Modernization of the *Provincial Offences Act*

FINAL REPORT

August 2011

LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

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Modernizing the *Provincial Offences Act*: A New Framework and Other Reforms

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ABOUT THE LAW COMMISSION OF ONTARIO

The Law Commission of Ontario (LCO) was created by an Agreement among the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, Osgoode Hall Law School and the Law Society of Upper Canada, all of whom provide funding for the LCO, and the Law Deans of Ontario's law schools. It is located at Osgoode Hall Law School, York University.

The mandate of the LCO is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and support scholarly research. The LCO is independent of government and selects projects that are of interest to and reflective of the diverse communities in Ontario. It has committed to engage in multi-disciplinary research and analysis and make holistic recommendations as well as to collaborate with other bodies and consult with affected groups and the public more generally.

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FOREWORD

We are pleased to release this Final Report in the Law Commission of Ontario's project on Modernization of the *Provincial Offences Act*.

In December 2007, Kennth Jull, a legal practitioner with expertise in regulatory law, submitted a proposal to the LCO for a review of the POA with the objective of reforming certain aspects of the statute. With other projects already approved for study, the LCO was not able to consider undertaking the project until April 2009 when it was approved by the Board of Governors. The Board of Governors approved the Final Report in August 2011.

The POA project took as its starting point a refashioning of the statute to reflect the developments that have occurred since it was enacted 30 years ago, including the impact of the *Canadian Charter of Rights and Freedoms*, changes to the Criminal Code, the considerable increase in fines for certain offences, the importance of new technologies and the official recognition of paralegals, among them. Yet the reason for the POA has not changed: to recognize the difference between regulatory and criminal offences. Similarly, the need for a relatively simple or accessible statute addressing procedure with regard to offences that affect many ordinary Ontarians remains a priority. In its recommendations, the LCO has attempted to return the POA to its roots in this latter respect, while making recommendations that recognize contemporary legal realities. In addition to specific recommendations for reform, we have also identified issues which could not be addressed in the LCO's review, but which we believe merit further consideration for making the POA an even more effective document for today and the future.

The LCO appreciates the assistance it received from the *Ad Hoc* POA project Advisory Group. The LCO project advisory groups are not asked to speak for their organizations and the contents of this Report should not be ascribed to them.

The LCO is governed by a Board of Governors, comprised of appointees of the founding partners, the judiciary and members at large. The Board approves LCO policies, projects and final reports. The Board's approval of this Report reflects its members' collective responsibility to manage and conduct the affairs of the LCO, and should not be considered an endorsement by individual members of the Board or by the organizations to which they belong.

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In addition, the LCO wishes to thank the many individuals and organizations who took the time to speak with or write to the LCO about the Modernization of the POA project. A list of people who provided written submissions on the project or otherwise provided substantial information during the course of the project is appended to this Report as **Appendix A**.

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EXECUTIVE SUMMARY

I. INTRODUCTION

Regulatory law dictates how we drive our vehicles, the safety of our places of work, the food and beverages we consume and how we treat our pets, among many other areas that affect Ontarians on a daily basis. The *Provincial Offences Act* mandates the process to deal with the millions of charges that are brought under regulatory statutes each year. The vast majority involve "less serious" offences for which defendants are most likely to be unrepresented. It is important that the process governing these offences is fair, efficient, accessible and proportionate to the interests at stake.

The POA was enacted more than 30 years ago, establishing a procedure for the prosecution of offences under Ontario statutes, regulations and municipal by-laws. A comprehensive review of the POA has not been undertaken since then to assess whether it continues to meet its original objectives and whether those objectives remain current today. Nor has there been a review to consider the impact of significant developments such as the enactment of the *Charter of Rights and Freedoms*, the transfer of prosecution and court administration of POA matters from the Province to municipalities, significantly increased penalties for many offences, and the increased use of administrative monetary penalties to enforce regulatory standards.

The Board of Governors of the Law Commission of Ontario (LCO) therefore approved a project on Modernization of the *Provincial Offences Act* on April 2, 2009. We have examined specific procedural issues, and have proposed structural improvements and a mechanism whereby procedural improvements in the future can be more easily achieved. This Final Report provides an analytical framework for modernizing and reforming the *Provincial Offences Act* (POA).

II. STRUCTURAL REFORMS TO THE POA

Provincial Offences and the POA

Prior to the POA's coming into force, the *Summary Convictions Act* governed the procedure for enforcing and prosecuting provincial offences. It largely adopted the federal *Criminal Code*'s provisions for the prosecution of summary conviction offences. The new POA was intended to establish a speedy, efficient, simple and appropriate method of dealing with, for the most part, minor offences by the provincial offences court. This objective remains current today.

The POA sets out three distinct streams for commencing prosecutions of provincial offences before a judge or justice of the peace (justice) in the Ontario Court of Justice. It contains ten parts described in detail in the Report. Parts I, II and III address the three different ways a POA proceeding may be commenced; Part IV provides for the trial process for all offences; Part V addresses general matters; Part VI describes procedures for young persons; Part VII deals with appeals and reviews; Part VIII is concerned with arrest, bail and search warrants; Part IX concerns the application of the POA to statutes that provide for orders but does not provide for a procedure; and Part X provides for agreements between the Attorney General and municipalities.

Seven regulations apply to POA proceedings, governing such matters as costs, fees for late payment of fines, forms and notices for various types of proceedings and fine surcharges. In addition, four different sets of procedural rules dictate the practice and procedure for POA proceedings and appeals.

To give some context to the type of provincial offences that would be governed by the POA, we describe key areas of regulatory law in Ontario. They include motor vehicle regulation, occupational health and safety laws, environmental protection, the regulation of controlled substances such as liquor and tobacco, safety regulation such as fire protection and restraining orders, general public order and safety regulation such as soliciting in certain public locations and consumer protection regulation.

A separate statute addressing procedural matters reflects the view that there is a clear distinction between regulatory offences and true crimes. Criminal conduct under the federal *Criminal Code* is said to constitute conduct that is inherently contrary to basic human values and is therefore prohibited completely through criminal enactments. There is usually stigma associated with a conviction of a crime. Regulatory offences, on the other hand, most often involve conduct that is prohibited not because it is inherently wrongful but because dangerous conditions and risks to society at large would result if that conduct was not regulated. There is little or no stigma associated with most provincial offence convictions. Unlike criminal activity, there is usually an expectation that people will continue to engage in the regulated activity after a prosecution, but that they will do so lawfully. It is not always easy to make the distinction, particularly for provincial offences that have significant penalties and the possibility of imprisonment. Nevertheless, the vast majority of POA charges relate to matters that are clearly regulatory and are minor in nature and warrant distinctive treatment, including sentencing.

We therefore recommend maintaining a distinct procedural code in relation to provincial offences. (Recommendation 1)

POA Reform Framework

Certain principles ought to guide the reform of POA procedure now and in the future.

They are:

Fairness. Fairness must remain a paramount consideration when reforming the POA, although not necessarily as broad in scope as in the criminal context.

Access to Justice. Given the volume of minor provincial offences, the POA system is the "face of the justice system" for most Ontarians. Most defendants are believed to be unrepresented. The POA must therefore provide for simple, easily understood and accessible procedures for the most common offences.

Proportionality. The procedure governing the prosecution of an offence must be proportionate to the interests at stake.

Efficiency and the Administration of Justice. Any procedural system must be efficient to handle the millions of minor charges as well as the less common, but increasingly complex, cases under Part III.

We have also applied the concept of responsive regulation to POA reform. Responsive regulation is most applicable when deciding how best to enforce regulatory standards, but it also has relevance to sentencing of regulatory offences. In this regard we briefly discuss "the regulatory pyramid", under which regulators proceed with modest strategies to encourage parties to comply with regulatory standards, and if unsuccessful, resort to successively more punitive mechanisms, as an alternative to regulatory prosecutions and fines as a first response. We discuss alternative sentencing tools in Part III of this Final Report.

The Purpose of the POA and a Proposed New Structure

Section 2 of the POA states that the statute's purpose is "to replace the summary conviction procedure for the prosecution of provincial offences…with a procedure that reflects the distinction between provincial offences and criminal offences." The POA's underlying objectives were to establish a fair and efficient method of resolving provincial offences proportionate to the complexity or seriousness of the offence, but different from the process governing criminal cases. Given the numbers of unrepresented litigants today, accessibility is an increasingly important objective. It is also important that the POA, as a procedural code, further the objectives of the offence-creating statute to which it applies.

We therefore recommend that the purpose section be amended to incorporate these concepts in order to guide parties and the court when interpreting the POA, and to inform the development of any rules, forms or other subordinate authority. (Recommendation 2)

We believe the POA and its four sets of rules and seven regulations must be simplified. The POA contains 10 parts and

176 sections, with internal exceptions and frequent cross-references to other sections, regulations or forms. The trial provisions apply to the most serious and less serious offences without distinction.

We therefore recommend that the POA be restructured to remove the detailed procedural code to regulation, leaving only those matters that are properly left within a statute. While it should continue to prescribe different streams for less serious and more serious matters, the bulk of the procedural code should appear in a single rule, regulation or other subordinate authority, with streamlined procedures for less serious offences, and more detailed procedures for more complex cases, consistent with the principle of proportionality. Simple, plain language guides for defendants would make the POA more readily accessible. We further recommend that the Attorney General and the Chief Justice (Ontario Court of Justice), in consultation with others, jointly determine the most appropriate body to develop the new procedural code. (Recommendations 3 to 9)

Administrative Monetary Penalties as an Alternative to the Court Process

Justices of the peace preside over virtually all provincial offence trials, with nearly 60% of their time spent presiding over Part I and Part II trials. Given the relatively minor nature of many of these offences, we assess whether the relevant POA provisions be replaced by an administrative monetary penalty system that is less expensive and more efficient.

An administrative monetary penalty (AMP or AMPS) is a penalty imposed that is due once an infraction has been detected, unlike a fine, which is imposed only once a party has pleaded guilty to an offence or the court has convicted the defendant. AMP systems are already in place in Ontario for certain regulatory breaches. They are said to be an effective and efficient tool to enforce compliance with regulatory standards, while respecting principles of fairness since they typically provide an opportunity to dispute the AMP before an independent, administrative decision-maker (rather than the court).

The *Municipal Act, 2001* (which does not apply to the City of Toronto) authorizes municipalities to establish systems of administrative penalties for parking infractions which are then no longer subject to the POA, but so far, only the City of Vaughan and the City of Oshawa have done so (although the City of Oshawa approved the adoption of an AMPS parking regime on January 31, 2011 which came into effect on March 1, 2011). The experience of the City of Vaughan has been that matters are heard much more quickly; defendants are given a firm hearing date; less time is wasted by the public; there are cost savings by using administrative hearing officers; hearings are streamlined without the need for a prosecutor; and it frees up time on the court's dockets to hear more serious matters.

While cost arguments support a move to an AMPS regime, they are not determinative. Proportionality is a major consideration. Non-judicial adjudicators in Ontario deal with matters of fundamental importance to us, such as our human rights, our rights as tenants, our entitlement to social assistance and our ability to work and be licensed in a chosen profession. Yet, under our current POA regime, it is possible to get a trial before a justice to adjudicate upon a disputed $30 parking ticket. We believe greater respect for the rule of law and the administration of justice would be achieved if court and judicial resources were reserved for more serious matters.

In light of the challenges arising for each municipality, we recommend a three year delay before any provincial legislation providing for mandatory AMPS systems for parking infractions comes into force. (Recommendations 10 and 14)

We provide a constitutional analysis under sections 7 and 11 of the *Canadian Charter of Rights and Freedoms* in relation to the AMPS system under the *Municipal Act, 2001*, based on Supreme Court of Canada jurisprudence and cases examining AMPS in other contexts. We conclude that given the maximum permissible penalty and that penalties cannot be punitive, the system we endorse is constitutional. We further conclude that higher penalties for improperly using disabled parking spaces would be constitutionally permissible under AMPS and therefore *we recommend that the AMPS regulation under the Municipal Act, 2001 be appropriately amended to include the improper use of disabled parking spaces in an AMPS regime*. (Recommendations 11 to 13)

The vast majority (80%) of Part I offences arise under the *Highway Traffic Act* and are heard by justices of the peace. We considered whether they should also be subject to an AMPS system. We concluded, however, that the nature of these offences raises more complicated issues than do parking infractions and therefore *we recommend that the Ontario government review Part I offences to determine which, if any, would be better addressed through AMPS.* (Recommendation 15)

Under Part IV, we briefly discuss the used AMPS for parking enforcement by First Nation communities

Sentencing Reform

The maximum fine for a Part I offence is $1,000. For Part III offences, the maximum fine is $5,000, unless a statute directs otherwise, and imprisonment is possible where authorized by the offence-creating statute. Certain other sentencing tools, such as probation, are available, but only for Part III offences and their use is limited.

The POA lacks a statement of sentencing principles and only a few decisions from appellate courts are available to guide lower courts, including a leading decision now a quarter century old. As a result, there has been marked variation in sentences and a call for consistent sentencing principles. Sentencing principles adopted under the *Criminal Code* may serve as a model, although these principles have been criticized as failing to give sufficient guidance to the court on their application or interrelationship.

If sentencing is to be legitimate, it should be based on a consistent and principled approach that aligns that part of the regulatory process with the underlying regulatory objectives. *We therefore recommend that the POA be amended to provide a statement of sentencing principles for general application within the POA, subject to different or additional principles being prescribed in the offence-creating statute.* (Recommendations 16 to 17)

Sentencing would promote the remedying of harm, rehabilitation, deterrence and where there are aggravating factors, a denunciatory or punitive penalty.

For many offences, the sentencing principles may have little or no impact. Fines for certain regulatory offences may well remain the most effective means of promoting compliance with regulatory standards. However, where fines are issued, it will only be after a court has first considered whether remediation and rehabilitation sentencing orders can best achieve regulatory objectives.

The adoption of sentencing principles represents a shift away from the traditional deterrence-fine paradigm and will be most helpful and appropriate for Part III offences. Given the principle of proportionality and the objective of maintaining simple, streamlined processes for Part I offences, the LCO is not persuaded that the new sentencing principles *must* apply when sentencing Part I offences, but rather where the unusual circumstances of the case warrant it.

The proposed sentencing principles cannot be realized with the penalties currently available. *We therefore recommend that the POA be amended to give the court authority to (a) make probation orders for all provincial offences in order to achieve the remedial and rehabilitative sentencing principles, including broad authority to order terms of probation (although for less serious offences only under certain circumstances); (b) make express, freestanding restitution or compensatory orders outside of probationary terms that may be enforced in civil courts; (c) use victim impact statements; and (d) impose an embedded auditor to monitor compliance with regulatory standards. We defer to the Ministry of the Attorney General consideration of whether alternative measure programs should also be available for less serious offences, after further consultation with municipalities.* (Recommendations 18 to 23)

When corporations and other business enterprises breach regulatory standards, it can have significant deleterious effects on communities and potentially thousands of consumers. Fines may not be the most effective sentencing tool since they can often be passed on to consumers.

We therefore recommend that the POA adopt a provision similar to that under the Criminal Code expressly giving the court the power to include remedial and rehabilitative terms within a probation order against a corporation or other business enterprise, whether incorporated or not, as well as clear authority for the court to impose a punitive or denunciatory penalty where appropriate. We further recommend that the Ministry of the Attorney General, in consultation with others, develop a non-exhaustive list of aggravating factors that may justify such a penalty for inclusion within the POA sentencing provisions. (Recommendations 24 and 25)

Bail Reform

Although very few people are arrested for the commission of provincial offences, and even fewer are held or released on bail, the principles of fundamental justice require that a fair and effective mechanism be in place for pre-trial release from custody.

The presumption under the POA is that a defendant who is arrested be released pending the disposition of the charge, unless the detention is necessary to ensure the defendant's attendance in court. There does not appear to be authority to deny bail for the protection and safety of the public, leading to the anomaly that a police officer has the authority to detain a defendant to prevent the continuation or repetition of an offence or the commission of another offence, but a justice does not have the authority to deny bail where there is evidence of a real threat to the safety of the public, including a victim or witness.

We therefore recommend the POA bail provisions be amended to add the protection and safety of the public as a ground for denying bail, but only where there is a real and substantial likelihood that the defendant will commit a serious offence that will harm the public. (Recommendation 26)

Generally speaking, the only justification under the POA to impose bail conditions is to ensure the defendant's appearance in court. There may be other appropriate bail conditions within the limits imposed by the *Charter* and case law, in addition to the safety of the public. However, given the nature of most provincial offences, we are concerned that bail conditions may be overused or unnecessarily imposed. *We therefore recommend that the Ministry of the Attorney General, in consultation with the judiciary, municipal prosecutors, defence bar, paralegals and relevant legal and community organizations review and consider any further bail conditions that ought to be added to the POA. We further recommend the development of judicial guidelines to promote the use of any new bail conditions and review of their use to ensure they are not abused or overused.* (Recommendation 27)

Finally, the bail procedure in the POA has not kept up with recent bail procedural amendments in the *Criminal Code*. *We recommend that the POA bail procedure be reviewed to assess whether it would benefit from process improvements after considering the Criminal Code bail amendments and other relevant considerations.* (Recommendation 28)

III. OTHER PROCEDURAL REFORMS TO THE POA AND ITS RULES AND REGULATIONS

This Report focuses primarily on structural and major process reforms to the POA, but several discrete procedural issues were raised during our consultations and we make recommendations on several of them.

The POA allows for search warrants to be executed on particular "things", but it fails to appreciate searches of electronic data on computerized systems or devices. While we believe that it would be appropriate to amend the POA accordingly, we recognize the highly intrusive nature of searches of personal computers and other electronic sources of information. Also, section 160 of the POA, which seeks to protect searches that uncover documents subject to solicitor-client privilege, may not be lawful because it does not require that the client – the privilege holder – to be advised that the document has been seized.

We therefore recommend that the Ministry of the Attorney General or body responsible for developing the new POA procedural code consider these search warrant issues, so that appropriate amendments may be made. (Recommendations 29 and 30)

With the licensing of paralegals in Ontario, more paralegals appear on POA matters, raising the appropriateness of paralegal-client privilege. *We recommend that the Ministry of the Attorney General further consider this in consultation with the Law Society of Upper Canada, paralegals and others.* (Recommendation 31)

At least one Ontario regulator relies on the POA's search warrant provisions to obtain bank records in order to

investigate and prosecute certain offences, although it is not clear that banks have the authority to disclose bank records in response to a search warrant without first giving notice to the account holder. It appears that what is truly sought is a production order from a non-party (e.g., a bank), rather than a search warrant. At this time, we do not recommend that production orders be authorized under the POA because there are outstanding policy and operational issues that must first be considered. *We therefore recommend that the Ministry of the Attorney General or body responsible for developing the new POA procedural code consider this issue further.* (Recommendation 32)

The POA states that common law defences are applicable in POA proceedings. It was proposed that common law defences be codified within the POA; however, we do not recommend the implementation of this proposal given the difficulty of codifying common law defences and the risk of freezing them under the POA while the common law would develop in the criminal context. However, *we do recommend that the Ministry of the Attorney General include a summary of common defences in its guides on POA proceedings.* (Recommendations 33 and 34)

Section 109 of the *Courts of Justice Act,* requiring that Notice of Constitutional Question (NCQ) be served on the federal and provincial Attorneys General under certain circumstances, was drafted prior to municipalities taking over the prosecution and courts administration of POA offences. *We therefore recommend that the Court of Justice Act be amended to: require that prosecutors in all POA matters be served with NCQ; and require that that a NCQ be served on a municipal prosecutor when relief is sought arising from an act or omission of a municipality.* (Recommendation 35)

The POA allows for convictions of Parts I and II offences to be "reopened" if a defendant has been convicted without a hearing and seeks to have the case reopened within 15 days of becoming aware of the conviction. There have been concerns that this rule has been abused and it has been proposed that limits on its use be introduced. *We therefore recommend that the Ministry of the Attorney General or body responsible for developing the new POA procedural code consider this issue further.* (Recommendation 36)

Section 124 of the POA references when an appeal of a Part III matter should not be allowed, but it refers to a "certificate" which suggests a proceeding commenced under Parts I or II. *We recommend that the Ministry of the Attorney General or body responsible for developing the new POA procedural code consider this issue further.* (Recommendation 37)

Media reports suggest that there are over $1 billion in unpaid fines in Ontario, although this may not be completely accurate. New enforcement tools have recently been introduced, but they may be of limited assistance. Other provinces have agreements with the Canada Revenue Agency whereby unpaid fines are deducted from income tax refunds and GST rebates. However, for some low-income Ontarians, tax refunds and GST rebates may represent a significant source of income needed for basic necessities. *We recommend that the Government of Ontario, in consultation with municipalities and others, assess whether this tax diversion is an effective and fair fine enforcement tool, with due policy consideration given to its potential impact on low-income Ontarians.* (Recommendation 38)

The POA contains various provisions to allow for certain hearings to be heard by telephone or videoconference, although some have not yet been proclaimed. *We recommend that the Ministry of the Attorney General or body responsible for developing the new POA procedural code consider the effectiveness of these provisions (once proclaimed) and recommend any improvements it may deem appropriate.* (Recommendation 39)

The POA permits the Superior Court of Justice to review POA decisions, but the Superior Court does not have the authority to review cost decisions which must be appealed, leading to unnecessarily fractured proceedings. *We therefore recommend that the POA be amended to provide jurisdiction to the Superior Court of Justice to review a cost award when a review to that court has been brought.* (Recommendation 40)

The ability to identify the French language needs of Francophones is not reflected in current POA procedures. *We recommend the development of proactive procedures for early identification of French Language needs.* (Recommendation 41)

The fair and equitable treatment of persons with disabilities requires that their needs be given particular attention when developing any court process, including the newly updated POA procedural code. *We recommend that these needs be identified so that the newly updated POA procedural code can respond to them early and effectively.* (Recommendation 42)

We were also told of concerns with having to physically attend a courthouse to file a notice of intention to appear in response to a Part I certificate of offence or Part II parking infraction notice. This can be particularly burdensome where a defendant (or defendant's representative) does not reside near the courthouse where the offence is filed. *We recommend that options be developed to reduce the cost and burden of attending courthouses to file notices of intention to appear.* (Recommendation 43)

The Ministry of the Attorney General's POA Streamlining Review of 2006 developed a list of proposals for POA reform, but only some of them have been implemented. *We recommend that body responsible for developing the newly updated POA procedural code review the recommendations of the POA Streamlining Review Working Group to assess whether any recommended amendments not yet implemented should be adopted by way of rule, regulation or statutory amendment.* (Recommendation 44)

IV. FUTURE LAW REFORM INITIATIVES

We also identify three issues that were brought to our attention but which we are unable to address in this report: the treatment of young persons charged with provincial offences; the application of the POA to Aboriginal people; and the possible application of AMPS to First Nation communities. In each case, *we recommend that the Ontario government review these matters, in consultation with affected groups.* (Recommendations 45 to 47)

I. INTRODUCTION

A. Background to the Modernization of the *Provincial Offences Act* Project

This Final Report in the LCO's Modernization of the *Provincial Offences Act* project provides an analytical framework for modernizing and reforming the *Provincial Offences Act* (POA).[1] In this project, the Law Commission of Ontario (LCO) has not only examined specific issues raised during our research and consultations, but has also made structural improvements and created a mechanism whereby future procedural improvements can be more easily achieved. In this respect, the Report is divided into three parts: (1) Structural reforms to the POA and its rules and regulations on which we make direct recommendations; (2) specific procedural issues that were brought to our attention and for which we raise the prospect of reform but refer most of these matters to others for further review or specific technical detail; and (3) future law reform initiatives which we consider of importance, but which we could not address in this study. We hope this Report and the POA reform framework that we propose will serve as a valuable tool to respond to evolutionary developments on the provincial offences landscape in the years to come.

When the POA came into force 30 years ago it was hailed as "one of the most sweeping legislative reforms of procedures governing the prosecution of offences since the enactment of the Criminal Code in 1892". Since that time the provincial offences environment in Canada has changed considerably, yet there have only been modest amendments to the POA.

When the POA came into force 30 years ago it was hailed as "one of the most sweeping legislative reforms of procedures governing the prosecution of offences since the enactment of the Criminal Code in 1892".[2] Since that time the provincial offences environment in Canada has changed considerably, yet there have only been modest amendments to the POA. Major developments include the adoption of the *Canadian Charter of Rights and Freedoms* (the *Charter*),[3] amendments to the *Criminal Code,*[4] significantly increased maximum penalties for certain provincial offences[5] the increased use of administrative monetary penalties (AMPS),[6] the emergence of licensed paralegals and increased use of technology.

The impact of the POA on the lives of Ontarians is significant, not merely because of the vast number of offences to which the POA applies or the number of proceedings commenced each year, but because of the nature of the regulatory offences governed by its process. Regulatory law dominates many aspects of our daily living. John Swaigen has described the impact of regulatory law, or public welfare law, on the lives of Canadians as follows:

> Public welfare laws pervade the lives of ordinary people. Almost every aspect of our activities is regulated from parking the car to fixing the roof. When people think about "the law" they often think of crimes such as theft, sexual assault and murder. But lawyers are well aware that the laws most likely to affect ordinary people, and to be broken by them, are not criminal laws, but the myriad of public welfare laws that are necessary to regulate and reduce the risk we impose on each other through activities as diverse as driving a car, operating a school, spraying a herbicide or constructing a nuclear power plant. These regulatory laws protect consumers, children in day-care centres, the elderly in nursing homes and hospitals, pedestrians and motorists, workers in factories, and the natural environment that sustains human and other life forms.[7]

Consistent with the LCO's mandate, this Final Report examines the current framework of the POA and considers its efficacy in achieving the legislative objectives of the statutes that create the provincial offence. Clarity of process and accessibility by the average Ontarian are also key considerations given the significant impact provincial offences can have on individual and corporate defendants. Finally, the sheer volume of provincial offences demands that any procedure governing these matters be both fair and efficient. In a sense, our recommendations seek to return the POA to its roots, as legislation that responds to the needs of those it most affects, with additional enhancements reflecting more contemporary thought in regulatory law.

The original proposal to review and revise the POA was received in December 2007 from Kenneth Jull, a lawyer with much expertise in provincial offences and risk management. A number of organizations and individuals involved in POA matters also supported a review at this time. It is against this backdrop that on April 2, 2009 the LCO's Board of Governors approved the Modernization of the *Provincial Offences Act* project.

[O]ur recommendations seek to return the POA to its roots, as legislation that responds to the needs of those it most affects, with additional enhancements reflecting more contemporary thought in regulatory law.

The LCO engaged in an initial review of literature and informal discussions with many organizations and individuals prior to issuing a Consultation Paper on November 16, 2009 that set out a number of issues initially raised with the LCO. It was sent to over 90 individuals and organizations and invited comments on the issues raised, as well as the identification of further issues that had not already been canvassed. The LCO also met or spoke with many people and organizations including academics, paralegal organizations, members of the bench, Aboriginal organizations, members of the defence bar, civil servants (including prosecutors), court administrators, municipal organizations and other municipal representatives.

The LCO also established an *Ad Hoc* project Advisory Group whose members are listed on page iv. The group met regularly from December 2009 onwards and meetings or telephone calls with individual members were common. The diverse views they brought forward were extremely valuable to the LCO in its efforts to make recommendations that took into account a broad array of perspectives. The Advisory Group also contributed to the project by facilitating discussions between their connections and the LCO.

This Final Report was prepared on the basis of feedback to the Interim Report which was circulated broadly to the judiciary, lawyers, paralegals, government officials and the public for consultation and comment and on additional research subsequently undertaken. It was approved by the LCO's Board of Governors on August 11, 2011.

B. A Word on the Scope of the Project

This Final Report does not purport to deal with all of the issues that could possibly be addressed in the modernization and reform of the POA. Entire law reform reports could be drafted on several of the discrete Parts of the Act, and a substantive analysis of each is well beyond the scope of this project. Moreover, a very technical review of many of the current POA sections was recently undertaken in 2009 by the Ministry of the Attorney General's *Provincial Offences Act* Streamlining Review. With its Municipal Partners, the Ministry agreed to explore ways to streamline POA proceedings. A Working Group was

established to consider proposals to simplify procedures, reduce demand for court resources, enhance fine enforcement and improve service to the public. Input from others on these issues was sought through the distribution of a consultation paper.[8] The Working Group made over 60 specific and detailed recommendations to the Attorney General, and many have already been implemented by the *Good Government Act, 2009* which made amendments to the POA and *Municipal Act, 2001*.[9] Therefore, to avoid a duplication of efforts or the potential for competing recommendations, we were of the view that the LCO project not focus on detailed procedural reforms to the POA.

A major objective of the POA Reform Framework is to serve as a set of guiding principles to tackle additional reform areas that are not dealt with in this Report… and the issue-specific recommendations significantly contribute to building a roadmap for POA reform that will modernize it today and make it a responsive and functional statutory instrument for the future.

Instead, the LCO project considered structural improvements, the establishment of an overall framework for an improved provincial offences system, alternative monetary penalties, sentencing and other specific recommendations that were not the subject of the detailed *Provincial Offences Act* Streamlining Review. Our objective was to establish a new framework for the POA that will bring greater clarity of process to and improved accessibility by the average Ontarian, while promoting a simple, fair and efficient procedure for the adjudication of provincial offences. In Section II.B, we describe a framework for the modernization and reform of the POA ("the POA Reform Framework") and then in subsequent sections address a handful of specific issues that were brought to the LCO's attention. A major objective of the POA Reform Framework is to serve as a set of guiding principles to tackle additional reform areas that are not dealt with in this Report. The LCO believes the POA Reform Framework and the issue-specific recommendations significantly contribute to building a roadmap for POA reform that will modernize it today and make it a responsive and functional statutory instrument for the future.

In Part IV of the Report, we identify three issues which were raised with us, but which we have not been able to address in this study: reforming the treatment of young people under the POA; the POA's application to Aboriginal communities; and the status of First Nations band by-laws in relation to AMPS. We recommend further study of these matters.

C. Key Developments that Support Reform at This Time

In the 30 years since the POA came into force, important changes to the Canadian legal landscape have significantly affected the POA's operation.[10] These developments strongly support reform of the POA at this time, but one can expect that many will continue to have an ongoing impact on our provincial offences system for years to come. A procedural code that can adapt and respond to these and other developments in the future is a central recommendation of this Report. For this reason, they must be considered not only for their present-day impact, but their potential impact on the administration of provincial offences in the future.

1. The Adoption of the *Canadian Charter of Rights and Freedoms*

In 1982, two years after the POA came into force, the *Canadian Charter of Rights and Freedoms* was enacted. Although the *Charter* applies to POA prosecutions, the Supreme Court of Canada has stated that the regulatory context is relevant in determining the scope and content of *Charter* rights:

> A contextual approach is particularly appropriate in the present case to take account of the regulatory nature of the offence and its place within a larger scheme of public welfare legislation. This approach requires that the rights asserted by the appellant be considered in light of the regulatory context in which the claim is situated, acknowledging that a Charter right may have different scope and implications in a regulatory context than in a truly criminal one.[11]

A number of *Charter* decisions affect the discussion of issues later in this Report.[12] For example, in a recent decision of the Alberta Court of Appeal, *Lavallee* v. *Alberta (Securities Commission),*[13] the court examined whether sections 7 and 11 *Charter* rights apply to proceedings involving a $1 million administrative monetary penalty for an offence under Alberta's *Securities Act*. This case informs our discussion on the use of alternative monetary penalties (AMPS). The *Charter* will also be referenced with respect to search warrants.

2. Developments in Criminal Law and Other Regulatory Statutes

We recognize the distinction between the Criminal Code and the POA. Nevertheless, some amendments to the Criminal Code, as well as to other provincial regulatory statutes, present an opportunity to consider whether similar amendments might be necessary or helpful in the POA context.

We recognize the distinction between the *Criminal Code* and the POA. Nevertheless, some amendments to the *Criminal Code,* as well as to other provincial regulatory statutes, present an opportunity to consider whether similar amendments might be necessary or helpful in the POA context. Some statutory changes have influenced our recommendations in this Report. The introduction of a statement of sentencing principles in the *Criminal Code,*[14] along with amendments relating to sentencing principles for corporate or "organization" offenders,[15] are considered to assess whether similar provisions are needed in the POA. The search warrant provisions in the *Criminal Code* also inspired a consideration of the POA's equivalent provisions. Developments in other jurisdictions, such as British Columbia's *Public Health Act,*[16] have also been enlightening.

3. Increase in Penalties for Some Provincial Offences

The severity of sanctions available for certain provincial offences is another key development. The maximum fine for some offences prosecuted under Part III is far more than the $2,000 maximum set out in the residual penalty clause of the originally enacted POA. When the Supreme Court of Canada decided *R. v. Sault Ste. Marie (City)*[17] in 1978, the highest fine available for most environmental offences was $5,000. By contrast many environmental laws now have maximum fines in the millions of dollars, imprisonment and other serious consequences such as forfeiture of property and business licences.[18] While the severity of penalty has mounted for many offences, there is little direction to the judiciary on when these powerful sentencing tools are to be used in a principled and consistent manner.

Periods of incarceration can be significant under Ontario regulatory laws with a possibility of imprisonment of five years less a day under certain statutes such as the *Securities Act*[19] and the *Environmental Protection Act*.[20] It has been argued that the POA is not suited for such serious offences and the unavailability of conditional sentences or other sentencing tools is cited in support of this argument.[21]

4. Increased Use of Administrative Monetary Penalties

A fourth important development has been the increased use and acceptance of administrative monetary penalties (AMPS) in Ontario statutes, which are thought by some to be more efficient and less expensive than a regulatory offence regime.

A fourth important development has been the increased use and acceptance of administrative monetary penalties (AMPS) in Ontario statutes, which are thought by some to be more efficient and less expensive than a regulatory offence regime.[22] There are a number of AMPS regimes in Ontario, including the system created under the *Municipal Act, 2001*[23] that allows a municipality to establish an AMPS system to enforce parking by-laws instead of pursuing a prosecution under Part II of the POA.[24] At present, only the City of Vaughan and the City of Osawa have chosen to implement an AMPS system for parking infractions,[25] although other municipalities have them to enforce other by-laws or are considering implementing a parking AMPS system like Vaughan. This issue is the focus of Section II.D of this Report.

5. Transfer of POA Prosecution and Administration to Municipalities (Municipal Partners)

Part X of the POA allows the Attorney General and a municipality to enter into an agreement with respect to a specific area that authorizes the municipality to perform courts administration and court support functions. When such an agreement is in force, municipalities have the power to conduct most prosecutions, collect fines in POA proceedings and enforce their payment.[26]

Municipalities in some Court Service Areas (CSAs) identified one municipality to deliver POA court services on behalf of all municipalities in the CSA, although in some larger CSAs, there is only one municipality (e.g., Ottawa and Toronto). A Municipal Partner is a municipality that has entered into an agreement with the Attorney General as per Part X of the POA on behalf of more than one municipality. Where there are multiple municipalities in a CSA, the Municipal Partner is required to enter into an inter-municipal revenue and cost-sharing agreement with all other "serviced municipalities" in the CSA. For the purposes of this Report, we refer only to "municipalities" recognizing that some will be included within a Municipal Partner transfer agreement. Since 1999 the Attorney General has entered into 52 POA Transfer Agreements with municipalities and the transfer of these responsibilities to the municipalities is now complete.

This is an important consideration when modernizing the POA. Different regions of the province may face unique operational pressures and new procedures may have a different impact on each municipality.

6. The Licensing of Paralegals to Provide Legal Services

The increased use of paralegals in POA matters is a new development that did not exist when the POA was enacted 30 years ago. It goes some way to affording greater access to justice for those unable to afford a lawyer.

Paralegals are now regulated by the Law Society of Upper Canada[27] and may represent people on POA matters in the Ontario Court of Justice[28] and before administrative tribunals. As of March 30, 2009 over 2,300 paralegals had been licensed and insured in Ontario. Paralegals are required to follow the Paralegal Rules of Conduct and complaints about paralegals can be made to the Law Society of Upper Canada, which may result in discipline where appropriate.[29] The increased use of paralegals in POA matters is a new development that did not exist when the POA was enacted 30 years ago. It goes some way to affording greater access to justice for those unable to afford a lawyer. It also raises questions about the appropriateness of extending traditional solicitor-client privilege to paralegal-client relationships.

