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Sentencing of environmental offenders in Ontario: The behaviour of the sentencing official.

Peter David Brady
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SENTENCING OF ENVIRONMENTAL OFFENDERS

IN ONTARIO:

THE BEHAVIOUR OF THE SENTENCING OFFICIAL

by

Peter David Brady

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ABSTRACT

This research explores the socio-legal activities of sentencing environmental offenders in Ontario. The research utilizes a political economy and post-structuralist framework. Prosecution data from the year 1989 was analyzed in order to supply an accounting of sanctions and offenders. This data set was complemented by the participation of ten sentencing officials in an in-depth questionnaire. The questionnaire data allowed for significant details to be extracted regarding sentence disparity within the current legal framework. The concept of the "implementation gap" as developed by Webb (1988) forms a vital component of the analysis. The wide-ranging issues surrounding the environment are having effects on many aspects of modern life as society struggles to rectify centuries of environmental abuses. This research takes note of the lack of scholarship on the environment, generally, and the sentencing of environmental offenders, specifically, by the social sciences. This fact is illustrated by (Franklin, 1990). The central issues are illuminated in order to provide a window into the behavior as it currently takes place, in accordance with the given provisional penalties. The conclusion becomes clear; that the current focus of government and industry is counterproductive to environmental protection and that a co-operative strategy of all citizens, both corporate and public, is to achieve a new focus that can maintain human life into the next century.

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I INTRODUCTION

Increasing technological advances over the past century have resulted in two distinct developments; first, some of these 'advances' have served to exploit, alienate, endanger, or eliminate natural resources as well as living species from the global homeland. Secondly, others have increased our awareness and sensitivity to such realities. Both of these developments are currently coming to fruition. Environmental exploitation is a serious dilemma and environmental awareness, concern, or conscience is growing in all sectors of the community:

> Environmental law has undergone a substantial development, also in terms of an increasing awareness and concern on the part of politicians, special interest groups, and the public at large (Jeffery, 1984:43).

This awareness has reverberated. It is no longer just a popular 'nouveau' movement: it finds itself affecting political and consumer life:

> Environmental protection has been transformed from a fringe interest of a few "eco freaks" into a mainstream societal value (Webb, 1988:4).

This development of awareness can be seen manifested as political agendas (green plan), corporate response (green products), increased levels of financial support for legitimate environmental groups, (Greenpeace, Pollution Probe), and as successful activist campaigns (blue box, recycling).

There is a genuine and legitimate fear growing in people, that unless changes are made, both aesthetic beauty, and human

health will diminish irreversibly. A quote from the federal green plan states:

> Health means not merely the absence of disease, but an optimal state of physical, emotional, social, spiritual and environmental well being (1990).

It is understandable that a concern and fear is developing. The ignorance of the past is surfacing at all levels as society realizes the finite, contained nature of our natural world. The practices of the emerging industrial complex of the past have left a noxious, painful legacy of degradation and death. A staggering statistic was reported by the Globe and Mail. Victoria, British Columbia pumps "20 million gallons per day" of untreated sewage into the Pacific Ocean (Mon. May 20 1991:sec. A). United States officials were reported in the same piece as stating that Canada's environmental standards are in 1991 what the U.S.A.'s were in the 1950's.

Major Canadian industry plays a grand role in the pollution play. The Globe and Mail's report on business (June, 26,1991) contained an article entitled, "Cleanliness is next to profitability." The article outlined the environmental performance of Algoma Steel. In 1988 Algoma dumped an average of 3,806 kilograms a day of ammonia into the water from its Sault Ste. Marie mills. In the same year, mill effluent from Algoma contained "a veritable gusher of oil and grease, averaging 2,475 kilograms a day." It would appear logical to assume that the Ministry of the Environment is functioning to protect the fragile nature of the natural environment. However, the Ministry

apparently feels pressure to protect business interests as well. The same article outlines the "safe" limits created by the Ministry for effluent by Algoma. Algoma's control order states that it must limit oil and grease discharges to a maximum of 1,023 kilograms a day, suspended solids to 5,108 kilograms a day and phenols to 22.7 kilograms a day, 90 per cent of the time. Clearly, compromises are being struck between two competing interests--environmental, and business; the fallout from both interests being monumental.

People see environmental wrongdoing as originating either in private industry or state-administered facilities. It is therefore natural that the most often cited recourse measure is a legal change. Environmental groups have since been calling for increasingly harsher, more effective sanctions. One commonly suggested strategy is to place environmental offenses in the Criminal Code where more stringent penalties could be invoked. The sentencing principle which drives public response is the attempt to deter future wrongdoing; however, deterrence implies that a given offender will stop the offending behaviour based on external constraints on his/her behaviour. It is argued that removal of these constraints (e.g., fear of fine or imprisonment) would inevitably result in the return of the undesirable behaviour. Therefore the mentality of the potential offender is never changed. Progress is not initiated; one only achieves forced compliance based on fear. It is on this point that one should enter the criminalization debate with care and

thoughtfulness.

It can be noted that since environmental regulation in Ontario is governed by the provincial legislation of the Environmental Protection Act, (EPA), the Water Resources Act (WRA), and the Pesticides Act (PA), they are therefore not 'crimes' per se. Accordingly, this work refers to environmental 'wrongdoings' as a conscious generic label recognizing the semantical implications of the environmental criminalization debate. The absence of the word crime does not in any way reflect a position in reference to seriousness of a given offence:

> Where responsibility for pollution is concerned, the average citizen would probably not hesitate to demand that polluting the environment should become a crime punishable under the criminal code. Those of us who live in a place like Windsor should be able to convince anyone of the need for penalties much more severe than we have at present to control a severe and worsening problem (Windsor Star, Jan:83).

The growing number of people involved in environmental groups and action committees would appear to reflect a desire from the general populace that laws need to be changed and made more severe. What is fuelling this concern? The social movements surrounding the environment are growing and are having an effect at various administrative levels that is fostering legitimate social change. The laws when changed or amended are applied at various levels; one level is the judicial.

In Ontario the three main Acts governing provincial environmental regulation are guidelines for action, demarcating ranges of sentences applicable for non-compliance. These cases

are heard first by an independent judicial officer, a justice of the peace (JP). If a case is seen as too complex or legally pioneering, counsel or the sentencing official can have the case advanced to a higher court. However, the impact and role played by the JP (as a sentencing official) is considerable. This study will examine the sentencing behaviour of justices in environmental cases in Ontario by utilization of a case analysis. This analysis will be supplemented by a review of Ontario Environmental cases heard over the most recent recorded complete year of prosecutions (1989). The theoretical concept of the "implementation gap" (developed by Webb, 1988) between available legislation and actual use of that legislation, will play an integral part in directing the theoretical discussions surrounding the data.

Chapters 1 through 4 establish the theoretical and research backgrounds of the situation at hand, as well as the literature written on relevant topics. Chapter 5 gives a detailed outline of the contents of the three main provincial Acts in Ontario governing environmental pollution. This chapter clearly establishes the provisional penalties that are available when sentences are being imposed on convicted environmental wrongdoers. Establishing the penalties is the first element in the "implementation gap" concept. Chapter 6 grounds legally theoretical concepts in the intelligible realm of case descriptions. The legal cases in Canadian environmental law history that have set precedent are explored here. The defenses

that are systematically employed within the environmental trial are illustrated from within the same case histories. Chapter 7 is a focus on one environmental case, that being the Sault Ste Marie decision. The case has been influential enough to dictate an analysis of its implications both empirical and theoretical. Chapter 8 sheds light on the popular debate regarding the use of the criminal law or regulatory law to control environmental wrongdoing. The implications of both forums surface to have important implications in how environmental-legal business is conducted. Chapter 9 begins the analysis section by exploring the 1989 prosecution files from the Ontario Ministry of the Environment. The information is broken down generally into the corporate offender, the individual offender, and the sections of the relevant Acts contravened. Chapter 10 is a preface into the next section of analysis. This chapter describes the relevant variables that are contained within the hypothetical cases constructed for the questionnaire given to the justices overseeing environmental cases. Chapters 11, 12, and 13 break down the questionnaire responses by the justices, drawing conclusions within, based on the established theoretical concepts. Chapter 14 gives a brief overview of the issue of environmental wrongdoing using an element of post-structuralist theory as offered by Clause Offe. Chapter 15 gives a summary of finding and conclusions.

II REVIEW OF THE LITERATURE

The increase in concern, and awareness of environmental issues, as demonstrated by numerous indicators (media reports, levels of activism, political agendas), has produced considerable popular literature. 'Green' books abound as instructional tools directing people to recycle, reuse and also as testaments for social change. Print and electronic media have increased environmental coverage exponentially in the last ten years. Environmental columns are commonplace as a daily or weekly feature of newspapers. The sociological world, however, has not responded as emphatically as the general populace. Studies of an environmental nature have been limited to a large degree in the natural sciences (biology, marine biology, engineering, chemistry). The social science disciplines have not responded to the new age societal awareness. The environmental literature in the social sciences is found mainly in the environmental law realm. However, the law literature cannot be seen as a reactionary development, as this field was in place previous to the dramatic increase in societal environmental consciousness.

This lack of participation may stem from the mistaken belief that 'environmentalism' is only a limited life span, a fad or 'nouveau consciousness' not a legitimate social movement. With the focus of all political agendas at least paying lip service to environmental concerns, this would indicate that the consciousness is widespread enough to carry considerable

importance in voting behaviour. Academics may not have wanted to align themselves with a 'fleeting' social trend. The literature specifically on environmental wrongdoing is sparse at best in the sociological/criminological arena. Environmental 'crime' while being a legitimate legal issue has not been favoured with equal popularity in criminology. The results of this are a gap in terms of critical socio-criminological research. This being the case the literature cited in this work will be from a variety of foci, the final product of which will be an amalgamated literature representing the current interest in sentencing behaviour in environmental cases.

The literature on sentencing per se is quite extensive, however, it is centred mainly on criminal matters and does not clearly lend itself to application to provincial statutes (EPA, WRA, PA). The works can speak to the guidelines and criteria that surface in the courts and to the behaviour of the sentencing official (keeping in mind that all conclusions must be extrapolated to environmental issues).

Hogarth's 1971 study Sentencing as a Human Process was an extensive work which examined the sentencing behaviour of magistrates in Ontario. One of the principle findings of Hogarth's study underscored the extensive discretion given to sentencing officials, based on a high variation between minimum and maximum penalties. The sentencing official is guided by the given act or code toward this range, however, variation within the range is dictated by the individual's reading of the

particular case. (Hogarth, 1971; Mandel, 1987; Palys, 1982; Lovegrove, 1984; Henham, 1986) In reference to the magistrates' use of penal philosophy, Hogarth found that as a group, magistrates tend to view **reformation** as the overwhelming principle guiding sentence, followed in descending order by **general deterrence, individual deterrence, incapacitation and punishment.** A marked inconsistency in the principles of sentencing among magistrates was revealed.

The sentencing behaviour of Hogarth's magistrates (for every offence considered) was significantly associated with their attitudes. The disparity discovered in the sentencing process does not necessarily indicate an ineffective use of sanctions. The logical conclusion is that sentencing officials, when given discretionary power, will impose a sentence that best reflects a given hierarchy of sentencing principles subscribed to at the given time by that individual, and such a hierarchy would naturally be formed via the individual's attitudes. Disparate sentences do not necessarily reflect a continuum of laxity/severity, but merely indicate varying goals or desired outcomes by a given sentencing official.

It is not necessary to regulate or restrict the discretion of the sentencing official in environmental cases, but to centrally decide (via policy) what outcomes are desired through the use of the sanction. Discretion to a certain degree is an acceptable component of the system; however, this discretion should be contained within the logic of a set of clearly defined

sentencing goals.

Subsequent to Hogarth's study, similar works have been undertaken that have, as a result of the disparity present, called for a restructuring of judicial discretion in regard to sentencing. The use of official guidelines and a sentencing matrix are some of the recommendations which arose from these studies.

Lovegrove's (1984) research analyzed one particular method of combatting disparity in Australian courts--the use of sentencing statistics made available to the judges determining cases. A 1980 Australian Law Reform Commission study indicated that 83 per cent of the judicial respondents favoured the provision of detailed sentencing statistics as a means of promoting uniformity (Lovegrove, 1984). Essentially this method relates prescriptive measures to the discretionary function of the law. An apparent danger in advocating forced guidelines is the inevitable desensitizing effect which may render law insensitive to societal and human values. The French penal code of 1791 which standardized sentences ultimately failed on this point. In time the sentencing court could become merely an input terminal where characteristics are sifted and an 'appropriate' sanction results, or be completely replaced by a computerized judiciary. This notion, however futuristic, begs question in the ethical and empirical socio-legal realm in reference to desirability. This system would quantify the sentencing process. The sentencing official could use the established criteria to

place a given offence, offender, and characteristics surrounding them on a continuum or grid. At this point a sentence could be returned from within a predetermined range, thus reducing disparity. One cautionary observation to this principle: it would appear that in removing judicial discretion it is merely transferred to policy makers who establish guidelines (independent of considerations of human contingencies).

The optimum sentences are therefore created based on averaging statistics of previous sentencing behaviour and in no way indicates the desired, or most effective sentence. The sanctioning process merely becomes the manipulated victim of a measure of central tendency. In making a guideline static, one creates the dilemma regarding the possibility of future change. At some point in the future these guidelines may need to be amended to reflect societal changes. Legislative-legal change it is argued, is a difficult process at best.

The issue of disparity in sentencing has been a research concern among select academics following Hogarth. Palys and Divorski (1982) focused on sentencing disparity among provincial court judges in Canada. The study was a joint project of the Federal Solicitor General's office and Simon Fraser University. Palys and Divorski employed a simulated cases approach via questionnaires administered to 206 provincial court judges in Canada. The judges were given five case scenarios along with detailed offense and offender information (pre-sentence reports). They were asked to impose sentence as well as indicate the facts

relevant to sentencing, assign these facts priority in terms of their importance, and indicate the legal objectives they were trying to maximize in imposing sentence. The research discovered that a wide range of sentences were imposed and that importance of facts varied, as did the legal objectives trying to be maximized. However, what was positive regarding these findings was the fact that "case facts, legal objectives and sentences tended to be packaged neatly as a cohesive and rational unit" (Palys and Divorski, 1982). Therefore this study revealed a high level of competence in sentencing formulation across judges; however, individual discretion was a prevalent, and natural force governing sentence disposition.

Proponents of lessening inter judge disparity in sentencing typically call for decreasing the judicial officers' discretionary powers within the given code or act (Palys, 1982; Lovegrove, 1984; Miethe and Moore, 1988). The use of guidelines has been introduced in some jurisdictions (Australia, Minnesota) to mixed reviews (Moore, 1986).

The sentencing officials naturally react to the imposition of such guidelines and this was the focus of study for Miethe and Moore (1988). Too often criminal justice reform movements neglect to gain information on the effectiveness of a given program from the people who are in contact with it every day. In the case of sentencing reform, these individuals are the sentencing officials (Miethe and Moore, 1988). Their study took the form of contacting judges, prosecutors, and defense attorneys

via a mailed survey and eliciting their experiences and attitudes concerning the implementation of determinant sentencing guidelines in Minnesota. In the Minnesota case guidelines were proposed as viable alternatives for constraining judicial discretion and enhancing the predictability, uniformity and socio-economic neutrality of sentencing decisions.

The guidelines were in place in 1980. The study was initiated after six years of functioning under the guideline system. The study showed that over 85 per cent of the officials believed the guidelines had reduced judicial discretion. They also believed that prosecutorial discretion had been reduced in the areas of 'passionate appeals' and 'grandstanding' but had increased in terms of charging practices. The officials surveyed were found to be rather adamant about the guidelines giving prosecutors greater leverage to determine the actual sentence by the type and number of charges retained through conviction. The research also revealed general comments by the surveyed officials that supports previous comments (e.g., Hogarth).

Court officers believed the guidelines had "turned judges into technicians, created a bastion of non-thinking judges or developed a system in which judges could be replaced by clerks or computers" (Miethe and Moore, 1988). These findings would lend support to the theoretical literature regarding guideline implementation. It has been noted that guidelines merely shift the powers of discretion to the next lower echelon of social control agent (in this case from judge to prosecuting attorney).

A trickle-down effect could also be postulated, in that, enforcement personnel, being aware of penalties under determinant guidelines, would use discretion in charging at the level of offence. In environmental wrongdoing offenses this could be disastrous. If sentences are dramatically increased (either fines or other carceral methods) and placed in a determinant matrix format, the regulatory enforcement officer (MOE) would be less likely to enforce a given statute given the consequences. The commission of environmental wrongdoing is consistently linked to economic variables (Clinard and Yeager, 1980; Yeager, 1987), either under the motive of profit maximization, or the lack of economic resources to implement abatement technology (under the current political-legal framework). Therefore, given the unique nature of potential offender characteristics, the urgency and potential consequences of given offences, one must consider the applicability of such formulas on Canadian environmental tribunal functioning.

In shifting the theoretical focus of the relevant literature to the critical, or political economic arena one finds, too often, a descriptive, utopian, non-realist radical view. However, two works in the 1980's have bridged this tendency: Mandel's 1987 study directed at sentencing, and Yeager's 1987 work from the United States, focusing clearly on environmental issues.

Mandel examined the structural connections of a given offender population and other institutional forms in society;

specifically, the state and the economic sphere (labour force, employment). There are connections between the various spheres of social life, each 'functioning' in a skewed symbiotic manner:

> It is the function of the state and law to maintain the structure of productive relations by providing norms and institutions which allow these relations to flourish (Mandel, 1987:163).

This statement serves to tie together two important variables in the arena of environmental wrongdoing; (i) the state and law, (ii) productive relations. The interdependency of the various state systems and the productivity of the working class, as outlined within the political economic literature, affects environmental cases more so than traditional crime. In a case where the offender is also a mass employer, extra legal influences inevitably enter the judicial process, most noticeably at the policy formation level. Mandel's research indicates a strong position that the criminal law is not "majestically equal," as Anatole France had believed. The criminal law and its structure "is applied in anything but an equal manner. The phenomena occurs at all levels of the system, including the judicial sentencing stage" (Mandel, 1987:164). The dysfunctional nature of criminal law provisions is advanced again and gives credence to proceeding cautiously in entering environmental regulation into the Criminal Code.

Mandel focuses on traditional sentencing goals and analyzes them from a political economy perspective. He notes that punishment varies, based not only on offence types but offender

types. The above observation can be reduced to the notion of an offender's 'character' being measured by such documents as previous records and pre-sentence reports. "...Essential to this is the offender's relation to the productive apparatus, that is, his or her employment status, employment history, and occupation" (Mandel, 1987:164). This brings up interesting theories on the prosecution of an environmental offender within a criminal trial. Sanctions may be potentially more extensive or damaging, however one would have little confidence to believe they would be invoked, given that most environmental offenders presently being prosecuted could (and do) project an image of impeccable character and intention.

Yeager's 1987 work on the structural bias present in regulatory law enforcement by the environmental protection agency in the U.S. merged two lines of enquiry: (i) the corporate crime literature (Clinard and Yeager, 1980 et al.) and (ii) the political economic tradition (Clement, 1969; Coleman, 1985). Yeager sampled 214 manufacturing plants, discharging wastes into the water system in New Jersey. He tested this population based on the following variables: firm economic strength, utilization of agency appellate procedures, violations of the Clean Water Act, and sanctions imposed for violations. Yeager found that firms with greater economic strength could make successful use of appeal procedures and therefore insulate themselves from subsequent violations pending appeals. In using the appeal route, an obvious increase in success of overturning decisions

was found. High legal costs were the main barrier for smaller companies. Yeager found that the EPA could, if they chose to, advance the hearing to the criminal court system. However this was not done very often. The criminal hearings that proceeded were almost exclusively against smaller companies. Yeager believes the EPA was only willing to challenge smaller companies in this arena because of their legal vulnerability. (i.e., They could not access sophisticated legal counsel and resources.) Forcing compliance to high technical standards (abatement equipment) was found disproportionately burdening to the small firms. Large corporations enjoy economies of scale in the sense that they can amortize compliance costs over larger volumes of production, and potentially avoid or delay implementation.

The largest and most specific work on sentencing and the environment was undertaken as a study paper by the Law Reform Commission of Canada in 1985. It outlines many of the current issues in the flow and ebb of environmental policy. The report examines, once again, the general principles regarding fining and sentencing, as well as providing recommendations for sentencing reform. The latter half of the paper was critiqued by John Wilson (1986) who asserted that the Commission authors, Swaigen and Bunt, neglected to pursue certain sentencing issues engaged in the environmental dilemma:

> In my view, the Report places too much emphasis on the adjustment of fines as a sanction, but neither this recommendation, nor that dealing with incarceration, is adequately dealt with on a theoretical level (Wilson, 1986:332).

One of the conclusions arrived at in the Commission's paper referred to the criminalization issue:

> We doubt that the determinants lie in the words civil and criminal, but if they do, then the characterization of environmental offenses as civil supports our recommendations (Swaigen and Bunt, 1988:44).

The Law Reform Commission of Canada produced two other focused environmental works via the protection of life series. Shrecker's (1984) work entitled Political Economy of Environmental Hazards, examined state connections to the creation and implementation of environmental regulatory legislation.

The report, Pollution Control in Canada: The Regulatory Approach in the 1980's (Webb, 1988) examined the use of the regulatory scheme of controlling environmental wrongdoing. The concept of the "implementation gap" was developed in this work.

The "gap" is quite simply, the difference between what is written in legislation as available, and what is actually used or enforced by the given officials:

> What legislation suggests government is doing, and what government is actually doing have often been two different things (Webb 1988:27).

The "gap" plays a role in the behaviour of all players on the environmental game field. Therefore this concept will surface on numerous occasions throughout this thesis. An exploration of the legislation coupled with an examination of the actual and controlled use of that mechanism will allow for a clear measurement of the "gap" as it exists in current environmental regulatory functioning.

III THEORETICAL PERSPECTIVES

Global industrialization has created an increasing economic base for nation states in terms of the gross national product. This economic base is built through capital investment of both foreign and domestic corporations. Increasing state power via revenues, creates a strengthened capitalist class. Modern society is governed at all levels by commodity relations (economic and social). The everyday social world of the 'average' citizen is not immune to the dynamics of the relationship between the state and capital. At this point in the 20th century it appears that a reorganization is constantly taking place in the political economic arena, both at various national levels and international levels. This in turn has produced new avenues for legitimate social welfare concerns to be articulated at the state level that previously may have been discounted as counter-productive to capital accumulation. The situation also offers new vehicles for initiating social change. For the state, these impending changes offer challenges to its legitimized power.

The development of advancing capitalist formations has posed new challenges for the state's regulatory capacity. Recent changes in the political environment can be used to look directly at the state's role in intervening in issues involving environmental illegality.

In using a political economy approach to the analysis of

corporate/industrial environmental crime, one must address the issue of the relationship between capital and the state. To what extent are the two compatible or contradictory? To what extent does their relationship exist outside the discretion of nonstate sources of public information? These questions are fundamental in addressing issues surrounding law and policy formation, and implementation, as well as state-initiated mandates for enforcement agencies. Understanding the outcomes of such initiatives are central to enhancing our knowledge of environmental illegality.

