

Efficacy of Administrative Monetary Penalties in Compelling Compliance with Federal
Agri-Food Statutes

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To

*My wife Clareen, and Fiona, Leighton and Clifton,
Our three children, who did not give up on me*

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Abstract

The objective of the thesis is to determine whether administratively imposed monetary penalties (*amps*), the new enforcement tool provided by Parliament in the framework statute, the *Agriculture and Agri-Food Administrative Monetary Penalties Act (AAAMP Act)*, have improved compliance with the *Health of Animals Act* and the *Plant Protection Act*. Although a third statute, the *Pest Control Products Act* was also brought within the ambit of the *AAAMP Act*, it has not been included in the analysis because prosecution data for the five-year period prior to the *amps* regime became operational were not available and, therefore, comparison is not possible.

To answer the issue, Part II (Chapters 7 to 9) analyses litigation data over two five year periods, the first of which ended with the second millennium and the second began with the new millennium. Criminal sanctions were the only tool available in the first period; *amps* became operational in the second and prosecution was reserved for serious contraventions.

Data are analyzed through eight focus groups; within each, a few provisions that provide key indicators of compliance are selected. For visual emphasis, the data are illustrated by way of tables and line curves. They are then summarized and conclusions are drawn with a view to answering the issue.

A historical perspective on the use of criminal sanctions to punish regulatory offences is provided in Part I (Chapters 2 to 6) which touches briefly on the controversy sparked by the profligate use of the criminal process and over the doctrine of strict liability. The Part also describes the developments in Europe, the United States, Australia and Canada aimed at decriminalizing less serious regulatory offences. As far as possible, and in particular in chapter 2 on criminal sanctions, the analysis proceeds in historical order.

Before analyzing the data in Part II, chapter 7 describes the role of field officers who are responsible for enforcing the statutes and are required to use discretion in the choice of tools. It discusses the important contribution of compliance theorists and experienced inspectors, such as Ayres, Braithwaite and

Sparrow. The third and final chapter of this Part is intended as a caution on data interpretation. Whatever conclusions may become obvious, while litigation is an important indicator of compliance, numbers alone do not tell the whole story. Compliance and enforcement are not unidimensional concepts; they are only one aspect of the total regulatory picture. Their role is only supportive. Ayres & Braithwaite's Enforcement Pyramid emphasizes this point. The mere availability of these powers, and perhaps the threat of their use, often suffices to induce compliance.

Part III (Chapter 10) consolidates and elaborates the reflections of the author. It highlights the key points emerging from Part II and makes some observations, setting the stage for a number of legislative reforms, such as allowing the defence of due diligence to individuals charged with serious violations, clarification of the term continuing violations, disgorgement of profits, and a legislative direction on the use of *amps*.

Chapter 1 - Introduction

Regulation along with the criminal law is the quintessential instrument of governance in Canada. It occupies much of our Federal government's attention in the day to day administration of the country, which is entrusted to departments or agencies headed by Ministers or by non-political heads answerable to Parliament through a Minister. A very large portion of a state's budget and resources is devoted to implementing regulations which are embodied in statutes that provide the legal framework to subordinate bodies, such as two or more Ministers sitting in Cabinet (referred to as "Governor in Council"), a single Minister, or even a public servant, depending on the nature of the legal instrument that the statute has authorized. The statute itself is generally called a "regulatory statute"; the legal instruments it authorizes are called "statutory instruments" which normally comprise regulations, orders, decrees, declarations, directions, and so forth.¹

While regulations are necessary to conduct the work of government and protect its property and revenues, another driving force of governance is people who have suffered or experienced harm and have entrusted the responsibility for their protection and safety to the government.

Individuals, firms and enterprises need to be regulated because, left to themselves, human nature being what it is, people who control capital and resources are tempted to take unfair advantage of others, especially the vulnerable and those who do not have matching skills or resources, and thereby inflict harm or damage on them or on society generally.² Few activities have not been touched by regulation in

¹ Subsection 2(1) of the *Statutory Instruments Act*, RSC 1985, c S-22 defines a statutory instrument to mean: "(a) . . . any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established (i) in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which that instrument relates, or (ii) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament."

² See e.g. *R v Wholesale Travel Group*, [1991] 3 SCR 154, 52 CCC (3d) 9 [*Wholesale Travel* cited to SCR]; and the trio of cases that applied it in the following year: *R v Martin*, [1992] 1 SCR 838, 7 OR (3d) 319; *R v Ellis-Don Ltd*, [1992] 1 SCR 840, 7 OR (3d) 320 and *R v Rube*, [1992] 3 SCR 159, 75 CCC (3d) 575.

modern society. Those that have been left untouched, in which individuals and firms are free to engage, have escaped regulation because there have been no apparent problems or public pressure.

Myriad individuals, groups and firms are affected by regulation. Some are on the “receiving end”, both in terms of being the subject and the object of regulation in countless ways.

The impact of a regulation depends on the type of activity or operation one engages in. Its commands no one can ignore with impunity, unless it makes exceptions, for commands are there for a purpose – to compel people to comply with the law’s requirements and prevent harm from occurring. Imagine the chaos that can result if people were to drive on streets without obeying the rules of the road. Or the harm to public coffers if people can file their tax returns whenever they wish to, or come around to do it!

Whereas the criminal law operates to prohibit entirely many acts and omissions that are against the moral code, or to prohibit them unless certain permits such as a firearms certificate or a gaming licence, authorize, regulation by and large seeks to control legitimate activities that members of society are free to engage in provided that, in carrying out their operations, they do not inflict harm on those whom they serve or to whom they supply goods and services. As Canada is a federal state, certain limits have been placed by courts on the scope of the federal criminal law power when it trenches on provincial power over property and civil rights. Apart from laws that are unquestionably designed to prohibit an act through criminal punishment, statutes that relied on the federal peace, order and good government head of power have been struck down in many instances.³

³ Criminal law has been characterized by courts in a very wide sense, as embracing any conduct that Parliament decides to forbid by the use of criminal penalties, but because Canada has a federal system, the Privy Council, and later the Supreme Court of Canada following the same line of reasoning, thought it was necessary to restrict that usage when confronted with provincial property and civil rights head of power. See e.g. *Ontario (AG) v Hamilton (Street) Railway*, [1903] AC 524, 13 CRAC 201; *Proprietary Articles Trade Association v Canada (AG)*, [1931] 2 DLR 1, [1931] AC 310, [*Proprietary Articles* cited to AC]; *Reference Re Dairy Industry Act (Canada) s 5(a)*, [1949] SCR 1, [1949] 1 DLR 433; *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 49 DLR (4th) 161 [*Zellerbach* cited to SCR]; and *Canada (AG) v Hydro-Québec*, [1997] 3 SCR 213, 151 DLR (4th) 32 [*Hydro-Québec* cited to SCR]. On the division of powers, see Neil Finkelstein, *Laskin’s Canadian Constitutional Law*, 5th ed (Toronto: Carswell, 1986) at 83, and Jamie Benidickson, *Environmental Law*, 3d ed (Toronto: Irwin Law, 2009) at 35.

Regulations are both *protective and preventative*. They are addressed to specific members and groups in society who carry on a regulated activity or operation, whereas the criminal law is addressed to members of society at large and its commands are specific and clear. Criminal law does not need any further instrument to bring it into effect. The same specificity and clarity of commands and rules are not easily discernible from regulation, as those subject to it have to examine various provisions of the governing statute, as well as of subordinate legislative instruments, in order to understand precisely what duties and obligations apply to the person's activities or operations.

Regulation and criminal law, however, intersect at the point of enforcement because regulation has historically depended on the latter to enforce its commands and punish various breaches. Using the criminal law even for minor breaches of the regulation has created unease and agitation among eminent legal scholars and regulation specialists, especially when a large number are quite minor and overwhelm criminal courts. Often where a statute prescribes small penalties and the regulatory law does not often make a guilty mind an explicit requirement, offenders are given short shrift, some times on strict grammatical interpretation and at others by a supposed public policy as the judge in a specific case thought the statute was designed to implement.⁴

Both the English and American courts have resorted to the latter reasoning – after apparently considering arguments of both the prosecution and defence lawyers, and giving credence to the former - in upholding a law that imposed strict or absolute liability for a regulatory offence. Undoubtedly this situation has swelled the ranks of criminals even in such law-abiding society as the English where, the reaction to the publication of the JUSTICE report, *Breaking the Rules: The Problem of Crimes and Contraventions*, in 1980⁵ provoked such newspaper headlines as: “A blow to our honesty ... A shock to our criminals .. Nearly two million people in England and Wales

⁴ See e.g., Sayre (*infra*, note 45), Perkins (*infra*, note 31), Ashworth (*infra*, note 51), Edwards (*infra*, note 49), Hart (*infra*, note 29), and Coffee (*infra*, note 103) discussed in chapter 2, below. These scholars have pleaded for a review of laws imposing criminal penalties to provide at a minimum some defence to an accused who had taken every reasonable step available to avoid breaking the law and was aghast at finding that the activity did in fact have that result.

⁵ JUSTICE, *Breaking the Rules: The Problem of Crimes and Contraventions: A Report*, chaired by Paul Sieghart (London: Justice, 1980) [JUSTICE Report]. JUSTICE is the British section of the International Commission of Jurists.

alone notch up at least one conviction each.”⁶ Some of the leading cases on regulatory criminal law and the doctrine of strict and absolute liability (enunciated at a time when there was no difference between the two) are discussed in Chapter 2.

This historic experience establishes the context for the thesis the primary focus of which is on administrative monetary penalties (*amps*) established by framework legislation, namely, the *Agriculture and Agri-Food Administrative Monetary Penalties Act (AAAMP Act)*,⁷ to provide an additional tool to enforce agri-food statutes. Two of the four statutes that come under the ambit of the *AAAMP Act*, namely, the *Health of Animals Act*⁸ and the *Plant Protection Act*⁹, are examined in the thesis along with the principles and procedures that are to be applied when using them.¹⁰

The thesis examines the theme developed by the 1980 JUSTICE report. The report urged the British Government to remove thousands of infringements of minor regulations from the scope of the “criminal law” and place them in a new category of “contraventions”, a categorization which, it said, has worked very satisfactorily in Germany and a number of other countries.¹¹ Prior to the JUSTICE report, a little known report of the U.S. National Commission on Law Observance (better known as the Wickersham Commission) had recommended that minor offences should be transferred from criminal courts to administrative agencies.¹² The ideas for the

⁶ “7200 laws that turn Britain into a Nation of Crooks”, *Yorkshire Post* (4 July 1980) 7.

⁷ SC 1995, c 40 [*AAAMP Act*].

⁸ SC 1990, c 21 [*Health of Animals Act*].

⁹ SC 1990, c 22 [*Plant Protection Act*].

¹⁰ The third statute is the *Pest Control Products Act*, SC 2002, c 28 [*Pest Control Act*], the administration of which was transferred from the Department of Agriculture and Agri-food to Health Canada and enforced by the latter’s agency, called the Pest Management Regulatory Agency. It was brought within the ambit of the *AAAMP Act* when the latter was enacted. The fourth statute is the *Canada Grain Act*, RSC 1985, c G-10 [*Grain Act*], which was amended in 1998 to provide for the application of the *AAAMP Act*, but the amendment is not in force. The *AAAMP Act* authorizes the Governor in Council to bring within its ambit five more agri-food statutes.

¹¹ A similar recommendation was made by the Justices’ Clerks’ Society, *Decriminalization: An Argument for Reform*, A Report (Liverpool, England: 1981) [Unpublished].

¹² *Eighth Report of The National Commission on Law Observance and Enforcement*, chaired by George W Wickersham, to US Congress on Criminal Procedure (1931) [hereinafter cited as Wickersham Report].

German reform system go even further back, to the beginning of the twentieth century.¹³

Chapter 3 discusses the movement towards decriminalization and the important contribution made by the Council of Europe in its *Report on Decriminalization* (1980).¹⁴ The type of decriminalization, which it focused on, was of an act or omission that was previously classified as criminal ceases to be so by amendment of the law but continues to be prohibited, and those subject to it are penalized for failing to comply, through the use of previously available or new non-criminal measures.

Analysis of civil financial penalties, as an alternative to the criminal penalty regimes when it is determined that a criminal offence should be reclassified as a non-criminal infringement of the law, follows in chapter 4. Civil financial penalties are those which a statute authorizes a government department or an administrative agency to impose, as distinct from those which a statute authorizes an independent commission or a court to impose. The latter are the feature of the civil penalty provisions of the Australian *Trade Practices Act, 1974*¹⁵, *Corporations Act, 2001*¹⁶ and the *Environmental Protection and Biodiversity Conservation Act, 1999*¹⁷, and several modern U.K. statutes, especially the *Regulatory Sanctions and Enforcement Act 2008*.¹⁸

Chapter 5 highlights international trends in the use of administrative and civil sanctions, discussing the developments that preceded Canadian legislation in this

¹³ *Das Verwaltungsstrafrecht*, published by German scholar Goldschmidt in 1902, referred to by Thomas Weigend (*infra*, note 253), chapter 5, below.

¹⁴ Council of Europe, European Committee on Crime Problems, *Report on Decriminalisation* (Strasbourg, France: Council of Europe, 1980) [hereinafter and in the text cited as *Report on Decriminalisation*]. The Council of Europe is an inter-governmental organization of European states, on which Canada has observer status. The Recommendations of the Council are given careful consideration by Canada when developing policies and legislation.

¹⁵ Act No 51 of 1974, Part IV (Cth) (On January 1, 2011, the Act will be renamed to *Competition and Consumer Act 2010*).

¹⁶ Act No 50 of 2001 (Cth).

¹⁷ Act No 91 of 1999 (Cth).

¹⁸ 2008, c 13 (UK).

area, notably in Germany, the United States and Australia, and most recently in Great Britain. Several features in these systems have inspired the Canadian *amp* regime, although the latter differs in some important respects, and the Canadian regime has in turn inspired others that came later.

The theoretical discussion of criminal and non-criminal sanctions grounds description of the introduction of Canadian legislation in chapter 6. Several comparatively minor initiatives in the last quarter of the twentieth century preceded the much wider development in the agriculture sector at the end of that quarter. The chapter highlights the salient points in a few federal areas, such as customs, aeronautics, financial institutions and the environment. It investigates in detail the Agriculture and Agri-Food Administrative Penalties System, popularly known by its acronym "*amps*", an epithet that will often be used throughout the thesis. Constitutional issues (if any), as well as enforcement issues and necessary safeguards, are examined as they present themselves.

With the introduction of relevant Canadian legislation established in Part I the thesis proceeds to examine compliance and enforcement especially in the context of *amps*.

Part II consists of three chapters. Chapter 7 discusses the role of field staff who shoulder the brunt of the enforcement responsibility, how they go about exercising their discretion whether to charge an offender with an offence or proceed administratively. As the focus is exclusively on the enforcement of the *Health of Animals Act*¹⁹ and the *Plant Protection Act*²⁰ and their *Regulations*, the data on prosecution for five years immediately prior to the introduction of the new penalty regime and the data on both prosecution and administrative imposition over five years since then, is analyzed in chapter 8, and the results are discussed in order to reach some conclusions. The prosecution and penalty data on which the chapter rests were provided by the Canadian Food Inspection Agency (CFIA) which enforces the statutes concerned. The Canada Border Services Agency (CBSA) is also mandated by Parliament to enforce these (and other) statutes in respect of articles

¹⁹ *Supra* note 8.

²⁰ *Supra* note 9.

imported by travelers, using amp for violations, but as the data provided by that Agency cover later fiscal years, they are presented in a separate table.

The data are analysed in order to answer the issue that is at the core of the thesis, namely, whether there has been a significant improvement in compliance with the availability of the new non-criminal alternative to criminal sanctions that is provided by the *AAAMP Act*.²¹

Following the data analysis, chapter 9 explores the effectiveness of the regulatory system because it is a necessary aspect of compliance and enforcement policy and is closely related to the purposes of regulation as well as to the integrity of the system itself. It emphasizes that administrative summary powers, such as restrictions on licences or permits, seizures and forfeitures that had been previously provided in the legislation, and that continue to have full force and effect, are far more important for realizing statutory goals. It also emphasizes that enforcement through the use of administrative monetary penalties, and in appropriate cases, prosecution, is undertaken when warnings, administrative orders and directions fail to induce compliance.

Part III concludes the thesis with a short epilogue the purpose of which is to reflect on and sum up the discussion in the two earlier Parts, to make certain further observations. The thesis concludes with a number of recommendations for legislative reform for policy makers and legislators to consider.

For convenience, acronyms, terms and expressions used in the thesis are set out below explained below and more fully elaborated in the thesis as required.

1. Acronyms

<i>AAAMP Act</i>	<i>Agriculture and Agri-Food Administrative Monetary Penalties Act</i>
<i>AMPS</i>	(in upper case) administratively-imposed monetary penalty system
<i>amp</i> or <i>amps</i>	(in lower case) administratively-imposed monetary penalties; the singular or plural is used to conform to grammar.

²¹ *Supra* note 7.

CBSA	Canada Border Services Agency
CFIA	Canadian Food Inspection Agency
NOV	Notice of Violation
NOVP	Notice of Violation with a Penalty
NOVW	Notice of Violation with a Warning
OSFI	Office of the Superintendent of Financial Institutions

2. Terms and expressions

Absolute liability – liability for an offence for which an accused is not allowed to plead any defence; proof that an offence has been committed is sufficient for a conviction. Certain common law defences and common law rules and procedure may be expressly provided by legislation or recognized by courts. (See also *strict liability*)

Administrative financial penalty – a monetary penalty imposed by an administrative official.

Administrative penalty – includes seizure, recall, forfeiture, removal order, cease and desist order, closure or stoppage of an activity or work, and revocation, suspension or limitation of a permit, licence or authorization; also includes denial of government contracts and negative publicity.

Civil financial penalty – a monetary penalty imposed by a judge in a civil proceeding.

Civil penalty – includes injunction, cease and desist order, forfeiture; also includes a financial penalty imposed by a judge in a civil proceeding.

Compliance – is full adherence to legal requirements. (For a detailed discussion, see Part II, chapter 1).

Contravention – is a breach of a statute or regulation.

Criminal sanction – includes a fine, prison term, and other penalty imposed on offenders upon conviction in a criminal proceeding; it can include probation and a suspended sentence.

Decriminalization – declassifying a criminal offence and placing it in a non-criminal category, usually called by a civil law term, such as a *violation*.

Enforcement – response of administrative agency following detection of non-compliance with legal obligations; it includes inspections, notice to take corrective action, and referral for legal action, including civil and criminal. (For a detailed discussion, see chapter 1, Part II).

Financial penalty– a monetary penalty imposed administratively or by a court in civil proceedings.

Fine – is a monetary penalty imposed by a court following a conviction after a criminal prosecution.

Gravity value – the value assigned by Schedule 3 of the *AAMP Regulations* in respect of a violation based on its seriousness as determined under each of three categories of criteria, namely, history, Intent or negligence, and harm. The total score thus arrived at becomes the total gravity value of a violation for the purpose of penalty adjustment under Schedule 2 of the *Regulations*.

Offence - a prohibited act which is liable to punishment by a criminal sanction in a criminal court, following conviction.

Penalty - includes an administrative, civil and a criminal sanction.

"Sanction" - refers to the whole range of punitive and non-punitive coercive measures and incentives, whether criminal, civil or administrative, which are used to ensure compliance.

Strict liability - liability for an offence upon proof that a prohibited act has been committed but allowing the accused to assert and prove that reasonable care (or due diligence) was exercised to avoid the commission of offence. Certain common law defences and common law rules and procedures (excluding those expressly eliminated) may be available.

Violation - a prohibited act that has been designated as such by statute or by regulation.

PART I

Chapter 2 - Criminal Sanctions for Regulatory Offences

2.1 - Introduction

At the risk of repetition, the primary focus of this thesis as a whole is on administrative monetary penalties established by the *Agriculture and Agri-Food Administrative Monetary Penalties Act (AAAMP Act)*²² for the enforcement of two agri-food statutes²³ as an enforcement tool to supplement the current criminal justice system, which are among eight statutes administered by the Department of Agriculture and Agri-food through the Canadian Food Inspection Agency (CFIA).²⁴

The aim of this chapter is to review the position of criminal law in the enforcement of regulation. This requires a discussion of jurisprudence on the rise and demise of the doctrine of absolute liability which was a critical feature of judicial decision-making in the trial of regulatory offences for well nigh a century and a half, as well as a summary of the offence provisions in the two Agri-Food statutes as well as those offences in the *Criminal Code*²⁵ which are closely related to those two statutes. The offence provisions of all these three statutes are discussed in §2.7.

2.2 – The Respective Spheres of Criminal Law and Regulation; Meaning of “Regulation”

Criminal law and regulation have been the primary legal instruments to govern civil society from the earliest times that societies organized themselves into states with political authority over their members. These legal instruments authorized governments to bring peace, order and security to the society as well as to the lawfully constituted authority. Regulations, in particular, were used to secure

²² *Ibid.*

²³ *Health of Animals Act, supra note 8; Plant Protection Act, supra note 9.*

²⁴ *Supra note 10.*

²⁵ RSC 1985, c C-46, as amended by *Criminal Code* in 2008, c 12, s 1.

revenue needed to run government, to manage external trade, shipping and imports. They were also used to regulate internal trade, including weights and measures, health of animals, safety and quality of food, and sale of tobacco and alcohol. Both may be seen as a single branch of the criminal law, since regulation was backed by the sanctions provided in the former to ensure compliance by citizens.

The term "regulation" has acquired a bewildering variety of meanings.

Terence Daintith²⁶ gives six different meanings to the term, from the standard dictionary definition ("*the act of controlling, directing, or governing according to rule, principle or system*") to everything that government does.

To lawyers, however, it has more precise connotations: it is that area of public law by which the state and its agents seek to induce individuals and firms to outcomes which, in the absence of such inducements, they would not freely reach. This definition is preferred by Anthony Ogus.²⁷ In this usage, regulatory law is contrasted with other kinds of law, like criminal law (concerned with prohibition rather than with regulation), contract law and tort law. It is this last definition that is adopted in this chapter.

Criminal penalties are society's most severe sanctions against individuals and corporate bodies committing offences prohibited by the *Criminal Code* and other enactments. These sanctions include incarceration, fines, forfeiture of proceeds of crime or of conveyances and equipment used in the course of or in committing crimes, or any or all of them. At the same time, since personal liberty is at stake, an accused is accorded far greater rights by common law and statutes, as well as in Canada by the *Charter of Rights and Freedoms*,²⁸ that are not available to defendants who face only civil or administrative proceedings for regulatory contraventions.

²⁶ *International Encyclopaedia of Comparative Law*, edited by K Zweigert and Ulrich Drobnig, Vol 17, "Regulation", State and Economy, ch 10.

²⁷ A Ogus, "Enforcing Regulation: Do we need the Criminal Law?" in Hans Sjögren and Göran Skogh, eds, *New Perspectives on Economic Crime, New Horizons in Law and Economics Series* (Cheltenham, UK: Edward Elgar Publishing, 2004) at 42-56.

²⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 1 [hereinafter *Charter*].

A key characteristic of a crime, as opposed to other forms of prohibited acts and omissions which are to be found in regulatory statutes, is the repugnance attached to the act that invokes social censure and shame. However, as Henry M. Hart states:

*"[A crime] is not simply anything which a legislature chooses to call a "crime". It is not simply antisocial conduct which public officers are given a responsibility to suppress. . . . It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community."*²⁹

His critique is a reflection on Lord Atkin's observation in *Proprietary Articles Trade Association v. A.G. Canada*, that:

*"the criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?"*³⁰

Thus, in the regulatory sphere, the decision to legislate for a criminal rather than a non-criminal penalty may not be based on the inherent immorality of the act itself but rather on assumptions about the deterrence value of the penalty, the differences in pursuing a criminal or non-criminal procedure, or the policy ramifications of a particular choice.

2.3 - Distinction between Crimes and Regulatory Offences; *Malum in se v. Malum prohibitum*

A distinction between criminal law and regulation is evident in one important respect. Criminal law bound every citizen to obey its commands, while Regulation was addressed to specific groups and sectors of society that engaged in lawful activities, to ensure that those who were dependent on them were not subjected to oppressive, abusive, fraudulent or injurious conduct. This was done by making those specific acts and omissions, not the whole enterprise, illegal and subject to criminal sanctions.

The dichotomy between criminal law and regulation was not mutually exclusive but it did lead many commentators to distinguish *malum in se* and *malum*

²⁹ Henry M Hart, Jr, "The Aims of the Criminal Law" (1958) 23 Law & Contemp Probs 401 at 405.

³⁰ *Proprietary Articles*, *supra* note 3 at 324.

prohibitum offences. Criminal offences in regulatory statutes might also come within the mainstream crimes, especially where otherwise lawful activities become a cover for fraudulent or dishonest operations, or where rogue businesses operate beneath the vision of regulators. In that case, the criminal law operates independently of the regulatory statutes that forbid those acts and omissions.

The malum in se and malum prohibitum distinction was familiar since Blackstone's days in the eighteenth century when regulatory law was becoming a pervasive force in society. Blackstone, himself, according to Professor Perkins, held *mala prohibitum* offences in very low esteem. They

"... did not place upon the individual any duty of compliance; he could obey the law and avoid the penalty or violate it and pay the penalty. Which election he made was matter of indifference except to himself?"³¹

Legislatures and courts have of course treated *malum prohibitum* laws no differently from *malum in se* laws, even prescribing stiffer sentences and higher monetary penalties than those provided in *malum in se* statutes for core crimes, and courts declaring that a crime is a crime whether it is in the criminal law type of statute or in a regulatory type statute.³²

From the days of Blackstone in the 18th century down to our own times, there has grown a huge mass of regulatory statutes prompted by, what Professor James Starrs describes as, the "conscience of society", in a scholarly work.³³

³¹ Rollin M Perkins, "The Civil Offense" (1952) 100 U Pa L Rev 832 at 841, citing Sir William Blackstone, *Commentaries On the Laws of England* (London: Oceana Publications, 1966) The First Book, Vol I, S II: Of the Nature of Laws in General, at 57-58. In his *Commentaries*, Blackstone states: "But in relation to those laws which enjoin only positive duties, and forbidding such things as are not mala in se but mala prohibita merely, annexing a penalty of noncompliance, here I apprehend conscience is no farther concerned, than by directing a submission to the penalty, in case of each breach of those laws [But] in these cases, the alternative is offered to every man: either abstain from those, or submit to such a penalty' and his conscience is clear, whichever side of the alternative he thinks proper to embrace. . . Now this prohibitory law does not make the transgression a moral offence: the only obligation in conscience is to submit to the penalty if levied."

³² The classic exposition of this rule can be found in the statement of Lord Atkin in *Proprietary Articles*, *supra* note 3.

³³ JE Starrs, "The Regulatory Offense in Historical Perspective" in Gerhard OW Mueller, ed, *Essays in Criminal Science* (Hackensack, NJ: Fred B Rothman & Co, 1961) 235 at 263.

This huge mass went far beyond what the “conscience of society” required, by the government minutely controlling through administrative regulations various aspects of economic life. Judges, too, readily supported prosecutors who found it impossible to obtain convictions if in every instance they were required to prove *mens rea*, by interpreting regulatory offences more broadly, especially when the requirement of knowledge, intent, willfulness or other indicia of mental element, was absent or not made explicit in the statute or in subordinate regulations, thus ignoring the ancient principle of *mens rea* which was the overarching principle of criminal law. They justified their attitude by pointing out the slightness of penalty or on public policy grounds, saying that it was better for a person to pay for what his action caused to others who were the unwitting victims of his act or omission, though he be without fault, applying the principles enunciated in public nuisance cases, such as *R v. Medley*³⁴ to a host of public welfare offences, especially in the area of food safety, sale of tobacco and alcohol, and the like, which are discussed below.

2.4 - Historical Perspective

2.4.1 - English Criminal Law

2.4.1.1 - Earliest Cases

The emergence of strict liability in two mid-nineteenth century cases has been treated by legal scholars as the abrupt dawn of a new body of doctrine at variance with fundamental traditions of the common law. This, according to Professor Leigh,³⁵ appears to be both unhistorical and overstated. He points out that nuisance was a strict liability crime from an early period and the 18th century statute book also affords harbingers of strict liability in the form of statutory defences to be proven by accused persons, citing the *Tobacco Act 1715*, the *Bread Act 1773* and the *Tea Act 1777*, which provided defences to merchants and others who could prove that adulteration took place without their knowledge and despite their exercise of due diligence to prevent it. Professor Leigh concludes:

³⁴ (1834) 6 Car & P 292 (KBD), (1824-34) All ER Rep 123 [*Medley*].

³⁵ LH Leigh, *Strict and Vicarious Liability: A Study in Administrative Criminal Law* (London: Sweet & Maxwell, 1982) at 13.

*"there (thus) seems some reason to think that strict liability can be traced to the 18th century, although it did not assume a developed form until a later period."*³⁶

The conscious beginning of the doctrine of strict liability in its developed form can be attributed to *R. v. Woodrow* in 1846³⁷ which followed *R. v. Medley*,³⁸ a public nuisance case decided twelve years earlier.

In *Medley* an indictment against the Equitable Gas Company as well as against its chairman, deputy chairman and the directors (who were personally ignorant of the offence), and against the superintendent and the gas engineer who had some part in the direction of the works confided in them, was upheld. The directors were fined £25 each and the superintendent and engineer, £10 each. The indictment was for a nuisance for conveying the refuse of gas into the river Thames whereby the fish were destroyed, a number of fishermen were thrown out of employ, and water was rendered unfit for drink. Lord Denman, C.J., giving the verdict, held the chairman, deputy chairman, superintendent and engineer guilty (and others charged, as not guilty) and indicated that the fact that fishermen lost employment did not by itself constitute a public nuisance. However, he added:

*"It seems to me both common sense and law that, if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants. It is quite clear, that in great rivers of this sort there must be many inconveniences, arising from a variety of causes; and the question, therefore, will be, whether there has been produced by the special acts of this company that which you consider to amount to a nuisance. With regard to copper-bottomed vessels, it seems to me that a great number of trifling objects may produce deleterious effect, though the individual instances may not be the subject of indictment."*³⁹

Littledale, J., in giving the judgment of the court, said that this was not a matter to be passed over merely by the infliction of a nominal fine but added,

³⁶ *Ibid.*

³⁷ 15 M & W 404, (1846)153 ER 907 (Exch) [*Woodrow* cited to ER].

³⁸ *Supra* note 34.

³⁹ *Ibid* at 299.

*"(At the same time) as no complaint had been made since this indictment was preferred, we do not think it necessary to visit the offence of these defendants with severe punishment."*⁴⁰

In *Woodrow*⁴¹ the information alleged that the defendant possessed adulterated tobacco, the adulteration of which was unknown to him. Defendant's counsel vigorously asserted his client's moral and legal innocence of any crime. The Crown contended that this was a revenue measure and as such outside the scope of criminal justice, and, in addition, that its terms did not require intent or knowledge. Chief Baron Pollock, recognizing that great injustice would be worked, announced a novel theory despite his misgivings. At the trial, in an exchange with Crompton, counsel for the accused, who was arguing lack of intent, he questioned: *"So you are here willfully disobeying the Act of Parliament if you do not take due pains to examine the article in which you deal and to ascertain, before you receive it, that it is of a character which the law permits you to have."*⁴²

Baron Parke, one of the other judges, was more realistic in his reasoning.

*"It is very true indeed that in particular instances it may produce mischief because an innocent man may suffer from his want of care in not examining the tobacco he has received, and not taking a warranty, but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so."*⁴³

The penalty in this case involved no question of imprisonment, the prohibited conduct caused a very direct and widespread public annoyance, and the existence of *mens rea* was peculiarly difficult, if not impossible, for the state to prove.

⁴⁰ *Ibid* at 301.

⁴¹ *Supra* note 37.

⁴² *Ibid* at 911. Commenting on this statement, Professor Starrs remarks: *"(Thus) a negligent act in one fell stroke of the judicial pen (was) transmuted into an intentional one. The trend, once precipitated, (ran) the gamut," supra* note 33 at 264.

⁴³ *Woodrow, ibid* at 913.

2.4.1.2 - Doctrine of Absolute Liability

Woodrow was followed twenty years later by *R. v. Stephens*⁴⁴, marking the conscious beginning in England of the movement to do away with *mens rea* for petty police offences. In this case the defendant, who was the owner of a slate quarry, was indicted for nuisance because his workers obstructed a neighbouring river by throwing into it rubbish from his quarry. In spite of the fact that being upward of 80 years of age and that the defendant had taken no part in the actual conduct of the business, the trial judge instructed the jury that if the rubbish fell into the river from the defendant's quarry, he was guilty, although the workers acted "without knowledge and against his general orders." Mellor, J. at the Queen's Bench affirmed the conviction holding that although the proceeding was criminal in form, in substance it was of a civil nature and therefore no *mens rea* need be proved. Professor Sayre notes that the principle embodied in this decision evoked widespread comments, but in the main it won general approval.⁴⁵

The hardening of judicial attitudes toward regulatory offences symbolized in the above cases softened for a time by the classic exposition as to *mens rea* of Wright J. in *Sherras v. de Rutzen*⁴⁶ at the end of the 19th century. In a much-quoted passage, the English judge suggested three general groups of cases in which no guilty mind need be proved. One is a class of acts which are not criminal in the real sense, but are acts which in the public interest are prohibited under a penalty. Another class comprehends some, and perhaps all, public nuisance cases. Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right.

The high-water mark in the movement towards construing statutory crimes as being based on a doctrine of absolute liability was reached in *Hobbs v. Winchester*

⁴⁴ (1866) 1LR QB 702.

⁴⁵ Francis Bowes Sayre, "Public Welfare Offences" (1933) 33 Colum L Rev 55 at 59.

⁴⁶ [1899] 1 QB 918 at 922 [*Sherras*]. Wright J's classification was approved by Lord Evershed in *Lim Chin Aik v R*, [1963] AC 160 (PC) [*Lim Chin Aik*], and was adopted with slight modification by Dickson J in *R v Sault Ste Marie (City of)*, [1978] 2 SCR 1299; 40 CCC (2d) 353 [*Sault Ste Marie* cited to SCR].

Corporation in the first decade of the 20th century.⁴⁷ In this case Kennedy, L.J., declared:

*"Taking the case as a whole and admitting that some of them might give some ground for such an argument, I think there is a clear balance of authority that in construing a modern statute this presumption as to mens rea does not exist."*⁴⁸

Criticism of the common law decisions gathered momentum after the seminal decision in *Woodrow* of the 19th century, especially after the *Hobbs* decision in the 20th century. In a poignant preface to his exhaustively researched treatise, *Mens Rea in Statutory Offences*, Professor Edwards, voicing criticism of strict liability, describes this development as follows:

"In the entire field of criminal law there is no more important doctrine than that of mens rea, embedded as are its roots in the principle that no man shall be punished for committing a crime unless a guilty mind can be imputed to him. Since the turn of the last century this principle has been assailed in no uncertain manner by the legislature. ... In its place there has arisen a theory of strict liability in which the question of a guilty mind is wholly irrelevant.

*This departure from the earlier concept of criminal liability based upon a moral standard of wrong-doing is not the exclusive prerogative of Parliament. It has exercised a varying influence upon the judiciary, the present mood being manifestly suspicious of attempts to extend the field of strict liability in crime. This was not always so."*⁴⁹

Similar criticisms were voiced by Henry M. Hart⁵⁰ and Andrew Ashworth.⁵¹

2.4.1.3 - Twentieth Century Common Law Developments

In the first part of his preface, Professor Edwards was echoing the famous "golden thread" principle enunciated by Viscount Sankey in *Woolmington v. D.P.P.* in

⁴⁷ [1910] 2 KB 471.

⁴⁸ *Ibid* at 483.

⁴⁹ J LL J Edwards, *Mens Rea in Statutory Offences* (London: Macmillan, 1955), preface, at xiii.

⁵⁰ *Supra* note 29.

⁵¹ Andrew Ashworth, *Principles of Criminal Law*, 5th ed (Oxford: Oxford University Press, 2006).

1935. Overturning a murder conviction and death sentence imposed on a farmer by lower courts, Viscount Sankey L.C. declared:

*"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*⁵²

The decision of Kennedy L.J. in *Hobbs*⁵³ was viewed unfavourably by Lord Evershed delivering the judgment of the Privy Council in *Lim Chin Aik v. R.*⁵⁴, who preferred that of Wright J. in *Sherras*. And, in *Sweet v. Parsley*⁵⁵ Lord Reid offered an alternative, in the shape of liability for gross negligence, though the thrust of his speech favoured the "half-way house" solution, a solution that would allow an accused to free himself from the risk of conviction and punishment if he could positively establish his innocence.

2.4.1.4 - Modern Common Law Criteria

Modern criteria for absolute liability at common law were laid down by Lord Scarman in *Gammon (Hong Kong) Ltd v. Hong Kong (A.G.)*⁵⁶, in which the Privy Council considered the scope and role of absolute liability offences in the modern criminal law and their effect upon the "presumption of *mens rea*". Giving the opinion of the Privy Council, Lord Scarman said:

⁵² [1935] AC 462 at 481-82; [1935] All ER 1 (HL).

⁵³ *Supra* note 47.

⁵⁴ *Lim Chin Aik*, *supra* note 46.

⁵⁵ [1970] AC 132, [1969] 1 All ER 347 (HL).

⁵⁶ [1985] AC 1, [1984] 2 All ER 503 (PC).

" . . . the law may be stated in the following propositions: (1) there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is "truly criminal" in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."

2.4.1.5 – Summary of the Common Law Situation

To sum up, it appears that there has been some confusion between absolute and strict liability and this confusion did not emanate from judicial decisions. In none of the decided cases has a common law defence of an act or omission caused by circumstances beyond the control of a person charged been raised or rejected. These common law defences include: an act of God, an act of a total stranger, irresistible force of nature, honest and reasonable mistake of fact, etc., which the Canadian *Criminal Code* has continued to recognize.⁵⁷ Had those extraordinary circumstances resulted in the consequences that occurred the defendant's act or omission would not become offences. It is submitted that there is no need for a separate third category of absolute liability offences and that if an act of God and other circumstances referred to above were rejected by courts it would only be because of pre-existing fault of the defendant, such as failure to take recognized measures and precautions to withstand those calamities, for example to construct buildings that are strong enough for earthquakes or hurricanes, or to maintain sewage pipelines in good repair to prevent rupture due to heavy flooding, etc. These situations can easily be covered in the category of strict liability offences. Other jurisdictions, such as the United States and Australia, do not appear to have introduced the category of absolute liability offences.

⁵⁷ *Supra* note 25, s 8(3).

The above point is perhaps what Professor Leigh had in mind when he wrote that

*"much ... of the debate concerning the supposed rigour of the law and the absence of any recognition of a fault principle is beside the point," and notes that "in respect of many activities, particularly in relation to public health and consumer safety and standards (statutory) defences do exist. They tend to follow roughly standardized forms, are particular in their address, and enable persons and companies who show that they have complied with their exacting requirements to avoid conviction. Generally speaking, the courts have applied them strictly but sensibly, certain exceptions apart."*⁵⁸

The issue seems to have been blown out of all proportion by many scholars who admit that in most cases the penalty is small and the possible harm is only to reputation. No hardship was ever pointed out in paying the penalty. Perhaps the only objection they have had is that the proceedings were taken in criminal courts. It may be observed that two early English decisions had made the same observation. Mellor J in *R. v. Woodrow*⁵⁹ while affirming the conviction of the accused, remarked that, *"although the proceeding was criminal in form, in substance it was of a civil nature, and that therefore no mens rea need be proved;"* and in *Reg. v. Tolson*⁶⁰ Wills J who gave the leading judgment of the Court of Crown Cases Reserved (consisting of the Full Court of nine judges), quashing the conviction of a woman for bigamy, observed that

"(Again) the nature and extent of the penalty attached to the offence may reasonably be considered. There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest. To subject him, when what he has done has been nothing but what any well-disposed man would have been very likely to do under the circumstances, to the forfeiture of all his goods and chattels, which would have been one consequence of conviction at the date of the Act of 24 & 25 Vict., to the loss of civil rights, to imprisonment with hard labour, or even to penal servitude, is a very different matter; and such a fate seems properly reserved for those who have transgressed

⁵⁸ *Supra* note 35 at 79.

⁵⁹ *Supra* note 37.

⁶⁰ (1889) 23 QBD 168.

*morally as well as unintentionally done something prohibited by law.”*⁶¹

2.4.2 - Canadian Decisions

2.4.2.1 - Early Cases

Early English cases continue to be authoritative in Canada until they are departed from by Canadian courts. Subsection 8(3) of the *Criminal Code* expressly provides that “[E]very rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.”⁶²

In two cases in the early 1920s, the Saskatchewan court reached opposite decisions in strict liability prosecutions. In the first, *Rex v. Ping Yuen*⁶³, a Chinese grocer was convicted of possession of illicit spirits, although he was unable to ascertain the contents of the beverage in question (he was prohibited from so doing by provincial health regulations). The case was decided on the basis of *Woodrow* and consideration of ascertainability was specifically excluded. But the same court held in the second case, *R. v. Regina Cold Storage and Forwarding Co. Ltd.*⁶⁴, that where a storage company in possession of illicit beverages is precluded by law from examining the content of such beverages, no conviction will lie. In other words, the managerial personnel of the storage company could not ascertain whether the temperance beer was illicit, and they reasonably believed it was not.

In contrast to *Regina Cold Storage*, the Ontario Court of Appeal in *R. v. Lawrence*⁶⁵ held that it was no defence to a charge of illegal possession of a narcotic

⁶¹ *Ibid* at 177.

⁶² *Supra* note 25, s. 8(3).

⁶³ 65 DLR 722, [1921] 3 WWR 505, 36 CCC 269 (Sask CA).

⁶⁴ [1924] 2 DLR 286, 41 CCC 21, 17 Sask LR 507 (Sask CA).

⁶⁵ [1952] OR 149, 102 CCC 121.

drug, under s. 4-1(d) of the *Opium and Narcotic Drug Act, 1929, c. 49* (Can.), that the accused did not know that the substance in his possession was a narcotic drug.

2.4.2.2 - Demise of Absolute Liability in Canada

Two Supreme Court decisions finally laid to rest the doctrine of absolute liability that was laid down in English decisions, the first partially, the second finally. The first was *R. v Pierce Fisheries*.⁶⁶ The evidence in this case did not show that any officer or responsible employee of Pierce Fisheries Ltd. had any knowledge that undersized lobsters were on their premises. The majority decision upheld the conviction by the court below, on the ground that the offence was one of strict liability and that the defendants' lack of knowledge was therefore no defence. The Court did not make it clear whether it meant absolute liability or what we in Canada now call strict liability. Nevertheless, Ritchie J. observed that there was a reasonable possibility of discovering that some lobsters were undersize when the crates were readied for shipment, and did not entirely rule out reasonable mistake of fact. Since the mistake of fact defence was not excluded, the case should be considered as having been decided on the strict and not absolute liability principle.

It was the second case, *R. v. Sault Ste. Marie (City)*⁶⁷ that finally led to the demise of absolute liability at criminal law in Canada. The Court formally accepted the notion that regulatory offences were essentially different from crimes, and could be governed by different rules, the most important difference being that while *mens rea* is presumed to be an essential element of all true crimes, regulatory offences are presumed to be based on negligence. The prosecutor need prove only the *actus reus*. However, proof of the prohibited act alone may not be enough to convict. It is open to the accused to prove on the balance of probabilities that he or she exercised all reasonable care to prevent the offence.

The subsequent Supreme Court decision in *Wholesale Travel*⁶⁸ suggested that courts will continue to recognize the distinction between crimes and public welfare offences, while shifting some offences from the latter to the criminal realm on the

⁶⁶ (1970), [1971] SCR 5, [1970] 5 CCC 193.

⁶⁷ *Sault Ste Marie*, *supra* note 46.

⁶⁸ *Wholesale Travel*, *supra* note 2.

basis of criteria for “true crimes” and creating new sub-categories within the framework of the regulatory offence. It suggested that while typical regulatory offences will still be based on negligence, offences carrying a particularly heavy stigma or penalty may be interpreted as *mens rea* offences, especially where they involve an element of dishonesty or are similar to “true crimes” in other ways. The Court unanimously held that no matter how heavy the penalty for an offence was, the *Charter does not require mens rea*. Nevertheless, where the legislature is silent on the issue of liability, the courts may interpret an offence as being either one of strict liability or *mens rea*.⁶⁹

2.4.2.3 - *Charter*-driven Classification Criteria

Since the passage of the *Canadian Charter of Rights and Freedoms*⁷⁰ there is an additional need to set classification criteria: one must determine whether placing an offence into a particular category will offend the *Charter*. If so, this will usually result in the offence being placed in a different category where it will not offend the *Charter*, rather than being declared invalid. For example, an offence involving a possibility of imprisonment cannot be classified as an absolute liability offence, since that will offend section 7 of the *Charter*.⁷¹ Any such offence must be treated as invalid or construed, at a minimum, as a strict liability offence. It has similarly been argued that offences resulting in a possibility of imprisonment and other substantial penalties, such as heavy fines and forfeiture of property, and those carrying a heavy stigma, are indistinguishable from criminal offences, and therefore must be construed as *mens rea* offences rather than offences of strict liability. To date, such arguments do not appear to have been successful. In light of the *Wholesale Travel* judgment it is unlikely that the penalty alone would ever be enough to dislodge the presumption that a public welfare offence is one of strict liability.

⁶⁹ *Ibid*, Cory J’s judgment at 234-38.

⁷⁰ *Supra* note 28.

⁷¹ *Reference Re S 94(2) of the Motor Vehicle Act (BC)*, [1985] 2 SCR 486, 24 DLR (4th) 536 [*BC Motor Vehicle*]; *R v Vaillancourt*, [1987] 2 S.C.R. 636, 47 DLR (4th) 399; *R v Logan*, [1990] 2 SCR 731, 73 DLR (4th) 40 (per Lamer CJ for the majority).

2.4.3 - United States Decisions

In the United States, earlier cases imposing strict liability involved the sale of alcoholic beverages and sex crimes, notably bigamy, adultery and seduction. According to Sayre,⁷² the rule of *absolute liability* came to be established about the same time as in Britain, at first in state courts deferring to English decisions and then in a landmark judgment, *U.S. v. Balint* (1922)⁷³ which reiterated the principle in these words:

*"The policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells . . . Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute..."*⁷⁴

A brief history of the development and progress of the absolute liability jurisprudence can be found in the judgment of Justice Jackson in the leading case of *Morissette v. U.S.*⁷⁵

As Professor Hall noted,⁷⁶ a few years after *Woodrow* a Massachusetts court upheld the conviction for selling adulterated milk though, again, the defendant was not at fault. The court emphasized the language of the statute, the fact that the penalty was a fine, the impracticability of requiring proof of knowledge, the importance of protecting the community against the common adulteration of food, and the reasonableness of imposing the risk upon the dealer, and thus holding him absolutely liable," citing *Com. v. Farren* (1864).⁷⁷ These State judicial decisions set

⁷² *Supra* note 45 at 56-59, 62-66.

⁷³ 42 S Ct 301, 258 US 250 [*Balint* cited to US].

⁷⁴ *Ibid* at 252-54.

⁷⁵ (1952), 72 S Ct 240, 342 US 246 [*Morissette*].

⁷⁶ Jerome Hall, *General Principles of Criminal Law* (Indianapolis: Bobbs-Merrill, 1947).

⁷⁷ 91 Mass 489 (Mass Sup Ct). This case (quoted by the U.S. Supreme Court in the landmark case of *Balint*, *supra* note 73, and by Justice Jackson in *Morissette*, *supra* note 75) and the case of *Commonwealth v Nichols*, 1865, 10 Allen 199, also cited by the Supreme Court, were decided nearly two decades after *Woodrow*, *supra* note 37. Justice Jackson however cited *Barnes v State*, 1849, 19 Conn 398 (Conn Sup Ct Err), saying that it was "(t)he pilot of the movement" in the United States, *Morissette*, *supra* note 75 at 256. That case was decided shortly after *Woodrow*, *supra* note 37, but still fifteen years after *Medley*, *supra* note 34.

the foundations of strict liability which, "starting as a delicate thing that was merely tolerated because it involved only slight sanctions has since become a mighty structure whose effects, though hardly known, must certainly be very great."

Professor Hall added:

*"Strict liability has expanded so considerably in recent years and in such various forms, that it is impossible to generalize regarding it. Quite apart from the diverse major crimes that have been brought within this sphere, it is difficult to recognize common features in the so-called public welfare offences. These include, e.g., the sale of narcotics, the sale of adulterated food, the possession or transportation of gambling devices, the transportation of intoxicating liquors, the sale of liquor to habitual drunkards, traffic offences, violations of building regulations and a great additional miscellany that can hardly be subsumed under any classification. The penalty is generally small, but that is also true of countless ordinances, statutes and regulations which are not subject to strict liability."*⁷⁸

United States, as will be noted in chapter 5, has created a category of "non-criminal violations" in a large number of regulatory statutes and in regulations made under them, which by the end of the 1970s numbered nearly 350.⁷⁹ Under those statutes, a few of which are discussed in that chapter, only those contraventions that were "knowingly" committed (the *scienter* rule) can be prosecuted as criminal offences.

2.4.4 - Australian Decisions

The leading Australian case is *Maher v. Musson*⁸⁰, in which the accused was charged with having in his possession illicit liquor under section 74(4) of the *Distillation Act 1901-1931*. Subsection 7 of the same section made it an offence to purchase any illicit spirits knowing them to be illicit spirits. Despite the absence of any reference to knowledge in the subsection under which the accused was charged, the High Court of Australia held that it was a good defence to prove that the accused neither believed nor had reason to believe that the spirits were illicit, distinguishing

⁷⁸ *Supra* note 76 at 279.

⁷⁹ Colin S Diver, "Assessment and Mitigation of Civil Monetary Penalties by Federal Agencies" (1979) 79 *Colum L Rev* 1435.

⁸⁰ 52 CLR 100, [1935] ALR 80.

*Woodrow*⁸¹ on the ground that the adulteration of the tobacco in that case could have been ascertained.

Maher v. Musson was the precursor of the well known judgment in *Proudman v. Dayman*.⁸² Dixon J. participated in both cases. In the latter he formulated the general rule that an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence. From this it followed that, save in an exceptional case where liability is truly intended to be absolute, the accused might defend himself by showing that he exercised due diligence to comply with the law. The Australian cases are discussed in chapter 5.

2.5 - Summary of This Part and Reflections

To conclude, the main battleground in regulatory criminal law has been the contentious issue of absolute liability where a person can be convicted irrespective of whether or not he had any knowledge or intention of committing the offence. That approach nullifies any inquiry into the guilt or innocence of the offender. It is based upon the *Hobbs'* philosophy that it is better for the person whose acts caused the harm to suffer than unknown or unknowable members of the public. It, therefore, does not matter that the accused took every reasonably possible step to avoid committing the offence. Lord Evershed had difficulty accepting this philosophy when giving the judgment of the Privy Council in *Lim Chin Aik v. R.*⁸³, and favoured the dictum of Wright J. in *Sherras v. De Rutzen*⁸⁴ to that of Kennedy L.J. in the *Hobbs*⁸⁵ decision. The House of Lords has adopted a more principled approach in subsequent decisions, such as *Sweet v. Parsley*,⁸⁶ *Alphacell Ltd. v. Woodward*,⁸⁷ and *Gammon (Hong Kong) Ltd. v. A.G. for Hong Kong*.⁸⁸

⁸¹ *Supra* note 37.

⁸² 67 CLR 536, [1944] ALR 64.

⁸³ *Lim Chin Aik*, *supra* note 46.

⁸⁴ *Sherras*, *supra* note 46.

⁸⁵ *Supra* note 47.

⁸⁶ *Supra* note 55.

Eminent scholars, such as Professors Sayre,⁸⁹ Perkins,⁹⁰ Ashworth,⁹¹ Edwards,⁹² Henry Hart,⁹³ and John Coffee, Jr.,⁹⁴ have been rankled by the routine use of absolute liability by courts following *Hobbs*, giving what one may describe as “assembly line” justice. They have pleaded for a review of these laws to provide at a minimum some defence to an accused who had taken every reasonable step available to avoid breaking the law and was aghast at finding that the activity did in fact have that result. National as well as international and intergovernmental law reform institutions, and others, have added their voices. As Sayre noted in his scholarly article,⁹⁵ as early as 1931 the National Committee on Law Observance and Enforcement urged the United States government to commit much of the enforcement of social regulation to agencies other than criminal courts. Sayre suggested that where public offences involve a possible penalty of imprisonment or heavy fine, it would be sounder policy to maintain the orthodox requirements of a guilty mind but to shift the burden of proof to the shoulders of the defendant to establish his lack of a guilty intent if he can.

The Administrative Conference of the United States in the late 1960s recommended that administrative monetary penalties would be an ideal tool to enforce many of the regulatory offences, especially where the fines were small and there was a considerable volume of cases that can be adjudicated by an

⁸⁷ [1972] AC 824, 2 All ER 475 (HL).

⁸⁸ *Supra* note 56.

⁸⁹ *Supra* note 45.

⁹⁰ *Supra* note 31.

⁹¹ *Supra* note 51.

⁹² *Supra* note 49.

⁹³ *Supra* note 29.

⁹⁴ John C Coffee, Jr, “Paradigms Lost: The blurring of the criminal and civil law models - And what can be done about it” (1992) 101 Yale LJ 1875 [hereinafter cited as Coffee, “Paradigms Lost”].

⁹⁵ *Supra* note 45 at 78, citing the Wickersham Report, *supra* note 12 at 14, 46-47.

administrative body.⁹⁶ Many statutes enacted since the early 1970s have implemented this recommendation.⁹⁷

JUSTICE,⁹⁸ Justices' Clerks' Society,⁹⁹ the Council of Europe,¹⁰⁰ and others at the beginning of the 1980s, joined the chorus and similarly pleaded for a distinction between crimes and regulatory offences, drawing attention to the distinction made by post-war Germany through its administrative penal law statute (*Ordnungswidrigkeitengesetz*)¹⁰¹ through which many regulatory offences were transferred to the jurisdiction of administrative agencies for initial adjudication and, if resolution failed, giving the option to the defendant to appeal to the courts. These developments, as well as the civil penalty offence regime in certain sectors of regulation in Australia and the latest UK legislation, have been described in chapter 5.

2.6 - Reflections on the Canadian Situation

With respect to the Canadian situation, there is some difficulty in accepting the logic of Dickson J's reasoning in the *Sault Ste. Marie* case¹⁰² itself, in so far as it applies to a corporate body. In that case only the corporation (City of Sault Ste. Marie) was charged and as a corporation has "no soul to damn, or body to be kicked"¹⁰³; it cannot be imprisoned, and so it cannot be said to face deprivation of liberty. Nor has the Supreme Court accorded all *Charter* rights to corporations. For

⁹⁶ See chapter 6, below, which discusses this issue further.

⁹⁷ See Diver, *supra* note 79 and chapter 6 where a few of these statutes are discussed.

⁹⁸ *Supra* note 5.

⁹⁹ *Supra* note 11.

¹⁰⁰ *Supra* note 14.

¹⁰¹ *Gesetz über Ordnungswidrigkeiten* of 25 March 1952 (*Bundesgesetzblatt*)(hereinafter cited BGBl) I.177. See Chapter 6.

¹⁰² *Sault Ste Marie*, *supra* note 46.

¹⁰³ John C Coffee, Jr, "No Soul to Damn, No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79:3 Mich L Rev 386 [hereinafter cited as Coffee, "No Soul to Damn"].

example, the Court refused to overrule pre-*Charter* cases which denied corporations the common law right against compellability at the instance of the Crown: *R. v. Amway Corporation*.¹⁰⁴ In the *Sault Ste. Marie* case, no charges were brought against officers of the corporation, and if they were, the defence of due diligence would have made sense. In fact, where directors and officers of a corporation face prosecution for the criminal offence of a corporation, they are explicitly provided with the defence of due diligence in many statutes.¹⁰⁵ Was there a transference of that defence to the corporation itself when none of its officers has been or would be charged? The learned Justice, later Chief Justice, did not clarify this point and there do not appear to be any decisions on it in any subsequent case.

It seems to follow from the *Sault Ste. Marie* decision that if an offence is punishable only by a monetary or other non-criminal penalty, the defence of due diligence need not be provided. Perhaps where an offence is committed by a corporation, the due diligence defence can be denied even where the penalty is a criminal fine, which is the only option. Dickson J however did not give any indication that criminal courts are not the appropriate forums for non-criminal sanctions. If a court is trying some offences under a particular statute, it does not make much sense to transfer other offences in the same statute (by calling them violations) to another adjudicating body; it only creates bureaucracy where none is required, and results in unnecessary expense.

On the other hand, no concern seems to arise if an offence is categorized as a “non-criminal violation” and proceedings are taken in non-criminal courts, such as a tribunal where a defendant has none of the protections available in a criminal court. Should there be a concern if proceedings are taken in a criminal court, as under the *Contraventions Act*?¹⁰⁶ If no, then why not take a page out of the 1892 *Criminal*

¹⁰⁴ [1989] 1 SCR 21, 56 DLR (4th) 309.

¹⁰⁵ See e.g., *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, s 126 (assented to 18 June 2009, not in force).

¹⁰⁶ SC 1992, c 47. The Act provides for a simplified, alternative procedure in cases where a person is charged with a summary conviction offence that has been brought within its ambit by a federal regulatory statute. The procedure allows the person to plead guilty and pay the prescribed fine, but if the offender prefers to take his or chances in court, the full criminal procedure rules apply. The statute has been described in chapter 6, below.

*Code*¹⁰⁷, where section 193, one of two common nuisance sections, expressly declared that “anyone convicted upon any indictment or information for any common nuisance other than those mentioned in section 192 shall not be deemed to have committed a criminal offence.” Only when a common nuisance endangered the lives, safety or health of the public, or occasioned injury to the person of any individual, a crime was committed under section 192. The codifiers seem to have had good sense in not splitting the common nuisance sections, one to be tried in the criminal courts (section 192), and the other to be tried in some other forum.

Parliament has already created a precedent in the *Contraventions Act* by giving jurisdiction to a “contraventions court”, designated as such by the Governor in Council, for regulatory offences classified as “contraventions” by a regulation.¹⁰⁸ A person accused of a strict liability offence perhaps gets better procedural protection under this statute since other criminal law and evidential rules, such as privilege against self incrimination, cross-examination of witnesses, etc., would still be available in this forum. Although the *Contraventions Act* works well, and is being used by several Federal departments which are uneasy about using administrative forums because of possible constitutional problems, it does not go far enough by declaring, as section 193 of the 1892 *Criminal Code* did, that a person prosecuted under the statutes that have adopted it is “not deemed to have committed a criminal offence.” Perhaps this model was what the drafters of section 65(2) of the *Health of Animals Act*¹⁰⁹ and the corresponding section 48 of the *Plant Protection Act*¹¹⁰ had in mind when they expressly provided that a person accused of an offence of “possession” of illegally imported animal or thing (contrary to section 15) can only be proceeded by way of summary prosecution and the offence is punishable by a fine not exceeding \$50,000, but the offender shall not be sent to prison even for default of payment of the fine. There is no indication in these provisions or anywhere in the two statutes that they are strict liability offences. It is submitted that, having regard to the wording of the sections, and notwithstanding that only a monetary fine is the

¹⁰⁷ (1892) 55-56 Victoria c 29.

¹⁰⁸ *Supra* note 106.

¹⁰⁹ *Supra* note 8.

¹¹⁰ *Supra* note 9.

prescribed penalty, the accused can avail themselves of the defence of due diligence, which they do not get if they are proceeded against administratively.¹¹¹ An amendment to the *Contraventions Act*, giving effect to this suggestion should be considered by Parliament.

Finally, one might ask, is there any need to label a large segment of a country's population as "criminal" when people have committed only minor regulatory infractions? To quote M. Bagaric

*"It would seem that the only rationale for criminalizing such conduct is that it is presumed to be an effective practical means of controlling and regulating the relevant conduct. The criminal law is a relatively cheap, convenient and swift means of reinforcing a system of regulation. Economic considerations and reasons of expedience are treated as outweighing any argument that the criminal law should be reserved for the most antisocial form of behaviour."*¹¹²

The author of this thesis takes issue with this rationale and submits that economic considerations should not govern whether conduct prohibited by regulation should be dealt with through the criminal process. In many areas, such as traffic regulations where masses of people commit petty violations, legislators have found it more practical and cheap to send notices of infraction by mail, thereby relieving courts of clogged up dockets and saving time and expense. As a matter of principle, too, criminal law is not an answer to such violations.

Professor Leigh, too, had anticipated the argument favouring the use of non-criminal forum to adjudicate regulatory infractions. He cautions against forgoing recourse to the cheap, swift and simple procedure of the magistrates' courts from considerations of a dogmatic character. He points out,

"(m)agisterial procedures are well-developed and fair. Civil liberties guarantees are embedded in the system. There is no need for a system incorporating the beguiling simplicity said to be a desirable attribute of administrative procedures. We have used magisterial

¹¹¹ Under the *AAAMP Regulations* discussed in chapter 9, Part II.

¹¹² "The "Civil-isation" of the Criminal Law" (2001) 25:4 *Criminal Law Journal* 184 at 190. Bagaric wrote the article in the context of the top ten infringement notices sent to the court for enforcement in 1990-91, most of which he says were vehicle offences and typically victimless strict liability offences. All of those offences constituted paradigm instances of regulatory offences (Bagaric at 189).

*procedures as part of a bundle of controls for a very long time, virtually since the beginning of modern administrative regulation....”*¹¹³

This is a very sound argument against using administrative tribunals to handle regulatory infractions. It is considered in the context of the *AAAMP Act* procedures discussed in chapter 6.

2.7 - Relevant Offences in the *Criminal Code* and in the *Health of Animals and Plant Protection Acts*

2.7.1 - Introduction

This section maintains the historical order of discussion in the thesis, and begins with a few of the relevant animal cruelty offences in the *Criminal Code*¹¹⁴ with which an offender can be charged. The offences are independent of those specifically provided in the two statutes that are the focus of this thesis, namely, the *Health of Animals Act*¹¹⁵ and the *Plant Protection Act*.¹¹⁶ The *Code* sections cover some of the same legal situations as in the two statutes; though they can conceivably operate independently of these or any other federal statute, or even provincial laws for that matter, and supplant them.¹¹⁷ However, no prosecution seems to have been launched under the *Code*. The provisions of all three statutes are briefly set out in this Part.

However, the *autrefois acquit* or *convict* provision of the *Criminal Code* could work in favour of an accused. It states:

"Where an act or omission is an offence under more than one Act of Parliament, whether punishable by indictment or on summary

¹¹³ Leigh, *supra* note 35 at 108-09.

¹¹⁴ *Supra* note 25.

¹¹⁵ *Supra* note 8.

¹¹⁶ *Supra* note 9.

¹¹⁷ Two peripheral points might be noted here: (1) as prosecution of *Code* offences comes under provincial jurisdiction, it is possible that a provincial Attorney General might step in where no federal prosecution has been undertaken, thereby nullifying any prosecutorial discretion that might have been the reason to refrain from undertaking a prosecution; (2) it is quite conceivable that a private prosecution may be instituted by animal rights advocates for glaring cruelty towards animals if their pleas to the public authorities, who normally undertake prosecution, go unheeded. They can do it by using Part XXVII of the *Code*, Summary Convictions Part.

*conviction, a person who does the act or makes the omission is, unless a contrary intention appears, subject to proceedings under any of those Acts, but is not liable to be punished more than once for the same offence.*¹¹⁸

2.7.2 - *Criminal Code*¹¹⁹

Five sections of the *Criminal Code* cover the general criminal offences of *willfully killing, wounding, injuring or endangering cattle and cruelty to animals and birds*. These are sections 444 to 447.1, but only three of immediate relevance to the subject of this thesis are listed below. Two further sections, one creating the crime of common nuisance (section 180) and the other, the offence of causing bodily harm by criminal negligence (section 221), may also be relevant because the introduction of animal or plant diseases by failing to comply with the strict obligations set out in the *Health of Animals Act*¹²⁰ and the *Plant Protection Act*¹²¹ could have devastating effect on human health and safety and on Canadian agriculture and forestry, respectively. However, no prosecutions, relevant in the context of the two regulatory statutes, could be found under these sections, perhaps because the regulatory statutes provide ample authority, as well as more severe consequences in some situations, than the *Criminal Code* sections referred to. This point will become clearer when discussing contravention of regulations.

The sections relating to *cruelty to animals* are 444 (willfully injuring or endangering cattle), 445 (cruelty to dogs, cats, birds and animals that are not cattle), and 446 (causing damage or injury). The antecedents of some of these offences are apparent; they are derived from the English criminal law. The English law of 1835 consolidated and amended previous laws on cruelty to animals, and further provisions were added in 1849.¹²² Keeping places for bull-baiting, and dog- or cock-fighting, were made offences. Persons who impounded animals were required to provide them with food and water. Regulations were made for slaughter-

¹¹⁸ *Supra* note 25, s12.

¹¹⁹ *Ibid* (s 446 was amended by SC 2008, c 12, s 1).

¹²⁰ *Supra* note 8.

¹²¹ *Supra* note 9.

¹²² (1835) 5-6 Wm IV c 59; (1849) 12-13 Victoria, c 92, ss 7-9.

houses and for the treatment of cattle sent to be slaughtered. The *Protection of Animals Act 1911* (U.K.) provided that “an owner shall be deemed to have permitted cruelty within the meaning of this *Act* if he shall have failed to exercise reasonable care and supervision in respect of the protection of the animal”¹²³

Section 444 makes it an offence to *wilfully* injure or endanger cattle. “Cattle” is defined by section 2 to mean an animal that includes neat cattle or an animal of the bovine species by whatever technical or familiar name it is known, and includes any horse, mule, ass, pig, sheep or goat.

Under *Criminal Code* section 444(1), “*wilfully injuring or endangering*” means to (a) kill, maim, wound, poison or injure, or (b) to place a poison in such a position that it may easily be consumed by cattle. The offence may be prosecuted as indictable or by summary proceedings. A maximum prison term of 5 years is prescribed as punishment on indictment and a maximum prison term of 18 months or a fine not exceeding \$10,000, or both, is prescribed for an offender on summary conviction. Section 429 sets out an extended definition of the epithet *wilfully*. It means, *knowing* that the act or omission will probably cause the occurrence of the event and was *reckless* whether the event occurred or not. In order to escape conviction, the accused has to prove that he acted with legal justification or excuse and with colour of right.¹²⁴

Section 445 is concerned with cruelty to dogs, birds or animals that are not cattle and that are kept for a lawful purpose. Punishment is as severe as that for a section 444 offence.

Section 445.1 is concerned with willfully causing or, being the owner, permitting to be caused, unnecessary suffering or injury to an animal or a bird, encouraging, aiding or assisting at the fighting or baiting of animals or birds, willfully, without reasonable excuse, administering a poisonous or an injurious drug or substance to a domestic animal or bird or an animal or a bird wild by nature that

¹²³ 1911, 1-2 Geo V, c 27 (UK), s 1(2).

¹²⁴ This reverse onus may be unconstitutional. See e.g., *R v Gomey* (1993), 80 CCC (3d) 117, 85 Man R (2d) 41 (Man CA); *R v Dupont* (1976), 22 NR 519, 11 AR 149 (Alta SC, AD), *aff'd*, [1978] 1 SCR 1017 ('wilfully' in this section is not simply limited to an 'evil intent').

is kept in captivity or, being the owner of such an animal or a bird, wilfully permitting a poisonous or an injurious drug or substance to be administered to it.

The punishment is the same as that prescribed under sections 444 and 445 and the reverse onus rule referred to under section 444 applies.

Section 446 creates the offence of causing damage or injury to animals or birds *while they are being driven or conveyed*, or, being the owner or the person having the custody or control of a domestic animal or bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or willfully neglects or fails to provide suitable and adequate food, water, shelter or care for it. The affinity of this provision to sections 138 to 143 of the *Health of Animals Regulations*¹²⁵ is obvious.

The maximum punishment for a section 446 offence, upon conviction on indictment, is a two year prison term, and on summary conviction, a six month prison term or a \$5,000 fine, or both. A reverse onus is provided in subsection 446(3). Evidence that the accused failed to exercise reasonable care or supervision of the animal or bird is proof that damage or injury was caused by willful neglect.