7. Changes in Technology

There have been enormous technological advances since 1980 and many could improve the investigation and enforcement of POA matters, court administration and how POA proceedings are conducted. The use of technology has been incorporated into certain POA sections. For example, on June 15, 2010, subsections 83.1(1), (2) and (3) of the POA came into effect, allowing a witness, defendant, prosecutor and interpreter to participate in a POA proceeding by electronic method. An electronic method means video conference, audio conference, telephone conference or other method determined by the regulations. While section 83.1 does contain some caveats and limitations on this authority, it is a significant development that can improve access and service.

However, there are gaps in the use of technology in the POA. For example, the POA search warrant provisions, in contrast to the *Criminal Code* provisions, do not deal with the seizure of intangibles such as electronic data on a computer. Amending the POA to address advances in technology is one solution, but one might question the efficacy of legislating procedural matters involving technology when Rules of Practice, a regulation or practice guideline may offer a more adaptable and flexible alternative, particularly given the rapidly changing nature of technology.

[A]s is the case with all legislation and regulation, many years of experience have led those working with the POA to develop views about which parts of the POA work well and which could be improved to better implement its purposes.

8. Lengthy Waiting Periods to Resolve POA Matters

In its 1973 *Report on the Administration of the Courts*, the Ontario Law Reform Commission wrote as follows:

> The primary goal of the court system is to serve the public; this involves adjudicative decisions which are not only fair, but made without delay and at reasonable cost and convenience.[30]

While the disposition time of POA matters in courts changes over time and varies between municipalities, it is clear that there is presently a significant waiting period to resolve a POA matter. In Ontario as a whole in 2007, the average number of days from the date of the first hearing request to disposition of a Part I matter in the Ontario Court of Justice was 198.7 days and for a Part III matter it was 291.9. In 2008, it was 207.1 days for Part I matters and 276.8 days for Part III matters.[31] Figures for Part II parking tickets are not available, but the City of Toronto has indicated that it can take up to 14 months to get a trial date for a parking matter. (There is a range of anywhere from 8 to 14 months, depending on a number of variables.)[32]

9. Lessons from Experience

Finally, as is the case with all legislation and regulation, many years of experience have led those working with the POA to develop views about which parts of the POA work well and which could be improved to better implement its purposes. The LCO's discussion on bail in POA proceedings, for example, was driven more by the problems that stakeholders had experienced rather than by a simple statutory comparison with the *Criminal Code* bail provisions.

II. STRUCTURAL REFORMS TO THE POA

A. Provincial Offences and the POA

1. History of the POA

The POA was first enacted in 1979.[33] It governs much of the process for the prosecution and enforcement of provincial and federal regulatory offences and municipal by-laws.[34] In 1974, the Law Reform Commission of Canada estimated that there were 20,000 regulatory offences in each province plus an additional 20,000 federal offences, and these numbers did not include municipal by-law offences.[35] And we know that approximately 2 million charges were laid in Ontario over each of the past three years under offence-creating statutes to which the POA applies.[36] Those charges are laid in diverse areas such as traffic, regulation of controlled substances, environment, and occupational health and safety.

[W]e know that approximately 2 million charges were laid in Ontario over each of the past three years under offence-creating statutes to which the POA applies. Those charges are laid in diverse areas such as traffic, regulation of controlled substances, environment, and occupational health and safety.

Prior to the POA's coming into force, the procedure for enforcing and prosecuting regulatory offences in Ontario was set out in the *Summary Convictions Act*.[37] It was a short Act containing 23 sections that largely adopted the *Criminal Code's* provisions for the prosecution of summary conviction offences. While these procedures were "marginally less strict than the *Criminal Code's* indictable offence procedures, they were still entirely out of keeping with the minor, regulatory nature of most provincial offences."[38] According to a 1973 report of the Ontario Law Reform Commission, the disproportionate process that governed certain provincial offences was having a harmful impact on the administration of justice:

> The matters which we have been discussing are, in our view, evidence of a much larger problem. The whole system of administration of provincial offences is collapsing, not only in court but also with respect to the service of summonses, execution of warrants and the vast amount of related paperwork. Police resources are being used to enforce parking tags while subpoenas in serious criminal cases are being sent by ordinary mail. Some police officers do not bother to attend as witnesses. Defendants are acquitted apart from the merits. The latter result may be unobjectionable if some other desirable purpose is served, but if acquittal is simply the consequence of administrative incapacity it only encourages disrespect for the system.[39]

In 1978, The Honourable R. Roy McMurtry, Attorney General for Ontario at the time, discussed the problem that the POA was intended to correct:

> The proposed Provincial Offences Act attacks directly the root of the present procedural problem, which springs from the fact that provincial offences are now being prosecuted under a code of procedure adopted by reference to the Criminal Code of Canada. Although the adopted procedure is the less rigid and formal of the two systems established in the Criminal Code, it is still steeped in centuries of assumptions about crimes and the persons who commit them. Neither these assumptions nor the rigid technicalities they have engendered are appropriate for the 90% of the provincial offences which are intended to regulate activities which are not only legal but also useful to society.[40]

There was a clear intention to create an entirely new "custom-built procedural framework"[41] that replaced and was distinct from the summary conviction procedure

contained in the *Criminal Code*. The POA's purpose, as stated in subsection 2(1) of the Act, made this new approach abundantly clear:

> The purpose of this Act is to replace the summary conviction procedure for the prosecution of provincial offences, including the provisions adopted by reference to the *Criminal Code* (Canada), with a procedure that reflects the distinction between provincial offences and criminal offences.[42]

Under the POA, distinct streams were created – one for minor offences (Part I) and one for more serious offences (Part III) with a third stream for parking infractions (Part II). Flexibility was built within the Act to permit the circumstances in each case to dictate whether the stream for minor offences or the one for more serious offences was most appropriate.[43] The new POA was "designed to provide a fair and efficient method for the trial of the large number of cases which are handled by the provincial offences court."[44] It "was intended to establish a speedy, efficient and convenient method of dealing with…for the most part, minor offences".[45]

Today, respect for the administration of justice, speed, efficiency and a convenient or simple process remain laudable goals for a procedure that governs the adjudication of minor offences. These are particularly important objectives where the vast majority of defendants are self-represented.

Today, respect for the administration of justice, speed, efficiency and a convenient or simple process remain laudable goals for a procedure that governs the adjudication of minor offences. These are particularly important objectives where the vast majority of defendants are self-represented.[46] We must also consider more serious provincial offences that come with significant penalties and view them through the lens of a POA regime created in 1979 to assess whether that framework remains appropriate today. Respect for the administration of justice, proportionate process and appropriate procedural protection, given the seriousness and complexity of the issues at stake, are further important objectives of any regime. In the next section, we offer an overview of today's POA regime to give some perspective on whether it continues to meet these objectives, or whether they have been lost over the last 30 years given the evolving nature of provincial offences.

These factors reveal that the POA regime may have become too complex and technical for the resolution of minor offences, and that it is potentially too generic for the increasingly serious number of provincial offences.

2. Structure and Overview of the POA

The POA is a procedural code that governs the prosecution of regulatory offences created by provincial law and municipal by-laws. The term "offence" is defined as "an offence under an Act of the Legislature or under a regulation or by-law made under the authority of an Act of the Legislature".[47] In addition, the POA applies to the prosecution of contraventions defined under the federal *Contraventions Act*.[48] "Court" under the POA is the Ontario Court of Justice, which may be presided over by a "judge", defined as a judge of the Ontario Court of Justice, or a "justice" which is defined as a judge or a justice of the peace of the Ontario Court of Justice.[49] Below is a snapshot overview of some of its key parts.

The Act contains three distinct parts that govern the commencement of proceedings.[50]

Part I – Proceeding Commenced by Certificate of Offence

Part I prescribes proceedings commenced by way of a certificate of offence. It is often referred to as a "ticketing" process,[51] and it is used for less serious offences, such as a failure to carry a driver's licence while driving[52] or the consumption of alcohol in a public place.[53] While we describe Part I offences as "less serious", a more accurate description is that the provincial offences officer has elected to proceed by way of a less formal ticketing process, rather than compel the person's attendance in court through the Part III mechanism. The maximum fine is $1,000 and imprisonment is not a permitted penalty.[54] Where an enforcement officer serves a person with an offence notice (e.g., a speeding ticket is an offence notice), the officer will file a certificate of offence with the court to commence a proceeding.[55] The offence notice may indicate a set fine for the offence. Set fines are fixed by the Chief Justice of the Ontario Court of Justice.[56]

A defendant who receives an offence notice may do one of the following:

- If the defendant does not wish to dispute the charge, pay the set fine including any applicable charge or surcharge fixed by regulation. Payment of the fine constitutes a plea of guilty, a conviction of the defendant and imposition of a fine in the amount of a set fine.[57]
- If the defendant does not wish to dispute the charge but wants to make "representations" as to penalty, including a reduced fine, or seek an extension of time to pay, the defendant may appear before a justice at a time and date specified in the offence notice.[58]
- If the defendant wishes to enter a plea and have a trial of the matter, the defendant must give notice of intention to appear in court.[59]

If the defendant takes none of the above steps within 15 days of service of the offence notice, the defendant will be deemed not to dispute the charge, and if the certificate of offence is complete and regular on its face, the justice will enter a conviction in the defendant's absence.[60] Where a defendant wishes to enter a plea and have a trial, the clerk of the court will send notice of the date and time of trial,[61] and the process governing trials and sentencing found in Part IV of the Act applies.[62]

We recommend that the Ministry of the Attorney General consider moving the prosecution of minor Part I offences out of the POA, and suggest that some might be more effectively enforced through a system of administrative monetary penalties.

Part II – Proceeding Commenced by Parking Infraction Notice

Part II sets out the procedure for commencing a parking infraction proceeding. It is very similar to the Part I process, except that Part II applies exclusively to parking offences which are primarily created by municipal by-laws. An enforcement officer will serve a parking infraction notice either personally or by affixing it to a conspicuous place on the vehicle.[63] Set fines for the parking infraction will be indicated on the parking infraction notice and the defendant must, within 15 days,[64] choose to pay the fine[65] or request a trial.[66] The amount of a set fine for a by-law parking infraction may be established by the Chief Justice of the Ontario Court of Justice.[67]

Where a defendant requests a trial, a proceeding may be commenced by filing the certificate of parking infraction with the court along with proof of ownership of the vehicle by the defendant.[68] A defendant who does not pay the set fine or request a trial may be convicted in default,[69] although provision is made to "re-open" a conviction in circumstances where a defendant establishes that he did not receive the parking infraction notice. Where a municipality has entered into an agreement with the Attorney General, the municipality will collect and retain fines under Part II.[70]

We recommend that the ability to prosecute parking offences in court be removed from the POA. Instead each municipality (or Municipal Partner) would establish a system of administrative monetary penalties to enforce parking by-laws.

Part III – Proceeding Commenced by Information

The procedure in Part III is for offences that must be brought before a justice for resolution; they cannot be resolved through the payment of a set fine. The decision whether to prosecute under Part I or Part III often rests with the police officer or provincial offences officer. That decision will depend upon the nature of the offence and the public interest that may demand higher penalties. For example, offences under the *Environmental Protection Act* that carry potential fines of up to $50,000 on a first conviction and $100,000 on subsequent convictions would be brought under Part III.[71]

The decision to charge under Part III may also depend on the circumstances or consequences of the commission of the offence.[72] For example, an employer may be charged under the *Occupational Health and Safety Act*[73] for failure to provide its employees with appropriate protective devices and served with a Part I offence notice. However, if the failure to provide such protective devices resulted in serious injury or death to an employee, the employer may be charged under the Part III procedure.

For Part III proceedings, a provincial offences officer (which is defined as including a police officer)[74] may serve a summons on a defendant and then subsequently attend before a justice to swear an information; or the information may be sworn before the justice with service of the summons occurring afterwards.[75] In addition to a provincial offences officer, any person may lay an information that alleges the offence under oath before a justice.[76] The justice may issue a summons directed at the defendant setting out briefly the offences in respect of which the defendant has been charged and requiring the defendant to appear in court on a specified date and time.[77] Instead of a summons to compel the defendant's appearance in court, the justice may issue an arrest warrant for the defendant where authorized by statute and where the justice is satisfied on reasonable and probable grounds that it is necessary in the public interest to do so.[78] Service of a "ticket" or offence notice does not commence a Part III proceeding; all Part III proceedings are commenced by swearing of the information before a justice. In these respects, the procedure for commencing a Part III proceeding is more akin to commencing a criminal proceeding.

With respect to sentencing, the $1,000 fine maximum applicable to Part I offences does not apply under Part III, and imprisonment is a sentencing option.[79]

Part IV – Trial and Sentencing

Part IV of the Act covers the conduct of a trial and sentencing in POA proceedings.[80] The sections relating to the conduct of a trial are set out in sections 29 to 55, and those relating to sentencing are found in sections 56 to 75. The trial provisions apply to all trials, regardless of whether the proceeding was commenced under Parts I, II or III. They address such matters as venue, authority of the Attorney General to stay a proceeding, issuance of summons to witnesses or the arrest of a witness who fails to appear, taking of pleas, pre-trial conferences, evidence and when it may be presented by way of a certificate, adjournments, and the authority to convict where a defendant does not appear.

The remainder of Part IV details the powers of the court when sentencing. Certain sentencing powers are limited to Part III proceedings, such as directing the preparation of a pre-sentence report[81] and issuing a probation order.[82] Where the statute that creates the offence authorizes imprisonment as a penalty, the court may consider the time the person convicted already spent in custody,[83] and the imposition of a fine in lieu of imprisonment.[84] There is no general authority within the POA to order imprisonment as a sentence; such authority must exist in the offence-creating statute. Upon conviction, a defendant is liable to pay court costs as prescribed by regulation[85] and a surcharge when a fine is imposed in respect of a Part I or Part III offence.[86] Fines are due and payable within 15 days after they are imposed.[87]

When a fine is in default, it may be enforced as a civil judgment by filing a certificate in either the Small Claims Court or Superior Court of Justice, which shall be deemed to be an order of that court for the purposes of enforcement.[88] Other fine enforcement tools include a suspension of or refusal to renew a permit, licence, registration or privilege where an Act authorizes the suspension or refusal to renew.[89]

The POA states that a justice may issue an arrest warrant when a fine is in default, but only where other methods of collecting the fine have been tried and have failed, or where they would not appear to be likely to result in payment within a reasonable period of time.[90] A justice may also order a term of imprisonment (i.e. warrant of committal) for unpaid fines where incarceration would not be contrary to the public interest.[91] In the case of a person unable to pay a fine, a justice may grant an extension of time, establish a schedule of payments, or in exceptional circumstances, reduce the fine.[92] We note, however, that these more severe fine enforcement provisions (e.g., to issue a warrant or order imprisonment for non payment of a fine) are not truly in force since subsection 165(3) of the POA states that they do not apply where municipalities have entered into POA transfer agreements with the Province.[93] Transfer agreements have been established throughout Ontario, and therefore these enforcement tools are not truly available. There may be a case to remove these enforcement tools from the POA altogether, although there may be offences prosecuted by the province involving offenders who flagrantly refuse to pay fines even though they are able to do so. These situations may offer a policy rationale to retain them.

Finally, a fine options program, authorized by the Act and established by regulation, permits the payment of fines by means of credit for work performed,[94] although no such program is currently in effect.

Below we recommend that different trial procedures be adopted proportionate to the nature and complexity of the offence (i.e., different trial processes for Part I and Part III offences). We also recommend the adoption of sentencing principles and an expanded toolkit of sentencing tools to better promote compliance with regulatory objectives.

Part V – General Provisions

Part V of the POA is entitled "General Provisions" and it applies to all types of proceedings under the Act. It includes provisions respecting limitation periods for the commencement of proceedings,[95] a definition of parties to an offence and those who counsel another person to be party to an offence,[96] common law defences[97] and the authority for a witness, defendant, prosecutor and interpreter to participate in a proceeding electronically by way of video, audio or telephone conference.[98] One of the few offences created by the POA is found in Part V, namely, the offence of contempt of court.[99]

Part VI – Young Persons

Part VI applies to young persons, defined as being between the ages of 12 and 16,[100] who are alleged to have committed provincial offences. It includes special provisions with respect to initiating Part I proceedings (i.e., by way of summons rather than offence notice),[101] additional sentencing options and processes for young persons,[102] and a prohibition against publishing the identity of a young person who has committed or is alleged to have committed an offence.[103] We recommend that this Part of the POA be the subject of a separate review.

Parts VII – Appeals and Review

Part VII contains provisions dealing with appeals and review. Certain provisions in this Part apply to all appeals. However, the remaining provisions are separated between appeals from orders under Parts III, and appeals from orders under Parts I and II. In addition, there are separate rules of procedure that apply to appeals of Part III matters[104] and appeals of Parts I and II matters.

We propose modest amendments to these sections to remedy an apparent anomaly about the power to award costs by an appellate court.

Part VIII – Arrest, Bail and Search Warrants

The arrest provisions in Part VIII describe the authority to arrest a person with or without a warrant and the use of force.[105]

The sections on bail speak to when police officers are to release a person after arrest, and if not released, the authority of the "officer in charge" to release the person. If the defendant is not released by the officer in charge, the person is to be brought before a justice as soon as is practicable but in any event within 24 hours.[106] A justice may order the conditional release of the defendant or that the defendant remain in custody.[107] Other provisions speak to the liability of those released on a recognizance to appear, the liability of a surety, and the consequences of a default of recognizance.[108]

We make recommendations as to the circumstances under which bail may be denied and suggest a review of the conditions upon which bail may be granted. We also propose a review of bail procedures more generally.

The search warrant sections cover the authority of a justice to issue a search warrant and the circumstances under which a search warrant may be issued by telewarrant without an appearance before a justice.[109] Further sections define the duty of a person who carries out a search warrant, orders a justice may make regarding things seized, and the procedure to follow when a document seized is subject to a claim of solicitor-client privilege.[110]

We recommend that the search warrant provisions be redrafted to account for searches of information from electronic sources, and we also propose that the power to issue a production order be considered as an alternative to issuing a search warrant. We further propose a review of paralegal-client privilege in relation to protection of documents that may be seized.

Part IX – Orders under Statutes

Part IX of the POA has only one section. Section 161 states that the POA applies where another Act permits the making of an order but does not provide a procedure.

Part X – Agreements with Municipalities

Finally, Part X of the Act allows the Attorney General and a municipality to enter into an agreement with respect to a specific area that authorizes the municipality to perform courts administration and court support functions. When such an agreement is in force, municipalities have the power to collect all fines under Parts I, II and III and to enforce their payment.[111] Throughout this Report, we recommend that municipalities (or Municipal Partners) be actively involved in POA reform, given the significant role they play in POA prosecutions, courts administration and fine enforcement.

In summary, the POA provides a single procedural code for the prosecution of all provincial offences. There are key differences with respect to how Parts I, II, and III proceedings are commenced (i.e., offence notice or parking infraction notice is used to commence Parts I and II proceedings, respectively, and the swearing of an information before a justice commences a Part III proceeding). Another key difference is with respect to sentencing. There is a maximum fine of $1,000 for Part I offences and imprisonment is not a permitted penalty, but these restrictions do not apply to Part III proceedings. Generally, and unless the statute states otherwise, the procedure on trial, arrest, bail and other processes apply equally to all Parts I, II and III proceedings.

Rules and Regulations Applicable to POA Proceedings

In addition to the Act, there are several rules and regulations that apply to POA proceedings created under the POA or the *Courts of Justice Act*. Seven regulations created under the POA affect POA proceedings:

RRO 1990, Reg 945	**Costs** - Prescribes the court costs that the defendant is liable to pay upon conviction.
O.Reg. 497/94	**Electronic Documents** - Prescribes the standards for the completion, signing and filing of electronic documents.
O.Reg. 679/92	**Fee for Late Payment of Fines** - Prescribes the fee for late payment of fines.
RRO 1990, Reg. 948	**Fine Option Program** - Prescribes the framework of the Fine Option Program and how it is to be administered (although no such programs are currently in effect).
RRO 1990, Reg. 949	**Parking Infractions** - Prescribes the forms, allowances to municipalities, and certain enforcement process for Part II (parking infraction) proceedings.
RRO 1990, Reg. 950	**Proceedings Commenced by Certificate of Offence** – Prescribes the forms and notices for Part I (Certificate of Offence) proceedings.
O. Reg. 161/00	**Victim Fine Surcharges** – Prescribes the victim fine surcharges applicable when a fine is imposed in a Part I or Part III proceeding.

In addition, the *Courts of Justice Act* confers on the Criminal Rules Committee, subject to the approval of the Attorney General, the authority to make rules relating to the practice and procedure of POA matters, including forms.[112] There are four different sets of rules established by regulation under the *Courts of Justice Act* that apply to POA proceedings and appeals, briefly described as follows:

RRO 1990, Reg. 200	**Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings** – Prescribes various procedural matters such as the calculation of time, filings, delivery of notices, certificates and other documents, and the prescribed forms to be used.
O. Reg. 721/94	**Rules of the Court of Appeal in Appeals under the Provincial Offences Act** – These rules govern appeals to the Court of Appeal, including inmate appeals.
O. Reg. 722/94	**Rules of the Ontario Court (Provincial Division) in Appeals under Section 135 of the Provincial Offences Act** – These rules govern appeals by a defendant, prosecutor or the Attorney General from an acquittal, conviction or sentence in a Part I or II matter that is appealed to the Ontario Court of Justice.
O. Reg. 723/94	**Rules of the Ontario Court (General Division) and the Ontario Court (Provincial Division) in appeals under section 116 of the Provincial Offences Act** – These rules govern appeals of Part III matters to either the Superior Court of Justice or the Ontario Court of Justice.

3. Nature and Volume of Provincial Offences in Ontario

To give some context to the nature of POA proceedings, we provide a brief overview of the numerous and diverse regulatory offences that are governed by the POA and review statistics on the volume and most common types of provincial offence charges brought before the Ontario Court of Justice.

Overview of Types of Provincial Offences

Numerous provincial statutes regulate the conduct of individuals and industry. Where breaches of those regulations occur, the governing statute typically creates a corresponding offence to promote compliance with the regulatory standard. Below is a sampling of some of the diverse areas of regulatory law in Ontario.

The Highway Traffic Act regulates the conduct of drivers on Ontario roads. It may be one of the most well known regulatory statutes within the province creating numerous offences including speeding, careless driving, failure to wear a safety belt, failure to follow the instructions on a road sign, and failure to carry one's license while driving a motor vehicle.

Motor Vehicle Regulation

The *Highway Traffic Act* (HTA) regulates the conduct of drivers on Ontario roads. It may be one of the most well known regulatory statutes within the province creating numerous offences including speeding, careless driving, failure to wear a safety belt, failure to follow the instructions on a road sign, and failure to carry one's license while driving a motor vehicle.[113] In some instances, the penalty for offences under the HTA can be significant. For example, motorists can incur a maximum fine of $10,000 or 6 months imprisonment for stunt driving, and a maximum fine of $50,000 if a wheel detaches from a commercial vehicle.[114]

The *Compulsory Automobile Insurance Act* also creates an offence for failure to have insurance while operating a motor vehicle and it carries a significant minimum fine of $5,000 on a first conviction, and $10,000 on a subsequent conviction.[115]

Municipal by-laws also prescribe various parking, "no stopping" and certain other motor vehicle related offences that are enforced through the POA.

Occupational Health and Safety Regulation

The *Occupational Health and Safety Act* (OHSA) imposes duties on both workers and employers[116] with respect to equipment, material and protective devices to ensure that our places of work are safe. The duties imposed by the OHSA on workers include wearing the clothing and equipment specified by their employers, and reporting any defects with such clothing or equipment.[117] Workers are also required to report to their employer any contraventions of the OHSA of which they are aware.[118] The duties imposed on employers include developing and implementing a health and safety program, and formulating a policy regarding workplace violence and harassment.[119]

The OHSA creates offences for a failure to comply with provisions in the Act punishable with maximum penalties of $25,000 or 12 months imprisonment for persons, and a $500,000 maximum fine for corporations.[120]

Some charges can be significant. For example, numerous charges have been laid against an employer who is alleged to have failed to provide proper training and equipment to migrant workers who were killed while performing balcony repairs to a building in Toronto in December of 2009. The 61 charges are reported to carry up to $17 million in fines in total.[121]

Environmental Protection Regulation

A particularly current and important area of provincial regulation is environmental protection. The *Environmental Protection Act* (EPA),[122] *Clean Water Act, 2006* (CWA)[123] and *Pesticides Act* (PA)[124] are just some examples of provincial legislation that create obligations to protect the environment with offences established for breaches of those statutes.

The EPA regulates the actions of persons in charge of pollutants, creating offences in areas such as spillage. A person in charge of a pollutant must develop a plan to reduce the risk of spillage and to respond to its occurrence.[125] The EPA also prohibits littering, imposing a fine up to $1,000 on a first time offence and up to $2,000 on a second time offence.[126]

The CWA establishes a number of obligations, such as a requirement that a person with authority under the CWA who becomes aware of a water drinking hazard provide notice to the Ministry of the Environment.[127] Under the CWA, it is an offence to continue engaging in an activity that endangers a water supply.[128]

A particularly current and important area of provincial regulation is environmental protection. The Environmental Protection Act, Clean Water Act, 2006 and Pesticides Act are just some examples of provincial legislation that create obligations to protect the environment with offences established for breaches of those statutes.

The PA imposes obligations on individuals who have released pesticides into their environment outside of an ordinary course of events, such that injury to the environment, animals or persons is likely to occur.[129]

Regulation of Controlled Substances

Provincial legislation also regulates the use of controlled substances, such as liquor and tobacco. The *Liquor Licence Act* (LLA)[130] and the *Smoke-Free Ontario Act* (SFOA)[131] are two examples that affect numerous individuals and businesses in Ontario and they create offences for breaches of their provisions.

The LLA makes it a regulatory offence to be intoxicated in a public place or to carry an opened container of alcohol in a motor vehicle.[132] Individuals must be licensed in order to sell alcohol.[133] Persons who are convicted of a regulatory offence under the LLA can be subject to a maximum fine of $100,000, imprisonment for a year, or both. Corporations convicted under the LLA can be subject to a maximum fine of $250,000.[134]

The SFOA makes it a regulatory offence to sell tobacco to persons under the age of 19,[135] or to display tobacco products in a place where such products are sold.[136] Corporations engaged in the manufacture, sale or distribution of tobacco products can be charged a maximum of $100,000 for contravening provisions under the statute.[137]

Safety Regulation

Numerous statutes regulate matters of public safety. The *Food Safety and Quality Act, 2001* regulates, among other things, the production, processing and manufacturing of food for consumption and it establishes offences for contraventions of the Act.[138] Under this statute, orders can be made to prevent or eliminate any food safety risk.[139] Part VII of the *Fire Protection and Prevention Act*, *1997* creates several offences, such as violating a provision of a fire code.[140] And the *Family Law Act* permits a court to make a restraining order against a person's former spouse where that person has reason to fear for his or her safety.[141]

General Public Order Offences

Several statutes create offences dealing with general public order. The *Trespass to Property Act* creates an offence where a person enters premises to which entry is prohibited by the Act.[142]

Christopher's Law (Sex Offender Registry), 2000 imposes certain reporting requirements on a person convicted of a "sex offence" and where a person fails to comply with the Act, he or she is guilty of an offence punishable by a fine or imprisonment.[143]

The *Safe Streets Act, 1999* creates offences for soliciting in certain public locations and disposing of dangerous things in an outdoor public place.[144] A provision under this statute makes it an offence to solicit a person in a vehicle on a roadway.[145]

Consumer Protection

The *Consumer Protection Act, 2002* (CPA) applies to consumer transactions in Ontario.[146] The CPA prohibits representations to consumers that are false or misleading. It lists a number of prohibited representations, such as specifying that a certain repair is necessary when it is not, or that a price advantage exists when it does not.[147] The CPA also governs consumer transactions that take place over the internet.[148] It imposes an obligation on suppliers to provide consumers with a written copy of any agreement they have entered into. The CPA also enables consumers to cancel an agreement made over the internet under prescribed circumstances.[149]

The *Consumer Reporting Act, 1990* regulates the gathering of information of a company's consumer base.[150] It requires a consumer agency to correct information where a consumer has reported to the agency that there is an error in the information kept in his or her file.[151] A director or an officer of a corporation who is convicted of an offence under this statute may be liable to a maximum fine of $35,000, one year of imprisonment, or both. The maximum fine that can be imposed on a corporation is $100,000.[152]

The preceding snapshot of regulatory offences provides a glimpse of the range of offences that could be brought under the POA's procedure. They differ dramatically not only in subject-matter, but also in gravity and in the potential penalties upon conviction.

The preceding snapshot of regulatory offences provides a glimpse of the range of offences that could be brought under the POA's procedure. They differ dramatically not only in subject-matter, but also in gravity and in the potential penalties upon conviction. A provincial offences officer may choose to use the Part III process which would allow for a more severe penalty as authorized under the offence-creating statute, but excluding the manner in which the proceeding is commenced, the POA makes virtually no other distinction as to the manner in which this broad range of offences is determined by the court.

Volume and Most Common Provincial Offence Charges

Judges and justices of the peace of the Ontario Court of Justice have jurisdiction to hear all POA offences, although justices of the peace preside over almost all provincial offence matters that require adjudication.[153]

In 2009, of the 2.1 million Part I and Part III charges received by the court, 1.9 million (or 92%) were Part I offences and 170,000 (or 8%) were Part III offences. Of the Part I proceedings, 1.6 million (or 81%) were offences under the *Highway Traffic Act* or its regulations.[154] Data from 2007 and 2008 reveal a similar volume and proportion of POA offences each year.[155]

In 2007, 2008 and 2009, the three most common Part I offences disposed of by the court arose from charges under (1) the *Highway Traffic Act* (approximately 80% each year), (2) the *Compulsory Auto Insurance Act* (approximately 6% each year), and (3) municipal by-laws (approximately 4% each year). Interestingly, the three most common Part III offences disposed by the court in the same years arose from charges under the same authority: *Highway Traffic Act* (approximately 58% each year), the *Compulsory Auto Insurance Act* (approximately 14% each year), and municipal by-laws (approximately 5% each year).[156]

Provincial data on the number of Part II parking infractions issued are not available but we know that in 2009 in Toronto alone, 2.8 million parking tickets were issued and 300,535 (10.75%) defendants requested a trial.[157] Data from select Ontario municipalities reveal a high volume of parking infractions that were issued in 2009: the City of Ottawa issued 343,719 with 5,614 (2%) trial requests,[158] and the City of Brampton issued 89,285 with 4,004 (4%) trial requests.[159]

4. Distinguishing Between Regulatory Offences and True Crimes – The Need for a Provincial Offences Procedural Code

Despite attempts in case law and academic articles to draw a clear line between regulatory offences and true crimes, one has not emerged in practice. The distinction is relevant in at least three respects: (1) for criminal offences, the prosecution must prove the existence of *mens rea* (mental intent), which onus does not exist for regulatory offences unless the statute prescribes otherwise;[160] (2) the extent of *Charter* procedural protections may differ depending upon whether the offence is regulatory or a true crime;[161] and (3) the purposes of sentencing (and actual sentences) differ depending upon whether the offence is criminal or regulatory.[162]

We summarize the arguments that distinguish a regulatory offence from a true crime to offer perspective on the objectives of a POA procedural framework, and indeed, the continued need for a POA separate from the former *Criminal Code*'s summary conviction procedure. An understanding of regulatory offences informs the POA Reform Framework discussed in the next chapter, and our discussion on alternative monetary penalties, sentencing and other POA procedural matters.

In the 1970's, the Law Reform Commission of Canada (LRCC) examined regulatory law in a series of influential working papers and reports. It viewed regulatory offences as fundamentally different from criminal offences.[163] In a working paper released in 1974, it distinguished between the two as follows:

> What we conclude is that in our criminal law there is a broad distinction which can't be pressed too far but which rests on an underlying reality. On the one hand there exists a small group of really serious crimes like murder, robbery and rape – crimes of great antiquity and just the sort of crimes that we should expect to find in any criminal law.
>
> By contrast there exists a much larger group of lesser offences like illegal parking, misleading advertising, selling adulterated foods – offences of much more recent origin. These are offences that were never known to common law and never gained entry into the Criminal Code.[164]

The LRCC argued that criminal offences are prohibited acts that are revolting to the moral

sentiments of society whereas regulatory offences are merely prohibited. It set out three further differences:

> First, crimes contravene fundamental rules, while offences contravene useful, but not fundamental ones. Murder, for example, contravenes a basic rule essential to the very existence of and continuance of any human society – the rule restricting violence and killing. Illegal parking violates a different kind of rule, one which is by no means essential to society, useful though it may be.
>
> Secondly, crimes are wrongs of greater generality: they are wrongs that any person as a person could commit. Offences are more specialized: they are wrongs that we commit when playing certain special roles or when engaging in certain specialized activities. Murder and stealing, for example, are wrongs done by men simply as men. Illegal parking, unlawful sale of liquor and fishing out of season are wrongs done by men as motorists, as merchants or as fishermen. Such specialized offences we expect to find, not in criminal codes or books on criminal law, but in the specialized statutes and books on these particular topics.
>
> But thirdly, crimes are far more obvious wrongs. Murder and robbery seem plainly wrong: they involve direct, immediate and clearly apparent harm to identifiable victims, and they are done with manifestly wrong intention. Offences are less clearly wrong: the harm involved is less direct, is collective rather than individualized, and is as often done by carelessness as by design. What is more, it is as often as not potential rather than actualized.[165]

"[C]rimes contravene fundamental rules, while offences contravene useful, but not fundamental ones. Murder, for example, contravenes a basic rule essential to the very existence of and continuance of any human society – the rule restricting violence and killing. Illegal parking violates a different kind of rule, one which is by no means essential to society, useful though it may be."

Law Reform Commission of Canada

The LRCC examines this distinction again in its 1976 report entitled *Our Criminal Law*. Referring back to its earlier work it states:

> There is, however, another distinction to which we drew attention in Working Paper 2, *The Meaning of Guilt*. This is a distinction between "real" crimes and mere regulatory offences. The difference between the two is well recognized by ordinary citizens, accepted formerly by criminal jurisprudence and based on logic and common sense. It should be recognized by law. **We therefore recommend** that the Criminal Code be pruned so as to contain only those acts generally considered seriously wrongful and that all other offences be excluded from the Code.[166] [emphasis original]

While arguing that there is a difference between real crimes and mere regulatory offences, the LRCC recognized that this distinction was not always honoured. It set out the scope of what criminal law should be:

> Only those crimes thought seriously wrong by our society should count as crimes.
>
> Not all such acts, however, should be crimes. Wrongfulness is a necessary, not a sufficient condition of criminality. Before an act should count as a crime, three further considerations must be fulfilled. First, it must cause harm – to other people, to society or, in special cases, to those needing to be protected from themselves. Second, it must cause harm that is serious both in nature and degree. And third, it must cause harm that is best dealt with through the mechanism of the criminal law. These conditions would confine the criminal law to crimes of violence, dishonesty and other offences. Any other offences, not really wrong but penally prohibited because this is the most convenient way of dealing

> with them, must stay outside of the Criminal Code and qualify merely as quasi-crimes or violations.[167]

In 1978, in the formative decision of *R. v. Sault Ste Marie*, the Supreme Court of Canada set out its classic statement that distinguishes true crimes from regulatory offences and the burdens of proof that accompany each:

> I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:
>
> 1. Offences in which *mens rea,* consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey's* case.
>
> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.
>
> Offences which are criminal in the true sense fall in the first category. Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full *mens rea.* An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.[168]

"Public welfare offences would prima facie be in the…category [of strict liability offences]. They are not subject to the presumption of full mens rea. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act."

R. v. *Sault Ste Marie* (SCC)

While the court distinguished between offences that are criminal in the true sense and public welfare or regulatory offences, it did not really explain the distinction.[169] This was not done until 1991 in *R. v. Wholesale Travel Group Inc.*, where the Supreme Court relied upon the inherent wrongfulness or moral blameworthiness of the offence to seek to distinguish between regulatory offences and crimes:

> Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.

> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.
>
> It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.[170]

"The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests."

