

**CONSULTATION ON MARKET SURVEILLANCE ADMINISTRATOR PROCEEDINGS  
BEFORE THE ALBERTA UTILITIES COMMISSION (BULLETIN 2009-15)**

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## INTRODUCTION

In Bulletin 2009-15 dated June 3, 2009, the Commission advised parties that a discussion paper would be prepared to assist parties in the consultation on Market Surveillance Administrator Proceedings before the Alberta Utilities Commission. Bulletin 2009-15 set out the Commission's suggested topics for discussion and parties provided comments on June 17, 2009. This discussion paper addresses the specific questions listed in Bulletin 2009-15 in light of the comments received from parties on June 17, 2009.

The purpose of this paper is to encourage debate with respect to potential options that the Commission may have in its approach toward administrative monetary penalties. To this end, the paper canvasses some ideas and options that have been discussed in academic commentary and jurisprudence. The paper is not meant to set out conclusions of law or otherwise but rather policy options. A full range of options is considered to stimulate debate. Any statements or opinions expressed in this paper represent the views of the author and do not represent the views of the Alberta Utilities Commission or Baker & McKenzie LLP.

### 1. RULES VERSUS COMMON LAW

*Questions: Can the Commission make rules, or if so should it, with respect to the standard of proof, availability of defences and quantum of penalty; or should the Commission develop the jurisprudence on these points on a case by case basis as they are raised by parties?*

In Bulletin 2009-15, the Commission stated:

Section 76 of the AUCA states that the Commission may make rules governing any matter within its jurisdiction including "any matter necessary for the administration of the system of administrative penalties under section 63." The Commission may also make rules of practice governing the Commission's procedure and hearings. In addition, under section 11 of the AUCA, the Commission has the powers of a Judge of the Court of Queen's Bench necessary for the exercise of its jurisdiction.

## DISCUSSION

### (a) Common law

Section 63 of the *Alberta Utilities Commission Act* (AUCA) states that if the Commission, after a hearing or other proceeding, "determines that a person has contravened or failed to comply" with the Act or other matters within the jurisdiction of the Commission, it may impose an administrative penalty (AMP). The section is silent with respect to the burden of proof and the standard of proof regarding the contravention. It is assumed for the purpose of this paper that the burden of proof rests with the Market Surveillance Administrator (MSA). Section 63 of the AUCA is also silent as to whether a defence of due diligence is available.

The Commission has noted that the issue of whether or not a due diligence defence ought to apply is an open issue. In the decisions in *EPCOR PPA Management Inc*<sup>1</sup>. and *TransCanada Energy Limited*<sup>2</sup> the

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<sup>1</sup> *EPCOR PPA Management Inc*. Decision 2008-114, November 19, 2008, Commissioners Beattie, Dahl Rees and Lyttle. ("EPCOR")

parties were prepared to proceed on the basis that ISO Rule 6.6 would allow for a due diligence defence. The Commission noted that it had not had the benefit of argument and therefore this point would remain to be decided in the future.

In *TransCanada*, the Commission observed that the starting point for any consideration of the due diligence defence was the Supreme Court of Canada decision in *Sault Ste. Marie*<sup>3</sup>. This decision was made in the context of a regulatory offence, (before the concept of administrative penalties existed), but the principles regarding the categories or types of statute and types of defences can be applied to contraventions under the jurisdiction of the Alberta Utilities Commission. This case is discussed below under the topic of burden of proof.

**(b) Rules**

The Commission has made Rule 001 governing the Rules of Practice, which govern matters such as disclosure, witness panels and hearings. The Commission has also made Rule 13 on the criteria relating to the imposition of administrative penalties, and Rule 19 regarding specified penalties for contravention of ISO rules. These rules do not, however, specify the standard of proof<sup>4</sup> or the nature of defences that may apply with respect to section 63 AMPs.

**(c) Rules versus common law**

The open question is whether the Commission *should* make rules governing the standard of proof and other procedural issues, or whether the Commission should wait for these issues to be raised by the parties in a specific case that is before the Commission. As noted above, Section 76 of the AUCA states that the Commission may make rules governing any matter within its jurisdiction including “any matter necessary for the administration of the system of administrative penalties under section 63”. This section would appear to give the Commission the power to enact rules that classify types of contraventions, and set out standards of proof regarding these contraventions.

There are advantages and disadvantages to the Commission making rules in this regard, as follows:

**(i) Advantages**

Rule-making following this consultation would take advantage of the expert submissions and roundtable discussions. Although the Commission is not required to hold a hearing before making a rule, this consultative process is inclusive and transparent.<sup>5</sup>

A major advantage of rules is certainty. Parties will know well in advance of a hearing process what the rules are with respect to important issues such as the burden of proof.<sup>6</sup>

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<sup>2</sup> *TransCanada Energy Ltd.*, Decision 2008-126, December 16, 2008, Commissioners Beattie, Dahl Rees and Lyttle. (“*TransCanada*”), Section 5.5 The Due Diligence Defence.

<sup>3</sup> *Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (SCC), at pages 373-74. (“*Sault Ste. Marie*”)

<sup>4</sup> The MSA in its comments notes that the standard of proof should be distinguished from the burden of proof.

<sup>5</sup> *Alberta Utilities Commission Act*, Chapter A-37.2 section 76(4).

A rule made by the Commission will avoid the possibility of the Commission arriving at inconsistent decisions on the issue in different cases.

(ii) **Disadvantages**

A defendant in an AMPs proceeding may argue that if the Commission makes rules on the issue of burdens of proof and defences without a hearing, it has arguably fettered its discretion if this same issue arises in a hearing. Parties may argue that a factual context is necessary for the appropriate disposition on these issues. They may also argue that a hearing on these issues will give them a potential right of appeal to the Court of Appeal on a question of law.<sup>7</sup>

These disadvantages are tempered somewhat by the fact that a rule may be challenged as not being in accordance with the *Alberta Bill of Rights* which is a quasi-constitutional instrument. In other words, litigants will not be denied an avenue in Court by which they may seek to challenge a rule enacted by the Commission.

**2. STANDARD OF PROOF**

*Question: What is the appropriate standard of proof with respect to the “actus reus” of a contravention under the AUCA?*

In Bulletin 2009-15, the Commission stated:

Section 63 of the AUCA states that if the Commission, after a hearing or other proceeding, “determines that a person has contravened or failed to comply” with the Act or other matters within the jurisdiction of the Commission, it may impose an administrative penalty.

The section is silent with respect to the standard of proof regarding the act which is at the centre of the contravention. This is in contrast to some other legislative schemes regarding administrative penalties. For example, the federal *Telecommunications Act* enforces the “do not call list” with an administrative monetary penalty, and explicitly states that the burden of proof is a balance of probabilities.

**DISCUSSION**

(a) ***Text of the statute***

The entire text of section 63 should be reviewed for the context to this issue.

- (1) If the Commission, after a hearing or other proceeding, determines that a person has contravened or failed to comply with any provision of this Act or any other enactment under the jurisdiction of the Commission, any decision or order of the

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<sup>6</sup> For a discussion of rules versus principles, see Jull and Schmidt, “Preventing Harm in Telecommunications Regulation: A New Matrix of Principles and Rules within the *Ex Ante* versus *Ex Post* Debate” 47 *Canadian Business Law Journal*, 329 (forthcoming).

