ADMINISTRATIVE PENALTIES CONSULTATION PAPER

LAW REFORM COMMISSION OF SASKATCHEWAN

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EXECUTIVE SUMMARY

Administrative penalties are a new means of enforcing compliance with regulatory legislation. They are monetary penalties assessed and imposed by a regulator without recourse to a court or independent administrative tribunal. It has been suggested that administrative penalties are appropriate tools "to engender compliance and cooperation from the 'regulated community', to secure environmental or consumer protection." However, because they do not involve the courts or tribunals at first instance, questions have been raised about the extent to which procedural fairness may be compromised when administrative penalties are imposed. This consultation paper discusses such issues as notice and disclosure requirements, hearing requirements, and perhaps most importantly, rights of appeal.

This consultation paper discusses the legal issues affecting administrative penalties, and poses questions about appropriate procedure for the consideration of both regulators and their clients. In addition, the Commission is particularly interested in learning about the experience of regulators and clients with administrative penalties.

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INTRODUCTION

Administrative penalties are a new means of enforcing compliance with regulatory legislation. In Saskatchewan, administrative penalties were first introduced in *The Securities Act* in 1995.[1] They are authorized under eight Saskatchewan statutes, covering subjects from forest management to electrical inspections and gaming.[2] A recent survey of the use of administrative penalties in Canada observed that "it is only relatively recently that they have become a favorite tool among regulators," but have been "increasingly used to engender compliance and cooperation from the 'regulated community', to secure environmental or consumer protection ".[3]

Administrative penalties are monetary penalties assessed and imposed by a regulator without recourse to a court or independent administrative tribunal.[4] It is primarily in this respect that an administrative penalty differs from a fine levied by the court upon conviction for a statutory offence. An administrative penalty is due and payable when the regulator, not a court, determines that a breach of the regulatory legislation has occurred.[5] In most cases, administrative penalties are imposed on individuals and businesses who have been licensed to undertake regulated activities. Administrative penalties are used in these cases to enforce the terms of the license. Advocates of administrative penalties suggest that it is neither necessary nor appropriate to make regulation of licensees a matter for the courts. The delay and cost of court proceedings are avoided, and decisions are made by officials acquainted with the purposes of the regulations in issue, rather than by judges who lack such specific expertise.[6] As the Public Interest Advocacy Centre's survey of the use of administrative penalties in Canada observed, they "have been

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[1] Section 135.1, titled "Administrative penalty," of *The Securities Act*, *1988*, S.S. 1988-89, c. S-42.2 was adopted by amendment, 1995, c.32, s.57.

[2] See below.

[3] Amanda Tait, "The Use of Administrative Monetary Penalties in Consumer Protection," Public Interest Advocacy Centre (PIAC), May, 2007.

[4] Thus, the Australian Law Reform Commission defined administrative penalties as "sanctions imposed by the regulator, or by the regulator's enforcement of legislation, without intervention by a court or tribunal." ALRC, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Final Report), March 2003.

However, a full definition of "administrative penalty" is not without difficulty. The Law Reform Commission of Canada struggled with a definition in its report, *Sanctions, Compliance Policy and Administrative Law*, (1981), finally concluding that the essential elements of an administrative penalty are: (1) administrative action authorized by law; (2) taken to achieve client compliance, and (3) perceived by the client as significantly affecting its interests. While this definition fits administrative penalties under Saskatchewan legislation, it does not clearly identify the distinguishing feature of administrative penalties. The Australian Commission also distinguished "true administrative penalties." Such a penalty "arises by operation of legislation when certain triggering events or circumstances are present." To the extent that this category includes only breaches that are obvious, raising no issues of evidence, interpretation, or discretion (e.g. nonpayment of a fee), it is too narrow to encompass all the sanctions characterized as administrative penalties under Saskatchewan and other Canadian legislation.

[5] Because administrative penalties are not characterized as offences, they are not quasi-criminal in nature. Assessment of a penalty is not an offence, nor is a conviction registered.

[6] Paul Baker, "Monetary penalties are newest environmental enforcement tool", *The Lawyers Weekly* 16:18 (September 1996).

heralded by regulators as providing a more flexible and responsive regulatory structure that balances the competing interests of stakeholders."[7]

But administrative penalties have been criticized. In particular, the exclusion of the courts or other decision-makers independent of the regulator has been controversial, even when limited to enforcing the terms of licences. The issue is most acute when, as in the case of many Saskatchewan administrative penalties, there is no statutory appeal from the regulator's decision, leaving an aggrieved party only the limited and often uncertain option of seeking judicial review under the general powers of the courts to supervise administrative action. In Saskatchewan, the question of review of administrative decisions was raised in the legislature when *The Forest Resources Management Act* was amended in 2002[8] to extend their use. In 2006, the report of the *Minister's Task Force on Forest Sector Competitiveness* recommended that "a process be established for allowing appeals of administrative penalties to an independent board."[9] The Australian Law Reform Commission has observed that because administrative penalties are imposed directly by the regulator, they are often seen as operating "in the shadow" of the formal legal system.[10]

Some critics have argued that administrative penalties are, despite their characterization by regulators and legislators, essentially criminal or quasi-criminal offences. If this is the case, extra-judicial assessment of "guilt" would likely conflict with section 11 of the *Charter of Rights and Freedoms*. While it seems unlikely that the courts will find that administrative penalties are criminal in nature and violate the *Charter* for that reason, the contention has been made by a respected authority on constitutional law.[11] But even if it is rejected, the similarities between administrative penalties and offences suggest that attention to procedural safeguards is important.

Other commentators are troubled by the dual role of the regulator as investigator of breaches of the administrative regime, and adjudicator of the issues. If there is a dispute about liability, the regulator appears to sit in judgment of its own case. In many administrative contexts, these functions are separated.[12] When they are not, appeal to an independent adjudicator is often provided for. This approach is intended to give effect to the "principles of natural justice" developed by the courts to supervise administrative action. Natural justice requires that administrative rules should be applied in an unbiased fashion, and that persons subject to them should have an opportunity to be heard before a decision is finalized. The legislation authorizing

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[7]Amanda Tait, "The Use of Administrative Monetary Penalties in Consumer Protection," Public Interest Advocacy Centre (PIAC), May, 2007.

[8]See Saskatchewan Hansard, debates July 3, 2002, Bill No. 65 *The Forest Resources Management Amendment Act, 2002*.

[9]Saskatchewan Environment, Minister's Task Force on Forest Sector Competitiveness, 2006, Recommendation 14.

[10]ALRC, Federal Civil and Administrative Penalties in Australia (Final Report), March 2003.

[11]Peter Hogg, who has written extensively on the *Charter*, made the contention in strong terms in an Opinion Letter written on behalf of the Retail Council of Canada presented at hearings, on *Bill C-19, An Act to amend the Competition Act* dated October 17, 2005. Hogg's opinion will be discussed below.

[12]Thus independent tribunals or review panels are often created by legislation. Nearly fifty administrative tribunals adjudicate disputes between citizens and government agencies at present in Saskatchewan. See the Saskatchewan Law Reform Commission's *Model Code of Administrative Procedure for Saskatchewan Administrative Tribunals* (October, 2005).

all Saskatchewan administrative penalties gives the subject of the penalty an opportunity to respond to allegations, but the extent of this right varies. Few provide for decisions to be made by an adjudicator who is independent of the regulator who administers the legislation authorizing the penalties. This, particularly when coupled with minimal opportunity to respond, may create an impression of bias. Whether this will lead to successful court challenges is uncertain; the courts do not require strict independence in all cases. However, it can be argued that effective appeal and review provisions are necessary to fully satisfy the requirements of natural justice as they have been expressed by the courts.

The next part of this paper is a survey of administrative penalties under Saskatchewan legislation. It is clear from the survey that, despite some common features, administrative penalty regimes in the province follow no consistent pattern with regard to the issues outlined above. Some provide for appeal to the courts, some provide for internal review of decisions by regulators, while others provide neither. Some require oral hearings, others permit them, while others allow only a written submission by the subject of a penalty proceeding.

This consultation paper discusses the use of administrative penalties in Saskatchewan. The goal is to assist in the development of principles of fairness and efficiency appropriate to the administrative penalty regime.