R. v. *Wholesale Travel Group Inc.* (SCC)

The court concedes that the application of this distinction is difficult, but maintains that there is a sound basis for it.[171] In fact, the distinction that the Supreme Court sought to create was controversial, as noted by Libman in his text:

> Hence as regulatory offences continue the trend from no longer resembling "minor offences" but "true crimes" (particularly as the sanctions for the former escalate higher than the latter with greater frequency), one wonders whether the lines between these categories of "public welfare offences" will become in time less and less apparent. Indeed, Dean Hogg describes the Supreme Court's decisions distinguishing between true crimes and regulatory offences as constituting a silly distinction.[172]

The illusory nature of this distinction is evident from the many offences in the *Criminal Code* that do not fit the LRCC's vision or the Supreme Court's description of a crime. In *Our Criminal Law*, the LRCC pointed to the offences of pretending to practise witchcraft and having a motor vehicle equipped with a smokescreen as examples of offences that most people would not count as sufficiently important to count as crimes.[173] Furthermore, some regulatory offences prescribe serious penalty provisions, such as hefty fines and periods of incarceration. It has been argued that significant stigma can attach to regulatory offences which have serious penalties.[174] Also, stigma associated with certain offences, such as securities offences, will shift with market volatility – at one extreme people will seek out villains for conduct that was previously thought trivial.[175]

Nonetheless, other reasons are put forward to maintain the distinction. It is not necessary to prove an intention to commit a regulatory offence for most provincial offences, and this has been said to be a key distinction between regulatory offences and crimes since greater stigma will likely attach to offences for which proof of intention to offend is established. In fact, this informed the court's reasoning in *R. v. Transport Robert (1973) Ltée*.[176] In this case, the Ontario Court of Appeal upheld subsection 84.1(1) of the *Highway Traffic Act*, which made it an offence for a wheel to become detached from a commercial vehicle while it is on a highway. It is an absolute liability offence and it is not a defence to assert due diligence. The offence is punishable by a fine of up to $50,000, but

imprisonment is not a possibility. The defendant argued that the absolute liability offence violated its guarantee of security of the person under section 7 of the *Charter*. The court rejected the defendant's argument and upheld the legislation. It stated that most regulatory offences focus on the harmful consequences of otherwise lawful activities. The court also stated that because proof of the mental state of the accused (*mens rea*) is not required for most provincial offences, the stigma associated with regulatory offences is generally less.

A further rationale for distinguishing criminal offences from regulatory offences is that they require different approaches to sentencing. With criminal activity, the activity is not desired and penalties exist to deter the activity from ever occurring in the first place. With regulated activity, the activity is often necessary or beneficial to society and it is only deviations from the regulated standards that are to be avoided. Penalties are imposed to deter deviations from the regulated standard, but once the sentence is imposed (e.g., a fine), the regulated entity typically resumes the regulated activity. Driving a car, processing food, or controlling water supplies are just some examples of necessary or beneficial regulated activities.

[S]ome regulatory offences prescribe serious penalty provisions, such as hefty fines and periods of incarceration. It has been argued that significant stigma can attach to regulatory offences which have serious penalties. Also, stigma associated with certain offences, such as securities offences, will shift with market volatility – at one extreme people will seek out villains for conduct that was previously thought trivial.

Sheri Verhulst proposes that sentencing principles that go beyond simple deterrence are required for regulatory offences, and that those principles ought to be different from those that apply to criminal offences.[177] She argues that sentencing of provincial offences must recognize that a regulatory sentence is part of a regulatory cycle. In the regulatory cycle, sentencing is not the end of the matter and the defendant will likely go back to the activity that led to its conviction:

> However, the sentence and any subsequent punishment are not the "end" of the cycle. Short of permanent incapacitation, the offender often continues to engage in the regulated activity after sentencing. Indeed, society may even desire this, as the regulated activity may be socially beneficial, creating employment or needed goods and services. What society does not desire [is] continued engagement in the same behavioural patterns that gave rise to the offence in the first place, so the offending behaviour must be corrected.[178]

It is clear that there has been a marked increase in the maximum fines available and the possible incarceration periods for Part III matters which have blurred the lines between certain provincial offences and criminal matters. The LCO is of the view, however, that this is not sufficient reason to abandon the separate procedural code for regulatory prosecutions and return to the summary conviction procedure of the *Criminal Code*. Indeed there are strong reasons to maintain a separate and efficient procedural code proportionate to the less serious nature of most provincial offences, which was the underlying intention behind the POA when it was first enacted.

The LCO acknowledges that the line drawn by the Supreme Court in *Wholesale Travel* can often be breached and it is difficult to implement, but there is enough truth in it that it is useful. Statistics reveal that the overwhelming majority of regulatory offences are minor in nature and less serious than most criminal offences. As noted previously, 1.9 million charges were laid under Part I in 2009 while fewer than 200,000 charges were laid under Part III, or 8% of the total number of charges laid under both Parts I and III.[179] While the

LCO could not obtain complete provincial data on parking infractions under Part II, these numbers would result in an even greater number of minor offences that fit the *Wholesale Travel* description.[180] It would appear to be completely incongruent with the objectives of proportionality and efficiency to revert back to a complex procedural code with its extensive procedural protections for primarily minor, regulatory offences. For the 8% of the more serious cases that require greater procedural protections, separate procedural rules can be enacted, although still through the POA.

Finally, it must be recognized that many regulatory offences, including those initiated under Part III, are committed while engaging in otherwise legitimate and useful conduct. Roughly 74% of the 2.1 million Part I and Part III charges (or 80% of the Part I charges) relate to offences under the *Highway Traffic Act* or its regulations.[181] Regulated activities, like driving, are not typically morally wrong; rather it is the way in which they are conducted and the resulting consequences that are sought to be avoided. For these reasons, we agree with the view of the LRCC in 1976 that "a quicker, more streamlined, more informal arbitration" procedure is needed for the vast number of regulatory offences that do not contravene basic values.[182]

[I]t must be recognized that many regulatory offences…are committed while engaging in otherwise legitimate and useful conduct… Regulated activities, like driving, are not typically morally wrong; rather it is the way in which they are conducted and the resulting consequences that are sought to be avoided.

Accordingly, the LCO concludes that a separate procedural code for regulatory offences is still justified and is a useful tool for regulators who need a responsive and flexible tool kit to best ensure compliance with regulatory standards.

The LCO recommends that:

1. **Given the distinctions between regulatory offences and criminal offences, a separate procedural code for the prosecution, enforcement and sentencing of provincial offences should remain in place, separate and apart from the Criminal Code procedure.**

B. POA Reform Framework

1. Principles Informing the POA Reform Framework

When it was first enacted in 1979, the POA had as its objective the creation of a procedural code for the prosecution of provincial offences distinct and separate from the procedure that applied to criminal offences.[183] Yet from our discussion on the history of the POA in Section II.A, it is clear that other, more fundamental principles were the basis for the new POA. Proportionality, efficiency and fairness informed the creation of the POA and we believe they should continue to guide future reform. Access to justice and contemporary regulatory law theory based on the concept of responsive and proportionate regulation are further considerations that should inform POA reform. Collectively, we refer to these principles and considerations as the POA Reform Framework.

Fairness

The principle of fairness was strongly entrenched within the POA based on the premise that "provincial offences are in substance quasi-criminal."[184] Drinkwalter and Ewart stated in 1980 that even for offences prosecuted in the minor stream (Part I), the right to a trial remained absolute and unqualified.[185] "[T]he principal challenge in the creation of the new code of procedure [was] to strip out the excess procedural baggage while preserving and enhancing the procedural rights of accused persons."[186]

It is critical that fairness in procedure remain a paramount consideration when reforming the POA. Proportionate and efficient processes for prosecuting provincial offences must always be measured against fairness considerations. However, it is our view that the extent of procedural fairness that ought to be afforded for many minor offences need not be as broad today as may have been envisaged when the POA was first enacted. The purpose of proceedings under the POA, it was perceived, "was clearly to impose punishment" and this perspective informed the view that provincial offences are quasi-criminal in nature.[187] In view of contemporary theories of regulatory law and the objectives of sentencing discussed in the following sections, the LCO questions whether the purpose of modern-day POA proceeding is to punish. Other objectives, such as persuasion and compliance with regulatory standards through non-penal means, or restorative justice may be more effective in achieving the regulatory goals of the offence-creating statutes. In this sense, fairness may dictate something less than the full procedural guarantees afforded in criminal trials. Put differently, applying criminal-trial processes to all regulatory offence hearings may well frustrate the very important public welfare objectives of these statutes and significantly hamper the effective administration of justice.

In view of contemporary theories of regulatory law and the objectives of sentencing discussed in the following sections, the LCO questions whether the purpose of modern-day POA proceeding is to punish. Other objectives, such as persuasion and compliance with regulatory standards through non-penal means, or restorative justice may be more effective in achieving the regulatory goals of the offence-creating statutes.

Courts have held that procedural protections under the *Charter of Rights and Freedoms* may be less stringent or may not apply to regulatory proceedings. Archibald, Jull and Roach state, "the Supreme Court of Canada has often accepted the principle that reductions in due process in terms of search requirements, the presumption of innocence and rights against self-incrimination, go hand-in-hand with the fulfillment of regulatory objectives."[188]

For example, in *R. v. Transport Robert (1973) Ltée*, the Ontario Court of Appeal held that the section 7 right to security of the person and not to be deprived thereof except in accordance with the principles of fundamental justice does not apply to the prosecution of the offence of a wheel coming detached from a commercial vehicle. The court distinguished the offence from a "true crime" and relied instead on the regulatory nature of the offence (i.e., to prevent the harmful consequences of a breach) when it concluded that the stigma of a conviction along with the potential imposition of a $50,000 fine was not sufficient to trigger section 7 protections.[189]

A similar conclusion was reached by the Alberta Court of Appeal in *Lavallee* v. *Alberta (Securities Commission)*, which held that sections 7 and 11 of the *Charter* did not apply to proceedings alleging breaches of the provincial *Securities Act*.[190] Proof of the alleged fraudulent and illegal activity carried sanctions of administrative penalties of up to $1 million for each contravention. The court looked at the penalty, the purpose of the penalty and the purpose of the *Securities Act* in concluding that the appellants were not charged with an "offence" within the meaning of section 11 of the *Charter* because the potential consequences for breach were not penal in nature. Instead, the court concluded that the

purpose of the fine was to regulate conduct within the securities industry to best achieve the purposes of the statute, including the protection of investors and the public. Accordingly, the section 11(d) right to be presumed innocent of an offence until proven guilty in a fair and public hearing did not apply.[191] With respect to the section 7 right to security of the person, the court found that the imposition of the penalty did not compare to the kind of stigma attached to an overlong and vexatious criminal trial, and therefore, the section 7 *Charter* right was not engaged.[192]

This, however, can be contrasted to offences which carry imprisonment as a penalty or those that are "penal in nature". In these cases, procedural protections guaranteed under the *Charter* are more likely to apply. For example, in *R. v. Pontes*, the Supreme Court of Canada stated, "generally speaking, an offence of absolute liability is not likely to offend s. 7 of the Charter unless a prison sanction is provided."[193] And in *R. v. Jarvis*, the Supreme Court held that where the predominant purpose of an investigation of a regulatory offence is to determine penal liability, all *Charter* protections that are relevant in the criminal context apply.[194]

Regardless of the penalty or the predominant purpose of an offence, a minimum level of procedural fairness must always be guaranteed. A right to know the offence combined with an opportunity to be heard by an unbiased decision-maker will be essential hallmarks of any reformed provincial offences procedural code.

Regardless of the penalty or the predominant purpose of an offence, a minimum level of procedural fairness must always be guaranteed. A right to know the offence combined with an opportunity to be heard by an unbiased decision-maker will be essential hallmarks of any reformed provincial offences procedural code.[195] The content of procedural fairness afforded in a given case may vary and its content is to be decided in the specific context of each case.[196] Most importantly, any procedure adopted for the prosecution or enforcement of provincial offences must be perceived to be fair in order to maintain the public's respect for the rule of law and the administration of justice. People may be more willing to obey the law if they believe that they are being treated fairly.[197]

Access to Justice

A second and important consideration that guides the POA Reform Framework is access to justice. Access to justice, in its broadest sense, has several components and barriers may include:[198]

- Procedural barriers that prevent reasonable and effective access to court proceedings. Examples may include complex court rules, or the lack of simple, plain-language information on court processes;
- Complexity of substantive law and statutes, the use of "legalese" and challenges to accessing legal resources;
- Economic barriers such as the cost of retaining a legal representative, or processes that require multiple and unnecessary court appearances which thereby increase costs;
- Physical barriers that prevent physical access to the justice system, such as inaccessible courthouses or court forms that cannot be accessed by people with disabilities;
- Cultural and language barriers that may disproportionately impact certain groups' access to the legal system. Perceptions of non-Canadian legal systems may also impact on some groups' perception of our justice system; and
- Other barriers that preclude certain groups from becoming involved in broader law, economic and social justice reform. These may include a lack of education or lack of awareness as to how to participate in the development and reform of the law.

Access to justice must be considered in any reform of the provincial offences justice system. Regulatory law impacts each of us daily. The provincial offences justice system is the "face of the justice system" for most in Ontario and it must therefore provide for simple, easily understood and accessible procedures for those offences with which typical Ontarians most often are charged. Without a simple and accessible provincial offences system there is a risk that it will be detached from, and lose the respect of, the community that it serves. Most worrisome is that it will not foster respect for the rule of law.

Proportionality

The principle of proportionality remains a primary consideration in the reform of the POA, as it was when the statute was first proclaimed. Drinkwalter and Ewart described in 1980 how the procedures under the former *Summary Convictions Act* that governed the prosecution of provincial offences "were still entirely out of keeping with the minor, regulatory nature of most provincial offences."[199] They stated that the Ontario legislature responded with the new POA that created a "custom-built procedural framework" and "[f]rom start to finish the Act represents an attempt to ensure that each individual section is consonant with the nature of the offences it governs… . One of the major procedural changes wrought by the Act lies in the creation of two distinct procedural streams, one for minor offences and the other for more serious ones."[200]

Millions of offences each year are handled through the procedure dictated by the POA. For this reason alone, efficiency must be a consideration within the POA Reform Framework

As stated by the Attorney General for Ontario at the time:

> Many persons living in Ontario find the procedure which now governs the prosecution of provincial offences bewildering, expensive, time consuming and altogether disproportionate in gravity to those offences. This situation is redressed by the proposed Provincial Offences Act, which creates a clear, self-contained procedural code to simplify procedures, eliminate technicalities, enhance procedural rights and protections, and remove the obstacle of delay from the assertion of rights and the conclusion of prosecutions.[201]

Undoubtedly, proportionality of process consonant with the gravity or seriousness of the provincial offence was an underlying objective of the POA in 1979. It ought to remain a guiding principle for any future POA reform. Common sense dictates a commensurate relationship between the seriousness or complexity of an offence and the procedure afforded to its resolution. This is not unique to provincial offences reform. Proportionality of process has also been a driver for reform in the civil and family justice systems.[202] Given the vast number of provincial offences, the gamut of possible sanctions ranging from nominal fines to incarceration, and the increased complexity of some cases that may involve experts and thousands of documents, the principle of proportionality remains a relevant principle in POA reform.

Efficiency and the Administration of Justice

Millions of offences each year are handled through the procedure dictated by the POA. For this reason alone, efficiency must be a consideration within the POA Reform Framework. Indeed, it was a key consideration when the POA was enacted. In *R. v. Jamieson*, former Associate Chief Justice McKinnon stated:

> The *Provincial Offences Act* is not intended as a trap for the unskilled or unwary but rather…an inexpensive and efficient way of dealing with, for the most part, minor offences.[203]

More than just the *volume* of cases, the *nature* of some POA cases demands that efficient processes be in place. An effective and efficient Provincial Offences Court was the subject of a 2003 decision of the Ontario Court of Appeal in *R. v. Felderhof*. The case involved the prosecution of offences under the *Securities Act*. The decision speaks to the increased complexity of some provincial offence charges, the importance of dealing with these cases efficiently and the need for procedural tools for their effective adjudication:

> . . . Until relatively recently a long trial lasted for one week, possibly two. Now, it is not unusual for trials to last for many months, if not years. Early in the trial or in the course of a trial, counsel may make decisions that unduly lengthen the trial or lead to a proceeding that is almost unmanageable.
>
> . . . One of the "evolving social and material realities" is that litigation, even in the Provincial Offences Court, has become more complex and trials longer. Part of this is a result of the greater complexity of society that produces cases such as this one, which are based on complex commercial transactions. The other reality is the impact of the *Charter of Rights and Freedoms*. It may be that this would have been a lengthy case before 1982. However, the *Charter* has introduced an additional level of complexity.
>
> . . . Similarly, requiring a provincial offences court to function as if this complex securities regulation case were nothing more than a traffic violation would seriously compromise its effective functioning. As a result of *R. v. 974649 Ontario Inc.*, the Provincial Offences Court has a broad remedial jurisdiction under the *Charter*. It seems to me that by necessary implication it must have the procedural tools to ensure its process is effective and efficient for the disposing of applications for any of those remedies...The Legislature has given to the provincial offences court jurisdiction to deal with these complex commercial cases, involving hundreds if not thousands of documents, and sometimes, although not always, involving complex *Charter* applications and remedies. In my view, the trial judge must have the power to control the procedure in his or her court to ensure that the trial is run effectively. [204]

Efficiency of process, we believe, must be a guiding consideration to deal with not only simple and uncomplicated POA cases, but also the more complex and lengthy ones. A POA procedural code will not further the administration of justice if it is not efficient.

Efficiency of process, we believe, must be a guiding consideration to deal with not only simple and uncomplicated POA cases, but also the more complex and lengthy ones. A POA procedural code will not further the administration of justice if it is not efficient.

2. Responsive Regulation

A final concept that ought to inform the POA Reform Framework is responsive and proportionate regulation. This concept has been described as taking the form of a "regulatory pyramid" which suggests an incremental response when regulators detect non-compliance with regulatory standards, rather than launching regulatory prosecutions with hefty fines as the first avenue of response.[205]

We recognize that the regulatory pyramid itself does not directly bear on the appropriate procedural code for provincial offence prosecutions; it is more germane to a critical review of how regulators ought best respond to breaches of regulatory standards once detected. As described below, prosecutions are only one potential response within the regulatory pyramid and the POA only deals with the procedure once a decision to prosecute has been made. Nevertheless, the regulatory pyramid can be an instructive and helpful tool for prosecutors when deciding whether to launch a prosecution, and most notably for our

purposes, the concepts it reflects can be instructive for justices when considering appropriate sentencing options.

The concept of responsive regulation arose from the unsatisfactory debate over business deregulation. On the one hand, prominent politicians in the 1980s and 1990s sought to replace what was perceived as excessive government control by the "Nanny State" with greater privatization and governance by "the magic of the market."[206] The opposing view is that government regulation with strict enforcement via penalties is necessary to protect individuals in a modern society. Private industry, without regulation and enforcement of those regulatory standards, cannot be trusted to protect the public since they are only interested in profit, and not public welfare objectives. Those in favour of strong regulation and enforcement (in both the public and private context) might point to the tragic incidents arising from unsafe drinking water in Walkerton, Ontario in 2000 and the subsequent Inquiry where the Honourable Mr. Justice O'Connor found that the failure of the provincial government to enact legally enforceable regulations contributed to the outbreak of unsafe drinking water and the sickness and death that ensued.[207]

Responsive regulation provides a balance between those who believe deterrence through "tough sanctions" is the best way to achieve compliance with the law, and those who believe that "gentle persuasion works in securing . . . compliance". Instead of asking whether to punish or persuade, it asks when to punish, or when to persuade?

Responsive regulation seeks to transcend the debate about regulation versus deregulation.

> The responsive approach (to regulation) proposed by Ayres and Braithwaite involves a process whereby regulators proceed with compliance based strategies and then resort to more punitive "deterrents" when the desired level of compliance is not achieved. In their opinion, this is a more preferable option to the positions supported either by those who believe that "gentle persuasion works in securing business compliance with the law" and those who only consider that corporations would only comply with the law where tough sanctions were applied.[208]

Responsive regulation provides a balance between those who believe deterrence through "tough sanctions" is the best way to achieve compliance with the law, and those who believe that "gentle persuasion works in securing...compliance". Instead of asking *whether* to punish or persuade, it asks *when* to punish, or *when* to persuade.[209] John Braithwaite concludes from his empirical research on what motivates regulated actors, that punishment as a first response can often inhibit compliance with regulatory standards; it insults the regulated actors and demotivates them.[210] It fosters individual rebellion and the potential for a business subculture of resistance to regulation.[211]

> When punishment rather than dialogue is in the foreground of regulatory encounters, it is basic to human psychology that people will find this humiliating, will resent and resist in ways that include abandoning self-regulation.[212]

Ayres and Braithwaite note that people and businesses often comply with regulations not because of a fear of sanctions, but because of other factors that motivate compliance, including a loss of reputation, a desire to do what is right, to be faithful to an identity as a law-abiding citizen and to sustain a self-concept of social responsibility.[213] They argue these motivators ought to be the source of proportionate and custom-tailored responses to regulatory breaches that promote cooperation and compliance, rather than a prosecution with the imposition of a standard fine as the first response. Moreover, prosecutions might ultimately have no impact on altering behaviour or motivating compliance, especially if the fine is passed on to the consumer and not borne by the regulated party.

Resort to punishment, however, should not be abandoned. It must always be in the background as a "big stick" that can be called out to promote compliance with lesser sanctions.[214]

The base of the regulatory pyramid, proposed by Ayres and Braithwaite, is persuasion. As one moves up the pyramid, the more demanding and punitive the tools used by regulators become. Persuasion escalates to a warning letter that in turn escalates to a civil penalty, a prosecution or criminal penalty, a licence suspension and then a licence revocation. The model is intended to be dynamic. It should not be used to specify in advance what level regulators should turn to respond to a violation. There should be a presumption in favour of starting at the base of the pyramid, although circumstances may demand starting elsewhere. Where the regulated person fails to respond to persuasion the regulator can move up the pyramid until there is "reform and repair".[215]

In Ontario, Archibald, Jull and Roach build on the work of Ayres and Braithwaite. They also place self-regulation and persuasion at the bottom of the pyramid, but in addition, they see an early role for restorative justice for some regulatory breaches.[216] They refer to the definition of restorative justice articulated by Supreme Court of Canada in the criminal context:

> In general terms, restorative justice may be described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the need of the victims and the community, as well as the offender. The focus is on the human beings closely affected by the crime.[217]

Any eventual coercion is more likely to be seen as fair and legitimate...if persuasion is attempted first. Persuasion can also divert cases out of the traditional prosecutorial response, reducing overall court and prosecutorial costs and the delay associated with prosecutions.

If persuasion and restorative justice are unsuccessful, Archibald, Jull and Roach propose warning letters. Where there is non-compliance after warning letters have been sent, the next level is the civil or administrative stream which would include civil actions whose purpose would be compensation and cost internalization. Administrative Monetary Penalties (AMPS) (which would be outside the POA) would appear to be included on this level. The next level is regulatory prosecution, which is where the POA would come into play. Deterrence has traditionally been the objective at this level. Defendants are prosecuted, but they may avoid guilt by establishing that they acted with due diligence by implementing safeguards that any reasonable defendant would have taken to avoid the occurrence of the prohibited act.[218] At the apex of their pyramid would be criminal sanctions and temporary or permanent licence suspension.[219]

Braithwaite argues that the pyramid works from the experience of business regulatory agencies all over the world.[220] Empirical evidence shows that sometimes persuasion works and sometimes it does not, but the same is true of punishment. Also, the presumption in favour of persuasion means that you start with the cheaper and more respectful option. Any eventual coercion is more likely to be seen as fair and legitimate by regulated persons or at least by others if persuasion is attempted first. Persuasion can also divert cases out of the traditional prosecutorial response, reducing overall court and prosecutorial costs and the delay associated with prosecutions.[221]

The LCO supports responsive regulation and the notion of a flexible and responsive toolkit for regulators to promote compliance with regulatory standards. The multi-disciplinary field research conducted by Braithwaite and others[222] is compelling and it ushers in creative solutions for promoting compliance with regulatory standards.

As mentioned earlier, the model of the regulatory pyramid itself is more relevant to a general analysis of how best to promote compliance with regulatory standards by regulators than it is to a procedural code for prosecuting offences. However, the model of responsive regulation does have some application to a review of the sentencing tools available to a justice at the regulatory prosecution stage of the pyramid. It questions the general deterrence-fine paradigm as the standard sentencing response for most regulatory prosecutions, and opens up the possibility of more efficacious sentencing tools that can better promote compliance with the regulatory objectives in the future. As discussed in Section II.E on sentencing, the greater use of probation, the ability to make restitution and compensatory orders and the ability to order an embedded auditor to monitor compliance are some sentencing options that are consistent with responsive and proportionate regulation.

[Responsive regulation] questions the general deterrence-fine paradigm as the standard sentencing response for most regulatory prosecutions, and opens up the possibility of more efficacious sentencing tools that can better promote compliance with the regulatory objectives in the future.

C. The Purpose of the POA and a Proposed New Structure

1. The Purpose of the POA Today

Section II.A began with a discussion of the purpose of the POA as found in section 2 of the Act. We noted that the underlying objectives of the POA were much more than simply "to replace the summary conviction procedure for the prosecution of provincial offences,...with a procedure that reflects the distinction between provincial offences and criminal offences." Several sources reveal that the true underlying objective of the POA was "to provide a fair and efficient method for the trial of the large number of cases which are handled by the provincial offences court,"[223] and "to establish a speedy, efficient and convenient method of dealing with...for the most part, minor offences."[224] The objectives of proportionality, efficiency and fairness were real then and they remain real today, and in our view, they ought to be properly reflected in an amended purpose section of the POA.

After 30 years of experience with a separate procedural code for POA matters, there is no doubt that regulatory offences are to be governed by a procedure that is separate from the *Criminal Code* summary conviction process. Therefore, it is no longer necessary to refer to the creation of a POA procedure distinct from the *Criminal Code* procedure as the *sole* purpose of the POA. There may still be valid reasons to distinguish "criminal offences" from "provincial offences" in the purpose section. As recommended in Section II.A, a separate procedural code ought to be maintained for provincial offences given the distinction between most regulatory offences and crimes, and this distinction ought to be retained in a newly expanded purpose section that reflects the legislation's true underlying objectives. Expressly stating within the purpose section that provincial offences are to be distinguished from criminal offences may be further justified, given the different extent to which *Charter* protections apply to provincial offences versus criminal ones,[225] and because some offences can be prosecuted as provincial offences or as criminal offences (e.g., cruelty to animals) .[226]

A purpose section provides insight into the legislator's true intent for the enactment. Not only does it guide the judiciary in the interpretation and application of the statute, but it also directs prosecutors and defendants to govern themselves in a manner consistent with this legislative objective. The drafting of subordinate POA rules, regulations and forms would similarly be guided by the overarching purpose of the statute. To date, it has been left to the judiciary[227] and rules committees to interpret the true underlying objective of the POA.

A POA purpose section that incorporates concepts of proportionality, efficiency, fairness, accessibility and responsiveness to the offence-creating statute's objectives will, in our view, create a dynamic and flexible procedural code. It will create opportunities for a living and evolving procedure (or procedures) that can best respond to the volume and diverse nature of POA offences today and in the future. It will establish the guiding principles upon which any POA procedure, rule or regulation is to be developed, interpreted and applied.

A POA purpose section that incorporates concepts of proportionality, efficiency, fairness, accessibility and responsiveness to the offence-creating statute's objectives will…create a dynamic and flexible procedural code.

The flipside of flexibility is certainty. Some may argue that the introduction of these concepts will make for an uncertain procedural code. The judiciary, prosecutors and defendants alike must know the process that governs a proceeding and we do not advocate abandoning a precise procedural code for POA offences. On the contrary, we recommend the establishment of clear procedures for different types of POA proceedings in the next section. We do believe, however, that the above-noted principles and factors be included in the POA's purpose section so that they may guide the statute's interpretation and application. The alternative is to provide no guidance and leave it entirely for judicial determination, but this can result in greater uncertainty and may not achieve the objectives that we believe ought to govern POA proceedings.

The approach we propose is neither unique nor novel. Each procedural code governing civil,[228] family,[229] small claims[230] and criminal cases[231] includes a governing purpose or interpretative provision that captures concepts of proportionality, fairness or efficiency in the administration of justice. Similar concepts should define the overarching principles that guide the development, interpretation and application of POA procedure. While we defer to the expertise of legislative drafters, we offer the following draft of a revised purpose section:

> *The purpose of this Act is to:*
>
> 1. *provide an accessible procedure for the fair and efficient resolution or trial of provincial offences in a manner that is proportionate to the complexity and seriousness of the provincial offence,*
> 2. *promote the objectives of the offence-creating statute, and*
> 3. *provide a procedure that reflects the distinction between provincial offences and criminal offences.*

The LCO recommends that:

2. The purpose section of the POA be amended to advance a procedure for the trial or resolution of provincial offence cases and to inform the development of any rules, forms or other subordinate authority or practice that is:
   a. fair;
   b. accessible;
   c. proportionate to the complexity and seriousness of the provincial offence;
   d. efficient;
   e. responsive to the offence-creating statute's objective; and
   f. reflective of the distinction between provincial offences and criminal offences.

2. Restructuring the POA and POA Rules

In Section II.A we summarized the POA structure, and the rules and regulations that govern provincial offence proceedings and appeals. We identified a number of concerns with the structure of the POA and its rules and regulations which we discuss next. In our view, it is time to significantly restructure and simplify the Act consistent with the objectives of the POA Reform Framework.

Simplify the POA

The POA regime, with its numerous rules, forms and regulations is very complex. Its complexity is particularly troubling since most offences prosecuted under the POA are minor and involve self-represented defendants. We list components of the POA regime to demonstrate how complex and cumbersome it can be:

- The Act contains 10 parts and has 176 sections. It describes how to commence a prosecution, how to respond to a proceeding, powers of arrest, search warrants, sentencing, bail and rules governing trials and appeals. Given the frequent cross-references to other sections within the statute or to regulations or forms, it can be very cumbersome for even the most educated reader. Moreover, it is not written in plain language.
- There are seven regulations under the POA that may apply to a given POA proceeding.
- There are four different sets of rules established by the Criminal Rules Committee under the *Courts of Justice Act* that govern POA proceedings and appeals. In some instances the POA Rules appear to duplicate or render superfluous what is already stated in the POA.[232]
- The forms required to follow the procedure set out in the POA are contained in a separate regulation or are found in one of the four sets of rules. These forms are not expressly identified within the POA, making it necessary to search through one of the four sets of rules or seven regulations to ascertain the correct form.

- There are several exceptions to the general processes prescribed in the POA. For example:
  - Several procedures that govern Part I and Part II proceedings apply only in certain parts of Ontario[233] and to determine whether they apply, reference must be had to a separate regulation.[234]
  - Various other sections of the Act do not apply in certain municipalities to which certain sections of the Act apply.[235]
- To become familiar with the POA statutory procedure, the procedural rules established under the *Courts of Justice Act* must also be referenced to ensure compliance.

We do not suggest that the procedural requirements set out in the POA are unnecessary or without a sound policy basis. A clearly defined process is essential for any procedural code. Much of the procedure, we suspect, appears to have been placed in the POA based on conventions for drafting quasi-criminal procedure when the POA was first enacted in 1979. We question, however, the necessity and efficacy of including such detail within a statute today.

To expect an unrepresented person to sort through the POA, its rules and forms to understand the process to which he or she is subjected promotes neither fairness nor accessibility. The amount of detailed procedure is simply disproportionate given the interests at stake.

We also question the wisdom of having to refer to several other sets of rules, regulations and forms to fully understand and adhere to the POA process. The complexity that results can render the procedure unintelligible, and therefore, inaccessible. This is compounded by the fact that the POA contains much "legalese" and it is not readily accessible unless one knows how to access statutory documents. In our view, the POA procedure must be simplified, particularly for Part I and II proceedings, which represent the vast majority of POA proceedings commenced and which are most likely to involve unrepresented defendants.

As noted previously, 90% of POA prosecutions are Part I offences, and 80% of those relate to *Highway Traffic Act* offences and it is believed that most of those defendants are unrepresented. To expect an unrepresented person to sort through the POA, its rules and forms to understand the process to which he or she is subjected promotes neither fairness nor accessibility. The amount of detailed procedure is simply disproportionate given the interests at stake. As a point of comparison, we note that another court forum where a majority of litigants are unrepresented, namely the Small Claims Court, has a complete procedural code that contains a total of 21 rules with all associated forms contained within these rules.[236] In addition, plain-language procedural guides prepared by the Ministry of the Attorney General are readily available to assist litigants through the Small Claims Court process.[237]

Simplify and Update the POA Rules

There are four different sets of POA rules with associated forms prescribed under each: (1) POA procedure before the Ontario Court of Justice;[238] (2) appeals to the Ontario Court of Justice from Part I and Part II proceedings;[239] (3) appeals of Part III proceedings to the Ontario Court of Justice or Superior Court of Justice;[240] and (4) POA appeals to the Court of Appeal.[241] The Criminal Rules Committee, with the approval of the Attorney General, makes POA rules under the authority of the *Courts of Justice Act*.[242]

As with the POA, we heard that the rules are also unduly complex. They are written in legal language and to navigate through them without formal training is a challenge. As one person said with respect to the complexity of the rules, "it's like you need to have your decoder ring from your box of Cheerios with you!" Since they were created, the general POA rules for the Ontario Court of Justice have only received minor amendment. The last time they received any amendment was ten years ago and those amendments were housekeeping in nature.[243] The remaining three sets of rules were established in 1994 and they have not received any amendments since that time. In fact, they still refer to the Ontario Court (Provincial Division), the former name of the Ontario Court of Justice, as do the prescribed forms. The rules are not consolidated or easily found and reference must be had to separate regulations to determine the correct forms, which is a concern given the number of unrepresented defendants.

[A] single set of trial provisions apply equally to all POA trials, without regard to the different types of POA trials or the gravity or seriousness of the offence(s). They apply to a trial involving a $30 parking ticket under Part II and equally to a major environmental offence under Part III with a potential $10 million fine and imprisonment.

We were also told that the Criminal Rules Committee, which has jurisdiction under the *Courts of Justice Act* to make POA Rules, might not be best suited for making POA rules. The Committee is comprised of 28 members including the Chief Justices and Associate Chief Justices of the Court of Appeal, Superior Court of Justice and Ontario Court of Justice, other judges from each level of court, lawyers, representatives of the Attorney General and courts administration. This composition may be appropriate for making criminal rules in the Ontario Court of Justice and Superior Court of Justice, but it does not appear to be ideal for making POA rules. The vast majority of its members have no direct involvement in POA matters with the exception of select Ontario Court of Justice judges. Justices of the peace hear most Part I and Part II proceedings but they are not represented on the Committee. Nor are there representatives from municipalities who perform prosecutions and court administration for the majority of POA offences, or paralegals who often represent defendants in POA proceedings. The Criminal Rules Committee has established and seeks advice and recommendations from a POA Rules Subcommittee, but this rule-making structure may not be the most effective because it is still reliant on the full Committee to approve any amendments proposed. The size of the Criminal Rules Committee and the fact that it does not meet regularly are further obstacles to continuously monitoring the POA rules and tabling necessary improvements.

Create Clear and Proportionate POA Trial Processes

There is one single set of trial provisions found in sections 28 to 55 of the POA that apply to all trials under Parts I, II and III. For the most part, they are a scattering of provisions addressing specific eventualities that may arise at a trial; they do not create a roadmap directing how a POA trial is to unfold. They would appear to be most relevant for more complex trials under Part III and may certainly be useful for that purpose. However, for an unrepresented defendant who seeks a basic understanding of how a simple POA trial is to unfold, these sections offer little guidance.

This single set of trial provisions apply equally to all POA trials, without regard to the different types of POA trials or the gravity or seriousness of the offence(s). They apply to a trial involving a $30 parking ticket under Part II and equally to a major environmental offence under Part III with a potential $10 million fine and imprisonment. The POA trial sections do not limit the amount of process that is available for the former type of trial, nor do they offer a specialized rule to assist in the management of the latter types of trials that may be more complex, involve expert witnesses and potentially weeks of trial time.

Benefits may be achieved if specific trial rules were created that were proportionate to the seriousness of the offence. If separate and simple trial rules applied exclusively to trials for less serious offences, and other more comprehensive rules were created for more serious trials, one might expect more efficient use of court and judicial resources and a greater understanding of court processes by those subjected to it. Proportionality, fairness and greater accessibility would be advanced.

