environmental offences as civil supports our recommendations.

B. Conclusion

The vast majority of pollution cases which come to trial lack the dramatic elements that would attract the higher penalties. Where those elements may be present, compassion for those whose ability to pay is limited will frequently mitigate the penalty merited by the gravity of the offence. Under these circumstances, we cannot argue strongly that current levels of fines are generally unreasonable for those kinds of cases. Our conclusion is that the fines provide a reasonable degree of specific deterrence, although whether they provide general deterrence is questionable. In some cases, in fact, lower fines may even be in order, to reflect the relatively minor nature of the act.

However, the present fine structure is clearly insufficient to handle the exceptional cases: those where harm or the offending activity is ongoing and the offender will not be deterred by fines; those where the gravity of the offence is severe, but a fine reflecting the gravity would financially cripple the offender; offences by large corporations; offences involving *mens rea*; offences causing great harm; offences arising from the use of especially dangerous materials; offences where the savings or gain from the activity exceeds the statutory maximum fine; and, destruction of particularly sensitive environments.

What is needed is not the dismantling of the fine structure, which may be adequate to achieve its purpose in most cases, but the addition of tools expressly limited to these exceptional situations. While this may lack the virtue of uniformity, we submit that uniformity is not desirable for its own sake in this field. Indeed, the great disparity of penalties in environmental statutes has always reflected the wide array of variables involved.

PART II

Recommendations for Reform

IV. Fines

The public perception of pollution offences is that they are serious crimes. The courts are perceived as helping to perpetuate the problem by letting polluters off lightly.

Typical of the public's view is the recent response of the editors of one newspaper to the announcement that the Law Reform Commission of Canada is studying whether pollution-related offences should be put into the *Criminal Code*. According to the *Windsor Star*:[169]

> Where responsibility for pollution is concerned, the average citizen would probably not hesitate to demand that polluting the environment should become a crime punishable under the *Criminal Code*.
>
> Those of us who live in a place like Windsor should be able to convince anyone of the need for penalties much more severe than we have at present to control a severe and worsening problem.
>
> Most of the laws in place now call for slap-on-the-wrist penalties, fines that some polluters might consider licence fees for the right to pollute.

If the stereotyped view of pollution offences as deliberate endangerment of public health or mass destruction of the environment were accurate, there would be no question that penalties higher than the statutes call for, or the courts hand out, would be warranted. However, an analysis of the reported and unreported cases over the past decade shows clearly that the vast majority of cases that come before the courts do not fit this stereotype. Most cases do not involve large, powerful corporations, but small businesses, whose ability to pay is limited. The typical case involves an accidental discharge of a small amount of a relatively safe substance, which is cleaned up quickly and involves little or no serious harm to the environment, or to human health.

For the typical case, we cannot conclude that many of the maximum fines available under federal and provincial statutes, or the actual fines being meted out by the courts, are inadequate. In fact, in some cases the maximum fines available (not those actually imposed) may even be excessive to reflect the gravity of the typical case. The problems lie in the fact that fines alone are not adequate to deal with certain problems and the exceptional cases: those involving very wealthy offenders, and very grave offences. Our recommendations therefore focus on these issues.

A. The Problem of Disproportionately High Maximum Fines

Environmental offences fall into two broad categories: the first is the prohibition or limitation of the deposit or emission of harmful substances into the environment; the second is technical or procedural requirements such as duties to obtain permits before carrying on certain activities, reporting changes in operation, filing plans, and filling out forms. The maximum penalties for the former offences are frequently higher than those provided for the latter offences. However, this is not always so. Occasionally, technical offences are subject to the same penalties as actual pollution. In the case of both actual pollution and procedural offences, the risk imposed by violation can vary from negligible to catastrophic.

Concerning procedural offences, however, the bulk of the cases are likely to fall on the "negligible risk" end of the spectrum if there is even-handed enforcement of the laws and prosecution is not a last-resort option saved for dramatic cases. For example, under Ontario's *Environmental Protection Act, 1971*, every load of industrial liquid waste must be accompanied by a "way-bill" setting out the source of the material, the kind and amount of waste, and its destination. Failure to fill out the form properly or to send a copy to the Ministry of the Environment is an offence.[170] The maximum fine for failure to do so is $2000, the same as for any other offence involving illegal transportation or disposal of waste. The cause of an offence can range from forgetting to fill in a form, even though the material was handled safely and in accordance with all other rules and regulations, to a deliberate and elaborate scheme to transport and dispose of toxic wastes illegally or to defraud customers. In cases which involve no *mens rea* and no actual danger, it would be unreasonable to expect the courts to impose a substantial fine; yet one might want to have this maximum, or one even higher, available for the serious offences.

In a previous Paper,[171] one of the authors has suggested that high maximum fines for offences which frequently involve little or no risk are actually counter-productive. Even though it is unlikely that a court will feel it necessary to impose a fine higher than the offence merits or the offender can pay merely because the maximum is so high, the fear of this possibility may deter enforcement officials from pursuing relatively minor incidents, or may cause the defendant to conclude that he has no alternative but to fight the charge. Moreover, when the prosecution results in low fines which reflect neither the high cost of investigation and prosecution nor the maximum fine available, this fuels the public perception that courts are lax and enforcement agencies incompetent.

The solution, it is submitted, does not lie in lowering the statutory maximum, which should remain available for the most serious examples of the offence, but rather in creating two or more procedural streams, as does the *Criminal Code*. The maximum fine available under the circumstances of the case would depend upon the procedure chosen by the prosecutor.

At present, one federal statute, the *Environmental Contaminants Act*, gives the Crown the option of proceeding on indictment or by summary conviction. Ontario's new *Provincial Offences Act*, R.S.O. 1980, Chap. 400, represents an attempt to accomplish this at the provincial level. It allows the prosecutor to differentiate

between more and less serious violations without depriving the defendant of a full trial on the merits, at his option. The Act creates two procedural streams, one intended for minor violations and the other for major ones. Either may be used for the same offence. It is the gravity of the conduct giving rise to the prosecution, rather than the gravity of the offence itself, which determines whether the technicalities of a formal procedure are necessary, or whether simpler, more expeditious procedures are appropriate.

Where the enforcement officer seeks a penalty of under $300 he can issue a ticket to the offender on the spot identifying the offence by an approved short form of wording such as "emit black smoke." This saves the resources required to draft and swear to an information and serve a summons. The defendant can appear in court at any time within a prescribed time period or send in a written explanation of his conduct, without the need to set a specific trial date and present oral evidence at trial. However, he may have a full trial if he wishes.

Where the ticket is used, a set fine is established by regulation, which can be any amount up to $300. Set fines have been established for several offences that generally involve limited potential harm or risk, such as improper operation of septic systems, improper installation of toilet facilities on recreational boats, littering, and disconnecting pollution abatement equipment on cars. The fines are generally either $75 or $150.

For violations the Crown considers too serious for a set fine, but not serious enough to warrant fines in the upper range available, a summons can be issued instead of a ticket. The penalty is still limited to a maximum of $300, but there is no set fine. The procedure is still less onerous than if the alleged offender were subject to the full range of penalties, but the offender must appear in court to answer the charge and the Crown can argue for a fine of up to $300.

If the enforcement officer feels a higher penalty is desirable or the Crown later decides to seek a greater penalty than the defendant has been notified of, a more formal procedure will be used. The complainant swears an information, and a summons or warrant is issued to bring the defendant before the court.

This system has the merit of flexibility. Lower fines can be sought in less serious incidents without forfeiting the availability of higher fines for more serious cases. By making it easier for field staff to lay charges for minor violations and more palatable for offenders to plead guilty with the assurance that the fine will be commensurate with the gravity of the offence and their ability to pay, the dual stream approach may result in more convictions, fairer penalties and greater overall deterrence.

B. Raising Statutory Maximum Fines That Are Exceptionally Low

While we will suggest below that an across-the-board increase in maximum penalties may not be desirable, a survey of the penalties now available reveals a wide discrepancy among the maximum penalties for similar offences under different statutes. A few maximum penalties stand out as being disproportionately low, and

should probably be raised. These penalties tend to be low either because they reflect the historical realities of their time and have not been updated, or because they are for technical offences which we now realize can have much more serious effects than were contemplated at the time they were established.

Federal penalties for a first offence of polluting range from the $300 maximum under the *Migratory Birds Convention Act* (R.S.C. 1970, c. M-12, s. 12(1)) to $200,000 under the *Clean Air Act* (S.C. 1970-71-72, c. 47, s. 33(1)). Provincially, the maximum fines range from $50 in some Newfoundland[172] environmental protection statutes to $5,000 in Ontario,[173] Nova Scotia[174] and Québec[175] legislation.

Other forms of environmental degradation also bring unjustifiably low fines in certain cases. For example, in Ontario, fines for injury or destruction of trees and woodlots range from statutes providing a maximum fine of $20[176] to others providing for up to $5,000.[177] In 1979, the *Trees Act* was amended to raise the fine for destroying woodlots from $500 to $5,000. The fine for cutting down a tree on a boundary line without the consent of both property owners was raised from $25 to $1,000. The former level had been set in 1883 and had not been raised in ninety-six years. Fines under most forestry statutes have not been revised and remain a licence to cut.[178]

The fines for certain technical violations also bear close scrutiny. For example, while the penalty for polluting under the *Ontario Water Resources Act* (R.S.O. 1980, c. 361, s. 16(1)) is $5,000, the Act also creates a number of technical offences which have potential pollution consequences but carry much lower fines: for example, $200 for failure to obey an order to treat sewage adequately or for ignoring an order to cease discharging that interferes with the proper operation of a sewage-works;[179] $500 for failure to comply with an order properly to maintain sewage-works;[180] and $2,000 for the establishment or extension of a sewage-works without approval.[181]

Waste management offences are a classic example of "technical" offences whose serious consequences were not fully appreciated at the time penalties were established. Most provisions were passed with relatively innocuous solid domestic waste and construction rubble in mind. Operating a waste disposal site without a permit carries smaller penalties than offences of discharging or emitting contaminants. In light of situations like Love Canal, we now know that dumping toxic chemicals in unlicenced sites whose existence is unknown to government officials and land developers can create serious environmental and public health problems decades later. Yet in most provinces, operating an illegal waste disposal site remains subject to the same low penalties that were set a decade ago.[182]

For those federal and provincial statutes which contain anomalous low penalties, we would recommend that consideration be given to raising the limits. In the case of technical offences, penalties should be re-evaluated in light of current knowledge of the risk and potential damage associated with them. Prosecution for technical offences can be an effective way of deterring potentially dangerous behaviour in the absence of sufficient evidence to prove actual pollution or a high probability of harm, provided that penalties are sufficiently high.

Two approaches to increasing the relatively low penalties for technical offences have some merit. One is to raise maximum fine levels generally, with provisions for two procedural streams: one leading to a lower ceiling in cases involving no real potential for harm; and the other making the offender subject to the higher range. The alternative approach, which will be discussed below, is to leave the present fine structure in place, but provide for penalties beyond the usual maximum under specified circumstances, such as a substantial risk of harm.

There is a potential disadvantage to raising fine levels for technical offences which should be considered in each case. While the courts, in light of the *Sault Ste. Marie* decision, have interpreted offences of discharging or emitting pollutants as strict liability offences, especially in light of the high fines they carry, they have tended to construe technical offences such as failure to obtain permits and failure to report pollution as absolute liability offences. Since one of the factors the courts take into account in classifying offences is the size of the fine, especially in relation to the Act as a whole,[183] raising the penalty limits could result in loss of any benefits that accrue to the prosecutor from having these offences construed as absolute rather than strict liability.

C. Raising Maximum Fines Generally

As we have stated, a common public perception is that the maximum fines available to the courts are too low to provide deterrence, and should be raised. In our view, however, this may not be the case. The $5,000 maximum available in Ontario, Nova Scotia, and Québec appears to be adequate to reflect the gravity of the average case and the means of most individual persons and many small corporations. The courts appear comfortable with these levels and generally impose fines well below the maximum. Where they wish to impose higher sentences, the opportunity is often available to them, as there is often a conviction on more than one count. The fact that conviction on several counts frequently leads to a fine within the maximum for a single offence distributed among the counts rather than a higher fine than could be imposed for a single count appears to indicate that the courts are not looking for a way to increase quantum. On the other hand, under federal statutes where maximum fines have been raised from $5,000 to $50,000 or more,[184] or where the statute was passed in the last few years and has carried large maximum fines from the outset,[185] we do see courts occasionally imposing much higher fines, both for individual counts and in total where there is more than one charge.[186]

There are two options for raising maximum fines. The first option is an across-the-board higher ceiling available in respect to all offences and all offenders, as the federal government has done with its statutes. The second is to maintain existing maximum fines for the "average" case, and supplement this base with special provisions for the exceptional cases. These provisions might include higher fines for larger corporations, for continuing offences, and for subsequent offences. In cases involving specified aggravating factors, greater access could be given to non-monetary penalties such as imprisonment, forfeiture, supervision by the court of

future activities, restitution, and compensation. These non-monetary tools will be discussed below. Here we will restrict our discussion to options involving different levels of fine.

