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# SENTENCING PURPOSES AND PRINCIPLES FOR PROVINCIAL OFFENCES

## The Modernization of the Provincial Offences Act

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## INTRODUCTION

Sentencing. It should come naturally to judges. After all, it is what most courts do much of the time. The resolution rate of charges in Ontario, whether criminal or quasi-criminal in nature, routinely approaches 90%: very few matters, in fact, go to trial.[1] Of those that do, findings of guilt often result; appeals from such cases rarely succeed.[2] Judges and justices of the peace should therefore be well versed in imposing sentences, and thoroughly familiar with the legal principles upon which such sentences are based.

But this is not always the case. At least not with the type of charges that arise most frequently, provincial offences under Ontario's *Provincial Offences Act*[3], which are a form of a regulatory or public welfare offence, and for which the overwhelming majority of persons will ever have contact with the administration of justice in the province of Ontario.[4] "Provincial offences" are created by laws enacted by the province, or regulations or by-laws established under such authority, and involve all manner of regulated activities.[5] There are also comparable federal laws for regulatory offences, or "contraventions," falling under the exclusive jurisdiction of the Parliament of Canada.[6] Such statutes, in common, set out provisions that regulate conduct for our protection, ranging from rules of the road governing motor vehicles to protecting workers from dangerous pieces of equipment; from regulating the preparation of food products to the sale of services and goods, and to safeguarding the environment. There is virtually no

area that is neither the subject of regulation, nor a corresponding penalty for breach of the regulatory standard.

The question which therefore arises is why should there be such uncertainty as to sentencing purposes and principles in this all encompassing area of the law? The answer appears to be relatively simple: there is no statement of what constitutes such sentencing purposes and principles for regulatory offences. Consequently, judges and justices of the peace who impose sentences for regulatory offences do not have before them a guiding rationale or legislative statement explaining what aims are to be addressed by the court's sentence, or what goals are to be furthered through the imposition of punishment. Neither is this any more apparent to the lawyers and parties who appear before the courts, including accused persons and corporate defendants. As a result, there is the oft espoused criticism that the absence of such a statement of sentencing purposes and principles for regulatory offences makes imposing punishment a lottery, where inconsistency and unpredictability abound. The statutory provisions which govern sentencing for regulatory offences have been described, aptly, as "a patchwork quilt … in need of reform."[7]

Identifying the problem is easy. What is more difficult is crafting a solution. The issue addressed in this research paper, in response to the questions posed by the Law Commission of Ontario in its *Modernization of the Provincial Offences Act Consultation Paper*[8] with respect to sentencing practices under the *Provincial*

*Offences Act*, is whether there should be a statement of sentencing purposes and principles for regulatory offences in the *Provincial Offences Act*, and if so, in what form it should take. A number of other issues arise. These include whether it should make any difference that there are different streams of procedure under the *Provincial Offences Act,* that is, tickets for minor offences under Part I where jail is not allowed and fines are capped at $1,000, as opposed to the information procedure under Part III for more serious offences where higher fines and imprisonment are available, as well as other sentencing dispositions, such as probation. Should sentencing purposes and principles apply to all such matters, or only the more serious Part III proceedings? And if there is to be such a statement of sentencing purposes and principles, what should it say? Should the goals or aims to be achieved be prioritized in some hierarchical manner? The means by which such a sentencing statement or purposes and principles should be carried out, that is, what sentencing tools are needed to best implement this sentencing statement, is also relevant. It is these important questions with which this research paper is concerned.

I commence my discussion under Part I where I seek to identify and frame the problem. There is first an overview of regulatory offences and sentencing provisions, as well as enforcement mechanisms. Regulatory offences correspond to an incredibly diverse and complex series of activities. Indeed, one of the challenges that emerges for courts when imposing a penalty for the commission of a regulatory offence is the breadth of the type of activity and conduct that may

comprise the infraction. Whereas the *Criminal Code* of Canada[9] includes a statement of sentencing purposes and principles to guide courts in determining punishment,[10] there is no such guidance provided to courts sentencing those who commit regulatory offences. I illustrate the consequences of this lack of statutory guidance, in summary form, by a matrix of regulatory offences in the area of workplace safety, consumer protection and environmental protection: regulatory agency sentencing patterns are of relevance in gauging the need for consistency and uniformity in the area of sentencing for regulatory offences generally. I conclude Part I by noting that it has been left to the courts, to fill in the gaps, when faced with the bewildering array of regulatory offences, enforcement mechanisms, and penalty provisions. What is lacking, however, is a consistent and rational approach. This requires, in turn, the identification and organization of sentencing purposes and principles for regulatory offences.

Part II of this research paper is entitled “Setting the Stage”. In it I set out purposes and principles of sentencing for *criminal offences*. I do so in order to not only identify what these purposes and principles are, but also to analyze how these sentencing purposes and principles are organized and arranged. The approach with respect to *Criminal Code* sentencing purposes and principles affords a potential model for regulatory offences sentencing purposes and principles. Moreover, there is a rich body of academic commentary and literature on the issue of sentencing purposes and principles for criminal offences in Canada, including numerous Parliamentary reports and Law Commission of

Canada studies in the area, as well as the debate surrounding the amendments to the *Criminal Code* in 1996 wherein a statement of sentencing purposes and principles was enacted for the first time.

In Part III, the foundation is developed for identifying those sentencing purposes and principles that are relevant for *regulatory offences.* Unlike the judge imposing sentence for a criminal offence, who need look no further than the *Criminal Code* for both a compilation of offences, and statement of sentencing purposes and principles, the justice of the peace or judge presiding over a regulatory offences case faces a much more diverse and unwieldy situation. Given the absence of a statement of sentencing purposes and principles for regulatory offences, the law of sentencing for regulatory offences has therefore developed, on a default basis, in the courts; it has been left to sentencers to fill in the gaps, with the common law development of sentencing principles, for the vast array of public welfare statutes. The purposes and principles of sentencing for regulatory offences that have been recognized by courts in Ontario and elsewhere in Canada are set out under this Part. Reference is made to the scholarly literature as well.

The review in Part III of sentencing principles for regulatory offences illustrates a concern that guidance is required for courts imposing sentences for such offences. However, there are differences of opinion as to how this guidance should be provided, and what form it might take. In order to see if the general

observations made about sentencing practices and patterns are borne out, a matrix of regulatory offences sentencing decisions in the areas of workplace safety, consumer protection and environmental regulation within the Canadian jurisprudence is examined. This expands the matrix of regulatory offences sentencing decisions, put forward in summary form, in Part I of this research paper. In the survey of sentencing cases which follows, decisions at the superior court level across Canada are analyzed, since this includes both judgments in trial courts as well as appeals against sentences imposed by lower courts. It is, of course, not possible to examine every type of regulatory offence or sentencing principle to test the argument that has been advanced as to the marked inconsistencies that apply in such cases, and thus the need for a statement of sentencing principles and purposes so as to promote uniformity and consistency of approach in sentencing dispositions. However, a sampling of cases in the areas of workplace safety, consumer protection and environmental regulation seems apt for a number of reasons, especially since these type of cases are frequently before the courts, and merit attention given their relative importance. To be sure, these regulatory regimes are necessarily broad and distinct, but an examination of sentencing practices and patterns in these areas may provide insights as to different modes of sentencing theory.

In Part IV solutions to the problem of sentencing inconsistencies and lack of guidance for regulatory offences are set out. It is my position that a new approach is required, in order to properly identify sentencing purposes and

principles that are to be applied to regulatory offences specifically, and that are best suited to the regulatory context in which such offences occur. For where there has been a breach of a regulatory standard, the court must look not only backwards at the conduct which gave rise to the non-compliance, but forward as well, since the defendant often continues to participate in the regulated endeavour following the imposition of punishment.

I explore this issue first with a discussion of the concept of the "regulatory cycle" and its role in shaping sentencing purposes and principles for regulatory offences. By this it is meant that sentencing is merely one part, albeit a most important part, in the regulatory offences context. The beginning of the regulatory cycle involves the identification of regulatory objectives; provisions are subsequently devised, and implemented, to give effect to these objectives, including the creation of regulatory offences. Enforcement strategies may thus include prosecution, in which case the offender, upon being convicted and sentenced, is often permitted to return to participate in the regulated activity, thereby continuing to be involved in the regulatory cycle, even after the imposition of punishment by the court. The focus of this section is to explore and critically analyze the concept of the regulatory cycle, and examine how it has the potential to play an important role in shaping regulatory offences sentencing principles. A proper understanding of the regulatory cycle is essential for courts when imposing punishment for regulatory offences, so as to better promote regulatory sentencing objectives and outcomes. The identification of sentencing

purposes and principles for regulatory offences, in turn, bolsters the court's ability to select the sanction that best encourages the regulated actor's successful reintegration within the regulatory cycle.

The next section under Part IV builds upon this theoretical discussion, and sets out those considerations which I argue should be recognized as constituting sentencing purposes and principles for regulatory offences. It is essential that a "sentencing rationale" for regulatory offences be clearly articulated by the legislators, so as to eliminate the problems caused by uncertain and unstructured sentencing practices which flow from the lack of a guiding philosophy for regulatory offences sentencing purposes and principles. The court's punishment or sentence, in turn, should be designed to give effect to the regulatory goals of the legislators which are set out in the legislation. In particular, purposes and principles of sentencing which are appropriate for regulatory offences should be identified and enumerated in a sequential order for courts to consider, and implement, in their dispositions. It is only when courts approach sentencing on this basis, applying a statement of sentencing purposes and principles enacted by the legislators in these terms, that regulatory objectives will truly be furthered. This approach sets out and prioritizes the applicable sentencing purposes and principles for regulatory offences and provides the courts with a clear rationale, aimed throughout, at furthering regulatory objectives.

I conclude my research paper with Part V which is entitled “Finishing Touches.” It contains a discussion of the sentencing tools that are required to best implement the statement of sentencing purposes and principles put forth for regulatory offences. The governing legislation in Ontario, the *Provincial Offences Act*, which was enacted thirty years ago, provides courts with few sentencing options apart from fines, probation and imprisonment; in limited circumstances restitution and community service may be imposed, the latter requiring the defendant’s consent. Consequently, there have been concerns expressed that there is a need for a much broader range of penalties and a wider array of sentencing tools.

It is therefore appropriate to consider whether an enhanced use of probation, restitution and community service orders, among other penalty provisions and ancillary orders, such as victim impact statements, would better equip courts with the necessary tools to deal with offenders who fail to achieve the regulatory standard, and are likely to return to the regulated activity following sentencing. It is my belief that such sentencing measures are not only desirable under the *Provincial Offences Act*, but also necessary. Otherwise, the goal of achieving compliance with the regulatory standard, and changing the behaviour of the regulated party through sentencing, will be frustrated. In short, courts will not be able to play an effective role in the regulatory cycle unless they are given the sentencing tools to accomplish this. At the same time, however, care must be taken not to simply duplicate criminal law sentencing provisions which may not

be well suited in the regulatory offences context. In this concluding Part, I thus consider how the regulatory offences sentencing toolbox might be updated and equipped, in order to best implement a new statement of sentencing purposes and principles for regulatory offences.

# PART I. FRAMING THE PROBLEM

## A. Regulatory Offences and Sentencing Provisions

### *1. Introduction*

Regulatory offences correspond to an incredibly diverse and complex series of activities. Indeed, one of the challenges that emerges for courts when imposing a penalty for the commission of a regulatory offence, is the breadth of the type of activity and conduct that may comprise the infraction. Whereas the *Criminal Code* of Canada includes a statement of sentencing purposes and principles to guide courts in determining punishment, there is no such guidance provided to courts sentencing those who commit regulatory offences. The consequences of the lack of statutory guidance are illustrated, in summary form, in this Part, by a matrix of regulatory offences in the area of workplace safety, consumer protection and environmental protection: regulatory agency sentencing patterns are of relevance in gauging the need for consistency and uniformity in the area of sentencing for regulatory offences generally.

It has been left to the courts to fill in the gaps, with respect to the purposes and principles of sentencing for regulatory offences, when faced with this bewildering array of regulatory offences, enforcement mechanisms and penalty provisions. What is lacking, however, is a consistent and rational approach. This requires, in turn, the identification and organization of sentencing purposes and

principles for regulatory offences. Consideration must first be given to the nature of regulatory offences themselves, and how they not only differ, conceptually, from criminal offences, but also from each other.

*2. Overview of Regulatory Offences, Enforcement Mechanisms and Penalty Provisions*

The words of Justice Cory in *R*. v. *Wholesale Travel Group Inc*.[11] describing the pervasive nature of regulatory offences in our society are well known. He stated that it would be difficult to think of an aspect of our lives that is not regulated for our benefit and for the protection of society as a whole. To this he added:

> From cradle to grave, we are protected by regulations; they apply to the doctors attending our entry into this world and to the morticians present at our departure. Every day, from waking to sleeping, we profit from regulatory measures which we often take for granted. On rising, we use various forms of energy whose safe distribution and use are governed by regulation. The trains, buses and other vehicles that get us to work are regulated for our safety. The food we eat and the beverages we drink are subject to regulation for the protection of our health.
>
> In short, regulation is absolutely essential for our protection and well being as individuals, and for the effective functioning of society. It is properly present throughout our lives. The more complex the activity, the greater the need for and the greater our reliance upon regulation and its enforcement. For example, most people would have no idea what regulations are required for air transport or how they should be enforced. Of necessity, society relies on government regulation for its safety.[12]

Regulatory offences thus correspond to an incredibly diverse and complex series of activities. Sayre, in 1933, classified regulatory offences into these eight categories: (1) illegal sales of intoxicating liquor (2) sales of impure or adulterated food or drugs (3) sales of misbranded articles (4) violations of anti-narcotic acts (5) criminal nuisances (consisting of annoyances or injuries to public health, safety, repose or comfort; obstructions of highways) (6) violations of traffic regulations (7) violations of motor vehicle laws (8) violations of general police regulations, passed for the safety, health, or well-being of the community.[13]

The methods of regulation are themselves varied, and often do not necessitate the involvement of the criminal or quasi-criminal law. [14] Indeed, the majority of "regulatory action" may involve attempts to secure compliance through persuasive efforts.[15] Regulation by prosecution if necessary, but not necessarily prosecution, it might be said.[16]

However, regulatory schemes can be effective, ultimately, only where they provide for "significant penalties in the event of their breach" and "strong sanctions", to return to the words of Cory J. in the *Wholesale Travel Group Inc.* case.[17] In a subsequent Supreme Court of Canada decision, it was observed that any regulatory statute which lacked prohibitions and penalties would be "meaningless."[18] After all, what would be the point in having "sophisticated codes of regulation" in the absence of provision being made for their enforcement?[19] In response to this question, it has been stated:

> Enforcement mechanisms exist as an aid to securing the policy objectives which underlie codes of regulation and the mechanism which is common to the vast majority of codes, although it may not be the only mechanism for which provision is made, is the criminal law.[20]

Sentencing for the commission of a regulatory offence has been described as "risk management on its head", that is, it represents a response to the failure of preventing a violation of a regulatory standard that embodies risk assessment.[21] Risk assessment is a "scientific assessment of the true risk" whereas risk management "incorporates non-scientific factors to reach a policy decision."[22] The scientific assessment of risk may be converted into laws or regulations; the extent of legal enforcement and allocation of resources for enforcement involves risk management.[23] However, it is at the sentencing stage that courts have the opportunity of addressing the regulatory standards which have been set by the legislature.

But there is also the potential for either undermining or over-enforcing these regulatory standards: if a penalty that is imposed is overly lenient, such as a nominal fine, this may have the effect of "under-cutting" the legislature's risk assessment which led to the creation of the violation in the first place; for some it may represent a "license" fee that it is viewed as merely the cost of doing business or engaging in the regulated activity. On the other hand, if the penalty is "too high", such as a crushing fine, it may not only inhibit business efficiency but also discourage other law-abiding persons from engaging in the activity or

remaining active in the field.[24] The example of imposing a fine at either end of these extremes is apt, given that the enforcement of regulatory statutes is achieved by financial penalties to "a very large extent."[25] A fine is the "primary mechanism" for regulatory and corporate punishment;[26] it is the penalty that is "most commonly invoked."[27]

One of the challenges facing those considering the imposition of a penalty for the commission of a regulatory offence is the breadth of the type of activity and conduct that may comprise the infraction. In a study on strict liability conducted for the Law Reform Commission of Canada in 1974, it was estimated that there were approximately 20,000 regulatory offences in each province plus an additional 20,000 federal offences.[28] This did not take into account municipal infractions, such as by-law offences. At the same time, there were 700 *Criminal Code* sections.[29] By 1983, the Department of Justice estimated that there were 97,000 federal regulatory offences.[30] Given these figures, there is no reason to believe that the number of regulatory offences at all levels of government has not continued to increase.[31] It is thus hard to take issue with the Law Reform Commission of Canada's prediction more than thirty years ago that "the regulatory offence … is here to stay."[32]

*3. The Nature of Regulatory Offences*

Unlike *Criminal Code* offences or "true crimes", which have a fault or moral blameworthiness element, regulatory or public welfare offences do not always involve fault. Negligence may suffice. Sometimes there will be a fault element; other times an absence of fault or absolute liability. In its seminal judgment in which the "half-way" house of *strict liability* was formally introduced into Canadian jurisprudence for regulatory offences, as a middle ground between fault (*mens rea*) and absence of fault (absolute liability), the Supreme Court of Canada observed in *R.* v. *Sault Ste. Marie (City*)[33] that public welfare offences involve a "shift of emphasis", from protecting individual interests to protecting social and public interests.

Dickson J., rendering the unanimous judgment of the Court in the *Sault Ste. Marie* case, stated that public welfare offences lie in a field of "conflicting values": on one hand it is essential for society to maintain through "effective enforcement" high standards of safety and public health so that the potential victims of those who "carry on latently pernicious activities have a strong claim to consideration"; on the other hand, there is a "generally held revulsion against punishment of the morally innocent." [34]

There are three categories of regulatory offences, flowing from the *Sault Ste. Marie* decision, each of which is distinct in nature. They were enumerated by

Justice Dickson as follows: (1) *mens rea* offences – these offences consist of "some positive state of mind", such as intent, knowledge or recklessness, and must be proven by the prosecution either as an inference from the nature of the act committed, or by additional evidence; (2) strict liability offences – for these offences the prosecution is not required to prove *mens rea*, as the doing of the prohibited act *prima facie* imports the offence, leaving it open to the defendant to prove, on a balance of probabilities, that he/she took "all reasonable care"; this defence will be available where the accused person reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he/she took "all reasonable steps to avoid the particular event"; (3) absolute liability offences – for these offences, it is not open to the defendant to exculpate himself/herself by showing that he/she was "free of fault".[35]

As can be seen, regulatory or public welfare offences are not only different from criminal offences, they differ conceptually from each other. For some there may be a fault element (*mens rea* offences); for others fault is not required (absolute liability offences). There is a presumption that public welfare offences fall into the strict liability category: whereas they are not subject to "full *means rea*", the principle that punishment generally should not be "inflicted on those without fault" applies. [36]

However, while the purpose of penalizing a public welfare or regulatory offence may be different from the purpose of penalizing a crime, "the means, a

penalty, and the effect, punishment, remain the same."[37] Indeed, Glanville Williams has made the observation that "all crimes are, in a sense, public welfare offences,"[38] all of which result from regulation: whether one describes these crimes as regulatory offences, public welfare offences or quasi-criminal offences, they have in common the same procedure for prosecution and kind of punishment as other offences.[39]

In the *Sault Ste. Marie* decision, Dickson J. explained that public welfare offences are not "criminal in any real sense", but are prohibited in the public interest.[40] While enforced as penal laws through the use of "the machinery of the criminal law", such offences are "in substance of a civil nature", and might be regarded as a "branch of administrative law."[41] However, the fundamental difference between criminal law, as a "system for public communication of values", as opposed to tort law, which "seeks to balance private benefits and public costs", becomes particularly important at the sentencing stage.[42] Tort law "prices" whereas the criminal law "prohibits". Hence, it is on sentencing that courts can draw a line between "enforcement of norms that were intended to price and those intended to prohibit."[43]

The type of activities to which public welfare offences relate were called "everyday matters" by Dickson J.[44] Examples given by the Court in *Sault Ste. Marie* were traffic infractions, sales of impure food, violations of liquor laws, and the like. The case in question involved water pollution. Regulatory legislation is

designed to ensure that “minimum standards” are adhered to in activities ranging from commerce, manufacturing and environmental protection.[45] Regulatory offences are often offences of omission, unlike at common law where most crimes involved “positive acts”.[46] The growth of this distinct category of regulatory offences, which unlike criminal offences, were “punishable without regard to any mental element” dates back to the middle of the nineteenth century in both England and the United States, and typically involved offences such as selling adulterated or impure food, including milk, tobacco and liquor.[47]

“Everyday matters”, to use the *Sault Ste. Marie* phrase, may concern the individual involved, or others implicated by the conduct. A person who discharges a pollutant into a water system may cause harm to himself/herself, or perhaps to others only. There may also be harm to fish and wildlife that inhabit the area. But equally, there may be no discernable harm to anyone until many years later. This is just one example of an offence which can encompass “a wide range of activities, effects and degrees of fault.”[48]

*4. Overlap of Regulatory Offences and Criminal Offences*

In some cases, the same “regulatory misconduct” is made the subject of both criminal and civil penalties.[49] The *Competition Act*[50] offence of false or misleading advertising, which was the subject of the *Wholesale Travel Group Inc*. case, was contained in the *Criminal Code* until 1969 when it was transferred to

the *Combines Investigation Act*.[51] Recent changes to the *Competition Act* allow for misleading representations or deceptive marketing practices to be brought under either a criminal or civil track.[52] Indeed, it appears that most matters under the *Competition Act* are dealt with under the civil track, leaving only the most serious offences to be the subject of a criminal prosecution.[53]

Another example of such regulatory overlap is provided by the workplace safety amendments to the *Criminal Code*, pursuant to Bill C-45, which imposes criminal liability on organizations.[54] This legislation has the effect of potentially criminalizing conduct formerly prosecuted under provincial occupational health and safety legislation by imposing a duty on persons who direct work to take reasonable steps so as to prevent bodily harm to workers and the public arising from such work.[55]

In other cases, there are multiple methods of enforcement available to the regulating agency. Under the Ontario *Securities Act*,[56] for instance, it is open to the Securities Commission to enforce its jurisdiction by means of quasi-criminal proceedings before the Ontario Court of Justice, by way of administrative proceeding for an order in the public interest, or by applying for a declaration in the Superior Court of Justice. These “enforcement tools” have been held to provide the Securities Commission with a “range of remedial options” that can be deployed in its discretion, in order to meet the “wide variety of problems and issues that it must confront.”[57] Further, a charge of “insider trading” might also be

prosecuted under the *Criminal Code,* as opposed to the provincial *Securities Act* legislation.

Under the Ontario *Environmental Enforcement Statute Law Amendment Act, 2005*,[58] a new regime of administrative penalties has been created, which are absolute liability in nature. The amount of these absolute liability environmental penalties has been set at $100,000 for each day that a contravention occurs. It is also permissible under the legislation to prosecute polluters for "serious spills" in addition to levying an administrative penalty. There are also administrative penalties which flow from *Criminal Code* charges, such as an administrative driver's licence suspension which is imposed following charges of drinking and driving.

The recourse to such administrative tools of regulatory enforcement that operate outside of the court system is yet another enforcement mechanism. What seems unreasonable to a court may not appear so to a regulator. The opposite is also true. Each represents different institutions with different interests. Regulators are concerned with reaching "practical and administrative results" which help achieve the general public interest goal of the legislation in question.[59] In their role of "expert advisers" rather than "industrial police", regulators may seek a compromise solution which is acceptable to the groups involved.[60] Those being regulated also play a significant role in the regulation of their own activities, and may be the "best judges of their self-interest".[61] Conversely, courts of law

must act on the basis of the record placed before them, without necessarily all the relevant facts or further factual investigation.[62]

*5. Regulatory Offences and Statutory Interpretation*

Whether the public welfare offence being enforced by the regulator is one of *mens rea*, strict liability or absolute liability, is a question of statutory interpretation.[63] This is the legacy of the *Sault Ste. Marie* decision, even with the presumption that most public welfare offences fall into the strict liability category. There is an especially "strong presumption" in favour of strict liability in the "interpretive contest" between it and absolute liability.[64]

However, it is open to the legislature to employ all three categories of regulatory offences within the same scheme. In its judgment concerning Ontario's *Highway Traffic Act* [65] offence of operating a motor vehicle with a child who is not wearing a seat belt, the Ontario Court of Appeal in *R.* v. *Kanda* [66] noted that Part VI of the legislation, in creating numerous "equipment" offences, contained "clear illustrations of all three categories of regulatory offence".[67] The examples cited by the Court included: the *mens rea* offence of a parent or guardian of a person under 16 years old authorizing or knowingly permitting the person to operate a bicycle on a highway unless the person is wearing a bicycle helmet;[68] the strict liability offence of having the control or care of a motor vehicle that sounds any bell, horn or other signaling device as to make an unreasonable noise, or permits any unreasonable amount of smoke to escape from the motor

vehicle;[69] the absolute liability offence of flying truck wheel from a commercial motor vehicle.[70]

The Court's conclusion in the *Kanda* case was that the seatbelt offence in question was one of strict liability. This classification of the offence struck the appropriate balance, in the Court's view, between encouraging drivers to be vigilant about the safety of child passengers in their vehicles, while not punishing those who exercise due diligence as to children's seat belts. It was noted, though, that the "minor penalty" for the offence pointed towards absolute liability.[71] But this is not always the case. Indeed, the flying truck wheel offence cited by the Court as an example of an absolute liability offence, carries the highest monetary penalty provided in the *Highway Traffic Act* of Ontario: a fine of up to $50,000. The administrative absolute liability environmental penalty amount of $100,000 per day under the Ontario *Environmental Enforcement Act,* has previously been noted. Such penalty provisions for absolute liability offences are the antithesis of "minor penalties". As Swaigen observes, there is a "lack of rationality" in the regulatory offences classification scheme.[72]

The Ontario Court of Appeal's recent judgment in *R.* v. *Raham,*[73] upholding the constitutional validity of the *Highway Traffic Act* offence of stunt driving or racing, further illustrates the complexities that arise with respect to statutory interpretation and regulatory offences, particularly classifying the nature of the regulatory offence. Whereas the offence of speeding has been held to be

absolute liability in nature by appellate courts in Ontario, [74] and in other provinces,[75] it was found in *Raham* that while the offence of stunt driving or racing could reasonably be interpreted as an absolute liability offence, it was in fact a strict liability offence due to the presumption in favour of a constitutional interpretation. The Court recognized, however, that the prohibited conduct in the case, driving 50 kilometres in excess of the speed limit, was "identical to the conduct prohibited by the offence of speeding."[76]

*6. The Recent Trend of Escalating Penalties for Regulatory Offences*

Neither does it follow that the penalties for regulatory offences generally are invariably less serious than those for *Criminal Code* offences. Thus the penalty provisions set out in the respective legislation do not necessarily reflect the differences between true crimes and minor offences. Indeed, the general penalty provision in the *Provincial Offences Act* of Ontario of $5,000[77] has until recently exceeded that for *Criminal Code* summary conviction offences.[78] Hence, the "simple fact", as noted by Sherrin, is that "regulatory offences can attract penalties as severe as criminal offences."[79]

At the time of the Supreme Court of Canada's judgment in *Sault Ste. Marie,* which was a pollution case, the highest fine available for most environmental offences was $5,000 or less, with imprisonment being an infrequent option.[80] However, within a span of fifteen years, many federal and

provincial environmental laws have been amended to provide for fines in the millions of dollars, substantial terms of imprisonment, and other serious consequences including forfeiture of property, suspension or cancellation of business licences, and clean-up orders.[81]

An individual sentenced to a period of imprisonment would find "little comfort", suggests Don Stuart, in the analysis that the so-called regulatory offence of misleading advertising, which carries a maximum sentence of five years' imprisonment, is not criminal.[82] After all, "A person whose liberty has been restricted by way of imprisonment has lost no less liberty because he or she is being punished for the commission of a regulatory offence as opposed to a criminal offence. Jail is jail, whatever the reason for it," as Chief Justice Lamer put it in his dissenting opinion in *Wholesale Travel Group Inc*. [83] For this reason, many commentators have suggested that the focus is better spent on the penalty being sought by the state, and not in seeking to distinguish between the nature of regulatory offences and true crimes.[84]

In a *Charter of Rights*[85] decision where the Supreme Court of Canada unanimously agreed that a justice of the peace conducting a trial for a regulatory offence possesses jurisdiction to grant *Charter* remedies as a "court of competent jurisdiction", the Court noted that while many prosecutions under provincial offences legislation involve "minor regulatory infractions", claims for *Charter* relief generally arise from prosecutions involving "significant fines and

the possibility of imprisonment."[86] In such cases, the Court reasoned, the distinction between provincial courts operating under the *Criminal Code* and provincial offences legislation is far less material. Indeed, the maximum sentence faced by the individual defendant in the instant case, for an offence under the Ontario *Occupational Health and Safety Act,* [87] of failing to comply with safety requirements on a construction project, was a fine of $25,000 and/or 12 months' imprisonment. These penalties far exceed those generally available for most *Criminal Code* summary conviction offences.

Many other examples of substantial regulatory offences penalties come to mind. Recent amendments to the Ontario *Securities Act* setting out the punishment for the offence of misleading statements expose a defendant to a fine of up to $5,000,000, and imprisonment for up to five years less one day, or to both. While it is possible for a conviction under a provincial law to result in a sentence in a federal penitentiary[88], it is unusual for provincial statutes to authorize such sentences.[89] Moreover, while the introduction of the conditional sentence regime for criminal offences under the *Criminal Code* permits such sentences to be served outside of an institution where the sentence imposed is less than two years' imprisonment[90], conversely, and "perhaps perversely", as Archibald et al observe, "more people are actually going to jail for regulatory offences", given the unavailability of conditional sentences for such offences.[91]

Motor vehicle infractions provide another point of comparison. While the minimum penalty for a drinking and driving offence under the *Criminal Code* was recently raised from $600 to $1,000, the minimum penalty under the Ontario *Compulsory Automobile Insurance Act*[92] for a first conviction for driving a motor vehicle without insurance is $5,000. A subsequent conviction carries a minimum penalty of $10,000. In the case of a person who is in possession of a false or invalid insurance card, the penalty for a first offence is a minimum fine of $10,000; subsequent convictions carry a minimum penalty of $20,000.

Under the *Highway Traffic Act* of Ontario, the offence of driving while suspended carries a minimum fine of $1,000 for a first offence, up to a maximum of $5,000. Subsequent convictions are punishable by a minimum fine of $2,000. In each instance, there is also the possibility of imprisonment for up to six months. Where the offence is in relation to a *Criminal Code* licence suspension, the minimum penalty increases to $5,000. for a first conviction, and $10,000 for subsequent convictions. There is also authority to impound the offender's motor vehicle. Indeed, the Ontario Court of Appeal has upheld a sentence of 10 days imprisonment and a fine of $5,000 imposed for a defendant who did not attend his trial for driving while suspended, and was sentenced in his absence, as permitted under the *Provincial Offences Act*.[93]

The *Highway Traffic Act* offence of stunt driving or racing, which, as noted, was recently upheld by the Ontario Court of Appeal in *Raham*, provides another

example: upon being charged the driver is required to surrender his/her driver's licence to the police officer at the scene, and is subject to an automatic 7 day administrative licence suspension; the officer is required to impound the motor vehicle for 7 days at the cost and risk to the driver. In the event of conviction, the defendant faces a minimum fine of $2,000 with a maximum of $10,000, a term of imprisonment of up to 6 months, or both a fine and imprisonment, and a licence suspension for up to 2 years on a first conviction and 10 years for a subsequent conviction.

Indeed, even traffic fines have overtaken the quantum of fines "handed out for many criminal offences."[94] Moreover, the "increased sanctions" for traffic offences in terms of high fines and demerit points, which may give rise to licence suspensions, mean that "traffic offence sentences are very much penal in nature in many cases."[95] There may also be an "adverse effect" on insurance premiums, especially in the case of younger drivers.[96]

A case involving hunting charges under the Alberta *Wildlife Act*,[97] as well as *Criminal Code* charges which were added in the course of the investigation, provides another illustration of how fine the line is as between the "seriousness" of regulatory offences and criminal offences. In *R.* v. *Mistol*,[98] the Court considered whether the addition of criminal charges made the matter more serious for the defendants, such that their rights under the *Charter of Rights and Freedoms* needed to be reiterated. The *Wildlife Act (Alta.)* charges were hunting

at night and hunting with a spotlight; the *Criminal Code* charges were obstruction of peace officers and failing to stop a motor vehicle while being pursued by peace officers. The Court stated that the question as to whether the criminal charges were "significantly most serious" was not easily answered, noting:

> What is 'serious', like what is beautiful, sometimes lies in the eye of the beholder. To policemen whose lives are dedicated to the regulation and preservation of the wildlife resource, the offences they were ultimately investigating were probably more serious than the *Criminal Code* charges which ultimately were added to the hunting charges. The law lends some support to that argument since the maximum monetary penalty provided by the provincial statute is in fact higher than the maximum monetary penalty provided by the *Criminal Code* for the summary procedure offences.[99]

If the penalty amounts as between criminal offences and regulatory offences seem blurred, the line may be no more apparent as between regulatory offences themselves. It has already been noted that some monetary penalties for absolute liability offences, far from being minor penalties, are among the highest fines available, such as the flying truck-wheels provisions under the Ontario *Highway Traffic Act* or the administrative penalties pursuant to the Ontario *Environmental Enforcement Act.*

And what of the situation where the regulatory offence carries a *mens rea* requirement, such that it more closely resembles in nature a criminal offence? Should this not be a relevant consideration in sentencing, and thus reflected in the disposition of the Court? There is some authority in support of this proposition. In *R.* v. *Virk*,[100] a case involving *mens rea* offences under the Ontario

*Workplace Safety and Insurance Act, 1997*[101] of making a false statement and failing to inform of a material change in circumstances, it was noted that very few public welfare offences fall into this category, thereby requiring the prosecution to prove wrongful intention or knowledge in addition to the prohibited conduct. However, where there is a *mens rea* element, and thus some degree of moral blameworthiness or fault, this is a significant factor and justifies a difference in approach to sentencing.

Madigan J. explained the rationale for such a distinction on sentencing as between the different categories of regulatory offences. He stated:

> Not all public welfare offences are equal in gravity. Some are more serious than others. Those requiring proof of wrongful intention or knowledge are more serious, for sentencing purposes, precisely because the prosecution has proven a guilty mind in addition to the prohibited conduct. Convictions for absolute liability and strict liability offences usually suggest '… nothing more than the defendant has failed to meet a prescribed standard of care.' However, offences like those alleged and proven in this case tend to involve an element of fault or moral blameworthiness in that they prohibit conduct which is inherently wrong. Quite undeniably, the intention to defraud and the intention to lie qualify as morally blameworthy.[102]

The Court went on to comment that on a continuum of offences ranging from "public welfare offences to true criminal offences", the defendant had been found guilty of offences which were "more serious" and therefore more comparable to criminal offences than to public welfare offences.[103] As for the significance of this on sentencing, the Court observed:

> In the case of most regulatory offences, the sentencing court usually attempts to balance the competing considerations in favour of rehabilitation of the offender and protection of the public. However, in cases involving proof of *mens rea*, the balance must favour the objectives of denunciation, retribution and deterrence. Whereas *mens rea* offences involve some degree of moral blameworthiness or fault, absolute liability and strict liability offences do not. This distinction justifies the difference in approach to sentencing.[104]

This approach to sentencing for regulatory offences, where the nature of the offence in question as either one of full *mens rea*, strict liability of absolute liability, is reflected in the sentence imposed, has been followed in numerous cases. These include decisions involving convictions for failing to remit retail sales tax, contrary to the *Retail Sales Tax Act* (Ont.),[105] where fines in excess of $100,000 were imposed; failing to declare earnings as required by the federal *Employment Insurance Act*[106] where an Alberta court sentenced the defendant to 30 days' imprisonment;[107] a breach of the *Occupational Health and Safety Act, 1993* (Sask.)[108] for failing to develop safety procedures, resulting in the employer being fined $30,000;[109] engaging in unfair practices under the *Business Practices Act* (Ont.),[110] leading to imprisonment for 90 days, a restitution order and 2 years probation;[111] infringements of the *Fair Trading Act* (Alta.)[112] where fines and restitution orders were imposed;[113] and breaches of the Alberta *Local Authorities Election Act* [114] resulting in a jail sentence of 14 days and a $2,000 fine.[115]

*7. Matrix of Regulatory Offences Sentencing Decisions*

To return to the differences between sentencing for criminal offences and sentencing for regulatory offences, there is one other important distinction to be noted. A statement of sentencing purposes and principles to guide sentencers has been included in the *Criminal Code*. There is no such statement enacted for regulatory offences under the *Provincial Offences Act*. What is it, then, that should guide courts when sentencing defendants for public welfare offences, and determining what kind of penalty to impose? Other cases for similar offences? Other cases for different regulatory offences? The statute creating the offence? Their own views of the offence or the offender? Comparable sentences under the *Criminal Code* for true crimes? These are some of the questions that currently face Courts when imposing sentences for regulatory offences, and giving effect to the enforcement mechanisms provided by the legislature.

Regulatory agencies have powers to oversee a broad range of activities in areas ranging from “quality of life” to “social regulation”.[116] Let us consider a matrix of regulatory offences in the area of workplace safety, consumer protection and environmental regulation. These regimes are necessarily broad and distinct, but an examination of sentencing practices and patterns in these areas may help reveal consistencies and differences in modes of sentencing theory. Regulatory agency sentencing patterns present important implications

concerning the need for consistency and uniformity in the area of sentencing for regulatory offences generally.

Workplace safety. On his second day at work in a plastics factory, a teenager is operating an oven conveyor that has an unguarded pinch-point. He gets caught in the machine and dies. The defendant, a sophisticated businessman, and his company, are found guilty of creating a hazard which endangered a worker by failing to guard the pinch point.[117] The company is fined $30,000 and the individual defendant $10,000.[118] Why is it that the Court determined that a monetary penalty rather than a period of imprisonment was sufficient punishment for the individual defendant? Is the quantum of fine for the corporate defendant enough to persuade it to comply with the law in the future, or is it merely the cost of doing business which will merely be passed on to consumers of its products? What is the principle or principles of sentencing that the Court should consider in imposing the sentence in this case? Where are such principles of sentencing to be found? These are some of the questions facing sentencers when dealing with this workplace safety case.

Consumer protection. Over a period of 18 months, the defendant contracts to perform home renovations for 13 elderly or financially constrained families. For some of them, no work is done; for others there is a failure to honour any warranty. Their monetary loss is about $70,000. The money cannot be accounted for. There has been no restitution to the victims for any of their losses. The

defendant is sent to jail for a total of 7 months.[119] This is more than the summary conviction ceiling of 6 months imprisonment under the *Criminal Code*. Did the Court essentially view the regulatory offence of committing an "unfair business practice" under the *Business Practices Act (Ont.)* as if it were fraud under the *Criminal Code,* given that there is a *mens rea* element in the former offence? Had the defendant been charged under the *Criminal Code* would he have received a similar sentence of imprisonment? Might he have received a conditional sentence of imprisonment so that he did not have to serve his sentence in jail? While this defendant abused the trust that his vulnerable victims placed in him and made off with all their money, for which he was sent to jail, the employer of the novice teenaged worker exposed him to the danger of an unsafe piece of equipment in the workplace for which the other lost his life, but that defendant was not sent to jail and given a monetary penalty instead. Are these two regulatory offences sentences compatible with each other? What are the principles of sentencing that leads to jail being imposed in one such case but not the other? Why is it that the more serious consequence of the regulatory offence, the loss of life of a worker, results in a fine, but the loss of money by vulnerable victims, results in a period of imprisonment?

Environmental regulation. The defendant, a municipal corporation, pollutes a major river with sewer discharge for many years, causing harm to several fish species, and adversely impacting the area's reputation for tourism. However, the licensing authorities were aware of its conduct, and continued to issue water-use

licences to the City despite its repeated non-compliance, and its obligation to build a proper sewage treatment plant. The Court imposes a fine of $5,000. But in addition the City is ordered by the Court to construct a sewage treatment plant so as to remedy any harm to fish or the fish habitat in the river. A time line is set by the Court as to when the plant was to be fully operational; for each month that the defendant failed to meet its timelines to have the plant in operation, an additional penalty of $5,000 would be imposed. The cost of building this plant is in excess of one million dollars.[120] Although the defendant has been convicted of the regulatory offence of pollution, contrary to the federal *Fisheries Act,*[121] the magnitude of the sentence imposed seems far beyond what might have been levied for conviction for a criminal offence: there is a fine, but the Court has additionally imposed a "creative sentence" to ensure that the conduct does not occur again, and that the defendant will clean up the damage it has already caused. This type of sentence seems aimed at both current and future behaviour by the defendant.[122] But is it sufficiently punitive? Should it matter that the defendant is a municipal corporation, and that the ultimate cost of the project and its ability to pay for it may be passed on to taxpayers, or that other municipal services may be impacted?

The matrix of cases above, in summary form, illustrates just some of the daunting questions faced by the Courts when imposing sentences for what are regarded by many as "minor offences", but seem in reality to be quite serious breaches of public welfare statutes. Indeed, some may regard such offences as

being at least as serious, if not more serious, than traditional criminal offences: the death of a worker in the first example; swindling elderly and vulnerable consumers out of their money in the second case; and polluting a major river system and endangering the environment in the third case. Indeed, Justice Cory referred to similar illustrations in the *Wholesale Travel Group Inc.* case where he posed the question whether "the single mother who steals a loaf of bread to sustain her family more blameworthy than the employer who, through negligence, breaches regulations and thereby exposes his employees to dangerous working conditions, or the manufacturer who, as a result of negligence, sells dangerous products or pollutes the air and waters by its plant?"[123]

To some, harm to the environment merits greater sanctions than the commission of many criminal offences.[124] It has also been observed that while most people agree that causing death constitutes serious harm, and murder in fact carries the "harshest penalties in criminal law", every year in Canada the number of deaths in the workplace, which are rarely treated as a crime, far exceeds the number of homicides. Thus, the concept of harm might indicate which behaviour is serious, but little in terms of how society ought to respond to it.[125]

While the factual issues in our matrix of cases seem very different from each other, they all involve, in common, breaches of regulatory statutes. A fine is imposed in one case, jail in another. Construction of a sewage treatment plant is

ordered in the third case. Are these sentences consistent with each other, or responsive to the underlying breaches of the public welfare statute in question? Where is it that the sentencers should look for guidance in these types of cases? Workplace safety, consumer protection and environmental regulation provide classic examples of strict liability offences, but as one can see, there are many differences in the nature of the conduct sought to be regulated.

*8. Statement of Sentencing Purposes and Principles in Other Statutes*

In some cases, the public welfare statute creating the offence may address the issue of sentencing principles. Examples of this are found in environmental laws where the "polluter pays" principle is set out. According to this principle, polluters are assigned the responsibility for remedying contamination for which they are responsible, and bear the direct and immediate costs of pollution.[126] Indeed, in the Quebec *Environmental Quality Act*[127] this principle contained in the legislation was approved by the Supreme Court of Canada.[128] Moreover, the Court noted that this principle has become "firmly entrenched" in environmental law throughout Canada, as it is found in almost all federal and provincial environmental legislation.[129] It is also recognized at the international level, such as the sixteenth principle of *Rio Declaration on Environment and Development*.[130]

In other statutes, a statement of sentencing considerations is included, such that the sentencer is specifically directed to take into account the enumerated criteria. The *Canadian Environmental Protection Act, 1999*[131] exemplifies this approach. Nine distinct factors are set out, such as the harm or risk of harm caused by the commission of the offence, whether any remedial or preventive action has been taken or proposed by the offender, and whether the offender committed the offence intentionally, recklessly or inadvertently. The *Canada Shipping Act, 2001*[132] provides a similar list of factors for the Court to consider in determining the appropriate punishment for the offence of discharging a pollutant.

The recently enacted *British Columbia Public Health Act*[133] contains sections on determining the appropriate sentence, and the purposes of sentencing. Under the former, the Court is directed to consider the purposes of sentencing set out in the legislation;[134] the latter directs the Court to consider imposing one or more penalties to achieve factors such as furthering the regulatory objective underlying the provision that was contravened, or rehabilitating the offender.[135] However, such provisions are specific to the legislation in question, and have no application to other public welfare statutes. As a result, guidance to the courts is not provided on a more general level as to how sentencing should relate to "the regulatory objectives the legislators desire to achieve."[136]

Given the lack of legislative direction in most such statutes, including the *Provincial Offences Act*, some Courts have attempted to summarize in a comprehensive manner the relevant sentencing principles for regulatory offences. The Law Reform Commission of Canada has referred to this approach as a "shopping list" of sentencing factors.[137] An example of this summary of sentencing principles approach is illustrated in *R.* v. *Fraser Inc*.[138], where the defendant admitted responsibility for polluting a river with discharge from its pulp mill, contrary to the New Brunswick *Clean Environment Act*[139] The Court provided a list of 23 separate factors for consideration, including the nature of the offence; potential for actual and possible harm; the deliberateness of the offence; profit, if any realized; attempts to comply; the ease or difficulty of preventing pollution; technology available; and whether the offence resulted from negligence or not.

This "multiple approach of applicable factors"[140] has been applied in numerous other environmental cases, including contravening approval and enforcement orders made under the Alberta *Environmental Protection and Enhancement Act*[141] respecting dust emissions and noise from the defendant's alfalfa processing operation;[142] discharging a pollutant into the city's sewer system;[143] depositing a deleterious substance in water frequented by fish;[144] pollution from a sewage lagoon;[145] and unlawfully transporting dangerous goods.[146] It has also been employed in cases involving breaches of other public welfare offences, such as failing to ensure the health and safety of workers,

contrary to the *Occupational Health and Safety Act* (Sask.),[147] where a worker was crushed between the bucket lever arms and body of the loader;[148] and failing to develop safety procedures.[149]

The problem with this "shopping list" or multiple factors approach is that no single sentencing principle or principles is emphasized, and there is the very real risk that it "loses sight of the fundamental purposes of sentencing."[150] Neither does there appear to be a priority or ordering among the various factors themselves. Indeed, the approach may be said to invite a new level of risk assessment that may be inconsistent with the "legislative assessment" as set out in the legislation.[151] As Verhulst notes, inconsistency "clearly remains" as it is not apparent how the approximately two dozen principles that have been applied for regulatory offences by the Courts interrelate, which principles are to be given priority, and which factors are to be considered as aggravating or mitigating.[152]

*9. Conclusion*

In summary, while it may be an overstatement to say that there is at present "chaos" in sentencing for regulatory offences,[153] the statutory provisions which govern sentencing in regulatory offences resemble "a patchwork quilt … in need of reform."[154] The fact that Courts have attempted to fill in the gaps, when faced with the bewildering array of regulatory offences, enforcement

mechanisms, and penalty provisions, is a testament to both the recognition and magnitude of the problem.

There is a need for a consistent and rational approach for sentencing purposes and principles for regulatory offences. To consider how this might be done, and what form it should take, sentencing principles generally for true crimes or criminal offences will be examined in the next Part, with particular emphasis on how the issue of inconsistency or disparity of sentencing among the various types of offences and offenders is addressed. Thereafter, one may turn to these same issues for regulatory offences, with the benefit of the experience gained from criminal offences, and consider what sentencing principles may lend themselves to the paradigm for minor offences, as opposed to true crimes. Only then will it be clear just how much the patchwork quilt is in need of reshaping and reform, and how this might best be accomplished.

# PART II. SETTING THE STAGE

## A. Purposes and Principles of Sentencing for Criminal Offences

### *1. Introduction*

The approach employed by the *Criminal Code* with respect to sentencing purposes and principles affords a potential model for regulatory offences sentencing purposes and principles. After all, criminal courts have had more than 100 years of sentencing experience in Canada. Additionally, there is a rich body of academic commentary and literature on the issue of sentencing purposes and principles for criminal offences in Canada, including numerous Parliamentary reports and Law Reform Commission of Canada studies in the area, as well as the debate surrounding the amendments to the *Criminal Code* in 1996 wherein a statement of sentencing purposes and principles was enacted for the first time. The approach taken to identifying sentencing purposes and principles for criminal offences is informative. It is not only the courts, but experts and sentencing scholars, who share the concern about the proper basis for imposing punishment, and providing sentencing practices aimed at promoting uniformity of approach and eliminating inconsistencies.

*2. History of Sentencing Reform prior to the Criminal Code of Canada Statement of Sentencing Purposes and Principles*

In Gilbert and Sullivan's opera, *The Mikado*, the Judge, the Lord High Executioner, sets out the clear terms of reference which guide his task:

> My object all sublime
> I shall achieve in time –
> To let the punishment fit the crime,
> The punishment fit the crime….[155]

According to the *Canadian Sentencing Handbook*,[156] a publication prepared for Provincial Court Judges across Canada, there is a "half truth" captured in this lyrical statement, since the exercise of sentencing calls for a "proper balancing" of the principles of sentencing in order to arrive at a punishment that meets the public interest in protection, while respecting the individual rights of the offender.[157] It is in this sense, according to the *Handbook*, that the appropriate sentence must "fit" the crime and not be excessive: the accused has a right to a "fit" and "proper" sentence, that is, one that it is not excessive having regard to the circumstances.

The Lord High Executor's stated purpose in meting out punishment in *The Mikado* is no mere whimsical matter. It has been said that the imposition of sentence "is one of the more important mechanisms through which society attempts to achieve its social goals."[158] A "unity of purpose and philosophy" has

been described by the Canadian Committee on Corrections as being essential to any system of criminal justice which purports to deal in a meaningful way with an offender against the criminal law.[159] Indeed, the Ouimet Report issued in 1969 by the Canadian Committee on Corrections expressed the view that there should be a "consistency in philosophy" from the time that the offender has his/her first contact with the police until the time of the offender's final discharge.[160] A "common principle", in other words, was necessary respecting the legislative policy in the creation of offences, the extent of police powers in crime prevention and investigation, the operation of courts and lawyers, judicial policy in the disposition of offenders, and finally the construction and operation of correctional services.[161]

The Ouimet Report began its chapter on sentencing with this observation:

> The greatest obstacles to the development of a unified system of criminal law and corrections have been the absence, to date, of any clearly articulated sentencing policy and the inadequacy of the services and facilities available to a judge responsible for the key operation in the entire process.[162]

Accordingly, the Committee's Report was not confined to only post-sentence issues, but also included a host of matters touching on the loss of liberty throughout the criminal process, as well as parole and imprisonment.[163] The Committee itself acknowledged that it was making "far reaching recommendations" with respect to both "sentencing policy" and "the necessity for increasing the range of dispositions" available to sentencers.[164]

A number of working papers and studies were subsequently published by the Law Reform Commission of Canada, dealing with sentencing and imprisonment issues. In a 1976 report entitled, *Dispositions and Sentences in the Criminal Process*, the need for a broader range of available sentences was explored, so as to provide options that could be applied with "restraint and justification" in order to promote "a sense of responsibility on the part of the offender and enable him to understand his actions in relation to the victim and society."[165] Imprisonment was described as being an "exceptional sanction" that was to be limited to cases where it was required to protect society by separating offenders who posed a "serious threat" to the lives and personal security of members of the community; or to denounce behaviour that was "highly reprehensible" or a "serious violation of basic values"; or to coerce offenders who willfully refused to submit to other sanctions.[166] It was also stated that a court ought not to impose imprisonment unless it was certain that a less severe sanction could not achieve "the objective set out by the legislator."[167]

Other Law Reform Commission reports concerned principles of sentencing and dispositions,[168] and imprisonment and release.[169] In *The Principles of Sentencing and Dispositions*, rather than defining the concept of "punishment", the term "sanction" was used, so as to denote a penalty which might be imposed for "purposes of punishment, protection, restitution or treatment."[170] This report went on to note that the purposes of the criminal law,

on one hand, and of sentencing and dispositions, on the other, are "closely tied together", and unless one knows what the purposes of the criminal law are or should be, it cannot be determined "how to formulate a consistent and rational sentencing policy."[171] A legislative statement of "basic policy setting forth the philosophy, the purposes, standards and criteria to be used in sentencing and dispositions" was put forward as a means of promoting uniformity through structuring and channeling discretion in the sentencing process.[172] Such a mechanism was preferable than "taking all discretion away" from prosecutors, judges or parole officials.[173] Another recommendation called for the drafting of a "sentencing guide" so as to assist courts in determining whether to impose a custodial or non-custodial sentence: it was contemplated that this guide would contain a statement of priorities and criteria to be considered in reaching such a decision.[174] As a general rule, non-custodial dispositions were to be given priority, unless factors such as the gravity of the offence, the offender's previous convictions and risk of recidivism dictated otherwise. [175]

In *Imprisonment and Release*, the Law Reform Commission echoed the importance of sentencing guidelines, as a device to "provide explicit principles and criteria to facilitate rational sentencing."[176] Imprisonment was, once again, regarded as an "exceptional sanction", to be used only when other sanctions appeared to be ineffective. According to this report, courts may have no alternative but to consider the use of imprisonment as a "last resort" against offenders who "willfully default in carrying out obligations imposed under other

sanctions."[177] Imprisonment was also to be used rarely in cases of non-violent crimes against property or the public order.