Traditional political economy (Miliband, 1969) underscores the importance of properly defining 'the state'. The state is not a tangible entity; it is not a fixture of the political environment of the day. " The state is not a thing, that it does not as such exist" (Miliband, 1969:49). The state can, however, become manifest in its peripheral institutions. If the state does not exist, its institutions are the minions of its will. Miliband continues that one aspect of the state is the government, the two are not synonymous terms. The government is a tangible entity that can be defined as such by society in general. The state is more of a mind set or an entrenched power source that surrounds the bureaucratic functioning of the institutions, as well as the given political party in power (government). "If it is believed that the government is in fact the state, it may also be believed that the assumption of governmental power is equivalent to the acquisition of state

power" (Miliband, 1969:49). There is a valid connection between the state and government. The government of the day acts in such a way as to represent the 'state'. However, sometimes the motivations internalized by government do not produce beneficial outcomes for either the state or the general populace. Therefore as government acts, via its institutions by changing legislation, taxation, implementation of services, and military action, it is supposedly representing the collective state.

The second player in the political economic relationship of the state regarding legal issues is that of capital. Capital can be seen in a simplistic way as the owners of the means of production. However, with increased modernization this definition is incomplete theoretically. In reference to capital's involvement with the state, capital must be viewed as a group of successful capital accumulators who collectively possess control over a majority of commodity forms. In order to be collectively powerful, capital must also possess an element of group cohesion. Advancing capitalism and the market system is a historical progression, therefore the most powerful cohesive force among capital interest is experience, as well as the emergence of various associations that represent capital interests to the state (business associations, Canadian Manufacturers, Fraser Institute) (Ornstein, 1985). It has been suggested that capital's collective power does not end here, that there exists an inner group of Canadian capitalists. Power is concentrated in the hands of a minority of corporate directors

that establishes the 'inner group'. These select few have influence on university boards, charitable and voluntary organizations; also these members are in frequent contact and have influence with government (Useem, 1978). In theorizing about the pervasive nature of capital within all realms of social and political life, it becomes evident that with capital accumulation comes power and that capital's power must inevitably translate to the preserving of its interests via the political institutions.

The state via government has a delicate balancing act to perform in modern market societies. The development of the capitalist economy has been paralleled by the development of the welfare state in order to 'band aid' the alienating and damaging aspects of commodity based relationships. The administration of welfare state services, while to a degree helps the state legitimize itself through popularity with the voting populace, also acts in a way that is negative to the operation of the government and capital. The government must exist within a simple democracy; that being true, it is at the mercy of the voting public. Thus the government can be viewed as a product to be successfully marketed to society. The marketing strategy inevitably consists of welfare state improvement claims. There is always a disparity between the government's claims and its ability to enact the proposed service:

> This leads to a noticeable loss of confidence between party organizers on the one hand, and their voters and members on the other, which results from the fact that the parties must almost necessarily frustrate the

> expectations they generate in obtaining a governing majority (Offe, 1979:68).

The government in addressing social welfare considerations, creates a desire for more from the populace (labour generally). The contradictory element is that welfare state considerations can contravene the working of capital accumulation and subsequently the self-regulating mechanisms of commodity market forces. The balance therefore is between public opinion, necessary for election in the 'democratic' process via administration of welfare state services, and maintaining the interests and successful functioning of capital, in order to generate revenue to implement such services. The condition has been called cyclical ungovernability (Offe, 1979).

A proper analysis of legislative and institutional functioning in regards to environmental regulation and enforcement dictates that a theory on the relationship between the state (institutions) and the potential violators (corporate/industrial business) is introduced. There are two main views on the functioning of the state in respect to the rest of society and subsequently in the workings of law and order (e.g., environmental regulation). Authors such as Miliband (1969) and Mills (1967) have stressed the instrumentalist perspective. A ruling class of elites in society emerges and dictates the use of resources and the functioning of the state apparatus for the rest of society. The few who emerged to take power were those who had gained political and economic dominance and thus had power over the state. The state can therefore be

viewed as an 'instrument' for the ruling class to achieve its ends (Chambliss, 1982). Studies were conducted based on the instrumentalist view that would seem to verify this perspective. The findings indicated the following: Individuals who sit on the boards of major firms all attended the same schools, vacation at the same resorts, marry into each other's families, and appoint one another to positions of power (Domhoff, as cited in Chambliss, 1982). Money determines the outcomes of all elections from municipal to the federal. The immense amount of money required to run a political campaign sets up a condition so that large contributors receive a built in bias in decision making (Chambliss, 1982). This view contends that if capital dictates the functioning of the state, then within capital there must exist a common set of interests. This is not always the case. The instrumentalist view would also have difficulty explaining instances where governmental decisions have been overwhelmingly opposed by capital.

The second paradigm surfaced in the late 1960's and early 1970's. This view believes that there is a structural objective relation between the state and capital, that the state will operate in the long term interests of capital within the inherent contradictions it faces via the class struggles (Chambliss, 1979). Clause Offe is an example of a contemporary writer subscribing to a structural view of the interaction of state and capital. The state does not respond to pressures from individual groups within capital; it represents the consensual interests of

a society that happens to be dominated by capital interests. This view can accommodate the sporadic implementing of policy that momentarily contradicts capital interests. The state must protect the process of capital accumulation for three reasons. First, for its survival the state depends (via taxation) on the production of surplus capital. Secondly, political stability depends on economic stability. Thirdly, the survival of the state and the interests of the capitalist class coincide, in that both depend on maintaining the viability of the economy and political stability (Chambliss, 1982:308). This description alludes to the balancing act that Offe (1979) suggests the state must perform between welfare state concessions and capital interests.

If welfare state interests and capital interests are essentially in opposition, and if environmental regulation is also in opposition to capital accumulation, one could contend that environmental regulatory policies can be viewed as a welfare consideration (social and/or ecological). The drive for profit has been cited as the most prominent reason for corporate/industrial illegal behaviour (Clinard and Yeager, 1980). The protection of the environment, (that becomes the exploited property of industry amidst the profit drive) does not create a positive sum balance in the quest for efficient and productive manufacturing. Therefore the state finds itself in a position where it must intervene to some degree in the workings of capital in order to preserve the welfare considerations of the

environment.

The connection between the environment and welfare is underscored when one considers the extensive chain of events that are created when there is environmental disruption or 'eco-cide'. "When we speak of environmental disruption we mean in effect the disruption of [man's] natural and social environment" (Kapp, 1971). As a result there are far-reaching effects resultant from environmental degradation, to the social worlds of individuals, as well as the economic fitness of the market. This interconnectedness of forces is of interest. Offe suggests that the welfare state, to a degree, is beneficial to capital in order to ensure a happy, healthy worker. Environmental illegalities can be viewed as a product of the functioning market, and they in turn have a detrimental effect on the social and natural world of the individual. Pollution is a dysfunction of the market economy. Its effects compound exponentially over time. It is noteworthy that Kapp, writing two decades ago, addressed this issue:

> Environmental disruption cannot be explained adequately as a case of market failure, **unless** the term is understood in the sense of the failure of the market system and of conventional economics to come to terms with inter-dependencies and complex causal chains which have long ceased to occupy a peripheral place in modern industrial societies and are bound to assume increasing significance as residual industrial waste products and debris are permitted to be discarded freely into the environment (Kapp, 1971:97).

The connection between the social and the economic or market implications of environmental exploitation delineate clearly a role for polity to play in this equation (and therefore political

economic theory). The state in modern capitalist formations becomes a regulatory body attempting to keep the capital needs of industry in a precarious balance with the welfare needs of society as a whole (Offe, 1979).

The problem the state faces is that this dilemma is uncommon to it. Environmental concern is both an economic issue and a welfare state issue. Environmental degradation, in conjunction with expanding technologies for exploiting resources (both natural, and manufactured), has reached the point where the environmental base may not be able to sustain capital development for any extended period under current practices.

The development of modern political formations has created interesting developments. Traditionally, there have been clearly discernable factions along the political continuum, each of which would have different diagnoses and prognoses for the state's functioning. Today, some authors suggest that there is a clear merging of diagnosis from left to right. The two extremes both voice their discontent over the functioning of the welfare state apparatus (Offe, 1979; Tourraine, 1988). The welfare state emerged out of developing market relations and the commodification of society. The state began to intervene in these relations in order to stabilize fault lines in the functioning of the market; however this mediation by the state became a snowballing characteristic. The more social programs the state introduced, the more people required and desired. First, the state was forced into fiscal problems resulting from

increased drain on revenue from the welfare state mechanism. Second, capital complained that the state was making the market dysfunctional. The modern state mechanism has therefore entered a self-perpetuating phase of 'ungovernability' (Offe, 1979). In terms of prognosis, the left would call for increased regulation and decreased privatization of services. However, the right contends that unhampered commodity exchange and an increased free market will return the social/economic system to homeostasis.

It is quite evident that in the current political environment Offe's ungovernability thesis is presenting itself as a reality. It has been proposed that there is a focus by both the right and left on welfare state mechanisms as problematic. The environment has previously been established as a legitimate welfare concern, both politically and socially (by definition). Therefore it would be plausible that social movements with decreased emphasis on political ideology and more on social concerns (environmental movement, sexual rights, women's movement), would gain legitimation and prominence as vehicles for socio-political change in the 1990's (Offe, 1979; Tourraine, 1988).

There has been a consistent increase in the environmental consciousness over the last decade, with particular intensity over the last two years. It has been suggested that this 'nouveau' consciousness is a middle class or bourgeois enterprise and consequently of no significant impetus as a socially mobilizing or unifying force. One could contend, however, that

certain events illustrate the contrary. First, the New Democratic party (NDP) in Canada has seen significant increases in the popular vote over time. Second, consider the election of the NDP provincially in Ontario. The NDP has been traditionally a labour-oriented party and the environment has been a major item on their platform for some time. However, in the past provincial election the environment was held in a primary light on many fronts, as witnessed from debates, news coverage, and policy statements. One could argue that the environmental conscience is emanating both vertically and horizontally in society.

Recently in outlining the mandate for their term the Ontario NDP set the stage for environmental legislation that undoubtedly will have widening effects in the political economic fronts. First, a stay was alluded to on all new nuclear generating operations. A policy such as this is beginning to place increased importance on environmental and social welfare vis a' vis a proactive stance, as opposed to blind investment for short term gains. Secondly, the Government of Ontario has proposed an Environmental Bill of Rights. This document would allow class action to be initiated by individuals against corporations or other individuals. Essentially, it may give a right to a clean social and natural environment (subject to judicial/legal challenge and ruling). Undoubtedly this will create a massive amount of case law and allow for the judicial transformation of existing legal guidelines. It would appear that via this route, the Government of Ontario is choosing to use

the legal structure as an institution of the state to democratically transform the notion of environmental quality, albeit more expensively and slowly than governmentally-legislated change.

These events in the political forum that lend credence to the power of the environmental lobby, both formally and as a pervasive, expanding conscience in society as a whole, tend to show the importance of social movements in eliciting socio-political change. The political structure has evolved in late market economies so that ideologies and practice are self crippling leading to ungovernability. Political transformation through military or quasi military revolt, has been essentially discounted. The resultant power is apparently being allotted to legitimate social concerns by a modern society eager for affirmation of anything constant. In terms of social change there appears to be segmented threads of the population clinging to traditional institutions (church, traditional family unit, marriage), while at the same time these very institutions are losing legitimacy. They are losing it by being increasingly shut off from the state. This dissolution of the traditional social framework, in turn, affects the state and the economic forecast. These conditions being so, the legitimate power of the social movement as a socio-political force is increased at the current point of political economic development.

A third segment of the research focus must be articulated within a theoretical framework: the issue of the

sanction or sentence imposed by the judicial body to the given wrongdoer. Sentencing theory can best be formulated as a set of goals or criteria that govern its imposition.

A sentencing rationale according to legal doctrine provides an answer to the following question. What is the justification for imposing legal sanctions? (Canadian Sentencing Commission, 1986:12) There have previously been two ways of addressing the issue of justification of sanctions. First, **retributivism** and just desserts. This perspective requires that retribution be exacted from those who are guilty of blameworthy behaviour. Retributivism is directed towards the past behaviour of the offender and stresses the necessity of public condemnation of this behaviour. Second, one can address the issue of justification in terms of their future beneficial consequences or their social utility. The **social utility** of sanctions was consequently measured in reference to crime prevention or control. This could be done potentially by deterring potential and past offenders by incapacitating and rehabilitating them. The three utilitarian goals were therefore deterrence, incapacitation and rehabilitation (Canadian Sentencing Commission, 1986). A third approach has gained favour in recent years--attempts to achieve **redress** for the victims of crime:

> Redress is understood in a very wide sense and ranges from procedural requirements such as the introduction of victim impact statements in the sentencing process - to the development of compensatory sanctions and reconciliation programs, which are victim-oriented. This third approach is supplemental not a replacement of the aforementioned (Canadian Sentencing Commission, 1986:128).

The third aspect of sentencing justification holds a precarious position to some elements of environmental concern. The call by some groups for increased criminalization surrounding environmental regulation (e.g., place provincial environmental jurisdiction in the Criminal Code), has elicited a rebuttal concerning the rigidity of the criminal law and its longstanding traditions and evolutionary process to deal with societal and human issues. Various traditional fringe groups that have recently moved into the realm of legitimate socio-political movements stress the fact that often the most devastated victims of environmental wrongdoing cannot and should not be measured in terms of economics or human loss. These victims are, in fact, the inhabitants of various ecosystems, both flora and fauna. If one assesses this claim within the traditional framework and guidelines of the Criminal Code or even the legal tradition, the results can seem expansionist or ill-founded. However, one would find it difficult to contend that such victims did not exist and that some form of redress, separate from the economically derived model of traditional sanctions should be incorporated into an evolving tribunal on environmental affairs. These facts have led groups to call for caution on blindly thrusting environmental concern into the arena of criminal litigation.

The theory underlying the application of criminal or legislative sanction is synonymous with sentencing's often-cited philosophical aims: retribution, deterrence, denunciation, incapacitation and rehabilitation. Each of these aims will be

assessed in terms of its content and implications to the environmental sanction.

These aims of sentencing are an abstract creation of legal, social, and ethical scholars. Their value is steadfast in that forum; however, the transition from a philosophy to its application by the sentencing body can meet with opposing, or at minimum, confusing variables. The behavioral components existing in the real life world of the sentencing judge play a role in the application of sentencing principles to any given case at hand (Canadian Sentencing Commission, 1985). This discretionary or semi-autonomous power is not necessarily contradictory to the ideals of equal and equitable justice, however, the dynamics and extent of its existence in the changing realm of environmental law should be discerned.

A problem at the centre of sentencing guidelines is that most court officials feel that all aims carry importance: Attempting to apply combinations of the aims, however, can produce contradictory results. Accordingly, sentences are often justified by reference to certain official aims but could actually be applied based on internalized sentencing goals that could vary somewhat from the official criteria. Sentencing undoubtedly becomes "a human process" (Hogarth, 1972):

> Where the sentencer does, in fact, attempt to combine elements of individualized and tariff sentencing, he runs the risk that his attempts to accommodate both aims will lead to the achievement of neither (Nadin-Davis, 1982:5).

(i) **Retribution**, or making the punishment fit the crime: Pure retribution, can be seen as vengeance towards the offender. The likelihood that vengeance would be a guiding factor in sentencing is unlikely in the realm of environmental wrongdoing given the fact that corporate industrial bodies are often the bodies committing the most devastating damage. Thus, one sees the re-entry of the leading player in the environmental sentencing drama--the economic considerations, the dollar value. Retribution carries with it the consideration that the punishment must not exceed the harm committed. This Kantian view has been re-expressed by Judge O'Hearn, a Nova Scotia county court judge. "The measure of punishment must be the harm that the offender has actually committed. No matter how large a penalty one thinks would actually be required to deter any specific individual, the court is not justified in going beyond the maximum penalty prescribed for the harm done" (as in Nadin-Davis, 1982:31). Therefore it seems appropriate, given the above comment that some groups see fines in environmental cases as mere licencing fees for large corporations. The sentencing judge, being bound by the above principle, could never exact an element of deterrence by the imposition of a fine to a large corporation. This shows the ineffectiveness of traditional sentencing principles on environmental issues.

(ii) **Deterrence**: The concept of deterrence has within it two distinct goals: first, discouraging others from committing similar offenses; secondly, discouraging the given offender as an

individual case. These two concepts being referred to as general and specific forms of deterrence, respectively.

It would appear logical that the main aim of sentencing in environmental cases would be general deterrence, based on the widespread nature of industrial operation (the most frequent offenders), as well as individual misconceptions regarding use/misuse of natural environments. Specific deterrence would seem easier to achieve, however, the process would be inevitably slow and costly based on a dramatic increase in regulatory enforcement that would be necessary. The main flaw in specific deterrence is its reactive stance to the given problem. General deterrence or regulatory compliance is the logical goal, however one is presented with the dilemma of sentencing options vs. the resultant effect of these options. The disparity shows again the ineffectual nature of applying traditional criminal type criteria within the realm of environmental wrongdoing (Wilson, 1986; Law Reform Commission of Canada, 1986):

> In general the deterring effect of the penalty is more indirect and subtle. It sets up an atmosphere by which society exhibits its disapproval of the conduct and thus works on the criminal by his tendency to pay deference to the opinion of his fellows in the community in which he lives (O'Hearn co. crt. judge, 1970 in Nadin-Davis, 1982).

This strategy is popular when dealing with various forms of white collar crime (Clinard & Yeager, 1980; Yeager, 1987) and is therefore applicable to environmental wrongdoing. This strategy is a legitimate goal and outcome of the function of the justice system: The question surfaces, however, regarding its

appropriateness in environmental regulatory policy. Social changes, both legislatively and regarding societal opinion are slow processes. Sources indicate that at current rates of environmental exploitation irreversible damage is being done. It could be said that a time component exists in reference to effectual changes. It would be illogical, therefore to pursue solely means of combatting this exploitation that are effective only over long periods of time.

(iii) **Denunciation** is a sentencing aim that allows the sentence to indicate society's abhorrence to the offence. This aim is again traditionally criminal-based and has the effect of retaining focus on the specific nature of the crime or the individual who committed the offence, similar to the effect of general deterrence. The dramatic changes in the socio-political status of environmental groups and the pervasive nature of an environmental conscience could indicate that denunciation may find its way into sentencing equations. The determining factor would be the degree to which a sentencing judge had internalized various elements of environmental consciousness, based on the human nature of sentencing (Hogarth, 1970).

(iv) **Rehabilitation:** When this measure is considered, the sentencing official is using an individualized sentence. The individual who has committed the offence is the focus. The sentencing official must have logically concluded from the evidence that there existed a malady inherent in the behaviour of the individual, and not a product of structural intervention. A

sentence would then be administered that was in the interest of reforming the individual's behaviour as to avert subsequent wrongdoing.

In situations of environmental wrongdoing the focus on rehabilitation as a primary sentencing criteria is unlikely. The focus of sentencing officials is most often pointed to deterrence (Wilson, 1986). The circumstances surrounding environmental cases are often involving corporations or some other less tangible entities (Swaigen & Bunt, 1985; Wilson, 1986; Yeager, 1987). Therefore it becomes a problem of logistics to discern who should actually be the focus of rehabilitative measures.

IV METHODOLOGY

The methodological sequence of events of the study begins with an extensive review of the relevant literature, both criminological and legal. Given the limited nature of the literature pertaining directly to Ontario, the review will include works from numerous geographical and legal jurisdictions. The focus of the study is one of sentencing and prosecutorial behaviour surrounding environmental regulation. Consequently, a qualitative emphasis on data collection is appropriate because of the interplay between the individual's perceptions, and the eventual professional outcome. Northey and Teppermen explain the use of qualitative methodology as "...Grounded, discovery-oriented, exploratory, expansionist, descriptive, and inductive" (1986:57). This clearly describes the methodological goals of this study. The study is unique, in that it amalgamates prior methodologies used to study sentencing, with established criminological legal theoretical concepts in order to produce a specific work on environmental sentencing. Franklin refers to the absence of focused works on environmental sentencing in her 1990 paper, concluding after an extensive review, that "studies of sentencing in environmental cases are unfortunately rare."

The fact that environmental regulation/criminalization is currently in a transitional phase, both socially and politically offers credence to the use of this method.

The researcher has used a questionnaire format to gather the

appropriate data. Questionnaires were selected in order to increase the sample size of the study. The number of JP's and judges overseeing environmental cases on a regular basis in Ontario is sufficiently small enough for this to play a significant role in the final figures. Originally the researcher had believed that the focused interview would be the best format to extract the necessary data, however, time, travel, and economic constraints dictated the change.

When assessing the imposing of sentences by judges, one can differentiate between two major approaches. The first is termed the 'archival' or 'actual cases' approach. The second is the 'simulated cases' approach (Palys and Divorski, 1982). It is the second of these approaches that this study will follow. Internal validity is maximized with this context, since one is giving identical information to each sentencing official. External validity, however, may be diminished with this approach, given the fact that the cases are hypothetical. The cases were developed so as to be legitimately plausible, therefore minimizing this concern.

Participants were selected purposively from a list of JP's and Judges who have been involved in environmental cases on a consistent basis. The list was compiled for the researcher in consultation with the Ministry of the Environment of Ontario, Prosecution Division. The individuals were contacted initially by phone call, and given a brief outline of the study. Confidentiality and anonymity were assured. The resultant sample

was then mailed the questionnaire. Included were the measures of sentencing behaviour. Scenarios of actual environmental cases were adapted from the Canadian Environmental Law Reports, with changes made only to standardize scenarios and reliably test for what the judiciary felt were the key determining factors of a case. This questionnaire also included a section that allowed comment on various aspects of environmental justice delivery practices and concerns. The body of data acquired from the questionnaire forms a major part of the analysis. However, a second data set allows for statistical inference to be drawn concerning prosecution practices in Ontario for 1989.

The researcher acquired from the Ministry of the Environment of Ontario (Legal Division) a printout listing all prosecutions for the 1989 judicial period, in the province. This data contains the convicted individual or company's name, relevant legislation for the conviction, and form and/or amount of sentence. This data allowed the researcher to analyze who was being prosecuted, and the ranges of sentences that were implemented. The second data set complements the questionnaire data received.

The mailed portion of the study was sent to approximately 28 judicial districts (counties) in Ontario. Two copies of the questionnaire were given to one contact person in each location, with the instructions to pass one copy to a colleague if possible. The districts selected were done so with the goal of achieving a representative geographical distribution across the

province. This allowed for representation of rural agricultural, rural mixed, suburban, urban industrial, and dominant aquatic regions.

The prospective respondents were originally contacted by a letter accompanied by the questionnaire. No responses were received within the first three week period. A follow-up letter was sent out at this point, one response was received. Telephone contact was then initiated with the other respondents. In order to achieve the final ten responses, as many as four calls were required. Two respondents discarded the questionnaire and were mailed second copies, at which point their participation was secured.

V THE PROVINCIAL ACTS AND THE PROVISIONAL PENALTIES

It should be noted, that for the purposes of this study, the use of the word environmental in the title of the work is not all encompassing. The author contends that "the environment" can, and does include all natural species, and habitats thereof, regardless of the connection or degree of intervention therein by human society. Hence, optimum, environmental legislation can cover animal life, plant life (forestry) as well as human intervention within these spheres (pollution, degradation, development). However, this study will focus on one aspect of the environment--'pollution' legislation (EPA, OWRA, PA) in Ontario. These three Acts govern mainly discharge or pollution activities. Justification for the omission of other pertinent Acts is achieved by maintaining a clear focus on this highly controversial area of environmental legislation. The interplay between the state and business is underscored via pollution regulatory behavior.

The three Acts that will be covered are the primary Acts governing judicial focus on environmental issues on a daily basis in Ontario (see Ministry of Environment data 1989). The Environmental Assessment Act maintains a high profile, both in the media and in hearings, based on its purpose of land use planning. However, the three Acts covered herein generate the most exposure and influence in the sentencing of environmental

wrongdoers in Ontario.

