THE ROLE OF THE PROVINCIAL COURTS AND CRIMINAL/QUASI-CRIMINAL PROCESS

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*This paper is printed as it was originally presented at the conference, Law and the Environment: Problems of Risk and Uncertainty, Dalhousie University, Halifax, Nova Scotia, Oct. 15, 1988, without any updates or changes by the author.

The Provincial Court's role in the process of environmental protection is straightforward. As the Court of First Instance, the Court in which most infractions are dealt with (almost exclusively so in environmental matters), its role is to:

1. apply the law in accordance with its provisions and with existing jurisprudence and legal principles; and
2. enforce the law in a meaningful way by cautious, step by step innovation, and exploration in a way that will ensure the goals of enforcement are achieved.

The Provincial Court, therefore, plays a primary role ... or does it? In any discussion of the role of the Courts, and indeed of the law, there is an inescapable issue: what is and what ought to be. The Court's role that I have indicated is really "what ought to be". Today's reality is quite different.

When infractions of environmental protection laws are discovered, the investigating agency's response is almost invariably administrative. Indeed, a prosecution is usually considered, if at all, as a last resort. As widespread and common as it is, this approach is highly problematic both as a process and as a means of achieving a result—compliance with the law.

The reasons for such an administrative approach include lack of enforcement personnel, resources and will. Regardless of the reason, it leaves us as a society in a state of suspended animation: the laws exist; the penalties exist; but there is no enforcement. There is no action.

By way of illustration: in the Northwest Territories for 1984, there were 1,226 *reported* spills of various substances, including sewage, diesel fuel, Bunker B, methanol, caustic soda, propane and other substances, involving a minimum of 667,822 litres—but not a single prosecution. Since 1984, over 2,500 spills have been reported, but there have been less than a handful of prosecutions.

Under the various legislative regimes in place (*Ocean Dumping Control Act, Fisheries Act, Canada Shipping Act, Northern Inland Waters Act, Arctic Waters Pollution Prevention Act)*, infractions have been handled, if at all, by various regulatory or administrative agencies such as the Environmental Protection Service on an administrative level. This method has been a failure in terms of effectively dealing with polluters, both in obtaining compliance with existing laws, and in enforcing the law in the face of infractions.

Failure of the regulatory response may in part also be traced to the impossible position of field agents—akin to having one foot in a dinghy and the other on your boat—with deep cold water in between. On the one hand, they are responsible for prosecution; on the other, they are prevailed upon to "work it out". Industry asks them for advice and help on how to comply with an enactment or regulation, yet field agents are quickly blamed—and used as a defence—if their suggestions don't work. Responsibility for achieving legislated goals is thereby transferred from industry—where it belongs—to the field agency or government.

The field agents are encouraged to work cooperatively with industry to achieve compliance,

to build contacts, to develop and establish a working relationship. Yet these agents are responsible for prosecutions, actions which industry states will destroy those same contacts, cooperation and mutual trust.

In many instances industry plays what appears to be a deliberate strategy of manipulation—making marginal offers and increasing them incrementally. The process of dealing with infractions becomes a negotiable matter, described to me by a senior field agent in the Environmental Protection Service as akin to buying a used car, involving bluff, posturing and pressure. In this atmosphere of constant negotiation, bickering, offer and counter-offer, we tend to lose sight of the bottom line: there has apparently been an offence—an important law has been broken.

Let me demonstrate these points by a particular case: The Federal Ministry of Transport (MOT) and the Northern Canada Power Commission (NCPC) jointly operate a fuel handling and storage facility at Baker Lake, N.W.T. This facility is fairly large, serving a local community of about 1,100 on the shores of Baker Lake. In 1976, the Environmental Protection Service (EPS) of Environment Canada expressed concern for the physical condition and integrity of the operation, and as well, the lack of contingency planning for the site in the event of a mishap. On its own accord, EPS prepared a "Surveillance Report" in 1978, which specifically identified certain deficiencies and made recommendations for remedial measures and general improvements. EPS even went so far as to proffer a draft Contingency Plan for spill prevention and clean up. The Report and Plan, together with correspondence were received by MOT/NCPC. The result? Absolutely nothing was done in response.

The facility continued to deteriorate until in 1984 the inevitable occurred: approximately 32,000 litres of a petroleum product escaped through broken and corroded pipes, contaminating the ground and the lake. EPS investigated the spill. An exchange of letters, demands, and promises, with copies to all and sundry, went back and forth; yet no action was taken. The originating problem was not corrected, and leakage continued. In fact, the existing spill was not even cleaned up or contained.

In June, 1985, a further 107,000 litres escaped onto the lake creating a two kilometer slick along the shoreline fouling boats, nets, ice and shore. In addition, a transformer was found to be leaking. It is unknown if PCBs were involved. Again more letters, telexes, warnings, demands, promises were passed back and forth but no meaningful action was taken by MOT or NCPC. The site remained an active and continuing source of contamination.