The Government of Canada released two policy papers of its own, recognizing the need to articulate "clear policies or principles of sentencing". In *The Criminal Law in Canadian Society*,[178] it was acknowledged that one of the most significant concerns in sentencing was the "apparent disparity" in sentences imposed for "similar crimes committed by similar offenders in similar circumstances", a problem compounded by the lack of guidelines as to the manner in which general principles ought to govern the choice of sentence, or the weight to be given to the different objectives or principles of sentencing.[179] Indeed, a "statement of purpose and principles" was required for the criminal law generally, and not just sentencing. A subsequent publication, entitled *Sentencing,*[180] termed it a "striking omission" that the *Criminal Code*, since its inception in 1892, had failed to provide any "formal Parliamentary guidance" respecting a statement of purposes and principles which underlie the criminal law generally, and sentencing in particular.[181] Given that such standards or principles are issues of "public policy which are of fundamental importance," Parliament was stated to be "the most appropriate forum for their articulation."[182]

Subsequently, the Government of Canada announced the establishment of the Canadian Sentencing Commission in 1984. Its terms of reference directed that the Commission should be guided by the statement of purpose and

principles set out in *The Criminal Law in Canadian Society*,[183] as well as sentencing and release practices. The Commission's Report, *Sentencing Reform: A Canadian Approach,* was released in 1987.[184] A research report commissioned by the Canadian Sentencing Commission noted that the "major danger" in Canada appeared to be the "tendency not to make hard choices on sentencing reform," given that previous sentencing reform "has been extremely incremental and hesitant".[185] The Commission's report itself stated that the "primary difficulty" with existing sentencing practices in Canada was that "there is no consensus on how sentencing should be approached." [186] This, in turn, was exacerbated by the "almost complete absence of policy from Parliament on the principles that should govern the determination of sentences."[187] In Chapter 6, entitled "A Rationale for Sentencing", the "goals" of sentencing were described as being: deterrence, rehabilitation, incapacitation, retribution, denunciation and "just deserts". The paramount goal was identified as protection of the public, although this was stated to be not so much the "overall goal of sentencing, but of the entire penal system."[188] The "fundamental purpose" of sentencing was said to be to preserve authority of and promote respect for the law through the imposition of "just sanctions";[189] the "paramount principle" governing the determination of a sentence is that the sentence be "proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence."[190]

In response to the Sentencing Commission's Report, the Standing Committee on Justice and Solicitor General conducted a review of sentencing

and conditional release, holding public hearings across the country and visiting various institutions. The Report that it released in August, 1988, entitled *Taking Responsibility*, endorsed the proposal that the *Criminal Code* should set out a statement of the purpose of sentencing, as well as the applicable principles which should guide discretion, such as proportionality.[191] Noting that there was general consensus that "unwarranted disparity should be eradicated", the point was made:

> Research on sentencing disparity demonstrates that the most frequently alleged cause for unwarranted variation is confusion about the purposes of sentencing. No sentencing goals are now set out in legislation. Conflicts and inconsistencies in case law appear to arise from the fact that it is often impossible to blend the elements of public protection, punishment, denunciation and deterrence; frequently, they are contradictory and inconsistent. It is important, therefore, to achieve consensus on a sentencing rationale for the guidance of the judiciary and the enlightenment of the general public.[192]

The Government of Canada responded to the Standing Committee's Report with a 1990 Green Paper, *Sentencing: Directions for Reform*[193], where the recommendation put forward in *Taking Responsibility* for a legislated statement of sentencing principles was endorsed. It was observed in the Green Paper that a rationale for sentencing "should clearly explain the basis for the imposition of legal sanctions."[194] Another point that was addressed was that while a body of case law on sentencing had been developing since the 1921 amendments to the Criminal Code which permitted appellate review of "fitness of sentence", such decisions were not generally accessible to the general public. As a result, "one of the basic tenets of our law, that it should be available and

understood by the population, is not well met in respect of sentencing law."[195] The Minister of Justice and Attorney General of Canada, Kim Campbell, echoed these statements, noting that the lack of a "clear, national set of objectives" to be applied in the sentencing process was incompatible with a system of sentencing which must be "understandable, accessible, and predictable – to judges, the public, correctional officials, and the offender."[196]

It is thus apparent that a central theme in the calls for reform leading to the introduction of a statement of principles for sentencing in the *Criminal Code* through the 1996 amendments has been the need to "structure sentencing discretion".[197] All of the major groups involved, the Law Reform Commission of Canada, the Canadian Sentencing Commission, Parliamentary Standing Committees and the Government of Canada itself, recognized the "necessity for a legislated statement of sentencing purpose."[198] Through this means, a "matrix of principles" is codified in order to "direct the sentencer's mind to factors which should be given appropriate play in deciding the kind of sentence and its extent."[199]

## 3. The Enactment of a Statement of Sentencing Purposes and Principles for Criminal Offences

Bill C-41 was introduced into Parliament as legislation that, for the first time, provided "comprehensive sentencing reform".[200] It became law in September, 1996.[201] Stated simply, it was no longer possible for the legislature to

"passively sit back and avoid involvement" in the sentencing reform movement.[202] Passage of legislation setting out the statement of purposes of sentencing also meant, as Roberts observed, "the debate over punishment has been particularly public."[203] As it turned out, it was the conditional sentencing provisions of the legislation that ultimately proved better known, and certainly far more controversial, than the statement of sentencing principles. Indeed, the former has already been substantially restricted in scope through subsequent amendments, such that conditional sentences are no longer available for many criminal offences.[204]

According to Manson, Bill C-41 succeeds, at least, by organizing the new sentencing provisions in a "coherent" and "systematic manner".[205] Beginning with alternative measures,[206] which would remove a case from the criminal system entirely, the legislation moves next to the purpose[207] and principles of sentencing.[208] A series of provisions follow, dealing with procedural and evidentiary matters,[209] after which are the sentencing options themselves, in ascending order of seriousness, starting with discharges[210] and probation,[211] moving next to fines and forfeiture,[212] restitution,[213] and culminating with conditional sentences[214] and, finally, imprisonment.[215]

The purpose of sentencing, as set out in s.718, is cast in these terms:

> The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the

> maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

The fundamental principle of sentencing is contained in s.718.1. It is that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." Other sentencing principles follow in s.718.2, including those factors that constitute aggravating circumstances.[216] Additional sentencing principles are: a sentence should be similar to sentences imposed on similar offenders for similar offenders committed in similar circumstances;[217] where consecutive sentences are imposed, the combined or total sentence should not be unduly long or harsh;[218] an offender should not be deprived of his/her liberty, if less restrictive sanctions may be appropriate in the circumstances;[219] and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.[220]

There has been much scholarly debate both as to the impact and merits of the statement of purpose and principles of sentencing added to the *Criminal Code* in 1996. Given the consensus in the sentencing reform movement advocating for the inclusion of such a sentencing statement, some have argued that the impact of the legislation may ultimately turn on issues such as the content of the statement, how it is structured, and the wording and qualification of the principles themselves.[221] While it has been acknowledged that "it must be better for an institution to be purposeful than purposeless", and that there can be nothing wrong with including a statement of purpose as opposed to failing to articulate one, there remains the concern whether s.718 will achieve its goals, or merely constitute "a self-justificatory and empty platitude."[222]

That the sentencing landscape has been indubitably altered by these new *Criminal Code* provisions is obvious, at least in the view of the Supreme Court of Canada. In one of its first decisions concerning the sentencing principles enacted by Bill C-41, *R.* v. *Gladue*,[223] a case where s.718.2(e) with respect to aboriginal offenders was in issue, the Supreme Court observed that the passing into law of the new Part XXIII of the *Criminal Code*, where these sentencing sections are grouped, constituted "a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law."[224] The following year, in its seminal judgment on conditional sentences, *R.* v. *Proulx*,[225] the Supreme Court returned to this theme, noting that Bill C-41 "substantially reformed" Part XXIII of the *Criminal Code* by introducing, "*inter alia*, an express

statement of the purposes and principles of sentencing, provisions for alternative measures for adult offenders and a new type of sanction, the conditional sentence of imprisonment."[226]

However, it is no small task to devise a fit sentence for an offender, even with the guidance provided by the new *Criminal Code* sections. Sentencing remains a very "human process".[227] The imposition of a fit and proper sentence has been described as being "as difficult a task as any faced by a trial judge."[228] It is essentially the product of "the combined effects of the circumstances of the specific offence with the unique attributes of the specific offender."[229] The term "individualized sentencing" has been used to describe this process.[230] This case by case nature of sentencing proceedings is said to be reflected in the principle of proportionality, which is described as being the fundamental principle of sentencing under s.718.1 of the *Criminal Code*. And in addition to complying with the principles of sentencing, the sentence imposed by the court must promote one or more of the objectives set out under s.718.

The importance and relevance of each of the objectives identified in s.718 must vary, though, having regard to the circumstances of the offender and the nature of the offence. Thus, as one commentator notes, while the new sentencing provisions which came into force in Canada included for the first time an explicit statement of the purposes and principles of sentencing, the *Criminal Code* "provides no guidance" on how a judge is to implement and give effect to

these principles.[231] In short, the sentencing sections constitute "a confusing mix of purposes, objectives and principles that are to be used in sentencing individual offenders."[232] A "smorgasbord of justifications for punishment" remain available to the court in its determination of what constitutes a fit sentence, without providing direction to judges as to how to match "punishment purposes" with offenders;[233] the form and structure of the statement of sentencing "provides no hierarchy within the principles to direct decision-making in a forceful and principled way."[234] In order to cover a large number of conflicting aims, "rather indecisive formulae" are set out in the legislation.[235] It is not made clear, for example, under which conditions certain of the aims are to be favoured over others.[236] The *Criminal Code*, according to another author, "remains silent on what ought to be done when conflicts arise between the various sentencing objectives."[237] In such cases, judges are left to decide which of the enumerated principles of sentencing should apply to the particular offender. As a result, discretion "continues to be the hallmark of sentencing in Canada."[238]

Still, it is the legislature that sets out the sanction for breaching its statutes. The legislature's "attitude" cannot but help guide the courts in sentencing within those limits, as Decore observed in an article on Canadian sentencing practices more than forty-five years ago.[239] That is, an analysis of the purposes underlying criminal sanctions assists one in attempting to answer the question, "Why do we punish?" It allows the court to move on to the next question: "How is the defendant to be punished?"[240] The statement of sentencing

principles in the *Criminal Code*, when viewed through this prism, serves the important task of providing "standard fundamental principles" and the framework within which courts may exercise their discretion in determining what is a fit and proper sentence, having regard to the particular facts in the case.[241] Having a sentencing policy means, in the words of Mannheim, "not merely using one's discretion but using it in a specific and consistent manner, with some ultimate object in view."[242] Creating sentencing standards requires a "coherent conception of purposes."[243] Whereas the absence of agreement on "a philosophy of sentencing" is an invitation for "chaotic criminal sentencing" practices,[244] a statement of sentencing purposes, even an imperfect one, brings order to the process. The "legislation of sentencing objectives" lessens the potential for disagreement among judges as to the legal objectives that govern in a particular case.[245] In summary, the importance of a statutory statement of sentencing purpose and principle "cannot be over-stated." [246]

*4. Conclusion*

It is clear that there is a shared recognition among experts and sentencing scholars as to the desirability of uniformity in sentencing practices with respect to criminal offences, and the importance of identifying sentencing purposes and principles. It is equally clear, though, that there is no unanimity as to how to best achieve these aims. On one thing there is agreement, however. The court imposing sentence, like The Mikado, must be guided in its task, whatever that

might be, and in whatever form that might take. Otherwise, on what principles is the sentence to be based? For what purposes is punishment to be imposed? And it is not only the court, but all the participants in the sentencing process, that have a keen interest in knowing the answers to these questions. Stated shortly, the public has the right to an intelligible sentencing system.

However, the sentencing system governing criminal offences appears to have limited utility as a model for courts imposing sentences for regulatory offences. This is because the latter do more than simply impose punishment for morally wrongful behaviour, that is, criminal conduct, but instead craft sentences for regulated parties who fail to meet the regulatory standard, and are likely to return to participate in the regulated activity following sentencing. In the criminal offences sentencing model, "individualized sentencing" mandates focus on the party before the court; in the regulatory offences sentencing system, broader societal concerns are engaged. While there are aspects of criminal offences sentencing practices that may be modified for use by regulatory offences courts, such as addressing sentencing purposes and principles through legislation, consideration of these issues for regulatory offences must occur within the particular context that such conduct takes place. Consequently, before one may devise a system which is best suited to reflect regulatory offences sentencing purposes and principles, the relevant sentencing factors for such offences must first be identified and examined. It is this issue which is addressed in Part III.

# PART III. DEVELOPING THE FOUNDATION

## A. Purposes and Principles of Sentencing for Regulatory Offences

### *1. Introduction*

Regulatory offences are different, conceptually, than criminal offences. That is, regulatory offences are different in that moral blameworthiness is not required, as is the case for true crimes. The essence of most regulatory offences is negligence, leaving it open to the defendant, on the basis of the doctrine of strict liability, to establish due diligence on a balance of probability, and exonerate himself/herself. An absence of fault will suffice for regulatory offences of absolute liability; on the other hand, some regulatory offences, like criminal offences, do require a *mens rea* element. These factors, which are unique to regulatory offences, limit the utility of sentencing considerations with respect to criminal offences.

When it comes time for punishment, then, how is it that a court should determine what purposes and principles of sentencing should apply to this eclectic mix of regulatory offences. Does sentencing for regulatory offences constitute a veritable barrier to effective enforcement, as some have suggested, or does the difference between regulatory offences and criminal offences merit a special approach, as others have posited. It will be to these issues that this section is devoted. In the following section, a matrix of regulatory offences cases in the areas of workplace safety, consumer protection and environmental

regulation will be examined, in order to see if the general observations made here respecting sentencing practices and patterns are borne out by reference to the jurisprudence in Canada.

### *2. Determining Sentencing Purposes and Principles for Regulatory Offences in Canada*

The problem which currently confronts sentencers in regulatory offences cases is an intractable one. It arises, in part, from the pervasive nature of regulatory offences. Unlike the judge imposing sentence for a criminal offence, who need look no further than the *Criminal Code* for both a compilation of offences, and statement of sentencing purposes and principles, the justice of the peace or judge presiding over a regulatory offences case faces a much more diverse and unwieldy situation. As noted in Part I, in a study on strict liability conducted for the Law Reform Commission of Canada in 1974, it was estimated that there were approximately 20,000 regulatory offences in each province plus an additional 20,000 federal offences.[247] This did not take into account municipal infractions, such as by-law offences. By 1983, the Department of Justice estimated that there were 97,000 federal regulatory offences.[248] Given these figures, there is no reason to believe that the number of regulatory offences at all levels of government has not continued to increase.[249]

Some of these regulatory offences statutes do include, as Archibald et al observe, a statement of sentencing considerations that are "tailor-made to a specific area."[250] An illustration of this is found in environmental laws, such as the *Canadian Environmental Protection Act, 1999,*[251] where the "polluter pays" principle is set out. According to this principle, polluters are assigned the responsibility of remedying contamination for which they are responsible, and bear the direct and immediate costs of pollution.[252] In fact, this principle has become "firmly entrenched" in environmental law throughout Canada, as it is found in almost all federal and provincial environmental legislation.[253]

But where there are no such sentencing provisions set out, where is the court to turn for guidance? In the case of federal regulatory offences which constitute "contraventions" within the meaning of the federal *Contraventions Act* the court is to be guided, in fact, by provincial offences legislation, to the extent that it contains any sentencing provisions; in the case of the majority of other federal regulatory statutes, where such a ticketing or "minor offences" procedure is not available, federal regulatory offences are generally enforced through the procedural sections of the *Criminal Code,* as well as the *Interpretation Act*.[254] Hence, where a particular regulatory statute enacted by Parliament is "silent" as to its own sentencing principles, the *Criminal Code* provisions apply, such that its sentencing sections and jurisprudence may be of some assistance. At the same time, though, such provisions apply to criminal offences, as opposed to regulatory offences. As a result, these *Criminal Code* principles "may not be transferred directly."[255]

Provincial regulatory offences legislation, on the other hand, is based on a "simplified criminal procedure model."[256] The stated purpose of Ontario's *Provincial Offences Act* is to provide a procedure that "reflects the distinction between provincial offences and criminal offences."[257] While Part IV of this legislation deals with trial and sentencing issues, no statement of the purposes or principles of sentencing is set out. As such, there is no sentencing guidance that is provided to sentencers. This "unsatisfactory state of affairs" is compounded where the particular provincial Act "is silent with respect to sentencing."[258] While some provincial statutes do contain a list of sentencing considerations, such as the Ontario *Environmental Protection Act*,[259] which enumerates a list of aggravating factors, such as whether the offence caused an adverse effect or resulted from reckless or intentional behaviour, as well as the defendant's conduct after the commission of the offence, including cooperation with the authorities,[260] and British Columbia's recently enacted *Public Health Act*, [261]which addresses the relevant considerations in determining sentence[262] and the purposes of sentencing,[263] this is often not the case.

The law of sentencing for regulatory offences has therefore developed, on a default basis, in the courts. It has been left to sentencers to fill in the gaps, with the common law development of sentencing principles, for the vast array of public welfare statutes. Indeed, in some cases the statutory regimes which do apply may serve to frustrate the court's ability to impose a sentence which

addresses issues such as the harm caused by the offence, or putting in place measures to prevent future violations of the regulatory standard, an example being the probation provisions of the *Provincial Offences Act* of Ontario which can only be imposed where the proceedings are commenced by information and not the ticketing procedure,[264] are not available for absolute liability offences,[265] and in some cases requires the defendant's consent to impose conditions, such as community service.[266] In British Columbia, to provide another example, probation orders under the *Offence Act*[267] may be made for no more than six months, thereby limiting the court's ability to put in place long term court sanctioned remedial and rehabilitation plans.[268]

It is perhaps due to the increasing complexity of regulatory provisions that courts have identified a list of multiple factors to consider in imposing sentence. In some cases, over 20 considerations are identified, in this "summary of sentencing principles approach"[269] or "shopping list" of sentencing factors.[270] An example of this approach is illustrated by *R.* v. *Fraser Inc*.,[271] a water pollution case caused by the defendant's pulp mill. Some 23 factors for consideration were itemized by the court, ranging from the nature of the offence, actual or potential harm, deliberateness of the offence, the attitude of the accused, attempts to comply, ease or difficulty of preventing pollution, technology available, uniformity of sentence, and innovative type of sentencing. A somewhat different approach was taken by the court in a British Columbia case, where the relevant factors were grouped under these categories: circumstances of the

offence and circumstances of the offender, as well as factors in aggravation, factors in mitigation and sentencing objectives.[272] However, as Archibald et al caution, this "multiple approach" may result in the court losing "sight of the fundamental purposes of sentencing", and perhaps even result in a sentence which is incompatible with the level of risk assessment set out in the legislation.[273] Further, as Verhulst notes, it is not clear how the approximately two dozen principles that have been applied for regulatory offences by the Courts interrelate, which principles are to be given priority, and which factors are to be considered as aggravating or mitigating.[274]

These "multiple approach" sentencing decisions originate from trial courts of first instance, and are therefore not binding on other courts as judicial precedent, although they may be considered persuasive or influential. Indeed, there is an institutional limitation that constrains the development of a cohesive jurisprudence for regulatory offences sentencing decisions at the appellate level. Whereas the *Criminal Code* provides for sentence appeals with leave of the court,[275] the threshold for bringing an appeal against sentence to the Court of Appeal under the *Provincial Offences Act* of Ontario is considerably more onerous. According to the Act, "special grounds" are required in order for leave to appeal to be granted.[276] This is defined as requiring a judge of the Court of Appeal to consider that "in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that leave be granted."[277] No further appeal or review may be brought against a decision

granting or refusing leave to appeal under the Act.[278] There are similar restrictive provisions for appeals to other provincial Courts of Appeal in respect of regulatory offences.

Not surprisingly, this stringent requirement for leave to appeal effectively limits the number of regulatory offences sentencing decisions that reach the level of the Ontario Court of Appeal. It is also an established principle that appellate courts owe considerable deference to the decisions of the courts below in imposing sentence, absent an error in principle, failure to consider or over-emphasizing a relevant factor, or the imposition of a sentence that is "demonstrably unfit" or "clearly unreasonable."[279] This, too, acts as a constraint on the ability of the appellate courts to assess the fitness of sentence, given that it is not simply a matter of the appeal court substituting its opinion of what the sentence should be for the particular regulatory offences infraction.[280] The dearth of regulatory offences sentencing decisions in the provincial appellate courts bears out the efficacy of these institutional limitations.

*3. R. v. Cotton Felts Ltd. and its Legacy*

In one of the few sentencing cases to reach the Ontario Court of Appeal, *R.* v. *Cotton Felts Ltd*.,[281] the Court, for the first time following the enactment of the *Provincial Offences Act,* discussed the principles of sentencing to be applied under the *Occupational Health and Safety Act*.[282]. In upholding the $12,000. fine

levied by the trial judge in relation to a workplace safety accident case, Blair J.A., on behalf of the unanimous Court, stated:

> The Occupational Health and Safety Act is part of a large family of statutes creating what are known as public welfare offences. The Act has a proud place in this group of statutes because its progenitors, the Factory Acts, were among the first modern public welfare statutes designed to establish standards of health and safety in the work place. Examples of this type of statute are legion and cover all facets of life ranging from safety and consumer protection to ecological conservation. In our complex interdependent modern society such regulatory statutes are accepted as essential in the public interest. They ensure standards of conduct, performance and reliability by various economic groups and make life tolerable for all. To a very large extent the enforcement of such statutes is achieved by fines imposed on offending corporations. The amount of the fine will be determined by a complex of considerations, including the size of the company involved, the scope of the economic activity in issue, the extent of actual and potential harm to the public, and the maximum penalty prescribed by statute. Above all, the amount of the fine will be determined by the need to enforce regulatory standards by deterrence.[283]

The Court went on to comment that, in computing the quantum of fine, the controlling principle 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."[284]

In terms of the application of this element of deterrence to others, or "general deterrence", the Court explained that this sentencing principle operates in a different manner for regulatory offences than it does for criminal offences. Blair J.A. stated as follows in this regard:

> With reference to these offences, deterrence is not to be taken only in its usual negative connotation of achieving compliance by threat of punishment. Recently my brother Zuber in *R.* v. *Ramdass*, a judgment pronounced on November 17, 1982, referred to deterrence in a more positive aspect. There he was dealing with a driving offence and he quoted an earlier unreported decision of this Court in *R.* v. *Roussy,* [1977] O.J. No. 1208 (released December 15, 1977), where the Court stated:
>
> > But in a crime of this type the deterrent quality of the sentence must be given paramount consideration, and here I am using the term deterrent in its widest sense. A sentence by emphasizing community disapproval of an act, and branding it as reprehensible has a moral or educative effect, and thereby affects the attitude of the public. One then hopes that a person with an attitude thus conditioned to regard conduct as reprehensible will not likely commit such an act.
>
> This aspect of deterrence is particularly applicable to public welfare offences where it is essential for the proper functioning of our society for citizens at large to expect that basic rules are established and enforced to protect the physical, economic and social welfare of the public.[285]

Since the release of the *Cotton Felts Ltd.* decision over 25 years ago, the Ontario Court of Appeal has not issued a similar regulatory offences sentencing decision of general application. What few sentencing cases do reach the Court of Appeal are generally confined to the facts of the particular matter, as evidenced by a workplace fatality decision in 2000 where the Crown brought an appeal against the provincial offences appeal court which lowered the quantum of fine imposed by the trial judge from $250,000 to $125,000 on two of the three counts.[286] An employee had been killed while mining; the defendant was convicted, at trial, of failing to provide information, instruction and supervision;

failing to maintain equipment; and failing to leave a guard to protect workers from a moving part. In restoring the sentence to the fine amount imposed at trial, the Court of Appeal, in a six paragraph endorsement, simply observed that for offences of this nature, involving the death of an employee, the penalty imposed must be such that it "acts as a deterrent" to both the defendant and "as an example to the mining community as a whole".[287] It went on to state that the appeal court below had "diluted the importance" of deterrence by listing it as but one of the dozen factors to be considered in arriving at a fit sentence.[288]

The *Cotton Felts Ltd*. decision has also been referred to by other provincial appellant courts in regulatory offences sentencing decisions. The Alberta Court of Appeal did so in *R.* v. *Terroco Industries Ltd*.,[289] a case where the defendant was convicted of releasing chlorine gas into the environment, contrary to the *Dangerous Goods Transportation and Handling Act*[290]and the *Environmental Protection and Enhancement Act.*[291] In its unanimous judgment, the Court identified a number of general sentencing principles that apply in such cases, noting that environmental offences require a "special approach."[292] What exactly is this "special approach"? The Court of Appeal enumerated the following five factors as having particular application for environmental sentencing cases: (1) culpability – which is the "dominant factor" in sentencing for environmental cases, and operates on a "sliding scale": the more diligent the offender, the lower the range of fit sentences; the less diligent the offender, the higher the range of fit sentences;[293] (2) prior record and past involvement with the authorities; (3)

acceptance of responsibility/remorse; (4) damage/harm – these factors include the "existence, potential, duration and degree of harm" which are to be "fully considered" in sentencing for environmental offences; where actual harm is established, this operates as an aggravating factor, particularly where the harm is a "readily foreseeable consequence of the underlying action";[294] and (5) deterrence – that is, a "key component of sentences imposed for breaches of environmental protection statutes should be specific and general deterrence."[295]

Having set out these special considerations, the Alberta Court of Appeal directed sentencing judges to first consider the "degree of culpability" of the offender. By this, the Court explained, a rigorous assessment of the facts of the "predicate offence" is required, so as to determine "where the offender's conduct lies on the continuum between virtual due diligence and virtual intent."[296] The importance of deterrence was also noted, given that it plays a "considerable role" in determining the appropriate sentence, and that general deterrence is also "engaged" as others "must be made aware that what may appear to be cost effective but risky behaviour will result in a stiff penalty" were actual harm to occur.[297]

While the *Cotton Felts Ltd.* decision concerned a workplace safety infraction, and *Terroco Industries* was an environmental case, they involved, in common, corporate defendants. In *R.* v. *United Keno Hill Mines Ltd*.,[298] Stuart C.J. reasoned that special considerations apply in not only environmental

sentencing cases, but for corporate offenders as well. This is due to the "size, wealth, nature of operations and power of a corporation" and the fact that the activities of one corporation "can reach into the lives of people and communities in many parts of the world."[299] The Court went on to identify the following factors as having particular relevance for the sentencing of corporations for environmental offences: criminality of conduct; extent of attempts to comply; remorse; size of corporation; profits realized by offence; and criminal record. Stuart C.J. also questioned the effectiveness of fines as a sanction against corporations, since they are "easily displaced and rarely affect the source of illegal behaviour," and may simply be passed on to consumers or taxpayers.[300] Instead, what was required on sentencing are sanctions which could reach the "guiding mind" of the corporation – the corporate managers, directors or supervisors, since they were the "instigators of the illegality either through willfulness, willful blindness or incompetent supervisory practices."[301] In this manner, sanctions would be imposed on the persons most directly responsible for the criminal activity. After all, pollution, as the Court put it bluntly, "is a crime."[302]

Different sentencing considerations for regulatory offences may thus be relevant for individual offenders, or at least apply differently for individuals than corporations. As Morgan J. explained in *R.* v. *Schulzke,*[303] there is "a world of difference between an environmental offence committed by a large mining company, for example, caused by that corporate offender's eye towards

increasing profits, than with an environmental offence committed by a private citizen with no economic business interests at stake."[304] Such a distinction is particularly germane in terms of the emphasis to be given to the factor of deterrence: a fine calculated to deter a "wealthy corporate offender" will be set at a different level than that for a person with modest economic means.[305]

In the British Columbia Court of Appeal's recent decision in *R.* v. *Abbott*,[306] the Court applied the *Cotton Felts* case to an individual defendant, who was convicted of infractions under the *Health Act*.[307] The defendant had refused to remove a septic tank and sewage disposal field which he had installed on his waterfront property on Vancouver Island; this sewage system was in proximity of a public drinking water source. Fines of $5,000 were imposed at trial on two counts of violating the Act, and a removal order of the septic system was issued as well. The Court of Appeal upheld the sentence, and in doing so rejected the defendant's argument that the removal order was unnecessary, given that no actual harm to the environment had been proven to have resulted from the sewage system he had installed. Stating that the sentencing principles applicable to public welfare offences are generally considered to be denunciation and deterrence, as indicated by the Ontario Court of Appeal in *Cotton Felts*, the Court pointed out that the circumstances of the offence in question were, in fact, "very serious": there was a threat of sewage infiltrating a public drinking water source with "potentially very serious damage."[308] Consequently, the removal order was justified. Kirkpatrick J.A., for the Court, explained:

> I am unable to find any error in the approach taken by the sentencing judge or the summary conviction appeal judge to the removal order. Both had in mind the salutary principle that public welfare offences involving the contravention of rules designed and enforced to protect the physical, economic and social welfare of the public will attraction sanctions that are designed to deter the offender and other like-minded persons.[309]

*4. Differing Views as to Purposes and Principles of Sentencing for Regulatory Offences*

The review of leading regulatory offences sentencing decisions, to this point, illustrates Archibald's assertion that the key principles of sentencing, deterrence and denunciation, and particularly restorative justice and remedial measures in environmental protection cases, emerge principally from the jurisprudence, limited as it may be.[310] Benidickson concurs in this assessment, stating that the task of determining the "most appropriate sentencing option" is generally left to the courts. As a result, the principles set out in sentencing decisions are of "considerable importance."[311] The author acknowledges, though, that the legislature does have the power to set out the relevant principles of sentencing, and provides, as an example, the *Canada Shipping Act*,[312] which identifies as relevant considerations for sentencing factors such as the harm or risk caused by the offence; total cost of clean-up and mitigation measures; remedial action taken by the offender to mitigate harm; precautions taken by the offender to avoid the offence; and any history of non-compliance with legislation designed to prevent or minimize pollution.[313]

The "silence" in most public welfare statutes on the issue of sentencing, then, effectively leaves it "entirely within the discretion of the court."[314] There are some exceptions to this, particularly in the environmental area. Berger notes that the discretion of sentencing judges has been "further limited"[315] by environmental legislation enacted in Ontario, such as the *Environmental Enforcement Act,* [316] which prescribes similar aggravating factors in the case of violations of the *Environmental Protection Act*[317] and the *Ontario Water Resources Act*.[318] This list includes, in the case of the former, that the offence caused an adverse effect, the offender committed the offence "intentionally or recklessly", and that the offence was "motivated by a desire to increase revenue or decrease costs"[319]; in the case of latter, aggravating factors include that the offence caused an impairment of water quality, the defendant committed the act "intentionally or recklessly", and that in committing the offence the defendant was "motivated by a desire to increase revenue or decrease costs."[320] Indeed, these provincial Acts require the Court to provide reasons if a determination is made that a statutorily enumerated aggravated factor "does not warrant a more severe penalty."[321]

A 1985 study paper prepared for the Law Reform Commission of Canada, *Sentencing in environmental cases*,[322] argued, in fact, for a "broader range of penalties" and "wider variety of sentencing tools" to reflect the wide range of offenders and offences which are comprised by environmental laws.[323] It was noted, for example, that while some violations may be the result of deliberate,

reckless or negligent conduct, others such as offences of absolute liability, might be nothing more than a "reasonable error of judgment."[324] Moreover, while the imposition of a fine was the usual punishment for breaches of environmental statutes, the authors queried whether fines, alone, were adequate to cover all the circumstances, given the wide range of activities, effects and degrees of fault. Indeed, fines may be too broad and too narrow at the same time. The former where the "highest fines" are out of proportion to the means of most offenders and the gravity of "minor infractions"; the latter where they do not reflect some offenders' "extreme wealth" and the "great gravity of a minority of flagrant offences."[325] This is exacerbated, in turn, by legislation which tends to incorporate, in a single statutory provision, what are separate environmental offences which include different degrees of gravity and a wide range of conduct, without taking into account the ability of offenders to pay.[326] A fine may be inadequate in some cases because it is unclear what the long term impact of an accidental spill or emission will be; in other cases a fine may be inadequate due to the offender's ongoing behaviour and financial resources.

This Law Reform Commission Report identifies a further "conceptual problem" which is related to its discussion of the limitation of fines as a sanction for environmental offences. That is, 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."[327] It is not clear, the authors observed, whether offences which are true crimes should be "treated

differently" than regulatory offences in terms of the applicable sentencing principles and factors. By way of example, it was queried whether punishment was "capable of achieving rehabilitation or deterrence in environmental cases," or how might the victim be "taken into account in sentencing."[328] To the extent that such factors merited consideration, the question, then, was to what degree was this to be done in the case of regulatory offences.

The authors of this Report, Swaigen and Bunt, concluded their introductory comments by stating that while courts frequently based their sentences on "deterrence", without attempting to reconcile these issues, it was important to address these "underlying principles" so as to determine whether the goals of the prosecution had been achieved, namely, "prevention, abatement, restoration of the environment, and restitution to victims, as well as punishment of offenders." [329] Writing 20 years before the enactment of the statement of sentencing purposes and principles to the *Criminal Code,* it was observed that the four objectives in criminal cases, protection of the public, retribution or punishment, reform and rehabilitation, and deterrence, were recognized in sentencing decisions for both environmental offences and criminal offences. However, it was not apparent as to how one was to decide between them, especially in cases where these objectives appeared to be "appropriate", but "incompatible" with each other.[330]

As one of the first commentators to touch on the importance of sentencing principles and purposes for public welfare offences, the views of the authors of Law Reform Commission's study paper are particularly significant. While the Report focused on environmental offences, it has been observed that such offences constitute "paradigmatic examples of regulatory offences."[331] Environmental legislation provides a "particularly rich and informative counterpoint to so-called criminal legislation"; however, the observations and analysis that may be gleaned from such provisions might well be said to apply to a "whole range of regulatory laws."[332]

The Law Commission's Report noted that very few attempts had been made 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."[333] While some decisions, such as *United Keno Hill Mines Ltd.*, [334] set out a "shopping list" of general principles and specific factors for sentencing on environmental cases, it appeared that a "different" or "special" approach was required, especially where the polluters were corporations. After enumerating the sentencing factors from the case law, such as extent of potential and actual damage, intent, savings or gain derived from the offence, size and wealth of the corporation, and contrition or remorse, the Report turned to the issue as to whether sentencing "in public welfare cases generally, and environmental cases specifically, requires a different approach from sentencing in criminal cases."[335] In its view, the most important differences in

sentencing were “practical rather than theoretical considerations”, which flowed from the fact that most polluters were corporations, and not individuals, and that the risk of pollution was “inherent in many otherwise socially useful activities and can be difficult or close to impossible to control.”[336] Hence, a “difference in emphasis” was appropriate on sentencing to reflect the difference between criminal offences and public welfare statutes: the latter were primarily offences based on negligence, and as such tended to lend themselves 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.”[337]

Commenting on the Law Commission’s Report, Chappell echoed the concerns that, with few exceptions, courts were generally reluctant to impose substantial or innovative penalties in environmental cases, thus posing a “barrier of sentencing” to effective enforcement strategy.[338] Chappell went on to observe that in order to produce a change in such views, “greater guidance” was required by the legislature respecting the “exercise of sentencing discretion.”[339] A sentencing commission was mentioned as one means of providing such guidance, as was the use of guidelines tailored to environmental offences, such as those in use in the United States.[340] The author noted, however, that the possible need or use for such sentencing guidelines or “more formal curbs on judicial discretion” when sentencing environmental offenders in Canada, had not been addressed by the Law Commission in its Report.[341]

A point of departure, then, between the approach advocated by Swaigen and Bunt in their study paper for the Law Reform Commission, and Chappell's observations as to judicial officers and sentencing, is the latter's identification of the issue as being not so much to make courts take public welfare offences "more seriously", but the desirability of providing a framework for how sentencing for such offences should be approached, the result being sentences which are different, and in some cases more stringent, being imposed.[342] Hughes explains the distinction thusly: the "principles" of sentencing in environmental cases are not necessarily different from those in criminal cases, but what is different is the "way" in which these sentencing principles are applied.[343]

Another commentator, Wilson, questioned whether the Law Reform Commission's recommendations with respect to the continued use of "traditional sanctions" such as fines and imprisonment for preventing pollution, were effective for artificial entities like corporations.[344] He proposed, instead, the use of civil law remedies as being more flexible and effective, including, divestiture, licence revocation and probation. Such "structural remedies" would permit the court to "restructure" the offender so as to prevent repetition of the offence.[345] This would also provide an effective means for dealing with the reluctance of the courts to impose "large penalties" for pollution, which was regarded as merely a regulatory offence. Indeed, it appeared that strict liability offences, "by their nature, are not consistent with excessive penalties."[346] Most corporate wrong-

doing, as noted by Puri,[347] is not prohibited by the *Criminal Code*, but by numerous regulatory statutes such as the *Competition Act,*[348] the *Canada Business Corporations Act,*[349] the Ontario *Business Corporations Act*, [350] the *Income Tax Act*,[351] occupational health and safety legislation, health and safety acts, environmental protection statutes, provincial securities acts, and the like. Corporate structures which are deliberately set up as shells without assets, so as to be shielded from paying fines, frustrate enforcement of these regulatory regimes.[352] Moreover, it has been observed that unless "violators" are subject to escalating penalties for infractions of regulatory statutes, others will not voluntarily comply since they will be at a "competitive disadvantage with non-compliers."[353]

A recent article by Verhulst directly addresses the issue as to whether or not there should be a statement of sentencing purposes and principles for regulatory offences generally.[354] Noting that the Government of Canada's response to complaints that sentencing for criminal offences in Canada lacked a principled, uniform approach, was to enact s.718 of the *Criminal Code* so as to legislate purposes and principles of sentencing, Verhulst observes that no similar amendments have been made to provincial statutes of general application, such as the British Columbia *Offence Act*,[355] which contain sentencing provisions specific to the regulatory context. As a result, there is no guidance provided to courts "as to how sentencing should relate to the regulatory objectives the legislators desire to achieve."[356] Where sentencing provisions are set out in a

particular piece of legislation, as was recently done under the British Columbia *Public Health Act*,[357] the application of these sentencing sections is confined to that statute. Moreover, while courts have endeavoured to create "some uniformity of approach" by developing principles of sentencing for regulatory offences, inconsistency "clearly remains."[358]

The preferred approach, in Verhulst's view, is for legislators to assist the courts in achieving a "consistent and principled approach" in sentencing for regulatory offences so that it "aligns that part of the regulatory process with the underlying regulatory goals."[359] The mechanism for doing so, in British Columbia, would be to amend the *Offence Act*[360] and put in place general principles to be applied during the sentencing process, as well as expanding the list of available sanctions to permit "greater flexibility" of sentencing dispositions.[361] Verhulst also contends that within the respective public welfare statutes, there should be included by the legislature, authority for "specific sanctions" or "guidance" that will assist the courts in achieving the regulatory objectives sought to be achieved. In her view, while legislation does not provide the sole means of addressing important sentencing issues, it does have a role to play. Stated shortly, in enacting laws, legislators seek to "achieve particular goals"; courts should be provided by the legislators with the means of achieving "those goals through sentencing."[362]

Sentencing in the context of regulatory offences is part of a "cycle", Verhulst observes, unlike the case of criminal offences.[363] The identification of regulatory goals starts the cycle, which then moves to drafting and implementing regulatory provisions in support of these objectives. Where a person engaged in a regulated activity is found in violation of such a provision, an enforcement strategy is to bring a prosecution, after which sentencing follows in the event of a conviction. However, the cycle does not terminate at this stage necessarily, except in the case of a disposition such as licence revocation or "permanent incapacitation"; instead, the offender is usually permitted to continue to participate in the regulated activity. Hence, courts should impose a sentence that takes this regulatory cycle into account, and in so doing "actively participate in achieving regulatory goals."[364] In order to do so, however, courts must "understand the regulatory scheme" and the offender's place within it, so as to be better able to "craft sentences that seek to align offenders' behaviour with those goals."[365]

The goal of designing sentences which further the "regulatory goals of the legislators" requires courts to embark on the following five steps: (1) encouraging the parties to make joint submissions on aggravating and mitigating factors, and the sanctions to be imposed, so as to provide the court with a "clear basis for sentencing"[366]; (2) the "first priority", to the extent that it is "possible and reasonable", should be to impose a sanction that remedies the violation, thereby giving effect to the principle of *remediation*; consequently, probation orders and

community service orders should be the "first choice of sanctions", rather than simply imposing a monetary penalty, since fines are "divorced from the offence, the offender, and the regulatory goals," and are often regarded as a "fee for non-compliance"; [367] (3) the "second priority", if it is likely that the offender will continue to engage in the regulated activity following sentencing, but there must be a change in the offender's behaviour in order to prevent future violations, should be for the court to impose a sanction to promote the necessary changes, thereby giving effect to the principle of *rehabilitation*[368]; (4) where the court is satisfied that the sanction would serve "a purpose that is consistent with the regulatory objective", and if the totality of the sentence would not be disproportionate due to any sanctions already imposed for the purposes of remediation and rehabilitation, the court should impose a sanction that will promote change in the behaviour of other persons, thereby giving effect to the principle of *general deterrence*[369]; and (5) where there are "sufficient aggravating factors" that make it appropriate, the court should impose a sanction that denounces and punishes the offender's behaviour, thereby giving effect to the principle of *punishment*.[370]

Amendments to the *Offence Act (B.C.)* would be made so as to require courts to consider these steps, in order, as well as to provide for a wider variety of sentencing dispositions, particularly in the area of probation and community service orders. The advantage of such an approach, as opposed to the statement of general sentencing principles under s.718 of the *Criminal Code*

which provides “no guidance on how to resolve the conflict” between the principles and purposes, is that there is a clear priority to the various principles of sentencing, while providing courts with a “single, guiding purpose: to further the regulatory objective.”[371]

The recently enacted British Columbia *Public Health Act*[372] provides an example of the approach advocated by Verhulst, that is, to legislate the principles and purposes of sentencing in a regulatory context. In the section entitled “determining sentence”, the court is given the authority, before imposing a sentence, to request a joint submission from the offender and prosecutor, setting out any agreement on the circumstances that should be considered by the sentencing judge as either mitigating or aggravating the offence, and the penalty to be imposed.[373] The court is expressly directed to consider, in determining the appropriate sentence, circumstances that aggravate or mitigate the offence.[374] There is also the requirement that the court consider the purposes of sentencing,[375] and, to give effect to those purposes, to first consider as a penalty an order for “alternative penalties”[376], such as community service for up to three years or paying compensation for the cost of remedial or preventive action, and second, to consider whether a fine or incarceration[377] is also necessary.[378]

Section 106 of the legislation sets out the purposes of sentencing. It is stated that in imposing sentence, the sentencing judge may impose one or more penalties that, in order, achieve the following: first, if harm was caused, remedy

the harm or compensate a person who remedied or suffered the harm, including the government, or, if no harm was caused, acknowledge the potential harm or further the regulatory objective underlying the provision that was contravened;[379] second, if the offence was committed in relation to a regulated activity, or other activity, in which the offender is reasonably likely to continue to engage, rehabilitate the offender.[380] The court is not permitted to impose any additional penalties if it would be "disproportionate to the offence", having regard to the offender, the nature of the offence, and the totality of the offences imposed under the section.[381] However, such a penalty may be imposed for the "purpose of achieving general deterrence" where the sentencing judge "reasonably believes that the additional penalty would have a deterrent effect, including because: the penalty imposed for the purposes of remedying the violation or rehabilitating the offender is inadequate to address the circumstances of the offence, or the nature of the penalty may assist others "similarly situated to the offender to avoid committing a similar offence" or educate others "similarly situated to the offender respecting the seriousness of the offence."[382] Finally, a sentencing judge may impose a penalty for the purposes of punishing the offender if he/she committed the offence "knowingly or deliberately, or was reckless as to the commission of the offence" or "sufficient aggravating circumstances exist" such that the offender should be punished for the offence.[383]

The British Columbia *Public Health Act*[384] thus illustrates how the legislature can provide guidance to courts in fashioning sentences that reflect the purposes and principles of sentencing for regulatory offences, at least in relation

to a specific statute. Jull cites another legislative response in a discussion paper on market surveillance administrator proceedings before the Alberta Utilities Commission.[385] Noting that the statute in question, the *Alberta Utilities Commission Act*,[386] provides for administrative penalties of up to $1,000,000 for each day or part of a day on which the contravention occurs or continues, [387] without specifying any intermediate ranges, Jull queries whether, "as a policy matter, is it wise to create ranges of penalties for certain types of infractions?"[388]

In response, Jull observes that most enforcement regimes contain categories of penalties that reflect the "gravity of different types of offences and specific fact situations." [389] In fact, there are a number of techniques that are open to the legislators to employ in this regard, and thus provide guidance to courts in imposing penalties, under the particular statute. Referring to the federal *Office of the Superintendent of Financial Institutions Act*,[390] it is noted that Cabinet is given the authority to make regulations by subject matter, namely, classifying each violation as a "minor violation", a "serious violation" or a "very serious violation",[391] and to set a penalty, or range of penalties, in respect of each category of violations.[392] The corresponding maximum penalties reflect these three different categories: in the case of a violation committed by a person, $10,000 for a minor violation, $50,000 for a serious violation, and $100,000 for a very serious violation;[393] in the case of a violation committed by an entity, $25,000 for a minor violation, $100,000 for a serious violation, and $500,000 for a very serious violation.[394] The legislation also addresses the criteria for

determining the amount of the penalty. Four such factors are specified: (1) the degree of intention or negligence on the part of the person who committed the violation; (2) the harm done by the violation; (3) the history of the person who committed the violation in terms of prior violations or convictions under a financial institutions Act within a five year period preceding the violation; and (4) any other criteria prescribed by regulation.[395]

Accordingly, one technique which is available to legislators is to enact regulations which set out in a schedule a list of various sections of a statute, or perhaps even groups of statutes, and assign to them penalty categories such as minor, serious, or very serious. This, in turn, would guide courts in devising a corresponding sanction. While Jull's comments are proffered in respect of administrative penalties which extend from $0 - $1,000,000, with no intermediate range in between, the same broad and unstructured penalty ranges apply to many public welfare statutes, such as making a misleading statement under the Ontario *Securities Act*[396] which carries a maximum penalty of a fine up to $5,000,000, or to imprisonment for up to five years less one day, or to both.[397] It would also be open to the legislators to devise categories based on the "magnitude of the maximum penalty".[398] This method would allow regulators to elect which category of penalty is being sought in a particular case, and to tailor the penalty to a given fact situation. Once such ranges of maximum penalties are identified, this would help serve as a "distinguishing point" between minor, moderate and more serious infractions under the regulatory regime. Courts, in

turn, would have a basis to distinguish between the seriousness of the offence in imposing sentence, in much the same way that the prosecutor's election in criminal cases to proceed by summary conviction or indictment exposes the offender to different penalty ranges upon conviction, and is thus a relevant consideration in sentencing.[399]

*5. Conclusion*

In summary, while the state of sentencing for regulatory offences in Canada may not be in "chaos", it certainly appears that there is in the courts a lack of uniformity, and marked inconsistency, in applying sentencing purposes and principles to such offences.[400] Indeed, how could it be otherwise, one might wonder, given the absence of any legislative rationale or guiding principle in sentencing provisions for most regulatory offences. The situation bears many similarities, in fact, to that in the criminal courts prior to the 1996 amendments to the *Criminal Code,* when a statement of sentencing purposes and principles was enacted, for the first time, so as to provide legislative guidance to sentencers of criminal offences.

The review in this section of sentencing purposes and principles for regulatory offences in Canada illustrates a concern that guidance is required for courts imposing sentences for such offences. However, there are differences of opinion as to how this guidance, and in what form, should be provided. To some, sentencing for regulatory offences constitutes a veritable barrier to effective

enforcement. For others, the difference between regulatory offences and criminal offences merits a special approach. In order to see if the general observations made here respecting sentencing practices and patterns are borne out, in the following section a matrix of regulatory offences will be examined in the areas of workplace safety, consumer protection and environmental regulation, within the Canadian jurisprudence.

## B. Regulatory Offences Sentencing Jurisprudence within Canada: A Survey of Workplace Safety, Consumer Protection and Environmental Regulation Decisions

### *1. Introduction*

In this section, a matrix of regulatory offences sentencing cases in the areas of workplace safety, consumer protection and environmental regulation within the Canadian jurisprudence will be examined, in order to determine whether the observations made in the previous section with respect to regulatory offences sentencing practices and patterns generally, are borne out. Approaches to sentencing purposes and principles for regulatory offences vary widely, as has been shown, in both the authorities and scholarly literature. In this section, emphasis is placed on the courts, specifically their sentencing decisions, in order to substantiate which sentencing purposes and principles are considered appropriate for regulatory offences, and how such considerations are identified and enumerated.

In the survey of sentencing cases which follows, decisions at the superior court level across Canada are analyzed, since this includes both judgments in trial courts as well as appeals against sentences imposed by lower courts. It is, of course, not possible to examine every type of regulatory offence or sentencing principle to test the argument that has been advanced as to the marked inconsistencies that apply in such cases, and thus the need for a statement of

sentencing purposes and principles, so as to promote uniformity and consistency of approach in sentencing dispositions. However, a sampling of cases in the areas of workplace safety, consumer protection and environmental regulation seems apt for a number of reasons, especially since these type of cases are frequently before the courts, and merit attention given their importance and relevancy: workplace safety laws protect one's physical well-being; consumer protection laws safeguard economic interests; and environmental regulation is concerned with "the quality of life to which we wish to expose our children."[401] To be sure, these regulatory regimes are necessarily broad and distinct, but an examination of sentencing practices and patterns in these areas may provide insights as to different modes of sentencing theory.

Regulatory agency sanctioning patterns present important implications for the question of the need for consistency and uniformity in the area of sentencing for regulatory offences generally. Rabbitt employed such a comparative approach in her study on *Social Regulation and Criminal Sanctions*,[402] where she examined five social regulatory agencies that were given responsibility for the implementation of "quality of life" and "social regulation."[403] One of the goals of her thesis was to evaluate the degree to which the criminal enforcement programs of these agencies were successful, given that regulatory agencies often have the "primary responsibility" for investigating and sanctioning violations of regulatory statutes and regulations.[404] Regulatory agency sanctioning patterns thus present "important implications for social justice."[405] The dispositions

imposed by the courts in response to such regulatory sanctioning schemes is no less important. As Gunningham observes, sanctions ought to be "sensitive to the nature of the behaviour to be controlled."[406] It was Rabbitt's conclusion that there existed evidence of inconsistent sentencing patterns and "discretionary justice", although she attributed "prosecutorial decision-making" as one of the key factors contributing to such disparity.[407]

The broad nature of regulatory offences means that courts are called upon to impose sanctions in all manner of cases. After all, public welfare laws "pervade the lives of ordinary people."[408] However, the regulatory offences which are the subject of examination in this chapter, namely, workplace safety, consumer protection and environmental regulation, typify activities which animate regulatory legislation. Cory J. explained the evolution of such legislation in the *Wholesale Travel Group Inc*. decision:[409]

> While some regulatory legislation such as that pertaining to the content of food and drink dates back to the Middle Ages, the number and significance of regulatory offences increased greatly with the onset of the Industrial Revolution. Unfettered industrialization had led to abuses. Regulations were therefore enacted to protect the vulnerable – particularly the children, men and women who laboured long hours in dangerous and unhealthy surroundings. Without these regulations many would have died. It later became necessary to regulate the manufactured products themselves and, still later, the discharge of effluent resulting from the manufacturing process. There is no doubt that regulatory offences were originally and still are designed to protect those who are unable to protect themselves.[410]

Having regard to these general observations as to the regulatory offences with which this section is concerned, let us turn first to workplace safety sentencing decisions.

*2. Workplace Safety Sentencing Decisions*

It seems appropriate to commence a review of regulatory offences sentencing jurisprudence in the area of workplace safety, given that one of the first cases to set out the general principles for sentencing for public welfare offences, *R.* v. *Cotton Felts Ltd*.,[411] involved a prosecution under such legislation, the *Occupational Health and Safety Act* of Ontario.[412]Indeed, in the previous chapter it was noted that in the United Kingdom, the leading cases which set out sentencing principles for regulatory offences, *R.* v. *Friskies Petcare (U.K.) Ltd*.[413] and *R.* v. *F. Howe & Son (Engineers) Ltd*.,[414] both involved prosecutions under comparable legislation, the *Health and Safety at Work etc. Act, 1974.*[415]

In *Cotton Felts Ltd.*[416], the Ontario Court of Appeal upheld the $12,000. fine levied by the trial judge in relation to a workplace safety accident case. The incident involved a worker who was cleaning a machine which had not been stopped; his arm was sucked into the machine's rollers. As a result of the injury, his arm was amputated below the elbow. There had been a previous incident where another worker had injured his thumb while working on a similar machine which was in motion. Management was aware of the practice of cleaning

machines which had not been turned off. Blair J.A., on behalf of the unanimous Court, made these observations about the nature of the legislation in issue:

> The *Occupational Health and Safety Act* is part of a large family of statutes creating what are known as public welfare offences. The Act has a proud place in this group of statutes because its progenitors, the Factory Acts, were among the first modern public welfare statutes designed to establish standards of health and safety in the work place. Examples of this type of statute are legion and cover all facets of life ranging from safety and consumer protection to ecological conservation. In our complex interdependent modern society such regulatory statutes are accepted as essential in the public interest. They ensure standards of conduct, performance and reliability by various economic groups and make life tolerable for all. To a very large extent the enforcement of such statutes is achieved by fines imposed on offending corporations. The amount of the fine will be determined by a complex of considerations, including the size of the company involved, the scope of the economic activity in issue, the extent of actual and potential harm to the public, and the maximum penalty prescribed by statute. Above all, the amount of the fine will be determined by the need to enforce regulatory standards by deterrence: see *R.* v. *Ford Motor Company of Canada Limited* (1979), 49 C.C.C. (2d) 1, per [Associate Chief Justice] MacKinnon at p.26; Nadin Davis, *Sentencing in Canada*, p.368 and cases cited therein.[417]

Very few regulatory offences sentencing cases reach the level of the Ontario Court of Appeal, given the stringent leave to appeal requirement under the *Provincial Offences Act.*[418] However, the Court's comments in *Cotton Felts Ltd*.[419]stand for the proposition that deterrence is the paramount consideration when imposing sanctions, and this is to be reflected by fines in order to "enforce regulatory standards." Beyond these general comments, no further guidance is given. As a result, one finds, not surprisingly, a wide range of dispositions that vary both in magnitude of fine amounts, as well as a lack of non-financial sanctions designed to repair the harm done or to address rehabilitation and

reparations, such as the use of compensatory terms, including restitution, or probationary terms designed at preventing repetition of the offence. Nevertheless, the *Cotton Felts* decision is cited routinely, in every jurisdiction across Canada.