The Environmental Protection Act

The EPA is the principle governing document for environmental protection in Ontario. The Act states as its purpose: "to provide for the protection and conservation of the natural environment" (R.S.O. 1980, c.141, s.2). The statement is a legally unobtrusive, socially ambitious aim that undoubtedly can achieve little but deflate the observer's enthusiasm as it proceeds. The Minister (MOE) oversees the operation of the Act, and enforcement of its provisions. Through the Minister, the Ministry personnel enact the provisions held within the document. These duties are as follows:

a) to investigate problems of pollution, waste management, waste disposal, litter management, and litter disposal

b) conduct research related to contaminants, pollution, waste management, waste disposal, litter, litter disposal

c) conduct studies of the quality of the natural environment, meteorological studies and monitoring programs

d) conduct studies of environmental planning, designed to lead to a wise use of the natural environment by man

e) convene conferences and conduct seminars and educational and training programs relating to contaminants, pollution, waste, and litter

f) gather, publish, and disseminate information relating to contaminants, pollution, waste or litter

g) make grants and loans for:
    1. research or training of persons relating to contaminants, pollution, waste or litter and,
    2. the development of waste management facilities

in such amounts and upon such terms and conditions as the regulations may prescribe.

h) establish and operate demonstration and experimental waste management systems

i) appoint committees to perform such advisory functions as the Minister considers advisable

j) with the approval of the Lieutenant Governor in Council, enter into an agreement with any government or person relating to the protection or conservation of the natural environment

It becomes evident that the mandate of the Ministry of the Environment under the relevant Acts is more extensive than policing the regulatory policies. The Ministry has a heightened concern for interaction and liaising with various interest groups. This position is understandable given the regulatory nature of the Acts. Co-operation with industry in achieving environmental protection is more desirable than an adversarial stance. However cooperation often gives rise to negotiation, at which point the balance of power in the cooperative relationships shifts towards industry (Webb, 1988:7).

Given the regulatory philosophy maintained by past and present provincial administrations, a need for self-reporting of discharges or "accidents" by industry or individuals is essential to the integrity of the process. Section 14(1) of the EPA initially makes the statement on such requirements:

> Every person who discharges a contaminant or causes or permits the discharge of a contaminant into the natural environment out of the normal course of events that causes or is likely to cause an adverse effect shall forthwith notify the Ministry (R.S.O. 1980, c.141 s.14).

Penalties

The sentencing of environmental wrongdoing is inevitably

constrained by the provisional penalties established within the relevant Acts. The three Acts discussed are essentially parallel in outlining legal frameworks for action, however, minor differences exist only in the amounts of fines available. Differences will be noted when appropriate.

There are no sentencing guidelines or formulas issued to sentencing officials, in reference to environmental cases. Judicial discretion is a prominent feature of the functioning environmental legal process. Discretion is high, and is bound only by the provisions of the Acts. Individual offence characteristics can be interpreted as mitigating or pertinent based on the perceptions of each individual sentencing official (Hogarth, 1972; Henham, 1976; Lovegrove, 1984; Palys and Divorski, 1984). Thus, the following provisions directly influence and dictate the magnitude and form of sanctions for environmental wrongdoing.

The general offence category is outlined initially in Sec. 146(1) of the EPA. "Every person who contravenes this Act or the regulations is guilty of an offence." The Act continues to include non-compliance with an order issued by the Ministry as being an offense. The issue of the control order is central to the functioning of the Ministry as a regulatory body. Once again the notion of a "process of negotiation" (Webb, 1988; Sabatier, 1975) is underscored by the use of such an order. Sec. 16 of the EPA states that:

> Where any person causes or permits the discharge of a contaminant into the natural environment, so that land,

> water, property, animal life, plant life, or human health or safety is injured, damaged, or endangered, or is likely to be injured, damaged or endangered, the director may order the person to:
>
> a) repair the injury or damage
> b) prevent the injury or damage
> c) where the discharger has damaged or endangered or is likely to damage or endanger existing water supplies; provide alternate water supplies.
>
> (R.S.O. 1980,c.141,s.16).

As a result, once a discharge takes place and is reported (usually by the discharger), a process of negotiation takes place where a control order is issued to the discharger to rectify the situation and return the activity to within Ministry established guidelines for discharge levels. Sec. 116(2) allows for submissions to the Ministry to be made by the offender regarding the control order, prior to the order being issued. This provision legitimates the negotiation process within the legislation:

> The person to whom the Director intends to issue the control order may make submissions to the Director at any time before the control order is issued (R.S.O. 1980, c.141, s.116(2)).

Given the limited human resources of the Ministry for 'policing pollution' the responsibility for reporting spills and environmental wrongs is placed often conveniently in the hands of the polluter. This situation does not have to be inherently counter productive to environmental protection. However, considering the level of adversarial relations between Ministry and industry is, at this time, still relatively high, the possibility that unbiased reporting will occur in a majority of cases is unlikely:

> ...the so called regulatory model, which typically consists of a general offence prohibiting harmful emissions outright, unless those emissions are authorized pursuant to the terms and conditions of "agreements" (for example certificates, or control orders) (Webb, 1988:6).

Consequently a great deal of environmental protection activity is undertaken in secret away from the scrutiny of public involvement, or at least public knowledge. The potential for corruption and/or ineffective environmental protection is obviously high.

The Acts are well drafted legal representations of an idealistic goal. However, the goal of creating legal statutes is to be able to represent all possible scenarios by using inclusive language. If one evaluates the potential of the Acts by focusing on the provisions therein, one could be inclined to feel positive about that potential. An example is the statement in the aforementioned Sec. 16: "...so that land, water, property , animal life, plant life, or human health or safety...". Legally it is necessary when drafting a piece of legislation to be inclusive in delineating prohibitive behaviour. In practice, the implementation of the legislation at the enforcement and control level is a highly discretionary and selective process. It would be utopian to believe that a violater of plant or animal life would report such activity, or that enforcement personnel would place animal or plant protection (for the animal or plant's sake alone) as important. If the harm done or absence of such natural life has adverse effects, whether aesthetic or economic impacting on humans then it may become important. Native residents of

Wholpole Island in southern Ontario, have been frequent victims of toxic water spills but their marginal status has resulted in little effort to prevent such errors or create effective punishments.

The separation of humanity from nature carries implications for survival, both biological and economical. Natural resource exploitation without concern for preservation is self defeating:

> The modern concepts of 'progress' and unlimited growth are formulations of the attitude toward nature which requires that man view himself apart from and superior to his physical environment (Vaughn, 1974:10) (in protecting the environment, Dwivedi, O.P.).

A further illustration of the interactive nature of Ministry/offender relations can be seen in Sec. 146(2):

> a person to whom an order or program approval of the Minister or the director is directed who complies fully with the order or approval shall not be prosecuted for or convicted of an offence in respect of the matter or matters dealt with in the order or approval that occurs during the period within which the order or program is applicable (R.S.O., 1980, c.141, s.146(2)).

The Ministry, by virtue of this clause, absolves the offender from further prosecution during a given period set out by the Ministry. Given the fact that a set of guidelines has been issued to the offender, the order will contain certain instructions. The offender, complying with these instructions is not liable for subsequent spills in the specified time period. The Ministry shoulders the technical responsibility for creating the recipe for remedial action. This chain of events potentially allows industry to become complacent in regards to environmental pollution abatement research. The state, via the Ministry,

maintains ownership of the technological research problem (and costs) dictated by 146(2) of the EPA. Industry is free to maintain operations that result in polluting behaviour, only to "negotiate" a control order if a 'major' mishap occurs. The state is neglecting a powerful research force, that of industry to take on part-ownership of the research problem. The conditions also create a text, wherein polluting behaviour is viewed as an 'inevitable' outcome of production operations that will be conveniently dealt with by the Ministry.

The penalties for contravening the general conditions of the Act, or for failing to comply with an order, or certificate of approval, or licence, or for a director or officer of a corporation that engages in an activity that may result in a discharge of a contaminant, and who does not take 'reasonable care' to prevent the discharge, are as follows:

Individual

For each day or part of a day that the offence occurs
Not more than **$10,000** on first conviction
Not more than **$25,000** for each subsequent conviction

Corporation

For each day or part of a day that the offence occurs
Not more than **$50,000** on first conviction
Not more than **$100,000** for each subsequent conviction

Sec. 146(b) outlines conditions for subsequent offenses. An offence is subsequent if previous convictions have been issued on the EPA, OWRA, or PA.

The penalty structure changes when "actual pollution" (EPA,

page 244:margin notation) is involved. Any corporation that contravenes Sec 13(1) (which prohibits discharging a contaminant into the natural environment), or non-compliance with a stop order (Sec.119(1)), can receive the following:

For each day or part of a day that the offence occurs

Minimum	$2,000	--- maximum	$200,000	on first conviction
Minimum	$4,000	--- maximum	$400,000	each subsequent conviction

It is notable that the minimum fines for subsequent convictions are increased by only $2,000 for a corporation. Considering the fact that the fines are amounts for each day, one may believe that the maximum fines are indeed quite sufficient. However, the maximum fine structure is a value in place for the "worst offence" (R. v. Panarctic Oils Ltd., [1983] N.W.T.R. 143) and the upper limits are very rarely approached (see analysis section).

If an individual is convicted of contravening Sec. 13(1) or 119 (1) they are liable in addition to, or in substitution for the aforementioned fines for individuals, to imprisonment for a term of not more than one year (R.S.O. 1980, c.141, s.146(2)).

The above provision does not apply unless the court is satisfied that the person was notified, before entering his or her plea, that a penalty would be sought under Sec. 146(2) (imprisonment).

It is an interesting point of legal functioning that the provisional penalty of imprisonment is not provided for directly, as an option for the sentencing official. The process of being

informed of the prosecution's desire to seek such a penalty, prior to the defendant's plea, would allow for legitimate plea negotiations between counsel, to remove such a request. This provision removes the ability to use the imprisonment sentence from the sentencing official and places that discretion in the hands of counsel. Therefore the provision becomes little more than decorative wrapping on the magnitude of the provisional penalties, or at best, the tool of select ambitious prosecutors.

Sections 146(c)(d) offer 'creative' sentencing options. 146(c) states:

> The court that convicts a person of an offence under this Act, in addition to any other penalty imposed by the court, may increase a fine imposed upon the person by an amount equal to the amount of monetary benefit acquired by, or that accrued to the person as a result of the commission of the offense, not withstanding any maximum fine elsewhere provided (R.S.O. 1980, c.141, s.146(c)).

This section again allows for a positive view of sentencing potential when analyzed theoretically. However, in legal practicality, the ability of the court to effectively ascertain the monetary benefit gained through the offending behaviour is minimal. The goal of the section is honourable. The wording, as it stands, renders the clause, ineffective. The difficulty for the courts in establishing a figure based on profit gains through offending behaviour is underscored in Saxe (1989).

Sec. 146(d)(1) is described in margin notation as an order to protect and restore the natural environment, either on the initiative of the court, or upon application by counsel for the prosecutor.

Sec. 146(d)(2) extends the court further into the theoretical guess world of sentencing options:

> An order under subsection (1) may contain such other conditions relating to the circumstances of the offence and of the person that contributed to the commission of the offence as the court considers appropriate to prevent similar unlawful conduct or to contribute to rehabilitation (R.S.O. 1980,c.141 s.146d(2)).

The phrase "...to prevent similar unlawful conduct" is clearly referring to deterrence (both specific, and general). This has been shown to be a primary goal of regulatory legislation via sentencing (Swaigen and Bunt, 1985; Yeager, 1987). However, the effectiveness of this mandate has yet to be substantially illustrated by the literature (Hagan, 1982) or in practice by the Ministry (see MOE data, 1989).

The statement "...to contribute to rehabilitation" is yet another flowery inclusive catch phrase that gives the state a shield against general accusations that sentencing is too focused, and not creative enough to deal with the range of offenses. In practice the sentencing officials avoid such dark recesses of the legislation. A possible explanation for this avoidance is due to the legal ambiguity of such phrases. A sentencing official invoking such a section in sentence could be forced to have his/her judgement extensively dissected during an appeal hearing. Justification for entering a philosophical area would undoubtedly require a well articulated philosophical (reinforced by legal fact), argument. The sentencing official is therefore more comfortable with using the traditional fine sanction.

Note: The provisional penalties within the Water Resources Act (OWRA) are drafted in the same form as the EPA. The creative sentencing options remain as does the imprisonment clause. The fine structure differs as follows.

General Offence Category

Person

For each day or part of a day that the offence occurs
Maximum **$10,000** on first conviction
Maximum **$25,000** for each subsequent conviction

Corporation

For each day or part of a day that the offence occurs
Maximum **$50,000** on first conviction
Maximum **$100,000** for each subsequent conviction

Actual Pollution (e.g., sec.16(1) or 19(2)b)

Corporation

For each day or part of a day that the offence occurs
Minimum **$2,000** --- maximum **$100,000** on first conviction
Minimum **$4,000** --- maximum **$200,000** subsequent conviction

(R.S.O. 1980,c.361s.67(1),68(1)(2).)

Note: The penalties outlined within the Pesticides Act are the same as listed above.

VI LEGAL CASES SETTING PRECEDENT IN CANADA: DEFENSES AND SENTENCING FACTORS

The defence of due diligence is available to the accused and they can avoid liability in environmental cases by "proving they took all reasonable care." This defence in environmental cases surfaced in the landmark (R. v. Sault Ste. Marie) case (1978). In a strict liability offense (see proceeding section) the defence of due diligence becomes available to the accused. The accused must show that they took 'reasonable care' to prevent the offense. The onus of proof, on a balance of probabilities, lies with the accused.

Dickson, J. in R. v. Sault Ste. Marie, at p. 373 C.C.C. writes:

> In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

In the 1989 case of R. v. Wholesale Travel the due diligence defence was challenged in reference to the burden of proof. The Wholesale Travel group were jointly charged with five counts of false or misleading advertising, contrary to section 36(1)(a) of the Competition Act. In the original trial the judge dismissed the charges citing certain sections of the Act as unconstitutional in that they do not allow for a proper defence. On appeal, the appeal judge held that the given section of that

Act did not violate the Charter and remitted the case for trial. The Wholesale Travel Group appealed to the court on a question of law. The Group believed that the Act forced the defendant to admit actus reus in order to avail himself of the only defense prescribed (due diligence). Since the burden of proof is placed on the accused to show absence of negligence this could result in the conviction and imprisonment of the accused even when the trier of fact has a 'reasonable doubt' as to the fault of the accused.

Zuber, J. A., in speaking for the court ruled that the case should be remitted for trial, however, certain sections did violate the Charter. Forcing the accused to establish a defence on the balance of probabilities was found not to offend the Charter; forcing them to disprove an element of the offence does. (R. v. Wholesale Travel Group Inc. (1989))

In an environmental case where the only criteria for establishing due diligence is producing an authentic, tangible certificate or licence, the above dilemma does not surface. If diligence is a nebulous concept that is difficult to prove to the court, the absence of an adequate defense may exist and thus become unconstitutional. This shows that Dickson J.'s third type of offence (strict liability) can become blurred under certain conditions.

In a precedent case involving due diligence the court established that the care taken must reflect diligence of a reasonable professional (R. v. Placer Developments Ltd. (1983)).

The above discussion serves to underscore the intricacies of the law, be it regulatory or criminal. The potential to obscure the primary goal while ensuring procedural fairness lends credence to a different focus in environmental protection.

Officially Induced Error

The case of R. v. Dow Chemical Canada Inc. (1987) The defendant disposed of tar waste by deep well injection and was charged with three counts of operating a waste management system without a certificate of approval issued by a director in violation of s.27(a) of the E.P.A..

The commission of the act was not contested. The issue was the validity, or existence of the certificate of approval. The defendant produced a letter on the letterhead of the Department of Energy Resources Management, dated May 31, 1967. This was the purported certificate of approval. The corporate accused did, in fact, operate and rely on the approval for a period of 17 years, with the full knowledge of the Ministry officials. Given that the approval was valid, if flaws exist in the approval that cause environmental degradation, it is the 'error' of the Ministry and is up to them to rectify the situation.

The defence of officially induced error is described in detail in (R. v. Cancoil Thermal Corp.):

> The defence of 'officially induced error' is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to

> successfully raise the defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.

In the Dow Chemical case, the issue is not so much the error in the approval itself, but the lack of interest, or negligence shown on part of the Ministry in updating the order. To allow waste disposal, such as tar injected into the ground based on the approval of an official in 1967, 17 years later is not action that will maintain the quality of the natural environment.

Once again, one witnesses procedural hopscotch as impeding environmental protection. Defences must be available in judicial hearings. However, proper action by the Ministry would divert some of the dilemmas prior to the court stage.

A non-legal interpretation can be inserted at this stage. Although it is 'fair' legally to allow defences such as officially induced error, in the everyday world of business/Ministry interaction a clearer set of conditions prevail. It would be 'reasonable' to assume that a company such as Dow would have reason to believe that injecting tar waste into a salt cavern below ground may have detrimental effects on the surrounding environment. The legal structure in place, ensures that the corporate entity knows that it is operating under an outdated or seriously deficient approval of the Ministry which is also the body that initiates any legal action. It may also be

that alternate methods of disposal may exist, albeit at an increased expense or inconvenience. The point being, that a reasonable person or corporation knows that such practices are not conducive to environmental protection, but business decisions, framed by the regulatory legal provisions, allow it to continue. The alternative is a change in the industrial/Ministerial relationship.

The close reading of the defence as outlined in R. v. Cancoil Thermal Corp. and R. v. Sault Ste Marie provides the operative word as 'reasonable'. This legally ambiguous term is illuminated somewhat by Barton (1980):

> To some extent, at least, the requirement that the actor have been reasonable is merged with the requirement that he have proceeded from a position of mistake rather than ignorance.

He then alludes to the practicality of the defence:

> ...the court is more likely to excuse a person who made an attempt to conform to the law or to ascertain his position, than one who has proceeded in sheer ignorance.

The case of R. v. Texaco Can. Inc. (1986, 1 C.E.L.R. (N.S.) 100.) brings to light a number of issues. The case has relevance to the levels of liability. The Texaco Canada station in Beachburg, Ontario was the subject of an investigation and subsequent prosecution, specifically under sec. 13(1) of the EPA. The soil in a drainage ditch adjacent to the property had become contaminated with gasoline. Based on the investigation, the gasoline holding tanks were excavated. The initial complaint was initiated by a neighbour in April. A further complaint was filed

in the fall of that same year; excavation was initiated in November. A two inch crack was discovered in the bottom of one tank, which was believed to have caused the leak. The word, 'leak' becomes the operative word. The trial judge dismissed the charges because the 'leak' did not constitute a 'discharge' as required by sec. 13 of the EPA.

Section 13 does not make reference to a leak. The words used in this section denote the necessity of an outside force, or energy. The words deposit, add, emit, and discharge require the intervention of energy, it cannot take place by itself. The section has since been amended, however it is an illustration of the barriers that the semantics of procedural precedent create for achieving the primary goal of environmental protection.

Section 13(1) has been shown to be an offence of strict liability and as such an element of actus reus must be established by the Crown. The act was not present, based on the absence of the external force mentioned previously. However, if so proven, Millette, DCJ stated that Texaco's position was virtually unassailable as to due diligence. He was referring (in his opinion) to the extent to which Texaco went in order to co-operate and address the situation as it developed.

Other defences that are common in environmental trials have been articulated in previous cases as well. "An act of God" is used to remove liability. Defendants have used the following scenarios: air pollution as a cause of high winds and unusually heavy rainfall causing contaminants to enter water sources.

Granted the act itself is out of the control of the defendant (at the critical moment); nonetheless adequate precautions should be taken to prevent discharge in the event of such occurrences. For example, overflow contingencies should be required in the event of heavy rainfalls. Every year the news media reports pollution levels rise due to high rainfalls, causing drainage to be diverted through storm/sewer systems and into waterways. These events close beaches every summer in the lower Great Lakes basin. The consistency of the events over the years would dictate that changes to the drainage system be implemented to avoid such contamination from entering storm runoff systems. Such avenues are not pursued. Is the cost not yet justifiable?

The 'mistake of fact' defence has also been used in environmental trials. This defence is similar to officially induced error. The defendant appeals for removal of liability when they have "an honest but mistaken belief in the existence of circumstances which, if true, would make the act for which the accused is charged an innocent act" (R. v. Sault Ste. Marie (1978), 40 C.C.C. 2d. 350).

It is notable that all the above defences are not claiming that the act was not committed, but providing justification for their commission, by attempting to provide legal arguments suggesting that they are not responsible in law for the act.

Environmental cases at the trial stage, seldom contest the occurrence of the environmental wrongdoing. Judicial time and resources are spent searching for justifications. Given the lack

of tangible benefits for society or the environment, that arise from the judicial process surrounding environmental wrongdoing, it would appear that the current practice is inefficient.

The sentencing of environmental offenders is a process which has developed through legal precedent shaped by legislation. A variety of factors become either pertinent or mitigating in establishing sentence for the offender. Some of these factors were discussed previously as to their theoretical implications and goals. The discussion may now turn to the legal practicality and origin of the given sentencing factors. Chapter 12 will then deal with the third stage of these factors, that being the sentencing officials' perceptions of their applications.

Sentencing Factors In Legal Precedent

a) The extent of harm created as a result of environmental wrongdoing is a prominent sentencing factor. At first glance, consideration of such an effect would appear to be tantamount to a fair system. However, to institute criteria for ascertaining degrees of harm is extremely difficult (or should be). In order to ascertain harm, a hierarchy of interests must be established. This hierarchy has been assembled with only one element, the interests of human society:

> Self-interest and the homocentric want-oriented perspective of instrumental rationality would give way to a theory of the natural order and our place in it (Emond 1984).

The sentencing factor of extent of harm, as well as the dilemma of Ministerial responsibility via certificates of approval or control orders is illustrated in the case of R. v.

Cyanamid Canada Inc.

Cyanamid of Canada Inc. was charged with one count of depositing a deleterious substance, namely, ammonia effluent from its Welland chemical plant into water frequented by fish, namely, the Welland River.

Cyanamid produces chemical fertilizers. On the bank of the river Cyanamid extends a "36 inch diameter sewer pipe" from its operation, from which "from time to time" a liquid effluent flows into the Welland River. The waters of the Welland River flow under the Welland Canal by means of a specially constructed siphon. The river waters are sucked down and under the canal, and come up on the other side to continue their easterly flow. Water pressure changes involved in the siphon process, create the situation where no fish can survive going through the siphon. This causes all fish west of the Welland Canal to be isolated from fish east of the canal. Where the Welland River meets the Niagara river the waters are directed through a series of canals constructed by Ontario Hydro and are carried to Hydro generating plants, pass through turbines and are discharged into the Niagara below the falls. Fish in the canal system are doomed. The principal species of fish in the east section of the Welland river (Cyanamid area) are catfish. The trial judge writes: "They are a scavenger fish and are not prized by sports-fishermen." The trial judge again references the species in listing mitigating circumstances:

> [The area]... is a poor quality fishing area in any event and not a good sport fishing area because the

> waters there are principally inhabited by catfish (Wallace PCJ).

The references are qualified by their importance to sports fishing people, and therefore society's value. The fish have no standing as living creatures. To extend the logic of Wallace, if a species of trout or walleye inhabited the area this would have dictated a more severe penalty. Maintaining a focus on human value of the environment obscures the primary goal. No mention is made in judgement of future damage surfacing, of silt or soil damage, only to the potential of the fish to provide human satisfaction (either in an economic or recreational pursuit).