Allow for POA Process to Be More Easily Amended

The POA procedure is contained in a statute, but it could be more easily and quickly amended if it were in a rule or regulation. With all statutory amendments, committees of the provincial Cabinet must first vet proposed amendments to the POA. If approved, Cabinet must consider the amendments next. Once Cabinet approval is obtained, time must be found on the Legislature's agenda to introduce and debate the amendments in a Bill. Careful review and debate of our statutes is fundamental to our democratic processes, and the decision to remove matters from this process should not be taken lightly; nevertheless, there may be certain purely procedural matters for which this process is not necessary. There would be value in delegating the development of a procedural code to an appropriate body with technical expertise.

Careful review and debate of our statutes is fundamental to our democratic processes, and the decision to remove matters from this process should not be taken lightly; nevertheless, there may be certain purely procedural matters for which this process is not necessary. There would be value in delegating the development of a procedural code to an appropriate body with technical expertise.

Amendments to subordinate authority such as rules or regulations, on the other hand, can typically be done much more quickly and easily. Depending upon the governing statute, approval of the Attorney General or the Lieutenant Governor in Council (i.e., Cabinet) is usually all that is required for such amendments. Specialized bodies with expertise (typically Rules Committees) will understand why procedural amendments are needed. This is the process by which civil, family and criminal procedural rule amendments made by the respective rule committees come into force. It is also the process by which POA rule amendments are made, but since most POA procedure is contained in the statute, amendments must be processed through the provincial Legislature.

As a result, having the bulk of POA procedure rest in a statute unduly prolongs inefficiencies and results in a POA regime that is unresponsive to needed improvements. It creates frustrations in those who prosecute, defend, adjudicate and administer POA offences and who seek procedural amendment. In our view, it could be corrected by transferring the bulk of that procedure to a new single set of POA rules or a regulation.

Of course, certain foundational, jurisdictional or offence-creating matters must always be within a statute as opposed to rules or regulations. Fairness and democratic accountability require that certain matters, such as the creation of offences and penalties, conferring decision-making power on justices, and the establishment of provincial courts, be within a statute so that they can be publicly debated and duly considered by elected officials. A regulation, on the other hand, is a directive of a legislative nature that typically deals with technical or procedural matters to give effect to a statute. A regulation is approved by the Executive Branch of government without public debate in the legislature, although the governing statute must authorize the creation of a regulation. In this sense, regulations are made under the authority of the legislature. As noted above, regulations or rules are typically approved by the Attorney General or the Lieutenant Governor in Council (i.e., Cabinet).

Standing Orders of the legislature dictate what matters must appear in a statute as opposed to a regulation. In addition, certain POA procedures may have a political component because they have a direct impact on the lives of most Ontarians, and therefore, ought to appear in a statute as opposed to a regulation to allow for public debate. The use of photo radar as a tool to commence a *Highway Traffic Act* proceeding is one example. Legislative Counsel is in the best position to analyze and advise what must remain within a statute, as opposed to subordinate authority. In addition, statutory amendments to the POA or the *Courts of Justice Act* may be required to expand the authority to enact subordinate rules or regulations. While we defer to the expertise of Legislative Counsel, we suggest that provisions establishing the court's jurisdiction to hear POA matters, the jurisdiction of judges and justices of the peace, the authority of court staff to perform certain functions, the authority to arrest and issue search warrants, the creation of offences and sentencing all remain in the POA. Other matters might also be required to remain within the statute.

While we defer to the expertise of Legislative Counsel, we suggest that provisions establishing the court's jurisdiction to hear POA matters, the jurisdiction of judges and justices of the peace, the authority of court staff to perform certain functions, the authority to arrest and issue search warrants, the creation of offences and sentencing all remain in the POA.

After this preliminary analysis is undertaken, the LCO believes that much of the detailed procedure currently found in the POA should be greatly simplified and transferred to rules or a regulation. Examples of POA matters that might be moved to rules or a regulation include:

- How a defendant may file a notice of intention to appear in response to a Part I or II offence notice, and how the clerk is to give notice of a trial (ss. 5, 17);
- How a summons is issued by the Court (s. 39);
- How parties may access pre-trial conferences (s. 45.1);
- How adjournments are granted (s. 49);
- The release of exhibits (s. 48);
- When documents may be filed electronically (s. 76.1);
- When parties or witnesses may appear at a hearing by telephone or video conference (s. 83.1);
- How and when extensions of time may be granted (s. 85); and
- How appeals are commenced (ss. 116, 135) and the procedure that governs appeals (see, e.g., ss. 118, 119, 136).

In light of the above, we recommend that the POA and its rules be restructured. The POA's detailed procedural code should be removed and what remains would be the necessary foundational, jurisdictional and offence-creating provisions required to permit the POA regime to operate. The POA should continue to prescribe how POA proceedings are to be initiated, and it should continue to establish separate streams so that processes proportionate with those streams can be detailed in the subordinate rules or regulation (i.e., the current Part I for less serious offences, and the current Part III for more serious offences. We note, however, that Part III may be "renamed" once the revised POA is drafted and after Part II parking infractions are removed from the POA, as recommended below in our discussion under AMPS). Other provisions that, by legislative convention or other authority, are required to remain in a statute and are necessary for an effective POA regime should also remain in the POA.

The detailed procedural code should then be consolidated in new POA rules or a new POA regulation. We discuss below options as to how the new POA rules or regulation might be enacted. The four sets of POA Rules would be revoked and replaced by a single set of rules or regulation, with all associated forms. As with the current POA, we envisage the rules or regulation continuing to set out different streams so that the process prescribed is proportionate to the seriousness of the offence. Simplicity for the less serious and most common proceedings should be a hallmark trait of a renewed procedural code. Statistics demonstrate that the overwhelming majority of these proceedings are traffic and parking violations, and to the greatest extent possible, the procedure should be simplified so that the most common types of proceedings are easily understood and accessible by individuals not familiar with the legal system.

To further promote access to justice for those who are self-represented, and contemporaneous with the release and implementation of a new streamlined and simplified POA rules or regulation, it would be helpful if the Ministry of the Attorney General offered a plain-language manual or guide to litigants that is readily accessible so that the POA process is clearly understood.

Within each stream, specialized processes may be developed for the fair, most efficient trial or other resolution of the proceeding. For example, for Part III offences, a system of case management might be prescribed to ensure that judicial and court resources are used effectively, and that these more complex proceedings are dealt with fairly and expeditiously. A distinct rule for appeals might also be created. There are possibilities for the creation of further specialized rules for certain types of offences, provided that they are established to further the objectives stated within the newly updated POA purpose section.

To further promote access to justice for those who are self-represented, and contemporaneous with the release and implementation of a new streamlined and simplified POA rules or regulation, it would be helpful if the Ministry of the Attorney General offered a plain-language manual or guide to litigants that is readily accessible so that the POA process is clearly understood. This is not a novel suggestion. The Ministry of the Attorney General already publishes on its website simple and easy to follow guides and brochures for Small Claims Court litigants,[244] litigants involved in civil proceedings before the Superior Court of Justice[245] and a procedural guide and other information for family litigants.[246] Similar information tools that are in plain language and easy to follow should also be created for POA litigants and be readily accessible. In developing the POA guide for defendants, consultation should be had with municipalities and legal and community organizations, including Community Legal Education Ontario and community-based groups affected.

In summary, we believe these structural changes to the POA will promote clarity of process and enhance access to POA courts. They will also further the objectives of having processes that are proportionate to the seriousness of the offence. They would also be more susceptible to amendment and responsive to new regulatory offences or circumstances that may arise.

The LCO recommends that:

3. The POA be significantly restructured to provide only the necessary foundational, jurisdictional and offence-creating provisions that are necessary to permit the POA regime to operate by removing the detailed procedural provisions to regulations.

4. The POA continue to prescribe different streams for the commencement of POA proceedings (i.e., Part I for less serious offences and Part III for more serious offences, although these parts may be renamed or renumbered in any new POA).

5. The four different sets of POA Rules and forms be consolidated into a single set of POA rules or regulation.

6. New POA rules or regulation prescribe a simplified and complete procedural code for the fair, accessible, most efficient trial, appeal or resolution of a POA proceeding based on the stream in which the proceeding is commenced. In particular, simplified trial rules be established for current Part I offences, and separate, more comprehensive trial rules established for current Part III offences. Further specialized and proportionate rules may be developed as necessary for the most common types of POA offences or for those offences that are unduly complex or would benefit from specialized rules that further the POA's objectives.

7. The Ministry of the Attorney General, in consultation with municipalities and legal and community organizations, develop simple, plain language procedural guides for POA defendants that are accessible on the Ministry of the Attorney General's website and at all POA court locations.

3. Enactment of New Procedural Code

There are several ways in which a new POA procedural code can be enacted. We offer the following options with a preliminary discussion of some relevant considerations:

Option 1: Traditional Rules Committee Model

This option would see new POA Rules created by a newly established POA Rules Committee, comprised of members of the bench, bar, prosecutors, paralegals and municipal courts administration.

Option 2: Judicial Rules Committee Model

Under this option, new POA Rules would be created by a newly established POA Rules Committee, comprised exclusively of judicial representatives and we would envisage almost all being members of the Ontario Court of Justice.

Option 3: Regulation Developed under Judicial Lead

This option sees a new POA procedural code developed within a new single regulation, as recommended by the Chief Justice of the Ontario Court of Justice, who shall consult as necessary and appropriate.

Option 4: Regulation Developed by MAG

This is a variation of the previous option, that would seek a new POA procedural code developed within a new regulation, but it would be developed and recommended by the Ministry of the Attorney General, which shall consult as necessary and appropriate.

Option 5: Procedural Guidelines or Best Practices Issued by Judiciary

The final option is to establish a new POA procedural code within a Guideline or Best Practices document, established by the Chief Justice of the Ontario Court of Justice, who shall consult as necessary and appropriate. These guidelines could be the exclusive source of POA procedure, or they could be in addition and supplement to, any newly created POA rules or regulation.

In assessing each option, the following considerations are relevant. First, rules of court enacted by bodies authorized by statute are regulations.[247] Therefore, in law, there is no practical difference between whether the new procedural code is found in "POA Rules" or a "regulation"; they would both be regulations and have the same force of law. The practical difference among the options, other than Option 5 which would not have the force of law, lies in who has the authority to create the "rules" or "regulation".

The Typical Rules Committee Model (Option 1) may prove to be ineffective if the size of the new POA Rules Committee is too large (e.g., the Criminal Rules Committee has 28 members). This has been a critique of at least one similar Rules Committee.[248] There may also be the potential for internal conflict, as the procedure proposed by the committee may not be supported by the Attorney General or Lieutenant General in Council.[249] Moreover, if members of the committee have no direct or regular involvement in POA

matters, they may not be best suited to recommend technical rule amendments. (If Option 1 is adopted, we recommend that all members have expertise in POA matters). On the other hand, a Rules Committee with broad representation ensures that the interests of most groups affected are considered. Any newly created POA Rules Committee could be smaller and still be representative of the key stakeholder groups (e.g., 10 members)[250] and it may rely upon informal subcommittees when specialized input is required but Rules Committee members do not possess that expertise.

A Judicial Rules Committee Model comprised primarily of the Ontario Court of Justice judiciary (Option 2) could be expected to operate more efficiently. It would have primary expertise of POA proceedings; however, input from other stakeholder groups would be necessary to ensure that the newly drafted rules are operational (e.g., municipal court administrators). Also, for matters appealed to the Superior Court of Justice or Court of Appeal, it would be helpful to have judges from those courts directly involved in processes that impact those courts.

A regulation developed under the leadership of the Chief Justice of the Ontario Court of Justice (Option 3) would have the same considerations as under Option 2. It would also respond to calls to give the judiciary express authority to make POA court rules, which is analogous to the rule-making authority the *Criminal Code* vests with the judiciary for criminal matters.[251] Option 3 also avoids the rigidity of process that might come with a formal Rules Committee structure. However, as we have discussed previously, provincial offences are unlike criminal matters; provincial offences impact most people and businesses and the procedure that governs POA matters will typically impact more people, which creates a strong case for broad input when developing POA rules. Municipalities have a strong interest in POA matters, as do several provincial ministries and many regulated industries, and they may not have a voice on the chosen process under this option unless the Chief Justice establishes a formal consultative process to seek their input. A further concern is the appropriateness of the Chief Justice developing a regulation on matters that are potentially political in nature, or proposing procedural amendments that respond to interests of government or prosecutors. Such matters could raise questions about the proper role and independence of the Chief Justice.

Should a Rules Committee model be adopted, the initial start-up work of consolidating and simplifying existing rules and forms will be significant. Time and resources will be required to complete this important work. For this reason, the most practical and effective option may be to rely upon the policy-making expertise of staff at the Ministry of the Attorney General to prepare a regulation after consultation with the appropriate groups (Option 4). This is the normal process for most regulations. However, Ministry staff may not have the day-to-day expertise of those who work in POA courts and because they do not work in the POA justice system daily, they may not be able to: (a) exercise a monitoring function to ensure the rules work effectively; or (b) respond with any further regulatory amendments that may be required over time.

The final option of guidelines or best practices issued by the judiciary would result in a procedural code that does not have the force of law. Since the judiciary would issue them after appropriate consultation, one would expect that the new procedural code would be treated by the judiciary, prosecutors, defendants and court administrators as having the force of law. The risk, however, is that they would not be consistently applied or adhered

to because they would not be a regulation or rule. Certainty of procedure, as we have stated, is an important goal since it furthers the principle of fairness and proportionate process. Moreover, serious cases in particular may demand greater formality of process particularly when significant fines and liberty interests are potentially at stake.

Alternatively, any guidelines issued by the judiciary may serve to supplement any rules or regulation that are enacted. They could offer best practices for prosecutors and defendants consistent with the purposes of the POA. They would serve to enhance the day-to-day operational procedures under the new POA procedural code. They may take the form of a Practice Direction. There is the risk, however, that guidelines issued to supplement the new POA rules or regulation may add to the procedural complexity that the single set of rules or regulation sought to remedy.

With each option, there must be a clear forum for input from municipalities. The transfer of POA prosecution and courts administration to municipalities dictate that they have a significant voice in developing any new procedural code.

With each option [for creating new POA rules], there must be a clear forum for input from municipalities. The transfer of POA prosecution and courts administration to municipalities dictate that they have a significant voice in developing any new procedural code.

We do not make a recommendation as to which of the above options ought to be adopted. We observe, however, that the appropriate body would be one with the characteristics of independence, inclusiveness, expertise and efficiency.

In our view, the preferable route is for the Attorney General and the Chief Justice of the Ontario Court of Justice to jointly agree on how the newly updated POA procedural code should be established and by whom. This decision should be made after consultation with the Criminal Rules Committee, the Chief Justices of the other levels of Court and municipalities who now have carriage over POA prosecutions and courts administration.

The LCO recommends that:

8. **The Attorney General and the Chief Justice of the Ontario Court of Justice jointly agree on how the newly updated POA procedural code should be established and by whom, after consultation with the Criminal Rules Committee, the Chief Justices of the other levels of Court and municipalities who now have carriage over POA prosecutions and courts administration.**

9. **Amend subsection 70(2) of the Courts of Justice Act accordingly, to relieve the Criminal Rules Committee of jurisdiction to make POA rules and identify the new body or entity responsible for developing the newly updated POA procedural code.**

D. Administrative Monetary Penalties as an Alternative to the Court Process

1. Using the Court to Adjudicate Part I and II POA Proceedings

Judges and justices of the peace of the Ontario Court of Justice have jurisdiction to hear all POA offences, although justices of the peace preside over almost all provincial offence matters that require adjudication.[252] Without question, this represents a significant volume of work for the court and the vast majority of it appears to involve minor offences. Given the volume and nature of this work and its associated costs, we examine whether moving the resolution of many of these offences into an AMPS regime would better promote the administration of justice and the efficacious use of judicial resources.

The court typically receives 2.1 million Part I and Part III charges each year. Of them, roughly 90% (1.9 million) are Part I offences, and about 10% (or 170,000) are Part III offences. Consistently in each of 2007, 2008 and 2009, of the Part I proceedings, approximately 80% are charges under the Highway Traffic Act or its regulations.

As noted earlier, the court typically receives 2.1 million Part I and Part III charges each year. Of them, roughly 90% (1.9 million) are Part I offences, and about 10% (or 170,000) are Part III offences. Consistently in each of 2007, 2008 and 2009, of the Part I proceedings, approximately 80% are charges under the *Highway Traffic Act* or its regulations.[253]

While provincial data on the number of Part II parking infractions received by the court are not available, we know that these numbers are significant. In 2009 in Toronto alone, 2.8 million parking tickets were issued.[254] Estimates from other large Ontario municipalities reveal that hundreds of thousands of parking infractions are brought annually.[255]

What is important to our analysis is the significant amount of court time spent disposing of POA matters. Provincial data on courtroom operating hours for 2009 reveal that justices of the peace spent a total of 57,576 hours on POA matters in 2009. Of those hours,

- 58% (33,358 hours) were spent presiding over Parts I and II trials,
- 26% (15,088 hours) were spent on Part III trials
- 16% (9,129 hours) were spent on other POA matters (e.g., motions, fail to respond).

These figures demonstrate that the majority of justice of the peace time on POA matters relates to parking and Part I offences.[256]

We were not able to obtain data on the cost of administering POA courts throughout Ontario but it is believed to be significant. The Ministry of the Attorney General does not have these data and each municipality calculates these costs differently. However, looking at Toronto data again, it is estimated that $50 million is spent each year administering POA courts.[257] The Ministry of the Attorney General's annual expenditure for justices of the peace is estimated at $45.4 million. Using the number of hours spent by justices of the peace presiding over Part I and II trials as a calculation tool, it is estimated that $9.2 million of justice of the peace expenditures relate to hearing these less serious offences. Additional POA administration costs borne by municipalities would include the cost of courtroom facilities, prosecutors, court staff and related administration (e.g., office equipment). Given these costs, we must ask whether a less expensive but equally fair forum for the adjudication of these offences should be made available, such as an AMPS process. Such a transition could also promote greater respect for the court system leaving appointed judicial officials to preside over more serious matters.

2. Introduction to Administrative Monetary Penalties

Administrative Monetary Penalty(ies) (AMP or AMPS) systems allow for monetary penalties to be imposed by a regulator for a contravention of an Act, regulation or by-law. The regulator issues an AMP upon discovering that an unlawful event occurred, and it is due and payable subject only to any rights of review that may be available under the AMP scheme. A fine may be distinguished from an administrative penalty in that a fine denotes a criminal or quasi-criminal monetary penalty payable only after an admission of guilt or finding of guilt by a court. An AMP, on the other hand, "does not contain a criminal element and is intended to merely reflect the violation of a law or rule that carries with it a monetary sanction."[258] It is a regulatory penalty imposed to promote compliance with a given regulatory scheme, and it "is not considered to be a criminal punishment, because it is primarily imposed in order to compensate the state for harm done to it, rather than as a means of punishing the wrongful activity."[259]

A fine may be distinguished from an administrative penalty in that a fine denotes a criminal or quasi-criminal monetary penalty payable only after an admission of guilt or finding of guilt by a court. An AMP, on the other hand, "does not contain a criminal element and is intended to merely reflect the violation of a law or rule that carries with it a monetary sanction."

Where an AMP is authorized, there is often some form of review available. The type of review will depend upon the AMP scheme. Quite often the regulator's decision to impose an AMP is subject only to administrative review by a designated person or body,[260] although sometimes there is a right to appeal the penalty to a court.[261] As with all decisions made by administrative bodies, decisions under AMP systems are subject to judicial review before the Superior Court of Justice.[262]

Of particular interest is the AMP system found in the *Municipal Act, 2001*.[263] Section 102.1 was added to the *Municipal Act* by the *Municipal Statute Law Amendment Act, 2006* on January 1, 2007.[264] This section gives municipalities the broad authority to require a person to pay an administrative penalty where the municipality is satisfied that the person failed to comply with a by-law respecting the parking, standing or stopping of vehicles.[265] It is the municipality's decision whether to create an AMP system for parking violations; should it choose to do so, the POA regime no longer applies.[266]

The *City of Toronto Act, 2006* applies to the City of Toronto rather than the *Municipal Act, 2001*.[267] A virtually identical section to section 102.1 is found in the *City of Toronto Act, 2006*, allowing the City to require a person to pay an AMP for a breach of parking, standing or stopping by-laws.[268] Thus it is open to the City of Toronto to choose to adopt an AMP system, and if it does, the POA regime no longer applies.[269] The virtually identical sections in the *Municipal Act, 2001* and the *City of Toronto Act, 2006* ensure that AMP systems for enforcing parking, standing and stopping by-laws are available in municipalities throughout Ontario at the election of the municipality. In fact, we understand the original request for such legislative provisions arose from the City of Toronto, in recognition of "the significant potential advantages of a system of AMPS for parking violations."[270] For the purpose of this Report, we will reference only the *Municipal Act, 2001* provisions and corresponding AMP regulation since they are virtually identical to the *City of Toronto, 2006* section and corresponding AMP regulation.

At the time of writing, only the City of Vaughan and the City of Oshawa have put in place an AMP system for parking, although the City of Oshawa's system came into effect very recently on March 1, 2011.[271]

Some municipalities have created AMP systems to deal with contraventions of other types of municipal by-laws passed pursuant to the *Municipal Act*.[272] It is important to note that

the authority to adopt an AMP system (as well as the authority for the enforcement of a licensing system established by a municipality under clause 151(1)(g) of the *Municipal Act*) begins with a phrase, "[w]ithout limiting sections 9, 10 and 11". Those sections confer broad powers on municipalities. Accordingly, it has been argued that the power to establish a municipal system of administrative penalties is not limited to parking and licensing but could potentially apply in respect of any by-law respecting services and things that a municipality is authorized to provide under the broad *Municipal Act* powers.

The use of AMP systems for other purposes appears to be steadily increasing in Ontario and elsewhere in Canada.[273] Twenty-one statutes in Ontario establish various different administrative penalties. Other terms are sometimes used to describe AMPS. Section 182.1 of the *Environmental Protection Act*, for example, provides for "environmental penalties" and it is one of the better known AMPS regimes in Ontario.[274] The *Metrolinx Act, 2006* also permits by-laws establishing a system of "administrative fees" for regional transit systems (i.e., GO Transit) where a person contravenes by-laws regarding the payment of passenger fees or the stopping, standing or parking of vehicle on certain land.[275] Regulations to the Act prescribe administrative and procedural requirements for any administrative fee by-law that are similar to the requirements under the *Municipal Act* regulation (e.g., notice to the person, review by screening officer, followed by review by hearing officer).[276]

The use of AMP systems for other purposes appears to be steadily increasing in Ontario and elsewhere in Canada. Twenty-one statutes in Ontario establish various different administrative penalties.

In the United States, the enforcement of parking tickets administratively is quite common. The chart at Appendix B suggests that administrative hearing systems are about as common as the use of courts for the enforcement of parking violations throughout the United States. Many of these systems have been in place for quite some time. New York City moved parking enforcement out of the court system to administrative tribunals in the 1970's.[277] Chicago's Department of Administrative Hearings came into effect in 1997, but it was in 1990 that the city decriminalized parking matters and its Department of Revenue began holding administrative hearings for a variety of matters including parking. Now, Chicago's Vehicle Hearings Department hears parking and vehicle equipment matters.[278]

3. AMPS as an Alternative to the POA Regime

Given the volume of minor Part I and II offences heard by the Ontario Court of Justice, the cost of administering POA courts, and the increasing use of AMP systems in Canada and elsewhere, one must ask whether Ontario's POA regime should rely more heavily on AMPS as an alternative to the court process. Another key consideration is whether respect for our judicial system is promoted when court resources are used to hear very minor offences. We first look at the following general areas before considering whether AMPS should be used to enforce certain matters currently prosecuted under the POA:

1. The policy arguments for and against AMPS generally;
2. The AMP system for parking infractions under the *Municipal Act* and its use in the City of Vaughan;
3. The application of the *Charter* to an AMPS system; and
4. Duty of fairness in an AMPS system.

We conclude with recommendations for reform.

Policy Arguments For and Against AMPS Generally

The focus of our recommendations is on the use of AMPS for parking and other minor offences, but we begin with a summary of the arguments for and against AMPS generally.

Several scholars and practitioners argue that AMPS are the more efficient alternative as compared to the court process.[279] While the many AMP systems provide for significantly different levels of procedural protection, they are generally less protective and more informal than the court process. With POA prosecutions, formal rules of court must be followed, defence and prosecutors must prepare their case and witnesses and detailed disclosure may be required. These are not traits of most AMP systems. The standard of proof required in AMP systems is often lower than in a typical regulatory prosecution, which can eliminate many of the issues typically dealt with at trial. For example, section 182.1 of the *Environmental Protection Act* states that the requirement to pay an environmental penalty is not subject to the defences of reasonable care and reasonable belief in a mistaken set of facts. Therefore, administrative penalties are generally seen as a quicker and less expensive option than court proceedings.[280]

It has also been argued that an enforcement system that employs AMPS is more effective than a system that relies exclusively on regulatory or criminal prosecutions. The cost, complexity and time demands associated with these prosecutions can deter regulators from enforcing a violation, leading to what Richard Macrory calls a "compliance deficit" – the failure to undertake enforcement action for known non-compliances because of a lack of resources to enforce effectively.[281] Macrory acknowledges that it is hard to assess the general level of compliance with regulatory standards because tangible evidence is lacking. However, 60% of the respondents in his study believed that the then current system in the UK for enforcing regulatory violations was inadequate and 66% supported the greater use of AMPS.[282]

The cost, complexity and time demands associated with . . . prosecutions can deter regulators from enforcing a violation leading to...a "compliance deficit".

One study by Professor R.M. Brown looked at investigations done by regulators in British Columbia and the United States who use AMPS to enforce occupational health and safety standards. Brown then compared them with investigations done by Ontario's Ministry of Labour to enforce its *Occupational Health and Safety Act* through POA prosecutions. The study concluded that there is a greater probability of penalties for violations of standards when AMPS are used as compared to prosecutions. To explain why enforcement through an AMPS scheme is more effective, the study cites the cost of adjudication in court, the work involved in preparing for a prosecution, the difficulty in securing a conviction and the delay involved in judicial determinations.[283] Brown goes on to argue that certainty of punishment has a stronger impact on compliance than the severity of the punishment.[284] For this reason, one might argue that if AMPS are not the exclusive enforcement tool, they should at least be available within the regulator's toolbox. If available, compliance rates can be expected to be better than in systems that rely solely on prosecutions.

Also, AMP systems often have decision-makers who possess expertise that the court typically does not have and, therefore, administrative decision makers may be better equipped to ensure that regulatory goals are met. A common example is environmental protection matters where members of specialist environmental tribunals possess or develop the technical and scientific expertise needed to realize regulatory goals.[285]

The Law Reform Commission of Saskatchewan (SLRC), however, has identified concerns with features of some AMP models. It expressed unease around regulators investigating breaches and then adjudicating upon any review of the AMP arising from breaches discovered.[286] The duty of fairness requires that the decision maker be unbiased and independent. It also requires that a person have an opportunity to present his or her case and respond to the evidence and arguments that others advance.[287] The SLRC notes that in many administrative contexts the investigative versus adjudicative functions of the decision maker are separated or there is an appeal to an independent adjudicator. However, many of Saskatchewan's AMP systems have no statutory right of appeal to a court or review by any other independent decision maker.[288] As will be considered in the discussion of AMPS for parking infractions, procedural protections set out in the *Municipal Act* regulations and municipal by-laws respond to these duty of fairness concerns.

A further apprehension with AMPS is that other enforcement tools may no longer be used. Prosecutions remain a valuable tool in the regulatory pyramid, yet regulators may rely excessively on AMPS and not bother with more cumbersome, costly and complex prosecutions. There is some support for this concern. Brown's study found that the two regulators studied who have the ability to use AMPS *and* prosecute relied almost exclusively on AMPS. Brown studied the Occupational Health Safety and Health Administration (OSHA) in the US and found that even for willful violations causing death, the OSHA used AMPS more than criminal prosecutions and their associated sanctions.[289]

The offence-creating statute or other authority can specify that AMPS are not available for certain categories of serious offences, or enforcement policies can set out when AMPS are appropriate and when prosecution should be pursued.

Regulatory directives or guidelines could be introduced to respond to this fear. The offence-creating statute or other authority can specify that AMPS are not available for certain categories of serious offences, or enforcement policies can set out when AMPS are appropriate and when prosecution should be pursued.[290] The attractiveness of AMPS also raises concerns that regulators will ignore tools at the lower end of the pyramid, such as warning letters, and go straight to AMPS.[291] While AMPS can be a useful addition to the regulator's toolbox, they are one tool only and there ought to be guidance on when it is appropriate to use AMPS over other available enforcement tools.

Another contributor to the project asked whether the real reason for AMPS is to get around the ruling in the *R. v. Sault Ste. Marie (City)*[292] decision that regulatory offences are most appropriately treated as strict liability offences rather than offences of absolute liability. With absolute liability offences, the defence of due diligence is not available and all that is required is proof that the offence occurred. By imposing an AMP upon discovering a breach of a regulatory standard, the matter would be treated very much like an absolute liability offence if there were no possibility of raising a due diligence defence at a subsequent hearing. Indeed, subsection 182.1(6) of the *Environmental Protection Act* states that the requirement to pay an environmental penalty is not subject to the defences of reasonable care and reasonable belief in a mistaken set of facts. If *Sault Ste. Marie* represented a solution that is fairer than absolute liability, the contributor asked whether it is good public policy to allow authorities to circumvent this decision merely by calling the offence by a different name, lowering the amount of the penalty, putting the case before a tribunal instead of a court, and perhaps calling the penalty "compensatory" or using other language that suggests the penalty is not really a penalty.

Arguably, this might be a very real concern for offences that carry significant penalties, but less of a concern for very minor offences now dealt with through an AMP system. In fact,

one could argue that the creation of AMPS for minor absolute liability offences is a logical and appropriate extension of the reasoning in *Sault Ste. Marie* which resulted in a different approach to different types of public welfare offences – those that are least like true crimes and which carry modest penalties (i.e., absolute liability offences) are not to be treated like true crimes with full rights of defence. Moreover, since *Sault Ste. Marie*, the courts have considered AMPS involving very significant penalties. These cases suggest that the court takes little issue with legislative enactments that move some traditional offences into an AMPS regime provided certain safeguards are in place. We discuss the court's treatment of other AMP regimes below under "Constitutional Considerations for AMPS".

Finally, responsive and proportionate regulation provides a compelling argument for making a diverse and flexible toolkit available to regulators. A criminal or regulatory prosecution is not always the appropriate response for every violation of a regulatory statute.[293] It would be unfair to prosecute someone criminally for a minor violation when there may be significant stigma attached to a criminal conviction, as well as other serious repercussions that follow such a conviction (e.g., impact on professional licensing or ability to serve as a company director).[294] In these circumstances, an AMP may be a more effective and appropriate enforcement tool.

[R]esponsive and proportionate regulation provides a compelling argument for making a diverse and flexible toolkit available to regulators. A criminal or regulatory prosecution is not always the appropriate response for every violation of a regulatory statute.

Our review of AMPS in Canada and abroad and the literature documenting their effectiveness and advantages as one enforcement tool creates a compelling case for a gradual shift towards greater use of AMPS throughout Ontario's offence-creating statutes. It is far beyond the scope of this Report to assess and catalogue all offences that ought to be enforced through AMPS. Depending upon the nature of the offence and the purpose of the offence-creating statute, AMPS may be the exclusive enforcement tool for certain contraventions, or simply one mechanism available within the regulator's toolbox when less severe tools (such as warning letters) or more severe tools (such as prosecutions and licence suspensions) are neither effective nor appropriate.

As a starting point for reform, there is a strong *prima facie* case to move all Part II parking infractions out of court and into an AMPS regime. We discuss moving parking infractions into an AMPS regime next, followed by an assessment of whether other minor traffic offences, including ones under the *Highway Traffic Act*, should also be subject to an AMPS process.

The Case for AMPS for Parking Infractions in all Ontario Municipalities

Overview of AMPS under the Municipal Act

Section 102.1 of the *Municipal Act* creates authority for municipalities to impose an administrative penalty where the municipality is satisfied that a person failed to comply with a by-law respecting the parking, standing or stopping of vehicles.[295] If a municipality chooses to set up an AMP system for parking infractions, the POA no longer applies.[296]

Section 3 of O. Reg. 333/07 under the *Municipal Act* (AMP Regulation) requires a municipality to pass a by-law establishing a system of AMPS if it is to exercise its authority to use AMPS for illegal parking, standing or stopping of vehicles. The by-law must meet the requirements of the AMP Regulation.

The first requirement is a monetary limit. Section 6 of the Regulation fixes a limit of $100 in any by-law establishing an AMP. It states:

> 6. The amount of an administrative penalty established by a municipality,
> (a) shall not be punitive in nature;
> (b) shall not exceed the amount reasonably required to promote compliance with a designated by-law; and
> (c) shall not exceed $100.

Section 7 creates rules for the administration of an AMP system, which appear intended to prevent political interference in its administration so that decisions made by hearing officers are independent. It reads:

> 7. A municipality shall develop standards relating to the administration of the system of administrative penalties which shall include,
> (a) policies and procedures to prevent political interference in the administration of the system;
> (b) guidelines to define what constitutes a conflict of interest in relation to the administration of the system, to prevent such conflicts of interest and to redress such conflicts should they occur;
> (c) policies and procedures regarding financial management and reporting; and
> (d) procedures for the filing and processing of complaints made by the public with respect to the administration of the system.

Imprisonment is not a permitted enforcement mechanism for non-payment of an AMP and … the AMP regulation states that any penalty shall not be punitive in nature.

Section 8 sets out the procedural requirements of any AMP by-law, addressing procedural fairness matters. It states that a person is entitled to notice of the penalty and to have the penalty reviewed by a screening officer appointed by the municipality. The screening officer may affirm, cancel or vary the penalty. The person may then request a review of the screening officer's decision before a hearing officer who is also appointed by the municipality. After providing the person with an opportunity to be heard, the hearing officer may similarly affirm, cancel or vary the penalty. Procedures for extensions of time to pay a penalty must be included in any municipal by-law. The *Statutory Powers and Procedure Act* applies to a hearing officer's review.[297]

Sections 9 and 10 describe enforcement mechanisms that are similar to those for non-payment of fines ordered by a POA Court. In the event of default of payment of a penalty, a certificate of default may be filed in the appropriate civil court for enforcement purposes.[298] In addition, notice may be given to the Registrar of Motor Vehicles; the Registrar shall not validate or issue a vehicle permit until the penalty is paid.[299] *Imprisonment is not a permitted enforcement mechanism* for non-payment of an AMP and as noted above, the AMP regulation states that *any penalty shall not be punitive in nature*.

Experience of the City of Vaughan

At the time of writing, the City of Vaughan and the City of Oshawa are the only municipalities that have passed a by-law creating an AMP system for parking violations, although the system in Oshawa was implemented very recently (March 1, 2011). We, therefore, focus our attention on Vaughan's experience with its AMP system which came into effect on August 10, 2009.[300] Instead of going to the Ontario Court of Justice, any

review of the roughly 40,000 parking tickets issued annually by the City of Vaughan goes to a screening officer and where a subsequent review is requested, to a hearing officer.

The administrative penalty looks much like a ticket and subsection 10.1(4) of the City's by-law states that it shall contain the particulars of the contravention, the amount of the penalty, information on how to request a review, and a statement that the penalty will constitute a debt to the City unless cancelled or reduced pursuant to the review process. If the person receiving the administrative penalty wants a review by a screening officer, he or she must call the City and an appointment is set up. Most screening officer appointments are scheduled for a date within two weeks of the call. The person then attends at a City of Vaughan office and provides whatever evidence or submissions they wish and the screening officer makes a decision at that time. The screening officer may affirm, cancel or reduce the penalty, or extend the time for payment on grounds set out in the by-law. If the person wishes to have the matter further reviewed by a hearing officer, he or she makes an appointment at that time and is given a time and date for the hearing with the hearing officer. The second proceeding is usually held within five weeks of the date of the screening appointment.

[In Vaughan, a] fixed time for a hearing is now provided. The public does not have to book extensive time off from work to wait around the courthouse until their matter is reached on the docket.

Hearings are held every Tuesday and there are roughly 20 held each day. At the hearing, the person challenging the AMP is in attendance, as well as the hearing officer, a clerk who puts the file together and manages it during the hearing, and the municipal law enforcement officer who wrote the ticket. There is no prosecutor. The City has contracted with two hearing officers, both legally trained and one a retired judge. The person is sworn in, submits any evidence and makes any submissions that they wish. The hearing officer provides a written decision on a pre-printed form, usually with a few lines giving reasons for the decision.