By way of example, in the *Ellis-Don*[420] case, which was decided by the Supreme Court of Canada shortly after its judgment in *Wholesale Travel Group Inc*., [421] the trial judge imposed a fine of $20,000 where a worker fell to his death down an opening to an elevator shaftway that had not been properly guarded. The fine was reduced on appeal to $10,000.[422] The Ontario Court of Appeal majority judgment in the case was solely concerned with the constitutional issue of the due diligence defence, and did not therefore address the sentence appeal brought by the Crown, given that a new trial was ordered; however, the dissenting judge would have upheld the $10,000 fine.[423] In the result, the Court of Appeal, applying its own judgment in *Cotton Felts*, upheld a lower level of fine in *Ellis-Don* than it did in *Cotton Felts*, notwithstanding there was a fatality, and that the defendant was a major corporation. In other cases, the Court has upheld fines ranging from $2,000 where the defendant did not implement a proper traffic control plan, resulting in a worker being hit by a truck,[424] approved fines totaling $35,000 imposed against a small family business where the boom of an excavator came into contact with live wires, causing minor burns to one employee and three others to feel the impact,[425] and restored two fines of $250,000 in a case where a major company in the mining industry failed to

maintain equipment and leave a guard to protect workers from a moving part in equipment, resulting in the death of a worker while mining.[426]

This wide range of fine amounts, and lack of non-monetary penalties, is also evident in the dispositions of the Ontario Superior Court. Unsuccessful crown appeals against the sentence imposed by the trial judge include decisions where the defendant was fined $3,500 for failing to provide sufficient instruction to protect a worker,[427] a $5,000 fine where a worker died when a trench collapsed,[428] and a non-custodial disposition, despite the crown's position seeking a period of imprisonment, where two workers died on a construction site due to the failure of the supervisor to have formwork inspected by a professional engineer, before allowing cement to be poured; the $30,000 fine and probation term for one year was left undisturbed on appeal.[429] On the other hand, a $250,000 fine was upheld in a case where a worker was crushed to death by a bundler machine and the appellant company was insolvent at the time of sentencing.[430] Fines totaling $650,000 against the corporate defendant, and $8,000 against the supervisor, were levied by the court following the trial where a worker was killed in an explosion due to a radio miscommunication during a blasting operation.[431]

A similar divergence in fine amounts and sentencing dispositions in workplace safety cases is evident in other jurisdictions. In Alberta, the Court of Appeal found no error in the imposition of a $115,000 fine where an employee

was killed due to heavy bale of wire falling on him.[432] This decision may be contrasted to *R.* v. *Tech-Corrosion Services Ltd*.[433] in which the defendant's appeal against a much lower fine, $7,500, was dismissed. This case involved a crane striking a power line which resulted in serious injuries to two workers. One of the men lost both arms below the elbow and both legs below the knee; the other lost one leg below the ankle. A similar case where a power line made contact with a tent pole, thereby causing the death of one worker and hospitalization of another, led to a considerably larger fine of $100,000.[434] A $300,000 fine was found not to be excessive where an employee died due to an explosion on a well site. [435] In other cases, the penalties have included fines of $15,000 for failing to report a fatal accident at a construction site and disturbing the accident scene,[436] and six corporations being fined $70,000 where an employee was seriously injured when he climbed over a safety guardrail to investigate a machine malfunction and fell onto the back roller.[437]

Two recent decisions illustrate divergent approaches in sentencing for regulatory offences under the Alberta *Occupational Health and Safety Act,*[438] notwithstanding that both make reference to the principle of deterrence as set out in *Cotton Felts*. In *R.* v. *Independent Automatic Sprinkler Ltd*.,[439] the Crown brought an appeal against the $100,000 fine imposed in circumstances where two workers fell from the top of a pallet while attempting to install a sprinkler; the men were using a ladder on top of a strand board, a practice which was "highly inappropriate."[440] One of the men died and the other survived, but was paralyzed.

On appeal, it was held that the fine failed to adequately "recognize the seriousness of the consequences of the degree of negligence."[441] It was increased by more than three-fold, to $350,000. Conversely, a $5,000 fine was upheld in a case where two workers were seriously injured while offloading the flammable contents of a tanker truck; they had parked the truck too close to the tank they were filling, and failed to properly ground the truck to the tank. The workers were still suffering from their injuries at the time of the trial, which was more than three years later.[442] In addition to the fine, the trial judge ordered the defendant to pay $95,000 to the Shock Trauma Air Rescue Society. While the appeal court agreed that the defendant had not been "grossly negligent", the accident was "foreseeable and preventable."[443] In the court's view, the range of fines for non-fatal offences where a guilty plea was entered appeared to be $70,000 - $125,000. As a result, the fine imposed on the appellant was well within this range, even though it had not shown remorse or taken responsibility through entering a guilty plea. The sentence imposed was within the range of sentences "for similar offenders in similar circumstances."[444]

These variations in penalties for like workplace safety offences appear in other jurisdictions. The death of a worker who was trapped under a loader resulted in a $30,000 fine being reduced on appeal by half, to $15,000, in one Saskatchewan case.[445] In arriving at this result, the court relied on *Cotton Felts* and another decision, *R.* v. *Pederson*,[446] where a worker was killed when the walls of a trench collapsed, and a $95,000 fine was lowered on appeal to

$35,000. Justice Krueger, who rendered the appeal judgment in the *Pederson* case, had previously decided another case, *R.* v. *Saskatchewan Wheat Pool*, [447] where, although the convictions were set aside on appeal, the court made a point of commenting that the total fines imposed of $15,000 were reasonable, having regard to the worker's arm getting caught and severely damaged in a grain drying blower fan while he was cleaning it.[448] The *Pederson* decision was also cited in *R.* v. *Sage Well Services Ltd*.,[449] where the Crown's appeal against fines of $25,000 and $1,000 was dismissed. In that case, an oilfield accident occurred when a pumpjack moved, throwing the worker against the rig and then onto the ground, causing his death.

Significant fines have been imposed due to the risk of harm, as where a municipality failed to establish a system to ensure that its workers were not exposed to asbestos while repairing a swimming pool it operated.[450] Citing the *Cotton Felts Ltd.* decision, the $90,000 fine imposed by the trial judge was upheld on appeal. However, in a subsequent Manitoba case where the worker suffered a serious injury to his hand while operating a welding machine that was not properly guarded, receiving an amputation as a result, fines totaling $15,000 were found to be fit.[451]

In *R.* v. *Nova Scotia Power Inc*.[452], the trial judge imposed a fine of $180,000 where the lift device in which a worker was standing crashed to the ground, killing him. As the conviction was set aside on appeal, the defendant's

sentence appeal was rendered moot, and the quantum of fine was therefore not commented upon by the appeal court. However, in another Nova Scotia case decided afterward, *R.* v. *Nova Scotia (Minister of Transportation and Public Works*),[453] the Crown successfully appealed the sentence imposed by the trial judge, which consisted of a $15,000 fine and a mandatory contribution of $7,500 to an education fund. This case involved a truck driver who collided with a Ministry of Transportation vehicle which did not display the required "be prepared to stop signs". The collision injured one of the workers; the truck driver just managed to escape his burning truck before it exploded. He had been unable to return to work due to the psychological impact of the accident. In arriving at her sentencing decision, the trial judge stated that "the constant theme of sentencing is the need for deterrence", [454] citing *Cotton Felts Ltd*. Nevertheless, the appeal court ruled that she failed to properly apply the factors set out by the Ontario Court of Appeal in the *Cotton Felts Ltd.* decision, and that the fine and contribution to an education fund should have been at least twice the amount that was imposed. As a result, the sentence was varied to a fine of $30,000 and a $15,000 education fund contribution. Accordingly, this case provides an illustration of both the trial and appeal courts applying the *Cotton Felts Ltd.* judgment, with significantly different results.

In New Brunswick, a fine of $30,000 was imposed at trial in *R.* v. *Atcon Construction Inc*.,[455] where a form for concrete made of steel located on top of a bridge column collapsed while concrete was being poured into it. Two of the men

who were working on the structure were killed, and one other survived. The conviction was reversed, however, on appeal. Nevertheless, in a subsequent workplace accident case, involving an employee who was injured during his second shift when his wrist came in contact with a machine blade, the *Atcon Construction* case was referred to.[456] In this later decision, fines totaling $19,000 had been imposed by the trial judge.[457] The appeal court noted that there were fatalities in *Atcon Construction*, unlike the present case. The two $7,500 fines were lowered to $2,500, making for a total fine of $10,000, which was said to "constitute sufficient deterrence in the circumstances."[458]

Finally, two Newfoundland cases involving fatalities on the work site stand in contrast to one another, in terms of the sentences imposed. In *R.* v. *Corner Brook Pulp and Paper Ltd*.,[459] an employee was crushed by a falling loader which had not been equipped with an emergency stopping device. The maximum fine permitted under the regulations at the time was $5,000. The fines of $2,000 for each of the two counts to which the defendant entered pleas of guilty before the trial judge were upheld on appeal. In a more recent decision, *R.* v. *Miller Shipping Ltd*.,[460] a worker was also crushed to death when a boom truck tipped while offloading a heavy container onto a barge. On this occasion, fines totaling $75,000 were imposed, a considerably higher amount than in the *Corner Brook Pulp and Paper* case. The appeal court noted that in imposing fines of this magnitude, the trial judge was "clearly motivated by the principle of deterrence",[461] and cited the *Cotton Felts* decision in support of this proposition. In upholding

the sentence, Wells J. considered that there was "ample precedent for the use of the principle of deterrence in cases such as this."[462] A further appeal was brought to the Newfoundland Court of Appeal, resulting in one of the convictions being set aside.[463]

*3. Consumer Protection Sentencing Decisions*

This category of regulatory offences sentencing decisions involves measures designed to safeguard consumers, including the protection of competition. Indeed, the offence which was the subject of the *Wholesale Travel Group Inc*.[464] case in the Supreme Court of Canada was one such matter, namely, false or misleading advertising, contrary to the *Competition Act*.[465] It has existed in Canada since 1914, although it remained in the *Criminal Code* until 1969, at which time it was transferred to the *Combines Investigation Act.*[466] In addition, the Ontario Court of Appeal expressly referred to these types of regulatory offences in *Cotton Felts Ltd*.[467] where it was observed that:

> The paramount importance of deterrence in this type of case has been recognized by this Court in a number of recent decisions. An example is provided by *R.* v. *Hoffmann-LaRoche Limited (No.2)* (1980), 30 O.R. (2d) 461. In that case Mr. Justice Linden imposed a fine of $50,000 for an offence under the *Combines Investigation Act*, R.S.C. 1970, c.C-23, and stated the principles governing the amount of a fine as follows:
>
> > In conclusion, I feel that a fine that is more than nominal, but which is not harsh, would be appropriate in this case. The amount must be substantial and significant so that it will not be viewed as merely a licence for illegality, nor as a mere slap on the wrist. The amount

> must be one that would be felt by this defendant. It should also serve as a warning to others who might be minded to engage in similar criminal activity that it will be costly for them to do so even if they do not succeed in their illegal aims.

As the Court further noted in *Cotton Felts Ltd.*, the $50,000 fine imposed in the *Hoffmann-LaRoche* case for predatory pricing was upheld by the Ontario Court of Appeal, which agreed that general deterrence was "the paramount factor to be considered in arriving at an appropriate sentence."[468]

The Ontario Court of Appeal considered numerous sentencing decisions under the *Combines Investigation Act,*[469] the predecessor legislation to the *Competition Act*,[470] prior to the *Cotton Felts Ltd.* case. In one such decision, *R.* v. *Browning Arms Co. of Canada*,[471] the Court exhibited a marked difference of opinion as to the appropriate level of fine. The trial judge imposed fines of $15,000 on each of the four counts of "resale price maintenance by dealers", being of the view that a total fine of $60,000 was required so that the monetary penalty did not amount to "a mere licence to carry on."[472] A majority of the Court of Appeal disagreed, holding that an appropriate fine would have been $10,000, consisting of $2,500 per count. This amounted to a total fine for the four counts that was still lower by $5,000 than the fines imposed for the trial judge for the individual counts. The dissenting judge would have reduced the fines to $25,000, with an equal amount attributable to each of the counts. Likewise, in *R.* v. *Steinberg's Ltd*.[473], a false advertising case, the trial judge's penalty of $10,000

per advertisement was found to be "too large a fine",[474] resulting in a reduction to $5,000 on each charge.

In a case under the *Motor Vehicle Safety Act*,[475] involving failure to give notice of a defect in the construction design of a motor vehicle, the trial judge imposed the maximum fine of $10,000 on each count, one of which charged the defendant in its capacity as an importer, and the other as a manufacturer of motor vehicles; however, the fines were reduced by half to $5,000.[476] As the Court of Appeal noted, the offences did not "call for the maximum penalty, however, inadequate that maximum may appear to have been at the time."[477] Nevertheless, the Court's judgment in this case was referred to in *Cotton Felts Ltd.*, in support of the proposition that the amount of the fine imposed is to be "determined by the need to enforce regulatory standards by deterrence."[478]

Fines imposed in other Ontario cases include $35,000 for an illegal "co-operative advertising" scheme which had the effect of fixing prices in the market place in *R.* v. *A. & M. Records of Canada Ltd*.[479] In another case involving attempts to influence upward the price by which distributors advertised the defendant's products, the trial judge imposed a total fine of $200,000, relying on the *A & M Records* case.[480] However, the Court of Appeal found that such a fine was "disproportionately high" and lowered it to $100,000.[481] In *R.* v. *Consumers Distributing Co*.,[482] the Court of Appeal granted the Crown's appeal and held that the defendant was properly found guilty of misleading advertising, and remitted

the matter to the County Court judge who had not addressed the sentence appeal against the $5,000 fine imposed by the trial judge; however, it remarked in doing so that a "nominal penalty would have been appropriate."[483] To give effect to this observation, the fine was reduced to $1,000 by the summary conviction appeal judge.[484] In another case of unduly lessening competition respecting ready mixed concrete, the fines imposed ranged from $35,000 to $7,500.[485]

Significant fines in excess of one million dollars have been imposed on other occasions. In *R.* v. *Canadian Oxygen Ltd*.,[486] a scheme to unduly lessen competition in the sale or supply in Canada of products including compressed oxygen, nitrogen, carbon dioxide, argon and hydrogen, resulted in fines of $1,700, 000 and $700,000 being imposed. In another Ontario case where misleading or false representations were made to the public about a patient lift, the corporation was fined $180,000 and its directors were fined $10,000 each.[487] Although the *Cotton Felts* decision was not expressly mentioned, Hill J. commented in imposing sentence that he was in agreement that general deterrence was "the paramount sentencing principle in this case."[488] A total fine of $135,000 was levied in another decision where misleading advertisements lasted for 100 weeks.[489] Fines ranging from $300,000 to $100,000 were imposed in a case involving the principal manufacturers of large lamps in Canada and an "industry sales plan" which was designed to virtually eliminate price competition from the marketplace.[490]

In terms of other appeal cases, fines totaling $19,600 were substituted in place of fines of $66,000 which the trial judge had levied for 22 counts of false or misleading advertisements.[491] Charges under the *Business Practices Act*[492] of unfair practice by making false, deceptive or misleading representations to customers resulted in fines of $1,000 each.[493] At the other end of the spectrum, the Ontario Court of Appeal has upheld a penitentiary sentence for convictions for misleading advertising, involving a fraudulent internet "yellow pages" business directory, where the revenues generated by the mail fraud scheme exceeded $1,100,000.[494] The trial judge sentenced two of the accused to 34 months' imprisonment and a $400,000 fine; another accused was given a nine month conditional sentence of imprisonment and fined $100,000. In upholding the terms of imprisonment, the Court of Appeal made these observations about the propriety of imposing "significant jail sentences" for misleading advertising:

> The reality of the threat of jail sentences for general deterrence of individuals and corporate executives who commit "white-collar" crimes has become an effective and apparently necessary tool in the arsenal of law enforcement agencies.[495]

Feldman J.A., who delivered the Court's unanimous judgment in the *Serfaty* case, went on to comment that despite the concern that a fine "not be seen just as a licence fee or cost of doing business," for some offenders "any fine without personal penalty may be viewed as just that."[496] To this she added:

> Obviously, not every case will require a custodial sentence. As with all sentencing decisions, the facts and circumstances of the offence and of the offender will have to be examined. The circumstances of the offence will include the extent and impact of the misleading material, the magnitude of the offence including the time period and geographic penetration of the dissemination of the material and the economic impact on the public, on the competitors of the offenders and the financial benefit to the offenders. However, in appropriate cases, significant jail sentences will not only be warranted, but required in order to meet the objectives of general deterrence and denunciation for this type of crime that some may still mistakenly view as relatively harmless.[497]

As for the fines imposed against the defendants, the court rejected the submission that it constituted error for the trial judge to impose "two significant punitive components of one sentence", consisting of the jail term and fine.[498] To the contrary, Feldman J.A. explained:

> One purpose of a fine as part of a sentence for an economic crime is to ensure that the offender does not retain the proceeds from the crime once the sentence is served. Also, a fine must be significant enough that it constitutes more than an effective licence fee or part of the cost of doing business.[499]

In short, the trial judge was held to have properly viewed the offence and the offenders as "requiring a significant fine in order to achieve the objectives of general and specific deterrence as well as denunciation."[500] However, the accused who received the fine of $100,000 had participated in the scheme at a "lower level" than the others, such that while his culpability was "more than minimal", a reduction to $35,000 was appropriate.[501]

The Ontario Court of Appeal's judgment in *Serfaty* was recently considered in a Quebec case, *R.* v. *Mouyal*,[502] involving telemarketing operations using deceptive or false representations over a seven year period where millions of dollars were solicited. Relying on *Serfaty*, the prosecution sought a penitentiary sentence and a fine of 2 million dollars. The Quebec court, however, distinguished the case before it as being less serious, and that a prison term "should, even for serious offences, be the sentence of last resort."[503] It was also relevant that the accused had contravened the *Competition Act*,[504] and not the *Criminal Code*,[505] and thus the sentence to be imposed "has to reflect that very important distinction."[506] A fine of $1,000, 000 was levied, along with probation for two years which included terms of $30,000 restitution and 240 hours of community work.

In British Columbia, a case involving a conspiracy to unduly lessen competition in relation to the price of cement over a ten year period resulted in fines exceeding $200,000 being imposed against the principal accused party.[507] The trial judge stated in this regard that such fines "must be such as to bring home to certain members of the business community the message that the Combines Legislation is to be obeyed and cannot be flouted with impunity", lest penalties "amount to little more than a slap on the wrist."[508] The British Columbia Court of Appeal upheld the sentence, rejecting the submission that the size of the fines was excessive.[509] Seaton J.A. commented in this regard:

> As to the shock at the size of the fines I say "Good." I hope that some people are sufficiently shocked that they will reject this sort of conduct in the future.[510]

In another British Columbia decision where a mail order promotion was found to be misleading, fines of $15,000 were found not to be excessive, given that the objective of such a sentence was deterrence to the accused and to others.[511]

The Manitoba Court of Appeal upheld a $200 fine in a case of false or misleading advertising, rejecting the Crown's contention that the sentence was too low.[512] This decision may be contrasted to the more recent case of *R.* v. *Shell Canada Products Ltd*.,[513] where the Crown again brought a sentence appeal against the quantum of fine levied by the trial judge.[514] The accused had been found guilty of retail price maintenance, for which a fine of $100,000 was deemed appropriate. The Court of Appeal differed, however, as to its fitness: the majority considered that it was "inordinately low" and "but a slap on the wrist," resulting in the fine being doubled on appeal to $200,000; the dissenting justice, Monnin C.J.M., opined that the fine was "substantial", even for a corporation such as Shell, and would not have increased it.

Fines at the trial court level in Manitoba also exhibit marked variations. In *R.* v. *Bidwell Food Processors Ltd*.,[515] a defunct company was fined $4,000 for misleading statements in a flyer whereas the director received a fine of $2,500 and an employee was fined $2,000. These fine amounts may be contrasted with a $500 fine that was upheld on appeal as not being excessive, in a case where a

catalogue published by the defendant was found to contain a misleading advertisement; approximately 150,000 copies of the catalogue were published each year.[516] In a subsequent case involving this same corporate defendant, a fine of $1,000 was imposed for a misleading advertisement in its sales catalogue; however, the conviction was set aside on appeal.[517] A $1,000 fine was also held to be appropriate in a case where a misleading advertisement was published on four separate occasions, receiving "fairly wide publicity" throughout the province.[518]

In other decisions, the Nova Scotia Court of Appeal overturned acquittals at trial and imposed fines totaling $339,700 against 73 insurance companies in a case involving a conspiracy to unduly lessen competition in the price of fire insurance on property throughout the province; the largest individual fine was $15,000 while others were as low as $200.[519] However, the Supreme Court of Canada restored the not guilty verdicts of the trial judge.[520] In another case involving a misleading advertisement in a newspaper, a fine of $1,000 was upheld by the Prince Edward Island Court of Appeal.[521] Finally, a $1 fine for a false advertisement was successfully appealed by the Crown in a Newfoundland decision where it was held that such a nominal penalty was inappropriate, having regard to the defendant's previous conviction for which it was fined $500, and "the principle of deterrence and the protection of the public."[522] The court substituted a $750 fine.

*4. Environmental Regulation Sentencing Decisions*

There are generally accepted principles of sentencing in this category of regulatory offences which have been recognized by the courts, notwithstanding that *Cotton Felts Ltd.* was not an environmental sentencing case, nor did it make reference to such offences, unlike other occupational health and safety and consumer protection decisions. However, as Justice Cory observed in the *Wholesale Travel* case, a "spectre of tragedy" is evoked by the mere mention of names such as "Bhopal, Chernobyl and the Exxon Valdez" which leave no doubt as to the "potential human and environmental devastation which can result from the violation of regulatory measures."[523] In a subsequent Supreme Court of Canada decision, the Court stated that the "polluter pays" principle is "firmly entrenched in environmental law in Canada."[524] According to this principle, polluters are assigned "the responsibility for remedying contamination for which they are responsible" and have imposed on them "the direct and immediate costs of pollution."[525] Still other courts frame the issue of sentencing for environmental offences in this manner: pollution "is a crime"[526] and there are "unique considerations"[527] or a "special approach" [528] required in the case of sentencing for environmental offences.

This more holistic approach to sentencing, which mandates that, unlike the case for other regulatory offences, fines are not the only sanction for punishment of environmental offences. That the court should craft dispositions to

repair the harm done by the offender and ensure that measures are put in place to prevent the breach of the regulatory standard from recurring, is evident in many of the following decisions. In one often cited case, *R.* v. *Bata Industries Ltd*., [529] Ormston J. found the defendant guilty of permitting the discharge of liquid industrial waste from its shoe manufacturing facility into the ground, in violation of the Ontario *Water Resources Act*.[530] Noting that there are not only "unique sentencing considerations" for public welfare offences, but that within "the subtopic of public welfare offences, environmental offences have their own set of special circumstances", the court considered, referring to *Cotton Felts Ltd.*, that protection of the public is best achieved by "emphasizing general deterrence rather than specific deterrence as the dominant sentencing principle."[531] In the result, the directors of the company were each fined $12,000, and the court indicated that the appropriate financial penalty against the company was $120,000.

Rather than imposing the entire amount of $120,000 as a fine, which in the normal course would be deposited to the Consolidated Revenue Fund, and eventually reallocated to the Ministry of the Environment, Justice Ormston determined that half of the amount should be allocated "directly to the environment, that is to say, the local environment."[532] Hence, in addition to a fine of $60,000, the defendant corporation was placed on probation for two years, with conditions aimed at achieving the goals of sentencing ,as identified by the court. One of these terms required the company to provide $60,000 to a local

waste Management Board so as to assist in funding a strategy for household removal of toxic waste, by means of a “toxic taxi”. Another term required the defendant to publish on the front page of its newsletter, for international distribution, the facts leading to its conviction, including the details of the penalties and terms of probation. The probation order further directed Bata to prepare a technical advisory circular on the topic of toxic waste storage pursuant to Ontario Standards for distribution to all of its companies in the world; place a caution on the land to warn future purchasers of the environmental damage caused, until such time as the Ministry of the Environment determined that the chemicals released no longer posed a threat; make environmental issues a mandatory agenda item on all Board of Director’s meetings during the term of the probation order; and the company was ordered not to indemnify the two directors for the fines imposed by the court. On appeal, the fines against the individual defendants were reduced from $12,000 to $6,000, and as the appeal court considered that the total monetary penalty against the company should have been $90,000 rather than $120,000, Bata’s contribution to the toxic waste disposal program was reduced from $60,000 to $30,000.[533] On further appeal to the Ontario Court of Appeal, the term of the probation order prohibiting the company from indemnifying the individual directors was held not to be appropriate, and was deleted.[534]

In other cases, fines alone have been imposed. For example, in *R.* v. *Safety-Kleen Canada Inc*.[535] the trial judge fined the defendant $20,000 for being

in possession of waste for which the generator of the waste had not completed a manifest. The provincial offences appeal court reduced the fine to $10,000. The Court of Appeal stated that, assuming there was jurisdiction to consider the fitness of sentence, it would not vary the penalty.[536] In another case, where the defendant was convicted at trial of discharging a pollutant, a small amount of chlorine in a localized area on the top of a building, fines totaling $8,000 were imposed as the breach was regarded as a technical one by the trial judge. The Crown's appeal against these fines was rendered moot upon the convictions being set aside on appeal.[537] A further appeal to the Ontario Court of Appeal resulted in the convictions being restored, but without further consideration of the quantum of sentence.[538]

There is a significant degree of variation in fine amounts and dispositions among the courts in Ontario. Whereas breaches of the *Environmental Protection Act*[539] for failing to keep proper records of stored P.C.B. waste led the trial judge to impose fines of just over $171,200, the appeal court reduced the fines to $13,500.[540] Conversely, a $100,000 fine and a 6 month period of imprisonment was imposed in a case where the defendant had been convicted numerous times for violating anti-pollution by-laws, and was found in contempt of court due to violating an order made by a justice of the peace.[541] Although the period of imprisonment was set aside by the Ontario Court of Appeal when the contempt conviction was quashed,[542] subsequent contempt proceedings were initiated,[543] resulting in a 6 month jail sentence being reinstated.[544] At the time, the

defendant's company was in default of $150,000 in fines imposed for pollution offences.

Fines and restorative justice orders along the lines crafted in the *Bata Industries* case are not uncommon. Hence, in *R.* v. *Shamrock Chemicals Ltd*.,[545] fines of $4,000 under the Ontario *Water Resources Act*[546] for discharging contaminated water were upheld on appeal, fines of $5,000 under the *Environmental Protection Act*[547] were substituted for those of $49,500 and $24,750, but the trial judge's probation order containing a condition that the defendants complete a hydrogeological report proposing a remedial action plan and timetable respecting the lands described in the information, which was to be submitted by a specified date to the local district office of the Ministry of the Environment, was affirmed. Similarly, in *R.* v. *Rainone Construction Ltd*.,[548] where the defendant deposited deleterious substances into a river frequented by fish, contrary to the *Fisheries Act*,[549] a $5,000 fine was imposed, along with a payment of $40,000 to promote the conservation and protection of fish habitat in the affected river. In a case where a mill deposited acutely lethal effluent into Nipigon Bay, fines totaling $210,00 were levied, along with a requirement that $35,000 be provided to designated environmental programs relating to the fishery in Ontario, and particularly in the Nipigon Bay area.[550] Depositing a deleterious substance in the Old Welland Canal, under conditions where that substance might enter Twelve Mile Creek, a body of water frequented by fish,

resulted in fines of $35,000 and an order to pay $95,000 to the Niagara Peninsula Conservation Authority.[551]

In *R.* v. *Canadian Tire Corp*.,[552] the defendant was found guilty on three counts of importing bar fridges which contained illegal chlorofluorocarbons, contrary to the *Canadian Environmental Protection Act*,[553] and the *Ozone Depleting Substance Regulations*.[554] The trial judge imposed a total penalty of $25,000, which was made payable to the Canadian Dermatological Association. However, in doing so, it was observed by the appeal court that the trial court made no reference "to the role of the deterrence principle in this instance of public welfare sentencing," or to the Court of Appeal's judgment in *Cotton Felts Ltd.*, which mandated that deterrence in such cases was "a critical objective even in the case of a first offender."[555] Hill J. concluded that the fines imposed at trial fell within the range of "a mere licence fee for illegal activity", and increased them to $25,000 per count, that is, the equivalent of the fines in total at trial, to be payable to the same beneficiary identified by the trial judge.[556]

There are many cases, however, where fines alone, of varying amounts, remain the disposition of preference. A spillage of a plasticizer and solvent mixture from a tanker truck at the defendant's nylon intermediate plant resulted in fines of $3,000 to the individual accused, who was a controller, and a fine of $50,000 to the corporation.[557] A $4,000 per day fine was upheld in another case, involving a discharge of materials from the defendant's mine tailings dam, which

could impair water quality.[558] In *R.* v. *Commander Business Furniture Inc*.,[559] the Crown's appeal against sentence was dismissed where the defendant discharged paint odour into the air from its furniture spray-painting business. Fines totaling $20,000 were imposed against the corporate defendant, which was no longer in existence, and the individual defendant, a director of the company, was fined $5,000. General deterrence had been "accorded the most prominent place" by the trial judge in fashioning these penalties.[560] Another Crown sentence appeal failed where the defendant railway was fined $12,000 for managing PCB's without a certificate of approval.[561] On the other hand, fines totaling $28,500 were upheld on appeal where the defendant was convicted of operating a waste management system and a waste disposal site without a certificate of approval, and using a waste management system without such approval.[562]

There is a plethora of environmental offences sentencing decisions in other jurisdictions. The Alberta Court of Appeal rendered an instructive decision in *Terroco Industries Ltd*.,[563] a transportation of dangerous goods case where the driver of a transport truck, who was inexperienced, was given erroneous identifying documents respecting the nature of the solutions at the pick up site. When the driver mixed the products in a single tank of the truck, chlorine gas escaped; another driver at the site was seriously injured due to being exposed to the gas. A barrel of the mixture also seeped into the ground near a well. The trial judge fined the defendant $50,000 for releasing chlorine gas into the environment, contrary to the *Environmental Protection and Enhancement Act*

*(Alta.)*,[564] and $5,000 for transporting dangerous goods without compliance with the applicable safety requirements under the *Dangerous Goods Transportation and Handling Act (Alta.)*.[565] On appeal, the fines were increased, respectively, to $150,000 and $15,000. The Alberta Court of Appeal, in turn, upheld the $150,000 fine but restored the $5,000 penalty for transporting the goods.

In arriving at its decision, the Alberta Court of Appeal stated that sentencing principles for environmental offences require "a special approach",[566] adopting the words of Morrow J. in the *Kenaston Drilling (Arctic) Ltd.* case.[567] A "key component" of sentences imposed for breaches of environmental protection statutes, in the court's view, was specific and general deterrence.[568] Ritter J.A., for the Court, explained:

> Often breaches will arise out of shortcuts or perceived cost effective approaches taken by the offender. These shortcuts are to be discouraged both specifically with respect to the offender and generally with respect to the industry at large. Businesses that do not take short cuts or engage in risky or thoughtless behaviour should not be placed at a competitive disadvantage. Ultimately, a fit sentence should consider both the offence and the offender. It should be such that it is cheaper to comply than to offend and it must be meaningful to the offender by securing and holding its attention.[569]

The Court went on to find that deterrence had a "considerable role to play in appropriate sentences" for the offences under consideration, given that the defendant's conduct involved "a significant degree of culpability" as it had chosen to conduct its affairs in a cost effective way, but did not properly consider that the inexperienced personnel "placed the environment and the public at risk."[570] The

principle of general deterrence also was engaged, so that others would be aware that "what may appear to be cost-effective but risky behaviour will result in a stiff penalty."[571]

Sentences that include orders aimed at preventing repetition of the offence or repairing the harm caused by the offender are also not uncommon in the Alberta courts. In *Cool Spring Dairy Farms Ltd*.,[572] the accused, who were alfalfa producers, were found guilty of offences that related to emissions of dust from their facility that were beyond the prescribed levels. Due to the noise generated by their equipment, they were prohibited from operating the facility during certain hours, but they had been found to have contravened this requirement. The trial judge imposed fines totaling $50,000 between the defendants, and made an order requiring the facility to stop work. In addition, he ordered that the defendants pay security of a further $50,000, otherwise it would be deemed to be a decision by them to cease operations. There was also a requirement that the defendants submit a written report from a consultant as to steps to reduce the emissions of dust, after which time they were to meet with the Director to discuss what arrangements would be put in place to achieve these measures. Failure to do so would result in forfeiture of the security. On appeal, the Crown agreed to the removal of the term that failure to post the $50,000 security would be deemed as a decision by the defendants to cease their business. However, the appeal court was further of the opinion that the factor of deterrence, which "was the primary factor behind the sentences imposed" had

been over-emphasized.[573] As a result, the fine was reduced to $25,000 globally for both defendants, and the security deposit and requirement that the defendants stop their operations pending the deposit was and further compliance, was also set aside. The conditions respecting the filing of the report and meeting with the Director thereafter were not disturbed.

The same judge who heard the *Cool Spring Dairy Farms* case, Sulyma J., subsequently decided a matter where the Crown brought a sentence appeal against a $7,000 fine in a case involving the off-loading of canisters which contained potassium superoxide.[574] The canisters are classified as dangerous goods under the federal legislation, and hazardous waste under the provincial environmental law. The Crown had sought a penalty of six months' imprisonment before the trial judge, arguing that the potential for profits from the crime constituted an "extreme aggravating factor."[575] It was noted by the court, however, applying *United Keno Hill Mines Ltd*., [576] that the range of "inherent criminality" in pollution cases can be extreme, and that the severity of punishment should be "directly related to the degree of criminality inherent in the manner of committing the offence."[577] Moreover, it did not follow, in the court's view, that "the only fit sentence for an environmental offence which in turn involves a potential for profit is that of a custodial sentence."[578] The sentence imposed by the trial judge was found not to be demonstrably unfit, or to have proceeded from any error of law or principle, thus resulting in the Crown's sentence appeal being dismissed.

Fines that were imposed in other Alberta cases have also been the subject of Crown appeals. In *R.* v. *Blain's Custom Ag (99) Ltd*.,[579] the trial judge fined the defendant $1,000 for refusing to produce records, as required by the *Environmental Protection and Enhancement Act (Alta.)*,[580] due to the defendant believing that the records would be used against him in some inappropriate fashion. He later produced the records and pleaded guilty to the offence. The defendant had been charged with other offences relating to the improper application of potentially dangerous chemicals, which were subsequently withdrawn. The sentence was upheld on appeal.

In another case, *R.* v. *Centennial Zinc Plating Ltd*., [581] a fine of $125,000 was imposed where the defendant unlawfully released cyanide and chrome compounds into the environment. The basis of the Crown's sentence appeal was that the trial judge had declined to make an order for community service or a "creative sentence", namely, requiring the defendant to provide funding for research. As particularized by the Crown, the proposal was for a fund to be established of approximately $50,000 per year for a total of $200,000, for a Master's student or Ph.D. candidate to conduct research as to the type of micro-organisms which might be "capable of in a sense naturally dealing with the cynanide," under the supervision of an assistant professor in the Soil Biochemistry Department at the University of Alberta, and a representative of Alberta Environment who was also a soil scientist. [582] In addition, the Crown

recommended that the defendant be fined $75,000 for the offence itself. The appeal court judge indicated that he would have been inclined, as a trial judge, to impose a greater total sanction, including both a fine and a community service order. However, he concluded that the sentence rendered by the trial judge was not patently unfit so as to require appellate intervention.

The British Columbia Court of Appeal recently considered the fitness of sentence in a case where the defendant was fined $10,000, and ordered to remove a septic tank and drainage field which he had installed on his property, without first obtaining a permit.[583] The defendant lived on a waterfront property; the lake was a source of drinking water for the residents. The appeal court upheld the fine on the basis that deterrence was "an appropriate goal in sentencing",[584] and also found that the order to remove the septic tank was in accordance with the principles in environmental cases of the potential for harm "to the environmental protection process."[585] The British Columbia Court of Appeal upheld the sentence, stating that the sentencing principles applicable to public welfare offences "are generally seen to be denunciation and deterrence."[586] It cited the *Cotton Felts* decision as authority for these "guiding principles."[587] The circumstances of the offence were "very serious", given the threat of sewage infiltrating a public drinking water source "with potentially very serious damage."[588] Kirkpatrick J.A., on behalf of the Court, concluded:

> I am unable to find any error in the approach taken by the sentencing judge or the summary conviction appeal judge to the removal order. Both

> had in mind the salutary principle that public welfare offences involving the contravention of rules designed and enforced to protect the physical, economic and social welfare of the public will attract sanctions that are designed to deter the offender and other like-minded persons.[589]

Sentences in other British Columbia cases reveal significant differences in fine levels and accompanying orders. In one decision involving pollution of an anti-stain lumber agent which is acutely toxic to fish, even when greatly diluted, the trial judge imposed a fine of $35,000; however, the appeal court considered that the sentence was excessive, and reduced it to just $2,000.[590] In another case where the defendant had been convicted at trial of permitting waste to be introduced into the environment, the Crown brought an appeal against the sentence of a $10,000 fine.[591] The appeal court judge, however, allowed the defendant's appeal and set aside the convictions. In doing so, Shaw J. observed that such a high fine was uncalled for, and would have dismissed the Crown's sentence appeal, had it been necessary to do so.[592] In yet another decision where significant fines were imposed at trial, $200,000, for discharging waste into water in excess of permit limits, the appeal court reduced the fines by more than half, to a total of $95,000, on the basis that the penalty was not appropriate to the circumstances, giving too much emphasis to the concept of specific deterrence.[593]

On the other hand, exemplary fines have been upheld in a number of other British Columbia cases. In *R.* v. *Fibreco Pulp Inc*.,[594] the trial judge imposed fines of $5,000 per day for the 40 day period that the defendant was found to

have breached its permit which set the amount of waste that it was permitted to discharge into the Peace River. Its appeal against the total fine of $200,000, or "forty days of fines" as Maczko J. phrased it, was dismissed, given that the fine was "entirely appropriate for this type of case."[595] A further appeal to the British Columbia Court of Appeal was dismissed.[596]

In another case, *R.* v. *Alpha Manufacturing Inc*.,[597]where convictions were imposed for dumping waste into the environment, the corporate defendant was fined $640,000, consisting of $390,000 which represented its profits from committing the offence, plus a further $250,000, and the individual defendant, Anderson, who was the principal of the company, was sentenced to 21 days of imprisonment and fined $75,000. The permit issued to the company allowed it to dump waste in an area specified by legal description; however, the defendants began dumping outside the area, and destroyed about seven acres of a bog. The appeal court considered that the trial judge was correct in giving "the deterrent aspect of the sentence paramount consideration," stating that this approach is "particularly important in public welfare offences such as environmental offences."[598] In support of this proposition Gray J. cited the *Cotton Felts Ltd*. decision. The fines were held to be fit in all the circumstances, particularly having regard to the significant harm to the environment. However, the jail sentence given to the individual defendant, who was a 60-year old woman with no prior convictions, was held to be excessive and was set aside. A further appeal by

Anderson against the quantum of her fine was dismissed by the British Columbia Court of Appeal.[599]

In one other recent decision, *R.* v. *Canadian Pacific Railway Co*.,[600] where a train derailment resulted in approximately 75,000 litres of ethylene glycol spilling into a ditch opposite the Burrard Inlet, the trial judge imposed a sentence consisting of a $25,000 fine and a payment of $50,000 directed to be paid to the Environmental Protection Fund under the *Fisheries Act*.[601] In upholding the sentence, Griest J. observed that the trial judge "recognized the priority of deterring the defendant and others from committing environmental offences in conjunction with the environmental impact of the spill."[602]

Sentencing decisions in environmental regulation cases in other jurisdictions show similar patterns of inconsistency. In a Saskatchewan case involving ditching that was undertaken in a wildlife habitat land to alleviate flooding problems, but without proper permits, the regional municipality was fined a total of $20,000; three individuals including the reeve, a councilor and rate payer, were fined, respectively, $2000, $1,000 and $1,000.[603] The appeal court found that the sentences were neither excessive nor otherwise inappropriate. These fine amounts may be contrasted with another permit case, *R*. v. *Echo Bay Mines Ltd*.,[604] where the defendant was fined $4,000 on each of seven counts of quarrying without a land use permit. However, Marshall J. considered that the company's breach of the law was "benign and technical", thereby resulting in a

reduction of the fines from $28,000 to $1,000.[605] Conversely, in *Kenaston Drilling (Arctic) Ltd*.,[606] Morrow J. increased a $100 fine to $2,000 against a corporation which had conducted a land use operation in a land management zone without a proper permit, observing:

> In cases of this kind to fine a corporation such as the present one a mere $100 is to in effect invite breaches, to invite the gamble. 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 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.[607]

Substantial fines have been imposed in other cases. In *R.* v. *Placer Development Ltd*.,[608] the defendant was convicted on nine counts of diverting the flow of water within a water management area, for nine days, without authorization; de Weerdt J. fined it $4,000 on each of the four days that the work was done, and $5,000 on each of the five days immediately afterward, for a total of $21,000. In a subsequent case, de Weerdt J. upheld a fine of $15,000 for a corporate accused which was convicted of polluting water frequented by fish.[609] However, the trial judge's order requiring the directors and chief executive officer to make a public apology was quashed on the basis that it was improper to coerce an apology from the defendant where none had been offered voluntarily. In one other case, *R.* v. *Northwest Territories (Commissioner),*[610] de Weerdt J., sitting again as an appeal court, considered appeals by both the defendant and Crown where a dyke, containing a lagoon in which raw untreated sewage and municipal waste was stored, failed over a 10 day period. Consequently, 12.3

million gallons of such sewage and waste was released into an inlet, which was an arm of the sea within Frobisher Bay, on the south shores of Baffin Island. The trial judge fined the defendant $49,000 and ordered it to make a payment order for $40,000 for the purpose of promoting the conservation and protection of fish or fish habitat in the Northwest Territories. This total penalty of $89,000 was raised on appeal to $200,000 on the basis that both the fine and payment order required variation. The fine was increased to $100,000 as was the payment order.[611]

There are examples of significant penalties in other cases. In *R.* v. *Iqaluit (City)*[612] a discharge of raw sewage from the defendant's two sewage lift stations into the waters of Koojesse Inlet on five occasions resulted in between 540,000 and 830,000 litres of effluent escaping to foul the waters adjacent to the City of Iqaluit. The Court imposed a fine of $10,000 and made an order for $90,000 to be paid to the Minister of Environment for the purpose of promoting the conservation and protection of fish or fish habitat in Nunavut.[613]

The *Cotton Felts* decision was cited in a Quebec case, *R.* v. *Services environnementaux Laidlaw (Mercier) Ltée*.,[614] where a fine of $10,000 and costs of more than $25,000 was imposed against the defendant for discharging a contaminant into the environment. The Crown brought an appeal against the sentence, which was allowed. Sévigny J. observed that in pollution cases, the primary goal of sentencing is "la protection du public"[615] since in such cases

"c'est toute la population environnante qui est la victime."[616] Citing the need for deterrent fines as discussed in *Cotton Felts Ltd.*, the fine was raised to $50,000.

Fines exceeding $100, 000 were upheld by the Nova Scotia Court of Appeal in *R.* v. *Vac Daniels Ltd*.,[617] a case where the corporate defendant and its president were convicted of failing to respond to demands by environmental officials as to where hazardous fluid waste had been deposited, as required by the *Environmental Protection Act (N.S.)*.[618] By refusing to provide information as to where the wastes were dumped, the defendants avoided costs of any cleanup. The Court of Appeal upheld the $90,000 fine to the company and $25,000 fine to its president, commenting, "Violations of rules for the protection of the environment strike at the interests of all individuals and call for strongly deterrent penalties."[619]

These fine levels stand in contrast to other Nova Scotia cases. In *R.* v. *Oxford Frozen Foods Ltd*.,[620] the trial judge imposed a fine of $6,000 for dumping deleterious substances in water frequented by fish. The defendant was also ordered to implement an environmental control program. Due to a breach in a dyke in one of the plant's waste treatment or holding lagoons, more than two million litres of waste water was discharged into a river. The defendant did not take any action to recover any of the lost waste water. Neither did it have a contingency plan for problems that developed through spills. On appeal, it was held that the trial judge had over-emphasized deterrence; the fine was reduced to

$4,000. In another case, the Crown's appeal against a $300 fine for violating a Ministerial order by discharging waste and exceeding the prescribed limits was dismissed.[621] In upholding the sentence, Stewart J. stated that in regulatory offences and under the *Fisheries Act* and Regulations' offences, "general deterrence is paramount in sentencing,"[622] citing *Cotton Felts Ltd*. as authority for this proposition. However, the violation was a technical one rather than deliberate, and the defendant had installed a new method to eliminate effluent and resolve the problem.

In another Crown sentence appeal case, in New Brunswick, *R.* v. *Fraser Papers Inc. (Canada*),[623] the defendant was fined $1,000 for releasing a contaminant into the air which caused damage to property, contrary to the *Clean Air Act*.[624] The prosecutor had sought a fine in the range of $10,000 to $15,000. It was determined that 19 homes and businesses had been sprayed with the pulp/liquor fall-out, which the defendant cleaned at a cost of $9,361. However, there was no evidence that the fall-out resulted in harm to the environment or posed any risk to the health or safety of the public. The appeal court dismissed the Crown's appeal, holding that the trial judge had not committed any error in principle, or failed to consider a relevant factor or overemphasized any appropriate factors.

In another New Brunswick case where the Crown brought a sentence appeal, *R*. v. *Gemtec Ltd*.,[625] the defendant was convicted of two counts of

depositing a deleterious substance into the Jonathan Creek and the Petitcodiac River. On the first count an absolute discharge was imposed; on the second count the individual defendant, who was the president of the company, was fined $1,000 and ordered to pay $1,000 to the Environmental Damages Fund and another $1,000 to restore the Jonathan Creek whereas the corporate defendant was fined $5,000 and ordered to make $10,000 payments to the same two beneficiaries. The total amount of the fines, thus, was $28,000. However, the Crown sought an increase of these fines to a range of $70,000 to $80,000 on the basis that the trial judge erred by failing to give proper consideration to "the need to address both specific and general deterrence in the regulatory context."[626] McNally J., disagreed, observing that the penalties and fines imposed by the trial judge did not amount to "a mere 'slap on the wrist' or a 'licence' to do business."[627] As a result, the Crown's sentence appeal was dismissed.

Finally, the Courts in Newfoundland have also imposed penalties in varying amounts in environmental cases. In *R.* v. *Lundrigan Group Ltd*.,[628] the defendant was found guilty of polluting a salmon river for which it was fined $10,000. The substance released, silt, was harmful to fish, but it was not a toxic chemical, and there was no evidence of any fish kill. The appeal court held that the sentence imposed "properly emphasized the specific and general deterrence aspects of sentencing rather than the interests of the offender."[629] Conversely, in *R.* v. *Pennecon Ltd*.,[630] fines totaling $2,000 were reduced to $1,000 on appeal where the defendant was convicted of operating an asphalt plant, contrary to the

*Department of Environment and Lands Act*.[631] There had been an emission of a small quantity of non-toxic gravel dust into the air, with no serious or permanent risk to the environment.[632] Indeed, the Crown agreed that the fine should be reduced to $1,000 in the circumstances of the case.[633]

In a recent decision, *R.* v. *Newfoundland Recycling Ltd*.,[634] the defendant was fined $15,000 for discharging more than 1,000 litres of oil from its vessel into waters frequented by fish. The vessel had been tied to the dock when it sank, causing the oil spill. There was no immediate environmental impact and the act, resulting in the spill, was unintentional in nature. The appeal court found that the fines were not unfit. In coming to this conclusion, Dunn J. noted that in a similar case involving an oil spill of 1,000 litres from a vessel, *R.* v. *Tahkuna (The*),[635] a fine of $20,000 was upheld on appeal. Although there was no environmental damage in that case, 1500 feet of shoreline had been affected by the spill, and the owners of the vessel paid Environment Canada $67,000 for the cost of the clean-up. Dunn J.'s decision was upheld on appeal.[636]

*5. Conclusion*

As the above review of sentencing jurisprudence in this matrix indicates, there is marked inconsistency in the dispositions imposed by courts throughout Canada in respect of workplace safety, consumer protection and environmental regulation decisions. That this is so is to be expected. There is no Supreme

Court of Canada case on point which sets out the sentencing principles which should apply for regulatory offences generally, or to these categories of regulatory offences cases in particular. Appellate decisions throughout Canada vary, and are principally concerned with legislation which applies in the particular jurisdiction, save for public welfare legislation enacted by the federal government. Neither have legislators enacted a statement of sentencing purposes or principles for regulatory offences so as to guide sentencers in the same manner that Parliament has done for criminal offences..

One of the most often cited decisions governing regulatory offences sentencing considerations, *R.* v. *Cotton Felts Ltd*.,[637] is over 25 years old, and appears to have been overtaken by other events, such as the increasing high fine ceilings for public welfare offences which in many cases far exceed those for criminal offences. There has also been the development of other sentencing initiatives, especially creative sentencing orders, where the offender is required to provide funds to an agency, for example, to repair the harm it has caused, or to study ways in which a recurrence might best be prevented. In short, the *Cotton Felts Ltd*. decision is as likely to be cited, as the matrix of sentencing cases reveals, to increase a fine fivefold,[638] as it is to uphold a fine of a few hundred dollars.[639] Deterrence and denunciation, the key sentencing concepts promulgated by *Cotton Felts Ltd.*, have been relied upon to sanction creative sentencing orders,[640] but equally in declining to do so.[641]

Perhaps the greatest limitation that has developed, however, in the sentencing jurisprudence for regulatory offences stemming from the *Cotton Felts Ltd.* decision, is the emphasis it places on the use of fines as the penalty of preference for breaches of regulatory standards. While it is stated that fines should not operate as mere licence fees or the cost of doing business, fines remain, ultimately punitive in nature, and increasingly appear to be an insufficient sentencing tool, at least on their own. It has been observed that the use of "a fine-only sentence makes trial courts vulnerable to seemingly arbitrary sentence reductions or even increases by appellate courts."[642] Indeed, "pure number picking in fines" may bolster the impression that financial penalties "are merely a cost of doing business."[643] Fines, alone, clearly inhibit the creation of a culture of compliance.[644]

It appears, then, that a new approach is required, in order to properly identify sentencing purposes and principles that are to be applied to regulatory offences specifically, and that are best suited to the regulatory context in which such offences occur. Where there has been a breach of a regulatory standard, the court must look not only backwards at the conduct which gave rise to the non-compliance, but forward as well, since the defendant will often continue to participate in the regulated activity following the imposition of punishment. It is therefore especially important that the court on sentencing address this consideration, which is very different than the context in which criminal defendants are punished for engaging in anti-social or morally blameworthy behaviour. It is to these issues which consideration will next be given

# Part IV. SETTLING ON SOLUTIONS

## A. The Regulatory Cycle and its Role in Shaping Purposes and Principles of Sentencing for Regulatory Offences

### *1. Introduction*

There is presently, as has been noted, no identified set of sentencing purposes and principles for regulatory offences. As a result, it is up to each court, in each case, to assess the circumstances of the offence, and the offender, and to impose a sentence that best reflects the *mélange* of principles of traditional sentencing theory, including denunciation, deterrence, protection of the public, rehabilitation, reparations, and promoting a sense of responsibility in offenders along with an acknowledgment of the harm done to victims and the community, all in juxtaposition to public welfare or regulatory offences. But such offences correspond to an incredibly diverse and complex series of activities, ranging from protection of the environment, workplace safety and motor vehicle infractions.[645] These are but a few examples. Public welfare laws, as has been noted, "pervade the lives of ordinary people."[646]

In a recent article on sentencing for regulatory offences, Verhulst comments that unlike sentencing in the criminal process where the imposition of punishment concludes a morally blameworthy offender's dealings with the state, sentencing in the context of regulatory offences, which are for the protection of

the public from conduct which is not intrinsically evil, is better viewed as part of a cycle, and not the culmination of a process.[647] That is, sentencing is merely one part, albeit a most important part, in the regulatory offences paradigm. The beginning of the regulatory cycle involves the identification of regulatory objectives; provisions are subsequently devised, and implemented, to give effect to these objectives, including the creation of regulatory offences.[648] Enforcement strategies may thus include prosecution, in which case the offender, upon being convicted and sentenced, is often permitted to return to participate in the regulated activity, thereby continuing to be involved in the regulatory cycle, even after the imposition of punishment by the court.