<sup>7</sup> *Alberta Utilities Commission Act*, *supra* footnote 5, section 29(1).

- Commission or any Commission rule or ISO rule, the Commission may by order do either or both of the following:
- (a) impose an administrative penalty on that person;
  - (b) impose any terms or conditions on that person that the Commission considers appropriate.
- (2) An administrative penalty imposed under subsection (1) may require the person to whom it is directed to pay either or both of the following:
- (a) an amount not exceeding \$1 000 000 for each day or part of a day on which the contravention occurs or continues;
  - (b) a one-time amount to address economic benefit where the Commission is of the opinion that the person has derived an economic benefit directly or indirectly as a result of the contravention.
- (3) The terms and conditions referred to in subsection (1)(b) may include, but are not limited to, prohibiting the person from engaging in conduct specified in the order or directing the person to take action specified in the order.
- (4) A person who pays an administrative penalty in respect of a contravention may not be charged under this Act or any other enactment with an offence in respect of that contravention.
- (5) An administrative penalty paid to the Commission under this section or pursuant to section 67 shall be paid into the General Revenue Fund.

The wording of section 63 is wide open. It refers to a contravention or failure to comply with “any provision” of the legislative framework in addition to an order of the Commission or an ISO rule. In the language of quasi criminal law, the “actus reus” (the act that must be proved by the MSA) can be a wide array of acts or failure to act, which requires that one look to the specific rule or provision in issue. This requires a classification of contraventions.

**(b) Classification of contraventions**

In *TransCanada*, the Commission observed that the starting point for any consideration of the due diligence defence was the Supreme Court of Canada decision in *Sault Ste. Marie*<sup>8</sup>. This case set out a classification of offences that may be applicable by analogy to administrative monetary penalties. It is worth reviewing the details of the case.

In 1972, the city of Sault Ste Marie was charged under the *Ontario Water Resources Act* with polluting the Cannon Creek and Root River. The city’s garbage dump bordered Cannon Creek. This site had been selected and operated by a contractor hired by the City. Garbage was compacted in layers and then covered by sand or gravel. The garbage and wastes formed a high mound sloping steeply toward, and

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<sup>8</sup> *Sault Ste. Marie*, *supra* footnote 3, at pages 373-74. (“*Sault Ste. Marie*”)

within twenty feet, of the creek. Pollution resulted and the contractor was convicted. In deciding whether the city should also be convicted, the Supreme Court of Canada had an opportunity to canvass the very rationale for such regulatory offences.

The “halfway house” created by Justice Dickson for the Court is now famous. Justice Dickson identified three categories of offences ranging from those that require intent to those that focus only on the act. In between the extremes was a “halfway house” where the prosecution need only prove the commission of the act, but the defence could show that it was not at fault because it had exercised reasonable care (due diligence). Justice Dickson’s categories are set out in the following passage which is still good law to this day:

- 1) Offences 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) Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. 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 offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey’s* case.
- 3) Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.<sup>9</sup>

Justice Dickson’s judgment is an important and well-reasoned articulation of the distinction between mens rea offences on the one hand, and strict and absolute liability offences on the other. Justice Dickson made it clear that public welfare offences, whether absolute liability or strict liability, were not criminal in any real sense:

[a]lthough enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like. In this appeal we are concerned with pollution<sup>10</sup> [emphasis added].

The above reference to regulatory offences as akin to a branch of administrative law makes it easy to draw a parallel between administrative monetary penalties, and the common law test articulated by Justice Dickson.

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<sup>9</sup> *Sault Ste. Marie*, *supra* footnote 3, at pages 373-74. (“*Sault Ste. Marie*”)

<sup>10</sup> *Sault Ste. Marie*, *supra* footnote 3, at page 357.

Applying the analysis articulated by Justice Dickson, the starting point is to analyze the statute that creates the contravention. For example, does the contravention require an element of “wilful” conduct which requires proof of intent? Provincial legislation may create contraventions that require this level of fault.<sup>11</sup>

One can apply the above framework to the contraventions under the jurisdiction of the Alberta Utilities Commission. For example, the Fair, Efficient and Open Competition Regulation (FEOC) Alberta Regulation 159/2009 was recently enacted. This regulation contains provisions that enumerate types of conduct that do not support the fair, efficient and openly competitive operation of the market. One of the listed conducts in Regulation 159/2009 is “colluding, conspiring, combining, agreeing or arranging with another market participant to restrict or prevent competition”.<sup>12</sup> Applying Justice Dickson’s classification, this would appear to fall within the first class requiring proof of intent, as a conspiracy generally requires intent. The listed conduct in the regulation relates to section 6 of the *Electric Utilities Act*<sup>13</sup> which requires that “Market participants are to conduct themselves in a manner that supports the fair, efficient and openly competitive operation of the market.” In order to find the necessary contravention, this general requirement of section 6 must be linked back to the wording of section 63, which refers to contravention of any enactment under the jurisdiction of the Commission.

Other conduct, set out in the same regulation would appear to fall within the halfway house. For example, “providing misleading records to the market or to any other person” is conduct which requires that it be shown that the records are misleading; it is not a requirement to show that a person knew about or intended that they be misleading.<sup>14</sup> This would appear to fall within the classic “strict liability” category, or the halfway house, described by Justice Dickson.

ISO rules must also be classified. Section 20.8 of the *Electric Utilities Act* requires that a market participant must comply with an ISO rule, *and the matter must be referred to the Market Surveillance Administrator*. The regime of specified penalties has been set up to deal with ISO rules identified by the Commission, subject to the discretion of the Commission to rescind or confirm the penalty or to impose an administrative monetary penalty (section 52(4) of the AUCA).

In terms of classification, the types of ISO rules deal with a variety of practices and procedures as set out in section 20(1) of the *Electric Utilities Act* and each type of rule is potentially amendable to the classification scheme articulated in *Sault Ste Marie*, including the absolute liability classification.

**(c) *If Sault Ste. Marie applies, does this import reasonable doubt regarding the act?***

A regulatory offences trial is a complex concept involving dual burdens. The prosecution must prove that the act was committed beyond a reasonable doubt, following which the legal onus shifts to the defendant to prove due diligence on a balance of probabilities. The dual burdens of proof create awkward procedural steps. The Court will only rule on the two burdens at the end of the trial. This means that the defence

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<sup>11</sup> For example, the Ontario *Highway Traffic Act* offence of “wilfully continuing to avoid police while a police officer gives pursuit” imports the requirement of *mens rea* or intent where the legal burden always stays with the Crown to prove the requirement of intent beyond a reasonable doubt. *Highway Traffic Act*, R.S.O. 1990, c. H.8, s.189(a). *R. v. Dilorenzo; R. v. Bancroft* (1984), 45 O.R. (2d) 385 (C.A.); See *Libman On Regulatory Offences in Canada*, (Salt Spring Island: Earls Court, 2002) at Chapter 4 “Public Welfare Offences involving Mens Rea.”

<sup>12</sup> Alberta Regulation 159/2009, section 2 (h)(i).

<sup>13</sup> *Electric Utilities Act*, Chapter R-5.1.