In addition to the punishment prescribed for the group of animal cruelty offences referred to above, a new section was added in 2008 to the *Criminal Code*¹²⁶ authorizing the Court that convicts an offender, to impose:

- “(a) an order prohibiting the accused from owning, having the custody or control of, or residing on the same premises as the animal or a bird during any period that the court considers appropriate for a minimum of 5 years; and
- (b) on the application of the Attorney General or on its own motion, on a second or subsequent offence [to] order that the accused pay to a person or an organization that has taken care of an animal or a bird as a result of the commission of the offence, the reasonable costs that the person or organization incurred in respect of the animal or bird, if the costs are readily ascertainable.”

¹²⁵ CRC, c 296.

¹²⁶ *Supra* note 25.

Contravention of the disability order imposed under paragraph 447.1(a) is a summary conviction offence.¹²⁷

2.7.3 - Criminal Regulatory Offences

2.7.3.1 - Overview

In order to get a flavour for the regulatory scheme of the *Health of Animals Act*¹²⁸ it would be useful to appreciate the general scenario in which the *Act* operates. Canada's huge land mass and her natural, renewable wealth have provided Canadians with enormous resources for farming and raising farm animals such as cattle, swine, sheep, goats, and other livestock and poultry. Both grain and livestock are big businesses in this country for they provide food to live on both here and in many other countries around the world that do not produce enough of their own. Food safety has been a serious concern to Canadians and to our foreign buyers.¹²⁹ This has been realized from the earliest times in this country and in England from where immigrants to Canada brought the laws that prevailed in that country to regulate food safety and to prevent the spread of contagious diseases which animals contract from time to time. Feeding the meat of diseased animals to humans would spell disaster and so the laws prohibited the slaughter of those animals and totally banned and punished the sale of their meat with severe criminal penalties, including death or long term imprisonment.

Farm animals are bred not only for their meat, though a very large proportion is exclusively bred for that purpose, but also for other produce derived from them, notably milk from dairy cows and goats. Canadian laws have been concerned not just with the health of the animals *per se*, because living in herds or flocks, especially in vast numbers, would communicate any disease that one or a few contract, especially if the disease is contagious, to the rest of the species around them and in neighbouring farms. If that happens, as periodic episodes of foot-and-mouth, tuberculosis, scrapie, avian influenza, etc., witnessed in recent history have

¹²⁷ *Ibid.* The general penalty prescribed by s 787, namely, a maximum fine of \$2,000 or maximum prison term of six months, or both, applies.

¹²⁸ *Supra* note 8.

¹²⁹ See Appendix 3 at 309, below, for a snapshot of this enterprise.

shown, the entire food supply is at great risk and so are humans who are dependent on the affected animals.¹³⁰ Another miserable episode has been that of bovine spongiform encephalopathy (or BSE) which ravaged cattle in the United Kingdom in the 1980s and spread to Canada and the United States, though in less disastrous ways. Governments in UK and Europe incurred huge expenditure to compensate owners of animals who were forced to cull the animals lest the general animal population, and humans, be placed at risk of disease or even death. When the spread of BSE to Canada became common knowledge, imports from Canada were banned by our best trading partners until confidence was restored. This took several years and resulted in enormous economic loss.¹³¹

Government's concern for farm animal health is just as strong as that for human health principally because animals cannot take care of themselves and they are the source of human food. For these reasons, the government tries to ensure that animals are well taken care of on the farm and provided with proper feed. For example, the disaster that resulted from use of animal protein in cattle feed, which many years later was found to cause BSE or mad-cow disease, led to feed ban regulations and also to the present livestock identification program. Animal welfare laws require livestock and birds to be treated and cared for humanely, driven or conveyed to markets and fairs for sale or auction, or to slaughterhouse, in a safe manner so that they do not suffer injuries and are not traumatized by the journey. Similar gentle treatment is also required for diseased animals and birds that are destined to deadyards.¹³²

This huge enterprise of raising, feeding, conveying, selling, slaughtering and other operations involves many actors, small, medium and large, carrying on business as individuals or under corporate veil. These include individual and corporate farmers, transporters who convey animals to their destination, stockyards,

¹³⁰ Erica Weir, "Public Health: Foot-and-mouth disease in animals and humans" (2001) 164:9 CMAJ 1338, online: CMAJ <<http://www.cmaj.ca/cgi/content/full/164/9/1338>>. According to Weir, the last outbreak in Canada occurred in 1952, as per Weir's consultation of Health Canada website on 30 March 2001.

¹³¹ Canadian Food Inspection Agency (CFIA), "Overview of Canada's BSE Safeguards", online: CFIA <<http://www.inspection.gc.ca/english/anima/disemala/bseesb/bseesbfs2e.shtml>>; Statistics Canada, "Canada's beef industry and BSE", online: Statistics Canada <http://www41.statcan.gc.ca/2006/0920/ceb0920_001-eng.htm>.

¹³² *Supra* note 125, Part XII. Provincial laws are listed in Appendix 6 at 314, below.

auction marts, feed mills and renderers, as well as butchers and handlers both at huge meat packing plants and down to the retail level where the processed meat is sold for further preparation in kitchens and consumption. Private veterinarians look after the health of animals on most farms. A few large corporate farms employ their own veterinarians for that purpose.

All these stages of the enterprise (excluding, of course, home kitchens), are closely regulated, monitored and inspected by governments, by deploying thousands of highly trained veterinary inspectors, enforcement officials, health officers, and other professionals, from the farm to the meat processing plants by the Federal government, in retail sales and restaurants and hotels serving food by provincial governments and local authorities, and in some cases, by both levels acting within their own jurisdictional spheres.

2.7.3.2 - *Health of Animals Act*

2.7.3.2.1 - Overview

The *Health of Animals Act*¹³³ and the *Regulations*¹³⁴ enacted under its authority (hereinafter in this section referred to as the Act or Regulations) regulate the operations referred to in the Overview, from the farm (including imports to and export from the farm) to the delivery of animals raised for food to their final destination, at which point, in the case of slaughterhouses and meat packers, the *Meat Inspection Act*¹³⁵ and its *Regulations*¹³⁶ take over.

The *Act* and the *Regulations* generally apply only to the farming community which raise livestock and poultry that directly or eventually get into the food chain for public consumption, and to those ancillary enterprises and persons involved in or who facilitate that operation. There are however many situations where the general

¹³³ *Supra* note 8.

¹³⁴ *Supra* note 125.

¹³⁵ RSC 1985, c 25 (1st Supp).

¹³⁶ *Meat Inspection Regulations, 1990, SOR/90-288.*

public may run afoul of the *Act* or the *Regulations*. This would happen primarily when they import prohibited animals (such as honeybees at certain times), birds, household pets, etc., and fail to report their importation to Customs.¹³⁷

2.7.3.2.2 - Duties, Obligations, Prohibitions and Offences

Sections 8 to 10 *Health of Animals Act*

Where an animal is afflicted with a reportable disease or toxic substance, section 8 prohibits that fact from being concealed from the authorities, section 9 prohibits the owner or person in care and control of the animal from turning it out, keeping or allowing it to graze on any undivided or unenclosed land, and section 10 forbids a person from taking the animal, without a licence issued by the CFIA, to any market, fair or other place that is known by the person to be affected or contaminated or has been exposed to any reportable disease or toxic substance. There is a long list of reportable diseases in the regulations which include bovine tuberculosis, foot-and-mouth disease, mad cow disease, scrapie, avian flu, and so forth. Some of these diseases must be notified immediately; others on an annual basis.¹³⁸

Sections 11-19, 25 of the *Health of Animals Act*

Selling or disposing of an animal, animal product or animal byproduct, that is known to be diseased, without a CFIA licence, is prohibited by section 11. Other prohibitions include throwing or placing the carcass of a diseased animal in a body of water (section 12), digging up a buried carcass of a diseased animal (section 13), possessing or disposing of an animal that the person knows was imported in contravention of the *Act* or the *regulations* (section 15), importing any animal, animal product or byproduct, animal food or veterinary biologic without presenting it to a CFIA inspector or officer (section 16) and exporting an animal from Canada by vessel or aircraft without giving prior notice of the export and without a CFIA veterinary inspector's certificate (section 19). A copy of the veterinary inspector's certificate must be delivered to the master or agent of the vessel or the pilot in

¹³⁷ The provisions of the *Act* and the *Regulations* relating to imports (and exports) are enforced by the CBSA which is given this mandate by the *Canada Border Services Agency Act*, SC 2005, c 38 [*CBSA Act*].

¹³⁸ *Supra* note 125, Schedules VII and VIII.

command of the aircraft, as the case may be, and to the chief officer of customs of the port or airport from which the vessel or aircraft is to depart. The vessel or aircraft is forbidden from departing from the place where the animals were boarded without such certificate. Section 25 prohibits the removal from or taking into an infected place any animal or thing without a CFIA inspector or officer's licence or permit.

Section 35 of the *Health of Animals Act*

Obstructing or hindering, or making any false or misleading statement to a CFIA analyst, inspector or officer who is performing duties or functions under the *Act*, or the *regulations*, is prohibited by section 35.

General Offence

Section 65 creates the general offence of contravening any provisions of the *Act* or the *regulations* and prescribes a maximum punishment of 2 years in prison, or a \$250,000 fine, or both, when a person is convicted on indictment, or a maximum of 6 months or a \$50,000 fine, or both, when convicted on summary prosecution. However, the offence of possession of an illegally imported animal or thing, contrary to section 15, can only be proceeded by way of summary prosecution and it is punishable by a fine not exceeding \$50,000. Furthermore, a section 15 offender cannot be sent to prison for default of payment of the fine.

2.7.3.2.3 - Powers under *Regulations*

The regulatory framework of the *Act* is contained in the *Health of Animals Regulations*.¹³⁹ Section 64(1) grants wide ranging regulation making powers to the Governor in Council "for the purpose of protecting human and animal health through the control or elimination of diseases and toxic substances and generally for carrying out the purposes and provisions of the *Act*." Some powers can be related to the specific duties and obligations set out in the *Act* but many are not so tethered.

Powers that flow directly from the enumerated sections include the following:

¹³⁹ *Supra* note 125.

“(1) prohibiting or regulating the importation, exportation and possession of animals and things in order to prevent the introduction of any vector, disease or toxic substance into Canada or into another country from Canada;

(2) subjecting animals and things that may transmit a disease or toxic substance to quarantine; or requiring their destruction on importation into Canada and for requiring the disposal on importation into Canada of things that may transmit a disease or toxic substance;

(3) requiring proof of the fact that animals imported into or passing through Canada have not been brought from any place where there was, at the time of their embarkation, a disease or toxic substance;

(4) requiring the segregation and confinement of animals within certain limits, establishing areas of inspection or quarantine and establishing eradication areas where animals may be inspected, segregated and tested for any disease or toxic substance;

(5) requiring that animals be treated humanely and regulating the conduct and operation of zoos and game farms;

(6) prohibiting or regulating the feeding to animals of any thing that could introduce or spread any disease or toxic substance to animals;

(7) regulating the construction, operation and maintenance of animal deadyards, rendering plants and animal food factories;

(8) regulating the importation, preparation, manufacturing, preserving, packaging, labelling, storing, distribution, sale, conditions of sale and advertising for sale of products of animal deadyards, rendering plants and animal food factories.”

Powers that are not so tethered but come under the general regulation making authority are those that:

(1) authorize regulations generally governing the care, handling and disposition of animals, the manner in which animals are transported within, into or out of Canada, and providing for the treatment or disposal of animals that are not cared for, handled or transported in a humane manner;

(2) require animals and things to be marked or to have affixed to them tags, seals or other devices for the purposes of the Act, and prohibiting the removal, breaking, tampering with or altering of those marks, tags, seals or other devices;

- (3) establish and governing a national identification system for animals that provides for standards and means of identification; and
- (4) require animals to be identified under that system when the ownership or possession of them changes or when they are transported or otherwise dealt with.

Powers in this latter class are particularly relevant to *strict liability offences* the jurisprudence of which is discussed in Part A of this chapter, as the offences resulting from the contravention of those regulations would, presumably, belong to that category since terminology indicating *knowledge* or other mental element specifically in regard to them is absent. At the same time there are only two categories of criminal offences in regulatory law, the third (absolute liability) having been declared by the Supreme Court of Canada as offending the *Charter of Rights and Freedoms*.¹⁴⁰ It might be observed that previous versions of the *Health of Animals Act*, provided specific authority in the substantive part for transportation of animals and for animal transportation regulations.¹⁴¹

Powers Respecting Regulation of Birds Bred in Captivity

Subsection 64(2) authorizes the Governor in Council to make regulations with respect to birds bred in captivity and their chicks (under seventy-two hours old) for the purpose of maintaining or improving the quality of bird stock and of controlling or eliminating diseases and toxic substances among birds. Under this authority, the Governor in Council may also regulate the production, marketing and distribution of birds and hatching eggs; prohibit or control the movement of birds and hatching eggs; require hatchery operators to register with the Minister annually the names and addresses of persons who act as agents in the marketing of birds produced at the operators' hatcheries; prescribe the types, sizes, specifications and labelling of packages used by hatchery operators for the marketing of chicks; and the sanitation in or about hatcheries.

¹⁴⁰ *BC Motor Vehicle*, *supra* note 71.

¹⁴¹ *Animal Contagious Diseases Act*, RSC 1970, c A-11, ss 31, 32; *Animal Diseases and Protection Act*, RSC 1970, c A-13 (title amended 1974-75-76, c 86).

2.7.3.2.4 - *Mens Rea* or Strict Liability

Most of the prohibitions in the above referred sections of the *Health of Animals Act* require a specific state of mind, such as “knowledge” which suggests that they are *mens rea* offences where the prosecutor has not only to prove that the offence was actually committed but it was committed by the accused with the requisite state of mind. This cannot be said with certainty with regard to the numerous offences created by regulations pursuant to section 64 of the *Health of Animals Act*.

2.7.3.2.5 - Criminal Penalties

Despite the heavy fines and prison terms mentioned in paragraph (2)(d) above, the data on prosecutions over the last 10 years (1996/97 to 2006/07) indicate that only one offender was fined \$172,000 on a single count. The prosecution in this case was eventually turned into an indictment after an agreement was reached with the accused who had pleaded guilty. The maximum fine for a summary conviction offence is \$50,000. The previous highest fines were \$71,000 on two counts, \$69,000 and \$38,000, and there were several fines in the \$10,000 to \$20,000 range. The average of all fines during this period was under \$10,000. It would appear that judges are more realistic, even sympathetic, when imposing fines and generally do not go by the book. In no case was a prison sentence imposed, although Ron S. Way, who was convicted by an Ontario court for committing a summary conviction offence against s. 176 of the Regulations and was fined \$2,000, was warned by the judge that if he appears before him charged with another offence, he might face a jail sentence. This was his second offence.¹⁴²

In most prosecutions over the same 10-year period the ratio of convictions to acquittals or stays of prosecution under the *Health of Animals Act* was almost 2:3. 78 accused in 190 prosecutions were convicted. The ratio is even less under the *Plant Protection Act* (31 accused in 73 prosecutions were convicted).

Part II of this thesis presents and discusses the data.

¹⁴² Judgment of the provincial court in Bradford, Ontario dated 13 December 2005. Information from CFIA Prosecutions Bulletin (13.12.'05) and transcript of judgment provided to author by its officials.

2.7.3.2.6 - Indictment or Summary Procedure

No guidance is given by the *Health of Animals Act* on whether a charge should be laid by information or indictment, the only limitation being that section 68 imposes a 2 year limitation period for commencing summary conviction proceedings. This forces the prosecutor to choose an indictment for a strict liability offence, even if it is not very serious, if the limitation period has run out. From a review of all the prosecutions conducted under the *Act* over the last 10 years, there appears to have been only one case that went to trial by indictment where not only the time limit for summary proceedings had expired but the criminal financial penalty demanded by the prosecutor and agreed to by the offender's counsel exceeded the maximum permitted for a summary conviction.¹⁴³

2.7.3.2.7 - Continuing Offences

There is no indication anywhere in the *Health of Animals Act* or the *Plant Protection Act* covered by the *AAAMP Act* that any of the offences created in them can be of a continuing type, i.e., making each day an offence continues, a separate offence. This point is important because section 21 of the *AMPS Act* says precisely that. It has the effect of increasing the maximum penalties that are authorized by the section. The issue is discussed in chapter 6 as the *Health of Animals Act* and the *Plant Protection Act* permit the Minister to administratively reclassify offences as *violations* to be proceeded with in accordance with the *AAAMP Act*.

2.7.3.2.8 - Offences Committed by a Corporation and its Officers

Under the law a corporation is a person. It can incur criminal liability as a person and can be prosecuted for a criminal offence.¹⁴⁴ The law however recognizes

¹⁴³ Judgment of 2 April 2007 in Saskatoon, Saskatchewan. This was a prosecution in the provincial court of Frank Eaton Livestock Ltd. for falsely misrepresenting Manitoba heifers as originating from either Alberta or Saskatchewan on 141 export health certificates presented to CFIA between August 2002 and February 2003. The penalty was \$172,000 on a single count. CFIA Prosecution Bulletin (2.4.'07).

¹⁴⁴ *Interpretation Act*, RSC 1985, c I-21. Section 35(1) defines a "person" to include a corporation. Section 34(2) states that "all the provisions of the Criminal Code relating to indictable offences created by an enactment, and all the provisions of that Code relating to summary conviction offences, apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides." Under the *Criminal Code*, *supra* note 25, everyone, including a corporation, can incur criminal liability (section 2 defines "everyone", "person", etc. to include a corporation) and it is generally accepted in jurisprudence that the directing mind and will is the mind and will of the corporation. By the same token, if a defence is available to the directing mind and will (e.g. due diligence), the corporation can claim benefit of that defence: *Sault Ste Marie*, *supra* note 46; *Wholesale Travel*, *supra* note 2.

that a corporation has no mind and will of its own, and hence attributes to it the mind and will of those directing its affairs. Section 71 of the *Health of Animals Act* holds officers, directors or agents of the corporation guilty of the offence and liable on conviction to the prescribed punishment whether or not the corporation has been prosecuted for it. Section 72 however provides them with a defence that the offence was committed without their knowledge or consent and they exercised all due diligence to prevent the commission of the offence. Does this mean that the corporation itself cannot plead due diligence? This question was left open by the Supreme Court in both the *R. v. Sault Ste. Marie* and the *R. v. Wholesale Travel Group* cases. Perhaps if an offence by a corporation is provided explicitly in a section separate from that of its officers and agents, a court may interpret criminal liability differently, a possibility raised by Lamer CJ (with LaForest and Sopinka JJ concurring) in the *Wholesale Travel* case. And if the defence of due diligence were made available only to the officers and agents, the canon of construction, *expressio unius est exclusio alterius*, may apply.¹⁴⁵

2.7.3.3 - *Plant Protection Act*

2.7.3.3.1 - Criminal Regulatory Offences

Many of the provisions of the *Plant Protection Act*¹⁴⁶ (hereinafter in this section referred to as the *Act*) mirror those in the *Health of Animals Act*, especially those relating to import and export, possession, movement of prohibited articles from control or quarantine areas and offences and criminal liability.

The *Act* prohibits the import or export of any thing¹⁴⁷ that is a pest¹⁴⁸ or that constitutes or could constitute a biological obstacle to the control of a pest (in this and following paragraphs referred to as "pest") unless the thing is imported under the required permit, certificate or other documentation required by the

¹⁴⁵ *Wholesale Travel*, *ibid*, McLachlin J did not find it necessary to decide the issue.

¹⁴⁶ *Supra* note 9.

¹⁴⁷ *Ibid*, s 3 (a "thing" is defined to include a plant and a pest).

¹⁴⁸ *Ibid* ("pest" means any thing that is injurious or potentially injurious, whether directly or indirectly, to plants or to products or by-products of plants, and includes any plant prescribed as a pest").

*Regulations*¹⁴⁹ and the thing is presented to an inspector in accordance with the regulations: section 7. Section 9 prohibits the possession or disposition of a pest by a person who knows that it was imported in contravention of the *Act* or the *Regulations*. Section 35 which creates the offence of impeding an inspector who is performing duties under the *Act* and the regulations, has identical wording to that in the corresponding section 35 of the *Health of Animals Act*.

2.7.3.3.2 - Duties and Obligations

Several sections of the *Act* create specific duties and impose obligations on the owner or person in possession, care or control of a pest. These include the duty:

- (a) to notify the CFIA if the person suspects that the thing is a pest and provide the CFIA with a sample of it (section 5);
- (b) to refrain from moving, growing, raising, culturing or producing any thing that is believed to be a pest or could be infested with a pest and to comply with the notice communicated by an inspector in that regard (section 6);
- (c) to remove a pest from Canada where it was imported in contravention with the *Act* or the *regulations*, or the thing is believed on reasonable grounds to be a pest, and to comply with the notice communicated by an inspector in that regard (section 8);
- (d) where a place is infested with a pest, to comply with a declaration communicated by the inspector, prohibiting or restricting for a period of ninety days the movement of persons or things within, into or out of that infested place for the purpose of controlling the pest (section 13).
- (e) to store, treat, place in quarantine, dispose of or move a conveyance or thing which was sealed by an inspector and the seal was broken (section 24); and
- (f) to require the owner or person having the possession, care or control of the pest at the time of its seizure to store, treat, quarantine or dispose of it or move it to any other place and store, treat, quarantine or dispose of it as directed by the inspector (section 30).

¹⁴⁹ *Plant Protection Regulations, SOR/95-212.*

2.7.3.3.3 – Offences Created by Sections 48 and 49

Failing to comply with any notice or declaration issued by an inspector, or contravening a prohibition or restriction imposed on movement, referred to above, are offences under sections 49 and 50, and the punishment is the same as for the general offence in section 48.

A specific defence is provided by subsection 50(3) in relation to the contravention of a prohibition or restriction; it must be proved that, at the time of the alleged contravention:

- (a) the person had been notified of the prohibition or restriction; or
- (b) reasonable steps had been taken to bring the substance of the prohibition or restriction to the notice of persons likely to be affected by it.

As under the *Health of Animals Act* (section 68), a two year limitation for institution of summary prosecution is provided by section 51.

2.7.3.3.4 - Criminal Regulatory Penalties in Section 48

The general offence and penalty provisions of section 48 of the *Plant Protection Act* are identical to those in section 65 of the *Health of Animals Act*, including the section 9 offence of illegal possession which is only punishable by a fine of \$50,000 like its counterpart, section 65(2). The section 51 limitation period of two years for bringing a summary conviction proceeding is also identical. The same observations apply alike to the contravention of regulations which, like the contravention of the *Act*, is declared to be an offence by section 48. Some mental element, such as knowledge, seems to be necessary for a few of the contraventions of the *Act* but not for contravention of regulations. Where no mental element is specified, the contraventions would, as discussed under the *Health of Animals Act*, come within the class of strict liability offences.

The observations on the volume of convictions in respect of all the charges laid over the last 10 years ending in fiscal year 2007, and the size of penalties, have been made above under the *Health of Animals Act* section, and the data are presented and discussed in Part II of the thesis.

2.8 – Summary of Chapter

This chapter briefly dealt with the role of criminal sanctions in ensuring compliance with regulatory law, in particular the *Health of Animals* and the *Plant Protection Act*. It critically examined the controversy surrounding the issue of strict liability where a person cannot plead due diligence, and the issue of absolute liability where even an honest and reasonable mistake of fact cannot be pleaded. It was observed that absolute liability offences do not mean no defences whatever are available. Act of God, extraordinary forces of nature, acts of total strangers which could not have been foreseen, continue to exist, and for that reason the term absolute liability is not literally what it means. Canadian court decisions have held that absolute liability offences violate *Charter* rights and in order for an offence that is punishable by deprivation of liberty to satisfy *Charter* requirements, it should provide the defence of due diligence.

Although due diligence has not been defined in statutes and case law has considered it to be a question of fact to be determined at trial, lower courts have considered as a useful definition the passage of Dickson J. in *R. v. City of Sault Ste. Marie* that “*the due diligence which must be established is. . . whether the accused exercised all reasonable care by establishing a proper system to prevent the commission of the offence and by taking reasonable steps to ensure the effective operation of the system.*”¹⁵⁰ They have emphasized two basic elements of the defence, namely, reasonable care which commences from the time any equipment is purchased and installed and continues throughout the operational activity down to the occurrence of the prohibited event, and the civil standard of proof, i.e. balance of probabilities.¹⁵¹ A B.C. decision had added a rider to this defence, holding that a search warrant issued under the *Criminal Code* to collect evidence of an offence did not authorize the collection of evidence pertaining to the exercise of due diligence, as

¹⁵⁰ *Sault Ste Marie*, *supra* note 46.

¹⁵¹ See e.g., *R v Petro-Canada*, 171 CCC (3d) 354, 63 OR (3d) 219 (Ont CA): “it is not sufficient to say that the best equipment was purchased and installed ... must go further and show what steps were taken to prevent the discharge on that day and that these steps constitute reasonable care (per Goudge, JJA at 360). Similarly, in *R v Imperial Oil Ltd*, 2000 BCCA 553, 148 CCC (3d) 367, 144 BCAC 118, the B.C. Court of Appeal held that the company’s general safety record is not sufficient to establish due diligence; due diligence also was not established by reliance on third party advice that failed to identify chemicals as toxic to fish. See also *R v Sobey’s Inc*, 172 DLR (4th) 111, 134 CCC (3d) 344 (NSCA).

it is for the accused to establish and the prosecution to rebut. However, the Supreme Court reversed that decision, Major J who gave the Court's judgment stating '*it is antithetical to our system of justice*' to restrict the search warrant provisions of s. 487(1) of the *Criminal Code* in that way.¹⁵²

Due diligence is not a defence to violations covered by the *AAAMP Act*¹⁵³ though it has to be taken into account in determining the gravity of the violation to make the appropriate adjustment. However, it is permitted by other *amps* legislation discussed in chapter 6.^{154, 155}

The issue of continuing offences was briefly referred to since it is important for analysing the *AAAMP Act*. Section 21 specifically provides for continuing violations but neither of the two subject matter statutes, namely the *Health of Animals Act* and the *Plant Protection Act*, contains such a provision. It has been more fully discussed in chapter 6.

Criminal sanctions do, however, have an important role where a person repeatedly breaches the law, exhibiting contempt for it. There are no other avenues in a liberal democracy to put an end to criminality. But criminal sanctions are not the only tools that should be used in ordinary situations.

The chapter also surveyed the criminal sanctions provided in the *Criminal Code*, the *Health of Animals Act* and the *Plant Protection Act*. In view of the fact that the latter two statutes contain a detailed regulatory framework relating to food animals and agriculture and forestry resources, the *Criminal Code* provisions

¹⁵² *CanadianOxy Chemicals Ltd v Canada (AG)*, 138 DLR (4th) 104, 108 CCC (3d) 497 (BCSC), aff'd, 145 DLR (4th) 427, (1997) 114 CCC (3d) 537 (BCCA); rev'd (1999) 133 CCC (3d) 426, [1999] 1 SCR 743, per Major J (at 435 ccc).

¹⁵³ *AAAMP Act*, supra note 7, s. 18(1). Section 11(1) of the *Environmental Violations Administrative Monetary Penalties Act*, supra note 105, is identical. Even reasonable mistake of fact is not allowed as a defence under these two statutes. For jurisprudence under *AAAMP* legislation where the defence has not been expressly excluded, see *infra* note 346.

¹⁵⁴ E.g., *Aeronautics Act*, RSC 1985, c A-2, s 8.5; *Office of the Superintendent of Financial Institutions Act*, RSC 1985, c 18 (3d Supp), s 34(1) [*OSFI Act*]; and *Canada Marine Act*, SC 1998, c 10, s 129.17, amended by SC 2008, c 21.

¹⁵⁵ *Customs Act* amendment of 2001, c 25, is silent on this point (s 109.1-5).

described in §2.7.2 do not appear to have been utilized to protect farm animals. The likely reason for this is that most situations relating to wilful injury and cruelty to animals, especially with respect to the non-farm populations, are dealt with by the provinces and territorial governments under their regulatory laws, a snapshot of which is provided in Appendix 6.¹⁵⁶

Decriminalization, which is discussed in the next chapter, will explore this issue and the remaining chapters of this Part will further explore that area.

¹⁵⁶ For a snapshot of provincial/territorial laws on animal protection, see Appendix 6 at 301, below.

Chapter 3 - Decriminalization of Regulatory Offences

3.1 - The Concept

3.1.1 - Introduction

This chapter focuses on alternative enforcement approaches rather than relying predominantly on criminal sanctions which have been heavily criticized by scholars and commentators as draconian when dealing with simple regulatory contraventions. Decriminalization of such contraventions has been advanced by many theorists and law reform bodies as an ideal approach. After defining the concept of decriminalization and the various terminology utilized by scholars and by legislators, the chapter discusses (a) the several proposals and movements advocating it, (b) the differentiating terminology used by scholars to distinguish statutory offences from criminal offences, (c) the justification for and arguments against it, (d) the issue of reclassification of offences, (e) legislative developments and authority granted by statute for adjudicating disputes, and (f) the safeguards proposed by the Council of Europe and the International Association of Penal Law in their recommendations.

The Council of Europe defined decriminalization as: (a) changing the law by no longer making an act or omission a criminal offence, (b) removing it from the criminal law category and placing it in another category, or (c) changing public policy in regard to its prosecution.¹⁵⁷ In the third situation, the law remains in the penal code but is not enforced. The second of these three meanings, which the Council of Europe describes as Types C1 and C2, is relevant to this thesis. In sub-type C2, the act or omission that was removed from the criminal category is still illegal, but the Council's report suggested that its Member States might deal with such act or omission by using already available or new non-criminal measures to force offenders to comply with the law.¹⁵⁸

¹⁵⁷ *Report on Decriminalisation*, *supra* note 14 at 85. The Report states: "... type C2 decriminalisation differs from all other forms of decriminalisation in one important respect: the State does not abandon all attempt to control the behaviour in question, but on the contrary strives to make this control more effective. Since a wide range of different approaches is involved in this form of decriminalisation, there is also a variety of different possibilities with regard to deterrence."

¹⁵⁸ *Ibid.*

The Council studied decriminalization in the context of the German administrative penal law system, called *Ordnungswidrigkeiten*, which had been successfully implemented since after the Second World War and which had been adopted by several Western Europe countries. The report has been quoted extensively in this chapter because of the immense importance of its recommendations. The *Ordnungswidrigkeiten* system was analysed in depth by Dr. Thomas Weigend in 1994¹⁵⁹ and has been described in chapter 5 of this Part.

Pressure to decriminalize minor regulatory offences had been building up for over a century. According to T. Weigend, the earliest recommendation in this area seems to have been made by the German legal theorist Goldschmidt, who argued in 1902 that administrative offences should be distinguished from traditional crimes.¹⁶⁰ A general concept of 'administrative offences' (*Ordnungswidrigkeiten*), procedurally different from criminal liability (*Straflichkeit*) was however introduced in Germany only half a century later.¹⁶¹

A similar movement began in the United States almost thirty years after Goldschmidt's proposal. The Wickersham Commission recommended in its Eighth Report to the U.S. Congress on Criminal Procedure, that road traffic, parking, and other minor offences, should be entrusted to administrative agencies rather than criminal courts.¹⁶²

Eminent scholars, since then, such as Professors Sayre,¹⁶³ Perkins,¹⁶⁴ Starrs,¹⁶⁵ Edwards,¹⁶⁶ Hart,¹⁶⁷ Ashworth,¹⁶⁸ and Coffee¹⁶⁹, have been advocating

¹⁵⁹ T Weigend, *The system of administrative and penal sanctions in the Member States of the European Communities*, Vol I, National Reports, Federal Republic of Germany (Brussels, Luxembourg: 1994) [hereinafter cited as Weigend].

¹⁶⁰ *Ibid.* Weigend quotes *Das Verwaltungsstrafrecht* (Berlin: Scientia, 1969), reprint of original 1902 ed.

¹⁶¹ *Ibid.*

¹⁶² *Supra* note 12.

¹⁶³ *Supra* note 45.

¹⁶⁴ *Supra* note 31.

¹⁶⁵ *Supra* note 33.

decriminalization, and joining the chorus were law reform bodies in the United States (e.g. the Administrative Conference of the U.S.),¹⁷⁰ Canada (Law Reform Commission of Canada)¹⁷¹ and Britain (JUSTICE¹⁷² and Justices' Clerks' Society¹⁷³). These efforts ultimately bore fruit.

3.1.2 - Differentiating Terminology

Eminent scholars have used various expressions to differentiate offences created by regulatory statutes from true criminal offences. Sayre¹⁷⁴ coined the phrase "*public welfare offenses*", Perkins preferred to call them "*civil offenses*",¹⁷⁵ a term also preferred by Peter Brett.¹⁷⁶ The Model Penal Code called them "*violations*".¹⁷⁷ Others have used different terms, such as "contraventions", "infractions", "prohibitory laws", "prohibited acts", "police regulations," and the like, according to their own semantic bent. On the other hand, Starrs¹⁷⁸ prefers, for the sake of clarity, the label "regulatory offense". The Law Reform Commission of

¹⁶⁶ *Supra* note 49.

¹⁶⁷ *Supra* note 29.

¹⁶⁸ *Supra* note 51.

¹⁶⁹ Coffee, "Paradigms Lost", *supra* note 94.

¹⁷⁰ Recom. ACUS 72-6 and ACUS 79-3.

¹⁷¹ Law Reform Commission of Canada, *The Meaning of Guilt – Strict Liability*, Working Paper No 2, June 1974.

¹⁷² *Supra* note 5.

¹⁷³ *Supra* note 11.

¹⁷⁴ *Supra* note 74.

¹⁷⁵ *Supra* note 31.

¹⁷⁶ P Brett, "Strict Responsibility: Possible Solutions" (1974) 37:4 Mod L Rev 417.

¹⁷⁷ The American Law Institute, *Model Penal Code*, official draft adopted at the 1962 Annual Meeting, §1.04(5). The subsection further provides that "a violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense."

¹⁷⁸ *Supra* note 33.

Canada¹⁷⁹ prefers the last term, but the Australian Law Reform Commission¹⁸⁰ prefers the term “non-criminal contraventions” or “regulatory contraventions”, to reduce confusion. However, the Law Reform Commission of Canada remarked that re-classifying regulatory offences as mere “violations” or transferring regulatory offences from criminal to administrative law, “by no means solves the problem of avoiding the injustice of penalizing those who are not at fault. It just displaces it.”¹⁸¹ This point was also emphasized by the Council of Europe in its *Report on Decriminalisation*.¹⁸²

Professor Lawrence expressed a similar view about “infractions”, while commenting on a 1985 law introduced by the North Carolina General Assembly in which it attempted to distinguish certain offences, primarily involving motor vehicles. For such offences a person is to be found responsible for the infraction rather than be held guilty of a misdemeanour. The punishment was labelled as a penalty rather than a fine. The intent behind the legislation was to decriminalize those offences.¹⁸³

Professor Coffee argues that a principal cause of over-criminalization is the profligate extension of the criminal sanctions to cover all rules lawfully promulgated by an administrative agency and suggests that the criminal law should be reserved to prohibiting conduct that society believes as lacking any social utility, while civil penalties should be used to deter (or “price”) minor forms of misbehaviour, e.g. negligence, where the regulated activity has positive social utility but is imposing externalities on others.¹⁸⁴ This is a sound idea provided those who inflict damage on

¹⁷⁹ *Supra* note 171.

¹⁸⁰ Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95, 2002, §2.22.

¹⁸¹ *Supra* note 171.

¹⁸² *Supra* note 14.

¹⁸³ DM Lawrence, “Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis” (1986) 65 NCL Rev 49 at 81. Professor Lawrence states: “[a] law that is enforced as an infraction is clearly a penal law. A monetary payment is imposed upon proof of its violation and the penalty is clearly intended to be punitive rather than compensatory. Furthermore, the penalty accrues to the state. Just as criminal proceedings are prosecuted by state officials, so are infraction proceedings. There is no private prosecutor to whom the penalty will be awarded, and so the proceeds of the infraction penalties should be treated just as much as proceeds of criminal fines.”

¹⁸⁴ *Supra* note X.

society are made accountable in the civil process and the portion of civil penalties that is based on damage caused by the regulated entity is available to compensate members of society or the environment as the case may be.

Professor Coffee suggests that criminal law should be oriented towards total deterrence and civil law towards optimal deterrence. What should fall within each of these two categories is, of course, debatable. In his view, the watershed between civil and criminal penalties lies between pricing and prohibiting. Above all, he doubts that administratively-imposed penalties will ever reflect the same scrupulous concern for the defendant's rights as displayed in a criminal trial,¹⁸⁵ and hopes that when the legislature uses an abrupt, discontinuous increase in penalty levels to prohibit rather than to price behaviour, such a use of deterrence should trigger at least some constitutional safeguards applicable to a criminal trial.¹⁸⁶

3.1.3 - Statutory Terminology

Statutory terminology indicating that a regulatory offence is not considered as a criminal offence varies widely even within a particular jurisdiction. The different terminology used in the German, U.S., Australian and British statutes is referred to later in this chapter.¹⁸⁷ The Canadian *Criminal Code* refers to a crime as a criminal offence which can be prosecuted by indictment or by information. Summary prosecution is commenced by laying an information.¹⁸⁸ However, regulatory offences which have ceased to be criminal offences are called violations in the *Aeronautics Act*,¹⁸⁹ the *AAAMP Act*,¹⁹⁰ the *Office of the Superintendent of Financial Institutions Act*,¹⁹¹ and by other statutes that have decriminalized offences since the

¹⁸⁵ Coffee, "Paradigms Lost", *supra* note 94 at 1885 (point made earlier by Professor Leigh, *supra* note 35 at 109).

¹⁸⁶ Coffee, "Paradigms Lost", *ibid.*

¹⁸⁷ See paragraph 3.3, below, and the various statutes referred to in footnotes referenced in the text.

¹⁸⁸ See *Criminal Code*, *supra* note 25, s 2.

¹⁸⁹ *Aeronautics Act*, *supra* note 154.

¹⁹⁰ *Supra* note 7.

¹⁹¹ *OSFI Act*, *supra* note 154.

beginning of the 21st century.¹⁹² The *Customs Act*¹⁹³ and the *Contraventions Act*¹⁹⁴ refer to them as “designated provisions” and “contraventions”, respectively.

3.1.4 - Justification for Decriminalization

One might ask if there is a compelling need to criminalize every form of errant behaviour. It is possible to distinguish conduct which is wrongful in itself (*mala in se*), e.g. traditional crimes, and conduct which is prohibited because it is the subject of specific proscription (*malum prohibitum*), e.g. regulatory offences. This was also the message of the JUSTICE report which in 1980 advocated a clear divide between regulatory and criminal offences, and of the Justices’ Clerks’ Society, in their reports previously referred to. Reclassification of appropriate regulatory offences as non-criminal contraventions, as JUSTICE opined, would remove the stigma and practical disqualifications associated with criminal convictions, a message reinforced in the press media of the day. Decriminalization, therefore, provides a means for the state to enforce breaches of laws without going as far as declaring all law-breakers as “criminals”.

Similarly, in its *Report on Decriminalisation* the Council of Europe listed several reasons for introducing decriminalization:

“(a) it would permit a better approach to problems existing within the criminal justice system;

(b) it could help solve social problems created by the criminal justice system (e.g. insufficient attention paid to the personal and social problems of the author and to the general and social problems conducive to criminality; impact of punishment on offender’s family and other components of his environment; endless stigmatisation; considerable differentiation reflecting social inequalities, often operating in practice to the disadvantage of the weaker members of society; etc.”.

The Council suggested that cutting back on the jurisdiction of the justice system in certain areas may be one way of dealing with these problems.¹⁹⁵

¹⁹² See e.g., *International Bridges and Tunnels Act*, SC 2007, c 1 [IBT Act]; *Canada Shipping Act, 2001*, SC 2001, c 26.

¹⁹³ RSC 1985, c 1 (2nd Supp), s 109.1 (as amended by SC 2001, c 25, s 62).

¹⁹⁴ *Contraventions Act*, *supra* note 106.

3.1.5 – Arguments against Decriminalization

As decriminalization¹⁹⁶ replaces criminal sanctions by non-criminal penalties, the argument often turns on the predominant penalty that is used to correct regulatory contraventions, namely a financial penalty, and its merits or demerits. Whether imposed administratively or judicially, it can be very substantial in some jurisdictions, such as Germany, the United States, and Australia. This fact prompted the European Committee of Ministers to note in Resolution No. (77) 31 that the individual is more frequently affected by administrative procedures, and that the protection of the citizen with regard to procedural aspects of administrative matters affecting him is part of the protection of the individual's fundamental rights and freedoms.¹⁹⁷

One of the main arguments against decriminalization which the Resolution noted was that it could damage the situation of the offender; in certain circumstances alternative measures outside the penal system may offer less effective legal guarantees than the criminal justice system.¹⁹⁸ Judicial controls within the penal system, the idea of equal justice and the principle of proportionality between offences and sanctions, present a degree of protection to the offender, and of rationality, which should not be underestimated. To ensure that the legal rights of those who are subjected to administrative penalties are safeguarded, the Council issued its Recommendation R 91 (1), which is summarized in the final section of this chapter.

¹⁹⁵ *Report on Decriminalisation*, *supra* note 14 at 168. The problems are caused by clogged dockets when a mass of minor offences are handled by them and the introduction of administrative penal law and summary determination of such offences could take away much of the pressure.

¹⁹⁶ "Decriminalization" in this chapter means Type C2 decriminalisation discussed in the Introduction to the chapter at 52, above.

¹⁹⁷ Council of Europe, Committee of Ministers, *Protection of the individual in relation to the acts of administrative authorities*, Resolution 77(31), adopted 28 September 1977 [unpublished]. The Resolution preceded the *Report on Decriminalisation*, *supra* note 14, where the role of the Council of Europe is briefly described. The Committee of Ministers is the executive decision-making organ of the Council.

¹⁹⁸ *Report on Decriminalisation*, *supra* note 14 at 63-64.

3.1.6 – Safeguards

This section summarizes the recommendations of the Council of Europe and of the International Association of Penal Law which were designed to ensure that legislators provide adequate procedures protecting the legal rights of those who are subjected to administrative penalties. These recommendations contain many of the common law rules and procedures that have been recognized by courts in Canada and by legislation, such as the *AAAMP Act* (section 18(2)).

3.1.6.1 - Council of Europe Recommendation No. R (91) 1¹⁹⁹

This recommendation subsumes the guarantees of administrative procedure set out in Resolution (77) 31 as well as the guarantees well established in criminal procedure. It sets out the following basic principles:

- “1. the principle of legality, which requires that the authority to impose sanctions and the circumstances in which they may be imposed, should be founded in law.

2. the principle of non-retroactivity, under which no administrative sanction may be imposed on account of an act which, at the time when it was committed, did not constitute unlawful conduct; and where a less heavy sanction was in force at the time when the act was committed, a heavier sanction subsequently instituted may not be imposed. On the other hand, if a less repressive sanction comes into force after the unlawful act was committed, the person should be given the benefit of the less repressive sanction.

3. the principle of *ne bis in idem*, under which a second administrative sanction may not be imposed for the same unlawful act. The Recommendation does not cover the situation where a single act is simultaneously sanctioned by administrative and criminal law.

4. the principle of prompt expedition of procedure for the determination of individual’s rights and obligations, which requires that the administrative sanction procedure must be instituted and the sanction must be imposed within a reasonable time.

¹⁹⁹ Council of Europe, Committee of Ministers, *Recommendation R(91)1*, adopted 13 February 1991 [unpublished].

5. the person faced with an administrative sanction should be accorded the following rights:

- a) to be informed of the charge against him;
- b) to be given sufficient time to prepare his case, taking into account the complexity of the matter as well as the severity of the sanction which could be imposed on him;
- c) to be informed of the nature of the evidence against him;
- d) to be heard before any decision is taken; and
- e) to be informed of the reasons on which the sanction is based.”

The Recommendation adds that these rights may be abridged or dispensed with in cases of minor importance for which only limited pecuniary penalties are possible (e.g. in mass litigation cases), provided however that the person concerned has agreed to the procedure adopted and does not object to the sanction. It further adds that “the onus of proof of the offence should lie on the administrative authority which instigates the sanction and the control of the legality of the act imposing an administrative sanction (the legality of the sanction as well as its merits) by an independent and impartial court should be established by law.”

3.1.6.2 - Recommendation No. R (87) 18 (The Simplification of Criminal Justice)²⁰⁰

Section II of this *Recommendation* is particularly relevant to administrative penal law. Paragraph (a) recommends that legal systems should decriminalise offences, particularly mass offences in the field of road traffic, tax and customs law, if they are inherently minor, and that, in dealing with them,

- states should make use of summary procedures or written procedures not calling, in the first instance, for the services of a judge (where the factual element takes precedence over the moral element, i.e. the intent to commit an offence);

²⁰⁰ Council of Europe, Committee of Ministers, *Recommendation R(87)18*, adopted 17 September 1987 [unpublished]. While the recommendation did not expressly cover food safety and plant protection in which areas there is no mass litigation, it would be pertinent in the customs area which sees a fairly large number of contraventions relating to imports and exports of prohibited animals and plants, or their products and by-products. CBSA data given in Appendix 5 at 301, below, bears this out.

- states should not order physical coercive measures, especially detention on remand;
- states should impose sanctions principally of a pecuniary nature with the rate, determined by law, normally being a fixed or a lump sum; a sanction may involve the restriction or deprivation of rights but not deprivation of liberty;
- states may use simplified collection procedures and automatic data processing methods; however the procedure adopted *should unambiguously safeguard* all the rights of the persons concerned and should not deprive them of their right to judicial recourse;
- the acceptance of or compliance with the simplified procedure should *preclude any prosecution* in respect of the same facts.”

Paragraph (b) encourages out-of-court settlements, in particular for minor offences, on the basis of conditions which

“(a) are prescribed by law (e.g. payment of a sum of money, restitution of goods or advantages obtained by the commission of the offence, compensation of victim of the offence, etc.);

(b) adhere to the principle of equality before the law (e.g. by publishing the circumstances in which such recourse is available, drawing up guidelines and tables of amounts payable, etc.);

(c) preserve the right of the alleged offender to ignore or refuse the offer of out-of-court settlement; and

(d) provide that the acceptance of the out-of-court settlement by the alleged offender and his fulfilment of the conditions make the renunciation of the right to prosecute definitive.”

3.1.6.3 - The International Association of Penal Law (AIDP)

In 1989, at its 14th Congress, the International Association of Penal Law (AIDP) adopted the following three-part resolution, the first on sanctions for administrative penal infractions, the second on principles of substantive law, and the third on principles of procedure that should be adhered to by administrative agencies.²⁰¹

²⁰¹ Congress of the International Association of Penal Law, *Recommendation*, Section I adopted in Vienna, 2-7 October 1989 ((1990) 61:3-4 AIDP 86-110 (English), 111-134 (French)). AIDP is a prestigious

(1) With respect to sanctions, the Congress resolved that:

“(a) sanctions should be reasonable and proportionate to the gravity of the infraction and the personal circumstances of the offender. Deprivation and restriction of personal liberty should not be available as a primary sanction or as an enforcement measure;

(b) the amount of the administrative sanction, particularly of a pecuniary penalty, should not exceed the maximum amount of a fine under criminal law for the same act or omission;

(c) restriction of individual rights in proceedings of administrative penal law must not be out of proportion to the gravity of the presumed offence. Pre-trial detention, surveillance of mail and telephone lines as well as similar severe restrictions of individual rights should not be permissible in administrative penal proceedings.”

(2) With respect of principles of substantive law, the resolution urged that

“(a) administrative penal infractions as well as sanctions should be defined in accordance with the principle of legality. The line between criminal offences and administrative penal infractions should be drawn, with sufficient clarity, by the legislature. Distinctive terms for administrative penal infractions and sanctions should be used;

(b) administrative penal responsibility of physical persons should be based on personal fault, i.e. intent or negligence;

(c) however, the nature of administrative penal sanctions makes the field of administrative penal law more than criminal law conducive to the recognition of corporate liability;

(d) defences of justification and excuse recognized in criminal law, including unavoidable mistake of law and extenuating circumstances, should likewise be available in administrative penal law.”

(3) With respect to principles of procedure, the Resolution urged that

“(a) the presumption of innocence and the principle that the defendant can be sanctioned only if the violation has been proved beyond a reasonable doubt should be respected;

(b) in simple cases the procedure can and should be expedited, but the defendant should retain the right to be informed of the charges and evidence brought against him, the right to be heard, the right to present evidence and the right to counsel;

(c) proceedings may be conducted by administrative agencies or by other non-judicial bodies that can impose the sanction, but recourse to the judiciary and to adversary proceedings should be possible;

(d) if an act meets the definition both of a criminal offence and of an administrative penal infraction, the offender should not be punished twice; at least, full credit should be given in sentencing on a subsequent conviction, for any sanction already imposed in relation to the same act.”

3.2 - Decriminalization and Re-designation of Regulatory Offences - Clear Divide or Spectrum?

Decriminalization presents the inevitable problem of deciding at what point a breach of law ceases to be non-criminal and should be regarded as a criminal offence. In most situations the problem is not intractable. Police, inspectors and other enforcement officials often face a situation where they have to decide whether to lay a charge or let a person go by treating a breach as an unpremeditated act without any kind of deliberateness. There would be some situations which are not so clear.

1. JUSTICE in its 1980 report²⁰² recommended that the category of crimes should be confined to those offences about which reasonable people could credibly hold the view that the conduct concerned involved some real and deliberate moral turpitude, and the category of contraventions should include many of the present offences which require no criminal intent of any kind and some of those which require only carelessness, omission, failure, or other kinds of intent involving no moral turpitude. It recognized that the distinction between crimes and contraventions is not black and white and there is a vast grey area of conduct in between which in some circumstances may fall on this or the other side of the line, and recommended a dual track approach for dealing with such conduct. In its view this could be done by creating a third category of criminal contraventions to cover at least part of the grey area, generally defined as the commission of any contravention with intent to deceive or defraud, or to gain a dishonest advantage for oneself or any other person, or to cause damage to another. The report concluded by saying that apart from reversing the current trend of disrespect for the criminal law, the adoption of the recommendations would save a great deal of time and public money, and could reduce the total annual number of criminal convictions by more than a half. This approach is similar to that of the German administrative penal system discussed below as JUSTICE had used it as a model.

2. The Australian Law Reform Commission (ALRC)²⁰³ considered the criminal/civil distinction in Report 95 and presented two approaches. At one end is a clear divide approach, which argues for a very clear divide between the two, with criminal sanctions serving the purpose of expressing social condemnation and non-criminal sanctions having a more utilitarian function of discouraging, or placing a cost on, undesirable behaviour and rewarding desirable behaviour. At the other end, which it called the spectrum approach, is the argument that the terms civil and criminal serve no useful function for penalties and should no longer be used. Instead a scale of procedural protections should be adopted according to the severity of the penalty, so that the most serious penalties should attract the strongest procedural protections. When monetary penalties are sharply increased by law, escalated by

²⁰² *Supra* note 5, ch 3, especially §§3.9-3.11 at 21 and Recommendations 3-5 at 53-54. See also Brett, *supra* note 176 at 436-437.

²⁰³ *Supra* note 180, §§3.47-3.49.

penalties for continuing violations, and become indistinguishable from criminal penalties, the spectrum approach with higher safeguards would be desirable.

The ALRC appreciated that “there are cogent arguments in favour of retaining the criminal law for those regulatory offenders where the action of a person has caused, or is capable of causing, significant harm to another and, in relation to individuals, where there is dishonesty or fraud. The parallels are with general criminal law.” It recognized that “the spectrum approach has difficulties in those areas of regulation where there are parallels with the criminal law. The criminal/civil distinction is blurred when criminal offences are made offences of strict or absolute liability.”^{203b}

3. In the United States, rules have been developed to guide administrative agencies in determining whether a contravention should attract an administrative or a civil sanction by some jurisdictions. For example, the U.S. *Plant Protection Act* contains a provision requiring the Secretary of Agriculture in coordination with the Attorney General to establish guidelines to determine under what circumstances the Secretary may issue a civil penalty or suitable notice of warning, in lieu of prosecution by the Attorney General for a violation of the *Act*.²⁰⁴ The *Animal Health Protection Act* has an identical provision.²⁰⁵ A different procedure is provided by the Food and Drug Administration where the Secretary can issue a show cause notice to a defendant before determining whether to refer a breach to the Attorney General for prosecution.²⁰⁶

4. Dual track has been a distinctive feature of the German administrative penal law system which has successfully operated for sixty years. In that jurisdiction the initial decision is taken by enforcement officials of the agency that administers

^{203b} *Supra*, §§ 3.104, 3.47, 3.53.

²⁰⁴ *US Plant Protection Act*, Pub L No 106-124, § 424(d), 114 Stat 438 (2000).

²⁰⁵ Pub L No. 107-171, § 10410(d), 116 Stat 494 (2002).

²⁰⁶ *Food, Drug and Cosmetics Act*, 21 USC 335, § 303, states: “[b]efore any violation of this Act is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding.”

the regulations. The official's decision can be challenged by a defendant (obviously, if the officials charge the defendant with an offence) in a court, and the judge decides whether the proceeding should continue by way of prosecution or transform it into an *OWig* or administrative penalty proceeding. Conversely, the judge can transform an *OWig* into a criminal procedure.²⁰⁷

3.3 - Legislative Developments

Decriminalization occurred on an extensive scale for the first time in post-War Germany in 1949 with the enactment of the *Economic Crime Law*, which was followed three years later by a framework law called *Gesetz über Ordnungswidrigkeiten*. The statute differentiates criminal liability (*straflichkeit*) from administrative liability. The former are called *strafat*, the latter as *ordnungswidrigkeiten* (or simply administrative violations). *Straftat* are punished by a *geldstrafe* (or fine) or by imprisonment in the case of humans. *Ordnungswidrigkeiten*, on the other hand, are penalized by a *geldbuße* ("financial penance").²⁰⁸

In the United States, decriminalization has occurred on a wide scale since the early 1970s. Regulatory offences that were previously considered as less serious and committed without *scienter* (i.e., knowingly) or intent are labelled as violations.²⁰⁹ The statutes prescribe civil and criminal penalties separately in the same sections of a statute for the same contravention, depending on the intent or lack thereof. The sections in other respects are almost identically worded.

Australia, to a much lesser extent, has reclassified certain breaches of a statute as civil liability provisions.²¹⁰ A choice is given to the enforcement agency on

²⁰⁷ These features are discussed in chapter 5, below.

²⁰⁸ *Gesetz zur Vereinfachung Wirtschaftsstrafrechts, 1949 – Gesetzblatt der Verwaltung des Vereinigten Wirtschaftsgebeitz, 1949*]. *Gesetz über Ordnungswidrigkeiten (Ordnungswidrigkeitengesetz)*, 1952, consolidated on 24 May 1968 and amended and re-promulgated, 19 Feb. 1987 (BGBl I.602). This statute has been analyzed in chapter 5, below.

²⁰⁹ See e.g., *Occupational Safety and Health Act*, Pub L No 91-596, 84 Stat 1591 (1970), *Resource Conservation and Recovery Act*, Pub L No 94-580 (1976) (42 USC § 6901); *Atomic Energy Act*, Pub L No 585, 79th Cong (1946), completely amended in 1954, 42 USC § 2011, c 14; *Energy Reorganization Act*, Pub L No 93-438 (1974); *Plant Protection Act*, *supra* note 204; *Animal Health Protection Act*, *supra* note 205. Some of these statutes have been analyzed in chapter 5, below

²¹⁰ See e.g., *Corporations Act 2001*; *Environment Protection and Biodiversity Conservation Act 1999*, analyzed in chapter 5, below, and mentioned at 71, below.

which track to pursue, sometimes based upon enumerated criteria. If the prohibited act is not described as one that requires *knowledge* or other indicia of *mens rea*, the agency can only take administrative or civil proceedings.

The United Kingdom which recently enacted the *Regulatory Enforcement and Sanctions Act 2008*²¹¹ has taken a large number of regulatory offences out of the criminal offence category and has designated them as “relevant offences” which are to be penalized only by fixed or variable monetary penalties or by other discretionary (non-criminal) measures. Chapter 5 surveys at some length the statutes referred to above, under International Comparison.

Administrative adjudicating authorities vary across jurisdictions. Only the Canadian and U.S. models are briefly described below. Models of other jurisdictions are dealt with in chapter 5.

Under the Canadian procedure, the defendant has the right to appeal, initially within the hierarchy of the department or agency which issued the penalty notice, then to an adjudicator who may be the chairperson of the Canada Agricultural Review Tribunal or the Transportation Appeals Tribunal, depending on the statute, and then on review, to the Federal Court or the Federal Court of Appeal as the case may be, as directed by legislation.. There is no intermediate tribunal under the *Customs Act*²¹² or under the *Office of the Superintendent of Financial Institutions Act*²¹³ to appeal administrative imposition of penalties; the aggrieved party has to proceed directly to the Federal Court by instituting appeal proceedings.

In the United States, two models have been established by statutes to impose and adjudicate regulatory contraventions.²¹⁴ Under the first model, a duly authorized enforcement official, upon discovering a breach of a statute or regulation during inspection, decides whether to issue a warning, a penalty notice or, if his or

²¹¹ (UK), 2008, c 13.

²¹² *Supra* note 193, s 135; the appeal is by way of action in the Federal Court.

²¹³ *Supra* note 154, s 30.

²¹⁴ These models have been described in W Funk “Close Enough for Government Work? Using Informal Procedures for Imposing Administrative Monetary Penalties” (1993) 24 Seton Hall L Rev 1.

her assessment of the situation is that it is a deliberate or very serious breach, especially if damage or injury has resulted, to refer it to investigative officials to pursue action, including a criminal proceeding. If the breach of a statute or regulation does not warrant a penalty, a formal warning may be issued. If the appropriate response is a penalty, then a penalty notice can be issued. Practice may vary. A Warning may be coupled with a penalty notice, the penalty being applied only if corrective action is not taken within the time allowed by the inspector.

A Penalty Notice may either impose, or assess, a penalty for the breach depending on the procedure set out in the relevant statute. The inspector sets out the prescribed penalty in the penalty notice, as in Canada, but in the case of occupational safety and health, the applicable penalty is only assessed, not imposed, the power to impose being given by the statute to an independent body, the Occupational Safety and Health Review Commission.

Whether imposed or assessed, if the penalty is paid by the defendant, the proceeding is terminated. No further action can be taken on the particular violation.

In many U.S. agencies, such as the Environmental Protection Agency, an administrative law judge may hear the appeal which will be reviewed by the Administrator of the Agency. In the case of occupational or mining safety and health, the appeal is heard by another body, the Occupational or Mining Safety & Health Review Commission as the case may be. Thereafter, an appeal by way of review lies to the U.S. District Court.

The U.S., Australian, German and U.K. models vary in detail, and have been described in chapter 5.

3.4. Summary

In summing up this chapter, it should be pointed out that no one has suggested that all regulatory offences should be dealt with outside the criminal justice machinery. Certainly there are breaches that can truly be categorized as criminal when they cause or create an endangerment to the health and safety of human beings, to animal and plant life and to the environment, for example. Relegating such conduct to a lesser category would avoid social stigma but, on the

other hand, some offences, for example pollution and reckless disregard for human safety, should carry a stigma, and should properly be subject to criminal sanctions.

The author submits that discrimination is necessary when classifying errant behaviour as a criminal act or as a non-criminal contravention and that defendants should be given an opportunity to make submissions against prosecution. Great care needs to be taken to ensure that criminalization of the errant behaviour is necessary for effective regulation. In determining whether to impose an administrative financial penalty or refer the matter for prosecution, administrative agencies should consider the following factors: (a) Is there an element of moral culpability? (b) Is there an element of fraud, bad faith or reckless endangerment? (c) Is the offence "victimless" in that it merely inconveniences the regulator but is not otherwise immoral or socially repugnant? (d) Is it an offence of strict liability, i.e. irrespective of the mental state of the offender or what he intended by his action? (e) Is the primary purpose of the legislation to punish, to deter or to compensate victims of the wrongdoing?

Even after offences are decriminalized, there is a need to retain the use of criminal law and procedure as a mode of control of last resort when all other avenues have proved futile.

Since the issue in decriminalization involves reclassification of certain regulatory offences as non-criminal contraventions, the discussion turns predominantly to the imposition of financial penalties by an administrative or other enforcement agency to secure compliance with the regulations. The advantages and disadvantages of financial penalties are the subject of the next chapter.

Chapter 4 - Use of Financial Penalties to Secure Regulatory Compliance

4.1 - Introduction

The Council of Europe's 1980 *Report on Decriminalisation* referred to in chapter 3, focused on sub-type C2 under which offences that are previously punished by criminal sanctions and, after being removed from the criminal offence category, are placed in a non-criminal category by an amendment to the law which provided non-criminal sanctions, primarily financial penalties. Removing them from the criminal category did not make the conduct legal. It continued to be prohibited, but non-criminal sanctions, both new and pre-existing, would be applied to them. The latter are, for example, cancellation or suspension of permits or licences, closure of works, injunctions, and other administrative or judicial remedies, all or most of which can be and often are more severe than fines. Criminal fines are replaced by civil money penalties imposed by courts or by an administrative agency with recourse to the judiciary.

The spotlight in this chapter, however, is on civil financial penalties which have replaced criminal fines. Civil financial penalties that are highlighted here are those which a statute authorizes a government department or an administrative agency to impose, as distinct from those which a statute authorizes an independent commission or a court to impose. The latter are the feature of the civil penalty regime of the Australian *Trade Practices Act, 1974*,²¹⁵ *Corporations Act, 2001*²¹⁶ and *Environmental Protection & Biodiversity Conservation Act, 1999*²¹⁷ and several modern U.K. statutes, especially the *Financial Services and Markets Act, 2000*.²¹⁸ In the United States too, in the case of occupational safety and health, the Occupational Safety and Health Review Commission, an independent federal agency, has been

²¹⁵ Act No 51 of 1974, Part IV, and s 76 of Part VI.

²¹⁶ Act No 50 of 2001.

²¹⁷ Act No 91 of 1999.

²¹⁸ (UK), 2000, c 8. A few other UK statutes are briefly summarized in a table, Appendix 2 at 295, below.

authorized to *impose* penalties whereas the administrative agency (the Occupational Safety and Health Administration) is given power only to assess them.²¹⁹

The Australian and U.S. statutes are briefly discussed in chapter 5, under International Comparison and Trends.

4.2 - Superiority of Financial Penalties over Fines

Several scholarly bodies and agencies extol the advantages of using financial penalties and *amps* over fines, while minimizing or ignoring their disadvantages.²²⁰

The discussion that follows relates to financial penalties imposed by commissions or other statutory bodies whose decisions are subject to appeal to or review by courts as in Australia, UK and the United States, or to a review commission independent of the enforcement body as under the U.S. Occupational Health and Safety legislation. The same principles also apply to *amps*.

Financial penalties are imposed by an administrative agency through its enforcement officials who discover a contravention during inspection. Usually the preliminary decision concerning the type of sanction to seek is made by an inspector, and, if the decision is to seek a monetary penalty, then the appropriate amount.

The administrative response is swift, tailor-made by virtue of a matrix or other table within which a contravention falls, and resolved very quickly within the hierarchy of the agency. If the contravenor does not find the resolution satisfactory, he or she is given a right to seek a further review, or to appeal to a tribunal set up under the applicable legislation or to a court. The assessment of a penalty usually requires the exercise of considerable judgment about enforcement policies.

The desire and willingness of most contravenors to settle a dispute instead of instituting an appeal are also a major reason why the agency prefers administrative financial penalties. The dispute process is streamlined, summary and often informal

²¹⁹ The Review Commission was created by the *Occupational Safety and Health Act*, *supra* note 209, §12.

²²⁰ See e.g., JUSTICE Report, *supra* note 5; Justices' Clerks' Society Report, *supra* note 11; ALRC Report No 95, *supra* note 180, §§2.88-2.90; Environment Canada, Reviewing Canadian Environmental Protection Act, The Issues #14, "Administrative Monetary Penalties: Their Potential Use in CEPA" (Ottawa: CEPA Office, 1994) at 10-12.

without any need for legal counsel of either party to be involved, and therefore expeditious. Both parties save a lot of money in the process, often far more than what they would incur prolonging the dispute and engaging counsel. Businesses can move on and treat the expense as a cost of operation. Inspectors do not have to adhere to all the requirements that are generally imposed by law when an investigation with a view to prosecution is undertaken, and the agency can conserve its budget or funnel the savings into more inspections.

The administrative agency has also a wide discretion in negotiating penalty amounts. Australian courts, for instance, have shown a willingness to accept negotiated penalty submissions in civil proceedings although, as the Australian Law Reform Commission points out,²²¹ not without hesitation, quoting the following dictum in *NW Frozen Foods Pty. Ltd. v. Australian Competition and Consumer Commission* in which case the full Federal Court gave the following reason for approving a negotiated settlement:

*"when corporations acknowledge contraventions, very lengthy and complex litigation is frequently avoided, freeing the court's time to deal with other matters, and investigation officers of the Australian Competition and Consumer Commission to turn to other areas of the economy that await their attention."*²²²

Consistency, certainty and celerity as well as cheapness, are thus the principal advantages of administrative financial penalties. The agency is at all times in control of the dispute and the file, except in a minority of cases where an appeal is taken by the contravenor, and it can during the penalty process negotiate a settlement that is too tempting for the contravenor to refuse. No external party, not even the prosecutorial authority need be involved. If the administrative penalties

²²¹ ALRC Report No 95, *ibid*, at §16.6.

²²² (1996) 71 FCR 285 at 290-91, 141 ALR 640 (FCA, Gen Div). Burchell and Kiefel JJ, giving the judgement of the Court, overturned the trial judge's decision to reject the jointly proposed penalty in the sum of \$900,000, which they had asked the judge to approve, and substituted a substantially more severe penalty in the amount of \$1.2 million, saying that "the court does not ask whether it would, without the aid of the parties, have arrived at the precise figure they had proposed, but rather whether the proposal can be accepted as fixing an appropriate amount" (because "fixing of the quantum of a penalty cannot be an exact science", 141 ALR 640 at 640). Carr J, after agreeing with the reasons in the majority judgement, added one reservation, namely, that cases decided to date on the question of the assessment of pecuniary penalties have not ruled out or excluded punishment as one of the purposes of s 76 of the *Trade Practices Act 1974* (Cth), 141 ALR 640 at 652.

were not available and prosecution was the only option, the agency would have to take the dispute to the court through a federal prosecutor, whereupon it loses control of the file, has to take extreme care in assembling evidence of violation and collect “legal” samples or documents which can stand up in court, submit to cross-examination by counsel, and abide by the decision of the presiding judge who weighs the evidence not under a civil evidence test (of balance of probabilities) but on beyond a reasonable doubt basis. The contravenor, who is called a defendant in the proceeding, has also to abide by identical rules but cannot be forced to answer incriminating questions.

Proponents of administrative penalties emphasize their advantages over criminal sanctions in terms of time, money and efficiency; that they are easier to calculate and administer; and are unencumbered in Canada by rigorous *Charter* and evidentiary tests associated with criminal trials, such as proof beyond a reasonable doubt, privilege against self-incrimination, appointment of counsel, empanelling of juries (where the possible prison term is five years or more), etc.²²³ Departmental officials when defending their legislative proposals to their Minister, who in turn pilots them through Parliament, produce unsubstantiated evidence as to savings in time and money. As the Regulatory Impact Analysis of the *Feed Ban Regulations*²²⁴ enacted in 2006, that introduced new restrictions on animal feed, pet food and fertilizers to protect against the spread of BSE, states:

“..... By pursuing amps, costs associated with undertaking prosecutions will be reduced although there is no way of knowing precisely the litigation costs that will be avoided. However, a researcher with the province of Ontario Attorney General’s office estimated that an average regulatory prosecution costs the provincial courts \$10,000. The figure includes the costs of a judge and other court officials. In addition there are the costs of a federal Department of Justice prosecutor, and the defence lawyer hired by the defendant. A cost of \$1,500 for each of these is a conservative estimate (5 hours preparation time and 5 hours court time @ \$150 an hour). At these costs, an average prosecution cost for the Province, the Department of Justice and the defendant is \$13,000.”²²⁵

²²³ *Charter*, *supra* note 28, s 11(f).

