



**Background paper for the
"Seminar on Strengthening the Enforcement and
Administration of Environmental law in North America."
PANEL 2.- Procedural and evidentiary challenges for effective
environmental law enforcement. (e) Natural Resource Damages.
Author: CEC Secretariat.**

Introduction

In the context of sentencing principles, there is a need to assess and balance direct environmental protection and restoration measures alongside more traditional punitive and deterrence considerations. Thus, when pleading sentencing arguments, prosecutors must understand how courts may order non-monetary remedies to ensure the restoration or replacement of the natural resources. The following background paper will summarize Canada's relevant federal and provincial statutory provisions dealing with such remedies, and to subsequently highlight applicable jurisprudence in this regard.

Relevant Federal Statutes and Jurisprudence

The *Fisheries Act*¹ and *Canadian Environmental Protection Act, 1999* (CEPA)² are examples of two federal statutes which contain broad provisions authorizing the courts to order non-monetary remedies in cases where there have been damages to natural resources. Pursuant to s. 79.2 of the *Fisheries Act*, the court may:

- Prohibit a person from engaging in acts or activities that may result in the continuation or reoccurrence of the offence - s. 79.2(a);
- Direct a person to take any action the court deems appropriate to remedy or avoid future or present harm to the fish, fisheries or fish habitat arising out of the offence that occurred - s. 79.2 (b);
- Direct a person to perform community service - s. 79.2(e)
- Require the person to comply with other conditions the court deems appropriate to secure the person's good conduct and prevent that person from carrying out future harmful conduct - s. 79.2(i).

The breadth of potential relief under these provisions is evident, as exemplified in *R. v. Northwest Territories (Commissioner)* where Crown counsel proposed that the accused serve a punishment that included a remedial order to rebuild the Iqaluit sewage lagoon which let out untreated municipal sewage into the Koojesse Inlet.

Although the court did not ultimately agree with this proposition, it did state that s. 79.2 "indicates a direction with respect to sentences: that significant sanctions be applied to achieve the purpose of the legislation."³ In March 2003, the Yukon Territorial Court

¹ *Fisheries Act*, R.S.C. 1985, c. F-14.

² *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33.

³ The court considered this proposed remedy but did not order it because the accused had already rebuilt the lagoon. See *R. v. Northwest Territories (Commissioner)*, [1993] N.W.T.J. No. 131. at para 8.



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imposed on the City of Dawson a requirement to build and complete a secondary sewage treatment plant, to be fully operational by September 1, 2004.⁴

In *R. v. Basso* a restoration order was made against a waterfront property owner to remove the granite rocks he had illegally dumped into the Wainwright Basin.⁵ This sentence was given because the rocks had damaged sedgegrass plants which are vital for the development of young salmon.

CEPA contains similar language to that found under s. 79.2 of the *Fisheries Act*. Section 291(1) of CEPA provides the court with a variety of additional orders that may be imposed upon persons who have committed an offence under this law. In *Canada v. IPSCO Recycling Inc.*, s. 291(1), the Federal Court of Canada acknowledged that CEPA provides the courts with additional orders apart from mere fines in environmental cases.⁶ Certain provisions are notable under s. 291(1), granting discretion for the court to:

- Direct an offender to take any action the court deems appropriate to remedy or avoid environmental harm caused by that offender's acts or omissions which caused the initial offence - s. 291(1)(b);
- Direct the offender to perform community service - s. 291(1)(l);
- Require the offender to comply with any other reasonable conditions deemed appropriate and just by the court to secure the offender's good conduct and prevent future harmful conduct by the offender - s. 291(1)(q);

Other federal statutes which contain similar provisions with respect to restorative remedial provisions include the *Species at Risk Act*, S.C. 2002, c.29, s.105, the *Migratory Birds Convention Act*, 1994, c.22 (s.16(1)) and the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52, s.22(6).

Relevant Provincial Statutes and Jurisprudence

Several provincial statutes provide for restorative remedial provisions. In Ontario, several statutes are of interest in this regard.⁷ First, the legislation governing the management of public lands and resources in this province, the *Public Lands Act*, authorizes a court to order the rehabilitation of Crown lands.

⁴ *R v. City of Dawson*, 2003 YKTC 16.

⁵ *R. v. Basso*, [2001] B.C.J. No. 1285.

⁶ *Canada v. IPSCO Recycling Inc.*, [2003] F.C.J. No. 1950 at paras. 87-88.

⁷ R.S.O. 1990, c. P.43, section 14(7).



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Second, the Ontario *Environmental Bill of Rights*, at s. 93(1)(b) allows for court orders directing parties to negotiate a restoration plan where a public natural resource has been harmed⁸, consistent with the following purposes:

- prevention, diminution, or elimination of the harm to the natural resource at issue - s. 95(2)(a)
- restoration of all forms of life, physical conditions, the natural environment and other aspects of the natural resource which were adversely impacted by the offender - s. 95(2)(b)
- restoration of whatever uses that natural resource served, such as public enjoyment, that were adversely impacted by the offender - s. 95(2)(c)

It is notable that such restoration plans may include community and education programs, and also research and development initiatives.⁹ In accordance with s. 98, if parties cannot agree to a restoration plan, the court is empowered to develop a restoration plan for the parties.¹⁰

Third, Ontario's *Forestry Act*, which governs the conservation and management of forest resources, provides for restoration measures with respect to harm caused to forestry within the province.¹¹ A contravention under this law may result in a court order to replant trees that have been destroyed.¹² For example, in *R. v. Vastis*, the court exercised these powers to order the restoration of approximately 23 acres of trees that had been destroyed for the purposes of building a golf course.¹³

Significance of Non-monetary Remedies

The choice of sentences imposed by the courts plays a vital role in environmental prosecutions, and there is extensive doctrinal support for the idea that "simply moving fines up or down a scale cannot foster an environmental compliance culture alone."¹⁴

⁸ *Environmental Bill of Rights*, S.O. 1993 c. 28, s. 93(1)(a).

⁹ *Ibid.* s. 95(3).

¹⁰ *Ibid.* s. 98.

¹¹ *Forestry Act*, R.S.O. 1990 c. F.26. Similarly, see the replanting orders found under s. 6(2) of the *Trees Act*, 1990, R.S.O. c. T-20. In *R. v. Iacobelli*, [2005] O.J. No. 833, a court ordered the implementation of a restoration plan pursuant to the *Trees Act* where an offender clear-cut approximately 7 acres of trees that resided on his own property, but which were situated near a protected and geologically sensitive area.

¹² *Forestry Act*, *supra*, s. 19(1), (2).

¹³ *R. v. Vastis*, [2006] O.J. No. 3774.

¹⁴ Gordon Scott Campbell. "Fostering a Compliance Culture through Creative Sentencing for Environmental Offences," *Canadian Criminal Law Review*, (Sept. 2004) 9, 1. at 32. See also Jamie Benidickson. *Environmental Law, Second Edition* (Toronto: Irwin Law Inc., 2002) at 160.



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However, the lack of an extensive jurisprudence demonstrating Canadian courts' use of such remedies may reflect the fact that restorative orders are more difficult to calculate and enforce compliance with. Campbell asserts that "[a] creative sentence must not be thought of and presented by counsel to the court solely in terms of its monetary value, otherwise a court might simply treat a creative sentence interchangeably with a fine."¹⁵ Clearly, the quantification of restoration is not the goal, but rather to force offenders to play an integral role in the restoration of the resources. In so doing, it is hoped that the natural resource will be returned to its original state prior to being harmed, while also deterring and denouncing such acts that led to the harm.

¹⁵ Campbell, *supra*, at 30.