<sup>14</sup> Alberta Regulation 159/2009, section 2 (a).

must adduce evidence of due diligence, without knowing whether the prosecution has actually succeeded in proving the initial violation beyond a reasonable doubt. The only mechanism available to the defence to test the Crown's case prior to putting in evidence is to bring a motion for a directed verdict. The threshold for such a verdict is so high<sup>15</sup> that it is a rare case indeed that is stopped at this stage.

If the scheme developed by Justice Dickson in *Sault Ste. Marie* were imported in its entirety, the MSA would be required to prove contraventions beyond a reasonable doubt, before the onus would shift to the defence to prove due diligence.

The Supreme Court of Canada has directed that reasonable doubt be put on a spectrum and compared to proof on a balance of probabilities. This was most recently articulated by Justice Iacobucci in *R. v. Starr*:

[i]n my view, an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities. As stated in Lifchus, a trial Judge is required to explain that something less than absolute certainty is required, and that something more than probable guilt is required, in order for the jury to convict. Both of these alternative standards are fairly and easily comprehensible. It will be of great assistance for a jury if the trial judge situates the reasonable doubt standard appropriately between these two standards.<sup>16</sup>

A survey of other administrative monetary penalty schemes in Canada finds that none of them has adopted the criminal standard of proof beyond a reasonable doubt. The schemes with significant penalties have tended to use a *balance of probabilities* standard.<sup>17</sup> For example, the *Telecommunications Act* states:

If the person makes representations in accordance with the notice, the Commission must decide, **on a balance of probabilities**, whether the person **committed the violation** and, if it so decides, it may impose the penalty.” [emphasis added]<sup>18</sup>

Another example is found in the *Office of the Superintendent of Financial Institutions Act*.<sup>19</sup> Section 29(2) states:

If the person makes representations in accordance with the notice, the Superintendent shall decide, on a balance of probabilities, whether the person committed the violation and, if so, may, subject to any regulations made under paragraph 25(1)(c), impose the penalty proposed, a lesser penalty or no penalty.

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<sup>15</sup> The well-known test is whether there is any evidence, direct or indirect, on which a properly instructed jury would reasonably convict, without weighing credibility. Reasonable doubt is not to be considered on a motion for a non-suit. It can only be raised when the defence has either elected to call no evidence or has called all of its witnesses. *R. v. Morabito*, [1949] S.C.R. 172. This creates an impossibility for the defence in a regulatory trial, if it wishes to call no evidence on the *actus reus*, but must call evidence on due diligence.

<sup>16</sup> *R. v. Starr*, [2000] 2 S.C.R. 144 at para. 242. (“*Starr*”)

<sup>17</sup> Archibald, Jull and Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management*, (Canada Law Book 2004 updated annually), chapter 15. (“Archibald et al.”)

<sup>18</sup> *Telecommunications Act*, (1993, C. 38) section 72.08 (2).

<sup>19</sup> 1985, c. 18 (3rd Supp.).

It should also be noted that the standard of reasonable doubt will be applied in the offence provisions contained in the AUCA, which is separate from the AMP contained in section 63.<sup>20</sup> This could imply that the legislation did not intend that the standard of reasonable doubt apply for AMPs.

**(d) Structural arguments**

The structure of section 63 is administrative in format. For example, the Commission has the option of imposing terms as part of an administrative order, instead of an administrative penalty or in addition to it. The administrative nature of the scheme suggests that a balance of probabilities standard applies to both orders and penalties. The Alberta Court of Appeal has noted that the standard of proof in administrative law is on a balance of probabilities, and the Court will look at the structure of the section itself:

Finally, the balance of probabilities is the standard that normally governs tribunal decisions: see for example, *K.V. v. College of Physicians and Surgeons of the Province of Alberta*, 1999 ABCA 125, 173 D.L.R. (4th) 431, leave to appeal dismissed [1999] S.C.C.A. No. 331, when this Court refused to reconsider a previous decision which held that the appropriate standard of proof in administrative law contexts was balance of probabilities. See also R.W. Macaulay and J.L.H. Sprague, *Hearings Before Administrative Tribunals*, 2nd ed. (Toronto: Carswell, 2002) at 17-6; Sir William Wade and Christopher Forsyth, *Administrative Law*, 9th Ed., (Oxford: Oxford University Press, 2004) at 291.<sup>21</sup>

**(e) Balance of probabilities: is there stricter scrutiny or the requirement of clear and convincing evidence when administrative monetary penalties are assessed?**

The Supreme Court of Canada decision in *F.H. and McDougall et al.*<sup>22</sup>, has recently clarified the meaning of the standard of balance of probabilities. There is only one standard of proof in a civil case and it is the balance of probabilities standard. This important decision reversed the long line of cases that held that a stricter scrutiny within the balance of probabilities standard was appropriate where the allegation involved impropriety such as fraud.

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<sup>20</sup> Section 64 of the AUCA states:

Section 64 (1) A person who fails to comply with an order of the Commission made under this Act or any other enactment is guilty of an offence.

(2) A person who fails to comply with this Act or the regulations or a Commission rule or an ISO rule is guilty of an offence.

<sup>21</sup> *Carbon Development Partnership v. Alberta (Energy Utilities Board)* [2007] A.J. No. 1187, 2007 ABCA 343. (“*Carbon Development*”)

<sup>22</sup> *F.H. and McDougall et al.* 2008 SCC 53. (“*F.H.*”) The facts in this case involved sexual assaults that had allegedly occurred many years before. Justice Rothstein comments that the seriousness of the allegations may make the trial Judge's task difficult but it must still be made on a balance of probabilities standard:

Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test. (Paragraph 46)

Justice Rothstein for the Court sets the standard as follows:

Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. I am of the respectful opinion that the alternatives I have listed above should be rejected for the reasons that follow.<sup>23</sup>

Justice Rothstein notes that civil cases do not involve the government's power to penalize or take away the liberty of the individual.<sup>24</sup> It might be argued, however, that AMPs *do* involve the government's power to penalize the individual and accordingly stricter scrutiny might be a good option for AMPs schemes. In professional discipline cases, the stricter scrutiny test has been applied, and it remains to be seen whether the decision in *F.H.* will change the law in the discipline context. For example, in the case of *Law Society of Upper Canada v. Neinstein*<sup>25</sup> (which pre-dates *F.H.*) the court affirmed that proof in a professional discipline case must be clear, convincing and cogent within the balance of probabilities standard:

The significance of the requirement of clear, convincing and cogent evidence is well-explained in Linda R. Rothstein, Robert A. Centa and Eric Adams, "Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof" (The Law Society of Upper Canada Special Lectures, 10 June 2003), Law Society of Upper Canada, ed., *The Law of Evidence* (Toronto: Irwin Law, 2004), p. 5 (Q.L.). While the civil standard of balance of probabilities applies in the professional discipline context, the authors say:

. . . probability depends on the circumstances, and where there are serious consequences at issue, a higher or more rigorous evidentiary standard must be met for that fact to be found probable. This more rigorous approach to the evidence involves a qualitative assessment of the evidence -- for "cogency" and "persuasiveness" -- in determining whether the fact in question has been demonstrated to be probable.<sup>26</sup>

If the Commission decides that administrative monetary penalties are different from the civil arena such that a clear and convincing standard could apply, the next problem relates to the difficulties of identifying different mathematical probabilities with a shifting standard of proof. Justice Rothstein describes these problems:

An intermediate standard of proof presents practical problems. As expressed by L. Rothstein et al., at p. 466:

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<sup>23</sup> *Ibid.*, at paragraph 40.