²²⁴ SOR/2005-190 at 1612 (9 June 2005).

²²⁵ *Ibid*, RIA (Benefits and Costs) further stated that there are other advantages, such as: (1) *amps* will encourage compliance; (2) *amps* will allow CFIA to increase enforcement activities; (3) *amps* allow more

Proponents sometimes blame judges for not being familiar with the issues, not giving adequate consideration to detailed issues, and being pressed for time due to workload, and more serious trials to attend to, thereby prolonging a case far beyond the government's target expectations. They are also not satisfied with the ultimate judicial outcome which they allege as being delayed far too long to have any impact on offenders and which in many cases may result in an acquittal, or a fine which they believe to be too small to worth all that trouble and expense.

Thus, decriminalization is often accepted by government on grounds of expediency and cost savings, not on sound legal principles although lip service is sometimes paid to that principle.

4.3 - Disadvantages of Financial Penalties

While cost savings and speedy process are real advantages for both government and defendants to a proceeding, and, in addition, relief for the latter from not being exposed to the criminal process, a few may work to the disadvantage of the latter when safeguards available in the criminal process are not fully accorded, but this does not seem to concern the government as its goal is to get compliance by all legitimate means.

Having lost its edge in the criminal courts over absolute liability prosecutions,²²⁶ which prosecutors had enjoyed for nearly a century and a half with pragmatic judges leaning in its favour, government under some statutes seems to have softened this blow by overcoming the setback through the backdoor by eliminating due diligence defence and even the defence of reasonable mistake of fact, which together are the hallmarks of absolute liability. While most international and Canadian administrative penal systems have retained due diligence as a defence for non-criminal contraventions, an absolute liability system exists in the *AAAMP*

strategic and proactive enforcement; and (4) potential exposure to civil liability (for failure to enforce regulations).

²²⁶ *Sault Ste Marie*, *supra* note 46.

*Act*²²⁷ and the more recent *Environmental Violations Administrative Monetary Penalties Act*.²²⁸

Professor Ogus points out two major limitations to the administrative sanction. First, because of the low public profile of the system, the costs arising from stigma and an inferior market reputation are unlikely to be significant. Even with a relatively high probability of infliction, the formal sanction may then be insufficient to deter contravention. His second point is linked to the first. He argues that there are limits to the severity of the administrative charge. This is not only because offenders aggrieved by the amount will be more likely to appeal to a tribunal and thus raise the administrative costs. It is also because once a sanction reaches a certain threshold of severity it is, for constitutional or human rights reasons, regarded as a "*criminal penalty*" and thus necessarily subject to criminal justice procedures.²²⁹ He expressed these views in the context of European Human Rights law which is binding on Member States, and while persuasive in the Canadian context, our courts have not so far taken a similar position holding that the size of a penalty alone does not attract *Charter* considerations.²³⁰

From a compliance perspective, Bryce & Heinmiller make the same point. According to them, the advantage to be gained from a prosecution is that a fine and/or a term of imprisonment can make a very strong impression on the offender and, if sufficiently serious, it can also send a strong message of deterrence. In their view, the greatest shortcoming of using prosecution to enforce compliance, at least with occupational safety and health legislation which they were studying, has been the relatively high chances of acquittal (a similar point is made in Part II).²³¹

²²⁷ *Supra* note 7, s 18. *Customs Act*, *supra* note 155, (ss. 109.1-5, 127.1, 129) does not expressly eliminate due diligence and courts have not fully wrestled with that issue.

²²⁸ *Supra* note 105, s 11.

²²⁹ Ogus, *supra* note 27 at 49-50.

²³⁰ This issue is discussed in some detail under due diligence in chapter 6, below.

²³¹ George K Bryce & George R Heinmiller, "Analysis and Comparison of the OHS Enforcement Provisions of the *Workers' Compensation Act*", Issues Paper #5", submitted to the Royal Commission on Workers' Compensation in British Columbia, 25 August 1997, online: <<http://www.qp.gov.bc.ca/rcwc/research/issues5enforcement.pdf>>.

From the standpoint of a defendant to an administrative charge, Professor Coffee notes:

*" . . . it seems an indeterminate question whether defendants would fare better under a legal regime promoting the civil imposition of very punitive penalties with only somewhat enhanced procedural safeguards."*²³²

With respect to stigma of a criminal conviction, Gillooly and Wallace-Bruce adopt the spectrum approach discussed by the Australian Law Reform Commission in its Report 95,²³³ and make the following observation:

"the stigma attached to a person who is adjudged guilty of a misconduct does not depend upon whether that adjudication is labelled a criminal conviction; rather it is dependent upon the combination of factors including the nature of the misconduct, its seriousness (as indicated by the penalty imposed), and the degree of publicity it attracts. Civil offenders may suffer greater stigma than criminal offenders.

*Whatever modifications are made to the normal rules of civil procedure in penalty proceedings, those rules will provide significantly less protection for an innocent person than rules of criminal procedure. Hence there remains a serious risk of penalties being wrongly imposed on such persons."*²³⁴

Professor Coffee expresses the same reservation:

"The prosecution obtains a decided advantage when it can try its case in an extra judicial proceeding before an administrative law judge operating under informal rules of procedure and evidence.

*Beyond the home court advantage, public enforcers also gain the ability to prove their cases simply by preponderance of the evidence, rather than a reasonable doubt, and to evade jury's ability to nullify an overly harsh law. As a result, civil penalties, particularly when administratively imposed could provide the means for evading constitutional safeguards."*²³⁵

²³² Coffee, "Paradigms Lost", *supra* note 94 at 1888.

²³³ *Supra* note 180.

²³⁴ M Gillooly and NL Wallace-Bruce "Civil Penalties in Australian Legislation" (1994) 13 U Tasm L Rev 269.

²³⁵ "Paradigms Lost", *supra* note 94 at 1888-91.

Most scholars do not seem to have a concern over the fact that when an administrator is authorized to impose penalties, he or she becomes both the prosecutor and the judge (at least of the first instance), but Professor Gellhorn did strive to make that point in his article.²³⁶

Some disadvantages of monetary penalties relate to the way they currently operate, for example, the failure of the legislature to fix sufficiently high penalties. Low penalties do not deter non-compliance and therefore substantial fines are required. By the same token, if penalties are too high they may raise constitutional issues as pointed out by Professor Ogus, even though such arguments are weak under the Canadian *Charter*.²³⁷

On the other hand, the possibility of individual accountability by the people involved in the offence tends to be minimised in the case of administrative penalties. Managerial personnel who were better placed to avoid the offence in question can avoid responsibility for the offence as it is easier to prosecute their employer or the company, if monetary penalties are substantial. In any case, where a statute denies the defence of due diligence, no amount of care would relieve them of financial liability although it may be taken into account in its quantification. It creates a disincentive to take appropriate corporate reform measures as corporate managers may decide to treat fines as recurrent and unavoidable business losses which they would pass on to their shareholders or workers where possible. Alternatively, large fines may result in increases in the price of a product in a monopolistic market situation so that the consumer will end up bearing the burden.

4.4 – Summary

The following conclusions seem to emerge from this chapter.

(1) Administrative and civil financial penalties have assumed a place of paramount importance in the compliance arsenal of federal regulators in the United States, Australia, Britain and Germany, as well as in Canada at both the federal and provincial levels. They provide an ideally flexible sanctioning tool and are effective in

²³⁶ W Gellhorn, "Administrative Prescription and Imposition of Penalties" [1970] Wash ULQ 265.

²³⁷ Ogus, *supra* note 27 at 49-50.

a wide variety of situations where neither licence revocations, injunctions, work stoppages or other drastic civil remedies, nor criminal sanctions, are appropriate. By holding these drastic alternatives in reserve to be used in exceptional situations, financial penalties that are substantial in amount can act as a real deterrent, or at least as a strong disincentive to further non-compliance. Should a penalty become necessary, it would more accurately reflect a balancing of societal interests.

(2) Administrative or civil financial penalties may not result in increased likelihood of offenders being caught – that is determined by the effectiveness of regulatory monitoring mechanisms and human resources allocated to enforcement activities.²³⁸ But they offer important advantages in other areas. They can be cheaper and faster, and they can increase the likelihood of an enforcement response. Therefore, they are more likely to be used. Disputed cases are unlikely to be in substantial numbers, as the data in chapter 8, Part II will show, and can be adjudicated quickly, efficiently and at relatively low cost.

(3) Monetary penalties can take account of benefits of non-compliance by disgorging them, and thus provide a real deterrence. By the same token, violators can be provided strong incentives to take remedial measures or prevent future non-compliance through the use of negotiated settlements which are often built into *amp* regimes.

(4) When administrative financial penalties are adjudicated and imposed by an administrative agency, its officials act as prosecutor and judge. They decide on the relevant issues of fact and law and then determine the type or amount of penalty to be levied in each case. The risk of abuse or misuse of power exists. There is a crucial need for transparency, both in the rules themselves and in the decision making process, accountability and efficiency, as well as for providing adequate safeguards to defendants

(5) Safeguards emphasized by the Council of Europe and the AIDP in their recommendations are:

²³⁸ This issue is the topic of discussion in chapter 9, Part II, below.

- (a) Persons subject to a financial penalty should be given sufficient information as to the reasons for the penalty, and the evidence on which the action is based so as to enable them to understand the grounds for the administrative action.
- (b) They should have a reasonable opportunity to effectively challenge the grounds for the proposed action and present any evidence and arguments that are relevant to the decision in question.
- (c) The circumstances under which a penalty will be imposed, and the criteria for determining the penalty amount for each particular case, should be fair and clear.
- (d) Those charged with a violation should be given some of the protections which they had been accorded under the criminal justice system, especially a defence that they took all reasonable steps to ensure that they were in compliance with the law.²³⁹

Most administrative penalty regimes provide or recognize these safeguards.²⁴⁰ The Law Reform Commission of Canada, in a Study Paper prepared by Howard Eddy, believed that civil penalties are a useful technique for administrative compliance policy, but cautioned that they should not be seen "as simply name-changing to avoid problems created by the decision in *Sault Ste, Marie* and the current trend towards recognition of the due diligence defence."²⁴¹

As Mary Cheh notes,

"The special contributions of civil remedies would seem to lie elsewhere. First, when civil remedies are used as an alternative to criminal remedies, it is possible to reserve a special province for criminal justice and the criminal sanction. Criminal law can focus on serious transgressions and harms involving culpable conduct, not merely negligent and impaired action. Civil remedies are a means to impose strict liability for offence and to identify behaviour as antisocial without invoking the full procedural moral artillery of a criminal case. The idea is that, to maintain its moral force, the criminal law should

²³⁹ Council of Europe and its Committees of Ministers' Recommendations and Resolutions, and AIDP Recommendations, from which this summary is derived, have been referred to in chapter 3, above.

²⁴⁰ See e.g., *AAAMP Act*, *supra* note 7, s 18(2), which expressly recognizes common law rules and procedures but only to the extent they are not inconsistent with the *Act*.

²⁴¹ Howard Eddy, "Sanctions, Compliance Policy and Administrative Law", Study Paper, Law Reform Commission of Canada, Ottawa, July 1981, at 64 (mimeographed version).

*address only seriously antisocial behavior and only behavior involving persons who are responsible for their actions.*²⁴²

Despite the scholarly criticism, there is a danger in over-stating the case against monetary penalties. The various disadvantages referred to above indicate not so much the need to step away from monetary penalties as an alternative to criminal sanction, but the need for better legislative directions to agency administrators on enforcement priorities and a range of options which can overcome some of the difficulties referred to in appropriate cases.

It is submitted that for an administrative monetary penalty system to be efficient, there must be adequate means of enforcement. The penalty should be deemed to be a civil debt due to the administrative agency and enforceable through civil proceedings in court. In this connection, the agency should be empowered to apply to court for ancillary relief, such as injunctions or restitution orders, to aid in recovery of the civil debt. In addition, the administrative agency should also be empowered to take other forms of administrative action for failure to pay the financial penalty. For example, the agency could be allowed to suspend or revoke a licence, subject to reasonableness principles. Compliance and enforcement are the subject of discussion in Part II of the thesis.

²⁴² Mary M Cheh, "Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction" (1991) 42 Hastings LJ 1325 at 1346.

Chapter 5 - International Comparison

5.1 -Introduction

The spotlight in the last chapter was on civil financial penalties which have replaced criminal fines in certain circumstances. It highlighted statutory regimes that authorized a government department or an administrative agency, as distinct from an independent commission or a court, to impose monetary penalties.

This chapter describes the salient features of the administrative penalty regimes of Germany, the United States, and Australia (under certain federal statutes) as well as of Great Britain, the latest to introduce the reform internationally. A brief comparison of the significant features of these international regimes with the Canadian *AAAMP Act* is made, especially with the German and American systems from which key ideas were drawn and utilized when developing the Canadian legislation.

5.2 - Germany

5.2.1 - Brief History

Post-war Germany, the Federal Republic of Germany (FRG), can take credit for pioneering *decriminalization* of regulatory offences. According to Professor Thomas Weigend, German theorists argued in favour of having a separate body of law dealing exclusively with instances of mere disobedience to State regulations, as opposed to criminal offences violating individual legal interests. The most influential of them was Goldschmidt whose work (*Das Verwaltungsstrafrecht*) was published in 1902 but it was not until about half a century later that Germany introduced a general concept of 'administrative offences' (*Ordnungswidrigkeiten*), procedurally different from criminal liability (*Straflichkeit*).²⁴³

This German development which began at the commencement of the second half of the twentieth century was a response to the inflation in criminal law following the transformation of the 19th century liberal state into a 20th century *administrative state*.

²⁴³ Weigend, *supra* note 159.

In 1949 Germany introduced the concept of *Ordnungswidrigkeiten* (or administrative violation) by enacting the *Economic Crimes* law²⁴⁴ which formally established a distinction between administrative violations and criminal offences. These violations were, henceforth, not to be punished by a criminal sanction (such as a criminal fine or incarceration) but only by an administrative penalty (*geldbiße* - literally *financial penance*). The administrative penalty did not connote moral blame, which was inherent in the criminal fine (or *geldstrafe*), and the defendant was given a right of appeal against the administrative agency's decision to a court of first instance, thus respecting the doctrine of separation of powers.

With the expansion of administrative violations beyond the area of economic regulation, Germany found it necessary to enact a comprehensive statute in 1952, called *Gesetz über Ordnungswidrigkeiten (OWiG)*.²⁴⁵ This law, replaced by a *new codification* in 1968 (amended and re-promulgated in 1987),²⁴⁶ has remained the basic legislation for dealing with any administrative offence that is created by any statute. It is of enormous practical relevance because the great majority of road traffic offences are *Ordnungswidrigkeiten (OWiG)*,²⁴⁷ and a large number of minor offences in economic fields are latched on to it. As Professor Weigend observes:

*"It is probably fair to say that the concept of Ordnungswidrigkeiten as it has been applied in Germany has stood the test of the first 40 years: it permits administrative agencies to handle minor offences efficiently while giving citizens reasonably extensive judicial protection against unjustified penalties."*²⁴⁸

Professor Weigend adds, however:

²⁴⁴ *Gesetz zur Vereinfachung Wirtschaftsstrafrechts, 1949 – Gesetzblatt der Verwaltung des Vereinigten Wirtschaftsgebeitz, 1949.*

²⁴⁵ *Gesetz über Ordnungswidrigkeiten* of 25 March 1952 (Bundesgesetzblatt) I.177 [hereinafter cited BGBl].

²⁴⁶ *Gesetz über Ordnungswidrigkeiten* of 24 May 1968, amended and re-promulgated on 19 Feb. 1987 [hereinafter cited as OWiG – with 'G' in upper case]; BGBl, *ibid*, I.602.

²⁴⁷ The abbreviation *OWig* ('g' in lower case) is used when it refers only to administrative offences, not the statute, the latter is denoted by capital 'G'.

²⁴⁸ *Supra* note 159 at 95.

"This practical success is in contrast with a remarkable theoretical deficiency. It is difficult to find a jurisprudential basis for the quid pro quo typical of Ordnungswidrigkeiten law: a reduction of penalties (as compared with those available in criminal law) is linked to a streamlined process with diminished rights of the defendant." ²⁴⁹

OWiG borrows heavily from the German *Criminal Code (Strafgesetzbuch)* (StGB)²⁵⁰ and the *Code of Criminal Procedure (Strafprozeßordnung (StPO))*²⁵¹ in so far as the general part of the substantive law and the judicial process are concerned; but it differs significantly with respect to penalties and preliminary procedure.

5.2.2 - Definition of Violation

OWiG defines an administrative violation as "an unlawful and blameworthy act fulfilling the elements of a legal provision which permits the imposition of an administrative fine (*geldbuße*)".²⁵² It is thus the legislative determination of the permissible sanction, not any characteristic of the prohibited act, which is the distinctive element of an *OWiG*.

OWiG can be created by any federal, State or local statute and ordinance, dealing with all kinds of subjects. The great majority of administrative fines are imposed in road traffic matters. The Road Traffic Regulations contains a list of 50 *OWiG* which cover just about every conceivable breach of road traffic law, some of which are committed several thousand times a day. Another large area of application are what are called "police offences", that is to say, breaches of rules aiming at the maintenance of public order and security, for example, making excessive noise, illicit prostitution, and keeping dangerous animals. Finally, *OWiG* abound in the field of economic and environmental regulation, ranging from maintaining a campsite without the required number of toilet facilities to participating in an antitrust conspiracy. Professor Weigend notes that "*there is hardly a statute or ordinance in economic, business or environmental matters which does not list,*

²⁴⁹ *Ibid.*

²⁵⁰ *Straftat Gesetz Buch* (StGB) of 15 May 1871, amended and repromulgated 10 March 1987 (BGBl I.945).

²⁵¹ *Strafprozeßordnung* (StPO) (Code of Criminal Procedure) of 1 Feb 1877, amended and repromulgated on 7 April 1987 (BGBl I.1074).

²⁵² *Supra* note 246, §1.

usually in a separate paragraph at the end of the statute, prohibited activities and omissions, declaring them to be *Ordnungswidrigkeiten*²⁵³

5.2.3 - Principle of Legality

The principle of legality laid down in the German Constitution (*Grundgesetz*) of 1949,²⁵⁴ as well as in the *Criminal Code* (StGB)²⁵⁵ for criminal offences, which requires that criminal conduct must be precisely defined, was made applicable to *OWig*. The principle is also specifically stated in the *OWiG*,²⁵⁶ although the contravention itself can be in a statute or ordinance of a duly authorized legislative body, including a local authority. But because the possible legal consequences are less strict, the term "reproachable" - in contrast with "blameworthiness" (or *schuld*) which is applicable to criminal offences - is used. *OWig* are to be penalized only if there is culpability (intention or *negligence*) by administrative fines.

It should be noted that there are no absolute liability *OWig*. In contrast to criminal offences, however, most *OWig* require no more than a showing of negligence, which is exceptional for criminal offences. While liability for inadvertent negligence in administrative violations is an exception, in the practical application of *OWiG* laws the offender's *lack of due diligence* is often proved by showing his *objective deviation from the norm* in question. Thus, Professors Weigend, Hefendehl and others, take the view that the principle that liability presupposes fault is paid lip service.²⁵⁷

²⁵³ Weigend, *supra* note 159 at 97.

²⁵⁴ *Grundgesetz für die Bundesrepublik Deutschland (GG)*, The Basic Law for the Federal Republic of Germany, approved May 8, 1949 and with the signature of the Allies came into effect on 23 May 1949 as the de facto constitution of West Germany.

²⁵⁵ *Supra* note 158.

²⁵⁶ *Supra* note 246, §8.

²⁵⁷ Weigend, *supra* note 159; Prof Dr R Hefendehl, "Mit Langem Atem: Der Begriff des Rechtsguts" in *Goldammer's Archiv für Strafrecht*. 1/2007, *seiten* 1-14, and personal interview, Feb. 1, 2007; Prof Dr G Heine, exchange of e-mails in 2007/08.

5.2.4 - Corporate Criminal Liability

Corporate criminal liability, which is alien to civil law countries is accepted under administrative law since *OWiG* responsibility, is considered ethically neutral and the pecuniary sanctions provided by it can be effectively imposed on a corporation. However, no special provision is made in the statute for criminal liability of administrative office holders in their representative capacity.

5.2.5 - Sanctions - Penalty Amount

The minimum fine (*geldbuße*) provided in the *OWiG* is DM 5; the *maximum*, if not set in the subject matter statute, is DM 100,000 (on corporations, the maximum is DM 1 million.²⁵⁸ Statutory law permits fines of up to DM 2 million. Fines in excess of that amount may be imposed if necessary to skim off an illegal profit.

5.2.6 - Vicarious Liability

Vicarious liability of the principal or employer for acts of agents and employees is accepted under *OWiG* but only if the act or omission harms a third person AND the principal or employer could have foreseen and avoided the harm. Thus the owner or responsible manager of an enterprise commits an *OWiG* whenever he or she fails to take the supervisory measures necessary for preventing the violation of duties incumbent upon the owner (principal or employer) of an enterprise, if that person's negligence leads to violation of such duties by anyone in the enterprise. It is not necessary to identify the actual perpetrator or to find any personal knowledge (*mens rea*) relative to the violation. The violation merely constitutes an objective or factual pre-condition of penal liability.²⁵⁹

5.2.7 - Justification and Exoneration

An authorization by a competent administrative official precludes *OWiG* liability. Mistake of fact defence is available but the mistake must not have been due

²⁵⁸ *OWiG*, *supra* note 245, §130, permits a fine of up to DM 1 million for neglect of duty to supervise employees [2 DM = 1 Euro].

²⁵⁹ G Heine, "National Reports – Germany" in Günter Heine/Mohan Prabhu/Anna Alvazzi del Frate, eds, *Environmental Protection – Potentials and Limits of Criminal Justice: Evaluation of Legal Studies*, at 219 (UNICRI Publication No 56, United Nations Publication Sales No E96IINo 1.1997. ISBN (UNICRI) 9-290-78032-0).

to a reproachable lack of diligence. The defence of *superior orders* is more readily accepted under *OWiG*.

OWiG recognizes only two grounds of justification, namely, self-defence (including defence of others), and justifying necessity,²⁶⁰ both of which are taken from the *Criminal Code*.

5.2.8 - Penalty Procedure and Criteria

OWiG provides a simplified procedure. The administrative agency in charge of the subject matter investigates the violation, adjudicates and fixes the *geldbuße*. Unlike the accusatorial process of the criminal law, the *OWiG* process is primarily an inquisitorial, intra-agency proceeding.

The agency can conduct searches and seizures, obtain samples, hear witnesses, with judicial authorization order suspects and witnesses to appear in person, call in police to assist, and so on, but some of the intrusive criminal law powers (such as arrest, pre-trial detention, seizure of mail, installation of wire-tap) are not available.

The agency has discretion whether or not to take action, to issue a formal caution (with a small fine) or to impose a *geldbuße*. The *criteria for geldbuße* are: significance of violation and degree of culpability (primary); and the economic situation of the offender, except where violation is insignificant (secondary).²⁶¹

The agency's decision not to investigate an offence or not to impose a sanction cannot be challenged in court. If after investigation the agency determines that a *geldbuße* is warranted, it issues an *administrative fine decree* (*Bussgeldbescheid*) fixing the amount of *geldbuße*. If the defendant accepts the decree it is a valid determination of facts and legal consequences. The *geldbuße* is enforced by the agency itself.

²⁶⁰ *OWiG*, *supra* note 246, §§15, 16.

²⁶¹ *Ibid*, § 17, s 3.

5.2.9 - Criteria for Demarcation: "Dual Track"

The demarcation between criminal offences and *OWig* is purely formal. Under *OWiG* (as well as in criminal law), liability for merely negligent conduct is regarded as an exception; only intentional conduct can be penalized unless the relevant statute expressly extends liability to instances of negligence.²⁶² In fact, however, *OWiG* provisions in most statutes almost invariably begin with the words "whoever intentionally or negligently ...". Criminal offences are called *straftat*, *OWig* are called *übertretungen*.²⁶³ *Straftat* is punishable by fine or imprisonment, *übertretungen* only by *geldbuße*.

An offence is usually dealt with as *OWig* unless the prosecutor decides to upgrade it to a criminal offence based on the quality of the act (*rechtsgut*) and whether any harm resulted from it or there was abstract or concrete endangerment. An unintentional or negligent act is usually proceeded with as an administrative offence; but if it was intentionally committed, it may be prosecuted as a crime.

The initial decision on which track to proceed is made by the prosecutor, that decision is, however, not final.

5.2.10 - Penalty Adjudication

Only if the defendant contests an agency's determination is the process transferred to the *Amtsgericht* for trial. *Amtsgericht* is the lowest court of general jurisdiction in the German system handling both civil and criminal cases. Administrative matters are handled by a separate branch, *Verwaltungsgericht* (administrative court). The fact that *OWig* cases are brought before *Amtsgericht* and not before *Verwaltungsgericht* shows that the German system regards them as petty criminal cases rather than administrative law matters. If an *OWig* comes to trial, criminal procedure applies.

²⁶² *Ibid*, §10.

²⁶³ "*übertretungen*" means "infraction, violation" (German dictionary definition).

5.2.11 - Filing an Appeal

An appeal against the administrative agency's decision is filed with the agency itself, in writing or orally. If it is filed, the agency can re-examine the appropriateness of its *Bussgeldbescheid* (fine decree), reopen the investigation and ask the defendant to produce exonerating evidence. If at that stage the agency does not withdraw the *Bussgeldbescheid* it sends the file to the public prosecutor who then has three options: to dismiss the case; to send the file back to the agency for further investigation; or to present the file to court.

5.2.12 - Appeal Process

The *Amtsgericht* may dismiss the appeal if it is not filed within the prescribed time or is not in proper form. If it does not dismiss the appeal, the process enters immediately into the pre-trial phase of a criminal proceeding, the *Bussgeldbescheid* becoming the formal accusation. The court holds a *trial de novo*, not simply a review. It is free to evaluate the evidence differently, to punish the defendant more severely and even to find him guilty of a criminal offence. But it cannot go beyond the adjudicating events encompassed by the *Bussgeldbescheid*.

While the process is similar to a criminal trial, *OWiG* permits a simplified and shortened procedure (for instance, the attendance of prosecutor or defendant is excused unless ordered; rules of evidence are relaxed; oral trial may be dispensed with; cases of minor significance may be dismissed by the court, etc.).

5.2.13 - Transferring *OWiG* to Criminal Process and *Vice Versa*

If it appears to an administrative agency during its investigation of a violation that:

- (a) the suspect's conduct was criminal and not merely *OWiG*,
- (b) the suspect's *OWiG* is connected with criminal offences committed by others,
- or
- (c) the suspect has committed a criminal offence in addition to an *OWiG*,

the agency can refer the matter to a public prosecutor.

Similarly, if in the course of a defendant's appeal of an agency's OWig decision to the court, the criminal nature of the appellant's conduct comes to the court's attention, the court can transform the OWig appeal into a criminal trial. In that case, the defendant must be informed, the simplified OWig procedure ceases to apply, but evidence taken in the earlier proceeding remains valid.

If, during the investigation of an alleged offence referred by the agency for prosecution, the prosecutor forms the opinion that the suspect's conduct does not meet the definition of a criminal offence, the prosecutor may:

- (a) dismiss the case altogether,
- (b) refrain from bringing the prosecution (usually), or
- (c) transform a prosecution into a *OWig* in the criminal court (in which case the court adjudicates the issue).

The criminal court can also transfer a case for an *OWig* trial even if the defendant has been charged with a criminal offence. It is not bound by the prosecutor's legal assessment of the conduct charged. The defendant thus takes its chances.

5.2.14 - Collection of *Geldbuße*

The agency can take civil proceedings to collect the *geldbuße* once it has become final. If it is unsuccessful in collecting and the offender refuses to pay, having the means, the offender can be taken into custody (for a maximum period of 6 weeks) but *geldbuße* is not thereby reduced.

5.2.15 - An Assessment and Critique of the *OWig*

The *OWiG system* has been adopted in several European countries, notably Austria, Belgium, Finland, Greece, Italy, Portugal and Spain. Because of its acceptance by many civil law countries and its all-encompassing features which are adopted by a large number of regulatory statutes, Professor Ogus describes *OWig* as ". . . perhaps the most coherent and comprehensive system of regulatory enforcement"²⁶⁴

²⁶⁴ Ogus, *supra* note 27 at 46.

However, the system is *not without some criticisms*. While there has been a statutory attempt to distinguish regulatory offences from criminal offences²⁶⁵ the distinction is not all that clear because it lacks qualitative criteria and gives lawmakers relative freedom to assign conduct to either OWiG or to penal law, sometimes on grounds of policy and sometimes due to expediency, and thus tempts them to abuse their discretion by over-expanding administrative penal law and mislabeling offences. The temptation to assign socially harmful conduct, which is difficult to prove or which creates other enforcement problems, to the category of administrative offences, leads to mislabeling which threatens to disturb, in the long run, the hierarchy of values existing in a society. On the other hand, the simplified procedure minimizes the defendant's chances of success and may thus easily catch parties innocent of harmful conduct in the densely woven net meant to catch big offenders. It is quite a formidable task to legislatively draw a line. So the determination of where that line should be drawn is left to the prosecutor with the court making the final determination in advance of or during the administrative or criminal proceeding.

Weigend, Hefendehl and Heine suggest that there should be more substantive criteria to limit legislative discretion in classifying offences. Social harmfulness of conduct should be a key consideration, and consideration of efficiency should be accorded only secondary relevance because the preventive efficiency of criminal as well as non-criminal sanctions is difficult to assess. They suggest that only when the designation of a violation as a criminal offence would actually impede effective law enforcement, the legislator should be permitted to retreat, even in the face of seriously harmful conduct, to the field of administrative penal law.^{266, 267} Civil liability for any damage or harm that results, recoverable through action in civil courts, would be more appropriate.

²⁶⁵ OWiG, *supra* note 246 §1 defines a regulatory offence as "an unlawful and reproachable act meeting the definition of law which permits the imposition of an administrative fine."

²⁶⁶ Weigend, *supra* note 159; Hefendehl, *supra* note 257; Email of 3.03.08 from and personal discussions earlier with Prof. Dr. Günter Heine.

²⁶⁷ Similar criticisms were voiced at the AIDP XIV Congress on Penal Law, in 1989, *supra* note 201.

Many of the features of the German administrative penal law system were adopted in the Canadian legislation developed in the mid-1990s, and the similarities and differences are highlighted in Part II.

5.3 – The United States

5.3.1 - Brief History

Administratively imposed monetary penalties are not new to US administrative law. For example, as early as 1853, the US Supreme Court upheld a Customs-imposed 20% penalty duty for an undervaluation of imported goods.²⁶⁸ The penalty did not rely on judicial enforcement because Customs had a very effective remedy; it merely withheld imported goods until the entire duty was paid. As William Funk points out, despite this early endorsement of administratively imposed penalties, certain legal issues kept them relatively controversial. One such issue involved the question whether or when “civil” penalties are really “criminal penalties”.²⁶⁹ This is a critical issue because it is widely accepted that administrative agencies cannot impose criminal penalties.

Perhaps influenced by the German development, American sociologists in the 1960s questioned the appropriateness of the criminal law for regulatory enforcement, arguing that the latter lacked the moral basis of the former.²⁷⁰ This development was largely due to the influential work of Harvey Goldschmidt and Colin Diver who developed recommendations on administrative penalties for the Administrative Conference of the United States. As Diver pointed out in an influential article, by 1980 there were some 348 statutory civil penalties enforced by 27 Federal departments and independent agencies in the US.²⁷¹ These penalties are authorized for a host of regulatory commands relating to such varied subjects as operating authority of carriers and broadcasters, safety standards for consumer products,

²⁶⁸ *Bartlett v Kane*, (1853) 57 US 263, referring to the 17th section of the *Tariff Act*, 1842.

²⁶⁹ Funk, *supra* note 214.

²⁷⁰ Ogus, *supra* note 27.

²⁷¹ Diver, *supra* note 79.

workplaces, vessels and vehicles, marketing restrictions, prohibitions against fraud and deception, liquidity requirements for banks, revenue laws, and pollution abatement requirements. Civil penalties may be invoked for violating statutes, administrative regulations, or administrative orders; for failure to file reports, keep records, permit entry, or respond to agency requires, or for willful, negligent, repeated or even unintended conduct. The civil penalty regime has now assumed a place of paramount importance in the compliance arsenal of US regulators.

There is no one standard civil penalty model in these statutes but several features are common to all. In addition, penalty proceedings generally conform to the *Administrative Procedures Act*,²⁷² but several statutes have their own procedures, some of them informal and others embodied in agency regulations, as well as bodies for adjudicating disputes.

In this section, three models that are closest to the Canadian *AAAMP Act* are described as they provided inspiration for the latter. The three models are: (1) US Environmental Protection Agency, (2) the US Occupational Safety and Health Administration, and (3) the US Department of Agriculture. A fourth model has also been added, that at the Nuclear Regulatory Commission which regulates the nuclear establishment areas as that model contains very useful precedents.

5.3.2 - Administrative Monetary Penalty System at US EPA

The first of the models described here because of its influence on the Canadian *AAAMP* legislation is the EPA. The US Environmental Protection Agency (US EPA) administers several key environment statutes, the most important ones being the *Clean Water Act*,²⁷³ the *Safe Drinking Water Act*,²⁷⁴ the *Clean Air Act*,²⁷⁵

²⁷² 9 USC §55(8),(10),(11).

²⁷³ Pub L No 91-224 (1970), 33 USC §§1251-1387.

²⁷⁴ Pub L No 93-523, 88 Stat 1060.

²⁷⁵ Publ L No 91-604, 84 Stat 1676, 42 USC §7401.

the *Toxic Substances Control Act*,²⁷⁶ the *Resource Conservation and Recovery Act*,²⁷⁷ and the *Federal Insecticide, Fungicide and Rodenticide Act*.²⁷⁸

5.3.2.1 - Uniform Penalty Policy

US EPA has established a Uniform Penalty Policy for each major area of regulation under these statutes. The Policy governs both the assessment of civil monetary sanctions and the kinds of remedial action that will be expected of non-complying facilities. Penalties and other requirements are often negotiated in the course of informal settlement conferences between the defendants and US EPA officials before any formal enforcement action is decided upon. The settlement conferences usually result in an agreement (called a *consent order*). If a settlement is not reached, the dispute will go to a hearing before an administrative law judge, who is an employee of the US EPA but at the same time independent of agency's control. Decisions of the administrative law judge are subject to review by the Administrator of the EPA or by a judicial officer who acts on behalf of the Administrator. The latter decision becomes final for the purpose of review by the District Court.

EPA has issued a Policy on Civil Penalties which generally applies to all the statutes under its administration except the *Clean Air Act*.²⁷⁹ By way of an example, the civil penalty policy for the *Resource Conservation and Recovery Act* sets out four steps for calculating monetary penalties.²⁸⁰

²⁷⁶ Pub L No 94-469, 15 USC §53.

²⁷⁷ Pub L 94-580 (1976), 42 USC c 82.

²⁷⁸ Pub L No 92-516 (1972), 94 Stat 140, 7 USC §176.

²⁷⁹ "Policy on Civil Penalties: EPA General Enforcement Policy #GM-32", effective 16 February 1984, online: <<http://www.epa.gov/compliance/resources/policies/civil/penalty/epapolicy-civilpenalties021684.pdf>>.

²⁸⁰ Much of the information in this subsection is taken from personal interviews conducted by the author in 1989 and 1990 (along with a team of Canadian officials) at the US EPA. Notes on these interviews have been kept. Jonathan Libber was one of the staff attorneys at these meetings. The information was updated in October 2007 at a subsequent meeting of the author with Mr. Libber and his director, Walker Smith, and from Libber's article, "Penalty Assessment at the EPA: A View from Inside," (1990) 35:2 *SDL Rev* 189.

(1) The first step consists of the “gravity-based component”. Here, the extent of the deviation from the regulated standard and the degree of potential harm from non-compliance are taken into account. For a major deviation from the standard that gave rise to a major potential harm, there would be a mandatory basic monetary penalty of \$20,000 to \$25,000. By contrast, a minor deviation that constituted a slight potential risk of harm would be penalized by a discretionary monetary penalty of \$100 to \$499. Other violations receive proportionately serious penalties.

(2) The next step is called the “multi-day component”. It takes account of the duration of the non-compliance.²⁸¹ A separate matrix is provided for this calculation. The monetary penalty is increased by an amount equal to the product of the number of days of non-compliance, and a dollar figure corresponding to the gravity of the violation is attached.

(3) The third step takes account of the economic benefit of non-compliance. The aim is to recapture any significant benefit that accrued to the violator from non-compliance. The policy takes account of economic benefits arising from delayed or avoided compliance expenditures. A computer model, called *BEN*, has been developed to calculate these benefits.

According to the EPA,²⁸² 95% of the Agency’s cases are settled using this model because of its objective character and reliability, and hence *BEN* has become the tool of choice. *BEN* has introduced a high degree of objectivity into EPA’s penalty calculations, thus enhancing the confidence of EPA enforcement professionals in their penalty figures. If settlement is not reached, EPA uses expert witnesses to calculate the economic benefit at trial or hearings.²⁸³ Two other computer models are used for different purposes, the *ABEL* model to evaluate a company’s claim that it cannot afford to pay compliance costs, clean up costs or civil penalties, and the *CASHOUT* model to calculate the present value of clean up costs for a particular site.

²⁸¹ Pollution acts are continuing offences.

²⁸² Libber, *supra* note 280 at 74.

²⁸³ *Ibid.*

(4) The fourth and final step involves making adjustments to the monetary figures arrived at under the first three steps. These adjustments allow for an increase or reduction of the overall monetary penalty based on the following factors:

- (a) The reason for the violation;
- (b) The *intent* of the violator;
- (c) The presence of good faith on the part of the violator;
- (d) The degree of violator's negligence;
- (e) The violator's compliance history;
- (f) The violator's ability to pay;
- (g) The violator's involvement in environmental projects; and
- (h) Any other relevant or unique consideration.

Any single factor may result in an increase or decrease of the monetary penalty by as much as five per cent. The factors are cumulative, so the overall context of the violation can be taken into account in determining the final penalty amount. Typically, there are negotiations between the EPA officials and the violator and the sum actually assessed and then collected is substantially lower than that calculated by any fixed formula in order to discourage appeals to court.

Negotiations, in EPA's view, are a cost effective way to address violations as long as they result in an agreement which achieves enforcement goals. The great majority of formal enforcement proceedings, whether administrative or judicial, are settled by negotiation before they reach the hearing stages.

Statutory guidance on factors to be taken into account in determining penalty amounts is also given in some of the major statutes administered by the EPA.²⁸⁴

5.3.2.2 - Civil Judicial Actions

Unlike the administrative penalty actions described above which do not involve judicial court process, civil judicial actions are formal lawsuits filed in court against persons or companies that have failed to comply with regulatory requirements or with an administrative order. These cases are brought to court by the US Department of Justice on behalf of the EPA.

²⁸⁴ See e.g., *Toxic Substances Control Act*, *supra* note 276 (s 16(a)(2)(B)); *Federal Insecticide, Fungicide and Rodenticide Act*, *supra* note 278 (s 14).

5.3.2.3 - Criminal Enforcement

A Criminal Penalty Policy was established through the Sentencing Guidelines on 1st November 1987. EPA's criminal enforcement operates as a supplement to the administrative and civil judicial enforcement vehicles which are its principal enforcement tools. Such actions are pursued through the Department of Justice and are usually reserved for the most serious violations which have been willfully or knowingly committed. Big and small firms alike are prosecuted. While a monetary penalty is the typical penalty which is almost always imposed on a corporate offender, dollar amounts vary widely. Jail time has been imposed where an individual within the corporation has been convicted, but in most cases all or a portion of the time is suspended and the time actually served is even shorter. Nevertheless, the threat of incarceration is present in every criminal case where an individual is charged. Probation, when imposed, is an extremely efficient part of the criminal program because in the event that an individual, while on probation, commits another crime (not limited to environmental crime), the individual gets an automatic prison sentence, which is a condition of the probation.²⁸⁵

5.3.3 - US Occupational Safety and Health Administration²⁸⁶

5.3.3.1 - Overview

The US OSHA also served to provide some relevant experience to the formulation of Canadian AAAMP legislation and is, accordingly, reviewed here.

The Occupational Safety and Health Administration (OSHA), along with the Federal Mine Safety and Health Administration (FMSHA), is responsible for administering health and safety laws that apply to U.S. industry falling within federal jurisdiction, under the *Occupational Safety and Health Act (OSH Act)* and the *Federal Mine Safety and Health Act*, respectively. Appeals against the decisions of these two Agencies are heard by the Occupational Safety & Health Review Commission (OSH

²⁸⁵ *Supra* note 279.

²⁸⁶ Much of the information in this subsection is taken from personal interviews conducted by the author in 1989 and 1990 (along with a team of Canadian officials). Notes on these interviews have been kept. The information on penalties has been updated by checking the current U.S. statutes.

Review Commission) and the Federal Mine Safety & Health Review Commission, respectively, each comprising three members who are not in-house employees as in the US EPA adjudications. These Commissions were established by Congress to carry out adjudicatory functions and are independent of the administrative agencies and of the Department of Labor within which they are located. They are independent, quasi-judicial bodies, part of the Executive Branch. Their members are appointed by the President with the advice and consent of the US Senate.

Over 5 million workplaces come within the scope of the *OSH Act*. The *Act* imposes two principal obligations on every employer: (1) to furnish to each employee employment and place of employment which are free from recognized health hazards that cause or may cause death or serious physical harm to employees; and (2) to comply with the health and safety standards and all rules, regulations and orders issued pursuant to the *Act* which are applicable to the employer's own actions and conduct.²⁸⁷

5.3.3.2 - Criminal and Civil Contraventions

Section 17 of the *OSH Act* divides contraventions into two categories: criminal and civil. It sets forth a number of penalty classes, the most serious of which are those wilfully, i.e. knowingly and intentionally, committed, resulting in death, and falsifying records, reports and applications. Those contraventions are criminal offences and carry a maximum fine of \$10,000 and a maximum jail term of six months, or both. A second criminal conviction doubles these criminal penalties. Assaulting a compliance officer or obstructing the officer in the performance of his or her duties is another criminal offence, and carries a penalty of up to \$5,000 and imprisonment for up to 3 years.

If an employer fails to correct a contravention within the time allowed by the citation issued by OSHA inspectors, cumulative penalties of \$7,000 for each day of failure to correct the violation, or for each day the violation continues, can be assessed by OSHA. On the other hand, if the employer is prosecuted, the maximum cumulative fine that can be imposed by the Court is \$10,000 or six months imprisonment, or both; on a second and subsequent conviction, the maximum punishment is doubled.

²⁸⁷ *Occupational and Safety Health Act, supra* note 209.

Criminal contraventions are prosecuted by the Justice Department. The *OSH Act* does not pre-empt state Criminal Codes. A state can prosecute a workplace health and safety crime occurring within its jurisdiction if that crime comes within its *Code*.

5.3.3.3 - Civil Contraventions

All other contraventions of the *OSH Act* that do not come within the criminal category are civil contraventions and are dealt with administratively. A contravention which is *not* willful but serious, i.e., if there is a substantial probability that death or serious physical harm could result, carries a *mandatory civil penalty* of \$7,000 but the penalty is not less than \$5,000 for each violation that is willful. For a contravention which is *not serious*, i.e., if it would probably *not* cause death or serious physical harm, a discretionary penalty of up to \$7,000 is authorized. Failure to correct a prior contravention and failure to post citations in the workplace as required by law carry penalties of up to \$7,000. The amount of penalty stipulated above is per contravention, per day. The Secretary of Labor is authorized to establish abatement requirements for those contraventions.

It should be noted that, unlike the US EPA Administrator, the Secretary of Labor only proposes a penalty under the *Act*; the power to assess them is given by the *Act* to the OSH Review Commission. The Secretary does not have the power to assess penalties.

5.3.3.4 - Penalty Criteria (Civil Contraventions) and Penalty Negotiation

In proposing a penalty, the Secretary is required by the *OSH Act* to consider several factors, such as the violator's good faith, compliance history, gravity of violation and the size of business, etc. The OSHA area director has been delegated authority by the Secretary of Labor to issue citations and/or proposed penalty notices, and to enter into a settlement agreement with an employer who has been issued a citation or notice of proposed penalty. This is done following an informal meeting requested by the employer, after which a revised citation or proposed penalty notice may be issued to avoid further legal disputes. Negotiations are an important part of the penalty process. They begin at the inspection stage. Settlements require the employer to establish a *bona fide* recognized safety program. If this settlement is violated, a new citation and a new penalty notice will

be issued. The employer also has a right to petition for modification of abatement if additional time for making corrections to abate the violation is needed.

5.3.3.5 - Appeal of Citation/Proposed Penalty to the Review Commission

Filing of a notice of contest begins the formal adjudicatory process. Very few citations and notices of proposed penalty are contested by employers, however. Even after an employer files a notice of contest, there are opportunities for settlements, but as the process has already commenced, the settlement has to be approved by the OSH Review Commission (Commission) which is done by way of a final order of the Commission. If the citation or proposed penalty notice is not contested, it becomes the final order of the Commission by operation of law, and can be enforced through formal court proceedings.

The employer has fifteen working days to file a notice of contest which is sent to the area director who issued the citation/notice of proposed penalty. The appeal is heard by an administrative law judge (ALJ) in the first instance after which the penalty is assessed. The ALJ is free to assess a penalty *de novo*, increase, decrease or set it aside. The ALJ's decision becomes a final order of the Commission if no review is directed by the Commission within thirty days of the ALJ's decision. The Commission has held that unreviewed ALJ decisions are binding only on the parties to the case and have no broader precedential effect.

Any one of the three Commission members may direct that the decision be reviewed by the full Commission. A party may petition the Commission to review the ALJ's decision if the party believes the ALJ made findings of material fact that are not supported by the evidence, the decision is contrary to law, a substantial question of law, policy, or abuse of discretion is involved, or a prejudicial error was committed. This is done by filing a Petition for Discretionary Review.

5.3.3.6 - Appeal to the Court

A further appeal to the U.S. Court of Appeals is available against both an adverse decision of the ALJ that has become final without review and of the Commission after review. A simplified process is provided for by the *OSH Act*, if both parties to the dispute are agreeable, in which case pleadings and other formalities may be dispensed with.

5.3.3.7 - Employee Participation in Adjudicative Process

An employee or employee's representative has a right to participate in the adjudicative process if an inspection of the place of employment was initiated as a result of an employee's complaint. An employee has also a right to request an informal review of any decision by an OSHA area director not to issue a citation where the inspection had been initiated as a result of the employee's complaint. The employee cannot contest a citation but may contest the time allowed for abating a hazardous condition. The employee may also contest an employer's petition for modification of abatement.

5.3.4 - US Department of Agriculture (USDA)²⁸⁸

The third US model that was influential in the formulation of Canada's *AAAMP* legislation was developed within the USDA. Indeed, many of the provisions of the *Animal Health Protection Act* and the *Plant Protection Act* are similar to those in the Canadian *Health of Animals Act* and the *Plant Protection Act*, especially those imposing duties and responsibilities and criminal penalties for their breach.

Most of the administrative work in the Animal and Plant Health Inspection Service, Food Safety and Inspection Service and some work in the Agricultural Marketing Service entail administrative proceedings which are conducted under *Administrative Procedure Act* (APA). They include licensing cases and numerous civil penalty cases. The older statutes, such as the *Plant Quarantine Act* and the *Animal Quarantine Act*, have now been incorporated in the *Plant Protection* and the *Animal Health Protection Act*, respectively.²⁸⁹

5.3.4.1 - Plant Protection Act

5.3.4.1.1 - Penalty Provisions

The penalty provisions of the *Plant Protection Act*²⁹⁰ are identical to those in the *Animal Health Protection Act*.²⁹¹ The penalty and offence provisions of the latter

²⁸⁸ Much of the information in this subsection is taken from personal interviews conducted by the author in 1989 and 1990 (along with a team of Canadian officials) and a further interview with attorneys of the Department in October 2007. Notes on the 1989 & 1990 interviews have been kept.

²⁸⁹ *Ibid.*

²⁹⁰ *Supra* note 204.

were modeled on the former which was enacted two years earlier. The Act (a) prohibits the importation, entry, exportation or movement in interstate commerce of any plants or plant pests, unless authorized under a general or specific permit and is in accordance with regulations, and (b) regulates the movement of plants, plant pests, plant products, biological control organisms, noxious weeds, articles, and means of conveyance. These actions may be taken by the Secretary if it is determined that the prohibition or restriction is necessary to prevent the introduction of a plant pest or noxious weed into the U.S. or its dissemination within the U.S.

5.3.4.1.2 - Amount of Civil Penalty

Section 424 of the *Plant Protection Act* provides for a maximum penalty of \$50,000 in the case of any individual, \$250,000 in the case of any other person (usually a corporation), and a maximum of \$500,000 for all violations adjudicated in a single proceeding. If the violator has profited from the violation, or has caused pecuniary loss to another individual or person, the maximum provided in the *Act* is increased to twice the gross gain or loss that was derived or the loss that resulted from the violation. In that case, the penalty amount is the higher of the two maxima. However, if the violator is an individual moving regulated articles not for monetary gain, the amount of civil penalty must not exceed \$1,000 for an initial violation.

5.3.4.1.3 - Factors in Determining Civil Penalty

When determining the amount of the civil penalty, the USDA must take into account the factors that are set out in the *Act* itself. These are: (a) the nature, circumstances, extent and gravity of the violation or violations, and (b) with respect to the violator, the ability to pay, the effect on ability to continue to do business, the history of prior violations and the degree of culpability. The Secretary of Agriculture may consider such other factors as the Secretary deems to be appropriate. The penalty is recoverable in the District Court.

5.3.4.1.4 - Guidelines for civil penalties

The Secretary of Agriculture is required by the statute to establish guidelines to determine under what circumstances the USDA may issue a civil penalty, or a

²⁹¹ *Supra* note 205

suitable notice of warning, in lieu of prosecution by the Attorney General for a violation of the *Act*. These guidelines must be approved by the Attorney General.²⁹²

5.3.4.1.5 - Penalty Negotiation

The Animal and Plant Health Inspection Service (APHIS) of USDA may enter into negotiations, compromises and settlements prior to instituting a formal proceeding in an effort to effect an amicable or informal settlement of the dispute. If the parties fail to reach an agreement, the dispute is sent to an Administrative Law Judge (ALJ) who may, at any stage of the proceedings, direct the parties to attend a *pre-trial hearing*. If the parties enter into a settlement during this stage, the ALJ would review it, and if it appears to be satisfactory, confirm it by a *consent order*. If negotiations fail, the matter is set for a trial type of hearing before the ALJ who bases his or her decision solely on the record and on the briefs submitted by the parties in support of their position. The ALJ makes an initial decision which is sent to the Deputy Administrator of the Service who makes a final decision on behalf of the Service. That decision may be appealed to the court.

5.3.4.1.6 - Rules of Practice

USDA has established uniform rules of practice for agency adjudications. These rules emphasize pre-hearing conferences and extensive use of telephone conferences. Oral hearings, which are less productive, may be held if there is a chance of reaching a settlement.

Pre-hearing conferences facilitate discovery. Parties are asked to exchange exhibits, witness lists, etc. But interrogatories and depositions, which increase the cost of litigation, are shunned. It is normal for the USDA to send its material first to the other party with a view to finding out if there is some chance of settlement, which the latter returns after examination.

Following the close of a hearing, if one is held, each party may submit to the hearing clerk, for the consideration of the ALJ, its proposed findings of fact,

²⁹² *Plant Protection Act*, *supra* note 204, §424(d); *Animal Health Protection Act*, *supra* note 205, §10414(d). The guidelines are not available publicly to foreigners.

conclusions, order, and brief in support thereof, and serve the record on the other party.

5.3.4.1.7 - USDA Secretary's Discretion to Compromise, Modify or Remit Penalty

Even after a penalty amount (or other administrative sanction) has become final, the *Act* authorizes the Secretary of Agriculture in his discretion to compromise, modify or remit, with or without conditions, any penalty. That discretion is exercised on the Secretary's behalf by a judicial officer.

5.3.4.1.8 - Administrative Appeals

The ALJ's decision is not the final decision of the USDA so far as judicial review is concerned. It becomes unreviewable 35 days after the issuance of the decision.

An ALJ's decision may be appealed to a judicial officer by either party, by filing an appeal petition with the hearing clerk within 30 days of receiving the ALJ's decision. The judicial officer's decision is the final decision of the Secretary for the purpose of review by courts. Prior to court review, a party may petition for a re-hearing or re-argument or for re-consideration of that decision.

5.3.4.1.9 - Criminal Sanctions

Criminal sanctions are also available to the USDA under the two statutes, but the prosecution has to be launched through the Department of Justice. Knowingly contravening the *Act* is punishable in accordance with the Sentencing Guidelines²⁹³ by the same maximum fines as provided for civil penalties or by one year, or by both fine and imprisonment. The Attorney General may also bring an action to enjoin the violation of or to compel compliance with the *Act*, to enjoin any interference by any person with the Secretary in carrying out the *Act*, or to recover any unpaid civil penalty, funds under reimbursable agreements, late payment penalty, or interest assessed under the *Act*.

²⁹³ Title 18, USCA. USSG §2, M6 (Atomic Energy), N7 (Food, Drugs and Agricultural Products), Q1 (Environment).

5.3.4.2 - Animal Health Protection Act

5.3.4.2.1 Penalty Provisions

The civil and criminal penalty provisions of the *Animal Health Protection Act*²⁹⁴ mirror those in the *Plant Protection Act*²⁹⁵ but a longer prison term is provided - up to five years, for the offence of knowingly importing, entering, exporting or moving any animal or article for distribution or sale in violation of the Act. Similarly, the enforcement provisions²⁹⁶ are identical to those in the *Plant Protection Act*.

5.3.5 - Nuclear Regulatory Commission

5.3.5.1 - Overview

A fourth US model, though not directly influential in connection with the Canadian *AAAMP* legislation is important nonetheless on the basis of manner in which it addresses significant procedural and operational issues that arise where financial penalties are administratively implemented.

The Nuclear Regulatory Commission (NRC) was established in 1974²⁹⁷ and replaced the Atomic Energy Commission that had been created following the Second World War in 1946. NRC is authorized by the *Atomic Energy Act*,²⁹⁸ its governing statute, to license the construction and operation of power and non-power reactors and reactor operators, major nuclear material facilities, medical, academic and industrial users of nuclear materials, and high level radioactive waste disposal sites.

Violations are detected from inspections and from the approximately 5,000 annual reviews of reports submitted by its licensees. All violations are subject to administrative or civil action.

²⁹⁴ *Supra* note 205, §10410(a) (criminal penalties), §10410(b) (civil penalties).

²⁹⁵ *Supra* note 204, §424(a) (criminal penalties), §424(b) (civil penalties).

²⁹⁶ *Supra* note 205, §10415.

²⁹⁷ *Energy Reorganization Act of 1974*, Pub L No 93-438.

²⁹⁸ *Atomic Energy Act*, Pub L No 585, 79th Cong (1946), amended in 1954, 42 USC §14.

Administrative actions include notices of violation, civil penalties and licence suspension. Criminal prosecution is also authorized by the statute but it has to be launched through the Department of Justice where a violation has been found to be deliberate. Criminal penalties include imprisonment.

5.3.5.2 - Violations and Penalties

5.3.5.2.1 - Administrative Sanction; Severity Levels

The type of sanction imposed depends on the severity of violation. NRC uses five severity levels (Levels I to V) within eight activity areas (reactor operations; facility construction; safeguards; health physics; transportation; fuel cycle and materials operation; miscellaneous matters; and emergency preparedness). The most serious violations are assigned Level I severity; the least serious ones, Level V.

Violations of very serious regulatory concern fall under Levels I and II. They generally involve actual or high potential impact on the public. Level III is assigned to violations which are cause for significant concern. Violations of less serious concern but more serious than minor concern, i.e. if left uncorrected they could lead to more serious concern, fall under Level IV. Violations of minor safety or environmental concern come under Level V. The severity level of a violation may be increased if the circumstances surrounding the violation involve careless disregard of requirements, deception, or other indication of wilfulness.

5.3.5.2.2 - Factors Determining the Level of Violation and Weight

The specific level of a violation involving wilfulness is determined by considering such factors as (a) the position of the individual involved in the violation (e.g. first-line supervisor or senior manager), (b) the significance of any underlying violation, (c) the *intent of the violator* (i.e. negligence not amounting to careless disregard or deliberateness), and (d) the economic advantage, if any, gained as a result of the violation.

The relative weight given to each of these factors in arriving at the appropriate severity level is dependent on the circumstances of the violation. For instance, the severity level of a failure to make a required report depends on the significance of and the circumstances surrounding the matter that should have been reported.

5.3.5.2.3 - Penalty Procedure

5.3.5.2.3.1 - Notice of Violation (NOV)

Upon detection of a violation, a Notice of Violation (NOV) is issued if the violation is of such a nature that an enforcement action is proposed. The NOV sets forth the violation and requires the violator to provide a written statement describing (a) the corrective steps that have been taken and the results achieved; (b) the corrective action that will be taken to prevent recurrence; and (c) the date when full compliance will be achieved.

The NOV formalizes the existence of a violation. For isolated Level V severity violations, a NOV is NOT normally issued if the licensee has initiated appropriate corrective action before the inspection ends. Also, violation findings which warrant exercise of discretion do not result in a NOV. But the violation is documented along with the corrective actions taken in the history of the licensee.

5.3.5.2.3.2 - Civil Penalties

A Level V severity level violation does not result in monetary penalties, but Level IV may, especially if it is a repeat violation. Level III severity violation could result in a civil penalty unless the NRC decides it is appropriate to exercise its discretionary authority. Civil penalties are proposed for Level I and II severity violations absent mitigating circumstances.

Penalties are normally assessed for knowing and conscious violation of any reporting requirements and for any wilful violations of any regulatory requirement at any severity level.

If the severity level of the violation is such that a civil penalty is called for, the NOV is issued in conjunction with escalated actions.

5.3.5.2.3.3 - Base Penalty Amount and Adjustments

The *Atomic Energy Act* provides for a base penalty amounts ranging from \$1,000 to \$100,000, based upon the severity level of the violation. The amounts are proportionately lower for lower level severity violations. E.g. For Level V it is 5%, for Level IV, 15%, for Level III, 50%, 80%, for Level II and for Level I, 100% of the base amount.

The base amount is adjusted up or down to reflect six policy considerations:

- (1) identification and reporting (reduction up to 50%);
- (2) quality of corrective action taken (reduction or increase up to 50%);
- (3) past performance (reduction or increase up to 100%);
- (4) prior notice of similar events (increase of up to 100%);
- (5) multiple occurrences (increase of up to 100%);
- (6) duration (increase of up to 100%; each day a violation continues is counted as a separate violation).

These factors are *cumulative but* cannot exceed the statutory maximum of \$100,000 per violation per day.

5.3.5.2.3.4 - Enforcement Conference

When NRC proposes to issue a civil penalty, it normally holds an *enforcement conference* with the licensee. The conference is conducted in a Regional office and is not open to the public. Its purpose is to ensure that the licensee understands the significance of the violation and the need to take effective corrective action, as well as to give an opportunity to the licensee to challenge the findings of the inspector or to make submissions for mitigating the proposed penalty. There is no negotiation of penalty amount.

Following the conference, NRC takes the decision whether or not to impose a penalty and if it decides to impose penalty, the amount. Most penalties (80%) are paid at the penalty proposal stage, even before a formal penalty order is issued. Most of the remaining are paid following an administrative hearing. Very few are appealed to the Administrative Law Judge (ALJ) and fewer still are referred for judicial review.

5.3.5.2.3.5 - Civil Penalty Hearings

Where a person wishes to appeal a penalty, the matter goes before an administrative law judge. Even at that stage a compromise on the penalty amount may be reached, and if so reached, the order would embody the compromise.

5.3.5.2.4 - Other Sanctions

The NRC has power to issue orders suspending, modifying or revoking a licence, cease and desist orders, orders to appoint a work supervisor or independent consultant. These sanctions would normally precede a civil monetary penalty.

5.3.5.2.5 - Escalated enforcement order (“Immediately Effective” order)

NRC has power to issue an escalated enforcement order for any serious violation at any level if it considers the violation to be serious, e.g. when public health or safety is involved, or when the violation is deliberate. This order may be issued in conjunction with civil penalties to achieve immediate corrective action.

An escalated enforcement order must be complied with immediately; a hearing is held later. If a licensee is not satisfied with the outcome of the hearing, it may appeal the order to the US Court of Appeals for review.

5.3.5.2.6 - Orders Against Individuals

Individuals, in certain situations, may be subject to an NRC order. The NRC may order a licensee to remove an individual from further involvement in any activity or to limit his or her involvement – e.g. where the individual has given false information to an NRC inspector, or has wilfully violated an NRC requirement or has attempted to cover up a violation. Physicians using licensed material, reactor operators, plant managers and radiographers may be removed following NRC orders.²⁹⁹

5.3.5.2.7 - Criminal Sanctions

The *Atomic Energy Act* provides for varying levels of criminal penalties, such as fines and imprisonment, for willful violations of the Act and regulations or of orders issued by the NRC. Criminal penalties may also be imposed on individuals who knowingly violate the NRC requirements where the violation has the potential to cause injury, who obstruct inspectors, and who attempt to or sabotage a nuclear facility or nuclear fuel.

²⁹⁹ Notes from meeting on 1 June 1990 with U.S. Nuclear Regulatory Commission, Rockville, MD, in “Issues in Regulatory Enforcement, Vol.VIII: Administratively Imposed Sanctions for Regulatory Violations in Europe and the United States”, Consultation Report on European and U.S. Experience, July 1990, Department of Justice, Canada.

5.4 - Australia

5.4.1 - Brief History

5.4.1.1 - Overview

Since elements of the Australian experience also embody parallels with the evolution in Canada of judicial and legislative thinking on the relationship between criminal law and regulatory offences, and in relation to *amps*, examination of this jurisdiction is also instructive. Australia originally received its laws, including the criminal law, from the English common law and statute which have been adopted and modified over the last century. Criminal law is on the list of States' powers, and thus Australian criminal law generally refers to the criminal laws of the several jurisdictions in the Commonwealth. The Commonwealth of Australia, however, has its own *Criminal Code* for dealing with offences against laws enacted by it.

5.4.1.2 - Origins of Civil Penalties

The Australian Law Reform Commission (ALRC) notes in its Report #95 that civil penalties have been available under the *Customs Act* since its enactment in 1901 and that they were provided in Part I of the *Trade Practices Act* when it was enacted in 1974.³⁰⁰

5.4.1.3 - Move Away from Absolute Liability

As noted in chapter 2, the Australian High Court departed from the common law precedents in *Proudman v. Dayman*³⁰¹ in which Dixon J. allowed the reasonable mistake as a defence to a criminal charge. The rationale for this departure was explained by Hunt, C.J. in *Hawthorn (Department of Health) v. Morcam Pty. Ltd.*,³⁰² where he stated that " [A]ll that the imposition of such [absolute] liability will do

³⁰⁰ ALRC, Report No 95, *supra* note 180, §§2.53-2.55, 2.60.

³⁰¹ *Supra* note 82.

³⁰² (1992) 29 NSWLR 120 (Ct of Crim App) [*Morcam Pty.*].

is to obtain convictions for conduct which is manifestly not criminal in nature by any recognized standards of justice."³⁰³

5.4.2 - Civil Liability Provisions in Commonwealth Statutes

This section describes the civil penalty provisions in the *Corporations Act, 2001* in some detail. It is followed by a brief description of the features in the *Environment Protection and Biodiversity Conservation Act, 1999*.

5.4.2.1 - *Corporations Act, 2001*³⁰⁴

5.4.2.1.1 - Civil Penalty Provision

The *Corporations Act, 2001* contains both a civil liability and a criminal liability provision for the same act, but expressly clarifies when the criminal liability applies. Subsection 181 (1) of the *Act* imposes an obligation on a director or other officer of a corporation to exercise their powers and discharge their duties: (a) in good faith in the best interests of the corporation; and (b) for a proper purpose. This subsection is expressly stated to be a civil penalty provision and special procedures and rules described below apply.³⁰⁵

On the other hand, if a director or other officer is (a) reckless; or (b) is intentionally dishonest and fails to exercise their powers and discharge their duties in good faith in the best interests of the corporation or for a proper purpose, then the director or officer commits a criminal offence.³⁰⁶ Similarly, they and their employees commit an offence if they use their position dishonestly with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.³⁰⁷ Furthermore, a person who obtains information

³⁰³ *Ibid* at 133.

³⁰⁴ Act No 50 of 2001 (repealing and replacing the 1989 enactment).

³⁰⁵ *Ibid*, s 1317E.

³⁰⁶ *Ibid*, s 184(1).

³⁰⁷ *Ibid*, s 184(2).

because they are, or have been, a director or other officer or employee of a corporation commits an offence if they use the information dishonestly: (a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or (b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.³⁰⁸

There is thus a clear divide between the civil penalty provision and the offence. Civil penalty provisions are to be found in several other sections of the *Corporations Act*.³⁰⁹

5.4.2.1.2 - Civil Penalty Procedure

5.4.2.1.2.1 - Court Declaration of a Contravention

Section 1317E sets out the procedure for obtaining a court declaration of contravention when the above civil penalty provisions are breached. When the court is satisfied that a person has contravened any of those provisions, and makes a declaration to that effect, then the Australian Securities and Investments Commission can seek a pecuniary penalty order from the court under section 1317G or a disqualification order under section 206C. The maximum amount of pecuniary penalty authorized by section 1317G is A\$200,000. The penalty is a civil debt payable to ASIC on the Commonwealth's behalf or the Commonwealth may enforce the orders as if it were an order made in civil proceedings against the person to recover a debt due by the person. The debt arising from the order is taken to be a judgment debt. Section 1317H empowers the court to make a compensation order to compensate a corporation or a registered scheme for damage suffered, if the damage resulted from the contravention. Damage, in this section includes profits made by the person as a result of the contravention or the offence, and includes diminution of value of the scheme property.

³⁰⁸ *Ibid*, s 184(3).

³⁰⁹ *Ibid*. Examples are (a) subsections 180(1), 181(2), 182(1),(2), 183(1),(2) (officers' duties); (b) subsection 209(2) (related parties rules); (c) subsections 254L(2), 256D(3), 259F(2) and 260D(2) (share capital transactions); (d) subsection 344(1) (requirements for financial reports); (e) subsection 588G(2) (insolvent trading); (f) subsection 601FC(1); (g) subsection 601FD(1); (h) subsection 601FE(1); (i) section 601FG; (j) subsection 601JD(1); (k) sub-clause 29(6) of Schedule 4.

5.4.2.1.2.2 - Factors Determining Pecuniary Penalty Amount

In determining the amount of pecuniary penalty, the court is required to have regard to all relevant matters, including the following³¹⁰:

- (a) the nature and extent of the contravention; and
- (b) the nature and extent of any loss or damage suffered as a result of the contravention; and
- (c) the circumstances in which the contravention took place; and
- (d) whether the person has previously been found by the Court in proceedings under this Act to have engaged in any similar conduct.

5.4.2.1.2.3 - Civil Standard of Proof

Section 1332 states that a civil standard of proof, namely, balance of probabilities, applies in any proceedings that are brought to establish a contravention of the Act.

5.4.2.1.2.4 - Limitation Period

By section 1317L a six year limitation period applies to an application for a declaration or order, and civil procedure rules apply to the proceedings.

5.4.2.1.2.5 - No Declaration if Person had been Convicted for Same Conduct

Section 1317M prohibits the making of a declaration of contravention or a pecuniary penalty order against a person for a contravention if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention. Thus double jeopardy is eliminated. Where, however, criminal proceedings are brought while proceedings for a declaration of contravention or pecuniary penalty order are in progress, the latter are stayed until the conclusion of the criminal proceedings and if in those proceedings the accused is not convicted of the offence, the proceedings for the declaration or order may be resumed. If the person is convicted, then section 1317N requires the court to dismiss the latter proceedings.