If criminal offences and regulatory infractions reflect different societal interests and purposes, it follows, as Verhulst suggests, that punishment principles should also mirror these differences. That is, the rationale for punishment imposed by the court for a criminal offence and that for a breach of a regulatory provision should find expression in the sanction or disposition of the court. As Gunningham observes, sanctions ought to be "sensitive to the nature of the behaviour to be controlled."[649] It is here that the regulatory cycle takes on particular importance: unlike criminal conduct where the party's actions will cease and the court's punishment will conclude the defendant's interactions with the state, the regulated actor will usually be permitted to continue participating in the regulatory endeavour, even after punishment has been imposed, unless even more severe enforcement actions are necessary, such as a licence suspension

or revocation, that is, the final stages of the regulatory enforcement pyramid. Regulatory theory, particularly as it relates to those who come into contact with the enforcement mechanism of prosecution, therefore has the potential to play an important role in the shaping of sentencing purposes and principles for regulatory offences. Stated shortly, regulatory theory can and should influence sentencing practices since regulation and sentencing alike are part of the same cycle; placing the offender within the regulatory context on sentencing allows the court to understand the underlying regulatory objectives.

Scholars like Gunningham,[650] Braithwaite,[651] Breyer,[652] and Archibald et al[653] make important contributions to regulatory theory literature in this area through their work on the model of the enforcement pyramid as it relates to regulatory offences. However, these studies tend to focus on the perspective of regulators, and their efforts to encourage regulatory compliance through enforcement strategies, but less so towards the attitudes of the regulated parties themselves, and the extent to which such factors should inform the disposition of the sentencing court in its choice of the appropriate sanction. The conduct of those being regulated, and an understanding of their motivations and responses to initiatives designed to induce compliance, is an important consideration for sentencing courts. “Attitudes” may be judged along with “activities”.[654] Thus, it is necessary to distinguish between regulations and regulators, and those who are the intended beneficiaries of such “social policy objectives,” including both the regulated parties and the public at large.[655] After all, as Glasbeek puts it,

regulatees do "play a large role in the regulation of their activities", for they, and not regulators, are the "best judges of their self-interest, they are the ones with the requisite skills and abilities to measure the costs and the benefits of their activities."[656]

The focus of this section, then, will be to explore and critically analyze the concept of the regulatory cycle, and examine how it has the potential to play an important role in shaping regulatory offences sentencing purposes and principles. A proper understanding of the regulatory cycle is essential for courts when imposing punishment for regulatory offences, so as to better promote regulatory sentencing objectives and outcomes. The identification of sentencing purposes and principles for regulatory offences bolsters, in turn, the ability of courts to select the sanction that best encourages the regulated actor's successful reintegration within the regulatory cycle.

In terms of this section's organization, there is first an overview of the concepts of risk assessment and risk management, which are central to the notion of the regulatory cycle. Whereas the risk assessment process leads to the choice of regulatory strategy, the risk management process leads to the choice of enforcement strategy. This is followed by a discussion of regulatory enforcement pyramids which include, as one option, prosecution of regulated parties who fail to meet the regulatory standard. The focus then moves to the two central topics which apply these key concepts: (i) "penalties principles", and (ii) changing

regulatory strategies. Penalties principles apply to both the particular choice of sanction within the enforcement pyramid, and to the choice of sanction by the courts; an appreciation of changing regulatory strategies allows the court, when crafting its sentence, to better understand the offender's past and current behaviour. In the conclusion, observations are made for future consideration as to the utility of the regulatory cycle, and its potential for playing a role in the debate concerning the identification and enactment of sentencing purposes and principles for regulatory offences.

*2. Risk Assessment and Risk Management*

The regulatory cycle has its roots in risk assessment and risk management theory, concepts which were touched on briefly in Part I. Sentencing for the commission of a regulatory offence has been described as "risk management on its head", that is, it represents a response to the failure of preventing a violation of a regulatory standard that embodies risk assessment.[657] Risk assessment is a "scientific assessment of the true risk" whereas risk management "incorporates non-scientific factors to reach a policy decision."[658] The scientific assessment of risk may be converted into laws or regulations; the extent of legal enforcement and allocation of resources for enforcement involves risk management.[659] However, it is at the sentencing stage that courts have the opportunity to address the regulatory standards which have been set by the legislature. That is, it is only where a regulated party has been found to have

breached the regulatory standard that the court has the opportunity of quantifying this shortcoming, as reflected by the penalty it imposes.

In short, the risk assessment process informs the choice of regulatory strategy. That is, it forms the basis of regulation, and the choice of what conduct will be required or prohibited. It is important for courts to be mindful of these regulatory objectives, so that consideration can be given to the type of sentences which will be both appropriate and assist in achieving those objectives. The risk management process, in turn, leads to the choice of enforcement strategy. It impacts on the enforcement pyramid, and the choice of sanction sought by the regulator on contravention of the regulatory standard. An appreciation of this assists the court, on sentencing, in understanding the past and current behaviour of the offender. Specifically, it draws attention to any problems in the regulatory strategy that may have adversely affected compliance; it also reveals the nature of the relationship between the regulated party and the regulator, including enforcement practices. These factors are relevant to the court, and assist it in crafting a sentence that is responsive to the needs of the offender, particularly in moving the regulated party back to achieving compliance. It is important, then, to examine the concepts of risk assessment and risk management at the outset, as they comprise the foundation of the regulatory cycle.

Risk assessment is described by Salter and Slaco as a “problem-oriented concept” whose use is said to imply that “developments *should* be allowed to

proceed, and products used, unless serious problems have been identified."[660] The authors go on to point out that, whereas the model for risk assessment is largely taken from epidemiology, where comparisons of rates of fatality or disease are based on statistical information, there are no "standard yardsticks" for the measurement of risk in forums such as inquiries. Although inquiries are not the same as courts, the former is an instrument of the legal process which can take "evidence", and under specific conditions, such testimony can be used in a court. Science and scientists, however, are routinely used in the "making of public policy" or "mandated science" as Salter calls it. [661] Indeed, science in government is "tied closely to regulating and managing risks."[662] Risk assessment may be viewed, then, as "a procedure for bringing together a scientific and a value-based assessment."[663] That is, the scientific assessment of risk is "converted" into regulations or laws which are enacted or codified by legislators.[664]

Yet, as Breyer notes, it is not all risk that is the subject of regulation, but only that which regulators identify in order to "make our lives safer by eliminating or reducing our exposure to certain potentially risky substances or even persons."[665] Measures designed to eliminate or reduce risk can be "enormously costly." [666] Whenever individuals engage in an activity, "there is a risk and eliminating that risk carries a cost."[667] Risk assessment may be considered, though, as an "essential means of directing regulatory resources where they can have the maximum impact on outcomes."[668] There must therefore be not only a

"real scientific basis" for the regulations or law that result from risk assessment, but a value judgment as to the desirability of expending resources to achieve this regulatory result.[669]

Risk assessment is the "technical part" of the regulatory system.[670] It is designed to measure the risk associated with the substance. Risk assessment may be divided into four discrete activities: (i) hazard identification (ii) dose-response assessment (iii) exposure assessment (iv) risk characterization.[671] Risk management, on the other hand, is "more policy-oriented", and involves determining "what to do about it."[672] That is, risk management is the means by which the regulator decides what do about the "risks that the assessment reveals."[673] This process entails weighing policy options in view of the results of risk assessment, and "selecting appropriate control options including regulatory measures."[674]

An integrated framework for risk assessment and risk management consists of six stages: (i) defining the problem and putting it in context (ii) analyzing the risks associated with the problem in context (iii) examining options for addressing the risks (iv) making decisions about which options to implement (v) taking actions to implement the decisions (vi) conducting an evaluation of the action's results.[675] Predicting risk is a "scientifically related enterprise."[676] Certainty and objectivity are key components of the scientific process.[677] On the other hand, the "translation of risk assessment into law" entails a process of risk

management involving the "incorporation of non-scientific factors to reach a policy decision."[678] Ricci observes that risk assessment "develops choices" for risk managers to rank according to criteria such as risk-cost-benefit analysis, and "implement, monitor and change as new knowledge becomes accepted."[679]

But for regulators regard must also be had to a plethora of other factors, including circumstances which may be constantly changing, and require the expertise of other disciplines in order to arrive at a decision. In addition to a "science foundation," there may be policy and "political considerations".[680] Issues take on more complexity when there is a "public interest involved."[681] Maintaining the public's confidence requires that all of the relevant information ought to be considered.[682] The public must be apprised of the "realities" of risk management.[683] Scott puts the matter this way: while risk can be measured precisely by a formula which is a "simple function of the magnitude of the loss and the probability of occurrence", the question for "ordinary people" whether a particular activity is considered risky depends on factors external to consequences or magnitude of the loss, and the probability of occurrence.[684] That is, while science provides a means for calculating the "probability of harm under certain conditions", decisions as to the "acceptability of risk" are beyond the proper scope of science and are the subject of risk management.[685] Regulatory risk management "prioritizes different types of risk and permits a calculation on which a plan of action can be based."[686]

*3. Regulatory Enforcement Pyramids*

Instituting a prosecution before a court of law is one such "plan of action," as noted above, in the regulatory risk management spectrum. However, courts and regulatory agencies may view the risk associated with products or activities in very different ways. Each represents different institutions with different interests. What seems unreasonable to a court may not appear to be unreasonable to a regulator.[687]

Regulators are concerned with reaching administrative and practical results that help attain the general public interest goal of the legislation in question; indeed, this may represent a compromise solution which is deemed acceptable by the groups involved. Regulators, it has been observed, prefer to think of themselves as "expert advisers rather than industrial police."[688] The sphere within which regulators operate is "dynamic and proactive."[689] Courts, on the other hand, must make decisions based on the record placed before them, without necessarily all of the relevant facts or further factual investigation. The judge's ruling must be "fair, the merits of which depend upon the relevant legal norm."[690] The role of the court is not to seek out additional information beyond that which is placed before it; neither is it concerned with establishing a working relationship with the parties. There is, in the context of a prosecution, an adversarial relationship between the parties themselves; the court is to take a detached, neutral role in making a determination on the merits of the case.

For these reasons, a compromise solution that is considered reasonable by a regulator, due to practical and administrative considerations, may not seem "rational" to the judge upon viewing the matter in light of statutory interpretation and legal precedent in relation to the merits of the case.[691] Courts are "policy interpreters" whereas regulators act as "policy makers."[692] Regulators do not simply make and enforce rules: they "commonly carry out a number of administrative, judicial-like, policy analysis, and other functions."[693]

Given these limitations in the court system, and the breadth of regulators' responsibilities, punishment is weighed by regulators along with other compliance measures. It is here that the enforcement pyramid illustrates the graduated choices available to regulators, only one of which is prosecution. In fact, in the enforcement pyramid, most offences, explains Braithwaite, are at the base, and attract "gentle sanctions"; the intention is that "progressively fewer suffer the tougher sanctions."[694] This approach acts as a deterrent to those who fear being singled out and having the "book thrown at them."[695] At the same time, it encourages those who are being regulated to reform their ways so as to receive treatment that is more lenient. Regulatory institutions must be able to protect society "against knaves while leaving space for the nurturing of civic virtue."[696] Excellence in compliance, as Haines and Gurney observe, will not be achieved by "regulatory strategies in isolation from enforcement."[697]

The base of the enforcement pyramid, then, is concerned with persuasion: most regulatory action occurs at the lowest level of the pyramid where attempts are made by regulators to coax compliance from the regulated.[698] Voluntary or negotiated compliance measures, however, must be "backed" by other options. Thus, in the next phase of escalation are warning letters. Attempts to secure compliance thereafter are through the means of civil monetary penalties. It is only following this stage that criminal prosecutions are brought. Should further steps of increasing severity be required, it is open to the regulator to seek a shutdown or temporary licence suspension of the regulated activity. The final step if this fails is permanent licence revocation.[699] From a regulatory perspective, it is essential that the response be "neither too lenient nor too severe."[700] In the "responsive regulation" approach, escalated responses which result in compliance must be followed by measures to "de-escalate down the pyramid."[701] To put it another way, the behaviour of the regulated party serves to "channel the regulatory strategy to greater or lesser degrees of government intervention."[702] The goal is to encourage laggards to become leaders and "committed compliers".[703] As Baar puts it, "positive compliance programs" seek to find the "right balance between persuasion and punishment."[704]

The regulatory enforcement pyramid may be adapted to the theories of risk assessment and risk management.[705] Braithwaite uses the term "meta risk management" to describe the "risk management of risk management," which is the application of risk management techniques to determine which level of risk

management will be used by the State towards the actors in question.[706] Of course, risk assessment techniques are not infallible, and the risks of non-compliance may be great, as where the regulated activity concerns the potential for harm as opposed to lost revenue.[707] However, the application of risk management principles to the regulatory enforcement pyramid, and the more efficient deployment of regulatory resources, constitutes a "shift from reactive law enforcement to proactive risk management" where the regulator "scans its environment for the greatest risks and moves resources to where those risks can be managed."[708]

Gunningham and Johnstone observe that while the enforcement pyramid involves both "carrots and sticks", it is usually the case that persons being regulated respond better to rewards than to punishments.[709] Moreover, those who comply willingly or voluntarily tend to do so with "far more commitment and effect" than those who are reluctant to undertake such efforts, and become compliant only under "threat of penalty."[710] In sum, "volunteers almost always behave better than conscripts."[711]

Indeed, Braithwaite's approach may be said to be "bottom heavy" since it is contemplated that most action takes place at the base of the enforcement pyramid.[712] In Ayres and Braithwaite's view, regulatory agencies are most effective at securing compliance when they act as "benign big guns." That is, regulators can "speak softly" when they carry "big sticks", including a hierarchy of

lesser sanctions; the larger and more various the sticks, the greater the likelihood that success will be achieved by "speaking softly."[713] Punishment is "expensive" whereas persuasion is "cheap". [714]At the same time, however, while regulators are attempting to build relationships with regulatees, other processes may be involved and operate at cross-purposes, such as organizations dealing with compensation claims for injured parties, or inquiries as to the cause of industrial accidents, where issues of fault or blame potentially arise. [715]

The relationship between regulators and the regulated parties is hardly static or one-dimensional. Neither is this the product of the size of the enforcement weapons that are wielded by the former, nor the pain that may be inflicted on the latter. Just as regulators have the ability to move up and down the enforcement pyramid, the regulated parties may respond to initiatives aimed at inducing compliance with more or less commitment. The manner in which regulatees comply with their obligations is described by Johnstone as consisting of three stages: (i) a commitment to compliance (ii) learning what procedures are necessary for compliance (iii) institutionalizing compliance by implementing risk management systems.[716] These stages are not necessarily unilinear, and regulatees may move both backwards and forwards throughout the different phases.[717]

In the first such stage, a form of "self regulation" takes place, owing to a commitment by management or the individual to comply with the regulatory

regime. There may be a number of reasons or incentives for doing so, ranging from the desire to avoid unfavourable publicity, the imposition of a new regulatory requirement, or the result of a "shock induced by enforcement action".[718] The second phase involves learning how to comply or putting into effect a "design and establishment."[719] It is during this juncture that risk management systems are typically developed.[720] Finally, there is institutionalism of compliance measures. According to Hutter, there are two discrete phases in this process: first, an "operational phase" where risk management systems, procedures and rules are implemented, and second, a "normalization phase" where behavioual change is institutionalized, and there is "compliance with risk management procedures and rules as part of the normal, everyday life" on the part of the regulated party.[721]

*4. The Regulatory Cycle and "Penalties Principles"*

Despite the best efforts of regulators and regulatees, non-adversarial efforts aimed at achieving compliance, including negotiation, may not prove successful, and prosecution might appear at some point to be the most appropriate enforcement response. It is clear that in terms of the regulatory enforcement pyramid, this is not the sanction of first choice; but neither is it the final option. Where charges are brought before a court, a successful prosecution will lead to conviction and punishment. However, unlike criminal conduct where the underlying act is blameworthy and morally wrong, leading to a penalty to deter the guilty party from repetition of the offence, regulatory offences are not

inherently evil, and the regulatee will usually be permitted to return to participate in the regulated activity, even after the imposition of punishment by the court.

This distinction between "true crimes" and regulatory offences was noted in the Supreme Court of Canada's decision, *Sault Ste. Marie,* where Dickson J. explained that public welfare offences are not "criminal in any real sense", but are prohibited in the public interest.[722] While enforced as penal laws through the use of "the machinery of the criminal law", such offences are "in substance of a civil nature", and might be regarded as a "branch of administrative law."[723] The fundamental difference between criminal law, as a "system for public communication of values", as opposed to tort law, which "seeks to balance private benefits and public costs", becomes particularly important at the sentencing stage.[724] Tort law "prices" whereas the criminal law "prohibits". Hence, it is on sentencing that courts can draw a line between "enforcement of norms that were intended to price and those intended to prohibit."[725]

Professor Macrory in his report on *Regulatory Justice* in the United Kingdom has identified a series of "penalties principles" that might serve as the basis for a regulatory offences sanctioning regime.[726] These principles are triggered by the enforcement apparatus of the pyramid, where less intrusive compliance strategies have failed to achieve the desired result. Penalties principles apply to not only the particular choice of sanction within the enforcement pyramid, but to the choice of sentence by the courts. They are a

bridge between administrative and judicial sanctions. While regulators and courts have different roles and responsibilities, they both work toward achieving the same end within the regulatory context. That is, by operating under the same penalties principles with respect to the choice of sanction, there is a harmonization with respect to regulatory outcomes by courts through its role in the regulatory cycle. It is therefore important for courts to consider such punishment principles when imposing penalties for regulatory offences, since not only will the party usually be permitted to resume involvement in the regulated activity, the sentencing process also permits the court to "actively participate in achieving regulatory goals."[727]

This task is no simple one, since sentencing purposes and principles for regulatory offences have not been legislated in any Canadian jurisdiction to date. Some provincial statutes do contain a list of sentencing considerations, such as the Ontario *Environmental Protection Act*,[728] which enumerates a list of aggravating factors, including whether the offence caused an adverse effect or resulted from reckless or intentional behaviour, as well as the defendant's conduct after the commission of the offence, including cooperation with the authorities,[729] and British Columbia's recently enacted *Public Health Act*,[730] which addresses the relevant considerations in determining sentence[731] and the purposes of sentencing.[732] However, this is often not the case. Moreover, these statutes are not of general application, and hence such sentencing provisions do

not apply to other legislation, even in relation to regulatory offences of a similar nature.[733]

The Macrory "penalties principles" provide a framework for how a court might further regulatory objectives in sentencing the regulatee at this particular stage of the regulatory cycle. Just as regulators select certain sanctions in the enforcement pyramid so as to produce a desired impact on regulatees, when the enforcement mechanism of choice is prosecution the court in imposing punishment must understand what the sanctions are intended to achieve, so that it imposes a sentence which furthers the underlying regulatory objective, while also permitting the party to resume participation in the regulated activity. Verhulst puts the matter this way:

> By crafting a well-thought-out sentence that takes the regulatory cycle into account, the courts can actively participate in achieving regulatory goals. To do so, they must understand the regulatory scheme and the place of the offender within it, and then craft sentences that seek to align offenders' behaviour with those goals.[734]

What, then, are Macrory's "penalties principles"? In the consultation document released by Professor Macrory, six such considerations were put forward as the basis for any sanctioning regime.[735] First, sanctions should change the behaviour of the offender. Second, sanctions should ensure that there is no financial benefit obtained by non-compliance. The third principle is that sanctions should be responsive and consider what is appropriate for both the particular offender and regulatory issue. Fourth, sanctions should be

proportionate to the nature of the offence and harm caused. Fifth, sanctions should aim to restore the harm caused by regulatory non-compliance. Finally, sanctions should aim to deter future non-compliance.

The first penalties principle is directed at changing the regulated party's behaviour. This is to say a sanction should not be "focused solely on punishment", but that it should also ensure that the offender will be less likely to break the law in the future.[736] The second principle seeks to prevent offenders from benefiting financially from non-compliance. In this manner firms and individuals who seek to profit from breaking the law will be met with sanctions "specifically targeting the financial benefits gained through non-compliance," the intention being to reduce any financial incentive for engaging in such behaviour.[737] Responsive sanctioning is the goal of the third penalties principle. It is desirable that the regulator be able to exercise discretion and determine whether the regulated party would respond to sanctions which are less punitive than prosecution, having regard to the particular offender and the particular regulatory issue.

Proportionate sanctioning is the subject of the fourth penalties principle. Whereas the previous principle addresses the reasons for the failure of the regulatee to comply, this principle is concerned with the nature of the non-compliance, and its consequences. The goal is to ensure that offenders are "held accountable" for the impact of either actual or potential consequences of their

non-compliance, and that such considerations are "properly reflected in any sanction imposed."[738] The next principle is related: where harm is caused by the offender, the sanction should include an element of restoration of such harm. Finally, the principle of deterrence is relevant. A sanction should discourage future non-compliance. This is accomplished by sanctions which send the message to the regulatory community that "non-compliance will not be tolerated and that there will be consequences."[739]

Macrory's Final Report, entitled *Regulatory Justice: Making Sanctions Effective*, contained the recommendation that regulators be guided by these six penalties principles.[740] The characteristics which guide the framework within which regulators operate were also set out, but augmented by one additional factor: regulators should avoid "perverse incentives" that might influence the choice of sanctioning response.[741] The report explained that penalties principles "help build a common understanding of what a sanctioning regime should achieve amongst regulators and the regulated community" and that this provides a framework for regulators when deciding what enforcement action or sanction to choose.[742] It also provides a safeguard that sanctions will be used "fairly and consistently."[743] Macrory acknowledged that it might not be appropriate for all of the penalties principles to apply in each case; however, for the purpose of consistency of approach, the principles should "always be considered" by a regulator when "taking an enforcement action, or designing a specific sanctioning scheme."[744] In addition, it was emphasized that the penalties principles were to

be regarded as the "underlying basis" of regulators' sanctioning regimes so as to achieve consistency, and not as "legally binding objectives."[745] To this end the majority of the principles were best understood, and now expressed, as "aims" rather than "absolutes."[746]

These penalties principles inform the regulator's choice of prosecution in the enforcement pyramid. They become necessary when negotiation or lesser coercive measures are no longer considered to be a viable option. Not all of the penalties principles need necessarily be applied at once, or to all of the parties whom are being regulated. However, the penalties principles assist the court in imposing punishment by providing a rationale for the sanction being pursued. That is, the court will be better equipped to craft a sentence promoting compliance if it is clear what goals the sanction is intended to achieve. Most importantly, this enables the court to view more accurately the party at one particular stage of the regulatory cycle, as opposed to at its "end". For not only is it most likely that the offender will be permitted to continue to engage in the regulated activity following the imposition of sentencing by the court, which is doubtlessly in the interests of the regulatee, but, as Verhulst notes, it is also in society's interest for this to happen, since the regulated activity in question "may be socially beneficial, creating employment or needed goods and services."[747] What is not in the societal interest is for "continued engagement" by the regulated actor in the behaviour that gave rise to the commission of the offence in the first place.[748]

In summary, there is a certain irony in the use of prosecution by regulators and the seeking of sanctions where, as Hawkins puts it, "there is already a body on the floor."[749] When a regulator identifies risk, and it is determined that "something ought to be done about it", a different set of considerations arise.[750] That is, in a "high risk situation", the procedures that will be employed by the regulator will differ from those in a "low risk situation."[751] Risk characterization requires such determinations; categorizing the result informs the regulator's assessment of the risk and the response it deems appropriate to take. But regulatory strategies themselves are not always constant, and this gives rise, in turn, to compliance issues for the regulated parties in meeting the requisite standard of care. Regulation may not guarantee the safety of the worker in Hawkins' example, but it is nevertheless essential to have a stratagem in place for the regulated activity.[752]

*5. The Regulatory Cycle and Changing Regulatory Strategies*

Viewing an offender at a particular point of time in the regulatory cycle is important for another reason, apart from the role it should play for the court at the time of imposing punishment. It also promotes an understanding of the nature of the regulated activity and how the party fits within it, in light of changing regulatory strategies. This is important for two discrete reasons put forward by Verhulst. The first is that the manner in which many activities are currently being

regulated is moving away from “clearly articulated standards”; the second is that regulatory schemes are being enforced in a “less adversarial” manner.[753] In other words, the “regulatory environment is changing.”[754] Consequently, these trends are relevant at the time of sentencing, not just for the purposes of determining what is an appropriate penalty for non-compliance, but so that the court can view the party in a way that is different from one situated in the more traditional regulatory context and take this into account when assessing the reasons for the offender’s failure to comply with the regulatory standard.

The notion of the court acting as a partner in the regulatory cycle is hardly a novel idea. In a report submitted to the Department of Justice in 1991 on positive compliance programs, Baar identified the problem of courts “forgiv[ing] non-compliance without an adequate understanding of the consequences of their actions for the quantum and distribution of risk and for the incidence of non-performance.”[755] The result was termed an “enforcement deficit”, which reduces the incentive to “invest in compliance.”[756] In terms very similar to those of Verhulst, the authors cautioned against deterrent or punitive responses by the court, as opposed to the goal of determining whether the regulated actor’s “performance was inadequate and to impose the standardized incentive.”[757] Indeed, the concern was expressed that the courts might “check regulatory discretion” and undermine the regulator’s ability to “achieve their objectives.”[758]

An analogy may be drawn in this regard to the importance of courts giving reasons for judgment so that the parties understand the basis of its decision. The Supreme Court of Canada has held that the delivery of "reasoned decisions" is inherent in the judge's role such that an accused person should not be left in a state of doubt as to why a conviction has been imposed.[759] In the case of regulatory offences, it has been observed that reasons for judgment serve another important function. Since the purpose of regulatory offences "is not so much to punish, as to encourage compliance with the regulatory standards", it is important for the offender, and others in the same position, as well as inspectors and agents of the regulator, to know "what the legal standard requires."[760] After all, as Black puts it, a rule "is only as good as its interpretation."[761]

In much the same manner, the regulated party may find that it is alleged that he/she has failed to comply with a regulatory standard, although the standard has not been "clearly articulated," thereby inhibiting the regulatee's ability to understand the basis of the regulator's decision.[762] In fact, some regulators have moved away from design-based regulations, where the party is expressly told "how to do things."[763] While this approach has the advantage of being "clear and direct", it also may be said to be subject to the limitation that it is "often slow to adapt to changing technology and expertise, and consequently may impair efficiency and innovation" in the regulated area.[764] Design-based regulations set out "detailed, prescriptive rules."[765] However, as one regulator has recently observed, despite such supervisory actions as to how firms should

operate their business, such prescriptive standards "have been unable to prevent misconduct", and have become "an increasing burden" on both the industry and regulator's resources.[766] Of course, the same might be said as to the limitations of criminal standards to prevent misconduct, and yet one would not necessarily suggest that such standards should be abandoned. This may properly lead, though, to a re-evaluation of the approach being undertaken so as to best promote compliance with the law or standard.

As a result, other regulatory strategies may be employed which shift the emphasis away from "reliance on detailed, prescriptive rules" to "high-level, broadly stated rules" in order to achieve the regulatory objective.[767] Such methods of regulation include "outcome-based" regulation which provide for a measurable result to be achieved, but without stating how to achieve it; "performance-based" regulation, which provides for a non-measurable result to be achieved; and "principles-based" regulation, which sets out only an operational goal.[768] On the other hand, these approaches contain less specific criteria, and may give rise to uncertainties as to how the result is to be optimally achieved. It is also to be acknowledged that regulatory offences cover such a broad range of activities that regulators may find that one strategy produces better results for certain types of activity, such as prescriptive rules for transportation of inherently dangerous substances, whereas a less detailed principles-based regulation might suffice for setting clean air levels.

The differences between these respective regulatory strategies may be illustrated by the following example concerning air pollution. In a "design-based" system the operator would be expressly told how to do things, such as "an operator must install a specified scrubber in a smoke stack." Conversely, in an "outcome-based" regulation, the requirement might state "an operator must ensure that emissions from a smoke stack contain less 'x' parts per million of particulate matter 'y'". In a "performance-based" regulation, the requirement might read "an operator must ensure that emissions from a smoke stack do not contain particulate matter 'y' in concentrations that may pollute the immediate environment." Finally, in "principles-based" regulation, the requirement might be worded "an operator must operate in a manner that is environmentally sound."[769]

It can be seen that in contrast to design-based regulation, these other enforcement strategies provide regulated persons with "greater operational flexibility."[770] However, at the same time, the standards may be not be as well-defined, thereby creating potential for uncertainty for the regulated parties, among others, in terms of what is required for compliance, or at least acting with due diligence so as to avoid liability for the commission of a regulatory offence. Black acknowledges this concern for principles-based regulation, conceding that "it must be possible to predict, at the time of the action" whether or not it would be a breach of a principle.[771] The same concern would be warranted, albeit to a lesser extent, in respect of performance-based regulations, and even outcome-based regulations. It may be that the more imprecise the regulatory strategy, the

more egregious the result that is required so as to warrant prosecution, since uncertainty in measuring outcomes may detract from proof of the regulatory offence. The fact remains, however, that sentencing courts when dealing with the offender at this particular juncture of the regulatory cycle are presented with a unique opportunity to examine the regulatory strategy in issue, and consider "how sentences can be used to assist offenders to determine, meet and even exceed regulatory standards in the future."[772]

The movement away from design-based regulation has been accompanied by another change in regulatory strategies, namely, a shift to a less adversarial approach to enforcement, or more measured use of this step of the regulatory enforcement pyramid.[773] In the case of a design-based standard, it should be apparent whether enforcement action is clearly warranted: the operator, in the air pollution example above, has either installed a specified scrubber in a smoke stack or not. Likewise, it should be readily apparent when an outcome-based standard has been violated, the requirement in the air pollution example being that "an operator must ensure that emissions from a smoke stack contain less 'x' parts per million of particulate matter 'y'". As Verhulst comments, either the outcome is within "acceptable parameters or not."[774]

On the other hand, in the case of performance-based or principles-based regulation, it is not necessarily as clear whether enforcement action is warranted.

In a performance-based regulation, as where the requirement in our example reads “an operator must ensure that emissions from a smoke stack do not contain particulate matter ‘y’ in concentrations that may pollute the immediate environment”, how is the regulated party to know if the “immediate” environment is being “polluted?” Moreover, all emissions produce pollution. The issue, though, is how much pollution should be tolerated. Likewise, in the principles-based regulation where the requirement reads “an operator must operate in a manner that is environmentally sound”, how is the regulatee to know if the operations are “environmentally sound?” Other issues may arise, such as those involving causation: the regulated party’s actions may not be the sole cause of the pollution, but a contributing cause of it. To what degree must the regulated party cause the pollution in order to warrant prosecution or other enforcement action? There may also be the need for expert evidence to substantiate the party’s responsibility for the pollution, or to interpret technical data from test results or other scientific processes. In short, evaluations of conformity by regulators may be “fluid and abstract”, instead of “concrete and unproblematic.”[775]

Given that these regulatory strategies may create “less certainty about whether an offence has been committed”, warnings and more cooperative approaches, including negotiation, might seem preferable to the more formal measures of investigation and prosecution.[776] Indeed, in some cases, a return to prescriptive standards may be warranted. Violations which are of a technical nature may be “overlooked” in exchange for agreements to devote resources into

practices or technologies that are aimed at addressing the "larger problems"; indeed, even "clear violations" might be tolerated where they are not of a serious nature, or it seems that the regulated party is making genuine efforts to become compliant.[777] Moreover, as Hawkins observes, what "risk" means to a regulator may change at certain times, and be viewed at different points in different ways.[778] Regulatory objectives may "change over time."[779] The regulator may identify risk in a manifest way and "redress harms when they occur"; conversely the approach may to "obscure risk" and seek to make the public "feel sanguine about the risks that are obscured."[780] But incentives to negotiate and cooperate within the regulated industry may equally be undermined if it appears that enforcement is not a viable option.

Black and Baldwin put forth the concept of "really responsive regulation", having regard to the fact that regulatory powers are not always "clear" and there may be limited legal powers available to the regulator.[781] Indeed, it may be difficult to evaluate the success or failure of a regulatory strategy, and even if it is possible to do so, it may prove "very difficult to improve the regulatory system by adjusting enforcement strategies and legal powers."[782] According to the authors, the "really responsive regulator" should not be confined to one particular strategy of enforcement, much less to enforcement as the 'control method of first choice."[783] However, a failure to provide "clear objectives" may make it "extremely difficult to state what 'compliance' involves." [784] For Gunningham, who proposes the approach of "smart regulation" in preference to "responsive

regulation", given that the latter may be limited due to individual instruments not being designed to facilitate responsive regulation or because of there being "no potential for coordinated interaction between instruments", the regulated party does not interact with state regulators only, but rather with a number of parties who employ different instruments in order to achieve compliance.[785]

Accordingly, when a court is considering what sentence to impose on the regulated party who has failed to meet the requisite compliance standard, it must have regard to these changing regulatory strategies. After all, the reformulation of the regulatory requirement may have played a role in the offender having difficulty in meeting the regulatory goal. Conversely, failure to achieve regulatory compliance with standards, which are prescriptive and detailed, may be indicative of an institutional "attitude" of lack of commitment to compliance that requires re-orientation. Nevertheless, the offender appears before the court, in both these instances, at one particular point of the regulatory cycle, and is most likely to be permitted to resume his/her regulated activity. The court, in turn, should look both forwards and backwards at the conduct of the regulated party. Past attempts at compliance and the offender's response to non-adversarial enforcement entreaties are germane to sentencing; the future relationship between the regulated party and the regulator is also a relevant consideration.[786] That is, the court should be mindful of the fact that, following its involvement in the matter, the parties are likely to continue dealing with each other in the same regulatory endeavour.

In essence, then, the question for the court at the sentencing stage is whether it can "enhance the cooperative model of enforcement and assist offenders to move to the next stage of compliance?"[787] To put the matter another way, taking into account the past relationship between the regulated party and the regulatory authority, how will the sentence imposed by the court impact on the parties' ability to move forward and resume a non-adversarial, cooperative working relationship. A successful compliance strategy, even if it emerges at the time of sentencing, has as much "symbolic significance" as one arrived at earlier during the course of the regulatory cycle.[788]

*6. Conclusion*

There is a danger for courts and regulators to operate at cross-purposes. While the roles of these respective institutions are clearly different, and each is properly concerned with distinct tasks and goals, they deal in common with a regulated party who has failed to act in compliance with the regulatory standard. Whereas regulators are proactive in nature and may have instituted a prosecution as a tool of last resort, while courts react to the record placed before it and must impose punishment where it has been established that the regulatee's conduct exhibited a lack of reasonable care or due diligence, both regulators and courts interact, in common, with a regulated party during the course of the regulatory cycle.

However, a failure by the court to take into account at the time of sentencing, that is, at a crucial juncture in the regulatory cycle, that the offender has been subject to regulatory strategies that may have evolved over time, or did not meet standards that may not be clearly articulated, risks undermining the regulatory objective being enforced. It is also important for the court to be aware of the "penalties principles" that inform the sanction it is being asked to impose. These considerations are important because the offender will usually be permitted to resume his/her involvement in the regulated activity, and thus continue to engage the regulatory cycle, following the imposition of punishment by the court.

In short, courts have an important role to play as partners in the regulatory cycle. The penalties that are imposed by courts cannot be determined in a vacuum without regard for how they will operate within the regulatory context. The goal of furthering the regulatory objective, at the time of sentencing, will be better appreciated by the court by viewing the offender at one particular point in the regulatory cycle, as opposed to at the end of the process, so as to successfully reintegrate the regulated actor within the regulatory regime.

The identification and provision of sentencing purposes and principles for regulatory offences thus enhances the ability of courts to select the sanction that best encourages the regulated actor's successful reintegration within the

regulatory cycle. A sentencing rationale or guiding purpose which promotes furthering the regulatory objective would help focus the court's choice of sanction in order to hold the offender accountable for his/her conduct, as well as ensuring that the offender will maintain compliance with the regulatory standard in the future. Consequently, the concept of the regulatory cycle has an important role to play in the current debate respecting the identification and enactment of a statement of sentencing purposes and principles for regulatory offences.

## B. Sentencing Purposes and Principles for Regulatory Offences: a New Approach for Regulatory Justice

### *1. Introduction*

A statement of sentencing purposes and principles for regulatory offences is desirable for a number of reasons. These include providing certainty as to what such sentencing purposes and principles are, and promoting uniformity in approach by removing the matter from courts on a default basis. Another is to enact sentencing purposes and principles in a transparent manner by the same legislative body which has responsibility for enacting the public welfare legislation for which the courts are asked to interpret and impose punishment, as opposed to leaving the matter for judges to decide, based on the circumstances of a particular case. Further, a "sentencing rationale" provides "the foundation for solutions to unwarranted variation" since it makes known "what are the grounds for imposing penal sanctions and the principles governing the sentencing process."[789]

All of these considerations, it may be said, are aimed at eliminating the problems caused by uncertain and unstructured sentencing practices, which effectively make sentencing for regulatory offences a game of chance. This is the antithesis of regulatory justice. Instead, a new approach is required for identifying and enacting sentencing purposes and principles for regulatory offences. Otherwise the sentencing jurisprudence for regulatory offences will continue to

resemble a lottery, where inconsistency and unpredictability abound, as illustrated in the matrix of workplace safety, consumer protection and environmental regulation sentencing decisions within Canada, set out in Part III.

Were a sentencing rationale to be formulated for regulatory offences, courts, and the parties appearing before them, would doubtlessly be guided by it. This is not to say that a statement of sentencing purposes and principles would be a panacea, as the discussion in Part II with respect to the statement of sentencing principles under the *Criminal Code*[790] clearly demonstrates. However, it is better to know what the legislators' stated and intended sentencing goals and aims are for regulatory offences, than not knowing this. As Manson comments, there can be nothing wrong with including a statement of purpose for sentencing, as opposed to failing to articulate one [791]

The relationship between the regulatory cycle and sentencing purposes and principles for regulatory offences has been described in the previous section. As Verhulst observes, once the court "understands the regulatory context", namely, the regulatory strategies that are appropriate to the standards governing the conduct of the regulated party, as well as the "penalties principles" that informs the choice of the sanction being sought by the regulator, the court will be in a better position to determine the sentence it should impose.[792] The court's punishment or sentence, in turn, should be designed to give effect to the regulatory goals of the legislators which are set out in the legislation.

It now falls to be determined how these regulatory offences sentencing purposes and principles should be identified and set out. To this end I turn first to the recently enacted British Columbia *Public Health Act*,[793] which provides a model for how a statement of sentencing purposes and principles for regulatory offences might be set out by legislators. This is followed by a discussion as to the importance of prioritizing sentencing purposes and principles for regulatory offences. These purposes and principles of sentencing are then specified, including, in order, remedying the harm or potential for harm, rehabilitation, general deterrence, and denunciation. I next discuss the desirability of setting out these purposes and principles of sentencing in a statute of general application, in Ontario the *Provincial Offences Act,*[794] as opposed to a statute which does not apply to other regulatory legislation within the jurisdiction, as is the case with British Columbia's *Public Health Act.* Consideration is also given to whether such a statement of sentencing purposes and principles should apply to all regulatory offences, or only to those where sentencing dispositions such as imprisonment, probation and elevated fines are available, as opposed to minor offences governed by a ticketing procedure. Finally, concluding observations are made as to the utility of sentencing purposes and principles for regulatory offences, particularly in furthering the role courts play in the regulatory cycle.

*2. The British Columbia Public Health Act: A Model of Sentencing Purposes and Principles for Regulatory Offences enacted by Legislators*

Verhulst proposes that the British Columbia *Offence Act*,[795] which is the equivalent legislation to Ontario's *Provincial Offences Act*,[796] should be amended to specify five considerations or "sentencing steps" for courts to consider, in order, when determining what punishment to impose for breach of a regulatory statute. By providing these measures in a provincial offences statute of general application, the sentencing provisions would apply to all provincial offences legislation in the province, as opposed to being limited to the particular statute, which is currently the case with statutes such as the British Columbia *Public Health Act*,[797] or the *Canadian Environmental Protection Act*,[798] these statutes setting out sentencing provisions which do not apply to other Acts. The desirability of specifying sentencing purposes and principles in a statute of general application will be discussed in more detail below.

The "sentencing steps" which Verhulst advocates are the following:

1. encourage joint submissions on aggravating and mitigating factors, and the sanctions to be imposed (the "Friskies Schedule");[799]

2. to the extent it is possible and reasonable, impose a sanction that remedies the violation (remediation);

3. if it is likely that the offender will continue to engage in the regulated activity after sentencing, but the offender's behaviour must change to prevent future violations, impose a sanction that promotes the necessary changes (rehabilitation);

> 4. if it is appropriate in the circumstances and would likely have social value, impose a sanction that will promote change in the behaviour of other persons (general deterrence);
>
> 5. if aggravating circumstances make it appropriate, impose a sanction that denounces and punishes the offender's behaviour (punishment).

The requirement that courts approach regulatory offences sentencing decisions by considering these factors, in order, would result in sentences which are, Verhulst contends, responsive to the "regulatory goals of the legislators."[800] This approach also takes into account the unique relationship between the regulator and regulated party, at the time of sentencing, where both previous attempts at compliance and future efforts to do so, are relevant and should be reflected in the disposition crafted by the court.[801] The sequential order of sentencing principles, as set out in the "steps", also ensures that there is a principled progression in the court's analysis, and the sanctions which may be imposed.

A statute which provides a model for this approach is the recently enacted British Columbia *Public Health Act*.[802] In its sentencing provisions, criteria for determining sentence[803] and purposes of sentencing[804] are specifically set out, with a view to identifying sentencing principles which are appropriate for regulatory offences, having regard to the regulatory cycle. These sections read as follows:

## Determining sentence

105(1) Before imposing a sentence, a sentencing judge may request a joint submission from the offender and the prosecutor setting out any agreement on

(a) the circumstances that should be considered by the sentencing judge as either mitigating or aggravating the offence, and

(b) the penalty to be imposed.

(2) In determining the appropriate sentence, the sentencing judge must consider, in accordance with the regulations, circumstances that aggravate or mitigate the offence.

(3) In determining the appropriate sentence, a sentencing judge must

(a) consider the purposes of sentencing set out in section 106 [*purposes of sentencing*], and

(b) to give effect to those purposes,

(i) first, consider as a penalty one or more of the orders that may be made under section 107 [*alternative penalties*], and

(ii) second, consider whether a fine or incarceration under section 108 [*fines and incarceration*] is also necessary.

## Purposes of sentencing

106(1) In imposing a sentence, a sentencing judge may impose one or more penalties that, in order, achieve the following:

(a) first,

(i) if harm was caused, remedy the harm or compensate a person who remedied or suffered the harm, including the government, or

(ii) if no harm was caused, acknowledge the potential harm or further the regulatory objective underlying the provision that was contravened;

(b) second, if the offence was committed in relation to a regulated activity or other activity that the offender is reasonably likely to continue to engage in, rehabilitate the offender.

> (2) In addition to a penalty imposed under subsection (1), a sentencing judge may impose one or more penalties under subsection (3) or (4), unless it would be disproportionate to the offence, given the offender, the nature of the offence and the total of the penalties imposed under this section.
>
> (3) A sentencing judge may impose a penalty for the purpose of achieving general deterrence if the sentencing judge reasonably believes that the additional penalty would have a deterrent effect, including because
>
> (a) the penalty imposed under subsection (1) is inadequate to address the circumstances related to the offence, or
>
> (b) the nature of the penalty may
>
> (i) assist others similarly situated to the offender to avoid committing a similar offence, or
>
> (ii) educate others similarly situated to the offender respecting the seriousness of the offence.
>
> (4) A sentencing judge may impose a penalty for the purpose of punishing the offender if
>
> (a) the offender committed the offence knowingly or deliberately, or was reckless as to the commission of the offence, or
>
> (b) sufficient aggravating circumstances exist that the offender should be punished for the offence.

These provisions are complemented by sections that specify "alternative penalties",[805] which are designed to "give effect to the purposes of sentencing". These "alternative penalties" include the following: paying a person an amount of money as compensation for the cost of remedial or preventive action taken by or on behalf of the person as a result of the commission of the offence;[806] performing community service for up to three years;[807] complying with any conditions that the court considers appropriate for preventing the person from continuing or repeating the offence or committing a similar offence under the Act;[808] where the person is a corporation, designating a senior official within the corporation as the person responsible for monitoring compliance with the Act, or

regulations under the Act, or the terms or conditions of a licence or permit held by the corporation under the Act;[809] developing guidelines or standards in respect of a matter, implementing a process, or doing another thing, for the purposes of preventing the person from continuing or repeating the offence or committing a similar offence;[810] publishing, in any manner the court considers appropriate, the facts relating to the commission of the offence and any other information that the court considers appropriate;[811] posting a bond for an amount of money that the court considers appropriate for the purpose of ensuring compliance with a prohibition, direction or requirement under the section;[812] and submitting to inspections so as to permit a person specified by the court to monitor compliance, for a period of up to three years, with an order made under the section.[813]

The remaining sections under Division 3, which governs sentencing under the Act, address fine levels and length of imprisonment for offences,[814] as well as stating the factors to take into consideration for imposing a fine "in a lesser amount that the sentencing judge considers appropriate," due to the offender's inability to pay.[815] There is also a provision for applying to the court to vary an order made under s.107 respecting alternative penalties.[816] A mechanism exists, in addition, for recovery of penalties under s.107.[817]

### *3. Identifying and Prioritizing Sentencing Purposes and Principles for Regulatory Offences*

There is much to be said for the approach proposed by Verhulst, and exemplified by the British Columbia *Public Health Act*. [818] Purposes and principles of sentencing which are appropriate for regulatory offences are identified and enumerated in a sequential order for courts to consider, and implement, in their dispositions. The hierarchy of such principles is important, as it answers the often made criticism of the *Criminal Code*[819] statement of sentencing principles and purposes under s.718, namely, that merely listing sentencing objectives in a "smorgasbord approach," provides no direction as to the priority to be attached to competing principles, or how the court is to choose as between them.[820] However, by ranking in priority "the concerns that may be at some point conflicting", courts are provided with a mechanism "to resolve dilemmas arising from the need to consider competing principles."[821] A "progression in regulatory approaches," as expressed through sentencing purposes and principles, is therefore essential.[822]

In terms of the content of these sentencing purposes and principles generally, Verhulst's approach is consistent with the jurisprudence which recognizes both the "special approach" that is required when imposing punishment for breaches of the regulatory standard, such as in the area of protection of the environment, where remediation of the harm done, and

rehabilitation measures, are especially important considerations,[823] as well as the factors of general deterrence and denunciation in sentencing for regulatory offences, as stated in cases such as the Ontario Court of Appeal's decision in *Cotton Felts Ltd.*[824] Indeed, environmental offences, while said to merit a "special approach", have also been described as constituting "paradigmatic examples of regulatory offences."[825] For all manner of regulatory offences, then, a premium is rightly placed on measures which obligate the responsible party to remediate the harm, or potential for harm, he/she causes, given one's voluntary participation in the regulated activity. This also prevents the party from benefiting from any non-compliance, or having the incentive to do so, by failing to meet the regulatory standard.[826] In short, a sentencing rationale which is set out along these lines accords with what should be the reality of the sentencing process for regulatory offenders, and therefore meets the goals of "clarity, consistency and realism".[827]

*(i) remedying the harm or potential for harm*

The placing of priority on the sentencing principle that a regulatory offender must first remedy the harm or potential for harm he/she causes, is to effectively extend the "polluter pays" principle, that is, where polluters are assigned "the responsibility for remedying contamination for which they are responsible" and have imposed on them "the direct and immediate costs of pollution",[828] to regulatory offences violators more generally. Thus, a party breaching the regulatory standard, whether in the area of consumer protection,

workplace safety or environmental regulation, should, firstly, repair any harm he/she causes, through the making of restitution or compensation to the aggrieved party or victim, including the regulatory authority or government.