Like the screening officer, the hearing officer may affirm, cancel or reduce the administrative penalty, or extend the time for payment on grounds set out in the by-law. The grounds are limited to the individual who receives the penalty establishing on a balance of probabilities that the vehicle was not parked, standing or stopped as described in the penalty notice. This is extremely hard to prove since Vaughan municipal law enforcement officers photograph the car at the time they hand out the penalty and the photograph is always provided to the decision makers. The second ground is undue hardship. As one writer notes, these narrow grounds effectively remove the defence of due diligence and create an absolute liability offence.[301]

From the perspective of the three employees of the City of Vaughan and the hearing officer to whom the LCO spoke, the AMP parking system has been a great success with the following benefits achieved:

- **Matters are heard much more quickly**. The time to have a matter heard by both a screening officer and hearing officer is typically under two months. This compares with a roughly 10 month wait for parking tickets when they were heard in court.
- **Less time wasted by the public**. A fixed time for a hearing is now provided. The public does not have to book extensive time off from work to wait around the courthouse until their matter is reached on the docket.
- **Savings in costs**. Hearings are scheduled during the municipal law enforcement officers' regular work shift so that it is not necessary to pay them overtime. When

parking matters were heard in court, the City would often have to pay the officer overtime since court scheduling was not tailored to the officer's regular working hours. In addition to the wage savings of the municipal law enforcement officer, no prosecutor attends the hearing.

- **Overall reduction in hearings**. The percentage of matters going to a hearing officer is roughly 1.5% of tickets issued, which is lower than the roughly 3.5% of tickets that were challenged in court. One might assume that fewer hearings are requested now because people no longer benefit from the delay with the court system, or the potential for dismissal of the ticket because of delay or the absence of the ticketing officer.
- **Savings of time for POA Court and prosecutor**. Parking offences were taking up valuable court time. Time has now been freed up for the regional prosecutor to bring more serious matters to court more quickly.
- **Public satisfaction**. Vaughan employees and the hearing officer believed that those who sought review seemed satisfied with the process. They noted that while the AMP system does not involve the same procedure as POA prosecutions, people are still afforded a fair hearing in front of a legally trained, neutral decision maker on matters involving less than $100 (with most between $25 and $35).
- **Cost of Hearing Officers is not significant**. From a cost perspective, we were told that the additional cost incurred by the City of Vaughan for both hearing officers is not significant. As there is only one day of hearings per week, the annual cost of both hearing officers is approximately $13,000. This additional cost is recovered through revenue from the administrative penalties. Moreover, revenue that was lost from parking tickets that were dismissed or disposed of without a fine payable under the court system no longer occurs. Parking penalty revenue is expected to be the same or greater than under the POA regime.

Parking offences [in Vaughan] were taking up valuable court time. Time has now been freed up for the regional prosecutor to bring more serious matters to court more quickly.

AMPS for Parking Infractions in all Ontario Municipalities

The very positive experience of Vaughan, albeit for only one year, creates a strong case for the use of AMPS for parking infractions in all Ontario municipalities. Some municipalities are in the process of implementing an AMPS system for parking, but legal and operational concerns create reluctance for other cities to adopt an AMPS model at this time.

The first argument against an AMPS parking regime is that it results in no practical difference to the POA system that is currently in place. Under both systems, a parking ticket recipient can pay the penalty (or set fine), or request a review hearing (or trial). Provincial data are not available on the number of people who voluntarily pay fines versus asking for a trial, but if Toronto data are representative of trial requests in other cities, it would appear that only 10% or less of ticket recipients request a trial.[302] Therefore, the only real change, which is the nature of the hearing, would impact only a small proportion of cases. Also, some municipalities have given staff guidelines to cancel a parking ticket under limited specified grounds (e.g., irregularities on the ticket; presenting a parking permit demonstrating that the parking was legal).[303] This is the same function that a screening officer would perform in the AMPS model. Furthermore, some municipalities said that they do not experience long delays in having parking matters heard in POA courts. For these reasons, an AMPS system would offer little

practical benefit except that the hearing officer would be a less expensive adjudicator than a justice of the peace.

We do not find this argument convincing. What is important is the actual number of cases that do end up in court, the cost of running courts for this purpose, and the perception it leaves on the public when a judicial officer determines such matters and is thereby unavailable to hear more serious matters that are pending on the court's dockets. While only 10% or less of all parking tickets may end up on trial lists, in raw numbers, this can represent a significant number of cases that draw upon limited resources. In Toronto in 2009, 129,932 parking trials were heard by justices of the peace, taking up costly court, judicial and prosecutorial resources. Costs include court staff, a prosecutor, overtime costs for enforcement officers to attend, courtroom security and the annual salary of a justice of the peace.[304] Cost savings could be achieved under an AMPS model where hearing officers are paid less than justices of the peace, where prosecutors are not required to attend hearings, and where hearings are scheduled so that enforcement staff can attend without being paid overtime.

[T]here is something strikingly disproportionate with having trials of parking infractions heard by an appointed judicial officer in a courtroom. Non-judicial adjudicators in Ontario determine matters of fundamental importance to us, such as violations of our human rights, our rights as tenants to housing, our entitlement to social assistance and our ability to work and be licensed in a chosen profession. Yet, under our current POA regime, it is possible to get a trial before a justice of the peace to adjudicate upon a disputed $30 parking ticket.

Even if a compelling cost argument cannot be established, there is something strikingly disproportionate with having trials of parking infractions heard by an appointed judicial officer in a courtroom. Non-judicial adjudicators in Ontario determine matters of fundamental importance to us, such as violations of our human rights, our rights as tenants to housing, our entitlement to social assistance and our ability to work and be licensed in a chosen profession. Yet, under our current POA regime, it is possible to get a trial before a justice of the peace to adjudicate upon a disputed $30 parking ticket. There are more serious matters with greater public safety implications (e.g. criminal bail, environmental and occupational health and safety offences) that should take precedence over parking violations. In our view, greater respect for the rule of law and the administration of justice would be achieved if court and judicial resources were reserved for more serious matters.

A second argument against an AMPS regime is that AMPS cannot apply to parking tickets issued pursuant to a by-law establishing a system for disabled parking.[305] The result is that certain parking infractions must always be prosecuted in POA courts and that it does not make sense to have an AMPS *and* POA system for parking infractions – instead, a single system should be adopted. We agree that a single system for all parking infractions is preferred, and therefore recommend the inclusion of these infractions within an AMPS scheme. Again, if Toronto's experience is representative of the province, only 0.32% of all parking tickets issued in 2009 relate to disabled parking.[306] More importantly, we do not understand the policy rationale for excluding disabled parking tickets from an AMPS regime. If an AMPS system offers a fair, quick, and more accessible forum for resolving disputed parking tickets, we see no reason why it should not be made equally accessible to those who seek a review of a disabled parking penalty. This is particularly true if the ticketed person lives with a disability and properly displayed a valid disabled parking permit, but the ticketing officer failed to see it.

Fines for parking in a disabled parking spot may exceed the $100 limit for AMPS, and part of the rationale for excluding them may be that the fine is seen as "punitive in nature". Constitutional arguments may be made that the court must hear those offences or that

Charter protections apply. As discussed in our constitutional analysis below, AMPS of up to $1 million have been upheld as not contravening the *Charter*. Accordingly, we believe the limit should be increased or exceptions should be drafted so that all tickets relating to by-laws for the parking, standing or stopping of vehicles are dealt with within an AMPS regime.

A third reason against an AMPS by-law like the one in Vaughan is that unique and different considerations may apply to other municipalities given their nature and size. In Toronto, for example, we were told that a significant volume of its 2.4 million parking tickets are issued to courier trucks and other commercial vehicles that need to make regular stops on Toronto streets. Toronto City Council is currently seeking a report on this issue so that it can properly respond to the competing pressures of facilitating traffic flow and permitting deliveries on some of its busiest streets.[307] This is likely an issue for other urban centres in Ontario, as well. While it is a real issue, we do not see how it affects a decision to adopt an AMPS system. One might expect this issue to be resolved through amendments to the parking, stopping and standing by-laws, but not to a by-law establishing how the former by-laws are to be enforced.

[T]he transition [to AMPS] should occur within three years; however, we recognize that the exact date will have to be decided upon after extensive consultations with the municipalities and after sufficient time is provided to develop information technology systems to report defaulted AMPs to the Ministry of Transportation.

Another unique consideration applicable to larger urban centres is the volume of parking tickets issued, and the resulting cost of administering an AMPS regime. The costs in the City of Toronto would be much larger than the costs in the City of Vaughan. There are also administration costs with setting up and maintaining an AMPS system. However, municipalities are currently responsible for the costs of administering POA courts under municipal transfer agreements, and it would seem that those costs would not necessarily increase and in fact, could well decrease under an AMPS regime.

On the other hand, smaller municipalities said they do not have the volume of parking violations to warrant a separate system. Section 20 of the *Municipal Act*, however, permits a municipality to enter into an agreement with one or more municipalities "to jointly provide, for their joint benefit, any matter which all of them have the power to provide within their own boundaries." Indeed, municipal partnerships have already been made to administer POA courts under Part X of the POA, and these Municipal Partners could similarly share in the cost of an AMPS regime. Thus it is possible for several smaller municipalities to jointly create an AMPS system for their shared use. The benefits that Vaughan achieved ought to be seriously considered by all municipalities. There may well be other unique considerations, and we recommend that each municipality carefully assess and seek to resolve them with a view to adopting an AMPS regime for all parking infractions.

Time should be permitted for the transition to AMPS. While any date is arbitrary, we believe the transition should occur within three years; however, we recognize that the exact date will have to be decided upon after extensive consultations with the municipalities and after sufficient time is provided to develop information technology systems to report defaulted AMPs to the Ministry of Transportation. During our consultations on this issue, we were advised of very real implementation issues, most notably the time needed to establish an IT infrastructure to allow municipalities to report defaulted AMPs to the Registrar of Motor Vehicles. The authority in the Registrar to not validate or issue a vehicle permit until the penalty is paid is an important and effective enforcement tool.[308] We were told by the City of Oshawa, from its experience, that considerable work is involved to set up an appropriate IT infrastructure that would allow

direct reporting of the non-payment of an AMP to the Ministry of Transportation (MTO). Traditionally, the Ministry of the Attorney General (MAG) maintains the IT infrastructure that would allow direct reporting to the Registrar of Motor Vehicles. The MTO does not yet have the IT structure in place to allow municipalities to directly report non-payment of AMPS. Municipalities must work through MAG, who in turn, deals with the MTO.

Without question, this is a real implementation issue, but we are hopeful that three years is a reasonable and sufficient time to develop and have in place a direct reporting IT infrastructure between municipalities and MTO, especially given the work and consideration of this issue that has been done to date. A three year transition period will allow municipalities to put in place their systems carefully and to have the advantage of observing the Vaughan experience (and other municipalities such as the City of Oshawa which recently implemented an AMPS system). Minor operational challenges need not be used to unduly prolong the implementation of an AMPS system; instead solutions to those difficulties can be sought out and implemented so that court and judicial resources can be redirected to more serious matters.

A final concern raised by some municipalities is the constitutionality of using AMPS for parking infractions … [we] conclude that there are strong arguments supporting the constitutionality of an AMPS model like that used in Vaughan.

A final concern raised by some municipalities is the constitutionality of using AMPS for parking infractions. If parking infractions are offences to which *Charter* protections apply, then an AMPS regime that imposes a penalty without a trial or finding of guilt may offend the *Charter*. We discuss this issue next and conclude that there are strong arguments supporting the constitutionality of an AMPS model like that used in Vaughan.

Constitutional Considerations for AMPS

Charter Principles Applicable to All AMP Systems

A critical question is whether the *Charter* applies to AMPS. The purpose of the offence-creating statute, the nature and purpose of the sanction, and the nature of the proceeding will inform whether the proceeding is one to which the *Charter* applies. If *Charter* rights do apply, then an AMP system may be found to be unconstitutional or it may require the addition of further procedural safeguards that could render the benefits of an AMP system negligible. The *Charter* rights which are most relevant are sections 7 and 11.

Section 7 of the *Charter* states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In *R. v. Pontes,* the Supreme Court held that absolute liability offences that could potentially result in imprisonment infringe section 7 of the *Charter*.[309] Therefore, any AMP system that has imprisonment as a potential penalty is most likely to offend section 7. The majority of the court, however, left open for another day the issue of the constitutionality of an absolute liability offence punishable by fine with the possibility of imprisonment should payment of the fine go into default and where the legislation has a means test for the imposition and collection of fines.[310]

If the penalty is only a fine, case law suggests that this alone will not engage section 7 rights. In *R. v. Transport Robert (1973) Ltée,*[311] the Ontario Court of Appeal considered the constitutionality of section 84.1 of the *Highway Traffic Act*. As discussed previously, this

case involved a defendant who was charged with operating a commercial motor vehicle on a highway when a wheel became detached. It was an absolute liability offence since subsection 84.1(5) provides that due diligence is not a defence to this charge. It carries a maximum penalty of a $50,000 fine; however, the offence did not entail the penalty of imprisonment. The defendants argued that the combination of the risk of a significant fine being imposed and the stigma attached to a conviction offended the section 7 *Charter* right to security of the person.

The court considered the Supreme Court of Canada's decision in *R. v. Blencoe* which canvassed the scope of the section 7 right to security of the person:

> . . . In *Blencoe v. British Columbia (Human Rights Commission)*..., Bastarache J. speaking for the majority held that, "[N]ot all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to 'serious state-imposed psychological stress'". Thus, "[n]ot all forms of psychological prejudice caused by government will lead to automatic s. 7 violations." Further, there is no "generalized right to dignity, or more specifically, a right to be free from stigma" ... and, "[d]ignity and reputation are not self-standing rights. Neither is freedom from stigma". [312] [citations omitted]

The court went on to hold that despite the high fine, section 84.1 of the *Highway Traffic Act* did not engage the security of the person guarantees in the *Charter*:

> However, we are not convinced that a prosecution for the s. 84.1 offence engages the kind of exceptional state-induced psychological stress, even for an individual, that would trigger the security of the person guarantee in s. 7. The offence does not create a true crime, and like most regulatory offences, it focuses on the harmful consequences of otherwise lawful conduct rather than any moral turpitude. . . . The s. 84.1 offence focuses on the unintended but harmful consequences of the commercial trucking industry. We reject the proposition that a defendant charged with this offence is stigmatized as a person operating in a wanton manner, heedless of the extreme dangers to life and limb posed by his or her operation. Conviction for the offence at most implies negligence and like the misleading advertising offence considered in *Wholesale Travel*, any stigma is very considerably diminished.
>
> The diminished stigma attached to the s. 84.1 offence is not sufficient to trigger the security interest in s. 7 even when coupled with the possibility of a significant fine. This is simply not the kind of serious state-imposed psychological stress that is intended to be covered by security of the person. It is qualitatively different than the kinds of stresses that have been recognized in the cases.313

In a recent decision of the Alberta Court of Appeal, *Lavallee v. Alberta (Securities Commission),*[314] the court considered an AMP system under the *Securities Act* that could result in penalties of up to $1 million per contravention.[315] The appellants argued that clauses 29(e) and (f) of the *Securities Act* were contrary to sections 7 and 11 of the *Charter* because their effect was to require the Securities Commission to admit all evidence marginally relevant to the matter, regardless of that evidence's probative value, prejudicial effect or reliability. The court disagreed with the above interpretation of clauses 29(e) and (f), but stated that if it had reached a different interpretation of the two clauses, sections 7

and 11 of the *Charter* are not applicable to administrative proceedings and did not protect economic rights. In dealing with section 7, the court found that consequences of the large penalties were not sufficient to trigger s. 7:

> As Bastarche J. stated at para. 83 of *Blencoe*, the s. 7 security of the person interest is triggered only in exceptional cases where the state interferes in profoundly intimate and personal choices; such choices "would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings".
>
> I agree with the chambers judge that the effect of the potential consequences faced by the appellants does not compare to the kind of stigma attached to an overlong and vexatious criminal trial or proceedings initiated to remove a child from parental care. The appellants' s. 7 rights are not engaged here.[316]

"[T]he s. 7 security of the person interest is triggered only in exceptional cases where the state interferes in profoundly intimate and personal choices; such choices would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings."

R. v. *Transport Robert (1973) Ltée*
Citing *Blencoe*

It is noteworthy that the application for leave to appeal this decision to the Supreme Court of Canada was dismissed.[317]

In summary, it would appear that AMP regimes that provide for purely monetary penalties and for which there is no possibility of incarceration are unlikely to engage section 7 of the *Charter*. The more interesting question is whether section 11 of the *Charter* would apply to AMPS imposed for breaches of regulated activity.

The parts of section 11 relevant to this analysis are:

> 11. Any person charged with an offence has the right
>
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
>
> (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;

The Supreme Court of Canada's decision in *R. v. Wigglesworth* is the starting point to the analysis of section 11.[318] Justice Wilson restricts the application of section 11 to criminal or penal matters and then formulates a test to determine if a particular proceeding is a criminal or penal proceeding. As Archibald, Jull and Roach note, the *Wigglesworth* case seems to create "two separate levels of analysis to make that determination: (1) the 'by nature test', and (2) the true penal consequence test".[319]

With regards to the "by nature" test, Justice Wilson states:

> There are many examples of offences which are criminal in nature but which carry minor consequences following conviction. Proceedings in respect of these offences would nevertheless be subject to the protections of s. 11 of the Charter. It cannot be seriously contended that just because a minor traffic offence leads to a very slight consequence, perhaps only a small fine, that offence does not fall within s. 11. It is a criminal or quasi-criminal proceeding. It is the sort of offence which by its very nature must fall within s. 11.[320]

The court then sets out the "by nature" test and describes matters that fall within section 11:

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11.[321]

Proceedings to which section 11 would not apply, because of their nature, are then described:

> This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere. . . Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceeding to which s. 11 is applicable.322

"Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of 'offence' proceeding to which s. 11 is applicable."

R. v. *Wigglesworth* (SCC)

Justice Wilson went on to state that even where a proceeding passed the "by nature test" it would still be subject to section 11 if it provided for a true penal consequence. A true penal consequence that would attract the application of section 11 was imprisonment or a fine, the magnitude of which "would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity."[323]

Many AMP systems could be classified as being of an administrative nature instituted for the protection of the public in accordance with the policy of a statute. The "by nature" analysis was elaborated upon by the Supreme Court of Canada in the decision of *Martineau v. M.N.R.*[324] In this case, a customs officer ordered Mr. Martineau to pay $315,458 under section 124 of the *Customs Act*. This process is widely known as "ascertained forfeiture". The amount of the demand was the deemed value of the goods that he had allegedly tried to export by making false statements. Mr. Martineau requested that the Minister of National Revenue review the custom officer's decision, but the Minister upheld the order for payment. Mr. Martineau then appealed the Minister's decision by way of an action, which led to the Minister filing a motion to examine Mr. Martineau for discovery.

Mr. Martineau argued that discovery would violate his right against self-incrimination guaranteed under section 11(c) of the *Charter* and this was the issue before the Supreme Court. To answer this question, the court had to determine whether Mr. Martineau had been charged with an offence. After examining its decision in *Wigglesworth,* the Court stated that a distinction must be drawn between penal proceedings on the one hand and administrative proceedings on the other, with only the former attracting the application of section 11. The court set out three criteria to determine if a proceeding is penal or administrative in nature.[325]

The first criterion is the objective of the Act and the section in question. The *Customs Act*'s objectives are to "regulate, oversee and control cross-border movements of people and goods." To do this, reporting requirements under the Act must be enforceable, which is the purpose of section 124 of the *Customs Act* under which the customs officer made his order. The court is clear that the focus of this inquiry is on the nature of the proceedings, not the nature of the act that gives rise to the proceeding.[326] Therefore, it was irrelevant to the court's determination that the violation of the *Customs Act* could have been enforced by prosecution rather than demand by written notice, as was the case in *Martineau*.

The second criterion is the purpose of sanction. The court held that the purpose of ascertained forfeiture is not to punish the defendant to create a deterrence effect. Instead, the purpose is to ensure compliance with the *Customs Act* by giving customs officers a timely and effective method of enforcement. It is not designed to punish the offender, though the court concedes that it may have that effect in some cases. It is true that ascertained forfeiture can deter; however, actions in civil liability and disciplinary hearings that also aim to deter are not thereby criminal proceedings.[327] Finally, the court said there was nothing to indicate that the ascertained forfeiture was to redress a wrong to society. It notes that section 124 does not take into account principles of sentencing or criminal liability in reaching this conclusion.[328]

The final criterion examines the ascertained forfeiture process. Section 124 requires a customs officer to have reasonable and probable grounds that there has been a violation of a *Customs Act* provision. If this is the case and it has been established that it would be difficult to seize the actual goods, the amount of money equal to the value of the goods may be demanded. The person who receives the notice of demand can ask the Minister of National Revenue to review the decision. The Minister then serves a notice of reasons in support of the sanctions and the person has 30 days to make submissions and submit evidence in writing to the Minister. The Minister then makes a decision on the review request. This decision is not subject to review except that the person may appeal it by way of action to the Federal Court.

The court found that this process is not at all like a penal process. No one is charged, no one is arrested, no one is summoned to appear before a court of criminal jurisdiction and no criminal record follows from the proceedings. The worst thing that can happen is that a person may be subject to a civil action if the person exhausts all avenues of appeal and still refuses to pay.[329]

The Supreme Court concluded that the notice of ascertained forfeiture was administrative in nature, but recalling its judgment in *Wigglesworth*, it said that in cases where the "by nature" test conflicts with the "true penal consequences" test, the latter trumps the former. Therefore, the court considered whether the notice of ascertained forfeiture was a true penal consequence. It noted that there is no chance of imprisonment and then considered whether the money demanded under section 124 "constitutes a fine that, by its magnitude, is imposed for the purpose of redressing a wrong done to society at large, as opposed to the purpose of maintaining the effectiveness of customs requirements."[330]

The court said that while the amount of $315,458 is greater than the maximum fine that could be imposed on a person upon summary conviction for the same act, if it had proceeded by way of indictment the fine could have been as large as $500,000. Further, a fine on summary conviction or indictment must take into account the factors and principles governing sentencing and is clearly penal in nature. Ascertained forfeiture, on the other hand, is civil in nature, purely economic and arrived at by a simple mathematical formula. The court also stated that the demand does not stigmatize anyone. There is no criminal record, the purpose is not to punish and principles and factors of sentencing do not apply. The court concludes that a notice of forfeiture does not lead to true penal consequences for Mr. Martineau.

We return to the *Lavallee* case of the Alberta Court of Appeal because it is noteworthy given the amount of the penalty in that case. The court applied the *Wigglesworth* decision to determine if section 11 of the *Charter* applied to the AMPS system created by the *Securities Act*. It found that administrative hearings before the Securities Commission generally fall into the category of "administrative proceedings instituted for the protection of the public in accordance with the policy of a statute."[331] It then went on to consider whether, despite the nature of the proceeding, the Security Commission proceedings resulted in true penal consequences.[332] The appellants argued that a fine of up to $1,000,000 per contravention is a true penal consequence. The Court of Appeal rejected this argument and stated that the purpose of the sanction and the *Securities Act* must be considered along with the magnitude of the penalty. The purposes of the *Securities Act* include the "protection of investors and the public, the efficiency of the capital markets, and ensuring public confidence in the system."[333] In this light, the magnitude reflects the legislature's intent that the penalties are not considered just another cost of doing business and that no true penal consequences arise. Finally, the Court of Appeal held that general deterrence is a relevant factor when the Commission imposes a sanction that is intended to be "protective and preventative."[334]

The decisions in Transport Robert and Lavallee coupled with the objective of promoting compliance with parking by-laws would suggest that reasonable increases to the $100 maximum would also survive a section 7 challenge.

Applying the Charter to the AMP System for Parking Infractions

In our view, an AMP system for parking infractions similar to the model adopted by the City of Vaughan and authorized under the *Municipal Act* and its regulations would not attract the protections of sections 7 and 11 of the *Charter*. We offer the following analysis in support of our recommendation that all municipalities implement an AMPS system for parking infractions and that their prosecution be taken out of the POA.

First, for section 7 rights to be engaged there must be a life, liberty or security of the person interest at stake. None appears to be at stake given the nature of the penalty authorized under the *Municipal Act* regulations. First, imprisonment is not a permitted penalty. Second, the monetary penalty cannot be punitive in nature, shall not exceed the amount reasonably necessary to promote compliance, and in no case can it exceed $100.[335] One need only compare the fine of $50,000 in *Transport Robert*, or the $1,000,000 penalty in *Lavallee,* and the court's finding in each case that these amounts do not attract the level of stigma necessary to engage section 7 rights, to find further support for our view that a $100 penalty for a parking infraction is unlikely to engage section 7 rights.[336] Over time, one might expect modest and incremental increases to the $100 maximum. The decisions in *Transport Robert* and *Lavallee* coupled with the objective of promoting compliance with parking by-laws would suggest that reasonable increases to the $100 maximum would also survive a section 7 challenge.

The Supreme Court in *R. v. Pontes* left open whether the possibility of imprisonment for unpaid fines could give rise to a section 7 right,[337] and therefore, we consider whether incarceration is a possibility should a person refuse to pay an AMP. In *R. v. Bowman*, the Ontario Court of Justice held that the possibility of being imprisoned for an unpaid parking ticket under the current POA regime was too remote to trigger section 7 rights.[338] The court noted that imprisonment is not a direct penalty arising from a parking infraction conviction; it is only possible after a further hearing before a judicial officer and even once that occurs, it remains a remote possibility since there must be a showing that the person is able to pay the fine but refuses to do so and that imprisonment is not contrary to the

public interest.[339] As noted previously, imprisonment for unpaid fines is not truly available in Ontario today since subsection 165(3) of the POA precludes this enforcement option once municipalities have entered into transfer agreements with the Province. Agreements are now in place throughout Ontario, and therefore, imprisonment is unavailable as an enforcement tool to municipalities for unpaid fines. In fact, no one was imprisoned for non-payment of a fine in recent years, based on data from the Ministry of the Attorney General for 2007 and 2008.[340]

[I]mprisonment for unpaid fines is not truly available in Ontario today since subsection 165(3) of the POA precludes this enforcement option once municipalities have entered into transfer agreements with the Province. Agreements are now in place throughout Ontario, and therefore, imprisonment is unavailable as an enforcement tool to municipalities for unpaid fines.

Similarly, if imprisonment can occur under the AMPS parking regime, it would appear to be a very remote possibility that is not directly related to the penalty. Section 9 of the regulation allows municipalities to file a certificate of default with the Small Claims Court or Superior Court of Justice where a fine is not paid, and the certificate is deemed to be an order of the court and can be enforced as such. Arguably, if someone were to refuse to abide by enforcement proceedings in these courts (e.g., fail to attend a judgment-debtor examination or answer a relevant question), he or she could be incarcerated for contempt of court after a further contempt hearing before a judge.[341] But such incarceration would arise from a failure to abide by orders of those courts and not because of a failure to pay the penalty. Indeed, this would be true in any civil enforcement proceeding.[342]

The case of *London (City) v. Polewsky* is also instructive.[343] In that case, the Ontario Court of Appeal considered whether the potential risk of imprisonment arising from default proceedings under section 69 of the POA could give rise to section 7 *Charter* rights in the original POA proceeding. After noting that section 69 provides for separate default proceedings from the original trial of the provincial offence and that it also requires an assessment of the person's ability to pay the fine, it held that the risk of imprisonment in default was sufficiently remote so as not to engage a liberty interest under section 7. Similarly, under the AMPS regime authorized by the *Municipal Act* regulation, the enforcement of a certificate of default would be made in a different proceeding in a civil court. Moreover, section 8 of the regulation requires municipalities to establish procedures to permit persons to be excused from paying all or part of an AMP where requiring payment would cause undue hardship. This also reduces the prospect of a penalty being enforced against a person who is unable to pay it. For these reasons, we believe that the possibility of imprisonment under the AMPS regime is sufficiently remote as not to engage a liberty interest under section 7 as it would only arise from a separate proceeding for contempt of court.

We now consider whether section 11 rights would be engaged. Section 11 applies only to penal proceedings, not administrative proceedings. To determine whether the AMPS regime for parking infractions is a criminal (penal) or administrative proceeding, we turn to the three criteria set out in *Martineau*.

The first is the objective of the statute and regulation. Subsection 3(2) of the AMPS Regulation describes the purpose of a system of administrative penalties:

> The purpose of the system of administrative penalties established by the municipality shall be to assist the municipality in regulating the flow of traffic and use of land, including highways, by promoting compliance with its by-laws respecting parking, standing or stopping of motor vehicles.

This purpose of this system is regulatory rather than criminal. The AMP scheme seeks to promote compliance with parking by-laws, which are there to regulate the flow of traffic and use of land. The emphasis is on compliance and the prevention of harmful consequences rather than punishment of past conduct.[344] One can infer that the AMP system is intended to deter illegal parking but this does not mean that its purpose is criminal. In *Martineau*, Justice Fish held that actions in civil liability and disciplinary hearings that are also "aimed at deterring potential offenders, nevertheless do not constitute criminal proceedings."[345]

The second criterion is the purpose of the sanction itself. Similar to the analysis in *Martineau*, the purpose of the administrative penalty is to ensure compliance with parking by-laws by providing the municipal law enforcement officers with a cost effective and timely method of enforcement. AMPS are not designed to punish a person who violates the by-law; in fact, the regulation demands that any penalty imposed not be punitive in nature. The monetary limit of the penalty of $100 is low and a much steeper penalty, one would argue, would be necessary to achieve a penal purpose. Finally, the regulation does not require a consideration of the principles of criminal liability and sentencing before the AMP is issued; the City fixes the amount of the penalty before the infraction occurs, and the amount does not vary based on repeated infractions or other factors of those who contravene the by-laws.[346]

The AMP scheme seeks to promote compliance with parking by-laws, which are there to regulate the flow of traffic and use of land. The emphasis is on compliance and the prevention of harmful consequences rather than punishment of past conduct.

The final criterion is the AMPS proceeding. Under the regulation, an AMP may be issued if a vehicle has been left parked, standing or stopped in contravention of a designated by-law. The owner must be given notice of the penalty and be advised of the right to request a review by a screening officer and hearing officer. Only the hearing officer is required to hold a hearing and the *Statutory Powers and Procedures Act* (SPPA) applies. The SPPA applies to tribunals, not courts. The rules of evidence relating to tribunals in the SPPA are different from those that apply in court proceedings. For example, a hearing officer can admit oral evidence even when it is not under oath or affirmation and can accept all relevant evidence unless the testimony or documentation is inadmissible due to a privilege under the law of evidence or a provision in a statute.[347] The decision of the hearing officer is final and not subject to an appeal.

Like the process in *Martineau*, this process is much closer to an administrative hearing than a judicial criminal hearing. No one is charged, no information is laid, no one is arrested and no one is summoned to appear before a court of criminal jurisdiction. No criminal record follows from an administrative penalty and if the person refuses to pay, the worst that might happen is that civil enforcement proceedings are initiated and the Registrar of Motor Vehicles may refuse to validate or issue a new vehicle permit to that person.

Based on the three criteria set out in *Martineau*, there is a strong argument that an AMPS system like the one used in Vaughan is administrative in nature rather than criminal or penal. This analysis can be trumped by the true penal consequences analysis. The maximum fine that can be imposed under the regulation is $100 and the regulation is clear that the amount under this cap cannot be punitive and cannot exceed the amount reasonably required to promote compliance. Given these limits, it seems much more like a penalty that promotes compliance with parking, standing and stopping of motor vehicle by-laws, than one that is imposed to redress a wrong done to society at large. Indeed, one

might argue that the limit of $100 could be increased to at least $500 (and potentially higher over time) so that it may cover penalties that promote compliance with by-laws respecting disabled parking.[348] We say this given the willingness of the Court to find much larger AMPS not subject to *Charter* protections as was done in *Lavallee*. We are also of the view that steeper penalties may indeed be necessary to promote compliance with disabled parking by-laws, given the strong social interest of accommodating persons with disabilities with appropriate parking.

To conclude, in our view, the AMP regime prescribed under the *Municipal Act* and its regulations for enforcing municipal parking by-laws does not appear to offend sections 7 or 11 of the *Charter*. We are supported in this conclusion by the fact that AMPS are already in place throughout Ontario in several other contexts and by some municipalities, that they have been duly considered and analyzed for their constitutionality by government prior to implementation and that they have subsequently been upheld by various courts. As the above analysis demonstrates, we are hard pressed to identify any constitutional concerns with the model AMP parking by-law permitted under the *Municipal Act*. In our view, constitutional concerns should not be tabled as a reason to delay implementation of a province-wide AMPS parking regime.

[W]here a regulator imposes an administrative penalty, a level of procedural fairness must be afforded to those who are subject to the penalty. The Superior Court of Justice has jurisdiction to judicially review the procedure used by any administrative body and it may make various orders to ensure the appropriate level of procedure is afforded.

Duty of fairness concerns in an AMPS system

Independently of any consideration under the *Charter*, the duty of procedural fairness applies to an administrative decision that affects "the rights, privileges or interests of an individual".[349] Therefore, where a regulator imposes an administrative penalty, a level of procedural fairness must be afforded to those who are subject to the penalty. The Superior Court of Justice has jurisdiction to judicially review the procedure used by any administrative body and it may make various orders to ensure the appropriate level of procedure is afforded.

Generally speaking, the duty of procedural fairness includes some measure of the following procedural rights: (a) notice that an individual's rights, privileges or interests may be affected with sufficient information so that the person may respond; (b) an opportunity to be heard orally or in writing and to make representations to the decision-maker before a decision is made; (c) an impartial decision maker with decisions that are made free from a reasonable apprehension of bias; and (d) a right to know the decision, and in some cases, the reasons for the decision.

The concept of procedural fairness is variable and dependent upon the context of each case.[350] In *Baker v. Canada,* the Supreme Court held that the content of the duty of fairness depends on the type of right and the circumstances of the case. The Court listed five factors that affect the content of this duty.[351] Underlying these factors

> . . . is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.[352]

We discuss each factor briefly in relation to the AMPS regime for parking infractions under the *Municipal Act,* AMPS Regulation, and the City of Vaughan by-law.

(i) Nature of the decision being made and process followed in making it

This factor examines how close the administrative process is to a judicial process. The closer the process is to a judicial process the more likely it is that procedural protections used in trials will be required.

The AMPS procedure is very different from the procedure in a POA court: the hearing officers are not judicial officials; the first stage of review by a screening officer is more in the nature of a meeting than a hearing; the process is not adversarial as there is no prosecutor; there is an opportunity for the ticket recipient to be heard at a meeting with the screening officer and then before the hearing officer, but the strict rules of evidence used in court do not apply before a hearing officer; the issue at the hearing is not whether a "fine" should be imposed, but whether the "penalty" should be varied or cancelled, or whether an extension of time for payment should be granted. Taken together, the AMPS hearing process appears to be much closer to an administrative than a judicial hearing.

(ii) Nature of the Statutory Scheme

Subsection 3(2) of the AMPS regulation states that the purpose of the administrative penalty system is to help municipalities regulate "the flow of traffic and use of land, including highways by promoting compliance" with its parking by-laws.[353] The purpose is not to punish, which would suggest greater procedural protections. Furthermore, there are two levels of review of the initial decision to impose a penalty – first by a screening officer and then by a hearing officer – which provides further procedural protection.

The importance of the decision to the individual affected is a significant factor in considering the content of procedural fairness.

(iii) Importance of the Decision to the Individual

The importance of the decision to the individual affected is a significant factor in considering the content of procedural fairness. Compared to other interests that are the subject of administrative or judicial hearings, a maximum penalty of $100 cannot be said to be a significantly important interest that demands a full trial process. Moreover, review procedures are built in to assess if the penalty would cause undue hardship and extensions of time to permit payment may be granted. Where the person refuses to pay a penalty, the Registrar of Motor Vehicles can refuse to validate or issue a new permit to the person until it is paid. Still, these are fairly minor and easily remedied consequences and do not compare to the significant interests that are typically affected in civil, family or criminal court proceedings.