The simplest approach is to raise the maximum fine, leaving the courts with a wider range with which to work. The disadvantage of across-the-board higher ceilings is that they run the risk of being empty symbolic gestures because the upper ranges will rarely be utilized. Unless they result in commensurate across-the-board higher fines, the gap between the symbolic maximum and the actual fine may become even greater than it is now. To the extent that the problem of "low fines" is one of public perception rather than reality, such discrepancies could exacerbate rather than solve the problem.

To test whether higher potential fines would result in generally higher fines in the average case, one could monitor the results of changing the maximum fine in the *Fisheries Act*, one of the most frequently enforced environmental laws. In 1977 several penalty provisions were increased. Notably, the fine for violating subsection 33(2), the general pollution prohibition, was increased from $5,000 to $50,000 for a first offence and $100,000 for subsequent offences.

If raising the ceiling for all offences is the most appropriate approach, one would expect to find not only an increase in the median, but a corresponding increase in the mean fine. If the mean fine has not increased at least substantially, if not proportionately, one would have to question the effectiveness of wholesale increases in the potential fine.

In fact, while there are a few dramatic examples of very high fines, most fines are still clustered in the low figures. Of thirty-eight convictions registered under section 33 of the *Fisheries Act* between the beginning of 1978 and the end of 1983, only eight resulted in fines of over $5,000.[187] It would appear that raising the maximum has resulted in a slight upward pressure on fines generally, and has freed the courts to impose very high fines in isolated cases, but the vast majority of fines remain at the bottom end of the spectrum.

In our view, the same result can be achieved using a more selective approach. As we have stated, the typical pollution offence that comes before the courts involves an offender of limited means, is accidental, and causes little or no serious harm. It is often an isolated event unlikely to recur. However, if it is a continuing offence, often the pollution is inherent in the manufacturing process and it is prohibitively expensive to remove. In that case, fines, no matter how high, will not be an effective deterrent. Often the offence has been preceded by large expenditures to improve operations, and has been followed by prompt and costly clean-up and remedial measures. Under such circumstances, a maximum fine such as the $5,000 in the statutes of several provinces is often an adequate ceiling.

We suggest that the most effective (but far more complex) approach to raising fines, therefore, is to isolate the factors which make offences or offenders exceptional, and to create higher fines for cases involving these factors. As we have suggested, these factors include the *mens rea* of the offender, the wealth of the offender, persistence or recalcitrance, the sensitivity of the environment, the degree of risk associated with his activity, the degree of harm potentially associated with the

contaminant he releases, the severity of the harm that actually occurs, and the realization of a financial benefit from the offence which exceeds the maximum fine available.

There are several methods of raising fine levels selectively that are already in use. One of the most common is to deem each day on which an offence occurs or continues to be subject to a separate fine up to the maximum provided for a single offence. There is such a provision in almost every provincial and federal environmental protection statute.[188] A second, somewhat less common method is provision for a higher fine for subsequent offences.[189] Typically, the potential fine for a second offence is approximately twice as high as for the first. Except where the maximum fine for a first offence is already very high, such as the five- and six-figure penalties in federal statutes, we would recommend that statutes be amended to provide higher maximum fines for subsequent offences. We would also recommend that statutes which do not deem each day to be a separate offence be amended to include such a provision.

Care should be taken in trying to treat an offence as being subject to separate penalties or in seeking a higher penalty for a subsequent offence. Whether separate charges must be laid for each day to trigger the former remedy may depend on the precise wording of each statute.[190] With respect to escalated penalties for subsequent offences, while the *Criminal Code* specifies that notice must be given to the defendant, there is no such provision in many other statutes. In both instances, however, a strong argument might be made that fairness to the defendant and the *Canadian Charter of Rights and Freedoms* require notification of any such intention.

D. Establishing Minimum Fines

As we have suggested, the maximum fines available may be generally adequate if the courts are not hamstrung by inappropriate criteria which build in a bias toward the minimum figure. If the concern is that the fines being imposed are too low in relation to the maximum, this tendency can be reduced by creating a statutory minimum fine. Very few statutes provide for this.[191]

Parliament and the legislatures have been reluctant to fetter the discretion of the courts by imposing minimum fines. This reluctance is probably well justified. The circumstances vary so greatly that no fixed formula can ensure that justice is done. To avoid harsh results, the court must be in a position to give full weight to mitigating factors and take into account ability to pay.

Moreover, safeguards against unjustifiably low sentences exist in the form of sentencing principles the court must take into account: general deterrence, the range of fines in similar cases, and the proposition that a fine should not be so low as to constitute a licence.

Nevertheless, sentence appeals by the Crown are costly and time-consuming. The lack of any floor on fines may deter enforcement officials from prosecuting in

the first place, if they feel that too many suspended sentences or nominal fines are being handed out for a particular offence.[192] Minimum fines can provide greater certainty that the gravity of an offence will receive substantial weight in each case.

There are ways to impose statutory minimum sentences without hamstringing the courts' desire to give exceptional cases individual treatment. The first is to impose a minimum fine for all offenders with provision for relief in exceptional cases. This is the approach taken in Ontario's *Provincial Offences Act*, which gives courts the power, in exceptional circumstances, to relieve against minimum penalties set by the legislature. According to the government:

> This is not intended to allow courts to overrule the Legislature's view of the gravity of an offence, but merely to provide for those exceptional cases where imposition of the minimum penalty would amount to oppression of, for example, a fixed income pensioner.[193]

The second approach is to provide for minimum sentences only under specified exceptional circumstances such as the ones suggested above. Recent amendments to Ontario's *Environmental Protection Act* use the handling of particularly hazardous materials, coupled with actual risk of certain injuries, as the triggering mechanism for a minimum fine.

> 147. — (1) Where any person is convicted of an offence under this Act or the regulations or under subsection 16(1) of the *Ontario Water Resources Act* in respect of hauled liquid industrial waste or hazardous waste as designated in the regulations relating to Part V of this Act and the action or failure to act for which the person is convicted results or may result in,
>
> (*a*) impairment of the quality of the natural environment for any use that can be made of it;
>
> (*b*) injury or damage to property or to plant or animal life;
>
> (*c*) harm or material discomfort to any person;
>
> (*d*) an adverse effect on the health of any person;
>
> (*e*) impairment of the safety of any person;
>
> (*f*) rendering any property or plant or animal life unfit for use by man;
>
> (*g*) loss of enjoyment of normal use of property; or
>
> (*h*) interference with the normal conduct of business, the person is liable to a fine of not less than $2,000 and not more than $25,000 for the first offence and for each subsequent offence to a fine of not less than $4,000 and not more than $50,000 for every day or part thereof upon which the offence occurs or continues, and not as provided in the section under which the person is convicted.

Québec takes a similar approach. The *Environment Quality Act* authorizes the government to make regulations establishing different minimum fines for different offences and provides in addition that "penalties may be prescribed in a manner allowing them to vary according to the degree of the infringement of the standards."[194]

E. Raising Minimum or Maximum Fines for Corporations

The very wealthy present special problems in sentencing. The major problem is that the vast majority of fines available under environmental statutes are too low to have any financial impact on them or to deter their peers from committing offences. The very wealthy invariably carry on their business through corporations. Therefore, a simple and expedient approach to solving this problem is to impose higher maximum fines on corporations. This approach appears to have popular appeal, since many provinces have a higher fine structure for corporations; for example, Québec, where both minimum and maximum fines are higher for corporations and the government has the power to prescribe fines up to four times as high for corporations.

However, while the wealthy often operate corporations, not all corporations are wealthy. Therefore, it might be argued that to discriminate on the basis of a "deep pocket" assumption is invidious. Whether a provision for higher fines for corporations is discriminatory depends upon whether the assumption that corporations are generally richer than non-incorporated businesses is correct. As we have pointed out, most corporations are "small." However, it is likely that even small corporations are usually wealthier than unincorporated businesses, since incorporation only becomes attractive once entrepreneurs are obtaining sufficient income for themselves that they have a surplus to retain in the business. Conversely, at any given time, an unincorporated business may be profitable, while a corporation down the block may be losing money. The reason the assumption that corporations are wealthier than sole proprietorships and partnerships is impossible to verify is that this is comparing apples and oranges — the means of natural persons and the means of artificial constructs. As we have stated, when dealing with such an artificial construct, the answers lie more in pragmatism than in theoretical considerations. If the comparison is invidious, the question is whether expediency justifies this discrimination.

The problem of differentiating between rich and poor corporations is compounded by evidentiary difficulties in determining the real wealth of a corporation. It is possible for the proprietors of a corporation to manipulate figures on paper and transfer actual dollars to increase or decrease profitability and net worth to suit their ends, particularly when the corporation is interlocked with others under the same or overlapping ownership. The manipulation is not necessarily fraudulent. The very purpose of corporations is to minimize the risks to the individual owners and provide them with a vehicle for risk taking and business expansion. Corporations will often carry a greater debt load, making them less "wealthy" than individuals, if one looks only at assets and liabilities.

We have recommended against raising maximum fines generally just to reflect the circumstances of a small percentage of wealthy offenders. If fines are to reflect ability to pay, therefore, corporations must be given special treatment. This can be done without blatant discrimination or harsh results to small corporations in a number of ways:

1. By making only corporations over a certain size subject to the higher penalties. The court would be directed to determine the size by looking at specific factors such as assets, liquidity, and net profit in the last year for which data is available or over a number of years.

2. There might be several maximum fines referable to corporations of different sizes.

3. All corporations might be subject to higher fines, but this presumption that the corporation is wealthier than individuals generally are, would be rebuttable. There would be reversal of onus, so that the corporation can show that it should not fall within the higher maximum set for corporations, but it would carry the burden of proving that it is not wealthy.

4. There may be a need to lift the corporate veil to find out the wealth of the individuals who control the corporation and other corporations under their control.

5. Rather than mentioning corporations specifically, legislation may provide for a minimum fine or a higher maximum, or a series of ascending limits, when the wealth of an offender exceeds certain limits. This is consistent with the approach we have suggested of isolating specific factors which should lead to higher sentences.

A most attractive alternative, although it would involve a radical departure from current sentencing methods and considerable administrative complexity, is the Scandinavian "day-fine."[195] The court would determine how many days' income an offender should be fined. If an offender dumped contaminants for three days in an attempt to maintain or increase production, it could be deprived of three days' profit. For an individual, this might mean a fine of a few hundred dollars, for a small company, a few thousand, and for a large company, tens or hundreds of thousands. The income might be the basic fine with an ability to increase or decrease the fine depending on aggravating or mitigating circumstances. The day-fine might be an excellent way to take into account disparity in income and tailor the fine to the offender's means, without building into the system any *a priori* discrimination between incorporated and unincorporated businesses.

While in theory singling out corporations for higher fines may be inherently discriminatory, the dangers of unfair treatment are negligible in practice. As long as there are no minimum fines or the courts have the power to grant relief from minimum fines and take into account ability to pay in relation to maximum fines, a dual fine structure should create no hardship.

Underlying this discussion is the nagging question, should large corporations have to pay higher fines just because they can afford them? Or should the size of the fine be determined solely by the gravity of the offence? This kind of question throws into sharp relief the issues of general deterrence versus specific deterrence and deterrence versus retribution in its various aspects. Our answer is that the courts have generally come to the right conclusion in principle. Although concern for the gravity of the offence should act as a damper on rampant utilitarianism, deterrence should still play an important part in almost every sentence. There can be no deterrence value in sentencing large corporations if the courts can fine them no more

than smaller businesses can afford to pay. This approach is also supported by the fact that corporations generally have greater capacity than individuals, and large corporations have greater opportunity than small corporations, to harm the environment. (In fact, when one thinks of the major pollution incidents of the past three decades, in almost every case a large corporation was responsible.) We have also suggested that the higher the standard of care, the greater the penalty should be for substandard conduct. Not only do corporations have more money to pay fines and more opportunities to cause harm, they also have greater resources at their disposal to prevent accidents, and a correspondingly higher standard of care can be demanded by society.

A second difficulty in sentencing corporations is that they cannot be imprisoned. Several statutes provide for imprisonment in addition to, or instead of, a fine, or in default of payment. To the extent that a higher fine for corporations reflects this absence of an opportunity for imprisonment, it is not discriminatory. It does not treat corporations worse than individuals but merely removes or reduces an advantage they would have over human beings. We feel that a different fine structure for corporations is justified whenever they would otherwise be subject to imprisonment. However, there must be safeguards to ensure that if this immunity from imprisonment is the only reason for the higher limit, the court enters the higher range only when it would otherwise be considering imprisonment. Guidelines can easily accomplish this.

F. Imposing Minimum Fines or Higher Maximum Fines under Specified Special Circumstances

Imposing higher maximum or minimum fines under special circumstances is the preferred solution to the problem of inadequate fines. It is the approach Québec and Ontario have taken in a very limited and tentative way in section 109 of the *Environment Quality Act* and section 147 of the *Environmental Protection Act* respectively. The factors that may trigger greater liability will be controversial. Should the mental state of the offender be taken into account? Should actual damage be the test or the degree of risk? Our previous analysis suggests answers to these questions, with which not everyone will agree. We believe that all the factors we have looked at which take cases out of the "average case" category should trigger greater liability — factors such as wealth, any *mens rea* greater than mere negligence, special environmental sensitivity, hazardousness of materials, risk inherent in the activity, additional risk imposed by the way the activity is carried on, the magnitude of potential damage, the existence of actual damage, financial benefit from wrongdoing, and prolongation of risk.