³¹⁰ *Ibid*, s 481(3).

5.4.2.1.2.6 - Relief from Civil Liability

Special provisions are made by section 1317S to relieve a person either wholly or partly from liability to which the person would otherwise be subject, or that might otherwise be imposed on the person because of the contravention, if it appears to the court that the person has acted honestly and, having regard to all the circumstances of the case, the person ought fairly to be excused for the contravention. Quite apart from this section, section 1318 also empowers the court to relieve certain persons, such as an auditor, an expert, a receiver or liquidator, and even an officer of the corporation, from liability for contravention of section 588G where the court comes to the conclusion that having regard to all the circumstances of the case, the person ought to be relieved from liability caused by negligence, default or breach on such terms as the court thinks just.

Section 1331 does not allow civil proceedings under the *Act* to be stayed, however, merely because the proceeding discloses, or arises out of, the commission of an offence.

5.4.2.1.2.7 - Criminal Proceedings after Civil Proceedings Permitted

Section 1317P permits criminal proceedings after civil proceedings against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether: (a) a declaration of contravention has been made against the person; or (b) a pecuniary penalty order has been made against the person; or (c) a compensation order has been made against the person; or (d) the person has been disqualified from managing a corporation under Part 2D.6 of the *Act*. However, by section 1317Q evidence given in proceedings for penalty are not admissible in criminal proceedings, but this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order.

5.4.3 - Environmental Protection and Biodiversity Conservation Act, 1999

5.4.3.1 - Civil Penalty Provisions

The civil penalty provisions of Australia's *Environment Protection and Biodiversity Conservation Act, 1999*³¹¹ (in this section referred to as the *Act*) equally

³¹¹ Act No 91 of 1999.

illuminate the evolution of the comparable mechanisms in Canada that are the subject of this thesis. These mirror those in the *Corporations Act* and only references to the corresponding sections are made in this paragraph except when there are significant differences. Section 142 is one of the civil penalty provisions which are spread out throughout the *Act*. A civil penalty provision is defined by section 482 as a subsection of the *Act* (or a section of the *Act* that is not divided into subsections) where (a) the words “civil penalty” and one or more amounts in penalty units are set out at the foot of the subsection or section; or (b) another provision of the *Act* specifies that the subsection or section is a civil penalty provision. Section 483 of the *Act* makes it abundantly clear that a contravention of a civil penalty provision is not an offence.

5.4.3.1.1 - Penalty Amount

Subsection 142(1) of the *Act* provides that if a person fails to comply with any condition attached to an approval given by the Minister for the taking of any action, that person, if an individual, will be penalized by a pecuniary penalty of 1,000 penalty units or such lower amount as is prescribed by the regulations; but if it is a body corporate the penalty is ten times that amount. A contravention of a condition attached to an approval does not, however, invalidate the approval.

5.4.3.1.2 - Application to Court for Penalty Order

Division 15 of the *Act* contains provisions similar to those in the *Corporations Act*, 2001 with respect to the application for an order for a civil penalty and to the matters to be taken into account by the court in determining the amount of penalty.³¹² Further, if a person’s conduct constitutes a contravention of two or more civil penalty provisions, proceedings may be instituted under the *Act* in relation to any one or more of those provisions, but the person is not liable to more than one pecuniary penalty in respect of the same conduct.³¹³

³¹² *Ibid*, Subdivision A, s 481.

³¹³ *Ibid*, s 481(4).

5.4.3.1.3 - Double Jeopardy

Rules relating to double jeopardy where civil and/or criminal proceedings are commenced are identical to those in the *Corporations Act, 2001*.³¹⁴

5.4.3.2 - Enforceable Undertakings

Enforceable Undertakings are a special feature of the legislation and are unique to Australia. They were first introduced in the *Trade Protection Act, 1974*.

Subdivision C of Division 15 of the Act allows the Minister to *accept* a written undertaking from a person who has contravened a civil penalty provision of the Act, in which the person undertakes to pay a specified amount within a specified period to the Commonwealth, or to some other specified person, for the purpose of activities directed towards the protection and conservation of the matter protected by the civil penalty provision that has been breached. The person may withdraw or vary the undertaking at any time, but only with the consent of the Minister.

If the undertaking is breached, the Minister may apply to the Federal Court for an order directing the person to comply with that term of the undertaking that has been breached and for any other order that the Court considers appropriate.³¹⁵

5.5 – United Kingdom³¹⁶

5.5.1 - Brief History

The contemporary approach to regulatory offences in Canada emerged from the country's inherited legal background as adapted through codification. It is accordingly essential to appreciate the point of origin for criminal law and the regulatory offence in the Canadian context. Crimes and regulatory offences were

³¹⁴ *Ibid*, Division 15, subdivision B, ss 486A-86C.

³¹⁵ *Ibid*, s 486DA.

³¹⁶ Although the U.K. legislation discussed in this section was adopted many years after the *AAAMP Act*, *supra* note 7, it is of considerable interest for the thesis as the legislation has adopted several features of the Canadian Act and the latter can profit from some of the improvements in the former (which have been highlighted in the section and referred to in Part III of the thesis), so that Canadian legislators may consider incorporating them in future revisions.

never differentiated in English criminal law. Common law knew only of felonies and misdemeanours and regulatory offences belonged to one or the other, thus establishing a close link between the two, and both were visited with the same consequences. Felonious offenders of regulatory statutes were treated with the same barbaric cruelty as other felons.

Despite occasional judicial criticism and writings of criminal law scholars such as Professors Henry Hart, Andrew Ashworth and others, and despite the three reports at the beginning of the 1980s, referred to in chapter 2, the common law remained largely unchanged.

One of the several reasons has been the United Kingdom like other common law countries does not have any problem with corporate criminal responsibility, which civil law countries have. Corporations are predominantly involved in activities regulated by statutes, and can be prosecuted as criminal offenders, just like individuals, except that, having *no body to kick or soul to damn* (to use Professor Coffee's colourful expression),³¹⁷ they cannot be imprisoned, although corporate officers who had participated or acquiesced in the criminal offence, or deliberately turned a blind eye to wrongdoing within the corporation, could be jailed whether the corporation has been prosecuted or not.

A more important reason for the stability of the legal system was there had been a strong aversion to officialdom and resistance in the government to give any kind of power to public servants to impose administrative penalties. As Professor Gellhorn states in a short but very thoughtful article, "sensitivity concerning legislative delegation does mount when administrators become penalizers."³¹⁸

As a result, the 1980 Report of JUSTICE³¹⁹ advocating a clear divide between regulatory and criminal offences, fell on deaf ears of U.K. parliamentarians and gathered dust at the Home Office,³²⁰ although it did create a stir in the public media.

³¹⁷ Coffee, "No Soul to Damn", *supra* note 103.

³¹⁸ Gellhorn, *supra* note 236.

³¹⁹ JUSTICE Report, *supra* note 5.

³²⁰ Home Office is the department responsible for criminal justice policy in the U.K.

The Report, nevertheless, has had some impact on Home Office policies. These policies were directed at ensuring that the criminal law is not engaged unnecessarily in systems of regulation; while accepting that criminal sanctions are needed in most cases as a longstop, that where criminal prosecution is resorted to, it should be used to catch those who are genuinely culpable; and in ensuring that penalties are appropriate. Home Office has been pursuing the possibility of distinguishing, in creating new “regulatory” offences, between less and more serious breaches, reserving tougher penalties for the more serious ones. Recent legislation on environmental protection, food safety, and human fertilization and embryology, reflected these initiatives.³²¹

5.5.1.1 - Civil Penalties

Civil penalties are not entirely new to the U.K.. For example, the UK Income Tax laws have for more than a hundred years imposed civil financial penalties on taxpayers for failure to file or make correct tax returns and these are recoverable at the suit of the Board of Inland Revenue in the High Court. Penalties under Customs and Excise laws are even older. They were introduced into Australian and Canadian laws by the colonial government.

There are also a number of other examples of administrative sanctions in U.K. law. With rare exceptions, such sanctions consist, typically, of withdrawal of a licence or authorization to carry out some activity, or the service of enforcement notices, or the imposition of conditions such as reporting requirements, or to order a person’s deportation where the person enters the country illegally or overstays. Sanctions of that kind are normally imposed by regulatory bodies rather than by courts, and their enforcement comes within the jurisdiction of those bodies or to special inspectorates established under central or local government rather than to the police. In most cases there are rights of appeal to the courts. But those sanctions do not affect criminal proceedings for the same misconduct.

In the last two decades of the twentieth century, however, a broad range of civil and fixed penalties power was given by the U.K. Parliament to a variety of regulatory agencies and government bodies, such as the Competition Commission, Occupational Pensions Regulatory Authority (OPRA), Office of Fair Trading (OFT),

³²¹ The statutes are listed in Appendix 2 at 295, below.

Registrar of Companies, Environment, Food & Rural Affairs (DEFRA), Financial Services Authority (FSA), Customs and Excise, Department of Health, and local authorities. As the focus of the thesis is on administratively imposed monetary penalties and the *Regulatory Enforcement and Sanctions Act 2008*, which is discussed below, is more relevant, the power to impose civil monetary penalties given by statutes to independent regulators are not discussed, but a table briefly highlighting relevant provisions in those statutes can be found in Appendix 2.

The 21st century ushered in a new era. U.K. finally seems to have revised its thinking on the policy of not entrusting public servants with administrative penalty powers. It recently accepted the recommendations of the Hampton Review³²² which was followed by a review of the penalties for regulatory non-compliance led by Professor Richard Macrory in 2006.³²³

The Hampton Review set out a vision for a risk-based approach to regulation and included a set of principles for regulatory inspection and enforcement, based around risk and proportionality, and recommended a major streamlining of regulatory structures. The Macrory Review aimed at ensuring that regulators have access to a flexible set of sanctioning tools that are consistent with the risk-based approach to enforcement outlined in the Hampton Review.

In response to the two above referred reports, the *Regulatory Enforcement and Sanctions Bill*, an omnibus statute, was introduced in the House of Lords in November 2007, creating, among others, a civil sanctions regime in relation to regulatory offences. It was passed by Parliament and received Royal Assent in July 2008.³²⁴ Part 3 came into operation in October 2008. The Act was passed more than a decade after the Canadian *AAAMP Act* and, to some extent, was influenced by the latter. As the UK statute contains several important features that are relevant for reform of the *AAAMP Act*, it is discussed below in some detail.

³²² Philip Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement* (London: HMSO, March 2005), online: <http://www.astrid-online.it/Qualit--de/Studi--ric/Seminario-/UK_BR_Hampton-Report_2005.pdf>.

³²³ Professor Richard B Macrory, *Regulatory Justice: Making Sanctions Effective*, Final Report (London: HMSO, November 2006), online: <<http://www.berr.gov.uk/files/file44593.pdf>>.

³²⁴ *Supra* note 217.

5.5.2 – *Regulatory Enforcement and Sanctions Act 2008*³²⁵

Part 3 of the *Act* introduces a new, expanded framework for regulatory sanctions, authorizing Ministers to confer new civil sanctioning powers on regulators in relation to specific offences. The following are the highlights of Part 3 which in many respects reflects the Canadian *AAAMP Act*.³²⁶

5.5.2.1 – Relevant Offences

Part 3 covers what are described as “relevant offences”. These offences are those set out in the various enactments specified in Schedule 6 which covers regulatory areas such as agriculture, animals, the environment, food safety, consumer protection, transport and health and safety. Orders under Part 3, which a Minister of the Crown is authorized to make, confer powers only in relation to offences in existing statutes, as well as those listed in Schedule 6. It is intended that, in future, statutes which create regulatory offences will themselves incorporate whatever civil sanctions are necessary. The Minister decides which relevant offences should be covered.

Offences in subordinate legislation are dealt with in section 62.

5.5.2.2 – Administratively Imposed Monetary Penalties

5.5.2.2.1 – Fixed and Variable Monetary Penalties

Sections 39 to 41 make provisions for fixed monetary penalties, and section 42 to 44, for discretionary requirements, including variable monetary penalties. The amount of a fixed monetary penalty will be specified in the Ministerial Order or calculated by reference to criteria specified in that Order. For example, the level of the fixed monetary penalty could differ according to whether the person liable is an individual or a body corporate. The regulator will have no discretion in determining the amount of the fixed monetary penalty in any individual case. Where the relevant offence is one which is triable summarily (whether or not it is triable on indictment)

³²⁵ *Ibid.*

³²⁶ *AAAMP Act*, *supra* note 7, discussed in chapter 6, below. Professor Macrory, the author of “Regulatory Justice”, *supra* note 323, whose recommendations were accepted by the U.K. Government, visited Ottawa to learn about the Canadian *amps* legislation and was briefed by the Canadian Food Inspection Agency in 2006.

and a relevant offence punishable summarily by a fine or by a term of imprisonment, the Order cannot specify a level of fixed penalty that is more than the maximum fine available for that offence (usually £5,000).

Section 42 specifies certain minimum requirements that must be met. In particular, when imposing the penalty the regulator must issue a penalty notice to the person setting out the information specified in subsection (3), such as the grounds for imposing the penalty and how payment may be made. The notice must also inform the person that he or she has a right to request a review of the penalty notice by the regulator which is conducted in-house, and to appeal against any decision of the regulator to a tribunal established by the *Tribunals, Courts and Enforcement Act 2007* [c.15] or to another tribunal specified in the notice.

The exact process of the internal review stage will be provided for in the Ministerial Order that authorizes a regulator to impose penalties for a relevant offence. The review must, however, take place within a period of no more than 28 days from when the person's notice requiring the review is received by the regulator. Subsection 42(5)(a) provides that the regulator "*must secure that a regulator may not decide to impose a fixed monetary penalty on a person where the regulator is satisfied that the person would not by reason of any defence, be liable to be convicted of the relevant offence.*"

Section 42 also sets out the minimum grounds for appeal that must be available to the defendant.

In accordance with subsection 42(5), the final penalty notice must include information as to the period within which the penalty must be paid, any early payment discount or late payment penalties, rights of appeal and the consequences of non-payment.

Section 52 allows a regulator to recover any fixed or variable monetary penalty issued, any non-compliance penalty authorized by section 45(a) and any additional late payment charges that are relevant, as a civil debt recoverable through the courts or as if payable under court order.³²⁷

³²⁷ *Supra* note 217, s 52.

5.5.2.2.1.1 - Observations

Two significant points must be noted with regard to both fixed and variable monetary penalties.

(i) Sections 41 and 44 explicitly preserve freedom from double jeopardy. When a fixed or variable monetary penalty is imposed on a person, that person cannot be later criminally prosecuted for the relevant offence, except in certain circumstances. This does not extend to a case where non-monetary discretionary requirements are imposed or an undertaking is accepted without the imposition of a variable monetary penalty (discussed below). In these cases, if the person subject to the sanction fails to comply with it, the person may be prosecuted at a later date for the original offence.

(ii) By virtue of section 42 a penalty may be issued only where the regulator is satisfied beyond reasonable doubt that the person has committed a relevant offence.

5.5.2.2.2 – Discretionary Requirements

1. Section 42 authorizes a Minister to grant a regulator the power to impose on a person, in addition to a monetary penalty, by notice, one or both of the following requirements which are described as "discretionary requirements."

- (1) To ensure that the incident of non-compliance does not continue or recur;
- (2) To restore the position, as far as possible, to what it would have been had the non-compliance not taken place.

Before imposing a discretionary requirement, the regulator must be satisfied beyond reasonable doubt that a person has committed a relevant offence. Furthermore, such a requirement may not be imposed on a person on more than one occasion in relation to the same act or omission.

5.5.2.2.3 – Enforcement Undertakings³²⁸

1. Section 50 provides for *Enforceable Undertakings* which first appeared in Australian legislation. The undertakings are offered by a person and are different from the discretionary requirements which are imposed by the regulator but in both cases the regulator must believe that a relevant offence has been committed. They are an alternative to fixed and variable monetary penalties and discretionary orders. The following types of action can form part of an undertaking:

- (1) Actions that ensure that the person does not repeat or continue their non-compliant actions; for example, the person may undertake to fix faulty equipment that breaches safety standards.
- (2) Actions that restore the position, as far as possible, to what it would have been had the non-compliant action not taken place; for example, the person may undertake to clean up an area that has been contaminated by its non-compliant actions.

The above two are identical to what a regulator may impose under section 42; In addition, an enforceable undertaking can include:

- (3) Actions that benefit any person affected by the non-compliant actions of the person (including payment of money); for example, the person may set up a compensation scheme for victims of its non-compliance.
- (4) Other actions that may be prescribed by the Minister in the order.

2. An enforcement undertaking may only be accepted by the regulator when it has reasonable grounds for suspecting that an act or omission of the person constitutes a relevant offence. Once an enforcement undertaking is accepted, the person may not be prosecuted for the act or omission or have a fixed monetary penalty or discretionary requirement imposed on them, unless the person fails, or is deemed to have failed, to comply with the undertakings. In that case, the regulator can prosecute the person for the original offence or impose a fixed monetary penalty or discretionary requirement.

³²⁸ Enforceable Undertakings (EUs) are an Australian innovation, first introduced in the *Trade Practices Act 1974*, *supra* note 222 (s 87B), which the Hampton Review found very attractive. EUs are briefly discussed under "Australia" in the preceding section.

3. Subsection 50 (5) permits the Minister to prescribe further provisions, such as the procedure for entering into enforcement undertakings, certification by the regulator that an undertaking has been complied with and the consequences for a person providing misleading or inaccurate information. As an undertaking is volunteered by the person, and not imposed by the regulator, there is no right of appeal against it once it has been accepted by the regulator. However, there is a right of appeal against a regulator's refusal to certify that the undertaking has been completed.

5.5.2.2.4 – Orders under Part 3: Supplementary Provisions

5.5.2.2.4.1 - Combination of Sanctions

Section 51 provides that a regulator cannot combine a fixed monetary penalty with either a discretionary requirement or a stop notice for the same offence. The former ends the proceedings but in the latter case the regulator imposes continuing obligations on the person and in imposing them it has to comply with the procedural requirements set out for them in Part 3.

5.5.2.2.4.2 - Discounts and Late Payment Penalties

Section 52 allows the Ministerial Order to provide for discounts for early payment of a monetary penalty and for interest or a financial penalty for late payment. The total amount of any late payment penalty must not exceed the total amount of the original penalty. The section also provides for the enforcement of unpaid penalties (and any interest or late payment charges) through civil courts. The Ministerial Order can provide for a more streamlined process of recovery by treating the penalty as if it were payable under a court order.

5.5.2.2.4.3 - Costs Recovery

Section 53 enables a Minister to include in the Order a provision for a regulator to recover its costs, by notice, from a person on whom a discretionary requirement or a stop notice is imposed. This does not extend to fixed monetary penalties and enforcement undertakings. Costs are those incurred by the regulator in relation to the imposition of the sanction, up to the point of imposition, *and* include investigation costs, administration costs and the costs of obtaining expert (including legal) advice. The defendant is not required to pay any costs that can be

shown as having been unnecessarily incurred. Where a costs notice is served, the person subject to the notice has a right of appeal against both the regulator's decision to impose the costs and the amount of the costs.

5.5.2.2.4.4 - Appeals

Appeals under Part 3 must be heard by either the First-tier Tribunal (created by section 3 of the *Tribunals, Courts and Enforcement Act 2007*, c.15) or another statutory tribunal specified in the Order made by the Minister under this Part. This exception is to cover tribunals that will not form part of the First-tier Tribunal, such as the employment tribunals, which currently hear some health and safety appeals and may be an appropriate venue for hearing certain appeals under this Part. Paragraph 54 (3) (a) allows the Minister, when setting out this power to make provision for the suspension of the effect of a penalty or other requirement during an appeal. This might include provision such as:

- (1) During an appeal, a person may apply for the effect of the stop notice to be suspended pending the result of the appeal. If this application is unsuccessful then the notice will remain in force during the appeal; or
- (2) Should the person appeal, the effect of the stop notice may be automatically suspended until the result of the appeal is known.

In particular, paragraph 54(3) (b) enables the Minister to make provision about the powers of an appellate body. Examples of such powers are set out in subsection (4). The appellate body may withdraw or confirm a sanction, take such other steps which a regulator could take (e.g. impose another sanction upon the person), and remit the sanctioning decision back to the regulator for further consideration.

5.5.2.2.4.5 - Consequential and Other Provisions

Section 55 enables an order made under Part 3 to make consequential and other supplementary provisions. Examples include:

- (1) the power to allow the civil sanctions to be regarded as previous convictions for the purposes of other enactments. For example, if a statute imposes a higher fine if a person was previously convicted, the court is authorized to

impose a higher fine if the offender had been issued a civil penalty for a relevant offence.

- (2) the power to extend existing provisions in other legislation to apply to these civil sanctions. For example, the power could extend a provision that a convicted person must pay the clean up costs of the regulator, such as that under 33B *Environmental Protection Act 1990*, to apply to these civil sanctions as well.

These supplementary powers might be used to grant a regulator powers to require information or extend a regulator's existing information gathering powers in order to allow a regulator to investigate a matter that might lead to the use of the alternative sanctioning powers under the *Act*. The power may also be used in a similar way in relation to a regulator's powers of entry, search, or seizure. Where the legislation setting out the relevant offence contains a prohibition of collateral use of information gathered during the investigation for other matters, the power under subsection (1) might be used to allow that information to be used to prove that an act or omission constituting a relevant offence meriting the use of sanctions in the *Act* has occurred. The power can be used by a Minister responsible for administration of statutes listed in Schedule 7 in these ways only for the purpose of facilitating the use of the alternative sanctioning powers contained in the *Act*, namely, the imposition of fixed and variable monetary penalties, discretionary requirements, and stop notices, and for acceptance of enforcement undertakings.

5.5.2.2.4.6 - Affirmative Resolution of Parliament

An Order under Part 3 must be made by a statutory instrument and will be subject to the affirmative resolution procedure provided in section 61.

5.5.2.2.4.7 - Penalty Guidance

Under section 63, a Ministerial Order must require a regulator to publish guidance in relation to the imposition of a sanction and the acceptance of enforcement undertakings ("Penalty Guidance"). The Penalty Guidance must contain information about the circumstances in which a sanction is likely to be imposed or an undertaking accepted, the defences available to the person, and the person's rights of appeal. For particular sanctions, further specific requirements to be contained in the Penalty Guidance are set out in subsections (3) to (5).

The Ministerial Order must also stipulate that the regulator have regard to the Penalty Guidance when exercising its functions.

The Ministerial Order must also require the regulator to consult persons specified in the Order (for example, persons affected by the new sanctioning powers) before publishing or revising the Penalty Guidance. A regulator will be able to revise the Penalty Guidance periodically, for example, where there has been a change in the rules, but it must consult with all persons it considers appropriate before publishing or revising the same.

5.5.2.2.4.8 - Guidance as to Enforcement Policy

Section 64 requires that, where a Minister grants a regulator any alternative sanctioning power under this legislation, the regulator should prepare and publish guidance about how the offence to which the power relates is enforced ("Enforcement Policy"). For each offence, the Enforcement Policy must set out the relevant sanctions to which a person may be liable. The Enforcement Policy must also set out the action which the regulator may take to enforce the offence. For example, it might state that a particular offence will usually be enforced by way of a fixed monetary penalty rather than criminal prosecution. The Enforcement Policy must set out the circumstances in which the regulator is likely to take such action. For example, the policy might say that criminal prosecution may be more likely where the person has a history of regulatory non-compliance. The Enforcement Policy, in contrast to Penalty Guidance, is focused on how particular offences are enforced.

5.6 - Summary

This chapter described the administrative penal systems, and highlighted key features, in four jurisdictions, the first two of which, namely that of Germany and the United States, were instructive in guiding the development of the Canadian *amps* legislation. The overall operational experience of the two countries, gathered from meetings and seminars organized by their officials for the benefit of the Canadian team, and through a preliminary analysis of their legislation, was indeed influential in designing the Canadian framework legislation. Canada adopted the framework legislative model of Germany in preference to the individual statutory models of the United States, but adopted the criteria for penalty determination in the U.S. statutes.

To the German and U.S. models were added the Australian and U.K. models because of their unique features. Australia has also had a distinct brand of civil penalty system which made a clear distinction between civil and criminal contraventions in the statute itself, giving guidance to enforcement agencies on the factors to be taken into account when considering the circumstances where civil penalties were appropriate and the size of penalty amounts. By contrast, the U.K. adopted many features of the Canadian *amps* legislation as it benefited from the Canadian experience, but carefully distanced itself from the absolute liability model of the latter by ensuring that no penalties could be imposed if a defendant could not be convicted of the contravention because of a defence available to that person under the statute which has been brought within its ambit. When discussing the *AAAMPS* Act in the next chapter, reference will be made to the above models where appropriate.

Chapter 6 - Canadian Examples

6.1 -Introduction

The purpose of this chapter is to provide examples of decriminalization in Canada by establishing administrative financial penalty systems in a few federal statutes, notably (1) the *Aeronautics Act*; (2) the *Customs Act*, (3) the *Income Tax Act*; (4) the *Employment Insurance Act*, and (5) the *Agriculture and Agri-Food Administrative Monetary Penalties Act*; and in a small number of new statutes enacted since the turn of the 21st century. There are also provincial examples but only a couple of them, namely, the Ontario environmental penalties and the British Columbia occupational health and safety administrative penalties are briefly described.

While there is some scope to expand the use of financial penalties in other than the above sectors, a few departments fear that constitutional limitation may be a barrier to their introduction as regulatory tools, notably Health Canada, which derive their jurisdiction from the criminal law power of the Federal Parliament.³²⁹ However, several departments, including those who do not have constitutional hurdles, such as Fisheries and Oceans, have preferred to use ticketing schemes for summary offences under the *Contraventions Act* which was enacted in 1992 to yield similar benefits as administratively-imposed penalties, although proposals were introduced by the Minister of Fisheries and Oceans for new fisheries legislation in which administrative monetary penalties figured prominently.³³⁰ The ticketing scheme does not involve the creation of new appeal structures since it uses the provincial court system, thereby saving costs for departments, and it is also a more

³²⁹ Environment Canada had the same reservations, particularly because *Hydro-Québec*, *supra* note 3, declared that its key legislation on toxic substances (now in the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33) is sustainable under the federal criminal law power, not under the peace, order and good government power which had been the authority for the latter under the decision of that Court in *Zellerbach*, *supra* note 3. See Benidickson, *supra* note 3 at 35. It is submitted that the *Hydro-Québec* decision does not go so far as to require compelling obedience to criminal law by criminal penalties alone; the option of using administrative penalties is not barred. Perhaps this explains why Environment Canada set aside its reservations when it decided to go ahead with Bill C-16 which was passed by Parliament on 13 May 2009 (now c 14); see this chapter, below.

³³⁰ Bill C-32, *An Act respecting the sustainable development of Canada's seacoast and inland fisheries*, 2nd Session, 39th Parliament, 56 Eliz II, 2007. The Bill died on the Order Paper when the 39th Parliament was dissolved on 7 September 2008.

efficient collection system for penalties. However, notwithstanding its special features discussed later in this chapter, it is still tied to the criminal justice process.

Agriculture Canada, too, had introduced ticketing provisions in the *Health of Animals Act* and the *Plant Protection Act* to link up with the *Contraventions Act*, but those provisions were repealed on the enactment of the *Agriculture and Agri-food Monetary Penalties Act (AAAMP Act)*.

This chapter is divided into four sections. The first three give Federal examples; the fourth gives provincial examples. Section I briefly describes the five federal statutes referred to above. Section II is far more detailed as it covers the *AAAMP Act*, which is the principal focus of this thesis. Section III gives highlights of new and proposed federal legislation which have been inspired by *AAAMP Act*. The final section describes two provincial examples, the Ontario Environmental Penalties Regulations framed under amendments to the *Environment Protection Act* and the British Columbia administrative penalties under the *Workers Compensation Act*.

6.2 - Pre-AAAMP Legislation

6.2.1 - The *Aeronautics Act*³³¹

6.2.1.1 - The Current *Aeronautics Act*

The first important administrative penalty regime at the Federal level was established under the *Aeronautics Act*. While the regime is not comprehensive, it provided a few key ideas in the development of the *AAAMP Act*.

6.2.1.1.1 - Establishment of the Transportation Appeal Tribunal of Canada (TATC)

The *Aeronautics Act* established the Civil Aviation Tribunal in 1986, since renamed as the Transportation Appeal Tribunal of Canada (TATC).³³² TATC is given power to hold hearings in relation to violations of and penalties imposed by Transport

³³¹ *Supra* note 154.

³³² The tribunal was established by section 2(1) of the *Transportation Appeal Tribunal of Canada Act*, SC 2001, c 29 [*TATC Act*].

Canada officials pursuant to the *Aeronautics Act* and other statutes enacted since then.³³³

6.2.1.1.2 - Penalty Procedure

The process begins with the issuance of a notice of violation to a person the enforcement officer believes on reasonable grounds has committed a violation. The notice sets out the amount of the penalty and informs the person of the opportunity to make representations to a senior departmental official and to the Tribunal. The amount of the penalty is established by section 7.6 of the Act. The maximum penalty is \$25,000 for a corporation and \$5,000 for an individual, but if section 4.81(1) or 4.82(4) or (5) is a designated provision, the maximum penalty is \$50,000 (this section imposes obligations on an air carrier and the operator of air reservation system to provide certain information to the Minister).

6.2.1.1.3 - Appeal Jurisdiction of TATC

TATC has appeal jurisdiction in relation to administrative monetary penalties imposed by the Department of Transport under the *Act*, and also in relation to other administrative penalty matters, such as licence suspension or withdrawal. Its jurisdiction has recently been extended to cover administrative monetary penalties authorized under the *International Bridges and Tunnels Act, 2007*³³⁴ and under the 2008 amendment to the *Canada Marine Act, Canadian Transportation Act* and the *Pilotage Act*.³³⁵ Significant features of all these statutes are described below. Hearings take place before an individual member of the Tribunal, whose decision may be appealed to a panel of Tribunal members. Judicial review lies to the Federal Court.

The data provided by the Transportation Appeal Tribunal of Canada in its annual report for 2004-05 show that of the 269 cases (new and those carried over from previous years) 153 or 57% involved administrative fines; 30 of the latter were

³³³ See e.g., *IBT Act*, *supra* note 192; amendments to the *Canada Marine Act*, *supra* note 154, *Canadian Transportation Act*, *Pilotage Act*, etc, SC 2008, c 21. [These are discussed in section III of this chapter].

³³⁴ *IBT Act*, *ibid*.

³³⁵ *An Act to amend the Canada Marine Act, the Canada Transportation Act, the Pilotage Act and other Acts in consequence*, SC 2008, c. 21.

heard in the fiscal year. The annual report indicates that since its inception in 1986, the Tribunal has registered 5,338 cases or an average of about 500 a year.³³⁶

6.2.1.1.4 - Designation of Administrative Penalties Provisions

Section 7.6 of the *Act* authorizes the Governor in Council by regulation to designate any provision of Part I of the *Act*, or any regulation, notice, order or security measure under that Part, as a designated provision. The contravention of any such provision may be dealt with under, and in accordance with, the procedure set out in sections 7.7 to 8.2, and no proceedings may be taken against the person by way of summary conviction. If Bill C-6 (2007) (see below) is reintroduced, that terminology will be abandoned.

6.2.1.1.5 - Defence of Due Diligence is Available

It is expressly provided by section 8.5 that “no person shall be found to have contravened a provision of this Part or any regulation, notice order, security measure or emergency direction made under this Part, if the person exercised all due diligence to prevent the contravention.”

6.2.1.1.6 - Imprisonment is Precluded in Certain Cases

Subsection 7.3 (7) bars imprisonment of a person convicted of a summary conviction offence or for default of payment of fine imposed by the court, except in limited situations specified in subsection 7(1). Similar provision is made in subsection 7 (7.1) where a person is proceeded against *under section 8.4* and is convicted of an offence under Part I.

6.2.1.1.7 - Continuing Offence

A continuing offence is defined as an offence committed or continued on more than one flight or segment of a flight. Section 7.31 deems such an offence to be a separate offence for each flight or segment of a flight on which the offence is committed or continued.

³³⁶ Transportation Appeal Tribunal of Canada, *Annual Report for the fiscal year 2004-05*, Ministry of Supply and Services Canada, 2005.

6.2.1.1.8 - Payment of Penalty

A person that has been served with or sent a notice of violation must either pay the amount of the penalty specified in the notice or under the procedure in section 7.8 file with the Tribunal a written request for a *review* of the facts of the alleged contravention or of the amount of the penalty.

Payment of the penalty must be accepted by the Minister as and in complete satisfaction of the contravention. Section 7.9 prohibits further proceedings against the person in respect of it. If the penalty is not paid, the person is deemed to have committed the contravention. In that case, the Minister may obtain from the TATC a certificate of non-payment and institute collection proceedings in civil courts, together with cost of recovery, under subsections 7.3(8) and 7.3(9).

6.2.1.2 - Proposed Amendments to the *Aeronautics Act*³³⁷

6.2.1.2.1 - Introduction of *Amp* Measures

On October 29, 2007, Bill C-7 was introduced in the House of Commons (which died on the Order paper because of the elections). The Minister of Transport proposed a number of new features, such as a violation (with definition) to replace the term designated offence used in the current *Act*, notice of violation without penalty, assurance of compliance without imposing penalty, and elimination of the defence of due diligence in complying with such compliance assurance, etc. The last provision was perhaps added because compliance assurance is volunteered by the person who had contravened the relevant provision and would prevent him from putting forward an excuse that diligent steps were taken to comply with it. The Bill also proposed to provide explicitly that section 126 of the *Criminal Code* does not apply to a violation.

6.2.1.2.2 - Appeal to the TATC

Section 7.91 sets out the procedure for appealing the Minister's notice of violation and penalty imposition. Both parties to the appeal are to be accorded an

³³⁷ Bill C-7, *An Act to amend the Aeronautics Act and to make consequential amendments to other Acts*, 2nd Sess, 39th Parliament, 56 Eliz II, 2007 (re-introducing Bill C-6 which had been tabled in the previous session).

opportunity consistent with procedural fairness and natural justice to present evidence and make representations.

The burden of establishing that a person has contravened a designated provision is on the Minister. The person who is alleged to have contravened the designated provision is not required and shall not be compelled to give any evidence or testimony in the matter.

The proposed amendment to section 7.6 also authorizes the Governor in Council to fix a maximum penalty of \$50,000 in the case of an individual and \$250,000 in the case of a corporation.

6.2.1.2.3 - Expunging Penalty from Record

On the application of a person affected by the penalty, any notation of the penalty imposed under sections 7.6 to 8.2 must be removed from the record respecting the person kept by the Minister, after 2 years from the date the penalty amount has been paid, *unless* (a) in the opinion of the Minister the removal from the record will not be in the interest of aviation safety or security; or (b) a penalty has been recorded by the Minister in respect of that person after that date.

The same provisions apply to suspension of a licence.

6.2.1.2.4 - Enforcement

Section 8.4 allows the above referred provisions to be enforced against the registered owner of the aircraft, the operator of the aircraft, a pilot in command of the aircraft, and the operator of an aerodrome or other aviation facility.

These amendments (other than the defence of due diligence) were perhaps inspired by similar provisions of the *AAAMP Act*, which are analysed in Section II.

6.2.2 - The *Contraventions Act*

The *Contraventions Act* was adopted in October 1992³³⁸ in order to establish a simplified procedure for prosecuting certain Federal offences. The *Act* provides that offences designated as contraventions in any Federal statute may be prosecuted

³³⁸ *Supra* note 106.

through the issuance of a ticket, if those offences are designated by the Governor in Council as ticketing offences by a regulation.³³⁹ The purposes of the Act are:

“to provide a procedure for the prosecution of contraventions that reflects the distinction between criminal offences and regulatory offences and that is in addition to the procedures set out in the *Criminal Code* for the prosecution of contraventions and other offences; and
to alter or abolish the consequences in law of being convicted of a contravention in light of that distinction.”³⁴⁰

Federal statutes that will be proceeded with under the *Contraventions Act* are (and will from time to time be) prescribed by regulations authorized by section 8 of the *Act*. The section also empowers the Governor in Council to establish the amount of fine in respect of contraventions, subject to certain limitations³⁴¹ and to prescribe classes of contraventions.

6.2.2.1 - No Imprisonment in Default of Payment of Fine

The *Criminal Code* allows a court to sentence a fine defaulter to prison³⁴² but this provision is inapplicable to a fine imposed on a person under the *Contraventions Act*, unless an offender is unwilling, though able, to pay.³⁴³

³³⁹ *Ibid*. Section 2 defines a contravention as “any offence that is created by an enactment and is designated as a contravention by a regulation of the Governor in Council.”

³⁴⁰ *Ibid*, s 4(a),(b).

³⁴¹ *Ibid*, s 8(3),(4). The amount established may not exceed the maximum amount established for the relevant offence by the enactment creating offences, and the maximum fine for young persons is one hundred dollars.

³⁴² *Supra* note 25, ss 734.7(3) and 787(2).

³⁴³ *Supra* note 106, s 60.

6.2.3 - The *Customs Act*³⁴⁴

6.2.3.1 - Brief History

The Canadian customs law has had an administrative financial penalty system from very early times as in other countries such as Great Britain, Australia and the United States. Customs did not have to rely on prosecutions to collect penalties on imported goods. If an importer smuggles goods, fails to declare them or undervalues them, or fails to comply with other federal laws prohibiting or regulating imports, the goods were seized at the port of entry, the imported goods were declared forfeit to the Crown as authorized by those laws. This feature of enforcement of customs law, derived from English law, was brought into the *Customs Act* when it was enacted more than a century ago, and is now found in section 122, which states that forfeiture accrues automatically from the time of contravention, which is generally when the goods were imported, even if the contravention is discovered afterwards. Conveyances used in carrying the goods are also forfeit. As Sedgewick J. put it so eloquently in his judgment in *The Ship 'Frederick Gerring Jr.' v. R.* [1897]³⁴⁵,

"(I)n the eye of the statute the vessel itself is the offender. The statute gives to it a moral consciousness – a personality – a capacity to act within or without the law, and impose upon it the liability of forfeiture in the event of a transgression. In the enforcement of fiscal law, of statutes passed for the protection of the revenue or of public property, such provisions are as necessary as they are universal, and neither ignorance of law, nor, as a general rule, ignorance of fact, will prevent forfeiture when the proceeding is against the thing offending, whether it be the smuggled goods or the purloined fish, or the vehicle or vessel, the instrument or abettor of the offence. The goods themselves are endowed by law as they are with faculty and right of speech....."

6.2.3.2 - Ascertained Forfeiture

If Customs discovered on investigation that goods that have already been imported were illegally brought into the country, it is authorized to issue under section 124 an ascertained forfeiture, by which an amount equal to the value of the goods (plus the applicable duty on them) is forfeited. The *Act*, however, authorizes

³⁴⁴ *Supra* note 193.

³⁴⁵ 27 SCR 271 at 284-85.

the release of the forfeited goods on payment of a money penalty in addition to the duty, which penalty could be equal to the value of the goods. If the penalty is not paid, Customs could simply assert a statutory lien on the goods and release them only after payment or until after the dispute is settled by the court if the importer wants to recover the penalty paid. If the importer wanted immediate release, it could get it by depositing money or a duly approved bond from an insurance company. Customs could also assert its lien on subsequently imported goods.

The discretion of customs officers is regulated by departmental enforcement manuals under the D-Memoranda series. An aggrieved person may request the Minister of National Revenue to make a decision on the matter. The person is given an opportunity to provide evidence for the Minister's consideration. The Minister decides the matter and communicates the decision to the individual. The Minister has delegated the authority for making these decisions to senior officials. The decision can be appealed to the Federal Court Trial Division.

6.2.3.3 - Administrative Monetary Penalties

In 2001, the *Customs Act* was amended to provide for administrative monetary penalties (*amp*) in a much wider variety of situations, by adding sections 109.1 and 109.2.³⁴⁶ The sections were brought into operation in October 2002. The maximum penalty for a single contravention is \$25,000. Currently, about 50 *Customs Act* provisions and 10 *Customs Tariff* provisions, as well as over 100 infractions under the regulations, have been designated as contravention provisions by the *Designated Provisions (Customs) Regulations*.³⁴⁷ The penalties are applied against the person, not goods, generally in response to their non-compliance with requirements respecting commercial importation and exportation of goods. They largely replace the seizure and ascertained forfeiture provisions of the *Act* for technical infractions. The CBSA, which administers the customs laws, has indicated that seizures, ascertained forfeitures and prosecution will continue to be used for most serious offences (such as importation of prohibited or controlled goods) as well as in situations where a monetary penalty will not provide an adequate deterrent.³⁴⁸

³⁴⁶ *Supra* note 193.

³⁴⁷ SOR/2002-336. The list is expanded from time to time.

³⁴⁸ Customs D Memorandum 22-1-1 (2003-06-16) "Administrative Monetary Penalty System", §§19-22.

Individuals and entities can also face *amps* in an amount ranging from \$250 to \$5,000 under the *Cross-border Currency Monetary Instruments Reporting Regulations*³⁴⁹ made under the *Proceeds of Crime (Money Laundering) and Terrorism Financing Act*.³⁵⁰

Section 127.1 of the Act allows a person served with a Notice of Penalty Assessment (NPA) to make a correction request, where obvious errors have been made by the CBSA in relation to the issuance of NPA.

The *amp* system is modeled on the *AAAMP Act*³⁵¹ with the difference that an appeal against the Minister's decision goes not to a tribunal but to the Federal Court. Penalties are also higher.

CBSA and the person to whom a NPA has been issued may enter into a formal Penalty Reduction Agreement (PRA) which is designed to assist the latter to become compliant with the legislation by providing an incentive to invest in the correction of underlying systemic problems that result in the application of penalties. A PRA is available for penalties assessed over \$5,000. Penalties may be reduced partially or fully.

If a person disputes the penalty assessment, a request for a ministerial decision can be made pursuant to section 129. The request is reviewed by the Appeals Branch of the CBSA. If a settlement is not reached at that stage, the dispute can be appealed to the Federal Court under section 135.

The *amp* provisions do not legislate a due diligence defence; accordingly, the Federal Court will ultimately determine whether the operative words "fails to comply" in section 109.1 permits such a defence.³⁵²

³⁴⁹ SOR/2002-412, s 18.

³⁵⁰ SC 2000, c 17. Section 73 authorizes the Governor in Council by regulation to prescribe a maximum penalty of \$100,000 if violation is by a person and \$500,000 if violation is by an entity.

³⁵¹ *Supra* note 7.

³⁵² Litigation in other settings, such as under the Federal *Excise Tax Act*, RSC 1985, c E-15, and provincial legislation, has not been definitive. In *Pillar Oilfield Projects Ltd v Canada*, [1993] GSTC 49, 2 GTC 1005 (TCC), Bowman J allowed the defence of due diligence to be pleaded against a penalty imposed under section 285 of the *Excise Tax Act*, which, unlike section 280 of the same *Act*, did not expressly bar that

CBSA issued nearly 58,300 administrative penalties for contravention of the *Customs Act* over the four years since 2002, following the legislative amendment which authorized the imposition of *amp*. Over the same period the Agency referred nearly 1,140 cases to the Department of Justice for prosecution.³⁵³

6.2.3.4 - Administrative Monetary Penalties under the *AAAMP Act*

The CBSA is also responsible for enforcing the *Agri-Food* statutes³⁵⁴ in respect of livestock, plants and plant products when these cross the international border. It is required to apply the *AAAMP Act*³⁵⁵ in which case appeals against its decisions, if not settled after ministerial review, lie to the Canada Agricultural Review Tribunal established under the *Canada Agricultural Products Act*.³⁵⁶ In practice, the CBSA enforces the Agri-food statutes only against travelers,³⁵⁷ commercial importations normally being handled by the CFIA.

defence, stating that there was no reason for not extending the decision of Dickson J in *Sault Ste Marie*, *supra* note 46, to *amps*. The Federal Court of Appeal in *Canada (AG) v Consolidated Canadian Contractors*, [1999] 1 FC 209, 165 DLR (4th) 433, adopted the same view. See Mohan A Prabhu, *The 2010 Annotated Customs Act*, 10th ed (Toronto: Thomson Carswell, 2010) at 177-78. See also, the two *amp* cases decided under the laws of New Brunswick and British Columbia, respectively: *504174 NB Ltd v NB (Ministry of Public Safety)*, 2005 NBCA 18, 279 NBR (2d) 307, 63 WCB (2d) 456; *Whistler Mountain Ski Corp v BC (General Manager, Liquor Control and Licensing Branch)*, 2002 BCCA 426, 171 BCAC 231, 43 Admin LR (3d) 294, the latter referred to by Benidickson, *supra* note 3 at 157. Professor Benidickson concludes that there is some continuing basis for uncertainty about due diligence defence, at least where the actual burden of penalty might (not) be perceived as modest." On the other hand, in *R v Transport Robert (1973) Ltée* (2003), 68 OR (3d) 51, a case decided under the *Highway Traffic Act*, the Ontario Court of Appeal held that the absolute liability *amp* regime provided in that *Act* did not violate the provisions of the *Charter* dealing with the right to security of the person and the presumption of innocence. See also, *supra* notes 151 and 152 where a few decisions under provincial laws are referred to.

³⁵³ *Amp* data were provided by Marilyn Fox and Eli Shacker at a meeting held in their office in 2007, and prosecution data by Steve Sloan and Dale Brown at a meeting subsequently held in their office.

³⁵⁴ These are the same statutes as those listed in the *AAAMP Act*, *supra* note 7; see *CBSA Act*, *supra* note 137, paragraph (b) of the definition of "program legislation" in section 2.

³⁵⁵ *Ibid.*

³⁵⁶ RSC 1985, c 20 (4th Supp).

³⁵⁷ Part II provides some data on *amps* issued by CBSA during the years 2007/08 and 2008/09.

6.2.4 - The *Income Tax Act*³⁵⁸

6.2.4.1 - Fixed Monetary Penalties

Canada Revenue Agency (CRA) administers the *Income Tax Act*. Fixed administrative penalties have been, and continue to be, imposed for certain violations of the *Income Tax Act*, such as late filing, failing to file a return, failing to withhold or remit tax, or failing to issue or remit other required documentation. Penalties are based on the amount of tax owed. For example, for a late filing, the penalty is equal to 5 percent of the tax owed plus an additional one percent for each passing month for up to 12 months. For repeated failure to file a return, after a demand to file has been served on the taxpayer, the penalty is 10 per cent plus an additional two percent for each passing month for up to 20 months. Penalties are also authorized by section 164 for failure to provide information, failure to provide identification number (SIN or Business Number), etc.

Penalties are also authorized by section 162 for failure by a non-resident corporation to file a return of income, the penalty being the greater of \$100 and 25 times the number of days (not exceeding 100) from the date the return was required to be filed to the date it was filed.

For serious violations (for example, failing to file a return with intent to evade tax), if CRA considers imposing a penalty, it may invite the taxpayer to make representations. Representations are reviewed by senior assessment officials. If the violation was the result of an innocent error, a reassessment may be issued without imposing the penalty. Appeal may be taken to the Tax Court of Canada.

6.2.4.2 - Administrative Monetary Penalties

In 2000, the *Income Tax Act* was amended to extend administrative monetary penalties to other situations, by adding section 163.2.³⁵⁹ This section imposes penalties for misrepresentations of a tax matter by a third party. It states that every person who makes or furnishes, participates in the making of or causes another person to make or furnish statements that the person knows or would

³⁵⁸ RSC 1985, c 1 (5th Supp).

³⁵⁹ SC 2000, c 19.

reasonably be expected to know, in circumstances amounting to culpable conduct, is a false statement that can be used by another person for the purposes of this Act, is liable to a penalty in respect of the false statement. Culpable conduct is defined as conduct where an act or failure to act is (a) tantamount to intentional conduct; (b) shows an indifference as to whether the Act is complied with; or (c) shows a willful, reckless or wanton disregard of the law. A false statement includes a statement that is misleading because of an omission or statement.

The penalty prescribed by subsection 163.3 is (a) where the statement is made in the course of a planning activity or a valuation activity, the greater of \$1,000 and the total of the person's gross entitlements at the time at which the notice of assessment of the penalty is sent to the person in respect of the planning activity and the valuation activity; and in any other case, \$1,000.

Section 163.2 is a civil penalty provision and was enacted to overcome the problems created by section 239 which is a *criminal penalty provision* and covers the same, and even broader, ground, since the latter section requires proof beyond a reasonable doubt when alleging that the taxpayer has evaded or attempted to evade compliance with the Act, or conspired with others to commit the evasion. Not only that, the agency enforcement officials have to observe *Charter* provisions when conducting the investigation leading up to the imposition of the penalties. Section 163.2 being a civil penalty provision, a lesser, civil standard onus is placed on the tax agency, to prove evasion and *Charter* rules with respect to audit of records are presumed to be inapplicable.³⁶⁰

An appeal from administrative decisions of the CRA lies to the Tax Court of Canada and from the latter to the Federal Court.

³⁶⁰ See EC Harris, "Civil Penalties under the Income Tax Act" in 'Income Tax Enforcement, Compliance and Administration', (1988) Canadian Tax Foundation 9:1 and WA Mitchell, "Civil Penalties: A wolf in sheep's clothing", 2000 CR 16:1.

6.2.5 - The *Employment Insurance Act*³⁶¹

6.2.5.1 - Fixed Monetary Penalty

Under subsection 38(2) of the *Employment Insurance Act* individuals believed to have made false or misleading claims for benefits may be required to pay a penalty in respect of each false or misleading statement or piece of information but not exceeding three times the weekly benefit to which they were entitled. The penalty on employers for contravening the benefits provision by making a false statement, representation or providing false or misleading piece of information is, under subsection 39(2), not to exceed nine times the maximum weekly rate of benefit in effect when the penalty is imposed. Directors and officers, who were complicit in the provision of false information, may also be subjected to monetary penalties of a maximum of \$12,000 or the amount of penalties imposed under subsection 38(2), whichever is the greater, whether or not a penalty has been imposed on the corporation.

6.2.5.2 - Warning

Instead of imposing a penalty, the Commission may issue a warning under section 41.1 for an act or omission under subsection 38(2) or 39(2), and the limitation period for issuing such a warning is 6 years.

6.2.5.3 - Penalty for Major Contravention

In the case of a major contravention, as defined by regulations, the Commission is authorized to impose a penalty set out in regulations.

6.2.5.3.1 - No Penalty if Prosecution Instituted

Section 40 prohibits the imposition of a penalty under section 38 or 39 if a prosecution for the act or omission has been initiated against the employee, employer or other person.

³⁶¹ SC 1996, c 23.

6.2.5.3.2 - Time Limit for Penalty Imposition

Subsection 40(b) places a limitation period of 36 months after the expiration of the date on which the false or misleading statement, representation or piece of information was made or furnished.

6.2.5.4 - Procedure

A notice of violation is sent in the form of a letter to the individual setting out the nature of the allegation and informing the person of the opportunity to rebut the allegation. If the Commission is satisfied on the representation of the person who is issued the notice that a penalty under section 38 or 39 was imposed without knowledge of, or on the basis of a mistake as to, some material fact, section 41 authorizes the Commission to rescind the penalty.

6.2.5.5 - Appeal

A person who is aggrieved by the administrative decision to impose a penalty may appeal the decision to a Board of Referees, which holds an oral hearing into the matter. The Board's decision may be appealed to an Umpire for a breach of natural justice, on jurisdictional grounds, for error of law or a seriously erroneous finding of fact. Umpires are judges of the Federal Court.

6.3 - The *Agriculture and Agri-food Monetary Penalties Act (AAAMP Act)*³⁶²

6.3.1 - Introduction and Background

The preceding sections of this Chapter have reviewed the early introduction of *amps* to Canadian federal legislation, based in part on the experience of other jurisdictions whose experience and approach was previously considered. As the *AAAMP Act* is the centerpiece of this thesis, both in terms of the overall statutory framework it has established and also with reference to an analysis of operational data derived from experience with selected fields of agricultural regulation, a brief background to the origin and development of this legislation is considered useful.

The origin of the legislation can be traced to the XIVth Congress of the International Association of Penal Law held in Vienna, Austria in 1989 where a

³⁶² *Supra* note 7.

Recommendation was adopted by members urging governments to give better safeguards to defendants charged with administrative offences.³⁶³ The report on the conference proceedings submitted by the author of this thesis³⁶⁴ who had participated in it, engaged the attention of the Steering Committee of Deputy Ministers which had been formed to consider more appropriate ways of regulatory enforcement, and the Steering Committee agreed that first hand information should be obtained on the administrative monetary penalty system which had been in place in several U.S. Federal agencies and departments for about two decades. A small team of officials representing a few government departments interested in administrative penal law traveled to the United States to meet with officials at the Environmental Protection Agency, the Occupational Safety and Health Administration, the Department of Agriculture and the Administrative Conference of the United States, to gain an insight into their administrative monetary penalty systems.³⁶⁵

A second visit to the same and a few other U.S. Agencies, with a larger team of officials, was organized in June 1990, and it was decided that information should also be obtained from certain European countries by meeting with appropriate officials, notably in Germany which had been a pioneer in the development of administrative penal law. The reports of these three visits, and of the Vienna Congress of 1989, excited the interest of the Steering Committee of Deputy Ministers and the Department of Agriculture became the first government institution to seriously consider the innovation for enforcing all the statutes that it has been administering as the only enforcement tool it has had in the past (besides administrative licensing, product recall, forfeiture, quarantine, etc.) was criminal prosecution with which the officials were not wholly pleased.

Over the next three years, the Department of Agriculture assembled its team of section heads responsible for administering various statutes, such as the *Health of*

³⁶³ The Recommendations from this Congress, held in Vienna, Austria from 2-7 October 1989, are set out in chapter 3, *supra* note 201.

³⁶⁴ The conference report was prepared on 30 November 1989.

³⁶⁵ The team consisted of officials from the Departments of Agriculture, Environment, National Revenue (Customs), Transport, the Law Reform Commission, and Justice. The author of this thesis (then a lawyer with the Department of Justice) briefed the officials before and after these consultations, served as rapporteur and produced reports on these consultations).

Animals Act, Meat Inspection Act, Plant Protection Act, Pest Control Products Act, Seeds Act, Feeds Act and Fertilizers Act, and intensive meetings were held for three months, under the guidance of the author, then a lawyer at the Department of Justice, with a view to identifying those sections of the statutes and regulations that could conceivably be decriminalized and made part of a new administrative penalty regime. Appropriate compliance and enforcement policies, penalty matrices and draft legislative provisions were drawn up at these meetings, and a short Bill was prepared for public consultation containing the significant elements of the legislation. The draft Bill was generally well received by various stakeholders in the animal health and plant and forestry resources industries, and was presented by the Minister of Agriculture to Parliament. For a Bill that radically altered the way government enforced regulatory requirements in the agriculture sector, the time between presentation (First Reading) and its enactment was short, just over a year. The First Reading was in November 1994 and the Bill was passed and received Royal Assent on 5th December 1995. This became the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, chapter 40 (Statutes of Canada, 1995).

In marshalling the *AAAMP Bill*, the proponents of decriminalization downplayed philosophical attractions and spoke the language that politicians would be comfortable with and would encourage legislators to accept, especially in times of budgetary constraint. Emphasis was placed on better and speedier compliance, level playing field, reducing pressures on the criminal justice system, support of the industries and businesses, international harmonization and competitiveness of Canadian industry, and the cost effectiveness as compared to the traditional prosecution system. Because of financial constraints faced by the Government at that time, the Minister of Agriculture prudently decided not to have a new appeal body but instead enlarge the jurisdiction of the existing tribunal in the Department by giving it adjudicative authority. The Bill received all-party support, although there was considerable criticism of the exclusion of the defence of due diligence³⁶⁶ and a few other provisions.

³⁶⁶ This point is discussed in §6.3.1.7, below, when analysing the defence of due diligence.

The *AAAMP Act* covers ten “agri-food” statutes,³⁶⁷ but the Minister of Agriculture and Agri-food decided to bring within its purview only three, the *Health of Animals Act*, the *Plant Protection Act*, and the *Pest Control Products Act*. Although enacted in December 1995, the *Act* was not brought into operation until May 2000,³⁶⁸ to give the Department adequate time to put together Regulations, compliance and enforcement policies and penalty matrices, and in the meantime to set up a separate body to administer and enforce the legislation. That body, the CFIA, was created in 1997.³⁶⁹ At the same time, the *Pest Control Products Act*,³⁷⁰ was transferred by Parliament to Health Canada and the Pesticide Regulatory Management Agency (PMRA) was created to administer and enforce that statute.

The newly created CBSA was also empowered to enforce “agri-food” (along with a number of other statutes) in so far as importations (and exportations) were concerned.³⁷¹

6.3.2 - Key Features of the *AAAMP Act*

Significant features of the *AAAMP Act* are analyzed below with explanatory notes or commentaries, and a comparison with provisions in international examples which had provided inspiration for the Canadian legislation or have been enacted since, where appropriate.

³⁶⁷ *AAAMP Act*, *supra* note 7. The statutes are: *Canada Agricultural Products Act*, *supra* note 356; *Feeds Act*, RSC 1985, c F-9; *Farm Debt Mediation Act*, SC 1997, c 21; *Fertilizers Act*, RSC 1985, c F-10; *Health of Animals Act*, *supra* note 8; *Meat Inspection Act*, *supra* note 135; *Pest Control Products Act*, RSC 1985, c P-9, repealed and replaced by SC 2002, c28, *Plant Protection Act*, *supra* note 9, *Seeds Act*, RSC 1985, c S-8 and the *Grain Act*, *supra* note 10. The last statute was added by an amendment in 1998, SC 1998, c 22, s 1(3) (amendment not yet in force). The definitions and review procedures in those statutes were also amended to enable the Minister to bring them within the scope of the *AAAMP Act*. The administration and enforcement of the *Pest Control Act* was transferred to the Minister of Health, by SI/2000-94.

³⁶⁸ The *Act* was proclaimed in force 30 July 1997 (SI/97-99 but the first *AAAMP Regulations*, SOR/2000-187, were enacted May 24, 2000).

³⁶⁹ *Canadian Food Inspection Agency Act*, SC 1997, c 6 [*CFIA Act*].

³⁷⁰ *Supra* note 10.

³⁷¹ The agency was created in 2002 and was continued as a new Agency by the *CBSA Act*, *supra* note 137.

6.3.2.1 - Purpose of Act

The stated purpose of the *AAAMP Act* is:

*"to establish as an alternative to the existing penal system and as a supplement to existing enforcement measures, a fair and efficient alternative monetary penalty system for the enforcement of the agri-food Acts."*³⁷²

When the Minister of Agriculture presented his proposals to Cabinet in 1994 he extolled the virtues of the administrative penal system as one that will provide consistency, certainty and celerity to enforcement as the criminal justice system did not encourage compliance, having been proved to be cumbersome, time consuming and costly and relied principally on punishment. Cost savings were also emphasized. The Minister also pointed out that it will harmonize the enforcement system with our principal trade partner in the South, put competitors on a level playing field, and bring about greater predictability to the process.

6.3.2.2 - Powers of the Minister to Designate Offence as Violation

Section 4 empowers the Minister to designate as a violation the contravention of any specified provision of an agri-food *Act* or a regulation made under that *Act* or the contravention of any specified order, or class of orders, made by the Minister under the *Plant Protection Act*, or the refusal or neglect to perform any specified duty or class of duties imposed by or under the *Health of Animals Act* or under the *Plant Protection Act*, if the contravention, or failure to neglect to perform the duty, as the case may be, is an offence under an Agri-food *Act*.

Section 4 gives the crucial power to designate an offence as a violation (on which the entire statute rests) to the Minister of Agriculture, not to the Cabinet, unlike most other statutes, including especially *amp* statutes.³⁷³ The term violation itself is not defined in this Act but in the three statutes brought within its ambit. It has its origin in several American statutes³⁷⁴ and the concept, in turn, was inspired

³⁷² *AAAMP Act*, *supra* note 7, s 3.

³⁷³ *Ibid.* The two *amps* statutes are the *Health of Animals Act* and the *Plant Protection Act*.

³⁷⁴ See e.g., *Clean Air Act*, *Occupational Safety and Health Act*, *Plant Protection Act*, *Animal Health Protection Act*, *Atomic Energy Control Act*, etc, discussed in Chapter 5, above.

by the *Ordnungswidrigkeiten* (administrative offence) used in many West European countries that adopted the German administrative penal law system.³⁷⁵ A different term, but embodying the same concept, is used in Australia³⁷⁶ ("civil penalty provision") as well as in the Canadian *Aeronautics Act* ("designated provision")³⁷⁷. The UK in its recent law³⁷⁸ uses the term "relevant offence", expressly subjecting it only to administrative monetary penalties. The international regimes have been analyzed in chapter 5 of this Part.

Because the *AAAMP Act* is a "gloss", it refers to the incorporated statutes, since Parliament has entrusted discretion to the Minister, in effect, to compound³⁷⁹ an offence created in those Acts and sanction it administratively. This authority can be deduced from section 5 of the *AAAMP Act*. The converse is, however, not permitted. Furthermore, all three statutes have been amended to define a violation and to authorize the Minister to proceed with them under the *AAAMP Act* as discussed below.

6.3.2.3 - Definition of Violation

The term "violation" is defined in the *Health of Animals Act*,³⁸⁰ the *Plant Protection Act*,³⁸¹ and the *Pest Control Products Act*.³⁸² Section 2 of the *Health of Animals Act* defines a violation as:

"(a) any contravention of any provision of this Act, or of a regulation under this Act; or

³⁷⁵ This is discussed extensively in chapter 5, above.

³⁷⁶ See, e.g. *Trade Practices Act 1974*, *Corporations Act 2001* and the *Environment Protection & Biodiversity Conservation Act 1999*, discussed in chapter 5, above.

³⁷⁷ See *Aeronautics Act*, *supra* note 154, s 7.6 discussed in Section I of this chapter, above.

³⁷⁸ *Regulatory Enforcement and Sanctions Act 2008* (UK), c 13, *supra* note 211.

³⁷⁹ In the sense of downgrading the offence from a serious to a less serious breach of statute.

³⁸⁰ *Supra* note 8 (H-3.3).

³⁸¹ *Supra* note 9 (P-14.8).

³⁸² *Pest Control Act*, *supra* note 10.

(b) any refusal or neglect to perform any duty imposed by or under this Act, that may be proceeded with in accordance with the *Agriculture and Agri-food Administrative Monetary Penalties Act*.”

The definition in the other two statutes is identical.

6.3.2.4 - Minister’s Power to Classify Violations

Under the power granted by section 4, the Minister³⁸³ may classify a violation as a minor violation, a serious violation or a very serious violation. The Minister may also fix a penalty or range of penalties in respect of each violation, within the maximum permitted by subsection 4(2), and criteria are specified in subsection 4(3) paragraphs (a) to (c), including the degree of intention or negligence of the person committing the violation, the harm done by the violation, and the prior history of the person who committed violation. The statutes administered by the USEPA go further by capturing the economic benefits accruing to the violator as a result of non-compliance, and at the USDA other factors, such as ability of the violator to pay and ability to continue to do business are taken into account.³⁸⁴

Pursuant to this authority, the Minister has promulgated regulations clearly establishing the three-fold classification of *violations* by setting it out in the two Parts of Schedule 1 to the Regulations made under the *AAAMP Act*.³⁸⁵ There are over 300 items in Division 1 (25 classifying violations of *Health of Animals Act* sections, the remaining classifying violations of *Health of Animals Regulations*). In Part 2, Division 1, there are 10 items covering *Plant Protection Act* sections, and in Division 2, 55 items classifying *Plant Protection Regulations*.

³⁸³ The Minister, for the purposes of the *Pest Control Products Act*, is the Minister of Health (as per s 2 of the Act). In all other cases, the Minister is the Minister of Agriculture and Agri-food.

³⁸⁴ See e.g., §5.3.2.1 at 94, above (EPA’s Uniform Penalty Policy) and §5.3.4.1.3 at 102, above (USDA, where the ability to pay and effect on ability to continue to do business must be taken into account).

³⁸⁵ SOR/2000-187, Schedule 1, Part 1, Division 1 – *Health of Animals Act*, Division 2 – *Health of Animals Regulations*, Division 3 – Import Reference Document; Part 2, Division 1 & 2 – *Plant Protection Act* and *Plant Protection Regulations*. The schedules were revised in 2002, 2003, 2004, 2005 and 2008 by SOR/2002-183, s 1; SOR/2003-256, ss 2-4; SOR/2003-385, ss 1, 2; SOR/2004-40, s 1; SOR/2005-190, ss 2- 4; SOR/2008-183, ss. 1(F), 2-8, adding more violations.

Schedule 2 gives the formula for penalty adjustments. The adjustment, whether up or down, is made after adding up the total gravity values for each of the three criteria set out in Schedule 3. Schedule 3 sets out criteria for establishing gravity values in respect of each serious and very serious violation in conformity with the power given in subsection 4(3) of the *AAAMP Act*, though not in the same order. These range from 0 to 5 under History and Intent or Negligence, and 1, 3 and 5 under Harm.³⁸⁶ For example, under "History", if the violator had no contravention in the previous five years,³⁸⁷ the gravity value is 0; if it had only one previous contravention in the preceding five years, the gravity value is 3; and if it had any other history (in addition to the number of contraventions), the gravity value is 5. Under "Intent or Negligence", if the violator committed a violation without intent or negligence, or makes a voluntary disclosure and takes necessary steps to prevent re-occurrence of the violation, the gravity value is 0; if the violation is committed through a negligent act, the gravity value is 3; and if the violation is committed through an intentional act, the gravity value is 5. Under "Harm", if the violation caused or could have caused only minor harm, the gravity value is 1; if it could have caused serious or widespread harm, the gravity value is 3; and if it did cause serious or widespread harm, the gravity value is 5. The "harm" referred to is harm to human, animal or plant health or to the environment, and monetary loss to any person.

The schedule applies only where the violations are serious or very serious, which means that the base penalty should be either \$6,000 or \$10,000, respectively.³⁸⁸ The gravity values computed under Schedule 3 are added and the score becomes the total gravity value, the maximum being 15. If the score is 5 and below, the penalty is progressively reduced by 10% from 50% to 10%; if the score is between 6 and 10 no adjustment is made; and if the score is between 11 and 15, the penalty is increased progressively by 10% from 10% to 50%.

³⁸⁶ The schedules are set out in Appendix 4 at 297, below.

³⁸⁷ The three-year period stipulated in SOR/2000-187 was raised to five years by SOR/2010-215 on 12 October 2010.

³⁸⁸ The penalty amounts of \$2,000 for a serious violation and \$4,000 for a very serious violation stipulated in SOR/2000-187, *surpa* note 385, were sharply increased to \$6,000 and \$10,000, respectively, by SOR/2010-215 on 12 October 2010.

The following observations may be made with respect to section 4:

(1) Under the governing statutes, in order for an act or omission to be an *offence* it has to be *knowingly* committed. This seems to be clear from sections 8 to 12 and 15, read with section 65 of the *Health of Animals Act* and sections 7 and 9 read with section 48 of the *Plant Protection Act*. The same can be said for the offences created by section 66 for failure to comply with notices issued under the two statutes. But this cannot be said for other sections of the two statutes. At the very least some of the offences in those sections, and offences of not complying with regulations, would be considered by courts as ones of strict liability, giving the accused the defence of due diligence. The amendment of the two statutes made in consequence of the *AAAMP Act*, defining a violation does not change the substance of the offence.

The statutes brought within the ambit of the *AAAMP Act*, however, have defined a violation as any contravention of any provision of, or the failure or neglect to perform any duties imposed by, the *Act* or *Regulations* made under those *Acts* and in addition, in the case of the *Plant Protection Act*, any contravention of any order made by the Minister made under that Act, which contravention, or failure or neglect may be proceeded with in accordance with the *AAAMP Act*.³⁸⁹ As a result of the combined provisions of the two statutes, i.e. section 2 of the *Health of Animals Act* and section 7 of the *AAAMP Act* (and similarly section 3 of the *Plant Protection Act* combined with section 7 of the *AAAMP Act*), the Minister has the power to determine which contraventions or failures or neglect can be decriminalized and treated as violations. No legislative guidance is given to the Minister.

(2) The Minister is given further discretionary authority to classify offences as violations but there is no legislative guidance on how that discretion is to be used.