By the end of June, EPS issued a remedial Order compelling MOT and NCPC to take action. The 1985 Order made mandatory what had been advisory seven years earlier. No charges were laid. There has been no public vindication of the law and the criminality of conduct has not been assessed. The contraveners bargained for and got a seven year breathing space. From MOT/NCPC's perspective, it may well have been a profitable exercise.

The typical offender in environmental offences is an industry—with connections and power

in many areas. It would be naive to pretend that industries are without political influence and capable of bringing enormous pressure to bear on politicians, and through them on regulatory bodies. Political or bureaucratic pressure to compromise with an offender, or not to prosecute will remain a fact of life. That regulatory agencies will, in one way or another, react to this pressure is equally self-evident.

Specific instances of political or bureaucratic pressure being brought to bear on regulatory agencies in the Northwest Territories may be found in *R.* v. *Robinson's Trucking Ltd.*. The Deputy Minister of Renewable Resources is reported to have called EPS at the beginning of the prosecution and demanded they "call off the dogs". In *R.* v. *Panarctic Oils* Ltd., key players in the prosecution reported a number of efforts to frustrate the prosecution.

I suspect that among potential offenders there is a strong belief that they will not be caught and, if caught, the consequences may be negotiated or bargained away. Does this situation reflect the rule of law—the supremacy of law—to which we as legal professionals have devoted our careers and lives? Would we as a society accept this response to a robbery? A sexual assault?

From this brief sketch, I suggest it is apparent that an administrative or regulatory response to environmental infractions is simply not effective. I say that the Courts can do better, and indeed, ought to be playing the leading role in the process of dealing with offenders. The reactions to some recent decisions, following successful prosecutions, appear to demonstrate that Court action is effective in enforcing the law and in achieving classic sentencing goals, all in a setting that allows for a full, fair and public expression and defence. In this regard, I refer to four cases.

1. ***R.* v. *ROBINSON'S TRUCKING LTD*.**

Robinson's Trucking is a small or medium sized trucking operation, which among other things, operates up to 100 trucks on winter roads in the Northwest Territories. These trucks ferry supplies from food to oil to isolated mining camps on the barrens. By 1985 the firm had been involved in 17 significant oil spills over a period of five years. The company had been cautioned, advised, warned, pleaded with and written to—all to no real avail. It remained singularly lackadaisical and cavalier in its attitude to its legal obligations. In 1985, two of its vehicles were involved in separate incidents resulting in the oil contamination of two lakes and a river, and it was prosecuted pursuant to the *Fisheries Act*. As I mentioned before, negotiation/intervention continued with the Deputy Minister of Renewable Resources requesting that the Regional Director of EPS "call off his dogs". Ultimately, the Defendant was convicted and sentenced. The sentence consisted of fines totalling $5,000, as well as Orders to Take Action (s. 33(7)) which required the Defendant to install and carry certain minimum emergency equipment, and as well, to dedicate and train an Emergency Response Team.

From subsequent accounts, the Defendant has responded to the convictions and sentence (indeed, the whole Court process) in a positive fashion. It has embraced, it appears, the new found

ethic of environmental protection with an ardour usually associated with converts. In fact, the Defendant has gone beyond its Court-ordered obligations and has made substantial changes in its internal organization as well as in its actual operations. It is even contemplating organizing and operating an environmental protection and spill recovery service for hire.

2. ***R.* v. *PANARCTIC OILS LTD.***

Panarctic Oils Limited was prosecuted in 1982 for offences under the *Ocean Dumping Control Act* (ODCA) and to this day remains one of the worst examples of the frontier free-for-all mentality condemned by Morrow, J. in *R.* v. *Kenaston Drilling.* Interestingly, investigation and prosecution was only commenced and continued due to the efforts of one woman, the mother of a worker, whose sense of law and "rightness" was so outraged as to drive her to extensive lobbying efforts.

In this case the Defendant, in direct and knowing contravention of its drilling authority conditions and the ODCA, drilled a hole in the sea ice and used it to dump literally tons of garbage— from junk steel and waste oil to a half-ton truck. As in the Robinson's Trucking case, it is reported that numerous efforts were apparently made to frustrate the investigation and pressure brought to bear to terminate the prosecution.

By way of sentence, fines totalling $150,000 and two years probation were imposed. The Board of Directors was ordered to prepare and file a plan for the implementation of procedures to prevent a recurrence. Once again, reports indicate that the past sentencing attitude and actions of the Defendant have undergone a substantial change for the better. Evidence of the dawn of its realization of its obligations is apparent in its manuals, procedures and operations. Once again, the law, the enforcement agencies and the Courts fulfilled their respective mandates to the benefit of all.