Once again, the occurrence is not contested. Justifications for the occurrence are pursued at the expense of the natural environment and of cooperative progress.

The effluent was tested by an independent, Brock University researcher against the control of the river water above the discharge pipe. Fish were placed in the two liquids. The fish in the aquariums containing the effluent died in 51 seconds, the other fish lived for many hours.

The discharging of this effluent was known to the MOE. The Ministry had studied the production process of Cyanamid and produced an engineering emission report for both air and water. The report culminated in the issuing of a control order in February, 1978. The compliance schedule was to be completed by 1984 (six years). The order was also prioritized:

> They gave higher priority to air pollution control rather than to water pollution control, presumably on the basis that air pollution affecting thousands of

> citizens was of higher priority than water pollution affecting a handful of catfish (Wallace, in R. v. Cyanamid).

The effluent that had been discharged for an indefinite period prior to 1978 would continue for at least six more years. The same liquid that killed fish in 51 seconds emitted through a three foot diameter pipe. The water table, the river soils, the downstream receiving waters and their inhabitants, all become the victims of a list of priorities.

Since Cyanamid was acting under the supervision and approval of the MOE, they maintain no liability for wrongdoing based on the contents of the control order during the specified period. However, the trial judge did find them guilty of the charges under the Fisheries Act; they were fined **$1.00.**

One cannot expect a corporate entity to act in any other fashion than calculated rational behaviour. In the above situation Cyanamid, the corporation, cannot be faulted for the action (post facto). They complied and co-operated with the Ministry as required by the "full extent of the law." The point of interest and concern is the action of the Ministry. A six year implementation period may be necessary in order to minimize economic burdens to the company. Is it adequate for environmental protection? This case illustrates clearly a number of dilemmas present in environmental legislation and sentencing. First, the Ministry/industry relationship: the negotiation process can only favour industry in terms of compliance schedules. Second, the judicial thought processes in

establishing levels of importance, in reference to 'extent of harm', are clearly subjective. Third, the legislative difficulties embodied in the nature of control orders and approvals: are they effective instruments of environmental protection, or merely convenient tools for easing political economic impacts on industry and the government?

The co-operative stance of Cyanamid as indicated at trial should be applauded and encouraged, however, Ministerial reluctance to rule with more of an iron fist does not lend to creating supportive legislation. It only furthers the gap between action and legislation. The situation illustrates the fact that the offenders are not the exclusive enemies of environmental protection, Ministerial inaction also exacerbates the dilemma.

b) Intent: The factor of intent is not a necessary component to be proven by the prosecution in most environmental cases, based on Sault Ste. Marie. If intent can be shown as a factor it can play an important role in both defence strategy, and sentencing.

In the case of R. v. Lehnen (1985) the issue of intent surfaces as a sentencing factor. The accused was charged with contravening the OWRA 23(3). An order was issued by the MOE but not complied with. The accused owned a trailer park and was installing sewer pipes therein. The OWRA via the MOE dictates that water lines and sewage lines be separated by at least eight horizontal feet. The accused was placing both pipes in the same

trench. The MOE did consult the accused as to the regulations through the order, however the order was clearly disobeyed. The trial judge and prosecution viewed this as a mental act of intent to contravene the OWRA. The accused had also been previously convicted under the same section of the Act. These factors were clearly a factor in sentencing. The trial judge stated:

> I appreciate that the corporate respondent may have been in some financial difficulty at some time during the 1982 and 1983 year. This however does not excuse the deliberate flouting of the law which occurred here (Carter DCJ in R. v. Lehnen).

In a 1987 case involving Gulf Canada Inc. the company was refused a permit to dump waste at sea (North West Territories). They proceeded to dump waste in contravention of regulations. The actions of Gulf Canada were clearly viewed as intentional and this was stated as a factor in sentencing (R. v. Gulf Canada Inc. (1987).

c) Previous convictions are an important sentencing factor in all criminal and regulatory offenses. The case of R. v. B.E.S.T. Plating Shoppe Ltd. is an environmental illustration. The accused operated a plating operation in Metropolitan Toronto. On May 28, 1985 a prohibition order was issued against the accused by a justice of the peace, to terminate discharges of metals into the sewage system in excess of limits. Prior to the order B.E.S.T. Plating had been fined and convicted on 49 occasions for violating the sewer use bylaws. Only after that many convictions was a stop order issued. The length of time that unregulated

discharging was allowed illuminates a possible mindset in regard to the Ministry. The Ministry/Industry relationship may have been deep-rooted enough to allow the enforcement division to overlook the occurrences and allow the behaviour to continue, with only the licencing fees of the sanction as a fine. Subsequent to the order, four further offences were committed. Fines accrued prior to the order amounted to $67,750 of which only $15,000 had been paid. The discharges into the sewage system were analyzed to contain cyanide, copper, zinc and nickel. The cyanide was 20 times in excess of permissible limits.

It was clearly established at trial that the accused corporation was indeed the source of the discharges, and that the director was aware of the stop order. (Knowledge of the order is all that is necessary to maintain liability for its contents.) [(e.g., see R. v. Jetco Manufacturing).]

> The defence counsel stated, in speaking to sentence:
>
> It was almost impossible for anybody to comply with this particular by-law while operating a plating business.

This attitude is one of extreme danger to the goal of environmental protection amidst the political economic concerns of the day. If, in fact, one cannot operate a plating business without damaging the environment (as Mr. Bucker for the defence is indicating), then new technologies for production and/or treatment of by-products should be legislated to be developed. The operation of blatantly environmentally harmful industry should not continue on the rationalization that "it's the only

way it can be run." A time has to arise where one goal takes priority, at least for an interim period. Industry appears to be using illogical arguments in thinking that unabated pollution via production, can continue to allow for capital accumulation over the long term.

In R. v. United Keno Hill Mines Ltd. the trial judge stated:

> that previous convictions show that the accused was more interested in profits than compliance, therefore higher fines were justified.

In passing sentence the judge (in R. v. B.E.S.T.) stated, "I view his continuing flagrant disregard of violations as a serious matter." Therefore previous convictions and actions (inactions) are a stated factor in the case law.

d) The 'Worst Case' scenario has been adopted on a number of judicial areas to be a hypothetical construct justifying the harshest sanctions. In regulatory offences this usually is referring to the maximum fine levels. Environmentally, the case of R. v. Panarctic Oils (1983) verifies this position:

> Ignoring obligations, knowledge of harm being done, no attempt to cleanup put case into "worst case" category; maximum fines reserved for these offenders.

Swaigen and Bunt, describe factors that move a situation towards the worst case, surreptitiousness, deliberateness, recklessness, attitude, and disregard for instructions of environmental authorities (1985:24).

e) The size and wealth of the corporation inevitably surfaces as

a mitigating factor in sentence. The factor is addressed in varying ways by sentencing officials. Carter, DCJ as stated previously in R. v. Lehnen found financial hardship of a corporation to not be an excuse for "deliberate flouting of the law." However, in R. v. United Keno Hill Mines the size and wealth of the corporation was a mitigating factor. A precarious situation arises in sentencing behaviour when the accused is a municipal corporation. Environmental wrongdoing by municipalities is a source of degradation that is often obscured by high profile cases involving corporations. The fact that municipalities are collective representations of individuals in a community for administrative purposes, and not a profit-orientated entity, poses problems when imposing sentence. The problems of discerning corporate responsibility is the same as that for a profit-driven industrial corporation; however, this dilemma cannot be escaped by imposing a fine (as is the case in most regulatory sanctions involving corporations).

To fine a municipal body is to remove revenue from the operating capital of that municipality. Therefore, a substantial fine would be amortized through higher taxes, and/or decreased programs. The individuals become the recipients of the sanction.

The trial judge in R. v. City of Quesnel (1987) indicated that a small fine would be in order based on the fact that it would be paid by the taxpayers. This position leads to ineffective prosecution of municipal bodies and potentially could be an impetus for the Ministry to be reluctant to formally

prosecute municipal bodies when environmental wrongdoing has occurred. This in turn pushes the negotiation process of Ministry/polluter interaction deeper into the recesses of the closet and away from public scrutiny.

f) **The amount of Remorse** exhibited by an offender is a mitigating factor in sentencing. This factor gives rise to various forms of subtle theatrics in the courtroom and in the actions of the accused. The scenario is commonplace in all trial situations. The defendant is instructed by counsel to attend the trial in dress clothes, sporting a "new unoffensive haircut." The same theatrics have been remodelled for use in environmental situations. Post-infraction undertakings by the corporation or individual are factors considered as remorseful (Training programs are set up for employees; expenditures on abatement technology increase.). Large, high profile corporations can even capitalize on environmental expenditures in terms of advertising (witness, Inco Canada Inc. winter 1991 ads on CBC).

R. v. United Keno Hill Mines, surfaces again as a reference for this factor. The trial judge states:

> Speed in rectifying problem and cleaning up pollution, voluntary reporting, and corporate presence at trial are all evidence of remorse.

He continues:

> The personal attendance of responsible senior corporate officials in court and their testimony substantiate corporate remorse, contrition, and good faith in desiring to resolve outstanding problems, and accordingly has a positive impact on sentencing.

This belief sets a precedent for legitimating legal theatrics. The presence of high ranking corporate officials at trial should not in any way reflect remorse. The presence is probably more indicative of the degree of concern over the potential finding of guilt. Extending this logic, the presence of the accused in a murder trial should indicate remorse. The inclusion of such an opinion as that of Stuart CJ in the United Keno Hill Mines case official report sets the stage for corporate offenders to be present at trial for the sole purpose of extracting leniency from the sentencing official. Defence counsel will undoubtedly reference such attendance in speaking to sentence. These factors are not conducive to environmental protection, or to the functioning of a fair, equitable legal system. They merely add elements that corrupt and cloud the administration of justice.

g) The use of a guilty plea as a mitigating factor in sentencing becomes a question of jurisprudential ethics in opposition to promoting expediency of process. If the plea of guilty consistently provides for a lenient sentence, does this not induce an offender to abandon his/her defence if a poor balance of probabilities exists in reference to acquittal (regardless of actual guilt or innocence)? All accused should be able to defend their actions or the charge before them without fear of being sanctioned for anything more than the original offence. In reality, however, the absence of a guilty plea in a trial where

the accused is convicted can dictate a more severe penalty than an accused who pleads guilty given identical circumstances.

In R. v. FMC of Canada (1985) the trial judge stated that, "guilty plea is not a factor; to treat as such would be to penalize for pleading not guilty." In R. v. Panarctic Oils Ltd. (1982) "The corporation has the right to defend the charge against it; no inference should be drawn from its decision to do so."

If guilty pleas are considered, the victim can become the small economically vulnerable corporation, or presumably individuals. These parties, devoid of the economic ability to pursue costly legal representation for extensive periods (as can be the case with long environmental hearings), may choose to plead guilty and accept a smaller fine. These cases may, at first glance, seem insignificant in reference to the amount of time and/or the degree of environmental degradation. However, the issue is one of ethical concern. The situation creates a "criminalization" effect by labelling accused who may not rightfully deserve such distinction.

VII THE CASE OF R. v. THE CITY OF SAULT STE. MARIE

The Sault Ste. Marie case harbours the distinction of being the most influential decision for environmental law in the modern era in Canada, as witnessed by its frequency of reference in subsequent decisions. The case became a testament to the functioning of the law. The decision heralded the delineation of a new set of legal categories. The decision specifically applied to environmental offenses (given its content); however, it has had effect on both criminal and standard regulatory offenses:

> In recognizing that the public interest is paramount over the right of the individual to carry on activities that put the environment at risk, the Sault Ste. Marie case implicitly extends this principle to sentencing as well (Swaigen and Bunt, 1985:9).

The city of Sault Ste. Marie was charged under s. 32(1) of the OWRA. "That it did discharge, or cause to be discharged, or permitted to be discharged, or deposited materials into Cannon Creek and Root River, between March 13th, 1972 and September 11th, 1972."

The city had entered into an agreement on November 18, 1970 with Cherokee Disposal and Construction Co. Ltd. for the disposal of all refuse originating in the city. Under the agreement, Cherokee furnished a sanitary landfill site which bordered Cannon Creek, which in turn runs into the Root River. Pollution of both water courses resulted and Cherokee was convicted of a breach of s. 32(1) of the OWRA. The question before the Supreme Court was whether the city was also guilty of an offense.

The city was acquitted in Provincial Court, but was convicted following a trial 'de novo' on a Crown appeal. A further appeal to the Divisional Court by the city was allowed and the conviction was overturned. The Court of Appeal for Ontario on yet another appeal directed a new trial. The Supreme Court of Canada granted leave to the Crown to appeal and leave to the city to cross-appeal (Jeffery 1987, 40 C.C.C (2d)).

"The importance of the decision lies in the court's handling of the question of mens rea" (Jeffery 1987:62).

The court discussed the original two categories of offenses and their application to public welfare offenses:

> Generally in classifying offenses with respect to mens rea the choice has been between requiring proof of full mens rea or making the offense absolute in the sense that a conviction will follow on proof merely that the accused committed the actus reus of the prohibited act, there being no relevant mental elements (Dickson J, in R. v. Sault Ste Marie).

Absolute liability has been imposed on public welfare offenses in the past, based on the belief that high standards of care are more likely to be upheld if the actors know that ignorance or mistake of fact will not excuse them of liability for the act. It was believed that the social ends to be achieved were of such importance as to override the unfortunate by-product of punishing those who may be free of moral turpitude (R. v. Sault Ste. Marie).

Dickson J. in the Sault decision viewed the arguments against absolute liability as more persuasive. "Absolute liability violates fundamental principles of penal liability."

Given this position, Dickson J. presented that the doctrine proceeds on the assumption that the defendant could avoid the prima facie offence (absolute liability) through the exercise of reasonable care, and he is given the opportunity of establishing, if he can, that he did in fact exercise such care.

Previously, in absolute liability cases, due diligence was admissible when speaking to sentence, therefore Dickson J. believed "the evidence might just as well be heard when considering guilt." Liability in this case rests upon control and the opportunity to prevent (e.g., that the accused could have, and should have prevented the pollution).

In noting the difficulty for the prosecution in proving mens rea and the corresponding ethical dilemma of absolute liability coupled with the gravity of pollution offenses as public welfare concerns, the following was created:

> Dickson J. The correct approach in my opinion is to relieve the Crown of the burden of proving mens rea given the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by activities of a large and complex corporation. Equally there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.

In such a doctrine it is not a requirement of the prosecution to prove negligence. It is, however, open to the defendant to prove all reasonable care was taken, therefore establishing that he/she/it was not negligent. It is ethical to place this burden of proof on the defendant because they are the

only ones with the means of proof. The fairness of this burden is underscored when one looks at the alternative which is absolute liability which denies any defence. The prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act. The defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

Dickson J. continued:

> I conclude, for the reasons I have sought to express, that there are compelling grounds for the recognition of three categories of offenses, rather than the traditional two.
>
> 1. Offenses in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> 2. Offenses in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imparts the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offenses may properly be called offenses of strict liability.
>
> 3. Offenses of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offenses which are criminal in the true sense (therefore, within the Criminal Code not Provincial legislation (see Dickson J. p.356)) "as valid provincial legislation does not create an offence which is criminal in the true sense" fall in the first category. Public welfare offenses would prima facie, be in the

second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly" or "intentionally" are contained in the statutory provisions creating the offence. On the other hand, the principle that punishment should, in general, not be inflicted on those without fault applies. Offenses of absolute liability would be those in respect of which the legislature had made it clear that guilt would follow proof merely of the proscribed act:

> The overall regulatory pattern adopted by the legislature, the subject matter of the legislation, the importance of the penalty and the precision of the language used will be primary considerations in determining whether the offence falls into the third category (Sault Ste. Marie:65).

Dickson J. allows this clear interpretation in reference to the environment:

> Pollution offenses are undoubtedly public welfare offenses enacted in the interests of public health. There is thus no presumption of full mens rea.

In the concluding statements regarding the appeals of Sault Ste. Marie Dickson J. elaborated on the wording of S. 32(1) OWRA:

> The 'permitting' aspect of the offence centres on the defendant's passive lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen (p.377).

Again in reference to a municipality:

> A municipality cannot slough off responsibility by contracting out the work. It is in a position to control those whom it hires to carry out garbage disposal operations, and to supervise the activity, either through the provisions of the contract or by municipal by-laws. It fails to do so at its peril (p.377).

The Sault Ste. Marie case has been extremely important, however, the decision has also created new dilemmas. It has cleared up in some regards, distinctions between the three categories of offenses, but in doing so has left a substantial amount of judicial baggage. The decision was not far-reaching enough. It is still necessary for the courts to look at a variety of factors (outlined by Dickson J.) such as, "precision of language used," "importance of penalty" and "subject matter of legislation," in order to determine whether the offence falls into the second or third category (Jeffery 1987:66). "The category of strict liability has effectively made prosecution more difficult for the EPA and OWRA" (Jeffery, 1987:66).

The advancing of the due diligence defense under the strict liability category shifts the burden of proof to the defence. If it cannot prove, on a balance of probabilities that it took reasonable care, conviction will result. The regulatory enforcement agent (MOE in Ontario) is given the increased pressure of obtaining evidence in anticipation of the due diligence defence. If the defence is adopted by the accused, the prosecution must be prepared to rebut it. It has been stated (in support of reversing the burden of proof) that generally the proof of diligence/negligence is only available to the accused. Literally, the issue has been addressed, procedurally. One finds the prosecution still in search of this elusive evidence in order to be prepared for rebuttal:

The training programs of both the Ministry [of the Environment] and the Ontario Police College emphasize the necessity of constructing a case with the view to establishing whether or not the alleged offender was negligent.

Part of the problem stems from the fact that there is no procedure analogous to that of discovery in civil actions which enables the prosecution, first, to know in advance that the defence of due diligence will be raised and second, if it is raised, to know upon what facts the defence will be based (Jeffery, 1987:68).

VIII The Criminal Law and Environmental Protection

In the previous sections two levels of political-legal intervention have been alluded to in reference to environmental wrongdoing. First, regulatory offenses (Provincial Acts) and the criminal law, 'in the true sense' (Canadian Criminal Code).

Criminal Code offenses are traditionally viewed as more stigmatizing, and carrying harsher penalties than provincial regulatory strategies. It is therefore understandable why a call has been made to include environmental offenses in the Criminal Code, and to prosecute offenders through that medium. The benefits of such a move seem clear given the previous assumption, however what are the real outcomes of a stronger reliance on the criminal law?

> ...that calls for increased penalties are the knee-jerk reactions of those not familiar with the actual situation (Webb, 1988:31).

In reference to the Australian situation:

> deficiencies in the knee-jerk political reactions to environmental pollution concerns, such as the Environmental Offenses and Penalties Bill. The interest for criminal lawyers is the predictable appeal to the symbolic force of the criminal law without, however, any appraisal of the likely outcome (Franklin, 1990:1).

The "symbolic force" of the criminal law is the philosophical variable that attracts the attention of the uninformed. Claims of harsher penalties via criminalization are a convenient tool for sweetening political rhetoric by policy makers. Given the perception of 'criminal' as more severe, and therefore more effective, the public is appeased by an

administration "getting tough" with polluters through this means. Politically advantageous headlines are easier to secure when announcements can be made regarding increasing penalties. In Australia, Franklin notes that headlines were numerous involving the proposed Environmental Offenses Bill that sought to criminalize pollution offenses:

> Bosses who pollute face jail and we are just going to go for the jugular of anyone breaking the law. We will take no prisoners (1990).

These headlines were delivered in speeches by the New South Wales Minister of the Environment. It therefore becomes evident that many of the same misconceptions concerning environmental legal strategies held by the public are also held by the political spokes-people:

> Public perception and political response proceed on a limited understanding of the prosecution and sentencing process (Franklin, 1990:5).

The rigid procedural necessities governing the functioning of the criminal law make it a slow performer in dealing with a multi-dimensional problem such as environmental wrongdoing:

> The criminal fine has been recognized as being too blunt a weapon, and the criminal process too cumbersome and onerous, and not well suited to corporations and other business organizations (Franklin, 1990:8).

The components of the criminal law make it a less desirable forum for combatting environmental degradation. The components are as follows: First, in order for an offence to be truly criminal two elements must be present, (actus reus, and mens rea). These are simply the criminal act, and the criminal mind:

> The requirement for actus reus and mens rea constitutes such a basic principle within our criminal law that it must form, if only in the most general terms, the starting point for any rational exposition of that law (Law Reform Commission of Canada (LRCC) 1982:21).

Criminal liability is created, in part only when "the commission of conduct coming within the definition of an offence ensues" (LRCC 1982). The act in environmental cases is often quite clear within the regulatory framework, however, the proof process involving the act in a criminal trial could be increasingly difficult. "Proof beyond a reasonable doubt" can be a challenge when one considers such situations as proving that dead fish in a large body of water resulted from the particular pollution in question. The presence of multiple variables can often be enough to create "reasonable doubt" in the criminal sense. However, in the regulatory forum of Provincial offenses:

> In many cases polluters plead guilty, thereby relieving the Crown of the burden of proving an offence took place (Webb, 1988:33).

The mental element emerged from the principle "actus non facit reum nisi mens sit rea." In order to be guilty it was not sufficient to do a wrongful act. The accused also had to do it with a wrongful state of mind (LRCC 1982:22).

Proof of this component, beyond a reasonable doubt, becomes a nearly impossible task for the Crown within the context of environmental wrongdoing. The criticism of these two central tenants of criminal law is not an all-encompassing one. In the context of 'traditional' crimes such procedural inflexibilities have evolved via the common law tradition as mechanisms for

ensuring judicial fairness and effectiveness:

> Pollution does not resemble the typical criminal violation which courts are most familiar with because the activity of polluting often defies reduction to simple legal formulae (Webb, 1988:33).

It is this uniqueness that dictates a different focus be initiated in regard to hearing environmental cases.

The knee-jerk reaction of criminalizing environmental legislation in order to "get tough" can have the inverse effect. The criminal law would ensure that (given the proof requirements) convictions would be harder to attain than from within the present regulatory strategy:

> If a court concludes that a pollution offence is criminal, so that mens rea must be proven, it can be very difficult to secure convictions, since many acts of pollution are not deliberate (for example, spills) and are perpetrated by corporations (In which case, establishing intent for a corporate body can be an extremely onerous task.) (Webb, 1988:34).

In support of this empirical connection, Swaigen and Bunt comment that "Pollution offenses have been called closely analogous to white collar corporate crime" (1985:41). Given that point, the criminological literature on white collar crime suggests an inherent complexity within the structure of the corporation that provides a difficult obstacle for legal prosecution (Clinard and Yeager, 1980; Sutherland, 1949; Yeager, 1987).

Procedures within the criminal law can also play a role in obstructing effective prosecutions. The issue of disclosure of information could be a barrier in environmental cases. In criminal cases the Crown must disclose its case but the accused

can maintain silence. Search warrants are also necessary to obtain evidence. In civil matters (regulatory, Provincial legislation) mutual discovery and production of documents are considered unexceptionable:

> The complexity of corporate structure, business arrangements and pollution control systems make it impossible for the Crown to prove negligence (Swaigen and Bunt, 1985:43).

The corporate actor is often the only one with the knowledge of what took place in reference to pollution activity. Therefore to burden the Crown with proving, or even discussing the occurrence without disclosure, would render the prosecution process totally ineffective.