The closest example where this problem is addressed is the *Regulatory Enforcement and Sanctions Act 2008* (U.K.), discussed in the chapter 5, which explicitly provides that no proceedings for a relevant offence may be brought unless it is also an offence under the governing statute.³⁹⁰ It might be noted that section

³⁸⁹ *Health of Animals Act*, *supra* note 8, s 2; *Plant Protection Act*, *supra* note 9, s 3; *AAAMP Act*, *supra* note 7, s 7.

³⁹⁰ *Supra* note 211, s 39(2) (fixed monetary penalties), s 42(2) (discretionary requirements).

42(4) of that Act³⁹¹ expressly provides that a regulator must not impose a fixed monetary penalty if it is satisfied that a person would not be liable to conviction for the relevant offence because of a defence. This indicates that when a contravention is proceeded with as a relevant offence, the defences available for the offence under the statute are not taken away. Such a restriction would better protect the rights of defendants than if it is left to the present unclear wording.

The offences created by the three agri-food statutes brought within the ambit of the *AAAMP Act* require *knowledge* or, at a minimum, negligence (if the offences could be interpreted as strict liability offences following the judgment of the Canadian Supreme Court in the *R. v. Sault Ste. Marie (City)*³⁹²). But neither the defence of due diligence nor mistake of fact is available under the *AAAMP Act* which section 18 expressly eliminates. It seems incongruous (although authorized by the *AAAMP Act* itself), that Schedule 3 of the *AAAMP Regulations* requires intention and negligence to be taken into account in determining the quantum of penalty, concepts which the statute has rejected in determining whether or not there was a violation.

6.3.2.5 - Dual Track

Section 5 provides a dual track for enforcement. The Minister may proceed with a contravention either as a violation under the *AAAMP Act* or as an offence under the relevant statute, but choosing one track precludes the other. This inevitably means that cases may be won or lost depending on which track the government proceeds.

A practice, such as that provided under the German *Ordnungswidrigkeiten* system by which the decision whether to continue with the proceeding as an administrative offence or as a criminal offence is left to the judge after hearing the evidence, would be worthwhile considering. Australian statutes contain specific provisions on criminal proceedings during civil proceedings or after they are commenced, and double jeopardy is carefully avoided.³⁹³

³⁹¹ *Ibid.*

³⁹² *Sault Ste Marie, supra* note 46.

³⁹³ These statutes have been discussed in chapter 5, above.

However, the decision whether or not to prosecute a contravention is not made by the Minister but by the federal Director of Public Prosecutions (D.P.P.). The Minister can only recommend that the contravention be prosecuted. At this stage, if the Director does not accept the recommendation for policy reasons, there is no bar to *amp* proceedings. On the other hand there is no obligation to consult with the D.P.P. if the Minister decides to proceed with a contravention as a violation.

6.3.2.6 - Violation Not an Offence

Section 17 makes it explicit that a violation is not an offence and that section 126 of the *Criminal Code* does not apply. That section makes it a crime to disobey a statute enacted by Parliament.

The principle of decriminalization is established by section 17 but it is within the power of the Minister to determine, by virtue of section 5, whether a contravention shall be a violation or be recommended for prosecution as an offence. In theory, the Minister may decide all breaches of the statutes brought within *AAAMP Act* should be proceeded with administratively even where violations have been committed repeatedly and despite uncovering a wrongdoing that indicated criminality. That decision is final and cannot be questioned even by the D.P.P. who has prosecutorial jurisdiction over all criminal matters.

6.3.2.7 - Defences of Due Diligence and Mistake of Fact Not Available

Section 18 expressly excludes the defences of due diligence and mistake of fact which are available to a person charged with a criminal offence, if the Minister decides to proceed with a contravention as a violation. By eliminating both defences absolute liability is introduced by section 18 for violations, subject, however, to subsection (2) of the section which recognizes common law rules and procedure. Although silent on the point, common law defences that would have been available are recognized by section 8 of the *Criminal Code*.³⁹⁴

Section 18 makes it easier for the Minister (in practice, the CFIA) to proceed with a contravention as a violation without any of the safeguards provided by the criminal law, especially the defence of due diligence which the Supreme Court of

³⁹⁴ *Supra* note 25.

Canada had declared must be made available to a person charged with a strict liability offence.³⁹⁵ If the inspector who detects a violation reasonably believes that it was committed by the person identified in the notice of violation, and has taken care to ensure the facts, the civil test of balance of probabilities to establish the violation is met.³⁹⁶ For this reason, the Law Reform Commission of Canada, in its Study Paper believed that “*civil penalties are a useful technique for administrative compliance policy, so long as they are not seen as simply name-changing to avoid problems created by the decision in Sault Ste. Marie and the current trend towards recognition of the due diligence defence.*”³⁹⁷

Despite the strong exception raised by scholars and judges to offences of absolute liability, courts have in proper cases allowed defendants to claim certain common law defences, such as act of God, *force majeure*, natural and irresistible forces, act of state, acts of war (and terrorism, in the modern context), act of strangers, duress, justification, necessity, and detrimental reliance on authority, etc. For this reason, it was the view of Leigh that absolute liability is not what is meant by that term.³⁹⁸ In this author’s view, it is a subset of strict liability.

The common law rules and procedures that are expressly recognized by the section but not spelled out, would include, among others: the principle of legality of the provisions under which a sanction is imposed, non-retroactivity, and the principle that a second administrative sanction for the same act must not be imposed

³⁹⁵ *Sault Ste Marie*, *supra* note 46.

³⁹⁶ Several cases both at the Review Tribunal stage and on review by the Federal Court of Appeal have been won or lost because the evidence either supported the charge of violation or the causal link was broken. In view of the strong position of CFIA in these proceedings, the Federal Court has emphasized that it is necessary for “the decision-maker to be circumspect in managing and analysing the evidence and in satisfying all essential elements of the violation and the causal link are met,” per Létourneau JA in *Doyon v Canada (AG)*, 2009 FCA 152, 312 DLR (4th) 142 at para 28, 395 NR 176 [*Doyon* cited to DLR]. See e.g., *Canada (AG) v Denfield Livestock Sales Ltd*, 2010 FCA 36, 399 NR 79 [*Denfield*]; *Thong v Canada (CBSA)*, 2010 CART 15. Several decisions have depended on interpretation of words, such as “undue suffering,” which the Tribunal had sometimes held to mean “slight”, ostensibly following the Federal Court decision in *Samson v Canada (CFIA)*, 2005 FCA 235, 140 ACWS (3d) 410, 339 NR 264, or “excessive” (rejected by Nadon JA in *Canada (CFIA) v Porcherie des Cedres Inc*, 2005 FCA 59, [2005] 3 FCR 539, 254 DLR (4th) 676), or the word “import” as in *Canada (CFIA) v Westphal-Larsen*, 2003 FCA 383, 232 DLR (4th) 486, 312 NR 378, in which Pelletier, JA rejecting the Tribunal’s interpretation (CART RTA#60041) held that “importation” occurred when the goods were brought into the country and not when they were presented for inspection.

³⁹⁷ Eddy, Study Paper, *supra* note 241.

³⁹⁸ *Supra* note 35 at 58.

(expressed in Latin by the phrase *ne bis in idem*). The common law procedural rights would include: the right not to be prejudged; the right to a fair hearing, to be informed of the charge for which the penalty is proposed; to have the violation proved beyond a reasonable doubt; to be given adequate time to make submissions against the charge; to examine witnesses and cross-examine government witnesses; to be heard and represented by counsel; impartiality of the decision-making authority, and the right to challenge the decision where the rules and procedures have not been respected, before courts. A comprehensive list of these rights and safeguards were set out by the Council of Europe and the AIDP in their recommendations referred to in Part I.³⁹⁹

There was considerable debate on the issue of due diligence in the House of Commons during Second Reading of Bill C-61 (the Bill to enact *AAAMP Act*) in the Committee. Some members opposed the exclusion on the ground that a person should not be held liable without any fault, others pointed out that in the *Aeronautics Act*, for instance, the defence of due diligence is available and officials of the Department of Transport who were called as witnesses opined that it did not hamper the enforcement of the designated provisions (which distinguished them from offences) in any way. It might be noted that enforcement agencies in other jurisdictions (such as the United States and Germany) which distinguish criminal offences from violations, before proceedings are commenced for a violation, generally do not proceed with an administrative infraction without some proof of negligence that indicates failure to exercise due diligence. The Minister, however, prevailed.⁴⁰⁰

The Federal Court of Appeal has had an occasion to make a critical observation on the *AAAMPS* penalty regime. Létourneau, J.A., in the leading case of *Doyon v. Canada (Attorney General)*, characterized it as a draconian system and set out six reasons for making that assessment: (1) the *Act* eliminates the principle of continuing violations and replaces it with a multiplicity of violations; (2) monetary

³⁹⁹ Many of these rights and procedural safeguards are listed in Chapter 3 under Council of Europe Recommendation R91(1) at §3.1.8.1.1 (*supra* note 199) and the XIVth AIDP Congress Recommendation at §3.1.8.2 (*supra* note 201). Rules of Canadian courts at all levels adequately provide for them which makes it unnecessary to spell them out in statutes.

⁴⁰⁰ Commons Debates, 1st Sess, 35th Parl, 17 January 1994 - 2 February 1996, *Hansard*, Sessions 1994-95, 1995-96, at 9515-24, 15839, 15850 and especially 16088.

penalties are substantial, depending on the gravity of the conduct; (3) The *Act* punishes diligent individuals, even if they took every reasonable precaution to prevent the commission of the alleged violation; (4) the *Act* denies to individuals who committed a violation the right to make a mistake even if the mistake could have been made by a reasonable person in the same situation; (5) the *Act* denies those individuals the benefit of any reasonable doubt which they would be entitled to in the case of penal offences, instead deciding guilt on the basis of a mere balance of probabilities; and (6) lastly, the individual is offered a discount if the penalty is paid quickly. *"In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor's burden of proof. Absolute liability, arising from an actus reus which the prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating himself or herself."*

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As noted earlier, intention and negligence are required by Schedule 3 of the *AAAMP Regulations* to be taken into account in determining the quantum of penalty which the statute has rejected in determining whether or not there is a violation. Why not make this a statutory requirement? Perhaps for administrative expedience, this defence can be eliminated for minor violations where penalties are low. A recommendation in that regard has been made in Part III of the thesis.

6.3.2.8 - Penalty for Continuing Violations

Section 21 states that a violation that continues for more than a day is deemed to be a separate violation. As Létourneau J.A. has pointed out in the *Doyon* case, this provision replaces the principle of continuing violations with a *"multiplicity of violations, depending on the number of days on which the violation in question occurred and giving rise to increased penalties."*⁴⁰²

There is no similar provision in the *Health of Animals Act* or the *Plant Protection Act* for continuing offences, although there is a provision in the third

⁴⁰¹ *Doyon*, *supra* note 396 at para 27.

⁴⁰² *Ibid* at para 22.

statute that has been brought under the *AAAMP Act*.⁴⁰³ This provision can be used by the Minister to cumulate the maximum penalty amount fixed by the *AAAMP Act* or regulation, thus increasing the final amount of penalty to make it truly deterrent, a factor that may cast a doubt on the legality of the provision, especially since absolute liability is created by the *AAAMP Act*.

Most contraventions consist of acts which, once committed, fully complete the offence. Though there may be repetition of such acts, each is regarded as attracting a separate fine or other sanction and, if a time limit on the initiation of proceedings applies, time will run separately for each independent breach even though it forms part of a series of multiple violations. An offence of a continuing nature normally comprises a single ongoing failure to perform some duty imposed by law. It is often difficult, except in cases such as pollution offences, to determine whether an offence is a single act or a continuing state of affairs. In the latter case, the failure to carry out the duty imposed gives cause for prosecution for each day it continues but separate, discrete acts or omissions can be prosecuted as only one offence. The same reasoning applies to violations. It is surely not the intention of the legislator that a continuing violation relates back to the date when the violation was detected or the date the Minister became aware of it, since there are no words indicating that in the section, or even earlier since a violation is not detected the moment it is committed, but at best from the time a notice of violation was issued. In the last situation, the violator should at least be put on notice that if the contravention is not remedied within a reasonable time, the CFIA might consider treating each day it continues as a separate violation.

Because the fine for continuing offences can be quite substantial, the legislator normally does not permit them to accrue on a daily (or weekly) basis until a conviction has been first obtained. For example, the *Clean Air Act* of South Australia provides for a daily penalty of not more than \$2,000 each day an offence continues after conviction or Court order.⁴⁰⁴ Another way in which the legislator reveals its intention to treat crimes as being of a continuing nature is to list one penalty for the substantive offence together with another which is described as a

⁴⁰³ This is the *Pest Control Act*, *supra* note 10, s 72. The provision did not exist in the repealed statute.

⁴⁰⁴ *Clean Air Act 1984 (SA)*, replaced by *Environmental Protection Act 1993 (SA)*, s 123, and since further updated and amended.

default penalty. The default penalty is applicable only to a continuing offence and cannot be incurred until at least one prior conviction for the same breach has been recorded. The US *Animal Health and Plant Protection Acts*, referred to in chapter 5, contain similar provisions.

In view of problems referred to above, a provision corresponding to section 21 of the *AAAMP Act* should be added to statutes coming within its ambit where continuing offences can be expected and what constitutes a continuing offence should be defined. A recommendation to that effect has been made in Part III of the thesis.

6.3.2.9 - Issue of Warning Instead of Penalty

Under section 7, an inspector or other enforcement official may be duly authorized by the Minister to issue a Notice of Violation with a Warning or with a Penalty in respect of any contravention that the inspector or official believes to have been committed and which has been designated as a *violation*. Section 8 gives the recipient of the warning the right to seek a review of the same by the Minister or, directly, by the Canada Agricultural Review Tribunal. If such review is not requested, the recipient is deemed to have committed the violation, which goes on the recipient's record.

6.3.2.10 - Penalty Amount and Criteria for Assessment

6.3.2.10.1 - Maximum Amount

The statutory maximum penalty depends on whether a violation is committed in the course of a business or otherwise, and whether it is committed to obtain a financial benefit. The maximum amounts are:

- (a) for a violation that is committed otherwise than in the course of a business and that is not committed to obtain a financial benefit, is \$2,000;
- (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.

The Minister has established fixed penalties within the maximum specified above, in section 5 of the *AAAMP Regulations* which are set out below:

(1) The penalty amounts for a violation committed by an individual otherwise than in the course of business and that is not committed to obtain a financial advantage, are: (a) for a minor violation, \$500; (b) for a serious violation, \$800 and for a very serious violation, \$1,300;

(2) The penalty amount for a minor violation that is committed by a person in the course of business or in order to obtain a financial benefit is \$1,300;

(3) The penalty amount for a violation that is committed by a person in the course of business or in order to obtain a financial benefit is (a) for a serious violation, \$6,000, and (b) for a very serious violation, \$10,000.⁴⁰⁵

6.3.2.10.2 - Increase or Reduction of Penalty – Criteria

The Minister is authorized by regulation to establish criteria for increasing or reducing the amount of penalty for a violation, but in the criteria so established, the Minister is required to include the following:

- (a) the degree of the intention or negligence on the part of the person who committed the violation;
- (b) the harm done by the violation; and
- (c) the history of the persons who commits the violation or prior violations or convictions under agri-food *Acts* within a *five year* period immediately before the violation.

AAAMP Regulations enacted by the Minister prescribe the criteria. While the *AAAMP Act* provides for a higher penalty if a violation is committed to obtain a financial benefit, there is no suggestion in the criteria established by the Minister that there is a recapture of the benefits realized by a defendant as a result of the violation. These benefits can be quite substantial. As noted in chapter 5, the US EPA has specifically built this recapture of benefits into its penalty calculation, using computer models. Without the ability to recapture ill-gotten gains directly attributable to a violation, all that a violator faces is a somewhat higher penalty.

⁴⁰⁵ *AAAMP Regulations*, SOR/2010-215, s 1. The penalty amounts until 12 October 2010 when the amendment was enacted were less than half the above amounts.

6.3.2.10.3 - Penalty Reduction for Prompt Payment

The Minister is authorized by regulation to grant an automatic reduction of penalty determined under the procedures, if it is paid within a prescribed time and manner.

The purpose of the reduction in penalty is to encourage payment without resorting to review or appeal procedures, thus saving both parties time and money, especially where the assessed penalty amount is small and not worth appealing. In return for a quick resolution, and peace of mind, a defendant in most cases is tempted to cave in. There is, however, no provision for payment of interest when the person issued a penalty notice that has become final, does not pay in time or not at all. Presumably, judgment interest can be collected under the Federal Court process. This point is addressed below, under Recovery of penalty.

6.3.2.11 - Issue of Notice of Violation with Penalty

Section 9 authorizes a designated inspector or other enforcement official to issue a Notice of Violation with a Penalty in accordance with the Regulations, after determining that there has been a *violation*, its level of seriousness and total gravity value, and the penalty established therefor. The recipient of the notice has four options: (a) pay the amount set out in the notice, with any abatement that has been specified for prompt payment, (b) request a review by the Minister of the facts of the violation, (c) as an alternative to Ministerial review, seek a review by the Canada Agricultural Review Tribunal of the facts of the violation, or (d) if the penalty stipulated is \$2,000 or more, request the Minister to agree to a Compliance Agreement for the purpose of reducing the penalty. If the recipient chooses option (a), i.e. to pay the amount demanded, he is deemed to have committed the violation, and no further proceedings may be taken. As noted previously, there is no other recourse to the Minister except to collect the penalty if not paid.

The review procedure is described after the Compliance Agreement option.

6.3.2.12 - Compliance Agreements in lieu of *Amps*

Compliance Agreements, the star feature of the *AAAMP Act*, are similar to Enforceable Undertakings, which are a unique feature of Australian legislation, described under the Australian *Environment Protection and Biodiversity Conservation*

Act, 1999 in chapter 5, and to Stipulations under the *Animal Health and Plant Protection Acts* of the United States described in the same chapter. Section 10 provides for entering into a compliance agreement if the recipient of the Notice of Violation with Penalty so requests, under option (d) of section 9. It should be noted that a request for a compliance agreement comes from the person to whom a Notice of Violation with a Penalty of at least \$2,000 has been issued by an official.⁴⁰⁶ Hence it is a contractual offer. The Minister may accept the offer with conditions attached, including the provision of a reasonable security as guarantee for the fulfillment of the agreement. In return, the Minister will offer a penalty reduction in whole or in part.

Entering into a compliance agreement is deemed to be acknowledging the violation and if the Agreement is satisfactorily performed and the Penalty, if any (i.e. after the reduction) is paid, further proceedings are terminated. If the Agreement is not complied with, the proceedings are re-started, but the amount of the original penalty is doubled and the security is also forfeited. That can be a deterrent.

Section 11 provides for the situation where the Minister refuses to enter into a compliance agreement. The person who requested the Agreement may ask the Canada Agricultural Review Tribunal to review the Minister's refusal. The Tribunal may review the facts of the violation and determine if there was any violation. It does not seem to have the power to direct the Minister to enter into the Agreement. If the Tribunal decides there was no violation, the decision is binding on the Minister and the proceedings are ended; the question of compliance agreement is thus moot. Because of this, the Minister has the sole power to agree or to reject an offer of agreement.

If the Minister were to accept a compliance agreement, the terms and conditions, and the security for performance, offered by a defendant must be satisfactory. In consequence, very few agreements have been entered into in the five years for which data was reviewed.⁴⁰⁷ If the Minister were to demand security

⁴⁰⁶ While penalties were increased in 2010 by *AAAMP Regulations, ibid*, for a serious and a very serious violation to \$6,000 and \$10,000 respectively, the minimum amount required for seeking a compliance agreement (\$2,000) is unchanged, as it is fixed by the *AAAMP Act, supra* note 7, s 9(2)(a).

⁴⁰⁷ Between 2001 and 2006 (FY 6 and FY 10), the Minister considered 30 requests for compliance agreements from persons issued notice of penalty, and rejected only one. One agreement was from a firm in the Atlantic Region, two from the Western Region (all 3 being completed by the client). Of the remaining 26, Quebec Region firms accounted for 17 of which 9 were not completed by the client (resulting in reinstatement of penalties for the full amount) and Ontario for 9, none of which was

equal to twice the amount of penalty set out in the Notice of Violation, there would probably be little incentive for the recipient of the notice to seek a compliance agreement in the first place, as it just becomes a collection action on the security. Entering into a compliance agreement, as stated earlier, is deemed by section 10 to be an admission of violation.

Another reason why firms are not attracted by compliance agreements is that the current penalty levels are low whereas they are quite high in the United States and Australia. Furthermore, because of the 50% discount when penalties are paid within the prescribed time to discourage prolonging the process, there is even less incentive for those who have been issued penalties to request a compliance agreement, as the firm would have to submit to additional supervision by CFIA inspectors relating to its fulfillment and they would probably feel better off paying the discounted amount of penalty. With the sharp increases in penalties that came into effect on October 12, 2010 there might be greater incentive for violators to offer compliance agreements.

Enforceable Undertakings in Australian legislation are similar to Canadian compliance agreements but as discussed in chapter 5, §5.4.3.3, payments agreed under them are directed for many other purposes and can be enforced through the courts.

By contrast, in the United States, under equivalent provisions in the *Animal and Plant Protection Acts*, "stipulations" (which correspond with compliance agreements) appear to be more popular according to data provided to the author by APHIS (Animal and Plant Health Service) of the US Department of Agriculture.⁴⁰⁸ The reasons may be the penalties under those statutes are much higher and the statutes allow negotiation of penalty amounts.

completed (also resulting in reinstatement of the full penalty). Thus, there was an average of 6 agreements a year of which only two were satisfactorily completed. CFIA had not demanded prepayment of any amounts where agreements were not completed, which in effect gave the firms extended time to pay their penalties.

⁴⁰⁸ Comparative data from APHIS show that in the corresponding five-year period (2002/2006) over 2,800 stipulations were accepted, nearly 2,500 of which were under Plant Protection and Quarantine Services.

6.3.2.13 - Rights of Review – Notice of Violation with Warning or with Penalty

The person who is alleged to have committed a *violation* and to whom a Notice of Violation with Warning or with Penalty is issued by an authorized official, is given a right to seek a review by the Minister or, at the person's option, the Canada Agricultural Review Tribunal. The person may also seek a review of the Minister's refusal to enter into a compliance agreement. The Tribunal's power is limited with respect to the last issue, as noted below.

6.3.2.13.1 - Review by the Minister

After receiving a request from a recipient of a Notice of Violation with a Warning or with a Penalty for review, the Minister is required by section 8 to review the facts of the violation.

Upon review, the Minister may determine whether or not the facts warrant the conclusion that a violation was committed, and whether or not there was a violation. If the Minister decides that there was no violation, the recipient of the notice of violation is notified and the proceedings are ended. The Minister may also decide that the amount of the penalty was not calculated in accordance with the regulations and correct the same, reducing (or increasing) the amount, in which case, the Minister has to notify the recipient of the notice of violation to pay the revised penalty amount.

6.3.2.13.2 - Review by the Canada Agricultural Review Tribunal

The review powers of the Canada Agriculture Review Tribunal (Tribunal) are set out in section 14.⁴⁰⁹ Upon request of a review from the recipient of a Notice of Violation with a Warning or with a Penalty, the Tribunal may confirm, vary or set aside the decision of the Minister, if the recipient of the Notice had first gone to the Minister for review. If the recipient had bypassed the Minister and gone directly to the Tribunal, the Tribunal has the power to determine whether or not there was a violation and, if there was, whether or not the penalty was established in accordance with the regulations. If the review was in respect of a refusal by the Minister to

⁴⁰⁹ The Tribunal was established under s 4.1 of the *Canada Agricultural Products Act*, *supra* note 356. Its full-time chairman and other members (who may be full- or part-time) are appointed by the Governor in Council.

enter into a compliance agreement, the Tribunal's power is confined to determining the facts of the violation.

The Tribunal's decision is final. If it decides that there was no violation, the proceedings are terminated forthwith. If it confirms the violation but varies the penalty amount, the revised amount is set out in its Order and is payable by the applicant, and upon payment, the proceedings are terminated.

The Minister is authorized to prescribe by regulation the circumstances under which reviews by the Tribunal shall be oral or in writing. The procedure before the Tribunal is prescribed in the Rules of Procedure made by the Tribunal and approved by the Governor in Council on the recommendation of the Minister of Agriculture and Agri-Food.⁴¹⁰

6.3.2.13.3 - Judicial Review

The Minister or the person aggrieved by the Tribunal's decision can apply to the Federal Court of Appeal for judicial review⁴¹¹ under the *Federal Court Rules*. The Court may confirm or set aside the Tribunal's decision and send it back for a further review on the basis of its judgement.⁴¹²

6.3.2.14 - Recovery of Penalty

When a penalty has become final, the amount of the penalty is deemed to be a debt owing to Her Majesty in right of Canada from the time the proceedings were commenced or, in the case of a compliance agreement, from the time the compliance agreement is entered into; and may be recovered in the Federal Court.⁴¹³ Where there was default in payment, time begins to run from the date of the default notice; where the Tribunal has made a penalty amount order, time begins to run from the date of the Tribunal's Order. Reasonable expenses incurred in recovery of

⁴¹⁰ *Rules of the Review Tribunal (Agriculture and Agri-Food)*, SOR/99-451, s 8(3).

⁴¹¹ *Federal Court Act*, RSC 1985, c F-7, s 28.

⁴¹² *Federal Court Rules*, SOR/98-106.

⁴¹³ *AAAMP Act*, *supra* note 7, s 15.

the debt may be added to the debt. The time limit for the recovery of the debt is five years.

6.3.2.15 - Prescription Period for Proceedings in respect of Violations

Section 26 of the *AAAMP Act* has prescribed 2 years for the commencement of a proceeding for serious and very serious violations. That is the same period for prosecuting summary offences under the *Health of Animals Act*⁴¹⁴ and the *Plant Protection Act*.⁴¹⁵ For minor violations, that period is 6 months.

6.3.2.16 – Expunging Violations from Record

Pursuant to section 23, a person whose name is put on the record of notices of violations with warning or with penalty kept by CFIA has a right to apply to the Minister for the removal of their name from the record after the expiration of five years which commence from the date of the notice of violation with warning or, if it is a notice of violation with penalty, from the date the penalty is paid. The Minister is required to remove their name unless the Minister is of the opinion that it is not in the public interest to remove the name, or there is a subsequent notation of a violation. On removal of a name, a notice has to be sent to the applicant.

6.4 - New and Proposed Legislation

This section gives highlights of new and proposed legislation that incorporates *AMPS*. The purpose of including the section is, first, to point out developments that were inspired by the *AAAMP Act*, and, secondly, to indicate areas of departure from the *AAAMP Act* which might be worth considering for changes to the *AAAMP Act*.

Two statutes, one new and the second an amendment to an existing statute, contain provisions on administrative monetary penalties very similar to the *amp* under the *AAAMP Act* analyzed in Section II. Two Bills presented to Parliament in 2007, one by the Minister of Fisheries and Oceans and the other by the Minister of Transport are also featured.

⁴¹⁴ *Supra* note 8, s 68.

⁴¹⁵ *Supra* note 9, s 51.

6.4.1 - New Legislation

6.4.1.1 - *Canada Grain Act Amendment Act*⁴¹⁶

The Act incorporates the *AAAMP Act*,⁴¹⁷ thereby allowing the Canadian Grain Commission (CGC) to impose monetary penalties or fines for most violations of the *Canada Grain Act* and its regulations. Present enforcement mechanisms in the *Act* are limited in scope, most being too harsh and costly to impose. For example, criminal prosecution or suspension of a licence is the only enforcement tool available for some minor infractions. The *AAAMP Act*, which has already been extended to the enforcement of the *Health of Animals Act*, the *Pest Control Products Act*, and the *Plant Protection Act*, offered an established system for enforcing the *Canada Grain Act* that would encourage compliance with established standards of quality.

Administrative sanctions already provided in the *Act*, such as restrictions on operations, revocation or suspension of, or refusal to issue, a licence, seizure of assets, reporting of violations, detention of documents and records, continue to be available, in addition to *amp*.

Criminal offenders are liable to a fine not exceeding \$50,000 or a prison term not exceeding six months for any offence on summary conviction, or a fine not exceeding \$250,000 or a prison term not exceeding two years for an indictable offence. Administrative monetary penalties for a *violation* of the *Canada Grain Act* are those stipulated in the *AAAMP Act*.

The amendment to the *Act* comes into force on a day to be fixed by the Governor in Council. Although 10 years have elapsed since the enactment, it has not been proclaimed in force.

⁴¹⁶ *An Act to Amend the Canada Grain Act and the Agriculture and Agri-Food Administration Monetary Penalties Act and to Repeal the Grain Futures Act*, SC 1998, c 22 (the Act is not yet in force).

⁴¹⁷ *Supra* note 7.

6.4.1.2 - *Office of the Superintendent of Financial Institutions Act and the Administrative Monetary Penalties (OSFI) Regulations*

The *Office of the Superintendent of Financial Institutions Act (OSFI Act)* was passed by Parliament in 1985⁴¹⁸ and came into operation in 1987. The *Act* empowers the Superintendent of Financial Institutions (such as banks, cooperative credit societies, loan and trust companies, insurance companies and Green Shield Canada) in supervising the administration of these companies, to impose *amp* with respect to any contraventions of the included statutes that the Governor in Council designates as violations. Those statutes contain their own offence provisions, some based on *mens rea*, others on strict liability. The *amp* provisions, which came into effect 20 years after the *OSFI Act* was enacted, are contained in the *Administrative Monetary Penalties (OSFI) Regulations*.⁴¹⁹

6.4.1.2.1 - Designation of a Contravention as a Violation

By subsection 28(1) of the *OSFI Act*, every contravention of or non-compliance with the governing statute or that is designated under paragraph 25(1) (a) constitutes a violation and the person who commits the violation is liable to a penalty determined in accordance with sections 25 and 26.

Under section 3 of the *OSFI Regulations*, the contravention of a provision of a financial institutions *Act* that is set out in columns 2 to 5 of an item of the schedule, or non-compliance with an order or direction made, of any terms and conditions imposed, any undertaking given or any prudential agreement entered into, under a provision of a financial institution *Act* that is set out in columns 2 to 5 of an item of the schedule, is designated by the Governor in Council as a violation that may be proceeded with under sections 26 to 37 of the *Act*. Section 4 of the *OSFI Regulations* has designated three classes of violation, namely, a minor, a serious and a very serious violation, which are set out in column 6 of the schedule.

⁴¹⁸ *OSFI Act*, *supra* note 154.

⁴¹⁹ SOR/2005-267, 31 August 2005.

6.4.1.2.2 - Penalties

Subsection 25(1) of the *OSFI Act* empowers the Governor in Council to fix a penalty or range of penalties in respect of any violation, subject to the maximum amounts specified in subsection 25(2), which are:

- (a) in the case of a violation that is committed by a natural person, \$10,000 for a *minor* violation, \$50,000 for a serious violation and \$100,000 for a very serious violation; and
- (b) in the case of a violation that is committed by an *entity*, \$25,000 for a minor violation, \$100,000 for a *serious* violation and \$500,000 for a very serious violation.

Violations that are classified as minor in the schedule to the Regulations are subject to a penalty from \$100 to \$500, based on the total assets of the financial institution, bank or insurance holding company. These violations involve late or erroneous filing of information required by the governing statutes.

6.4.1.2.3 - Continuing Violations

Each day a minor violation continues is deemed to be a separate violation for which the amount of penalty is not a multiple of the fixed amount referred to above, but the lesser of the penalty fixed under subsection 5(1) of the *Regulations* and the amount determined by dividing \$25,000 by the total number of those separate violations.⁴²⁰

6.4.1.2.4 - Criteria for Establishing Violations

Section 26 of the *Act* requires the Governor in Council to take into account several criteria, similar to those in section 21 of the *AAAMP Act*. These are:

- (a) the degree of intention or negligence on the part of the person who committed the violation;
- (b) the harm done by the violation;

⁴²⁰ *AAAMP Act*, supra note 7, s 21; *OSFI Regulations*, *ibid*, s 5(2).

- (c) the history of the person who committed the violation with respect to any prior violation or conviction under a financial institutions Act within the five-year period immediately before the violation; and
- (d) any other criteria that may be prescribed by regulation.⁴²¹

6.4.1.2.5 - Violation Not an Offence – Dual Track

Section 33 makes it abundantly clear that a violation is not an offence and, accordingly, section 126 of the *Criminal Code* does not apply in respect of it. If a contravention or non-compliance that is designated under paragraph 25(1)(a) is proceeded with either as a violation or as an offence, section 27 bars a proceeding on one track (as a violation) from proceeding on the other track (prosecution), and *vice versa*.

6.4.1.2.6 - Due Diligence Defence and Common Law Rules Available

Section 34(1) expressly allows the defence of due diligence in any proceeding with respect to a violation. Subsection 34(2) also makes it clear that every rule and principle of the common law that renders a circumstance a justification or an excuse in relation to a charge for an offence under the governing financial institutions Act applies in respect of a violation to the extent that it is not inconsistent with this Act.

6.4.1.2.7 - Penalty Proceedings Commenced by a Notice of violation

Penalty proceedings are commenced in accordance with section 28 by the Superintendent serving a notice of violation and setting out the amount of penalty that the Superintendent proposes to impose. The person who is served with the notice must either pay the penalty within 30 days, or such longer time as the Superintendent allows, or appeal the notice to the Federal Court under section 30. If the person neither pays the penalty nor makes any representations in accordance with the notice, the person is deemed to have committed the violation and the penalty, subject to any reduction by the Superintendent in accordance with the *Regulations*, becomes final. If the person pays the penalty, the proceedings are ended but the person is deemed to have committed the violation. There is no right of appeal against a penalty for a minor violation.

⁴²¹ AAAMP Act, *Ibid*, s 26.

When communicating the decision on the penalty, the Superintendent is required by section 29 to specify in the notice that the person who has committed a serious or a very serious violation has a right to appeal within 30 days to the Federal Court.

6.4.1.2.8 - Appeal to the Federal Court

Subsection 30 (1) allows a person on whom a notice of violation has been served by the Superintendent under subsection 29(4) in respect of a serious violation or very serious violation, within 30 days after the notice is served, or within any longer period that the Court allows, to appeal the decision to the Federal Court.

On such appeal, the Court may confirm, set aside or, subject to any regulations made under paragraph 25(1) (c), vary the decision of the Superintendent.

6.4.1.3 - *International Bridges and Tunnels Act*⁴²²

This enactment establishes an approval mechanism for the construction, alteration and acquisition of international bridges and tunnels and provides for the regulation of their operation, maintenance and security. The general offence and penalty section makes the contravention of a provision of the *Act* or any regulation or order made under it, for which no other offence is specified in the *Act*, an offence which may be proceeded with by summary prosecution and upon conviction, the offender is liable to a fine not exceeding \$5,000 if an individual, and not exceeding \$25,000, if a corporation.

6.4.1.3.1 - Designation of Contravention as Violation

Section 43 empowers the Minister by regulation to designate as a provision or requirement the contravention of which may be proceeded with as a violation in accordance with sections 45 to 55, and to prescribe the maximum amounts payable for each violation, which are the same as for a general offence under section 42, above.

⁴²² *IBT Act*, *supra* note 192.

6.4.1.3.2 - Continuing Violations

Section 45 (2) provides that a violation that is committed or continued on more than one day constitutes a separate violation for each day on which it is committed or continued.

6.4.1.3.3 - Double Jeopardy

Double jeopardy is eliminated by subsection 45(3). If an act or omission is proceeded with as a violation, it precludes proceeding with it as an offence, and *vice versa*.

Subsection 45(4) further provides, for greater certainty, that a violation is not an offence and accordingly section 126 of the *Criminal Code* does not apply.

6.4.1.3.4 - Limitation Period for Contravention Proceedings

A 12-month limitation period for proceeding with an act or omission as a contravention is stipulated by section 55.

6.4.1.3.5 - Appeal to Transportation Appeal Tribunal of Canada

An application for review of the Minister's decision holding that a person has contravened a designated provision and imposing a penalty can be made to the Transportation Appeal Tribunal of Canada (TATC) under section 48. The application is heard and determined by a member of TATC. Under section 50, the Minister has the burden of establishing the violation. An appeal against that determination can be taken under section 53 by either the Minister or the person affected by the determination, which is heard by an appeal panel of the TATC. The appeal panel's disposition of the appeal is final and binding on the parties.⁴²³

⁴²³ *TATC Act*, *supra* note 332, s 21. Judicial review is available under the *Federal Court Act*, *supra* note 411, s 28.

6.4.1.4 - Amendments to the *Canada Marine Act*, the *Canadian Transportation Act* and the *Pilotage Act*

6.4.1.4.1 - Administrative Monetary Penalties

An amendment to the *Canada Marine Act*, the *Canadian Transportation Act*, *Pilotage Act* and other Acts in 2008⁴²⁴ has added sections 129.01 to 129.19 establishing an administrative monetary penalty scheme and identifying the Transportation Appeal Tribunal of Canada (TATC) as the body to hear appeals against ministerial decisions on administrative penalties.

6.4.1.4.2 - Purpose of Amendment

Section 129.04 of the *Act* states that the purpose of the administrative monetary penalty is to promote compliance, not punishment. This purpose is emphasized by section 129.02 which requires the Governor in Council to take it into account when establishing penalties. It is the view of Departmental officials that enforcement by way of administrative monetary penalties is more efficient and flexible than by way of summary conviction, which is the prescribed punishment under several provisions of the amended statutes.

6.4.1.4.3 - Designation of Contraventions

The Governor in Council is empowered by the amendment (a) to designate as a contravention any provision of the statute, regulation or instruction that may be given under the regulations, (b) to establish penalty amounts, and (c) to establish criteria to be taken into account in determining the penalty.⁴²⁵ The maximum penalty for a particular violation may not exceed \$5,000 for an individual and \$25,000 for a ship. Every person or ship that contravenes a provision or instruction so designated commits a violation and is liable to the penalty established by the regulations under this section.⁴²⁶

⁴²⁴ *Supra note 333.*

⁴²⁵ *Ibid*, s 129.03.

⁴²⁶ *Ibid*, s 129.02.

6.4.1.4.4 - Penalty Criteria⁴²⁷

In addition to taking into account the purpose of a penalty, the following penalty criteria, similar to those in the *AAAMP Act* and *International Bridges and Tunnels Act*, referred to above are stipulated:

- (a) the seriousness of the violation, including frequency and duration of the conduct;
- (b) the history of the person or the ship that has been served with the notice of violation;
- (c) any other criteria established under section 129.03(c).

6.4.1.4.5 - Continuing Offences

Section 128(1) that currently applies to persons is extended to ships. That provision provides that an offence committed on more than one day or continued for more than one day is deemed a separate offence for each day on which it is committed or continued.

6.4.1.4.6 - Review Process

Section 129.08 describes the review process before the TATC. The process begins when an enforcement officer issues and serves a notice of violation pursuant to section 129.05(1), based on reasonable grounds to believe that a person or ship has committed a violation. The person or ship that has been served with a notice of violation must either pay the penalty set out in the notice or file a written request with the TATC under section 129.06 for a review of the facts of the alleged violation or of the amount of the penalty. The TATC assigns one of its members to review the case.

If the person or ship pays the penalty in accordance with the notice of violation, the person or ship is deemed by section 129.07 to have committed the violation and proceedings in respect of the violation are ended. Similarly, if the person or ship neither pays the penalty nor files a request for review in accordance with the particulars set out in the notice of violation, it is by section 129.09 deemed to have committed the violation (section 129.09).

⁴²⁷ *Ibid*, s 129.04.

Section 129.12 sets out certain amounts that constitute debts to the federal Crown that may be recovered in a court of competent jurisdiction with certain exceptions and other conditions.

Section 129.13(1) allows the TATC to certify, at the request of the Minister, all or part of a debt referred to in section 129.12 in respect of which there is a default of payment. According to proposed section 129.13(2), a certificate made under proposed section 129.13(1), when registered in a superior court, has the same force and effect as if it were a judgment obtained in that court for the amount of the debt specified in it and all reasonable costs and charges attendant in its registration.

At the review, the Minister has the burden of proving that the applicant has committed the violation identified in the notice of violation. The applicant is not required, and cannot be compelled, to give any evidence or testimony in the matter (section 129.08(5)).

By section 129.1(3), upon conclusion of the review, the member of the TATC who conducts the review may make one of two findings: that the applicant did or did not commit the alleged violation of the *Canada Marine Act*. If the member determines that the person or ship has committed the alleged violation, then the member must inform the applicant and the Minister of the amount of the administrative monetary penalty determined by the member to be payable.

Either party to the proceeding may appeal against that determination to the TATC within 30 days after the determination. Section 129.11(2) does not permit parties that do not appear at review hearings to appeal a determination, unless they can establish that there was sufficient reason for the absence. The appeal is heard before an appeal panel of the TATC, which may dispose of the appeal by either dismissing it or allowing it. In the latter case, the appeal panel may substitute its decision for the determination appealed against. If the appeal panel finds that a person or ship has committed the alleged violation, the panel must without delay inform the person or ship of the finding and of the amount of the administrative monetary penalty determined by the panel to be payable in respect of the violation.

6.4.1.4.7- Defence of Due Diligence – Dual Track

Section 129.17 gives the defendant, including a ship, that has been found to have contravened a designated provision the right to plead due diligence as a defence.

Section 129.16 makes it explicitly clear that section 126 of the Criminal Code does not apply to a contravention and, as a corollary, under section 129.18 a decision by the Minister to proceed with an act as either a violation or an offence, precludes the other option.

6.4.1.5 - *Canada Shipping Act, 2001*⁴²⁸

The *Canada Shipping Act*, one of the oldest pieces of Canadian legislation, was streamlined and modernized in 2001 when the new enactment, *Canada Shipping Act, 2001* received Royal Assent on November 1, 2001. The new Act was brought into force only on July 1, 2007. Part 11 of the Act establishes the administrative penalty system for contraventions designated as violations to which the provisions of sections 229 to 244 are made applicable. It empowers the Governor in Council to designate by regulation the violation of any provision (other than those in Parts 5, 7, 8 and 10 which are prosecuted in the usual way, including the issuance of tickets under the *Contraventions Act*⁴²⁹) and fix a range of penalties with a maximum of \$25,000 but no greater than the maximum prescribed in the Act for summary offences.

The principal features of the *Canada Shipping Act, 2001* are the same as in the *AAAMP Act* and have been described earlier in this chapter. Hence, other than pointing out those features, no further explanation is given.

The definition of a violation, issue of a notice of violation, and assurance of compliance (which are called compliance agreements in the *AAAMP Act*) are almost identical, and so also are the notation of violations on the offender's record, the application of the common law principles and the rule that once it is decided to proceed one way (i.e. administratively), the other way (criminal prosecution) is

⁴²⁸ *Supra* note 192.

⁴²⁹ *Supra* note 106.

barred. Similarly, the *Act* makes it clear that a violation is not a criminal offence and section 126 of the *Criminal Code* does not apply.

While the Minister has to establish that a violation was committed, the *Act* is silent as to whether the violator has a defence of due diligence – which is expressly excluded by the *AAAMP Act*. The only other differences between the latter and the *Canada Shipping Act* are: (1) the Governor in Council designates provisions of the *Act* as violations and fixes the range of penalties, not the Minister as in the case of *AAAMP Act*; (2) the Governor in Council (not the Minister) decides which contraventions are “continuing violations” (no criteria are set out in the *Canada Shipping Act*); and (3) there is no internal review, but an application for review of the Minister’s decision can be made to the TATC where the procedure is identical to that described under the amendments to the *Canada Marine Act*, the *Canadian Transportation Act* and the *Pilotage Act*, described earlier.⁴³⁰

Regulations were promulgated in 2008⁴³¹ setting out the offences in the *Act* that can be proceeded with as violations and fixing the range of penalties according to the gravity of the offence as determined by the Department under three severity levels: Low, Medium and High. The range of penalties covers individuals and vessels/corporations. The Regulatory Impact Analysis states that for the present only 76 items (covering about 40 sections of the *Act*) have been designated as violations and that a comprehensive list of all relevant provisions, with penalty ranges, will be prescribed in due course. The penalty matrix designed by the Department, as published in the *Canada Gazette*,⁴³² is reproduced below:

⁴³⁰ See §6.4.1.4.6 at 174, above. Authority to designate offences and fix the range of penalties, and to decide which contraventions are “continuing violations” is conferred on the Governor in Council, which is a better approach in Parliament’s view, the same power given in the *AAAMP Act* to the Minister would seem to be an anomaly.

⁴³¹ *Administrative Monetary Penalties Regulations*, SOR/2008-97.

⁴³² *Ibid* at 625.

Canada Shipping Act Penalty Matrix

GRAVITY	FIRST VIOLATION Individual/Vessel & Corporation	SECOND VIOLATION Individual/Vessel & Corporation	SUBSEQUENT VIOLATIONS Individual/Vessel & Corporation
LOW	\$250 to \$1,000	\$500 to \$2,000	\$1,000 to \$5,000
MEDIUM	\$600 to \$3,000	\$1,200 to \$6,000	\$2,400 to \$12,000
HIGH	\$1,200 to \$6,000	\$2,000 to \$12,000	\$5,000 to \$25,000

6.4.1.6 - *Environmental Violations Administrative Monetary Penalties Act*

Bill C-16⁴³³ was introduced by the Minister of the Environment on March 4, 2009 and received quick passage in the House of Commons. Section 126 of the *Act* enacts the *Environmental Violations Administrative Monetary Penalties Act*, establishing an *amp* system for the enforcement of 7 environmental statutes administered by the Minister of the Environment, including the *Canadian Environmental Protection Act, 1999* (CEPA), and 3 statutes administered by the Minister responsible for the Parks Canada Agency.⁴³⁴

The *Act* adopts the principal features of the *AAAMP Act*,⁴³⁵ especially the denial of due diligence and reasonable mistake defences, and the fixing of maximum penalties, but differs from the latter in three important respects, namely:

1. The powers to designate what constitutes a violation and to fix the penalty amounts are given not to the Minister but to the Governor in Council. Only

⁴³³ Bill C-16, *Environmental Enforcement Act*, 2nd Sess, 40th Parl, 2009 (as passed by the House of Commons 13 May 2009); now SC 2009, c 14. Section 126 of the *Act* enacted the *Environmental Violations Administrative Monetary Penalties Act*, *supra* note 105.

⁴³⁴ The 10 "Environmental Acts" are: (1) *Antarctic Environmental Protection Act*; (2) *Canada Water Act*; (3) *Canada Wildlife Act*; (4) *Canadian Environmental Protection Act, 1999*; (5) *International River Improvements Act*; (6) *Migratory Birds Convention Act, 1994*; (7) *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* (all these administered by the Minister of the Environment); and (8) *Canada National Marine Conservation Areas Act*; (9) *Canada National Parks Act*; and (10) *Saguenay-St. Lawrence Marine Park Act* (the last three administered by the Minister responsible for Parks Canada Agency): section 2.

⁴³⁵ *Supra* note 7. Provisions of this *Act* have been analysed, *supra* note §6.3.2.7 and ff (pages 153 and ff).

contraventions and failures to comply that are offences under any of the 10 environmental statutes (in the case of CEPA, only under the provisions of Part 7 and 9) may be designated by the Governor in Council as a violation. Penalty amounts established by regulations are not to exceed \$5,000 in the case of an individual and \$25,000 in the case of any other person.

2. An appeal against an administrative penalty may only be taken to the Chief Review Officer appointed under section 245 of the *Canadian Environmental Protection Act*, 1999, whose decision is final, subject only to judicial review under the *Federal Court Act*.

3. All penalties collected by the government are to be credited to the Environmental Damages Fund, an account in the accounts of Canada, and used for purposes related to protecting, conserving or restoring the environment or for administering that Fund. [This is a rare concession as the government seldom allows fines and penalties to be deposited anywhere but in the Consolidated Revenue Fund of Canada].

Environment Canada officials were active members of the team that consulted internationally at the turn of the 1990s and took part in all the departmental meetings leading up to the development of the *AAAMP Act* in 1995.⁴³⁶ They were provided full access to all the background materials that went into the development. For reasons that were not apparent, the Minister of the time decided not to go ahead with similar legislation at that time, but it appears that with the passage of amendments to the Ontario *Environment Protection Act* legislating environmental penalties in 2005 and the *Regulatory Enforcement and Sanctions Act 2008*⁴³⁷ by the U.K. in November 2008, the current Minister concluded that the time was opportune for similar legislation in Canada.

⁴³⁶ *Ibid.* The power to designate what are violations and to fix penalties is given by Parliament to the Governor in Council, which indicates a trend away from conferring power on the Minister to exercise penal powers.

⁴³⁷ *Supra* note 211. See chapter 5, above, where this statute is briefly discussed.

6.4.2 - Proposed Legislation

6.4.2.1 - Proposals for New *Fisheries Act*⁴³⁸

The proposed *Fisheries Act* introduced by the Minister of Fisheries and Oceans in the 39th Parliament will provide for an administrative monetary penalty system in Part 5, creating a Fisheries Tribunal to deal with the majority of *Fisheries Act* violations, thereby reducing reliance on criminal courts.

Part 5 of the proposed Act would allow certain offences to be dealt with by applying sanctions to fishing licences, such as reductions in quotas, licence suspensions and fines. It would also provide clear guidance for applying Alternative Measures Agreements (AMA) as a method of dealing with some infractions, avoiding use of the criminal courts. An AMA would be available to individuals who are prepared to accept responsibility for fishery and habitat offences and who are ready to take steps to remedy the wrong.

Penalty imposition will be delegated to enforcement officers who are called *case presentation officers* in the legislation.

Part 5 proposes to classify *violations* as major and minor, which are defined and set out in sections 172 to 175. A contravention that is a violation may not be proceeded with as an offence, and *vice versa*. Procedure relating to violations, such as notice of violation, hearing, tribunal's decisions and sanctions are set out in sections 181 to 185. A maximum monetary penalty for a major violation of \$30,000 is prescribed, but for a minor violation, the Governor in Council is authorized to prescribe a penalty not exceeding \$3,000. The Governor in Council is also authorized to prescribe what constitutes a minor and major violation.

6.5 - Provincial Examples

Examples of two provincial administrative monetary penalty regimes, one in British Columbia under the workers' compensation statute, which antedates the Federal *AAAMPS*, and the other in Ontario under the environmental protection statutes, which came into force in 2007, are described below to illustrate how

⁴³⁸ Bill C-32, *An Act respecting the sustainable development of Canada's seacoast and inland fisheries*, 2nd Sess, 39th Parl, 2007 (first Reading 29 November 2007). The Bill did not become law before the 30th Parliament ended on 7 September 2008.

provinces are resorting to non-criminal tools to enforce compliance in preference to prosecution.

6.5.1 - OHS Administrative Penalties in British Columbia:

The Workers' Compensation Board of British Columbia (WorkSafe BC) is given authority by section 196 of the *Workers' Compensation Act*⁴³⁹ to levy administrative monetary penalties, on employers for failing to comply with the Act, with the regulations or with orders. WorkSafe BC can also stop hazardous work and levy administrative penalties on employers who use unsafe work practices that pose a high risk of death, serious injury or disease. Administrative penalties will not be imposed if the employer has exercised due diligence to prevent the violation or unsafe condition. In this respect alone, the B.C. compensation regime differs from the *AAAMP Act*.

Many factors are considered by enforcement officers in determining whether to pursue *amp*. They include:

- (1) The degree of hazard associated with the violation;
- (2) The employer's past history of compliance;
- (3) Whether the employer deliberately violated Work Safe requirements;
- (4) Whether the employer has a complacent attitude toward compliance;
- (5) The adequacy of employer OHS program and evidence that the employer is actively pursuing a program of compliance with the Act, and the regulations;
- (6) The training and instructions workers receive on how to perform their job safely;
- (7) The training provided to supervisors and managers about their health and safety duties; and
- (8) Whether workers were properly supervised.

If an administrative penalty is imposed, the employer cannot be prosecuted under the *Act* in respect of the same facts and circumstances upon which the administrative penalty was based. There is thus no double jeopardy.

⁴³⁹ RSBC 1996, c 492. Information provided by John McNamee, Attorney and Manager, Compliance Section, Investigation Division, WorkSafeBC, in a personal interview on 16.04.08 and by emails of 14.01.08 and 18.08.09.

In addition to providing a defence of due diligence, there are further differences from the Federal *AAAMP Act*. Penalties have a direct impact on employers' contribution to insurance premiums. Penalties do not become part of the province's general revenue but must be deposited into the accident fund to cover the amount paid by way of compensation to the family of deceased workers, and to injured and sick workers under sections 73 and 220.

For 2002 - 2007 inclusive there were only two prosecutions. One was stayed in October 2003. The second was commenced in January 2007 and a plea and sentencing are pending. In the same period, over 600 penalties were issued, the average amount being approximately \$15,000. In lieu of penalties, the Commission also issued approximately 970 warnings during the same period.⁴⁴⁰

In John McNamee's opinion⁴⁴¹, legislative and policy changes that came into effect in early 2003 considerably increased penalty amounts thereby making penalties a more effective tool for motivating employers. There is a high level of penalty acceptance of the penalties levied. Roughly 60-70% of employers do not seek a review by the Board or appeal to the courts.

6.5.2 - Environmental Penalties in Ontario

The Ontario Legislature passed the *Environmental Enforcement Statute Law Amendment Act* on June 9, 2005, known as Bill 133, amending the *Environmental Protection Act*⁴⁴² and the *Ontario Water Resources Act*⁴⁴³ and giving the government authority to establish by regulations environmental penalties to deal with most contraventions that were not deliberately committed without foreclosing the option of

⁴⁴⁰ Data on penalties were downloaded (and summarized) from Statistics Reports for the years 2002-2006 available online: WorkSafe BC <www.worksafefbc.ca>.

⁴⁴¹ John McNamee is an attorney with WorkSafe BC and Manager of its Compliance Section; he provided his opinion by an email dated 14.01.08. In this email McNamee points out that prosecutions take a very long time to conclude, giving the example of one prosecution which took 7 years to conclude with all the appeals having run their course. He states that, in contrast, administrative appeals are disposed of much more quickly, with a maximum resolution period of 450 days if the total time limits are reached.

⁴⁴² RSO 1990, c E-19.

⁴⁴³ RSO 1990, c O-40.

prosecution. The legislation provides for an appeal to the Environmental Review Tribunal, but none of the penalty notices has been appealed.⁴⁴⁴

Regulations establishing the new environmental penalty regime came into force on August 1, 2007⁴⁴⁵. Under the law, all penalties are required to be deposited into a special purpose account that would provide financial assistance to impacted communities who undertake environmental restoration and rehabilitation projects, research and development projects, and education and outreach programs. Although the legislation authorizes penalty amounts of up to \$100,000, the Ministry has been cautious by not exercising its authority to the fullest. The Ministry estimates the average penalty amounts for spills and spill related violations to be in the range of \$10,000 and \$20,000, for limit exceedances to be \$5,000 and for failure to submit a report to be \$1,000. Only 7 *amps* were issued by the Director in the first year of its operation, averaging approximately \$10,000. In 2009 the Ministry issued six notices of violation, the penalty amounts of which have not been disclosed at this point but the Ministry has indicated that they will be made public in its 2009 Annual Report.

Environmental penalties apply to those facilities that are part of the nine industrial sectors regulated by the Municipal-Industrial Strategy for Abatement (MISA) regulations. They have been introduced in stages; in the first phase they covered 148 major industrial facilities that together cause about one third of reported industrial spills; they were extended to paperwork violations in December 2008. The Ministry predicts that average penalties will be \$1000 for paper violations, and \$10,000 to \$20,000 for spills. However, they could be much greater: the maximum for failure to report is \$100,000; there is no maximum for spills. If a toxic substance is involved, the gravity portion of the penalty will be increased 35%.

A 5% reduction is available for those with a qualifying Environmental Management System, such as ISO 14001, with external certification.

The basic elements of each penalty are: one charge to strip away the monetary benefit of non-compliance, plus one charge to reflect the gravity of the

⁴⁴⁴ Information provided by Kelly Pritchard by email, 7 August 2009. For a critique of the legislation and penalty details see *Saxe Environmental Law News* published by Dianne Saxe, a Toronto Lawyer, online: *Saxe Environmental Law News* < <http://envirolaw.com/>>.

⁴⁴⁵ *Environmental Protection Act*, O Reg 222/07; *Ontario Water Resources Act*, O Reg 223/07.

incident. The Director picks an amount within the range prescribed in the Ministry's Guidelines; then negotiations begin. Offenders can qualify for discounts by showing due diligence, and/or by agreeing to spend at least three times as much on "beyond compliance" projects.⁴⁴⁶

While several features of the Ontario regime reflect *amp* under the *AAAMP Act*, there is no protection against double jeopardy and criminal prosecution is not barred. There is thus no decriminalization. *Amp* is not just an alternative but an additional tool provided to enforcement officials to secure compliance.

6.6 - Summary of Chapter

The purpose of this chapter was to highlight the significant features of several federal laws that have provided *amp* as an additional enforcement tool which can be used as an alternative to criminal sanctions, without affecting the currently available administrative options, such as licence or permit suspension or revocation, seizure and detention, cease and desist orders, and the like. *Amp* provisions under two provincial statutes were also described to emphasize that provinces have not completely lagged behind.

The provisions of the *AAAMP Act* were critically examined at some length in light of the background of the other statutes, especially the *Aeronautics Act* and the second generation statutes, namely the *International Bridges and Tunnels Act* the amendments to the *Canada Marine and other Acts*, the *Administrative Monetary Penalties (OSFI) Regulations* under the *Office of the Superintendent of Financial Institutions Act*, and the *Environmental Violations Administrative Monetary Penalties Act*. With the exception of the last mentioned statute and the *Customs Act*, they all provide a defendant with the defence of due diligence. It also gave a brief description of the proposed *Fisheries Act's* Part V provisions on *amp*. This background indicates willingness of the government as a whole to look anew at the *amp* regime and refine shortcomings as it goes along, and it is hoped that if and

⁴⁴⁶ Much of this information was provided by the Ontario Ministry officials who had organized a half-day seminar for the candidate on 13 June 2008 about two months before O Reg 222/07, *ibid*, and O Reg 223/07, *ibid*, came into effect. The procedure for calculating penalties and the calculation of monetary benefit component of the penalties are contained in the Ministry's Guideline documents. The Ministry notes that Alberta and New Brunswick are among provinces that have similar environmental penalties.

when the *AAAMP Act* comes up for Parliamentary review, it will be amended to reflect this new approach.

6.7 - Summary of Part I

The objective of Part I was to portray the transformation of regulatory offences from their historic link with the criminal justice system and the barbaric punishment visited on offenders in the seventeenth and eighteenth centuries, to a less repressive justice system in the nineteenth century with *Hobbes'* philosophy ruling for nearly a century, until judges conceded that absolute liability where no intentional misconduct was involved had gone too far. Simultaneously, in the twentieth century the decriminalization movement, which originated in Germany under pressure from the burgeoning regulatory legislation and consequent overloading of the criminal justice system, spread to other parts of the world, at first in Western Europe which followed German legal tradition, thence to the United States and Australia. Eminent scholars and writers as well as prestigious law reform bodies played a big part in this transformation. To attain the ends of justice as well as to motivate people to comply with regulations, it was urged that it would be counterproductive to brand everyone who failed to comply, even for no fault of theirs, as criminals. Minor regulatory offences were formally decoupled from the criminal justice system and proceeded with administratively, giving aggrieved persons a right of review or appeal, in some cases directly to the courts. Within a department or agency, a review of officials' decision is made by the Minister and the Minister's review in some cases may be re-reviewed by a tribunal or by the court and in other cases the defendant may appeal the Minister's (or an official's) decision to the court. Where a review is made by a tribunal established by Parliament, an application for judicial review may be made to the court by either the Minister or the defendant.

Canada developed its own brand of decriminalization, drawing inspiration from the international sources and also from within as elaborated in the previous two chapters. The *Contraventions Act* has proved to be a good solution for a vast number of minor offences. Despite its hybrid features, being tied to the criminal justice system when an appeal is taken by an aggrieved person, it has softened many of the system's features and continues to be useful to many government departments, especially where cases are clear-cut and do not involve any scientific or other evidence to be proffered at trial.

Part I is intended to be a background to the discussion of compliance and enforcement of regulatory legislation, especially in the context of the *AMPS*, and introduces Part II and the data on summary prosecutions and *amp* proceedings that follow that discussion.

PART II

Introduction

The objective of Part I was to provide a theoretical background to Part II. With this theoretical background, Part II further develops the theme in three chapters. The first is still theoretical but is practically oriented in that as far as possible it is related to the methods and styles of enforcement within the CFIA, *the agency that is given the mandate by Parliament to enforce the two statutes (the Health of Animals Act and the Plant Protection Act and the regulations made under them) which come within the ambit of the AAAMP Act, and are the focus of this thesis.* It discusses compliance and enforcement issues after describing the work of regulation theorists such as Ian Ayres and John Braithwaite who introduced the concept of enforcement pyramid, and the considerable work done at the US Environmental Protection Agency and at other institutions.

Chapter 8 then presents enforcement data through several focus groups for (a) *Health of Animals Act*, and (b) *Plant Protection Act*, during

- (1) the 5-year period between 1996-97 and 2000-01 (before the AAAMP Act came into operation); and
- (2) the 5-year period between 2001-02 and 2005-06 (after the AAAMP Act came into operation).

The third and final chapter puts compliance and enforcement in perspective through the lens of Professor Malcolm Sparrow whose work, *The Regulatory Craft*, has received considerable international attention, in an effort to find indicators or measures to determine the effectiveness of the new compliance tool and its relative contribution to the achievement of the overall statutory purpose.

Part II is followed by a third and much shorter concluding Part where the whole fabric of the thesis is woven together with reflections and conclusions.

Chapter 7 - Compliance and Enforcement

7.1 - Introduction

The two key components of regulatory administration that are discussed in this chapter are: (a) compliance and (b) enforcement. Deterrence is fundamental to both. Compliance is not voluntary. People and firms may willingly comply because it is in their interests to do so or because there is a penalty to pay if they fail to comply. This penalty may be an administrative or a criminal penalty. The major responsibility for ensuring that compliance occurs, and for initiating appropriate response actions where it doesn't, is on the regulatory agency that administers regulations. Within the agency the field staff bear the brunt of the enforcement responsibility. These two components and the role of the field staff are briefly described below.

7.1.1 - Overview of Compliance

The *raison d'être* for regulation is to prevent people, groups and firms from harming other people, the society, the economy and the environment. So, for regulation to accomplish this task, government must ensure that these 'adversaries' comply with the requirements and obligations that have been prescribed in regulations, orders, directives, declarations and instructions framed under the authority of the law. When governments establish regulatory requirements they usually have the legal obligation to make reasonably effective efforts to secure compliance with those requirements. Failure to do that might expose them to liability for damages at the behest of injured third parties whose protection was contemplated by the statute. The trio of cases, *Just v. British Columbia*,⁴⁴⁷ *Rothfield v. Manolakos*⁴⁴⁸ and *Tock v. St. John's Metropolitan Area Board*⁴⁴⁹ decided by the Supreme Court of Canada in 1989, and the decision of the Federal Court in *Swanson*

⁴⁴⁷ *Just v British Columbia*, [1989] 2 SCR 1228, 64 DLR (4th) 689 [*Just*].

⁴⁴⁸ *Rothfield v Manolakos*, [1989] 2 SCR 1259, 63 DLR (4th) 449 [*Rothfield*].

⁴⁴⁹ *Tock v St John's Metropolitan Area Board*, [1989] 2 SCR 1181, 65 DLR (4th) 620 [*Tock*].

*v. Canada*⁴⁵⁰ in 1990 following those decisions, are important precedential authority for Crown liability for failure to enforce regulation.

Compliance assumes special importance in the food safety and plant product areas because even a negligent or unintentional act can have devastating effects on human health, the environment and the national economy. Regulated parties in the food industry understand their obligations and are deeply concerned with those effects as their products (live animals, meat, plants and plant products) will be shunned by Canadian society and by the international community until confidence returns. This was abundantly clear after Canadian beef was shunned by large number of Canadian consumers and embargoed by our trading partners when a single indigenous Alberta cow was discovered with bovine spongiform encephalopathy (BSE) in 2003.⁴⁵¹ The import embargo on meat and meat products, as well as on bovines above the age of 30 months resulted in billions of dollars of losses to the farmers and exporters during the period it was in force. Therefore, it is in the interests of the regulated parties themselves to be on full alert and comply with all the regulations.

Compliance occurs when individuals and firms, whose operations are regulated, fully adhere to regulatory requirements by organizing their activities and operations in accordance with the procedures and requirements set out in the law.

To ensure compliance, the agency that administers the regulation *monitors* the activities of the regulated parties through *inspection* which is the backbone of most enforcement programs and involves visual inspection, collection and analysis of samples, records and other information on the compliance status of those parties. These tasks are essential for detecting and correcting violations and provide evidence to support enforcement actions, and to evaluate program progress.

⁴⁵⁰ *Swanson v Canada* (1990), 32 FTR 129 [Swanson].

⁴⁵¹ Treasury Board of Canada, Departmental Performance Reports, CFIA, *Analysis of Program Activities by Strategic Outcome*, 2007, online: <<http://www.tbs-sct.gc.ca/dpr-rmr/2006-2007/inst/ica/ica02-eng.asp>>. [Hereinafter referred to as CFIA Performance Report, 2007].

Compliance cannot be left to the persons or groups who are regulated, especially in the food safety area. It is like the fox put in charge of the henhouse. Governments have historically paid special attention to food safety. However, as there were no inspectorates such as those of modern times, the responsibility for compliance was at times left with the producers and vendors of grain, meat, fish, ale and other necessities of life. The criminal justice system, and its harsh, even barbaric penalties, ensured that they did not sell unwholesome bread, putrid meat, rotting fish and stale ale. Self-regulation, mantra of free market oriented governing modern day politicians, has the potential of danger, and some times actual occurrence of illness and death. The 2008 episode of Listeriosis is a good example of that, the causes of which are still being studied. Luckily, these modern day food producers will not be paraded publicly on cucking-stool, or pillory or have stale ale poured over their heads, the punishment meted out in medieval times in England! Executives of the large corporation just had to spend millions of dollars to appear before the public in the visual media and profusely apologize for something, which they maintained, had never happened in the past one hundred years!⁴⁵² They also settled class action suits by paying millions of dollars in compensation.⁴⁵³

Whatever the shortcomings of inspection might have been, the CFIA, which is responsible for administering federal food safety laws has apparently learned a hard lesson and is giving greater attention to monitoring on the shop floor rather than relying exclusively on the firm's approved Hazard Analysis Critical Control Point system⁴⁵⁴ for meat processors and the firm's own meat inspectors to do so.

7.1.2 - Overview of Enforcement

No regulatory system can be effective without enforcement. Without demonstrable enforcement the law would be ignored by regulated persons with

⁴⁵² "Maple Leaf settles class action listeriosis lawsuits for \$27M", *CBC News Canada* (18 December 2008) online: <<http://www.cbc.ca/canada/story/2008/12/18/listeriosis-settlement.html>>.

⁴⁵³ Government of Canada, *Report of the Independent Investigator into the 2008 Listeriosis Outbreak* (July 2009), Executive Summary at vii, online: <http://www.cmc-cvc.com/english/documents/ListeriaIndependentInvestigatorReport_July212009.pdf>.

⁴⁵⁴ *Supra* note 451. CFIA Performance Report states that "[a]s of December 2005, the meat slaughter and processing industry moved to a new food safety control system (Hazard Analysis Critical Control Point system or HACCP). Under [this] system, industry identifies specific hazards and measures for their control to ensure the safety of food. CFIA inspectors evaluate industry compliance to regulatory requirements through audits, inspections and sampling."

impunity. Not that this happens on a large scale in the food and plant safety areas where human life and the environment, as well as the national economy, are at stake.

Enforcement is a multilayered term, the obverse of compliance, and refers to the response action that government and its instrumentalities take to ensure that compliance occurs on an ongoing basis. It may simply refer to the prosecution of those in breach of the rules in response to complaints, a model familiar from our notions of general policing. But regulatory enforcement often consists of a more subtle range of techniques of monitoring, inspection, advising, warning, with prosecution constituting only a small part of the overall picture.