<sup>24</sup> *F.H.*, *supra* footnote 22, at paragraph 42.

<sup>25</sup> *Law Society of Upper Canada v. Neinstein* (2007) 85 O.R. (3d) 446 (Ont. Div. Ct.) ("*Neinstein*")

<sup>26</sup> *Ibid.*, at paragraph 57.

As well, suggesting that the standard of proof is “higher” than the “mere balance of probabilities” leads one inevitably to inquire what percentage of probability must be met? This is unhelpful because while the concept of “51% probability”, or “more likely than not” can be understood by decision-makers, the concept of 60% or 70% probability cannot.<sup>27</sup>

### 3. AVAILABILITY OF DEFENCES

*Questions: Should a defence of due diligence be available as a matter of liability, or ought due diligence be relevant only to the quantum of the penalty, in addition to other mitigating factors going to quantum set out in AUC Rule 013: Rules on Criteria Relating to the Imposition of Administrative Penalties? Should the onus of proof be a legal onus or an evidentiary onus on the person or entity maintaining due diligence?*

In Bulletin 2009-15, the Commission stated:

Section 63 of the AUCA is also silent as to whether a defence of due diligence is available. By comparison, some other legislative schemes are explicit on this point. For example, the *Telecommunications Act* provisions relating to the administrative monetary penalty state as follows:

#### Defences

72.1 (1) It is a defence for a person in a proceeding in relation to a violation to establish that the person exercised due diligence to prevent the violation.

### DISCUSSION

#### (a) *Benefits of due diligence: a risk management matrix*

The availability of a due diligence defence will enhance compliance. In order to avail itself of the due diligence defence, an organization must create systems for compliance. For example, this may include the drafting of a Code of Conduct and effective monitoring of the Code. Due diligence is based on reasonable systems to prevent problems, and incorporates an element of risk management.

The decision of the AUC in *TransCanada*<sup>28</sup> proceeded on the basis (consented to by the parties) that ISO Rule 6.6 was subject to a due diligence defence. The panel summarized the defence of due diligence as follows:

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<sup>27</sup> *F.H.*, *supra* footnote 22, at paragraph 43. Note that Justice Matlow made the same point in his dissent in *Neinstein*: “It may be that this court is bound to accept these expressions of the applicable burden of proof but, in my respectful view, it is impossible, as a matter of logic, for one to understand how a required burden of proof can be “on a balance of probabilities” and, at the same time, even more stringent than that because of the serious consequences at issue. Nor can I understand how this same burden of proof can logically be raised, in certain types of cases, by requiring “clear and convincing evidence” to tilt it. Either the applicable burden of proof is on a balance of probabilities or on something higher. It cannot, in my view, be both.” (at para 115)

<sup>28</sup> *TransCanada*, *supra* footnote 2.

- a) The due diligence defence relates to the standard of reasonable care, as expressed in tort law, with respect to the offence alleged. It asks whether the accused (or, as here, respondent) has taken all steps that were reasonable in the circumstances to prevent the breach.
- b) The first consideration is foreseeability: the respondent cannot be expected to have taken steps to prevent an event that was not reasonably foreseeable. Thus if the event was not reasonably foreseeable, the defence is made out without further inquiry.
- c) Defining what it is that is foreseeable or not is important. The issue is whether the respondent could have foreseen an event of the type that occurred, as opposed to the exact event in all of its particularity.
- d) Generally speaking, human error is foreseeable. Thus a respondent must guard against the effects of human error on its operations.
- e) The degree of care to be taken, or, put another way, the extent of the measures the respondent is expected to take, depends on a number of factors, including:
  - i) The gravity of the potential harm.
  - ii) The likelihood of harm.
  - iii) The alternatives that are available to the respondent.
- f) Where possible, the respondent must put procedures in place that address foreseeable breaches of laws, regulations and applicable rules.<sup>29</sup>

The primary advantage of the due diligence formula is that it is consistent with risk management principles that are being increasingly adopted by industry.<sup>30</sup> It is also consistent with the stated purpose of administration monetary penalty schemes to encourage compliance.

**(b) Option of absolute liability**

The panel in *TransCanada* observed that the Commission had not had the benefit of argument that the contravention be treated as one of absolute liability, in which case, a defence of due diligence would not be available.

As a general comment, the administrative schemes that have eliminated due diligence as a defence have tended to establish lower administrative monetary penalties. The liability to an AMP up to \$1 million under the AUCA suggests that due diligence ought not to be eliminated. This is subject of course to the creation of ranges or capping of penalties considered below, where it might be argued that it is appropriate to eliminate the defence for lower range penalties.

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<sup>29</sup> *TransCanada*, *supra* footnote 2, at paragraph 5.5.

<sup>30</sup> Archibald et al., *supra* footnote 17, chapters 4 and 7.

In the regulatory offence area, the Courts have presumed that due diligence will be available unless it is explicitly removed.<sup>31</sup> The same argument can be made in the interpretation of section 63: It does not explicitly eliminate due diligence and therefore it should be presumed to apply. In addition, at least one Court has stated that there is no evidence that a higher standard of care results from absolute liability:

There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others?<sup>32</sup>

**(c) *Due diligence as a factor on quantum***

Rule 13 as passed by the Commission provides guidance concerning quantum including the seriousness of the contravention, the compliance system, and self-reporting or cooperation of the person named in the contravention.

Some AMP schemes do not make the due diligence defence available with respect to a violation, but rather apply the same factors in assessing the size of the monetary fine. For example, the *Agriculture and Agri-Food Administrative Monetary Penalties Act*<sup>33</sup> creates a layered scheme. This is a variation of absolute liability, and as noted, the penalty ranges tend to be lower. For example, under the *Agriculture and Agri-Food Administrative Monetary Penalties Act* the maximum penalty for a violation is

- (a) in the case of a violation that is committed by an individual otherwise than in the course of a business and that is not committed to obtain a financial benefit, \$2,000; and
- (b) in any other case, \$2,000 for a minor violation, \$10,000 for a serious violation and \$15,000 for a very serious violation.<sup>34</sup>

**(d) *Legal versus evidentiary onus with respect to the defence of due diligence***

In regulatory offences and under the doctrine established in *Sault Ste. Marie*, the legal onus is shifted to the defence to prove due diligence once the prosecution has proved the *actus reus* beyond a reasonable doubt. The constitutional validity of this burden on the defence was upheld by the Supreme Court of Canada in *R. v. Wholesale Travel Group Inc.*<sup>35</sup>

The alternative proposed by Chief Justice Lamer in *Wholesale* was an evidentiary burden, which had been suggested by the Ontario Law Reform Commission (“OLRC”) in its *Report on the Basis of Liability for*

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<sup>31</sup> *Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec Inc.*, 2006 SCC 12. (“*Lévis*”); *R. v. Kanda* (2008) 88 O.R. (4d) 732. (“*Kanda*”)

<sup>32</sup> *Kanda*, *supra* footnote 31, at page 738 citing Justice Dickson in *Sault Ste. Marie* (1978) 40 C.C.C. (2d) 353 at 363.