3. ***R.* v. *ESSO RESOURCES CANADA LTD***

In *R.* v. *Esso Resources,* I was faced with one of the least culpable Defendants to appear in my Court, one whose conviction was based upon the absolute liability set out in the *Canada Shipping Act*. Two of its employees, in charge of supervising an oil transfer apparently got drunk and fell asleep. The oil barge filled and overflowed into the Mackenzie River. What is interesting is that, notwithstanding the sentence of $8,000, the Defendant did not react negatively to the field agents or its obligations—in circumstances where one could certainly understand such a reaction. The Defendant continued to demonstrate in concrete terms an acute awareness of its obligations in law. This included revised procedures, voluntarily replacing all fuel lines at its dock and sponsoring spill training exercises. Its working relationship with EPS and the field agents has not been compromised or weakened.

4. ***R.* v. *GULF CANADA CORPORATION***

Finally, in *R.* v. *Gulf Canada Corporation,* a senior manager quite simply and flagrantly ignored the advice of his own Environmental Advisory Staff and a definitive "NO" from permit authorities and allowed the disposal at sea of hundreds of tons of drilling mud and cement. Upon conviction, fines of $185,000 were imposed, and some publicity followed.

It has been reported to me that as a result of the prosecutions and sentences, certain internal changes have been effected, the Environmental Advisory staff has been allocated a measure of authority and, most importantly, in the field, the Defendant has demonstrated a more acute awareness of its responsibility to obey the law. Respect for and cooperation with field agents has increased.

Court action, as confrontational and adversarial as it is, has not fulfilled the dire prophesies of its detractors. To the contrary, effective meaningful enforcement has brought real change and promoted cooperative and productive relationships between industry and regulatory bodies based upon respect rather than sufferance. It has come closer to achieving legislative goals and the goals of law enforcement than other processes.

Court action is, I suggest, particularly appropriate because of the nature of the offender and of the offence: for the most part, environmental offences are demonstrative offences, *i.e.* offences given to open expression, logically provable, unlike expressive crime where an emotional outburst results in a victim. The offender in the former category is most susceptible to effective law enforcement be it the traditional goals, deterrence/rehabilitation, or as more recently described by the Sentencing Commission, a simple respect for the law. One can reason with a Board of Directors and demonstrate on a cost/benefit basis the need to obey the law in a way that is almost pointless when dealing with an accused who has beaten his children in an alcoholic rage.

The Court is an unencumbered, independent body: a forum where our whole society is free to observe the operation and vindication of its laws. No politician or bureaucrat would dare phone a Judge in the hopes of influencing the outcome of a case. No Judge need fear for his career in adjudicating cases involving the strongest elements of our society. The court exercises its role publicly where full answer and defence will be entertained.

In terms of meaningful enforcement, the challenge is before us. We have a wide range of options under the existing laws, a "new" kind of Defendant, and new law. It is an area that needs careful, step by step innovation and exploration in a way that will offer society what law has so often sought to give—prevention of further offences.

I recognize that there is much criticism about the Court's role: principally, that Court sanctions are meaningless given the nominal fines imposed in many cases. I suggest that this criticism needs to be directed at the whole body of the Court—not just Judges; that is to say, to Crown and Defence.

I point out that, firstly, the Provincial Courts are not receiving the full range of offences from which low, mean and high levels of criminality may be assessed. Jurisprudence in this regard is still in the toddler stage. Secondly, it must be remembered that the Crown prosecutes—not the Courts. In many instances the Crown seems content to simply obtain a conviction and to leave sentencing as an afterthought. Minimal penalties may be a reflection of minimal submissions.

Our legal system places great emphasis on the process and much less on the result. I see the process of law enforcement as culminating and capped with a well crafted, effective sentence that achieves the goal of law enforcement. This is an area that begs for contributions by Provincial Courts, Appeal Courts, Counsel and Academics.

While the Court's role to this decade has been that of a neglected understudy, I submit that the Courts represent the most effective and positive forum for applying and enforcing the law as it relates to the environment. The Courts are ready to assume the primary role. Bring us the cases and your expertise.

ENDNOTES

- *Ocean Dumping Control Act,* s.c. 1974-75-76, c. 55; R.S.C. 1985, c. O-2.
- *Fisheries Act,* R.S.C. 1985, c. F-14.
- *Canada Shipping Act*, R.S.C. 1985, c. S-9.
- *Northern Inland Waters Act*, R.S.C. 1985, c. N-25.
- *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12.
- *R.* v. *Robinson's Trucking Ltd.*, [1985] N.W.T.R. 92 (N.W.T. Ct.).
- *R.* v. *Panarctic Oils* Ltd., [1983] N.W.T.R. 143 (N.W.T. Ct.).
- *Supra* note 6.
- *Supra* note 2.
- *Supra* note 7.
- *Supra* note 1.
- *(1974), 41 D.L.R. (3d) 252 (N.W.T. S.C.).*
- [1983] N.W.T.R. 59 (N.W.T. Ct.).
- *Supra* note 3, s. 682 (N.W.T.S.C.).
- [1987] N.W.T.R. 277 (N.W.T. Ct.).
- *Sentencing Reform: A Canadian Approach. Report of the Canadian Sentencing Commission* (Ottawa: Canadian Gov't. Pub. Center, 1987).