Enforcement usually follows inspection of facilities and auditing of records, and commences with investigations where significant failures have been reported or detected, followed by sample collection and analysis, correction of or halting situations that endanger the public, and instituting legal action, whether by imposing monetary penalties or by prosecution where necessary, to compel compliance and to impose consequences for violating the law. Inspectors are given very wide powers by the Agri-food statutes. While they can make unannounced routine inspections and do not need search warrant to do so, they cannot cross the line between inspection and investigation for the purpose of discovering wrongdoing with a view to laying criminal charges. This line has been clarified by the Supreme Court in *Comité Paritaire de l'Industrie de la Chemise v. Potash*⁴⁵⁵ as follows:

"An inspection is characterized by a visit to determine whether there is compliance with a given statute. The basic intent is not to uncover a breach of the Act; the purpose is rather to protect the public. On the other hand, if the inspector enters the establishment because he has

⁴⁵⁵ [1994] 2 SCR 406 at para 5, 115 DLR (4th) 702 [translated by La Forest J from Lucie Angers, "À la recherche d'une protection efficace contre les inspections abusives de l'état: la Charte quebecoise, la Charte canadienne et le Bill of Rights américain" (1986) 27 C de D 723 at 727-28]. See also Benidickson, *supra* note 3 at 142-144, pointing out that "(a)s an operational consequence of this distinction, officials involved in investigations must pay particular attention to fact finding techniques, including the taking of witness statements and the identification and safeguarding of evidence such as samples that could eventually be required in courts." At 174 Professor Benidickson further cautions about the application of *Charter* provisions which are directly relevant in the course of investigative procedures; in particular section 7 which specifies that "everyone has the right to be secure against unreasonable search and seizure."

reasonable grounds to believe that there has been a breach of the Act, there is no longer inspection but a search as the intent is then essentially to see if those reasonable grounds are justified and seize anything which may serve as proof of the offence.”

The Supreme Court has further clarified when an inspection crosses into investigation because in the latter situation, the safeguards provided by the *Charter*⁴⁵⁶ become available and evidence obtained in violation of those safeguards will be excluded by the courts. In *R. v. Jarvis*⁴⁵⁷ the Court set out seven factors that would assist in ascertaining whether an inquiry’s purpose is to investigate penal liability, and if the predominant purpose of an inquiry is to determine the latter, all *Charter* protections that are relevant in the criminal context must apply.⁴⁵⁸ The same issue arose in the companion case, *R. v. Ling*⁴⁵⁹ and the Court reiterating the judgement in *Jarvis* pointed out that all evidence gathered subsequent to the point in time when an inquiry turns to investigation, will be excluded if prior warning is not given to the person that the purpose was to further the investigation or prosecution for an offence.⁴⁶⁰

7.1.3 - Components of a Successful Enforcement Program

Several components have been identified by Cheryl Wasserman in an effective enforcement program. Wasserman cites the following six:

“1. Creating requirements that are enforceable; (2) Knowing who is subject to the requirements and setting program priorities; (3) Promoting compliance in the regulated community; (4) Monitoring compliance; (5) Enforcement response to

⁴⁵⁶ *Supra* note 28.

⁴⁵⁷ 2002 SCC 73, [2002] 3 SCR 757, 219 D.L.R. (4th) 233 [cited to SCR].

⁴⁵⁸ *Ibid* at 806-07. The seven factors are: (1) Did authorities have reasonable grounds to lay charges or could a decision have been made to proceed with a criminal investigation?; (2) Was the general conduct of the authorities consistent with a criminal investigation?; (3) Did the auditor transfer his or her file to the investigators?; (4) Was the auditor’s conduct such that he or she was acting as an agent for the investigators?; (5) Does it appear that the investigators intended to use the auditor as their agent?; (6) Is the evidence relevant to taxpayer liability generally or only to penal liability?; and (7) Do other circumstances or factors suggest that an audit became a criminal investigation?

⁴⁵⁹ 2002 SCC 74, [2002] 3 SCR 814, 219 D.L.R. (4th) 279 [cited to SCR].

⁴⁶⁰ *Ibid* at 827-28.

violations; and (6) Evaluating the success of the program and holding program personnel accountable for its success.”

Wasserman adds: “Enforcement by government seeks to correct violations and create an atmosphere in which the regulated community is stimulated to comply both because the government has demonstrated a willingness to act when non-compliance is detected and because of the consequences that such actions bring to bear.”⁴⁶¹

An important first step in developing program priorities is to identify who or what groups are subject to specific regulations and to understand as far as possible their sophistication, ability, motivation, and willingness to comply. An accurate profile of the regulated community helps policymakers focus the compliance strategy (including both compliance promotion and enforcement response) to optimize its effectiveness. It is also valuable for designing compliance monitoring schemes. The contact with the regulated community creates a perception of an effective enforcement program and can be a form of compliance promotion.

7.1.4 - Overview of Deterrence

Enforcement actions are taken to deter regulated parties from disobeying the law. Deterrence is fundamental to all compliance and enforcement programs. Its purpose is to create an atmosphere where most are motivated to comply with rather than violate the law. As Wasserman points out, “four interrelated elements are needed to create this atmosphere.” She lists the following: (1) a credible likelihood that non-compliance will be detected; (b) a swift and certain response by the enforcing agency; (c) appropriate consequences in the form of sanction or penalty; and (d) the perception that the above conditions exist.⁴⁶²

Each element of a compliance and enforcement program relates to these aspects of deterrence. Inspection programs are established in large part to ensure a credible likelihood of detection. The enforcement response part is designed to

⁴⁶¹ C Wasserman, “The Principles of Environmental Enforcement and Beyond: Building Institutional Capacity” in Gerardu & Wasserman, eds, *Third International Conference on Environmental Enforcement*, Oaxaca, Mexico: 25-28 April, 1994, 15, Attachment 1, 28- Conference Proceedings, Volume I. (1994) [hereinafter cited as Wasserman, Principles of Environmental Enforcement]

⁴⁶² *Ibid.*

ensure swift and sure response and appropriate sanction. There is also an important communications component to any enforcement effort that ensures general public awareness about the consequences of violating the law and there is a strong possibility of being detected.

Compliance and enforcement are further elaborated below.

7.2 - Compliance

In the food and plant products sectors two parties are closely linked to compliance: (a) those who are required to comply – the regulated persons; and (b) those whose duty it is to ensure that the former comply: the CFIA compliance and enforcement officials - the inspectors and the field staff.

7.2.1 - Regulated Persons (or Regulatees) in the Food and Plant Products Sectors

The food industry comprises three primary sectors: (1) livestock producers who raise animals and birds for providing meat, meat products, milk and dairy products, eggs and honey, (2) farmers who produce grain, fruits and vegetables, and other articles of food, and (3) establishments where animals and birds, etc. are slaughtered, processed, packaged, and prepared for distribution in the domestic market or for export. In the animal food industry, there are supporting, or ancillary, enterprises, such as the feed lots and feed mills which formulate livestock feeds, rendering plants which process dead animals and poultry (or live ones that are unfit for human consumption), deadyards where diseased animals and birds after they are culled are buried or burned, auction houses where livestock and birds are bought and sold, and transporters who convey the livestock and birds to their final destinations, using trucks, vessels or aircraft.

The regulated community in the food and plant product sectors includes:

- (1) Individual farm and dairy operators,
- (2) ranches,
- (3) Horticulturists, timber logs exporters,
- (4) Corporations,
- (5) Small businesses,
- (6) Commercial importers of animals, plants, animal and plant products, and

- (7) An amorphous group of travelling public who import animals, plants, and animal or plant products that are restricted or prohibited.

More detail is provided below with respect to those groups that are the main subjects of regulation under the *Health of Animals Act* and the *Plant Protection Act*.

Those engaged in farming activities constitute an enormous number. The largest number is of those who raise animals and birds for food on an estimated 115,000 farms of an average size of 728 acres. Nearly 16 million cattle are raised on over 60,000 farms, about 6 million dairy cows on over 14,600 farms, about 15 million hogs and pigs on over 6,000 farms, about 15 million other farm animals such as sheep, goats, horses, elk and deer on over 30,000 farms, and over 125 million chicken and turkeys on about 4,500 farms. The farms are spread all over the country on millions of acres of land.⁴⁶³

Farm animal population is concentrated in the Western provinces, Ontario and Quebec. Over three-quarter of all cattle (about 12 million) are in Western Canada, with bison accounting for only a fraction of this number (about 200,000). On the other hand, dairy production is centred in Quebec which accounted for nearly half, with Ontario in the second place accounting for about a third in 2006. Main pork-producing provinces are in Central Canada, including Manitoba.

Of the over half a million colonies of honeybees in 2006, more than seventy percent were located in the Prairie provinces and most were found in Alberta, the province with the largest acreage of forage seed in Canada. Saskatchewan had over half of the leaf-cutter bees, bees used exclusively for pollination.

Statistics Canada reports that of the approximate 300,000 farm operators, the under-35 age group has been declining and constituted only about 10% or nearly 30,000 in 2006. Farm incomes have also been falling, about two-thirds reporting less than \$100,000 in receipts, 17.4% reporting income between \$100,000-to-\$249,999 while those in the over \$250,000 income category accounted for 17% of

⁴⁶³ Statistics Canada, Census of Agriculture, 2001, 2006, Table 3: Canadian farms by farm type, 2006 and 2001 [hereinafter cited as Stats Can Census]. See Appendix 3 at 296, below.

all firms. Farm numbers have fallen in all categories except for the over \$250,000 category.⁴⁶⁴

Quoting *World Trade Atlas* and Statistics Canada, the CFIA Performance Report for 2006-07 estimates that the economic value of trade in animals and animal products to Canada in 2006 was huge. Total exports were nearly 3 billion dollars, and imports just over three-quarters of a billion dollars.⁴⁶⁵

The above numbers are mind boggling, to say the least, and show how enormous is the task of ensuring compliance that CFIA's inspection and enforcement field staff face in the animal husbandry and ancillary sector alone, the sector that is regulated by the *Health of Animals Act* and its regulations. Obviously, the agency has to be selective in its enforcement as it is impossible for its inspectors and enforcement officials to be in all places all the time.

The agriculture sector together with forestry, is relevant for compliance because the purpose of the *Plant Protection Act*⁴⁶⁶ and its regulations is to prevent the invasion of pests in food crops, as well as in Canadian forests from foreign sources and to eradicate pests that have escaped into Canada, either by human smuggling activities or by actions of the wind and water, or by flying over or riding as stowaways in vehicles, vessels and aircraft arriving in Canada.

Approximately 45% of total Canadian farms (approximately 112,000) grow crops, and fruits and vegetables, food crops accounting for nearly 40% or just over 91,000. Fruits and vegetables are grown in over 12,500 farms. A smaller number (8,754 farms or just under 4%) are greenhouses, nurseries and horticulture farms.⁴⁶⁷

The economic value of trade in plant and plant products to Canada in 2006 was also huge, according to the Industry Canada's *Trade Data On-line Database*,

⁴⁶⁴ *Ibid.*

⁴⁶⁵ CFIA Performance Report 2007, *supra* note 451.

⁴⁶⁶ *Supra* note 9.

⁴⁶⁷ Stats Can. Census, *supra* note 463, Table 3.

which the CFIA has quoted in its Performance Report for 2006-07. Total exports were just over 22.5 billion dollars, and imports just over 9.6 billion dollars.⁴⁶⁸

7.2.2 - Motivating Compliance Behaviour

In a vast majority of cases, the regulated population is honest and law-abiding, but many factors affect their behaviour. These include social, moral, and personal influences, the level of technical sophistication, familiarity with regulatory obligations and requirements, and economic factors. However, it is impossible to predict their behaviour when faced with these pressures, and a successful compliance strategy must address all of these factors to overcome barriers to compliance.

In every society there is a small number of individuals and firms that is incorrigible or that simply refuses to comply unless there is a credible prospect of detection and meaningful consequences. It is natural to expect this since humans are motivated by many different and opposing values, desires, needs and priorities. As Starrs remarks,⁴⁶⁹ "*we need not accept the entire Hobbesian philosophy to recognize that man's societal existence is one of conflict, not amity.*"⁴⁷⁰ Regulatory theorists and others have various labels for them, such as rogue businesses, bandit operators, malicious non-compliers, bad apples, and the like, who deliberately defy authority, but these appellations are hardly applicable in the food and plant products area where non-compliance is generally due to sloppy or careless management, or to the unfortunate situation in which farmers, growers and producers find themselves owing to technical inability or physical or economic incapacity.

7.2.3 - Benefits of an Effective Compliance Strategy in the Food Industry

An effective compliance strategy and enforcement program brings many benefits to society. First and foremost is the improved safety and public health that results when regulatory requirements are complied with. Second, compliance reinforces the credibility of regulatory efforts and the legal system that supports

⁴⁶⁸ CFIA Performance Report, 2007, *supra* note 451.

⁴⁶⁹ Starrs, *supra* note 33.

⁴⁷⁰ *Ibid* at 265. This is apparently a reference to the philosophy of Thomas Hobbes (1588-1679) expounded in his *Leviathan* (1651) that individuals are essentially selfish.

them. Third, an effective enforcement program helps ensure fairness for those who willingly comply with the law; it ensures a level playing field. Efficient enforcement can support compliance across the whole range of businesses, delivering targeted, effective intervention without unreasonable administrative costs to business.⁴⁷¹

7.2.4 - CFIA Field Staff – Their Role in Securing Compliance

Regulatory agencies are specialist enforcement authorities, having a finite domain of control that nevertheless encompasses a large segment of the population in the food industry, as noted above. This segment is continuously subject to inspection and control, and the population of deviants is potentially knowable, which gives regulators a good knowledge of potential violators who mix animal feed on the farm or convey animals and birds to their destination. The intimacy of the enforcement relationship is a characteristic of compliance systems where the control of a distinct population of potential violators is directed to firms or individuals in organized activities rather than apart from them.

Regulatory agencies seldom make newspaper headlines and when they do it is more often to publicize that something has gone terribly wrong in enforcement. It is only then one hears about inspectors and investigating officials, the front-line officers of the agency and the backbone of the regulatory system. Unlike the police, whose presence in the community is immediately known by their uniforms and badges and their no-nonsense attitudes, one would not recognize CFIA inspectors on the street, as their job is not so glamorous or exciting as that of the police whose lives are often on the line, and they go quietly about their duties.

Yet, the actions of inspectors and investigating officials affect vast segments of population, communities and, some times, even the entire nation. The latter happens, though infrequently, when there is a health scare brought on by some zoonotic disease or plant infestation that is spreading like wildfire, or by some food-borne disease that has caused sickness or even death. Any laxity in inspection and any relaxation of controls by entrusting their implementation to the firms themselves, then immediately become public knowledge and scare people into taking their own precautionary self-help measures before any product recall or quarantine

⁴⁷¹ Summarized from Wasserman, "International Conference on Environmental Enforcement" (Sept 22-25, 1992) Budapest, Hungary, Proceedings Vol 1 at p 36 (Table 1-1 at 37).

actions are announced by government. Food recalls have received increasing publicity in recent times.

7.2.4.1 – CFIA Response to Contraventions and the Range of Mechanisms

Given the huge numbers of known as well as unknown and amorphous groups of regulatees, the field staff of the CFIA has a daunting and unenviable task. Most regulators have to make optimal use of their limited human and financial resources, so it is essential to have strategic inspection and enforcement plans that will target activities at the most critical points in the operations of the regulatees, such as at the entry and exit points on Canada's borders, and at statistically valid random points and times in domestic operations. These strategic plans are provided to regional offices by CFIA Operations hierarchy regionally under the overall oversight and guidance of headquarters.⁴⁷²

7.2.4.2 - Inspections and Interventions

In a review of British regulatory enforcement strategy, Philip Hampton sets out a number of principles for inspection and enforcement,⁴⁷³ which are pertinent to this aspect of an inspector's work. Among those, Hampton lists the following:

“(1) Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most; (2) the few businesses that persistently break regulations should be identified quickly and face proportionate and meaningful sanctions; (3) entrench the principle of risk assessment throughout the regulatory system, so that the burden of enforcement falls most on highest-risk businesses, and least on those with the best records of compliance; (4) ensure that inspection activity is better focused, reduced where possible but, if necessary, enhanced where there is good cause (noting that, currently, not only are unnecessary inspections carried out but necessary inspections are not carried out).⁴⁷⁴

⁴⁷² CFIA Performance Report, 2007, *supra* note 451.

⁴⁷³ Hampton, *supra* note 322.

⁴⁷⁴ *Ibid* at paras 23-24

The CFIA Performance Reports for 2006-07 and 2007-08 indicate that the Agency takes a similar risk-based approach. Establishments or products are inspected, sampled and tested in such a way that the resulting compliance rates are representative of the regulated population. This monitoring approach provides an accurate overview of compliance in the marketplace in general. When monitoring has identified specific compliance problems, the Agency takes a *targeted approach* to inspections, sampling and testing, by focusing on the problem areas and areas of highest risk. Improved compliance is promoted through *enforcement actions* which commence with *investigations* and involve the gathering of evidence and information from a variety of sources considered relevant to a suspected violation or offence.⁴⁷⁵

A risk-based approach is representative of the regulated community based on statistically valid sample, and is supplemented by random inspections and targeting previously known parties who came to the attention of inspectors. While it sounds much like known suspects who appear on police radar whenever trouble erupts on streets, it is not a dragnet that will detect and catch every violation or offence. There is always a compliance deficit and so long as this is within established limits, risk-based approach can be a cost-effective method of ensuring compliance. This is particularly true in the animal health sector where, as was noted previously, it is humanly impossible to inspect each and every farm and farm lot, which would in any case not help detect every case of violation.

Even in the livestock identification program administered by industry associations such as the Canadian Cattle Identification Agency and the Canadian Sheep Federation (and enforced by CFIA) where CFIA reports almost a one hundred percent inspection by its officials, a small percentage of livestock is found not to have been tagged over the few years since 2004 when the program was instituted.⁴⁷⁶ Here we are looking at millions of cattle, sheep, hogs and poultry (referred to in the previously quoted statistics) owned by tens of thousands of farmers and farm operators.

⁴⁷⁵ *Ibid* at para 24.

⁴⁷⁶ Data provided by CFIA's Livestock Identification Division (See Table 17**Error! Reference source not found.** in chapter 8 at 252, below).

7.2.4.3 - Enforcement – Response to Non-compliance

Response mechanisms generally fall into two categories, informal and formal:

The informal category consists of telephone calls, visits, persuasion and warning letters. The formal category of administrative or civil actions and criminal prosecutions is resorted to when the informal category fails to induce compliance.

Several important issues have to be addressed by an inspector when non-compliance is detected. These can be broadly stated as follows:

- (1) When should a sanction be imposed?
- (2) Should the first response include a sanction?
- (3) What type of sanction should be imposed?
- (4) How much to enforce?

Inspectors have considerable discretion in determining each of these issues but the exercise of that discretion has to be backed by solid evidence and they must be ready to support their decisions when questioned, especially when some decisions have proved costly or raised the ire of consumers, or of animal welfare advocates who are often vigilant against incidents of animal cruelty and bring pressure to bear on governments to act after making headlines in the print and visual media. In this context, the observations of Robert Baldwin and Martin Cave are very pertinent. They say,

*".. skilled field enforcers can use their discretion to apply rules selectively so as to solve problems, or to temper excessively restrictive bodies of regulation. On the other hand, failures to identify and deal with breaches of rules may reduce regulatory statutes to mere paper exercises."*⁴⁷⁷

CFIA has, through its inspection manuals, provided inspectors with guidance through enforcement and compliance policies, indicating the situations in which it would be appropriate to use cooperative methods, or to issue warnings and penalty

⁴⁷⁷ R Baldwin & M Cave, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford: Oxford University Press, 1999) at 96.

notices, and the circumstances where it would be appropriate to recommend prosecutions.⁴⁷⁸

7.3 - Business Regulatory Pyramid

The above four compliance enforcement issues will be elaborated following the discussion of the *Business Regulatory Pyramid* which Ayres and Braithwaite conceived in their influential work in 1992.⁴⁷⁹

Responsiveness, in the authors' view, is to be ensured by deploying a pyramid strategy of sanctions by the public bodies, speaking softly and carrying a big stick and a variety of smaller sticks. In a preface to this concept they state:

*"To reject punitive regulation is naïve; to be totally committed to it is to lead to a charge of the light brigade. The trick of successful regulation is to establish a synergy between punishment and persuasion."*⁴⁸⁰

Ayres and Braithwaite's business regulatory pyramid is an attempt to solve the puzzle of when to punish and when to persuade. At the base of the pyramid is the most restorative dialogue-based approach that can be crafted to secure compliance. As one moves up the pyramid, more and more demanding and punitive interventions in peoples' lives are involved. The idea of the pyramid is that the presumptions should always be to

"start at the base of the pyramid, then escalate to somewhat punitive approaches only reluctantly and only when dialogue fails, and then

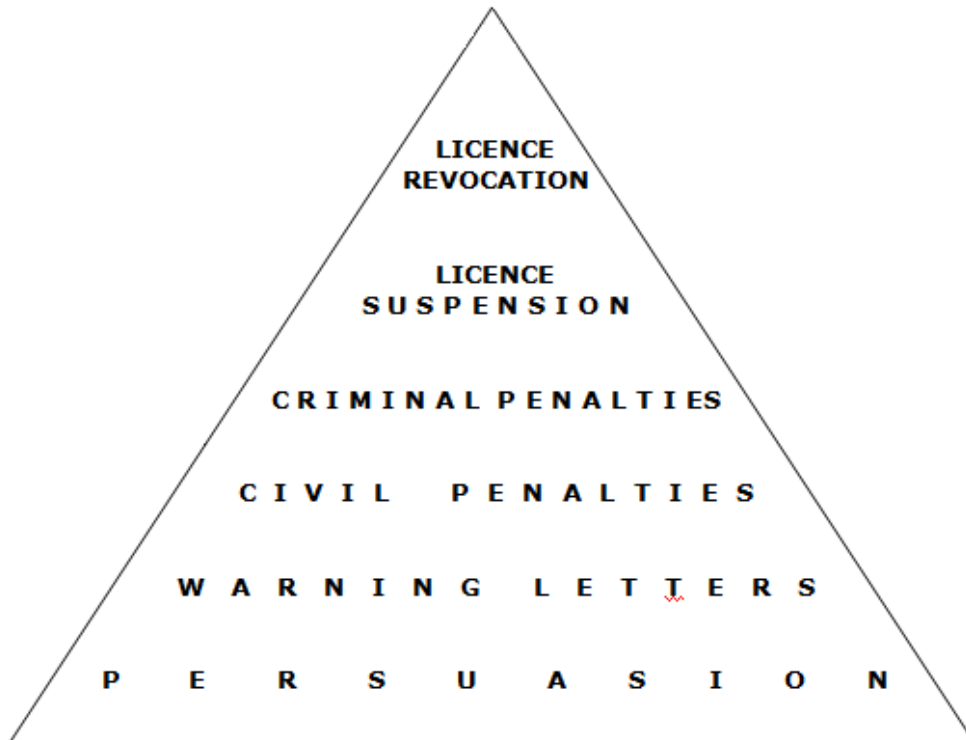
⁴⁷⁸ CFIA Enforcement & Compliance Strategy and Inspectors' Manuals set out guidance to inspectors when they have noted non-compliance with statutes and regulations during inspection: chapter 7 of the document issued in 2002 (revised in 2007). Most decisions are taken at the regional level. When a cooperative approach fails or is unsuitable in particular instances of nonconformity with the statute or regulations, the Area Executive Directors, with the involvement of the Regional Directors where significant enforcement actions are contemplated, are accountable for the decision to recommend prosecution (for which the Public Prosecution Service has the responsibility) or to respond in other ways, such as warnings, amps, product detention, seizure, etc. (§3). Compliance & Enforcement Strategy, Policies and Manuals were downloaded from CFIA'S website www.inspection.gc.ca on 20.09.09.

⁴⁷⁹ I Ayres & J Braithwaite, *Responsive Regulation. Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992).

⁴⁸⁰ *Ibid* at 25.

*escalate to even more punitive approaches only when the more modest forms of punishment fail.*⁴⁸¹

The proportion of space at each layer of the pyramid represents the proportion of enforcement activity at that level.



[Ayres & Braithwaite's Example of an Enforcement Pyramid]⁴⁸²

Under the pyramid strategy, the regulator escalates its response to a recalcitrant company from persuasion to a warning to civil penalties to criminal penalties and ultimately to corporate capital punishment -permanently revoking the company's licence to operate. As one moves up the pyramid in response to a failure to elicit reform and repair, a point is often reached where finally reform and repair

⁴⁸¹ *Ibid* at 30.

⁴⁸² *Ibid* at 35, fig 2.1, reproduced in J Braithwaite, *Restorative Justice & Responsive Regulation* (Oxford: Oxford University Press, 2002) at 30.

are forthcoming. At that point, the authors say, responsive regulation must put escalation up the pyramid *into reverse and de-escalate down the pyramid*. The pyramid remains firm, yet forgiving in its demands for compliance. Reform is rewarded just as recalcitrant refusal to reform following wrongdoing will ultimately invoke punishment.

Braithwaite stresses:

*"The crucial point is that this is a dynamic model. It is not about specifying in advance which are the types of matters that should be dealt with at the base of the pyramid, which are the most serious ones that should be in the middle, and which are the most egregious ones for the peak of the pyramid."*⁴⁸³

Ayres and Braithwaite's works are valuable to the discussion of the four issues previously set out, which are now discussed below.

7.3.1 - When Should a Sanction be Imposed?

This is a hard question to decide. Braithwaite points out:

*"What makes the question such a difficult one is that attempts to regulate conduct do not simply succeed or fail. Often they backfire, making compliance with the law a lot worse. So the tragedy of consistent punishment of wrongdoers of a certain type is that our consistency will regularly cause us to make things worse for future victims of the wrongdoing."*⁴⁸⁴

As stated earlier, persuasion can be effective for certain types of contraventions and in many cases it may be sufficient to negotiate a compliance schedule with a violator. On the other hand, when deterrence is important, maximum impact will be gained if each enforcement action is used to send a clear message to the regulated community. Sanctions are essential for certain types of violations where harm or damage was caused by recklessness, negligence or simply by a "don't care" attitude.

Criminal sanctions are appropriate to halt persistent offenders and those who operate without legal authority (where it is needed), by defying the regulatory

⁴⁸³ *Ibid* at 30.

⁴⁸⁴ *Ibid* at 29.

system. Sanctions help send this message. This point was emphasized by Hampton in his Review where he states:

"The few businesses that persistently break regulations should be identified quickly, and face proportionate and meaningful sanctions;

*the penalty regime should be based on managing the risk of re-offending, and the impact of the offence, with a sliding scale of penalties that are quicker and easier to apply for most breaches with tougher penalties for rogue businesses which persistently break the rules."*⁴⁸⁵

Hampton, however, adds:

*"... early warning before enforcement action should allow companies to correct problems before going to court, and therefore cut the administrative burden."*⁴⁸⁶

7.3.2 - Limitation of Sanctions

Sanctions are, however, not appropriate for violations that are either not preventable or are too minor to focus government resources on the legal process that is necessary to impose them. These considerations need to be balanced in deciding when to impose a sanction. Instead, the regulator may promote *voluntary compliance* through persuasion, educational programs, technical assistance and even subsidies.

7.3.3 - Should a First Enforcement Response Include a Sanction?

There are two basic approaches to this issue.

One approach does not seek sanction for a first violation but imposes a stiff sanction if non-compliance continues. This approach – *second strike and you are out* - is based on the belief that every person or facility should be given at least one opportunity to correct its problems before it receives a sanction. The approach is most successful when violations are easy to detect and when the enforcement program has an excellent track record of detecting violations, diligently following up on violations to verify compliance, and imposing stiff sanctions for continued non-

⁴⁸⁵ *Supra* note 322 at para 23, Box E2: Principles of Inspection and enforcement.

⁴⁸⁶ *Ibid* at para 29.

compliance. It is also an approach recommended where there is an ongoing relationship between the regulator and the regulated party, as it would indicate a sign of goodwill and a chance given to the latter to shape up.

The second approach is to impose a sanction for a first violation. It is based on a belief that lack of a penalty may encourage facilities to postpone compliance activities until the violation has been detected. Such an approach is essential for violations that are difficult to detect.⁴⁸⁷

A few examples that have used this approach are given at the end of this section.

7.3.4 - What Type of Sanction Should be Used?

Enforcement officials often have several types of sanctions in their arsenal. The enforcement policy is designed to provide guidance on when these various types of sanctions are appropriate.⁴⁸⁸

Administrative orders are issued directly by enforcement officials that define the violation, provide evidence of the violation, and require the recipient to take corrective action within a specified time period. If the recipient violates the orders, program managers can usually take further legal action using other administrative orders or court system to directly force compliance. Field citations which are popular in the United States, are administrative orders issued by field inspectors. They are the equivalent of Warning letters in Canada.

Negotiation is an integral part of enforcement. In the United States most enforcement cases are settled through negotiation rather than by unilateral decision. It provides an opportunity to reach a solution that satisfies all parties and results in considerable saving in costs. Enforcement actions create a stimulus and a context for discussion and resolution. Negotiation can enhance compliance by sending a signal to the regulated community that, while pursuing an enforcement response, government is willing to be responsive to the concerns and difficulties faced by the

⁴⁸⁷ Wasserman, "Principles of Environmental Enforcement", *supra* note 461 at 32-33.

⁴⁸⁸ The enforcement actions at the US EPA, for instance, are described in chapter 5, Part I, above.

regulated community in achieving compliance and to work cooperatively to develop a satisfactory solution.

Negotiation will generally be most effective if there remains a real possibility of litigation. The result of negotiation is a “*settlement*” – a documented official resolution to the situation, e.g. an “administrative consent order” or a “judicial consent decree” in the United States; – the latter, when legal administrative proceedings have already been commenced.

There is no negotiation of monetary penalties under the *AAAMP Act* because the amounts are small and the person who is issued a penalty notice is entitled to a fifty percent reduction for payment within the prescribed time. Negotiation can, of course, occur in the context of a compliance agreement provided for in that statute.⁴⁸⁹ As noted in the discussion of compliance agreements in Part I of this thesis, not many of these have been negotiated under the two statutes.

Less drastic measures may also be available. They include temporary closing of a section of a firm’s operations, limiting the duration of a licence, or keeping the firm on a short leash with increasing frequency of inspections. These are akin to “police measures” which many regulatory agencies can deploy.

These are formal court actions and are usually taken to stop illegal activities, especially of those persons who persistently break the law or operate beneath the vision of the law, variously labelled as *rogue businesses*, *bandit taxi operators*, and the like, in order to put them out of business. They are seldom encountered in the animal and plant health sector.

Prosecution is generally considered appropriate when a person or facility has knowingly and wilfully violated the law, or has otherwise committed a violation for which society has chosen to impose the most serious legal sanctions available.

Enforcement policy in the United States regulatory statutes indicates that criminal enforcement actions are generally reserved for actions that deserve punishment, rather than correction, e.g., where a violation is intentional and willful. Criminal actions are also used to ensure the integrity of the regulatory scheme, e.g.,

⁴⁸⁹ *AAAMP Act*, *supra* note 7, s 10.

for facilities that operate without a permit or licence.⁴⁹⁰ Generally, prosecution is pursued in cases involving:

- (1) falsification of documents;
- (2) operation of a facility without a permit;
- (3) tampering with monitoring or control equipment;
- (4) repeated violations; or
- (5) intentional and deliberate violations.

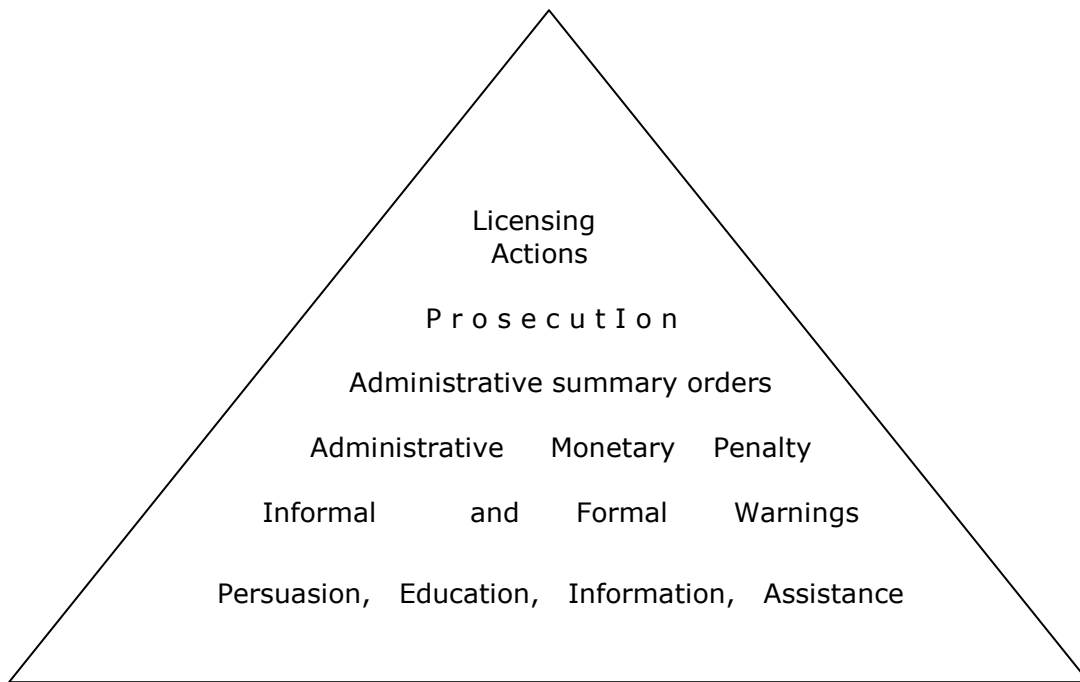
In all these situations, the U.S. statutes concerned expressly stipulate that those who contravene the law knowingly are liable to criminal penalties, and those who do not contravene knowingly are only subject to civil penalties, but in most cases the two proceedings have identical penalty amounts. Although liable to criminal penalties, the enforcement agency can prefer pursuing the matter administratively by imposing civil penalties, thereby avoiding all the pitfalls of a prosecution. There is no similar direction in Canadian statutes but compliance and enforcement policies are put in place by most departments and enforcement agencies, including the CFIA whose compliance strategy is discussed below.

7.3.5 - CFIA's Regulatory Enforcement Pyramid

CFIA's compliance and enforcement strategy follows very closely Ayres & Braithwaite's Business Regulatory Pyramid reproduced previously⁴⁹¹ and this can be shown by an adaptation of that pyramid in the following figure:

⁴⁹⁰ See generally chapter 5, Part I; J Libber, *supra*, note 280; Reports on US Consultations, *supra* note 279, 281 and 283.

⁴⁹¹ This is the candidate's adaptation of Ayres & Braithwaite's Enforcement Pyramid, *supra* note 482. Note: the administrative summary orders are independent of any non-compliance acts of a regulated person. Most often they are issued as precautionary measures, but enforcement response actions will result if those orders are not complied with.



As in Ayres & Braithwaite’s Business Regulatory Pyramid, CFIA places a great deal of reliance on cooperation. Generally speaking, for minor, non-threatening violations, especially where the regulatee has used great skill and diligence but, on hindsight, had obviously overlooked some critical steps in its operation, inspectors let the violation go with a warning which may be either formal or informal. The data on formal warnings is given in Table 7 but there does not appear to be any record kept of informal warnings. Warnings usually produce compliance, but where they fail to have that effect, the next response action is issuance of a notice of violation with a penalty; seriousness of the violation and the corresponding penalty amount are determined by the *AAAMP Regulations*.

Administrative orders, such as quarantine, declaration of an infected place or area, embargo on movement of animals or plant products from the quarantined area without special permit or licence, etc., are unaffected by the penalty actions, or prosecutions for that matter. They operate independently under statutory or regulatory authority. Furthermore, these administrative orders are only issued to limit the spread of disease from one farm or lot to another. The owners or operators of the farm may have been fully compliant with all the regulations and may have been victims of the disease or pest among their livestock or plants. Non-

compliance in those situations results from failure to comply with the orders and failure to cooperate with inspectors.

Apart from administrative orders, CFIA inspectors can seize, detain and even confiscate animals and plant products that have been illegally imported or moved without a permit where one is required by administrative orders. It may also revoke or suspend a licence, for example, an import or export licence, where one is required. In extreme cases, destruction may be ordered.

In the case of food products (which are covered by other CFIA enforced statutes, such as the *Meat Inspection* and *Fish Inspection Acts*), the CFIA also has recourse to Recall Orders. Here again there need not have been a contravention of the legislation.

The administrative orders referred to above are relatively few and much rarer than warnings and penalty notices. Prosecution is usually reserved for serious contraventions, especially where there has been a callous disregard for the health and safety of humans or even of the animals themselves. The CFIA's compliance and enforcement strategy contains guidelines to inspectors on when a recommendation for prosecution is to be considered. Section 3.5.2 of chapter 7 of the strategy sets out the following situations where prosecution should be considered by inspectors as appropriate. Prosecution should be considered "when the offence involves:

- (1) death of, or injury to, a person and the evidence indicates that the death or injury was directly attributed to failure to comply with the FIA, FIR or other applicable legislation;
- (2) the willful, reckless, or negligent actions of the regulated party pose a health and safety risk or constitute fraud;
- (3) forging, altering or tampering with an inspection certificate;
- (4) obstructing or interfering with an inspector acting in the execution of the FIA, FIR or other applicable legislation;

- (5) moving or interfering with any thing seized or detained without having received prior permission from an inspector;
- (6) refusal to comply with a recall order;
- (7) a conviction for a previous similar offence or a repeat offence; or
- (8) based on past history of non-compliance, other enforcement actions have not had, nor are they likely to have, the appropriate deterrent effect and a more severe action is warranted.”⁴⁹²

The ultimate decision-making authority for resort to prosecution, as well as to respond in other ways such as notices of violation with penalty, seizure and detention, forfeiture, licence revocation, etc., is the Area Executive Director with the involvement of the Regional Directors. But the Public Prosecution Service of Canada has the sole responsibility to embark on prosecution.

7.3.6 - Examples of Criminal Sanctions Used by CFIA

The following are some examples that illustrate the use of criminal sanctions by CFIA in conformance with its guidelines. They are summarized from the Prosecutions Bulletins for 2007 and later, posted by the CFIA:⁴⁹³

- (1) In November 2007, 1648291 Ontario Inc., operating as Butch Clare Livestock was prosecuted for unlawfully exporting to the United States in 2006 a shipment of cattle over 30 months of age the import of which was prohibited by the U.S. following the detection of BSE in Canada in May 2003. It was an offence under the *Health of Animals Act* and the company was fined \$25,000 by the Ontario Court of Justice in Brantford.
- (2) Ronald Way of Belleville, Ontario was prosecuted in December 2005 for unlawfully removing from a farm to a stockyard three sheep that did not bear approved tags, contrary to the *Health of Animals Regulations* and was fined

⁴⁹² CFIA Compliance and Enforcement Strategy (chapter 7), issued in 2002 and revised in 2007, *supra* note 451. The legislation referenced in this strategy are *Fish Inspection Act* (FIA) and *Fish Inspection Regulations* (FIR), but the phrase “other applicable legislation” would cover all legislation enforced by CFIA.

⁴⁹³ Summarized from various CFIA Prosecutions Bulletins (2005 onwards), online: www.inspection.gc.ca.

- \$2,000 by the provincial court in Bradford, Ontario. This was not the first time he had done this. He had been previously warned.
- (3) Two Saskatchewan companies were prosecuted and fined in separate cases.
- (a) In the first, Frank Eaton Livestock Ltd. was prosecuted for falsely misrepresenting Manitoba heifers as originating from either Alberta or Saskatchewan on 141 Export Health Certificates presented to the CFIA between August 2002 and February 2003. United States import policies require all breeding cattle from Manitoba to be tested for bovine tuberculosis. The prosecution began as a summary proceeding but was continued as an indictment because the limitation period for summary prosecution had expired, and the company was fined \$172,000 the largest penalty under the *Health of Animals Act* by the Court.
- (b) In the second, Prairie Livestock Ltd. was prosecuted for exporting cattle to the United States that did not comply with the U.S. livestock import requirements, and was fined \$71,000 in a Saskatchewan provincial court. The charges had been laid following a joint investigation by the CFIA and APHIS, its counterpart in the US Department of Agriculture. The two agencies cooperate on cross-border movements through formal memoranda of understanding.
- (4) Another person from Saskatchewan, an elk rancher *Eric Alsager* and his company were fined \$69,000 by a provincial court in Lloydminster for an offence under the *Health of Animals Act*. The accused had physically moved 36 elk onto a premise that had previously been declared an infected place, without permission to do so, by unlawfully moving elk without a permit in breach of CFIA quarantine orders. The court also found that the accused subsequently breached a CFIA order by allowing the animals to co-mingle with others present on the ranch, thereby breaching the conditions of quarantine.
- (5) In another prosecution under the *Health of Animals Regulations*, an Ontario company, Merlin International Trading Inc, was fined \$10,000 in January 2008 by the Ontario provincial court in Newmarket for illegally importing 100 cartons (1,600 kg) of pork legs from China. The company had failed to declare the importation which was prohibited because China is not designated by the regulations as a country free from reportable diseases such as Foot and Mouth disease. The pork legs were discovered by the Canada Border

Services Agency during a routine inspection in Burnaby, B.C. and reported to the CFIA. There was no indication this shipment was infected with a foreign animal disease.

- (6) Importation of 8,416 Queen honeybees in May 2003, contrary to the *Honeybee importation Prohibition Regulations* (enacted pursuant to section s. 16(1) of the *Health of Animals Act*), resulted in the prosecution of Dudley Gottfriedson of Osoyoos, in the Penticton, B.C. provincial court, and fine of \$10,000. The prohibited bees were found by the Canada Border Services Agency upon a secondary examination of the vehicle crossing the border into Canada. The regulations prohibited importation from the United States, except Hawaii from 1999 when the regulations were enacted to the end of December 2004.
- (7) A professional apiarist, Ernest Fuhr, from Fort St. John, B.C., was convicted under the same regulations and fined \$20,000 for failing to present honeybees to a customs officer for inspection on arrival in April 2003.
- (8) The last case under the *Health of Animals Regulations* was that against Arjoon Deonauth of Scarborough, Ontario, who had concealed 17 Guyanese finch birds in small ventilated envelopes inside his jacket which contained multiple pockets and false compartments. His jacket, the containers and the birds were seized by the Canada Border Services Agency on his arrival at Toronto's Pearson International Airport in July 2002, and the Ontario provincial court in Brampton fined him \$4,000 upon conviction.
- (9) A case of cruelty to animals was lodged against Transport Gaétan Pellerin Inc of St. Paul, Quebec which transported in a motor vehicle in breach of the *Health of Animals Regulations*, Part XII a swine that could not be transported by reason of infirmity, illness, injury, fatigue or any other cause without undue suffering. The trucker was convicted and fined \$5,000 by the Court of Quebec at Rivière-du-Loup courthouse in June 2006.
- (10) One of the several cases under the *Feeds Act* was registered against the Land O'Lakes Canada Ltd. of Guelph, Ontario which was convicted and fined \$50,000 for having in possession medicated feed that was labelled contrary to subsection 3(1)(c). The *Act* and its regulations were put in place to control and regulate the sale of livestock feeds.

A second case under the same statute was registered on December 18, 2007 against P.H. Friesen Ltd. of Calgary, Alberta, and the company was convicted and fined \$35,000 by the Alberta Provincial Court in Edmonton.

- (11) Two convictions for offences are representative of several prosecutions under the *Plant Protection Act* and its regulations. The first was a prosecution of Timber Baron Contracting Ltd. of Terrace, B.C. for illegally exporting logs in November 2005 to China without a Canadian phytosanitary certificate, in violation of subsection 55(2) of the *Plant Protection Regulations*. The second was a prosecution of Interforest Ltd. for importing in January 2005 an ash log that did not meet the prescribed specified in the regulations. The company was fined by the Ontario Court of Justice in Owen Sound for violating subsection 48(2) of the *Plant Protection Act*, resulting in a fine of \$20,000.

In all the above cases, the offences involved one off and deliberate acts of non-compliance that had been completed, leaving CFIA inspectors no choice but to launch prosecution. They were in conformity with CFIA's prosecution guidelines referred to earlier.⁴⁹⁴ It should be emphasized that the number of enforcement actions is only a partial indicator for measuring the effectiveness of CFIA's continuum of enforcement work such as the issuance of detentions, seizures, warning letters and administrative monetary penalties.

7.3.7 - How Much to Enforce?

In economic terms, the socially optimal level of enforcement occurs at the point where the extra costs of enforcement exceed the resulting additional benefits to society. Included within the cost calculation are the following:

- a) the costs of agency monitoring;
- b) the expense of processing and prosecuting cases;
- c) the defence costs of innocent and guilty parties; and
- d) the costs of misapplications of law, convicting the innocent and deterring desirable behaviour.

While it is not very difficult to estimate these costs, the agency has, in addition, to weigh the impact that any enforcement action would have for the

⁴⁹⁴ *Supra* note 478.

effectiveness of the regulatory program as a whole and choose one or more of the several tools provided to it in the legislation that brings about the best results. That is a subjective determination which can only be based on experience. This is a topic that is more fully discussed in the next chapter.

7.4 - Summary

To sum up this chapter, compliance and enforcement are integral components of a regulatory system and are necessary for its effectiveness. Their underlying theme is deterrence. Compliance in the food and plant products sectors focuses on risk management which is based on monitoring representative, statistically valid sample situations, supplemented by targeting of those who appear on the agency's radar as suspects to be followed up, and investigation of incidents which have indicated on inspection as suspicious. Enforcement actions, though considered by many as a discretionary exercise, in fact are the result of a careful determination of the various options and tools that are available to regulatory enforcement officials, depending on the nature and seriousness of non-compliance. Choice of a wrong tool may undermine a case which could happen if, for instance, a proceeding under the *AAAMP Act* is chosen instead of a prosecution, since choosing one precludes the other.⁴⁹⁵

On the other hand, the efficacy of the criminal sanction should not be underestimated. The symbolic condemnation of offenders through the criminal process may alter public attitudes about health and safety and other serious offences and thereby enhance compliance with regulatory requirements.

Guidance on the exercise of this discretion has been provided by CFIA's agency policies, which entrusts Area Executive Directors responsibility for enforcement decisions. Failure to exercise their responsibility to enforce the legislation might expose the government to civil liability at the instance of injured third parties.⁴⁹⁶ It might also be a sign of capture or at least official pusillanimity.

⁴⁹⁵ *AAAMP Act*, *supra* note 7, s 5.

⁴⁹⁶ See *Just*, *supra* note 447; *Rothfield*, *supra* note 448; *Tock*, *supra* note 449; *Swanson*, *supra* note 450.

After describing and analyzing the enforcement data in chapter 8, chapter 9 focuses on the efficacy of the regulatory system, to determine whether compliance and enforcement activities promote statutory objectives, such as the enhancement of the health and safety of human beings through the protection of animals raised for food and of plants and plant products to eliminate pests that damage food crops and forestry resources.

Chapter 8 - Description and Analysis of Enforcement Data

8.1 - Introduction

The objective of this chapter is to portray and analyse the data on both criminal prosecutions and administrative penalty proceedings. The prosecutions are analysed over 10 years in two five year periods, the first period commencing from Fiscal Year 1996/97, the second from Fiscal Year 2001/02, and *amps* only over the second five year period. The chapter also sets out the relevant statutory provisions, especially liability for punishment and penalties, where appropriate.

These two periods were chosen for good reason. In the first period, the only tool of any significance to enforcement that was available to the regulatory authority (then, the Federal Department of Agriculture) to secure compliance with the two statutes⁴⁹⁷ that are the focus of the thesis, was a criminal sanction. Although the *AAAMP Act* was enacted in 1995,⁴⁹⁸ it was not brought into operation until the beginning of the year 2000⁴⁹⁹ but only a few notices of violation were issued in that year. So, for the purpose of data analysis, those *amps* have been included in the second period which starts in 2001. The statute provided a new tool to the enforcement authority, namely, monetary penalties which the authority itself could impose in lieu of prosecuting those who contravened the statutes brought within its scope. As well, as from that year, the enforcement authority for all agri-food statutes and a few others, for example the *Food and Drugs Act*,⁵⁰⁰ *Fish Inspection Act*,⁵⁰¹ *Consumer Packaging and Labelling Act*,⁵⁰² was entrusted to a newly established

⁴⁹⁷ These are the *Health of Animals Act*, *supra* note 8, and the *Plant Protection Act*, *supra* note 9.

⁴⁹⁸ *Supra* note 7.

⁴⁹⁹ SOR/2000-187 (registered 4 May 2000).

⁵⁰⁰ RSC 1985, c F-27.

⁵⁰¹ RSC 1985, c F-12.

⁵⁰² RSC 1985, c C-38.

agency, the CFIA, which was created by statute in 1997.⁵⁰³ Thus, the CFIA had two distinct enforcement tools.

While a third statute was also brought within the ambit of the *AAAMP Act*, - namely the *Pest Control Products Act* (PCPA)⁵⁰⁴ - the administration and enforcement of that statute was transferred by the Government from Agriculture Canada to Health Canada, and a new agency, the Pesticide Regulatory Management Agency (PMRA) was created to administer and enforce that statute. *Amps* data were collected from PMRA but were not analysed as prosecutions data for the first period were not available and hence they could not be compared as that was the objective of the thesis. Furthermore, the *PCPA* was repealed and replaced in 2002 and came into force only in 2006.⁵⁰⁵

These two five-year periods, therefore, permit a comparison of the compliance effectiveness of *amps*, with criminal prosecution, which is at the heart of the issue explored in the thesis.

At the outset it should be emphasized that *amps* do not supplant or supplement the criminal sanction. It is an *alternative* to the criminal sanction. But the *AAAMP Act* makes it abundantly clear that the two sanctions cannot be mixed; they are on separate tracks. If an *amp* proceeding is commenced, the criminal sanction option is barred, and *vice versa*.⁵⁰⁶ Thus the *AAAMP Act* has created a “*dual track*” system. On which track to proceed must be determined by the CFIA enforcement officials when they decide to respond to non-compliance. When making that determination, the officials are guided by departmental policies and manuals, as no legislative (or regulatory) directions are given to them.⁵⁰⁷

⁵⁰³ *CFIA Act*, *supra* note 369.

⁵⁰⁴ RSC 1985, c P-9.

⁵⁰⁵ SC 2002, c 28. Act came into force 28 June 2006 (see SI/2006-93).

⁵⁰⁶ *AAAMP Act*, *supra* note 7, s 5.

⁵⁰⁷ See CFIA manuals referred to in CFIA Compliance and Enforcement Strategy, *supra* note 478.

A significant point that emerges from the data, as will be noted in Focus Group 1 (Table 2 and Chart 1) is that over the 10 years for which the figures were available, the total number of cases that were prosecuted for contravening the *Health of Animals Act* and *Regulations* was 191 involving 244 counts but convictions were obtained in only 79 cases involving 84 counts. The number of prosecutions and convictions in the first 5-year period (125:52) was nearly twice as many as those in the second, post-*amps* period (66:27). As the 5-year *amps* period resulted in 1,064 penalties (plus 398 notices of violation with warnings only), the fifty percent reduction in prosecution activity is more than compensated for by *amps* enforcement activity, approximately a 1:18 ratio.

Prosecutions under the *Plant Health Act* and its *Regulations*, showed a similar ratio but, as will be pointed out in Part B of the data, their total number was far less as there are fewer individuals and firms to be regulated by CFIA than under the *Health of Animals Act* and its *Regulations* (Period 1 = 40:9; Period 2 = 33:4).⁵⁰⁸

It must once again be stressed that the effectiveness of compliance enforcement through the use of either criminal sanction or the *amp*, or both, is not the only or a sufficient measure of the effectiveness of the regulatory system and the attainment of the purposes of the statutes, although enforcement has a clear impact on the latter. This issue is discussed at some length chapter 3 of this Part.

8.2 - Focus Groups

The prosecution and administrative penalty data is given by way of nine focus groups each with one or more tables (for a total of 21) and four of the tables are illustrated with graphics for a visual appreciation of the figures. The box on the following page gives a brief snapshot.

The data are presented both on a fiscal year basis and for selected sections of the two statutes and their regulations, namely, the *Health of Animals Act*⁵⁰⁹ and the

⁵⁰⁸ Far more persons are engaged in imports and exports of regulated plants and plant products and the data from CBSA (for 2006 and subsequent years) have a much larger component of violations than animals and animal products.

⁵⁰⁹ *Supra* note 8; *Health of Animals Regulations*, CRC, c 296, Part XII amended by SOR/97-85, 2000-181, Part XV added by SOR/2000-416, 2003-403, 2005-192.

*Plant Protection Act*⁵¹⁰. Only those sections that had a substantial volume of enforcement activity and are significant for effectiveness of the compliance system as a whole, figure in the presentation.

Each focus group contains a short summary of the provisions of the statute or regulation concerned, the statutory maximum penalties⁵¹¹ and, in the case of *amps*, the category – minor, serious or very serious - in which the violation of a particular section has been placed by the *AAAMP Regulations*.

The comparison of compliance data in both periods is shown by line curves, with the curve for *amp* data beginning in the second phase since only in that phase *amps* became available to CFIA as an option. Data on the *Health of Animals Act* and the *Health of Animals Regulations* are presented in Part A; those on the *Plant Protection Act* and the *Plant Protection Regulations*, in Part B.

⁵¹⁰ *Supra* note 9; *Plant Protection Regulations*, SOR/95-212.

⁵¹¹ In the case of *amps*, penalties are fixed by *AAAMP Regulations*, SOR/2000-187 (s 4) at a level well below the maximum. Since October 12, 2010, by SOR/2010-215, they have been sharply increased.

Breakdown of Focus Groups

FOCUS GROUP	TABLE	DATA ON	PERIOD
<u>1. HEALTH OF ANIMALS ACT AND REGULATIONS</u>			
F.G. 1	Table 1 + Chart 1	All Prosecutions (S & U/s)*	1 & 2
F.G. 2	Table 2 + Chart 2	Prosecutions (S & U/s) and <i>Amps</i>	1 & 2
F.G. 3	Table 3	Prosecutions: Selected Sections, by Region & FY	1 & 2
	Table 4	<i>Amps</i> (selected sections) by Region & FY	2
F.G.4	Table 5	All <i>Amps</i> by Region & FY	2
	Table 6	Prosecutions and <i>Amps</i> by Region and FY	2
F.G. 5	Table 7	Prosecutions, selected sections of <i>Act</i>	1 & 2
	Table 8	Prosecutions, selected sections of <i>Regulations</i>	1 & 2
F.G.6A	Table 9	Prosecutions, section 16 of <i>Act</i>	1 & 2
	Table 10	Pros. & <i>Amps</i> , section 16 of <i>Act</i>	2
	Table 11	Prosecutions, <i>Regulation</i> 41(2)	1 & 2
	Table 12	Pros. & <i>Amps</i> , <i>Regulation</i> 41(2)	2
F.G.6B	Table 13	Prosecutions, <i>Regulation</i> 138(2)	1 & 2
	Table 14	<i>Regulation</i> 138(2)	2
	Table 15	Prosecutions, <i>Regulation</i> 143	1
	Table 16	Pros. & <i>Amps</i> , <i>Regulation</i> 143	2
F.G.6C	Table 17	Warnings & <i>Amps</i> , Part XV	2
F.G.7	Table 18	Fines	1 & 2
	Table 19	Fines and Penalties	2
<u>2. PLANT PROTECTION ACT AND REGULATIONS</u>			
P.P.A. & P.P.R.	Table 20	<i>Amps</i> under section 7 of <i>Act</i>	2
	Table 21	<i>Amps</i> under <i>Regulation</i> 53	2

Notes: F.G. = Focus Group. S = Successful. U/S = Unsuccessful. Pros. = Prosecutions

8.2.1 – Part A – Health of Animals Act⁵¹² and Health of Animals Regulations⁵¹³

8.2.1.1. – Prosecutions and Administrative Monetary Penalties

8.2.1.1.1 - Overview of Prosecutions

A total of 191 cases involving 244 counts were prosecuted over both periods, with convictions registered against 79 offenders on 84 counts; 52 of them were in Period 1 (on 54 counts) and 27 in Period 2 (on 30 counts). Of the 112 unsuccessful prosecutions, 73 were in Period 1 (on 87 counts) and 39 in Period 2 (on 73 counts).⁵¹⁴

Period 1 refers to fiscal years 1996/97 to 2000/01 (denoted by FY 1 to FY 5), and Period 2 refers to fiscal years 2001/02 to 2005/06 (FY 6 to FY 10).

The total number of guilty verdicts in the two periods represents almost one in three counts. The breakdown of cases is given under several focus groupings in the following sections of this chapter.

8.2.1.1.2 - Overview of Administrative Monetary Penalties (*amps*)

Amps became available only in Period 2 during which 398 Notices of Violations (Warning), or NOVW, were issued to those found in contravention of the *Health of Animals Act* and *Regulations* and 1,067 Notices of Violations (Penalty), or NOVW, were issued to those found in contravention of the same legislation, bringing the total to 1,465. Of the 1,067 NOVW, excluding a small number that was pending, only 84 were overturned, the vast majority by the Canada Agricultural Review Tribunal and the remaining ones by the Minister of Agriculture.

NOVW are important because they become part of a regulated party's compliance history, and if an enforcement official has ordered some changes to the

⁵¹² *Supra* note 8.

⁵¹³ CRC, c 296, amended by SOR/97-86, 2000-181, 2000-416, 2003-403, 2005-192 (Part XII amended, Part XV added).

⁵¹⁴ One prosecution case was outstanding for nearly nine years and has been included in the "unsuccessful" category as there is one possibility in three that a conviction will be registered, if at all, as the case may be stayed for lack of movement – a good possibility in summary cases where a two year limitation period has been prescribed, or dismissed under the *Askov* doctrine (*R v Askov*, [1990] 2 SC 1199; 59 CCC (3d) 449) as violating the *Canadian Charter of Rights and Freedoms*. The case was begun in the first period and continued to be shown as "pending" in the data.

party's method of operation, there is likely to be a return inspection. If the party is aggrieved by a NOVW, it can seek a review either by the Minister or by the Canada Agricultural Review Tribunal. Review of only five NOVW was sought.

A provision for *compliance* agreements has been made in the *AAAMP Act*.⁵¹⁵ There were only 30 requests for such agreements and the Minister accepted all but one.

Combined data on *amps* and prosecutions are presented in Focus Group 2.⁵¹⁶

8.2.1.1.3 - Focus Group 1 – Volume of Prosecutions in Periods 1 and 2

Group 1 focuses in each of the two periods on the total number of (a) successful prosecutions, i.e. convictions, and (b) unsuccessful prosecutions, i.e. not guilty or other judicial verdicts. In broad terms, there was a decline in the number of prosecutions in the five year period from 2001 to 2006, after the *amp* regime came into force, relative to the preceding five year period [See Table 2]. In Period 1 (pre-*amp*) 125 individuals were subject to prosecutions under the *Health of Animals Act* and *Regulations*, with a total of 141 counts being brought. In Period 2 (post-*amp*), 66 individuals were charged with a total of 103 counts.

In Period 1 convictions were entered on 54 counts against 52 offenders. Prosecutions brought against 73 alleged offenders were unsuccessful, the accused being acquitted or found not guilty by the court or the prosecutions having been stayed or withdrawn by the prosecutor. In period 2 only 27 individuals were convicted on a total of 30 counts, while prosecutions initiated against 39 individuals on a total of 73 counts were unsuccessful.

The year in which the offence occurred is used as the basis for choice of enforcement instrument. If the offence arose in Period 1, the only option that CFIA had was to prosecute, even where the court decision was rendered in Period 2. But

⁵¹⁵ *AAAMP Act*, *supra* note 7, s 10.

⁵¹⁶ It must be emphasized that the underlying data was provided to the candidate by the CFIA through the good offices of its Investigation and Enforcement Service, on a confidential basis, with a written undertaking that it will not be disclosed to any third party without the express consent of CFIA, except for the purpose of evaluating the Thesis. The analysis and presentation of the data in the form that is found in the Thesis are the work of the candidate alone, and is not subject to that restriction.

for offences that arose in Period 2, CFIA could have chosen to proceed administratively, treating the offence as a violation subject to *amp*, if the policy criteria were met.

The number of unsuccessful prosecutions shown in Table 3 in Period 1 includes the figure for the last year of Period 1 which was unusually high (out of 27 prosecutions only 8 were successful), but smaller in number of prosecutions than in FY2 and FY3, while there were more prosecutions in the three earlier years (FY 2 to FY4) and a better conviction rate.

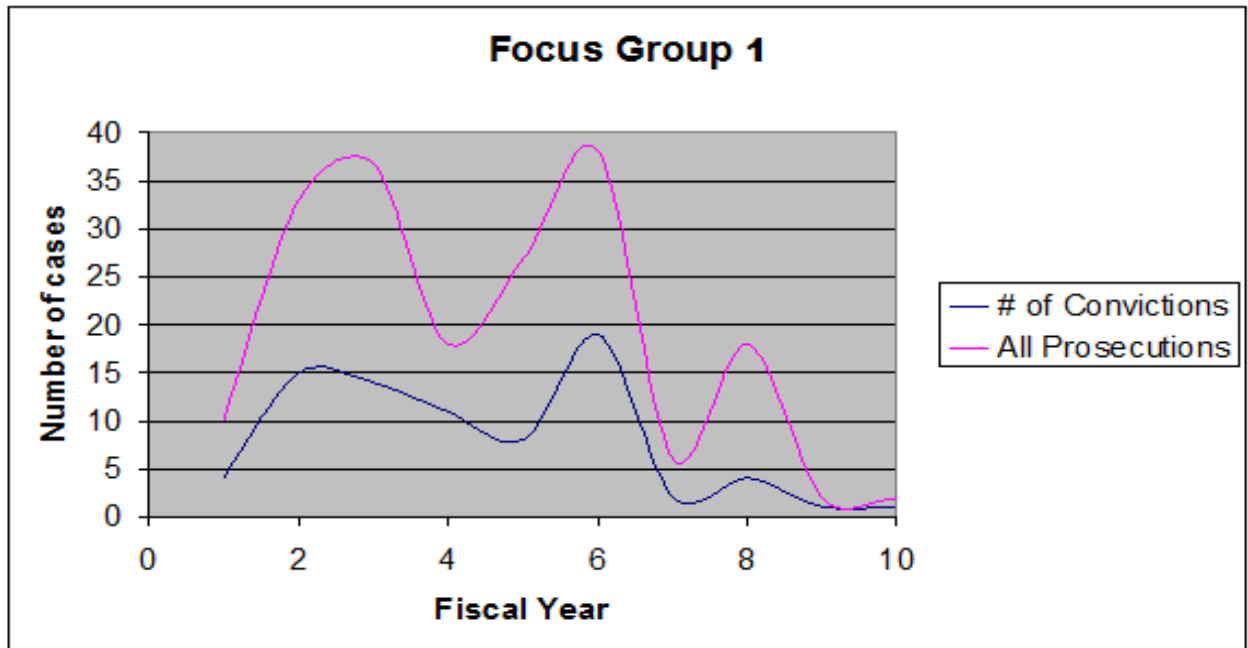
Similarly, while the prosecution figures in Period 2 were almost one half of those in Period 1, the largest number (19 successful and 19 unsuccessful, out of a total of 66 prosecutions – or just over one-half) was in FY 6, the first year of Period 2. This indicates that the impact of the optional proceeding as a violation was not seen until after FY 6. The delayed impact could also be seen on the number of unsuccessful prosecutions (19) in FY 6 as against a total of 20 for the remaining four years. The decline in the number of prosecutions in the last two years with a 50% conviction rate is remarkable (2 prosecutions in each of those years).

Table 1: Volume of All Prosecutions
[*Health of Animals Act & Regulations*]

	Successful prosecutions		Unsuccessful prosecutions	
	# of offenders	# of counts	# of offenders	# of counts
Period 1	52	54	73	87
Period 2	27	30	39	73
Total	79	84	112	160

The following chart illustrates the data in Table 1. The top curve shows all prosecutions; the bottom curve shows convictions.

Chart 1 - Volume of All Prosecutions - [*Health of Animals Act & Regulations*]



The high number of unsuccessful prosecutions in the transitional years (38 out of 65) between Periods 1 and 2 (FY 5 and FY 6) is perhaps due to a failure to fully integrate *amps* in the enforcement regime. It might also indicate a failure to weigh the chances of success, as prosecution is a serious matter where the onus is borne by the prosecutor to prove *mens rea* (intention or knowledge) or, where liability is strict, to disprove due diligence put forward as a defence by the offender. The due diligence defence is not permitted if proceedings are taken under the *AAAMP Act*. The data indicate the conviction rate overall has remained almost unchanged and this was true also for the transition years.

It should be noted that if a prosecution fails, the alternative to proceed administratively is expressly barred by the *AAAMP Act*. However, lack of success in prosecutions does not necessarily connote laxity in ensuring compliance. Technical or procedural problems related to the transition may have contributed to the failure of prosecutions, but the accused person may have learnt from the experience.

8.2.1.1.4 - Focus Group 2: Volume of Prosecutions and *Amps* in Period 2

As pointed out under Focus group 1, Period 2 includes an unusually high number of prosecutions in FY 6, the very first year of that period when there were 38

prosecutions (19 successful on 19 counts and 19 unsuccessful on 47 counts). In the remaining four years, there were only 28 prosecutions [8 successful (11 counts) and 20 unsuccessful (26 counts)]. The latter figure includes a very high number (14) in one single year, i.e. in FY 8.

By contrast, the penalty proceedings in Period 2 appear to have been extremely high (see data in Table 2, illustrated by Chart 2 below). Approximately 1,500 notices of violation were issued for violation of the *Health of Animals Act* and the *Health of Animals Regulations* during the period, including 353 Warnings (NOVW), compared to a total of 66 prosecutions (successful and unsuccessful), a ratio of over 22:1. The success rate under *AMPS* was also much higher than what was experienced by enforcement officers in criminal courts. Less than ten percent of penalty notices were withdrawn by CFIA or overturned by the Minister or by the Canada Agricultural Review Tribunal.⁵¹⁷

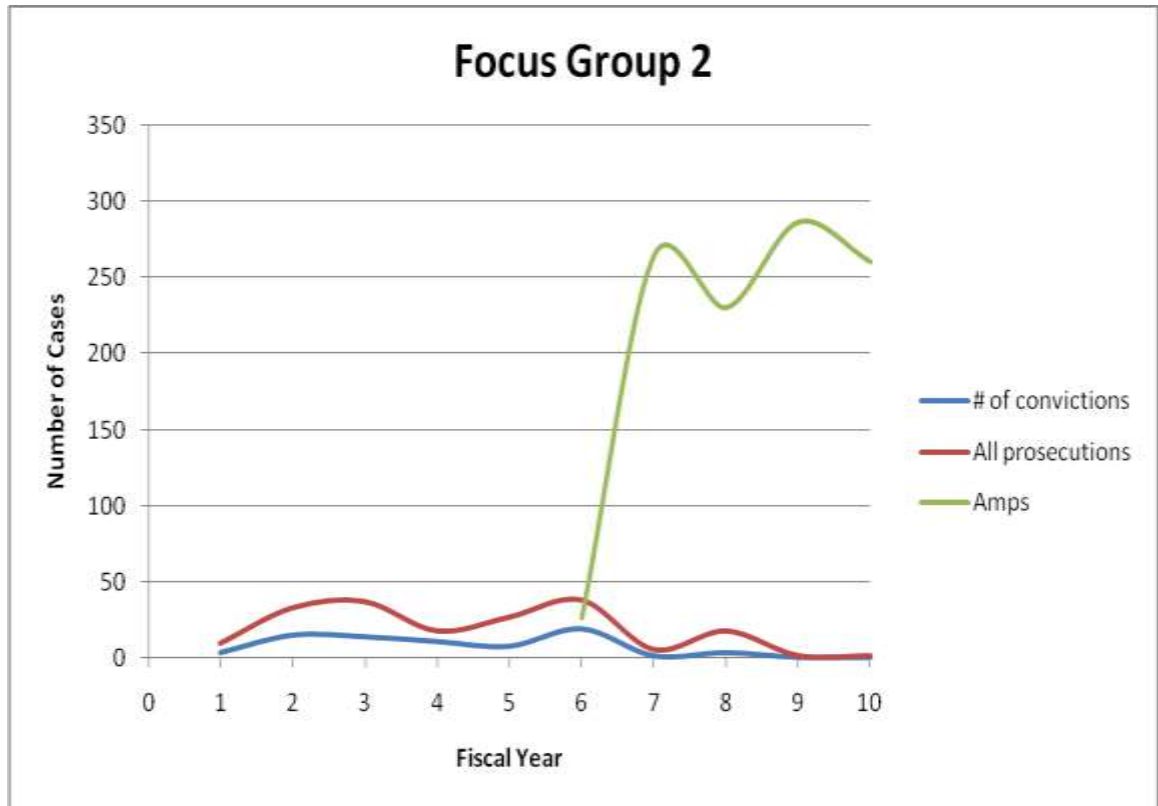
Table 2: Volume of All Prosecutions and *Amps* by Fiscal Years, Periods 1 & 2
[*Health of Animals Act & Regulations*]

	<u># of convictions</u> (# counts in brackets)		<u># unsuccessful</u> (# counts in brackets)		<u>All prosecutions</u> (# counts in brackets)		
Period 1							
FY 1	4	(4)	6	(7)	10	(11)	
FY 2	15	(15)	18	(22)	33	(37)	NO
FY 3	14	(16)	23	(29)	37	(45)	<i>amps</i>
FY 4	11	(11)	7	(7)	18	(18)	IN THIS
FY 5	8	(8)	19	(19)	27	(30)	PERIOD
Total	52	(54)	73	(84)	125	(141)	
Period 2							<i>amps*</i>
FY 6	19	(19)	19	(47)	38	(66)	27
FY 7	2	(3)	4	(10)	6	(13)	264
FY 8	4	(6)	14	(14)	18	(20)	230
FY 9	1	(1)	1	(1)	2	(2)	286
FY 10	1	(1)	1	(1)	2	(2)	260
Total	27	(30)	39	(73)	66	(103)	1067
Both Periods	79	(84)	112	(157)	191	(244)	(*NOVW not included)

The following chart illustrates the data in table 2. The top curve shows *amps*, the middle curve shows all prosecutions and the bottom curve shows convictions.

