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## Let's Shine Some Light into Creative Environmental Sentencing

By: Shaun Fluker

**Case Commented On:** *R v Canadian National Railway Company* [sentencing order](#) dated June 2, 2017 (ABPC)

On June 12 the Alberta government [announced](#) that Canadian National Railway Company (CN Rail) had pled guilty to two offences under the *Environmental Protection and Enhancement Act, RSA 2000, c E-12* (EPEA) with respect to the release of hydrocarbons that occurred in April 2015. The penalty imposed on CN Rail was a total of \$125,000, consisting of \$15,000 in fines and a \$110,000 payment in funds directed to the [Edmonton and Area Land Trust](#) to support conservation in the Edmonton region with a focus on aquatic and riparian habitat. This payment of funds to the Land Trust is known as a creative environmental sentence, and this post asks some critical questions about how this increasingly popular form of punishment for environmental offences is being implemented in Alberta.

CN Rail and the Crown agreed to a [statement of facts](#) concerning these events, and the following summary is taken from this statement. The release of hydrocarbons occurred from a faulty separator located in a sump at a CN Rail fueling facility in Edmonton. The sump collects spilled hydrocarbons and other liquids, and the separator is designed to separate the hydrocarbons from the other liquids in the sump. The separation process is to ensure hydrocarbons are not returned to the environment with the other liquids which ultimately flow into the Edmonton sewer system. On April 9, 2015 the separator malfunctioned such that hydrocarbons from the CN railyard were discharged into the sewer system, and later that day the hydrocarbon sheen was reported on the North Saskatchewan river.

CN was convicted under section 227(j) of EPEA for (1) releasing or permitting the release into the environment of a substance in an amount that causes or may cause a significant adverse effect contrary to section 109(2) of EPEA; and (2) for being a person responsible for a substance that is released into the environment and that may cause, is causing or has caused an adverse effect, and who failed, as soon as it was aware of the release, to take all reasonable measures to remediate, manage, remove or otherwise dispose of the substance in such a manner as to prevent an adverse effect or further effect contrary to section 112(1)(a)(ii) of EPEA. CN Rail was fined \$7500 for each of these offences.

In addition to \$15,000 in fines, the Provincial Court ordered CN Rail to forward \$110,000 to the Edmonton and Area Land Trust pursuant to a [sentencing order](#) issued on June 2, 2017 under section 234(1) of EPEA. Section 234 provides that where a person is convicted of an offence under EPEA, in addition to a fine or imprisonment, the court may also direct the offender to take further measures—these measures are the ‘creative’ aspect of environmental sentencing. Section 234(1) reads as follows:

234(1) When a person is convicted of an offence under this Act, in addition to any other penalty that may be imposed under this Act, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order having any or all of the following effects:

- (a) prohibiting the offender from doing anything that may result in the continuation or repetition of the offence;
- (b) directing the offender to take any action the court considers appropriate to remedy or prevent any harm to the environment that results or may result from the act or omission that constituted the offence;
- (c) directing the offender to publish, in the prescribed manner and at the offender's cost, the facts relating to the conviction;
- (d) directing the offender to notify any person aggrieved or affected by the offender's conduct of the facts relating to the conviction, in the prescribed manner and at the offender's cost;
- (e) directing the offender to post a bond or pay money into court in an amount that will ensure compliance with any order made pursuant to this section;
- (f) on application to the court by the Minister made within 3 years after the date of conviction, directing the offender to submit to the Minister any information with respect to the conduct of the offender that the court considers appropriate in the circumstances;
- (g) directing the offender to compensate the Minister, in whole or in part, for the cost of any remedial or preventive action that was carried out or caused to be carried out by the Government and was made necessary by the act or omission that constituted the offence;
- (h) directing the offender to perform community service;
- (i) requiring the offender to comply with any other conditions the court considers appropriate in the circumstances for securing the offender's good conduct and for preventing the offender from repeating the same offence or committing other offences.

Creative environmental sentencing has been used in Alberta for environmental offences since the mid-1990s. A good overview of creative environmental sentencing was published by Professor Elaine Hughes and Larry Reynolds in 2009 (see "Creative Sentencing and Environmental Protection" (2009) 19 *Journal of Environmental Law & Practice* 105). Chilenye Nwapi and my colleague Professor Allan Ingelson of the Canadian Institute of Resources Law have published more recent work on creative environmental sentencing (see [here](#) and [here](#)). And a research team at Mount Royal University led by Professor Janice Paskey has conducted an empirical

investigation into creative environmental sentencing orders in Alberta, and they have published some of their very revealing work at [Alberta Creative Sentencing](#).

The creative sentence for CN Rail is set out as Schedule B to the [sentencing order](#). Schedule B is the Recipient Agreement between the Province and the [Edmonton and Area Land Trust](#) (the Recipient of the sentencing funds). The Agreement sets out the terms upon which the CN Rail funds will be provided to the Land Trust, and includes a description of the funded project, the objectives of the project, and eligible expenses to be charged to the fund.

The Recipient Agreement attached to the sentencing order is an unsigned draft which is cause for concern on its own, but also leads me to raise a number of other concerns about how creative environmental sentencing is being implemented in Alberta:

1. There is no transparency in how projects or recipients are selected for creative sentences. We might ask how the Edmonton and Area Land Trust was selected in this case? Were other organizations also considered? How would these other organizations know about this opportunity to receive \$110,000 in funds for conservation initiatives?
2. There are no terms in the Agreement that provide for third party monitoring of outcomes from the project. We might ask how we are to know whether the project fulfills its objectives? How will we know the funds were spent appropriately? The Agreement requires the Land Trust to engage in self-monitoring of expenditures to ensure they are eligible, and provide periodic financial reports to the Province on expenditures. Will these reports be available to the public? Who scrutinizes these reports? How is eligibility determined for expenses? The Agreement simply states an eligible expense is one that is incurred in accordance with the project objectives.
3. And what about the project objectives? The Agreement states simply that the project is the Recipient's land conservation and stewardship activities conducted within the Edmonton region with a specific focus on aquatic and riparian habitat (at Schedules A and B attached to the Agreement). In short, there does not appear to be a specific project objective here—but rather these funds will contribute to the general work of the Land Trust in the Edmonton region.
4. The nexus between the crime and the punishment is hard to decipher. We might ask how the punishment fits the crime in this case? How close does \$110,000 in funding come to compensating for the environmental damage and clean-up costs incurred as a result of the discharge? To what extent will the funded work address or offset the damage caused to the North Saskatchewan river by this incident? The Agreement indicates that expenses incurred which have no connection to the Edmonton region will not be eligible. The work of the Land Trust is focused on the Edmonton region, and perhaps that provides for a sufficient nexus. But we are given very little else to work with in terms of establishing a nexus here.

These questions are based on the general observations in the literature raising concerns about creative environmental sentencing. These concerns are focused on a lack of transparency, a lack of opportunities for public participation, and the absence of meaningful monitoring and enforcement of sentencing orders. CN Rail has admitted to committing an act that is contrary to

our public morals, and has accordingly been punished. But very little else can be said to be ‘public’ in this sentencing process. It is time to shed some light into creative environmental sentencing in Alberta.

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