(iv) Legitimate Expectations of the Person Challenging the Decision

In some cases the legitimate expectations of the person challenging the decision can inform the content of the duty of procedural fairness. For example, where a person has a legitimate expectation that they will be able to make oral arguments before an unbiased decision maker, this may inform the type of hearing provided. A legitimate expectation, however, can only give rise to a procedural right, not a substantive right.[354] We are not aware of any assertions by the City of Vaughan that would create expectations of a procedure that is beyond what is set out in its AMPS by-law, and which may give rise to additional procedural protections based on legitimate expectations.

An argument may be made that those confronted with a parking AMP will equate it with a parking ticket based on their past experience with tickets. They may come to expect certain processes to continue to be in effect, such as the Parking Ticket Cancellation Guidelines issued to staff in the City of Toronto directing when parking tickets may be cancelled without appearing before a justice.[355] These guidelines list numerous situations in which a parking ticket may be cancelled administratively, such as where there is incorrect or missing information on a ticket, or where a person presents a permit evidencing their authority to park.[356] While this argument may be made, a more rational approach would be to continue to adopt these cancellation guidelines as the grounds upon which a screening officer may cancel a parking AMP.

(v) The Choice of Procedure Made by the Agency

The Vaughan AMPS regime, which is based largely on the requirements of the AMPS Regulation, contains significant procedural protections that, in our view, are sufficient given the interests at stake and the nature and purpose of the AMPS regime for parking violations.

A fifth factor in assessing the content of the duty of fairness is deference to the choice of procedure adopted by the agency itself. The AMPS Regulation prescribes the most important procedural components of any municipal AMPS by-law for parking infractions, and there is little room remaining to deviate from the procedure prescribed. One would expect some deference to the few additional procedural details provided for in a municipality's AMPS by-law.

In light of the above analysis, we are of the view that the content of the duty of procedural fairness in an AMPS parking regime would be much less than one might expect at a full trial involving more significant rights or interests. The Vaughan AMPS regime, which is based largely on the requirements of the AMPS Regulation, contains significant procedural protections that, in our view, are sufficient given the interests at stake and the nature and purpose of the AMPS regime for parking violations. These protections include:

- Notice of the penalty with particulars of the contravention and information on how to exercise a right of review;
- A right to have the penalty reviewed by a screening officer at a meeting;
- A further right of review before a hearing officer at a hearing;
- An opportunity to make oral representations to the hearing officer; and
- All the procedural protections set out in the SPPA.[357]

With respect to the independence of the decision-maker and protecting against a reasonable apprehension of bias, the City of Vaughan By-Law 157-2009 prohibits interference with decisions made by the screening or hearings officers. It states:

> 6. No person shall attempt, directly or indirectly, to communicate for the purpose of influencing a Screening Officer or a Hearings Officer respecting the determination of an issue respecting a Delegated Power of Decision in a proceeding that is or will be pending before the Screening Officer or Hearings Officer except a person who is entitled to be heard in the proceeding or the person's lawyer or licensed paralegal and only by that person or the person's lawyer or licensed paralegal during the hearing of the proceeding in which the issue arises. Failure to comply with this section constitutes an offence.

Finally, the AMPS Regulation requires that the appointment of a hearing officer be consistent with conflict of interest guidelines.[358] Vaughan's by-law states that City Council members and relatives are ineligible for appointment as a screening or hearing officer.[359]

It would appear that the Vaughan by-law puts in place sufficient protections to ensure independent decision-making by the screening and hearing officer.

Use of AMPS for Minor Offences under Current Part I

80% of Part I charges relate to offences under the *Highway Traffic Act* and its regulations, representing approximately 1.6 million charges each year that take up approximately 30,000 hours of time by justices of the peace. Many offences would be considered minor. They take up enormous court and judicial resources that could well be directed to more serious offences. While we highlight minor *Highway Traffic Act* offences, there are other provincial statutes for which AMPS may be appropriate. For example, the *Building Code Act, 1992*[360] is municipally enforced. It provides a system of administrative orders with corresponding rights of review and appeal. A system of administrative penalties is a natural extension of these existing systems to encourage compliance in advance or possibly in lieu of a POA prosecution. The current use of judicial officials to dispose of these minor offences may not promote respect for the administration of justice. For these and other reasons, Archibald, Jull and Roach argue that minor speeding offences should be transferred out of POA courts and into an AMPS regime:

> Resource considerations suggest that for minor provincial offences, we ought not to use our courts at all. Minor speeding offences are a perfect subject for administrative monetary penalties. In our view, the present practice of utilizing courts, presided over by Justices of the Peace, to adjudicate minor speeding offences, does not make great practical sense. Moreover, the practice is inconsistent with the move towards administrative monetary penalties in other sectors such as the environment.[361]

The legal, policy and constitutional arguments relating to parking AMPS would be relevant to an analysis of whether minor Part I offences should also move to an AMPS regime. Having said that, careful consideration of a variety of additional legal, policy and operational issues should be undertaken before moving minor offences, including minor Highway Traffic Act offences, into an AMPS regime.

The legal, policy and constitutional arguments relating to parking AMPS would be relevant to an analysis of whether minor Part I offences should also move to an AMPS regime. Having said that, careful consideration of a variety of additional legal, policy and operational issues should be undertaken before moving minor offences, including minor *Highway Traffic Act* offences, into an AMPS regime. They include:

- **Which offences?** There are hundreds of *Highway Traffic Offences* and many other minor offences under other statutes that could potentially be subject to an AMP. An assessment of which should qualify for an AMP will have to be made, and for consistency, that decision should be based on a rationale and consistently applied threshold test.
- **When to impose an AMP or commence a prosecution?** Some offences may be considered minor in some circumstances (e.g., driving without a licence because the driver forgot his licence at home) but more serious in others (e.g., driving without a licence because it was previously cancelled by the Registrar of Motor Vehicles because of prior convictions). Would the enforcement officer have jurisdiction to issue an AMP or elect a POA prosecution?
- **Nature of offence — absolute vs. strict liability**. Another issue is whether offences that are now strict liability offences would effectively become absolute liability offences if enforced through an AMPS regime. Would a defence of due diligence be available for some offences before a hearings officer under an AMPS regime, or would they expressly be excluded by statute as is done for environmental penalties under the *Environmental Protection Act*? If due diligence defences were to be

maintained, might it be possible to outline those defences in guidelines to be used by a hearing officer which could also be made available to the public?

- **The penalty and constitutional considerations**. Whether the proposed penalty contemplates imprisonment or another punitive penalty. The quantum of any penalty should not be punitive; if so, it might invoke *Charter* rights.
- **Other legal and policy issues**. For example, how might an AMPS hearings officer deal with an unlawful arrest or search that arose during the commission or investigation of a Part I offence, and under what authority would a hearing officer exercise any remedial powers? Also, would people still be prepared to comply with important regulatory standards if they know that the only consequence was a monetary penalty, versus a potentially more severe penalty that could be issued only by a justice of the Ontario Court of Justice (e.g., probation, licence revocation)?
- **Implementation issues**. The volume of cases would be significant, and municipalities would have to develop and implement appropriate structures and staffing to accommodate the expected case volume. Appropriate IT infrastructures would also have to be in place to allow for appropriate reporting to government agencies/ministries for enforcement purposes (e.g., Registrar of Motor Vehicles).
- **Loss of Victims' Justice Fund Revenue**. Section 60.1 of the POA authorizes a victim fine surcharge to be levied on fines imposed in Part I or Part III offences. The Ministry of the Attorney General advises that, in 2010, this surcharge generated $43.5 m. in revenue dedicated to support programs and community agencies that assist victims. Transitioning some Part I offences to an AMPs system would reduce revenue to this fund.
- **Creating two discrete systems**. If an AMPS regime for certain minor offences is created, but the current POA system is to be maintained for other offences, there would be two discrete systems. There may be economies of scale achieved by keeping a single system for all Part I and III offences, rather than creating a new and separate system for only certain minor offences.

The sheer volume of Part I offences and the time devoted to their disposition require that this issue be further investigated. We believe that the system could benefit from the Ontario government undertaking an analysis of which minor provincial offences, and most notably, minor *Highway Traffic Act* offences, are candidates to transition to an AMPS regime after due consideration of all legal, policy, social and operational issues.

Use of AMPS for Parking Enforcement by First Nation Communities

A further potential reform option was presented to the LCO near to the completion of the Interim Report in the project, the use of AMPS for parking enforcement by First Nation communities. We discuss it briefly under Part IV as an issue worthy of further review and consideration.

4. Conclusions and Recommendations

The use of AMPS as an alternative to prosecuting minor Part I provincial offences is a subject worthy of its own report. However, we have sought input and conducted research and analysis to recommend discrete yet major reforms that will see greater use of AMPS as the exclusive enforcement mechanism for parking infractions.

As a starting point, there is a strong *prima facie* case that significant cost and time savings can be achieved if all Part II parking infractions were moved out of the POA system and into an AMPS regime in each municipality. Even if a compelling cost-savings argument cannot be established or is not accepted, there remains something strikingly disproportionate with using justices of the peace and limited court resources for these very minor matters. We believe that the use of AMPS, based on the model adopted in the City of Vaughan, provides a fair and balanced mechanism to review administrative penalties and that this system would not offend the *Charter*. The AMPS regime is also more accessible and it should be made available for the enforcement of by-laws relating to systems of disabled parking. Most importantly, we believe that greater respect for the rule of law and the administration of justice would be achieved if court and judicial resources were reserved for the prosecution of more serious provincial offences.

[T]here is a strong prima facie case that significant cost and time savings can be achieved if all Part II parking infractions were moved out of the POA system and into an AMPS system in each municipality.

The City of Toronto, in a submission to the LCO, supports the use of AMPS for parking offences but cautions against making AMPS mandatory without first obtaining an opinion from the Court of Appeal on this issue. If the proposed AMPS scheme were struck down by the courts as unconstitutional, it could have a deleterious impact on the City. According to the City Solicitor,

> If a court struck down the [AMP] system in place for resolving parking tickets the financial impact on the City would be approximately $6.5 million per month or $215,000 per day until the problem was corrected. An even more significant problem would be the traffic and pedestrian safety issues that would result from the resulting lack of enforcement.[362]

Accordingly, the City of Toronto has proposed that the constitutionality of the AMPS scheme be considered by the Court of Appeal by way of reference from the Attorney General pursuant to section 8 of the *Courts of Justice Act*. We do not believe a reference is required. In the preceding section, we have gone to some length to consider the constitutionality of the proposed AMPS regime, have commissioned a paper to consider this very issue, and one would expect that the Ministry of the Attorney General's Constitutional Law Branch would have duly considered this issue before the AMPS process was incorporated into the *Municipal Act, 2001* (and the *City of Toronto Act, 2006*). In sum, we do not believe constitutional concerns exist with the proposed AMPS regime, although it is, of course, open to the Attorney General to direct a reference to the Court of Appeal on this issue out of an abundance of caution.

We believe that a transition to an AMPS regime for all Part II parking infractions in all Ontario municipalities should be completed within three years; however, the exact date will have to be determined after further consultation with municipalities and relevant government ministries.

With respect to having AMPS apply to other minor offences currently prosecuted under Part I, including minor *Highway Traffic Act* offences, we believe there is a strong *prima facie* case to do so, subject to an examination of several outstanding legal, policy and operational considerations. The Law Society of Upper Canada, in its comments on the Interim Report for this project, opposes the inclusion of Part I offences within an AMP system. It noted that while many offences prosecuted under Part I might be considered minor, they may have serious public safety implications, particularly in the context of the

Highway Traffic Act, where serious injury or death can arise from the commission of seemingly minor offences. It also noted that a judicial process will still be required for resolving other provincial offences, and that from an access to justice perspective, efficiency may not be achieved by having two separate procedures.[363]

We agree that these are valid considerations. In fact, we have noted some of them above. These factors ought to be considered by the Ministry of the Attorney General when assessing whether certain minor offences that are typically prosecuted under Part I ought to transition to an AMPS regime. In our view, there nevertheless remains merit in conducting a comprehensive policy analysis of this issue given the potential benefits of an AMPS regime; the review should take into account all appropriate factors, including those raised by the Law Society.

Given these conclusions, we make the following recommendations:

The LCO recommends that:

10. **Within three years, after the Ministry of the Attorney General has consulted with municipalities and an appropriate IT infrastructure has been developed to report defaulted AMPs, the POA be amended to remove the prosecution of Part II parking infractions in the Ontario Court of Justice.**

11. **Within three years, each municipality (or jointly with other municipalities or Municipal Partners) adopt and implement a by-law for administrative penalties to enforce by-laws relating to the parking, standing or stopping of vehicles, including by-laws relating to disabled parking.**

12. **Amend O. Reg. 333/07 under the Municipal Act (and O. Reg. 611/06 under the City of Toronto Act, 2006) to permit administrative penalties for the enforcement of by-laws establishing systems of disabled parking.**

13. **Increase the monetary limit for administrative penalties in section 6 of O. Reg 333/07 (and section 6 of O. Reg. 611/06) from $100 to $500, or such other amount as is necessary to permit enforcement of disabled parking by-laws through AMPS.**

The LCO recommends that:

14. Each municipality and relevant government Ministries, including the Ministry of Transportation, immediately assess operational challenges to the successful implementation of an AMPS regime for parking enforcement (such as any required IT infrastructure), and put in place a plan to resolve those challenges within three years. Consultation with municipalities who have already implemented an AMP system may assist in overcoming any operational challenges.

15. The Ontario government conduct a review of minor provincial offences most typically commenced as Part I proceedings, and in particular, minor Highway Traffic Act offences currently prosecuted under Part I, to assess which offences may be better enforced under an AMPS regime. This review should consider, among other legal, policy and operational considerations:
    a. the most common offences currently prosecuted under Part I, their volume, and associated court and judicial resources required to dispose of these offences as compared to an AMPS regime;
    b. the effectiveness of AMP regimes for other minor offences;
    c. the nature of the offence (i.e., whether it is a strict or absolute liability offence), and whether due diligence defences could or should be maintained in an AMPS regime through appropriate guidelines to the administrative hearing officer;
    d. the proposed penalty under an AMPS regime and whether it would be punitive or give rise to the potential of imprisonment;
    e. whether the potential circumstances giving rise to the offence could potentially lead to allegations of infringements of Charter or other rights, and if so, how might those allegations be dealt with under an AMPS regime;
    f. operational issues that would hamper the ability to transition the offence into an AMPS regime;
    g. the impact on the Victims' Justice Fund; and
    h. the merits of maintaining two separate and distinct systems for the resolution of the same provincial offences currently prosecuted under Part I (e.g., an AMPS and a POA court-based system).

E. Sentencing Reform

1. Sentencing Provisions Under the POA

Two areas of sentencing reform were proposed during our consultations: first, whether a statement of sentencing purposes and principles should be adopted in the POA, and second, whether the range of sentencing options available to the court should be expanded. We begin with a snapshot summary of the current sentencing provisions in Part IV of the POA and then an analysis of these two issues with reference to responsive regulation discussed in Section II.B.

Under the POA, a maximum fine of $1,000 may be imposed where a person is convicted of an offence commenced under Part I.[364] For Part III offences, the maximum fine is $5,000 unless a statute directs otherwise.[365] Certain sentencing powers are limited to Part III proceedings, such as directing the preparation of a pre-sentence report[366] and issuing a probation order.[367] There is no general authority within the POA to order imprisonment as a sentence; such authority must exist in the offence-creating statute, although the POA creates several procedural offences where a term of imprisonment may be ordered (e.g., contempt of court can result in a fine of up to $1,000 or 30 days imprisonment).[368] Where a statute authorizes imprisonment, the court may consider the time the person convicted already spent in custody[369] and the imposition of a fine in lieu of imprisonment.[370]

Upon conviction, a defendant is liable to pay court costs as prescribed by regulation,[371] and a surcharge when a fine is imposed in respect of a Part I or Part III offence.[372]

Fines are due and payable within 15 days after they are imposed.[373] When a fine is in default, it may be enforced as a civil judgment by filing a certificate in either the Small Claims Court or Superior Court of Justice, which shall be deemed to be an order of that court for the purposes of enforcement.[374] Other fine enforcement tools include a suspension of or refusal to renew a permit, licence, registration or privilege where an Act authorizes the suspension or refusal to renew.[375] The POA prescribes other enforcement tools, but as noted previously, they are not truly in force since by virtue of subsection 165(3) of the POA, they are not available to municipalities who have entered into transfer agreements with the Attorney General. They include the authority of a justice to issue an arrest warrant when a fine is in default and where other methods of fine collection have failed,[376] and the authority of a justice to order a term of imprisonment for unpaid fines where incarceration would not be contrary to the public interest.[377] We further note a Supreme Court of Canada decision that said genuine inability to pay a fine is not a proper basis for imprisonment.[378] Where a person is unable to pay a fine, a justice may grant an extension of time, establish a schedule of payments, or in exceptional circumstances, reduce the fine.[379]

A fine options program, authorized by the Act and established by regulation, permits the payment of fines by means of credit for work performed,[380] although no such program is currently in effect.

2. Sentencing Purpose & Principles

Challenges Faced Without Prescribed Sentencing Purpose or Principles

The POA does not contain a statement of the purpose or principles of sentencing. The court has had to fill in the gap through case law. This approach has been criticized since the judiciary has had to make policy decisions on sentencing, arguably a task better left to the legislature. Also, several cases with similar facts have had vastly different sentencing outcomes that are difficult to rationalize. Several commentators have called for clear sentencing guidelines to promote consistency in sentencing and to assist the court in advancing the offence-creating statutes' objectives. This is in contrast to the *Criminal Code* which expressly states the purpose and principles of sentencing applicable to criminal matters,[381] and British Columbia's *Public Health Act*[382] which also contains sentencing principles for offences committed under that Act. Ontario's *Environmental Protection Act* does set out aggravating factors to consider when sentencing environmental offenders,[383] but it also lacks an overriding statement of sentencing purposes and principles. Thus Archibald, Jull and Roach conclude that sentencing provisions for Ontario's regulatory offences "are a patchwork quilt that are in need of reform."[384]

The POA does not contain a statement of the purpose or principles of sentencing. The court has had to fill in the gap through case law. This approach has been criticized since the judiciary has had to make policy decisions on sentencing, arguably a task better left to the legislature.

Over the years, the court has established lengthy lists of sentencing principles for regulatory offences. It has considered and relied upon as many as 23 factors including the nature of the offence, the size, wealth, and nature of operations of the defendant, and the social utility of the defendant's actions or business.[385] This "shopping list" does offer guidance to the court, but it has not been wholly satisfying.[386] For instance, it is not clear how the factors interrelate, if they should be considered aggravating or mitigating and what priority should be given among them.[387] Furthermore, while the shopping list approach has been developed in trial courts of first instance, the Ontario Court of Appeal has rendered few decisions to guide lower courts during sentencing. One reason given for this lack of sentencing jurisprudence is the onerous threshold that must be met in order to appeal a sentence to the Court of Appeal.[388]

The leading Court of Appeal decision on sentencing in regulatory matters is *R. v. Cotton Felts Ltd*.[389] An employee was cleaning a moving machine when his arm was sucked into a machine's rollers and crushed. His arm had to be amputated below the elbow. A regulation under the *Occupational Health and Safety Act* provides that a machine shall be cleaned only when motion that may endanger a worker has stopped. The defendant was convicted and given a $12,000 fine that was appealed. The Court of Appeal held that fines are typically used to enforce regulatory matters and that the primary determinant of the amount is deterrence:

> *To a very large extent the enforcement of such [regulatory] statutes is achieved by fines imposed on offending corporations*. The amount of the fine will be determined by a complex of considerations, including the size of the company involved, the scope of the economic activity in issue, the extent of actual and potential harm to the public, and the maximum penalty prescribed by statute. *Above all, the amount of the fine will be determined by the need to enforce regulatory standards by deterrence*.[390] [emphasis added]

The court further stated that while the fine should not be harsh, it should "not appear to be a mere licence fee for illegal activity."[391] The Court of Appeal has not issued a

sentencing decision of general application like *Cotton Felts* in the more than 25 intervening years.[392]

A number of writers take issue with *Cotton Felts'* reliance on fines as the predominant sanction, and deterrence as the paramount sentencing principle for regulatory matters. They argue that other principles, such as remediation and rehabilitation, have an equal or even more important role in regulatory sentencing.[393] They also call for additional tools beyond fines to implement this broader array of sentencing principles.[394] Below we discuss principles of sentencing and other sentencing options that ought to be considered to enable courts to help promote regulatory goals.

Inconsistency in Sentencing Outcomes

A number of writers take issue with Cotton Felts' reliance on fines as the predominant sanction, and deterrence as the paramount sentencing principle for regulatory matters. They argue that other principles, such as remediation and rehabilitation, have an equal or even more important role in regulatory sentencing.

Libman argues that *Cotton Felts* gives very little guidance and as a result there is a wide range of sentencing outcomes that are difficult to explain. He also questions the use of fines and the lack of other sanctions aimed at repairing the harm or rehabilitating the offender to promote future compliance with the regulatory statute. To illustrate his point, Libman examines several cases from Ontario and other Canadian jurisdictions.[395]

Examining workplace safety cases first, Libman references the *R. v. Ellis-Don* decision where the Ontario District Court reduced a fine imposed by a lower court under the *Occupational Health and Safety Act* from $20,000 to $10,000.[396] A worker died after falling down an elevator shaft. On appeal, the majority of the Court of Appeal did not deal with the sentence because it ordered a new trial after addressing a constitutional issue, but the dissenting judge would have upheld the $10,000 fine.[397] This would have resulted in a fine that was less than the fine in *Cotton Felts*, even though *Ellis-Don* involved a fatality and the defendant in that case was a major corporation.[398] In another case, an employee received minor burns and others felt the impact after the boom of an excavator came into contact with live wires. The Court of Appeal approved fines against a small family-run business that totaled $35,000, far exceeding the fines awarded in *Cotton Felts* or *Ellis-Don* and where the injuries were much less significant than in these other two cases.[399]

Even in cases with the same facts, different levels of court have difficulty determining the proper amount of a fine. In *R. v. Inco Ltd.,* the defendant was a large mining company ultimately convicted of failing to maintain equipment in good condition and failing to leave a guard to protect workers from a moving part of equipment.[400] This resulted in the death of an employee. The trial judge fined the company $250,000 per count on three counts. The Superior Court of Justice overturned one of the convictions and reduced the sentence on the remaining counts to $125,000 per count after revisiting the trial judge's assessment of two factors applicable to sentencing.[401] The Court of Appeal then restored the fine of $250,000 on the remaining two counts.[402] Libman notes similar disparities in fine amounts from decisions in Alberta, Saskatchewan, New Brunswick and Newfoundland.[403]

Sentences rendered in consumer protection cases can be equally difficult to explain. Libman cites *R. v. Browning Arms Co. of Canada* where the trial judge imposed a fine of $15,000 per count on four counts of "resale price maintenance" for a total of $60,000. The court noted that a large total fine was required so that it did not amount to "a mere licence to carry on."[404] The Court of the Appeal disagreed and imposed a fine of $2,500 per count for a total of $10,000.[405] The result was that the total fine for all four counts was $5,000

less than what the trial judge would have ordered for each count individually. The case of *R. v. Epson (Canada) Ltd*. offers a further example. The trial judge imposed a fine of $200,000 for an attempt to influence upwards the price by which distributors advertised the defendant's products, but the Court of Appeal found the fine to be disproportionately high and reduced it to $100,000.[406] And in *R. v. Total Ford Sales Ltd.,* the Ontario District Court overturned fines ordered by a provincial court judge totalling $66,000 and replaced them with fines totalling $19,600 on the basis that the trial judge had not correctly applied certain sentencing factors.[407] Again, the variance in the fines with the same facts supports the argument that greater guidance is needed in sentencing.

The third area examined by Libman is environmental offences. Although sentencing tools other than fines are more likely to be used for environmental offences, there is still considerable variation in the sentences handed down. In the case of *R. v. Bata Industries Ltd*., the Provincial Court imposed a total penalty of $120,000 for the unlawful discharge of toxic waste and a two year probation order.[408] Half of the penalty was a fine and the remaining $60,000 was to fund the start-up costs of a local program designed to clean up domestic toxic waste, which was a term of the probation order. On top of Bata's fines, two directors of the company were fined $12,000 each. The District Court on appeal reduced the total penalty to $90,000, resulting in $60,000 paid as a fine to the government's Consolidated Revenue Fund and only $30,000 paid towards the local toxic clean up program. In addition, the fines for the individual directors were reduced to $6,000 each.[409]

"Fairness demands that courts tailor sentences to the circumstances of each offender and offence. If sentencing is to be legitimate though, it should be based on a consistent and principled approach that aligns that part of the regulatory process with the underlying regulatory goals."

Sherie Verhulst

Clearly, the unique circumstances of a given case will result in different sentences being rendered, and therefore some disparity must always be expected. However, if sentencing is to be legitimate, it has been argued that "it should be based on a consistent and principled approach that aligns that part of the regulatory process with the underlying regulatory goals."[410] More defensible and principled sentences might be expected if the purposes of sentencing and sentencing principles are firmly established and not left entirely to judicial discretion. Moreover, it appropriately falls to the legislature to provide courts with the necessary tools to achieve the regulatory goals. As Libman notes:

> . . . while the state of sentencing for regulatory offences in Canada may not be in "chaos", it certainly appears that there is in the courts a lack of uniformity, and marked inconsistency in applying sentencing purposes and principles to such offences. Indeed, how could it be otherwise, one might wonder, given the absence of any legislative rationale or guiding principle in sentencing provisions for most regulatory offences.[411]

Others writers have similarly argued that greater consistency in sentencing is needed and that legislation can play a role by providing a principled and consistent approach.[412] Of key importance, legislation should ensure that sentencing aligns itself with regulatory goals. As stated by one writer:

> Certainly, some disparity is to be expected. Fairness demands that courts tailor sentences to the circumstances of each offender and offence. If sentencing is to be legitimate though, it should be based on a consistent and principled approach that aligns that part of the regulatory process with the underlying regulatory goals. These may be categorized generally as the prevention or mitigation of harm, the enhancement of administrative efficiency or the achievement of a particular goal in the public interest.[413]

Development of Sentencing Purposes and Principles Elsewhere

Sentencing purposes and principles adopted in other contexts offer a basis to consider whether similar reforms should be made to the POA. Various studies by the Law Reform Commission of Canada, Parliamentary Standing Committees, the Canadian Sentencing Commission and the Government of Canada each recognized the need to express sentencing principles in the *Criminal Code*. The Standing Committee on Justice and the Solicitor General conducted a review of sentencing and conditional releases and its 1988 Report made the following comments on sentencing disparity in the criminal context:

> Research on sentencing disparity demonstrates that the most frequently alleged cause for unwarranted variation is confusion about the purposes of sentencing. No sentencing goals are now set out in legislation. Conflicts and inconsistencies in case law appear to arise from the fact that it is often impossible to blend the elements of public protection, punishment, denunciation and deterrence; frequently, they are contradictory and inconsistent. It is important, therefore, to achieve consensus on a sentencing rationale for the guidance of the judiciary and the enlightenment of the general public.[414]

This reform movement eventually led to the introduction of Bill C-41[415] which provided for "comprehensive sentencing reform".[416] As a result, the *Criminal Code* now contains express sentencing purposes and principles:[417]

> **Purpose**
>
> 718 The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.
>
> **Fundamental principle**
>
> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> **Other sentencing principles**
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age,

> mental or physical disability, sexual orientation, or any other similar factor,
>
> (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
>
> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
>
> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
>
> (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or
>
> (v) evidence that the offence was a terrorism offence shall be deemed to be aggravating circumstances;
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The *Criminal Code* provisions do not create a hierarchy of objectives or principles, nor do they provide guidance to the judiciary on how they are to be applied. In fact, this has been a source of considerable criticism.[418] Despite these challenges, others have argued that the *Criminal Code* provisions are better than an absence of purposes and principles and that it brings some order to sentencing.[419]

The Public Health Act[420] in British Columbia is another example of legislation that sets out purposes and principles of sentencing. Unlike the *Criminal Code,* it prioritizes sentencing principles and requires sentences that are first, remedial in cases where there has been harm; second, intended to rehabilitate where it is expected that the offender will continue to engage in the regulated activity; third, will serve as a general deterrent where the sentence under the previous priorities is insufficient and a further penalty can be justified to deter others; and fourth, to punish if the offence was deliberate or other aggravating circumstances justify punishment. The relevant sections are discussed in greater detail below.

Introducing Sentencing Purposes and Principles to the POA

Similar to the results of the research on sentencing disparity under the *Criminal Code*, there appears to be unwarranted variation in sentencing in POA matters. The patchwork of legislative provisions and the limited case law from the Court of Appeal have not filled in the legislative gaps. Sentencing should have a principled basis to best promote regulatory objectives and a statement of principles in the POA can achieve this.

Rather than simply adopt the *Criminal Code* sentencing principles, special attention must be given to the distinction between criminal and regulatory offences, and most notably,

the "regulatory cycle" discussed previously.[421] Simply put, it is the cycle by which a regulated party will engage in a regulated activity, a breach of a regulatory standard will be detected and resolved (e.g., warning letter, AMP or prosecution with fine), and then the regulated party will typically resume in the regulated activity. They will continue to haul waste, drive their car, run a manufacturing plant or spread biosolids on a farm. Indeed, it is in the interest of society that the convicted person continues to carry on the regulated activity, but that they do so lawfully, rather than being prohibited from doing it altogether.

When a provincial offence has been committed, appropriate and consistent sentencing requires recognition of the regulatory cycle. Thus the court need look "not only backwards at the conduct which gave rise to the non-compliance, but forward as well, since the defendant will often continue to participate in the regulated activity following the imposition of punishment."[422] Therefore, when sentencing, the court ought to consider what response would best promote compliance in the future, "which is very different than the context in which criminal defendants are punished for engaging in anti-social or moral blameworthy behaviour."[423] This is the key distinction between sentencing in criminal matters versus regulatory ones, and it must be considered when developing sentencing principles for regulatory offences as well as how those principles interrelate.[424]

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To fully understand the regulatory cycle and its implications for sentencing, trends in regulatory enforcement must be considered. Regulatory standards are moving away from being design-based.[425] Design-based regulations identify how an act is to be carried out and they are clear and direct (e.g., an operator must install a number 2 scrubber on each smoke stack).[426] But design-based regulations have been criticized as being slow to adapt to changing technology and expertise, which may lead to impaired efficiency and innovation.[427] A regulation that is too narrow or inflexible can unduly hamper effective operations. One report looking at the financial sector argues that such prescriptive standards fail to respond quickly enough to changes in the market, burden industry and have failed to prevent misconduct.[428]

Design-based standards are being replaced with newer strategies including outcome-based, performance-based and principles-based regulation. These types of regulations have been distinguished as follows:[429]

1. "Outcome-based" regulations provide for a measurable result to be achieved (e.g., an operator must ensure that emissions from a stack contain less than *x* parts per million of nitrous oxide);
2. "Performance-based" regulations provide for a non-measurable result to be achieved (e.g., an operator must ensure that emissions do not contain nitrous oxide in amounts that cause an adverse effect on the environment); and
3. "Principles-based" regulations establish standards of conduct (e.g., the operator must dispose of a dead farm animal in a manner that is environmentally sound).

While these newer strategies provide regulated persons with more operational flexibility, the latter two can create uncertainty around the regulated person's precise obligations. The obligation to install a specified scrubber is a much more exact obligation than ensuring that an operation is run in an environmentally sound manner. When an uncertain

regulatory standard is the subject of a prosecution, the sentencing court must consider the lack of certainty of the standard, whether the sentence can be used to assist the offender in determining what the regulatory standard requires and how the sentence will help the offender to achieve that standard.[430]

This shift in regulation strategies has led to less of an adversarial approach to enforcement,[431] and a greater reliance on enforcement tools at the bottom end of the regulatory pyramid discussed in Section II.B of this Report. Warning letters, education and attempts to persuade by the regulator ought to be used before approaches at the top of the pyramid such as investigation, prosecution and licence suspension are invoked. When the court is sentencing it should consider any past attempts at compliance and the defendant's response to those attempts. The court should also consider the effect of the sentence on the future relationship between the regulator and the regulated person. In all likelihood the regulator and the regulated party are likely to continue dealing with each and the court must consider whether the sentence might actually be used to enhance cooperative enforcement in the future.[432] Libman sums it up as follows:

> To put the matter another way, taking into account the past relationship between the regulated party and the regulatory authority, how will the sentence imposed by the court impact on the parties' ability to move forward and resume a non-adversarial, cooperative working relationship.[433]

When the court is sentencing it should consider any past attempts at compliance and the defendant's response to those attempts. The court should also consider the effect of the sentence on the future relationship between the regulator and the regulated person. In all likelihood the regulator and the regulated party are likely to continue dealing with each and the court must consider whether the sentence might actually be used to enhance cooperative enforcement in the future.

After considering the new regulatory strategies, Sherie Verhulst argues that courts should adopt a five step inquiry when sentencing a matter under British Columbia's *Offence Act*[434], which is that province's equivalent of the POA. She proposes that the court:

1. Encourage joint submissions on aggravating and mitigating factors as well as the sentence to be imposed ("joint submissions");
2. Impose a sanction that remedies the violation, to the extent that such a sanction is possible and reasonable (e.g., compensation, probation, community orders) ("remedial");
3. If the offender is likely to continue to engage in the regulated activity after sentencing, but the offender's behaviour must change to prevent future breaches, impose a sanction that promotes the changes necessary to prevent future violations (e.g., probation, community service) ("rehabilitation");
4. Impose a sanction that promotes change in the behaviour of other persons, but only if the court believes that it could serve a regulatory objective and where the remedial and rehabilitative sanctions are insufficient given the circumstances of the matter (e.g., community service, fines) ("general deterrence");
5. Impose a sanction that denounces and punishes the offender's behaviour if aggravating circumstances make such a sanction appropriate (e.g., punitive publicity orders, order to cease certain activities temporarily or permanently) ("denunciation").[435]

Verhulst's approach envisages a hierarchy of principles for the court to consider when sentencing.[436] Such a hierarchy has been said to be an improvement to the approach under the *Criminal Code,* which provides no priority and little guidance on how to apply its sentencing principles and purposes.[437]

Libman notes that each individual step in the hierarchy is well grounded in regulatory jurisprudence. Deterrence and denunciation are retained as traditional sentencing principles consistent with the *Cotton Felts* case, but now the principles of remediation and rehabilitation are expressly noted and they have a higher priority than deterrence. This is consistent with a contemporary view of regulatory law which envisages persuasion as a stronger motivator than punishment, and an enforcement regime that is flexible and responsive to newer regulatory strategies.

While joint submissions on aggravating or mitigating factors and the sentence to be imposed can be very helpful, it may not be practical in all POA cases . . . [M]any parties who appear before the court, particularly on minor POA offences, will not be legally trained or will represent themselves, and for such parties, knowing what factors are aggravating or mitigating or the range of appropriate sentencing outcomes may not be possible.

Verhulst and Libman offer justifications for each step. The first is the encouragement of joint submissions from the prosecutor and the defence setting out aggravating and mitigating factors, as well as the sanction that they agree the court should impose. For complex matters that involve performance-based or principle-based regulation, this first step can be immensely helpful. The regulator and the regulated persons, each with expertise that the court may not possess, can propose a sentence that will further the regulatory objectives and that is also informed by the ability of the regulated person to comply with the sentence terms. One can expect more creative sentences that will advance greater compliance in the future. In addition, agreed-upon sentences promote a greater understanding of each of the parties' positions that encourages improved cooperation between the two in the future.[438] Joint submissions over purely court imposed punishment can also help promote future compliance. As noted by Ayres and Braithwaite,

> When punishment rather than dialogue is in the foreground of regulatory encounters, it is basic to human psychology that people will find this humiliating, will resent and resist in ways that include abandoning self-regulation.[439]

While joint submissions on aggravating or mitigating factors and the sentence to be imposed can be very helpful, it may not be practical in all POA cases. First, many parties who appear before the court, particularly on minor POA offences, will not be legally trained or will represent themselves, and for such parties, knowing what factors are aggravating or mitigating or the range of appropriate sentencing outcomes may not be possible. Second, even when a plea is entered, the parties will often not be able to agree on aggravating or mitigating factors and the court will have to determine whether such factors exist. For these reasons, we do not believe that agreement on aggravating or mitigating factors or a recommended sentencing outcome should be a *requirement* in all cases. Instead, we believe the court should merely be open to hearing any agreement on these issues that has been reached by the parties. Where a consensus on such factors is present, it will ensure that all of the relevant considerations on sentencing are before the court, and obviate the necessity for resolving factual disputes as to their application. Where the parties are unable to agree, the court will be required to resolve these factual issues in order to arrive at the correct basis for its sentencing decision.