ADMINISTRATIVE PENALTIES IN SASKATCHEWAN

Saskatchewan legislation authorizing administrative penalties differs considerably in scope, structure, and function. The review which follows will focus on three topics that directly affect the fairness and effectiveness of the penalty regime:

(1) Procedure

(2) Review and appeal

(3) Function in the regulatory system.

The Securities Act, 1988 [13]

The administrative penalty regime incorporated into *The Securities Act* in 1995[14] is the oldest under Saskatchewan legislation, and is perhaps not typical of the regimes under other legislation.

Administrative penalties are imposed by the Saskatchewan Financial Services Commission (SFSC) only after a formal hearing:

> 135.1 (1) The Commission may make an order pursuant to subsection (2) where the Commission, after a hearing:
>
> (a) is satisfied that a person or company has contravened or failed to comply with:
>
> (i) Saskatchewan securities laws; or
>
> (ii) a written undertaking made by that person or company to the Commission or the Director; and
>
> (b) considers it to be in the public interest to make the order.

The SFSC was established in 2003 under *The Saskatchewan Financial Services Commission Act*[15] to administer *The Securities Act, 1988* and other regulatory legislation; it is the successor to the old Securities Commission. An SFSC publication, *Securities Regulation in Saskatchewan,* summarizes the functions of the Commission thus:

> The SFSC makes Commission regulations, establishes policy, grants orders and rulings under the *Act*, functions as a quasi-judicial tribunal in conducting hearings under the *Act*

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[13]*The Securities Act*, *1988*, S.S. 1988-89, c. S-42.2.
[14]Section 135.1, adopted by amendment, 1995, c.32, s.57.
[15]*The Saskatchewan Financial Services Commission Act*, S.S. 2002, c. S-17.2.

> and acts as an appeal body from decisions of the staff. Staff in the SFSC's Securities Division carry out the day-to-day regulatory functions under the *Act*.[16]

Hearings conducted by the Commission give the subject of the complaint an opportunity to be heard, present evidence, and respond to allegations. The standards of procedural fairness applied by the Commission are high.[17] In addition, imposition of an administrative penalty by the Commission may be appealed to the Saskatchewan Court of Appeal.[18]

Saskatchewan securities regulation follows principles similar to those adopted by other Canadian securities regulators, and regulators across the country work closely together. The Ontario *Securities Act* differs from its Saskatchewan counterpart in that it allows the Commission to impose an administrative penalty without a hearing,[19] but a hearing may be demanded to review the decision to impose the penalty.[20] The Commission's final decision may then be appealed to the courts.[21]

Subsection 135.1(1) of the Saskatchewan *Securities Act, 1988* allows a penalty to be imposed if the SFSC is "satisfied" that a contravention has occurred. This amounts to a standard or burden of proof, comparable to the standard in civil trials of proof on a balance of probabilities. It is a lower standard than the proof beyond a reasonable doubt required in prosecution of offences.

Subsection 135.1(4) provides that:

> (4) If the Commission has made an order against a person or company pursuant to this section, the Commission may also make an order pursuant to this section against:
>
> (a) every director or officer of that person or company who directed, authorized, permitted, assented to, acquiesced in or participated in the contravention of or failure to comply with Saskatchewan securities laws or an undertaking to the Commission or Director by that person or company; and
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> (b) every other individual who directed, authorized, permitted, assented to, acquiesced in or participated in the contravention of or failure to comply with Saskatchewan securities laws or an undertaking to the Commission or Director by that person or company.

This extends liability to directors and officers and others who are responsible for contraventions. Such an extension of liability applies when offences are charged, but in the absence of section 135.1(4), it might be uncertain whether it would apply to an administrative penalty. However, the legislation does not clarify the application of other principles that apply to prosecutions,

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[16] Saskatchewan Financial Services Commission Securities Division, *Securities Regulation in Saskatchewan*, n.d.

[17] See the SFSC Order 12-602, "Procedure on hearings and reviews before the Commission." The Order is a comprehensive procedural handbook. Hearings and reviews before the Commission are best characterized as "internal review" by the regulator, since they are not conducted by a tribunal separate from the Commission.

[18] Section 11.

[19] *Securities Act*, R.S.O. 1990, c. S.5, s. 127(1) 9.

[20] Section 8.

[21] Section 9.

including vicarious liability of corporations for actions of their employees, and the defense of due diligence usually available to persons accused of regulatory offences.

The maximum penalty that can be imposed under the *Act* is $100,000. As the Law Reform Commission of Canada observed, to be effective, a penalty must be "perceived by the client as significantly affecting its interests." The profits involved in the issue and trading of securities can be substantial; substantial penalties are required to deter wrongdoing or negligence. In Ontario, the maximum penalty is $1,000,000.

Administrative penalties can be imposed for any breach of securities law. While penalties can be imposed for breaches by licensed securities dealers, the regime goes beyond enforcement of the obligation of licensees. However, in practice the SFSC relies primarily on "enforcement orders" rather than administrative penalties.[22] In addition, since administrative penalties are only imposed after a hearing, the distinction between regulation of licensees and others may be less significant here than under other legislation.

The Saskatchewan Insurance Act[23]

The Saskatchewan Superintendent of Insurance has been authorized to impose administrative penalties since 1998:[24]

> 475.3 (1) If the superintendent is satisfied that a person has contravened a provision of this Act, the superintendent may make an order imposing all or any of the following penalties:
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> (a) an administrative penalty of up to $100,000;
>
> (b) a private or public reprimand;
>
> (c) that the person pay the cost, to a maximum of $100,000, of producing material specified by the superintendent to promote education or knowledge in areas related to consumers and activities of insurers.

The Superintendent of Insurance is the official responsible for administration of *The Saskatchewan Insurance Act.* The Superintendent is thus the investigator and regulator as well as the adjudicator. However, the subject does have some procedural protection. The *Act* gives the subject the right to know the case against it and to respond by making representations to the Superintendent:

> (4) Before assessing a penalty against a person, the superintendent shall cause written notice to be served on the person:
>
> (a) setting out the facts and circumstances that, in the superintendent's opinion, render the person liable to a penalty;
>
> (b) specifying the amount of the penalty that the superintendent considers

[22] Saskatchewan Financial Services Commission Securities Division, *Securities Regulation in Saskatchewan*, n.d.

[23] *The Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26.

[24] Section 475.3, adopted by amendment 1998, c.35, s.40.

appropriate in the circumstances; and

(c) informing the person of his, her or its right to make representations to the superintendent.

There is a right to appeal the Superintendent's decision to impose an administrative penalty to the Court of Appeal.[25]

The maximum penalty under the *Act* is $100,000. This high maximum is presumably justified by the same considerations that are advanced to justify the same maximum under *The Securities Act, 1988*.

As under *The Securities Act*, *1988*, penalties will usually be imposed on licensees, but the scope of the penalty regime is not confined to licensed insurers and their agents. But unlike *The Securities Act*, *1988*, a hearing before a tribunal is not required even when the subject of the penalty is not a licensee.

The Trust and Loan Corporations Act, 1997[26]

Administrative penalties are authorized by section 76 of *The Trust and Loan Corporations Act, 1997*. The administrative penalties regime under the *Act* is almost identical to the regime established by *The Saskatchewan Insurance Act*. There is a right to appeal a decision of the Superintendent of Financial Institutions to the Court of Appeal. As under *The Saskatchewan Insurance Act* and *The Securities Act, 1988* the maximum penalty is $100,000.

The Alcohol and Gaming Regulation Act, 1997[27]

The Liquor and Gaming Authority and Liquor and Gaming Licensing Commission have been authorized to impose administrative penalties since 1998:[28]

> 39.1 (1) The authority or the commission may assess a penalty, within the limits prescribed in the regulations, of not more than $10,000 against any permittee or registrant who fails to comply with any term or condition imposed on the permit, endorsement or certificate of registration by this Act, the regulations, the authority or the commission.