<sup>33</sup> *Agriculture and Agri-Food Administrative Monetary Penalties Act*, 1995, C. 40.

<sup>34</sup> *Ibid.*, section 4(2).

<sup>35</sup> (1991), 67 C.C.C. (3d) 193 [“*Wholesale Travel*”].

*Provincial Offences*.<sup>36</sup> Although the Supreme Court did not adopt this option, it is worth considering in the context of administrative monetary penalties.

The evidentiary onus, as contemplated by the OLRC would have worked as follows:

Crown establishes *actus reus* beyond a reasonable doubt;

Accused has an evidentiary burden to satisfy the Court that he or she was not negligent. Evidence through the testimony of the accused or defence witnesses, or evidence adduced through cross-examination of the Crown, would support this burden;

- The evidence would have to reveal that reasonable care of due diligence was taken;

If such an evidentiary burden was satisfied, the mandatory presumption of negligence would be rebutted. In effect, the issue of due diligence would be clearly before the court by way of adduced evidence.

- If the mandatory presumption was rebutted, the Crown would have to establish the accused's negligence beyond a reasonable doubt.

The onus regarding due diligence is related to the above discussion concerning the standard of proof relating to the act. If the standard to prove the act for an AMP is ultimately decided to be a balance of probabilities, it could be argued that it is not fair to put the identical legal burden (albeit on a different discrete issue) on the defendant to prove due diligence. It might be argued that the reverse onus conceptualized by Justice Dickson was designed for a system whereby the prosecution was able to satisfy the high burden of proving the act beyond a reasonable doubt. In civil cases the burden of proof does not generally shift to the defendant, but stays on the Plaintiff throughout. If AMPs are considered to be civil in nature, the onus of proof arguably should mirror the civil onus.

Accordingly, it could be argued that the defendant ought to only have an evidentiary burden in this regard. The scheme would look as follows:

- MSA establishes act of contravention on a balance of probabilities
- Defendant has an evidentiary onus to adduce some evidence of due diligence
- MSA must satisfy tribunal on a balance of probabilities that due diligence is not made out

#### **4. QUANTUM OF PENALTY**

*Questions: Should different ranges of penalties be identified for certain types of contraventions?*

*If it is appropriate to link the quantum of penalty to categories, should the categories be defined by subject matter, seriousness of the contravention, past compliance, or other criteria? Is it a worthwhile*

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<sup>36</sup> Ontario Law Reform Commission, *Report on the Basis of Liability for Provincial Offence* (Toronto: N.P., 1990), cited by Lamer C.J.C. in *Wholesale Travel*, at 224.

*exercise to chart these ranges in a matrix, subject of course to discretion of the Commission to depart from the ranges?*

In Bulletin 2009-15, the Commission stated:

Section 63 of the AUCA provides that the administrative penalty cannot exceed \$1,000,000 for each day or part of a day on which the contravention occurs or continues.

## DISCUSSION

The Stakeholder Consultation Discussion Paper on Specified Penalties Proceedings considers procedural issues with respect to specified penalties that are prescribed pursuant to section 52(7) of the AUCA. These penalties are capped up to a maximum of \$100,000 per day and are specified in Rule 19, which includes a penalty table of escalating categories. (At present the highest specified penalty is \$10,000). The Specified Penalties Consultation Paper raises issues specific to that scheme.

As a policy matter, is it wise to create ranges of penalties for certain types of contraventions?

Just about every enforcement regime utilizes categories of penalties to reflect the gravity of different types of offences and specific fact situations. For example, the *Criminal Code*<sup>37</sup> creates categories based on the monetary amount in issue that determine procedure.<sup>38</sup> A further discretion is created by permitting the Crown Attorney to elect the procedure in certain cases, which permits flexibility with respect to specific fact situations.<sup>39</sup>

The same principle ought to apply to AMPs. The AMP presently contained in Section 63 goes from \$0-\$1,000,000 without any intermediate ranges.

There are various techniques or methods for creating procedural options for an AMPs scheme. First, a scheme can be divided by “Subject matter.” This method is used in the *Office of the Superintendent of Financial Institutions Act*<sup>40</sup> which provides Cabinet with the power to make regulations classifying each violation into categories such as minor or serious.<sup>41</sup> The Administrative Monetary Penalties (OSFI) Regulations<sup>42</sup> create a very detailed schedule that lists various sections of the *Act* and then places them into categories such as minor or serious.

A second technique is the division of categories by “magnitude of the maximum penalty”. This method gives the regulator discretion to elect which category of penalty it is seeking in a given case. This method allows for maximum flexibility as the regulator can tailor the penalty sought to a given fact situation. For example, the Commission could identify moderate AMPs as up to \$200,000 and more serious AMPs as exceeding that amount. (These figures are used only as an example and are not suggested as being appropriate). Once the ranges are identified, this may serve as distinguishing point for types of procedure and evidence rules, to be discussed below.

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<sup>37</sup> *Criminal Code*, R.S.C. 1985, Chap C-46.

<sup>38</sup> For example, theft over the amount of \$5,000 is prosecuted by indictment. See section 334.

<sup>39</sup> For example, for theft under \$5,000 the Crown may elect to proceed by way of summary or indictable procedure.

<sup>40</sup> *Office of the Superintendent of Financial Institutions Act*, S., 1985, c. 18 (3rd Supp.)

<sup>41</sup> The *Act* also provides for a “very serious” category. In the scheme that we propose in this paper, we reserve very serious contraventions for the regulatory and criminal regimes.

<sup>42</sup> Administrative Monetary Penalties (OSFI) Regulations, SOR/2005-267.

## 5. DIVESTING OF ECONOMIC BENEFIT

*Questions: Should the Commission rules set out the specific method for calculation of economic benefit?*

In Bulletin 2009-15, the Commission stated:

Section 63 (1) (2) (b) provides that the Commission may order either or both an administrative penalty and a one time amount to address economic benefit.

## DISCUSSION

Rule 13 states that “Where the Commission determines that a person has derived an economic benefit as a result of the contravention, the Commission shall order that person to disgorge the economic benefit in the amount determined or estimated by the Commission to nullify the value of gains acquired through misconduct.”

It may be worthwhile to further define the meaning of economic benefit. For example, does this refer to gross income from a contravention, or only profit? It should be kept in mind that this calculation should not have a punitive aspect, as this is performed by the AMP.

## 6. NATURE OF HEARINGS

*Questions: Are there some types of cases seeking administrative penalties that ought to be decided by written procedure rather than an oral hearing? Are there some types of cases seeking administrative penalties that do not require a panel of the Commission but rather could be decided by one member sitting alone?*

In Bulletin 2009-15, the Commission stated:

Section 63 of the AUCA states that the Commission must have a “hearing or other proceeding” before imposing an administrative penalty.

### (a) *The Canadian Charter of Rights and Freedoms*

This consultation paper proceeds on the basis that to date, the administrative monetary penalties (AMPs) provided for in section 63 have not been characterized as “offences” within the meaning of that term in the *Canadian Charter of Rights and Freedoms*. This assumption permits a review of hearing procedures that might not meet the *Charter* requirements associated with criminal offences.