V. Penalties Other than Fines

Even if all the recommendations we have made were implemented, they would not adequately address some problems in sentencing. Fines alone are not adequate tools to deal with problems of extreme wealth, inability to pay, recalcitrance, or offences of great opprobrium. The exceptional cases will require additional remedies. Nor are fines applied where they are most needed: in environmental clean-up or restoration, to compensate victims, or to reduce the costs of effective enforcement. Other techniques should be made more readily available to the courts.

As we have stated, the true goal of environmental legislation is protection of the public through prevention. Fisse states that "a punitive approach to corporate responsibility is often out of touch with the aim of prevention ...." He goes on to point out that:

> A constructive approach to prevention might be achieved by means of conditions accompanying bonds, probation, or suspended sentences. But usually only fleeting thought appears to have been given to the application of these methods to corporations. Texts on sentencing generally ignore corporate offenders, and relevant legislation is often framed so as to be inapplicable ....[196]

The Law Reform Commission confirms in its discussions of corporate criminality that "heavy reliance on fines is not the answer" and that there is a need to develop and use innovative methods of sanctioning corporations.[197] The literature on white-collar crime is replete with suggestions for reform which may be useful in the environmental context. These ideas include: making companies pay for publicity about their convictions; requiring them to inform shareholders of offences; barring individuals who misuse the corporate form from incorporating businesses or being officers or directors of corporations; community service orders; compensation and restitution; court orders making offenders forfeit property used in the offence; forfeiture of all profits made from the offence; forfeiture of licences; permits and approvals; orders to do something or cease doing something; and, making executives and officers of corporations personally liable for offences committed by the corporation. The balance of this Paper focusses on a few of these alternatives, particularly ones which already have some precedent in the Canadian legal system. We examine the extent to which such innovative methods are possible under existing law concerning probation, compensation, and peace bonds and the extent to which law reform is needed to make such techniques possible.

While the goals sought to be achieved by innovative methods are the same as those enunciated under general sentencing objectives, it is possible at this point to isolate some more specific objectives. Retribution for the harm done to the community can be accomplished in two concrete ways: by ordering the offender to redress the injury it caused through payment of compensation to those affected and restoration of the environment, and by ensuring that the offender does not benefit from its illegal gains. Deterrence can be accomplished by ensuring that the inability of an offender to pay a substantial fine does not result in his escaping punishment, and by ordering the offender to conduct its operation so as to minimize the

possibility of a repetition of the offence or of a commission of further offences. It is in the context of these specific purposes that the provisions mentioned will be examined.

A. Forfeiture of Property

Very few environmental statutes provide for forfeiture of equipment or vehicles used in committing offences. Recent amendments to Ontario's *Environmental Protection Act* provide for seizure of the permit and licence plates of any vehicle suspected of being used in the commission of an offence involving hauled liquid industrial waste or hazardous waste in circumstances involving risk of harm to the environment.[198]

If the owner of the vehicle is convicted of such an offence, the court may order the suspension of the permit and the detention of the plates for up to five years, provided that the court is satisfied that the continued use of the vehicle is likely to result in further harm, and provided that the Crown has given notice that it intends to seek this penalty.

Forfeiture provisions are not common in environmental statutes,[199] but they exist in other Canadian statutes.[200] They are seldom used.[201] In some circumstances they can be very appropriate; for example, forfeiture of an expensive rifle by a recreational hunter who has violated game laws. However, they can also be Draconian. Seizure of a fisherman's boat or a trucker's vehicle has the potential to deprive him of his livelihood. Forfeiture would seldom accomplish anything that cannot be accomplished by less drastic means.

However, forfeiture provisions may have some value in limited circumstances where all other means fail to stop continuing offences. For corporations, which cannot be imprisoned, depriving them of their means of operating may be the equivalent of incarcerating a human being who is a frequent offender.

If the corporation is a shell with no assets, and perhaps only rented equipment, which ignores orders and does not pay fines, forfeiture of equipment could provide an inexpensive, rapid way of obtaining compliance. The advantages of incorporating forfeiture powers in sentencing proceedings over the use of other tools available to enforcement agencies such as separate proceedings for injunctions, orders, and contempt proceedings, are procedural, but procedure is often the determinant of whether it is practical to take prompt and effective action.

B. Suspension or Revocation of Licences, Permits and Other Privileges

Environmental enforcement agencies generally have powers, subject to complex procedural requirements and hearings, to suspend or revoke licences and permits on grounds set out in the statute. Allowing the sentencing court to bypass these procedural safeguards has obvious dangers. The issues are largely the same as arise

in respect to forfeiture of physical objects, except that suspension of a permit does not have the same ability to incapacitate operations.

The availability of this remedy must be restricted to narrow circumstances. Nevertheless, it may be a useful adjunct to the fine and other common remedies in cases of recalcitrance or urgency. The Ontario *Provincial Offences Act* makes provision for this remedy in default of payment of fines. Its most obvious value in that province is to provide an effective and inexpensive way of dealing with large volumes of unpaid fines for traffic violations by refusing to renew drivers' licences.

C. *Imprisonment*

There has been a growing consensus in recent years that imprisonment in criminal cases is costly to society, is often ineffective as a deterrent or as a method of rehabilitation, is degrading to the person imprisoned, punitive to his family, and may even increase the possibility of recidivism. Nevertheless, we continue to rely heavily on incarceration in criminal cases. This is partly because the police, the community, and the courts have not yet been furnished with alternative sanctions which show promise, such as diversion, community-run "neighbourhood" tribunals, and community service orders and work orders. However, our reliance on incarceration also flows from the fact that we have not found and are unlikely to find any alternative that adequately expresses society's repudiation of certain very serious conduct, incapacitates very dangerous offenders, or has any effect on recalcitrant offenders. These criticisms do not go to the basic legitimacy of the idea of imprisonment, but to the way in which it is used and the extent to which the justice system relies on it. While everyone hopes the incidence of incarceration can be greatly reduced, it can never be completely eliminated. We do not disagree with the efforts of the federal Minister of Justice to reduce the use of imprisonment in criminal cases,[202] where it may well be overutilized; however, in regulatory offences imprisonment is underutilized.

There is a need for an incarceration option in environmental cases. There are situations in which, for various reasons, no other sanction will suffice; for example, in the *Krey* case, *supra*, note 20, where a serious offence was committed by a foreign national, who might avoid any other sanction by leaving the jurisdiction. While imprisonment may not be effective for the "expressive" offence, or for the offender driven by some psychological flaw or already alienated from the mainstream values of society, it may be a particularly effective sanction for the rational, calculating offender, who can be influenced by general standards of behaviour to which are attached threats of penalties. As Weiler points out, "[t]he average member of our middle-class feels an abhorrence for even short-term imprisonment — almost akin to a moral leper colony — which is far out of line with the actual deprivations it entails."[203] For this reason, we feel the courts should have the ability to incarcerate offenders in environmental cases.

Some environmental statutes provide for a term of imprisonment, usually less than six months, in addition to, or instead of, a fine.[204] Most statutes, however, make

no provision for incarceration, except in default of payment of a fine.[205] In general, imprisonment is not an appropriate remedy for offences of negligence. However, there are situations in which the ability of the court to impose an appropriate sentence is fettered by the lack of an incarceration option. This is the case when the offence is so grave that a fine cannot adequately reflect the opprobrium associated with it, or the level of fine that will demonstrate this opprobrium or provide deterrence is beyond the defendant's ability to pay.

For example, let us say that Mr. Rudsky is a young self-employed small businessman supporting a family on a very low income.[206] He has no significant assets except for his truck, which is crucial to his business. As part of a business transaction he finds himself in possession of a veritable witches' brew: dozens of drums and bags of toxic chemicals for which he has no use. Because of the lack of suitable, nearby, inexpensive disposal or treatment facilities, he decides to dispose of them himself. Under cover of darkness, he dumps the chemicals in an open field adjacent to a lake which supplies drinking water to a small community. Because of the topography of the area, it will take only a normal rainfall to wash the material into the lake. Children have free access to the area and frequent it. Fortunately, the chemicals are discovered the following morning and the owner of the land arranges and pays for their removal at a cost of $2,000. Several workers removing the material become ill as a result of their exposure to the chemicals.[207]

The gravity of the offence clearly requires an exceptionally heavy penalty, but Mr. Rudsky's ability to pay a substantial fine is severely restricted. The maximum fine is $25,000 and the legislation provides for a minimum of $2,000 in the circumstances. Any fine of $2,000 however, will punish Mr. Rudsky's family more than it will punish him. Some statutes provide for forfeiture of vehicles used in the commission of an offence. Even if this penalty were available, seizure of Mr. Rudsky's truck would be tantamount to depriving him of his livelihood. The court's only viable options are to impose a fine too low to reflect the gravity of the offence or to impose a high fine and fail to ensure that it is paid, or to imprison the offender, not for the gravity of his offence, but for his inability to pay the fine.

In such cases, imprisonment as a first resort is an obvious choice. One might argue that providing for imprisonment under such circumstances is to impose cruel or unusual punishment on a person because of his poverty. However, the counter-argument is that a person should not be able to derive a special benefit from his poverty. The imprisonment option, we submit, does not impose an additional burden on the offender as a result of his poverty, but merely removes a special advantage which, as a result of his poverty, he has over others who commit equally serious offences. A short term of imprisonment, for example a few days, could underline the seriousness of the offence without imposing a severe financial burden on the offender or his family.

There are three options for reform. The first is to provide for imprisonment in default of payment of fines. The court can then impose on Mr. Rudsky a fine which reflects the gravity of the offence but which it knows he cannot pay. He will then pay what he can and "pay" the rest in time spent imprisoned. This is distasteful and smacks of a return to the debtors' prison. It has been frowned upon judicially, and

the arguments against it are canvassed eloquently by the Law Reform Commission[208] and in Mr. Ruby's text.[209]

The second and third options are to provide specifically either for terms of imprisonment to be imposed instead of a fine in specified circumstances, or for a term of imprisonment to be imposed in combination with a fine. These options, particularly the second, are more attractive. The assumption is that the impact of imprisonment on the individual is so severe that a very short term of imprisonment is equivalent to a much higher fine than the income foregone during imprisonment. Thus, to punish effectively and deter the offender, avoid the trivialization of the offence by a small fine, and communicate to the general public the opprobrium the court felt towards the offence, the imprisonment need not be so long as to cause severe financial deprivation. Even a few days in prison, in addition to a fine within the defendant's ability to pay, might be sufficient to make the point to the offender and others who might be tempted to take the risk.[210]

D. Orders to Take Specific Action or Refrain from Conduct

To describe the variety of orders a court might need to make for adequately protecting the environment, we will refer to the various powers contemplated as "supervisory powers." It is apparent that clearer powers should be given to the court to supervise future behaviour.

Sentencing is generally retrospective and the courts are severely restricted in their ability to take a prospective or future-oriented approach to sentencing. The person is being punished for the offence he has already committed, not for offences he might commit in future. It is important to limit the power of judges to take into account factors that may be extraneous, and it is central to the criminal law power that people be punished for their actions and their attempts, and not for their thoughts or future intentions. However, these concerns must be balanced against the fact that public welfare offences are preventive.[211] They are future-oriented in the sense that they are intended not primarily to punish accomplished damage to health or well-being but to anticipate and prevent it. To be successful in accomplishing these goals, the judges must be able to carry this philosophy forward into the sentencing process.

There are some cases where an offender is so wealthy that the highest fine available may only act as a licence to pollute, or so impoverished that the threat of a monetary penalty has no deterrent value. Imprisonment may not be an available option. In such cases, the courts are at a loss to fashion an effective sentence.

In one case, Mr. Garbano had used his property as a dump for garbage.[212] This was unsightly and was attracting insect disease vectors, resulting in a public health hazard. Mr. Garbano refused to remove the garbage. He represented himself at trial. He boasted that he could spare the time to represent himself as his wife could operate his business in his absence, and that if convicted he would appeal and represent himself again. Legal fees and time, therefore, represented no deterrent to him. The Crown had reason to believe he would default if a substantial fine were

imposed. Of course, imprisonment or execution of the fine as a judgment debt were available in default of payment, but by the time the courts invoked these remedies — if ever — the problem would have persisted for months or years, and perhaps worsened, as garbage dumps gradually generate leachate, which eventually could contaminate nearby watercourses.

In short, the Crown had reason to believe the risk to the environment would continue notwithstanding conviction, and advised the court of this, leaving it to the court to devise an appropriate remedy.

The court's solution was Solomonic, but probably beyond its powers.[213] It adjourned the sentencing to a fixed date several months away, advising the defendant that the sentence to be imposed at that time would depend upon the report by the prosecuting agency, the Ministry of the Environment, which would state the extent to which the property had been cleaned up to its satisfaction.