The Authority is responsible for "the regulation and control" of alcoholic beverages and gaming.[29] The Commission is an independent branch of the Authority, and hears appeals from decisions of the Authority.[30] *The Alcohol Control Regulations, 2002*[31] and *The Gaming*

[25]Section 24.
[26]S.S. 1997, c. T-22.2
[27]The Alcohol and Gaming Regulation Act, 1997, S.S. 1997, c. A-18.011.
[28]Section 39.1, adopted by amendment 1998, c.16, s.8; 2000, c.36, s.14.
[29]Section 12.
[30]Section 21.
[31]R.R.S. c. A-18.011 Reg. 1

Regulations, 2007 [32] set out specific penalties. This is the only administrative penalty regime in Saskatchewan at present in which the agency imposing the penalty and the board charged with reviewing the decision are wholly independent. Note also that administrative penalties are imposed only on a "permittee or registrant." Thus the penalty regime is confined to enforcement of the terms of licenses.

The *Act* provides two levels of procedural protection. First, the subject has the right to know the case to be met and to respond to it:

> (3) Before assessing a penalty against a permittee or registrant pursuant to subsection (1), the authority shall provide to the permittee or registrant a written notice:
>
> (a) setting out the facts and circumstances that, in the authority's opinion, render the permittee or registrant liable to a penalty;
>
> (b) proposing:
>
> (i) the amount of the penalty that the authority considers expedient based on the authority's understanding of the circumstances; and
>
> (ii) a specific period of suspension that the authority considers expedient if the permittee or registrant, as the case may be, is assessed a penalty in accordance with this section and fails to pay the penalty in full by the date determined at the time of the assessment;
>
> (c) advising the permittee or registrant that he, she or it may make representations to the commission respecting:
>
> (i) whether or not a penalty should be assessed;
>
> (ii) the amount of a penalty, if any; and
>
> (iii) whether or not the permit or certificate of registration, as the case may be, should be suspended if the permittee or registrant fails to pay the penalty in full by the date determined at the time of the assessment;

Second, the subject may apply for a hearing before the Commission:

> (4) A permittee or registrant who receives a written notice pursuant to subsection (3) may, within 15 days after receiving the written notice, apply for an oral hearing with the commission by:
>
> (a) filing an application with the commission; and
>
> (b) paying the prescribed fee.

The procedural protections under *The Alcohol and Gaming Regulation Act, 1997* are comparable to those under *The Securities Act, 1988*. However, unlike the securities legislation, the alcohol and gaming legislation does not provide for appeal to the court from a decision to impose an administrative penalty. This difference may reflect the fact that there is a structural separation

[32] R.R.S. c. A-18.011 Reg. 5

between the regulatory/licencing role of the Authority and the Commission, which operates only as a review tribunal.

Penalties under the regulations are a minimum of $100 and a maximum of $10,000. The regulations cover a wide range of behaviour. The potential profits involved in gaming and liquor sales arguably justify penalties at least as high as the maximums under the regulations.

The Electrical Inspection Act, 1993[33]

The Electrical Inspection Act, 1993 was amended in 2004 to allow electrical inspectors to impose administrative penalties: [34]

> 28.2 (1) The chief inspector or an inspector may order a person to pay an administrative penalty in an amount not exceeding the maximum amount prescribed in the regulations if the chief inspector or the inspector is satisfied that the person has contravened section 16.

Section 16 governs electrical work done by contractors under permits that "authorize the work of electrical installation specified in the contractor's application." Penalties appear to have been introduced to penalize contractors doing work without obtaining a permit.[35] Thus the use of administrative penalties in electrical inspection is restricted. Regulatory offences likely remain a more important regulatory tool, though data on the use of penalties is not recorded.[36]

Section 28.2 requires notice and gives the subject contractor the right to make a written response, though a full hearing does not appear to be required:

> (2) Before making an order pursuant to subsection (1), the chief inspector or the inspector shall provide written notice to the person:
>
> (a) setting out the facts and circumstances that, in the opinion of the chief inspector or the inspector, render the person liable to a penalty;
>
> (b) specifying the amount of the penalty that the chief inspector or the inspector considers appropriate in the circumstances; and
>
> (c) informing the person of the person's right to make representations to the chief inspector or the inspector.
>
> (3) A person to whom notice is sent pursuant to subsection (2) may make written representations to the chief inspector or the inspector respecting whether or not a penalty should be assessed and the amount of any penalty.

It appears that an internal review and appeal to court are possible. However, the review and appeal provisions were adopted before the administrative penalty provisions, and are not well

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[33] S.S. 1993, c. E-6.3.

[34] Section 28.2, adopted by amendment 2004, c.56, s.15.

[35] See discussion of similar provisions under *The Gas Inspection Act, 1993*.

[36] Saskatchewan *Votes and Proceedings*, Tuesday, April 11, 2006, response to Question No.800: "SaskPower levies administrative penalties pursuant to the authority of the Electrical Inspections Act and the Gas Inspections Act. A record of the number of penalties issued does not exist. To create this record would require the manual review of approximately 2,200 contractor files to extract and compile the data."

integrated with them. Review of a decision of an inspector to the chief inspector is provided in section 32. This presumably applies to administrative penalties imposed by inspectors; no internal review appears to be available if the administrative penalty was imposed by the chief inspector:

> 32 (1) A person aggrieved by a decision, order or directive made by an inspector may, within 30 days after the date of the service of the decision, order or directive on the person, appeal in writing to the chief inspector who may affirm, amend or cancel the decision, order or directive.
>
> (2) The chief inspector shall give notice of, and provide written reasons for, his or her decision to the person mentioned in subsection (1).
>
> (3) An appeal pursuant to subsection (1) does not suspend the operation of the decision, order or directive, but the chief inspector may suspend its operation pending the disposition of the appeal.

Under section 33, a decision of the chief inspector may be appealed to a judge of the Court of Queen's Bench.

The penalty for proceeding to do electrical work without a permit is modest, limited in the Regulations to a maximum of $250.[37]

The Gas Inspection Act, 1993[38]

The Gas Inspection Act, 1993 was amended in 2004 to allow inspectors to impose administrative penalties.[39] The provisions of the *Act* governing administrative penalties parallel those of *The Electrical Inspection Act, 1993*. An inspector or chief inspector may impose a penalty when the permit requirements established by the legislation[40] are breached. Administrative penalties were introduced for the limited purpose of penalizing gas line installation without a permit.[41] Notice and submission requirements are identical to those under *The Electrical Inspection Act, 1993*, as are provisions governing review of inspectors' decisions by the chief inspector[42] and appeal to the Court of Queen's Bench. [43]

As under *The Electrical Inspection Act, 1993*, the penalties for proceeding to do work without a permit is modest, limited in the Regulations to a maximum of $250.[44]

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[37]*The Electrical Inspection Regulations*, R.R.S. c. E-6.3 Reg. 1.
[38]S.S. 1993, c. G-3.2.
[39]Section 35.2, adopted by amendment 2004, c.11, s.16.
[40]Section 12.
[41]When the amendments were introduced in 2004, their purpose was described by the Minister responsible as "strengthening of the process for administrative penalties if and when contractors fail to obtain required permits."
[42]Section 27.
[43]Section 28.
[44]*The Gas Inspection Regulations*, R.R.S. c. G-3.2 Reg. 1.

The Forest Resources Management Act[45]

Administrative penalties are authorized by section 78 of *The Forest Resources Management Act*:

> 78 (1) The minister may assess a penalty in an amount prescribed in the regulations against any licensee if the licensee:
>
> (a) fails to pay dues or fees owing in the amount or by the time specified pursuant to this Act or a licence;
>
> (b) harvests forest products in excess of the volume permitted by a licence or an approved plan;
>
> (c) harvests forest products in contravention of the terms of a licence, an approved plan or any applicable standards set out in a manual established pursuant to section 19.1;
>
> (d) conducts renewal activities in contravention of the terms of a licence, an approved plan or any applicable standards set out in a manual established pursuant to section 19.1;
>
> (e) fails to submit any records or documents with respect to the transportation, scaling, measurement, harvesting, renewal or manufacturing of forest products by the time or in the manner specified pursuant to a licence or an approved plan;
>
> (f) grazes livestock in contravention of the terms of a licence or an approved plan;
>
> (g) operates a processing facility in contravention of the terms of a licence or an approved plan; or
>
> (h) scales forest products in contravention of the terms of a licence, an approved scaling plan or the Scaling Manual.

The *Act* expressly makes companies vicariously liable for the acts of their employees:

> 78(8) The minister may assess a penalty against a licensee pursuant to subsection (1) notwithstanding that the facts and circumstances giving rise to the penalty arose due to the actions of an employee, helper, contractor or agent of that licensee.