Reliance on the criminal process could also limit the scope of sentencing options. The criminal law, through its blunt nature, can be effective in its punitive capacity, however, its ability to provide for compensation or restitution to victims may be hampered by the belief "that criminal courts are not a collection agency" (Swaigen and Bunt 1985:43). The progression of environmental consciousness and environmental legal thinking may in time begin to take a less homocentric view of environmental concern. This may give rise to a desire to implement an ecocentric sentencing policy, wherein restitution and compensation to non-human actors may be a part of the process. The civil, regulatory law provides a more receptive forum for such concerns.

Criminal prosecutions foster an adversarial relationship between enforcer and offender. In the case of environmental

wrongdoing between the MOE and Industry or individual, a cooperative, receptive relationship would appear to be a prerequisite for an effective long-term strategy for environmental protection. Closing off communication lines (disclosure, compliance schedules, technology development) can only drive activity underground further away from scrutiny. An industrial offender, faced with a criminal prosecution, would understandably be hesitant to report a spill to the appropriate authorities. This would cause cleanup activity to be delayed at the expense of the natural environment. A focus on detection by Ministry officials would be required, given the lack of cooperation. Detection, to a point of certainty that would create even a remote level of deterrence, would require thousands of person hours and vast, illogical amounts of public spending. An increase in public funds to combat environmental degradation is not in itself illogical. To target such funds towards an adversarial method, is illogical:

> ...because abatement often cannot be achieved overnight, and frequently necessitates close government/industry cooperation as solutions are worked out, again it does not resemble the typical police-criminal relationships courts are most familiar with (Webb, 1988:33).

The cooperative relationship between government (MOE) and Industry must be encouraged in order to implement an effective new focus towards environmental policy. It has been stated that public concern is present and is escalating. A solid relationship that is open for consultation and technological development under the mandate of environmental protection,

potentially has support in the form of revenue from a concerned voting public. Methods, such as grants or loans to implement abatement technologies, and incentives for research will have to replace a mentality driven by the illusive deterrence theory via punitive criminal sanctions. Prosecutions will undoubtedly have a continual place in the framework given the propensity for non-normative behaviour to occur in defiance of all strategies. An effective prosecution strategy can play a minor role in complementing the overall goal within a regulatory framework, not an adversarial criminal legal forum:

> As a general comment, proof beyond a reasonable doubt may be a sensible burden to be observed in typical criminal cases, but in the scientifically imprecise world of pollution, it means that a great many potentially harmful substances will elude the court's grasp. The criminal courts are accustomed to the immediate and demonstrable harm and risk associated with traditional criminal behaviour: criminal courts may not be the most appropriate forum for checking and controlling the less obvious and less tangible harm associated with many modern pollutants (Webb, 1988:40).

Swaigen and Bunt in summarizing their position on the issue state:

> We doubt that the determinants lie in the words "civil" or "criminal" but if they do, then the characterization of environmental offenses as civil supports our recommendations (1985:44).

Franklin, in analyzing Australian environmental law also supports the position:

> Above all there is the instrumental justification that the civil law encompasses an array of remedies, including fines, damages and injunctions which are more flexible, interventionist and effective in addressing the overarching objectives of pollution control policy (1990:8).

IX EXPLANATION OF THE DATA SET

The tables and data contained in this section have been derived from a computer-generated listing of the Ontario Ministry of the Environment's prosecutions for the year 1989. The cases in the listing are ones that have been 'closed' within the year 1989. Therefore, the legal process may have been initiated, and the offence committed prior to 1989.

The data set contained (1) a file number, (2) the offender's title (e.g., R. v. Stelco or R. v. P.Smith), (3) the legislation contravened (EPA, OWRA, PA), (4) the plea issued by the offender (5) the disposition (guilty, or not guilty),and (6) the amount of fine.

In common with data sets from public agencies, various information was missing from certain files. On the whole, the data set allows for an adequate view of one particular year of prosecution behaviour by the Ministry of the Environment.

The author acquired the data after contacting the Ministry in October 1990. He was originally told that the information was not available, however an MOE records official sent the printout. The individual was contacted twice subsequent to receiving the data for the purpose of explaining various recording categories and in order to validate the data's scope.

This section containing the 1989 data, will consist of four tables expanding the information. The tables will allow for an explanation of the four aspects contained in the set that are of primary illustrative value for creating a window into the actual

behaviour of both enforcement (regulatory) body and sentencing official (disposition and fine amount).

First, the individual and corporate offenses will be broken down in reference to the fine ranges imposed. Second, the occurrence levels of the legislation will be presented in order to show which type of offence is most often being brought to trial. Third, the concept of corporate actor liability will be explored by showing an estimate of individuals charged via direct connection with a corporate offence. Fourth, the total picture will be tabulated illustrating the total fines, charges, and charged entities for the year 1989.

For the purposes of the analysis of the data set, the corporate offender has been defined by name. A perusal of MOE prosecution files shows that corporations are listed by corporate name and individuals by an individual surname. Offenders were also deemed to be corporate if, after the title, Inc. or Ltd. was present.

In 1989 the MOE prosecuted a total of 141 offenders, of which 90 were corporate entities. These 90 corporate offenders who were 'selected' for prosecution were assessed a total of 195 separate charges. The total fines levied against all convicted offenders amounted to $525,557.50.

In any realm of law enforcement or regulation, the enforcement levels are extremely low in reference to occurrences. However, in the case of enforcing environmental standards, the rate of enforcement is minuscule. It is logically obvious that there were considerably more than 90 corporations that had breached a section of a given Act regulating environmental quality. The chosen few, as it were, become little more than legitimation tools for government and the MOE. Considering the amount of fines, deterrence through prosecution clearly is not the mandate. The underlying strategy, either through choice or necessity, is negotiation. If one balances the amount of fines against the inestimable cost done to the environment and human health by all polluters, the corporate fines assessed appear to

be nothing short of ridiculous.

The previous section outlining the provisional penalties within the Acts presented a potential for serious fines to be levied. The picture in actuality is painted with quite a different colour:

> ...and yet, for all the fire and brimstone suggested by environmental legislation, in reality government has generally proceeded in a much quieter, less adversarial manner. What legislation suggests government is doing, and what government is actually doing have often been two different things (Webb, 1988:17).

It is interesting to note that while the approximate corporate fines for Ontario were $525,557, the environmentally infamous Exxon Corporation from New York tabled a three month, first quarter profit of 2.24 billion dollars (Globe and Mail, April 25/91). Exxon settled for 1 billion dollars for their Valdez spill on the Pacific Coast; however, the actual criminal fine levied was 100 million dollars. United States District Judge Russell Holland called the fine "a licencing fee" (USA Today, April 25/91).

A simple analysis shows that fines are clearly not a deterrent to major corporations. Critics of this logic may allude to innovative sentencing, such as the sanction of public disclosure. The Exxon spill was highly publicized world wide, and environmental groups attempted to tarnish the Exxon image. The profit increase above would obviously be a testament to innovative marketing strategies being superior to public disclosure as a sanction. The Tylenol case of the early 1980's is also a witness to the power of corporate recovery after

negative publicity.

Out of the 195 total corporate charges, full data was available for 147. In 94 charges convictions were secured, resulting in a mean fine amount of 5,591 dollars. Only one charge elicited the significant fine of 70,000 dollars. This fine was 40,000 dollars higher than the next highest amount. It is notable that the fine ranges available for sentencing officials (as outlined previously), became quite insignificant when looking at the average fine. It is quite legitimate to state that the upper levels of the fine structure are reserved for the "worst case," however, when fines are skewed so severely to the bottom, a focus on deterrence (see sentencing principles) can be nothing more than a device for academic debate with little practical application. Of the 147 charges with full data, 53 were either dismissed or withdrawn (36%).

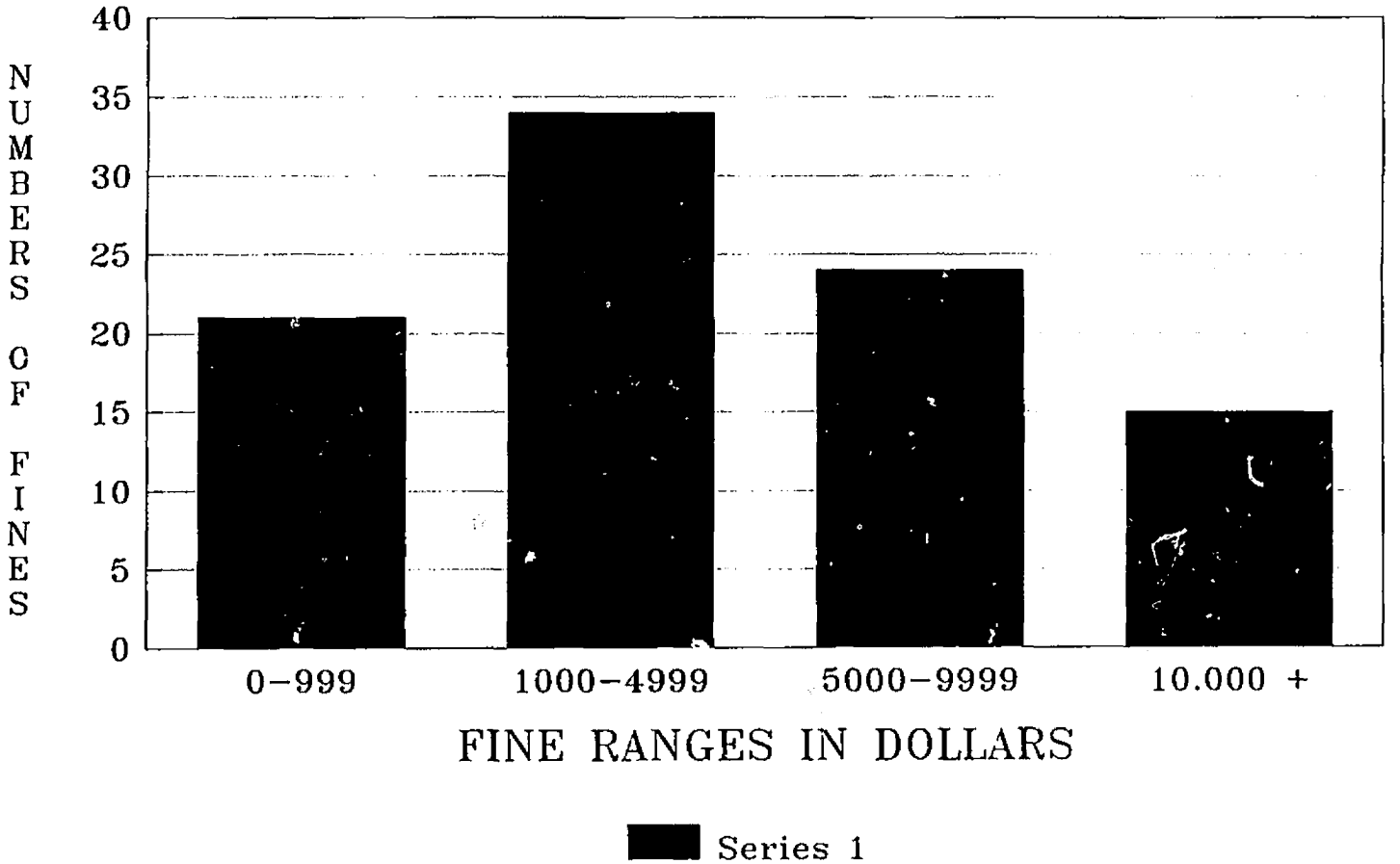
An interesting aspect of the corporate data that surfaced during study was the size and wealth of the charged corporation. If corporate influence on government is proportional to the size and power of the corporation, one would expect to find a disproportionate number of smaller companies represented in the prosecution list. Galbraith states:

> By virtue of their ability to influence their economic and political environment, rather than simply reacting to it, such large corporations have more in common with governments than with the atomistic, competitive producers whose existence is an implicit premise of much economic theory (1975:38).

The task of discerning the corporate power variable was beyond the scope of this research, however, it would be a

valuable focus for further Canadian research (noting that Yeager, 1987 used firm strength measured by assets in his study of the United States EPA).

CORPORATE FINE RANGES



n = 94

THE INDIVIDUAL OFFENDER

Given the previous description of the data set, a charged offender was deemed to be an 'individual' based on an absence of corporate connections, either through the file number or the name of the accused; that being, Kilpest Services was labelled a corporate offender while J. Smith would be seen as an individual. Undoubtedly, the majority of individuals charged by the MOE committed the alleged offence during some form or degree of business activity. An independent contractor, a one person haulage company, a small landscaping business, would be examples. These 'individuals' may have been acting under an agreement of an exchange of services, however, were unlikely to have considerable staff or a management hierarchy.

The environmental regulatory process is one of negotiation, often compromise between regulator (MOE) and offender. "...relying on formal sanctions only as a last resort" (Webb, 1988:18). This unscrutinized give and take of time, compliance schedules, and effluent limits becomes the fulcrum of a balancing act between industry and government (Sabatier, 1975; Schrecker, 1984; Webb, 1988; Yeager, 1987).

Since formal sanctions (prosecutions) are used as a "last resort" what ability did the offenders possess who managed to avoid prosecution? Put another way; what inability did the offenders have who found their way into the formal legal machinery? Are these offenders all inadequate in their

negotiation process? Were they all persistently disregarding Ministry guidelines?

One must remember that the MOE is an extension of state control and regulation into the social/industrial sphere. The MOE faces a twofold crisis. First, it must legitimate itself to the state as a whole, based on its effectiveness of functioning, via its mandates. Second, being an appendage of the state it must assist in the legitimation of the state as a whole. The legitimation of the state itself becomes an issue of crisis management in late capitalist systems (Offe, 1984). Offe illuminates this management issue via his concept of "negative subordination":

> In negative subordination the dominance of the economic system over the two subsystems (the other being the political-administrative) depends on whether--given the possibility of the partial functional irrelevance of these two systems for the economic system--the boundaries between the respective systems can be stabilized; so that the economic system is able to prevent the alternative organizational principles of the state power systems from interfering with its own domain of the production and distribution of goods (Offe, 1984:39).

The variables in the current issue (MOE and offender) can fit clearly into Offe's conception. Environmental regulation is clearly counter productive to the functioning of industry. State intervention via MOE into business activities, blurs the lines between the "subsystems." Given that environmental protection is a social welfare consideration carrying increasing importance in voter mobilization (as established previously), the state is under the burden of legitimating itself to the greater

constituency through regulation of environmental wrongdoing. The state, possessing the need to foster economic growth, delegates responsibility for environmental regulation to a peripheral ministry (MOE). Resources are allocated from the central government to the MOE in levels that conveniently dictate its ability to function at various levels of enforcement and regulation. Therefore central budgets become a useful tool for covertly controlling the activities of peripheral appendages, while overtly maintaining a certain level of legitimacy with the populace:

> An agency with the most aggressive intentions may be forced into emphasizing negotiation, and into applying sanctions with a severity and frequency that varies inversely with the size and wealth of the offender (Shrecker, 1984:13).

Yeager also touches on this point in his work on the U.S.A, EPA:

> Research shows that federal agencies are often reluctant to engage corporate adversaries in legal battles, preferring instead to negotiate with them and administer symbolic penalties, if any. For lack of political and economic muscle smaller firms may be more likely to feel the full force of the law (1987:333).

Shrecker's thoughts in reference to agency resources are helpful in explaining the presence of a substantial number of 'individuals' and small companies in the 1989 data.

In that year the Ontario MOE prosecuted 51 individuals. This total represented 36 per cent of all charged entities. The total charges issued to these 51 individuals totalled 84. As with the corporate information, certain files lacked various aspects of the case. Therefore full information regarding disposition and fine amount was available for 55 of the 84

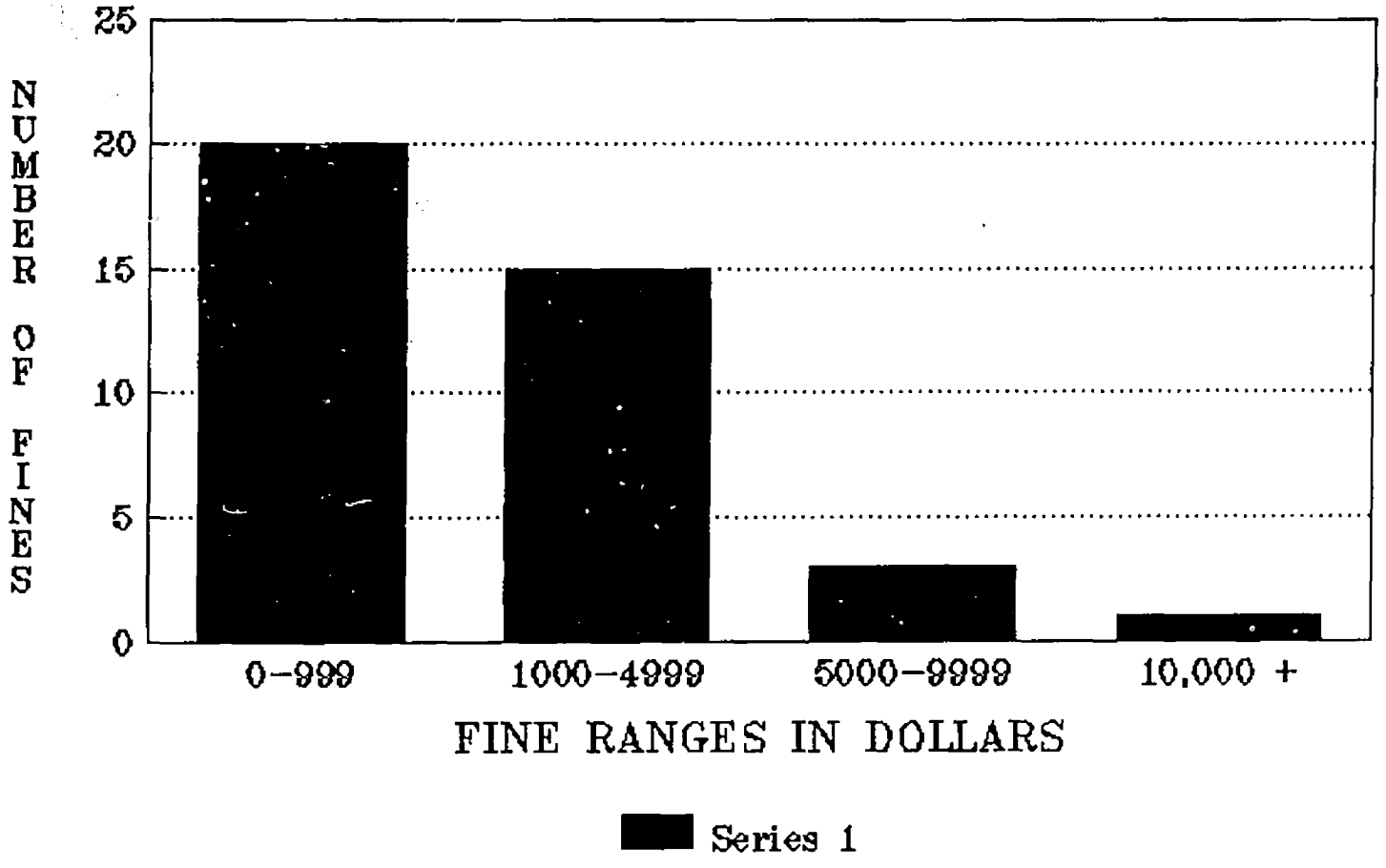
charges, or 65.5 per cent. Of the 55 known charges, 39 resulted in a conviction. The mean fine amount over these 39 convictions was $2740.45. This mean represents approximately 49 per cent of the mean for corporations. It becomes clear that based on "potential" resources, the impact of the average fine per charge is considerably more penetrating financially on the convicted individual than the corporation. (Although financial data is not available it is logical to assume that corporate resources would be more extensive than individual financial capabilities.) Removal of the extreme high values in both the individual data and the corporate data still generates the figure that corporations are paying only 69 per cent more than individuals. The adjusted means become $1458.40 for individuals and $4846.36 for corporations.

The absolute value is extremely inequitable, but compounding the inequity is the ability of larger companies to absorb and amortize the costs of regulatory fines, passing on costs discretely to the consumer. This can be done by corporations in less competitive environments. Smaller firms and individuals do not have this luxury as they lack monopolistic power (Yeager, 1987).

The 55 known charges resulted in 16 being withdrawn or dismissed (29 per cent).

The actual presence of individuals and corporations in reference to the mean fine levels would tend to be supported by Swaigen and Bunt's perceptions:

INDIVIDUAL FINE RANGES



n = 39

> The vast majority of cases that come before the courts do not involve large, powerful corporations, but small businesses, whose ability to pay is limited (1985:45).

Swaigen and Bunt end there, they do not question the lack of representation in the environmental cases by "large powerful corporations." It would be difficult to believe that such corporations are not breaking environmental laws, that many of the same occurrences are not taking place as with the charged smaller businesses.

The sentencing official undoubtedly takes into consideration the "ability to pay" when imposing a fine. Therefore smaller fines (relatively) are levied to individuals and smaller corporations. This behaviour by the courts is quite universal in the Canadian setting (Swaigen and Bunt, 1985). Given that this is true, the prevalence of low fines per charge in the 1989 data could indicate an absence of larger corporations. This could be an indication of the ability of influential corporations to avoid prosecution and to extend the negotiation process. This is not to say that Ministry officials necessarily neglect the actions of larger corporate actors, only that alternative courses of action may be more readily chosen when dealing with powerful corporate offenders:

> Larger more powerful corporations--because of their great stock of legal and technical expertise--will more often use formal legal procedures to negotiate favourable terms of imposed regulations (Yeager 1987:333).

Yeager also notes:

> Enforcement agents consider the larger corporations more likely to be socially responsible, and to make good faith efforts at compliance (1987:341).