Nothing happened until one week before the sentence was to be imposed. A massive clean-up began and was substantially completed by the date set for sentencing. Mr. Garbano was then given a suspended sentence and placed on probation for one year to discourage him from repeating the offence.

The defendant was convicted in Ontario, where the environmental statutes do not give the courts any supervisory powers on sentencing. One must look to the probation sections of the *Provincial Offences Act* (R.S.O. 1980, c. 400) (POA) for the court's supervisory powers. The kinds of powers that would be useful would include powers to order a defendant to clean up or restore the environment, to cease operating in a manner or in a location which would inevitably result in harm or nuisance, to inform the Ministry of the Environment of changes in operation or location, and to apply for a certificate of approval (permit) for his operations if requested by the Ministry.

Section 71 of the POA provides for suspension of fines, subject to the performance of a condition. However, this applies only where a specific Act provides for this. None of the Ontario legislation makes provision for this. Moreover, under this section, the period of suspension may be not more than one year. This would be a relatively short time to prohibit someone from carrying on polluting activities, and therefore, amendments to the environmental statutes to provide for this would be useful, but their utility would be somewhat restricted by this time-limit.

Section 72 of the POA provides for a probation order for up to two years. In addition, it provides that probation is not merely an alternative to a fine, but that both a fine and probation may be imposed. However, this section does not appear to give a court the power to impose the kinds of conditions mentioned above.

The section does provide that a probation order shall be deemed to contain a condition that the defendant not commit the same or any related or similar offence. However, this would not appear to give a court the power to order the cessation of the activity that is likely to result in an offence, but only to bring the defendant back before the court for further punishment on the first offence if subsequently convicted of another offence.

In some other provinces, provincial summary conviction procedure legislation incorporates the probation provisions of the *Criminal Code*. For example, the applicable provision in Saskatchewan is *The Summary Offences Procedure Act* (R.S.S. 1978, c. S-63). Under subsection 3(2) of this Act, Part XXIV of the *Criminal Code* is applied to provincial summary proceedings. Since Part XXIV incorporates the probation provisions of the *Code*, probation orders can be made in provincial environmental offences.

The *Criminal Code* provisions are broader than the Ontario legislation and potentially more useful in environmental cases arising under these provincial statutes or the *Criminal Code* itself. Section 663 sets out the uses of probation a court may make. The key conditions a court may impose are that the defendant be of good behaviour and "such other reasonable conditions as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences." The power to order restitution is also potentially important and will be discussed under a separate heading.

(1) Good Behaviour

Every probation order is deemed by subsection 663(1) of the *Criminal Code* to contain a condition that the accused shall keep the peace and be of good behaviour. A person who pollutes while on probation could be found not to be of good behaviour. It is not necessary under this condition for the Crown to prove that the defendant has been convicted of another offence, or even that it engaged in conduct for which it could be convicted. The vague and subjective nature of this condition has resulted in criticism that its invocation is arbitrary. If it is perceived as unfair to individuals, it may be seen as even less fair in the corporate sphere where there may be no general agreement as to proper standards of behaviour. But imposition of a probation order containing such a condition might, in itself, have a deterrent effect,[214] and there might well be blatant cases of pollution which the court would have no difficulty in finding the defendant, whether an individual person or a corporation, to have fallen outside the bounds of good behaviour. This provision could be useful in clear-cut cases.

(2) Prevention of Future Offences

Under paragraph 663(2)(*h*) the court may impose other reasonable conditions the court considers desirable to secure the good conduct of the defendant or prevent him from repeating the same offence or committing other offences. This section appears to fetter the judge's discretion in three ways. The condition must have the securing of law-abiding conduct in the future as its objective. Punitive measures are, therefore, not authorized.[215] The law-abiding conduct sought must be that of the accused, so that the condition cannot be aimed at deterrence of others. And lastly, the condition must be reasonable. A similar provision was applied by a United States

court in ordering the Atlantic Richfield Company to establish and complete within forty-five days a program to clean up an oil spill.[216] The United States Court of Appeal ruled the condition unreasonable because the corporation could not determine what it had to do to meet the terms.

So long as the order is specific and capable of execution within a specified period, there appears to be nothing to prevent the court from making an order aimed at pollution abatement or prevention. For example, where the Crown can establish that the installation of available equipment of a certain description will result in a reduction in the rate of emissions, or prevent the recurrence of a discharge of a deleterious substance, there appears to be nothing to prevent the court from ordering the installation of such equipment. The same might be said of ordering the initiation of a system of quality control or inspection, provided the order is sufficiently specific as to what the company must do.

This is not to pretend that difficult questions will not arise concerning the scope of such orders or the ability of the company to pay. The difficulties are not, however, insuperable. Supervision of polluters would represent a change from what probation officers are accustomed to, but officers of government environmental protection agencies would likely be available to work with the probation officer in monitoring the company's compliance, and any difficulties in this regard would involve merely administrative adjustment. Given the scope of corporate crime, the day may not be far off when probation officers skilled in commercial matters will carry special corporate case-loads. The same may be true in environmental matters.

(3) Probation under Federal Environmental Statutes

The *Criminal Code* probation provisions appear to apply to federal environmental statutes. Most federal statutes that create environmental offences provide that the offender is "liable on summary conviction."[217] Summary conviction proceedings are governed by the *Criminal Code*, Part XXIV, by virtue of subsection 720(1), which defines "proceedings" to include proceedings in respect of offences that are declared by an Act of the Parliament of Canada. The definition of "sentence" in the same provision incorporates orders made under subsection 663(1), that is, probation orders. The word "sentence" appears in Part XXIV only in that section dealing with appeals. According to section 748, the appeals portion of Part XXIV deals with appeals against "sentence" passed only "in proceedings under this Part." Since the only proceedings under Part XXIV are summary proceedings, it must be possible under Part XXIV to impose a probation order. The criminal courts have, in practice, made probation orders under federal statutes.[218]

(4) Can Corporations Be Put on Probation?

Because so many polluters are corporations, it is important that such supervisory orders apply to them. Unfortunately the matter is not free from doubt. Until very recently, the only decision on this issue was that in *R.* v. *Algoma Steel*

Corp.,[219] which held that a suspended sentence and probation order were inapplicable to a corporation under both the *Criminal Code* and provincial legislation. The decision was made at the provincial court level, and no reasons appear in the brief summary of the case. In January of 1983, however, Judge Bourassa of the Territorial Court of the Northwest Territories rejected that decision in placing a polluting corporation on probation.[220] We feel that this is the better view.

The *Criminal Code* section 663 regarding probation contains no express reference to corporations. Corporations are, however, specifically excluded from subsection 662.1(1) concerning absolute and conditional discharges, and subsection 662(1) concerning preparation of a pre-sentencing report. The *exclusio unius* rule, especially in light of the close proximity and similarity of subject-matter of these sections to section 663, raises an argument that Parliament intended to include corporations in section 663. In addition, the word "accused" which appears in subsection 663(1) clearly falls within the *Interpretation Act* (R.S.C. 1970, c. I-23) section 28 definition of "person" which includes corporations in "any word or expression descriptive of a person."

Exclusion of corporations from the pre-sentence report provision could indicate that probationary orders for corporations were not intended by the legislative drafters. An alternative explanation, however, is that the sort of psychological and socio-economic information that would ordinarily be contained in a pre-sentence report is simply not relevant to corporations. Both the Crown and the accused are always free to adduce other kinds of evidence.

The argument against inclusion of corporations may rest on the requirement under section 663 that the judge have regard to the age and character of the accused. These factors do not inherently exclude corporations. Parliament may simply have intended this as a direction to the courts to be followed where appropriate, that is, in the case of individuals, and ignored where clearly inappropriate, that is, in the case of corporations. Alternatively, the length of time a company has been incorporated (its age) may be, in conjunction with its criminal record and its experience in pollution abatement, a reasonable factor to consider in determining whether supervision is called for. Character may refer to the sort of anthropomorphic analysis that courts have sometimes indulged in, or may simply refer to non-human legal form. A direction to the court to have regard to the fact that the accused is a corporation is merely neutral. While there may be room for disagreement concerning the intended breadth of this provision, it appears to be open to the courts to interpret it so as not to exclude corporations.

However, to allay any doubt, we would recommend the amendment of environmental statutes expressly to provide that probation provisions in any relevant legislation apply to corporations.

(5) Cease-and-Desist Orders

In addition to their probation powers, the courts have specific power under most federal environmental statutes to make "cease-and-desist" orders.[221] The provisions

of these statutes are generally identical to section 34 of the *Northern Inland Waters Act*:

> 34. Where a person is convicted of an offence under section 32, the court may, in addition to any punishment it may impose, order that person to refrain from committing any further such offence or to cease to carry on any activity specified in the order the carrying on of which, in the opinion of the court, will or is likely to result in the committing of any further such offence.

(6) Conclusion

The courts have made some, albeit limited, use of probation and other supervisory orders. They appear to be useful in many cases. In light of the limitations in the federal and provincial probation powers and the general unavailability in provincial environmental statutes of other forms of supervisory powers, there is merit in clarifying and expanding the courts' powers to make such orders.

Relatively little use has been made of these provisions,[222] and there has been little discussion of their potential scope and limitations. However, the Northwest Territories Territorial Court recently served notice that it considers such orders more effective than fines and "will not hesitate to use this tool in future cases."[223]

E. The Partially Suspended Sentence

Under the *Criminal Code*, where no minimum penalty is provided for an offence, paragraph 663(1)(*a*) allows the court, in addition to imposing a probation order, to suspend the passing of the sentence. Provincial summary procedures legislation contains similar provisions.[224] The suspended sentence represents, depending upon how one views it, either an expression of faith in the offender or a gamble that he will not repeat the offence. It is appropriate when it is unlikely that the offender will repeat the conduct and there is no pressing need for the sentence to express the community's repudiation of the conduct or to have a general deterrent effect. This approach is seldom appropriate for a large corporation or other very wealthy offender. Suspension of part of the sentence and imposition of part might be more appropriate to combine imposing a penalty with creating an incentive for good behaviour. However, because it is the passing of sentence, not the sentence itself, that is suspended, under the *Criminal Code* and similar provincial legislation, a court that suspends sentence cannot levy a fine at all unless and until the probation order is breached.[225]

An interesting approach has been taken in two American cases. In *United States* v. *J. D. Ehrlich*,[226] a company that violated the *Migratory Birds Treaty Act* was fined $5,000. All but $500 of the fine was suspended. The company was placed on five years probation. If it were convicted of a federal offence concerning wildlife during that period, the remaining $4,500 would be immediately due. In *Apex Oil Co.* v. *United States*,[227] the company had failed to notify the government of an oil spill. Here the wording of the order was somewhat different: $15,000 of the $20,000 fine

was stayed on condition that the corporation not violate any pollution law during the three-year probation period. In both cases the order was upheld on appeal.

It does not appear that either of these formulations is possible in Canada under existing legislation. A minor difference between American and Canadian legislation is that paragraph 664(2)(*b*) of the *Criminal Code* limits the probation period to three years. The major difference, however, is that the court cannot levy a fine and suspend part. The Ontario *Provincial Offences Act* (R.S.O. 1980, c. 400, s. 71) contains a provision allowing the court to impose a fine and suspend all of it if the offender carries out remedial activities, but this is not adequate since, in most cases, the offender ought not to have the opportunity to have the entire penalty rescinded for doing what it should have done anyway.

The American approach allows a corporation that claims good corporate citizenship and a commitment to prevention in the future to put its money where its mouth is. If it follows through with its promises, the small fine initially levied may be seen in retrospect to have been justified; if it fails to follow through, the heavier fine ultimately collected will also appear to have been justified. But in Canada, where the suspension of sentence is unaccompanied by any initial fine, suspended sentences may serve as an incentive to break the law the first time around. Unless such an order were accompanied by very stringent conditions of probation, it could well be counter-productive to the purposes of environmental legislation. It might, however, be appropriate in very rare cases, such as that of a small closely held corporation in financial difficulty.

F. Restitution and Compensation

Restitution and compensation are imprecise terms that are often used interchangeably. Generally, restitution is subsumed under the broader term "compensation." In its narrowest sense, restitution means the return of property or its monetary equivalent where that is easily ascertained. The *Canadian Law Dictionary* (Toronto: Law and Business Publications (Canada) Inc., 1980) defines restitution at page 330 as "[r]estoration of anything to its rightful owner. Also, the act of compensating or making good any loss or damage to property." The *Criminal Code* and some provincial statutes make provision for both restitution and compensation, indicating that the words describe two different remedies. In general, restitution or reparations corresponds to what would be considered "special damages" in a civil action and compensation includes these as well as the less concrete and less easily ascertainable "general damages." For example, if a person dumps a load of toxic waste in a farmer's field, and the farmer pays $1,000 to have it removed, his out-of-pocket expenses would probably be considered restitution. The diminution in value of his property and crop losses might be considered compensation because of the difficulty of ascertaining them precisely. Any mental anguish, aesthetic or spiritual considerations, if recoverable at all, would come under the rubric compensation.