⁵¹⁷ The Minister overturned 5 of the 68 notices of violation after review. The Tribunal overturned 23 out of 176 notices of violation after review.

Chart 2 - Volume of All Prosecutions and Amps in Periods 1 & 2 - *Health of Animals Act & Regulations*



The *amps* data do not include penalties issued by the CBSA, which is responsible for enforcing import and export prohibitions or controls with respect to travelers entering or leaving Canada. Those data are relevant only to certain sections of the *Health of Animals Act and Regulations* and is presented in Appendix 5. If the data were included, the total number of penalty notices issued would probably be tripled, based on the figures for part of FY 6 and subsequent FYs.

It will be observed from a later table⁵¹⁸ that a very large number of penalties resulted from violation of the animal identification rules which were introduced in FY 8 following the discovery of BSE in a Canadian cow in 2003 in Alberta. The identification rules program, which covered cattle and bison initially, was later extended to sheep and swine. Prosecution for breach of the identification rules was

⁵¹⁸ Focus Group 6C, Table 18.

a distinct possibility, but rarely resorted to;⁵¹⁹ hence the gross imbalance. There were no similar regulations in Period 1.

8.2.1.1.4.1 - Observations on Data in Focus Groups 1 and 2

What interpretation can be placed on the data presented in Focus groups 1 and 2 with regard to compliance and enforcement? It is hard to explain but it can be assumed that there was no sudden surge in non-compliance because those who contravened the *Health of Animals Act* and the *Health of Animals Regulations* expected no more than a small monetary fine. Many would gladly pay the fine by admitting the contravention rather than be embroiled in further litigation, but the data indicate that many won their day in court. They had better than a 50:50 chance of acquittal. They had no such success in administrative proceedings under the *AAAMP Act* where most of their applications for review were unsuccessful.⁵²⁰

Three reasons come to mind to explain why enforcement officials were reluctant to refer a non-compliance situation to the federal prosecutors, especially if the offence was one of strict liability:

- (1) The high rate of failure to get convictions. Failure to get a conviction could be due to the fact that in a criminal case the burden of proof is on prosecutors to rebut the common law presumption of innocence or, if an accused was charged with a strict liability offence, to rebut the defence of due diligence asserted by the accused. Unless the prosecutor has an iron-clad case, there is a feeling it would be a waste of resources to pursue a strict liability offence.
- (2) The time and effort it takes to mount a prosecution, the need to administer a caution during investigation, take legal samples, the time for a case to come before courts, and the uncertainty of eventual success. All these, especially court proceedings, are outside CFIA control. In the meantime, as the matter

⁵¹⁹ In the only reported prosecution (from CFIA Prosecutions Bulletin of 2005, *supra* note 493, second example in the text), *Ronald Way* of Belleville, Ontario was convicted in 2005 for unlawfully removing from a farm to a stockyard three sheep that did not bear approved tags, and fined \$2,000 by a provincial court judge. The transcript of the judgment was provided to the candidate by Rick Sauder of the CFIA in which the judge warned the accused that he could face a jail sentence if he commits another offence.

⁵²⁰ Between FY6 and FY10, the Minister overturned only 5 out of 68 penalty notices reviewed, and the Tribunal overturned 23 out of 176 penalty notices it reviewed.

is before courts, CFIA cannot impose any administrative orders to correct the non-compliant situation; and

- (3) Low fines. Even if a conviction was obtained, the only penalty the court had been imposing was a fine which in most cases was far below the maximum provided in the statutes (\$50,000 in summary cases and \$250,000 in indictment cases).

For all the above reasons, unless inspectors had solid evidence that would overcome legal challenges, they may have been impelled to exercise their discretion by looking the other way when they were convinced there was non-compliance, or by issuing a verbal or written warning which they could follow up on another inspection whenever they came around to it.

Amps also offer advantages in terms of cost-benefit to both CFIA and the non-compliers. One of the great advantages for CFIA is that it can re-allocate resources from time-consuming prosecutions, to increase inspections and perhaps also realize cost savings. The data on *amps* presented below provide ample proof of the former but there are no hard facts to substantiate real savings in financial terms.⁵²¹

On the other hand, in an *amp* proceeding, unlike in a prosecution where a case is taken out of its hands, the CFIA does not lose control. The proceeding begins in-house; there may be many face-to-face negotiations and compromises; there is no need, as a precondition to proceeding, to produce witnesses or to confront violators with facts of their violation or to take legal samples, and there is also no need for legal representation if a violation is not contested. More importantly, if the facts of the violation are undisputed, that is the end of the matter. Defences, such as due diligence, or mistake of fact, are not permitted, although all common law rules and principles continue to be available. The *AAAMP Act* has effectively circumvented the due diligence defence⁵²² that was laid down by the Supreme Court of Canada in the *R. v. City of Sault Ste. Marie* case in 1978.⁵²³ The

⁵²¹ For a discussion of this issue, see text at §6.3.2.7, above.

⁵²² *Supra* note 7, s 18.

⁵²³ *Sault Ste Marie*, *supra* note 46.

enforcement staff are confronted with fewer problems in an administrative setting than in a court of law, although they have to make a persuasive argument before the Review Tribunal if the matter goes that far. It is no wonder that administrative officials are strong proponents of *amp*.

For non-compliers, too, *amps* are a better proposition. When proposals for *amp* legislation were published and cross-country consultations were held, there was overwhelming support from the regulated community.⁵²⁴ They would rather face an administrative tribunal than a criminal court, since a criminal conviction would jeopardize their business and negatively impact on their ability to contract with governments of this country or of a foreign country because there will be a record of that conviction. Furthermore, the amount of penalties that they would be paying is (after discounts for prompt payment) just a slap on the wrist, which big firms can somehow absorb in their business. The data on penalties presented in one of the later focus groups is proof of that. Non-compliers know that once they are in the *amps* stream, they cannot be prosecuted for the same violation. All that can happen is, the violation would become part of their compliance history which might come to haunt them if there are more such cases against them and that history is not erased in five years as limited by the *AAMP Act*.⁵²⁵ Thus, it is a “*win win*” situation for both parties.

8.2.1.1.5 - Focus Group 3 – Volume of Prosecutions and *Amps*: Regional Picture

Tables 3 and 4 below give data on prosecutions for the two periods for section 16 of *the Health of Animals Act* and subsections 41(2) and 138(2) of the *Regulations* which have generated large enough data for comparison. Section 16 of the *Act* controls the importation of animals and animal products and by-products, and subsection 41(2) contains requirements prescribed pursuant to section 16(2) of the *Act*; hence they are taken together. Subsection 138(2) is one of the key provisions of Part XII of the *Regulations* which prohibit the transportation of animals unless the vehicles meet prescribed requirements and the animals can be moved without undue suffering.

⁵²⁴ The author participated in some of these consultations in 1993 and 1994, and the point is often made by the Department of Agriculture officials when presenting draft regulations to the Cabinet. This point was also confirmed during consultations with US agencies in 1989 and 1990.

⁵²⁵ *Supra* note 7, s 23.

Data for *amps* are given only for Period 2. These tables give the breakdown for the four regions which are administratively known as (1) the West – comprising British Columbia, Alberta, Saskatchewan and Manitoba; (2) Ontario; (3) Quebec; and (4) the Atlantic – comprising the provinces of Nova Scotia, New Brunswick, Newfoundland and Labrador, and Prince Edward Island. It should be noted that there is a larger volume of *amps* cases which are not reflected in the tables since CBSA has the responsibility for the control of imports and exports and its data were available only for a few months of FY 10 and for subsequent FYs. The CBSA data covers both animals and plants coming within the *Health of Animals Act* and the *Plant Protection Act* and their respective *Regulations*. CBSA data are given in Appendix 5.

Table 3: Volume of Prosecutions under Selected Sections by Region and FY

	<i>Act</i> s.16		<i>Reg.</i> s.41(2)		<i>Reg.</i> Sections 138-143			TOTAL
	WEST	ONT	WEST	WEST	ONT	QUE	ATL	
	Period 1							
FY 1								
FY 2	1	2		2				5
FY 3	3	1	1	5				10
FY 4	5		2	2				9
FY 5	1		1	2			1	5
Sub-Total	10	3	4	11			1	29
	Period 2							
FY 6	1		1	2			1	5
FY 7	2		1	8				11
FY 8	1							1
FY 9					1	1		2
FY 10	2		1		1	1		5
Total	16	3	7	21	2	2	2	53

The Table indicates that most of the prosecutions in the ten-year period arose in the West; the other provinces had only a few. On the other hand, a fairly large number of penalties were issued under those sections of the *Act* and *Regulations* after *amps* became available in Period 2, with Quebec Region accounting for the vast majority.

Table 4: Volume of Amps in Period 2 by Selected Sections of Act and Regulations – by Region and FY

	<i>Act s.16</i>		<i>Reg. s.41(2)</i>		<i>Reg. Sections 138-143</i>			TOTAL
	WEST	ONT	WEST	WEST*	ONT*	QUE**	ATL*	
	Period 2							
FY 6	2	8	1					11
FY 7	22	2	1	8		9	2	44
FY 8	15	6		2		37	5	65
FY 9	1	6	2	6	3	126	6	150
FY 10	1	7	4	6	6	55	12	91
Total	41	29	8	22	9	227	25	361

Note: *Amps* withdrawn or overturned are excluded

* only s 143
** s.138-192; s143=35

8.2.1.1.6 - Focus Group 4: Volume of Prosecutions and *Amps* in Period 2

Table 5 below gives data on all *amps* issued in the four CFIA administrative regions. It differs from the data in Table 4 which showed *amps* only for a few selected sections where there were prosecutions in Period 2. For purposes of comparison Table 6, which follows, shows the total of prosecutions and *amps* in the same period.

Table 5: Volume of All Amps Issued in Period 2 by Region and FY

	WEST	ONTARIO	QUEBEC	ATLANTIC
FY 6	4			
FY 7	215	28	11	4
FY 8	105	31	49	6
FY 9	14	7	143	11
FY 10	39	14	85	15
TOTAL	377	80	288	36

Note: *Amps* in this table do not include Warnings.

Table 6: Volume of Prosecutions and Amps in Period 2

	Successful Prosecutions	Unsuccessful Prosecutions	TOTAL	Notices of Violation (NOVW/NOVP)		
				NOVW	NOVP	TOTAL
Period 2						
FY 6	19	19	38	11	27	38
FY 7	2	4	6	26	264	290
FY 8	4	14	18	45	230	275
FY 9	1	1	2	114	286	400
FY 10	1	1	2	157	260	417
Total	27	39	66	353	1,067	1,420

It will be noted from Table 6, under NOVW/NOVP, that Warnings have considerably increased in the last two years of Period 2. This is probably due to the identification requirement introduced in 2003/04 under new Part XV of the *Health of Animals Regulations*.⁵²⁶ Warnings become part of compliance history and in the vast majority of cases they are accepted by the regulatees without objection. In a very few cases, however, it appears that protests were lodged and the warnings were withdrawn. If a disputed warning is not withdrawn, the aggrieved party can appeal to the Canada Agricultural Review Tribunal. Of the 353 warnings issued, only three were withdrawn and two were taken to the Tribunal for review.

Not reflected in Table 6 are the penalties imposed on travelers who import (or export) articles or things regulated or prohibited by the *Health of Animals Act* and its *Regulations* for which CBSA has enforcement authority. Those figures were not available for the years referred to as CBSA began to exercise that authority as Period 2 ended. The figures for the years following Period 2 are given in a separate table in Appendix 5. CBSA enforcements activities in this area will have a much greater impact in the future.

⁵²⁶ CRC, c 296. Part XV (ss 172-89) was added only in 2000 by SOR/2000-416.

8.2.1.1.7 - Observations on Data in Focus Group 4

As noted above in the discussion on Focus Group 2, the number of prosecutions in Period 2 was almost half that in Period 1. But there were almost 22 times as many penalty notices as prosecutions in Period 2. As explained earlier, the introduction of animal identification regulations accounted for a very substantial number of these penalties and created a greater imbalance.

8.2.1.1.8 - Focus Group 5: Volume of Prosecutions by Selected Sections of *Act* and *Regulations*

This group focuses on those sections of the *Health of Animals Act* and the *Health of Animals Regulations* that contain the core obligations imposed on regulated parties. Relative to other sections, these give rise to a larger number of prosecutions.

The sections of the *Act* that have been selected are: 15, 16, 25 and 35; those of the *Regulations* are: 41(2), 138(2), and 140 to 143.⁵²⁷ Under the sections of the *Act* there were a total of 80 prosecutions, 29 with a guilty verdict and 51 with a not guilty verdict (Table 7). Under the *Regulations*, there were a total of 96 prosecutions, 34 with a guilty verdict and 62 with a not guilty verdict (Table 8), giving a combined total for both the *Act* and the *Regulations*, of 176 prosecutions, with guilty verdicts in 63 and not guilty verdicts in 113. Amps issued under Part XV are not shown as they cannot be compared with prosecutions; the Part was enacted only in Period 2. Tables 7 and 8 are shown below.

⁵²⁷ As Part XV (sections 172-189) of the *Health of Animals Regulations* was enacted only in 2000 (SOR 2000-416) and there being no prosecutions to compare between Periods 1 and 2, data on it have not been selected.

Table 7: Number of Prosecutions by Selected Sections -
Health of Animals Act in Periods 1 and 2

		GUILTY			NOT GUILTY			BOTH TOTALS	
		FY	#	TOTAL	FY	#	TOTAL		
<i>s. 15(1)</i>									
Period 1	FY 1		1		FY 1	4		5	
	FY 4				FY 4	3		3	
				1				7	
								8	
<i>s. 16(1)</i>									
Period 1	FY 1		3		FY 1				
	FY 2		6		FY 2	4			
	FY 3		4		FY 3	4			
	FY 4		1		FY 4	2			
	FY 5		1		FY 5	4			
				15				14	
								29	
Period 2	FY 6		3		FY 6	20			
	FY 7				FY 7				
	FY 8		1		FY 8	2			
	FY 9				FY 9	1			
	FY 10		3		FY 10	1			
				7				24	
								31	
<i>s. 25(1)</i>									
Period 1									
Period 2	FY 6		3	3	FY 6	1			
<i>s. 35(1)</i>									
Period 1									
Period 2	FY 6		3	3	FY 6	1			
	FY 8				FY 8	4			
				6				6	
								12	
TOTAL				29				51	80

Table 8: Number of Prosecutions by Selected Sections -
Health of Animals Regulations in Periods 1 and 2

	FY	GUILTY		NOT GUILTY		BOTH TOTALS
		#	TOTAL	#	TOTAL	
s. 41(2):						
Period 1	FY 2	1		3		
	FY 3	3		4		
	FY 4			2		
Period 2	FY 5	2		2		
	FY 6	1		5		
	FY 7			1		
	FY 8					
	FY 9	1				
Sub-Total			8		17	25
s. 138:						
Period 1	FY 1	1		4		
	FY 2	2		7		
	FY 3	2		1		
	FY 4			1		
Period 2	FY 10	1		1		
Sub-Total			6		14	20
S. 139						
Period 1	FY 4	1		1		
	FY 5	2				
Period 2						
Sub-Total			3		1	4
s. 140						
FY 4	FY 3			3		
	FY 4	1		4		
	FY 5	2				
Period 2	FY 7			1		
	FY 8	2		6		
Sub-Total			5		14	19
s. 141(1)						
Period 1	FY1			2		
	FY2	1				
	FY3	1				
Sub-Total			2		2	4
s. 143						
Period 1	FY 1	1		1		
	FY 3	1		4		
	FY 4	7		1		
	FY 5	1		8		
Sub-Total			10		14	24
TOTAL			34		62	96

8.2.1.1.9 - Further Analysis of Prosecutions and *Amps* (by Selected Sections of the *Act* and *Regulations*)

The three sub-groups of Focus group 6 described below cover: A. Imports, B. Transportation of Animals, and C. Animal Identification. Basically they recapitulate Focus group 5 (Tables 7 and 8) but from a different perspective, and also describe the related provisions of the statute and regulations.

8.2.1.1.9.1 – Imports - Sections 15 and 16 of the *Health of Animals Act*, Sections 40 and 41 of the *Health of Animals Regulations*

8.2.1.1.9.1.1 - Focus Group 6A

Sections 15 and 16 of the *Act* and sections 40 and 41 of the *Regulations* are taken together because they deal with importation of animals, animal products, animal food or thing (imported things). Section 15 prohibits the possession of illegally imported things, and section 16 creates an offence of failing to present the imported things to an officer, inspector or customs officer. These offences may be prosecuted or, alternatively, proceeded with as very serious violations under item 10 (for section 15 violation) and item 11 (for a section 16 violation) of the AAAMP Act.

Sections 40 and 41 of the *Regulations* are concerned with the same imported articles and things as mentioned in, and correspond with, sections 15 and 16 of the *Act*. They make it an offence to import the articles and things if they do not meet the prescribed requirements (section 40), import them from a country other than the United States that is not designated as free of prescribed diseases (paragraph 41(2)(a), and import without a certificate (paragraph 41(2)(b). If the offences are proceeded with as contraventions, a paragraph 41(2)(a) contravention is a serious violation, whereas paragraph 41(2)(b) contravention is only a minor violation. Administrative monetary penalties reflect the gravity of the violation.

It should be noted that travelers bringing in imported animals (generally birds and bees, and pet animals) are subject to declaration requirements at the point of entry and the CBSA has the power under the *CBSA Act* to intercept them, and proceed under the *Health of Animals Act* and the *Regulations*. CBSA keeps its own data as it has independent authority under the *CBSA Act* but relies on CFIA for

general advice and assistance in complex cases. It has issued a large number of penalties, using the *AAAMP Act*. Tables 6B and 6D do not include those penalties.⁵²⁸

8.2.1.1.9.1.1.1 - Prosecutions under Section 15

Eight prosecutions were initiated in Period 1 for the contravention of subsection 15(1), but only one was successful. There was no prosecution in Period 2.

Under section 15, which makes it illegal to possess or dispose of any animal or thing that was imported in contravention of the *Act* or *Regulations*, the accused has the burden to prove, when found in possession or disposing of an imported animal or thing, that it was not illegally imported. Unlike other offences, which are *hybrid*, that is to say, prosecutable either by summary procedure or by indictment, this offence is exclusively summary and subsection 65(3) expressly states that no prison term can be imposed by the court upon conviction of the offender.

The reversal of the burden of proof to the accused has the potential for a constitutional challenge. It has led courts to strike it down in several Customs cases.⁵²⁹

A maximum fine of \$50,000 is prescribed by subsection 65(2) of the *Act*. In the only successful prosecution, which occurred in FY 1 in the Western Region, the provincial court imposed a fine of a mere \$1,000.

8.2.1.1.9.1.1.2 - Prosecutions under Section 16

Table 9 gives prosecution data for section 16 of the *Act*.

Of the 64 charges brought over the 10-year period under this section, only 22 convictions were registered; 19 against offenders from the West and 3 Ontario offenders.

⁵²⁸ CBSA data is provided in Appendix 5 at 300, below.

⁵²⁹ Reversal of the burden of proof in the context of s 152(4) of the *Customs Act*, RSC 1985, c 1 (2nd Supp) was held by the Supreme Court of Canada to violate s 11(d) of the *Charter*, *supra* note 28, since it is possible for an accused to be convicted despite the existence of a reasonable doubt in the mind of the judge, *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200. Additional jurisprudence is referenced in Prabhu, *supra* note 352 at 238.

Subsection 65(1) of the Act prescribes a maximum fine of \$50,000, or six months prison term, or both, on a summary conviction and on a conviction upon indictment, a maximum fine of \$250,000 and, in addition, a maximum prison term of two years. Fines in Period 1 ranged from \$100 to \$200 on offenders from Ontario, and on offenders from the West, in both periods, they ranged from a low of \$250 to a high of \$20,000. Seven offenders received fines from \$7,000 to \$20,000.

Table 9: Prosecutions and Fines Imposed under Section 16 *Health of Animals Act* by Region

	Prosecutions	Convictions	Unsuccessful Prosecutions	Fine amounts
WEST				
Period 1				
FY 1	1	1		\$1,000
FY 2	10	6	4	2 x \$250; 2 x \$1,500 1 x \$5,000; 1 x \$7,000
FY 3	7	3	4	1 x \$300; 1 x \$4,000 1 \$7,500
FY 4	3	1	2	\$8,000
FY 5	5	1	4	\$8,000
Sub-Total	26	12	14	
Period 2				
FY 6	23	3	20	1 x \$3,000; 1 x \$10,000; 1 x \$12,000
FY 7	4		4	
FY 8	3	1	2	\$20,000
FY 9	1		1	
FY 10	4	3	1	\$2 x \$4,000; 1 x \$6,000
Sub-Total	35	7	28	
ONTARIO				
Period 1 (only)				
FY 1	2	2		1 x \$200; 1x\$100
FY 2				
FY 3	1	1		\$200
Sub-Total	3			
Total both periods	64	22	42	

8.2.1.1.9.1.1.3 - *Amps* under Section 16 (Period 2)

CFIA has the option of proceeding with section 16 offences as violations subject to administrative monetary penalties. Failing to present an animal at the time of import is classified as a serious violation under the *AAAMP Regulations*, item 11. Table 10 shows that only 12 amps were issued in Period 2, one of which was overturned or withdrawn, compared with 7 convictions (out of 35 prosecutions). The amount of penalties in nine cases was \$4,000; it was \$4,400 in one case and \$2,000 in another.⁵³⁰

Table 10: Comparison of Prosecutions and Amps in Period 2 under Section 16 *Health of Animals Act*

	Prosecutions*			Amps	
	Convictions	Unsuccessful	Total	Penalty Notices	Withdrawn/ Overturned
FY 6	3	20	23	2	
FY 7		4	4	2	
FY 8	1	2	3	6	
FY 9		1	1	1	1
FY 10	3	1	4		
Total	7	28	35	11	1

*[Data on prosecutions is repeated from Table 9 to enable comparison.]

8.2.1.1.9.1.1.4 - Prosecutions under *Regulation* Sections 40 and 41

Regulations 40 and 41 go together as the offence is created by section 40 but ceases to be so if the conditions set out in sections 41 and other sections of Part IV do not apply. Section 40 prohibits the importation of an animal byproduct, manure or thing containing an animal byproduct or manure, except in accordance with Part IV of the *Regulations* which contains 12 sections. Section 41 prohibits the importation of these things, with some exceptions, if their country of origin is not the United States (subsection (1)), unless that country is designated under subsection (2) as free of any reportable disease or any other serious epizootic disease to which the species that produced that byproduct or thing is susceptible and which can be transmitted by the animal byproduct or thing.

⁵³⁰ CBSA data is provided in Appendix 5 at 300, below.

In addition to meeting the conditions of section 41, the importer must produce a certificate signed by an official of the government of the country of origin showing that the country of origin is the country designated as free of such disease.

8.2.1.1.9.1.1.4.1 - Punishment Prescribed

Offenders contravening sections 40 and 41 are liable under section 65, on summary conviction to a fine of \$50,000, or six months imprisonment, or both, and on indictment, to a fine of \$250,000 or two years imprisonment, or both.

As Table 11 below shows, all the 21 prosecutions initiated under subsection 41(2) of the *Regulations* were launched in the West (province of British Columbia). Of these, only nine were successful. Seven of them were in Period 1 (one in FY 2, two each in FY 3, 4 and 5), and two in Period 2 (one in FY 6 and one in FY 9). Except for the offence in FY 2 where a fine of \$1,500 was imposed, the fines in FY 3 ranged from \$500 to \$750, in FY 4 and 5 from \$6,500 to \$8,000 and in FY 9 to \$38,000. This suggests a trend, though based on a small sample, that courts are progressively becoming tougher with offenders. Courts no doubt consider many other factors at the time of sentencing, including the situation of the accused and the submissions of both parties, in deciding on the appropriate level of fine.

Table 11: Prosecutions under s. 41(2) *Health of Animals Regulations*

	Prosecutions	Convictions	Unsuccessful Prosecutions
WEST			
Period 1			
FY 1			
FY 2	4	1	3
FY 3	2	2	-
FY 4	7	2	5
FY 5	6	2	4
Sub-Total	19	7	12
Period 2			
FY 6	1	1	-
FY 7			-
FY 8			-
FY 9	1	1	
FY 10			
Sub-Total	2	2	-
Total both	21	9	12

8.2.1.1.9.1.1.4.2 - Amps under Regulation Sections 40 and 41

Section 40 offences can be proceeded with as *violations* pursuant to the *AAAMP Act*. With the exception of the violation of importing an animal byproduct without a certificate, contrary to paragraph 41(2) (b), which is a *minor violation* (item 81), contraventions of the other parts of the section are classified as *serious violations* (items 79 and 80).⁵³¹ The numbers shown in Table 12 below are small in the data given by CFIA as most of the enforcement activity involves imports and exports for which the CBSA has the primary responsibility. The data from CBSA (Appendix 5) show a large number of penalties in the last few months of FY10 and in the following two years.

Table 12: Prosecutions and Amps in Period 2 under Section 41 (2) *Health of Animals Regulations*

	Prosecutions			Amps	
	Convictions	Unsuccessful	Total	Penalty Notices	Withdrawn / Overturned
WEST					
Period 2					
FY 6	1		1	1	
FY 7				1	
FY 8					
FY 9	1		1	2	
FY 10				4	
Sub-Total	2		2	8	
Ontario					
Quebec					
FY 8				1	
Atlantic					
Sub-Total				1	
Total both periods	2		2	9	

⁵³¹ *AAAMP Regulations*, *supra* note 385.

8.2.1.1.9.2 - Transportation of Animals - Part XII of the *Health of Animals Regulations* (Sections 138 to 143) - Focus Group 6B

8.2.1.1.9.2.1 - Overview

Regulations governing the transport of animals are codified in Part XII of the *Health of Animals Regulations*, the authority for enacting which is contained in paragraph 64(1)(i) of the *Act*. Regulations for humane treatment includes those that cover the care, handling and disposition of animals, as well as the manner in which animals are transported within, into or out of Canada, and those that provide for the treatment or disposal of animals that are not cared for, handled or transported in a humane manner. Subsection 64(3) makes it clear that this authority is not to be limited to the humane treatment of animals; it includes the humane treatment of birds.

Sections 138 to 143, the group of sections that comes within Part XII, are of special relevance to this thesis. These sections have produced a substantial volume of prosecutions as well as *amps*. The data are presented in Tables 13 to 16.

The law on the humane transportation and treatment of animals is not contained only in Part XII, although Part XII comes exclusively within CFIA jurisdiction. There are other laws, including sections 444 to 446 of the *Criminal Code*⁵³² and provincial animal welfare laws, which are enforced by the police or provincial inspectors, animal welfare agencies and organizations. The latter are briefly summarized in Appendix 6.

8.2.1.1.9.2.1.2 - Prosecutions and *Amps* under Section 138

Paragraphs 138(2)(a), (b) and (c) prohibit the loading and transport (or causing to be loaded or transported) of an animal that cannot be transported without suffering (paragraph (2)(a), of an animal that has not been fed and watered (paragraph (2)(b)), and of an animal that might give birth during the journey (paragraph (2)(c)).

Contravention of section 138 of the *Regulations* is an offence under section 65 of the *Act*. A person who commits the offence is liable on summary conviction to a

⁵³² These sections are discussed in chapter 2, Part I, above.

fine of \$50,000, or six months imprisonment, or both, and on indictment, to a fine of \$250,000 or to two years imprisonment, or both.

8.2.1.1.9.2.1.2.1 – Prosecutions

Of a total of 18 charges laid under section 138 (2) in both periods, 15 were from the West (all in Period 1) and 2 from Quebec (in Period 2). Only three of the 16 Western charges, and one of the two Quebec charges, were successful. Of the three successful Western prosecutions, two arose in Alberta South area, one in British Columbia Mainland/Interior sub-region. This is a poor success rate.

Subsection 138(4) prohibits the continuing transport of an animal that is unfit for transport. Only two charges were successfully brought in the West under this subsection in Period 1. As the number is quite small, a table has not been provided.

Table 13: Prosecutions by Region under section 138 (2) *Health of Animals Regulations*

	Prosecutions (# of charges)	Convictions	Unsuccessful	Amount of fines
WEST				
Period 1				
FY 1	4	-	4	
FY 2	8	1	7	\$600
FY 3	3	2	1	1 x \$750; 1 x \$500
FY 4	1	-	1	
FY 5				
Period 2				
FY 6 -10	-			
QUEBEC				
Period 1				
FY 1-5				
Period 2				
FY 6-9	1	-	1	
FY 10	1	1	-	\$5,000

8.2.1.1.9.2.1.2.2 – Amps Proceedings

Instead of prosecuting offenders for breach of section 138, the CFIA has the option of proceeding with the contraventions as violations. Items 233 to 236 of the *AAMP Regulations* classify them as serious violations.⁵³³ Table 14 shows that 232 *amps* were issued during Period 2 under subsection 138 (2) but only 16 charges were laid in the West and two in Quebec (Table 13).

To the above number of 232 should be added another seven issued under subsection 138 (4), bringing the total to 239 under section 138. Of these seven, one was overturned by the Canada Agricultural Review Tribunal, and all except one were issued in the West. The single remaining penalty was issued in Ontario. These seven are not included in Table 14 below.

Table 14: Amps issued by Region in Period 2 under s. 138 (2) *Health of Animals Regulations*

	<u>NOVP</u>	<u>W/d or O/t</u>	<u>Penalty amount</u>
QUEBEC			
FY 6			
FY 7	5	1	\$200
FY 8	29	6	\$2,000 to \$3,000
FY 9	127	8	\$2,000 to \$3,000
FY 10	50	4	\$2,000 to \$3,000
ATLANTIC			
FY 6-9			
FY 10	2		\$2,000
Total	213	19	

Note: Total NOVP issued were 213 + 19 = 232
 NOVP = Notice of Violation with Penalty
 W/d = Withdrawn
 O/t = Overturned

⁵³³ *Supra* note 385.

8.2.1.1.9.2.1.3 - Prosecutions under Section 139

Subsection 139 (1) makes it an offence to beat an animal whilst it is being loaded or unloaded. Loading or unloading an animal in a way that is likely to cause suffering is an offence under subsection 139(2). Using a ramp or gangway with sides that are of insufficient strength and height is an offence under subsection 139(4).

The three successful prosecutions for contravention of subsection 139(2) were all in the Prairie Provinces and occurred during Period 1, one of those in FY 4 and two in FY 5. Fines ranged from \$500 to \$2,500.

8.2.1.1.9.2.1.3.1 - Punishment Prescribed

Contravention of this provision is an offence under section 65 and a person convicted of the offence is liable on summary conviction to a fine of \$50,000, or six months imprisonment, or both, and on indictment, to a fine of \$250,000 or two years imprisonment, or both.

8.2.1.1.9.2.1.4 - Prosecutions under Section 140

8.2.1.1.9.2.1.4.1 - Provisions of the Section

Subsection 140(1) prohibits overloading a conveyance and subsection 140(2) prohibits transport of animals in an overcrowded conveyance.

Of the five successful prosecutions for contravention of subsection 140(2), two occurred in the Western region in Period 1, one in the Atlantic region in the same period, and two in the Ontario region in Period 2.

8.2.1.1.9.2.1.4.2 - Punishment Prescribed

Contravention of subsection 140(1) is an offence under section 65 and a person convicted of the offence is liable on summary conviction to a fine of \$50,000, or six months imprisonment, or both, and on indictment, to a fine of \$250,000 or two years imprisonment, or both. The fines imposed by the court on summary conviction ranged from \$1,000 to \$4,500.

8.2.1.1.9.2.1.5 - Prosecutions and *Amps* under Sections 141 and 142

8.2.1.1.9.2.1.5.1 – Prosecutions

(a) Provisions of the Sections

Subsection 141(1) prohibits the loading of animals in a conveyance or transporting them without segregating them as prescribed (based upon age, sex, size, propensity to injure other animals in the vehicle, etc.). In particular, the section requires the segregation, during transport, of groups of mature bulls, de-tusked boars, rams and goat bucks, from others of the same species, and the segregation of a mature boar that has not been de-tusked and mature stallion from all other animals.

Section 142 prohibits the transport of animals unless each animal is able to stand in its natural position without coming into contact with a deck or roof and without making provision for the drainage or absorption of urine from all decks or levels.

There were only two successful prosecutions under subsection 141(1) both of which occurred in the southern sub-region of the Province of Alberta and both in Period 1, and none under section 142.

(b) Punishment Prescribed

Contravention of this provision is an offence under section 65 and a person convicted of the offence is liable on summary conviction to a fine of \$50,000, or six months imprisonment, or both, and on indictment, to a fine of \$250,000 or two years imprisonment, or both.

8.2.1.1.9.2.1.5.2 - *Amps* under Sections 141 and 142

CFIA has the option of proceeding with the breach of sections 141 and 142 as *violations*. A total of 12 *amps* were issued in Period 2 under section 141 and 2 under section 142.

8.2.1.1.9.2.1.6 - Prosecutions and *Amps* under Section 143

(a) Provisions of the Section

Paragraphs 143(1)(a), (b), (c), (d), and (e) are concerned with the transportation of livestock in inadequately constructed conveyances, crates and containers which could cause injury or undue exposure to weather or inadequate ventilation to animals during their journey by air or land or at sea. Paragraphs 143(2) (a) and (b) are concerned with transporting livestock in a conveyance without sand or secure footholds or without bedding. Subsection 143(4) requires a sea carrier who takes an equine on board a vessel for exportation outside Canada in the winter months (November 1 to March 31 following) to provide and maintain such facilities and equipment on board the vessel as will ensure that the equine does not become ill from seasickness due to rough seas during the voyage.

(b) Prosecutions under Section 143

There were 23 prosecutions, all in Period 1 and all, except one, in the West. Eight of the 22 prosecutions conducted in the West were successful and fines ranging from \$250 to \$3,000 were imposed by the court. The single prosecution outside the West, which was successful, was conducted in the Atlantic where the court imposed a fine of \$1,500. Table 15 gives the prosecution data under this section. There were no prosecutions in Period 2.

Table 15: Prosecutions under Subsections 143(1) and (2)
Health of Animals Regulations

		Prosecutions	Convictions	Unsuccessful	Amount of fines
WEST					
	FY 1	2	1	1	\$3,000
	FY 2				
	FY 2				
	FY 4	11	6	5	2 x \$1,500; 2 x \$750; 1x \$500; 1 x \$250
	FY 5	9	1	8	\$1,750
	Sub-Total	22	8	14	
ATLANTIC					
	FY 3 only	1	1		\$1,500
TOTAL		23	9	14	

Note: FYs based on date of occurrence of offence. Total includes 15 Period 2 prosecutions.

(d) *Amps* under Section 143

Early in Period 2, 15 prosecutions were conducted under section 143 with 8 convictions as compared to a total of 98 penalty notices, 21 of them in the West, 14 in Ontario, 36 in Quebec and 27 in the Atlantic. Most of these were from FY 7 onwards. Penalties ranged from a low of \$200 to a high of \$3,000. Of these, only 6 were either withdrawn by the CFIA or overturned on appeal. Table 16 gives the data for *amps* in Period 2.

Table 16: *Amps* under s. 143(1) *Health of Animals Regulations*

	<u>NOVP</u>		<u>NOVP</u>		<u>NOVP</u>		<u>NOVP</u>		<u>NOVP</u>	
	WEST		ONTARIO		QUEBEC		ATLANTIC		TOTAL	
FY 6	3	1W/d							3	1W/d
FY 7	5				6	1 O/t	3		14	1 O/t
FY 8	4				13		7		24	
FY 9	3		4	1 W/d	7		10		24	1W/d
FY 10	6		10	3 O/t	10		7		33	3 O/t
Total	21	1 W/d	14	1 W/d; 3 O/t	36	1 O/t	27		98	2 W/d; 4 O/t

Note: W/d = Withdrawn; O/t = Overturned

8.2.1.1.9.3 - Animal Identification, Part XV *Regulations*⁵³⁴

8.2.1.1.9.3.1 - Focus Group 6C

8.2.1.1.9.3.1.1 - Reason for Including Animal Identification in Analysis

Animal Identification Regulations were introduced only in 2004 following the discovery that one Alberta cow was afflicted with BSE (bovine spongiform encephalopathy) which had ravaged much of the European continent, especially Britain and France in the last decades of the last century. Rigorous testing of Canadian cows, especially those that were imported from those countries that had experienced the BSE, and precautionary feed bans, were introduced mandating the removal from animal feeds of specified risk material, such as the skull, brain, eyes, tonsils and spinal cord which, it was discovered, were the primary causes of BSE.

Part XV *Regulations* require cattle and bison to be tagged with an identification chip or other device in its ear, a requirement extended to sheep and swine in the next couple of years, and more recently, poultry. Animal owners' associations (such as the Canadian Cattle Identification Agency, the Canadian Sheep Federation) were delegated by CFIA to administer the tagging program, with CFIA monitoring the same through inspections on farm sites and at other points before the animals reach the food chain or, if culling has been ordered, before they are disposed of.

Under the animal identification program, no bovine could be moved from its farm of origin except in special cases (such as taking it to a tagging site, or the loss of a tag during transport), unless it had a tag. Persons who received the animal either for sale (e.g. auction marts), transport (e.g. a trucker), slaughter (e.g. a meat plant), renderers and operators of deadyards, were made responsible to ensure that they did not take animals that did not bear an identification tag. Switching tags or selling them is made an offence.

Importers are required to ensure that they obtain a tag as soon as the animals are received at their initial destination (section 189) and exporters must report the number on the tag within 30 days of export (section 188).

⁵³⁴ *Health of Animals Regulations*, *supra* note 125, Part XV added by SOR/2000-416.

Sections 176 and 177, particularly the former, are the core sections of Part XV. Section 176 makes it illegal to remove or cause the removal of an animal which does not bear a tag approved by the administrator, from the farm of origin of the animal or from a farm or ranch other than its farm of origin. Section 177 prohibits the transportation, or cause the transportation, of an animal or the carcass of an animal that does not bear an approved tag (which would include auction mart),⁵³⁵ except to a tagging site or except when a tag is lost during transport, in which case a new tag must be obtained.

Millions of cattle and bovines on farm sites have been inspected in the last three years by CFIA to ensure that the tagging requirements are complied with. The largest number is in the West which has the biggest bovine population, followed by Ontario and Quebec.

The number of site visits, and the animal population inspected, give an idea of the extent of CFIA's inspection work, and the amount of time spent on inspections, as well as of the number of warnings or administrative monetary penalties that were issued in the course of that inspection. It also gives Canadians a greater confidence in the safety of food supply, as CFIA has the ability to trace back the origin of any contaminated meat and react promptly after being made aware of it by ordering the recall of affected meat products, thereby enhancing the statutory goals.

Table 17 extracts the data provided by CFIA's Livestock Identification Administration division. The data are kept by calendar year, not on a fiscal year basis. Data for 2004 are only for the last two months of the year.

⁵³⁵ In *Denfield*, *supra* note 396, the Federal Court of Appeal reversed the decision of the Review Tribunal holding that an auctioneer (the respondent in this case) exercises, from a legal standpoint, control over the property he sells at an auction, and by so doing, causes the movement of animal from its farm, ranch, as defined by section 172.

Table 17: Inspections and Notices of Warnings and Penalties under sections 176 and 177 – [Livestock Identification]

Year	# of sites visited		Estimated bovine population	Net inspection time* (hrs)	Warnings	Amps		
	Cattle/Bison	Sheep				Cattle	Bison	Sheep
2004	1,843	122	431,764	3,059	50	10		4
2005	7,729	1,343	2,487,389	15,560	235	161	21	62
2006	9,343	1,882	2,341,591	8,773.53	507	202	3	24
Total				*excl. travel	792	373	24	80

It will be observed from the above data that the number of warnings (792) and penalty notices (477) has considerably inflated the totals that were presented in Focus Group 1. There was just one prosecution since the tagging regulations were implemented, which resulted in a fine of \$2,000. In the absence of *amps*, the criminal justice system for prosecuting offenders will undoubtedly be overloaded as the courts would be unable to cope with such large numbers from just one regulatory agency. These are the main reasons for including the data on sections 176 and 177, the key *sections* of Part XV at this point, as they are among a group that regulates the animal tagging requirement, and constitute the most widely invoked sections.

8.2.1.1.9.3.1.2 Penalty for Violation

A contravention of sections 176 and 177 is classified as a *minor violation* only (item 304, 306, 307 *AAAMP Regulations*).⁵³⁶ In the vast majority of cases only a \$500 penalty was imposed, and if it was paid within the prescribed time, the violator was eligible for a fifty percent reduction, which amounted to \$250. Quite a number of defendants did not pay within the prescribed time and hence did not qualify for the reduction. Furthermore, a large number of penalties, even where they were discounted, remained unpaid, which creates a huge collection problem.

⁵³⁶ *Supra* note 385, Schedule 1, Part I, Div 2. The penalty has been increased to \$1,300 for minor violations by persons who are in business or who committed the violation for monetary gain by SOR/2010-215 since 12 October 2010.

8.2.1.1.9.3.2 - Focus Group 7 – Amount of Fines and Penalties

8.2.1.1.9.3.2.1 - Overview

It is useful to compare the amount of fines that courts impose for offences against the various provisions of the *Health of Animals Act* and the *Health of Animals Regulations* with the amount of monetary penalties that CFIA has been imposing since it received authority in 2000 under the *AAAMP Act* for what in effect are identical provisions.

Two observations are pertinent. The maximum fines prescribed by subsection 65(1) of the *Health of Animals Act* are much larger compared to the maximum penalties prescribed by the *AAAMP Act*. The maximum fine on a summary conviction is \$50,000 and for a conviction on indictment, \$250,000. The Court has considerable discretion in choosing a fine level. Its discretion is not controlled by statute as no minimum fines have been established; it is judicially exercised. On the other hand, subsection 4(1) of the *AAAMP Act* prescribes a maximum penalty of \$15,000, subject to the limits set out in the *AAAMP Regulations*.⁵³⁷

8.2.1.1.9.3.2.2 - Amount of Fines Imposed by Courts

Two tables, Table 18 which shows the amount of fines imposed by the court on summary conviction of an offender under the core sections of the *Health of Animals Act* and its *Regulations*, and Table 19 which compares these fines with *amps* (this comparison, for obvious reasons, is for Period 2 only), conclude the data in this focus group.

⁵³⁷ SOR/2010-215, s 1. The penalty amounts until October 12, 2010 when the amendment was enacted were less than half the above amounts. The penalty scales are set out in §6.3.2.10.2.

Table 18: Fines Imposed by Courts by Section and Fiscal Year

Fiscal Year	Section of Health of Animals Act				Section of Health of Animals Regulations													
	S. 15 Act		S 16 Act		S. 41 Regs.		S. 138 Regs.		S. 139 Regs.		S. 140 Regs		S. 141 Regs		S. 142 Regs		S. 143 Regs.	
	#	Fines imposed	#	Fines imposed	#	Fines imposed	#	Fines imposed	#	Fines imposed	#	Fines imposed	#	Fines imposed	#	Fines imposed	#	Fines imposed
FY 1			1	\$100			1	\$6,000					-				1	\$3,000
			1	\$200														
			1	\$1,000														
FY 2			2	\$250	1	\$1,500	1	\$600			1	\$4,500	1	\$500	1	\$500		
			2	\$1,500														
			1	\$5,000														
			1	\$7,000														
FY 3	-		1	\$200	2	\$500	1	\$500					1	\$2,000	1	\$2,000	1	\$1,500
			1	\$300	1	\$750	1	\$750										
			1	\$4,000			1	\$2,000										
			1	\$7,500														
FY 4	1	\$1,000	1	\$8,000			1	\$500	1	\$500	1	\$2,500					1	\$250
																	2	\$500
																	1	\$750
																	2	\$1,500
FY 5			-		1	\$6,500												
FY 6			1	\$8,000	1	\$7,500					1	\$1,000						
FY 7			1	\$3,000					1	\$2,000							1	\$1,000
			1	\$12,000					1	\$2,500								
FY 8			1	\$10,000	1	\$8,000												
FY 9											2	\$1,000						
FY 10					1	\$38,000												
Total & Range	1	\$1,000	18	\$100-\$12,000	7	\$500-\$8,000	6	\$500-\$6,000	3	\$500-\$2,500	5	\$1,000-\$4,500	2	\$500-\$2,000	2	\$500-\$2,000	9	\$250-\$3,000
FY 11			1	\$20,000	1	\$38,000			1	\$5,000								

Table 19: Fines Compared with Amps in Period 2

<i>Year</i>	<i>Section</i>	<i>Fines</i>	<i>Amps</i>
FY 6	s. 16 (Act)	1 x \$3,000; 1x \$10,000; 1 x\$ 12,000	2 x 4,000
FY 7	s. 16 (Act)	No fines	2 x \$4,000
FY 8	s. 16 (Act)	1 x \$2,000	5 x \$4,000; 1 x \$2,000;
FY 10	s.41(2) (Reg.)	1 x \$38,000	No <i>amps</i>
FY 8	s. 41 (Reg.)	1 x \$8,000	No <i>amps</i>
FY 10	-	-	\$2,000 to \$3,000
FY 8	s. 140 (Reg.)	2 x \$1,000	No <i>amps</i>

8.2.2 - Observations on Part A Data

To sum up to this point, one striking observation is that the volume of prosecutions has dropped dramatically from that during the four years just before the end of the old millennium, not including the transition years (FY 5 and FY 6), but this drop is more than made up by the sudden surge in *amps*, especially for violations committed against section 16 of the *Act* and sections 138 and 143 of the *Regulations*. The enforcement data are swelled by *amps* for violation of Part XV *Regulations* (especially sections 176 and 177) which were enacted in the present millennium, so they cannot be compared with fines. Furthermore, *amps* have provided an important tool to the CBSA in its enforcement of import/export provisions of the *Health of Animals Act/Regulations* (as well as of the *Plant Protection Act/Regulations*). Unfortunately the CBSA's enforcement data for the entire ten-year period under reference are not available. However, the data available for a part of FY10 and the subsequent two years do indicate that there are a vast number of minor violations which are dealt with by *amps* and that *amps* have been found very effective. The penalty amounts involved did not exceed \$400 per violation, before

applying discounts for prompt payment.⁵³⁸ All the violations appear to have been committed by individuals otherwise than in the course of business and were not committed to obtain a financial benefit, thus falling under Tier 1 of the penalty matrix.

With respect to the amount of fines and penalties, there does appear to be a big gap between the two. In some cases fines upon summary conviction have been as high as \$8,000 in Period 1 and \$38,000 in Period 2, as shown in Tables 18 and 19. In comparison, some violations in Period 2 carried the maximum penalty of \$4,000 permitted by the *Regulations*. Beginning mid-October of 2010, the amended *Regulations* have increased that maximum to \$10,000, but they are still less than the fines prescribed for offences in the *Health of Animals Act*. The results in the future would probably bring penalties closer to fine levels.⁵³⁹

Table 18 did not show the conviction registered for breach of subsections 16(1) and 41(2) of the *Act* in British Columbia where the court imposed a fine of \$38,000, as the judgments were rendered outside the period under review. There were also fines under a few sections of the regulations that have not been included because they were isolated cases. In these prosecutions courts have imposed fines between \$20,000 and \$171,000.⁵⁴⁰ Excluding these prosecutions, the average of fines imposed by the court during Periods 1 and 2 was approximately \$4,200 (on 78 offenders). The average of penalties (excluding penalties for Part XV violations) in Period 2 amounted to \$2,225 on 428 NOVP or almost one half of fines. Part of the reason why this is so is the penalties established in the *AAAMP Regulations* are much lower than what is authorized by the *Act*. As pointed out earlier, with the sharp increase in penalties with effect from mid-October 2010, better results are expected.

The thesis now turns to the *amps* regime under the *Plant Protection Act*, which is the second of the two *AAAMP* statutes, and its *Regulations*. Compliance under both statutes is the responsibility of the same inspectors and field officers. It will be noted that the prosecution and *amps* data under this legislation are vastly

⁵³⁸ CBSA data is provided in Appendix 5 at 300, below.

⁵³⁹ *Supra* note 536

⁵⁴⁰ Examples of these cases can be found at §7.3.6, above.

smaller than those under the *Health of Animals Act* and its *Regulations*, because of its limited field of operation, but the comparative compliance experience would be instructive and interesting, particularly because some of the provisions of the *Plant Protection Act* mirror those in the other statute.

8.2.3 - PART B – *Plant Protection Act* and *Plant Protection Regulations*

8.2.3.1 - Introduction

The stated purpose of the *Plant Protection Act* is “to protect plants and the agricultural and forestry resources of Canada, and to that end to take measures to prevent the import, export and spread of pests and control or eradicate pests.”⁵⁴¹ If, despite all the control measures taken under the statute, infested plants find their way into the country, or pests are carried by natural elements, such as wind, water and wildlife which respect no political borders, then the statute authorizes the Minister of Agriculture to take quarantine measures, declare infected areas as out of bounds for any physical movement of plants or plant products, such as taking of wood for burning, timber logs for export, etc., and take eradication measures to control the spread of pests.⁵⁴²

The control and eradication measures authorized by the *Plant Protection Act* must be distinguished from the control of pest control products (pesticides) which comes under the jurisdiction of another agency, the Pest Management Regulatory Agency (PMRA). PMRA derives its authority from the *Pest Control Products Act*.⁵⁴³ This distinction appears rather subtle and is perhaps explained by the difference between a “pest” and a “pest control product”. The *Plant Protection Act* defines a “pest” as

*“any thing that is injurious or potentially injurious, whether directly or indirectly, to plants or to products or by-products of plants, and includes any plant prescribed as a pest”,*⁵⁴⁴

⁵⁴¹ *Supra* note 9, s 2.

⁵⁴² *Ibid*, ss 12-14.

⁵⁴³ *Pest Control Act*, *supra* note 10.

⁵⁴⁴ *Supra* note 9, s 3.

whereas the *Pest Control Products Act* defines a pest as

*"an animal, a plant or other organism... or their organic functions ... which are injurious, noxious, troublesome, whether directly or indirectly"*⁵⁴⁵

and a pest control product as

"(a) a product, an organism or substance, including a product, an organism or substance deemed through biotechnology, that consists of its active ingredients, formulants and contaminants, and that is manufactured, represented, distributed, or used as a means for directly or indirectly, controlling, destroying, attracting or repelling a pest or for mitigating or preventing its injurious, noxious or troublesome effects;

(b) an active ingredient that is used to manufacture anything described in paragraph (a); or

*(c) any other thing that is prescribed to be a Pest Control Product."*⁵⁴⁶

Up until 2001, when both the *Plant Protection Act* and the *Pest Control Products Act* were administered and enforced by the Department of Agriculture and Agri-Food (formerly the Department of Agriculture), no difficulty would have arisen with the definition of a pest and pesticides (which is the generic name for pest control products). But with the transfer of the latter *Act* to the Department of Health's administration, which is exercised through PMRA, its own agency, some difficulties might arise in precisely limiting the scope of either agency's jurisdiction, as the *Plant Protection Act* authorizes the CFIA, which is the agency under the Minister of Agriculture, to take measures to prevent the import, export and spread of pests and to *control or eradicate pests*. Presumably the control and eradication measures go beyond controlled burning and felling of trees and involve the use of pesticides on a large scale in control or quarantine areas which have been infested.

The core duties, obligations and responsibilities of the *Plant Protection Act* are contained in sections 6, 7 and 9 and the corresponding sections of the *Regulations*, namely, 53, 55 and 57. Offence and criminal liability provisions are contained in sections 48 to 51. The sections of the statute mirror similar provisions in the *Health*

⁵⁴⁵ *Pest Control Act*, *supra* note 10, s 2.

⁵⁴⁶ *Ibid.*

of *Animals Act* (sections 15, 16, 65, 66 and 68). Hence most of the discussion in Part A is also applicable to this Part and, except where there are substantial differences, it will not be repeated.

Section 6 of the *Act* prohibits a person from moving, growing, raising, culturing or producing a thing that is believed to be a pest, that is infested with a pest or that constitutes a biological obstacle to the control of a pest.

Section 7 of the *Act* prohibits the import or export of any thing that is a pest, that is infested with a pest or that constitutes a biological obstacle to the control of pests, unless the thing is presented to an inspector. If despite this prohibition, a thing that is a pest has escaped detection at the time of import, section 9 prohibits the possession or disposal of the thing that is known by the person, who has possession of it, to have been illegally imported. It may be noted at this point that illegal importation (as well as exportation), and possession of illegally imported goods, are also offences under the *Customs Act*⁵⁴⁷ which comes under the administration of the CBSA. CBSA has also been authorized by Parliament to enforce the *Plant Protection Act* (and, as pointed out in Part A, also the *Health of Animals Act*) in so far as the import or export crosses into Canada or is taken out of Canada.⁵⁴⁸ The *Customs Act* provides for more stringent criminal penalties, and goods unlawfully imported are subject to forfeiture or, where they are not found, to *ascertained forfeiture*.⁵⁴⁹ CBSA has, thus, more options than CFIA.

Failure to comply with the *Act* and the *Regulations* is an offence and a person who is found in contravention may either be prosecuted or, at the option of CFIA, be issued an *amp*. Items 2, 3 and 4 of the *AAAMP Regulations*⁵⁵⁰ designate the contravention of sections 6, 7 and 9 as very serious violations.

⁵⁴⁷ *Supra* note 193, s 160(1).

⁵⁴⁸ See *Supra* under Part A, Imports.

⁵⁴⁹ *Supra* note 193, ss 122 (forfeiture), 124 (ascertained forfeiture).

⁵⁵⁰ *Supra* note 385.

Sections 53 and 54 of the *Plant Protection Regulations*⁵⁵¹ reinforce section 6 of the statute, and their contravention is similarly punished or penalized. *AAAMP Regulations* designate the contravention of section 53 as a very serious violation⁵⁵² and that of section 54 as a serious violation.⁵⁵³

Sections 55 to 57 of the *Plant Protection Regulations* implement the export obligations contained in section 7 of the *Act*. Pursuant to the *AAAMP Regulations*, breaches of the following provisions of section 55 are very serious violations: failure to obtain an export document (Canadian Phytosanitary Certificate or Canadian Phytosanitary Certificate for Re-Export); altering or defacing the export certificate; or erasing information or statement contained in it; and substituting a thing for the thing⁵⁵⁴ for which the export certificate was issued.⁵⁵⁵ Likewise, failure to obtain an export permit as prescribed by the *Regulations* and failure to meet the phytosanitary requirements of the importing country are *very serious violations*.⁵⁵⁶

8.2.3.2 - Prosecutions under the *Plant Protection Act* and *Regulations*

A total of nine convictions were reported in Period 1, and four in Period 2.

Of the nine convictions in Period 1, one was for contravention of section 6, two were of section 7, two of section 23, one was of section 31, one of section 39 of the *Act*, and two were for the contravention of *Regulations* (one each under sections 55 and 57). Fines ranged from a low of \$150 to a high of \$4,000.

The four convictions in Period 2 were: three for the contravention of the *Act* (one each for sections 7, 9 and 23(1), and one for section 55 of the *Regulations*). Fines ranged from a low of \$2,500 to a high of \$30,000. It appears that only

⁵⁵¹ *Supra* note 149.

⁵⁵² *AAAMP Regulations*, *supra* note 385, items 45 and 46.

⁵⁵³ *Ibid*, item 47.

⁵⁵⁴ The repetition of the word "thing" in the text and elsewhere is deliberate as the term has been statutorily defined in both the *Health of Animals Act*, *supra* note 8, and the *Plant Protection Act*, *supra* note 9. The definition is quoted in the text as well as in various footnotes.

⁵⁵⁵ *Supra* note 385, items 49 to 52.

⁵⁵⁶ *Ibid*, items 53 and 54.

serious offences were prosecuted and that the fines imposed by the court were substantially higher than in Period 1.

8.2.3.3 - Amps under Sections 6 and 7 of the Act

A total of 25 Warnings were issued during Period 2, one of which was issued under section 6, four under section 15, and 14 under section 7 of the Act. Another 24 warnings were issued under the Regulations, 16, the largest number being under section 53.

During Period 2, 18 penalty notices were issued under section 7. All defendants were from the Western region. Of the 18, all except two were for \$4,000 each; in the two exceptional cases, the penalty was only \$400. With 50% discount which defendants were eligible under the AAAMP Act for timely payment,⁵⁵⁷ many were able to reduce their penalty by one half of the original penalty.

Table 20: Amps under Section 7 of the Plant Protection Act

Fiscal Year	Number	Amount
WEST (only)		
FY 6	3	3 x \$4,500
FY 7	6	5 x \$4,000; 1 x \$400
FY 8	1	1 x \$4,000
FY 9	5	4 x \$4,000; 1 x \$400
FY 10	3	3 x \$4,000
	18	

8.2.3.4 - Amps under the Regulations

8.2.3.4.1 - Section 53

This is the only regulation that had a substantial volume of *amps* (as well as warnings), probably because of illegal movement during Period 2 of plants or plant products which were infested by the Emerald Ash borer, from quarantined zones. The Regulation prohibits a person from moving any thing from, into or out of any place that is declared as an infected place by a ministerial order or by an order of an

⁵⁵⁷ *Supra* note 7, s 4(e).

inspector, as an infected place, unless the movement is permitted by the order and the movement occurs in accordance with that order.

A contravention of this section is a very serious violation under items 45 and 46 of the *AAAMP Regulations*.⁵⁵⁸ Of the 44 penalties that were issued, only two were withdrawn. All the defendants came from Ontario. Two penalties were in an amount of \$4,000, one was of \$200 and 31 were of \$400.

Data on amps issued under section 53 of the *Plant Protection Regulations* are set out in Table 21 below.

Table 21: *Amps Issued under s. 53 of the Plant Protection Regulations*

Fiscal Year	Number	Amount
ONTARIO (only)		
FY 6	3	3 x \$4,500
FY 7	6	5 x \$4,000; 1 x \$400
FY 8	1	1 x \$4,000
FY 9	15	14 x \$400; 1 x \$4,000
FY 10	17	16 x \$400; 1 x \$200*
Total	42	

*Note: Excludes 2 that were withdrawn

8.2.3.4.2 - Sections 55 and 57

These two *Regulation* sections implement the export prohibitions contained in section 7 of the *Act*. Their contravention is designated as very serious violations under items 49 to 52 and 54, respectively, of the *AAAMP Regulations*.⁵⁵⁹ Only one penalty was imposed under section 55, in the amount of \$2,000, and three under section 57, two of which were overturned on review. The penalty that was not reviewed was in the amount of \$4,000.

8.2.3.5 – Summary of Part B data

This section described the provisions of the *Plant Protection Act* and the *Plant Protection Regulations*, which mirrored those in the *Health of Animals Act* and the

⁵⁵⁸ *Ibid*, s 10(2).

⁵⁵⁹ *Ibid*, Schedule 1, Part 1, Div 2.

Health of Animals Regulations, but with a more limited scope than the latter. As a result, the quantitative enforcement data over the two five-year periods shows much less activity than was the case with its counterpart, *the Health of Animals Act/Regulations* and, therefore, only a couple of tables showing the data are given.

8.2.4 - PART C. Assessment of Data

8.2.4.1- Assessment of and Observations on the Part A and Part B data

What does the data presented in Parts A and B and summarized above signify? Several observations can be made.

It was observed that over 10 years (i.e., the two periods covered by the data), the total number of prosecutions for breaches of the *Health of Animals* and *Plant Protection Acts* and their respective regulations averaged 25 a year. This number is less than one quarter of all prosecutions instituted under all statutes administered by CFIA and its predecessor, the Department of Agriculture (approximately 1,500); the average for 10 years is thus 150. Only the *Meat Inspection Act* (about 35) and the *Food and Drugs Act* prosecutions (about 75) surpassed the average for the *Health of Animals* and *Plant Protection Acts* and *Regulations*. It cannot therefore be said that the caseload of criminal courts had increased significantly by these prosecutions.⁵⁶⁰ Justification for introducing *amps* must be found elsewhere.

⁵⁶⁰ Criminal Justice Statistics provided by Statistics Canada indicate that *Criminal Code* offences handled by criminal courts numbered approximately 600,000 in 2006, and criminal offences under all Federal statutes (other than the *Criminal Code*) that were handled by them were approximately 57,000 or less than ten percent of *Criminal Code* offences. On this basis, the average of 150 offences prosecuted under CFIA administered statutes constitute less than 0.4% of all offences (excluding *Criminal Code* offense) and 0.04% of all *Criminal Code* offences. [Source: Stats Canada CANSIM Table 252-0013 for 2006, provided to the candidate by Chantal Fournier-MacGillvray by email 23.05.2008 as Excel table. The condensed data appear in Appendix 7 at 306, below.]

There were not many prosecutions in Period 1 especially for the breach of the *Plant Protection Act* and its *Regulations*, and there was a dramatic drop in the number in Period 2. This drop can be attributed to *amps*. It appears that *amps* have enabled CFIA to free up more resources to inspections than were available under the old prosecution regime. However, apart from the penalties imposed under the transportation of animals group of regulations (Part XII), *amps* under the other core sections (section 15 and 16 of the *Health of Animals Act*) have not increased by such dramatic numbers. Sections 176 and 177 of the *Regulations* are an exception; they have produced a far greater number of penalties than all others, about one half of all the penalties imposed, and that too within a shorter period of time.

Except in the case of Part XII (transportation of animals) of the Health of Animals Regulations, the compliance rate under other sections of the Act and Regulations has been stable.

The few prosecutions in Period 1 for Part XII breaches do not necessarily indicate that there was high compliance and that compliance had suddenly worsened in Period 2 leading to a more aggressive enforcement. Although there may have been many instances of Part XII offences in Period 1, they were perhaps not prosecuted for several reasons, such as the difficulty of proving mens rea of the offender (or rebut the defence of due diligence), the offences were not serious enough to expend time and financial resources, and so forth. Now, thanks in a large measure to the freeing up of human resources by the amp procedure, and mens rea not being a hurdle any more (and in fact a violator could not even plead due diligence or mistake of fact), it was possible to give more attention to this area of regulation. So, at least in this area, more and more regulatees are caught and amps appear to have been a success.

The size of penalties imposed in Part 2 under the Health of Animals Act and Regulations is considerably smaller than the fines imposed by courts following a conviction of an accused. As noted under focus group 7 (Tables 18 and 19), penalty amounts were almost one half of fines imposed by courts. This is wholly due to the fact that the amount of amps which CFIA can impose is limited by the Minister to \$4,000 by Regulations even though the AAAMP Act prescribes a maximum of

\$15,000.⁵⁶¹ On the other hand, the governing statutes (the Health of Animals Act and the Plant Protection Act) have prescribed a much larger maximum within which courts are able to fix the quantum of fines. The lesson that this serves is that if regulators really want to bring offenders to justice, they are better off prosecuting them instead of letting them off with small penalties. Penalties have been sharply increased by amendments to the AAAMP Regulations effective October 12, 2010 as indicated earlier.⁵⁶²

The deterrent effect of small penalties is probably low. For any company other than the smallest, the penalty currently prescribed is likely to be an insignificant sum, not sufficient to encourage compliance. Furthermore, if a regulatee has done all it can to comply with the law it can only grin and bear the penalty and it may not think it is worth its while to show due diligence with a view to getting a small reduction in that penalty.

However, there was no significant difference in average amounts between fines and amps for the contravention of Plant Protection Act and Regulations. In this situation, of course, the numbers are not big enough to make a meaningful comparison.

CBSA data on warnings given to travellers and penalties imposed on them, which are far more frequent, are significant for compliance, but as no data were available for the period under consideration in this thesis, other than for a few months of FY10, it was left out. However, the table of figures for years since FY10 given in Appendix 5 may indicate the magnitude of the numbers.

The data do not give the full picture of compliance, as there are additional avenues for disciplining non-compliers, for instance by seizing and forfeiting illegally imported or illegally transported animals and animal products, and plants and plant products, suspending or revoking licences, permits or registrations, and by using other powers given by the statutes concerned. This issue is pursued in the next

⁵⁶¹ The *Regulations* have now almost caught up with the statute: *supra* note 536.

⁵⁶² *Supra* note 536.

chapter which discusses the efficacy of the regulatory system and the role of enforcement in the total picture.

Chapter 9 - Efficacy and Enforcement

9.1 - Introduction

Having given the Government a mandate to protect society, Parliament is vitally interested in knowing whether the regulatory system it has put in place is adequately fulfilling the objectives set out in the legislation.⁵⁶³ This issue requires an examination of the efficacy of the system and is explored in the present chapter.

The object of exploring the efficacy is to determine whether the way it is administered and enforced contributes substantially to attaining the broad objectives set out in the legislation.

This task is far more difficult than measuring the success of enforcement activities by the outcome of litigation undertaken to respond to contraventions.

Assessment of effectiveness is important because it is a necessary aspect of compliance and enforcement policy. It is closely related to the purposes of regulation and to the integrity of the system itself. The question arises as to how to identify whether the statutory goals are being successfully achieved. A perennial problem encountered in determining this is that the elements that can be measured are not necessarily those that reveal the most about the functioning of a system.

This chapter begins with setting out the statutory purposes of the two major laws that are the focus of the thesis, beginning however with the statutory mandate of the *Canadian Food Inspection Agency* which is charged with the duty to enforce those two (and other agri-food) laws.

⁵⁶³ Provisions such as those requiring a Minister to lay an annual report on the administration and enforcement of laws entrusted to their mandate are to be found in several statutes. E.g. *CFIA Act*, *supra* note 369, s 23; *Canadian Environmental Protection Agency Act, 1999*, SC 1999, c 33, s 342; *OSFI Act*, *supra* note 154, s.40.

9.2 - Purposes of Legislation

9.2.1 - The *Canadian Food Inspection Agency Act*

The statutory mandate of the *Canadian Food Inspection Agency (CFIA)* is set out in the *preamble* to its constituent legislation, the *Canadian Food Inspection Agency Act*⁵⁶⁴. The preamble states that the purpose of the statute is:

"to enhance the effectiveness and efficiency of Federal inspection and related services for food and animal and plant health".