The use of restitution in this manner has been described as an "ideal measure" since it "personalizes the offence by inviting the offender to see his or her conduct in terms of the damage and injury done to the victim."[829] Restitution has also been described as a "rational sanction": it underlines "the larger social interest inherent in the individual victim's loss" which is "reaffirmed through restitution to victim," while also working "towards self-correction, and prevents or at least discourages the offender's committal to a life of crime", such that the community "enjoys a measure of protection, security and savings."[830] Stated simply, a sanction which is aimed at remedying "the harm caused by regulatory non-compliance," where it is appropriate to do so, addresses the "needs of victims" while ensuring that regulatory offenders "take responsibility for their actions and its consequences."[831]

There is a further reason why remedying the harm done, or potential for such harm, merits primacy as a sentencing consideration for regulatory offences. It is in keeping with restorative justice principles.[832] Restoring the victim to the position he/she was in prior to the commission of the offence constitutes an important goal of the overall sentencing process. Restorative justice is a means of repairing harm done to victims and communities; it also promotes the goal of

making offenders feel accountable for their conduct, and acknowledging responsibility. Such considerations are recognized as purposes and principles of sentencing under the *Criminal Code*.[833] Restorative justice principles are particularly appropriate for regulatory offences, given the nature of such conduct and its potential to impact the community at large when there is a failure to meet the regulatory standard, while providing the court with an opportunity to encourage the regulated party to make amends for its actions.[834]

*(ii) rehabilitation*

The next priority in the sentencing purposes and principles paradigm emphasizes rehabilitation. As Verhulst explains, sanctions which are designed to rehabilitate the offender are appropriate, not as a matter of course, but only where it is likely that the regulated party will continue to participate in the regulated activity following the imposition of punishment.[835] This sentencing principle reflects the unique nature of the regulatory cycle for regulatory offences offenders: the sentence meted out by the court does not usually conclude the party's involvement in the regulated endeavour; hence, courts should craft dispositions that will encourage the party to meet the regulatory standard in the future. Put another way, sanctions should be aimed at changing the offender's behaviour, such that he/she "moves back into compliance."[836]

At present, fines remain the usual penalty for failure to meet the regulatory standard.[837] They are intended to "eliminate any financial gain or benefit from non-compliance."[838] However, such sentences are punitive in nature, and do not operate as catalysts to "change attitudes or long-term behaviour".[839] Indeed, having offenders promote compliance is likely to be more effective at changing behaviour than merely imposing fines.[840] It is also problematic to rely on a process "of attaching a monetary value in sentencing."[841] A fine which is set too low may be viewed be as being "simply worth the price" of the violation to gain a business advantage; a fine which is set too high may have the undesirable effect of dissuading "lawful business efficiency."[842] In short, financial penalties may not always send the right message: fines which fail to act as a deterrent may actually provide an incentive for others "to fail to comply in return for a profit."[843] This is the antithesis of creating a "compliance culture."[844]

On the other hand, rehabilitative measures may be effectively put in place by court orders such as probation, which constitutes a mechanism for allowing persons who have been found guilty of an offence to "be given an opportunity to rehabilitate themselves, without being sent to prison, through the supervision of probation officers and the convicting court."[845] There is authority under the *Provincial Offences Act* of Ontario to place persons convicted of provincial offences on probation.[846] As is the case under the *Criminal Code* probation provision,[847] probation under the *Provincial Offences Act* is considered an appropriate sentencing disposition "having regard to the age, character and

background of the defendant, the nature of the offence and the circumstances surrounding its commission."[848] Where probation is imposed, the party is not only required to follow the conditions or terms set out by the sentencing court in the order, but additionally faces a penalty for failing to do so.[849] In the case of regulatory offences, terms of probation may be imposed to not only "address the cause of non-compliance" with the regulatory standard, but also to "instill long-term behavioural change."[850] These measures, as Archibald et al observe, provide a "welcome change" in comparison to the "monetary quantifications required by a fine."[851] Hence, the "principal virtue of probation" has been said to be "not in probation itself, but in the contrast which it provides to the inflexibility of imprisonment, and the impersonal nature of the fine."[852]

Indeed, changes made by Bill C-45[853] to the *Criminal Code* in 2003 respecting the use of probation for "organizations"[854] found guilty of criminal offences are considerably broader than those terms which may be imposed for individuals convicted of criminal offences who are placed on probation.[855] By way of example, the organization may be required to establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence,[856] and to communicate such policies, standards and procedures to its representatives.[857] Other terms authorize the organization to be required to report to the court on the implementation of these policies, standards and procedures,[858] and to notify the public of the offence of which the organization was convicted, the sentence imposed by the court, and any measures that the

organization is taking to reduce the likelihood of its committing a subsequent offence.[859]

These terms are essentially rehabilitative in nature, and demonstrate the utility of courts commencing the sentencing analysis for regulated actors by giving primacy to the consideration of "restorative and remedial remedies first", prior to progressing to "the notion of deterrence."[860] This is not to say, as Archibald et al observe, that the principles of remediation and rehabilitation will necessarily be given precedence over the principles of deterrence and denunciation. Rather, the focus of the court should first be on restorative and remedial measures.[861]

The utility of rehabilitative measures for corporate offenders convicted of regulatory offences has been questioned by commentators such as Swaigen and Bunt in their study paper for the Law Reform Commission of Canada.[862] As the authors comment, while corporations "can be coerced or pressured into changing policies and practices and revising systems and structures," the "central purpose" of the corporation is profit; hence, "how can you 'cure' the corporate compulsion to show a profit?"[863] In the words of another scholar, when a corporation is punished, there is "no soul to damn" and "no body to kick."[864]

It is to be acknowledged that corporate offenders are different from individual offenders: while some sanctions, such as fines, may be imposed in

both cases, in other instances this is not possible, as in the case of the use of imprisonment since the corporation has no liberty interest. However, this is not to say that rehabilitative sanctions are inapplicable for corporate offenders. Indeed, the *Criminal Code* organization sentencing provisions[865] reflect these differences, and recognize, through measures such as s.732.1(3.1)(f)) which allow the judge to require the organization to inform the public about the conviction, sentence and procedures adopted to prevent the offence from recurring, that "the public and customers may play an important role in influencing and monitoring corporate behaviour."[866] Hence, there are sentencing factors that can be devised to further rehabilitative initiatives by corporate offenders. Examples set out in the *Criminal Code* organization provisions include directing the sentencing court to take into account any penalty imposed by the organization on a representative for their role in the commission of the offence;[867] any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence;[868] and any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.[869]

There are many examples of regulatory offences probation orders being imposed by courts on corporations for the express purpose of rehabilitation. In *General Scrap Iron and Metals Ltd*., [870] Watson J., as he then was, observed that the imposition of probation in the case of corporate offenders, and the potential for subsequent breach proceedings, constitutes an effective means of elevating the "level of social supervision of corporations", having regard to the fact that the

"entity being sanctioned is not the entity being spoken to by the sentence disposition."[871] Indeed, where the recurrence of the breach of the regulatory standard is "real", the court may consider that a probation order is more effective than a fine, since probation may be used to require the corporation to expend funds to improve its monitoring systems, as well as providing funds to alleviate the damage "both known and unknown" that it has caused."[872]

Similarly, in *R.* v. *Panarctic Oils Ltd.,*[873] the court noted that while a fine would reinforce the principle of deterrence, a probationary order would provide the defendant with "the opportunity that it requests to rehabilitate itself."[874] Probation also provides the means to require an offender to prepare a report proposing a remedial action plan and timetable concerning the lands it has polluted,[875] or making a contribution towards forest maintenance and restoration, as part of a probation order, which the court considered to be "a reasonable, even laudable, remedy for the harm done."[876] Indeed, it has been recently held by the Ontario Court of Appeal in *Ontario (Minister of the Environment)* v. *Quinte-Eco Consultants Inc*.[877] to be a proper use of probation to impose a term that the offender not engage directly or indirectly in the business of environmental consulting, under the authority of the *Provincial Offences Act* so as to "to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant."[878] The Court considered that the condition was "both rehabilitative in nature and served the purpose of preventing similar unlawful conduct, even though it may have had a punitive consequence."[879]

Other creative uses of probation have included terms requiring the corporation to fund a program to assist householders in ridding themselves of toxic waste, publish on the front page of their newsletter details of the conviction and penalties and terms of probation, prepare a technical advisory circular on the topic of toxic waste storage, place a caution on the land to warn future purchasers of the environmental damage caused, and a condition that it make environmental issues a mandatory agenda item on all Board of Directors' Meetings during the term of the probation order.[880] It has also been suggested that the court could order an "imbedded auditor" within a convicted corporation, so as to allow regulatory inspectors to monitor the company's compliance for a set period of time.[881]

*(iii) general deterrence*

The next step in the sentencing calculus involves consideration of the principle of general deterrence. While remedial and rehabilitative measures may be sufficient to achieve the regulatory objective, it should not be assumed that this will be the case in all instances. Indeed, a sanction which is designed to change the behaviour of others may be particularly apposite where a "systemic problem exists throughout a regulated industry," and the sentence of the court would demonstrate that "failure to achieve certain standards will not be tolerated."[882] Given the nature of the offence, and the circumstances of the

offender, remedial and rehabilitative sanctions may simply be insufficient, and an "additional penalty" may be required to convey to the regulated community that the penalty imposed by the court will not merely constitute the "business-cost for non-compliance."[883] Through the principle of general deterrence, courts can "send a message to other players in the industry."[884]

The Ontario Court of Appeal in its *Cotton Felts Ltd.* decision, explained the operation of the general deterrence principle in relation to offenders who breach the regulatory standard by stating that, in computing the quantum of fine, the controlling principle 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.[885] Sanctions should therefore "signal to others within the regulated community that non-compliance will not be tolerated and that there will be consequences."[886] There must therefore be a "deterrent effect" in the court's sanction, when imposed to effect a change in the behaviour of others.[887]

Given that fines, as noted in *Cotton Felts Ltd.*, are the disposition of choice for breaching the regulatory standard, it is important that there is an effective deterrent effect of such penalties when this sentencing consideration is implicated. Otherwise there will be the unintended result that such fines are regarded as merely the cost of doing business. A deterrent penalty must be intended to send a strong message that the risk of failing to achieve the

regulatory standard will not be tolerated. To use the language of Professor Macrory's "penalties principles", such sanctions should ensure that there is no financial benefit obtained by non-compliance. [888] That is, it is important that there is no incentive to fail to meet the regulatory standard in order to make a profit.[889]

*(iv) denunciation*

Finally, the court may impose a sentence to emphasize the principle of denunciation for the purpose of punishing the regulated party. Verhulst contends that a punitive response will be justified where the offender commits the regulatory offence where there are "key aggravating factors", such as "deliberate or reckless conduct."[890] The British Columbia *Public Health Act*[891] employs similar language, providing that a penalty may be imposed for the purpose of punishing the offender where the party committed the offence "knowingly or deliberately, or was reckless as to the commission of the offence,"[892] or "sufficient aggravating circumstances exist."[893] In Verhult's view, while most regulatory offences do not require proof of negligence or intent, the presence of "deliberate or reckless conduct" merits punishment.[894] Indeed, conduct of this nature may constitute "key aggravating factors."[895]

It is to be acknowledged that while *mens rea* is not usually a constituent element of regulatory offences, its presence places the offender on a similar footing to one who commits a criminal offence, and therefore merits greater

punishment. As Madigan J. explained in *R.* v. *Virk*,[896] where there is a *mens rea* element in a regulatory offence, and thus some degree of moral blameworthiness or fault, this has "significance for sentencing" and should be reflected in the court's disposition, since such offences are "much more serious and therefore more comparable to criminal offences than to public welfare offences."[897]

Care must be taken, though, not to unduly limit the legitimate sentencing principle of denunciation to only those cases where there is knowing or deliberate or reckless conduct on the part of the offender. Most regulatory offences by definition involve negligence (strict liability), while others may preclude a fault element altogether (absolute liability). Consequently, it will be few regulatory offences that incorporate the elements specified by Verhulst, and will thereby be deserving of punishment. Indeed, the Supreme Court of Canada in the *Sault Ste. Marie* decision took into account "the virtual impossibility in most regulatory cases of proving wrongful intention" as a justification for recognizing strict liability as a middle ground or "half-way house" between offences involving *mens rea* and those of absolute liability.[898] The vast majority of regulatory offences, following *Sault Ste Marie*, have been interpreted, in fact, as strict liability offences, that is, as offences of negligence where there has been "negligent violation of statutes."[899] Moreover, those public welfare offences that do contain a *mens rea* element, as Archibald et al observe,[900] are likely to qualify for prosecution under the Bill-45 *Criminal Code* negligence provisions for organizations.[901]

In any event, the sentencing principle of denunciation may seem particularly appropriate in strict liability offences where the defendant has failed to exercise reasonable care, and as a result a death has occurred on the work site, or a serious spill has polluted a town's water supply. These are offences which may be as likely the result of a failure to put in place sufficient compliance systems, or to train employees adequately, or to properly gauge the foreseeability of an event from happening, as opposed to knowing or deliberate or reckless conduct on the part of the regulated party. This is not to say that actual harm is required so as to justify punishment. Endangering public health, or failing to care for vulnerable persons under one's supervision, may be sufficient to merit a penalty for the purpose of punishing the offender. Accordingly, it would seem appropriate, as a sentencing principle for regulatory offences, to reserve denunciatory penalties for conduct which is sufficiently aggravating in nature, and may even justify prohibiting the offender from participating in the regulated activity for a temporary or permanent period of time. However, the bar must not be set so high that such punishment will be imposed in all but the most egregious of cases, and that for all intent and purposes courts are restricted to imposing denunciatory sentences for regulatory offences conduct which is, essentially, the equivalent of a criminal offence.

The use of denunciation as a sentencing principle for breaches of the regulatory standard is in accordance with the meaning of denunciation as a

sentencing principle more generally. Denunciation is, in essence, "a communication process which uses the medium of language to express condemnation."[902] In *R.* v. *C.A.M.,*[903] Lamer C.J., on behalf of the unanimous Court, stated in this regard:

> The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law.[904]

Where the party's failure to meet the requisite regulatory standard is such that a denunciatory sentence is appropriate, the court should impose a sentence on this basis. It may well be that the "culpability of the offender," as opposed to the circumstances of the offence, provides sufficient aggravating features which are deserving of punishment.[905] Indeed, the "victim" of most regulatory offences will be "society as whole rather than a specific person."[906] Still, there will be regulatory offences comprised of essentially negligent behaviour, as demonstrated in the matrix of sentencing jurisprudence in chapter 4, where it is appropriate to fashion a sentence which denounces societal unacceptable behaviour: in the area of *workplace safety,* as in the case where a worker was killed in an explosion due to a radio miscommunication during a blasting operation, and the court fined the company $650,000;[907] in the area of *consumer protection*, as where convictions for misleading advertising, involving a fraudulent internet "yellow pages" business directory, where the revenues generated by the

mail fraud scheme exceeded $1,100,000, resulted in jail sentences being imposed;[908] and in the area of *environmental regulation*, as where a defendant who had been convicted numerous times for violating anti-pollution by-laws, and was found in contempt of court due to violating an order made by a justice of the peace, was imprisoned for six months.[909]

The utility of imprisonment as a sanction for regulatory offences was recognized by Justice Cory in the *Wholesale Travel Group Inc*. decision.[910] He put the matter in these terms:

> Regulatory schemes can only be effective if they provide for significant penalties in the event of their breach. Indeed, although it may be rare that imprisonment is sought, it must be available as a sanction if there is to be effective enforcement of the regulatory measure. Nor is the imposition of imprisonment unreasonable in light of the danger that can accrue to the public from breaches of regulatory statutes. The spectre of tragedy evoked by such names as Thalidomide, Bhopal, Chernobyl and the Exxon Valdez can leave no doubt as to the potential human and environmental devastation which can result from the violation of regulatory measures. Strong sanctions including imprisonment are vital to the prevention of similar catastrophes. The potential for serious harm flowing from the breach of regulatory measures is too great for it to be said that imprisonment can never be imposed as a sanction.[911]

As can be seen, punishment or imprisonment is an important sentencing tool for regulatory offences. It is not linked, however, to knowing or deliberate or reckless conduct on the part of the offender, but, as Archibald et al note, to the "potential gravity of the adverse effect."[912] As the authors go on to comment, this approach is "consistent with the foundation of regulatory offences in public welfare."[913]

Verhulst does acknowledge that there will be cases where punishment or denunciation is justified for breaches of regulatory statutes, apart from cases involving intentional, deliberate or reckless acts. She cites, as examples of sufficient aggravating factors which merit such a "punitive response", the offender's failure to exercise due diligence "if it would have been simple or inexpensive to do so, or if the risks of harm were particularly high," or the party's "dismissive or obstructive attitude towards regulatory officials", especially "if attempts have been made to suppress the offence or re-direct blame."[914] These considerations would clearly constitute the requisite "sufficient aggravating circumstances," so as to be deserving of punishment, under s.106(4)(b) of the British Columbia *Public Health Act*.[915]

Lastly, it should be noted that punishment or denunciation may involve an element of incapacitation to protect society, apart from the use of imprisonment. Incapacitation is achieved, primarily, through the use of custodial sentences.[916] However, in the context of regulatory offences, an incapacitation order will "generally prohibit the offender from engaging in certain regulated activities or acting in certain capacities temporarily (or even permanently).[917] As Verhulst observes, such sanctions are particularly effective for activities that require licences or permits to operate, but are not restricted to such operations.[918] For repeat offenders who have not been dissuaded by monetary penalties, incapacitation while severe, may nonetheless be appropriate.[919] There is a need

for such sanctions when deterrence fails, and cooperative and remedial approaches have been exhausted; in the regulatory enforcement pyramid, the ultimate sanctions are licence suspension and licence revocation.[920] Without recourse to these incapacitation sanctions, when all else fails, the enforcement pyramid cannot be effective.[921]

*4. Sentencing Purposes and Principles in a Statute of General Application*

The British Columbia *Public Health Act's* provisions with respect to punishment appear in the context of a discrete regulatory law statute, and not one of general application for all regulatory offences, as would be the case with a similar provision pertaining to punishment purposes and principles in the British Columbia *Offence Act*[922] or Ontario's *Provincial Offences Act*.[923] It may well be appropriate, as a matter of statutory drafting, to word a provision broadly for ease of application to other provincial statutes, in much the same way that the *Criminal Code*[924] statement of statutory sentencing purposes and principles is set out,[925] which applies to other federal statutes creating offences. There is a presumption of coherence and consistent expression, such that statutes enacted by the legislature that deal with the same subject are presumed to be drafted with the other in mind, and not to contain "contradictions or inconsistencies."[926] Indeed, statutes which deal with the same subject matter are to be interpreted with reference to each other, to ensure that they operate harmoniously.[927]

However, it is preferable that a statement of sentencing purposes and principles should be placed in a provincial offences statute of general application, so that these principles are transferable, and may therefore be applied uniformly to all other statutes containing offences in the jurisdiction. Otherwise, a court lacks the power to make an order that is authorized under one statute, but not another. In Ontario, the vehicle for setting out a statement of sentencing purposes and principles that applies to other provincial statutes is the *Provincial Offences Act*.[928] If it is thought desirable to do so, it is open to the legislators to craft additional sentencing principles to apply to a particular statute, should a purpose or principle, such as denunciation, be considered to merit primacy for breaches of a particular regulatory standard. Another approach, which is available, is to set out additional sentencing considerations that apply to particular regulated parties, following the model provided by the *Criminal Code* probation provisions for organizations only.[929]

An illustration of the type of issues that arise where provincial statutes contain sentencing considerations, which are not of general application, is illustrated by the Ontario *Regulatory Modernization Act, 2007*.[930] This Act sets out a provision stating that where a person has a previous conviction under the same or another statute, it should be regarded by the court as an "aggravating factor"[931] which may be used to justify "a more severe penalty."[932] The inclusion of aggravating factors in one statute, as opposed to an Act of general application where sentencing considerations are grouped together and organized, has the

potential to make it more difficult, if not confusing, for the parties, including courts, to be aware of the relevant sentencing purposes and principles, and to apply and prioritize them in a consistent manner. Of course, it remains open for a statute to set out additional aggravating factors on sentencing, depending on the manner of the commission of the proscribed act, or the conduct of the offender.[933] There may also be enacted a statement of sentencing purposes and principles specific to the particular statute, with reference to the statute of general application.[934]

The Ontario Court of Appeal's decision in *Serfaty*[935] provides an illustration of the application of such additional sentencing provisions. In upholding penitentiary sentences imposed for a mail fraud scheme involving an Internet Yellow Pages business directory that generated over $1.1 million, contrary to the *Competition Act*,[936] the Court noted that a number of the circumstances in the case qualified as aggravating factors under s.380.1 of the *Criminal Code*,[937] respecting punishment for fraud, which had been enacted as part of the government's recent corporate crime initiative.[938] These factors were stated to be the following: (1) the value of the fraud committed exceeds one million dollars[939] - this amount was exceeded in the case; (2) the offence adversely affected, or had the potential to adversely affect, the stability of the Canadian economy or financial system or any financial market in Canada or investor confidence in such a financial market[940] - the Court found that the nature of the misleading invoice scheme forced business people to scrutinize every

invoice for fraud, thereby "undermining consumer and business confidence in the marketplace;"[941] (3) the offence involved a large number of victims[942] - it was stated that there were hundreds of thousands of victims; and (4) in committing the offence, the offender took advantage of the "high regard in which the offender was held in the community"[943]- the accused were found to have traded on a "known brand", and the deceit was "compounded" as the brand was not their own."[944] This *Code* provision, then, provides an illustration of aggravating circumstances peculiar to an offence, "without limiting the generality" of the sentencing principles that are stated to operate more broadly.[945] Indeed, it is even stated that the court should not consider, as mitigating factors, a list of considerations, such as the offender's employment, employment skills or status or reputation in the community "if those circumstances were relevant to, contributed to, or were used in the commission of the offence."[946]

*5. Sentencing Purposes and Principles for All or Some Regulatory Offences*

An issue that does arise with respect to enumerating a statement of sentencing purposes and principles in a statute of general application, such as the Ontario *Provincial Offences Act,* is that the Act differentiates between ticket offences under Part I, where there is a maximum fine level of $1,000, and no possibility of imprisonment or use of probation,[947] in contrast to Part III proceedings, where the Act authorizes the use of imprisonment and probation, a general penalty of $5,000, and other sentencing dispositions.[948] The question

which therefore may be posed is whether a statement of sentencing purposes and principles should reflect these differences, and be limited in its application to the more serious Part III proceedings only, or whether such a sentencing statement of purposes and principles should be applicable to all manner of proceedings under the Act, notwithstanding these procedural distinctions.

There are arguments that may be fashioned, with some force, in support of excluding a statement of sentencing purposes and principles from the Part I ticketing procedure. The provisions under Part I allow for proceedings which are not permitted under Part III, such as default convictions where the defendant fails to respond to a ticket,[949] or fails to appear at trial;[950] Part I also permits re-openings and the striking out of the conviction by a justice of the peace, following a finding of guilt, where it is not the defendant's fault that he/she was convicted without a trial.[951] It is consistent with such provisions, it might be said, that a statement of sentencing purposes and principles should be inapplicable to Part I proceedings, since these Part I procedures do not apply, in turn, to the trial and sentencing provisions under Part III of the Act. Moreover, sentencing provisions which are set out under Part III, such as imprisonment and probation, are inapplicable to Part I proceedings.[952]

It may further be contended that if fines are the only available penalty under Part I of the Act, and minimal ones at that, at least for the most part, there is no practical need for a guiding rational on sentencing for courts, given that

such dispositions will almost always be imposed. Indeed, the amount of many such fines is determined at the time the offender is charged, that is, "set fines" are imposed by the court.[953] Further, the statement of purpose under the *Provincial Offences Act,* which refers to "a procedure that reflects the distinction between provincial offences and criminal offences,"[954] might be said to be consistent with a statement of sentencing considerations not applying to those offences which are most unlike criminal offences, that is, ticket offences under Part I of the legislation, as opposed to Part III offences which, in common with criminal offences, are initiated by sworn information.

On the other hand, there are a number of arguments which may be marshaled in support of a statement of sentencing purposes and principles applying to all proceedings under the *Provincial Offences Act*, despite the procedural differences and other distinctions between Part I and Part III of the legislation. To begin, it is not infrequently the case that offences which are the subject of a Part III proceeding, such as careless driving under the *Highway Traffic Act (Ont.)*,[955] might be charged under Part I, where, for example, the provincial offences officer considers that the nature of the infraction does not justify the laying of an information, and exposing the defendant to a greater penalty and the more formal Part III procedure. The opposite is also true. The officer might decide to lay a charge under Part III for an offence which is usually prosecuted under Part I, such as speeding,[956] in order to have the matter accompany a more serious offence which is committed at the same time, such as

driving while suspended.[957] In either case, the disposition of the court most likely to be imposed is a fine, in accordance with the *Cotton Felts Ltd.* decision,[958] regardless of whether the offence is charged under Part I or Part III of the *Provincial Offences Act.* A deterrent or exemplary monetary penalty may thus result, notwithstanding how the proceeding is conducted; conversely, the court may decide to impose no fine at all, as where there are extenuating circumstances that justify this penalty option.

In exercising its discretion to determine the amount of any fine, or vary a monetary penalty that is predetermined, that is, a "set fine", courts should approach the matter on a sound and principled basis, including the determination as to whether or not to raise or lower the fine, and by what amount. For example, an offender who comes before the court for the first time and accepts responsibility for his/her conduct, may be contrasted with one who has a previous record for the same offence, and lacks remorse. On what basis would a court determine the appropriate financial penalty, and distinguish between these two cases, if a statement of sentencing purposes and principles did not apply under Part I of the Act? It is the penalty amount that is impacted by the mode of procedure, not the underlying sentencing considerations. To preclude sentencing purposes and principles from applying if the matter is treated as a ticket offence, but not if charged by an information, thus seems an arbitrary distinction.

Moreover, it is the case with many offences under the *Criminal Code* that the prosecutor has an election as to the applicable trial procedure, which impacts, in turn, upon the available penalty and manner of trial which follows. If the election for such offences is by way of summary conviction, as opposed to indictment, in which case lesser penalties apply, the prosecutor's election evidences its view as to the seriousness of the charge. However, it does not result in the *Criminal Code* purposes and principles of sentencing provisions not applying to such offences, merely because the Crown considers that the summary mode of procedure will suffice for punishment or other purposes, such as a more expeditious hearing of the matter.

In the context of the *Provincial Offences Act*, if a statement of sentencing purposes and principles did not apply to all manner of regulatory offences, the mode of procedure would become the determining factor with respect to the applicability of such sentencing purposes and principles. That is, the question as to whether or not there was a statement of purposes and principles applying to a sentencing hearing would depend upon the nature of the proceedings, as opposed to the unique character of regulatory offences themselves. This would inevitably give rise to unpredictability and disparities in treatment of offences and offenders, and undermine the intended goals of certainty and consistency that the enactment of a statement of sentencing purposes and principles for regulatory offences is designed to achieve. It would also produce the anomalous result that the same basic rules of procedure and admissibility of evidence would

apply to all manner of provincial offences trial proceedings, but not sentencing hearings. In short, it would create a large body of offences for which sentencing considerations would continue to be inapplicable, and perhaps foster a perception that such offences were less deserving of penalties being imposed on a principled basis.

Therefore, the better view, on balance, is that a statement of sentencing purposes and principles should be enacted for all regulatory offences. This uniform approach has the advantage of being both principled and rational. The limitation of quantum of fine amount, or unavailability of other sentencing options, due to one mode of procedure, may properly be viewed as one factor for the court to consider on sentencing with regard to the seriousness of the offence, and the need, if any, for a deterrent penalty. It ought not, however, be used to preclude a principled approach from being taken to sentencing itself, merely because either imprisonment or a fine in excess of $1,000. is not an available sentencing option. Fines, even in minimal amounts, may trigger adverse consequences, as in the case of default of payment giving rise to suspension of a driver's licence, or non-renewal of a permit due to an outstanding balance. Indeed, the fine ranges themselves may be expanded or increased, as recent amendments to the *Provincial Offences Act* demonstrate.[959]

The impact that provincial offences have on the administration of justice in the province of Ontario was recently described by Chief Justice Bonkalo in her

remarks at the Opening of the Courts in 2009. Noting that approximately 2 million charges had been brought before the Ontario Court of Justice, comprised of criminal cases, family law matters and provincial offences, of which the vast majority were provincial offences, she commented:

> Many can be resolved quickly, some are complex, lengthy proceedings. Every one of them is important to the community and those directly affected by any case.[960]

It follows that there is no reason to think that a person, who comes before the court charged with a provincial offences ticket, would consider that such a matter is any less deserving of principled consideration, including on sentencing, than one who appears before the court under Part III of the *Provincial Offences Act,* or otherwise.

*6. Conclusion*

Regulatory offences are conceptually distinct from criminal offences, being offences that consist essentially of negligent conduct by a regulated actor who fails to meet the regulatory standard. Moral blameworthiness and fault are generally not required. Consequently, the sentencing principles and purposes which are appropriate for regulatory offences are not the same as those for true crimes. Nevertheless, it is essential that, as in the case of our criminal law, sentencing purposes and principles for regulatory offences are identified and

stated by the legislators, such that there can be no doubt as to what such sentencing principles are, and what is the guiding rationale behind them.

The ordering of sentencing purposes and principles for regulatory offences has similarities to the structure of enforcement based regulatory pyramids, where actions which are persuasive and voluntary are first considered, before moving on to more coercive measures, including criminal prosecution, and ultimately licence suspension or revocation. Sentencing purposes and principles for regulatory offences should borrow from this model. Courts should first consider remedial and rehabilitative measures, such as restitution or probation, before moving to more punitive responses, such as fines and imprisonment. The ultimate weapon in the court's sentencing arsenal, incapacitation, is the same as that at the apex of the regulatory enforcement pyramid: the power to suspend or prevent the regulated party from participating in the regulated activity. Stated simply, such an orderly and principled approach aims first at fostering a compliance culture; however, where more drastic steps are required, a culture change may also be sanctioned. These are the "penalties principles" that should illuminate regulatory justice.

It is thus not only important to enact a statement of such sentencing purposes and principles, but to arrange them into a hierarchical order so that courts may interpret and apply them in a coherent and logical fashion, to all manner of regulatory offences, regardless of the procedure by which they are

brought before the court. Having regard to the regulatory cycle, and the unique nature of regulatory offences, this statement of sentencing purposes and principles should require sentencing courts to do, in order, the following:

> 1. impose a sanction that *remedies* the violation, where it is possible and reasonable to do so;
>
> 2. impose a sanction to *rehabilitate* the offender, so as to promote the necessary changes, where it is likely that the offender will continue to engage in the regulated activity after sentencing, but the offender's behaviour must change to prevent future violations;
>
> 3. impose a sanction for *general deterrence*, so as to promote change in the behaviour of other persons, where it is appropriate in the circumstances, and would likely have social value;
>
> 4. impose a sanction to *denounce,* and therefore punish, the offender's behaviour, where aggravating circumstances make it appropriate to do so.

It is only when courts approach sentencing on this basis, applying a statement of sentencing purposes and principles enacted by the legislators in these terms, that regulatory objectives will truly be furthered. By encouraging the regulated party and the regulator authority to cooperate at the time of sentencing, so as to agree upon the aggravating and mitigating factors, as well as the sanctions to be imposed, the court will put in a better position to further the regulatory objectives on sentencing. The first priority on sentencing should be remediation; it ought to be followed by rehabilitation. In this manner offenders will be "held responsible for past conduct and encouraged to change their behaviour

to avoid future violations."[961] General deterrence and denunciation are the next two sentencing principles: the former where "there is reason to believe that doing so would actually have value", and the latter where it is warranted by the aggravating circumstances.[962] This approach, in simple terms, sets out and prioritizes the applicable sentencing purposes and principles for regulatory offences, and provides the courts with a clear rationale, aimed throughout, at furthering regulatory objectives, and hence, regulatory justice.

# Part V. FINISHING TOUCHES

## A. Retrofitting the Regulatory Offences Sentencing Toolbox: a New Set of Sentencing Options for a New Statement of Sentencing Purposes and Principles

### *1. Introduction*

Almost from the time of implementation in 1980 of the *Provincial Offences Act,*[963] concerns have been expressed that the sentencing options provided under the legislation were unduly limited.[964] This was noted, for example, in the Law Commission of Canada's study paper in 1985, entitled, *Sentencing in environmental cases*, where it was stated that due to "the wide range of offenders and contemplated by environmental laws," there was a need for "a broader range of penalties and a wider variety of sentencing tools."[965] This view has been echoed, in relation to all manner of regulatory offences by Archibald et al,[966] Verhulst,[967] and most recently the Ontario Law Reform Commission.[968] The issue is not unique to Ontario.[969] An enhanced use of probation, restitution and community service orders, among other penalty provisions, it is contended, would better equip courts with the necessary tools to sanction offenders who fail to achieve the regulatory standard, and are likely to return to the regulated activity following sentencing.

On the other hand, it is clear that the stated intention of regulatory procedural statutes, such as the *Provincial Offences Act* of Ontario, is to enact a procedure that "reflects the distinction between provincial offences and criminal offences."[970] Hence, the more limited use of sentencing dispositions is in keeping with this fundamental difference. Indeed, the *Provincial Offences Act*, unlike the *Criminal Code*,[971] does not contain penalty provisions which may be imposed for provincial offences, other than a general penalty, where no such punishment is set out in a provincial statute.[972] Moreover, the few offences it does include are "primarily procedural in nature",[973] such as failing to appear in court,[974] making a false statement,[975] contempt of court[976] and publishing the name of a young person.[977] Instead, the Act "creates a number of procedures to govern sentencing, and to govern the collection of fines,"[978] the latter being the most common form of punishment imposed by courts respecting the enforcement of public welfare statutes.[979]

But with the enactment of a new statement of sentencing purposes and principles for regulatory offences, it is essential that courts are equipped with the necessary sentencing tools so as to give effect to these new measures. Otherwise, the goal of achieving compliance with the regulatory standard, and changing the behaviour of the regulated party, through sentencing, will be frustrated. Stated shortly, courts will not be able to play an effective role in the regulatory cycle unless they are given the sentencing tools with which this may be done. While a detailed examination of the scope of all such sentencing

provisions is beyond the scope of this paper, it is appropriate to at least consider, in this concluding section, how the regulatory offences sentencing toolbox might be updated and equipped, in order to best implement a new statement of sentencing purposes and principles for regulatory offences.

*2. Provincial Offences Legislation Sentencing Provisions*

All provinces have provincial offences legislation in one form or the other. The majority, as exemplified by Ontario's *Provincial Offences Act* [980]and the British Columbia *Offence Act,*[981] contain discrete sentencing provisions of their own. However, some provinces simply provide for the summary conviction procedure set out in the *Criminal Code*[982] to apply, including punishment.[983] Typically, provincial offences sentencing provisions differ dramatically with those contained in the *Criminal Code*, particularly ones that have been added more recently, and which equip courts with broader and more innovative sentencing options, as in the case of conditional sentences for individuals,[984] and probationary terms for organizations.[985]

The sentencing options that are available under the *Provincial Offences Act* of Ontario are essentially these: fines, probation and imprisonment, or a combination thereof, such as a fine and period of imprisonment, or a suspended sentence and term of probation.[986] Discharges are not available, as there is no record of convictions under the Act.[987] In particular, a number of sentencing

provisions deal with fine enforcement and ancillary issues, such as surcharges,[988] the victims' justice fund account,[989] fine due dates[990] and extension of time for payment of fines,[991]regulations for work credits for fines,[992] civil enforcement of fines[993] and default of payment of fines.[994] Probation may be imposed for up to 2 years[995]; there is a penalty for breaching the terms of a probation order.[996] Where imprisonment is ordered, that is, the statute creating the offence provides for such a penalty, such as the offence of careless driving under the *Highway Traffic Act (Ont.),*[997] where there is a minimum fine of $200 and not more than $1,000, or imprisonment for up to 6 months, or both,[998] under the *Provincial Offences Act* the court may suspend the passing of sentence and place the offender on probation,[999] or, where less than 90 days' imprisonment is imposed, order that the sentence be served on an intermittent basis, such as over weekends.[1000]

In crafting such sentences, however, a number of questions may be posed. Did the court take into account how the breach of the regulatory standard impacted the victim? How would the victim, if he/she so wished, convey such information to the court? If such information were made available to the court, how should it play a role in the court's disposition, for example, might it support a term of probation, or influence the quantum of fine, or even be reflected in a custodial disposition as where a denunciatory sentence is warranted, but the victim attests to post-offence conduct by the offender mitigating the harm done? Community service, restitution or compensation, are examples of other matters

that the court might wish to consider in crafting its sentence, especially where the regulated party is likely to continue participating in the regulatory activity following sentencing. It is to these sentencing measures, and related provisions, that consideration will now be given.

*3. Victim Impact Statements*

Although the breach of the regulatory standard may cause harm, or potential for harm, to a person or the community, there is no formalized mechanism under the *Provincial Offences Act*[1001] to provide victims of regulatory offences with the opportunity to convey such information to courts, thereby depriving the judge or justice of the peace at the time of sentencing of hearing how the commission of the regulatory offence has impacted the party most directly impacted by the regulated offender's conduct. This contrasts to the *Criminal Code*[1002] where there are detailed provisions which allow the victim of a crime[1003] to file before the court a victim impact statement, in prescribed written form,[1004] "describing the harm done to, or loss suffered by, the victim arising from the commission of the offence."[1005] Such a victim also has the right to read his/her statement to the court;[1006] the court, in turn, has the obligation to inquire of the prosecutor, prior to sentencing, if the victim has had the opportunity to prepare a victim impact statement,[1007] and may adjourn the proceedings to allow this to be done.[1008]

The victim impact statement provisions under the *Criminal Code* reflect the objective that courts should impose sentences that "provide reparations for harm done to victims or to the community."[1009] Accordingly, victims play a "significant role" in the sentencing process.[1010] In fact, a number of purposes are served by victim impact statements in the sentencing process: courts receive "relevant evidence" concerning the effect or impact of the crime from the person able to provide direct evidence on point; resort to the "best evidence on the subject of victim loss", namely, the victim himself/herself, assures an accurate measure of any necessary compensation and brings home to the offender the consequences of his/her behaviour; victim participation in the trial process "serves to improve the victim's perception of the legitimacy" of the process; and information respecting the "individuality of the victim" promotes an understanding of the consequences of the crime in the context of the personal circumstances of the victim.[1011] In short, without this type of information "a Court would be unable on its own to adequately understand the harm done and the loss suffered by a victim."[1012] This, in turn, helps the court "to understand the circumstances and consequences of the crime more fully, and to apply the purposes and principles of sentencing in a more textured context."[1013]

A number of decisions support the practice of receiving victim impact statements with respect to regulatory offences into evidence on sentencing. However, this is up to the individual judge or justice of the peace. Hence, while victim impact statements have been adduced in evidence in provincial offences

proceedings in the Ontario courts,[1014] as well as other jurisdictions,[1015] there is no automatic right to do so. As a result, the authority of courts to hear such evidence remains unclear. Equally uncertain is the manner that such evidence should take when it is tendered, given that there are no prescribed victim impact statement forms, as is the case under the *Criminal Code*, and whether the victim has the right to personally address the court, or someone else, if the victim is unavailable to do so. It may also be unclear whether a person would be considered a "victim," and thus entitled to participate in the sentencing process, where he/she does not suffer harm immediately or directly, but is nevertheless impacted by the regulated party's conduct, as might occur in a pollution case. These are just a few of the uncertainties that illuminate the victim impact statement process, at present, in relation to provincial offences and other public welfare statutes.

One of the anomalies that results from this omission in provincial offences legislation is that for victims of both criminal and regulatory offences, which are the subject of the same or related transactions, such as stealing a car contrary to the *Criminal Code*,[1016] and causing an accident while driving it away in excess of the speed limit contrary to the *Highway Traffic Act*,[1017] the victim would be permitted to describe to the sentencing court, as of right, the impact of the offence on him/her only for the former offence, but not the latter. The same result is produced where the defendant is charged with a *Criminal Code* offence, such as dangerous driving,[1018] but is allowed to plead guilty to a provincial offence,

such as careless driving[1019]: the victim is entitled to address the court in the former instance only, but not the latter.

The enactment of victim impact statement provisions under the *Provincial Offences Act* would allow victims of regulatory offences to play a greater role in the sentencing process, while ensuring that courts receive information as to the impact of the offence on those most directly affected. This furthers the court's ability to address the issue of remedial measures as well as rehabilitation of the offender, and the other sentencing principles, deterrence and denunciation. Indeed, a statement of sentencing purposes and principles for regulatory offences, which accords priority to remediation undertaken by the regulated party, would doubtlessly be enhanced by the nature and quality of information furnished by victim impact statements, in furtherance of this sentencing objective.

*4. Probation*

The probation provisions under the *Provincial Offences Act*[1020] particularly illustrate the limitations of the Act's sentencing powers, especially when compared to the use of probation for offenders who commit criminal offences. Probation under the Ontario provincial offences legislation may be imposed for a maximum of 2 years[1021] whereas the *Criminal Code* maximum period of probation is 3 years.[1022] The latter neither distinguishes between the use of probation for indictable (more serious) nor summary conviction (less serious)

offences. Probation may be imposed in either case so long as the offence is not one where there is a minimum punishment prescribed by law,[1023] or the sentence of the court does not exceed two years,[1024] thereby amounting to a penitentiary sentence.[1025] Conversely, probation under the *Provincial Offences Act* is available only where the offence is one where the proceedings have been commenced by information, that is, Part III proceedings as opposed to Part I ticket proceedings;[1026] neither must the individual have been convicted of an absolute liability offence.[1027]

Under both the federal and provincial legislation, there are statutory or compulsory terms that must appear in a probation order, as well as those that are optional and may be imposed at the court's discretion. A comparison of these provisions readily demonstrates the limitations of probationary terms for offenders who breach provincial regulatory statutes, subject to the sentencing powers that may be set out in the particular provincial statute.[1028] This is particularly the case respecting optional conditions that may be utilized in a provincial offences probation order. Even the mandatory terms of probation differ, although there are three such conditions in both criminal offence and provincial offences probation orders.

Under the *Criminal Code* the statutory or compulsory terms of probation are the following: (1) keep the peace and be of good behaviour;[1029] (2) appear before the court when required to do so by the court;[1030] and (3) notify the court

or the probation officer in advance of any change of name or address, and promptly notify the court or probation officer of any change of employment or occupation.[1031] These differ somewhat from the mandatory three terms which are deemed to be contained in Ontario provincial offences probation orders: (1) the defendant not commit the same "or any related or similar offence", or any offence under a statute of Canada or Ontario or any other province of Canada that is punishable by imprisonment;[1032] (2) the defendant appear before the court as and when required;[1033] and (3) the defendant notify the court of any change in the defendant's address.[1034] In essence, the keeping the peace and being of good behaviour clause of the provincial offences probation order is worded more narrowly than its criminal counterpart, and the matters to notify the court of, as opposed to a probation officer, are confined to a change of address, as opposed to any change of name, employment or occupation.[1035]

It is with respect to the optional or discretionary terms of probation that may be imposed on sentencing, however, where it is most readily apparent as to the restrictive manner in which provincial offences probation orders operate. The more restrictive terms of probation under the *Provincial Offences Act* is said to reflect "the different character of provincial offences".[1036] Under the *Criminal Code*, there is a currently a list of 10 such optional conditions that may be imposed;[1037] additional optional terms of probation are set out for organizations.[1038] In the case of offenders placed on probation in relation to criminal offences, the optional terms include matters such as requiring the person

to report to a probation officer,[1039] or remaining within the jurisdiction of the court.[1040] Other terms include requiring the offender to abstain from owning, possessing or carrying a weapon,[1041] or providing for the support or care of dependents.[1042] It is also open to the court to direct that the offender perform up to 240 hours of community service over a period of not more than 18 months.[1043] Another optional condition is that the court may require the person to "comply with such other reasonable conditions as the court considers desirable" in order to protect society and facilitating "the offender's successful reintegration into the community."[1044]

As noted, there are also further optional conditions which are specifically set out in the *Criminal Code* for organizations.[1045] These terms read as follows:

> 732.1(3.1) The court may prescribe, as additional conditions of a probation order made in respect of an organization, that the offender do one or more of the following:
>
> (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
>
> (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
>
> (c) communicate those policies, standards and procedures to its representatives;
>
> (d) report to the court on the implementation of those policies, standards and procedures;
>
> (e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
>
> (f) provide, in the manner specified by the court, the following information to the public, namely,

> (i) the offence of which the organization was conviction,
>
> (ii) the sentence imposed by the court, and
>
> (iii) any measures that the organization is taking – including, any policies, standards and procedures established under paragraph (b) – to reduce the likelihood of it committing a subsequent offence; and
>
> (g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

By way of comparison, there are only four optional conditions that may be included in probation orders under the *Provincial Offences Act*. The first is that the defendant satisfy any compensation or restitution that is required or authorized by an Act.[1046] The effect of this is that compensation or restitution may be ordered as a term of probation only where it is specifically permitted by the enactment creating the offence; the *Provincial Offences Act* does not itself authorize this.[1047] Conversely, probation provisions in provincial offences legislation in other jurisdictions across Canada expressly permit compensation or restitution to be made a condition of such orders.[1048]

The second optional term is that the defendant perform community service. This condition requires the consent of the defendant, and the offence must be one that is punishable by imprisonment.[1049] These are significant limitations on the use of community service, and appear to reflect the view that such orders, at least in relation to provincial offences, are “sufficiently draconian in their intrusion on the liberty of the subject to require their restriction to

circumstances in which they are an alternative to imprisonment."[1050] Unlike the *Criminal Code*, there is no prescribed period over which such community service is to be completed, nor any ceiling on the number of hours of community service that may be ordered by the court. Moreover, provincial offences legislation in other Canadian jurisdictions authorizes the imposition of community service as a term of probation.[1051]

The third optional term is that where the conviction is for an offence punishable by imprisonment, the court may impose such other conditions relating to the circumstances of the offence and of the defendant that contributed to the commission of the offence, as the court considers "appropriate to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant."[1052] This term therefore requires that the conditions "relate to the circumstances that actually contributed to the commission of the offence."[1053]

Finally, there is an optional condition respecting a reporting requirement. Where the court considers it necessary for the purposes of implementing the conditions of the probation order, it may direct that the defendant report to a "responsible person" designated by the court, as well as be under the supervision of the person to whom the defendant is required to report, where the circumstances warrant it.[1054] This optional term differs from the *Criminal Code* reporting condition in three significant ways: it can only be imposed where the requirement to report is "considered necessary" for the purpose of implementing

the other conditions of the probation order; the defendant must report to a "responsible person" as opposed to a probation officer; and the term that the defendant be under the supervision of the person to whom he/she reports is only to be imposed where "the circumstances warrant it".[1055]

Probation orders enable the court to supervise the conduct of the offender for a significant period of time following the imposition of the court's sentence. Under the *Provincial Offences Act* this can be for a maximum of 2 years.[1056] In addition, the offender can be punished for failing to follow the terms of probation. This includes fining the defendant up to $1,000, or imposing imprisonment for a maximum of 30 days, or both; the court can also make changes or additions to the probation order, and extend its application for an additional 1 year period.[1057] Alternatively, it is open to the justice who made the original probation order to revoke it, and instead impose the sentence which was suspended upon the making of the probation order.[1058]

For offenders convicted of regulatory offences, the operation of s.72(3) respecting optional or additional terms of probation severely limits the court's ability to use probation as a means of furthering the regulatory objective through remedial and rehabilitative measures. Indeed, a probationary term that is appropriate for rehabilitation may have "a secondary punitive effect."[1059] Community service, for example, is permitted only with the defendant's consent and where the underlying offence is punishable by imprisonment; compensation

and restitution are available only where authorized by the statute in question. However, as Verhulst observes, in order for courts "to craft the most appropriate sentence", it is essential that there be "a wide variety of sentencing options".[1060] The Ontario provincial offences legislation, on the other hand, appears to inhibit such sentences, at least through the restrictive scope of probation orders.

Moreover, the Act frustrates other innovative approaches, such as the use of an "imbedded auditor" to monitor compliance by the defendant with the court's order, as proposed by Archibald et al.[1061] Another measure the authors put forth is a requirement that corporations post a bond, as a form of security to the Crown, to ensure that there are funds available to satisfy any potential fines or remediation "in any sector where there are significant regulatory constraints."[1062] Such terms might well be included in a provincial offences probation order, were there the authority under s.72(3)(c) to do so, on the basis that such conditions would "prevent similar unlawful conduct" or "contribute to the rehabilitation of the defendant. "On the other hand, the *Criminal Code* probation terms for organizations[1063] provide a model of what additional terms of probation might be considered desirable and appropriate, especially in relation to corporations convicted of breaching regulatory statutes. At a minimum, these *Code* provisions suggest that it is appropriate to set out probationary terms that operate differently for corporations than for individuals. Indeed, the *Criminal Code* probationary provisions for organizations seem particularly apposite for regulated parties who

fail to adhere to the regulatory standard, as they are particularly directed towards remedial and rehabilitative goals.

*5. Fine Option Programs*

Least it be thought that the issue of sentencing inflexibility merely stems from the restrictive manner in which probation is provided for under the *Provincial Offences Act*,[1064] it should be noted that there is a dearth of other sentencing options and ancillary provisions in the legislation, beyond fines and jail. There is currently no fine option program or manner in which work credits can be performed in lieu of financial penalties. It was contemplated in the original legislation that such a program be established in order to allow the offender to satisfy a fine by performing specified work.[1065] There is no requirement under s.67 of the Act that the fine must be in default in order for the defendant to be eligible for the work credit program. A similar fine option program is set out under s.736 of the *Criminal Code*[1066]. For impecunious offenders who commit regulatory offences and are fined, then, there is no system in place of "working off" fines, although other relief from payment provisions are available.[1067]

While regulations were enacted to permit such a fine option program to operate for provincial offences, there continues to be no such program in existence in Ontario.[1068] Indeed, the schedule of fine option program districts has been revoked.[1069] As a result, Ontario is one of the few jurisdictions in Canada

not to have a fine option program in operation.[1070] It has been observed that such programs are "clearly aimed at offenders of limited means for whom a fine is the appropriate disposition."[1071]

The Supreme Court of Canada has made reference to the absence of the fine option program in Ontario, commenting that the dismantling of the program's administrative apparatus appeared to be in response to "budget cuts".[1072] The defendant in the case in question had been convicted of being in possession of contraband tobacco, contrary to the *Excise Act*,[1073] and was sentenced to the minimum fine, of which he was unable to afford. The trial judge commented that had the fine option program been available in Ontario, he would have enrolled the defendant to work off the debt over a period of time through community service.[1074] This case attests to the usefulness of fine option programs for regulatory offences, and their potential application under provincial offences legislation.

*6. Alternative Measures*

Other options, such as "alternative measures"[1075] which are set out in the *Criminal Code* for adult offenders, or "extra-judicial sanctions" for young persons,[1076] are not available under the *Provincial Offences Act*.[1077] Some public welfare statutes do, in fact, authorize such alternative measures, as in the case of the *Canadian Environmental Protection Act, 1999,*[1078] which sets out

"environmental protection alternative measures."[1079] In essence, "alternative measures" are a form of diversion: the court is authorized to dismiss a charge where the defendant has entered into, or completed, an agreed upon program of alternative measures, such as community service, attendance at a victim awareness program, or donation to a charitable organization. Such programs are in keeping with restorative justice initiatives, by furthering the offender's rehabilitation through taking responsibility for the wrongful act, and acknowledging its impact on the victim. As is the case for fine option programs, it is up to the province to design and implement alternative measures or diversion programs.[1080]

Alternative measures under the *Criminal Code* are available only where "it is not inconsistent with the protection of society."[1081] Other requirements include that such measures must be appropriate having regard to the needs of the person alleged to have committed the offence, and the interests of society and of the victim.[1082] Victim input is an important component of diversion resolution agreements which found alternative measures.[1083] The defendant must accept responsibility for the conduct that forms the basis of the offence with which he/she has been charged;[1084] alternative measures are not to be used if the person denies participation or involvement in the commission of the offence,[1085] or wishes to have the charge dealt with by the court.[1086] Failure to complete the alternative measures program will lead to the continuation of the proceedings against the defendant.[1087]

In terms of how alternative measures might be proffered under provincial offences legislation, there are examples of public welfare statutes that contain such provisions, and might therefore serve as a model for Ontario's *Provincial Offences Act.* Incorporation of alternative measures into this procedural Act would thereby extend the ambit of such programs to all manner of regulatory offences, in much the same manner as does the *Criminal Code*. Under the *Canadian Environmental Protection Act, 1999,*[1088] "environmental protection alternative measures" are cast in similar terms to s.717 of the *Criminal Code*: where such measures have been used to deal with a person alleged to have committed a designated offence under the Act, the court may dismiss the charge, upon being satisfied that the person has complied with the agreement. [1089] The federal *Species at Risk Act*[1090] also puts in place an alternative measures scheme. Under this statute, an alternative measures agreement may remain in force for up to 3 years;[1091] it may be supervised by governmental or non-governmental organizations.[1092] These regulatory statutes effectively put in place diversion programs based on the *Criminal Code*, with appropriate modifications for the particular legislation. It would be open to the *Provincial Offences Act* to do the same: enact an alternative measures provision of general application, while allowing for modifications to suit individual provincial regulatory Acts.

*7. Alternative Penalties*

Alternative penalties, unlike alternative measures which are performed in advance of proceedings before the court, flow from a finding of guilt after the proceedings, and permit the court to impose a sanction which is beyond the typical penalty of a fine, probation or imprisonment. The British Columbia *Public Health Act*[1093] employs such an approach for regulatory offences. Some of the alternative penalties it provides resemble, in fact, terms that might be included in a probation orders; however, others are quite innovative and appear particularly well suited for regulated actors who have failed to achieve the regulatory standard.

A number of the alternative penalties in the British Columbia legislation might be considered to be quite traditional in nature, such as requiring the offender to pay compensation for the cost of a "remedial or preventive action taken by or on behalf of the person as a result of the commission of the offence."[1094] Community service may be ordered for a period of up to 3 years.[1095].The court may also require that the offender not engage in any activity that may result in the continuation or repetition of the offence, or the commission of a similar offence under the Act,[1096] or to comply with any conditions that the court considers appropriate for preventing the person from continuing or repeating the offence, or committing a similar offence under the Act.[1097]

In terms of some of the other more creative alternative penalties, the court may order that the offender submit information to the minister or a health officer, respecting the activities of the person, for a period of up to 3 years.[1098] Where the offender is a corporation, the court may designate a senior official within the corporation as the person responsible for monitoring compliance with the legislation, or the terms or conditions of any licence or permit held by the corporation under the Act.[1099] The offender can also be ordered to develop guidelines or standards, or implement a process, for the purposes of preventing the person from continuing or repeating the offence, or committing a similar offence.[1100] These guidelines or standards may also be made available over a 3 year period, from the time of their development, to another person or class of persons.[1101] The court also has the authority to order the offender to publish the facts relating to the commission of the offence, as well as any other information it considers appropriate.[1102] In addition, the offender may be required to post a bond in an amount of money that the court considers appropriate for the purpose of ensuring compliance with a prohibition, direction or requirement imposed as an alternative penalty.[1103]

The goal of alternative penalties is to "give effect to the purposes of sentencing" as set under the *Public Health Act*.[1104] The enactment of a statement of sentencing purposes and principles under the *Provincial Offences Act* of Ontario[1105] should likewise lead to a consideration of such innovative measures, which might encompass alternative penalties provisions, so as to give the court

broader flexibility in crafting a disposition that will encourage the offender to resume participation in the regulated activity, in a fully compliant manner.

*8. Creative Sentence Orders*

A recent trend in regulatory offences sentencing cases involves the courts imposing innovative sentencing dispositions which incorporate restorative justice principles, so as to give effect to the "polluter pays" principle.[1106] However, such "creative sentences" are dependent upon the statutory authority provided in the offence-creating statute. An example of sentencing powers of this nature is illustrated by s.79.2 of the *Fisheries Act*,[1107] which gives the court the authority to make the following orders:

> 79.2 Where a person is convicted of an offence under this Act, in addition to any punishment imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order containing any one or more of the following prohibitions, directions or requirements:
>
> > (a) prohibiting the person from doing any act or engaging in any activity that may, in the opinion of the court, result in the continuation or repetition of the offence;
> >
> > (b) directing the person to take any action the court considers appropriate to remedy or avoid any harm to any fish, fishery or fish habitat that resulted or may result from the commission of the offence;
> >
> > (c) directing the person to publish, in any manner the court considers appropriate, the facts relating to the commission of the offence;

> (d) directing the person to pay the Minister an amount of money as compensation, in whole or in part, for the cost of any remedial or preventive action taken by or caused to be taken on behalf of the Minister as a result of the commission of the offence;
> (e) directing the person to perform community service in accordance with any reasonable conditions that may be specified in the order;
>
> (f) directing the person to pay Her Majesty an amount of money the court considers appropriate for the purpose of promoting the proper management and control of fisheries or fish habitat or the conservation and protection of fish or fish habitat;
>
> (g) directing the person to post a bond or pay into court an amount of money the court considers appropriate for the purpose of ensuring compliance with any prohibition, direction or requirement mentioned in this section;
>
> (h) directing the person to submit to the Minister, or application by the Minister within three years after the date of the conviction , any information respecting the activities of the person that the courts consider appropriate in the circumstances; and
>
> (i) requiring the person to comply with any other conditions for securing the person's good conduct and for preventing the person from repeating the offence or committing other offences under this Act.

These provisions, which are not unlike "alternative penalties" as set out under the British Columbia *Public Health Act*,[1108] permit the court to effectively require the defendant to "take action" and clean up the mess for which it is responsible.[1109] In addition, the defendant may be ordered to pay monies to "laudable groups or agencies" rather than merely being fined.[1110] Decisions including creative sentencing orders have imposed requirements that the defendant provide the Ministry with a rationalized long-term site monitoring program and an engineering report which was to be submitted to the informant.[1111] In another case, the defendant was required to establish

scholarships for students enrolled in environmental science and resources technology, and construct an effluent treatment plant for which it had to post an irrevocable letter of guarantee respecting the plant's construction.[1112]

There is no authority to make such orders under the *Provincial Offences Act* of Ontario,[1113] the necessary authorization having to be found in the applicable legislation. Whether styled as "alternative penalties" or "creative sentences", the inclusion of such provisions in a procedural statute of general application would better permit courts to craft sentences which emphasize remedial and rehabilitative measures. This is in keeping with the underlying values of the regulatory regime, and thereby fosters a compliance culture. In essence, such sentences permit the court to be an active participant in the regulatory cycle, within the proper confines of sentencing, by furthering the regulatory objective and moving the offender towards compliance and a better relationship with regulators. There remains, if necessary, other sentencing powers to emphasize deterrence and denunciation. Creative sentencing provisions do not detract from such dispositions, but bolster the ability of courts, instead, to be more flexible in fashioning the most appropriate sentence, having regard to all the circumstances.