Under *The Forest Resources Management Regulations*,[46] administrative penalties of from $100 to $10,000 may be assessed. The maximum is considerably lower than the maximum fines that can be imposed on conviction for an offence under the *Act*. The general offence provision in the *Act* allows a maximum fine of $250,000 for individuals, and $1,000,000 for corporations.

Section 78 contains a notice requirement similar to those in other administrative penalty legislation, and gives the subject the right to know the substance of the allegations and respond to them:

> (2) Before assessing a penalty, the minister shall provide notice to the licensee:

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[45] S.S. 1996, c. F-19.1, as amended 2002, c.31.
[46] R.R.S. c. F-19.1 Reg. 1.

(a) setting out the facts and circumstances that, in the minister's opinion, render the licensee liable to a penalty;

(b) specifying the amount of the penalty that the minister considers appropriate in the circumstances; and

(c) informing the licensee of his or her right to make representations to the minister.

There is no provision for a hearing, or elaboration of the manner in which representation may be made.[47] In practice, submissions are reviewed and recommendations made by designated officials. Thus there is an internal review from the conservation officer who initially determines that a penalty should be assessed, and an official who reviews the case and makes a recommendation to the Minister. However, all decisions are made by members of the same branch of the department.

The absence of a right to appeal administrative penalties appears to have been the result of deliberate policy. The limitation of administrative penalties to licensees appears to have been part of the rationale for the absence of a right of appeal. When the *Act* was amended in 2002, the Minister responsible, in response to a question about the absence of a right to appeal, noted that judicial review would still be available, and that "these are relatively small penalties, they are not huge penalties . The purpose of this is to have some administrative penalties available to folks that may be exceeding their permit or may not be permitted in that area. It's intended to avoid criminal charges. It's more of an administrative penalty option."[48]

In practice, assessed penalties have been relatively small. In 2002-03, 14 administrative penalties were assessed, ranging from $500 to $3,017.[49] Administrative penalties are used primarily to regulate small operators rather than major forest companies. Nevertheless, there have been complaints from operators, who question the absence of an independent adjudication of fact.

The Environmental Management and Protection Act, 2002[50]

Administrative penalties are available to enforce Part IV of *The Environmental Management and Protection Act, 2002*, which deals with "Protection of Water":

77 (1) In this section, "permittee" means a person who holds a permit that has been issued pursuant to Part IV or that has been continued pursuant to subsection 84(5) or (6).

(2) The minister may assess a penalty prescribed in the regulations against any permittee if that permittee has contravened any prescribed provision of this Act or the regulations.

Permits are required under the Act for operation and construction of "waterworks and sewage

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[47]*The Forest Resources Management Regulations*, R.R.S. c. F-19.1 Reg. 1, do further specify the content of the notice, but without providing any additional guidance concerning submissions to the Minister.

[48]Saskatchewan Hansard, July 3 2002, Bill No. 65 *The Forest Resources Management Amendment Act*, 2002.

[49]See Saskatchewan Environment, Forestry Enforcement Report, 2002-03.

[50]S.S. 2002, c. E-10.21

works."[51]

The section contains a notice requirement similar to those in other administrative penalty legislation, and gives the subject the right to know the substance of the allegations and respond to them:

> (3) Before assessing a penalty, the minister shall provide notice to the permittee:
>
> (a) setting out the facts and circumstances that, in the minister's opinion, render the permittee liable to a penalty;
>
> (b) specifying the amount of the penalty that the minister considers appropriate in the circumstances; and
>
> (c) informing the permittee of the permittee's right to make representations to the minister.
>
> (5) A permittee to whom notice is sent pursuant to subsection (2) may make representations to the minister respecting whether or not a penalty should be assessed and the amount of any penalty.
>
> (6) A representation pursuant to subsection (5) must be made within 30 days after the permittee received the notice pursuant to subsection (2).

There is no provision for a hearing, or elaboration of the manner in which representation may be made.

As under *The Forest Resources Management Act*, there is no appeal from an administrative penalty.[52]

The Water Regulations, 2002 provide for penalties of $1000 to $5000, depending on the severity of the breach.[53]

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[51] Sections 21-23.
[52] Section 54.
[53] R.R.S. c. E-10.21 Reg. 1.

ENSURING PROCEDURAL FAIRNESS: ISSUES FOR CONSIDERATION

1. Background: Legal principles

In *Martineau v. MNR*, the Supreme Court of Canada recently upheld provisions in the *Customs Act* allowing customs officials to declare property illegally imported into Canada forfeit.[54] Although the provisions in question imposed forfeiture rather than a monetary penalty, the decision is almost certainly applicable to administrative penalties. The *Martineau* decision likely stands for the proposition that administrative penalties are not objectionable in principle, but it is unlikely to end questions about administrative penalties. Although the adequacy of safeguards was not directly in issue in *Martineau*, it assumed that the administrative regime met the minimum standards of natural justice, and that its purpose was truly regulatory rather than punitive. If a particular administrative penalty regime fails to meet this test, it will almost certainly be held to be unacceptable by the courts.

In *Euston Capital Corp. v. Saskatchewan Financial Services Commission*, the Court of Appeal recently upheld imposition of an administrative penalty. Although the penalty regime itself was not in issue, the decision suggests that Saskatchewan courts will accept administrative penalties in principle. However, the Court of Appeal also indicated that penalties will be upheld only if adequate procedural safeguards are adopted by the regulator.[55]

Administrative penalties, criminal law, and section 11 of the Charter. The primary issue before the court in *Martineau* was whether the penalties contained in the *Act* amounted to "penal provisions" which would attract application of section 11 of the *Charter of Rights*. This section provides in part that:

> Any person charged with an offence has the right not to be found guilty on account of any act or omission unless, at the time of the act or omission it constituted an offence under Canadian or international law; [and] to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The court held that "proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute" are not penal in nature. However, this formula was adopted from an earlier decision, *R v. Wigglesworth*.[56] Professor Hogg, arguing against

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[54] [2004] 3 S.C.R. 737, 2004 SCC 81.

[55] 2008 SKCA 22 (14 Feb 2008), affirmed [2004] 3 S.C.R. 737, 2004 SCC 81. See further discussion below.

[56] [1987] 2 S.C.R. 541.

administrative penalties, noted that in *Wigglesworth* the court stated that in some cases, "true penal consequences" could be deduced if a penalty "by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity." This may put the status of administrative penalties in statutes such as *The Securities Act, 1988*, which provides for penalties of up to $100,000, in question. Advocates of administrative penalties argue that to provide effective regulation, the magnitude of a penalty must be sufficient to encourage compliance, and not so low as to amount to a "cost of doing business."[57] Thus high penalties are not necessarily penal if administrative effectiveness requires them. Nevertheless, even supporters of administrative penalties admit that "the true function of the penalty may not always be readily apparent."[58]

Natural justice and administrative penalties. The courts have long exercised a jurisdiction to review administrative decisions that affect individuals. Although a distinction was formerly made between "quasi-judicial" decisions subject to review, and purely administrative or "executive" decisions which were not, the distinction has been eroded. The Supreme Court of Canada has held that:

> There is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges, or interests of an individual.[59]

The principles have been summarized as follows:

> The first two principles of natural justice are that persons whose interests may be affected by a decision should firstly be given notice of the case to be met or the allegations against them and secondly, an opportunity to be heard. The third fundamental principle of natural justice is that the decision maker should be disinterested and impartial. The policy reasons behind all three aspects of the rules of natural justice is the same: Namely, not only must justice be done, but it must manifestly be seen to be done. It is a matter of important public policy that there be no lack of public confidence in the impartiality of adjudicative tribunals.[60]

The courts will undoubtably expect regulators applying administrative penalties to act fairly, and can be expected to overturn penalties where minimum standards of fairness, as defined by the courts, have not been observed. It should be noted that, because the courts are concerned that justice must be seen to be done, even actions that are motivated by an intention to be fair may fail to meet the required standard. However, what constitutes procedural fairness is defined by the

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[57]For example, the Alberta Environmental Appeals Board, upholding what was impugned as an excessively high penalty, was of the opinion that "the amount of the penalty must reflect the regulatory matrix associated criteria. The Board believes that to achieve the goal of deterrence, the penalty must also be high enough so that those who violate the law without reasonable excuse will not be able to 'write off' the penalty as an acceptable trade-off for the harm or potential harm done to Alberta's environment."