An AMP that is very similar in magnitude to the section 63 AMP has recently been upheld as not being contrary to the *Charter* by the Alberta Court of Queen’s Bench in *Lavallee v. Alberta (Securities Commission)*.<sup>43</sup> The Court in *Lavallee* classified a potential million dollar AMP as not penal, and justified the penalties as follows:

The existence of administrative penalties under the *Securities Act* can be justified in light of the general purposes of the legislation. For instance, one can easily understand that, in

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<sup>43</sup> *Lavallee v. Alberta (Securities Commission)*, [2009] A.J. No.21. (“*Lavallee*”)

some cases, a trading ban would adversely affect investors and that the imposition of an administrative penalty may be the only sanction which would allow the attainment of the purposes of *Securities Act*: see for example *Morrison Williams Investment Management Ltd., Re* (2000), 7 A.S.C.S. 2888.

I agree with the Court of Appeal in *Brost* (2008, C.A.) that the potential imposition of administrative penalties of a certain magnitude reflects the legislative intent to ensure that penalties are not simply considered as another cost of doing business.<sup>44</sup>

The constitutional landscape will continue to evolve. We set out some of the competing arguments that may be made in this regard in Appendix “A”, “Constitutional Considerations”.

**(b) *The Alberta Bill of Rights***

Section 1(a) of the *Alberta Bill of Rights* states as follows:

1. It is hereby recognized and declared that in Alberta there exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely:
  - (a) the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

In defining the parameters of due process and procedural fairness, the Supreme Court has set out a five factor balancing test in the decision of *Baker v. Canada*<sup>45</sup>. The extent to which the process resembles a judicial process will make it more likely that trial like procedures are required. “The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.”<sup>46</sup>

The decision of the Alberta Court of Queen’s Bench in *Lavallee* held that with respect to a \$1 million AMP in the securities context “it is clear that considering the amount of the potential administrative penalties at stake and their potential effect on the Applicants' lives, a *Baker* analysis will mandate a reasonably high level of procedural fairness.”<sup>47</sup> Accordingly, the same reasonably high level of procedural fairness will apply to the AMP in Section 63.

The question is whether or not the reasonably high level of procedural fairness requires an oral hearing with a panel of three Commissioners, or whether alternate procedures such as a hearing with one Commissioner or a written proceeding would qualify.

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<sup>44</sup> *Ibid.*, at paragraphs 163-164.

<sup>45</sup> *Baker v. Canada* [1999] 2 S.C.R. 817. (“*Baker*”)

<sup>46</sup> *Ibid.*, at paragraph 25.

<sup>47</sup> *Lavallee*, *supra* footnote 43, at paragraph 201.

The Alberta *Administrative Procedures and Jurisdiction Act (Chapter A-3)* applies to the AUC power to impose AMPs.<sup>48</sup> Section 6 of the Act states that the authority is not required to afford an opportunity to the party

(a) to make oral representations, or

(b) to be represented by counsel,

if the authority affords the party an opportunity to make representations adequately in writing, unless the statute overrides this.

The AUCA also provides for the possibility of a written hearing in section 9(4). With respect to hearings, section 13(1) provides for one or more members to sit as a division.

The issue of procedure should be linked to the discussion above concerning ranges of AMPs. A leading administrative law scholar, David Mullan, has argued for a flexible approach that would combine different models of administrative procedure, depending upon the type of interests at stake.<sup>49</sup> Mullan observes that there has been a “due process” explosion in administrative law, with the result that in many cases, tribunals emulate Court proceedings. This is particularly the case where the administrative proceedings have a “passing similarity to the charging of persons with offences”:

In contexts which have any passing similarity to the charging of persons with offences, some courts (and agencies for that matter) have accepted the applicability of the *Stinchcombe* criminal process rules of full pre-trial discovery of the relevant fruits of the investigation. Thus, in Ontario, the Human Rights Commission has been held subject to this obligation, while the Supreme Court of Canada has recently sustained as not unreasonable the Ontario Securities Commission's adoption of such a regime.”<sup>50</sup>  
[emphasis added]

Applying this analysis, one would think that an administrative monetary penalty has at least a passing similarity to the charging of persons.

Mullan cautions that the origins and objectives of most administrative agencies should preclude wholesale transportation of Court-like rules of procedure. Mullan steps back to suggest a more flexible approach that would have different levels of hearing process. He cites the American 1981 *Model State Administrative Procedure Act* as a flexible model with four levels of hearing, including formal hearings, “conference hearings”, “summary adjudicative hearings” and “emergency hearings”. Aside from emergencies, the least formal method is a summary hearing, and the “conference hearing” is a hybrid that permits the parties to testify but there is no formal discovery process or presentation of evidence. The Model statute sets out certain criteria that guide the regulator in deciding which type of hearing process is best suited to the interests at stake.

Mullan concludes with a recommendation for a flexible model:

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<sup>48</sup> See Alberta Regulation 64/2003 which excludes application where the AUC is imposing penalties under Part 7 but allows it to apply to Part 6 AMPs.

<sup>49</sup> David Mullan, “Tribunals Imitating Courts – Foolish Flattery or Sound Policy” (2005) 28 *Dalhousie Law Journal* 1. (“Mullan”)

<sup>50</sup> *Ibid.*, at page 11, citing *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] 2 S.C.R. 713.

In this lecture, I have suggested that, at present, for many tribunals, there is in fact no real middle ground between the "informality" of ADR and the "formality" which characterizes those tribunals' constitutive statutes or procedural rules and, indeed, a statute such as Ontario's *Statutory Powers Procedure Act*. More needs to be done in terms of experimenting with alternative decision-making modes and opening up the possibility of the same tribunal functioning with varying levels of formality depending on the nature of the matters in issue and, at least in some contexts, the wishes of the tribunal's clientele. While some tribunals have in fact moved in this direction, it is my sense that this is an initiative that requires explicit legislative recognition and encouragement. At present, such a model exists in the form of the 1981 *Model State Administrative Procedure Act*, with its provisions for four levels of hearing process. This model deserves serious evaluation in a Canadian setting and the best way of ensuring that may well be to persuade the Uniform Law Conference to revisit the question of administrative procedures, something it did last in 1991.<sup>51</sup>

A flexible model may be implemented by creating separate classes of case, or by permitting the Commission itself to decide which level of procedure is appropriate to a given case.

As noted above, there is a very wide range between an AMP under section 63 of \$2,000 and an AMP of \$1,000,000. If rules are created which divide these AMPs into categories of seriousness, it is possible to also envision written hearings for minor AMPs, hearings with one Commissioner for moderate AMPs, and hearings with a full panel for the most serious AMPs.

In considering the possibility of multiple hearing models, the following criteria should be considered.

**(i) Credibility of witness is in issue**

If there are credibility issues, the traditional view is that these will be resolved through cross-examination, and the demeanour of the witness ought to be observed by the trier of fact. "Many courts in many different settings have emphasized that when a decision turns on credibility, a decision maker should not make an adverse finding of credibility without affording the affected person an oral hearing."<sup>52</sup>

**(ii) Expert evidence is relevant**

The AUCA covers a number of areas that require a specialized knowledge, reflected by the specialized nature of utilities in Alberta. There may be cases, therefore, where expert evidence will assist the Commission, and an oral hearing may facilitate this and permit cross-examination.