Few, if any, federal or provincial environmental statutes provide for restitution or compensation. If this is available, it is by virtue of incorporation of Part XXIV of

the *Criminal Code* or provincial summary procedures legislation. In Ontario, for example, the *Provincial Offences Act* provides that a court may order restitution or compensation as a condition in a probation order, in accordance with provisions for this in any other statute.[228] Unfortunately, no order can be made since provincial environmental statutes do not make provision for this.

(1) Restitution

Under *Criminal Code* paragraph 663(2)(*e*) a restitution order can be made. This section has stringent requirements which limit but by no means destroy its utility in environmental cases. Restitution can be ordered only as follows:

(a) "[T]o any person aggrieved or injured." A condition requiring a liquor company that had violated anti-trust legislation to pay $233,500 to a county council on alcoholism was struck out by an American court because the council was not the "person aggrieved."[229] In cases of widespread but insidious and unquantifiable damage, this provision would be unhelpful. In a case such as *B.L.S. Sanitation*[230] however, the government department that incurred the cost of clean-up might well have had a provable claim, although an issue could arise as to whether a government department is a "person." It should be noted that the request could be made by the Crown, since no application by the person aggrieved is required.

(b) The person must have been aggrieved "by the commission of the offence" and the damage must have been sustained "as a result thereof." A causal connection similar to that in tort must be shown between the offence and the damage. In many cases proof would be difficult, but that is not to say that cases where proof of cause is possible need be excluded.

(c) Restitution is available only for the "actual loss or damage sustained." Estimates of future damages could not be considered. Since probation orders are made at the time of sentence, or where sentence is suspended, at the time sentence would otherwise have been passed, the damages must be provable at that time. In many cases the clean-up operation will not yet be complete or the extent of the injury fully ascertainable. Again, however, where a claim is ripe there appears to be no reason why it or its provable portion should not be dealt with.

There is a possibility that the Crown might be tempted to delay prosecution until a claim could be made; but the limitation period for prosecuting summary offences is often six months.[231] Prosecutors know that delay in getting to trial makes cases harder to prove, and the conditions in a probation order are solely within the discretion of the trial judge. Moreover, an order could be refused if the delay resulted in injustice to the accused.

(d) An increase in the fine cannot be ordered in the guise of restitution. Thus, decisions ordering charitable donations as a term of probation have been reversed.[232]

In addition to the requirements expressed in paragraph 663(2)(*e*) of the *Criminal Code*, the British Columbia Court of Appeal in *R.* v. *Dashner*[233] laid down

others: the court has a duty to ensure that the offender has the ability to pay; the purpose must be to secure good conduct, not to compensate the victim; the court is not to be used as a debt collection agency; and a separate or formal inquiry must not be necessary. Difficult questions of title will not be considered.[234]

The principles stated in *R.* v. *Zelensky*[235] would probably apply to restitution as well as to compensation, which upheld the constitutionality of section 653, a separate compensation provision applicable only to indictable offences. The court cautioned that the criminal courts should not grant an order where there is any serious conflict on legal or practical issues or on whether the person alleging himself to be aggrieved is so in fact. To impair the sentencing process, however, would take a complicated and lengthy assessment.[236]

Because restitution has a nexus to protection of property and civil rights, which is a provincial head of power, an interesting constitutional issue might arise if paragraph 663(2)(*e*) were applied in a prosecution under a federal regulatory statute such as the *Fisheries Act*. *Zelensky*[237] upheld restitution as a federal concern despite its property and civil rights overtones, because of its relationship to criminal law. Where a statute falls under another head of federal power, however, the criminal law power does not come into play. *MacDonald* v. *Vapour Canada Ltd.*[238] held that the federal government cannot mount separate civil proceedings on the back of the *Criminal Code*. The *Fisheries Act* could not, apparently, provide for restitution outside of the sentencing process — nor could the *Criminal Code* itself do so. Where, however, a conviction is obtained under the *Fisheries Act*, if the sentencing itself is valid as an exercise of federal power, it must be valid as necessarily incidental to the source of that regulatory power; that is, the inland fisheries power. If sentencing is valid under the inland fisheries power, and if *Zelensky* can be taken to mean that restitution is an integral part of sentencing, then restitution must also be valid under the fisheries power. This reasoning would apply to any prosecution under a federal statute.

(2) Compensation

A limited form of compensation is provided for by section 653 of the *Criminal Code*.[239] The categories of damage are restricted to "loss of or damage to property" and the court has power to make an award only upon application by the person aggrieved. It is questionable whether this language can be stretched to cover one of the most frequent effects of environmental degradation — loss of use and enjoyment of property — although an argument can be made that loss of property includes loss of the use and enjoyment of it.

Moreover, as stated above, the Supreme Court of Canada has decreed that the order should be made with restraint and caution and should not be made where serious legal or factual issues arise.[240] However, subsequently the Alberta Court of Appeal has stated that the mere fact that the claim is disputed is not a sufficient basis for refusing to make the order where the amount of money involved and the nature of the claim indicated that the claim could be dealt with reasonably and expeditiously.[241]

(3) Conclusion

Criminal Code powers to order compensation or restitution are narrow. Most provincial statutes make no mention of these tools. For example, Ontario's *Provincial Offences Act* permits the court to require restitution or compensation as a condition of a probation order, where authorized by any Act. The environmental statutes of that province, however, do not make provision for this.

While the subject of restitution and compensation is not uncontroversial, there is support in Canada for a more active use of restitution and compensation as sentencing tools. The Law Reform Commission of Canada recommends that restitution be made central to sentencing theory and practice[242] and K. L. Chasse, in "Restitution in Canadian Criminal Law,"[243] supports expanded use of the concept. The traditional objection is that the criminal courts are ill-equipped to deal with the issues involved, and that the issues are best left to the civil courts. This ignores the reality that the personnel of the civil and criminal courts are often one and the same, and that criminal courts are able to handle complex commercial fraud and trade practice cases involving huge sums and convoluted transactions. The argument that restitution issues will unduly lengthen trials is also a shibboleth. The normal rules of evidence are adequate to exclude evidence that is not relevant to liability issues. Chasse suggests that:

> ... at the time of sentence there is no reason why the court cannot call for proof and provide the accused with the necessary avenues of examination and discovery in regard to any question of restitution that the court wishes to consider.[244]

His main concern is that the focus not shift from the criminal to the victim. While we agree that safeguards are needed to ensure that the main spotlight stays on the offender and his offence, we support the views put forward by the former federal Minister of Justice, the Honourable Mark MacGuigan,[245] and by the Canadian Federal-Provincial Task Force on Justice for Victims of Crime[246] that more emphasis must be placed on the victim, who is largely ignored in the present sentencing process. Mr. MacGuigan's suggestion that the court be presented with a "victim impact" statement and the task force recommendation that a surcharge on fines be used to aid victims of crime are consistent with our recommendations. Restitution and compensation provisions are additional ways of implementing this philosophy.

Another argument used against restitution and compensation is that they turn the criminal courts into a "collection agency." This ignores the often wasteful duplication involved in separate criminal and civil actions arising out of the same activity, and, more importantly, it does not take into account the reality that civil proceedings are too costly for the average person. The alternative to recovery through the sentencing process is not recovery through the civil process, but no recovery at all.

We therefore strongly recommend the incorporation, with appropriate safeguards for the defendant, of restitution and compensation into environmental statutes.

G. *Performance Guarantees*

Many aspects of the law, from contracts to licencing standards, incorporate methods of guaranteeing performance. They are often referred to as "securities" or "sureties." The two terms are often used interchangeably; however, one difference is that the former often refers to things and the latter to persons. A security is a resource to be used in the case of failure to meet an obligation. A surety is a person who undertakes to meet the obligation in the event his principal defaults. In environmental law, the possibility of harm and the need to clean up, restore the environment and compensate the victims are often anticipated in part by requirements for deposit of money, provision of bonds, and irrevocable letters of credit.[247] In criminal law, the *Code* provides for "bail." Section 745 allows the court to order a defendant to enter into a recognizance, with or without sureties, to keep the peace. An interesting blend of private action and criminal sanction, this is neither a criminal charge resulting in conviction nor a power to be exercised on sentencing, but a separate application that can be made by a person who fears that another person will cause him or his family personal injury or will damage property. The probation sections of the *Code* do not explicitly provide for guarantees. The only section that might reasonably be construed to give the court the power to order deposit of money or other guarantees is paragraph 663(2)(*h*) which compels the offender to "comply with such other reasonable conditions as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences."

Broader application of such guarantees would be useful in sentencing in environmental law in at least two circumstances: first, when the defendant makes a submission to the court as a mitigating factor that he intends to undertake certain activities in future, and secondly, to back up any order the court might make for future action.

At present, promises or undertakings to carry out activities are unenforceable. The offender can reap the advantage of a lower sentence as a result of such promises, and not carry them out.

Failure to obey a court's order is punishable by contempt proceedings, but there still remain difficulties in enforcing the contempt finding. Forfeiture of securities could provide a powerful incentive to comply with orders or keep promises.

Conclusion

The major problem in sentencing is not the one perceived by the public — that fines are generally too low. In fact, the average fine handed down by the courts is commensurate with the gravity of the typical offence that comes before the court and the means of most small offenders. The maximum fines available in most cases are not only adequate to cover the typical offence, but may even be too high to reflect the gravity of some kinds of cases.

The problems lie not with the fine levels in typical cases, but with matters such as the inadequacy of the fines as the sole sanction available, the lack of available alternatives to the fine, the substantive law relating to corporate liability, and the fact that the same offence may entail so many degrees of risk and culpability that fines appear to the public to be too low even when they may be appropriate to the circumstances of the case.

To a lesser degree, the courts may be faulted for their preoccupation with serious risk and harm and their unwillingness to place great weight on intangible, aesthetic, emotional, and non-utilitarian considerations, such as nuisance and harm to the ecosystem which does not perceivably impinge on human uses of it. On the whole, however, judicial attitudes toward the environment seem reasonable.

The problems in sentencing arise primarily in the exceptional cases — those involving the very wealthy and the very poor, the especially recalcitrant offender, sensitive environments, high-risk occupations, hazardous substances, reckless and deliberate activity, ongoing pollution, pollution so inherent in an operation that it is impractical to eliminate it, and where financial benefits of wrongdoing exceed the maximum fine.

Some of these problems can be addressed by higher fines, provided that the levels are correlated to these problems and not raised indiscriminately. Other problems require more innovative solutions.

Some of the solutions may arise completely outside the scope of the prosecution and sentencing process, through the use of techniques such as diversion schemes, effluent fees and pollution taxes, imposition of fines directly by administrative agencies without prior prosecution, and the whole range of what have come to be known as "soft sanctions." These are beyond the scope of this Paper.

Some of the most innovative sentencing options may require a more radical restructuring of the legal system. The concept of a "day-fine" for example, appears to have greater potential for creating equity between the wealthy and the poor offender, while also being closely correlated with the length of time an offence lasts and the profit achieved by it, than other suggestions we have made. The replacement of the fine as the basic sanctioning unit with restitutionary payments, as suggested at pages 15 and 16 in the Law Reform Commission Working Paper 5, the use of the community work order, and prohibition of offenders from participating in corporate activity also have great promise.

Our failure to discuss these and other promising reforms does not imply rejection of them. We have focussed instead on reforms which can be relatively easily accomplished within the present legal framework. In the long run, these reforms may prove to be only interim measures. However, the possibility of more fundamental reforms in future should not be an excuse for failing to make useful changes now.

Sentencing has been a neglected area of environmental law until very recently. The recent raising of fines by the federal government has already resulted in an explosion of case-law. As fines get higher, consideration of sentencing options is likely to continue to escalate. Recent recognition by the Ontario Court of Appeal that the range of fines in certain public welfare offences is too low[248] is likely to contribute to this escalation. The time is ripe not only for thoughtful discussion of the sentencing process, but for immediate application of many of the lessons about sanctions that have been learned from a decade of environmental litigation and five years of experience in applying the *Sault Ste. Marie* case, as well as the lessons that can be learned from the literature on white-collar crime.