In many cases, remediation may be an appropriate first consideration when sentencing. The court will consider orders that remedy the harm done. Where a person voluntarily enters into a regulated area and creates harm as a result of unlawful conduct, common

sense and fairness dictate that the harm ought to be remedied by the person who created it. Regulated persons should take responsibility for their actions through sanctions that are logically connected to the offence.[440] Remediation is important because it attempts to restore victims to the position they were in prior to the violation and is consistent with restorative justice principles.[441]

Tools such as compensation, probation orders and community service may be much more effective sentencing tools than fines when seeking to remedy harm, and the circumstances of the case may dictate that they be preferred over fines. Determining appropriate fines is often difficult and sometimes fines do not directly change the behaviour of the offender or satisfy regulatory goals.[442] Fines can easily become a mere "cost of doing business", and once collected in general government coffers, they may not be earmarked to remedy the harm that was created.

Remediation may be more difficult where there was no actual harm and instead, the achievement of a particular public interest goal has been undermined. Nonetheless, the court may be able to fashion a sentence that addresses remediation in these circumstances.[443] For example, if an offender were responsible for a spill in a lake but there were no known immediate adverse effects, the court could require a long-term study of the toxic effects of the spilled materials by an independent researcher to be paid for by the offender. Similarly, if there were no injuries arising from toxic chemicals discovered in a nursing home, the court could order improved staff training on the use of toxic chemicals. These sentences would create a further benefit of requiring the offender to take a direct interest in furthering the regulatory goals.

Tools such as compensation, probation orders and community service may be much more effective sentencing tools than fines when seeking to remedy harm, and the circumstances of the case may dictate that they be preferred over fines.

After remediation, rehabilitation of the offender may be particularly appropriate where it is likely that the defendant will engage in the regulated activity after sentencing.[444] The court's objective is to craft a sentence that encourages and assists the defendant in meeting regulatory standards in the future. Society's interest will often lie in the person continuing to carry out this activity lawfully rather than the person not carrying it out at all, and therefore rehabilitative orders are preferred over licence suspensions or crippling fines. It is better that a nursing home's doors are kept open in a manner that is safe for those who need assisted living, rather than its being shut down completely.

Research suggests that organizations go through three stages in complying with regulatory obligations. The particular stage that an organization finds itself should be taken into account by courts when fashioning rehabilitative remedies. The first stage is a commitment to comply. Second, the organization must learn how to comply. Third, it must institutionalize compliance through such means as standard operating procedures, performance appraisals and the organization's culture.[445] Thus if the organization were in the second stage of compliance the court might, as a term of probation, order that certain employees take training to learn how to comply with regulatory standards. If it were in the third stage, the court might require the company to hire an expert to help it develop standard operating procedures that meet regulatory standards.

Probation is to be preferred over fines to achieve the goal of rehabilitation. Empirical evidence suggests that while fines deter certain types of behaviour,[446] they do not change attitudes or long-term behaviour.[447] We discuss below the need for broader authority in the POA for courts to impose probation since it can play a key role in implementing the

sentencing principle of rehabilitation. Other tools such as an "embedded auditor" also have the potential to further rehabilitation goals.

Probation orders should be targeted at behaviours that help promote compliance. In Section II.B., we cited research that suggests regulated parties are often motivated to comply with regulatory standards, not because of a fear of a fine, but because of other factors. They include maintenance of a good reputation, a desire to do what is right, fidelity to an identity as a law-abiding citizen and realization of a self-concept of social responsibility.[448] These motivators ought to be the source of proportionate and custom-tailored probationary orders for regulatory breaches that promote compliance, rather than the imposition of a standard fine as the first response.

Fourth, the court should address general deterrence. Noting that general deterrence has been the primary focus of regulatory sentencing in the past, Verhulst argues that the pre-eminent status of this objective should now give way to other pressing sentencing principles for the following reasons:

> a. given the need to consider the effect of the totality of the sentence on an offender, an emphasis on deterrence leaves less room for remedial and rehabilitative measures, and, if regulatory objectives are to be achieved, those should have greater priority;
>
> b. research in both the criminal and regulatory law contexts strongly suggests that general deterrence, and, in particular, high penalties for this purpose, is not actually successful in changing long-term behaviour;
>
> c. it is unfair to punish one person for the sake of the anticipated sins of others; and
>
> d. the success of performance-based and principles-based regulation, and less adversarial enforcement strategies, relies on an assumption that most regulated persons largely act with goodwill rather than responding only to threats of formal sanction – imposing a sanction for the purposes of general deterrence conflicts with this assumption.[449]

A sanction based on general deterrence might be justified, for example, where there is a systemic problem in the regulated industry.

A penalty based on general deterrence should only be imposed if two conditions are both met:

> First, if the court has reason to believe that the sanction would serve a purpose that is consistent with the regulatory objective; second, if the totality of the sentence would not be disproportionate, given any sanctions already imposed for the purposes of remediation and rehabilitation.[450]

This approach is consistent with the model of the regulatory pyramid. Where penalties at the lower end of the pyramid have been tried unsuccessfully, or where a lesser sanction would be vastly inadequate given the aggravating circumstances of a particular offender, a more severe penalty may well be appropriate. A sanction based on general deterrence might be justified, for example, where there is a systemic problem in the regulated industry.

In terms of the severity of the sanction, it must signal to the community that non-compliance will not be tolerated. We would broaden the explanation of general deterrence

given in *Cotton Felts Ltd.* to include other types of sanctions beyond fines, but as was said in that case, the sanction imposed must warn others that the offence will not be tolerated without being harsh. On the other hand, the sanction must not appear to be a mere licence fee.[451] Consideration should be given to whether a fine is in fact the most appropriate penalty since it may suggest "that the offender is simply buying their way out of trouble."[452] Probation orders or publicity orders advertising the offender's offence and sanction may well be stronger motivators that promote compliance.

Finally, the court should only resort to denunciation if there are sufficient aggravating factors. A unanimous Supreme Court of Canada describes the objective of denunciation:

> The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law.[453]

In determining whether there are aggravating factors that warrant a denunciatory penalty, the court should focus more on the conduct of the offender rather than on the offence itself. Factors to consider would be deliberate or reckless conduct such as ignoring regulatory officials, repeated failures to act with due diligence, whether compliance with the regulation could have been achieved cheaply or easily or if the risk of harm was high.

In determining whether there are aggravating factors that warrant a denunciatory penalty, the court should focus more on the conduct of the offender rather than on the offence itself. Factors to consider would be deliberate or reckless conduct such as ignoring regulatory officials, repeated failures to act with due diligence, whether compliance with the regulation could have been achieved cheaply or easily or if the risk of harm was high.

Denunciation may also be appropriate for an offence that has resulted in death or widespread and long-term impacts. However, actual harm, while relevant, should not be a prerequisite to the use of the denunciation penalty. For example, someone who deliberately endangers public health despite repeated warnings from regulatory officials may well merit a denunciatory sanction.

Verhulst also argues that denunciation should be used with restraint so there is more room for remedial and rehabilitative sanctions. Widespread use of denunciation would undermine non-adversarial approaches to enforcement. This is because severe responses from the courts, such as incarceration and the revocation of licences will make regulators less likely to use prosecution, which will ultimately undermine non-adversarial approaches that rely on a credible threat of more serious sanctions.[454] This is in keeping with the research of Ayres and Braithwaite who found that regulated parties are more inclined to work cooperatively with regulators at the bottom of the pyramid, but where compliance is not achieved, denunciation through the use of a "big stick" must always be available in the background.[455]

B.C.'s *Public Health Act* adopts the approach proposed by Verhulst. Sections 105 and 106 are reproduced below:

> **Determining sentence**
>
> 105 (1) Before imposing a sentence, a sentencing judge may request a joint submission from the offender and the prosecutor setting out any agreement on
>
> (a) the circumstances that should be considered by the sentencing judge as either mitigating or aggravating the offence, and
>
> (b) the penalty to be imposed.

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

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

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

(b) to give effect to those purposes,

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

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

Purposes of sentencing

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

(a) first,

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

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

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

(2) In addition to a penalty imposed under subsection (1), a sentencing judge may impose one or more penalties under subsection (3) or (4), or both, unless it would be disproportionate to the offence, given the offender, the nature of the offence and the total of the penalties imposed under this section.

(3) A sentencing judge may impose a penalty for the purpose of achieving general deterrence if the sentencing judge reasonably believes that the additional penalty would have a deterrent effect, including because

(a) the penalty imposed under subsection (1) is inadequate to address the circumstances related to the offence, or

(b) the nature of the penalty may

(i) assist others similarly situated to the offender to avoid committing a similar offence, or

(ii) educate others similarly situated to the offender respecting the seriousness of the offence.

(4) A sentencing judge may impose a penalty for the purpose of punishing the offender if

(a) the offender committed the offence knowingly or deliberately, or was reckless as to the commission of the offence, or

(b) sufficient aggravating circumstances exist that the offender should be punished for the offence.

We are persuaded that a new approach to sentencing is needed that would have general application to all POA offences, unless the offence-creating statute directs that different or additional principles are to apply. We recognize that an offence-creating statute may prescribe a different set of sentencing principles that are specific to further the regulatory objectives, and these must always take precedence over general sentencing principles prescribed in the POA.

As compared to the current "deterrence and fine" paradigm that has been a hallmark of POA sentencing for at least the past 25 years, the proposed new model is responsive, flexible and is better suited to promote compliance with new regulatory strategies. It would be of general application and most helpful for those offences which offer no sentencing principles, but it would be subject to specific and potentially different sentencing principles where they are expressly stated in the offence-creating statute.

We recommend that the general sentencing principles proposed by Verhulst and Libman serve as a model for regulatory offences governed by the POA. However, we do not believe that these principles should be applied in a hierarchical sequence in the manner exemplified by BC's *Public Health Act*. Given the range of offences governed by the POA, our concern is that a rigid and systemic application of these principles in every POA case may result in an unnecessary level of complexity and may unduly prolong sentencing hearings. Instead, the judiciary ought to be directed to these sentencing principles and have flexibility in their application so as to best respond to the needs of an individual case and the objectives of the offence-creating statute. We note the criticism of the *Criminal Code* sentencing principles, which are not set out in a hierarchical manner. However, the newly proposed purpose section in the POA mandates that the POA be applied in a manner that promotes compliance with the offence-creating statute, among other things. Therefore, one can expect this overarching purpose section to result in a reduced reliance on fines as the primary sentencing response, and a greater reliance on principles such as remediation and rehabilitation.

As compared to the current "deterrence and fine" paradigm that has been a hallmark of POA sentencing for at least the past 25 years, the proposed new model is responsive, flexible and is better suited to promote compliance with new regulatory strategies. It would be of general application and most helpful for those offences which offer no sentencing principles, but it would be subject to specific and potentially different sentencing principles where they are expressly stated in the offence-creating statute. The proposed sentencing principles offer guidance to the judiciary so that sentences can be tailored to the different types of offences and offenders, and allows sentences to be more easily rationalized by appellate courts and among cases with similar fact situations.

Some contributors to our consultations expressed concerns about moving away from fines and deterrence as the primary sentencing principle. POA prosecutors advised that, from their experience, fines are the "bottom-line" in controlling conduct of regulated parties. They would disagree with the studies that suggest factors other than fines motivate compliance. They told us that corporations feel the pinch of a substantial fine and watch closely to see how competitors are sentenced at POA prosecutions.

The use of fines as a sentencing tool will still be available and ought to continue to be used for deterrent purposes when the circumstances of a given case justify it. Hefty fines authorized by the offence-creating statute would still be available and should continue to be ordered if they would be most effective in promoting compliance. The only difference with the introduction of sentencing principles is that a justice would now be able to consider other sentencing principles. The result may be costly remediation or rehabilitation orders, which might well impact the offending corporation's "bottom-line" and competitiveness as much as a fine. Examples include costly environmental clean-ups, or orders to update or improve equipment to higher safety and environmental standards.

In addition, the offending corporation may be ordered to pay a fine in addition to these remedial and rehabilitative orders. The new sentencing principles will give the court greater direction and flexibility in crafting an appropriate sentence that will further the legislative objectives and promote compliance.

We do not propose that parties be *required* to make a joint submission on aggravating or mitigating factors or a recommended sentence. Many unrepresented litigants will not be able to come to agreement on aggravating or mitigating factors, or on an agreed sentence. Instead, we recommend that parties be encouraged to do so when appropriate and that the court consider any such joint submission if made. The practical reality, we suspect, is that joint submissions may never occur in the most routine offences, although there may be cases where it might be valuable and helpful and we do not want to preclude this possibility. Indeed, joint submissions can be immensely helpful when sentencing the more serious offences that involve serious harm to individuals or might otherwise justify a denunciatory sentence. Therefore, we do not see the application of this recommendation as being onerous in comparison to its potential benefits.

[I]ntroducing sentencing principles is not intended to complicate sentencing or to delay the process arbitrarily. Nor should it be a pro forma exercise that is applied to every offence that is not subject to principles established by an offence-creating statute. The purpose is to make sentencing more consistent and proportionate to the offence and circumstances of the offender and thus make it more effective.

It is important to appreciate that introducing sentencing principles is not intended to complicate sentencing or to delay the process arbitrarily. Nor should it be a *pro forma* exercise that is applied to every offence that is not subject to principles established by an offence-creating statute. The purpose is to make sentencing more consistent and proportionate to the offence and circumstances of the offender and thus make it more effective. We are not proposing that the POA include a hierarchy of remedies that judges feel compelled to follow in order, but rather we are proposing that the POA contain principles that will govern a wider range of remedial options.

Offences under the current Part I of the POA are subject to the principles and remedies, but in most cases it will not be necessary and would be inefficient to consider the application of all the principles or the suitability of the various remedies. Since 80% of Part I offences are *Highway Traffic Act* offences that are effectively dealt with through fines (and the demerit point system), there is no need to complicate proceedings by considering other options. Nevertheless, there may be some instances where it would be helpful for a judge to have access to more creative dispositions as, for example, for a driver who has accumulated the requisite number of demerit points to lose his or her licence, but requires his or her vehicle for work in order to support his or her family. There are also some offences charged under Part I (for example, under the *Occupational Health and Safety Act*) that could also be charged under Part III; in these cases, it might be more effective in the long-term to impose a remedial or rehabilitative order that could prevent more serious harm in the future. Therefore, we are recommending that the principles and increased range of remedies apply to all offences, but anticipate that a proper use of the principles and remedies will result in a limited application to Part I offences and more significant application to Part III offences.

The LCO recommends that:

16. The POA be amended to provide a statement of sentencing principles of general application that shall be used by the court as guidelines when sentencing all provincial offences, subject to other or different sentencing principles or provisions prescribed in the offence-creating statute.

17. The statement of sentencing principles should include the following four principles:
    (i) Impose a sanction that remedies the violation, to the extent that such a sanction is possible and reasonable ("remediation");
    (ii) If the offender is likely to continue to engage in the regulated activity after sentencing, but the offender's behaviour must change to prevent future breaches, impose a sanction that promotes the changes necessary to prevent future violations ("rehabilitation");
    (iii) Impose a sanction that promotes change in the behaviour of other persons (e.g., dissuade others from committing the same or similar offence), but only if the court believes that that it could serve a regulatory objective and where the remedial and rehabilitative sanctions are insufficient given the circumstances of the case ("general deterrence");
    (iv) Impose a sanction that denounces and punishes the offender's behaviour if aggravating circumstances make such a sanction appropriate ("denunciation").

18. At sentencing hearings, particularly in Part III offences, parties should be encouraged to submit joint submissions on aggravating and mitigating factors as well as the sentence to be imposed.

3. Sentencing Tools

The POA's current sentencing provisions are too limited to allow courts to properly implement the sentencing principles and purposes recommended in the previous section. Too much of an emphasis is placed on fines, without regard to other sentencing options which inhibit sentences that best promote regulatory objectives. In order for courts "to craft the most appropriate sentence", it is essential that there be "a wide variety of sentencing options."[456], since "courts will not be able to play an effective role in the regulatory cycle unless they are given the sentencing tools with which this may be done."[457] Most notably, if the court is to implement the sentencing principles recommended in the previous section, it must have the necessary sentencing tools to give effect to them.

[T]here are many offences from which no harm results (e.g., many offences brought under Part I); however, this should not preclude the general availability of a remedial sentence for those offences in which harm has occurred. Ontario appears to be lagging in this regard, as general procedural Acts in other provinces provide broad powers to make restitution or remediation orders.

It is beyond the scope of this project to canvass all potential sentencing options that might be appropriate for every provincial offence. Instead, our discussion focuses on additional tools that ought to be introduced in the POA that may have application across all regulatory statutes.

Probation Orders

The POA allows the court to make a probation order in a proceeding commenced by information, provided the offence is not one of absolute liability.[458] Subsection 72(2) of the POA deems probation orders to contain certain standard conditions and subsection 72(3) allows the court to prescribe four additional types of conditions but only in narrowly prescribed circumstances. These circumstances, in our view, are too restrictive to permit the courts to implement the sentencing principles of remediation and rehabilitation.

First, under clause 72(3)(a), compensation or restitution may be ordered only as a condition in a probation order where it is authorized by an Act. This means that compensation and restitution can be ordered for some regulatory acts in Ontario, but not others. Given the introduction of remediation as a sentencing principle, a sentencing mechanism must be available to give effect to this principle. We note that there are many offences from which no harm results (e.g., many offences brought under Part I); however, this should not preclude the general availability of a remedial sentence for those offences in which harm has occurred. Ontario appears to be lagging in this regard, as general procedural Acts in other provinces provide broad powers to make restitution or remediation orders.[459]

Second, clause 72(3)(b) allows the court to prescribe community service, but only for an offence that is punishable by imprisonment and only where the defendant consents to the order. The rationale for this limitation appears to originate from a view that community service is an intrusion into the liberty interests of the offender, and therefore should only be available as an alternative where imprisonment is a permitted penalty.[460] However, legislation in other provinces permits the imposition of community service and its availability is not subject to the defendant's consent or the offence being punishable by imprisonment.[461] Also the view that community service is an appropriate alternative only to imprisonment is no longer true. It may be an effective alternative to a fine where an offender would be unable to pay a fine,[462] and where it can "further the offender's rehabilitation through taking responsibility for the wrongful act, or to acknowledge the

offender's impact on a victim."[463] While community service requires time that arguably intrudes on the offender's liberty interests, other probationary terms can similarly create mandatory time obligations (e.g., reporting to a probation officer or educating staff on workplace safety). Moreover, it is less of an intrusion on liberty interests as compared to total incarceration where imprisonment is a permitted penalty under the offence-creating statute. In order to limit the impact on an offender's liberty interest, we recommend the hours and duration of community service be limited in the POA as is done in other jurisdictions.[464]

And finally, clause 72(3)(c) of the POA permits probation conditions to be imposed relating to the circumstances of the offence and defendant that contributed to the commission of offence in order "to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant", but only where the conviction is of an offence punishable by imprisonment. Rehabilitation, as a sentencing principle, can apply to all offences. The restriction on offences punishable by imprisonment unduly hampers the court's ability to promote compliance with regulatory statutes where imprisonment is not a permitted penalty. If we are to allow courts to craft appropriate rehabilitative sentences for *all* offences, this restriction can no longer be justified and we believe it must be eliminated.

We wish to stress that the availability of probation for all POA offences does not mean that probation ought to become the standard sentencing response for all offences. As noted earlier, fines may well continue to be the most effective, fair and efficient means of promoting compliance for many, if not most, minor offences. However, where the circumstances of a particular case warrant probation with conditions as an effective tool to promote compliance with regulatory objectives relating to a minor offence, it ought to be available to a justice.

Alternative Penalties

Several regulatory statutes provide courts with a wide variety of sentencing powers that permit the court to impose a sanction that is beyond the typical penalty of a fine, probation or imprisonment. Known by many names such as "alternative penalties" and "creative sentencing measures", a number of them could prove to be immensely helpful in the POA context to help achieve regulatory objectives across a broad spectrum of regulatory regimes.

One example is found in British Columbia's *Public Health Act.* Section 107 provides for a large number of orders including the power to order community service for up to three years and to pay compensation for the cost of a preventative or remedial action. It also allows the court to order a corporate defendant to designate a senior official within the corporation as the person responsible for monitoring compliance with the Act or its regulations, or the terms or conditions of any licence or permit held by the corporation under the Act. Another power allows the court to order the defendant to post a bond in an amount the court considers appropriate for ensuring compliance with a prohibition, direction or requirement issued under the alternate penalties section. These orders can be used to further remediation and rehabilitation goals.

A different source of "creative sentence" orders is found in the *Fisheries Act*.[465] Section 79.2 states that the court can, taking into account the nature of the offence and the

circumstances surrounding its commission, make an order containing one or more listed prohibitions, directions or requirements. The directions include compensating the Minister for remedial and preventative actions taken and the posting of a bond to ensure compliance with an order under this section. Further, it permits the court to direct the person to submit to the Minister information respecting the activities of the person that the court considers appropriate.

The *Criminal Code* allows the court to order restitution and compensation as part of a free standing order or as an optional condition in a probation order to compensate victims of crime.[466] Neither option is currently available under the POA. Provincial offences legislation in other jurisdictions authorize compensation as a sentencing remedy for persons aggrieved due to loss or damage to property caused by the defendant, which may be enforced in civil courts in the event of non-payment.[467] An advantage of a free standing restitution order is that it may be enforced as a civil judgment, whereas restitution as a term of a probation order is enforceable only during the currency of the probation order and after that, only if breach proceedings are initiated. Restitution or compensatory orders are intended to repair harm done to victims or the community and to promote a sense of responsibility in offenders and to have them acknowledge the harm to their victims and the community. They would appear to be a helpful enforcement tool consistent with the recommended sentencing principles. They are also consistent with the principle of efficiency in that they eliminate the necessity of having to bring a separate civil proceeding for restitution on the same set of facts.

Provincial offences legislation in other jurisdictions authorize compensation as a sentencing remedy for persons aggrieved due to loss or damage to property caused by the defendant, which may be enforced in civil courts in the event of non-payment.

Authority to order an embedded auditor would be another useful sentencing tool in the POA.[468] A court would order a government auditor, or a private auditor approved by the court, to be placed within a corporation to monitor compliance for a certain period of time. The corporation would be required to fully cooperate with the auditor, and it would pay his or her salary or fees during the compliance period. The scope of the auditor's work could be limited to monitoring and reporting on the corporation's compliance at intervals determined by the court, or the auditor could take on a proactive role in assisting the corporation to develop and implement improved compliance measures. We note, however, that government hiring and procurement practices may present some challenges to the effectiveness of this option, but we nonetheless recommend that it be an available tool.

In our view, many of the above-mentioned alternative sentencing penalties could be used to further the recommended sentencing principles and prove effective in achieving regulatory goals.

Victim Impact Statements

The POA, unlike the *Criminal Code*, does not codify the right of a victim of an offence to file a victim impact statement.[469] The *Criminal Code* contains provisions allowing the victim of a crime to file a detailed statement, in a prescribed form, of the harm or loss suffered by the victim as a result of the commission of the offence. The victim also has the right to read the statement into the court. Although certain courts have used victim impact statements in POA proceedings, no clear right to do so exists.[470] Instead there is uncertainty surrounding the authority to permit such statements and who should be able to submit such evidence and in what form (e.g., oral or written submissions).

A victim impact statement can be a valuable tool in POA proceedings. In addition to giving victims a voice in the proceeding, such statements would provide the court with necessary information to permit it to fashion appropriate compensatory or rehabilitative sentences. We were told, anecdotally, that some Aboriginal victims have had difficulty being able to make victim impact statements. While there may be other reasons for this, expressly codifying the authority to use victim impact statements would help promote their use in appropriate cases, regardless of the nature or race of the victim.

We see this tool as being used primarily for more serious provincial offences, as the less serious offences tend not to involve "victims". However, we do not wish to limit access to victim impact statements only to the more serious proceedings. There may well be instances where the court could benefit from hearing from victims in order to fashion appropriate remedial or rehabilitative sentences. One example may be a neighbourhood plagued by litter or noise arising from a local business. While the littering offence or noise by-law that has been infringed may be seen as a minor offence, the community may have a strong interest in providing the court with its views on the impact that repeated violations have had so that an appropriate sentence may be fashioned. In practice, the presiding justice should retain authority to decide whether or not victim impact statements may be considered by the court after giving due consideration to the circumstances surrounding the offence and any harm caused.

[B]efore existing or new alternative measure programs are implemented, it would be desirable for the provincial government to consult with municipalities to ensure that appropriate administrative structures are in place to support diverting provincial offences to any such programs.

Alternative Measures

Alternative measures refer to a form of post-charge diversion whereby the Crown withdraws a charge or the court dismisses a charge if the defendant has completed an agreed program of alternative measures. They are distinct from the "*alternative penalties*" discussed above, which only arise following a conviction and which serve as alternatives to a fine, probation or imprisonment. With alternative measures, there is no conviction. For example, a prosecutor may agree to drop a charge for speeding upon receipt of satisfactory evidence that the defendant has enrolled in and completed a driver safety course. When such programs are used properly, they can support efforts to rehabilitate a defendant while avoiding the time and expense of a trial.

Alternative measures are available under section 712 of the *Criminal Code*, but they can only be used where they are consistent with the protection of society and if a number of other conditions are met. The section also sets out circumstances where alternate measures are not permitted, restrictions on the use of admissions made by the defendant and rules around subsequent charges.

There is no statutory basis for alternative measures in Ontario, although as of December 2009, we were told that some municipalities are offering such programs. If adopted in the POA context, amendments to the Act may provide for some oversight over these programs to ensure that they are effective and that they are appropriately used. Section 712 of the *Criminal Code* will provide a great deal of guidance in this regard. Part X of the *Canadian Environmental Protection Act* might also help in the development of POA provisions. The LCO believes that before existing or new alternative measure programs are implemented, it would be desirable for the provincial government to consult with municipalities to ensure that appropriate administrative structures are in place to support diverting

provincial offences to any such programs. Relevant legal and community organizations should also be consulted to ensure any alternative measures are effective in reducing the risk of the defendant committing the offence in the future.

The LCO recommends that:

19. The POA be amended to confer broad authority on the court to make probation orders for all provincial offences in order to give effect to the remedial and rehabilitative sentencing principles. Permissible probationary terms that may be ordered by the court ought to include restitution and such other conditions that the court considers necessary and appropriate to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant, regardless of whether or not the offence is punishable by imprisonment. While available for all offences, probation orders should be made for less serious offences only where the circumstances of the case render probation a particularly appropriate sentencing option.

20. The POA be amended to include community service as a possible term of probation where it would achieve remediation for any harm caused, contribute to the rehabilitation of the offender, or serve as an alternative to the payment of a fine where a defendant is unable to pay a fine.

21. The POA be amended to permit alternative penalties to be issued by the court. In particular, authority for free-standing restitution or compensatory orders that may be enforced in civil courts be expressly created, as well as authority to order an embedded auditor to promote compliance with regulatory standards.

22. The POA be amended to expressly permit the use of victim impact statements for offences in which harm has been caused, subject to a residual discretion in the court to decide whether or not to admit them after considering the seriousness of the offence and any harm caused.

23. After consultation with municipalities and legal and community organizations, the Ministry of the Attorney General consider the adoption of alternative measure programs for less serious provincial offences.

4. Sentencing a Corporate (Business) Offender

So far, we have not made a distinction between individuals and corporations when sentencing. In fact, many of our examples have assumed a corporate defendant and that the sentencing purposes and principles would apply equally to individuals and corporations. We believe that this is the correct result even though it may challenge some of the traditional concepts we have about sentencing. Rehabilitation, for example, has traditionally been associated with restoring the morality of an individual, but how do you "cure" a corporation that is not a real person? Since fines and remedial compensation orders are directly related to the "bottom line" and profit-making ability of a corporation and indeed its *raison d'être*, how can non-monetary sanctions like probation orders be effective? The scope of regulatory activity in which corporations are involved demonstrates the imperative of effective regulatory sanctions, and we revisit research that shows what motivates corporations to comply with regulatory standards. We then examine whether corporation-specific sentencing provisions should be adopted in the POA.

Most corporate wrong-doing is not prohibited by the Criminal Code, but by numerous regulatory statutes governing activity in these fields. It is therefore essential that effective enforcement mechanisms be in place within provincial offence regimes to promote compliance with regulatory standards.

Corporations and other business enterprises have a broad impact in our society. They are "the primary means of conducting business, employing the vast majority of workers, producing most of the economy's goods and services, and purchasing many goods and services."[471] We want corporations to engage in these activities, but they may also commit offences. We unfortunately know the tragic consequences that can result to our public welfare when corporations fail to implement safety standards in the workplace, ignore securities regulations for the sake of profit, fail to properly test our water supply or engage in business practices that create environmental disasters. Most corporate wrong-doing is not prohibited by the *Criminal Code*, but by numerous regulatory statutes governing activity in these fields.[472] It is therefore essential that effective enforcement mechanisms be in place within provincial offence regimes to promote compliance with regulatory standards.

We have discussed how fines can be ineffective in promoting compliance. They can often become a cost of doing business that is passed on to consumers. Corporate structures can be deliberately set up as shells without assets so as to be shielded from paying fines, which further frustrates enforcement of regulatory regimes.[473] While high fines may intimidate some corporations to act lawfully, they generally fail to address the root causes of regulatory non-compliance and they miss an opportunity to effect positive change in the corporation's conduct.[474] In fact, empirical research has shown that punishment can often inhibit compliance with regulatory standards; it insults the regulated actors and demotivates them.[475] It fosters individual rebellion and the potential for a business subculture of resistance to regulation.[476] On the other hand, factors that motivate compliance include desire to maintain reputation, a desire to do what is right, fidelity to an identity as a law-abiding citizen, and living up to a self-concept of social responsibility.[477] Sentencing orders that respond to these motivators may be much more effective in addressing the causes of non-compliance and in promoting future compliance.

Subsection 732.1(3.1) of the *Criminal Code* recognizes the principles of remediation and rehabrate and non-corporate entities. Clause (a) of section 732.1(3.1) allows for restitution to an injured person for any harm caused. Clauses (b) through (e) establish monitoring mechanisms to reduce the likelihood of the organization engaging in unlawful conduct in the future. Clause (f) permits the court to order that the organization notify the public of the

offence and sentence. This type of order recognizes that "the public and customers may play an important role in influencing and monitoring corporate behaviour."[478] This is also consistent with studies that show regulated parties do not wish to lose a positive reputation and that they seek to do what is right and socially responsible. Subsection 732.1(3.1) reads:

> (3.1) The court may prescribe, as additional conditions of a probation order made in respect of an organization, that the offender do one or more of the following:
> (a) make restitution to a person for any loss or damage that they suffered as a result of the offence;
> (b) establish policies, standards and procedures to reduce the likelihood of the organization committing a subsequent offence;
> (c) communicate those policies, standards and procedures to its representatives;
> (d) report to the court on the implementation of those policies, standards and procedures;
> (e) identify the senior officer who is responsible for compliance with those policies, standards and procedures;
> (f) provide, in the manner specified by the court, the following information to the public, namely,
> (i) the offence of which the organization was convicted,
> (ii) the sentence imposed by the court, and
> (iii) any measures that the organization is taking — including any policies, standards and procedures established under paragraph (*b*) — to reduce the likelihood of it committing a subsequent offence; and
> (g) comply with any other reasonable conditions that the court considers desirable to prevent the organization from committing subsequent offences or to remedy the harm caused by the offence.

We recommend the POA adopt a similar provision to expressly give the court the power to include remedial and rehabilitative terms within a probation order against a corporation or other business enterprise, whether incorporated or not. Such authority is necessary if the recommended sentencing purposes and principles are to be implemented by the court. In addition, the POA should permit a general power on the court to impose other creative terms, as found in clause 732.1(3.1)(g) of the *Criminal Code,* that will promote compliance with the offence-creating statute's objectives.[479]

We note that many businesses that run afoul of regulatory standards may be operated by an individual, partnership or firm with a registered business name, but the business is not a corporate entity. For these business enterprises, the above noted probation terms could be equally effective in promoting compliance and we see no reason why they should not apply simply because the business has chosen not to incorporate. This is likely the reason why the *Criminal Code* provisions apply to an "organization" which term is defined very broadly to include corporate and unincorporated bodies, as well as other associations of people.[480] We would not adopt the broad definition of organization in the *Criminal Code*, given its potentially significant scope. We do, however, recommend that probationary terms similar to those found in subsection 732.1(3.1) be available to the court when sentencing a corporation and any other business enterprise, whether incorporated or not.

The next issue is whether the POA should list factors that the court must consider when seeking to punish a corporation or other business enterprise after it has considered the

principles of remediation, rehabilitation, and deterrence. Clause 106(4)(b) of British Columbia's *Public Health Act* states that a sentencing judge may impose a penalty for the purpose of punishing if "sufficient aggravating circumstances exist that the offender should be punished for the offence." The Act, however, does not list a set of aggravating factors. In comparison, section 718.21 of the *Criminal Code* lists considerations that a court must consider when sentencing an organization, but the list includes both aggravating factors (e.g., the degree of planning involved in carrying out the offence) and mitigating factors (e.g., measures taken to reduce the likelihood of it committing a subsequent offence). Therefore, it does not transplant well into our proposed POA sentencing model.

In our view, there is good reason to prescribe a non-exclusive list of factors that might justify a punitive or denunciatory penalty. First, it will put corporations and other business enterprises on notice as to the kind of conduct that may result in a punitive penalty. It will also reinforce the authority of the court to render a punitive response in the appropriate case . Finally, it will respond to increasing expectations from the public that corporations and other businesses be held accountable for egregious conduct,[481] with an assurance that they will be punished where aggravating factors have been established.

Relatively few people are arrested for the commission of provincial offences. Even fewer are held or released on bail under the POA each year. In 2009, of the approximate 2.1 million provincial offence charges that were received by the court under Parts I and III, there were only 4,009 bail hearings (or 0.002% of all charges received).

At this juncture, we do not recommend what the non-exhaustive list of aggravating factors should include, only that a list be developed. In discussing the type of aggravating factors that may merit a punitive response, Verhulst gives, as examples, the offender's failure to exercise due diligence "if it would have been simple or inexpensive to do so, or if the risks of harm were particularly high," or the party's "dismissive or obstructive attitude towards regulatory officials", especially "if attempts have been made to suppress the offence or re-direct blame."[482] Reference may also be had to section 718.21 of the *Criminal Code*, which, for example, includes as a factor attempts made by a corporation to conceal or convert assets to avoid paying a fine or making restitution. Case law on sentencing provincial offences will provide further guidance on other aggravating factors that merit a punitive response.[483]

The LCO recommends that:

24. The POA be amended to confer power on the court to make a probation order against a corporation or other business enterprise, whether incorporated or not, with conditions modeled on subsection 732.1(3.1) of the *Criminal Code* regarding probation conditions for an organization.

25. The Ministry of the Attorney General, after consultation with the judiciary, prosecutors, defence bar and paralegals, develop a non-exhaustive list of aggravating factors to be included within the POA for the court to consider when ordering a punitive or denunciatory penalty against a corporation or other business enterprise. Such factors may include degree of planning in the commission of the offence, efforts to deliberately conceal the offence from detection by regulatory officials, or if compliance could have been achieved at little or no cost.

F. Bail Reform

1. POA Bail Provisions Generally

Relatively few people are arrested for the commission of provincial offences. Even fewer are held or released on bail under the POA each year. In 2009, of the approximate 2.1 million provincial offence charges that were received by the court under Parts I and III, there were only 4,009 bail hearings (or 0.002% of all charges received). At those hearings, bail was denied in 426 cases involving Part III offences. Bail was allowed in all 18 Part I bail hearings.[484] Although infrequent, the principles of fundamental justice demand that "even one arrest requires some mechanism for release."[485] We turn to a summary of the arrest and bail provisions in the POA followed by an analysis of two areas of potential bail reform: (1) the grounds for detaining someone and (2) the conditions that a justice is authorized to impose when granting bail.