*9. Restitution and Compensation*

Restitution and compensation are examples of "compensatory community sanctions".[1114] These measures are directed at "redressing the victim of an offence for loss or injury suffered."[1115] They are not, strictly speaking, the same: compensation is "monetary payment to redress property loss" whereas restitution is "financial reimbursement for either property damage of for physical injury."[1116] The Law Reform Commission of Canada in its 1974 paper on "Restitution and Compensation" commented that restitution "challenges the offender to see the conflict in values between himself, the victim, and society;" in particular, it "invites the offender to see his conduct in terms of the damage it has done to the victim's rights and expectations."[1117]

The *Criminal Code*[1118] provides for restitution and compensation to be awarded, either as a term of probation as an optional "reasonable condition",[1119] or as a free-standing order.[1120] The latter may be entered as a judgment in civil court and enforced as such if it is "not paid without delay".[1121] In this manner, the amount of restitution becomes enforceable against the offender as if the order was a judgment of the civil court.[1122] Conversely, a probation term of compensation or restitution (the term "reparations" is sometimes used as well) is enforceable only during the currency of the probation order, and thereafter only if breach proceedings are initiated, and successfully prosecuted. In either event, the *Criminal Code* encourages the use of such compensatory terms: the

statement of purpose in s.718 directs courts on sentencing to impose sanctions to "provide reparations for harm done to victims or to the community",[1123] as well as to "promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and the community."[1124]

On the other hand, the *Provincial Offences Act*[1125] severely restricts the ability of courts to award restitution or compensation to victims of regulatory offences. Unlike the *Criminal Code*, restitution may not be imposed as a free-standing order, independent of probation, in relation to provincial offences. Conversely, provincial offences legislation in other jurisdictions across Canada authorizes the awarding of compensation on sentencing, as a remedy for persons aggrieved due to loss or damage to property caused by the defendant.[1126] Indeed, as the England and Wales Court of Criminal Appeal very recently stated in *R.* v*. Thames Water Utilities Ltd.,*[1127], there is "a clear policy need" to encourage the making of voluntary reparation by offenders who commit regulatory offences, whether by consenting to compensation orders, or making or pledging voluntary payments.[1128]

As for probation, the provincial statute in question must authorize the use of compensation or restitution in order for such a condition to be attached; there is no authority under the *Provincial Offences Act* itself to do so. [1129] Further, there is no enforcement mechanism for restitution under the legislation, apart from breach of probation proceedings, such as seeking to have unpaid restitution

orders enforced as a judgment in the civil courts, as permitted by the *Criminal Code,* as well as provincial offences legislation in other jurisdictions.[1130] The effect of these limitations is to significantly restrict the utility of such restitution and compensation provisions for regulatory offences, notwithstanding that this sanction is a method of encouraging offenders to take responsibility for their actions, while providing an effective means of redress to victims.

*10. Forfeiture*

Under the *Criminal Code*[1131] there is a power for a judge on sentencing to order forfeiture of property that is "offence-related property," and where the offence was committed in relation to that property.[1132] A similar provision is contained in the *Controlled Drugs and Substances Act*.[1133] The *Criminal Code* also sets out forfeiture powers on sentencing in relation to "proceeds of crime".[1134] A detailed set of procedures is provided for all these forfeiture provisions. While forfeiture is recognized as being "technically part of the sentence", a forfeiture order is not punishment specifically for the offence.[1135] Instead, these provisions are designed to "deprive offenders of the profits of their crimes and take away any motivation to pursue their criminal activities."[1136]

It is not uncommon for public welfare statutes to employ forfeiture powers for courts on sentencing. Forfeiture is considered to be an "additional punishment" for the more serious regulatory offences, especially where there is a

commercial or profit motivation. Forfeiture is a particularly effective tool where there have been repeated violations of the law, since a method to prevent repetition of the offence is to "forfeit the means used in the commission of the offence."[1137] Hence, the *Fisheries Act* provides that a court may order that anything seized, or the proceeds realized from its disposition, be forfeited to the Crown.[1138] Other regulatory statutes that employ similar forfeiture provisions typically include hunting and wildlife legislation.

For example, in a case of unlawfully hunting at night under the Manitoba *Wildlife Act*[1139] the defendants were each fined $600, plus costs, and the truck and rifles used in the commission of the offence, which were worth approximately $45,000, were the subject of a forfeiture order.[1140] In a Newfoundland fisheries case, the court fined the defendant $25,000, and ordered forfeiture of the crab traps which had been seized by the authorities, as well as the amount of money ($132,000) realized from the sale of the crab which had been illegally caught.[1141] It has been observed, however, that forfeiture is "a rough tool of justice", given that it does not permit the court to take into account the mitigating factors that Parliament has set out under s.718.2 of the *Criminal Code* as being relevant on sentencing.[1142]

Conversely, the *Provincial Offences Act*[1143] refers to forfeiture only in the context of Part I (ticket) proceedings. Pursuant to s.12(2), which deals with consequences of conviction, it is stated that any thing seized in connection with

the offence after the service of the offence notice under Part I is not liable to forfeiture. It appears that the rationale for this provision is that when the offence notice is delivered, the defendant "will know what articles have been taken from him and thus be aware of the potential consequences of conviction."[1144] It also minimizes the "possibility of an unreasonable seizure of goods" once the officer has decided that the offence does not warrant the issuance of a summons, and thus any appearance in court by the defendant[1145] The absence, then, of forfeiture powers under the sentencing provisions of the *Provincial Offences Act*, precludes the court from making any order in relation to the proceeds of regulatory offences, or items used in furtherance of the commission of the offence, absent a provision to this effect in the underlying public welfare legislation in question.[1146]

*11. Conditional Sentences*

Finally, consideration may be given to conditional sentences as a sentencing option for regulatory offences. Indeed, it was at the same time that a statement of sentencing purposes and principles was enacted for criminal offences that the conditional sentence regime was also created, pursuant to the 1996 amendments to the *Criminal Code*.[1147] Such sentences are an alternative to the traditional method of imprisonment, since incarceration is not required to be served within an institution; they also constitute a means by which the court can implement its sentencing powers so as to "craft the appropriate disposition for an

offender."[1148] Conditional sentences are additionally said to achieve restorative objectives of sentencing, while providing denunciation and deterrence.[1149]

It is neither necessary nor desirable to set out in detail the *Criminal Code* conditional sentence provisions, other than to note that a procedure is in place governing the imposition of such sentences.[1150] Among other things, conditional sentences must be consistent with the fundamental purpose and principles of sentencing. Certain offences are excluded, depending upon their nature or maximum terms of imprisonment, including offences punishable by mandatory minimum terms of imprisonment.[1151] There are also compulsory conditions and optional conditions which may be attached to the conditional sentence order;[1152] a mechanism exists for breach of conditional sentence proceedings.[1153]

Conditional sentences, however, are not available for provincial regulatory sentences. They are "creatures of statute." Hence, the absence of provisions authorizing the use of conditional sentences under the *Provincial Offences Act* renders them inapplicable.[1154] They may not be imposed as an enforcement mechanism for unpaid fines.[1155] Indeed, it is questionable whether innovative sentences fashioned by courts which seek to invoke aspects of conditional sentence orders, such as a house arrest term, are proper, notwithstanding that the offender may well have consented to such a provision so as to avoid serving a period of imprisonment in an institution.[1156]

The absence of legislative authority to impose conditional sentences for offenders who commit provincial offences, as opposed to criminal offences, produces a number of anomalous results. Conditional sentences carry broader optional (and compulsory) conditions which might be attached to the court's order, and thus be better suited for the regulatory context, as opposed to the more narrow terms of provincial offences probation terms which restrict, for example, the use of community service and restitution or compensation. Conversely, community service of up to 240 hours over an 18 month period may be made an optional condition of a conditional sentence;[1157]a term of restitution may be attached, as well, to the conditional sentence order.[1158] The procedure for breach proceedings of conditional sentences is also more substantive, thereby providing further incentive for the offender to comply with the disposition of the court.

Further, a conditional sentence may be imposed for an offender who commits, for example, the *Criminal Code* fraud offence,[1159] but not related offences under provincial statutes, such as a violation of the *Securities Act*, which is punishable by imprisonment of up to 5 years less one day, and a maximum fine of $5 million dollars, or both.[1160] To give another example, a person charged with the *Criminal Code* offence of street racing,[1161] whom might be permitted to plead guilty to the *Highway Traffic Act* offence of street racing,[1162] is subject to a period of imprisonment in both instances, but is required to serve such a sentence in an institution only in relation to the provincial offence. Finally, a

conditional sentence might be imposed with respect to a federal regulatory offence, due to the application of the *Criminal Code* sentencing provisions, but not the equivalent provincial regulatory offence, as in the case of a workplace accident that occurs in relation to a federal undertaking where both the federal and provincial health and safety provisions "co-exist" on the same work site.[1163]

Whether conditional sentences are a viable sentencing tool whose use should be expanded, or restricted, is a matter for the legislators. Certainly there are competing policy considerations engaged with respect to the availability of conditional sentences for regulatory offences. On one hand, the inability to grant conditional sentences for regulatory offences produces the "perverse" result, according to Archibald et al, that "more people are actually going to jail for regulatory offences" than those who commit criminal offences.[1164] On the other hand, providing different procedural options, including sentences, might be viewed as a legitimate basis upon which to distinguish provincial offences from criminal offences, as the statement of purpose in Ontario's *Provincial Offences Act* makes clear.[1165] Hence, the inapplicability of criminal offences sentencing dispositions, such as conditional sentences, in relation to provincial offences, is in keeping with this distinction between regulatory offences and true crimes. It is clear, however, that conditional sentences do constitute a sentencing option which provides courts with flexibility in crafting sentences, while allowing offenders to serve sentences in the community, thereby furthering their rehabilitation. The unavailability of conditional sentences under the *Provincial*

*Offences Act* of Ontario is thus another example of the more limited form of dispositions which illuminate the regulatory offences sentencing process.

*12. Conclusion*

Changes to the *Provincial Offences Act* are required in order to expand and modernize its sentencing powers. These include providing for the admissibility of victim impact statements, alternative measures or diversion, alternative penalties or additional orders so as to impose creative sentences, restitution as a free-standing order, forfeiture of the proceeds of a regulatory offence, and conditional sentences. In addition, the probation provisions of the Act might be enhanced to provide for lengthier periods of probation; optional conditions could be increased so as to mandate community service and restitution, as of right, in probation orders. So too might the discrete probation sections of the *Criminal Code* for organizations be added. These additions to the sentencing landscape for provincial offences would be very significant, but are in keeping with the goal of furthering the regulatory objective on sentencing. In the result, courts would be equipped with much more flexible, and modern, sentencing options.

On the other hand, expanding the regulatory toolbox in this manner would continue to blur the distinction between criminal offences and regulatory offences. The intention of provincial legislative regimes for regulatory offences is

premised on the distinction between such offences, and to provide a procedure which reflects this difference. It must be acknowledged that the addition to the *Provincial Offences Act* of the panoply of sentencing powers reviewed here, especially dispositions such as conditional sentences, would inevitably make provincial offences courts resemble, more and more, criminal courts. Whether the value, then, of such enhanced sentencing options makes the cost of the regulatory toolbox too high, or its use unwieldy, is a question that merits further reflection.

## CONCLUSION

In the Law Reform Commission of Canada's study paper in 1985, entitled, *Sentencing in environmental cases,* it was stated that the "time was ripe … for thoughtful discussion of the sentencing process."[1166] Twenty-five years later, it is long overdue. The *Provincial Offences Act's*[1167] sentencing provisions are in need of revision and reform, so as to not to be rendered obsolete by the many changes and developments that have occurred in the three decades following the enactment of the legislation. These include the *Charter of Rights* [1168] and its impact on punishment provisions and procedure generally; the trend towards escalating penalty provisions for regulatory offences; the enactment of a statement of sentencing purposes and principles for criminal offences in the *Criminal Code,*[1169] as well as the broader sentencing powers under the *Criminal Code* which overlap with regulatory offences, such as in relation to organizations and victims; and the heightened public awareness of the impact that regulatory laws play in our daily lives, to say nothing of the volume of regulatory offences.

There is a pressing need for the enactment of a statement of sentencing purposes and principles for regulatory offences. It is important for there to be such a guiding philosophy or sentencing rationale, set out by the legislators who are responsible for enacting regulatory offences, so that courts imposing punishment may craft dispositions which further the underlying regulatory objectives with respect to offenders who fail to meet the regulatory standard.

Otherwise, inconsistencies in sentencing patterns and practices will inevitably continue to illuminate regulatory justice, as courts are left to make such determinations on a case by case basis.

This is not to say that the enactment of a statement of sentencing purposes and principles under the *Provincial Offences Act* will be a panacea for all that ails the sentencing system. It may well be, as some will doubtlessly contend, that regulatory offences prove no more amenable to a statement of sentencing purposes and principles than has been the case with the *Criminal Code* of Canada statement of sentencing purposes and principles. However, unlike the Criminal *Code*, a statement of such sentencing purposes and principles under the *Provincial Offences Act* can and should be specifically tailored towards regulatory offences, and organized and arranged in a hierarchical manner, thereby leading to a more consistent and predictable application, and just result. .

This statement of sentencing purposes and principles should apply to all categories of provincial offences. There must not be different classes of regulatory offences for which sentencing considerations are perceived as being less important. The persons who are impacted by regulatory offences are certainly not likely to view them this way. However routine the disposition of the court may appear in arriving at the penalty of choice for breaching the regulatory standard, that is, a fine, the process by which such punishment is calculated and

put into effect must remain principled and rational throughout. Whether the party appears before the court in response to a ticket, or more formal court process involving a sworn information, should make no difference to regulatory offences sentencing practices and procedures.

Lastly, in order to implement this new sentencing statement of purposes and principles, broader and more modern sentencing tools will be required. Otherwise courts will lack the means to hear evidence from victims of regulatory offences on sentencing, and craft orders through probation and other provisions, such as community service, compensation and restitution, and forfeiture, which are most responsive to the circumstances of the regulated offender and the regulatory offence. These additions to the sentencing landscape for provincial offences are in keeping with the goal of furthering the regulatory objective on sentencing. They are also necessary so as not to frustrate the court's ability to play an effective role in helping the party achieve compliance with the regulatory standard. However, the scope of expansion of the regulatory offences toolbox must be carefully considered, so as not to become unnecessarily cumbersome, and merely duplicative of criminal offences sentencing provisions which are not well suited for application in the regulatory context, having regard to the fundamental differences between true crimes and regulatory offences.

In short, a person who comes in contact with the administration of justice in the province of Ontario is most likely to do so for a provincial offence, more so

than for any other matter. The most likely outcome of the regulated party's case will involve a sentencing disposition, in one form or another. This is the reality of regulatory justice in Ontario. It is time for the *Provincial Offences Act's* sentencing provisions to be modernized to reflect this fact.

## Endnotes

[1] Chief Justice Brian W. Lennox of the Ontario Court of Justice in his speech at the Opening of the Courts, on 10 January 2007, noted that in 2006 there were 600,000 criminal charges brought in the Ontario Court of Justice, of which 87% were dealt with by guilty plea or withdrawal. The trial rate was 5-8%.
[2] *R..* v. *R.R.,* 2008 ONCA 497, 90 O.R. (3d) 641, 238 O.A.C. 242, [2008] O.J. No. 2468 at para. 16 (QL) [*R.R*.].
[3] *Provincial Offences Act*, R.S.O. 1990, c.P.33 [*Provincial Offences Act*].
[4] Opening of the Courts, 10 January 2007, note 1.There were over 1,700,000 charges under the *Provincial Offence Act* bought before the court in 2006, plus 11,000 appeals, according to Chief Justice Lennox. That is, there were almost three times as many provincial offences or regulatory offences, than criminal offences, before the courts. The latest statistics which are available indicate that for 2009, there were 2,159, 186 charges received by the Ontario Court of Justice for charges under the *Provincial Offences Act*. Of these the trial rate was 2.5%.
[5] *Provincial Offences Act,* note 3, s.1(1) definition of "offence". The terms "provincial offences", "regulatory offences" and "public welfare offences" are used inter-changeably throughout this research paper.
[6] *Contraventions Act*, S.C. 1992, c.47, s.2 definition of "contravention". [*Contraventions Act*]
[7] T.L. Archibald, K.E. Jull, and K.W. Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Aurora: Canada Law Book Inc., 2005) at 12-9-12-10.
[8] Ontario Law Commission, *The Modernization of the Provincial Offences Act*. (Consultation Paper, November 2009) (Toronto: Law Commission of Ontario, 2009) at 17-18.
[9] *Criminal Code,* R.S.C. 1985, c.C-46 [*Criminal Code*].
[10] *Criminal Code*, note 9, s.718.
[11] *R.* v. *Wholesale Travel Group Inc.,*[1991] 3 S.C.R. 154, [1991] S.C.J. No. 79 (QL) [*Wholesale Travel Group Inc*.].
[12] *Wholesale Travel Group Inc.,* note 11 at [QL] paras. 136-137.
[13] F.B. Sayre, "Public Welfare Offences" (1933), 33 Colum. L. Rev. 55 at 73.
[14] Liora Salter, *Methods of Regulation* (Vancouver: Simon Fraser University Department of Communication, 1986).
[15] Ian Ayres and John Braithwaite, *Responsive Regulation. Transcending the Deregulation Debate* (New York: Oxford University Press, 1992) at 35. In Canada "a great deal of the power" of regulatory agencies is dependent upon persuasion: Liora Salter and Debra Slaco, *Public Inquiries in Canada* (Ottawa: Government of Canada, 1981) at 210.
[16] Ayres, note 15 at 40, describes this strategy as "regulation by raised eyebrows" or "regulation by vice-regal suasion", noting in their study of approximately 100 Australian regulatory agencies that while enormous powers were given to these regulators, it was hardly necessary to use them in order to secure compliance.
[17] *Wholesale Travel Group Inc.,* note 11 at [QL] para. 219.
[18] *R.* v. *Hydro-Quebec,* [1997] 3 S.C.R. 213, [1997] S.C.J. No. 76 at para. 46 (QL) [*Hydro-Quebec*].
[19] Jeremy Rowan-Robinson, Paul Q. Watchman, and C.R. Barker, "Crime and Regulation", [1988] Crim. L.R. 211.
[20] Rowan-Robinson, note 19. See further Keith Hawkins, "Bargain and Bluff. Compliance Strategy and Deterrence in the Enforcement of Regulation" (1983), 5 Law & Policy Quarterly 35 at 48.
[21] Archibald, note 7 at 12-1.
[22] Archibald*,* note 7 at 1-16.3.
[23] Archibald, note 7 at 1-16.3. See further Salter, note 14 at 151 where risk assessment is described as a "problem-oriented concept" whose use is said to imply that "developments *should* be allowed to proceed, and products used, unless serious problems have been identified."
[24] Archibald, note 7 at 12-1.
[25] *R.* v. *Cotton Felts Ltd.* (1982), 2 C.C.C. (3d) 287, [1982] O.J. No. 178 at para. 19 (QL) (C.A.) [*Cotton Felts Ltd*.].

[26] Archibald, note 7 at 12-1.
[27] L.H..Leigh, "The Criminal Liability of Corporations and Other Groups" (1977), 9 Ottawa L. Rev. 247.
[28] Law Reform Commission of Canada, *Studies in Strict Liability* (Ottawa: Government of Canada, 1974) at 2.
[29] The first *Criminal Code* of Canada, which was enacted in 1892, contained 983 sections: see D.H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: Osgoode Society, 1989) at 126. The current *Criminal Code* contains fewer section numbers due to the numbering method which is employed,, but there are considerably more provisions in total; it is approximately 1600 pages in length.
[30] Law Reform Commission of Canada, *Policy Implementation, Compliance and Administrative Law* (Working Paper 51) (Ottawa: Government of Canada, 1986) at 38.
[31] *Wholesale Travel Group Inc.,* note 11 at [QL] para. 134.
[32] Law Reform Commission of Canada, *Our Criminal Law* (Ottawa: Government of Canada, 1976) at 11.
[33] *R.* v. *Sault Ste. Marie (City),* [1978] 2 S.C.R. 1299, [1978] S.C.J. No. 59 (QL), 40 C.C.C. (2d) 353 at 364 [*Sault Ste. Marie*].
[34] *Sault Ste. Marie,* note *33* at [C.C.C.] 362-363.
[35] *Sault Ste. Marie,* note 33 at [C.C.C.] 373-374.
[36] *Sault Ste. Marie,* note 33 at [C.C.C.] 374.
[37] J. Swaigen, *Regulatory Offences in Canada. Liability & Defences* (Toronto: Carswell Thompson Professional Publishing, 1992) at 219.
[38] Glanville Williams, *Criminal Law. The General Part* (2nd ed.) (London: Stevens & Sons Limited, 1961) at 235.
[39] R. Libman, *Libman on Regulatory Offences in Canada* (Salt Spring Island: Earlscourt Legal Press Inc., 2002) at 1-3.
[40] *Sault Ste. Marie,* note 33 at [C.C.C.] 357.
[41] *Sault Ste. Marie,* note 33. See further Colin Howard, *Strict Responsibility* (London: Sweet & Maxwell, 1963) at 1, stating that regulatory offences are often part of a legislative scheme "for the administrative regulation of society."
[42] John C. Coffee Jr., "Does 'Unlawful' Mean 'Criminal'?: Reflections on the Disappearing Tort/Crime Distinction in American Law" (1991), 71 Bost. U.L.R. 194.
[43] Coffee, note 42. Although it might be said that since penalties create financial incentives to dissuade a person or corporation from engaging in conduct which is unlawful, a penalty is the "price" of violating the law: see Karen Yeung, "Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective" (1999), 23 Melb. U. L. Rev. 440 at 446.
[44] *Sault Ste. Marie, note 33* [C.C.C.] at 357.
[45] Clayton C. Ruby and K.E. Jull, "The Charter and Regulatory Offences: A Wholesale Revision" (1992), 14 C.R. (4th) 226 at 228.
[46] Swaigen, note 37 at 4.
[47] Sayre, note 13 at 56.
[48] Law Reform Commission of Canada, *Sentencing in environmental cases* (Ottawa: Law Reform Commission of Canada, 1985) at 4. The authors of this Study Paper are John Swaigen and Gail Bunt.
[49] S.P.Green. "Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Context of Regulatory Offences" (1997), 46 Emory L.J. 1533 at 1544.
[50] *Competition Act,* R.S.C. 1985, c.C-34 [*Competition Act*].
[51] *Combines Investigation Act,* R.S.C. 1985, c.C-23 [*Combines Investigation Act*].
[52] See Competition Bureau, Information Bureau, 22 September 1999, "Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the *Competition Act*."
[53] Competition Bureau, "Conformity Continuum Information Bulletin" (23 December 2003).
[54] Bill C-45, *An Act to Amend the Criminal Code (Criminal Liability of Organizations),* S.C. 2003, c.21 [Bill C-45]. The legislation came into force on 31 March 2004.

[55] In the first prosecution under these new *Criminal Code* amendments, a contractor was directing construction work outside a house, but then left the scene to get materials for the job, when the trench collapsed killing a worker. The *Criminal Code* charges were subsequently withdrawn, and the defendant was permitted to plead guilty for a $50,000 fine under the Ontario *Occupational Health and Safety Act,* R.S.O. 1990, c.O.1 [*Occupational Health and Safety Act (Ont.)*]: see *R.* v. *Fantini,* [2005] O.J. No. 2361 (QL) (C.J.) [*Fantini*]. To date there has been one further prosecution under the legislation, a case where an employee was crushed to death by a concrete press: *R.* v. *Transpavé Inc*., 2008 QCCQ 1598, [2008] Q.J. No. 1857 (QL) [*Transpavé Inc.*]. The company pleaded guilty to a count of criminal negligence causing death, arising from this workplace accident, and was fined $100,000.
[56] *Securities Act*, R.S.O. 1990, c.S.5 [*Securities Act (Ont.)*].
[57] *Wilder* v. *Ontario Securities Commission* (2001), 53 O.R. (3d) 519, 142 O.A.C. 300, [2001] O.J. No. 1017 at para. 23 (QL) [*Wilder*]. In this case the Court rejected a challenge to the Security Commission's jurisdiction to reprimand a lawyer.
[58] *Environmental Enforcement Statute Law Amendment Act, 2005,* S.O. 2005, c.12.[*Environmental Enforcement* Act (*Ont.)*]
[59] J. Gobert, "Corporate Criminality: New Crimes for the Times", [1994] Crim. L.R. 722.
[60] Gobert, note 59 at 725. See also Law Reform Commission of Canada, *Sentencing in environmental cases,* note 47 at 15 where it is noted that some regulators may even feel that where abatement has been achieved due to a prosecution, a fine may be "irrelevant" and "counter-productive" due to straining relations between enforcement officials, or reducing resources available to the offender for improvement of the environment.
[61] H.J. Glasbeek, "Commercial Morality Through Capitalist Law: Limited Possibilities" (1993), 27 R.J.T. 263 at 301.
[62] S.G. Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Cambridge: Harvard University Press, 1993) at 57-58.
[63] *Lévis (City)* v. *Tétreault,* 2006 SCC 12, [2006] 1 S.C.R. 420, [2006] S.C.J. No. 12 (QL) [*Lévis]*.
[64] *R.* v. *Kanda,* 2008 ONCA 22, 88 O.R. (3d) 732, 233 O.A.C. 118, [2008] O.J. No. 80 at para. 43 (QL) [*Kanda*]; *R.* v. *Raham*, 2010 ONCA 206, [2010] O.J. No. 1091 at para 37 (QL) [*Raham*].
[65] *Highway Traffic Act*, R.S.O. 1990, c.H.8 [*Highway Traffic Act (Ont.)*].
[66] *Kanda,* note 64 at [QL] para. 43.
[67] *Kanda*, note 64 at [QL] para. 21.
[68] *Highway Traffic Act (Ont.),* note 65, s.104(2.2).
[69] *Highway Traffic Act (Ont.),* note 65, s.75(4).
[70] *Highway Traffic Act (Ont.)*, note 65, s.84.1.
[71] *Kanda,* note 64 at [QL] para. 44.
[72] Swaigen, note 37 at 52.
[73] *Raham*, note 64.
[74] *R.* v. *Hickey* (1976), 13 O.R. (2d) 228 (C.A.) [*Hickey*]; *R.* v. *Polewsky* (2005), 202 C.C.C. (3d) 257, [2005] O.J. No. 4500 (QL) (C.A.), leave to appeal to S.C.C. refused, [2006] 1 S.C.R. xiii. [*Polewsky*]
[75] *R.* v. *Harper* (1986), 53 C.R. (3d) 185, [1986] B.C.J. No. 706 (QL) (C.A.) [*Harper*]; *R.* v. *Lemieux* (1978), 41 C.C.C. (2d) 33, [1978] Q.J. No. 184 (QL) (C.A.) [*Lemieux*]; *R.* v. *Naugler* (1981), 49 N.S.R. (2d) 677, [1981] N.S.J. No. 547 (QL) (C.A.) [*Naugler*].
[76] *Raham*, note 64 at [QL] para. 51.
[77] *Provincial Offences Act*, note 3, s.61.
[78] *Criminal Code*, note 9, s..787(1).
[79] Christopher Sherrin, *Charter Rights in Regulatory vs. Criminal Proceedings: A Distinction in Need of a Difference?* (Osgoode Hall Law School, York University: Ph.D. dissertation, 2008) at 217.
[80] J. Swaigen, "Negligence, Reverse Onuses and Environmental Offences: Some Practical Considerations" (1992), 2 J. Envtl. L. & Prac. 149 at 153.
[81] Swaigen, note 80. See also K.R. Webb, "Regulatory Offences. The Mental Element and the *Charter*: Rough Road Ahead" (1989), 21 Ottawa L.R. 419 at 421.
[82] Don Stuart, *Canadian Criminal Law, 5*th ed. (Toronto: Thomson Canada Limited, 2007) at 195.

[83] *Wholesale Travel Group Inc.,* note 11 at [QL] para. 42. For a more recent comment to the same effect, see *R.* v. *Dial Drug Stores Ltd*. (2001), 52 O.R. (3d) 367, [2001] O.J. No. 159 at para. 103 (QL) (C.J.); rev'd (2003). 63 O.R. (3d) 529, [2003] O.J. No. 754 (QL) (S.C.J.) [*Dial Drugs Stores Ltd*.]: "It would be cold comfort to those whose rights were infringed on the way to a conviction that the time they spent in a penitentiary was only a 'mode of enforcement' of a regulatory statute. It looks like jail and punishment to me and I am sure to anyone involved."
[84] See, for example, Law Reform Commission of Ontario, *Report on the Basis of Liability for Provincial Offences* (Toronto: Government of Ontario, 1990). In a recent decision considering the *Competition Act,* note 50, offence of making false or misleading representations to the public, the Ontario Court of Appeal observed in *R.* v. *Stucky,* 2009 ONCA 151, [2009] O.J. No. 600 at para. 20 (QL) [*Stucky*]: "Since the decision in *Sault Ste. Marie,* the distinction between criminal and regulatory offences has blurred. The label attached to the offence is no longer determinative. Rather, the penalties attached to the conduct, the values underlying the offence, and whether the offence is one for which *mens rea* is required must be considered."
[85] *Canadian Charter of Rights and Freedoms,* Schedule B, *The Constitution Act, 1982* [*Charter of Rights*]
[86] *R*. v. *974649 Ontario Inc*., 2001 SCC 81, [2001] 3 S.C.R. 575, [2001] S.C.J. No. 79 at para. 84 (QL) [*974649 Ontario Inc*.].
[87] *Occupational Health and Safety Act (Ont.),* note 55.
[88] The *Criminal Code* provides that a person who is sentenced to imprisonment for a criminal offence for a term of at least two years is to serve it in a penitentiary: s.743.1(1).
[89] P. Hogg, *Constitutional Law of Canada*, (Toronto: Carswell Professional Publishing, looseleaf) at 591.
[90] *Criminal Code*, note 9, s.742.1.
[91] Archibald, note 7 at 9-2. Conditional sentences are "creatures of statute". While conditional sentences are available under the provisions of the *Criminal Code*, there is no jurisdiction to impose them under provincial legislation: see the cases to this effect summarized in Libman, note 38 at 11.2(t).
[92] *Compulsory Automobile Insurance Act*, R.S.O. 1990, c.C.25 [*Compulsory Automobile Insurance Act (Ont.)*].
[93] *R.* v. *Jenkins*, 2010 ONCA 278, [2010] O.J. No. 1517 (QL) [*Jenkins*]. Trials held in the absence of the defendant, or *ex parte* proceedings, are permitted under s.54 of the *Provincial Offences Act,* note 3. The Court of Appeal in *Jenkins* rejected a constitutional challenge to the validity of such proceedings.
[94] *R.* v. *Hughes,* 2004 ABQB 521, [2004] A.J. No. 895 at para. 19 (QL) [*Hughes*].
[95] *Hughes*, note 94 *at* [QL] para. 21
[96] *R.* v. *Welcher,* 2007 NLTD 87, 267 Nfld. & P.E.I.R. 211, [2007] N.J. 153 at para. 34 (QL) [*Welcher*].
[97] *Wildlife Act*, R.S.A. 2000, c.W-10 [*Wildlife Act (Alta.)*].
[98] *R.* v. *Mistol,* 2002 ABPC 123, 321 A.R. 220, [2002] A.J. No. 922 (QL) [*Mistol*].
[99] M*istol*, note 98 at [QL] para. 22.
[100] *R.* v. *Virk,* [2002] O.J. No. 4102 (QL) (C.J.) [*Virk*].
[101] *Workplace Safety and Insurance Act, 1997,* S.O. 1997, c.16 [*Workplace Safety and Insurance Act (Ont.)*].
[102] *Virk*, note 100 at para. 54.
[103] *Virk*, note 100 at para. 56.
[104] *Virk*, note 100 at para. 57. The defendant was subsequently sentenced to 5 months' imprisonment, ordered to pay restitution of $33,596 to the Workplace Safety Insurance Board, and placed on probation for two years.
[105] *Retail Sales Tax Act,* R.S.O. 1990, c.R.31 [*Retail Sales Tax Act (Ont.)*].
[106] *Employment Insurance Act,* S.C. 1996, c.18 [*Employment Insurance Act*].
[107] *R.* v. *Cox*, 2003 ABPC 9, [2003] A.J. No. 152 (QL) [*Cox*]
[108] *Occupational Health and Safety Act, 1993*, S.S. 1993, c.O-1.1 [*Occupational Health and Safety Act (Sask.)*].

[109] *R.* v. *Westfair Foods Ltd.,* 2005 SKPC 26, 263 Sask. R. 162, [2005] S.J. No. 279 (QL) [*Westfair Foods Ltd*.].
[110] *Business Practices Act*, R.S.O. 1990, c.B.18 [*Business Practices Act (Ont.)*].
[111] *R.* v. *Pellegrini,* 2006 ONCJ 297, [2006] O.J. No. 3369 (QL) (C.J.) [*Pellegrini*].
[112] *Fair Trading Act*, R.S.A. 2000, c.F-2 [*Fair Trading Act (Alta.)*].
[113] *R.* v. *Kreft,* 2006 ABPC 258, 407 A.R. 376, 66 Alta. L.R. (4th) 341, [2006] A.J. No. 1249 (QL) [*Kreft*].
[114] *Local Authorities Election Act,* R.S.A. 2000, c.L-21 [*Local Authorities Elections Act (Alta.)*].
[115] *R.* v. *Aftergood,* 2007 ABPC 122, 419 A.R. 82, 74 Alta. L.R. (4th) 368, [2007] A.J. No. 820 (QL). [*Aftergood*]
[116] Caitilin R. Rabbitt, *Social Regulation and Criminal Sanctions: Social Control for a Democratic Society* (New York University: Ph.D dissertation, 2005).
[117] *R.* v. *Adomako,* [2002] O.J. No. 3050 (QL) (C.J.) [*Adomako*]. The offence is under the *Occupational Health and Safety Act (Ont.),* note 55.
[118] *Adomako, note 117.*
[119] *R.* v. *Kirk,* 2005 ONCJ 352, [2005] O.J. No. 3316 (QL) [*Kirk*].
[120] *R.* v. *Dawson (City),* 2003 YKTC 16, [2003] Y.J. No. 22 (QL) [*Dawson*]. The time-line for construction of the facility was subsequently extended, given the City's financial situation which necessitated that it was under the management of a trustee: see *R.* v. *Dawson (City),* 2004 YKTC 69, [2004] Y.J. No. 94 (QL) [*Dawson No. 2*].
[121] *Fisheries Act*, R.S.C. 1985, c.F-14, s.36(3) [*Fisheries Act*].
[122] For a discussion on the use of "creative sentences" see Gordon S. Campbell, "Fostering a Compliance Culture Through Creative Sentencing for Environmental Offences" (2004), 9 Can. Crim. L. Rev. 1; Elaine L. Hughes and Larry A. Reynolds, "Creative Sentencing and Environmental Protection" (2009), 19 J.E.L.P 105; Cecily Y. Strickland and Scott R. Miller, "Creative Sentencing, Restorative Justice and Environmental Law: Responding to the Terra Nova FPSO Oil Spill" (2007), 30 Dalhousie L.J. 547; Libman, note 39, at 11.2(x).
[123] *Wholesale Travel Group Inc*., note 11 at [QL] para. 131.
[124] See, for example, Charles J. Babbitt, Dennis C. Cory and Beth L. Kruchek, "Discretion and the Criminalization of Environmental Law" (2004), 15 Duke Envtl. L. & Pol'y F. 1; Duncan Chappell, *From Sawdust to Toxic Blobs: A Consideration of Sanctioning Strategies to Combat Pollution in Canada* (Ottawa: Government of Canada, 1989): Chapter 6. A Matter of Enforcement: Or No More Mr. Nice Guy? In David C. Fortney, "Thinking Outside the 'Black Box': Tailored Enforcement in Environmental Criminal Law", (2003), 81 Tex. L. Rev. 1609 at 1610, reference is made to a survey of public perception of the severity of various crimes, the result of which was that environmental crime was ranked seventh, ahead of armed robbery and other serious crimes.
[125] Law Reform Commission of Canada, *What is a Crime? Challenges and Alternatives.* (Discussion Paper) (Ottawa: Government of Canada, 2003) at 3.
[126] Bruce Pardy, *Environmental Law: A Guide to Concepts* (Markham: Butterworths Canada Ltd., 1996) 187 defines the polluter pays principle as a principle of liability that, "whenever possible, the actor that causes pollution damage should pay for restoration, compensation and future prevention."
[127] *Environmental Quality Act* R.S.Q., c.Q-2, s.31.43 [*Environmental Quality Act (Que.)]*
[128] *Imperial Oil Canada* v. *Quebec (Minister of the Environment),* 2003 SCC 58, [2003] 2 S.C.R. 624, [2003] S.C.J. No. 59 (QL) [*Imperial Oil Canada*].
[129] *Imperial Oil Canada, note 128 at* [QL] para. 23. The recently enacted Ontario *Environmental Enforcement Act,* note 58*,* was introduced as the "'You Spill You Pay' Bill".
[130] *Rio Declaration on Environment and Development* UN Doc. A/Conf. 151/5/Rev. 1 (1992) [*Rio Declaration*].
[131] *Canadian Environmental Protection Act, 1999*, S.C. 1999, c.33, s.287 [*Canadian Environmental Protection Act*].
[132] *Canada Shipping Act, 2001,* S.C. 2001, c.16., s.191(4) [*Canada Shipping Act*].
[133] *Public Health Act,* S.B.C. 2008, c.28 [*Public Health Act (B.C.)]*
[134] *Public Health Act (B.C.),* note 133, s.105(3).
[135] *Public Health Act (B.C.),* note 133, s.106(1).

[136] Sherie Verhulst, "Legislating a Principled Approach to Sentencing in Relation to Regulatory Offences" (2008), 12 Can. Crim. L. Rev. 281.
[137] Law Reform Commission of Canada, note *48 at* 16.
[138] *R*. v. *Fraser Inc* (1993), 139 N.B.R. (2d) 125, [1993] N.B.J. No. 641 (QL) (Prov.Ct.) [*Fraser Inc*.].
[139] *Clean Environment Act* R.S.N.B. 1993, c.C-6. [*Clean Environment Act (N.B.)*]
[140] S. D. Berger, *The Prosecution and Defence of Environmental Offences* (Aurora: Canada Law Book Inc., looseleaf) at 7-3; Libman, note 39 at 11.2(c).
[141] *Environmental Protection and Enhancement Act* ,R.S.A. 1980, c.E-13.3 [*Environmental Protection and Enhancement Act (Alta.)*]
[142] *R.* v. *Cool Spring Dairy Farms Ltd.,* 1999 ABQB 247, 242 A.R. 143, [1999] A.J. No. 366 (QL) [*Cool Spring Dairy Farms Ltd*.].
[143] *R.* v. *Van Waters & Rogers Ltd.,* 1998 ABPC 55, 220 A.R. 315, [1998] A.J. No. 642 (QL) [*Van Waters & Rogers Ltd*.].
[144] *R.* v. *Goodman*, 2005 BCPC 482, [2005] B.C.J. No. 2322 (QL) [*Goodman*].
[145] *R*. v. *100 Mile House (Village),* [1993] B.C.J. No. 2848 (QL) (Prov.Ct.). [*100 Mile House*]
[146] *R.* v. *Snap-On Tools Canada Ltd*., [2002] O.J. No. 5520 (QL) (C.J.) [*Snap-On Tools Canada Ltd*.]
[147] *Occupational Health and Safety Act (Sask.),* note 108.
[148] *R.* v. *Rosin*, 2005 SKPC 69, 267 Sask. R. 154, [2005] S.J. No. 471 (QL), var'd 2005 SKQB 537, 273 Sask. R. 114, [2005] S.J. No. 757 (QL) [*Rosin*].
[149] *R.* v. *Westfair Foods Ltd.,* 2005 SKPC 26, 263 Sask. R.162, [2005] S.J. No. 279 (QL) [*Westfair Foods Ltd*.]
[150] Archibald, note 7 at 12-9.
[151] Archibald, note 7 at 12-9.
[152] Verhulst, note 136 at 282.
[153] Verhulst, note 136 at 282.
[154] Archibald, note 7 at 12-9-12-10.
[155] W.S. Gilbert and A. Sullivan, *The Mikado*, Act II, No. 17 "A more humane Mikado".
[156] Canadian Association of Provincial Court Judges, *Canadian Sentencing Handbook* (Ottawa: Canadian Association of Provincial Court Judges, 1982).
[157] Canadian Association of Provincial Court Judges*,* note 156 at 23.
[158] John Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971) at 3.
[159] Canadian Committee on Corrections, *Towards Unity: Criminal Justice and Corrections* (Ottawa: Government of Canada, 1969) at 185.
[160] Canadian Committee on Corrections, note 159 at 16.
[161] Canadian Committee on Corrections, note 159 at 185.
[162] Canadian Committee on Corrections, note 159 at 185.
[163] See Allan Manson, "The Reform of Sentencing in Canada" in Don Stuart, R.J. Delisle and Allan Manson, eds., *Towards a Clear and Just Criminal Law* (Toronto: Thomson Canada Ltd., 1999) 457 at 461.
[164] Canadian Committee on Corrections, note 159 at 185.
[165] Law Reform Commission of Canada, *Dispositions and Sentences in the Criminal Process* (Ottawa: Government of Canada, 1976) at 8-9. Interestingly, this was the Commission's first report in the area of criminal law, the significance of which was noted in the preface, at 1, as signifying the importance of the "operation of the law and its consequences in practice" as opposed to the "written law".
[166] Law Reform Commission of Canada, note 165 at 26 [Recommendation 14.1].
[167] Law Reform Commission of Canada, note 165 at 26 [Recommendation 14.3].
[168] Law Reform Commission of Canada, *The Principles of Sentencing and Dispositions* (Ottawa: Government of Canada, 1974).
[169] Law Reform Commission of Canada, *Imprisonment and Release* (Ottawa: Government of Canada, 1975).

[170] Law Reform Commission of Canada, note 168 at ix.
[171] Law Reform Commission of Canada, note 168 at 1.
[172] Law Reform Commission of Canada, note 168 at 25.
[173] Law Reform Commission of Canada, note 168 at 35.
[174] Law Reform Commission of Canada, note 168 at 13.
[175] Law Reform Commission of Canada, note 168.
[176] Law Reform Commission of Canada, note 169 at 17.
[177] Law Reform Commission of Canada, note 169 at, 13.
[178] Government of Canada, *The Criminal Law in Canadian Society* (Ottawa: Government of Canada, 1982).
[179] Government of Canada, note 178 at 33.
[180] Government of Canada, *Sentencing* (Ottawa: Government of Canada, 1984).
[181] Government of Canada, note 180 at 33.
[182] Government of Canada, note 180 at 33.
[183] Government of Canada, note 178.
[184] Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Canadian Government Publishing Centre, 1986).
[185] Aidan Vining, *Issues Relating to Sentencing Guidelines: An Evaluation of U.S. Experiences and Their Relevance for Canada* (Ottawa: Government of Canada, 1988) at 50.
[186] Canadian Sentencing Commission, note 184 at 77.
[187] Canadian Sentencing Commission, note 184 at xxii. These views were shared by the Government of Canada: see the comments of the Minister of Justice and Attorney General of Canada, A. Kim Campbell, "Sentencing reform in Canada" (1990), 32 Canadian Journal of Criminology 387.
[188] Canadian Sentencing Commission, note 184 at 146.
[189] Canadian Sentencing Commission, note 184 at 151 [Recommendation 6.1].
[190] Canadian Sentencing Commission, note 184 at 154 [Recommendation 6.2(4)(a)].
[191] Standing Committee on Justice and Solicitor General, *Taking Responsibility. Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections* (Ottawa: Government of Canada, 1988) at 44-46.
[192] Standing Committee on Justice and Solicitor General, note 190 at 43. In its examination of the history of sentencing reform in Canada, the Report made reference to an earlier Standing Committee Report which identified the problem of "broad discretion of the courts" as leading to "not only to great sentence disparities but also has left judges without assistance to make their difficult decisions." See Standing Senate Committee on Legal and Constitutional Affairs, *Parole in Canada (Report)* (Ottawa: Information Canada, 1974) at 51.
[193]Government of Canada, *Sentencing: Directions for Reform* (Ottawa: Government of Canada, 1990).
[194] Government of Canada, note 193 at 4.
[195] Government of Canada, note 193 at 5.
[196] Campbell, note 187 at 390.
[197] Manson, note 163 at 459.
[198] Julian V. Roberts and Andrew von Hirsch, "Statutory Sentencing Reform: The Purpose and Principles of Sentencing" (1995), 37 Crim. L.Q. 220 at 222. See also Anthony N. Doob, "The New Role of Parliament in Canadian Sentencing" (1997), 9 Fed. Sent. R. 239.
[199] Manson, note 163 at 459.
[200] Manson, note 163 at 460.
[201] Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995, c.22 [Bill C-41].
[202] Alan Young, The Role of an Appellate Court in Developing Sentencing Guidelines (Ottawa: Government of Canada, 1988) at 99.
[203] Julian V. Roberts, "Sentencing Reform: The Canadian Approach" (1997), 9 Fed. Sent. R. 245 at 248.
[204] Bill C-9, *An Act to amend the Criminal Code (Conditional Sentence of Imprisonment),* S.C. 2007, c.12 [Bill C-9]. The current provision is found in s.742.1 of the *Criminal Code*. An even

more restrictive amendment to s.742.1, which would have precluded conditional sentences for all indictable offences punishable by 10 years' imprisonment or more, had been introduced by the Government in 2006 as Bill C-9, but was not passed into law. As Allan Manson observes in "The Reform of Sentencing in Canada, note 163 at 467, the eventual role of the "controversial and enigmatic conditional sentence ... remains to be determined."

[205] Manson, note 163 at 468. For a detailed recent analysis of these provisions, see Gilles Renaud, *The Sentencing Code of Canada. Principles and Objectives* (Markham: LexisNexis Canada Inc. 2009).

[206] *Criminal Code*, note 9, s.717.

[207] *Criminal Code*, note 9, s.718.

[208] *Criminal Code*, note 9, s.718.1

[209] *Criminal Code*, note 9, ss.720-729.

[210] *Criminal Code*, note 9, s.730(1).

[211] *Criminal Code*, note 9, ss.731-733.

[212] *Criminal Code*, note 9, ss.734-737.

[213] *Criminal Code*, note 9, ss.738-741.

[214] *Criminal Code*, note 9, s.742.1.

[215] *Criminal Code*, note 9, s.743.

[216] *Criminal Code*, note 9, s.718.2(a). Examples are crimes motivated by hate or prejudice (s.718.2(a)(i)); abuse of the offender's spouse (s.718.2(a)(ii)) or of a person under 18 years old (s.718.2(a)(ii.1)). Abuse of a position of trust is another example: s.718.2(a)(iii).

[217] *Criminal Code*, note 9, s.718.2(b): the principle of parity or consistency.

[218] *Criminal Code*, note 9, s.718.2(c): the principle of totality.

[219] *Criminal Code*, note 9, s.718.2(d): the principle of restraint.

[220] *Criminal Code*, note 9, s.718.2(e): the principle of restraint and aboriginal persons.

[221] Manson, note 163 at 468.

[222] Manson, note 163 at 468

[223] *R.* v. *Gladue*, [1999] 1 S.C.R. 688, [1999] S.C.J. No. 19 (QL) [*Gladue*].

[224] *Gladue*, note 223 [QL] at para. 39. See also *R.* v. *Wells,* 2000 SCC 10, [2000] 1 S.C.R. 207, [2000] S.C.J. No. 11 (QL) [*Wells*] applying the *Gladue* case.

[225] *R.* v. *Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, [2000] S.C.J. No. 6 (QL) [*Proulx*].

[226] *Proulx*, note 225 at [QL] para. 14.

[227] The use of this phrase was popularized by John Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971).

[228] *R.* v. *Hamilton* (2004), 72 O.R. (3d) 1, [2004] O.J. No. 3252 at para. 1(QL) (C.A.) [*Hamilton*]

[229] *Hamilton*, note 228 at [QL] para. 87.

[230] *R.* v. *McDonnell,* [1997] 1 S.C.R. 948, [1997] S.C.J. No. 42 at para. 29 (QL) [*McDonnell*].

[231] Dale E. Ives, "Inequality, Crime and Sentencing: *Borde*, *Hamilton* and the Relevance of Social Disadvantage in Canadian Sentencing Law" (2004), 30 Queen's L.J.114 at 118.

[232] Ives, note 231 at 138.

[233] Anthony N. Doob, "Punishment in Late-Twentieth-Century Canada: An Afterword" in Strange, Carolyn, ed., *Qualities of Mercy: Justice, Punishment and Discretion* (Vancouver: University of British Columbia Press, 1996) at 168.

[234] Manson, note 163 at 472. See too Kenneth Jull, "Reserving Rooms in Jail: A Principled Approach" (1999), 42 Crim. L.Q. 67 at 77-79.

[235] Andrew J. Ashworth, "Sentencing Reform Structures" (1992), 16 Crime & Just. 181 at 189.

[236] Roberts, note 198 at 223.

[237] Clayton C. Ruby, *Sentencing, 7th ed.* (Markham: LexisNexis Canada Ltd., 2008) at 21.

[238] Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 80.

[239] J.V. Decore, "Criminal Sentencing: The Role of the Canadian Courts of Appeal and the Concept of Uniformity" (1963-64), 6 Crim. L.Q. 324.

[240] Decore, note 239 at, 334. See also Julian V. Roberts and Andrew von Hirsch, "Legislating the Purpose and Principles of Sentencing" in Julian V. Roberts and David P. Cole, eds., *Making Sense of Sentencing* (Toronto: University of Toronto Press) at 49.

[241] Decore, note 239 at 375.

[242] Hermann Mannheim, "Some Aspects of Judicial Sentencing Policy" (1958), 67 Yale L.J. 961 at 962.
[243] Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (New York: Hill and Wang, 1976) at 32.
[244] Molly Cheang, *Sentencing: A Study in the Proper Allocation of Responsibility* (Osgoode Hall Law School, York University: Ph.D. dissertation, 1974) at 290.
[245] T.S. Palys and Stan Divorski, "Explaining Sentence Disparity" (1986), 28 Cdn. Journal of Criminology 347 at 360.
[246] Roberts, note 198 at 239. See also Roberts, note 239 at 60.
[247] Law Reform Commission of Canada, note 28 at 2.
[248] Law Reform Commission of Canada, note 30 at 38.
[249] *Wholesale Travel Group Inc,* note 11 at para. 134 (QL).
[250] Archibald, note 7 at 12-5.
[251] *Canadian Environmental Protection Act, 1999,* note 130.
[252] Pardy, note 126 at 187 defines the polluter pays principle as a principle of liability that, "whenever possible, the actor that causes pollution damage should pay for restoration, compensation and future prevention."
[253] *Imperial Oil Canada,* note 128 at [QL] para. 23.
[254] *Interpretation Act*, R.S.C. 1985, c.I-21 [*Interpretation Act*].
[255] Archibald, note 7 at 12-6.
[256] Archibald, note 7 at 12-7.
[257] *Provincial Offences Act*, note 3, s.2(1).
[258] Archibald, note 7 at 12-7.
[259] *Environmental Protection Act*, R.S.O. 1990, c.E.19 [*Environmental Protection Act (Ont*.)].
[260] *Environmental Protection Act (Ont.),* note 259, s.188.1(1).
[261] *Public Health Act (B.C.),* note 133
[262] *Public Health Act (B.C.),* note 133, s.105.
[263] *Public Health Act (B.C.),* note 133, s.106.
[264] *Provincial Offences Act*, note 3, s.72(1).
[265] *Provincial Offences Act,* note 3, s.72(7).
[266] *Provincial Offences Act,* note 3, s.72(3)(b).
[267] *Offence Act,* R.S.B.C. 1996, c.338 [*Offence Act (B.C.)*].
[268] *Offence Act (B.C*.), note 267, s.89(4). The six month limit of probation coincides with the six month limit of imprisonment under s.4 of the *Offence Act,* as probation was "designed to be a substitute for prison": see Verhulst, note 136 at 290. This contrasts with Ontario's *Provincial Offences Act,* note *3,* s.72(4), where probation orders may be made for a maximum of two years.
[269] Libman, note 39 at 11-20. See also Berger, note 140 at 7-13.
[270] Law Reform Commission of Canada, note 48 at 16.
[271] *R.* v. *Fraser Inc.,* note 138..
[272] *R*. v. *100 Mile House,* note 145.
[273] Archibald, note 7 at 12-9.
[274] Verhulst, note 136 at 282.
[275] *Criminal Code*, note 9, s.675(1)(b) [appeal by the defendant]; s.676(1)(d) [appeal by the Attorney General].
[276] *Provincial Offences Act*, note 3, s.131(1) [appeals under Part III (information)]; s.139(1) [appeals under Parts I and II (tickets)].
[277] *Provincial Offences Act*, note 3, ss.131(2), 139(2).
[278] *Provincial Offences Act*, note 3, ss.131(3), 139(4).
[279] *R.* v. *Shropshire,* [1995] 4 S.C.R. 227, [1995] S.C.J. No. 52 at para 46 (QL) [*Shropshire*]: "An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulations of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit." See further in this regard *R.* v. *C.A. M.,* [1996], 1 S.C.R. 500, [1996] S.C.J. No. 28 at para. 89 (QL) [*C.A.M*.];

*Proulx,* note 234 at para. 123 (QL); *R.* v. *G.W.,* [1999] 3 S.C.R. 597, [1999] S.C.J. No. 37 at paras. 18-19 (QL) [*G.W.*]; *McDonnell,* note 229 at [QL] paras 14-17.
[280] There is a distinction, however, between the "principle" as opposed to "fitness" of sentence, the former putting in issue the legality of the sentence: see *R.* v. *Gardiner,* [1982] 2 S.C.R. 368, [1982] S.C.J.No. 71 (QL). [*Gardiner*]
[281] *Cotton Felts Ltd*., note 25.
[282] *Occupational Health and Safety Act (Ont.),* note 55.
[283] *Cotton Felts Ltd.,* note 25 at [QL] para. 19.
[284] *Cotton Felts Ltd.,* note 25 at [QL] para. 22.
[285] *Cotton Felts Ltd.,* note 25 at [QL] para. 23. Interestingly, despite making these sweeping pronouncements in the judgment, the Court concluded its reasons at [QL] para. 24 by referring to the discretion of the trial judge to impose a fine, even if it would have been disposed to impose a greater or lesser fine, noting that "a fine is 'peculiarly in the discretion of the trial judge – a discretion with which an appellate court should not lightly interfere'".
[286] *R.* v. *Inco Ltd.* (2000), 132 O.A.C. 268, [2000] O.J. No. 1868 (QL) [*Inco Ltd*.]. One of the convictions was set aside on appeal. Hence, the Crown's sentence appeal to the Court of Appeal proceeded on two counts only.
[287] *Inco Ltd.,* note 286 at [QL] para. 4.
[288] *Inco Ltd.,* note 286 at [QL] para. 5.
[289] *R.* v. *Terroco Industres Ltd.,* 2005 ABCA 141, 367 A.R. 1, 41 Alta. L.R. (4th) 1, [2005] A.J. No. 361 (QL). [*Terroco Industries Ltd*.]. The test for hearing appeals in regulatory offences cases under the Alberta legislation, like Ontario, is set at a high threshold, requiring a judge of the Alberta Court of Appeal to be satisfied that the case "involves question of law of sufficient importance to justify a further appeal": *Provincial Offences Procedure Act*, R.S.A. 2000, c.P-34, s.19(1) [*Provincial Offences Procedure Act (Alta.)*].
[290] *Dangerous Goods Transportation and Handling Act,* S.A. 1998, c.D-3.5 [*Dangerous Goods Transportation and Handling Act (Alta*.)].
[291] *Environmental Protection and Enhancement Act,* S.A. 1992 c.E-13.3. [*Environmental Protection and Enhancement Act (Alta*.)]
[292] *Terroco Industries Ltd*., note 289 at para. 34 (QL). One of the earliest cases to advocate this approach is *R.* v. *Kenaston Drilling (Arctic) Ltd.* (1973) 12 C.C.C. (2d) 383, [1973] N.W.T.J. No. 1 at para. 13 (QL) (S.C.) [*Kenaston Drilling (Arctic) Ltd*.]. See also *R. v. United Keno Hill Mines Ltd.* (1980), 10 C.E.L.R. 43, [1980] Y.J. No. 10 at para. 6 (QL) (T.C.) [*United Keno Hill Mines Ltd*.].
[293] *Terroco Industries Ltd*., note 289 at [QL] para. 35.
[294] *Terroco Industries Ltd*., note 289 at [QL] para. 45. In *Kenaston Drilling (Arctic) Ltd., note 292* at [QL] para. 13 the Court stated in this regard: "But surely the test to apply in approaching the question of sentence should be less a concern of what the damage was but more a concern of what the damage might have been."
[295] *Terroco Indutsries Ltd*., note 289 at [QL] para. 53.
[296] *Terroco Industries Ltd*., note 289 at [QL] para. 66.
[297] *Terroco Industries Ltd*., note 289 at [QL] paras 74, 76.
[298] *United Keno Hill Mines Ltd.,* note 292.
[299] *United Keno Hill Mines Ltd*., note 292 at [QL] para. 17.
[300] *United Keno Hill Mines Ltd*., note 292 at [QL] para. 39.
[301] *United Keno Hill Mines Ltd*., note 292. In a far-ranging and prescient discussion of the need for courts to be given the power to require "complete access to internal corporate allocations of responsibility" [QL] (para. 49), additional sentencing options and non-criminal governmental tools were recommended, including imposing statutory duties of an affirmative duty on senior echelon corporate officials to control corporate activities, the power to order restitution against corporate offenders or officials, licence suspension or revocation orders, and diversion schemes. The genesis of this "special approach" required for corporate offenders who commit environmental offences, as discussed in cases such as *United Keno Hill Mines Ltd*., is outlined by Robert Elliot Pollock, *Corporate executive liability for environmental offences: A comparison of the Ontario and Untied States approach.* (Osgoode Hall Law School, York University: LL.M thesis, 1994) at 98.