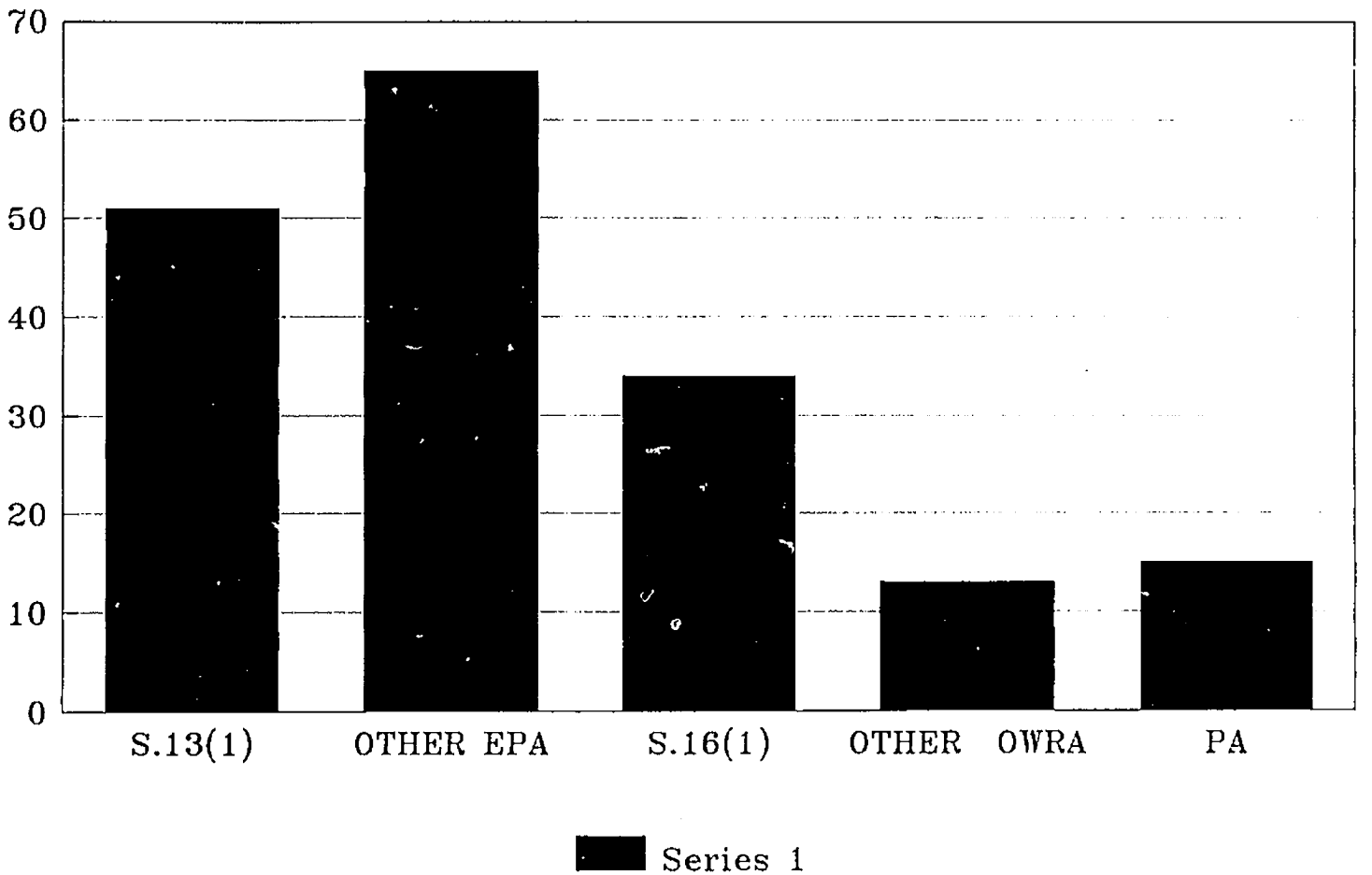
All of these negotiations take place far in advance of prosecutions, and involve relatively formidable legal adversaries for the MOE to do battle with.

From the data nine individuals could be 'clearly' linked to a larger corporate offender (based on common file numbers and relevant sections of the Acts). These individuals could be directors or major employees of "directing mind." These nine individuals were involved in a total of 15 charges. The 15 received convictions on only six of the charges. The individuals connected to the corporate offenses received dismissed or withdrawn charges on nine of the 15 charges. This number is significantly higher than the rates of dismissal for the other categories of offender. This could support Yeager's claims of increased legal resources and influence from corporations, affecting the dispositions of the courts in regard to the individual corporate actor.

Violated Sections of the Relevant Acts

In the 1989 Data Set, the representation of the three main Acts were distributed as would be expected. The EPA, being the foremost legislative regulatory statement in the province, was represented the most often, followed by the OWRA and the Pesticides Act. The data allowed for the analysis of 178 known charges where legislative content was listed.

CHARGES ISSUED



The EPA

The EPA was represented 116 times or 65.2 per cent. Section 13 (1), being the blanket prohibition on contaminants was breached 51 times or 44 per cent of the EPA violations:

> Notwithstanding any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect (R.S.O. 1980, c141, s.13(1)).

Section 39 represented 21 charges or 18.1 per cent of EPA violations. This section is a prohibition against depositing waste in a site that has not been issued a certificate of approval.

Section 27 represented 15 charges or 12.9 per cent of the violations. This section will undoubtedly become increasingly important based on the current situations regarding municipal waste management facilities, and proposed limits, or user fees on garbage pickup.

> Section 27
>
> No person shall use, operate, establish, alter, enlarge, or extend,
> (a) a waste management system; or
> (b) a waste disposal site,
> unless a certificate of approval or provisional certificate of approval therefore has been issued by the director and except in accordance with any conditions set out in such certificate (R.S.O. 1980, c.141, s.27.).

Section 146 is in the penalties area of the Act. It states that it is an offence to not comply with either a control order or certificate of approval. This section was violated five times or 4.3 per cent.

Twenty four, or 20.7 per cent of the EPA violations were under various other sections of the Act.

The OWRA

The OWRA was represented in the data by 47 charges or 26.4 per cent of the known total charges. A breakdown of the 47 charges revealed that 35 or 74.5 per cent were under section 16 (both 16(1) and 16(2) were represented in this figure). This section is the comparable section to the EPA's 13(1):

> Every person that discharges or causes or permits the discharge of any material of any kind into or in any water or on any shore or bank thereof or into any place that may impair the quality of the water of any waters is guilty of an offence (R.S.O. 1980, c.361, s.16(1)).

Section 16(2) continues to expand 16(1) in that if any discharge occurs "out of the normal course of events" the Ministry is to be notified, forthwith.

The OWRA was cited 13 other times or 27.6 per cent, under various sections of the Act.

The Pesticides Act

The Pesticides Act was cited on 15 occasions, or 8.4 per cent of the total charges. There were four sections of the Act referred to; s.6, s.5(1), s.5(2) and s.4(b).

Section 6 is prohibiting the sale or transfer of pesticides unless they are classified and a licence is obtained to do so.

Section 5(1) prohibits an individual to perform exterminations unless in possession of a licence to do so and

using a pesticide prescribed under that licence.

Section 5(2) elaborates further to prohibit the operation of an actual extermination business without a licence.

Section 4 is a discharge prohibition:

> No person, whether acting or not acting under the authority of a licence or permit under this Act or an exemption under the regulations, shall discharge or cause or permit the discharge of a pesticide or of any substance or thing containing a pesticide into the environment that,
>
> 4(b) causes or is likely to cause injury or damage to property or to plant or animal life greater than the injury or damage, if any, that would necessarily result from the proper use of the pesticide (R.S.O. 1980, c.376, s.4(b)).

Totals from the 1989 MOE data

Total charges	295
Total corporate charges	195
Total individual charges	84
Charges to individuals connected to corporate offence	16
Total number of charged entities	141
Total corporations	90
Total individuals	51
Individuals connected to corporate offence	9
Corporate charges withdrawn	53
Individual charges withdrawn	16
Total amount of corporate fines	$525,557.50
Total amount of individual fines	$106,877.68
Total fines	$632,435.18

The preceding section has illuminated an actual set of outcomes within Ontario's environmental/legal forum (1989). The data allowed a window to be cut into the size and type of sanctions issued in the province for the given time period. The data did not however allow one to dissect the motivations or opinions of the sentencing official involved in these decisions. The particular data set was hard data and not amenable to probing or question beyond statistical description or inference.

The second section of analysis within the thesis explores the issues not present in the previous data, as well as expanding others. The following data set has been derived from responses to questionnaires by the people actually (at times) involved in the sentencing recorded in the previous sections data.

The questionnaire was developed to look critically at sentencing disparity between sentencing officials by keeping the cases and case information constant between respondents. The questionnaire also allowed the respondents to make general qualitative comments on various aspects of the system.

The three hypothetical cases were constructed to contain certain variables or sets of conditions that could later be explored based on the respondents' comments regarding the particular case. These variables and conditions will be discussed in the following pages. The full case descriptions can be found in the appendix section.

The total number of respondents to the study was ten of a possible 28.

X DESCRIPTIONS OF KEY ELEMENTS WITHIN THE QUESTIONNAIRE DATA SET

Case #1

The case scenario was developed to be a 'classic' industrial spill affecting a water source. The case therefore becomes a matter regulated by the OWRA.

The date was chosen to coincide with the general fish spawning period. The term discharge was used to avoid the semantic dilemma of the distinction between 'discharge' and 'spill' (see section on cases and defenses). It was believed that the sentencing official would evaluate a discharge as more serious than a spill. The time period (30 hours) was chosen so that the discharge could extend into a two day period. It would be noted if the sentencing official made reference in the judgement to a fine per day, or only one fine. In the case scenario the Ministry was informed of the spill by plant workers, not the corporate administration. This fact may have had bearing on the sentencing official in establishing the attitude of the corporation.

In the information portion of the case file four variables were introduced that could have bearing on a judicial sentencing decision. First the plea of guilty is inevitably a mitigating factor:

> As in criminal cases, the courts treat guilty pleas in environmental cases as mitigating factors. There are

two reasons for this, money saved, and the pleas as an indication of contrition (Swaigen and Bunt, 1985:31).

Second, the size of the plant, based on its employment figure (250) establishes it as a major employer. This variable could prevent a sentencing official from imposing a financial burden via a fine that could affect employment in the area.

Third, it was stated that three municipalities down river had water supplies affected by the spill. This factor was introduced to increase the gravity of the discharge. It was believed by the author that such a case should approach the upper limits of the sanction possibilities, given the harm to fish species and habitat, as well as the geographical extent of the damage based on the effect to the downstream municipalities.

Fourth, the fact that the company had been convicted of two previous environmental charges was introduced to establish its environmental record for compliance.

Case #2

This case is complementary to cases #1 and #3 in that it involved an individual, not associated with a corporate entity. In the case scenario the individual (Ronald J.) entered into "a verbal agreement, with a small manufacturing plant." The phraseology was such as to convey an informal, "under the table" type of deal. The contents of the drums were described as a "known, highly toxic substance," and "moderately radioactive." This was done in order to be quite clear on the potential danger of the contents. The location of the quarry was established in order to give a degree of remoteness, however still close enough to residential areas to maintain the severity of the act. It was established by a reliable test that leaching did occur into adjacent agricultural land. The use of the quarry as a watering area for cattle, under permission from the municipality gave the area a tangible purpose. All facts in this case were presented to create a wrongdoing of considerable magnitude.

In the information section, facts were given pertaining to Ronald J.. The not guilty plea once again becomes a matter of consideration for the sentencing official. The occupation as 'seasonally' employed could convey a certain degree of financial instability. The marital status as being single can often be a determining factor in establishing a profile of the accused.

Ronald J. had two previous criminal convictions. This was presented to give a legal profile of the accused. The statement that the prosecution, prior to plea, had informed the accused

that a penalty would be sought under s.147 (1)c of the EPA, was included as a point of law. This allowed the sentencing official the option of giving a jail term as the sentence, or part thereof.

The inclusion of such a point could have also keyed the respondents that the author was expecting such a sentence, therefore biasing their decision. The actual effect cannot be determined however. The fact that Ronald J. exhibited remorse and cited severe economic conditions and unemployment as justification for the act was offered as an escape for the sentencing official to show bias of economic/personal factors as overriding environmental harm.

The fact that the Ministry was alerted to the offence by parents of children playing in the area was included to reinforce the previous viability of the area as a water source and recreational wooded area.

Case #3

This case returns the focus of the questionnaire to corporate environmental behaviour. Once again, this case scenario was developed in order for it to approach the upper limits of environmental damage. The expectation being, that the sentencing official can then have a wider range of possibilities to work with, allowing for his/her personal sentencing criteria to be illuminated.

Rondel is a family-owned business in a small community (1700 people), and is the only significant industry in the area, employing 36% of the employable workforce. This was presented to establish a personal connection to the business, to give the industry a greater social purpose than merely the obvious economic interests of many corporations. The recent layoffs were a fact that establishes economic difficulty.

The second mixing facility at the plant was locked off based on a MOE stop order pending improvements to safeguards. It would therefore be quite clear to management that the mixer was a potential environmental hazard. The subsequent use of the mixer was an obvious tradeoff of environmental protection for economic gain. The size of the spill was extremely large and its extent far reaching. The areas affected were residential, sewage system overload, and subsequent forest contamination. Again, this establishes an incident of extensive severity.

Cleanup of the town's sewage drainage system is presented to be extensive, given the evacuation of 15 residential dwellings.

The information section highlights a number of potential mitigating factors. The guilty plea is a factor again (based on previous discussion). The application by Rondel for Federal and Provincial aid underscores its economic situation. The management's statement that economic costs kept them from complying with the previous order illuminates a recent dilemma between the costs of abatement technology and economic interests. The situation is compounded by the issue of geographic flight to areas with less stringent environmental regulations that are surfacing in reference to dismantling trade barriers with neighbouring countries.

The fact that Rondel is active in community organizations solidifies the personal/community ties. Rondel's previous EPA violation (although not a spill) should surface as a factor. The fact that Rondel did not notify the Ministry of the spill "forthwith" should become a factor in sentencing.

XI SENTENCING DISPARITY

The ten respondents all received the same set of hypothetical cases and questions, at relatively the same period. The respondents were all trained sentencing officials, either presiding JPs or Provincial or District Court Judges (see demographic data). What logical explanation can be offered to account for the disparity of sentences between individuals? (Disparity being differences in sentences between officials.)

The methodological statement noted that by using the hypothetical cases approach internal validity is maximized given that identical information is presented to each official. Therefore, the only plausible explanation for disparity becomes the "human element" (Hogarth, 1971), or the personal beliefs and attitudes of the sentencing official:

> It is obviously repugnant to one's sense of justice that the judgement meted out to an offender should depend in large part on a purely fortuitous circumstance; namely the personality of the particular judge before whom the case happens to come for disposition (Mr. Justice Jackson then Attorney-General of the United States, in Hogarth, 1971:6).

Hogarth explored five possible relationships that the sentencing official (magistrate in his study) is involved in that could have an effect on sentencing behaviour.

The interaction between sentencing officials, via shared information and communication (on various levels), is a relevant variable:

> Perhaps the greatest social influence in the environment of magistrates is their relationship with

> each other. Reciprocal relationships which result out of this interaction are likely to produce a tendency towards consensus in outlook (Hogarth, 1971:180).

The relationship of magistrates to the Attorney-General's office was a variable of concern for Hogarth. Hogarth did not believe that direct, overt influence was exerted on magistrates by the Attorney General's office, however the functioning of presiding magistrates was not devoid of political activity. Magistrates in Ontario are appointed by the Provincial cabinet on recommendation from the Attorney-General. Hogarth found that salaries and promotion were dictated by the Attorney-General's office. The Ministry can exert subtle pressures through denying or granting, leaves of absence, holiday requests, or conference budgets.

The magistrates (JPs) appointed to preside often do not have formal legal training (see demographic data), therefore they often seek legal advice from superiors (Hogarth, 1971). This opens channels for potential 'trickle down' influences. The legal inexperience of many magistrates at the lower court level appears to allow for a greater potential influence on them from political interests, as opposed to higher courts. Hogarth's study showed that only 28 per cent of magistrates indicated that magistrates were as free from influence as higher court judges (Hogarth, 1971).

The power of the Attorney-General's office over the JPs in Ontario was made evident in the course of this research by the author. In initiating contact with the JPs presiding over

environmental cases, it was believed to be valuable to contact the Attorney-General's office for approval. This would allow for a greater participation rate based on the sanctioning of the project by the Attorney-General's office. In a fairly lengthy telephone conversation with the judge's office overseeing all provincial JPs in Ontario, a clear message of hesitancy was revealed concerning questioning JPs as to their sentencing philosophy or behaviour. When questioned regarding the hesitancy, the official candidly responded that:

> the office would have to review all questions that would be asked, because certain questions could potentially not be suitable for the JPs to make statements on, given the public nature of the research.

This clearly shows that the Attorney-General's office maintains at least an 'arm's length' control over the JPs by intercepting potentially controversial or complex legal questions.

Hogarth also believed that the magistrates' relationship to the "public at large" influenced sentencing. The present research would support this notion, at least insofar as the existence of the relationship. The previously stated belief in "showing the public" as an objective of sentencing, indicates the sentencing officials cognizance of the public eye. In a recent study Ouimet and Coyle found that:

> The perceived fear of crime (by the public) influenced the court practitioner's sentence recommendation for less serious offenses (1991:159).

The ability for public perceptions to be internalized in judicial functioning is again supported. Regulatory offenses (eg. environmental) could be classified as legally less serious,

therefore supporting both Hogarth and the present study.

Actual Disparity in the Present Study

Case #1

Case #1 resulted in a large variance in magnitude of sentence. The fines for the corporation ranged from $8000 to $200,000. Respondents #3 and #7 were the only ones in agreement, levying $10,000 fines. Respondent #3 also made provisions in sentence for compensating the down river municipalities. Respondent #7 alluded to the same by providing for additional cleanup costs. To introduce a 'real life' element to the scenario, would be to envision the corporate accused entering two separate courts, on one occasion it receives a fine of $8000 and the other levies a fine of $200,000. This indicates a severe disparity that can only serve to confuse all concerned (judiciary, potential violaters, counsel, public, politicians, Ministry officials).

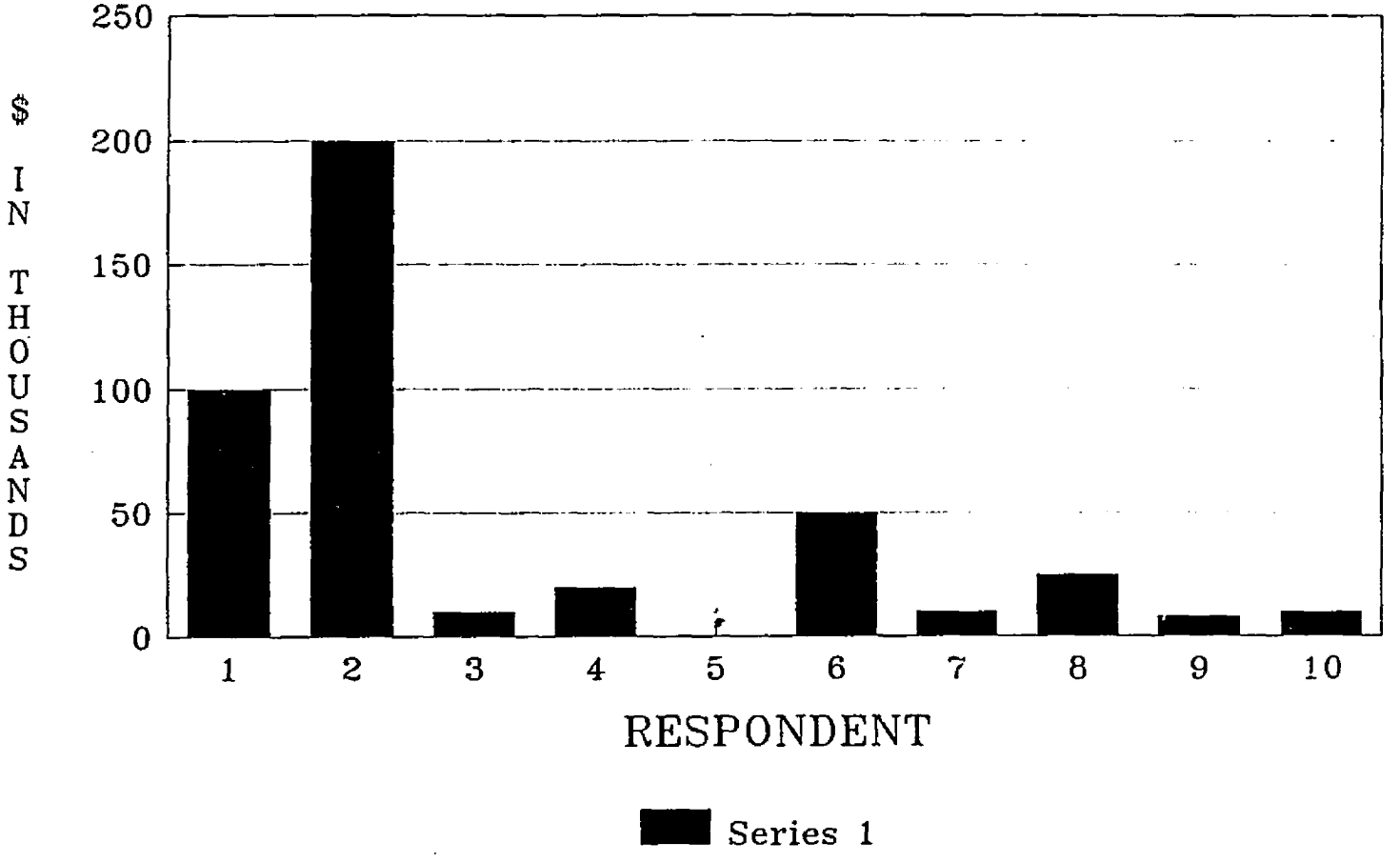
Palys and Divorski found that:

> Judges who imposed qualitatively different dispositions apparently differed also in their perceptions of events.

They continued in reference to the two extremes of the range in one particular case:

> Each of these views is quite rational and internally consistent. The problem of course is that they both refer to the same person and the same offense (1984:339).

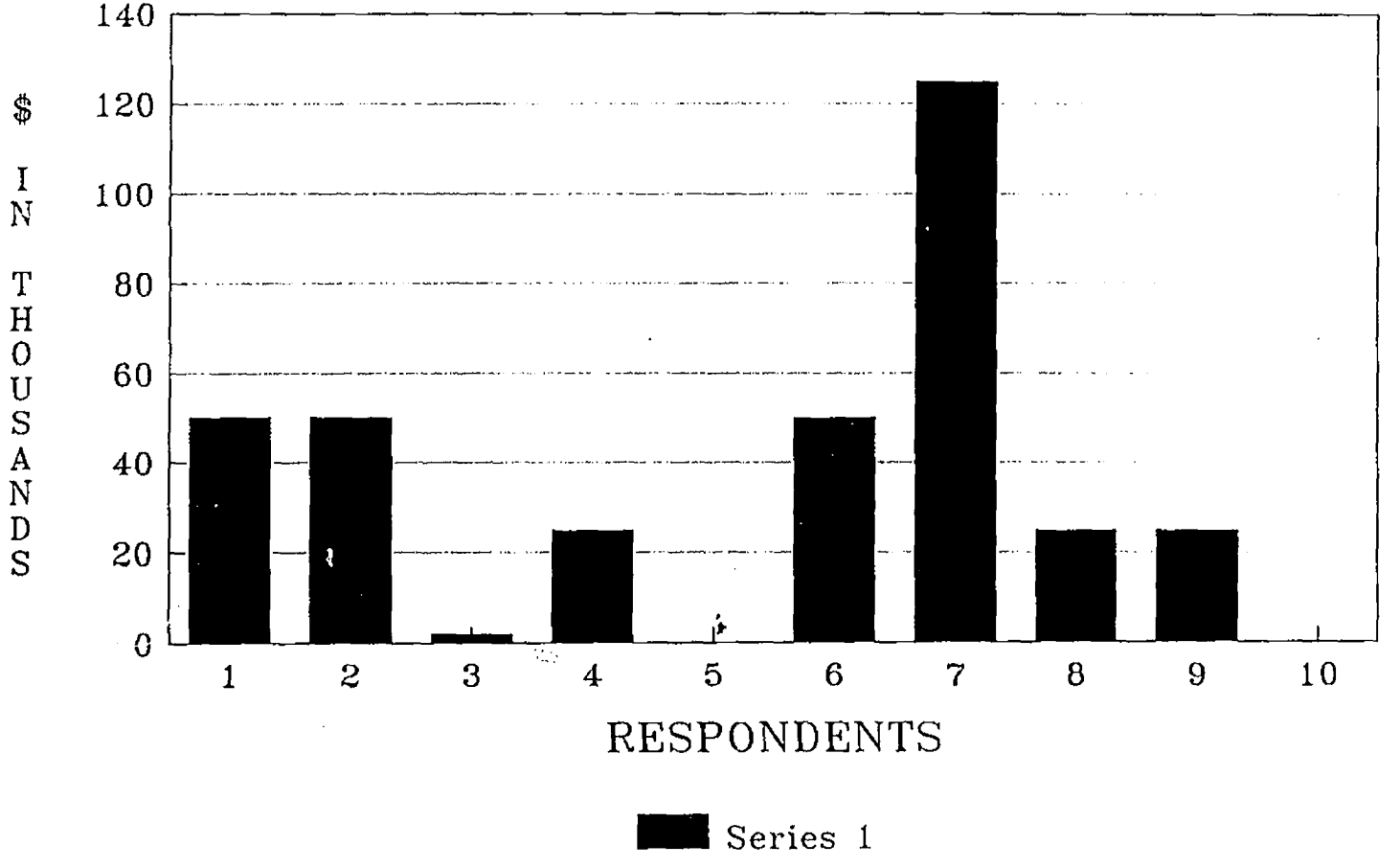
FINE CASE 1



Case #2 Fine and Sanction Distributions

Respondent	Sanction
1	30 days jail
2	$5,000
3	$100
4	six months jail
5	probation, comm. serv.
6	six months jail
7	$3,000
8	$8,500
9	$3,500 & 60 days jail (intermittent)
10	$2,000 & probation

FINE CASE 3



#3,5,7 COST OF CLEANUP; #10 "MAX FINE"

Case #2

Case #2 involving Ronald J. gave rise to more innovative sentencing strategies by the respondents. The actual pure fines ranged from $8500 to $100. Four officials issued a term of incarceration. Three respondents used only the carceral sanction (#1, #4, and #6). The terms were 30 days, six months, and six months respectively. Respondent #9 levied a $3500 fine in addition to 60 days in jail, to be served intermittently.