Endnotes

1. *R.* v. *United Keno Hill Mines Ltd.* (1980), 10 CELR 43 (Y.T. Terr. Ct.), p. 47.
2. *Ibid.*, p. 46.
3. *R.* v. *City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299; 85 D.L.R. (3d) 161; 40 C.C.C. (2d) 353.
4. E. Keyserlingk, *Environmental Pollution as Crime: Some Conceptual Considerations* (First draft, prepared for the Law Reform Commission of Canada, 1982). [Emphasis in the original]
5. Peter Z. Finkle and Alastair R. Lucas, eds., *Environmental Law in the 1980s: A New Beginning* (Calgary: Canadian Institute of Resources Law, 1982), p. 126.
6. *Supra*, note 3, [1978] 2 S.C.R. 1299, p. 1310.
7. Clauses (g) and (h) were added by s. 4 of the *Environmental Protection Amendment Act*, S.O. 1983, c. 52. Previously, these effects were contained in a separate regulation limited to air pollution: Reg. 308, R.R.O. 1980.
8. One exception is the allocation of guilt between a corporation and the individual actors within the corporation. To be able to allocate penalties to both corporations and their personnel for the same offence, some substantive law reform may first be required to make both guilty of the offence. Division of guilt is now possible only in relatively narrow circumstances.
9. Section 92(15) of the *Constitution Act, 1867* gives the provinces exclusive legislative jurisdiction over sentencing in relation to provincial statutes.
10. Sir Rupert Cross, *The English Sentencing System*, 2nd ed. (London: Butterworths, 1975), p. 107.
11. See, for example *R.* v. *Morrissette* (1970), 1 C.C.C. (2d) 307; 75 W.W.R. 644, 12 C.R.N.S. 392, 13 Cr. L.Q. 208 (Sask. C.A.); *R.* v. *Wilmott*, [1967] C.C.C. 171.
12. E.g., *R.* v. *American Can of Canada Ltd.* (1977), 2 FPR 121 (Ont. Prov. Ct.); *R.* v. *Sheridan*, *infra*, note 15; *R.* v. *Industrial Tankers*, [1968] 2 O.R. 142, p. 145.
13. *Supra*, note 3, p. 170.
14. *Supra*, note 3, p. 172.
15. *R.* v. *Sheridan*, [1973] 2 O.R. 192 (Ont. Dist. Ct.), p. 207.
16. *R.* v. *The Vessel "City of Guildford"* (1975), 27 C.C.C. (2d) 212 (Ont. Cty. Ct.), p. 216.
17. *Supra*, note 1, p. 46.
18. Ben Boer, "Environmental Values: A Role for the Law," unpublished paper, School of Law, MacQuarie University, New South Wales, Australia, 1983.
19. *Ibid.*
20. *R.* v. *Krey* (1982), 12 CELR 105.
21. On appeal the term of imprisonment was reduced to two months.
22. Clayton C. Ruby, *Sentencing*, 2nd ed. (Toronto: Butterworths, 1980), p. 8; *R.* v. *Warner, Urquhart, Martin, and Mullen*, [1946] O.R. 808.
23. P. C. Weiler, "The Reform of Punishment" in Law Reform Commission of Canada, *Studies on Sentencing* (Ottawa: Information Canada, 1974), p. 173. See also J. M. P. Weiler, "Why Do We Punish? The Case for Retributive Justice" (1978), 12 *U.B.C.L.R.* 295, pp. 314 and 315.
24. *The Queen* v. *W. Sumarah, Jr., G. Sumarah and North Star Shipping Ltd.*, [1970] 5 C.C.C. 317, 10 Cr. N.S. 169, 70 D.T.C. 6164 (N.S. Co. Ct.); *Galloway* v. *The Queen* (1969), 69 D.T.C. 5023 (Alta. D.C.).
25. *R.* v. *B.L.S. Sanitation*, unreported, Sept. 8, 1976, Sudbury (Ont. Dist. Ct.), p. 5.
26. *R.* v. *Cotton Felts Ltd.* (1982), 2 C.C.C. (3d) 287.
27. *Supra*, note 1, p. 48.
28. *Supra*, note 1.
29. *R.* v. *The Canada Metal Co. Ltd.*, unreported, Feb. 22, 1980, Toronto, Ont. (Ont. Prov. Ct.) Dnieper J., reversed on other grounds (1980), 11 CELR 28 (Ont. Cty. Ct.). Also *R.* v. *Echo Bay Mines Ltd.* (1980), 12 CELR 38; *R.* v. *Panarctic Oils Limited* (1983), 12 CELR 78.
30. *R.* v. *Hoffmann-La Roche Ltd. (No. 2)* (1980), 56 C.C.C. (2d) 563 (Ont. H.C.), p. 569.
31. Lois G. Forer, *Criminals and Victims* (New York: Norton, 1980), pp. 203-204.
32. *R.* v. *Aetna Insurance Co. and Seventy-two Other Corporations (No. 2)* (1975), 30 C.C.C. (2d) 76 (N.S. S.C.); *R.* v. *Kito Canada Ltd.* (1976), 30 C.C.C. (2d) 531.

33. *R.* v. *Browning Arms Company of Canada Ltd.* (1974), 18 C.C.C. (2d) 298 (Ont. C.A.).
34. *Supra*, note 30, p. 566.
35. *R.* v. *Kenaston Drilling (Arctic) Limited* (1973), 12 C.C.C. (2d) 383 (N.W.T. S.C.), p. 386.
36. *Le Procureur Général de la Province de Québec* c. *New Brunswick International Paper Co.*, Court of Sessions of the Peace, Bonaventure, July 4, 1980, No. 105-27-660-76, p. 49 (unreported). See also *Le Procureur Général de la Province de Québec* c. *Dame Claire Gagnon*, Superior Court, Criminal Division, Terrebonne, Oct. 26, 1977, No. 700-36-0019-777, Boilard J.C.S. (unreported). In Québec, perhaps in recognition of the limited value of fines, recourse to injunctions is set out in section 19.3 of the *Environment Quality Act*.
37. *R.* v. *The Canada Metal Co. Ltd.*, *supra*, note 29.
38. *R.* v. *Cyprus-Anvil Mining Corporation* (1975), 5 CELN 116 (Y.T. Mag. Ct.); aff'd (1976), 5 CELN 117 (Y.T.C.A.).
39. For example, in Ontario, approximately 97 per cent of all business can be categorized as small: Ontario Ministry of Industry and Tourism, *A Small Business Development Policy for Ontario*, March, 1980. A small business is defined as a service industry with fewer than fifty employees or a manufacturing industry with fewer than one hundred employees.
40. *R.* v. *McNamara* (1981), 50 C.C.C. (2d) 516, p. 527.
41. Ruby, *supra*, note 22, p. 11; *supra*, note 29.
42. For an explanation of these terms see Colin H. Goff and Charles E. Reasons, *Corporate Crime in Canada* (Scarborough: Prentice-Hall, 1978).
43. Personal communication, dated March, 1983, from a resident of the Junction Triangle in Toronto, Ontario, in reference to the fine in the *Nacan* case, *infra*, note 73.
44. "Cyanamid fined for job health violation," *St. Catherines Standard*, January 25, 1984. The case involved charges by the Ministry of Labour under the *Occupational Health and Safety Act* and by the Ministry of the Environment under the Ontario *Environmental Protection Act*.
45. Cited in Robert B. Gibson, *Control Orders and Industrial Pollution Abatement in Ontario* (Toronto: Canadian Environmental Law Research Foundation, 1983), p. 83.
46. W. B. Fisse, "Reconstructing Corporate Criminal Law" (1983), 56 *Southern California L.R.* 1141, p. 1148.
47. *Ibid.*, p. 1149.
48. Anthony N. Doob and Julian V. Roberts, *An Analysis of the Public's View of Sentencing* (Ottawa: Department of Justice, 1983).
49. For example *R.* v. *Wilmott*, *supra*, note 11; *R.* v. *Iwaniw*, *R.* v. *Overton* (1959), 127 C.C.C. 40, pp. 50-51 (Man. C.A.); *R.* v. *Nash (No. 2)* (1949), 8 C.R. 44 (N.B. C.A.).
50. *Supra*, notes 1 and 26.
51. See *R.* v. *Canadian Marine Drilling Ltd.* (1983), 13 CELR 8 (N.W.T. Terr. Ct.); also *R.* v. *Panarctic Oils Limited*, *supra*, note 29, p. 86.
52. *R.* v. *Canadian Marine Drilling Ltd.*, *supra*, note 51, p. 9.
53. *R.* v. *Cyanamid Canada Inc.* (1981), 11 CELR 31 (Ont. Prov. Ct.); *R.* v. *McCain Foods Ltd.*, unreported (N.B. Prov. Ct.), J.F.H. Crocco J., Sept. 27, 1984.
54. *Supra*, note 1, p. 48.
55. *Piette* c. *Choinière*, Superior Court, Bedford, May 20, 1982, Jurisprudence Express, No. 82-628. The case involved illegal disposal of pig manure.
56. *Supra*, note 35, p. 386.
57. *Supra*, note 35; *supra*, note 20.
58. *Supra*, note 16; see also *supra*, note 1.
59. *Panarctic Oils Limited*, *supra*, note 29, pp. 85-86.
60. *Supra*, note 1, p. 47.
61. *Supra*, note 1, p. 49.
62. *R.* v. *Western Forest Industries Ltd.* (1978), 2 FPR 269 (B.C. Prov. Ct.), p. 275.
63. Keith Devlin, *Sentencing Offenders in Magistrates' Courts* (London: Sweet and Maxwell, 1975), p. 30.
64. *Supra*, note 10.
65. *R.* v. *Mellstrom* (1975), 22 C.C.C. (2d) 472 (Alta. S.C.), p. 486.
66. *R.* v. *Webb*, [1971] V.R. 147 (Vic. S.C.), pp. 150-151.

67. The issue, which appeared unresolved at the time this Paper was begun, has largely been put to rest by *R.* v. *Parks* (1982), 39 O.R. (2d) 334 (Ont. C.A.) and *Cotton Felts Ltd.*, *supra*, note 26. For discussion of the situation previous to these decisions, see Ruby, *supra*, note 22, p. 145; R. Paul Nadin-Davis, *Sentencing in Canada* (Toronto: Carswell, 1982), pp. 144-6.

68. *R.* v. *Parks*, *supra*, note 67.

69. *Supra*, note 26.

70. *R.* c. *Grégoire*, Provincial Court, Dec. 11, 1981, District of St-Hyacinthe, No. 27-001200-81, Roberts J.

71. *R.* c. *Choquette*, Court of Sessions of the Peace, Feb. 6, 1981, District of St-Hyacinthe, No. 750-27-3221-78.

72. *R.* v. *Tricil*, reported in (1978), 3:6 CELA Newsletter 84 (Ont. Prov. Ct.).

73. *R.* v. *Nacan Products Ltd.*, unreported, Oct. 13, 1982 (Ont. Prov. Ct.), Dnieper J.

74. The issue is currently before the Supreme Court of Canada in *Attorney-General of Ontario* v. *Fatehi* (1982), 34 O.R. (2d) 129 (Ont. C.A.); leave to appeal to the Supreme Court of Canada granted. Whether the decision in this case will affect sentencing will depend on the extent to which the courts are willing to extend civil analogies to other aspects of the public welfare offence, as they have to the basis of liability.

75. *Supra*, note 25. In *Nacan*, *supra*, note 73, the court also took into account "mischief to ... public authorities."

76. *Supra*, note 1, p. 58.

77. The English position, which has received limited support in Canada, is that the Crown should take no position on quantum of sentence.

78. See discussion and cases cited in Ruby, *supra*, note 22, pp. 44-46; *Nadin-Davis*, *supra*, note 67, pp. 539-541.

79. John McLaren, "The Common Law Nuisance Actions and the Environmental Battle — Well-Tempered Swords or Broken Reeds" (1972), 10 *Osgoode H.L.J.* 505, p. 532.

80. R. Needham, ed., *Legal Control of the Environment* (New York: Practising Law Institute, 1971), p. 94, *passim*.

81. *R.* v. *Gardiner* (1982), 30 C.R. (3d) 289 (S.C.C.).

82. The analysis is also consistent with the demarcation between crimes and other offences proposed by the Law Reform Commission of Canada in *The General Part — Liability and Defences*, [Working Paper 29] (Ottawa: Supply and Services, 1982), p. 25:

> According to the case-law, the hallmark of crimes as opposed to quasi-crimes, is intent and recklessness as distinct from negligence. The difference between those distinct states of mind, however, lies in knowledge. Without knowledge there can be neither intent nor recklessness. Clearly, then the minimum requirement for liability is knowledge.
>
> Knowledge, however, may be actual or constructive. Actual knowledge is that which a person has or would have if he did not wilfully shut his eyes to an obvious means of knowledge. Constructive knowledge means knowledge he would have if he did not neglect to make such inquiries as a reasonable and prudent person would make. *Only the former, actual knowledge is sufficient for crimes. Constructive knowledge, a kind of negligence, is relevant to offences other than crimes, that is, regulatory offences for which strict or absolute liability may be imposed.* [Emphasis added]

83. *Supra*, note 1, p. 49.

84. *Supra*, note 31, p. 202.

85. *Supra*, note 33.

86. Law Reform Commission of Canada, *Restitution and Compensation* and *Fines*, [Working Papers 5 and 6] (Ottawa: Information Canada, 1974).

87. Law Reform Commission of Canada, *Criminal Responsibility for Group Action*, [Working Paper 16] (Ottawa: Information Canada, 1976), p. 39.

88. The Ontario Ministry of the Environment, using powers in the legislation it administers which require disclosure of information, has on occasion retained forensic accountants to determine whether companies can afford to abate pollution. Whether the Crown can use such powers to obtain information for the sole purpose of use in sentencing is open to question. Ministry staff economists have also been requested on occasion to provide information to counsel for use in making sentencing submissions.

89. *Supra*, note 25, p. 4.

90. *Supra*, note 1.

91. See, for example, *R.* v. *American Can of Canada Ltd.*, *supra*, note 12, pp. 123-124; *R.* v. *ELF Oil Exploration and Production Canada Ltd.* (1974), 2 FPR 27 (N.W.T. Mag. Ct.); *R.* v. *British Yukon Navigation Co. Ltd.* (1976), 2 FPR S-5 (Y.T. Mag. Ct.), p. 2.