[302] *United Keno Hill Mines Ltd*., note 292 at [Ql] para. 9. Stuart CJ at [QL] paras 7-8 traced the history of punishment provisions for pollution, ranging from capital punishment in England in 1307 for violating air pollution standards, to the twentieth century and late 1960's where pollution was regarded as a "minor if not trivial offence." In Canada, legislative amendments subsequently increased fines from $500 to $10,000 whereas in the United States jail terms, large fines and civil liabilities were enacted for environmental violations. Indeed, at the time of the Supreme Court of Canada's decision in *Sault Ste. Marie,* note 33, which was released shortly before *United Keno Hill Mines Ltd.,* fine provisions for pollution offences were still relatively modest compared to their present levels.
[303] *R.* v. *Schulzke* , 2008 SKPC 149, [2008] S.J. No. 790 (QL) [*Schulzke*].
[304] *Schulzke*, note 303 at [QL] para. 110.
[305] *Schulzke*, note 303 at [QL] para. 111.
[306] *R.* v. *Abbott*, 2008 BCCA 198, 81 B.C.L.R. (4th) 16, [2008] B.C.J. No. 824 (QL) [*Abbott*]. Appeals to the British Columbia Court of Appeal in a regulatory offences case require the granting of leave to appeal "on any ground that involves a question of law alone": *Offence Act (B.C.), note 266*, s.124(1).
[307] *Health Act*, R.S.B.C. 1996, c.179 [*Health Act (B.C.)*].
[308] *Abbott*, note 306 at [QL] para. 34.
[309] *Abbott*, note 306 at [QL] para. 49.
[310] Archibald, note 7 at 12-12- 12-16.
[311] Jamie Benidickson, *Environmental Law, 3rd ed.* (Toronto: Irwin Law Inc., 2009) at 183.
[312] *Canada Shipping Act*, note 132.
[313] *Canada Shipping Act*, note 132, s. 664(2).
[314] P. Puri, "Sentencing the Criminal Corporation" (2001), 39 Osgoode Hall L.J. 611 at 620.
[315] Berger, note 140 at 7-45.
[316] *Environmental Enforcement Act (Ont.),* note 58. This legislation also put in place administrative environmental penalties which are absolute liability in nature: see Rick Libman, "Bill 133 and 'Environmental Penalties': Absolute Liability when Necessary but Necessarily Absolute Liability?" (2005), 16 C.E.L.R. (3d) 155.
[317] *Environmental Protection Act*, R.S.O. 1990, c.E.19 [*Environmental Protection Act (Ont*.)].
[318] *Ontario Water Resources Act*, R.S.O. 1990, c.O.40. [*Ontario Water Resources Act*]
[319] *Environmental Enforcement Act (Ont.),* note 58, s.59 enacting s.188.1(1) to the *Environmental Protection Act(Ont.),* note 317.
[320] *Environmental Enforcement Act (Ont.),* note 58, s.36 enacting s.110.1(1) to the *Ontario Water Resources Act*, note 318.
[321] *Environmental Enforcement Act (Ont.),* note 58, s.59 enacting s.188.1(3) to the *Environmental Protection Act*, note 317; *Environmental Enforcement Act (Ont.)*, note 58, s.36 enacting s.110.1(3) to the *Ontario Water Resources Act*, note 318. A similar provision appears in the *Regulatory Modernization Act, 2007,* S.O. 2007, c.4, s.15(4) [*Regulatory Modernization Act (Ont.)*], which requires the Court to indicate, where the prosecutor is of the opinion that a previous conviction constitutes an aggravating factor, whether it is imposing a "more severe penalty" having regard to the previous conviction, or, alternatively, if the court decides that the previous conviction does not "justify a more severe penalty", the reasons for that decision.
[322] Law Reform Commission of Canada, note 48.
[323] Law Reform Commission of Canada, note 48 at 7.
[324] Law Reform Commission of Canada, note 48 at 2.
[325] Law Reform Commission of Canada, note 48 at 5.
[326] This point is also made by C.L.Saga, in an article published shortly before the Law Reform Commission' study paper, *Sentencing in environmental cases*, note 48, entitled "Regulatory Offences, Infractions and Alternative Compliance Measures" (1984), 42 U. Toronto Fac. L. Rev. 25 at 34, where it was noted that, for pollution offences, the gravity and risk of harm varies from case to case.
[327] Law Reform Commission of Canada, note 48 at 6.
[328] Law Reform Commission of Canada, note 48 at 6.
[329] Law Reform Commission of Canada, note 48 at 7.

[330] Law Reform Commission of Canada, note 48 at 8.
[331] Sherrin, note 79 at 2.
[332] Sherrin, note 79, uses the example of the relatively low penalties imposed for environmental offences as the basis for his examination as to whether the distinction between criminal offences and regulatory offences under the *Charter of Rights* ,note 85*,* is justified by the penalties imposed for such offences.
[333] Law Reform Commission of Canada, note 48 *at* 16.
[334] *United Keno Hill Mines Ltd.,* note 292.
[335] Law Reform Commission of Canada, note 48 at 40.
[336] Law Reform Commission of Canada, note 48 at 41.
[337] Law Reform Commission of Canada, note 48 at 42-43. The authors went on to recommend a number of measures that reflected, in their view, the civil nature of public welfare offences, such as a shift in the onus of proof of ability to pay, or illegal gain, to the defendant; discovery by the crown; or a separate trial of the "quantum issue" before a different court official than the trial judge, such as a master in civil proceedings. In support of its position, the Commission pointed to the fact that courts had five years' experience in applying *Sault Ste. Marie,* note 33, yet the Ontario Court of Appeal in *Cotton Felts Ltd*., note 25, stated that the range for fines in public welfare offences appeared to be too low.
[338] Chappell, note 124 at 35. This point is also made by Murray Rankin, "Economic Incentives for Environmental Protection: Some Canadian Approaches" (1991), 1 J.E.L.P. 241 at 244, who concluded in his study of penalties imposed for infractions of environmental statutes that most fines were "very low." By way of illustration, of 201 polluters who were fined between January 1984 and June 1989 for contravening the *Waste Management Act,* R.S.B.C. 1996, c.482 [*Waste Management Act (B.C.)*], the average fine was $723., with the majority of such fines being in the range of $100-$200.
[339] Chappell, note 124 at 36.
[340] See Pollock, note 301 at 117-120, explaining the operation of the U.S. sentencing guidelines to environmental offences. A fine is to be imposed in all cases, except where the defendant establishes he/she is unable to pay, and is unlikely to pay any fine. The amount of the fine is determined by reference to a fine table. Suspended sentences are not available under the guidelines; imprisonment is considered the norm, not the exception.
[341] Pollock, note 301 at 73.
[342] Chappell, note 124 views the issue through the lens of enforcement strategies, as evidenced by the title of the chapter where he made these observations: "A Matter of Enforcement: Or No More Mr. Nice Guy." Swaigen, on the other hand, in his subsequent publication, *Regulatory Offences in Canada. Liability & Defences,* note 37 at 227-228, stated that the problem of sentencing disparity and inconsistency in fine levels was best left to appellate courts which could overturn "inappropriate penalties" and establish the "appropriate range of penalties."
[343] Elaine L. Hughes, "Sentencing Environmental Offenders: Objectives and Principles" (1994), 4 J.E.L.P. 185 at 189.
[344] John D. Wilson, "Re-thinking Penalties for Corporate Environmental Offenders: A View of the Law Reform Commission of Canada's Sentencing in Environmental Cases" (1986), 31 McGill L.J. 313.
[345] Wilson, note 344 at 325.
[346] Wilson, note 344 at 321.
[347] Puri, note 314 at 614.
[348] *Competition Act*, note 50.
[349] *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 [*Canada Business Corporations Act*].
[350] *Ontario Business Corporations Act*, R.S.O. 1990, c.B.16 [*Business Corporations Act (Ont*.)].
[351] *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) [*Income Tax Act*].
[352] John Swaigen and David Estrin, *Environment on Trial. A Guide to Ontario Environmental Law and Policy, 3rd ed.* (Toronto: Emond Montgomery Publications Ltd., 1993) at 454.
[353] Sidney A. Shapiro and Randy S. Rabinowitz, "Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA" (1997), 49 Admin. L. Rev. 713 at 762.

[354] Verhulst, note 136.
[355] *Offence Act (B.C.)*, note 267.
[356] Verhulst, note 136 at 282.
[357] *Public Health Act* (B.C.), note 133. Sentencing is addressed under Division 3 (sentencing) of Part 8 (administrative penalties, offences and sentencing) of the Act, and contains sections on the purposes and principles of sentencing for regulatory offences: s.105 determining purpose; s.106 purposes of sentence. This legislation went into effect on 31 March 2009.
[358] Verhulst, note 136 at 282.
[359] Verhulst, note 136.
[360] *Offence Act (B.C.),* note 267.
[361] Under this approach, each province would be required to amend their respective provincial offences legislation of general application. In Ontario, the *Provincial Offences Act*, note 3, is the governing statute. The desirability of providing a statement of sentencing purposes and principles in a statute of general application, as opposed to one that does not apply to other statutes, as is the case with the *Public Health Act (B.C.),* note 133, is discussed further under Part IV of this research paper.
[362] Verhulst, note 136 at 283.
[363] Verhulst, note 136 at 283 cites in this regard Richard Johnstone [*From Fact to Fiction – Rethinking OHS Enforcement* (Australia: National Research Center for OHS Regulation, July 2003, Working Paper No. 11) who argues that regulated persons undergo three stages: (1) committing, by senior management, to compliance (2) learning what procedures, technologies, etc are necessary for compliance (3) institutionalizing compliance by implementing risk management systems and normalizing compliance as part of corporate behavior.
[364] Verhulst, note 136 at 283.
[365] Verhulst, note 136 at 283.
[366] Verhulst, note 136 at 287. This practice has originated in the United Kingdom where counsel are encouraged to submit a "Friskies Schedule" which is a joint submission between the Crown and defence stating those factors which are agreed as being the "relevant mitigating and aggravating features that the court should take into account." The name is derived from *R.* v. *Friskies Petcare (UK) Ltd*., [2000] EWCA Crim 95, [2000] 2 Cr App R (S) 401, [2000] E.W.J. J. No. 1568 at para. 2 (QL) (C.C.A.) [*Friskies Petcare (U.K.) Ltd*.]. The Court of Appeal, Criminal Division, added that it strongly recommended this procedure be routinely adopted in *Health and Safety Act* prosecutions. It has become an accepted practice in the Crown Court and Magistrates' Courts to produce "Friskies Schedules": see Neil Parpworth, "Environmental Offences: The Need for Sentencing Guidelines in the Crown Court," [2009] J.P.L. 18 at 28; Martha Grekos, "Environmental Fines – All Small Change?", [2004] J.P.L. 1330 at 1332-1333.
[367] Verhulst, note 136 at 288.
[368] Verhulst, note 136, recommends lengthening the period of probation orders to at least three years in order to give effect to this sentencing principle. This period is the current maximum period that probation may be imposed under the *Criminal Code,* note 9, s.732.2(2)(b); however, under the *Offence Act (B.C.)*, note 267, s.89(4), probation orders are currently limited to a maximum term of six months; under the Ontario *Provincial Offences Act*, note 3, s.72(4), probation may be imposed for up to 2 years.
[369] Verhulst, note 136 at 291.
[370] Verhulst, note 136 at 292.
[371] Verhulst, note 136 at 295.
[372] *Public Health Act (B.C.),* note133.
[373] *Public Health Act (B.C.),* note 133, s.105(1).
[374] *Public Health Act* (B.C.), note 133, s..105(2).
[375] *Public Health Act (B.C.),* note 133, s.106.
[376] *Public Health Act (B.C.),* note 133, s.107.
[377] *Public Health Act (B.C.),* note 133, s.108.
[378] *Public Health Act (B.C.),* note 133, s.105(3).
[379] *Public Health Act (B.C.),* note 133, s.106(1)(a)
[380] *Public Health Act (B.C.),* note 133, s.106(1)(b)

[381] *Public Health Act (B.C.),* note 133, s.106(2).
[382] *Public Health Act (B.C.),* note 133, s.106(3).
[383] *Public Health Act (B.C.),* note 133, s.106(4).
[384] *Public Health Act (B.C.),* note 133.
[385] K.E. Jull, *Consultation on Market Surveillance Administrator Proceedings Before the Alberta Utilities Commission* (Bulletin 2009-15) (Discussion Paper, June 30, 2009)
[386] *Alberta Utilities Commission Act,* S.A. 2007, c.A-37.2. [*Utilities Commission Act (Alta*.)]
[387] *Utilities Commission Act (Alta.),* note 386, s.63(2)(a).
[388] Jull, note 385 at 14.
[389] Jull, note 385 at 14.
[390] *Office of the Superintendent of Financial Institutions Act* ,R.S.C. 1985, c.18.[*Office of the Superintendent of Financial Institutions Act*]
[391] *Office of the Superintendent of Financial Institutions Act,* note 390, s.25(1)(b).
[392] *Office of the Superintendent of Financial Institutions Act,* note 390, s.25(1)(c).
[393] *Office of the Superintendent of Financial Institutions Act,* note 390, s.25(2)(a).
[394] *Office of the Superintendent of Financial Institutions Act,* note 390, s.25(2)(b).
[395] *Office of the Superintendent of Financial Institutions Act,* note 390, s.26.
[396] *Securities Act (Ont.),* note 56.
[397] *Securities Act (Ont.),* note 56, s.122(1).
[398] Jull, note 385 at 14.
[399] Jull, note 385 gives the example of theft under $5,000, contrary to s.334 of the *Criminal Code,* note 9*,* to illustrate the difference in penalty provisions based on the procedure that the prosecutor elects to follow: where the prosecutor elects to proceed by indictment, the maximum penalty is imprisonment for two years; where the prosecutor elects to proceed by summary conviction, the maximum penalty is a fine of $2,000, or imprisonment for six months, or both.
[400] Verhulst, note 136 at 282.
[401] *114957 Canada Ltée (Spraytech, Société d'arrosage)* v. *Hudson (Town),* 2001 SCC 40, [2001] 2 S.C.R. 241, [2001] S.C.J. No. 42 at para. 1(QL) [*Spraytech*].
[402] Rabbitt, note 116.
[403] Rabbitt, note 116.The agencies were comprised of two consumer protection agencies: National Highway Traffic Safety Administration, Food and Drug Administration; two worker safety agencies: Occupational Safety and Health Administration, Mine Safety and Health Administration, and an environmental agency: Environmental Protection Agency.
[404] Rabbitt, note 116 at 119.
[405] Rabbitt, note 116.
[406] Neil Gunningham, *Safeguarding the Worker. Job Hazards and the Role of the Law* (Sydney: The Law Book Company Limited, 1984) at 325.
[407] Rabbitt, note 116 at 301.
[408] Swaigen, note 37 at xxxv.
[409] *Wholesale Travel Group Inc*., note 11.
[410] *Wholesale Travel Group Inc*., note 11 at [QL] para. 122.
[411] *Cotton Felts Ltd.,* note 25.
[412] *Occupational Health and Safety Act (Ont.),* note 55.
[413] *Friskies Petcare (U.K.) Ltd* , note 366.
[414] *R.* v. *F. Howe & Son (Engineers) Ltd* [1998] EWCA Crim 3154, [1999] 2 All E.R. 249, [1999] 2 Cr. App. R. (S.) 37 (C.C.A.) [*Howe & Son (Engineers) Ltd.*]
[415] *Health and Safety at Work etc. Act 1974* (c.37).[*Health and Safety at Work Act (U.K*.)]
[416] *Cotton Felts Ltd.,* note 25.
[417] *Cotton Felts Ltd.,* note 25 at [QL] para. 19.
[418] *Provincial Offences Act*, note 3, ss. 131(2), 139(2).
[419] *Cotton Felts Ltd*., note 25.
[420] *R.* v. *Ellis-Don Ltd*., [1992] 1 S.C.R. 840, [1992] S.C.J. No. 33 (QL). [*Ellis-Don Ltd*.]
[421] *Wholesale Travel Group Inc.,* note 11.
[422] *R.* v. *Ellis-Don Ltd.,* [1987] O.J. No. 1669 (QL) (Dist.Ct.). [*Ellis-Don Ltd*.]

[423] *R.* v. *Ellis-Don Ltd.* (1990), 1 O.R. (3d) 193, 42 O.A.C. 49, [1990] O.J. No. 2208 (Q.L.) [*Ellis-Don Ltd*.]
[424] *Ontario (Ministry of Labour)* v.*Bruno's Contracting (Thunder Bay) Ltd.,* 2008 ONCA 495, 237 O.A.C. 311, [2008] O.J. No. 2442 (QL) [In Chambers]. [*Bruno's Contracting (Thunder Bay) Ltd*.]
[425] *R.* v. *Henry Heyink Construction Ltd*. (1999), 118 O.A.C. 22261, [1999] O.J. No. 238 (QL). [*Henry Heyink Construction Ltd*.]
[426] *Inco Ltd.,* note 286.
[427] *R.* v. *663374 Ontario Ltd.,* [1991] O.J. No. 1631 (QL) (Gen.Div.). [*663374 Ontario Ltd*.]
[428] *R.* v. *Lavis Contracting Co*., [1988] O.J. No. 1872 (QL) (Dist.Ct.). [*Lavis Contracting Co*.]
[429] *R.* v. *Di Franco,* [2008] O.J. No. 879 (QL) (S.C.J.). [*Di Franco*]The terms of probation are not specified in the judgment, although it was noted that the defendant was willing to take educational courses respecting "safety in the workplace."
[430] *R.* v. *Stelco Inc.,* [2006] O.J. No. 3332 (QL) (S.C.J.).[*Stelco Inc*.]
[431] *R.* v. *Inco Ltd.,* [2001] O.J. No. 4938 (QL) (S.C.J.). [*Inco Ltd*.]
[432] *R.* v. *General Scrap Iron & Metals Ltd.,* 2003 ABCA 107, 327 A.R. 84, 13 Alta. L.R. (4th) 31, [2003] A.J. No. 390 (QL). [*General Scrap Iron & Metals Ltd*.] The Court declined to grant leave to appeal against the judgment upholding the trial judge's decision: see *R.* v. *General Scrap Iron & Metals Ltd.,* 2003 ABQB 22, 322 A.R. 63, 11 Alta. L.R. (4th) 213, [2003] A.J. No. 13 (QL). [*General Scrap Iron & Metals Ltd*.]
[433] *R.* v. *Tech-Corrosion Services Ltd* , (1986), 68 A.R. 161, 43 Alta. L.R. (2d) 88, [1986] A.J. No. 40 (QL) (Q.B.) [*Tech-Corrosion Services Ltd*.]
[434] *R.* v. *Fiesta Party Rentals Ltd*., [2001] A.J. No. 1778 (QL) (Q.B.). [*Fiesta Party Rentals Ltd*.]
[435] *R.* v. *Trican Well Service Ltd.,* 2005 ABQB 904, 389 A.R. 236, [2005] A.J. No. 1720 (QL).[*Trican Well Service Ltd*.]
[436] *R.* v. *Peter Kiewit Sons Co.* (1991), 84 Alta. L.R. (2d) 395, [1991] A.J. No. 302 (QL) (Q.B.). [*Peter Kiewit Sons Co*]
[437] *R.* v. *Kal Tire Ltd.,* 2008 ABQB 551, [2008] A.J. No. 992 (QL). [*Kal Tire Ltd*.]
[438] *Occupational Health and Safety Act*, R.S.A. 1980, c.O-2.[*Occupational Health and Safety Act (Alta*.)]
[439] *R. v. Independent Automatic Sprinkler Ltd* , 2009 ABQB 264, [2009] A.J. No. 476 (QL) [*Independent Automatic Sprinkler Ltd*.].
[440] *Independent Automatic Sprinkler Ltd*, note 439 at [QL] para. 10.
[441] *Independent Automatic Sprinkler Ltd*, note 439 at [QL] para. 21.
[442] *R.* v. *Rose's Well Services Ltd. (c.o.b. Dial Oilfield Services*), 2009 ABQB 266, [2009] A.J. No. 499 (QL). [*Rose's Well Services Ltd*.]
[443] *Rose's Well Services Ltd ,* note 442 at [QL] para. 50.
[444] *Rose's Well Services Ltd.,* note 442 at [QL] para. 102.
[445] *R.* v. *Rosin,* note 148.
[446] *R.* v. *Pederson,* 2000 SKQB 255, 194 Sask. R. 102, [2000] S.J. No. 401 (QL) [*Pederson*].
[447] *R.* v. *Saskatchewan Wheat Pool* (1999), 185 Sask. R. 114, [1999] S.J. No. 711 (QL) (Q.B.). [*Saskatchewan Wheat Pool*]
[448] *Saskatchewan Wheat Pool*, note 447 at [QL] para. 32.
[449] *R.* v. *Sage Well Services Ltd* , 2000 SKQB 259, 194 Sask. R. 65, [2000] S.J. No. 448 (QL) [*Sage Well Services Ltd*.].
[450] *R.* v. *Winnipeg (City),* 2002 MBQB 96, 164 Man. R. (2d) 69, [2002] M.J. No. 122 (QL), aff'd 2002 MBCA 129, 170 Man. R. (2d) 13, [2002] M.J. No. 396 (QL). [*Winnipeg*]
[451] *R.* v. *Canadian National Railway Co.,* 2005 MBQB 71, 193 Man. R. (2d) 119, [2005] M.J. No. 104 (QL) [*Canadian National Railway Co*.].
[452] *R.* v. *Nova Scotia Power Inc.* (1999), 173 N.S.R. (2d) 179, [1999] N.S.J. No. 26 (QL) (S.C.) [*Nova Scotia Power Inc*.].
[453] *R.* v. *Nova Scotia (Minister of Transportation and Public Works)* , 2003 NSSC 274, 277 N.S.R. (2d) 11, [2003] N.S.J. No. 558 (QL)[*Nova Scotia (Minister of Transportation and Public Works*)]
[454] *Nova Scotia (Minister of Transportation and Public Works),* note 452 at [QL] para. 13.
[455] *R.* v. *Atcon Construction Inc*. (1995), 162 N.B.R. (2d) 26, [1995] N.B.J. No. 217 (QL) (Q.B.), aff'd (1995), 168 N.B.R. (2d) 238, [1995] N.B.J. No. 427 (QL) (C.A.) [*Atcon Construction Inc*.].

[456] *R.* v. *Hub Meat Packers Ltd*. (2000), 226 N.B.R. (2d) 33, [2000] N.B.J. No. 133 (QL) (Q.B.). [*Hub Meat Packers Ltd*.]
[457] The four offences and respective fine amounts comprised: failing to provide immediate notification of an accident ($2,000), disturbing an accident scene ($2,000), failing to take reasonable precautions to safeguard the health of a worker ($7,500), and failing to insure that the machine was installed and repaired according to manufacturer specifications ($7,500).
[458] *Hub Meat Packers Ltd*., note 456 at [QL] para. 17.
[459] *R.* v. *Corner Brook Pulp and Paper Ltd* . (1990), 85 Nfld. & P.E.I.R. 64, [1990] N.J. No. 417 (QL) (S.C.) [*Corner Brook Pulp and Paper Ltd*.]
[460] *R.* v. *Miller Shipping Ltd* . 2007 NLTD 208, 272 Nfld. & P.E.I.R. 305, [2007] N.J. No. 412 (QL) [*Miller Shipping Ltd*.].
[461] *Miller Shipping Ltd*., note 460 at [QL] para. 57.
[462] *Miller Shipping Ltd*., note 460 at [QL] para. 60.
[463] *R.* v. *Miller Shipping Ltd.,* 2009 NLCA 57, [2009] N.J. No. 274 (QL) [*Miller Shipping Ltd*.].
[464] *Wholesale Travel Group Inc*., note 11.
[465] *Competition Act*, note 50
[466] *Combines Investigation Act*, note 51.See *Wholesale Travel Group Inc*., note 11at [QL] para. 142.
[467] *Cotton Felts Ltd*., note 25.
[468] *R.* v. *Hoffmann-La Roche Ltd. (Nos. 1 and 2)* (1981), 33 O.R. (2d) 694, [1981] O.J. No. 3075 at para. 130 (QL) (C.A.) [*Hoffman-La Roche Ltd*.]. The Court noted in this decision that fines as high as $75,000 were upheld in a previous *Combines Investigation Act,* note 51*,* case: see *R.* v. *St. Lawrence Corp. Ltd.,* [1969] 2 O.R. 305, [1969] O.J. No. 1326 (QL) (C.A.) [*St. Lawrence Corp Ltd*.]. In another conspiracy to unduly lessen competition case, *R.* v. *Armco Canada Ltd.* (1977), 13 O.R. (2d) 32, [1976] O.J. No. 2066 (QL) (C.A.), leave to appeal refused, [1976] 1 S.C.R. vii [*Armco Canada Ltd*.], fines up to $125,000 were approved on appeal. Both the *St. Lawrence Corp. Ltd.* and *Armco Canada Ltd.* decisions were referred to in *Cotton Felts Ltd.*
[469] *Combines Investigation Act*, note 51.
[470] *Competition Act*, note 50.
[471] *R*. v. *Browning Arms Co. of Canada,* [1974] O.J. No. 502 (QL) (C.A.). [*Browning Arms Co. of Canada*]
[472] *Brownng Arms Co. of Canada*, note 471 at para. 2.
[473] *R.* v. *Steinberg's Ltd* (1976), 13 O.R. (2d) 293, [1976] O.J. No. 2201 (QL) (C.A.).[*Steinberg's Ltd*.]
[474] *Steinberg's Ltd*., note 473 at [QL] para. 32.
[475] *Motor Vehicle Safety Act,* R.S.C. 1970, c.26 [*Motor Vehicle Safety Act*].
[476] *R.* v. *Ford Motor Co. of Canada* (1979), 49 C.C.C. (2d) 1,[1979] O.J. No. 964 (QL) (C.A.) [*Ford Motor Co. of Canada*]
[477] *Ford Motor Co. of Canada*, note 476 at [QL] para. 54. The maximum fine had been increased to $100,000 after the commencement of proceedings against the defendant.
[478] *Cotton Felts Ltd*., note 25 at [QL] para. 19.
[479] *R.* v. *A. & M. Records of Canada Ltd*. (1980), 51 C.P.R. (2d) 225, [1980] O.J. No. 3910 (QL) (Co.Ct.). [*A. & M. Records of Canada Ltd*.]
[480] *R.* v. *Epson (Canada) Ltd.* (1987), 19 C.P.R. (3d) 195, [1987] O.J. No. 2708 (QL) (Dist.Ct.).[*Epson (Canada Ltd*]
[481] *R.* v. *Epson (Canada) Ltd.* (1990), 32 C.P.R. (3d) 78, [1990] O.J. No. 1003 (QL) (C.A.). [*Epson Canada Ltd*.]
[482] *R.* v. *Consumers Distributing Co.* (1980), 57 C.C.C. (2d) 317, [1980] O.J. No. 290 (QL) (C.A.) [*Consumers Distributing Co*.].
[483] *Consumers Distributing Co*., note 482 at [QL] para. 30.
[484] *R.* v. *Consumers Distributing Co.,* [1981] O.J. No. 304 (QL) (Co.Ct.). [*Consumers Distributing Co*.]
[485] *R.* v. *A.B.C. Ready-Mix Ltd.* (1972), 17 C.P.R. (2d) 91, [1972] O.J. No. 367 (QL) (H.C.) [*A.B.C. Ready-Mix Ltd*.]

[486] *R.* v. *Canadian Oxygen Ltd*., [1991] O.J. No. 1797 (QL) (Gen.Div.). [*Canadian Oxygen Ltd*.]In a related case, the court also imposed a fine of $1,700,000: see *R.* v. *Canadian Liquid Air Ltd.,* [1991] O.J. No. 1780 (QL) (Gen.Div.). [*Canadian Liquid Air Ltd*.]
[487] *R.* v. *Medi-Man Rehabilitation Products, Inc*. (1998), 76 O.T.C. 143, [1998] O.J. No. 2709 (QL) (S.C.J.) [*Medi-Man Rehabilitation Products, Inc*.].
[488] *Medi-Man Rehabilitation Products, Inc*, note 487 at [QL] para. 12.
[489] *R.* v. *F.W. Woolworth Co,* [1992] O.J. No. 1507 (QL) (Gen.Div.). [*F.W. Woolworth Co*.]
[490] *R.* v. *Canadian General Electric Co.* (1977), 35 C.P.R. (2d) 210., [1977] O.J. No. 509 (QL) (H.C.). [*Canadian General Electric Co*.]
[491] *R.* v. *Total Ford Sales Ltd.* (1987), 18 C.P.R. (3d) 404, [1987] O.J. No. 1421 (QL) (Dist.Ct.). [*Total Ford Sales Ltd*.]
[492] *Business Practices Act* (Ont.), note 110.
[493] *Ontario (Motor Vehicle Dealers Act, Registrar*) v. *Bechaalani*, [2005] O.J. No. 4631 (QL) (S.C.J.). [*Bechaalani*]
[494] *R.* v. *Serfaty* (2006), 81 O.R. (3d) 440, 212 O.A.C. 227, [2006] O.J. No. 2281 (QL). [*Serfaty*]
[495] *Serfaty*, note 494 at [QL] para. 32.
[496] *Serfaty*, note 494 at [QL] para. 33.
[497] *Serfaty*, note 494 at [QL] para. 35.
[498] *Serfaty*, note 494 at [QL] para. 40.
[499] *Serfaty*, note 494 at [QL] para. 41.
[500] *Serfaty*, note 494 at [QL] para. 42.
[501] *Serfaty*, note 494 at [QL] para.47.
[502] *R.* v. *Mouyal*, 2007 QCCQ 6141, [2007] Q.J. No. 6077 (QL). [*Mouyal*]
[503] *Mouyal*, note 502 at [QL] para. 27.
[504] *Competition Act*, note 50.
[505] *Criminal Code*, note 9.
[506] *Mouyal,* note 502 at [QL] para. 40.
[507] *R.* v. *Ocean Construction Supplies Ltd*. (1974), 15 C.P.R. (2d) 224, [1974] B.C.J. No. 391 (QL) (S.C.) [*Ocean Construction Supplies Ltd*.].
[508] *Ocean Construction Supplies Ltd*., note 507 at [QL] para. 23.
[509] *R.* v. *Ocean Construction Supplies Ltd*. (1974), 22 C.P.R. (2d) 340, [1974] B.C.J. No. 118 (QL) (C.A.) [*Ocean Construction Supplies Ltd*.].
[510] *Ocean Construction Supplies Ltd*. note 508 at [QL] para. 16.
[511] *R.* v. *Muralex Distributions Inc.* (1987), 15 B.C.L.R. (2d) 151, [1987] B.C.J. No. 1496 (QL) (Co.Ct.) [*Muralex Distributions Inc*.].
[512] *R.* v. *T. Eaton Co.* (1974), 17 C.C.C. (2d) 501*,* [1974] M.J. No. 13 (QL) (C.A.) [*T. Eaton Co*.].
[513] *R.* v. *Shell Canada Products Ltd*. (1990), 65 Man. R. (2d) 1, [1990] M.J. No. 73 (QL) (C.A.) [*Shell Canada Products Ltd*.].
[514] *R.* v. *Shell Canada Products Ltd.* (1989), 25 C.P.R. (3d) 101, [1989] M.J. No. 742 (QL) (Q.B.) [*Shell Canada Products Ltd*.].
[515] *R.* v. *Bidwell Food Processors Ltd*. (1976), 29 C.P.R. (2d) 266,[1976] M.J. No. 272 (QL) (Q.B.).[*Bidwell Food Processors Ltd*.]
[516] *R.* v. *Giftwares Wholesale Co (1977),* 36 C.C.C. (2d) 330, [1977] M.J. No. 307 (QL) (Co.Ct.).[*Giftwares Wholesale Co*.]
[517] *R.* v. *Giftwares Wholesale Co.* (1979), 49 C.C.C. (2d) 322, [1979] M.J. No. 354 (QL) (Co.Ct.) [*Giftwares Wholesale Co*.].
[518] *R.* v. *Miller's T.V. Ltd.* (1982), 19 Man. R. (2d) 259, [1982] M.J. No. 400 (QL) (Co.Ct.) [*Miller's T.V. Ltd*.].
[519] *R.* v. *Aetna Insurance Co. et al* (1975), 13 N.S.R. (2d) 693, [1975] N.S.J. No. 425 (QL) (C.A.). [*Aetna Insurance Co.*]
[520] *R.* v. *Aetna Insurance Co.,* [1978] 1 S.C.R. 731, [1977] S.C.J. No. 75 (QL) [*Aetna Insurance Co*.].
[521] *R.* v. *S.S. Kresge Co. Ltd*. (1975), 8 Nfld. & P.E.I. R. 415, [1975] P.E.I. J. No. 59 (C.A.) [*S.S. Kresge Co*.].

[522] *R.* v. *Mad Man Murphy Limited* (1983), 45 Nfld. & P.E.I.R. 116, [1983] N.J. No. 168 at para.10 (QL) (Dist.Ct.) [*Mad Man Murphy Limited*].
[523] *Wholesale Travel Group Inc.,* note 11at [QL] para. 219.
[524] *Imperial Oil Canada,* note 128 at [QL] para. 23..
[525] *Imperial Oil Canada*, note 128 at [QL] para. 24.
[526] *United Keno Hill Mines Ltd*., note 292 at [QL] para. 9
[527] *United Keno Hill Mines Ltd*., note 292 at [QL] para. 5.
[528] *Kenaston Drilling (Arctic) Ltd*., note 292 at [QL] para. 13
[529] *R v. Bata Industries Ltd*. (1992), 7 C.E.L.R. (N.S.) 245 at 293 (Ont.Prov.Div.) [*Bata Industries Ltd*.].
[530] *Ontario Water Resources Act*, note 318.
[531] *Bata Industries Ltd*., note 529 at 294-295.
[532] *Bata Industries Ltd.*, note 529 at 306.
[533] *R.* v. *Bata Industries Ltd*. (1993), 14 O.R. (3d) 354, [1993] O.J. No. 1679 (QL) (Gen.Div.) [*Bata Industries Ltd*.].
[534] *R.* v. *Bata Industries Ltd*. (1995), 25 O.R. (3d) 321, [1995] O.J. No. 2691 (QL) (C.A.) [*Bata Industries Ltd*.].This remedial approach in pollution cases was recently endorses by the English Court of Appeal, Criminal Division, in *R.* v. *Thames Water Utilities Ltd.,* [2010] EWCA Crim 202 (C.C.A.) [*Thames Water Utilities Ltd*.].
[535] *R.* v. *Safety-Kleen Canada Inc*. (1997), 32 O.R. (3d) 493, [1997] O.J. No. 800 (QL) (C.A.). [*Safety-Kleen Canada Inc*.]
[536] *Safety-Kleen Canada Inc*., note 535 at [QL] para. 27. Under the *Provincial Offences Act,* note 3, appeals to the Ontario Court of Appeal must involve a question of law, otherwise the Court lacks jurisdiction to hear the matter.
[537] *R.* v. *Dow Chemical Canada Inc*., [1997] O.J. No. 3301 (QL) (Gen.Div.) [*Dow Chemical Canada Inc*.].
[538] *R.* v. *Dow Chemical Canada Inc*. (2000), 47 O.R. (3d) 577, 130 O.A.C. 26, [2000] O.J. No. 757 (QL) [*Dow Chemical Canada Inc*.].
[539] *Environmental Protection Act (Ont*.), note 259.
[540] *R.* v. *Ontario Hydro*, [1988] O.J. No. 1673 (QL) (Dist.Ct.) [*Ontario Hydro*].
[541] *R.* v. *B.E.S.T. Plating Shoppe Ltd*. (1986), 1 C.E.L.R. (N.S.) 85, [1986] O.J. No. 706 (QL) (H.C.) [*B.E.S.T. Plating Shoppe Ltd*.].
[542] *R.* v. *B.E.S.T. Plating Shoppe Ltd. and Siapas* (1987), 59 O.R. (2d) 145, 21 O.A.C. 62, [1987] O.J. No. 165 (QL) [*B.E.S.T. Plating Shoppe Ltd. and Siapas*].
[543] *Toronto (Metropolitan)* v. *Siapas* (1988), 3 C.E.L.R. (N.S.) 122, [1988] O.J. No. 1359 (QL) (H.C.).[*Siapas*]
[544] *Toronto (Metropolitan)* v. *Siapas,* [1988] O.J. No. 2564 (QL) (H.C.). [*Siapas*]
[545] *R.* v. *Shamrock Chemicals Ltd*. (1989), 4 C.E.L.R. (N.S.) 315, [1989] O.J. No. 2356 (QL) (Dist.Ct.) [*Shamrock Chemicals Ltd*.].
[546] *Ontario Water Resources Act*, note 318.
[547] *Environmental Protection Act (Ont.),* note 317.
[548] *R.* v. *Rainone Construction Ltd*., [1999] O.J. No. 3315 (QL) (S.C.J.) [*Rainone Construction Ltd*.].
[549] *Fisheries Act*, note 121.
[550] *R.* v. *Domtar Packaging Red Rock Mill, a Division of Domtar Inc*. (2000), 36 C.E.L.R. (N.S.) 307, [2000] O.J. No. 5112 (QL) (S.C.J.) [*Domtar Packaging Red Rock Mill*]
[551] *R.* v. *Domtar Specialty Fine Papers, a Division of Domtar Inc*., [2001] O.T.C. 335, [2001] O.J. No. 1733 (QL) (S.C.J.) [*Domtar Specialty Fine Papers*].
[552] *R.* v. *Canadian Tire Corp*., [2004] O.T.C. 668, [2004] O.J. No. 3129 (QL) (S.C.J.) [*Canadian Tire Corp*].
[553] *Canadian Environmental Protection Act*, note 131.
[554] *Ozone Depleting Substance Regulations 1998,* SOR/99-7. [*Ozone Depleting Substance Regulations*].
[555] *Canadian Tire Corp*., note 552 at [QL] para. 101.
[556] *Canadian Tire Corp*., note 552 at [QL] para. 113.

[557] *R.* v. *Dupont Canada Inc.,* [1992] O.J. No. 2144 (QL) (Gen.Div.) [*Dupont Canada Inc*.].
[558] *R.* v. *Matachewan Consolidated Mines Ltd*. (1994), 13 C.E.L.R. (N.S.) 156, [1994] O.J. No. 4196 (QL) (Gen.Div.) [*Matchewan Consolidated Mines Ltd*.].
[559] *R*. v. *Commander Business Furniture Inc*., [1994] O.J. No. 313 (QL) (Gen.Div.) [*Commander Business Furniture Inc*.].
[560] *Commander Business Furniture Inc*., note 559 at para. 22.
[561] *R.* v. *Canadian Pacific Ltd*. (1994), 15 C.E.L.R. (N.S.) 181, [1994] O.J. No. 2573 (QL) (Gen.Div.) [*Canadian Pacific Ltd*.].
[562] *R.* v. *Lopes* (1988), 3 C.E.L.R. (N.S.) 78, [1988] O.J. No. 874 (QL) (Dist.Ct.) [*Lopes*].
[563] *Terroco Industries Ltd*., note 289.
[564] *Environmental Protection and Enhancement Act (Alta*.), note 291.
[565] *Dangerous Goods Transportation and Handling Act (Alta*.), note 290.
[566] *Terroco Industries Ltd*., note 289 at [QL] para. 34.
[567] *Kenaston Drilling (Arctic) Ltd*., note 292 at [QL] para. 13.
[568] *Terroco Industries Ltd*., note 289 at [QL] para. 53.
[569] *Terroco Industries Ltd*., note 289 at [QL] para. 63.
[570] *Terroco Industries Ltd*., note 289 at [QL] para. 74.
[571] *Terroco Industries Ltd*., note 289 at [QL] para. 76.
[572] *Cool Spring Dairy Farms Ltd*., note 142.
[573] *Cool Spring Dairy Farms Ltd*., note 142 at [QL] para. 10.
[574] *R.* v. *Lefebvre*, 1999 ABQB 523, 247 A.R. 178, [1999] A.J. No. 801 (QL) [*Lefebvre*].
[575] *Lefebvre*, note 574 at [QL] para. 12.
[576] *United Keno Hill Mines Ltd*., note 292.
[577] *Lefebvre*, note 574 at [QL] para. 13.
[578] *Lefebvre*, note 574 at [QL] para. 19.
[579] *R*. v. *Blain's Custom Ag (99) Ltd*., 2004 ABQB 615, [2004] A.J. No. 945 (QL) [*Blain's Custom Ag (99) Ltd*.].
[580] *Environmental Protection and Enhancement Act (Alta*.), note 291.
[581] *R.* v. *Centennial Zinc Plating Ltd*., 2004 ABQB 211, 353 A.R. 300, [2004] A.J. No. 319 (QL) [*Centennial Zinc Plating Ltd*.].
[582] *Centennial Zinc Plating Ltd*., note 581 at [QL] para. 77.
[583] *Abbott*, note 306.
[584] *Abbott,* note 306 at [QL] para. 22.
[585] *Abbott*, note 306 at [QL] para. 23.
[586] *Abbott*, note 306 at [QL] para. 32.
[587] *Abbott*, note 306 at [QL] para. 32.
[588] *Abbott*, note 306 at [QL] para. 34.
[589] *Abbott*, note 306 at [QL] para. 49.
[590] *R.* v. *Western Stevedoring Co*. (1984), 13 C.E.L.R. 159, [1984] B.C.J. No. 754 (QL) (Co.Ct.) [*Western Stevedoring Co*.].
[591] *R.* v. *Enso Forest Products Ltd*. (1992), 70 B.C.L.R. (2d) 145, [1992] B.C.J. No. 1429 (QL) (S.C.) [*Enso Forest Products Ltd*.].
[592] No opinion was expressed as to the appropriate quantum of fine as the defendant had not brought an appeal against sentence. Justice Shaw expressed an opinion as to the fitness of sentence in the event that the case was appealed further, and since, as he explained, he had formed a view on the sentence appeal. In fact, the Crown brought such an appeal, which was dismissed in a split decision: *R.* v. *Enso Forest Products Ltd*. (1993), 38 B.C.A.C. 74, 85 B.C.L.R. (2d) 249, [1993] B.C.J. No. 2409 (QL) [*Enso Forest Products Ltd*.].
[593] *R.* v. *Canadian Pacific Forest Products Ltd*., [1992] B.C.J. No. 1339 (QL) (S.C.) [*Canadian Pacific Forest Products Ltd*.].
[594] *R.* v. *Fibreco Pulp Inc*. (1993), 10 C.E.L.R. (N.S.) 1, [1993] B.C.J. No. 218 (QL) (S.C.) [*Fibreco Pulp Inc*.].
[595] *Fibreco Pulp Inc*.*,* note 594 at [C.E.L.R.] para. 70.
[596] *R.* v. *Fibreco Pulp Inc.* (1998), 106 B.C.A.C. 4, [1998] B.C.J. No. 758 (QL) [*Fibreco Pulp Inc*.].

[597] *R*. v. *Alpha Manufacturing Inc*., 2005 BCSC 1644, [2005] B.C.J. No. 2598 (QL) [*Alpha Manufacturing Inc*.].
[598] *Alpha Manufacturing Inc*., note 597 at [QL] para. 47.
[599] *R.* v. *Alpha Manufacturing Inc.,* 2009 BCCA 443, [2009] B.C.J. No. 2169 (QL) [*Alpha Manufacturing Inc*.].
[600] *R.* v. *Canadian Pacific Railway Co*., 2008 BCSC 1681, [2008] B.C.J. No. 2381 (QL) [*Canadian Pacific Railway Co*.].
[601] *Fisheries Act*, note 121.
[602] *Canadian Pacific Railway Co*., note 600 at [QL] para. 17.
[603] *R.* v. *Churchbridge (Regional Municipality),* 2005 SKQB 524, 273 Sask. R. 29, [2005] S.J. No. 746 (QL) [*Churchbridge*].
[604] *R.* v. *Echo Bay Mines Ltd*., [1984] N.W.T.R. 303, [1984] N.W.T.J. No. 35 (QL) (S.C.) [*Echo Bay Mines Ltd*.].
[605] *Echo Bay Mines Ltd*., note 604 at [QL] para. 23.
[606] *Kenaston Drilling (Arctic) Ltd*., note 292.
[607] *Kenaston Drilling (Arctic) Ltd*., note 292 at [QL] para. 14.
[608] *R*. v. *Placer Development Ltd*., [1983] N.W.T.R. 351, [1982] N.W.T.J. No. 37 (QL) (S.C.) [*Placer Development Ltd*.].
[609] *R.* v. *Northwest Territories Power Corp*., [1990] N.W.T.R. 125, [1990] N.W.T.J. No. 38 (QL) (S.C.) [*Northwest Territories Power Corp*.].
[610] *R.* v. *Northwest Territories (Commissioner*), [1994] N.W.T.R. 354, [1994] N.W.T.J. No. 58 (QL) (S.C.) [*Northwest Territories*].
[611] The payment order was also varied to state that while the funds were to be used to promote the conservation and protection of fish or fish habitat in the waters of or adjacent to the Northwest Territories, such use could also include the construction of an aquarium at Iqaluit, and the funding or conduct of programs approved by the Department of Environment of Canada related to sewage and waste treatment and disposal in order to meet the requirements of the *Fisheries Act,* note 121*,* in relation to the Northwest Territories.
[612] *R.* v. *Iqaluit (City),* [2002] Nu. J. No. 1 (QL) (C.J.) [*Iqaluit*].
[613] The terms of this order made under the *Fisheries Act,* note 121*,* appear in *R.* v. *Iqaluit (City),* [2002] Nu. J. No. 2 (QL) (C.J.) [*Iqaluit*]. The defendant was ordered to draft and implement a standard operating procedures manual for the City's sewage lift stations, and to develop a training course regarding spill, response and clean-up of sewage and other pollutants, as well as training its Public Works' employees pursuant to this course. The manual and training course were to be approved by Environment Canada before the manual was made effective, implemented and the training commenced.
[614] *R.* v. *Services environnementaux Laidlaw (Mercier) Ltée ,* [1998] R.J.Q. 276, [1997] Q.J. No. 4156 (QL) (C.S.) [Services environnementaux Laidlaw (Mercier) Ltée].
[615] *Services environnementaux Laidlaw (Mercier) Ltée,* note 614 at [QL] para. 16.
[616] *Services environnementaux Laidlaw (Mercier) Ltée.,* note 614 at [QL] para. 18.
[617] *R*. v. *Vac Daniels Ltd*. (1997), 159 N.S.R. (2d) 399, [1997] N.S.J. No. 160 (QL) (C.A.) [*Vac Daniels Ltd*.].
[618] *Environmental Protection Act*, S.N.S. 1973, c.6 [*Environmental Protection Act (N.S*.)].
[619] *Vac Daniels Ltd*., note 617 at [QL] para. 7.
[620] *R.* v. *Oxford Frozen Foods Ltd*. (1989), 91 N.S.R. (2d) 334, [1989] N.S.J. No. 500 (QL) (Co.Ct.) [*Oxford Frozen Foods Ltd*.].
[621] *R.* v. *B.A. Denton Management Ltd.* (1993), 127 N.S.R. (2d) 386, [1993] N.S.J. No. 542 (QL) (S.C.) [*B.A. Denton Management Ltd*.].
[622] *B.A. Denton Management Ltd*., note 621 at [QL] para. 5.
[623] *R*. v. *Fraser Papers Inc*. *(Canada*), 2001 NBQB 191, 242 N.B.R. (2d) 373, [2001] N.B.J. No. 404 (QL) [*Fraser Papers Inc*. *(Canada*)].
[624] *Clean Air Act*, S.N.B. 1997, c.C-5.2 [*Clean Air Act (N.B*.)].
[625] *R.* v. *Gemtec Ltd*., 2007 NBQB 199, 321 N.B.R. (2d) 200, [2007] N.B.J. No. 202 (QL) [*Gemtec Ltd*.].
[626] *Gemtec Ltd*., note 625 at [QL] para. 54.

[627] *Gemtec Ltd*., note 625 at [QL] para. 61.
[628] *R*. v. *Lundrigan Group Ltd*., [1990] N.J. No. 449 (QL) (S.C.) [*Lundrigan Group Ltd*.].
[629] *Lundrigan Group Ltd*., note 628 at para. 58.
[630] *R*. v. *Pennecon Ltd*. [1996] N.J. No. 9 (QL) (S.C.) [*Pennecon Ltd*.].
[631] *Department of Environment and Lands Act*, R.S.N. 1990, c.D-11 [*Department of Environment and Lands Act (Nfld)]*.
[632] At trial the director of the company was also found guilty and fined $500; however, an acquittal was substituted on appeal on the basis that the Crown had not established a *prima facie* case against him.
[633] *Pennecon Ltd*., note 630 at para. 22..
[634] *R.* v. *Newfoundland Recycling Ltd*., 2008 NLTD 38, 274 Nfld. & P.E.I.R. 83, [2008] N.J. No. 71 (QL) [*Newfoundland Recycling Ltd*.].
[635] *R.* v. *Tahkuna (The*) (2002), 210 Nfld. & P.E.I.R. 68, [2002] N.J. No. 62 (QL) (S.C.) [*Tahkuna*].
[636] *R,* v. *Newfoundland Recycling Ltd*., 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153, [2009] N.J. No. 105 (QL) [*Newfoundland Recycling Ltd*.].
[637] *Cotton Felts Ltd*., note 25.
[638] *Services environnementaux Laidlaw (Mercier) Ltée*, note 614.
[639] *B.A. Denton Management Ltd.,* note 621.
[640] *Abbott,* note 306.
[641] *Centennial Zinc Plating Ltd*., note 581.
[642] Campbell, note 122 at 13.
[643] Campbell, note 122 at 32.
[644] See for example Campbell, note 122; Hughes, note 122; Strickland, note 122; Verhulst, note 136. The limitations on the use of fines generally is discussed by the Law Reform Commission of Canada, *Sentencing in environmental cases,* note 48. This report, it should be noted, post-dates the *Cotton Felts Ltd*. decision, and indeed references it.
[645] Sayre, note 13.
[646] Swaigen, note 37 at xxxv.
[647] Verhulst, note 136 at 283.
[648] R. Glenn Hubbard, *Money, the Financial System and the Economy* (New York: Addison-Wesley Publishing Company, Inc., 1994) at 384, describes the regulatory cycle, in the context of banking regulation, as consisting of four stages: “financial crisis, regulation, financial innovation, and regulatory response.” Tara Naib, *Enron and the Regulatory Cycle* (Duke University, thesis, 2002) at 7 compresses the regulatory cycle into three categories: crisis, regulatory response, and innovation, observing that Hubbard’s “regulatory response” moves in the direction from response to regulation.
[649] Gunningham, note 406 at 325.
[650] Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: System and Sanctions* (Oxford: Oxford University Press, 1999). See also Neil Gunningham and Peter Grabosky, *Smart Regulation. Designing Environmental Policy* (Oxford: Clarendon Press, 1998); Gunningham, note 649; Neil Gunningham, Robert A. Kagan, and Dorothy Thornton, *Shades of Green. Business, Regulation and Environment* (Stanford: Stanford University Press, 2003).
[651] Ayres, note 15. See also John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mining Safety* (Albany: State University of New York Press, 1985); John Braithwaite, *Restorative Justice & Responsive Regulation* (New York: Oxford University Press, 2002).
[652] Breyer, note 62.
[653] Archibald, note 7.
[654] Keith Hawkins, *Environment and Enforcement. Regulation and the Social Definition of Pollution* (Oxford: Clarendon Press, 1984) at 109.
[655] Andrew Hopkins, *Making Safety Work. Getting Management Commitment to Occupational Health and Safety* (St. Leonards: Allen & Unwin, 1995) at 73.
[656] Glasbeek, note 61 at 301-302.
[657] Archibald, note 7 at12-1.
[658] Archibald, note 7 at 1-16.
[659] Archibald, note 7 at 1-16.