**(iii) Precedential value of decision**

It is possible to imagine, particularly in the early days of a new AUCA that decisions on AMPs will set the bar for future decisions. As such, participants may want to make oral submissions in a hearing, where

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<sup>51</sup> Mullan, *supra* footnote 49, "Conclusion". There is now a discussion draft of the *Model State Administrative Procedure Act* (National Conference of Commissioners on Uniform State Laws, 2005), which proposes that the 1981 *Act* be amended to reduce the four types of hearing model essentially into three types. This new scheme would appear to give more discretion to the Tribunal as to its preferred procedure.

<sup>52</sup> *Khan v. University of Ottawa* (1997) 148 D.L.R. (4<sup>th</sup>) 577 at 585. ("Khan")

there is a possibility that a precedent may be set. This should be a factor that is weighed by the Commission in making its decision as to whether to grant leave to have an oral hearing.

## 7. EVIDENCE

*Questions: When assessing administrative penalties, as contrasted to making other types of decision, ought the Commission to apply more rigorous gatekeeper functions in relation to the admissibility of evidence?*

In Bulletin 2009-15, the Commission stated:

Section 20 of the AUCA states that the Commission is not bound in the conduct of its hearings by the rules of law concerning evidence that are applicable to judicial proceedings.

## DISCUSSION

In *Lavallee*, similar provisions to section 20 of the AUCA concerning evidence were under attack. Recall that the Court in *Lavallee* held that a reasonable high level of procedural fairness was required when imposing large AMPs. Sections 29(e) and (f) of the *Securities Act* read as follows:

29. For the purpose of a hearing before the Commission or the Executive Director, as the case may be, the following applies:

[...]

(e) the Commission or the Executive Director, as the case may be, shall receive that evidence that is relevant to the matter being heard;

(f) the laws of evidence applicable to judicial proceedings do not apply;

These provisions were held to be inoperative to the extent that they mandated (shall) the receipt of any relevant evidence without any further inquiry.<sup>53</sup>

The open question remains as to how to structure the AUC's discretion to exclude evidence in certain cases. The Court in *Lavallee* does not require that a tribunal adopt the full protections of evidence law, such as hearsay:

the case law is clear that, in a regulatory context, the admission of hearsay or compelled testimony or the lack of opportunity to cross-examine will not necessarily breach procedural fairness: for a recent example see *Brost* (2008, C.A.);<sup>54</sup>

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<sup>53</sup> The Court observed in *Lavallee* that an administrative ban in combination with an AMP “may have a devastating effect” on the person. Accordingly the tribunal “will need to exercise its discretion not to admit relevant evidence in appropriate circumstances to preserve the mandated level of procedural fairness.” See paragraphs 206-207. The Court appears to extend this ruling to the corporate defendant, Arbour Energy Inc., without a discussion of whether corporations constitute “individuals” under the Bill.

<sup>54</sup> *Lavallee*, *supra* footnote 43, at paragraph 205.

By way of contrast to administrative fairness, the Supreme Court of Canada judgment in *R v. Blackman*<sup>55</sup> has set out a blueprint for courts to play a gatekeeper role when considering hearsay evidence. The Court reminds trial judges that hearsay is presumptively inadmissible. Although this decision was in the context of a criminal case, the Court describes the general principles of evidentiary law without distinguishing between civil or criminal law. In other words, the old adage that in civil cases evidentiary issues only go to weight, is no longer valid.

Section 5 of the Alberta *Administrative Procedures and Jurisdiction Act (Chapter A-3)* bases the right of cross-examination on fairness in contradicting evidence. Fairness is a somewhat malleable concept that will vary with the interests involved, as set out in *Baker*.

## 8. DISCLOSURE

*Questions: Should the rules specifically govern the manner in which there is disclosure of documents or expert reports? Should the guiding principle of disclosure be based on the test of "relevance" (ie. everything that may be relevant must be disclosed by the party seeking a penalty) or should the test be based on "reliance" (ie. only those documents and reports that the party is relying upon in seeking the penalty need to be disclosed).*

In Bulletin 2009-15, the Commission stated:

Section 76 of the AUCA states that the Commission may make rules governing any matter within its jurisdiction including “any matter necessary for the administration of the system of administrative penalties under section 63”.

## DISCUSSION

At the highest level is the procedural model required by section 11 of the *Charter* which demands a full disclosure model. Professor Hogg observes:

In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, the Supreme Court of Canada held that s. 11(d) of the Charter of Rights obliges the Crown, in advance of the trial, to make full disclosure to the defence of all relevant information in the possession of the Crown. All information, both inculpatory and exculpatory, that might be relevant to the defence must be disclosed. At the same time, the defence is under no obligation to disclose anything to the prosecution; that is part of the defendant’s constitutional right to remain silent.<sup>56</sup>

As noted earlier, in contexts which have any passing similarity to the charging of persons with offences, some courts (and agencies for that matter) have accepted the applicability of the *Stinchcombe* criminal process rules of full pre-trial discovery of the relevant fruits of the investigation.

The Competition arena affords a procedural model from which comparative lessons may be learned. By way of comparison, the *Competition Tribunal Rules*<sup>57</sup> were amended in 2002 to streamline and expedite civil non-merger proceedings. A major amendment included a change in the disclosure rules that moved

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<sup>55</sup> *R. v. Blackman* 2008 SCC 37. (“*Blackman*”)

<sup>56</sup> Opinion of Peter Hogg to the Retail Council of Canada, March 2005. (“Hogg”)

<sup>57</sup> SOR/1994-290, amended by SOR/2002-62.

from a wider “relevance” test to the more narrow “reliance” test.<sup>58</sup> This test only required disclosure of documents that a party intended to “rely” upon at the hearing. These rules were then amended again in a move back towards the relevance test. On May 14, 2008, the new *Competition Tribunal Rules*, SOR/2008-141, came into effect. These rules implement a discovery type of system based on relevance.

The story of the change in the rules illustrates the tension between administrative efficiency and procedural fairness.

The 2002 amendments were characterized as the new “truncated disclosure obligations”.<sup>59</sup> The thrust of the new rules was to reduce the level of disclosure generally required, and replace it with a discretionary mechanism whereby the Tribunal could consider on a motion at a pre-hearing conference whether to allow discovery of persons or documents if warranted in the circumstances.

The case of *Canada Pipe*<sup>60</sup> was the first abuse of dominance case to be litigated under the new rules. The Tribunal ruled that the “reliance” test is not inherently unfair in the context of procedures before administrative tribunals.<sup>61</sup> The reliance test only requires disclosure of documents that the Commission intends to rely upon, and falls well short of the disclosure required in criminal proceedings, which includes all relevant documents. For example, the Commissioner may not rely upon a document that would be useful to the defence in testing the credibility of a witness.<sup>62</sup> Critics argued that the reliance standard, as permitted in *Canada Pipe*, “has undeniably shifted the landscape of litigation before the Tribunal in favour of the Commissioner of Competition (the “Commissioner”), with potentially serious adverse impacts upon the right and ability of parties that become embroiled in proceedings of this nature to mount a complete and effective defence”.<sup>63</sup>

In response to academic criticism, the Competition rules were amended and now resemble the civil discovery process, requiring that there be discovery of “relevant” documents:

60. (1) The applicant and each respondent who has filed a response shall, within the time prescribed at a case management conference, serve an affidavit of documents on each other party.