92. *Supra*, note 38. See also *R.* v. *Cyprus Anvil Mining Corporation* (1976), 5 CELN 145 (Y.T. Mag. Ct.).

93. *Supra*, note 1. See also *R.* v. *Industrial Tankers*, *supra*, note 12.

94. *Supra*, note 38. In the case of *Pépin* c. *Le Procureur Général de la Province de Québec*, Court of Appeal, April 29, 1983, Jurisprudence Express, No. 83-590, the court confirmed a Superior Court judgment declaring the appellant guilty of contempt of court. The appellant had ignored an injunction ordering him to stop his illegal operation of his garbage dump. The Court of Appeal stated that the $7,000 fine imposed by the Superior Court took into account all the relevant factors, in particular the fact that the defendant admitted that, at the time the case was being heard, and in spite of the injunction, he was earning about $22,000 a year from the operation of the dump. See also *Panarctic Oils Limited*, *supra*, note 29.

95. This conclusion is based on a casual perusal of the case-law rather than a statistical analysis. However, the disparities are so obvious that probably no such analysis is required to verify the statement. A recent study of fines between 1975 and 1982 under Ontario's *Environmental Protection Act*, for example, showed that the median fine to individuals was roughly a third of the fine to corporations. No attempt was made to distinguish between large and small corporations: Heather Trueman, *Prosecutions under the Ontario Environmental Protection Act: A Summary, 1975-1981* (unpublished student's paper, April, 1983). In *Piette* c. *Choinière*, *supra*, note 55, the court declared it would take into consideration "the known financial difficulties presently being experienced by the pig producers" when imposing the fine. This was fixed at $250.

96. See, for example, *R.* v. *Sanatkar* (1982), 64 C.C.C. (2d) 325 (Ont. C.A.), p. 327.

97. For example, *R.* v. *Placer Development Ltd.* (1982), 12 CELR 58; *Panarctic Oils Limited*, *supra*, note 29; *United Keno*, *supra*, note 1; *Kenaston*, *supra*, note 35; *Cyprus-Anvil*, *supra*, note 38; *Canadian Pacific*, *infra*, note 113; *R.* v. *MacMillan Bloedel Industries Ltd.* (1976), 1:2 FPR 95.

98. *R.* v. *B. & R. Construction Ltd.*, unreported, March 10, 1976 (N.W.T. Mag. Ct.), Eckhardt Dep. Mag.; discussed in David Searle, "The Environment and the Law in Canada's North" (1977), 15 Alta. L.R. 412, p. 417.

99. *Supra*, note 29, p. 4.

100. *R.* v. *O. E. MacDougall Liquid Waste Sales and Systems Limited*, unreported, Jan. 13, 1982 (Ont. Prov. Ct.), Deacon J.; March 24, 1982 (Ont. Cty. Ct.), Newton J.

101. *R.* v. *Direct Winters Transport Limited*, unreported, Jan. 13, 1982 (Ont. Prov. Ct.), Deacon J.

102. *Supra*, note 87, p. 42 and following.

103. *R.* v. *Van's Gifts and Books Ltd.*, unreported, Oct. 14, 1977 (Ont. C.A.).

104. In *R.* v. *Canadian Marine Drilling Ltd.*, *supra*, note 52, Bourassa J. in sentencing a subsidiary of Dome Petroleum stated that "the court must be on guard to see that large corporations do not avoid large fines or responsibility for their illegal actions by establishing a network of small corporations." This approach is supported by Stuart J. in *United Keno*, *supra*, note 1, p. 50 and by American jurisprudence referred to therein.

105. For other reasons as to why it is reasonable and fair for corporate punishments to flow through to others, see Fisse, *supra*, note 46, pp. 1175-6.

106. W. B. Fisse, "Responsibility, Prevention, and Corporate Crime" (1972-73), 5 *N.Z. Univ. L.R.* 250.

107. *Supra*, note 87, p. 38.

108. Dershowitz, "Increasing Community Control over Corporate Crime — A Problem in the Law of Sanctions" (1961-62), 71 *Yale L.J.* 280, p. 296.

109. *Supra*, note 1, p. 50.

110. See, for example, *United Keno*, *supra*, note 1; *Canadian Marine Drilling Ltd.*, *supra*, note 52.

111. *Echo Bay*, *supra*, note 29.

112. *R.* v. *Giant Yellowknife Mines Ltd.* (1975), 4 CELN 69 (N.W.T. Mag. Ct.).

113. *R.* v. *Canada Cellulose Co.*, [1979] B.C.D. Crim. Sent. 7225-01 (B.C. Cty. Ct.). See also *Echo Bay*, *supra*, note 29; *R.* v. *Canadian Forest Products Ltd.*, unreported, Sept. 23, 1981 (B.C. Prov. Ct.); *R.* v. *Canadian Pacific Transport Co. Ltd.* (1977), 2 FPR 209 (B.C. Prov. Ct.).

114. *Supra*, note 30.

115. *Supra*, note 112.

116. *Supra*, note 112, p. 287 (note 39).
117. *Supra*, note 106.
118. *Supra*, note 87.
119. *Supra*, note 1.
120. *Supra*, note 29, p. 85.
121. There is considerable evidence of this because, since *United Keno*, counsel regularly parade a senior official before the court. See, for example, *R.* v. *Equity Silver Mines Ltd.*, unreported, June 20, 1983 (B.C. Prov. Ct.); *R.* v. *Ocelot Industries Ltd.*, unreported, June 8, 1983 (B.C. Prov. Ct.).
122. Christopher Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (New York: Harper and Row, 1975), p. xiii.
123. E.g., *American Can, supra*, note 12.
124. *R.* v. *Cyprus-Anvil* (1976), 5 CELN 145 (Y.T. Mag. Ct.), p. 150.
125. *Ibid.* See also *Cyprus-Anvil Mining Corp. Ltd.* v. *The Queen*, *supra*, note 38, p. 119; *R.* v. *Spillar*, [1969] 4 C.C.C. 211 (B.C. C.A.).
126. *R.* v. *Canadian Industries Limited* (1977), 8 CELR 121 (Y.T. Mag. Ct.).
127. *R.* v. *York Sanitation Co. Ltd.* (1978), 8 CELR 146 (Ont. Prov. Ct.).
128. *Supra*, note 126.
129. *Canada Tungsten Mining Corp. Ltd.* v. *The Queen* (1975), 5 CELR 120 (N.W.T. S.C.); See also *United Keno*, *infra*, note 155; *R.* v. *Texaco Canada Ltd.* (1979), 2 FPR 215, p. 228.
130. *Supra*, note 113.
131. *Supra*, note 1.
132. *Supra*, note 38.
133. *Plant National*, unreported, Dec. 22, 1980 (Ont. Prov. Ct.), Bates J.P.
134. *R.* v. *Metal Flo*, unreported, Nov. 5, 1981 (Ont. Prov. Ct.), McConnell J.
135. *Supra*, note 72.
136. *R.* v. *Festival Sales and Products Ltd.*, unreported, Sept. 7, 1982 (Ont. Prov. Ct.), Smith J.P.
137. *R.* v. *Russell*, unreported, Sept. 24, 1982 (Ont. Prov. Off. Ct.), Ferris J.P.; aff'd. Dec. 15, 1982 (Ont. Prov. Ct.), Cochrane J.
138. *American Can*, *supra*, note 12.
139. *Supra*, note 12.
140. *R.* v. *Barnes*, unreported, Jan. 25, 1980 (Ont. Prov. Ct.), Smith J.
141. *Supra*, note 29.
142. *R.* v. *Holmes Foundry*, unreported, Sept. 22, 1981 (Ont. Prov. Ct.), Cochrane J.
143. *R.* v. *Echo Bay Mines*, *supra*, note 29, p. 41.
144. *Ibid.*
145. *Ibid.*, pp. 41-42.
146. *R.* v. *Fabricated Plastics Ltd.* (1979), 8 CELR 173 (Ont. Prov. Ct.); and *supra*, note 113.
147. *R.* v. *Corporation of the City of Barrie* (1971), 13 Crim. L.Q. 371 (Ont. Prov. Ct.).
148. *R.* v. *Suncor Inc.*, unreported, May 31, 1983 (Alta. Prov. Ct.), Horrocks J.
149. *R.* v. *Wilby and Smithaniuk*, unreported, June 3, 1983 (B.C. Prov. Ct.).
150. *Supra*, note 1, p. 49.
151. *R.* v. *Spataro Cheese Products*, unreported, April 21, 1981 (Ont. Prov. Ct.), Nadeau J.
152. *Supra*, note 38, p. 116.
153. *Supra*, note 25.
154. *Supra*, note 1, p. 58.
155. See, for example, *Canadian Pacific Transport Co. Ltd.*, *supra*, note 113; *R.* v. *United Keno Hill Mines* (1979), 2 FPR 212 (Y.T. Mag. Ct.), p. 213.
156. *Day and Ross* v. *The Queen*, [1976] C.T.C. 707; 76 D.T.C. 6433 (F.C.-T.D.).
157. (1977), 25 *C.T.J.* 16.
158. *Interpretation Bulletin I.T.* — 104R.
159. *R.* v. *Adam Clark Co. Ltd.* (1982), 3 C.C.C. (3d) 323 (Ont. C.A.), p. 324.
160. *Tricil*, *supra*, note 72.

161. *Supra*, note 73.

162. Notably, *Kenaston*, *supra*, note 35, and *United Keno*, *supra*, note 1. See, however, the comments of Ayotte J. in *R.* v. *Echo Bay Mines Ltd.*, *supra*, note 29, to the effect that to some extent this special approach is merely a reminder of the importance of evidence.

163. P. C. Weiler, *supra*, note 23.

164. Stone, *supra*, note 122.

165. *Supra*, note 15, pp. 207-208.

166. *R.* v. *The Corporation of the District of North Vancouver* (1982), 11 CELR 158 (B.C. Prov. Ct., Crim. Div.).

167. *Ibid.*, p. 170.

168. *Supra*, note 26, p. 294.

169. "Pollution, When Is It a Crime?" editorial, *Windsor Star*, January 29, 1983.

170. Regulation 313 under the *Environmental Protection Act*, R.R.O. 1980, section 5.

171. John Swaigen, "Procedure in Environmental Regulation," in Finkle and Lucas, *supra*, note 5.

172. Newfoundland, *The Waters Protection Act*, R.S.N. 1970, c. 394, s. 8; Newfoundland, *The Nuisances and Municipal Regulations Act*, R.S.N. 1980, c. 276, s. 3.

173. Ontario, *Environmental Protection Act, 1971*, R.S.O. 1980, c. 141, s. 146; Ontario, *Ontario Water Resources Act*, R.S.O. 1980, c. 361, s. 16.

174. Nova Scotia, *Environmental Protection Act*, S.N.S. 1973, c. 6, s. 48; Nova Scotia, *Water Act*, R.S.N.S. 1967, c. 335, s. 8.

175. Québec, *Environment Quality Act*, R.S.Q., c. Q-2, s. 107. Actually, both sections 106 and 107 impose sanctions, and we are advised by Marie Tremblay of the Law Reform Commission of Canada that section 106 is used more often than section 107.

    For an *individual person*, section 106 decrees a maximum fine of $5,000 for a *first offence*. For a *corporation*, this fine is $30,000. For all *subsequent* offences, the maximum fine is $10,000 for an *individual person* and $60,000 for a *corporation*.

    Under section 107, in the case of a first offence by an individual person, the maximum fine is $3,000.

    Section 109.1, among other things, allows the government to adopt regulations providing for a maximum fine of up to $100,000 in the case of subsequent offences by a corporation. For an individual person, the maximum fine is $25,000 for subsequent offences.

176. Ontario, *Public Parks Act*, R.S.O. 1980, c. 417, s. 19.

177. Ontario, *Trees Act*, R.S.O. 1980, c. 510, s. 6.

178. John Andersen and John Swaigen, *Urban Tree and Forest Legislation in Ontario* (Sault Ste. Marie: Canadian Forestry Service, 1978), pp. 16-18, 76.

179. Ontario, *Ontario Water Resources Act*, R.S.O. 1980, c. 361, s. 51.

180. Ontario, *Ontario Water Resources Act*, R.S.O. 1980, c. 361, s. 32.

181. Ontario, *Ontario Water Resources Act*, R.S.O. 1980, c. 361, s. 24.

182. For example, Newfoundland, *The Waste Material (Disposal) Act*, R.S.N. 1970, c. 393, s. 13; Québec, *Environment Quality Act*, R.S.Q., c. Q-2, s. 66; Ontario, *Environmental Protection Act*, R.S.O. 1980, c. 141, Part V.

183. *Supra*, note 3, p. 374 (C.C.C.); *R.* v. *Capozzi Enterprises Ltd.* (1981), 60 C.C.C. (2d) 385, p. 391.