[58]Amanda Tait, "The Use of Administrative Monetary Penalties in Consumer Protection," Public Interest Advocacy Centre (PIAC), May, 2007.

[59]*Cardinal v. Kent Institution* (1986) 16 Admin. L.R. 233 (SCC). This principle has frequently been reiterated by the court.

[60]James Casey, *The Regulation of Professions in Canada*.

courts. The extent of the duty imposed on regulators varies. It has been noted that:

> The content of procedural fairness ranges across a spectrum. At one end of the spectrum procedural fairness emulates the procedures of adversarial litigation whereby affected persons are given notice that a decision will be made, and are allowed an oral hearing with a right to legal representation and to cross-examination. As one moves along the spectrum, depending on the circumstances of each case and the relevant statutory provisions, the content of procedural fairness may reduce, for example, by allowing for written submissions rather than an oral hearing, or by not providing for legal representation.[61]

Thus, for example, the courts have said that "probably no principle is more fundamental to administrative law than [the] rule of natural justice that parties be given adequate notice and opportunity to be heard."[62] But what constitutes adequate opportunity to be heard depends on the circumstances. When a tribunal has been established to make administrative decisions, the courts have preferred full "oral" hearings at which the parties present evidence, cross-examine witnesses, and respond to the evidence and arguments made by each other. However, a full hearing has not been insisted upon by the courts as a basic requirement of natural justice in all cases. A hearing may be necessary, for example, to suspend a professional's right to practice, but not to impose a minor penalty.[63]

When the principles of natural justice are applied to administrative penalties, a basic question is where the procedure imposing the penalty fits in the spectrum of procedural fairness. Although administrative penalties are usually imposed by the regulator instead of an independent decision maker, and without holding a full hearing, the courts have not found the procedure in violation of the principles of natural justice for those reasons alone. It is clear from the *Martineau* decision that hearings are not always necessary when administrative penalties are imposed. There may, nevertheless, be circumstances in which a hearing may be required by the courts when an administrative penalty is assessed. It has been held in other contexts that a full hearing may be required by the principles of natural justice if "reputation, livelihood, or matters of serious import" are at issue.[64] This suggests that a hearing may be required if the penalty is large enough to threaten the economic survival of the subject.[65]

Administrative penalties are imposed by agencies that also administer the regulatory system the penalties are intended to enforce. The principles of natural justice require that a decision maker should be disinterested and impartial. The courts have held that even a "reasonable apprehension" of bias is sufficient to overturn a decision.[66] Thus, the fact that the regulator and adjudicator are part of the same agency may create an apprehension that the decision is not

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[61] ALRC, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Final Report), March 2003.

[62] *Canadian Transit Co. v. Public Service Staff Relations Board (Can.)* (1989), 39 Admin . L.R. 140.

[63] See the discussion in Jones and de Villars, *Principles of Administrative Law (2nd ed.),* (1994), Carswell, Toronto, ch. 9.

[64] *Pett v. Greyhound Racing Assoc.* (1968), 2 WLR 1471 (Eng. CA).

[65] See comments on this point in Amanda Tait, "The Use of Administrative Monetary Penalties in Consumer Protection," Public Interest Advocacy Centre (PIAC), May, 2007.

[66] See Jones and de Villars, *Principles of Administrative Law (2nd ed.),* (1994), Carswell, Toronto, ch.10.

impartial, even if the agency has in fact acted impartially.[67]

This rule applies in principle to all administrative decisions, but the requirements of the rule depend on the circumstances.[68] If administrative penalties are likened to offences, the regulator can be regarded as both prosecutor and judge, a situation that would be likely to create an apprehension that the process is not impartial. However, the purpose of properly applied administrative penalties is not penal, and Canadian courts have not been prepared to find that imposition of administrative penalties by regulators is inherently unfair. Nevertheless, care must be taken by regulators to maintain impartiality. Failure to do so invites judicial review.

The status of administrative penalties may also depend on their function in the regulatory system. Many administrative penalties apply only to persons licensed to undertake a regulated activity. Even when the governing legislation allows administrative penalties to be used in other cases, they are often used primarily in practice to regulate licensees. Although there is no clear judicial authority on this point, it is likely that less stringent procedural safeguards would be required by the courts when penalties are used to enforce what amount to the terms of licenses granted to individuals who have, by seeking the license, subjected themselves to a regulatory regime.

2. Appeal of Administrative Penalties

The principles of natural justice are flexible. The courts have not insisted on rigid formulas. The question is essentially practical: Does the administrative regime produce fair results? In general, administrative penalties appear to be acceptable to the courts even if they are imposed without a full, formal hearing before an independent adjudicator. But in such cases, the courts will undoubtedly expect procedural fairness to be protected in other ways. It can be argued that a broad right to appeal to an independent adjudicator is an effective means of ensuring fairness.

A right to appeal an administrative action, including imposition of an administrative penalty, exists only if it is specifically provided by statute. As Jones and de Villars state in their *Principles of Administrative Law*:

> There is no legal or constitutional requirement that an appeal should exist from any decision made by a statutory delegate. It is possible, therefore, to find numerous examples where legislation has made no provision for an appeal, whether to the courts or to another step in the administrative hierarchy.[69]

However, appeals from many types of administrative decision are provided by statute. Five of the eight Saskatchewan statutes authorizing administrative penalties provide for appeals to the courts. Only *The Forest Resources Management Act* and *The Environmental Management and Protection Act, 2002* do not allow for independent review of the imposition of administrative

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[67]See further discussion in Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report no 39 (1995), Commonwealth of Australia, Canberra..

[68]Jones and de Villars, *Principles of Administrative Law (2nd ed.*), (1994), Carswell, Toronto, ch.10, citing *Syndicat des employes de production du Quebec v. Canada,* (1989) 2 SCR 879 (SCC).

[69]Jones and de Villars, *Principles of Administrative Law (2nd ed.*), (1994), Carswell, Toronto, ch.13.

penalties. No appeal to the courts is provided for in *The Alcohol and Gaming Regulation Act, 1997*, but a decision of the regulatory Authority established by the *Act* may be appealed to the Commission established by the *Act*.

A recent review of administrative penalties in Canada observed that "most administrative penalties provide for a right of review, although typically not before the penalty becomes enforceable." [70] The lack of a right of appeal under *The Forest Resources Management Act* has been criticized by both the forest industry and others. Failure to provide for appeal from all administrative penalties is the most obvious and contentious issue regarding administrative penalties in Saskatchewan.

When should there be a right of appeal from imposition of an administrative penalty?

A distinction must be made between appeal, internal review, and judicial review. An appeal, as usually understood in administrative law, is a review of the merits of an administrative action by an independent decision maker, either a court or an administrative tribunal. Typically, an appeal will require a hearing at which both the regulator and the subject will have a right to make submissions and respond to the submissions of one another. Internal review is a reconsideration of administrative action by another official of the agency that took the action. It may be authorized by statute, or created by an administrative agency as part of its decision making process. It may or may not involve a hearing.[71] While internal review may often be valuable, it may not be a replacement for appeal to an independent tribunal or court.[72]

Judicial review of administrative decisions is essentially a common law right. The courts have always exercised a jurisdiction to supervise decisions made by public officials. On judicial review, a court has the power to set aside decisions where the regulator has exceeded its jurisdiction or the proper legal process has not been followed.[73] There is little doubt that judicial review of all administrative penalties is available. Saskatchewan legislators have assumed that judicial review is available, and justified the absence of a right of appeal from imposition of certain administrative penalties on that ground.[74]

Note that the scope of judicial review is limited. It does not permit review of the evidence or merits of a decision. It is concerned only with whether the decision was reached following proper procedures. It is thus not an appeal proceeding, and not a replacement for appeal in cases in which a review on the merits is appropriate. The question is then, will appeal of administrative penalties on the merits contribute significantly to achieving the fairness and efficiency that should characterize the regulatory process?

As the courts have elaborated the principles of natural justice applicable to administrative decisions, the tendency has been toward more emphasis on the desirability of independent review

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[70] Amanda Tait, "The Use of Administrative Monetary Penalties in Consumer Protection," Public Interest Advocacy Centre (PIAC), May, 2007.