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<sup>58</sup> By way of contrast, the Ontario Securities Commission operates under a relevance standard. Rule 3.3(2) signals a commitment to full disclosure of relevant material to individuals facing proceedings under s. 127. The OSC has applied the standard of relevance described in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, to fix the scope of the investigators’ obligations. This practice was approved as reasonable by the Supreme Court of Canada in *Deloitte & Touche LLP v. OSC* [2003] 2 S.C.R. 713.

<sup>59</sup> Kent Thomson, Charles Tingley and Anita Banicevic, “Truncated Disclosure In Competition Tribunal Proceedings in the Aftermath of Canada Pipe: An Experiment Gone Wrong” (2006) 31 *The Advocates Quarterly* 67. (“Thomson et al.”)

<sup>60</sup> Competition Tribunal, *Commissioner of Competition v. Canada Pipe Company*, 2003 Comp. Trib. 15, August 8, 2003; also see the Federal Court of Appeal decision, *Canada (Commissioner of Competition) v. Canada Pipe Co.*, [2006] F.C.J No. 1028, 2006 FCA 233, where the Federal Court of Appeal remitted the matter back to the Tribunal for reconsideration on the merits in accordance with the legal guidelines set out by the Court. Leave to appeal was refused [2006] S.C.C.A. No. 366

<sup>61</sup> Tribunal decision, *Canada Pipe*, *supra* note 197, at paragraph 59

<sup>62</sup> The reliance test is criticized as undermining the right to a full cross-examination of witnesses, as a party may not be aware of certain documents. See the comprehensive discussion of this issue in Kent Thomson, Charles Tingley and Anita Banicevic, “Truncated Disclosure In Competition Tribunal Proceedings in the Aftermath of Canada Pipe: An Experiment Gone Wrong” (2006) 31 *The Advocates Quarterly* 67.

<sup>63</sup> Thomson et al., *supra* footnote 59, at page 68.

### *Content*

- (2) An affidavit of documents shall include
  - (a) a list identifying the documents that are relevant to any matter in issue and that are or were in the possession, power or control of the party;
  - (b) any claim that a document is confidential or contains confidential information;
  - (c) any claim that a document is privileged; and
  - (d) a statement of the grounds for each claim of privilege.

### *Power of the Tribunal*

61. Upon the motion of a party who has served an affidavit of documents and who opposes a claim for privilege of another party, the Tribunal may inspect the document and determine the validity of the claim.

In addition, the new Tribunal rules (section 68) require pre-hearing disclosure:

- (1) The applicant shall, at least 60 days before the commencement of the hearing, serve on every other party and on all intervenors
  - (a) a list of documents on which the applicant intends to rely at the hearing, noting any waivers of privilege claimed in regard to those documents; and
  - (b) witness statements setting out the lay witnesses' evidence in chief in full.

### **SUMMARY FOR DEBATE**

The legislative framework and the considerations set out in this consultation paper leave considerable room for the AUC to draft rules that will shape the fundamental nature of the AMPs imposed under section 63. There are competing models that the AUC can consider.

At one extreme is an efficiency model which seeks to streamline proceedings in a way that distinguishes them from Court proceedings. At the other end of the spectrum is a rights model that almost replicates the type of proceedings and burdens found in a courtroom.

It may not be necessary to choose between these extreme models or adopt a “one size fits all” compromise.<sup>64</sup>

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<sup>64</sup> Archibald et al. *supra* footnote 17, chapter 15, suggest a pyramid approach towards AMP schemes.

## APPENDIX “A”: CONSTITUTIONAL CONSIDERATIONS

Section 11 of the *Charter of Rights* provides constitutional safeguards to “any person charged with an offence”. A person includes a corporation.

Section 11(d) of the *Charter* provides:

Any person charged with an offence has the right

...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

**(a) Cases to date: A million dollar AMP has been upheld.**

The leading case to date on point is the Alberta Court of Queen’s Bench decision in *Lavallee v. Alberta (Securities Commission)*.<sup>1</sup> The administrative monetary penalty (AMP) in issue in this case was very similar to that contained in the *Alberta Utilities Commission Act*. If the Securities Commission, after a hearing, determines that a person or company has contravened Alberta securities law, the Commission may order the person or company to pay an administrative penalty of not more than \$1,000,000 for each contravention or failure to comply. The applicants in *Lavallee* argued that provisions in the Act dispensing with the laws of evidence that apply in judicial proceedings violated their constitutional rights under both section 7 and 11 of the *Charter*. The Court dismissed these arguments and upheld the constitutional validity of the AMP.

The Court in *Lavallee* found that Section 7 of the *Charter* is not meant to afford protection against ordinary stresses suffered by most people as a result of civil or administrative proceedings, as contrasted to the stigma that may attach to a criminal conviction.<sup>2</sup> With respect to section 11, the Court found that the administrative penalty did not have a “true penal consequence” that would qualify it as an offence that would engage section 11 *Charter* protections.<sup>3</sup> The Court characterizes the deterrent aspects of the AMP as essential to protect investors.

The Court in *Lavallee* classified a potential million dollar AMP as not penal, and justified the penalties as follows:

The existence of administrative penalties under the *Securities Act* can be justified in light of the general purposes of the legislation. For instance, one can easily understand that, in some cases, a trading ban would adversely affect investors and that the imposition of an administrative penalty may be the only sanction which would allow the attainment of the purposes of *Securities Act*: see for example *Morrison Williams Investment Management Ltd., Re* (2000), 7 A.S.C.S. 2888.

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<sup>1</sup> *Lavallee v. Alberta (Securities Commission)* [2009] A.J. No.21. (“*Lavallee*”)

<sup>2</sup> *Ibid.* at para. 119.

<sup>3</sup> *Lavallee, supra* footnote 5, at para. 165.

I agree with the Court of Appeal in *Brost* (2008, C.A.) that the potential imposition of administrative penalties of a certain magnitude reflects the legislative intent to ensure that penalties are not simply considered as another cost of doing business.<sup>4</sup>

**(b) *Public versus internal discipline***

If a penalty is “of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11.” The latter words are from Justice Wilson’s judgment in *R. v. Wigglesworth* (1987).<sup>5</sup> A second question is whether 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.”<sup>6</sup> A key question in the Alberta Utilities context will be whether market participants are treated similar to securities brokers, who are subject to internal discipline within a limited sphere of activities.<sup>7</sup>

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<sup>4</sup> *Lavallee*, *supra* footnote 1, at paragraphs 163-164.

<sup>5</sup> [1987] 2 S.C.R. 541, 559.

<sup>6</sup> *Wigglesworth*, cited in *Lavallee* at paragraph 140.

<sup>7</sup> The constitutional treatment of discipline cases is canvassed in Archibald, Jull and Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Canada Law Book, 2004 updated annually) at pp. 15-46-15-47