[660] Salter, note 15 at 151. See also Ellen Baar, *Positive Compliance Programs: Their Potential as Instruments for Regulatory Reform (Vol. 1)* (Ottawa: Department of Justice, 1991) at III-16 respecting risk assessment and safety regulation.
[661] Liora Salter, *Mandated Science: Science and Scientists in the Making of Standards* (Dordrecht: Kluwer Academic Publishers, 1988) at 1.
[662] G. Bruce Doern and Ted Reed, "Canada's Changing Science-Bases Policy and Regulatory Regime: Issues and Framework" in G.Bruce Doern and Ted Reed, eds., *Risky Business. Canada's Changing Science-Based Policy and Regulatory Regime* (Toronto: University of Toronto Press, 2000) at 7.
[663] Salter, note 661 at 176.
[664] Archibald, note 7 at 1-16.
[665] Breyer, note 62 at 3.
[666] Fazil Mihlar, "The Federal Government and the 'RIAS' Process: Origins, Need, and Non-compliance" in G. Bruce Doern, Margaret M. Hill, Michael J. Prince, and Richard J. Shultz, eds., *Changing the Rules. Canadian Regulatory Regimes and Institutions* (Toronto: University of Toronto Press, 1999) at 281.
[667] Mihlar, note 666.
[668] United Kingdom Treasury, *Reducing administrative burdens: effective inspection and enforcement* (Hampton Report – Final Report) March 2005 (www.hm-treasury.gv.uk/hampton) at 4.
[669] Archibald, note 7 at 1-10.
[670] Breyer, note 62 at 9.
[671] Breyer, note 62 at 9. See also Archibald, note 7 at 1-17. Douglas Powell, "Risk-Based Regulatory Responses in Global Food Trade: A Case Study of Guatemalan Raspberry Imports into the United States and Canada, 1996-1998" iin G.Bruce Doern and Ted Reed, eds., *Risky Business. Canada's Changing Science-Based Policy and Regulatory Regime* (Toronto: University of Toronto Press, 2000) at 135 notes that risk assessment as a component of risk analysis was first formalized by the U.S. National Academy of Sciences through the National Research Council in 1983. The four-pronged model of risk assessment is provided by the NAS-NRC.
[672] Breyer, note 62 at 9.
[673] Breyer, note 62 at 10.
[674] Archibald, note 7 at 1-27.
[675] Powell, note 671 at 137-138.
[676] Breyer, note 62 at 42.
[677] Archibald, note 7 at 1-20.
[678] Archibald, note 7 at 1-34.
[679] Paolo F.Ricci, *Environmental and Health Risk Assessment and Management. Principles and Practices* (Dordrecht: Springer, 2006) at 37. See also Albert J. Reiss Jr., "The Institutionalization of Risk" in James F. Short Jr., and Lee Clarke, eds., *Organizations, Uncertainties, and Risk* (Boulder: Westview Press, 1992) at 302.
[680] Ivo Krupka, "The Pest Management Regulatory Agency: The Resilience of Science in Pesticide Regulation" in G. Bruce Doern and Ted Reed, eds., *Risky Business. Canada's Changing Science-Based Policy and Regulatory Regime* (Toronto: University of Toronto Press, 2000) at 243. See also Breyer, note 62 at 57.
[681] Bill Jarvis, "A Question of Balance: New Approaches for Science-Based Regulation" in G. Bruce Doern and Ted Reed, eds., *Risky Business. Canada's Changing Science-Based Policy and Regulatory Regime* (Toronto: University of Toronto Press, 2000) at 317.
[682] Jarvis, note 681 at 322.
[683] Mihlar, note 666 at 284.
[684] Dayna N. Scott, "Confronting Chronic Pollution: A Socio-Legal Analysis of Risk and Precaution" (2008), 46 Osgoode Hall L.J. 293 at 308.
[685] Jeremy D. Fraiberg and Michael J. Trebilcock, "Risk Regulation: Technocratic and Democratic Tools for Regulatory Reform" (1998), 43 McGill L.J. 835 at 857.
[686] Archibald, note 7 at 1-32.
[687] Breyer, note 62 at 57.

[688] Gobert, note 59 at 725.
[689] Richard Johnstone, "Putting the Regulated Back into Regulation" (1999), 26 J. L. & Soc'y 378 at 382.
[690] Breyer, note 62 at 57.
[691] Breyer, note 62 at 58.
[692] Daniel E. Lane, "Fisheries and Oceans Canada: Science and Conservation" in G. Bruce Doern and Ted Reed, eds., *Risky Business. Canada's Changing Science-Based Policy and Regulatory Regime* (Toronto: University of Toronto Press, 2000) at 271.
[693] Michael J. Prince, "Aristotle's Benchmarks: Institutions and Accountabilities of the Canadian Regulatory State" in G. Bruce Doern, Margaret M. Hill, Michael J. Prince, and Richard J. Shultz, eds., *Changing the Rules. Canadian Regulatory Regimes and Institutions* (Toronto: University of Toronto Press, 1999) at 229.
[694] Braithwaite, *To Punish or Persuade: Enforcement of Coal Mining Safety,* note 651 at 142.
[695] Braithwaite, *To Punish or Persuade: Enforcement of Coal Mining Safety,* note 651 at 142
[696] Ayres, note 15 at 53. See also Johnstone, note 689 at 379: "The challenge is to develop enforcement strategies that punish the worst offenders, while at the same time encouraging and helping employers to comply voluntarily"; Gunningham and Grabosky, note 650 at 396.
[697] Fiona Haines and David Gurney, "The Shadows of the Law: Contemporary Approaches to Regulation and the Problem of Regulatory Conflict" (2003), 25 Law & Pol'y 353 at 360.
[698] Ayres, note 15 at 35. Neil Gunningham, *Legislating For Job Safety. A Critique of Occupational Health and Safety Legislation in Australia and a Programme for Reform* (Melbourne: Australian Society of Labor Lawyers, 1983) at 16 comments that the "favoured tools" of inspectorates are advice, guidance and persuasion.
[699] While the regulatory enforcement pyramid is ordered in this way, this is not to suggest that the regulator will necessarily employ such a sequential approach. For example, in a particularly egregious case of willful or repeated non-compliance, the regulator may move directly to prosecution; conversely, where it is thought that a prosecution may prove ineffective due to limited court or prosecutorial resources, recourse to licence suspension or revocation may be pursued, particularly if there are other regulated parties available to provide comparable goods and services. Likewise, enforcement officers may prefer administrative monetary schemes as opposed to fines imposed by courts, so as to obviate the necessity of a time-consuming and lengthy prosecution.
[700] Archibald, note 7 at 14-8.
[701] Ayres, note 15 at 36.
[702] Ayres, note 15 at 4.
[703] Gunningham, Kagan and Thornton, note 650 at 99-102 use these terms to describe environmental management styles in order of progressiveness and commitment to regulatory compliance: "environmental laggards", "reluctant compliers", "committed compliers", "environmental strategists" and "true believers".
[704] Baar, note 660 at I-1.
[705] Archibald, note 7 at 14-8.
[706] John Braithwaite, "Meta Risk Management and Responsive Regulation for Tax System Integrity" (2003), 25 Law & Policy 1.
[707] Archibald, note 7 at 14-9.
[708] Braithwaite, note 706 at 14-15. See also United Kingdom Treasury, *Reducing administrative burdens: effective inspection and enforcement,* note 668 at 9 which recommends that risk assessment should be employed comprehensively by regulators, and that penalties should be based on risk assessment.
[709] Gunningham and Johnstone, note 650 at 116.
[710] Gunningham and Johnstone, note 650 at 116.
[711] Gunningham and Johnstone, note 650 at 116.
[712] Gunningham and Johnstone, note 650 at 124.
[713] Ayres, note 15 at 19.
[714] Ayres, note 15 at 19.

[715] Gunningham and Johnstone, note 650 at 123. See also Fiona Haines, *Corporate Regulation. Beyond 'Punish' or 'Persuade'* (Oxford: Clarendon Press, 1997) at 221.
[716] Richard Johnstone, *From Fiction to Fact – Rethinking OHS Enforcement (Working Paper 11)* (Australia: National Research Centre for OHS Regulation, 2003) at 4.
[717] Bridget M. Hutter, *Regulation and Risk: Occupational Health and Safety on the Railways* (Oxford: Oxford University Press, 2001) at 303.
[718] Johnstone, note 716 at 4. Of course, many, if not most regulated parties, may be committed to compliance on their own, without the necessity of the types of incentives mentioned by Johnstone.
[719] Hutter, note 717 at 301-302.
[720] Johnstone, note 716 at 4.
[721] Hutter, note 717 at 301-302. See also Johnstone, note 716 at 4.
[722] *Sault Ste. Marie*, note 33 at [C.C.C.] 357.
[723] *Sault Ste. Marie*, note 33 at [C.C.C.] 357. See further Howard, note 41.
[724] Coffee, note 42.
[725] Coffee, note 42.
[726] United Kingdom, Department for Business Enterprise & Regulatory Reform, *Regulatory Justice: Sanctioning in a post-Hampton World* (Consultation Document, May, 2006) [http://www.cabinetoffice.gov.uk/regulation/penalties] at 8.
[727] Verhulst, note 136 at 283.
[728] *Environmental Protection Act (Ont*.), note 259.
[729] *Environmental Protection Act (Ont*.), note 259, s.188.1(1).
[730] *Public Health Act (B.C*.), note 133.
[731] *Public Health Act (B.C*.), note 133, s.105.
[732] *Public Health Act (B.C*.), note 133, s.106.
[733] The issue as to whether it is preferable to set out sentencing purposes and principles in a statute of general application, such as the *Provincial Offences Act* of Ontario, note 3, as opposed to the *Public Health Act (B.C.),* note 133, which is not such a statute, is discussed in further detail in the following section.
[734] Verhulst, note 136 at 283.
[735] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 726 at 8.
[736] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 726 at 8.
[737] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 726 at 8.
[738] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 726 at 20.
[739] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 726 at 20.
[740] United Kingdom, Department for Business Enterprise & Regulatory Reform, *Regulatory Justice: Making Sanctions Effective* (Final Report, November, 2006) [http://www.cabinetoffice.gov.uk/regulation/penalties] at 6.
[741] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 740 at 6.
[742] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 740 at 27.
[743] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 740 at 27.
[744] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 740 at 28.
[745] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 740 at 28.
[746] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 740 at 28. Macrory qualified the wording of four of the six penalties principles so that they now read: (i) a sanction should *aim* to change the behaviour of the offender (ii) a sanction should *aim* to eliminate any financial gain or benefit from non-compliance (iii) a sanction should be responsive and consider what is appropriate for the particular offender and the regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction (iv) a sanction should be proportionate to the nature of the offence and the harm caused (v) a sanction should *aim* to restore the harm caused by regulatory non-compliance, where appropriate (vi) a sanction should *aim* to deter future non-compliance.
[747] Verhulst, note 136 at 283.
[748] Verhulst, note 136 at 283.

[749] Keith Hawkins, "'FATCATS' and Prosecution in a Regulatory Agency: A Footnote on the Social Construction of Risk" in James F. Short Jr. and Lee Clarke, eds., *Organizations, Uncertainties, and Risk* (Boulder: Westview Press, 1992) at 296.
[750] Hawkins, note 749 at 296.
[751] Baar, note 660 at III-7.
[752] Hopkins, note 655 at 55.
[753] Verhulst, note 136 at 283.
[754] Gunningham and Grabosky, note 650 at 265. See too Julia Black and Robert Baldwin, "Really Responsive Regulation" (2008), 71 Mod. L. Rev. 59 at 73-76.
[755] Baar, note 660 at IV-20.
[756] Baar, note 660 at XII-4.
[757] Baar, note 660 at IV-21.
[758] Baar, note 660 at IV-21. In a subsequent study, it was noted that the term "positive compliance" denotes an approach to regulation which "relegates *as much as possible* to an administrative rather than a judicial process": see Liora Salter, *An Inventory of Positive Compliance Programs in the U.K., Australia, and U.S.A. (Vol. 2, Technical Report)* (Ottawa: Department of Justice, 1988) at vii.
[759] *R.* v. *Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, [2002] S.C.J. No. 30 (QL) [*Sheppard*]; *R.* v. *Braich,* 2002 SCC 27, [2002] 1 S.C.R. 903, [2002] S.C.J. No. 29 (QL) [*Braich*]; *R.* v. *Gagnon,* 2006 SCC 17, [2006] 1 S.C.R. 621, [2006] S.C.J. No. 17 (QL) [*Gagnon*].
[760] *R.* v. *Goebel*, 2003 ABQB 422, 338 A.R. 201, 17 Alta. L.R. (4th) 153, [2003] A.J. No. 591 at para.13 (QL) [*Goebel*].
[761] Julia Black, *Rules and Regulators* (Oxford: Clarendon Press, 1997) at 13.
[762] Verhulst, note 136 at 283.
[763] Verhulst, note 136 at 283.
[764] Verhulst, note 136 at 283; Ontario Law Commission, note 8 at 14-15.
[765] Julia Black, Martyn Hopper and Christa Band, "Making a success of Principles-based regulation" Law and Financial Markets Review (May 2007) at 191.
[766] United Kingdom Financial Services Authority, *Principles-based regulation. Focusing on the outcomes that matter* (London: The Financial Services Authority, 2007) at 6.
[767] Black note 765 at 191; United Kingdom Financial Services Authority, note 766 at 6. See too Elizabeth Bluff and Neil Gunningham, "Principle, Process, Performance or What? New Approaches to OHS Standards Setting" in Elizabeth Bluff, Neil Gunningham, and Richard Johnstone, eds., *OHS Regulation for a Changing World of Work* (Sydney: The Federation Press, 2004).
[768] Verhulst, note 136 at 284; Ontario Law Commission, note 8 at 15. For a discussion of how standards should be classified, see Gunningham and Johnstone, note 650, chapter 2, "From Compliance to Best Practice in OHS: The Roles of Specification, Performance, and Systems-Based Standards".
[769] These particular examples are used by Verhulst, note 135 at 284. Similar illustrations are used by the Ontario Law Commission, note 8 at 15. Presumably the parties have entered into a negotiation to produce these results, or exchanged views as to the desirability of the particular regulatory strategy for the activity in question.
[770] Verhulst, note 136 at 284; Ontario Law Commission, note 8 at 15.
[771] Black, note 765 at 196.
[772] Verhulst, note 136 at 284; Ontario Law Commission, note 8 at 15.
[773] Verhulst, note 136 at 284; Ontario Law Commission, note 8 at 15.
[774] Verhulst, note 136 at 285.
[775] Hawkins, note 654 at 109.
[776] Ontario Law Commission, note 8 at 15.
[777] Verhulst, note 136 at 285.
[778] Hawkins, note 749 at 281.
[779] Black, note 754 at 80.
[780] Albert J. Reiss Jr., "The Institutionalization of Risk" in James F. Short Jr., and Lee Clarke, eds., *Organizations,* Uncertainties*, and Risk* (Boulder: Westview Press, 1992) at 307.

[781] Black, note 754.
[782] Black, note 754.
[783] Black, note 754 at 69.
[784] Black, note 754 at 80.
[785] Gunningham and Grabosky, note 650 at 403. The authors give the example of pollution taxes as being "static" and not "dynamic", such that they cannot be effectively "tailored" to correspond to the behaviour of the party.
[786] Verhulst, note 136 at 286; Ontario Law Commission, note 8 at 15.
[787] Verhulst, note 136 at 286.
[788] Hawkins, note 654 at 109.
[789] Canadian Sentencing Commission, note 183 at 133.
[790] *Criminal Code*, note 9.
[791] Manson, note 162 at 468.
[792] Verhulst, note 136 at 286.
[793] *Public Health Act (B.C*.) note 133.
[794] *Provincial Offences Act*, note 3.
[795] *Offence Act (B.C*.), note 267.
[796] *Provincial Offences Act*, note 3.
[797] *Public Health Act (B.C*.), note 133.
[798] *Canadian Environmental Protection Act*, note 131.
[799] This practice is derived from *Friskies Petcare (UK) Ltd*., note 366.
[800] Verhulst, note 136 at 286.
[801] Ontario Law Commission, note 8 at 15.
[802] *Public Health Act (B.C*.), note 133.
[803] Public Health Act (B.C*.),* note 133, s.105.
[804] *Public Health Act (B.C*.), note 133, s.106.
[805] *Public Health Act (B.C*.), note 133, s.107.
[806] *Public Health Act (B.C.),* note 133, s.107(1)(c).
[807] *Public Health Act (B.C.),* note 133, s.107(1)(d).
[808] *Public Health Act (B.C.),* note 133, s.107(1)(f).
[809] *Public Health Act (B.C.),* note 133, s.107(1)(h).
[810] *Public Health Act (B.C.),* note 133, s.107(1)(i). These guidelines or standards may be made available to another person or class of persons, for a fee or free of charge, for up to three years from the date by which the guidelines or standards must be developed: s.107(1)(j).
[811] *Public Health Act (B.C.),* note 133, s.107(1)(k).
[812] *Public Health Act (B.C.),* note 133, s.107(1)(l).
[813] *Public Health Act (B.C.),* note 133, s.107(1)(m).
[814] *Public Health Act (B.C*.), note 133, s.108(1).
[815] *Public Health Act (B.C*.), note 133, s.108 (2).
[816] *Public Health Act (B.C*.), note 133, s.109.
[817] *Public Health Act (B.C*.), note 133, s.110.
[818] *Public Health Act (B.C*.), note 133.
[819] *Criminal Code*, note 9.
[820] See, for example, Manson, note 163 at 472; Jull, note 234 at 77-79; Ives, note 231 at 118; Doob, note 233 at 168; Ashworth, note 235 at 189; Roberts, note 198 at 223.
[821] Canadian Sentencing Commission, note 184 at 134.
[822] Archibald, note 7 at 12-38.
[823] See, for example, *United Keno Hill Mines Ltd.,* note 292; *Kenaston Drilling (Arctic) Ltd.,* note 292; *Bata Industries Ltd*., note 529; Law Reform Commission of Canada, note 48 at 40-44.
[824] *Cotton Felts Ltd*., note 25. The very recent decision of the England and Wales Court of Criminal Appeal in *Thames Water Utilities Ltd.,* note 534, is also particularly illuminating in this regard. The Court, in setting out a new principled approach to sentencing for regulatory offences, identified punishment, deterrence and reparation as being "particularly important purposes" of sentence in such cases, and stated that that there was "a clear policy need" to encourage the

making of voluntary reparation by offenders, whether by consenting to compensation orders, or making or pledging voluntary payments: see paras. 39(vi), 53.
[825] Sherrin, note 79 at 2.
[826] Verhulst, note 136 at 287.
[827] Canadian Sentencing Commission, note 184 at134.
[828] *Imperial Oil Canada,* note 128 at [QL] para. 24.
[829] Canadian Sentencing Commission, note 184 at 390.
[830] Law Reform Commission of Canada, *Restitution and compensation: Fines* (Working Paper 5) (Ottawa: Government of Canada, 1974) at 7-8. See also *R.* v. *Zelensky,* [1978] 2 S.C.R. 940 at 952, per Laskin C.J., [1978] S.C.J. No. 48 (QL) [*Zelensky*].
[831] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 740 at 31.
[832] See, for example, Braithwaite, *Restorative Justice & Responsive Regulation*, note 651.
[833] *Criminal Code*, note 9, s.718(e), (f).
[834] See Campbell, note 122; Hughes, note 122; Strickland, note 122; Libman, note 39 at 11.2(x).
[835] Verhulst, note 136 at 289.
[836] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 740 at 29.
[837] *Cotton Felts Ltd*., note 25.
[838] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 740 at 29.
[839] Verhulst, note 136 at 289.
[840] See Ellen Baar, *Positive Compliance Programs: Their Potential as Instruments for Regulatory Reform (Vol. 1)*[ Working Document] (Ottawa: Department of Justice, 1991) at 76; Archibald, note 7 at 12-12.
[841] Archibald, note 7 at 12-1.
[842] Archibald, note 7 at 12-1.
[843] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 740 at 20.
[844] See, for example, Campbell, note 122; Hughes, note 122; Strickland, note 122.
[845] Ruby, note 237 at 427.
[846] *Provincial Offences Act*, note 3, s.72(1).
[847] *Provincial Offences Act*, note 3, s.731(1).
[848] *Provincial Offences Act*, note 3, s.72(1). These considerations, which are also set out in s.731(1) of the *Criminal Code*, note 9, "reflect the origins of probation as relief from the constraints of incarceration justified on the basis of the offender's age or character or because of the minor nature of the offence": Canadian Sentencing Commission, note 184 at 351.
[849] Under the *Provincial Offences Act,* note 3*,* s.75(d), the offence of breach of probation is punishable by a fine of up to $1,000, or imprisonment for a term of not more than 30 days, or to both. Again, it is noteworthy to contrast the more robust provisions respecting probation breaches under the *Criminal Code,* note 9: s.733.1(1) allows the prosecutor to elect to proceed by indictment, in which case the offender may be imprisoned for up to two years, or by way of summary conviction, which makes the defendant liable to imprisonment for up to 18 months, or a fine of up to $2,000, or both. The usual maximum period of summary conviction imprisonment is six months: s.787(1).
[850] Verhulst, note 136 at 289.
[851] Archibald, note 7 at 12-1.
[852] Ruby, note 237 at 427.
[853] Bill C-45, note 54.
[854] The definition of "organization" in s.2 of the *Criminal Code,* note 9, includes a public body, body corporate, society, company, firm, partnership, trade union or municipality. It also encompasses "an association of persons" that is created for a common purpose, has an organizational structure, and holds itself out to the public as an association of persons.
[855] *Criminal Code*, note 9, s.732.1(3.1).
[856] *Criminal Code*, note 9, s.732.1(3.1)(b). Prior to making a probation order containing this term, the court is directed under s.732.1(3.2) to consider whether "it would be more appropriate for another regulatory body to supervise the development or implementation of the policies, standards and procedures" referred to in s.732.1(3.1)(b).
[857] *Criminal Code*, note 9, s.732.1(3.1)(c).

[858] *Criminal Code*, note 9, s.732.1(3.1)(d).
[859] *Criminal Code*, note 9, s.732.1(3.1)(f). To date, no such probation order has been imposed by a court. However, in one of the few cases under the legislation, *Transpavé Inc*., note 55, where an employee was crushed to death by a concrete press, the defendant company pled guilty to one count of criminal negligence causing death and was fined $100,000. Although probation was not ordered, it should be noted that the defendant had spent approximately $500,000 on improvements to reduce the likelihood of a similar incident occurring in the future. It would have been open to the court, had the defendant not taken such measures, to craft terms in a probation order to the same effect so as to reduce the likelihood of the organization committing a subsequent offence: see *Criminal Code*, note 9, s.732.1(3.1)(b), (g).
[860] Archibald, note 7 at 12-2.
[861] Archibald, note 7 at 12-2.
[862] Law Reform Commission of Canada, note 48.
[863] Law Reform Commission of Canada, note 48 at 12.
[864] John C. Coffee Jr., "'No Soul To Damn: No Body To Kick': An Unscandalized Inquiry Into The Problem of Corporate Punishment" (1981), 79 Mich. L. Rev. 386.
[865] *Criminal Code*, note 9, s.718.21.
[866] Archibald, note 7 at 12-5.
[867] *Criminal Code*, note 9, s.718.21(h).
[868] *Criminal Code*, note 9, s.718.21(i).
[869] *Criminal Code*, note 9, s.718.21(j).
[870] *General Scrap Iron & Metals Ltd*., note 432.
[871] *General Scrap Iron & Metals Ltd*., note 432 at [QL] paras. 27-28.
[872] *R.* v. *Potocan Mining Co.* (1996), 183 N.B.R. (2d) 54, [1996] N.B.J. No. 567 at para 29 (QL) (Prov.Ct.). [*Potocan Mining Co*.]
[873] *R.* v. *Panarctic Oils Ltd*., [1983] N.W.T.R. 143, [1983] N.W.T.J. No. 17 (QL) [*Panarctic Oils Ltd*.].
[874] *Panarctic Oils Ltd*., note 873 at [QL] para. 47.
[875] See, for example, *Shamrock Chemicals Ltd*., note 545.
[876] *Woods* v. *Ontario (Minister of Natural Resources),* [2007] O.J. No. 1208 at para. 7 (QL) (S.C.J.) [*Woods*].
[877] *Ontario (Minister of the Environment*) v. *Quinte-Eco Consultants Inc*., 2008 ONCA 630, [2008] O.J. No. 3533 (QL) [*Quinte-Eco Consultants Inc*.].
[878] *Provincial Offences Act*, note 3, s.72(3)(c).
[879] *Quinte-Eco Consultants Inc.,* note 877 at [QL] para. 5.
[880] *Bata Industries Ltd*., note 529.
[881] Archibald, note 7 at 12-2.
[882] Verhulst, note 136 at 291.
[883] Verhulst, note 136 at 291.
[884] Archibald, note 7 at 12-12.1.
[885] *Cotton Felts Ltd*., note 25 at [QL] para. 22.
[886] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 740 at 31.
[887] Canadian Sentencing Commission, note 184 at 135.
[888] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 726 at 8.
[889] United Kingdom, Department for Business Enterprise & Regulatory Reform, note 740 at 20.
[890] Verhulst, note 136 at 292-293.
[891] *Public Health Act (B.C*.), note 133.
[892] *Public Health Act (B.C*.), note 133, s.106(4)(a).
[893] *Public Health Act (B.C.)*, note 133, s.106(4)(b).
[894] Verhulst, note 136 at 293.
[895] Verhulst, note 136 at, 292.
[896] *Virk* , note 100.
[897] *Virk*, note 100 at para. 56.
[898] *Sault Ste. Marie,* note 33 at [C.C.C.] 373.
[899] Swaigen, note 37 at xxxvi.

[900] Archibald, note 7 at 12-15.
[901] *Criminal Code*, note 9, ss.22.1, 22.2.
[902] Canadian Sentencing Commission, note 184 at 142.
[903] *C.A.M.*, note 279.
[904] *C.A.M.*, note 278 at [QL] para. 81.
[905] Verhulst, note 136 at 292.
[906] Archibald, note 7 at 12-14.
[907] *Inco Ltd.,* note 431.
[908] *Serfaty,* note 494.
[909] *Siapas,*[note 544.
[910] *Wholesale Travel Group Inc*., note 11.
[911] *Wholesale Travel Group Inc*., note 11 at [QL] para. 219.
[912] Archibald, note 7 at 12-18.1.
[913] Archibald, note 7 at 12-18.1.
[914] Verhulst, note 136 at 293.
[915] *Public Health Act (B.C*.), note 133.
[916] Canadian Sentencing Commission, note 184 at 139.
[917] Verhulst, note 136 at 294.
[918] For example, an individual who is convicted of an offence involving cruelty or mistreatment of an animal may receive a sentence that incorporates incapacitation by prohibiting the person from having custody of animals for a period of time.
[919] Archibald, note 7 at 12-36-12-37.
[920] Ayres, note 15 at 35.
[921] Archibald, note 7 at 12-38; J. Scholz, "Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory" (1997). 60 Law & Contemp. Probs 253 at 254.
[922] *Offence Act (B.C*.), note 267.
[923] *Provincial Offences Act*, note 3.
[924] *Criminal Code*, note 9.
[925] *Criminal Code*, note 9, s.718.
[926] Ruth Sullivan, *Construction of Statutes,* 5th ed. (Markham: LexisNexis Canada Inc., 2008) at 325. See also Ruth Sullivan, *Statutory Interpretation,* 2nd ed. (Toronto: Irwin Law Inc., 2007) at 303.
[927] Sullivan, *Construction of Statutes,* 5th ed., note 926 at 412; Sullivan, *Statutory Interpretation,* 2nd ed., note 926 at 149-151.
[928] *Provincial Offences Act*, note 3.
[929] *Criminal Code*, note 9, s.732(3.1).
[930] *Regulatory Modernization Act (Ont.),* note 321.
[931] *Regulatory Modernization Act (Ont*.), note 321, s.15(3).
[932] *Regulatory Modernization Act (Ont*.), note 321, s.15(4)(a), (b).
[933] For example, s.718.01 of the *Criminal Code,* note 9, provides that where a sentence is being imposed for an offence which involves the abuse of a person under the age of 18 years, the court shall "give primary consideration to the objectives of denunciation and deterrence of such conduct."
[934] An illustration of this is s.10 of the *Controlled Drugs and Substances Act*, S.C. 1996, c.19 [*Controlled Drugs and Substances Act*], which provides its own purposes of sentencing "without restricting the generality of the *Criminal Code*."
[935] *Serfaty,* note 494.
[936] *Competition Act*, note 50.
[937] *Criminal Code*, note 9.
[938] Bill C-13, *An Act to amend the Criminal Code (Capital Markets Fraud and Evidence-Gathering),* S.C. 2004, c.3 [*Bill C-13*].
[939] *Criminal Code*, note 9, s.380.1(1)(a).
[940] *Criminal Code*, note 9, s.380.1(1)(b).
[941] *Serfaty,* note 494 at [QL] para. 37.
[942] *Criminal Code*, note 9, s.380.1(1)(c).

[943] *Criminal Code*, note 9, s.380.1(1)(d).
[944] *Serfaty,* note 494 at [QL] para. 37.
[945] *Criminal Code*, note 9, s.380.1(1).
[946] *Criminal Code*, note 9, s.380.1(2).
[947] *Provincial Offences Act*, note 3, s.12(1).
[948] There is additionally Part II of the *Provincial Offences Act,* note 3*,* which governs the procedure for parking infractions. Given that such offences cannot be charged under Part I, they are not mentioned further.
[949] *Provincial Offences Act*, note 3, s.9(1).
[950] *Provincial Offences Act*, note 3, s.9.1(1).
[951] *Provincial Offences Act*, note 3, s.11(1).
[952] *Provincial Offences Act*, note 3, s.72(1)(a).
[953] *Provincial Offences Act*, note 3, s.1(1) defines a set fine as "the amount of fine set by the Chief Justice of the Ontario Court of Justice for an offence for the purpose of proceedings commenced under Part I or II."
[954] *Provincial Offences Act*, note 3, s.2(1).
[955] *Highway Traffic Act (Ont.)*, note 65, s.130.
[956] *Highway Traffic Act (Ont*.), note 65, s.128.
[957] *Highway Traffic Act (Ont.),* note 65, s.53(1).
[958] *Cotton Felts Ltd*., note 25.
[959] *Good Government Act, 2009,* S.O. 2009, c.33, s.1(18), effective 15 December 2009 [*Good Government Act (Ont*.)]. This amendment to s.12(1) of the *Provincial Offences Act*, note 3, increases the maximum fine amount for Part I offences from $500 to $1,000.
[960] Opening of the Courts, 14 September 2009, Speech of Chief Justice Annemarie Bonkalo.
[961] Verhulst, note 136 at 295.
[962] Verhulst, note 136 at 295.
[963] *Provincial Offences Act*, note 3.
[964] The *Provincial Offences Act*, note 3, as enacted by S.O. 1979, c.4, was given third reading on 27 March 1979, after having originally been introduced in the legislature in April, 1978. It was reintroduced for first reading on 6 March 1979. In order to allow for the design and implementation of the new court systems and procedures under the Act, there was a delay until 31 March 1980 before the legislation went into effect. See W. Douglas Drinkwater and J. Douglas Ewart, *Ontario Provincial Offences Procedure* (Toronto: The Carswell Company Limited, 1980) at vi-vii.
[965] Law Reform Commission of Canada, note 48 at 7.
[966] Archibald, note 7 at 12-7-12-10.
[967] Verhulst, note 136 at 286.
[968] Ontario Law Commission, note 8 at 16.
[969] See Richard Macrory, *Regulation, Enforcement and Governance in Environmental Law* (Oxford: Hart Publishing, 2010) at 26 who observes: "When one looks at the current system of regulatory sanctions in this country, be it environmental, trading standards or health and safety, it is remarkable how narrow the range of sanctions are."
[970] *Provincial Offences Act*, note 3, s.2(1).
[971] *Criminal Code*, note 9.
[972] *Provincial Offences Act*, note 3, s.61 provides that except where otherwise provided by law, every person who is convicted of an offence is liable to a fine of not more than $5,000. This "residual penalty" therefore does not provide for the use of imprisonment. When the Act was first enacted, the fine ceiling was set at $2,000.
[973] Sheilagh Stewart, *Stewart on Provincial Offences Procedure in Ontario, 2nd ed.* (Salt Spring Island: Earlscourt Legal Press, 2005) at 1.
[974] *Provincial Offences Act*, note 3, s.42.
[975] *Provincial Offences Act*, note 3, s.86.
[976] *Provincial Offences Act*, note 3, s.91.
[977] *Provincial Offences Act*, note 3, s.99.
[978] Drinkwater, note 963 at 212.

[979] *Cotton Felts Ltd.,* note 25 at [QL] para. 19; Law Reform Commission of Canada, note 48 at 5.
[980] *Provincial Offences Act*, note 3.
[981] *Offence Act (B.C.*), note 267.
[982] *Criminal Code*, note 9.
[983] See, for example, the Nova Scotia *Summary Proceedings Act*, R.S. N.S. 1989, c.450 [*Summary Proceedings Act (N.S.*)]
[984] Bill C-41, note 201.
[985] Bill C-45, note 54.
[986] Stewart, note 973 at 239.
[987] Stewart, note 973 at 240. The one exception is s.97(1)(b) of the *Provincial Offences Act*, note 3, which permits the court to grant an absolute discharge to young persons. However, this does not permit a power to grant absolute or conditional charges to be implied for adult offenders: see *R.* v. *Sztuke* (1993), 16 O.R. (4th) 559, [1993] O.J. No. 3038 (QL) (C.A.) [*Sztuke*].
[988] *Provincial Offences Act*, note 3, s.60.1(1).
[989] *Provincial Offences Act*, note 3, s.60.1(4).
[990] *Provincial Offences Act*, note 3, s.66(1).
[991] *Provincial Offences Act*, note 3, s.66(2).
[992] *Provincial Offences Act*, note 3, s.67. However, the fine option program contemplated by this section is not in force. As a result, there is no such program in operation in the province which allows for the payment of fines by means of credit for work.
[993] *Provincial Offences Act*, note 3, s.68.
[994] *Provincial Offences Act*, note 3, s.69.
[995] *Provincial Offences Act*, note 3, s.72(4).
[996] *Provincial Offences Act*, note 3, s.75.
[997] *Highway Traffic Act (Ont.*), note 65, s.130.
[998] The *Road Safety Act*, S.O. 2009, c.5 [*Road Safety Act (Ont.)*] has raised the minimum penalty to $400 and increased the maximum amount to $2,000, but leaves unchanged the 6 months maximum period of imprisonment.
[999] *Provincial Offences Act*, note 3, s.72(1)(a).
[1000] *Provincial Offences Act*, note 3, s.72(1)(c).
[1001] *Provincial Offences Act*, note 3.
[1002] *Criminal Code*, note 9.
[1003] The *Criminal Code,* note 9*,* definition of "victim" includes "a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence": s.722(4)(a). Where no such person is capable of making a victim impact statement due to, for example, death or illness, the victim's spouse, common-law partner, relative or anyone responsible for the care or support of that person, or any dependent of that person, may provide a victim impact statement: s.722(4)(b).
[1004] *Criminal Code*, note 9, s.722(2).
[1005] *Criminal Code*, note 9, s.722(1)
[1006] *Criminal Code*, note 9, s.722(2.1).
[1007] *Criminal Code*, note 9, s.722.2(1).
[1008] *Criminal Code*, note 9, s.722.2(2).
[1009] *Criminal Code*, note 9, s.718(e).
[1010] Ruby, note 237 at 633. See further Joan Barrett, *Balancing Charter Interests. Victims' Rights and Third Party Remedies* (Toronto: Thomson Canada Limited, 2001) at 4-22-4-23.
[1011] *R.* v. *Gabriel* (1999), 98 O.T.C. 193, [1999] O.J. No. 2579 at para. 19 (QL) (S.C.) [*Gabriel*].
[1012] *R.* v. *Neely*, [2003] O.J. No. 1977 at para. 191 (QL) (S.C.) [*Neely*].
[1013] *R.* v. *Taylor* (2004), 189 O.A.C. 388, [2004] O.J. No. 3439 at para. 42 (QL) [*Taylor*].
[1014] See, for example, *R.* v. *Hutchings*, 2004 ONCJ 200, [2004] O.J. No. 3950 (QL) [*Hutchings*]; *R.* v. *Trigiani,* [2000] O.J. No. 5872 at para 16 (QL) (C.J.), aff'd (2001), 18 M.V.R. (4th) 222, [2001] O.J. No. 6111 (QL) (S.C.J.) [*Trigiani*] ; *R.* v. *Messercola*, 2005 ONCJ 6, [2005] O.J. No. 126 (QL) [*Messercola*]; *Di Franco*, note 429. For a recent case where there were objections to the admissibility of portions of the victim impact statements, see *R.* v. *Long Lake Forest Products Inc*., 2009 ONCJ 241, [2009] O.J. No. 2193 (QL). [*Long Lake Forest Products Inc*.]

[1015] *R.* v. *Robinson,* 2008 BCSC 1195, [2008] B.C.J. No. 1691 (QL) [*Robinson*].
[1016] *Criminal Code*, note 9, s.335.
[1017] *Highway Traffic Act (Ont*.), note 65, s.128.
[1018] *Criminal Code,* note 9, s.249.
[1019] *Highway Traffic Act (Ont*.), note 65, s. 130.
[1020] *Provincial Offences Act*, note 3.
[1021] *Provincial Offences Act*, note 3, s.72(4).
[1022] *Criminal Code*, note 9, s.732.2(2)(b).
[1023] *Criminal Code*, note 9, s.731(1)(a).
[1024] *Criminal Code*, note 9, s.731(1)(b).
[1025] *Criminal Code*, note 9, s.743.1(1)(b).
[1026] *Provincial Offences Act*, note 3, s.72(1)(a). The preclusion of probation for proceedings commenced by certificate of offence under Part I has been affirmed by the courts in Ontario: see, for example, *R.* v. *Nickel City Transport (Sudbury) Ltd*. (1993), 14 O.R. (3d) 115, 63 O.A.C. 289 [*Nickel City Transport (Sudbury) Ltd*.], and more recently *Ontario (Ministry of Labour)* v. *Creations by Helen Inc*., 2007 ONCJ 713, [2007] O.J. No. 5560 (QL) [*Creations by Helen Inc*.].
[1027] *Provincial Offences Act*, note 3, s.72(7).
[1028] The *Occupational Health and Safety Act (Ont.)*, note 55, s.2, provides that despite what is stated within any general or special legislation, such as the *Provincial Offences Act*, the provisions of the *Occupational Health and Safety Act* are to prevail. Given that the legislation contains penalties which are either fines or imprisonment, it is arguable that a *Provincial Offences Act* probation order may not be imposed: see Stewart, note 973 at 272-273.
[1029] *Criminal Code*, note 9, s.732.1(2)(a).
[1030] *Criminal Code*, note 9, s.732.1(2)(b).
[1031] *Criminal Code*, note 9, s.732.1(2)(c).
[1032] *Provincial Offences Act,* note 3, s.72(2)(a).
[1033] Provincial Offences Act, note 3, s.72(2)(b).
[1034] *Provincial Offences Act*, note 3, s.72(2)(c).
[1035] Drinkwater, note 964 at 245; Stewart, note 973 at 273.
[1036] Drinkwater, note 964 at 245.
[1037] *Criminal Code*, note 9,s.732.1(3).
[1038] *Criminal Code*, note 9, s.732.1(3.1).
[1039] *Criminal Code*, note 9, s.732.1(3)(a).
[1040] *Criminal Code*, note 9, s.732.1(3)(b).
[1041] *Criminal Code*, note 9, s.732.1(3)(d).
[1042] *Criminal Code*, note 9, s.732.1(3)(e).
[1043] *Criminal Code*, note 9, s.732.1(3)(f).
[1044] *Criminal Code*, note 9, s.732.1(3)h).
[1045] *Criminal Code*, note 9, s.732.1(3.1).
[1046] *Provincial Offences Act*, note 3, s.72(3)(a).
[1047] Drinkwater, note 964 at 245 explains that a reason for this limitation is that otherwise there would be "a significant potential for many persons to see provincial offence proceedings as a cheap and expeditious way to recover money for damages, particularly damages to automobiles."
[1048] See, for example, the New Brunswick *Provincial Offences Procedure Act,* S.N.B. 1987, c.P-22.1, s.74(3)(a). [*Provincial Offences Procedure Act (N.B*.)] The *Offence Act (B.C.), note 267*, s.89(3)(a), contains a similar restitution and reparation condition, although the legislation provides for the entering into of a recognizance when sentence is suspended, as opposed to probation. The effect, however, is the same.
[1049] *Provincial Offences Act*, note 3, s.72(3)(b).
[1050] Drinkwater, note 964 at 245.
[1051] See, for example, the *Provincial Offences Procedure Act (N.B.),* note 1048*,* s.74(3)(b).
[1052] *Provincial Offences Act*, note 3, s.72(3)(c).
[1053] Drinkwater, note 964 at 246 provides the example of a defendant, who is convicted of a liquor offence, could not be prohibited from driving an automobile unless the conduct prohibited actually contributed to the commission of the offence for which the defendant was found guilty.

[1054] *Provincial Offences Act*, note 3, s.72(3)(d).
[1055] Drinkwater, note 964 at 246.
[1056] *Provincial Offences Act*, note 3, s.72(4).
[1057] *Provincial Offences Act*, note 3, s.75(d).
[1058] *Provincial Offences Act*, note 3, s.75(e).
[1059] Ruby, note 237 at 441.
[1060] Verhulst, note 136 at 286.
[1061] Archibald, note 7 at 12-2.
[1062] Archibald, note 7 at 13-13.
[1063] *Criminal Code*, note 9, s.732.1(3.1).
[1064] *Provincial Offences Act*, note 3.
[1065] Drinkwater, note 964 at 233.
[1066] See Canadian Sentencing Commission, note 184, at 354-355 for a discussion of the use of fine option programs under the *Criminal Code.*
[1067] For example, a defendant convicted of a provincial offence may request an extension of time for payment of the fine under s.66(2) of the *Provincial Offences Act,* note 3. Where the fine is a minimum fine, the court also has a limited jurisdiction to grant relief if there are "exceptional circumstances" to do so, such that payment of the minimum fine "would be unduly oppressive or otherwise not in the interests of justice": s.59(2).
[1068] *Fine Option Program*, R.R.O. 1990, Reg. 948 [*Fine Option Program (Ont*.)].
[1069] O.Reg. 925/93. See further Stewart, note 973 at 293.
[1070] Stewart, note 973 at 293. The other jurisdictions without fine option programs are British Columbia, Nunavut and Newfoundland and Labrador.
[1071] *R.* v. *Wu* (2001), 152 O.A.C. 300, [2001] O.J. No. 4885 at para. 42 (QL) [*Wu*].
[1072] *R.* v. *Wu,* 2003 SCC 73, [2003] 3 S.C.R. 530, [2003] S.C.J. No. 78 at para. 54 (QL) [Wu].
[1073] *Excise Act*, R.S.C. 1985, c.E-14 [*Excise Act*].
[1074] *Wu,* note 1072 at [QL] para. 52. The trial judge imposed a conditional sentence of 75 days in default of payment of the minimum fine. This sentence was upheld by the Ontario Court of Appeal, in a split decision, but the Supreme Court of Canada reversed this decision, holding 8:1 that it was an error to impose a conditional sentence for default of payment of the fine.
[1075] *Criminal Code*, note 9, s.717.
[1076] *Youth Criminal Justice Act*, S.C. 2002, c.1, s.10. [*Youth Criminal Justice Act*]
[1077] *Provincial Offences Act*, note 3.
[1078] *Canadian Environmental Protection Act*, note 131.
[1079] *Canadian Environmental Protection Act*, note 131, s.295.
[1080] Ruby, note 237 at 134-135.
[1081] *Criminal Code*, note 9, s.717(1).
[1082] *Criminal Code*, note 9, s.717(1)(b).
[1083] Ruby, note 237 at 136.
[1084] *Criminal Code*, note 9, s.717(1)(c).
[1085] *Criminal Code*, note 9, s.717(2)(a).
[1086] *Criminal Code*, note 9, s.717(2)(b).
[1087] Ruby, note 237 at 135-136.
[1088] *Canadian Environmental Protection Act*, note 131.
[1089] *Canadian Environmental Protection Act*, note 131, s.296.
[1090] *Species at Risk Act*, S.C. 2002, c.29 [*Species at Risk Act*].
[1091] *Species at Risk Act*, note 1090, s.110.
[1092] *Species at Risk Act*, note 1090, s.109(2).
[1093] *Public Health Act (B.C*.), note 133, s.107.
[1094] *Public Health Act (B.C*.), note 133, s.107(1)(c).
[1095] *Public Health Act (B.C*.), note 133, s.107(1)(d). Note there is no maximum period of community service set out, unlike the ceiling of 240 hours in the *Criminal Code* probationary provisions pursuant to s.732.1(3)(f).
[1096] *Public Health Act (B.C*.), note 133, s.107(1)(e).
[1097] *Public Health Act (B.C*.), note 133, s.107(1)(f).

[1098] *Public Health Act (B.C.*), note 133, s.107(1)(g).
[1099] *Public Health Act (B.C.*), note 133, s.107(1)(h). This term has similarities with the optional probation condition for organizations: see *Criminal Code*, s.732.1(3.1)(e) imposing a like obligation on the organization's senior officer.
[1100] *Public Health Act (B.C.*), note 133, s.107(1)(i). This provision is not unlike *Criminal Code*, s.732(3.1)(b) respecting the organization's obligation to establish policies, standards and procedures for this same purpose.
[1101] *Public Health Act (B.C.*), note 133, s.107(1)(j).
[1102] *Public Health Act (B.C.*), note 133, s.107(1)(k). Such a term resembles *Criminal Code*, s.732(3.1)(f) respecting the organization's obligation to inform the public of such information.
[1103] *Public Health Act (B.C.*), note 133, s.107(1)(l).
[1104] *Public Health Act (B.C.*), note 133, s.107(1).
[1105] *Provincial Offences Act*, note 3.
[1106] See Campbell, note 122; Hughes note 122; Strickland, note 122; Libman, note 39 at 11.2(x).
[1107] S.C. 1991, c.1, s.24, amending *Fisheries Act*, note 121.
[1108] *Public Health Act (B.C.*), note 133, s.107.
[1109] *R.* v. *Silver Hart Mines Ltd*., [1991] N.W.T.J. No. 160 (QL) [*Silver Hart Mines Ltd*.].
[1110] *R.* v. *Amoco Canada Petroleum Co.* (1993), 13 C.E.L.R. (N.S.) 317 (Alta.Prov.Ct.). [*Amoco Canada Petroleum Co*.]
[1111] *Fletcher* v. *Kingston (City),* [1999] O.J. No. 5705 (QL) (Prov.Div.) [*Fletcher*].
[1112] *Corner Brook Pulp & Paper Ltd*., note 459.
[1113] *Provincial Offences Act*, note 3.
[1114] Canadian Sentencing Commission, note 184 at 348.
[1115] Canadian Sentencing Commission, note 184 at 352.
[1116] Canadian Sentencing Commission, note 184 at*,* 353.
[1117] Law Reform Commission of Canada, note 830 at 375.
[1118] *Criminal Code*, note 9.
[1119] *Criminal Code*, note 9, s.732.1(3)(h). See *R.* v. *Scherer* (1984), 5 O.A.C. 297, [1984] O.J. No. 156 (QL) [*Scherer*] holding that the sentencing court has the authority to make "restitution or reparation" a term of probation where it is satisfied that the term can be reasonably performed during the period of probation. See further Ruby, note 237 at 645.
[1120] *Criminal Code*, note 9, s.738(1).
[1121] *Criminal Code*, note 9, s.741(1).
[1122] Barrett, note 1010 at 4-77.
[1123] *Criminal Code*, note 9, s.718(1)(e).
[1124] *Criminal Code*, note 9, s.718(1)(f).
[1125] *Provincial Offences Act*, note 3.
[1126] See, for example, Alberta's *Provincial Offences Procedure Act*, R.S.A. 2000, c.P-34, s.8(1) [*Provincial Offences Procedure Act (Alta*.)], which authorizes an award of up to $2,000 as compensation for the victim's loss. If the amount awarded is not paid within the time ordered by the justice, the victim may file the order and have it entered as a judgment in the Court of Queen's bench where it is enforceable in the same manner as if it were a judgment rendered against the defendant in the Court of Queen's bench in civil proceedings: s.8(2).
[1127] *Thames Water Utilities Ltd*., note 534.
[1128] *Thames Water Utilities Ltd*., note 534 at para. 53.
[1129] *Provincial Offences Act*, note 3, s.72(3)(b).
[1130] *Provincial Offences Procedure Act (Alta*.), note 1127, s.8(2).
[1131] *Criminal Code*, note 9.
[1132] *Criminal Code*, note 9, s.490.1.
[1133] *Controlled Drugs and Substances Act*, note 934, s.16(1).
[1134] *Criminal Code*, note 9, s.462.31(1).
[1135] Ruby, note 237 at 663.
[1136] *R.* v. *Lavigne,* 2006 SCC 10, [2006] 1 S.C.R. 392, [2006] S.C.J. No. 10 at para. 9 (QL) [*Lavigne*].
[1137] Archibald, note 7 at 12-13.

[1138] *Fisheries Act*, note 121, s.72
[1139] *Wildlife Act*, C.C.S.M. c.W130 [*Wildlife Act (Man*.)].
[1140] *Turner* v. *Manitoba,* 2001 MBCA 207, 160 Man. R. (2d) 256, [2001] M.J. No. 562 (QL) [*Turner*].
[1141] *R.* v. *Perry,* [2003] N.J. No. 27 (QL) (Prov.Ct.) [*Perry*].
[1142] *R.* v. *Oates* (2002), 214 Nfld. & P.E.I.R. 166, [2002] N.J. No. 165 at para 12 (QL) (S.C.), aff'd 2004 NLCA 6, 233 Nfld. & P.E.I.R. 138, [2004] N.J. No. 29 (QL) [*Oates*].
[1143] *Provincial Offences Act*, note 3.
[1144] Drinkwater, note 964 at 67.
[1145] Stewart, note 973 at 269.
[1146] For example, the *Fish and Wildlife Conservation Act, 1997*, S.O. 1997, c.41 [*Fish and Wildlife Conservation Act (Ont*.)], provides for forfeiture in certain circumstances. See further Stewart, note 973 at 262.
[1147] Bill C-41, note 200.
[1148] Ruby, note 237 at 533.
[1149] *Proulx,* note 225*; R.* v. *Gladue*, note 223.
[1150] *Criminal Code*, note 9, ss.742-742 7.
[1151] *Criminal Code*, note 9, s.742.1.
[1152] *Criminal Code*, note 9, s.742.3.
[1153] *Criminal Code*, note 9, s.742.6
[1154] See, for example, *Virk,* note 100. For a discussion of other cases to this effect, see Libman, note 39 at 11.2(t)
[1155] *Wu,* note 1072.
[1156] See, for example, *R.* v. *Mitchell*, 2007 ONCJ 218, [2007] O.J. No.2016 (QL) [*Mitchell*]; *R.* v. *Wagenaar*, 2006 ONCJ 551, [2006] O.J. No. 5531 (QL) [*Wagenaar*].
[1157] *Criminal Code*, note 9, s.742.3(2)(d).
[1158] See, for example, *R.* v. *Stroshein*, 2001 SKCA 20, 203 Sask. R. 183, [2001] S.J. No. 90 (QL) [*Stroshein*].
[1159] *Criminal Code*, note 9, s.380.
[1160] *Securities Act (Ont*.), note 56, s.122.
[1161] *Criminal Code*, note 9, s.249.2.
[1162] *Highway Traffic Act (Ont*.), note 65, s.172.
[1163] *R.* v. *Scott Steel Ltd*., 2003 BCSC 271, [2003] B.C.J. No. 396 (QL), leave to appeal refused, 2004 BCCA 2, [2004] B.C.J. No. 2 (QL) [*Scott Steel Ltd*.].
[1164] Archibald, note 7 at 9-2.
[1165] *Provincial Offences Act*, note 3, s.2(1).
[1166] Law Reform Commission of Canada, note 48 at 72.
[1167] *Provincial Offences Act*, note 3.
[1168] *Charter of Rights*, note 85.
[1169] *Criminal Code*, note 9.