[71] See, for example the internal review authorized under *The Electrical Inspection Act*, discussed above.

[72] However, internal review will be discussed in the next chapter.

[73] See Jones and de Villars, *Principles of Administrative Law (2nd ed.),* (1994), Carswell, Toronto, ch.5.

[74] *Saskatchewan Hansard*, July 3 2002, Bill No. 65 *The Forest Resources Management Amendment Act, 2002*.

on the merits. Many advocates of administrative law reform have suggested that a right of appeal to an independent decision maker should be the general rule, displaced only in a limited range of cases. The Australian Law Reform Commission argues that appeals from most administrative penalties are appropriate and desirable:

> When penalties are imposed administratively by a regulator, many of the benefits of independence and transparency that are inherent in a court-imposed penalty scheme may be lost. Here the value of an appeal and review mechanism becomes more pronounced.[75]

The Commission recommended that:

> Recommendation 20 1. All penalty schemes should provide avenues of internal review, external merits review and judicial review, unless one or more of these is clearly inappropriate in the circumstances.

However, some regulators and administrative law experts argue that appeal rights can compromise the regulatory system. It has been observed that "administrative penalties are said to be largely directed at promoting the smooth running of social and economic structures, and are thus broadly separable from criminal penalties."[76] They are intended to be regulatory tools, designed to encourage and enforce compliance with the rules associated with regulated undertakings. If the regulatory system is to work smoothly and efficiently, the imposition of penalties and other administrative sanctions should be informed by knowledge of the structure and purpose of the regulatory regime, and final decisions should be reached with a minimum of delay and expense. Thus Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice,* while recognizing that appeals are often viewed as a useful safeguard, also note that:

1. Appeals may increase delays and costs;

2. Differences between the policies favoured by regulators and those applied on appeal may produce confusion and misunderstanding of the expectations of the regulatory system;

3. Appeals involving legalistic arguments before judges or other generalist decision makers may provide less timely and less expert decisions than decisions by specialists; and

4. Appeals may be regarded as the "real decision," leading to proliferation of appeals, delay, and expense.[77]

The Australian Commission considered the problems associated with appeals, but concluded that:

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[75]ALRC, Principled Regulation: Federal Civil and Administrative Penalties in Australia (Final Report), March 2003.

[76]Amanda Tait, "The Use of Administrative Monetary Penalties in Consumer Protection," Public Interest Advocacy Centre (PIAC), May, 2007.

[77]R Baldwin and M Cave, Understanding Regulation: Theory, Strategy and Practice (1999) Oxford University Press, Oxford, 295.

> Despite these disadvantages, the ALRC considers that the public interest in regulators acting in a consistent, fair and transparent manner demands that regulators be accountable for their decisions through the provision of systems of appeal and review. The ALRC acknowledges that all three forms of review internal review, external merits review and judicial review may not be necessary or appropriate in all situations, however, the ALRC considers that, particularly in relation to decisions to impose quasi-penalties that have the potential to directly adversely affect the person on whom the penalty is imposed, as a general principle all three forms of review should be available.[78]

Judicial review alone is not regarded as an adequate substitute for appeal by the Australian Commission and other advocates of broad appeal rights. On judicial review, the courts will apply the principles of natural justice to overturn decisions in which minimum standards of procedural fairness have been breached. The applications typically involve at least as much delay and expense as appeals. The outcome is often less certain, and may not be an adequate safeguard in all cases. In addition, it can be argued that an appeal mechanism is itself a corrective to perceived problems of fairness because it allows for an independent review of the initial decision.

Even if a right of appeal from imposition of an administrative penalty should be recognized as the general rule, there may be some circumstances in which appeals are not necessary to ensure procedural fairness. Three factors that bear on this issue deserve consideration.

1. *The magnitude of the penalty.* It was noted above that in *R v. Wigglesworth*,[79] the Supreme Court of Canada held that administrative penalties and similar administrative sanctions are only acceptable if they do not impose "true penal consequences." The court also suggested that penal consequences might be deduced if a penalty "by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity." It was also noted above that the most stringent procedural safeguards have been required when "reputation, livelihood, or matters of serious import" are at issue.[80] This suggests that a hearing may be required if the penalty is large enough to threaten the economic survival of the subject. The converse of the proposition may also be true: close scrutiny and appeal rights may not be necessary or appropriate if the penalty is small.

2. Penalties regulating licensees. The situations in which administrative penalties are most appropriate are those in which administrative efficiency is important. This is particularly the case when administrative penalties are imposed on licensees. A license is an authorization to undertake regulated activities; by becoming licensed, the licensee has agreed to be subjected to a regulatory system. Licensees expect regulators to scrutinize their activities, and to respond quickly and clearly to breaches of the conditions under which they operate. An argument can be made that in this context, appeals on the merits may compromise administrative efficiency. Judicial review is still available to ensure that regulators act properly if there is no right of appeal. It can be argued that this is the appropriate and sufficient safeguard when regulators

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[78] ALRC, Principled Regulation: Federal Civil and Administrative Penalties in Australia (Final Report), March 2003.

[79] [1987] 2 S.C.R. 541.

[80] *Pett v. Greyhound Racing Assoc.* (1968), 2 WLR 1471 (Eng. CA).

impose penalties on licensees.

3. Penalties triggered by clear circumstances. The Australian Law Reform Commission argued that appeals should be available in any case in which discretion or judgment is involved in reaching a decision. But it believed that appeals are less necessary in the case of what the Commission calls a "true administrative penalty." This is a "penalty which arises by operation of legislation when certain triggering events or circumstances are present." An example might be a penalty for failure to obtain a required permit to carry out a specified undertaking. The penalties imposed under *The Electrical Inspection Act, 1993* and *The Gas Inspection Act, 1993* may fit within this definition, though these *Acts* in fact provide for both internal review and appeal.

It may be that the drafters of *The Forest Resources Management Act* and *The Environmental Management and Protection Act, 2002*, neither of which provide for appeals, regarded the penalties that can be imposed under them as straightforward matters. However, there is room for doubt. Under *The Forest Resources Management Act*, penalties are imposed for a variety of purposes which may involve questions of judgment and assessment of evidence. For example, a penalty may be imposed if the subject "harvests forest products in contravention of the terms of a licence, an approved plan or any applicable standards." Similarly, under *The Environmental Management and Protection Act, 2002,* a penalty may be imposed if a "permittee has contravened any prescribed provision of this Act or the regulations."

Questions for Consideration

These questions are intended only for the purpose of eliciting comment. Please feel free to go beyond them. We would appreciate as much explanation of your answers and comments as possible.

1. *Should a right of appeal from imposition of administrative penalties be available:*

    (a) *in all cases;*

    (b) *as the general rule;*

    (c) *only exceptionally; or*

    (d) *not at all?*

2. *Is the magnitude of the penalty which may be imposed a factor in determining whether a right of appeal should be provided?*

3. *Is a right of appeal generally necessary from a penalty imposed on a licensee conducting a regulated activity?*

4. *Is a right of appeal generally necessary when a penalty is imposed if the penalty is triggered by a clearly defined event?*

Should appeals from administrative penalties be to the courts or to administrative tribunals?

At present, most Saskatchewan statutes authorizing administrative penalties that allow for appeals provide for appeal to either the Court of Queen's Bench (under two statutes), or the Court of Appeal (under three statutes). One statute provides for appeal to an independent administrative tribunal rather than to the courts. It is not surprising that appeal provisions are inconsistent in this regard. As Jones and de Villars note, in Canadian administrative law "there does not appear to be a discernable pattern about which level of court should hear an appeal."[81]

Since the principal function of the Court of Appeal is to hear appeals in all civil and criminal matters, it is a logical choice to hear appeals from administrative penalties. However, the Court of Queen's Bench has long had a limited appellate jurisdiction and a role in judicial review of administrative actions, and proceedings in the Court of Appeal typically are more time consuming and expensive. Provincial courts likely could not be given appellate jurisdiction for constitutional reasons.

Perhaps a more important question is whether appeals from administrative penalties should go, at least at first instance, to an independent administrative tribunal rather than to the courts. Only one Saskatchewan statute (*The Alcohol and Gaming Regulation Act, 1997*) presently creates a fully independent tribunal to hear appeals from administrative penalties. One other (*The Securities Act, 1988)* assigns appeals to a tribunal which, if not fully independent in a technical sense, maintains high standards of procedural fairness.