184. For example, the *Fisheries Act*, R.S.C. 1970, c. F-14, s. 33(5).

185. For example, *Canada Shipping Act*, R.S.C. 1970, c. S-9, Part XX; *Arctic Waters Pollution Prevention Act*, R.S.C. 1970, c. 2 (1st Supp.), s. 18; *Clean Air Act*, S.C. 1970-71-72, vol. 1, c. 47, s. 33(1); *Environmental Contaminants Act*, S.C. 1974-75-76, vol. 2, c. 72, s. 8(5); *Ocean Dumping Control Act*, S.C. 1974-75-76, vol. 1, c. 55, s. 13.

186. For example, *supra*, note 16; *Placer*, *supra*, note 97.

187. Statistics provided by C. C. Young, Regulations Unit, Department of Fisheries and Oceans.

188. E.g., Alberta, *Clean Water Act*, R.S.A. 1980, c. C-13, s. 15(4); British Columbia, *Pollution Control Act*, R.S.B.C. 1979, c. 332, s. 25; Manitoba, *Clean Environment Act*, R.S.M. 1970, c. C-130, s. 8; New Brunswick, *Clean Environment Act*, R.S.N.B. 1973, c. C-6, s. 33(2); Newfoundland, *The Department of Environment Act*, S.N. 1981, c. 10, s. 48(2); Nova Scotia, *Environmental Protection Act*, S.N.S. 1973, c. 6, s. 48; Ontario, *Environmental Protection Act, 1971*, R.S.O. 1980, c. 141, s. 146; Québec, *Environment Quality Act*, R.S.Q., c. Q-2, s. 110; statutes, *supra*, notes 184 and 185; *Canada Water Act*, R.S.C. 1970, c. 5 (1st Supp.), s. 28(2).

189. British Columbia, *Pesticide Control Act*, R.S.B.C. 1979, c. 322, s. 22(2); Newfoundland, *The Waters Protection Act*, R.S.N. 1970, c. 394, s. 8; Nova Scotia, *Environmental Protection Act*, S.N.S. 1973, c. 6, s. 48; Nova Scotia, *Water Act*, R.S.N.S. 1967, c. 335, s. 8(3); Québec, *Environment Quality Act*, R.S.Q., c. Q-2, ss. 106 and 107; *Fisheries Act*, R.S.C. 1970, c. F-14, s. 33(5).

190. However, see Nadin-Davis, *supra*, note 67, p. 371.

191. E.g., British Columbia, *Pesticide Control Act*, R.S.B.C. 1979, c. 322, s. 22(2) (minimum imposed for second and subsequent convictions); Prince Edward Island, *Environmental Protection Act*, P.E.I. Acts 1975, as amended, c. 9, s. 9(2), s. 23; Québec, *Environment Quality Act*, R.S.Q., c. Q-2, ss. 106, 107 and 108; Ontario, *Environmental Protection Act, 1971*, R.S.O. 1980, c. 141, s. 147.

192. For example, this has been cited as a problem in enforcement of municipal tree protection by-laws: M.J. Puddister, *The Response of Ontario Municipalities to Tree Conservation* (Guelph: University of Guelph, 1982), pp. 34-35; *supra*, note 178, p. 75.

193. *Provincial Offences Procedure: An Analysis and Explanation of Legislative Proposals* (Toronto: Ontario Ministry of the Attorney General, 1978), p. 14.

194. Québec, *Environment Quality Act*, R.S.Q., c. Q-2, s. 109.1. For a *natural person*, the government can establish a minimum fine of up to $5,000 for a first offence and as much as $10,000 for all subsequent offences. For a *corporation*, the minimum fine can be as much as $10,000 for a first offence and as much as $25,000 for subsequent offences.
The government used the power accorded to it in the *Regulation amending the Regulation respecting Solid Waste Management*, R.R.Q., 1981, Supplement, Volume 2, page 1077, s. 23.

195. The Scandinavian "day-fine" system is briefly described in Working Paper 6, *supra*, note 86, p. 33, and received favourable comment in *supra*, note 1. The day-fine system deserves much more analysis than we have given it in this Paper, as it has great potential to provide equity between large and small offenders.

196. *Supra*, note 106, pp. 253 and 264.

197. *Supra*, note 87, p. 39.

198. Ontario, *Environmental Protection Act*, R.S.O. 1980, c. 141, s. 47a to 47h.

199. E.g., *Fisheries Act*, R.S.C. 1970, c. F-14, s. 58; *Migratory Birds Convention Act*, R.S.C. 1970, c. M-12, s. 7.

200. E.g., *Criminal Code*, R.S.C. 1970, c. C-34, ss. 160, 181 and 447; *Customs Act*, R.S.C. 1970, c. C-40, s. 192(3); *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10.

201. Nadin-Davis, *supra*, note 67, p. 181.

202. *Infra*, note 245.

203. P. C. Weiler, *supra*, note 23, pp. 107-108.

204. British Columbia, *Pollution Control Act*, R.S.B. c. 1979, c. 332, s. 25; British Columbia, *Pesticide Control Act*, R.S.B.C. 1979, c. 322, s. 22(2); *Environmental Contaminants Act*, S.C. 1974-75-76, c. 55, s. 8(5); Northwest Territories, *Environmental Protection Ordinance*, R.O.N.W.T. 1974, c. E-3, s. 12; New Brunswick, *Pesticides Control Act*, R.S.N.B. 1973, c. P-8, s. 30; Newfoundland, *The Department of Environment Act*, S.N. 1981, c. 10, s. 48(1)(b); Prince Edward Island, *Agricultural Chemicals Act*, R.S.P.E.I. 1974, c. A-4, s. 22; Québec, *Environment Quality Act*, R.S.Q., c. Q-2, s. 109.1.

205. E.g., Alberta, *Clean Air Act*, R.S.A. 1980, c. C-12, s. 9; Alberta, *Beverage Container Act*, R.S.A. 1980, c. B-4, s. 8; Alberta, *Clean Water Act*, R.S.A. 1980, c. C-13, s. 9.

206. Not his real name, but the facts are based on an actual case.

207. This example involves *mens rea*, in that the act was deliberate even though the actual and potential consequences may not have been intended. Whether this should be a minimum requirement for imprisonment or there are cases where accidents are grounds for imprisonment merits further consideration.

208. *Supra*, note 86, p. 31.

209. *Supra*, note 22, pp. 268-270.

210. While the Law Reform Commission has suggested that community service orders should be substituted for imprisonment wherever possible, there are serious practical problems with this proposal. While this is correct in theory, the Crown, the defence counsel, and the court may be reluctant at the end of a trial to take on the additional responsibility, entailing further cost and delay, of attempting to design, implement and supervise an appropriate work program. Community agencies which have had unfortunate experiences with such "volunteers" may also be less than

eager to participate. The Commission is frank in acknowledging the drawbacks of community service orders in its Papers on the subject published in *Community Participation in Sentencing* (Ottawa: Supply and Services, 1976).

211. *Supra*, notes 3 and 26.

212. Not his real name, but the facts are based on an actual case.

213. For two reasons. First, it involved a delegation of authority to a party. Secondly, there is some authority that adjourning the imposition of sentence to encourage an offender to take some action will cause the court to lose jurisdiction: *R.* v. *Nunner* (1976), 30 C.C.C. (2d) 199 (Ont. C.A.).

214. Leonard Orland, "Reflections on Corporate Crime: Law in Search of Theory and Scholarship" (1979-80), 17 *Am. Crim. L.R.* 501.

215. *R.* v. *Ziatas* (1973), 13 C.C.C. (2d) 287 (Ont. C.A.).

216. *United States* v. *Atlantic Richfield Co.*, 465 F. 2d 58 (7th Cir. 1972).

217. E.g., *Fisheries Act*, R.S.C. 1970, c. F-14, ss. 33(5) and 51(1).

218. E.g., *Panarctic Oils*, *supra*, note 29; *R.* v. *Greater Vancouver Regional District, Greater Vancouver Sewage and Drainage District*, unreported, May 7, 1981 (Richmond Prov. Ct.), Govan J.; *R.* v. *The Corporation of the District of North Vancouver*, unreported, Nov. 8, 1982 (North Vancouver Prov. Ct.), Hume J.; *R.* v. *Central Okanagan Regional District*, unreported, May 19, 1983, (Kelowna Prov. Ct.), Ellis J.

219. *R.* v. *Algoma Steel Corp.*, unreported, Jan. 10, 1977 (Ont. Prov. Ct. (Crim. Div.)), Greco P.C.J., summarized at (1977), 1 W.C.B. 118.

220. *Panarctic Oils*, *supra*, note 29.

221. *Canada Water Act*, R.S.C. 1970, c. 5 (1st Supp.), s. 30; Alberta, *Clean Air Act*, R.S.A. 1980, c. C-12, s. 35; *Fisheries Act*, R.S.C. 1970, c. F-14, s. 33(7); *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, s. 14(2).

222. *R.* v. *Churchill Copper Corp. Ltd.* (1971), 5 C.C.C. (2d) 319, p. 324 (B.C. Prov. Ct.); *R.* v. *Federated Co-operative Ltd.* (1971), 1 FPR (Part III) 7A (B.C. Prov. Ct.), p. 9; but see *R.* v. *West Coast Reduction Ltd.* (1973), 1 FPR (Part II) 20A (B.C. Prov. Ct.); *R.* v. *Columbia Cellulose* (1970), 2 FPR 1C (B.C. Prov. Ct.), p. 12; *R.* v. *Irving Pulp and Paper Ltd. (No. 2)* (1977), 2 FPR 82 (N.B. Prov. Ct.), p. 98.

223. *Canadian Marine Drilling Ltd.*, *supra*, note 51.

224. E.g., Ontario, *Provincial Offences Act*, R.S.O. 1980, c. 400, s. 72.

225. *R.* v. *St. James* (1981), 20 C.R. (3d) 389 (Qué. C.A.).

226. *United States* v. *J. D. Ehrlich*, 372 F. Supp. 768 (1974) U.S.D.C. [District].

227. *Apex Oil Co.* v. *United States*, 530 F. 2d 1291 (1976) U.S.C.A. [Circuit].

228. Ontario, *Provincial Offences Act*, R.S.O. 1980, c. 400, s. 72(3)(a).

229. *United States* v. *Clovis Retail Liquor Association*, 540 F. 2d, p. 1390.

230. *Supra*, note 25.

231. The limitation period is longer under a few federal and provincial statutes, for example, two years under the *Fisheries Act*, R.S.C. 1970, c. F-14, and Ontario's *Environmental Protection Act, 1971*, R.S.O. 1980, c. 141, and *Ontario Water Resources Act*, R.S.O. 1980, c. 361.

In Québec, environmental cases are brought according to the *Summary Offences Act* (R.S.Q., c. P-15). By virtue of section 14 of this Act, and of section 1 of the *Penal Actions Act* (R.S.Q., c. A-5), the prescribed time period is two years.

Nevertheless, there is sufficient uncertainty about the operation of section 11 of the *Canadian Charter of Rights and Freedoms* that prosecutors are likely to treat these longer limitation periods as being applicable only with regard to exceptionally time-consuming investigations or when an offence does not come to light until long after it was committed.

232. E.g., *R.* v. *DeKleric*, [1969] 2 C.C.C. 367 (B.C. C.A.).

233. *R.* v. *Dasher* (1974), 25 C.R.N.S. 340 (B.C. C.A.).

234. *Starup* v. *United Dominion Trust (Commercial) Ltd.*, [1967] 1 Q.B. 418 (Eng. Q.C.).

235. *R.* v. *Zelensky*, [1978] 2 S.C.R. 940, 2 C.R. (3d) 107.

236. *R.* v. *Chislieri*, [1980] Alta. D. 7055-01 (Alta. C.A.).

237. *Supra*, note 235.

238. *MacDonald* v. *Vapour Canada Ltd.* (1971), 66 D.L.R. (3d) 1 (S.C.C.).

239. A separate possibility for the compensation of victims exists under subsection 388(2) of the *Criminal Code*. This section applies only where there was damage to property, the damage was wilful, and did not exceed $50. As in paragraph 663(2)(*e*), payment can only be made to a person aggrieved, and a causal connection must be proved. Personal injury is excluded. Because of these requirements and the large number of separate counts and very small claims that would have to be proved for the order to have any discernable impact on a corporate accused, this provision is unlikely to be of value in many environmental cases.

240. *Supra*, note 235.

241. *Supra*, note 236.

242. *Supra*, note 86. The Commission uses the term "restitution" in the broad sense, to include what we have described as "compensation."

243. (1977), 36 C.R.N.S. 201.

244. *Ibid.*, p. 213.

245. "Changes Due for Divorce, Sentencing," *Globe and Mail*, July 5, 1983.

246. "Surtax on Offenders Proposed to Aid Victims of Crime," *Globe and Mail*, Aug. 17, 1983.

247. E.g., Ontario, *Pesticides Act*, R.S.O. 1980, c. 376, s. 28 and Reg. 751, R.R.O. 1980; *Arctic Waters Pollution Prevention Act*, R.S.C. 1970, c. 2 (1st Supp.); Ontario, *Environmental Protection Act*, R.S.O. 1980, c. 141, s. 34; Québec, *Environment Quality Act*, R.S.Q., c. Q-2, ss. 55 and 95.2; Québec, Regulation respecting solid waste, R.R.Q. 1981, c. Q-2, r. 14.

248. *Cotton Felts*, *supra*, note 26.