The disparity is less exaggerated in this case, however it could be noted that small differences in sanction severity are magnified in application to an individual offender as opposed to the corporate entity. The less severe variance in this case could be explained by the level of comfort felt by the sentencing officials in using the provisional penalties in a case involving an individual. The comfort, or general acceptance of the penalties for individuals, is expressed in responses to question #4.

Case #3

Case #3 elicited the highest level of consensus among respondents, although the range was still sufficient to dictate concern. Respondent #3 imposed the low sanction, $2000 plus cleanup costs. Respondent #10 occupied the upper level by somewhat ambiguously imposing "a cash fine near the maximum", which in this case could be as high as $400,000. Three respondents (#1, #2, and #6) levied fines of $50,000. Agreement

was found as well between respondents #4, #8, and #9, who all imposed $25,000 fines.

The consensus proves interesting, however an explanation is elusive. Possibly given the gravity of the offense scenario, the offense began to approach a bench mark for the officials, either a "worst case" situation, or resembling a previous decision.

Question #4 asked the officials if existing sentencing options were adequate to deal with the given case. Respondents were asked to list any changes they felt to be necessary if options were not adequate.

Case #1 resulted in five respondents stating varying levels of dissatisfaction with the existing penalties. The popular public response to increase fines found only one supporter in respondent #9. This respondent believed that higher fines would help deter corporate polluters. Respondent #7 stated that corporations were allowed too many "legal loopholes" and that legal definitions of corporate actors and entities should be refined to reduce this effect. Respondents #1 and #5 expressed a need for increasing corporate involvement in the cleanup process. Respondents #1 and #4 believed that provisions should be clearer to allow financial restitution for affected victims of environmental wrongdoing.

Case #2 developed a near consensus in responses to question #4. Eight respondents believed that the penalties were adequate to deal with individuals. Respondent #1 believed that community service should be expressed in the provisions, while respondent

#2 believed that fine levels should be equated for the OWRA and the EPA.

Case #3 offered unanimous approval of existing penalties. As mentioned previously, the officials apparently held a high level of comfort in dealing with this case as exhibited by the low level of disparity in sentences surrounding $50,000 and $25,000. The fact that all respondents believed that the options allowed for an adequate sentence given the case facts, would tend to support this assertion.

XII ANALYSIS OF QUESTIONNAIRE DATA

SENTENCING OBJECTIVES

Case #1

In reference to question #2 dealing with sentencing objectives that would, or should be maximized by the sanction imposed, the respondents developed two main objectives. Deterrence, both general and specific, is the most common principle to strive for in sentencing. It is logical to wish to deter future crime either from the offending individual or the community at large. Given the established fine levels imposed by sentencing officials it is a clear misnomer to assert that a fine in the amounts levied could be a deterrent. The reliance on the fine as a mechanism of deterrence stems from the belief that the corporate (economic) actor is a rational entity, guided by the rules of profit maximization. The magnitude of the fines imposed coupled with the established regulatory approach to enforcement results in an ineffectual tug of war between two methods. This mistaken faith is illustrated in the statement by Morrow J:

> Where the economic rewards are big enough persons or corporations will only be encouraged to take what might be termed a calculated risk. It seems to me that the courts should deal with this type of offence with resolution, should stress the deterrent, via the high cost, in the hope that the chance will not be taken because it is too costly (Swaigen and Bunt, 1985:13).

The belief that the sentencing official (courts) can have a general deterrent impact is a recurring theme from many respondents. In response to question #2, respondent #2 stated:

> Our environment is so fragile that a message must be sent to offenders and potential offenders that they must "clean up their act"; fines of $1000, $2000,and $5000 are a thing of the past, insofar as the courts are concerned.

To quantify the extent, deterrence was listed by all ten respondents as a goal of imposing sentence for case #1.

The need for the sentence to "satisfy society" was mentioned by four respondents. This objective becomes interesting in that it appears to reflect a degree of non-confidence by the court. The need to "satisfy the public" is indicative of a need to legitimate the function of the court. The sentencing officials are acknowledging the growing public concern regarding environmental issues, and therefore feel the need to appease this concern via their judgements. Respondent #4 stated:

> Society has to be satisfied that the penalty fits the crime.

Respondent #7 continues:

> The sentence would be viewed by society that the courts will not tolerate such lack of regard for the environment, and with the additional costs of clean-up levied against the company this should further satisfy society that this matter is taken seriously by the courts.

Two respondents #7 and #8 indicated the objective of sending a message to the judicial system. This indicates that a level of internal power is believed to exist by some sentencing officials regarding judgements. The fact that no sentencing criteria are present, allows the official discretion to impose sentence based on a variety of forces (peer, societal, personal, media). The desire for a sentence to send an internal message to the judicial

system introduces a self-regulating mechanism within the judiciary in reference to a particular offence category, environmental wrongdoing. Respondent #7 states:

> The sentence viewed by the justice system, may be a precedent for sentence, but would indicate to the justice system that stiff action must be taken by the courts to prevent this type of blatant disregard for the environment.

Case #2

In reference to this case, deterrence again was listed as an objective of sentence by all respondents. Targeted deterrence (specific) was mentioned either directly, or alluded to more often in this case. The fact that an individual offender was the subject of the scenario could explain this trend. The elusive goal of deterrence, via sanction, becomes more attainable when the sentencing official is dealing with a more tangible offender, and subsequently a more concrete set of facts. Previous discussion has illustrated the ability of the corporate entity to remain aloof within a barrage of legal and administrative smoke-screens. Corporate assets, chains of command, and culpability are difficult to ascertain for the sentencing official. The applicable facts surrounding an individual, however, are often quite clear and allow for a targeted, objective driven sanction to be imposed. The effects of this are twofold. First, it potentially increases the effectiveness of the sentence in achieving the prescribed objective. Second, and of greater consequence, it allows the individual or small business to become a target for judicial legitimation, and increases the likelihood

of prosecution of the 'smaller' offender.

This point is underscored by the inclusion of an element of punitiveness in the responses regarding case #2. Two respondents #2 and #6 indicated punishment as part of the sentencing objectives. This relates directly to the effectiveness of sanctions. It is logistically less complicated for the sentencing official to envision an ability to affect the behaviour of an individual, as opposed to a corporation.

A focus that becomes disturbingly conspicuous in its absence is a focus on the environment as an element of the occurrence to be dealt with by the court. Only two respondents, #2 and #3 (covering all three cases) mentioned in the objectives, "restoration of the environment." Based on comments throughout the responses, the court, generally, has a genuine concern for the natural environment. However, it would appear it either feels it does not posses the tools to affect it, or that it sees the natural environment as a responsibility of the Ministry. To the detriment of the environment, the court remains myopic in that it focuses mainly on the human component.

Case #3

Responses to case #3 elicited the normal pattern of deterrence as the primary objective in all respondents, except one #3. General deterrence was the most common response, however two officials specified that deterrence should be targeted at the offender:

> In this case again the major factors must be deterrence, primarily specific deterrence. This corporation was aware of problems yet persisted in actions which resulted in considerable economic loss to the community in addition to environmental damage (respondent #9).

The previously mentioned objective of "satisfying the society at large," surfaces again in three responses, (#'s 4,7,8). The case scenario was developed to approach a severe environmental catastrophe, therefore it is logical to assume that the sentencing official would anticipate a great deal of societal outrage over the damage. In order to appease this extensive concern by the public, the sentencing official would desire to have this objective met through sentence outcome.

The issue of a focus by the sentencing official on not only the case at hand, but of the community "looking in" is alluded to by Henham in his 1986 work in Britain. In studying magistrates as to their opinion on the purpose of sentencing principles, Henham found that:

> 57% of those interviewed believed sentencing principles are present in order to achieve a just solution in each case.

In defining the "just" solution Henham noted that:

> Justice in this context referred to what magistrates considered to be community justice as well as their own opinions (Henham, 1986:190).

This clearly indicates an acknowledgement and/or acceptance of an amalgamation between the perceived views of society on the given case and the personal position of the sentencing official. This would appear to allow for a degree of social justice, however, when making assumptions on societal views, the

sentencing officials are opening themselves to misinterpretation, as well as dulling the focus from the case facts. Asking an individual to ascertain, and therefore reflect the views of the greater society, is unattainable and also allows for increased disparity between sentencing officials.

Question 3 Characteristics of the offense and offender having bearing on the decision

Case #1

In Case #1 the most common response to be listed as the primary characteristic (listed in the top three), was the extent of harm, or magnitude of actual or potential damage. The prevalence of this focus is encouraging, in that the officials are isolating the environment when developing a view of the facts. This contrasts with the lack of focus on the environment, per se in the objectives of sentence. Apparently, the officials recognize the actual or potential harm to the environment, but do not see sentences as being able to affect the after-the-fact damage.

The inclusion of the phrase "potential damage", brings about the contentious issue of penalizing someone for damage not ascertainable at the current time. The majority of environmental offenses result in a cumulative effect over time. The damage does not occur in total at the time of offense. Therefore, the court has a difficult job in imposing fair sanctions that

represent the harm done. Some sentencing officials are willing to extend the sentencing objective to potential harm, while others are not:

> In the face of uncertainty, some courts are willing to impose substantial sentences, while others hold out for proof of substantial risk or harm. The difference, it might be suggested lies in the ecological consciousness of the judge (Swaigen and Bunt, 1985:17).

Respondent #9 offers insight:

> As well the fine should be reflective of the magnitude of the damage done. In this case it appears there could be significant long-term effects.

If the ecological consciousness of the sentencing official directly affects the ability to effectively sentence, based on extent of harm, then such consciousness could be raised through targeted training for environmental sentencing officials.

The ability of the individual to play such an extensive role in determining the sentence, increases the likelihood of disparity, and in so doing, creates the likelihood of unfair decisions and mixed messages.

The fact that the spill (in case #1) affected the drinking water (for a period of time) of municipalities down river was also listed as a main factor in the decision by the respondents.

One respondent #4 mentioned as a factor the effect to the fish population. The lack of including this factor in the rest of the responses is notable. Two likely explanations are: (1) the other sentencing officials failed to retain the facts on the fish population from the reading of the case, or (2) the other officials did not view the effect on the fish population as a

determining factor in sentencing. The explanations are equally disturbing. The courts have not been willing to assign any legal rights to non-persons (see Emond, 1984).

The anthropocentric attitude by the courts may have been successful in delaying dealing with a legally complex issue, however it also delays justice from reaching a victim in need in many environmental offenses.

In contrast to the non-inclusion of non-human victims in sentencing, is the court's continued focus on the characteristics of the offender. The fact that the accused corporation had two previous convictions under the EPA was listed as a factor guiding sentence for all but one respondent. Prior convictions in environmental cases are usually treated the same as in traditional criminal hearings (Swaigen and Bunt, 1985). The near unanimous inclusion of prior convictions is understandable based on the clear delineation in the penalty sections of the Acts, between first and subsequent offense categories.

Theoretically, one would expect a concern to surface regarding the economic conditions of the offending corporation. The governmental, public relations balancing act between economic growth and environmental protection, undoubtedly manifests itself in the state's periphery institutions (justice system). Given the fact that the sentencing officials have expressed a clear connection with a societal image, a concern over threatening jobs via a large fine would be expected. Four respondents listed size of the corporation as a factor directing sentence:

> ... How the amount of fine might affect the employees at the plant. Sometimes high fines force closure of plants or affects the subsequent salary negotiations (respondent 4).
>
> However, one must also look at the size of the corporation. The fine imposed must not create a greater harm than it seeks to redress. If the fine is of such a magnitude that the corporation loses its viability as a business, there may be a resultant loss of jobs which could in itself create an economic and social harm to the public (respondent 9).

The court in R. v. The Canada Metal Co. Ltd. stated a position in reference to corporate size, and ability to pay:

> In public welfare offenses, the protection of the public is paramount to individual interests. The ultimate balancing of environmental damage against the economic benefit of commercial enterprise involves policy choices that are within the purview of the legislation (in Swaigen and Bunt, 1985:26).

The courts, therefore, clearly acknowledge the dilemma, and based on responses and sentences, clearly opt in most cases, for the politically safe route.

Case #2

Case #2 involving the hypothetical accused individual Ronald J. presented a clearly different array of potential mitigating or guiding factors. Responses to question #3 after this case resulted in the greatest disparity among officials.

The most often cited factor (although at varying levels of importance), was the extent or severity of the damage. In all, 17 different factors were listed by the respondents as important in directing sentence. In order to underscore the variance one can turn to the first listed factor of the respondents.

The marital status of Ronald J. as being single was listed by one respondent. This could indicate a decision to proceed with a harsher penalty, based on the individual's lack of spouse or family that could potentially be burdened emotionally or financially from a given sanction.

Remorse was stated as a primary factor, and was listed by other respondents, albeit as less influential:

> As in street crimes and trade cases, remorse or contrition has been recognized as a mitigating factor in environmental cases (Swaigen and Bunt, 1985:29).

The case scenario indicated that children played in the area and discovered the drums of waste. One respondent, #4, listed the danger to children as a primary factor. It is notable that this same respondent listed only factors external to the individual as directing sentence--danger to children, danger to farm animals, damage to water table, and the fact that Ronald J. was trespassing to commit the offense.

One respondent, #5, listed the character of Ronald J. as primary, therefore his previous record and personal status (employment, marital) were retained as most directing in choosing the appropriate sanction.

Two respondents, #3 and #7, clearly held a different view of the case based on the presented facts. The variance again underscores the disparity between sentencing officials. These two respondents chose to focus on the role of the small manufacturing company for which Ronald J. had disposed of the waste, and the municipality (the land owner). Respondent #7

stated that the manufacturing company should have had a certificate from the Ministry to both possess, and dispose of such materials:

> They would have been aware of their responsibility even though they are a small enterprise.

The same respondent listed as a factor:

> The accused Ronald J. - his drive to survive in economic hard times.

This is a clear transition from other respondents' perspectives.

Respondent (3) believed that the municipality was partially responsible due to its "sloppy business" of a verbal contract with farmers, and the absence of fencing surrounding the quarry area. This focus away from the accused is clearly indicated in the sentence imposed by respondent (3).

Other factors that were listed are the fact that Ronald J. did not report the spill, the choice of a "public" site by the accused to dispose of waste, negligence by the accused, and on a number of occasions, the financial situation of Ronald J.:

> The magnitude of the fine levied on an individual person must bear some reasonable relationship to his ability to pay. This presents a problem in the case of the offender who has little means but has committed a very serious offense (Swaigen and Bunt, 1985:25).

Case #3

Case #3 involving the family-owned corporate accused Rondel Manufacturing gave witness to the listing of the magnitude or severity of offense, as one of the major factors directing sentence in most instances. Substantial variance still existed

as to the relevance of other factors.

The conscious violation of the Ministry control order by the company in order to meet production was listed by five respondents. This would tend to express a belief by the court that the interaction of industry and Ministry is a viable mechanism for environmental protection that deserves upholding in sentencing behaviour.

The inclusion of a dossier of 'corporate character' and financial hardship by the corporation in the scenario was used to present the respondent with a difficult choice between environmental protection and economic viability. Seven respondents listed the "corporate character", or economic conditions of the company as influential. Three respondents listed such factors as primary in influencing sentence choice.

The choice that the sentencing official is faced with is becoming increasingly difficult, as manufacturing jobs are being lost for a variety of reasons (changing world economy, free trade). It becomes a politically dangerous adventure to drop the 'heavy hand of the law' as a matter of precedent when economic considerations are at stake in a community. Elected officials (MPP, MP) do not want their constituencies facing economic decline at the gain of environmental legal precedent. The message is undoubtedly carried through the political channels (directly or indirectly) to the sentencing officials. The impetus therefore remains inaction, despite the expressed tendency of some sentencing officials, (based on responses in the

current study) to "send a message to the judiciary."

This is not a plea for using the legal sanction as a bulletin for environmental awareness at the expense of economic quality of life via employment. The facts serve, however, to illuminate an intertwined group of competing goals manifested through incompatible means. The goal of environmental protection is quite clear, what is obscured is the route and medium this goal should be articulated within. The wide disparity in sentence and the variance among directing factors of identical cases reflects a deficiency for the current format of the justice system to attain the aforementioned goal.

In response to question #3 one respondent #3 focused entirely on Rondel's situation. The factors that were listed were; (1) Rondel is not able to withstand undue financial hardship, (2) The plant is family owned, (3) The municipality is small, (4) 35 workers were recently laid off.

The focus is interesting in light of a point of law brought up by Swaigen and Bunt:

> There is no rule of law that a corporation that is undercapitalized to meet its obligations, be they contractual, tortious, or criminal, is entitled to salvation from the consequences of its own acts (1985:26).

Again to underscore the disparity among officials, respondent (9) states:

> Although some consideration should be given to the continuing economic viability of the corporation, in a situation such as this the court and the community at large should not have the welfare of the community held ransom to such economic considerations and a clear message must be given through the penalty that such

behaviour cannot be tolerated.

In reference to the public's views on environmental protection versus economic considerations, a March 1991 poll by Winnipeg based Angus Reid found the following. More than 75 per cent of the people surveyed said:

> The government should not reduce its focus on environmental protection, even if it means a slower recovery from the recession.

and:

> Canadians don't want the government to ease up on pollution regulations even if it would put more people back to work (Vancouver Sun, April 2 1991:A1).

These statements reflect a level of success by the government's legitimation apparatus to instill a belief in the public of a "focus on environmental protection" and that they have "tough" legislation. The political patronage slush fund known as the Federal Green Plan has accomplished some of the success, given its extensive budget for advertising. The alluded to belief in "tough legislation" merely reinforces the "implementation gap" (Webb, 1988), the great rift between available sentencing limits and actual sentences.

XIII DEMOGRAPHIC REPRESENTATION OF RESPONDENTS

The demographic questions in the questionnaire allow for a picture to be created of the respondent's experience and geographic situation.

The ten respondents represent a microcosm of the actual population of sentencing officials dealing with environmental cases. The majority of cases are heard before a presiding Justice of the Peace, therefore the current sample contains eight JPs. The court structure allows for cases to be appealed or sent directly to a court of higher standing where a judge would hear the case. The current study contains two judges.

The experience presiding over legal cases, based on years presiding, ranges from four to 25 years; the mean being 12.8 years.

The respondents maintain a group environmental/legal experience level, (based on total environmental cases presided over) of 401 total cases. However, two respondents answered vaguely (very few, and numerous). The range for environmental cases heard was five to 200.

The academic profile of the respondents can be divided on title. The two judges both possess B.A.s and LL.B.s, one judge also possesses an MA degree. The JPs' educational training ranges from grade eight (for the most experienced in years) to a B.A. and an LL.B. for the JP with the least years presiding. Three of the remaining six have acquired bachelor degrees. The

Demographic and Personal Data of Respondents

Resp.	yrs pres.	env. cases	academic	court	comm size
1	5	6	courses	prov. off.	100-250
2	24	200	seminars	prov.	10-25
3	10	few	B.A.	prov. off.	25-50
4	25	50	gr. 8	prov. off.	250+ >5000
5*	5	5	B.A. LL.B.	prov.	250+
6*	17	5	B.A. LL.B. M.A.	prov.	250+
7	17	numerous	B.A. & seminars	prov.	50-100 5-10
8	5	75-100	courses & seminars	prov. off.	50-100
9	4	25	B.A. LL.B.	prov. off.	250+
10	16	25	B.A.	prov.	25-50 100-250

* denotes Judge

remaining three stated completion of Ministry training seminars, and some college courses, as the highest academic level attained. An interesting academic qualification absent from any of the respondents records, and also, apparently from Governmental policy on hiring, is the presence of a biological or ecological focus of study. The sentencing official with such academic training would clearly have the ability to discern the connections between environmental wrongdoing and environmental impact.

All of the respondents sit in Provincial court, either Provincial Offenses or Provincial Court General Division.

The respondents were asked to indicate the size of the geographic area which they serve. The sentencing official may travel to various courts or municipalities to preside over cases. The inclusion of this variable was based on the belief that this would indicate if an adequate rural/urban representation was achieved in the sample. The primacy of personal judicial attitudes to the sanction imposed (Hogarth, 1971; Lovegrove, 1984; Palys and Divorski, 1986), would indicate that over-representation of urban or rural could influence the validity of the study. The respondents represented all categories, ranging from populations of less than 5,000 to 250,000 +.

"The Worst Case"

Question #6 in the questionnaire pertains to the worst case scenario that becomes an unofficial internalized judicial bench mark for sentencing. Swaigen and Bunt discuss the "worst case":

> In environmental, as in criminal cases, the maximum fine is to be reserved for the worst possible cases. The factors that move a situation towards the worst case include, surreptitiousness, deliberateness, recklessness, attitude, and disregard for instructions of environmental authorities (1985:24).

The sentencing officials in the present study echoed many of these factors. The case scenarios were developed with the hope that the case facts would approach a potential "worst case" without sacrificing authenticity. In responding to sentence as well as to question #6, only two respondents mentioned the "worst case" belief. Respondent #7 stated in question #6 that cases #1 and #3 approached the "worst case." Respondent #10 in sentencing case #3 stated that the sentence should be a "cash fine near the maximum," therefore alluding to the "worst case" bench mark.

The above statements serve to increase the disparity levels of sentences between officials. The fine distributions for each case, #1 or #3, clearly show that the "worst case" was far from some sentencing officials' minds when imposing the sanction. The disparity, in turn, shows the personal, subjective nature of a judicial tool such as the "worst case."

The most common qualities of the hypothetical "worst case" stated by the respondents were somewhat predictable. The extent

of damage, duration of offense, amount or type of pollutant, and potential for long term effects, all speak to the nature of the act. Previous convictions, or "the repeat offender" was also a factor in the respondents' "worst case." Two respondents made direct statements on the effects to "human" populations. No respondents mentioned implicitly the damage to or concern for wildlife. Financial circumstances were mentioned as factors of the "worst case" on two occasions. The cost of cleanup was stated by respondent #1, while the economic circumstances of the defendant were mentioned by respondent #2.

The Working of the Environmental Legal Machine
Questions 7 to 11

Questions #7 to #11 in the questionnaire attempt to ascertain the actual functioning of specific pieces of environmental legislation.