It is perhaps surprising that appeal tribunals are not more widely used to review administrative penalties in Saskatchewan. Specialized tribunals are an important part of administrative law in Saskatchewan, appeals from administrative penalties are often assigned to tribunals elsewhere in Canada, and tribunals are extensively used for this purpose in Australia.[82]

Administrative tribunals in Saskatchewan are varied, running a gamut from the provincial Labour Relations Board to municipal Development Appeal Boards. These tribunals are designed to make independent, unbiased decisions.[83] Thus, for example, Development Appeals Boards review decisions of civic officials denying building permits, and have authority to waive strict compliance with zoning bylaws and building regulations. They are appointed by municipal councils, but do not include councillors or civic employees, and are expected to operate at arm's length from the civic authorities.

There may be some advantages in creating administrative tribunals to hear appeals from administrative penalties:

1. Administrative tribunals are typically specialized. The tribunal appointed to hear the appeals under a statute typically includes members with relevant experience and expertise. This meets the criticism that is leveled at appeal to "generalist" judges who lack specialized

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[81]Jones and de Villars, *Principles of Administrative Law (2nd ed.),* (1994), Carswell, Toronto, ch. 13.

[82]ALRC, *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (Final Report), March 2003.

[83]See the Commission's *Model Code of Administrative Procedure* (2007).

knowledge of the undertakings or activities regulated by administrative penalties.

2. Procedure before most administrative tribunals in Saskatchewan is informal, and decisions can be made quickly.

3. The cost of maintaining specialized tribunals is usually modest. Members of smaller tribunals are typically paid a per diem when they are hearing cases. Thus the cost of the tribunal is proportionate to its workload.

4. Tribunals may be more accessible than courts. If appeals are to make a real contribution to fairness, they must be readily accessible. The cost and delay involved in court proceedings may discourage appeals to court even in cases that ought to be reviewed. If the penalties involved are relatively modest, the cost of appeals to court is obviously a more significant problem.

However, tribunals may not be appropriate in all cases:

1. If the number of penalties imposed and the number of appeals lodged are small, creation of a tribunal to hear the appeals may be difficult to justify.

2. The availability of review by a tribunal may encourage inappropriate appeals, made simply because it is relatively easy and inexpensive to do so. This would compromise the efficiency of the administrative penalty regime, and many of the advantages associated with appeals to tribunals would be lost. This problem might be addressed by limiting the scope of appeals, as discussed below. If on the other hand, appeals are directed to the courts rather than tribunals, careful attention must be given to promoting procedural fairness when the regulator imposes the penalty in the first instance. This will also be discussed below.

3. Access to tribunals may be difficult in northern and rural Saskatchewan. Some administrative penalties, such as those under *The Forest Resources Management Act*, are often imposed on licensees outside urban centres. A tribunal with a province-wide mandate may be less accessible than the courts, which sit regularly at communities throughout the province.

Questions for Consideration

These questions are intended only for the purpose of eliciting comment. Please feel free to go beyond them. We would appreciate as much explanation of your answers and comments as possible.

5. *When there is a right of appeal from an administrative penalty, should it be:*

   (a) *to the Court of Queen's Bench;*

   (b) *to the Court of Appeal; or*

   (c) *to an administrative tribunal established to hear such appeals?*

What should the scope of appeals from administrative penalties be?

An appeal is a review that usually goes beyond the narrow procedural and jurisdictional issues that can be addressed by judicial review. However, the scope of appeals varies. In some existing legislation authorizing appeals from administrative decisions, the scope is limited to questions of law and jurisdiction. In this case, the issues that can be considered are similar to those relevant on judicial review. Some legislation explicitly provides for a review "on the merits," which allows reassessment of the evidence. In a few cases, the issues may be considered *de novo* in a new hearing. Most typically, the legislation does not specifically set out the scope of appeal. In such cases, the courts have usually held that an appeal on the merits is appropriate.[84]

In an appeal on the merits, the decision of the court will be based on evidence submitted by the parties at first instance. This approach is less time consuming than a hearing *de novo*, and helps prevent appeals from being merely a second opinion. However, the extent to which fairness can be protected when the scope of appeals is limited in this way may depend in large part on whether the subject of the penalty was given an adequate opportunity to respond to allegations when the penalty was imposed.

Questions for Consideration

These questions are intended only for the purpose of eliciting comment. Please feel free to go beyond them. We would appreciate as much explanation of your answers and comments as possible.

6. When there is a right of appeal from an administrative penalty, should it be:

(a) on the merits;

(b) by trial novo; or

(c) limited to issues of law and jurisdiction similar to those relevant on judicial review?

3. Procedural Fairness when Penalties are Assessed

Issues of procedural fairness when an administrative penalty is imposed arise before the final decision to assess a penalty has been made. An appeal can correct errors after the fact, and may compensate for some procedural inadequacies. But it is undoubtedly good administrative practice to maintain appropriate standards of administrative fairness throughout the process. A regulator who fails to do so may be subject to sanction upon judicial review for breach of the principles of natural justice developed by the courts.

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[84] Jones and de Villars, *Principles of Administrative Law (2nd ed.),* (1994), Carswell, Toronto, ch. 13.

Because administrative penalties are relatively new, the courts have not fully investigated the application of the principles of natural justice to them. As noted above, these principles are flexible, and are less onerous in some situations than in others. Most administrative penalties likely require less stringent rules of procedural fairness than the rules applied to administrative tribunals and similar administrative decisions. Some of the issues of procedure that may arise when administrative penalties are imposed will be identified below.

Disclosure

Failure to give notice of the case to be met is grounds for overturning an administrative decision on judicial review.[85] All Saskatchewan administrative penalties legislation requires that the regulator give notice to the subject of intent to impose a penalty. *The Electrical Inspection Act, 1993* is typical:

> 28.2 (2) Before making an order [imposing a penalty] pursuant to subsection (1), the chief inspector or the inspector shall provide written notice to the person:
>
> (a) setting out the facts and circumstances that, in the opinion of the chief inspector or the inspector, render the person liable to a penalty;
>
> (b) specifying the amount of the penalty that the chief inspector or the inspector considers appropriate in the circumstances; and
>
> (c) informing the person of the person's right to make representations to the chief inspector or the inspector.

This formula is clear, and if conscientiously followed, will satisfy the first principle of natural justice.

Questions for Consideration

These questions are intended only for the purpose of eliciting comment. Please feel free to go beyond them. We would appreciate as much explanation of your answers and comments as possible.

7. Are the statutory rules governing notice and disclosure when it is proposed to impose an administrative penalty presently in place in Saskatchewan adequate?

Hearings

What constitutes adequate opportunity to be heard depends on the circumstances. It is clear from the *Martineau* decision that full oral hearings are not always necessary when administrative penalties are imposed. In some cases, a written submission by the person affected may be adequate. However, in some contexts the courts have required a full hearing at which evidence is presented and the person affected is present as a participant. This is the case, for example, if "reputation, livelihood, or matters of serious import" are at issue.

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[85] *Wiswell v. Winnipeg*, [1965] SCR 512.

Penalties of $100,000 may be imposed under *The Securities Act, 1988, The Trust and Loan Corporations Act, 1997*, and *The Saskatchewan Insurance Act*. Under *The Securities Act, 1988*, penalties are imposed by the Saskatchewan Financial Services Commission only after a hearing. It can be argued that to promote fairness and protect the regulatory process, a hearing should at least be available at the request of the subject when penalties of this order of magnitude are possible. *The Alcohol and Gaming Regulation Act, 1997,* which permits penalties of up to $10,000, is a possible model in this regard. It provides that:

> 39.1 (4) A permittee or registrant who receives a written notice pursuant to subsection (3) may, within 15 days after receiving the written notice, apply for an oral hearing with the commission by:
>
> (a) filing an application with the commission; and
>
> (b) paying the prescribed fee.

Note, however, that a hearing may be requested under the *Act* even if the proposed penalty is small. The regulations affix penalties of as little as $100 for some breaches of the *Act.*

Most administrative penalties under Saskatchewan legislation are modest. It is unlikely that the courts would impose a hearing requirement in these cases. In fact, if hearings were routine, the simplicity and responsiveness that make administrative penalties an attractive regulatory tool might be compromised. Perhaps the issue is whether a hearing should be required or offered when the proposed penalty exceeds a stipulated amount.