That purpose is elaborated, and further fleshed out in the two statutes that are the focus of this thesis, namely, the *Health of Animals Act*⁵⁶⁵ and the *Plant Protection Act*⁵⁶⁶ and the duties and obligations imposed on the regulated parties in those statutes.

9.2.2 - The *Health of Animals Act*

Although there is no purpose clause in the *Health of Animals Act*, its long title does give an indication of its purpose when it declares that it is an

*"Act respecting diseases and toxic substances that may affect animals or that may be transmitted by animals to persons, and respecting the protection of animals."*⁵⁶⁷

This declaration can be interpreted to mean that the control and eradication of diseases in animals, which may be transmitted by them to humans as well as to other members of its species in a herd, and the protection of animals themselves, are the principal purposes of the statute. Diseased animals are to be confined until they are free of the disease and cannot be sent to slaughterhouses for use as food for humans. Animals infected with communicable diseases such as tuberculosis, foot-and-mouth, scrapie, swine or avian influenza, etc., will put the entire herd or flock they are a part of in grave danger of contracting those diseases, and have to be quarantined; in extreme cases, even exterminated. Quarantine areas can be set up

⁵⁶⁴ *Supra* note 369, Preamble.

⁵⁶⁵ *Supra* note 8.

⁵⁶⁶ *Supra* note 9.

⁵⁶⁷ *Supra* note 8.

within a herd on a farm, in neighbouring herds, within a specific area or region, or within one or adjoining provinces. In an extreme case (which, fortunately, has not arisen) it can cover the whole country.

9.2.3 - The Plant Protection Act

Unlike the *Health of Animals Act*, the *Plant Protection Act* has a purpose clause. It is

*"to protect plant life and the agricultural and forestry sectors of the Canadian economy by preventing the importation, exportation and spread of pests and by controlling or eradicating pests in Canada."*⁵⁶⁸

9.3 - Measuring Efficacy

When the Canadian Food Inspection Agency (CFIA) was established in 1997 it was assigned the responsibility to "... enhance the effectiveness and efficiency of the Federal inspection and related services for food and animal and plant health ..."⁵⁶⁹

In measuring efficacy, the area that is most closely connected with the protection of public health and safety has to be looked at first. In the case of the *Health of Animals Act*, it is the health of animals itself. If a disease in animals or birds goes undetected and the animal or bird finds its way to a meat establishment where it is slaughtered for human consumption, the devastating effect on human health is obvious. So, the veterinary and other designated inspectors whose job it is to prevent any animal or poultry from entering the food chain, have to be very vigilant and this vigilance begins from the moment there is any indication on the farm that certain diseases are prevalent among its animal population, or in the area or region where the animals are being raised, or are on their way to the market or the slaughterhouse.

The provisions of the *Health of Animals Act* impose the obligation on the owner of farm animals who raise cattle or other bovines and birds to report any disease that they observe among the population. Even if their herd or flock is disease-free, if the disease is prevalent in the area or region, they must ensure that

⁵⁶⁸ *Supra* note 9, s 2.

⁵⁶⁹ *CFIA Act*, *supra* note 369, Preamble.

their animals or birds do not co-mingle or come in contact with diseased populations. They must strictly comply with the requirements set out in ministerial orders or directives in declarations.⁵⁷⁰ To encourage owners and farm operators to live up to their obligation, the statute provides for compensation for any regulatory order that requires the culling of infected animals or birds.⁵⁷¹

CFIA inspectors, on their part, cannot sit back and relax in the hope that farmers will fulfil their obligations; they have the duty to be doubly vigilant and proactive, and ensure that the statutory obligations and requirements are in fact being fulfilled.

To a lesser extent, similar precautions have to be taken and duties imposed if a plant species is infected with a debilitating pest that can easily spread within their ecosystem and cause enormous devastation to the agriculture and forest resources. In particular, inspectors have to ensure that no movement takes place from an infected area to pest-free areas and they have a duty to stop vehicles that are laden with plants and plant products that do not conform to regulatory impositions, such as movement or phytosanitary certificates. As in the case of culled animals or birds, the owners of plants and plant products are encouraged to live up to their obligations by providing compensation for crops, trees, plants and plant products that are ordered destroyed by the CFIA.⁵⁷²

Thus, the indicators of efficacy depend crucially on whether the disease origins have been detected and effectively controlled by the CFIA inspectors. This has to be done at points of entry into the country of the animals or plants in the case of foreign imports, or at points of domestic inter- or intra-provincial movement, through ministerial directives declaring control areas and preventing any movement without prior authorization, as well as through the imposition of quarantine on farms and orders to segregate diseased animals or poultry from healthy populations. These administrative summary powers play a much bigger role in ensuring the attainment of statutory objectives, with enforcement buttressing that role.

⁵⁷⁰ These obligations were described *supra*, in Part I, chapter 2.

⁵⁷¹ *Supra* note 8, ss 51-55; *Regulations* SOR/2000-233.

⁵⁷² *Plant Protection Act*, *supra* note 9, ss 39-43; *Regulations*, *supra* note 510.

In practical terms, it is an indication that the system is working successfully if CBSA officials in the case of imports, and CFIA inspectors in all other cases, have successfully intercepted any animal or plant that has not been declared, or that an owner has attempted to move or transport from one area, region or part of the country to another without prior authorization, such as a permit or certificate where one is required by law. So, the number of such interceptions is a good measure of the effectiveness of the system and, this is so even if the interceptions do not result in charges.⁵⁷³ It is better to be safe than sorry, as the saying goes.

In some cases, CFIA inspectors may get a second chance to intercept animals or plants that have escaped the primary line of control. The *Health of Animals Act*⁵⁷⁴ as well as the *Plant Protection Act*⁵⁷⁵ makes it illegal to possess illegally imported animal or animal product, plant or plant product. If the inspectors do get this second chance, they can charge the owner or person in possession, or issue a penalty notice, but those opportunities are rare and perhaps too late since the damage might already have been done. It is only a deterrent for the future and should not be taken as an indication of success of the program.

9.4 - Measuring Outcomes

For agencies whose primary aim is collection of revenue, measuring enforcement success is a relatively straightforward task. For others, such as the CFIA, this is not so easy if enforcement is interpreted more broadly to indicate the achievement of statutory objectives.

Education and deterrence do not easily translate into statistics and, therefore, measurement of enforcement success in these respects is difficult.

Traditional measures of enforcement success - including number of proceedings commenced, quantum of penalties imposed, and litigation success rates - give some indication of the outcomes of conventional enforcement, but are not particularly helpful in identifying whether regulation is achieving its objectives.

⁵⁷³ No data on such interceptions were available to the candidate.

⁵⁷⁴ *Supra* note 8, s 15.

⁵⁷⁵ *Supra* note 9, s 9.

Regulators, including the CFIA, CBSA and the Department of Transport do have power to impose administrative monetary penalties and they do go to court to obtain convictions, but the penalties and fines imposed in this way are not necessarily a sign of the success of the regulator.

Professor Sparrow has used the example of the border-policing role of Customs authorities to illustrate how too much emphasis on enforcement rates distorts measures of success.⁵⁷⁶ He says that if a customs' interdictions project measured its success in terms of the numbers of arrests or seizures, then true success (which would be actually deterring people from trafficking goods through that port) would look like a failure because seizure rates would be down, and a failure (lots of illegal traffic through the port) would look like a success because an increased number were caught.⁵⁷⁷

On the other hand, even where interceptions have produced negative results, they can be counted as success of the program, and this point can also be made where a monetary penalty imposition or a prosecution has been unsuccessful. These negative results are also a good indicator of the effectiveness of the regulatory program.

9.5 - Measuring Outcome under a Risk Control Strategy

The increasingly sophisticated possibilities for commercial activity and regulatory surveillance provided by technological developments have raised new issues for regulators. Regulators cannot attempt to act on every contravention of the legislation. For regulators who continue in a traditional, enforcement-centred mode - given the constraints of shrinking budgets, declining public tolerance for the use of regulatory authority, and clogged judicial systems - this is now simply unfeasible. They have perforce to adopt a risk control strategy in enforcing the legislation, just as they have to do at the front end of the system, i.e., at the stage of compliance monitoring.

⁵⁷⁶ Malcolm K Sparrow, *The Regulatory Craft* (Washington, DC: Brookings Institution Press, 2000) at 151.

⁵⁷⁷ *Ibid* at 150-51.

Under the risk control strategy, Professor Sparrow called on regulators to search for the measurement of impacts within small, specific, well defined problem areas as indicators of success. Included in his list are the following:

- “(1) effects/impacts/outcomes: for example, environmental results, health effects, or declines in injury rates;
- (2) behavioural outcomes: compliance rates or other outcomes (for example, adoption of best practice, other risk reduction activities;
- (3) ‘beyond compliance’ activities (or voluntary actions);
- (4) agency activities/outcomes: for example, enforcement actions, inspections (number, nature, results);
- (5) education and outreach;
- (6) collaborative partnerships; administration of voluntary programs; or other compliance-generating or behaviour-change-inducing activities;
- (7) Resource efficiency: the use of agency resources; regulated enterprises’ resources; and state authority resources.”⁵⁷⁸

These indicators, especially the first four, are key to determining whether *amps* backed up by prosecution of egregious violators, have reduced non-compliance rates in the food and industry.⁵⁷⁹ Impact studies need to be carried out on compliance rates as a result of the use of *amps*, especially by keeping data on recidivism after violators have been penalized.

Wasserman points out that the level of penalties for non-compliance and the willingness of regulators to impose them are crucial factors in bringing about compliance and, consequently, in measuring the effectiveness of regulations.⁵⁸⁰

⁵⁷⁸ *Ibid* at 119. This is a shortened and summarized list.

⁵⁷⁹ Studies have been carried out by CFIA on feed ban compliance and on livestock identification, and they do indicate a high success rate. See “CFIA, Evaluation of the Feed Ban Program”, Final Report, August 2007, online: CFIA < <http://www.inspection.gc.ca/english/agen/eval/feebet/evale.shtml>>. The Report indicates a high level of compliance by feed mills and rendering plants during the period 2002/03-2005/06, from a low of 92% in 2002/03 to a high of 96% in 2005/06 (mills) and from a low of 90% in 2002/03 to a high of 93% in 2005/06 (rendering plants). Livestock Identification (tagging) compliance rates are similar.

⁵⁸⁰ Wasserman, “Principles of Environmental Enforcement”, *supra* note 461, gives the following eight criteria for effectiveness of an enforcement program in the environmental area at 34: (1) Environmental results; (2) Compliance rates; (3) Progress in returning significant violators to compliance; (4) Measures of compliance monitoring; (5) Number of enforcement responses; (6) Timeliness of enforcement

9.6 - Reflections on the Prosecution and *Amps* Data Analysis on Regulatory Effectiveness

As underscored in this chapter, quite apart from administrative summary powers, enforcement using criminal prosecutions or administrative penalties does not necessarily translate into future compliance by the persons who were convicted or penalized. In particular, is it possible to say with any degree of confidence that because a high number of penalties have been issued and collected in Period 2, *amps* is proving more effective than prosecutions and, consequently, is proving to be a deterrent? Is there a correlation between *amps* and prosecutions in Period 2? Data on recidivism are not available and in their absence it cannot be assumed that those who were subject to enforcement actions have learned their lesson for good.

The discussion below highlights the following three examples from the data that attempt to answer these questions: (1) the overall number of *amps* issued in period 2 under the *Health of Animals Act* and *Regulations* by CFIA and by the CBSA even though the latter were for a period subsequent to that under review; (2) the number of *amps* issued for violation of animal tagging provisions of Part XV of the *Health of Animals Regulations*; and (3) the prosecutions undertaken in Period 2 in lieu of *amps*, for breach of the animal cruelty provisions of Part XII of the *Regulations*, apparently for the reason that *amps* were not effective.

9.7 - Overall CFIA and CBSA *Amps*:

The data in Focus Group 2 showed that in total 1,067 *amps* were issued over the five years covered by Period 2, namely FY 6 to FY 10, as against 66 prosecutions conducted during the same period (of which 27, or less than one half, were successful).⁵⁸¹ During the three years after that CBSA had issued approximately 6,700 *amps* for illegal importation, or an average of 2,333 a year.

It could be assumed that the CFIA was able to issue a high number of penalties because of the flexibility it gained by using *amps* compared to the Period 1 years when a larger proportion of its time was utilized in preparing cases for

responses; (7) Monetary penalties assessed; and (8) Measures of technical assistance. These criteria would be valid, with some modification, to food safety and other regulatory compliance areas as well.

⁵⁸¹ The overall prosecution figures are given in § 8.2.4.1 at 262, above. The number of prosecutions in the preceding period (when *amps* had not been established) was 125 or almost twice the number in the succeeding period (of which less than half that number was successful).

prosecution. The data do not show what the rate of recidivism is, or if there were further violations by the same people on second or multiple occasions; if there were, were bigger penalties imposed for new violations occurring within three years?⁵⁸². The penalty matrix does allow for an increase in *amps* for repeat violations, which, in the worst case scenario, does not exceed 50% of the base penalty amount.

While inspection figures are not available, the extent of time spent on livestock identification (Table 17) gives some indication of the number and time devoted, and the results achieved. Apart from this, it is hard to say if there were increased inspections in other regulatory areas and if there were, whether it was due to the freeing up of human resources that would otherwise have been expended on prosecutions which were vastly fewer in Period 2. The latter number was 66, or just over half the prosecutions conducted in the previous period (i.e., 125). With 59 fewer prosecutions in Period 2, the CFIA was able to issue over 1,000 *amps* in the same period (1,067).⁵⁸³

Secondly, does it follow from the above that the issue of so many *amps* (approximately 18 *amps* to every prosecution) has resulted in increased compliance by the same persons or by other persons? In other words, have *amps* proved to be a greater deterrent to those persons (specific deterrence) or to the regulated population generally (general deterrence) than a prosecution? Quite possibly, it is the contrary. Those who received *amps* were the same people who had escaped prosecution simply because in most cases CFIA might have thought it was not worth its while to prosecute them or, given the rate of success (less than half in each period⁵⁸⁴), it would not have succeeded in doing so because of the obstacles posed in gathering enough evidence to prove *mens rea* or an accused person's lack of due diligence. As far as the CFIA issued *amps* are concerned, without any data on the number of times the same persons have been issued *amps* for subsequent violations

⁵⁸² The three-year period has been increased to five years by *AAAMP Regulations*, SOR/2010-215, effective 12 October 2010.

⁵⁸³ CFIA also issued 398 Warnings (see Focus Group 2, §8.2.1.1.4 at 225, above) during the period. In order not to complicate the comparison, the prosecution and *amp* figures in the *Plant Protection Act* area are not included in this summary. Those figures are small and do not make a significant difference. CBSA issued very few warnings (Appendix 5 at 300, below, reports that these constituted only 3 to 5% of all notices of violations).

⁵⁸⁴ In Period 1, out of 125 prosecutions, only 52 were successful; in Period 2, out of 66 prosecutions, only 27 were successful.

(or have been prosecuted), it is not possible to predict whether enforcement has resulted in increased compliance. It would be very useful to have such data. CFIA compliance and enforcement policy shows that there is greater scrutiny on those who have been issued warnings and *amps* in the form of follow-up inspections.⁵⁸⁵

Thirdly, apart from a single instance for repeated breaches of the animal tagging provisions by the accused Ronald S. Way,⁵⁸⁶ it is not possible to determine whether any of the 66 prosecutions that were undertaken in Period 2 was the result of repeat violations or was in response to cases where the CFIA had strong evidence to prove guilt (or lack of due diligence) of the accused.

With regard to *amps* issued by the CBSA, which has racked up an annual average of twice the number of all *amps* that CFIA had issued over five years, the conclusion seems inevitable that *amps* have not increased compliance. The reason is that travelers are an amorphous group and the data is bound to be fluid because those who smuggle a small number (or amount) of prohibited animals or animal products or bring in pets without the prescribed certification or vaccination against rabies, etc., are slapped with minor penalties, generally in the \$100 range (for a maximum of \$400). Being an amorphous group whose chances of being caught are perhaps one in ten, the individuals in the group are unlikely to smuggle a second time because their profile is already on the computer. As for the general traveling public, without a good deal of publicity on the number of people caught during the year (which the income tax people do on an annual basis), *amps* issued to a tiny fraction of the traveling public is unlikely to deter the general population. This is probably also the experience of traffic police who issue tickets to speeding motorists or to those violating parking or other traffic bylaws. The number of such tickets issued during any specific period are highly dependent on the number of inspectors deployed or cameras installed in busy intersections with very little correlation to compliance by the general public. Similarly, during seat-belt inspection "blitz" and ticketing of cyclists who ride on sidewalks, for example, most motorists and bicycle riders would behave as required by the law, but that extra caution wears out eventually until the next "blitz".

⁵⁸⁵ *Supra* note 451. CFIA Performance Reports, e.g. for 2006-2007, indicate that CFIA adopts a targeted approach under which areas of high non-compliance are given closer scrutiny.

⁵⁸⁶ Prosecution of Ronald Way is reported in text at 209, above (example 2), and *supra* note 142.

A further reason is pragmatic. The CFIA does not have unlimited resources to inspect each and every person who comes within the ambit of the two statutes and their regulations and has to use proven techniques that will net the largest number of possible violators. This is particularly so where the regulatees are spread out across the country or use hundreds of different roads and vehicles to transport the regulated animals and commodities to their destination; thus the chances of being inspected and caught are minimal and perhaps worth a gamble. Even in import situations where prospective contravenors are channelled through specific entry or exit points for inspection, as in the case of arrivals and departures, CBSA has to employ random secondary inspection since it is simply not economical to deploy enough officers to check each and every traveler's person or baggage at the border. Although their success rates are far higher than that of the CFIA, even with that data it is simply not possible to say that there is a high degree of compliance because of the new monetary penalty option.

On the other hand, as many scholars and thinkers have pointed out,⁵⁸⁷ the prophylactic power of a criminal prosecution should not be underestimated. If in a fitting case a prosecution is launched for deliberate importation or violation of other provisions of the statute and its regulations, and it is duly publicized, regulated persons (even the traveling public) are bound to take notice and will hesitate before taking chances with the law.

9.8 - Integrity of the Regulatory System

A secondary but still an important purpose of enforcement is to ensure the integrity of the regulatory system, notwithstanding that particular contraventions do not create a danger or risk of danger to human health or that a specific plant infestation does not damage the agricultural and forest resources of Canada. If regulated parties discover that they can get away with small or trifling contraventions, the system might come into disrepute and threaten the entire fabric. Regulation enforcement officials have to be cautious. The public, especially industry, view regulators, in Sparrow's words,

⁵⁸⁷ See, *inter alia*, R Brown and M Rankin, "Persuasion, Penalties and Prosecution v. Criminal Sanctions", ch 5 in ML Friedland, ed, *Securing Compliance: Seven Case Studies* (Toronto: University of Toronto Press, 1990) 324 at 348; Cheh, *supra* note 242; ALRC Report No 95, *supra* note 180; and Coffee, "Paradigms Lost", *supra* note 94 at 1899.

*" . . . all too often nitpicky, unreasonable, unnecessarily adversarial, rigidly bureaucratic, incapable of applying discretion sensibly and (worst of all, since regulation costs so much) ineffective in achieving their missions."*⁵⁸⁸

Therefore, in assessing the effectiveness of a regulatory program, it is important to ensure that minor violations do not become a major source of litigation. They need to be actioned, however, in order to demonstrate that the regulator is determined to step in when general laxity in compliance could spread to critical parts of the system. There are ways other than prosecution or administrative impositions to deal with such problems.

The focus in the remainder of this chapter is on the administrative and enforcement activities under the *Health of Animals Act* and the *Plant Protection Act*.

9.9 - Statutory Administrative Summary Powers

9.9.1 - Introduction

The summary power given to the regulatory authority to prevent, control and eradicate bovine and avian diseases and the exercise of that power proactively is important for gauging the effectiveness of a regulatory program. Enforcement powers in this respect are a follow-up to the declarations and control orders issued by veterinary inspectors and the Minister of Agriculture, to ensure that they are rigidly obeyed with no exception. Even movement of people within infected areas is controlled or prohibited unless they have special permission from the authorities.

While quarantine is not ordered when bovines are afflicted with *spongiform encephalitis*, if an animal is discovered by veterinary tests to have been infected with the disease, the regulatory authority immediately orders that it be removed and destroyed so that it does not get into the food chain.

9.9.2 - Declarations and Orders

Declarations and orders generally arise from national and international intelligence sources which report that animals bred for food (or even pets, such as dogs and cats where rabies is prevalent) have contracted certain diseases. This warning triggers an immediate government alert and translates into executive

⁵⁸⁸ *Supra* note 576 at 18.

orders. If the disease is prevalent in a country from where an animal is imported, pre-emptive steps are taken at the point of import so that it does not enter Canada. Similarly, if an animal is infected with a reportable disease within Canada, administrative regulations require immediate reporting of the disease and an embargo on movement within an area or region, or between provinces, and on international movement, is then issued, which has to be rigidly obeyed. Export of such animals is not only prohibited, but the import embargo by a foreign country to Canadian beef or other animal products is almost immediate.

The same is true in respect of plant infestations which may have the effect of decimating large plantations and forest areas, and ruining crops.

9.9.3- Interception before Marketing or Slaughtering of Animals or before Export: Livestock Identification

The Livestock Identification program which was introduced in 2004 is a vital component of the regulatory system and is designed to ensure that (1) no animal is moved or sold without a tag, and (2) the identification tag is intact and is duly accounted for at the time of its slaughter for food, or in a rendering plant where the meat is used for purposes other than human consumption, such as for animal feed or pet food. The verification is done through feed inspection and, at the time of slaughter or rendering, by meat inspection in a seamless operation.

CFIA inspectors have the authority, as well as the duty, to ensure that live animals that are being sold at auction or other markets carry appropriate, statutorily approved identification before they are marketed or sold, and even during their transportation to the market or auction block. Cattle, sheep, swine and poultry must, under the *Regulations*, have identification tags or chips at the appropriate spot, such as the ear. The identification acts like a passport and health card that humans are required to carry or produce when they move out of or into the country or visit a health care practitioner or facility within the country for treatment or other health related service.

9.9.4 - Interception of Animals and Poultry for Other Reasons

Part XII of the *Health of Animals Regulations* and the *Plant Protection Regulations* authorize interception for other reasons. The CFIA and the CBSA (the latter at the time of import or export) have authority to intercept animals and animal

products, and plant and plant products, that do not conform to the strict health requirements and identification requirements (or permits or certificates) specified in the statutes and regulations,

9.9.5 - Interception of Conveyances

The *Health of Animals Regulations* specify in considerable detail the obligations of persons respecting the loading, segregation, transporting and unloading of animals, their feeding at regular intervals, and the structure of the conveyances. The *Regulations* aim at protecting animals against injuries, malnutrition, sickness, and other vicissitudes of travel, including special care of pregnant animals, so that they arrive at their destination in a reasonably healthy condition. If animals or birds are destined to the slaughterhouse, inspectors have an obligation to prohibit slaughter if they are injured; if they are alive and are destined to the deadyard (generally those that are unfit for human consumption), inspectors must ensure that they are not subjected to undue suffering during transport. In all cases, inspectors have to ensure that animal identification rules and the appropriate permits, wherever necessary, are produced. The whole object of these regulations is to prevent cruelty and undue suffering of animals and birds while they are alive, whatever their end may be.

Enforcement officials who are posted at the point of loading or unloading, and designated officials at road check points are authorized to intercept vehicles to ensure that the regulations are strictly adhered to.

Although from the strict interpretation of the objectives of the statute the connection to protection of human health may seem rather remote, these responses by enforcement officials also serve other important public interest objectives, such as the obligation to treat animals humanely, objectives which are shared with the *Criminal Code* and several provincial laws prohibiting animal cruelty.

9.9.6 - Performance Reporting

It will be apparent from the foregoing discussion that reporting of the summary actions taken by administrative officials under ministerial authority, and more importantly their timeliness, are perhaps the best indicators of the effectiveness of the regulatory system. Enforcement actions to compel the regulated

farms or individuals to obey become necessary only when they fail to comply with those ministerial orders.

Enforcement actions are relatively few in number as they are taken against the few recalcitrant persons who are unmindful of public health interests, even though those interests are tied to their own and to that of the food industry and of the economy as a whole.

Thus, while the number of enforcement actions by means of interceptions or movement control, and by issuing penalty notices or laying information charging offences, are a good indicator of the effectiveness of the regulations, and contribute to the attainment of statutory objectives, they are not a sufficient indicator of the effectiveness of the regulatory system as a whole. They are a backstop to summary administrative powers described above, which in a vast majority of cases are obeyed without demur. Enforcement only becomes necessary as a last resort. One must therefore ask: (1) Does the proposed enforcement action advance the statutory objective? (2) How crucial is it to take a specific enforcement action (such as a penalty) as opposed to another less intrusive action (such as a warning) or more intrusive action (such as a prosecution)?

In the Canadian federal arena, performance reporting is provided in the individual departments and agency reports that the President of the Treasury Board annually presents to Parliament under the caption "Canada's Performance Report." The report gives a societal context for situating departmental results in relation to the broad quality of life themes in the areas of health, economy, the environment and Canadian communities. The Auditor General's report to Parliament also includes a substantial element of performance by departments and agencies, in particular the effectiveness of government policy, namely whether or not stated objectives are being achieved – though not on the choice of such policy. For example, the Auditor-General reported in 2000 on federal health and safety regulatory programmes, judging them against the government's overall objective in this area, namely, *"to proactively protect Canadians from risks to health and safety – to catch the problem before it happens, and if it happens, to minimize the consequences."* The report gave the results of its assessment of the major federal health and safety

programmes administered by the Canadian Food Inspection Agency, Health Canada, etc., covering about 85 statutes and 250 regulations.⁵⁸⁹

9.10 - Summary

Assessment of effectiveness is a necessary aspect of compliance and enforcement policy. It is closely related to the purposes of regulation, and secondarily to the integrity of the system itself.

When assessing effectiveness, the regulatory program as a whole should be differentiated from enforcement actions. Effectiveness of the former crucially depends on intelligence received in advance about diseases prevalent on farms within the country or in foreign countries, vigilance and timely proactive measures taken to prevent their communication to the herd or flock populations in Canada, and ensuring that quick and efficient measures are taken by putting in place ministerial orders, controls on entry into Canada and movement controls, so that no infected animal or bird enters the food chain. The number of interventions that are taken by the regulatory agency by exercising summary administrative powers is a strong indicator of the effectiveness of the regulatory program. The legality of the exercise of such powers is seldom challenged in courts as quarantine is compulsory under the statute. In probably the only case claiming damages under the *Health of Animals Act*⁵⁹⁰ for not supervising the unloading of animals which had suffered injuries during their long voyage from Australia, the trial judge held that the Crown had a duty to ensure humanitarian transportation for the animals, that the duty was based on section 64(1) of the *Health of Animals Act* and sections 138 (*et seq.*) of its *Regulations*, and the Crown was therefore liable for damages. This decision was reversed by the Federal Court of Appeal, Desjardins JA holding that the trial judge erred in her decision, that the Crown's humanitarian duty was not based on any provisions of the law, and therefore that the Crown could not be held liable.⁵⁹¹

⁵⁸⁹ *Report of the Auditor General of Canada* (December 2000), chapter 24, §24-5, online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/parl_oag_200012_24_e_11211.html>.

⁵⁹⁰ *Supra* note 8.

⁵⁹¹ *Wadacerf International Inc v Canada (Minister of Agriculture)* (2001), 196 FTR 161, 103 ACWS (3d) 321 (FCTD), rev'd, 287 NR 368, 112 A.C.W.S. (3d) 1004 (FCA). See also *Société Canadienne d'Exportation de Bisons Inc c Canada* (2000), 203 FTR 228, 103 A.C.W.S. (3d) 73 (FCTD), aff'd (2001), 288 NR 144, 112 ACWS (3d) 1005 (FCA). The immunity established by this provision was unconditional

On the other hand, enforcement actions play a supporting role to summary powers and are indispensable to the efficacy of the latter. When enforcement officials have intercepted the entry of animals and birds, or plants and plant products, and the movements of diseased or pest infected populations, their actions are a strong indicator of the efficacy of the regulatory program. Independently of such actions, the effectiveness can be measured by actions in other areas, such as interception of conveyances that carry animals or birds with little regard to their welfare or safety, birds, or that clandestinely move pest-ridden plants and plant products from quarantine zones to pest free zones or export them.

and was granted where someone suffered damages as a result of performance obligations arising out of the Act or the regulations.

PART III

Chapter 10 - Reflections and Conclusion

This thesis set out to examine the issue of whether *amp*, the new enforcement tool provided by Parliament to the Government to enforce regulatory legislation by enacting the *AAAMP Act*, has been efficacious in enhancing compliance with two of the three statutes that have been brought within its ambit, namely, the *Health of Animals Act* and the *Plant Protection Act*, which are administered by the Minister of Agriculture and Agri-Food through the CFIA. It was the core issue. In order to examine the issue it was necessary to study the situation that prevailed before the new enforcement tool became available and the situation that unfolded since then. Two five-year periods were chosen, the first five years (or Period 1) being immediately prior to the use of the new tool, and the second five years (or Period 2), immediately after. Period 1 thus covered Fiscal Years 1996/97 to 2000/01, and Period 2, Fiscal Years 2001/02 to 2005/06.

It was emphasized that administrative summary powers, restrictions on licences or permits, seizures and forfeitures and recall orders, etc., that had been previously provided in the legislation continued to be available and their use was totally unaffected. The criminal sanction was also unaffected, but the legislative expectation was that the latter sanction would be very selectively used by the Government to deter and punish egregious conduct or persistent breaches of the law, and that, in the main, compliance would be ensured through *amps*. That expectation was sought to be fulfilled by the *AAAMP Regulations* which classify most contraventions into three categories and provide a penalty matrix with criteria for imposing penalties.

Criminal sanctions were, therefore, the starting point for the examination of the situation that prevailed in Period 1. The thesis looked at the relevant jurisprudence over three centuries and the adaptation of the criminal procedure to the burgeoning regulatory legislation which appeared to have overwhelmed the capacity of the criminal justice system. It led courts to water down the overarching common law principle of *mens rea*, that no person may be found criminally liable for an act or omission unless it is proved beyond a reasonable doubt that it was done

knowingly, deliberately or willfully, by an alternative and very practical concept of absolute liability (or its modification by Canadian courts to "strict liability"), for offences that did not require proof of the mental element. The prosecutor has the onus of proving *mens rea*, but where it was dispensed with, he or she was relieved of that onus. Furthermore, in countries where absolute liability continues to exist, the prosecutor need only prove that a prohibited act was committed in order to get a conviction. Certain common law defences, such as an act of God, act of a stranger, etc., continued to be available even under an absolute liability regime. The concept of strict liability which allows an accused person to escape conviction by proving due diligence on a balance of probabilities is now well established in Canada.

It was the concept of absolute liability that provoked criticism from many a legal scholar and theorist. They seem to have assumed that the government was ruling with an iron fist putting in peril human rights and liberties, though a closer examination of cases indicates nothing of that sort. As the jurisprudence shows,⁵⁹² most persons accused of regulatory offences were punished by small fines which amounted to no more than a slap on the wrist, and did not face any jail time, drug traffickers excepted. The absolute liability concept had become entrenched with the approval of the highest courts of the land, and it is hard to believe that people were gripped with fear that they could at any time be arrested and hauled before criminal courts for petty offences. As many a judge, English as well as American, noted,⁵⁹³ the charges were basically trifling but, if violations prevailed on a large scale (as in road traffic or parking violations), they could jeopardize the entire regulatory system. Therefore, the criminal justice system and criminal procedures were used, for lack of any other less invasive method of penalizing offenders. The offenders were put through an "assembly line" justice process. Nonetheless, the rumblings of prominent legal writers and thinkers of the last quarter of the old millennium did have considerable impact on legal development. Law reform organizations, such as JUSTICE, the British Section of the International Commission of Jurists, the Justices' Clerks' Society of England, and the Council of Europe, joined the chorus. Their contribution has been discussed in chapter 2 of Part I.

⁵⁹² Sayre, *supra* note 45.

⁵⁹³ Balint, *supra* note 73; Morissette, *supra* note 75.

Meanwhile, however, pragmatism prevailed at the legislative level as well. It led to a re-thinking of the appropriateness of the criminal justice process to deal with minor offences. While lip service was paid, the reform was hailed and found general approval. The chapters on decriminalization,⁵⁹⁴ financial penalties⁵⁹⁵ and international comparison⁵⁹⁶ show that legislators reformed the regulatory justice system by decoupling it from the criminal justice system. Germany led the way and a good part of the European continent followed, but more serious violations in which the predominant offenders were banks, stock markets and public service corporations, were being subjected to the discipline of independent regulatory authorities with specific statutory mandates.⁵⁹⁷

Australian and Canadian courts took another look at the state of the law in which a person innocent of any intention of wrongdoing could face a jail sentence for even trifling offences which were not clearly distinguished in legislation. The Canadian Supreme Court, for instance, ruled that no person could be prosecuted for an offence that was committed unwittingly if the person faced a jail term, unless that person was afforded the defence of due diligence. This was the landmark decision of Dickson J. in *R. v. Sault Ste. Marie (City)* in 1978, following the Australian decision in *Proudman v. Dayman*⁵⁹⁸ decades earlier. As Dickson J. noted,

*"the concept of absolute liability and the creation of a jural category of public welfare offences are both the product of the judiciary ... The development to date of (due defence), in the numerous decisions ... of courts in this country as well as in Australia and New Zealand, has also been the work of judges. The present case offers the opportunity of consolidating and clarifying the doctrine."*⁵⁹⁹

⁵⁹⁴ Chapter 3, Part I, above.

⁵⁹⁵ Chapters 4 and 6, Part I, above.

⁵⁹⁶ Chapter 5, Part I, above.

⁵⁹⁷ Chapter 4, above, described some of these mechanisms.

⁵⁹⁸ *Supra* note 82.

⁵⁹⁹ *Sault Ste Marie*, *supra* note 46 at 1325.

The *Canadian Charter of Rights and Freedoms* was not in issue in this case as the *Charter* was not enshrined until four years later.⁶⁰⁰ Whether corporations have the same rights as individuals has not yet been made clear by the Court.⁶⁰¹

Absolute liability thus had its heyday for well over a century and a half. Since then some courts seem to have taken a one hundred and eighty degree turn in Australia, Canada and even in the United Kingdom.

The above was the context for the development of the *AMPS* legislation in Canada. It took five long years for the *AAAMP Act* to be brought into operation.⁶⁰² Meanwhile, two separate enforcement agencies were created by Parliament, one within the Department of Agriculture which was re-named as the Department of Agriculture and Agri-Food, the other in the Department of Health. The first, the *CFIA*, was given the mandate to enforce the *Health of Animals Act*⁶⁰³ and the *Plant Protection Act*,⁶⁰⁴ two of the agri-food statutes that were brought within the ambit of the *AAAMP Act*. The second, the *Pest Management Regulatory Agency*, was given the mandate to administer and enforce the *Pest Control Products Act*,⁶⁰⁵ the third of the three statutes that were brought within the *AAAMP Act*. The Department of Agriculture and Agri-Food had been enforcing the last mentioned statute in Period 1 in close collaboration with the Department of Health which evaluated the efficacy of pesticides and permitted their registration and use.⁶⁰⁶ While the enforcement of all three statutes was the principal responsibility of these two agencies, Parliament also authorized the *CBSA* when it was established in 2001 to enforce these statutes, along with the customs and other related laws, in so far as they related to imports

⁶⁰⁰ *Charter*, *supra* note 28.

⁶⁰¹ See *Wholesale Travel*, *supra* note 2, *obiter dicta*, at 234-238 (Cory, J); *cf. Amway Corporation*, *supra* note 104.

⁶⁰² The Act was brought into effect in 2000.

⁶⁰³ *Supra* note 8.

⁶⁰⁴ *Supra* note 9.

⁶⁰⁵ *Supra* note 10.

⁶⁰⁶ Licensing of pesticide applicators comes under the provincial jurisdiction.

and exports, especially with respect to travelers crisscrossing the globe and bringing in foreign goods as part of their baggage.⁶⁰⁷

While a thorough examination of the core issue set out in the first paragraph of this chapter should take into account the data from all three agencies, the CFIA, the PMRA and the CBSA, this was simply not feasible as the other two agencies did not keep prosecution data that would permit comparison undertaken in Part II of the thesis. They were brought into the picture post-Period 1 and had not been involved in Period 1 when the criminal sanction was the principal enforcement option. In point of fact, CBSA began to exercise its enforcement mandate after the close of Period 2. In any case, the success of *amps* in their enforcement strategy, and the very infrequent use of the criminal sanction even when *amps* had proved not to be a deterrent, would only provide additional support to the efficacy of *amps* and not diminish their usefulness.

Returning to the core issue, has *amps*, the new enforcement tool, enhanced compliance with the *Health of Animals Act* and the *Plant Protection Act*? A straight answer is not possible. The data on these two statutes, especially the former where there was a substantially larger volume of prosecutions and *amps*, could be regarded by some as just "*bean counting*", but the freeing of human and financial inspection resources that was made possible by not having to pursue criminal prosecutions, has possibly enabled enforcement officials to carry out more inspections in Period 2 and, consequently, a larger number of regulated parties have come under closer scrutiny and more frequent inspection, than in Period 1. This has resulted in uncovering more non-compliant situations than would have been possible before. That is one measure of success, and it is hoped that the data analysis in chapter 8, by way of various *focus groups* with accompanying tables and graphics, supports this observation.

But as underscored in chapter 9, while enforcement plays a crucially important part in the success of the entire regulatory program, the most significant part is played by the various administrative summary powers that are invoked from time to time, such as the declaration of control or infected (or infested) areas or regions, the embargo on movement within or outside that region, the preventative

⁶⁰⁷ *CBSA Act*, *supra* note 137, s 2(b) ("program legislation"); *CFIA Act*, *supra* note 369, s 11(5).

controls on imports and exports by requiring various licences, permits or phytosanitary certificates, and the interception of suspected imports and exports. The regulated community (with the exception of the amorphous group of travelers who sneak through with imported goods or sneak out with exports) realizes that it is in their own best interest to comply with the regulations. By failing to do so they would not only jeopardize their trade and the country's external trade on which both they and Canada depend, but also endanger the health of human beings thereby exposing themselves to civil and criminal liability.

So, what does the future hold for *amps*? Can absolute liability be justified in a civil penalty situation as distinct from a criminal justice proceeding? A few departments, prompted by public servants to whom the *Sault Ste. Marie* decision was a setback, seem convinced and were able to prevail upon their political masters to bring it in through the backdoor. The fallacy of the position in the criminal offence context was pointed out by Dickson J. Responding to the argument that a higher standard of care results from absolute liability, Dickson J. said that the argument

*"... rests upon assumptions which have not been, and cannot be, empirically established. . . . 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 a breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others?"*⁶⁰⁸

The jury is still out on the issue. However, absolute liability does appear to serve a useful function in enhancing compliance of the two agri-food statutes that have been analysed, compared to the total dependence on criminal prosecution for their enforcement in the past, especially because the civil standard of proof, namely, balance of probabilities, is all that is needed to prove a violation. A number of improvements to the current system were indicated in the thesis, as in the author's view monetary penalties do have a useful role in enforcement as long as appropriate maximum levels are statutorily prescribed and appropriate procedures and practices are adopted by the relevant authorities.

⁶⁰⁸ *Sault Ste Marie*, *supra* note 46 at 1311. This response struck a favourable chord with Hunt, CJ in *Morcam Pty*, *supra* note 302.

However, further improvements, indicated below, are needed:

1. The *AAAMP Act* should be amended to permit the defence of due diligence, especially for serious and very serious violations for which penalties were sharply raised in October 2010 to \$6,000 and \$10,000 respectively. Individuals facing penalties for minor violations below that level should also be provided the defence, especially in the case of those who are not in business or violated the laws covered by the *Act* without a view to gain. The defence has been provided in several other statutes referred to in the thesis and enforcement does not seem to have been affected significantly. Furthermore, the objective of ensuring compliance would not be jeopardized if a person has taken every reasonable care to ensure that the violation would not occur.
2. Government should make a policy decision whether or not the defence should be available to a corporate entity.
3. As an alternative, the *AAAMP Act* should be amended to give a defence to a person charged with a violation if the person's act or omission does not amount to an offence under the subject matter statute, such as the *Health of Animals Act* and the *Plant Protection Act*, because of a defence available to that person. Subsection 38(5) of the U.K. statute, the *Regulatory Enforcement and Sanctions Act 2008*⁶⁰⁹ is a good example of such a provision. Another model is the US *Food, Drug and Cosmetic Act*,⁶¹⁰ where the Secretary of Health is required to notify a defendant before referring a matter to prosecution and give the defendant an opportunity to present his views.⁶¹¹

⁶⁰⁹ *Supra* note 211. Subsection 40(4)(a) provides that "... the regulator may not decide to impose a fixed monetary penalty on a person where the regulator is satisfied that the person would not, by reason of any defence, be liable to be convicted of the relevant offence."

⁶¹⁰ *Supra* note 206.

⁶¹¹ *Ibid*, §305 ("Before any violation of this Act is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding").

4. An additional and lower penalty tier should be provided for small firms who are in business, including individuals.
5. Consistent with the harmonization of Canadian and U.S. laws in the animal and plant health areas, which resulted in an enormous increase in fines when the statutes were re-enacted in 1990, the administrative monetary penalties should be commensurately increased, albeit with statutory penalty matrices and legislative direction on their use.
6. If an increase in penalty levels is substantial, defendants should be accorded better safeguards by raising the burden of proof of violation to an intermediate standard, between balance of probabilities and proof beyond reasonable doubt, such as a "high degree of probability" or "clear and convincing evidence," a standard proposed by Professor Mann and discussed in his article by Professor Coffee and others.⁶¹²
7. Penalty power is an important sovereign function, one which is exercised by Parliament and entrusted to the government as a whole, through a regulation making authority conferred on the Governor in Council. This has been a trend in Canadian legislation and except in the *AAAMP Act*, continues to be so. The power conferred on the Minister to set penalty levels within the prescribed ceilings, should be considered an anomaly, and if penalty levels are raised, consideration should be given to confer the power on the Governor in Council.
8. Similarly, the power to designate offences as violations is an important function of the state, and the power in the *AAAMP Act* given to the Minister should be treated as an anomaly.
9. The concept of *continuing violations* should be clarified in legislation. Technically a violation has already occurred by the time it is detected by an inspector and a notice of violation is issued. If at that time the violation has ceased, it should be considered as a one-off incident, but if the defendant is not in compliance with the law by then, a method should be devised to

⁶¹² Coffee, "Paradigms Lost", *supra* note 94 at 1872, 1890/91 and 1903/4.

determine when the violation commenced. The defendant should then be put on notice that CFIA will consider every day the violation has continued as from the day thus determined to be a separate violation. Alternatively, the notice of violation may specify that if the violation is not corrected within a certain time frame, CFIA will seek penalty on a per day basis until it is corrected. The definition is crucially important because the penalties can become truly punitive if they increase exponentially with each additional day. This was one of the arguments of Létourneau J.A. in *Doyon*⁶¹³ when characterizing *amps* as a draconian penalty system. Not only the violator should be informed in the notice of penalty that the penalty will start accruing if the violation is not corrected within the time stipulated in the notice, but also there must be a statutory ceiling on the total amount that takes into account the ability of the person to pay or to continue in business.

10. The agri-food statutes listed in and brought within the ambit of the *AAAMP Act* should be amended to make a provision for continuing offences in the same way as was done in the re-enacted *Pest Control Products Act* (section 72) but with the clarification referred to in item 9 above.
11. Penalties should have a separate component to recapture gains made or benefits that accrued by non-compliance with the statutes concerned. Currently, there is no such provision in the *AAAMP Act* or the *AAAMP Regulations* but only an indication in the *Act* that this be considered in determining the size of penalty. If harm caused to individuals or the environment is a component of penalty calculation, that amount should be available to victims who have suffered the consequences of the violation. It should be deposited in a separate account similar to that provided in the *Environmental Violations Administrative Monetary Penalties Act*.⁶¹⁴
12. There should be legislative direction on the use of *amps*. It should not simply be left to ministerial regulations, CFIA policy or to the discretion of officials. The *AAAMP Act* is silent on this point. As a minimum, there should be a

⁶¹³ *Doyon*, *supra* note 396.

⁶¹⁴ *Supra* note 105.

guidance document prescribed by the Governor in Council pursuant to a specific clause in the regulation making power in the relevant statute. If the Minister decides to increase penalties within the current maxima authorized by the statute, the regulation by which it is done should be subject to approval by the Governor in Council.

13. In view of the large number of unpaid penalties (which is indicated by the data but not presented in the thesis), the *AAAMP Act* should be amended to provide for late payment penalties by way of interest, similar to the provision made by the *amps* section of the *Customs Act*,⁶¹⁵ as well as to provide authority to issue garnishee orders and a right of set off of the unpaid amounts against moneys that the debtor will be receiving from other departments or agencies of the government, such as payments under contracts or refund of taxes and duties.
14. Consideration should be given to the review of a ministerial determination by a single Regulatory Appeals Tribunal, the appointment of members of which is made by the Governor in Council. This would eliminate the proliferation of tribunals. Alternatively, following the *Customs Act* and other examples referred to in the thesis, the review could be carried out directly by the Federal Court by way of an action similar to the procedure adopted in the *Customs Act*.⁶¹⁶ The structure that was adopted under the *AAAMP Act* was influenced by the financial constraints of that era when the Government and Parliament were loath to accept any new appeal mechanisms that would become a drain on the public purse.
15. The Government, through the Minister of Justice (who is the responsible Minister) should propose to Parliament an amendment to the *Contraventions Act*⁶¹⁷ that declares that a person proceeded against under it is "*not deemed to have committed a criminal offence*". If this is done, that *Act* will in effect

⁶¹⁵ *Supra* note 193 (s 109.5 added by SC 2001, c 25, s 64).

⁶¹⁶ *Ibid*, s 135.

⁶¹⁷ *Supra* note 106.

decriminalize the offences brought within its procedures and thus it can be a viable alternative to creating administrative tribunals to adjudicate contraventions. Many Federal departments might be inclined to use the *Act* if they have any reservation to creating new tribunals. It may appeal even to CFIA as the provincial court system is well established in Canada and the issues that are currently dealt with under the *Agri-Food* statutes are not so complex as to require a tribunal with specialized knowledge of administrative penalties.

The extension of *amps* to other agri-food statutes administered by CFIA, and its availability government-wide, depend on improvements to the current system as indicated above.

Appendices

Appendix 1 - Effectiveness Indicators: Questionnaire

An important purpose of the data on *amps* and Prosecutions is to determine whether the *AAAMP Act* has enhanced the effectiveness of enforcement and, as a consequence, compliance rates have increased since its introduction in 2001/02 which can be attributed to this new tool. Effectiveness cannot be easily measured, but some indicators can point to the improvement. Among these indicators, at the *macro* level, is the enhancement of overall food safety and health of Canadians and the confidence that our overseas or continental customers have in our livestock and animal/poultry products (which would be apparent when import controls or bans are not put in place by those buyers). This undoubtedly is a very difficult measure. At the *micro* level, the indicators would be:

- (a) number of inspectors engaged and the number of inspections carried out in a given year - the quality of inspections is extremely important;
- (b) the number of infractions detected and proceeded with or prosecuted in a given year, and their trend over a given period of time- this is perhaps the single most important indicator though it has several limitations;
- (c) timely and appropriate enforcement response;
- (d) amount of penalty assessed; and
- (e) use of precautionary measures, including segregation/culling orders for animals/poultry before they enter the human food chain, and when discovery was too late, the use of Recall Orders of the products put on shelves for sale to consumer, to ensure consumer protection.

For the above purpose, I have prepared two questionnaires, one for Inspectors and the other for the veterinarians, and I would appreciate if information could be provided to me, in confidence of course, for a meaningful presentation of the data generously provided to me by CFIA.

Health of Animals Act

I. Questions to the Chief Inspector of each Region or at Headquarters, concerning inspections

1. Is it possible to provide an estimate of the number of inspectors in a given year who carry out inspections under the *Health of Animals Act*? And the total number of inspections that are carried out in a given year – if possible, also, would figures be available for the last 10 years (from 1966/97 to 2000/01, i.e. before the *AAAMP Act*, and from 2001/2006/7, i.e. since the *AAAMP Act* came into operation).

2. Do inspectors engaged to carry out inspections under the *Health of Animals Act* carry out inspections of both fixed establishments and movers/transporters of animals?

3. Do the above referred inspectors carry out inspections under other CFIA statutes, e.g. *Meat Inspection Act*, *Fish Inspection Act* etc?

4. What is the approximate percentage of inspections carried out under the *Health of Animals Act* and under the other CFIA statutes?

2. Questions for a Veterinarian

1. Are all the animals coming within the scope of the *Health of Animals Act/Regulations* herbivorous?, i.e. to say, none of the livestock/poultry that after slaughter enter the food chain of humans is fed with any feed that contains an animal product or byproduct?

2. What types of diseases are the animals/poultry referred to above are susceptible to, e.g.:

- (a) tuberculosis;
- (b) blue tongue;
- (c) foot-and-mouth;
- (d) BSE
- (e) avian 'flu or other bird 'flu or disease (please specify)
- (f) other (please specify)

3. What has been the incidence of the above diseases in the last five years? And what measures were taken to protect the animals/poultry and the food supply? [Sequestration/isolation? Recall orders when there was a subsequent discovery? How many "Recall orders" were issued in the last five years in such cases? What animals/poultry were involved in those Recall orders? What statutory authority was invoked to issue Recall orders? [*Health of Animals Act, Meat Inspection Act, Food & Drugs Act?*]

4. Under what circumstances is a culling ordered? Is segregation of healthy animals/poultry possible at the stage of an outbreak of any of the above diseases? What happens if an animal/poultry is infected by a disease? Is it possible to allow for recovery to occur and for later examination to ensure that it is completely free of the disease?

5. At what stage in the food chain does the application of the *Health of Animals Act* cease and another CFIA statute (e.g. the Meat Inspection Act) begin to apply?

- (a) from the time the animal/poultry reaches the slaughterhouse?
- (b) even after, when it may be detected that the contamination was due not after slaughter but occurred due to a disease (or an incidence of a wrong feed) while the animal was alive?

6. Is a veterinarian's examination/certificate mandatory before an animal/poultry is sent for slaughter? If so what is the latest in time is examination/certificate required?

7. What is the percentage of animals/birds examined?

8. When animals/poultry are being transported for slaughter, does a veterinarian inspect the condition of the animal, especially for any physical injuries sustained at the point of loading or unloading? What happens if an animal is found to be badly injured or is in distress? Would the transporter/owner be required to bring the animal/poultry back to health before it is sent for slaughter?

Appendix 2 - Current examples of civil and fixed penalties in the UK

The following list of UK statutes which contain civil and fixed penalties has been summarized from Woods and Macrory, *Environmental Penalties: A more proportionate response to regulatory breach*, Centre for Law and the Environment, Faculty of Laws. University College London. 2003. Several statutes in the list have been amended since the publication of the paper.

Pensions Act 1985 authorizes OPRA (Occupational Pensions Regulatory Authority) to regulate private pension schemes – maximum penalties range from £5,000 for individuals, £50,000 for other persons. Review by Pensions Board and on leave of the Board by High Court on a question of law.

Competition Act 1998 and *Enterprise Act 2002*. Act authorizes the Competition Commission to investigate monopolies and mergers, etc. Maximum penalty authorized is £20,000 and a maximum daily rate of £5,000. Appeal to the Competition Appeal Tribunal and from there to the Court of Appeal on a point of law.

Competition Act 1998 authorizes the Competition Commission to investigate agreements and conduct which distort UK trade. Penalty amount that is authorized is based on turnover of undertaking (5% or 10%, based on seriousness. Appeal to the Competition Appeal Tribunal and from there to the Court of Appeal on a point of law.

Companies Act 1989. Registrar of Companies empowered to impose a graduated penalty of a fixed amount ranging from £100 for a private company to £5,000 to a public company, based upon the length of delay in complying with the Act. Review by Registrar, appeal to High Court. [Act repealed and replaced in 2006].

Dairy Products Quota Regulations 2002 authorizes the Secretary of State (DEFRA) to regulate levy payable on any sale of dairy products by direct sale by a producer or delivered wholesale to a purchaser. Levy based on percentage of sales from 0.1 to 0.5% No formal appeal, but judicial review by High Court is available.

Finance Act 1994 authorizes H.M. Customs & Excise to impose penalties for breach of various statutes, including VAT and *Customs Act*, based upon a

percentage of total duty evaded, with remission powers up to a maximum of 75%. Appeal to the VAT and Duties Tribunal and then to the Court of Appeal.

Immigration (Carriers' Liability) Act 1987 and the *Immigration & Asylum Act, 1999* authorize the Secretary of State (Home Office) to levy a fixed penalty of £2,000 for each clandestine entrant, and empowers detention of vehicles. . No formal appeal, but judicial review to the High Court is available.

Health Services (Control of Patent Information) Regulations 2002 empowers the Secretary of State (Health) to impose a penalty not exceeding £5,000 fixed at the discretion of the Secretary of State, based on the seriousness of any non-compliance and the circumstances. No formal appeal, but judicial review to the High Court is available.

Noise Act 1996 authorizes Local Authorities (Environmental Health Officers) to impose a fixed penalty of £100 for emitting noise from private dwellings at night and to confiscate equipment emitting the noise. Opportunity given to accused to pay penalty, failing which a criminal action can be pursued.

Financial Services & Markets Act 2000 ("FSMA") regulates deposit taking, insurance and investment business. It empowers the Financial Services Authority ("FSA") to impose financial penalties for breach of *FSMA* provisions by "authorised persons" and misconduct by "approved persons" for contravention of requirements under the Act. FSA must comply with guidelines prescribed by the *FSMA* in exercising its discretion, publish a policy statement as to the factors it would consider in determining the amount of penalties that will be imposed, and publish a draft of the policy for public comment. In accordance with these requirements, the FSA issued an Enforcement Manual in December 2001. The *FSMA* provides the offender with a right to appeal a FSA decision to an independent Financial Services and Markets Tribunal appointed by the Lord Chancellor. Further appeal on points of law can be taken to the Court of Appeal.

Appendix 3 - Snapshot of Canadian agriculture

Canada and the World: Livestock Statistics Canada, Census of Agriculture, 2001 and 2006

Table 3: Canadian farms by farm type, 2006 and 2001

<i>Farm type</i>	<i>2006</i>		<i>2001</i>	
	<i>Number of farms</i>	<i>%age of total farms</i>	<i>Number of farms</i>	<i>%age of total farms</i>
Dairy	14,651	6.4%	18,321	7.4%
Beef	60,947	26.6%	67,838	27.5%
Hog & pig	6,040	2.6%	7,388	3.0%
Poultry & egg	4,578	2.0%	4,937	2.0%
All other animal production	30,594	13.3%	26,846	10.9%
Field crops	91,277	39.8%	101,041	40.9%
Fruit & veg	12,532	5.5%	11,663	4.7%
Greenhouse, nursery & floriculture	8,754	3.8%	8,889	3.6%
All farms	229,373	100.0%	246,923	100.0%

Source: FAO and Statistics Canada, Census of Agriculture, 2001 and 2006

Table 6: Livestock and poultry inventories, selected countries and years

<i>Country</i>	<i>Census year</i>	<i>Number of cattle</i>	<i>Number of sheep</i>	<i>Number of pigs</i>	<i>Number of chickens</i>
Canada	2001	15,551,44	1,262,448	13,958,772	126,159,529
Canada	2006	15,773,527	1,142,877	15,043,132	125,314,793

Appendix 4 -Agriculture & Agri-Food Monetary Penalties Act Penalty Scales

Section 4: Powers of the Minister

The Minister may make regulations

- (1)
- (c) fixing a penalty or range of penalties, in respect of each violation;
- (2) The maximum penalty for a violation
- (a) in the case of a violation that is committed otherwise than in the course of a business and that is not committed to obtain a financial benefit, is \$2,000;
- (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.
- (3) Without restricting the generality of paragraph (1) (d), in making regulations respecting the criteria for increasing or reducing the amount of the penalty for a violation, the Minister shall include the following in such criteria:
- (a) the degree of the intention or negligence on the part of the person who committed the violation;
- (b) the harm done by the violation; and
- (c) the history of the persons who commits the violation or prior violations or convictions under agri-food Acts within FIVE YEAR period immediately before the violation.

PENALTY ADJUSTMENTS

Agriculture & Agri-Food Monetary Penalties Regulations, SOR/2000-187

SCHEDULE 2 (Subsection 5(3))

PENALTY ADJUSTMENTS

Column 1 Item	Column 2 Total Gravity Value	Penalty Adjustment
1	1	Reduce penalty 50%
2	2	Reduce penalty 40%
3	3	Reduce penalty 30%
4	4	Reduce penalty 20%
5	5	Reduce penalty 10%
6	6-10	Do not adjust penalty
7	11	Increase penalty 10%
8	12	Increase penalty 20%
9	13	Increase penalty 30%
10	14	Increase penalty 40%
11	15	Increase penalty 50%

SCHEDULE 3 (Section 6) -TOTAL GRAVITY VALUE

PART 1 – HISTORY

Column 1 Item	Column 2 Gravity Value	History
1	0	No previous violations or offenses have been committed under the <i>Act</i> or <i>Regulations</i> under which the particular penalty is being assessed in the three years preceding the day on which the violation subject to the assessment is committed
2	3	No more than one previous minor or serious violation has been committed under the <i>Act</i> or <i>Regulations</i> under which the particular penalty is being assessed in the three years preceding the day on which the violation subject to the assessment is committed.
3	5	The history in the three years preceding the day on which the violation subject to the assessment is committed is other than the history set out in item 1 or 2

PART 2 - INTENT OR NEGLIGENCE

Column 1 Item	Column 2 Gravity Value	Intent or Negligence
1	0	The violation subject to the assessment is committed without intent or negligence
2	0	The person who commits the violation subject to the assessment makes a voluntary disclosure of the violation and takes necessary steps to prevent its re-occurrence.
3	3	The violation subject to the assessment is committed through a negligent act
4	5	The violation subject to the assessment is committed through an intentional act.

PART 3 - HARM

Column 1 Item	Column 2 Gravity Value	History
1	0	The violation subject to the assessment causes or could cause minor harm to (a) human, animal or plant health or the environment; or (b) any person as a result of false, misleading or deceptive practices.
2	3	The violation subject to the assessment could cause (a) serious or widespread harm to human, animal or plant health or the environment; (b) serious or widespread harm to any person as a result of false, misleading or deceptive practices; or (c) serious monetary losses to any person.
3	5	The violation subject to the assessment causes (a) serious or widespread harm to animal or plant health or the environment; (b) serious or widespread harm to any person as a result of false, misleading or deceptive practices; or (c) serious monetary losses to any person.

Appendix 5: CBSA Report on Food, Plant & Animal (FPA) Imports –Travellers AAAMP
at 10 International Airports in Canada

<i>Fiscal Year</i>	<i>Total # of NOV's Warning and Penalty</i>	<i>HAA</i>	<i>HA Regs</i>	<i>PPA</i>	<i>PP Regs</i>
Jan. 1 to March 31/06	1,556	Data unavailable at HQ	Data unavailable at HQ	Data unavailable at HQ	Data unavailable at HQ
2006/07	3,163	2,704	-	459	-
2007/08	2,404	1,534	511	301	58
2008/09	1,414	1,168	49	174	23

[Source: E-mail dated 6 April 2009 from Lise Dupuy, Senior Program Officer, CBSA AMP Policy and Program Unit, to Mohan Prabhu]

FPA AAAMP data for fiscal year 2001/02 to fiscal year 2005/06 (in part, up until December 31, 2005) can be retrieved from CFIA's NETS (National Enforcement Tracking System). Approximately 3,000 FPA AAAMP in the traveller stream were handled each year.

The following table outlines information retrieved from paper sources which you requested. Unfortunately, the sections of the *Health of Animals Act* and the *Plant Protection Act* and their respective *Regulations* are not displayed. Once the process is automated, this type of information will be readily available.

Of the combined totals, approximately 3 to 5% are warnings.

In the commercial stream, FPA violations are being referred to CFIA for either the assessment of an AAAMP or prosecution. CBSA only received delegated authority from the President of CFIA to issue AAAMP up to a maximum of \$400.00 which is why CBSA still does not issue commercial AAAMP.

Appendix 6 - Canadian Legislation Concerning Farm Animal Welfare

[From: Canadian Food Inspection Agency - Animal Welfare in Canada. Date modified: 2008-06-17]

[Note: The table given below does not include provincial statutes relating to fur animals which have several animal welfare provisions].

Government	Act/Regulations	Scope	Enforced by
Federal	Health of Animals Act Health of Animals Regs	Protects all animals from undue suffering during transport and loading.	CFIA inspectors Designated provincial authorities: British Columbia SPCA BC Minister of Transport Police Officers
	Meat Inspection Act Meat Inspection Regs, 1990	Protects food animals during handling and slaughter in federally registered slaughter establishments	CFIA inspectors Police Officers can enforce provisions that do not require designation as an inspector
	Criminal Code of Canada	Prohibits cruelty to animals that is willful or without lawful excuse	Police Officers SPCA Certain Quebec SPCA
Alberta	Animal Protection Act	Protects all animals, excluding human beings during any activity excluding generally accepted practices of animal management, husbandry and slaughter	Police Officers Alberta SPCA
	Alberta Livestock Transportation Regulation under Livestock and Livestock Products, Act	Protects horses, cattle, sheep, swine, goats, furbearing captive animals, game-production animals and live poultry and bees during transport	Inspectors designated by the Ministry of Agriculture Alberta SPCA Police Officers
	Meat Inspection Act Meat Inspection Regulation	Protects any animal, including birds, for which the meat is intended for human consumption from undue suffering during slaughter	Inspectors designated by the Ministry of Agriculture Police Officers
	Livestock Industry Diversification Act Livestock Industry Diversification (Ministerial Regulation)	Provides standards of care and slaughter for game animals and standards for velvet antler removal	Inspectors designated by the Ministry of Agriculture

Government	Act/Regulations	Scope	Enforced by
British Columbia	Prevention of Cruelty to Animals Act	Protects all animals, excluding wild animals, from distress during any activity excluding generally accepted practices of animal management	British Columbia SPCA Police Officers
	Milk Industry Standards Regulations	Protects dairy cattle during handling and milking	Inspectors designated by the Ministry of Agriculture
	Hatchery Regulation under Agricultural Produce Grading Act	Ensures adequate housing of poultry	Inspectors designated by the Ministry of Agriculture
	Meat Inspection Regulations under Food Safety Act	Allow cattle, horse, sheep, swine, goat, domestic rabbit, poultry, deer, reindeer, moose, elk and bison to be humanely slaughtered	Inspectors designated by the Ministry of Agriculture
Manitoba	Manitoba Animal Care Act Animal Care Regulation	Protect any animal, excluding humans, from suffering during all activities including transport, excluding generally accepted practices	Veterinary Services Branch of Manitoba Agriculture & Food Police Officers
New Brunswick	New Brunswick Society for the Prevention of Cruelty to Animals Act & Regulations	Protect any animal during any activity including general care, during medical treatment and slaughter	SPCA Animal Protection Officers Police Officers
	Hatchery Licensing and Supply Flock Policy Regulation under Poultry Health Protection Act	Provides protection for chicks during housing	Inspectors designated by the Minister of Agriculture
Newfoundland and Labrador	Animal Protection Act	Protects all non-human vertebrates from distress and cruelty during any activities	Police Officers, provincial veterinary staff and Newfoundland SPCA
	Regulations Respecting Facilities under Meat Inspection Act	Protects domestic animals including birds, that are intended for human consumption during holding, transfer and slaughter	Ministry responsible for Agriculture

Government	Act/Regulations	Scope	Enforced by
Nova Scotia	Animal Cruelty Prevention Act	Protect non-human vertebrates during any activity excluding generally accepted practices of animal management husbandry or slaughter	Police Officers Nova Scotia SPCA
	Regulations Respecting Slaughter under Meat Inspection Act	Protects any domestic animal for which its meat is intended for human consumption during slaughter	Inspectors designated by the Ministry of Agriculture
Northwest Territories	Herd and Fencing Act	Protect horses, cattle, sheep, swine and goats during housing (fencing) and from cruelty in general	Officers appointed by the Commissioner
Nunavut	Herd and Fencing Act	Protect horses, cattle, sheep, swine and goats during housing (fencing) and from cruelty in general	Officers appointed by the Commissioner
Ontario	Ontario Society for the Prevention Of Cruelty to Animals Act	Protects animals, including domestic fowl, from distress during any activity	Ontario SPCA Police Officers
	Livestock Community Sales Act	Protects cattle, goats, horses, sheep and swine health safety during sale	Inspectors as appointed by the Ministry of Agriculture
	Transporting Non-Ambulatory Animal Regulations under Livestock Products Act	Protects downed livestock during transportation and livestock handling	Inspectors as appointed by the Ministry of Agriculture Ontario SPCA
	Meat Inspection Regulations under Food Safety and Quality Act	Protects domestic animals, including poultry, that are destined for human consumption during slaughter	Inspectors as appointed by the Ministry of Agriculture Ontario SPCA
	Dead Animal Disposal Act	Protects 'fallen' animals from inhumane slaughter and prohibits their movement	Inspectors as appointed by the Ministry of Agriculture Ontario SPCA

Government	Act/Regulations	Scope	Enforced by
Prince Edward Island	Part IV: Animal Protection Section under Animal Health and Protection Act and Animal Protection Regulations	Protects all animals from distress during any activity	Inspectors appointed by the Ministry of Agriculture
	Dairy Industry Regulations under Dairy Industry Act	Protects dairy cattle during care and handling	Inspectors appointed by the Minister of Agriculture
Quebec	Animal Health Protection Act [not in force for farm animals]	Protects all animals designated by the Regulation, other than those covered by the Act respecting the conservation and development of wildlife, during any activity except generally accepted agricultural practices	Inspectors and veterinarians appointed by the Quebec Department of Agriculture, Fisheries and Food (MAPAQ)
	Regulation respecting food under the Food Products Act	Provides standards relating to the transport, holding and slaughter of animals as well as facility sanitation	Inspectors and veterinarians appointed by the Quebec Department of Agriculture, Fisheries and Food (MAPAQ)
	Regulation respecting the sale of livestock by auction under the Animal Health Protection Act	Protects farm animals subject to auction	Inspectors and veterinarians appointed by the Quebec Department of Agriculture, Fisheries and Food (MAPAQ)

Government	Act/Regulations	Scope	Enforced by
Saskatchewan	Animal Protection Act	Protects all animals including birds, fish and reptiles during any activity excluding generally accepted agricultural practices	Police Officers Saskatchewan SPCA
	Livestock Dealer Regulations under Animal Products Act	Protects cattle, horses, bison, sheep, goat and swine in housing and holding	Minister of Agriculture and appointed inspectors
	Livestock Inspection and Transportation Regulations under Animal Products Act	Protects livestock during transfer and transportation	Minister of Agriculture and appointed inspectors
	Saskatchewan Poultry Regulations Under Animal Products Act	Protects poultry during handling and transportation	Minister of Agriculture and appointed inspectors
Yukon	Animal Protection Act	Protects all animals from distress and cruelty during any activity	SPCA Police Officers

Appendix 7 - Crimes by type of offence

Crimes by type of offence – 2006

Total Population in 2006 – 32, 623,490

	Actual Incidents	Rate per 100,000 population	Cleared by charge	Cleared otherwise
All Incidents	2,697,647	8,269	652,554	398,296
All Criminal Code offences				
• Including traffic offences	2,572,750	7,886	595,804	361,542
• Excluding traffic offences	2,452,787	7,518	519,702	351,294
All Federal Statutes	124,897	383	56,750	36,754
• Bankruptcy Act				
• Canada Shipping Act				
• Customs Act	689	2	26	196
• Excise Act	1,490	5	277	379
• Other Federal Statutes	21,069	5	8,446	7,403

Source: Statistics Canada, CANSIM, table 252-0013 provided by Chantal Fournier-MacGilvray, Stats Canada as Excel table, by email 23.05.2008

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