Section 146 (d)(2) of the EPA allows for the addition of "other conditions" to be included in the sentence..."that the court considers appropriate to prevent similar unlawful conduct or to contribute to rehabilitation." Question #7 asked the officials if they had ever invoked this section. Eight of the respondents answered "no" to this question, however one of the eight stated that a prosecutor had on one occasion asked for a condition under that section. One respondent was unaware of the section, however a condition to "restore land to the satisfaction of the Ministry" was issued by the individual. Respondent (3) affirmed the use of the section on one occasion. The condition was to remove fill that was dumped illegally. The use of the clause for such a condition would not appear to be conducive to "prevent similar conduct," or "contribute to rehabilitation."

The section 146 (d)(2) can be seen as an opportunity for innovative or creative sentencing by the official. The responses by the sample would indicate that the section is only serving to increase distance for the "implementation gap" phenomena, and not as an innovative sentencing tool.

The responses to question #4 would indicate that some

sentencing officials desire an opportunity to use more effective sentencing measures for some cases. The lack of use for s.146 (d)(2) would therefore indicate that the sentencing official wants the sentencing option clearly spelled out in the provisional penalties. The non-use of s. 146 (d)(2) coupled with the expressed desire for other sentences indicates a reluctance to initiate or "step out from the crowd" in reference to sentencing. The use of 146 (d) would require substantial legal self confidence, insofar as its use would generate interest by the legal community.

Questions #8 and #9 refer to the EPA section 145a:

> The counsel or agent acting on behalf of the Crown, by notice to the clerk of the Provincial Offenses Court may require that a Provincial judge preside over a proceeding in respect of an offense under this Act (R.S.O. 1980 c.141 s.145(a)).

Equivalent sections exist in the other pertinent Acts as well. The proportion of cases being moved on to a higher court as witnessed by the respondents is quite small (ranging from none to 25 per cent). Three respondents indicated that none had been moved on, while one respondent stated the figure was unknown. The small numbers of cases that are moved on at request could be explained by the functioning of a legal relationship. Prosecutors and defense counsel may feel that they command more power in a court presided over by a JP as opposed to a judge. The perceived or actual ability of counsel to influence both disposition and sentence may be maximized under such a relationship. The lack of professional legal training by many

presiding JPs (only one JP possessed an LL.B. in the present study), could create a knowledge differential that could favour counsel.

Question #9 refers to the subsequent appeal of a decision, after being issued by the sentencing official. Appeals were also quite limited, as expressed by the respondents (ranging from none to 25 per cent). Four respondents stated that none of the environmental cases they presided over had been appealed. The mean figure pivots around 5 per cent.

Question #10 asked the sentencing officials to state the most common defenses used in environmental cases, based on their experiences. This question was answered by nine respondents. Seven officials stated, "due diligence" as the major defense used. The chapter on defenses deals with the implications of the due diligence as it was created via the Sault Ste. Marie decision. The defense is popular in that it does not require proof that the offense was not committed. The defense allows for presentation of mechanisms that show diligence in preventing pollution occurrences. As mentioned earlier, the defense is based on the wide concept of 'reasonableness', which in turn is determined with reference to the practices of the industry, not the costs to the environment. The mechanism can be carefully implemented by an astute company, to be low cost, ineffectual instruments or policies that can be legally impressive should a prosecution be initiated.

The popularity of the due diligence defense (as expressed

by the respondents), supports previously stated literature, (Jeffrey, 1984; Wilson, 1986) regarding the implications of the defense in reference to the extent of use. The present study serves to link literature with actual occurrence in that regard.

Defenses other than due diligence mentioned by the respondents were as follows; (1) "the event was due to an unforseen occurrence." This could be likened to the "Act of God" defense previously mentioned. (2) "The economic costs associated with better monitoring were excessive." The existence of such a defense is testimony to the weight given economic survival and economic growth by the justice system. (3) "Ignorance in the law" as a defense was cited by one respondent. (4) The plea that the discharge or activity did not result in environmental damage was used as a defense in cases heard by one respondent.

Question #11 asked the sentencing official to provide comments on changes to any area of environmental law that the individual deemed necessary. The question was included in the hopes of a response, however it is clearly stated to officials of the court (therefore government) not to make comment (either pro or con) regarding legislation, or public policy (based on conversation with the Attorney-General's office). Four respondents took advantage of the question to express concerns.

Respondent #8 stated:

> more training in dealing with environmental matters is extremely important.

Respondent #5 stated:

> eliminate imprisonment as a penalty in most

> environmental cases so that charter (of rights) problems raised in R. v. Ellis Don, and R. v. Wholesale Travel do not arise.

This concern refers to the reversal of proof in strict liability cases as created by the Sault Ste Marie case. The fact that the burden is placed on the defendant to prove, on a balance of probabilities the defense of due diligence, has been challenged as contravening s.7 of the Charter, therefore forcing the defendant to prove innocence.

Respondent #2 stated:

> I would like to see more uniformity in sentencing; consistent, periodic review of environmental legislation; perhaps environmental training sessions; severe sentencing provisions for the worst offenders.

The admission of highly disparate sentences is a candid response by the official and gives credence to the established figures of the current research. The request for training is also significant in respect to a need for recognizing a uniqueness to the functioning and objectives of environmental legislation.

Respondent #1 stated:

> Municipalities, because of impersonal connections are not forced to comply and are not penalized to the extent of individuals. They should set the example but in most cases because of inadequate funds are allowed to discharge into watercourses, untreated material on a regular basis.

The situation surrounding municipalities or any level of state administration (federally, see Saxe, 1990) is of considerable importance to environmental protection. The state administration becomes an incompatible product for the justice system. The mechanisms in place to deal with environmental wrongdoing are

clearly inconsistent for dealing with state bodies (Municipal, Provincial, Federal). Given the goals of sentencing, the court can clearly not affect the behaviour of such an entity via a traditional sanction. The state entity becomes more elusive to delineate than a private corporate actor. Therefore, public corporations remain essentially insulated from scrutiny of environmental practices given their connections to state power and influence.

Three respondents answering question #11 stated that no changes were required. The remaining three officials declined comment either explicitly or through absence of response.

XIV POST STRUCTURALIST DISCUSSION OF ENVIRONMENTAL REGULATION

Claus Offe, in his post structuralist analysis of political economic arrangements, offers an interesting model for the analysis of the presented material. To set the stage, Offe is paraphrased as establishing the following set of conditions.

The state is faced (in post modern society) with the dilemma of maintaining forces supportive of capital accumulation and commodification, as well as maintaining "mass loyalty" or "diffuse support" of the voting public. The market system is constantly producing "by products" that are counterproductive of its development. The state must intervene and rectify the problem, at least in the short term. The dilemma lies in the compensatory intervention of the state. The regulatory behaviour of the state increases societal expectations over time, until the intervention of the state reaches a critical level in terms of maintaining the forces of capital accumulation. The operative concepts therefore become state intervention through welfare state and regulatory services, market functioning, and societal expectations:

> The minimum level of intervention is defined by the inventory of problems produced by the economic system. These problems potentially endanger its existence, but cannot be processed and solved by this economic system (Offe, 1984:54).

The "problems" created are analogous to pollution. Pollution is created by the functioning of the economic system. The "problem"

cannot be "processed" or "solved" by the economic system because it is economically inefficient to spend capital on abatement technology, as abatement costs cannot increase profit margins directly. Offe continues:

> At the same time, a maximum level exists, beyond this point regulatory services and initiatives cease to compensate for the defects of the market-regulated process of creating surplus value, by in fact over compensating and thereby challenging the identity of the system. Beyond this maximum point interventions stimulate interpretations of needs which are both antagonistic to the system and which potentially subject the exchange system not merely to subsidiary political control, but actual political control (1984:54).

The maximum level in the case of environmental protection can be established as the point at which enforcement and prosecution would correct environmental wrongdoing. In analyzing judicial and Ministerial behaviour surrounding the issue of environmental protection, one can observe the ineffectual nature of the behaviour. It becomes easy to blindly suggest that, "huge fines would stop that company from polluting" (by shutting it down). Ideological statements are uttered with ease, however, the political implementation of such is extremely difficult.

Increasing state intervention via the current process would surely "challenge the identity of the system." Given the primacy of the economic system, one can therefore not expect increased intervention by the state, and subsequently should not expect increased environmental protection or solutions. Advancement in these areas will only result if industry and big business sanction the course of events or methods. The gains for the

environment are therefore at a pace dictated by the forces of capital accumulation, not at the pace necessary for arresting environmental degradation.

The statement by Offe that "beyond this point intervention stimulates interpretations of needs...", is clearly analogous to public perception regarding environmental issues. The increase in societal consciousness, and the green movements, can be rooted, theoretically to the "problems produced by the economic system" (pollution, environmental degradation). Worldwide people are witnessing the dysfunctional nature of capital in reference to natural preservation. The force of the awareness is exacerbated by the need for state regulatory intervention. The haphazard intervention by the state in terms of regulating industrial activity further stimulates a growing public concern. The growth is exponential and can only pose the most unenviable dilemma for the moderating agency, the state.

In reference to Offe's maximum and minimum levels of theoretical state intervention, in the current issue the two points can be seen as coexistent. That being, a move in either direction (under current practices) is severely detrimental for the state's "diffuse support." Offe mentions the possibility (of coexistence) on a theoretical level, however, he does not expand it:

> According to this hypothesis, there would have to be a point X at which the minimum and maximum thresholds intersect. This point would have to be interpreted as one at which the interventions necessary for the material reproduction of capitalist society are, at the same time, the kind which stimulate the interpretations

of needs which negate the capitalist form of social reproduction as such (1984:59).

XV SUMMARY CONCLUSIONS

The current research progressed through a series of stages, each offering its own insight into the tri-lateral relationship between legislation, the behavior of sentencing officials, and sentence.

The review of the relevant Acts allowed for the initial variable in the "implementation gap" to be explored. The legislation, while being a legitimate attempt, is known to be incomplete, and therefore becomes a creation of Provincial governmental theatrics, that is, merely the by-product of a self-legitimating process. The legislation, when analyzed 'in and of itself' offers promising proposals and a tool for effecting environmental protection. The provisional penalties conveniently spell out sentencing ranges and options to satisfy the most obvious objectives. Legislation is tabled in the House and is debated, the media reports the amendments, and the final document is published for all interested parties to possess. The legislation is a prop in a public process of societal appeasement, an attempt at managing the "crisis of crisis management" (Offe 1984). **The element that is not publicly scrutinized and reported by the media is the functioning and performance of the given legislation.** The rift in this reporting becomes the "raison d'etre" of the thesis, to fill this gap in our sociological knowledge.

The governing party exerts its power at the performance level, constraining activity by its peripheral arms (MOE) via

budget allocations, The allocation of funds is, in effect, the puppet strings that dictate what can be accomplished from within the given Acts. However, the public only hears that maximum penalties were raised, not if they were ever invoked.

The legal case material was offered so that a light of tangible realism could be shed on otherwise theoretically obtuse concepts. The defenses employed by the accused allow one to see the legally available mitigating circumstances that inevitably are a statement of the quality of the legislation.

The Sault Ste Marie case was explored in depth in order to illustrate the post facto implications of a landmark Canadian legal case. The discussion was a preamble for the legal exploration of criminal versus regulatory foci in prosecuting environmental wrongdoers. The dilemma between the two foci illustrates the need for grounding heartfelt public statements (get tough, criminalize), with the legal reality of the current situation. Public opinion is often not amenable to logic, and it is a credit to its often illogical nature, that the assembled power of the populace can exert such a force on the state (as witnessed by the growing concern in the masses and the acknowledgement of the concern by Parliament and Provincial Legislatures).

The 1989 prosecution data offered the second variable in the "implementation gap" concept. The data offered actual evidence of prosecution and sentencing behaviour. The variance between actual sentence levels and available options is extensive. The

lack of numerous, large, well known corporate citizens can presumably further the assumption that large corporations are exerting influence on the peripheral institutions of the state and therefore creating non-traditional options for dealing with their environmental 'problems.' The absence could also suggest that given budgetary constraints, prosecution of large legally powerful corporations is not consistently initiated. The presence of either option gives rise to a power differential in favour of the economic interests of major capital accumulators.

"The implementation gap" is extended in that an expressed objective of deterrence is inconsistent with fines or sanctions levied. The ineffectual nature of deterrence was discussed theoretically and empirically given the available data of the present research.

The data received from the sentencing officials offered an insightful view of controlled sentencing behaviour. The disparity exhibited is an expression of personal autonomy and control, but also of system confusion. The fines levied at the low end by the sentencing officials, concur with the 1989 data in reference to the variance from available options. This variance, as well as consistent comments and objectives surrounding economic conditions of defendants, shows an unwillingness to 'hurt' corporations via the sanction. The legal obligation to consider such conditions is not present in any Act, therefore the response to economic conditions is not a judicial response per se, but a political one. The link further solidifies the often

unconscious relationship between political-economic policy and the judiciary. The expressed interest in economic considerations is natural and expected in a highly individualized, essentially unstructured sentencing process. One judge expressed concern over the disparity in saying:

> I think it is impossible to reach anything that is going to be what other judges would reach. I think it is, unfortunately, a matter somewhat of guesswork (Webb, 1988:43).

The focus is necessary for a public official (given political repercussions to the contrary), however the focus is counterproductive to environmental protection. The problem may be rooted in the lack of accountability, and the faceless nature of the judiciary.

The focus cannot be removed from the judicial forum, therefore the goal of environmental protection would dictate changing the forum. The expressed goals of sentencing as stated by the respondents were not supported theoretically or empirically by the imposed sentences. This corresponds to the 1989 data as well.

The data presented leads one to the conclusion that the judicial arena is an ineffective forum for dealing with multi-faceted issues surrounding environmental wrongdoing. Environmental issues embody all that is complex within present social, economic, and political issues. The complex issue is not mathematical. It cannot be reduced or dismantled to its parts. In a post-modern world of social and economic transformations, a struggle has developed between short term quality of life and

development, and a sustainable technological morality. In removing the task of environmental protection from the shrouded mystique of the halls of justice, it undoubtedly must relocate to a more visible socio/political arena where the outcomes may be more beneficial, but the implementation considerably more intellectually taxing.

The one element that can lead the change is establishing the operative goal and allowing this goal to dictate the strategy. The goal can only be environmental protection and sustainability of the natural sphere, given the alternative as being economic unsustainability, social disunity, and loss of life (all animal life). The fact that the issue cannot be reduced dictates a change in general attitude.

Economic considerations are a valid concern; however, they must be incorporated within the strategy, not remain a mitigating circumstance. Isolating either environmental quality or economic development is an archaic and dangerous path. A recent statement by the Canadian Economic Development Ambassador to the USA regarding the proposed tri-lateral free trade deal in North America, indicates the separation of the essential elements is still prevalent:

> Environmental concerns should not become a barrier to trade negotiations (CBC National News, April 7th 1991).

It is not a productive stance for the public to view the issue as one in which "government should get tougher with polluters." Cooperation of all elements of society is essential.

The presence of concern surrounding the economic implications of environmental protection is understandable and desirable given the current political economic structure of the world. Therefore it is self-defeating to stand aside and support widespread closure of industry as a means of "getting tough" and combatting pollution. The answer is translating the projected public concern into financial support via public tax dollars, thus removing the dominant ideology that government is responsible. The urgency of the timeframe does not allow for a fair, equitable distribution of the responsibility of environmental degradation. The response by critics is obvious, "the public did not cause the problem, industry is the offender, make them pay." The position, while being partly correct, is both theoretically flawed and environmentally disastrous. General society made up a functioning unit within the advancing capitalist formation, whether by choice or necessity is not the issue. All occupants of the ecological heartland have played a negligent role in expanding environmental degradation, and therefore must become an integral component of the solution. If one waits for market forces to invoke positive environmental action (corrective measures, abatement), the dilemma will develop exponentially to include more irreparable areas.

The state of the natural environment can no longer be a flowery platform for politicians or ecologists. The reality is, it must become an institutionalized welfare concern no less important than health or economic development, because, as stated

previously, the state of the environment embodies both issues.

The current work has provided a picture of current thought surrounding environmental-legal action. The use of all levels of contributing jurisdictions and players allows one to witness clearly the gaps that exist between all concerned and/or involved parties. Environmental protection can never advance past infancy until the changing industrial political world embraces it for more than an innovative marketing strategy.

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CASE #1

On April 15, 1990, at the Industrial Chemical Division of Chemotec Inc., a discharge of a chemical byproduct was reported. The discharge continued over a 30-hour period into the adjacent river, via a drainage pipe.

The amount of the chemical discharged (approximately 50,000 litres) is in sufficient amounts to cause a potentially serious threat to spawning fish populations in the adjacent river (based on Ministry of the Environment tests). At the time of discharge, the fish spawning season was at its peak. The Ministry was informed of the discharge subsequent to its detection by plant workers. (The duration of the discharged period was ascertained reliably, based on the rate of flow of the contaminant and the volume lost in the holding tanks.)

Chemotec was found guilty of contravening the Water Resources Act 16 (1).

INFORMATION

* Chemotec pleaded guilty to the charge.
* The plant employs 250 workers.
* Three municipalities down river from Chemotec take their water supplies from the said river. As a result of the spill, they had to suspend intake for 5, 3 and 3 days, respectively while monitoring took place.
* Chemotec was convicted of two previous offenses under the EPA Section 13 (1).

With regard to the case you have just reviewed:

1. What sentence would you assign?

2. What objectives do you see the sentence(s) assigned as fulfilling, with regard to the offender, society, and our justice system?
(e.g. deterrence, rehabilitation, restitution, etc.)

3. Please list in the order of their importance, those facts regarding the offender and/or offence which had the greatest bearing on your decisions.

4. Do you feel the existing sentencing options, or ranges therein, are adequate to deal with this case?

If not, what changes would you suggest, and in what area?

CASE #2

On July 17, 1990 the accused Ronald J. entered into a verbal agreement with a small local manufacturing plant to dispose of twenty, 45-gallon metal drums of a known, highly toxic substance, in addition to four drums (of the same size) of a moderately radioactive arsenic-based waste soil. The accused transported the drums to a small abandoned quarry (30 ft. deep, approx. 200 ft. dia.). The quarry was located on municipal rural land, 1.5 kilometres off a county road. The closest dwelling is .75 kilometres from the site. The quarry currently is approx. two-thirds full of rain water. A geological survey concluded that the porous limestone base of the quarry has undoubtedly allowed for an undiscernible level of leaching of the contaminants into adjacent agricultural lands.

The quarry was being used as a watering area for the adjacent farm's cattle, under permission from the municipality.

Ronald J. was found guilty of contravening Section 13 (1) of the EPA.

INFORMATION

* The accused pleaded not guilty.
* Age 28
* Occupation - seasonally employed carpenter and transporter
* Marital status - single.
* Previous convictions - assault (1984), impaired driving (1986), no previous environmental offenses.

CASE #2 ...cont'd

* The Prosecution, prior to plea by the accused, informed the Defense that a penalty would be sought under 147 (1)c and 147 (3) of the EPA.
* Ronald J. has exhibited remorse for his actions in conversations with the Crown. He cited severe economic conditions and unemployment as reasons for his actions.
* Ronald J. was charged based on knowledge obtained via an investigation by the Ministry of the Environment after the waste drums were found (many broken and drained into the quarry) by local children. The discovery was reported by the children's parents.

With regard to the case you have just reviewed:

1. What sentence would you assign?

2. What objectives do you see the sentence(s) assigned as fulfilling, with regard to the offender, society, and our justice system?
(e.g. deterrence, rehabilitation, restitution, etc.)

3. Please list in the order of their importance, those facts regarding the offender and/or offence which had the greatest bearing on your decisions.

4. Do you feel the existing sentencing options, or ranges therein, are adequate to deal with this case?

If not, what changes would you suggest, and in what area?

CASE #3

Rondel Manufacturing is a family-owned plant specializing in the production and distribution of rubber sealants. The business has only one location situated in a town of 1700 people. Rondel is the only significant industry in the town and employs 36% of the employed labour force.

Rondel had recently laid off 35 workers, citing lack of contracts as the reason. A request was made by a client to have an order filled three days sooner than previously agreed upon. In order to meet the deadline, a secondary mixing tank was put into operation by the plant foreman. The secondary mixing facility was under a stop order by the Ministry of the Environment pending installation of contingency safeguards.

During operation of the secondary tank, a spill of the mixing broth (10,000 litres of concentrated corrosive compound) resulted. The contaminant entered the town sewage system via large floor drains around the secondary mixer.

The sudden overload to the town system caused backups into storm drains, and amounts of the mixture ran down a residential street drainage ditch. An overflow at the town

CASE #3 ...cont'd

filtration plant, resulting from the excess flow, caused overflow from sewage lagoons onto surrounding land and into an adjacent forest.

The chemical can cause serious respiratory damage when inhaled. However, it does not mix well with water and therefore extensive cleanup of the town drainage system is required and is currently under way, under the direction of the Ministry of the Environment. Fifteen residential dwellings have been evacuated pending cleanup.

Rondel was found guilty of contravening section 13 (1) of the EPA.

INFORMATION

* Rondel pleaded guilty to the charges.
* Rondel has applied for federal and provincial aid to upgrade facilities and to continue operations.
* Management cites economic costs as the reasons for non-compliance with the previous control order issued by the Ministry.
* Rondel is active in local service organizations, government, and sports groups.
* Rondel was convicted previously (1986) with improper storage of chemicals, contravening the EPA.
* The Ministry was notified of the spill by the town Council, not Rondel.

With regard to the case you have just reviewed:

1. What sentence would you assign?

2. What objectives do you see the sentence(s) assigned as fulfilling, with regard to the offender, society, and our justice system?
(e.g. deterrence, rehabilitation, restitution, etc.)

3. Please list in the order of their importance, those facts regarding the offender and/or offence which had the greatest bearing on your decisions.

4. Do you feel the existing sentencing options, or ranges therein, are adequate to deal with this case?

If not, what changes would you suggest, and in what area?

1. How many years have you been presiding over legal cases?

2. In that period, approximately how many cases have been of an environmental nature?

3. What is the level of academic training you have received? (e.g. college or university courses, BA, LLB, LLM, etc.)

4. In what level of court do you currently sit?

5. Please indicate the size of community you serve. If you visit several communities on circuit, please indicate the sizes of the communities you visit by placing one check mark opposite the appropriate population category for each community served.

250,000 +	_____
100,000 - 250,000	_____
50,000 - 100,000	_____
25,000 - 50,000	_____
10,000 - 25,000	_____
5,000 - 10,000	_____
under 5,000	_____

6. It is general legal understanding that the maximum limits of the sentencing range are reserved for the "worst case." What elements would have to be present in your conception of a hypothetical environmental "worst case"?

7. Section 146d. (2) of the EPA allows for the addition of "other conditions" to be included in the sentence..."that the court considers appropriate to prevent similar unlawful conduct or to contribute to rehabilitation."

Have you ever invoked this clause in a sentence? If so, how often, and what would an example be of an "other condition" under this Section?

8. To your knowledge, approximately what percentage of environmental cases that come before you are moved on to another level of court, either at the request of Counsel, or your request?

9. To your knowledge, what percentage of cases you sentence are appealed to a higher court?

10. Based on your experience, what are the most common defenses used in environmental cases?

11. Are there any changes that you could suggest be made to any area of environmental law (legislatively, administratively, sentences, information, training, etc.) that would benefit the system as a whole, or make your tasks more effective or efficient?

VITA AUCTORIS

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PLACE OF BIRTH:	Marmora, Ontario
YEAR OF BIRTH:	1967
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	University of Guelph, Guelph, Ontario, 1986-1990 B.A. (Hons.)
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