Questions for Consideration

These questions are intended only for the purpose of eliciting comment. Please feel free to go beyond them. We would appreciate as much explanation of your answers and comments as possible.

8. Should a right to a full oral hearing when an administrative penalty is to be imposed be:

(a) the general rule;

(b) limited to cases in which the proposed penalty exceeds a specified amount; or

(c) available on request of the person affected?

Impartiality

As noted above, by the very nature of the process, the regulator cannot be a truly independent decision maker when it both investigates apparent breaches of the regulatory scheme and imposes an administrative penalty. Canadian courts have not been prepared to find that imposition of administrative penalties by regulators is inherently biased. Nevertheless, care should be taken by regulators to maintain impartiality. Failure to do so invites judicial review.

Perhaps the most important way in which bias can be avoided is by rigorous respect for the subject's right to be heard and respond to allegations. Several other mechanisms to encourage impartiality have also been recommended.

The Australian Law Reform Commission suggests that agencies should develop guidelines to ensure procedural fairness when penalties are imposed, and provide for training in procedural matters for staff charged with adjudication of penalties. The Commission observes that:

> There is obviously a need for government authorities to provide training sessions to decision-makers, to provide up to date agency policy manuals which reflect developments in the law, and to create a general awareness in decision-makers of the fundamental requirements of the principles of procedural fairness ... if such an educative regime is observed, administrative error will tend to flow at the outer boundaries of previously articulated principles rather than from a general lack of understanding of the law.[86]

It has been suggested that staff who receive submissions from subjects and make the final decision to impose a penalty should maintain an arm's length relationship with the agency while engaged in the process. Thus, it has been recommended that the decision-maker should not take instruction from superiors or discuss issues with other staff members unless the subject is made a party to the discussion.

The appearance of bias may be avoided by having a system of internal review in place. Internal review has been described in these terms:

> Internal review involves reconsideration of a decision within the same agency by a person other than the original decision maker. In most cases, the review officer may make a new decision based on the merits of the matter or affirm the original decision. Another officer within the same agency, usually a more senior officer, undertakes the review. The review may be undertaken in consultation with the original decision maker, but the person making the decision on review should be independent of the original decision maker. Internal review can take a number of forms and an agency may have more than one system of internal review. Some agencies have relatively formal internal review systems, while others have less formal systems in place.[87]

Internal review of imposition of administrative penalties is required under two Saskatchewan statutes, *The Electrical Inspection Act, 1993* and *The Gas Inspection Act, 1993*. Jones and de Villars note that regulatory agencies often create internal review mechanisms, even when review is not required by statute, as a matter of good administration.[88] Perceptions of partiality can also be avoided by having a system of review. The Australian Administrative Review Council recommends internal review as:

> … a quick and easily accessible form of review which can efficiently satisfy large numbers of people who might otherwise not take up external review rights (because of perceived barriers), or unnecessarily pursue the more resource- and time-consuming external processes (with internal review acting as a filter).[89]

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[86] ALRC, Principled Regulation: Federal Civil and Administrative Penalties in Australia (Final Report), March 2003.

[87] ALRC, Principled Regulation: Federal Civil and Administrative Penalties in Australia (Final Report), March 2003.

[88] Jones and de Villars, Principles of Administrative Law (2nd ed.), (1994), Carswell, Toronto, ch. 13.

[89] Administrative Review Council, Better Decisions: Review of Commonwealth Merits Review Tribunals, Report no 39 (1995), Commonwealth of Australia, Canberra.

Questions for Consideration

These questions are intended only for the purpose of eliciting comment. Please feel free to go beyond them. We would appreciate as much explanation of your answers and comments as possible.

9. What steps can be taken to ensure impartial decision making when administrative penalties are imposed?

10. Would development of agency procedural guidelines governing administrative penalties, and staff training based on the guidelines, make a significant contribution to ensuring fairness when penalties are imposed?

11. When would establishment of a system of internal review of decisions to impose administrative penalties be appropriate?

Reasons for decision

Although legislation usually does not explicitly require administrative decision-makers to give reasons for their decisions, most administrative tribunals now accept that the participants are entitled to reasons. The trend in the courts is to encourage decision-makers to give reasons. In the *Euston Capital* case[90], the Saskatchewan Court of Appeal recently ruled that reasons are required in at least some cases when an administrative penalty is imposed. In that case, the Saskatchewan Financial Services Commission imposed a penalty of $50,000 after a hearing, but did not give reasons explaining why its decision was appropriate. The court held that:

> in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere.

Reasons for decisions assist the affected party in assessing whether to make an appeal or application for judicial review. More generally, fairness may require explaining the reasons for a decision, at least if they are not obvious from the context. An obligation to give reasons may also help decision-makers to focus on the issues before them. It should be noted, however, that the court did not hold that reasons for decision are necessary in all cases in which administrative penalties are imposed. Unless a general rule requiring reasons is adopted, careful consideration of the circumstances in which reasons can be dispensed with will be required. The issue might be left to the courts to develop appropriate rules.

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[90]*Euston Capital Corp. v. Saskatchewan Financial Services Commission*, 2008 SKCA 22 (14 Feb 2008). See further discussion below.

Questions for Consideration

These questions are intended only for the purpose of eliciting comment. Please feel free to go beyond them. We would appreciate as much explanation of your answers and comments as possible.

12. Should regulators be required to give written reasons explaining a decision to impose an administrative penalty:

(a) in all cases;

(b) as a general rule, but subject to exceptions;

or should requirements for written reasons be left to the courts to develop?

CONCLUSION AND SUMMARY OF QUESTIONS FOR CONSIDERATION

Because administrative penalties are a relatively new means of enforcing compliance with regulatory legislation, they raise some novel questions for regulators and legislators. They are useful tools for efficient and fair enforcement of rules applying to licensees and others operating within a regulated environment. However, because they do not involve the courts or tribunals at first instance, it is important that alternative procedural safeguards are in place to ensure fairness.

This consultation paper has discussed the legal issues affecting administrative penalties. It is intended to assist in developing appropriate procedures. The questions it poses about appropriate procedure were formulated to facilitate discussion and comment from both regulators and their clients. In addition, the Commission is particularly interested in learning about the experience of regulators and clients with administrative penalties.

We welcome your comments and suggestions.

Questions for Consideration: Summary

These questions are intended only for the purpose of eliciting comment. Please feel free to go beyond them. We would appreciate as much explanation of your answers and comments as possible.

1. Should a right of appeal from imposition of administrative penalties be available:

    (a) in all cases;

    (b) as the general rule;

    (c) only exceptionally; or

    (d) not at all?

2. Is the magnitude of the penalty which may be imposed a factor in determining whether a right of appeal should be provided?

3. Is a right of appeal generally necessary from a penalty imposed on a licensee conducting a regulated activity?

4. Is a right of appeal generally necessary when a penalty is imposed if the penalty is triggered by a clearly defined event?

5. When there is a right of appeal from an administrative penalty, should it be:

(a) to the Court of Queen's Bench;

(b) to the Court of Appeal; or

(c) to an administrative tribunal established to hear such appeals?

6. When there is a right of appeal from an administrative penalty, should it be:

(a) on the merits;

(b) by trial *de novo*; or

(c) limited to issues of law and jurisdiction similar to those relevant on judicial review?

7. Are the statutory rules governing notice and disclosure when it is proposed to impose an administrative penalty presently in place in Saskatchewan adequate?

8. Should a right to a full oral hearing when an administrative penalty is to be imposed be:

(a) the general rule; or

(b) limited to cases in which the proposed penalty exceeds a specified amount, or

(c) available on request of the person affected?

9. What steps can be taken to ensure impartial decision making when administrative penalties are imposed?

10. Would development of agency procedural guidelines governing administrative penalties, and staff training based on the guidelines, make a significant contribution to ensuring fairness when penalties are imposed?

11. When would establishment of a system of internal review of decisions to impose administrative penalties be appropriate?

12. Should regulators be required to give written reasons explaining a decision to impose an administrative penalty:

(a) in all cases,

(b) as a general rule, but subject to exceptions;

or should requirements for written reasons be left to the courts to develop?