There is no general power of arrest under the POA; a person may only be arrested before trial if the offence-creating statute specifically authorizes arrest.[486] Unless otherwise provided for in the offence-creating statute, the arrest and bail provisions of the POA apply. In general, a defendant charged will be released by the arresting officer,[487] the officer in charge[488] or by a justice at a bail hearing within 24 hours.[489] Section 150 sets out the grounds for detention by a justice. There is a clear presumption in this section "that a defendant who is arrested should be released pending the disposition of the charge, unless the detention is necessary to ensure the defendant's attendance in court."[490] The onus rests on the prosecution to show cause why an arrested defendant should remain in custody pending his or her trial.[491] Conditions for release are also prescribed, but the list is limited and the conditions must be considered sequentially.[492] Powers to review and appeal detention decisions are found in sections 151 and 152 of the POA.

Subsection 150(4) [of the POA] authorizes a justice to order detention in custody to ensure the appearance of an accused in court, but it does not authorize a justice to order detention for the protection or safety of the public.

2. Grounds for Detention

Subsection 150(4) authorizes a justice to order detention in custody to ensure the appearance of an accused in court, but it does not authorize a justice to order detention for the protection or safety of the public. It reads:

> 150(4) Order for detention — Where the prosecutor shows cause why the detention of the defendant in custody is justified to ensure his or her appearance in court, the justice shall order the defendant to be detained in custody until he or she is dealt with according to law.

This appears to have been by design. In 1980, Drinkwalter and Ewart, two drafters of the POA, wrote:

> The release provisions of the Criminal Code must be sufficiently stringent to deal with persons who are or may be dangerous to the public peace and to the public interest . . . However, persons apprehended for provincial offences are in a different situation. Their arrest will probably have been made initially for one of the ancient, historical reasons of public interest, including the need to properly identify the accused, to secure or preserve evidence, or to prevent the continuation of the offence or similar offences. However, these concerns last only a short while; thereafter the only issue is the likelihood of the person appearing for his trial.[493]

The absence of a public safety ground for detention may result in absurdities. In *R. v. Banka* (1999), for instance, the court was forced to grapple with the question of bail for a defendant charged with a provincial offence which, if repeated, would jeopardize the protection and safety of the public.[494] Mr. Banka had been charged with three breaches of a restraining order under section 46 of the *Family Law Act*, which is invoked where a person has "reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody."[495] Mr. Banka had recently been convicted of a similar offence. The court found that there was a substantial likelihood that, if released, Mr. Banka would reoffend. Under these circumstances, the justice determined that to follow subsection 150(4) of the POA would

> . . . cause an unacceptable and absurd consequence . . . it would bring the administration of justice into disrepute if this court was to turn a blind eye to the protection and prevention aspects of this case and order release, solely due to an obvious technical legislative deficiency.[496]

The absence of a public safety ground for detention in the POA also leads to a lack of uniformity within the Act. It is peculiar that clause 149(1)(iii) authorizes a police officer to detain a defendant to prevent the continuation or repetition or the commission of another offence but that a justice is not authorized to order the same under subsection 150(4).

The court ordered detention based on its "inherent jurisdiction . . . [to] remedy legislative drafting errors or gaps which lead to consequences which cannot have been the intent of the Legislature."[497]

The absence of a public safety ground for detention in the POA also leads to a lack of uniformity within the Act. It is peculiar that clause 149(1)(iii) authorizes a police officer to detain a defendant to prevent the continuation or repetition or the commission of another offence but that a justice is not authorized to order the same under subsection 150(4).

Similar to the POA, the application of the law of bail to criminal offences originally depended on the probability that an accused would appear in court. While this was once the sole ground for which an accused could be detained, other grounds of detention were eventually recognized.[498] Subsection 515(10) of the *Criminal Code* contains three grounds for detention: to ensure the attendance of the accused in court, for the protection or safety of the public, or to maintain confidence in the administration of justice. It states:

> 515(10) Justification for detention in custody — For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
> (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
> (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
> (c) if the detention is necessary is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
> (i) the apparent strength of the prosecution's case,
> (ii) the gravity of the offence,
> (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and

> (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

Complete correspondence between the POA and the *Criminal Code* may be contrary to the spirit of the POA, which was designed – at least in part – "to wrest provincial offences from the clutches of the Criminal Code's procedure and its concomitant mind-set."[499] However, as the *Banka* case demonstrates, the protection of the public might well be a necessary ground to deny bail in POA matters in certain circumstances.

With respect to the third ground in the *Criminal Code*, recent cases have considered whether the objective of maintaining confidence in the administration of justice is a justifiable ground for refusing bail.[500] In the 2002 decision of *R v. Hall*,[501] the Supreme Court struck out part of the wording of clause 515(10)(c) but concluded that this ground is neither "superfluous [n]or unjustified,"[502] as public confidence in the judicial system is necessary to the well-functioning of both the bail system and the judicial system as a whole.[503] Although the *Hall* decision remains authoritative, there have been variances in the courts' application of the reformed clause 515(10)(c). While some justices have emphasized that the provision should only be used in rare instances,[504] others have given it a more expansive interpretation.[505] An accused need not have committed a particular crime for clause 515(10)(c) to apply.[506]

While maintaining confidence in the administration of justice will in some instances be a valid ground for denying bail in the criminal context, it is difficult to conceive of instances that would justify its application in the context of provincial offences.

While maintaining confidence in the administration of justice will in some instances be a valid ground for denying bail in the criminal context, it is difficult to conceive of instances that would justify its application in the context of provincial offences. Moreover, this proposition did not receive much support in the LCO's consultations. The application of clause 515(10)(c) entails the consideration of four stated factors including the gravity of the offence, the use of a firearm and whether the accused will serve a lengthy sentence. These grounds point to the differences between provincial and criminal offences, and to the limits of using the *Criminal Code* as a comparator for this particular ground of detention. In our view, "maintaining confidence in the administration of justice" as a ground for denying bail should not be extended to the POA.

A foundational principle of all modern criminal law reform is the principle of restraint.[507] Fairness dictates that pre-trial detention should only be imposed where necessary.[508] Depriving an accused of his or her liberty prior to conviction is one of the bluntest instruments the state can use.[509] Pre-trial remand can be harsher than detention after sentencing.[510] Moreover, systems of bail have tended to discriminate and disadvantage people on the basis of race, ethnicity and income.[511] Most importantly, the presumption of innocence and the right not to be denied reasonable bail are values entrenched in sections 11(d) and 11(e) of the *Charter*. For these reasons, we prefer to limit the instances in which bail may be denied to those that are truly necessary in light of the nature and seriousness of provincial offences, as compared to criminal offences.

However, as *Banka* demonstrates, there may be unlawful conduct prohibited by provincial statutes that can create real public safety risks if repeated. In those instances, it would be absurd to ignore the public interest and maintain the presumption in favour of release. Where bail is denied to protect the public safety, care must be exercised. Case law has circumscribed

what is and is not "necessary" for the public safety. Detention should not be ordered where it would be merely convenient or advantageous;[512] a risk of reoffending that will harm the public safety must be real. There must be "sufficient evidence of a clear and present danger to justify interference with the liberty of the accused" before guilt or innocence has been determined.[513] These cases suggest that any grounds for pre-trial detention within the POA must be limited. They should be used sparingly and only where necessary to ensure attendance in court or for the protection or safety of the public. Consideration may be given to prescribing within the POA the factors a court shall consider when deciding whether or not to refuse bail under any newly proposed "public safety" ground.

The LCO recommends that:

26. The POA be amended to permit a justice to deny bail where detention is necessary for the protection or safety of the public, including any alleged victims or witnesses, having regard to all the circumstances. However,the LCO recommends that bail may be denied only under this ground in very limited situations; the prosecutor must demonstrate a real and substantial likelihood that the defendant will commit a serious offence that will harm the public.

"[T]he balance of the decision whether to remand a person in custody or on bail may well rest on the ability of the court to impose meaningful conditions on bail." However, the authority to impose bail conditions in the POA is very limited.

3. Bail Conditions

The ability to impose bail conditions can be very important when deciding whether to grant bail. As one author states, "[t]he balance of the decision whether to remand a person in custody or on bail may well rest on the ability of the court to impose meaningful conditions on bail."[514] However, the authority to impose bail conditions in the POA is very limited.

Clause 150(2)(a) of the POA empowers a justice to impose bail conditions generally, but only to "ensure his or her appearance in court." Clause 150(2)(b) and (c) cover offences that can lead to twelve or more months in prison, or ones where the defendant is not ordinarily resident in Ontario. In both situations, the court may impose the condition of recognizance with sureties or depositing security with the court. Again, these conditions may only be imposed to ensure the defendant's appearance in court.

R. v. Desroches,[515] a 1986 Ontario District Court decision, confirmed that the power to impose bail conditions is limited. A man was charged with an offence contrary to the *Trespass to Property Act*. A justice of the peace ordered that the defendant not enter certain premises as a term of the bail order. On appeal, the court confirmed that the only authority to impose bail conditions is to ensure the defendant's appearance in court. The court said, "[h]owever desirable it may be in certain circumstances to order that a person stay away from certain property, to impose such a condition is clearly beyond the powers given to the justice by [clause 150(2)(a)]."[516]

The *Criminal Code* can be used as a basis for comparison with the POA's treatment of bail conditions. Similar to the POA, the *Criminal Code* approaches bail conditions with caution. Bail orders must account for the fact that they are made previous to a finding of guilt. As

such, checks must exist against conditions that are inappropriately intrusive.[517] Subsection 515(4) of the *Criminal Code* authorizes a justice to select from five key types of bail conditions and permits other reasonable conditions to be imposed where appropriate.

> 515(4) Conditions authorized — The justice may direct as conditions . . . that the accused shall do any one or more of the following things as specified in the order:
> (a) report at times to be stated in the order to a peace officer or other person designated in the order;
> (b) remain within a territorial jurisdiction specified in the order;
> (c) notify the peace officer or other person designated under paragraph (a) of any change in his address or his employment or occupation;
> (d) abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, or refrain from going to any place specified in the order, except in accordance with the conditions specified in the order that the justice considers necessary;
> (e) where the accused is the holder of a passport, deposit his passport as specified in the order; [and]
> (f) comply with such other reasonable conditions specified in the order as the justice considers desirable.

When a defendant is charged with both criminal and provincial offences simultaneously, POA bail conditions become more complicated to impose. Under these circumstances, bail must be considered and ordered under two separate forms of release.

Subsection 515(4.1) authorizes a justice to restrict the use or possession of hazardous possessions such as firearms, explosives and other restricted weapons. Beyond the conditions explicitly set out in this subsection, non-enumerated types of conditions include monetary conditions, curfews, orders to seek medical treatment, control drug and alcohol consumption and carry identification or release documents at all times.[518] Examples of bail conditions less frequently used include not possessing a cell phone and not using a computer or attending football (soccer) matches.[519]

The *Charter* and case law place limits on bail conditions. Section 11(e) requires that any bail conditions imposed be reasonable.[520] Cases prior to the *Charter* considered when a bail condition would be reasonable. For one, bail conditions must relate to the offence with which the accused has been charged or to the context under which the accused was charged with the offence.[521] Conditions must be "operable" or not so onerous as to effectively amount to a detention order.[522] They must also not be so vague or overbroad as to lack certainty.[523] Finally, conditions should relate to the grounds for release and detention specified by the legislature.[524] In other words, they must be related to the purposes of bail and should not be used as a form of summary punishment to show the defendant that the court "means business".[525]

When a defendant is charged with both criminal and provincial offences simultaneously, POA bail conditions become more complicated to impose. Under these circumstances, bail must be considered and ordered under two separate forms of release.[526] This gives rise to jurisdictional and other problems.[527] In this regard, the Law Reform Commission of Canada has stated that "efficiency must also be promoted, especially where to do so would not seriously jeopardize fairness and, in fact, would help promote it." To this end, the LCO recommends that one level of court have complete competence and authority to determine judicial interim release or detention for both types of offences.[528] Alternatively,

at a minimum, any additional conditions imposed on bail for provincial offences must also comply with those already ordered for criminal offences.

The LCO heard from many who were supportive of having more reasonable bail conditions available to a justice where necessary. Some of the specific conditions proposed include refraining from committing the same or similar offence, prohibitions on driving, non-communication orders stipulating that a defendant refrain from contacting witnesses or victims to the offence, and non-association orders stipulating that a defendant limit contact with a co-defendant. The imposition of prohibitions relating to the operation of a motor vehicle is a "delicate matter" and the courts have on occasion viewed these types of conditions as "punitive measure[s]."[529] They should only be imposed in limited circumstances, such as where a defendant awaiting trial has a history of drunk, stunt or suspended driving.[530] Non-communication and non-association orders should be used very sparingly as they may temporarily terminate contact with family members and impair legitimate trial preparation.[531] Caution must also be exercised to ensure that the conditions relate to the circumstances under which bail may be granted or denied and that they do not resemble a probation order.

[G]uidelines ought to issue to assist in the application of any new bail conditions that are created to help promote their proper use, and to protect against their overuse … [H]ow any new bail conditions are being applied ought to be further studied within five years after they are introduced.

A further concern is the limited ability of the court to impose bail conditions pending appeal. Section 110 of the POA states that someone who has been convicted and incarcerated may be released on bail pending appeal "upon any of the conditions set out in sub-section 150(2)";[532] in other words, the same limited conditions available for post-arrest bail. When someone has been found guilty of a serious provincial offence and has been incarcerated, there is a stronger case to impose public safety and other conditions on bail. These may include conditions that the offender not commit the same or similar offence or attend at certain locations.

At the same time, the overall utility of bail conditions has been questioned.[533] There is no denying that enforcement of a number of types of conditions can be problematic.[534] There is also the risk that bail conditions can become subjected to overuse or "institutionalised" as some British researchers have documented.[535] Permitting the court to impose additional reasonable bail conditions that are directly related to the charge and the circumstances under which bail may be granted or denied can result in effective alternatives to pre-trial custody. These are significant concerns, and we recommend that these issues be the subject of further review. We further recommend that guidelines ought to issue to assist in the application of any new bail conditions that are created to help promote their proper use, and to protect against their overuse. Finally, how any new bail conditions are being applied ought to be further studied within five years after they are introduced.

The LCO recommends that:

27. The Ministry of the Attorney General, in consultation with the judiciary, municipal prosecutors, defence bar, paralegals, and relevant legal and community organizations:
    a. review and consider any further bail conditions that ought to be added to the POA;
    b. prior to the introduction of any new bail conditions, develop judicial guidelines to promote their use by the court in a manner that is consistent with the principles outlined in the POA Reform Framework; and
    c. within five years after any new bail conditions are implemented, review the cases in which they are being used to ensure they are not being abused or overused in a manner that unduly infringes a defendant's pre-trial liberties.

[T]he criminal bail procedural reforms give pause to consider whether similar or other process reforms should be adopted for POA proceedings. This does not mean the POA ought to necessarily adopt the Criminal Code bail procedure; differences between the nature and procedure that governs criminal versus regulatory offences may dictate that different procedures apply.

4. Bail Procedural Reforms

We were also advised that bail procedure within the POA has not kept up with recent bail procedural amendments in the *Criminal Code*. For example, a justice may make an order prohibiting the publication of evidence at a criminal bail hearing.[536] There is also a section that prohibits the defendant from being cross-examined on the circumstances of the offence which is the subject of the bail hearing.[537] These may well be worthwhile amendments to the POA.

A detailed review of POA bail procedure is not the focus of this Report. However, the criminal bail procedural reforms give pause to consider whether similar or other process reforms should be adopted for POA proceedings. This does not mean the POA ought to necessarily adopt the *Criminal Code* bail procedure; differences between the nature and procedure that governs criminal versus regulatory offences may dictate that different procedures apply. Indeed, the application of the principles under the POA Reform Framework may dictate a different bail procedure. A review of POA bail procedure ought to be considered by the new body vested with authority to codify provincial offence procedure.

The LCO recommends that:

28. The Ministry of the Attorney General or the body responsible for developing the newly updated POA procedural code consider the current POA bail procedure and assess whether it would benefit from process amendments after considering *Criminal Code* bail amendments and any other relevant considerations, including the principles under the POA Reform Framework. Any new bail procedure ought to be codified in the new POA procedural code.

III. OTHER PROCEDURAL REFORMS TO THE POA AND ITS RULES AND REGULATIONS

A. Non-Structural Process Improvements

This Report makes broad recommendations for modernizing key aspects of the POA. We have focused primarily on structural and major process reforms that we hope will support the fair and efficient enforcement of regulatory statutes for years to come. Several other procedural issues were raised in our consultation paper and during the course of our review, but it is beyond the scope of this Report to canvas each in detail. We are also cognizant of our recommendation that the POA be simplified and that the detailed procedural code be transplanted to a single set of POA rules or a single regulation. We do not recommend which body should be responsible for developing the newly updated POA procedural code, given that the issue of who should be making rules of court is a broader policy issue that transcends the POA and could impact how criminal, civil and family rules are made. Instead, we recommend that the Attorney General and Chief Justice of the Ontario Court of Justice jointly agree on how the newly updated POA procedural code should be established and by whom, and we note the characteristics that ought to be the hallmark of any new rule-making body: independent, inclusive, expert and efficient.

[W]e recommend that the Attorney General and Chief Justice of the Ontario Court of Justice jointly agree on how the newly updated POA procedural code should be established and by whom, and we note the characteristics that ought to be the hallmark of any new rule-making body: independent, inclusive, expert and efficient.

In our view, the body responsible for this important work will be in an excellent position to analyze the following further areas of reform, equipped with its own expertise and the POA Reform Framework as a guiding set of principles. Some issues, such as the establishment of a "paralegal-client" class privilege, will have implications beyond the enforcement of provincial offences and it may be that they are ultimately considered by another body for further analysis or the court through the common law. For these reasons, the majority of the following recommendations refer the issue to the body responsible for making the new POA procedural code or the Ministry of the Attorney General. To assist that body, we describe the potential procedural reform areas that were raised with us and touch briefly upon some legal and policy considerations for each.

B. Modernization of the Search Warrant Provisions

1. Search and Seizure of Electronic Data

The use of computers and the electronic storage of data has been a major technological advance since the POA came into force in 1980. As a result, some of the search warrant provisions appear to be outdated and in need of reform. We discuss two issues: (1) what is seized when a search warrant is issued to obtain electronic data on a computerized system or device; and (2) what parameters ought to be placed within a search warrant so that it is not an overly intrusive invasion of privacy.

Sections 158 to 160 of the POA deal with search warrants. There is no specific provision that deals with the search of computers or electronic data. Subsections 158(1) and (1.1) of the POA would appear to apply when a search of information from computerized systems

is needed, but they deal with "things" and do not specifically address electronic data. They state:

> (1) A justice may at any time issue a warrant under his or her hand if the justice is satisfied by information upon oath that there are reasonable grounds to believe that is in any place,
>
> (a) *anything* on or in respect of which an offence has been or is suspected to have been committed; or
>
> (b) *anything* that there are reasonable grounds to believe will afford evidence as to the commission of an offence.
>
> (1.1) The search warrant authorizes a police officer or person named in the warrant,
>
> (a) to search the place named in the information for any *thing* described in clause (1); and
>
> (b) to seize the *thing* and deal with it in accordance with section 158.2. [emphasis added]

The LCO heard from prosecutors who say that in the absence of clear authority, investigators are seizing hard drives and "imaging" those hard drives rather than simply copying the data which would be less disruptive and intrusive to the defendant and easier for investigators.

The LCO heard from prosecutors who say that in the absence of clear authority, investigators are seizing hard drives and "imaging" those hard drives rather than simply copying the data which would be less disruptive and intrusive to the defendant and easier for investigators. If this is the only approach authorized under the POA, it confirms the practical difficulties raised by prosecutors. Moreover, electronic data today are often saved on remote computer servers rather than individual, stand-alone computers, which can be more difficult to locate and physically seize.

In a 2007 Ontario Court of Justice criminal case involving searches of computers, the court acknowledged the problem with the traditional use of search warrants in a computerized age. It noted that warrants have traditionally been directed at a particular thing or documents in a defined location, but that computer technology "frees evidence and information from such physical limits and allows data to reside in various places on different media with no version representing an obvious original." The court concluded that *Criminal Code* search warrant scheme was "originally designed to deal with physical manifestations of privacy, [but] it does not always blend easily with the world of 'virtual evidence.'"[538]

These same challenges arise in the POA context. One solution is to expressly amend the POA to permit "electronic data" from computerized systems to be copied and searched, instead of seizing the computerized equipment itself. In 1997 the *Criminal Code* was amended to deal specifically with searching computer systems and the seizure of data.[539] Subsections 487 (2.1) and (2.2) state:

> (2.1) A person authorized under this section to search a computer system in a building or place for data may
>
> (a) use or cause to be used any computer system at the building or place to search any data contained in or available to the computer system;
>
> (b) reproduce or cause to be reproduced any data in the form of a printout or other intelligible output;
>
> (c) seize the print-out or other output for examination of copying; and
>
> (d) use or cause to be used any copying equipment at the place to makes copies of the data.

> (2.2) Every person who is in possession or control of any building or place in respect of which a search is carried out under this section shall, on presentation of the warrant, permit the person carrying out the search
>
> (a) to use or to cause to be used any computer system at the building or place in order to search any data contained in or available to the computer system for data that the person is authorized by this section to search for;
>
> (b) to obtain a hard copy of the data and to seize it; and
>
> (c) to use of cause to be used any copying equipment at the place to make copies of the data.

The provisions in the *Criminal Code* offer a good starting point for POA amendments that would allow "data" to be copied from computers or other devices that hold electronic data. The limitation in the Code on the issuance of a search warrant in respect of "a building, receptacle or place" may be an issue, however, if the data are stored at a different location from the terminal from which the authorities are conducting their search,[540] such as remote servers.

"As I mentioned at the outset, it is difficult to imagine a more intrusive invasion of privacy than the search of one's home and personal computer. Computers often contain our most intimate correspondence. They contain the details of our financial, medical, and personal situations."

R. v. *Thorelli* (SCC)

The next issue is whether the scope of data to be seized should be limited, and if so, how might it be limited within a search warrant. The Supreme Court of Canada has commented on the highly intrusive nature of a search of a personal computer:

> As I mentioned at the outset, it is difficult to imagine a more intrusive invasion of privacy than the search of one's home and personal computer. Computers often contain our most intimate correspondence. They contain the details of our financial, medical, and personal situations. They even reveal our specific interests, likes and propensities, recording in the browsing history and cache files the information we seek out and read, watch, or listen to on the Internet.[541]

Therefore, it would seem that restrictions on the scope of data are needed within search warrants, and obligations spelled out for anyone who is carrying out the search warrant so as to protect data or information that is not properly the subject of the search warrant.

When a thorough policy assessment of this issue is undertaken, reference might be had to *Sedona Canada Principles: Addressing Electronic Discovery* that puts forward principles and commentary regarding the disclosure of data from electronic sources in civil litigation.[542] It offers practical suggestions for limiting the scope of electronic data disclosure in the civil context, and aspects of it may be transferrable to the POA context or, at a minimum, may serve as a tool for justices who issue search warrants.

Finally, there have been several other amendments to the search warrant powers in the *Criminal Code* and other provincial regulatory statutes that should be examined for comparison purposes when amending the POA search warrant provisions.[543] We recommend that these be reviewed to assess the desirability of adopting similar amendments to the search warrant powers in the POA.

The LCO recommends that:

29. The Ministry of the Attorney General, or body responsible for developing the newly updated POA procedural code, consider the search warrant powers within the POA and specifically propose legislative amendments to the Attorney General that will address search warrants for information from electronic sources.

Section 488.1 of the Criminal Code and section 160 of the POA both set out a similar procedure for determining a claim of solicitor-client privilege when documents are seized from a lawyer under authority of a search warrant … [T]he Supreme Court of Canada held that section 488.1 was contrary to the Charter and struck it down.

2. Constitutionality of Section 160 of the POA

Section 488.1 of the *Criminal Code* and section 160 of the POA both set out a similar procedure for determining a claim of solicitor-client privilege when documents are seized from a lawyer under authority of a search warrant. Generally, these sections establish processes to protect solicitor-client privilege through various mechanisms until a court has an opportunity to consider whether the document should be disclosed or the privilege maintained.

In *Lavallee, Rackel & Heintz v. Canada,* the Supreme Court of Canada held that section 488.1 was contrary to the *Charter* and struck it down. In assessing whether the procedure in the section results in a reasonable search and seizure of documents in the possession of a lawyer, the court stated that the traditional balancing of interests involved in a section 8 analysis was inappropriate.[544] Instead it applied a test of minimal impairment and found a number of problems with section 488.1 that more than minimally impair solicitor-client privilege. The common "fatal" feature was that the procedure allows for the potential breach of solicitor-client privilege without the client's knowledge.

The first problem is with subsection 488.1(8), which requires an investigative officer to give a reasonable opportunity for a claim of solicitor-client privilege to be made by the solicitor at the time of the search before examining, making copies or seizing documents. However, it provides no opportunity to inform the client – the privilege holder – before the investigative officer can examine, make copies or seize the documents.

The court found another fatal flaw in paragraph 488.1(4)(b), which allows the Attorney General to inspect the seized documents where the judge is of the opinion that it would assist the court in deciding whether the document is privileged. The court concluded that "any benefit that might accrue … from the Crown's being in a better position to assist the court in determining the existence of the privilege is, in my view, greatly outweighed by the risk of disclosing privileged information to the state in the conduct of a criminal investigation."[545]

The court struck down the provisions and then set out principles that govern the legality of searches of law offices as a matter of common law until Parliament, if it chooses to do so, reenacts a new procedure.[546] While the court is clear that there is more than one way to draft constitutional provisions on searches of lawyers' offices, it writes the following about the purpose of the principles and the role that they have in the enactment of any future procedure:

> These general principles should also guide the legislative options that Parliament may want to address in that respect. Much like those formulated in Descôteaux…the following guidelines are meant to reflect the present-day constitutional imperatives for the protection of solicitor-client privilege, and to govern both the search authorization process and the general manner in which the search must be carried out….[547] [citation omitted]

Libman notes that it remains to be seen whether regulatory schemes such as the POA will be treated differently should they be challenged as being contrary to section 8 of the *Charter*.

> While there may well be a lowered expectation of privacy in the regulatory arena such that the standard of reasonableness must be assessed in this manner, concerns with respect to the solicitor-client relationship and the importance of ensuring that it is safe guarded during the execution of a search warrant may be no less deserving of enhanced protection.[548]

Section 160 of the POA does have some of the same attributes that led the Supreme Court to strike down section 488.1 of the Criminal Code.

Section 160 of the POA does have some of the same attributes that led the Supreme Court to strike down section 488.1 of the *Criminal Code*. For example, subsections 160(1) and (2) of the POA do not provide an opportunity to inform the client before a person executing a search warrant can examine or seize documents in the possession of a lawyer. Moreover, while a client may bring a motion to sustain the claim of privilege or for the return of the document after a document has been seized, there is no positive obligation to advise the privilege holder that a document has been seized, giving rise to a potential breach of privilege without the client's knowledge, let alone consent. The relevant portions of section 160 read:

> 160 (1) Where under a search warrant a person is about to examine or seize a document that is in the possession of a lawyer and a solicitor-client privilege is claimed on behalf of a named client in respect of the document, the person shall, without examining or making copies of the document,
>
> (a) seize the document and place it, together with any other document seized in respect of which the same claim is made on behalf of the same client, in a package and seal and identify the package; and
>
> (b) place the package in the custody of the clerk of the court or, with the consent of the person and the client, in the custody of another person.
>
> (2) No person shall examine or seize a document that is in the possession of a lawyer without giving him or her a reasonable opportunity to claim the privilege under subsection (1).
>
> (4) Where a document has been seized and placed in custody under subsection (1), the client by or on whose behalf the claim of solicitor-client privilege is made may make a motion to a judge for an order sustaining the privilege and for the return of the document.

Given that the Supreme Court has repeatedly stated that solicitor-client privilege must be nearly absolute and that exceptions to privilege will be rare, there is a strong argument that section 160 of the POA is unconstitutional.[549] However, its constitutionality remains to be decided by the courts.

Even if section 160 of the POA were found to be constitutional, there are strong policy reasons to amend it. The potential breach of solicitor-client privilege without the client's consent, or even the client's knowledge, is arguably an unnecessary and unacceptable breach of solicitor-client privilege, even in the regulatory context. It could potentially be remedied by mandating a positive obligation to give notice to a client when a document subject to solicitor-client privilege has been seized. The absolute nature of solicitor-client privilege applies outside of the criminal arena[550] and while section 160 does not directly fly in the face of this principle since it affords a level of protection to material that is subject to solicitor-client privilege (i.e., determination by the court of the claim of privilege), it has the potential to severely undermine it since the privilege holder may be unaware of its seizure and potential disclosure. Any amendment to section 160 should give due consideration to the principles set out by the Supreme Court in *Lavallee, Rackel & Heintz*.

Even if section 160 of the POA were found to be constitutional, there are strong policy reasons to amend it. The potential breach of solicitor-client privilege without the client's consent, or even the client's knowledge, is arguably an unnecessary and unacceptable breach of solicitor-client privilege, even in the regulatory context.

An additional concern with section 160 was brought to our attention. This section refers to a document "that is in the possession of a lawyer", but often documents for which solicitor-client privilege is claimed are in the possession of the client. Extending section 160 to documents that are in the possession of the client would appear to be helpful to all parties concerned as it would provide clarity on the process to be followed to determine the claim. A policy concern would be attempts by a client to improperly assert solicitor-client privilege to protect documents that would otherwise be the proper subject of a search warrant.

The Law Society of Upper Canada has issued Guidelines for Law Office Searches .[551] The Guidelines were developed in response to the Supreme Court of Canada's decision in *Lavallee, Rackel & Heintz*. The Guidelines may be helpful when assessing potential amendments to section 160.

The LCO recommends that:

30. The Ministry of the Attorney General, or body responsible for developing the newly updated POA procedural code, review and assess whether additional protections should be included within the search warrant powers currently found in section 160 of the POA:

a. that would better protect documents or other things that are in the possession of a lawyer and subject to solicitor-client privilege, including electronic data, consistent with the Supreme Court of Canada's decision in *Lavallee, Rackel & Heintz*; and

b. that would expand the protection to documents or other things that are in the possession of a client and for which the client asserts solicitor-client privilege, and propose corresponding legislative amendments to the Attorney General.

3. "Paralegal-Client" Privilege and Search Warrants

As noted in the introduction to this Report, a key development since the passage of the POA has been the licensing and regulation of paralegals. At present it is unclear if privilege extends to "paralegal-client" communications. We raise this because if section 160 is to be amended with respect to items that are subject to solicitor-client privilege, one should also consider whether such protection should be extended to a new ground of "paralegal-client" privilege.

At present it is unclear if privilege extends to "paralegal-client" communications. We raise this because if section 160 is to be amended with respect to items that are subject to solicitor-client privilege, one should also consider whether such protection should be extended to a new ground of "paralegal-client" privilege.

In *Chancey v. Dharmadi*, a 2007 decision of the Superior Court of Justice, a Case Management Master considered whether communications between a paralegal and a client should be privileged in the same way as solicitor-client communications. The client's discussions with the paralegal took place before the licensing of paralegals. The court held that in order to recognize a class privilege respecting paralegal-client communications, the class must have specific identifiable actors. Therefore, on the particular facts of the case it refused to decide whether or not class-privilege exists.[552]

However, after noting that paralegals are now regulated and licensed by the Law Society of Upper Canada, the court set out strong arguments for extending class-privilege to paralegal-client communications. It first noted that paralegals, under section 4.1 of the *Law Society Act,* must "meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide". The court also referenced the Paralegal Rules of Conduct that place confidentiality obligations on paralegals analogous to the obligations lawyers have with respect to the confidentiality of their clients.

The court then argued that access to justice requires that a class privilege be created for discussions between a paralegal and a client:

> In those areas where paralegals are entitled to represent clients they are often more affordable than lawyers and the matters often involve less serious issues, such as traffic tickets, small claims and tenants rights. Those are the very areas where many clients can ill afford the cost of a lawyer. Paralegals fill an affordability gap in delivering legal services in such matters and provide access to justice and legal representation where clients could not afford to retain a lawyer. The failure of the court to protect as confidential communications between paralegal and client sends a message to the public that there is a two-tier justice system in effect. As noted, the Access to Justice Act provides that the Law Society in regulating paralegals "has a duty to act so as to facilitate access to justice for the people of Ontario."[553]

The rationale for creating this new class privilege was summarized as follows:

> In my view there is no principled reason why communications between a paralegal and his client should not be subject to the same class privilege as exists between a solicitor and his client. Both are subject to similar rules of conduct including obligations of confidentiality. Both are now regulated and licenced by a governing body that ensures standards of competence and imposes and enforces ethical obligations. The historical reasons for recognizing a class privilege over solicitor-client communications apply with equal vigour to paralegal-client communications. Both require full and candid communication from the client to his legal advisor to ensure competent and fair

> representation before the court or tribunal. The relationship and the communications between a paralegal and his client are as essential to the effective operation of the legal system as those between a solicitor and his client. Such communications are inextricably linked with the very legal system which desires the disclosure of the communication. The paralegal-client relationship, no less than the solicitor-client relationship, is a part of that system, not ancillary to it.[554]

Following the release of *Chancey*, the then Treasurer of The Law Society of Upper Canada is reported to have said that it would be preferable if any paralegal-client privilege were to be developed through the common law as opposed to a statute:

> I do think the judgment is helpful, though it won't be the final word on the subject. The Law Society urged the government not to address the privilege in the legislation on the ground that the solicitor-client privilege is a principle that has evolved through the common law and should continue to do so in the context of regulated legal services.[555]

The issue to be determined is whether a class of paralegal-client privilege should be codified through legislation, or whether the common law should determine whether such a class privilege ought to be created.

The issue to be determined is whether a class of paralegal-client privilege should be codified through legislation, or whether the common law should determine whether such a class privilege ought to be created. Paralegals are licensed to represent clients in a variety of matters that go beyond POA proceedings.[556] Therefore, a legislative amendment could have implications beyond provincial offences and further consideration and consultation should occur on the impact of such a class privilege in those matters. A statutory approach has the advantage of resulting in a relatively quick determination of this issue as opposed to waiting for an authoritative court ruling from the Court of Appeal or Supreme Court of Canada. On the other hand, it would be anomalous if paralegal-client privilege were established by statute, but solicitor-client privilege were a product of common law when the rationale for both types of privilege appears to be identical. Should paralegal-client privilege be established by statute or common law, it would make logical sense that section 160 be amended to similarly protect paralegal-client communications.

The LCO recommends that:

31. The Ministry of the Attorney General, in consultation with the Law Society of Upper Canada, prosecutors, paralegals and administrative tribunals or adjudicative bodies before which paralegals are lawfully entitled to appear, consider whether a class of paralegal-client privilege ought to be prescribed by statute, and if so, propose amendments to section 160 of the POA.

4. Production Orders versus Search Warrants

The Travel Industry Council of Ontario (TICO) has raised a concern with the use of search warrants to enforce compliance with the *Travel Industry Act* ("TIA").[557] When TICO suspects that a breach of the TIA has occurred and it contemplates prosecution, a search warrant needs to be obtained for any search and seizure. Subsections 20(2) and (10) of the TIA permits a justice of the peace to issue a search warrant if there are reasonable grounds to believe that a person has contravened a section of the Act or its regulations. An investigator, in the course of executing the search warrant, may require a person to provide evidence or information described in a search warrant.

When investigating the conduct of travel agents and agencies, bank records are usually required and TICO will typically apply and receive the necessary search warrants for this purpose. However, an argument has been raised that by virtue of subsection 33(4) of the Ontario *Evidence Act* (OEA), banks are not compelled to provide any books or records in any proceedings to which they are not a party, "unless by the order of the court or the judge made for special cause" under subsection 33(5).[558] Subsection 33(5) states that the inspection of the account might be allowed by the court, if the application for inspection is made on notice to the account holder and the bank.

The *Canada Evidence Act* (CEA) similarly contains a section dealing with the inspection of bank records with notice to the account holder.[559] But subsection 29(7) of the CEA provides that the inspection of records on notice to the account holder does not apply where a search warrant is issued. Once served with the search warrant, the bank must allow the search and seizure of copies of bank records. The CEA, however, does not apply to provincial offences prosecution.

Arguably, section 33 of the OAE was intended to protect *original* bank records as their search and seizure would disrupt bank operations. This justification may no longer hold true, given the ease with which documents may be copied or reproduced today. Also, section 29(7) of the CEA was an amendment to that Act to permit search warrants of bank records to be executed, and one solution may be to introduce a similar amendment to the OEA.

An alternative solution is to permit "production orders" within the POA. A search warrant is a court order authorizing the officer to enter the premises, physically search them and remove any evidence or information that is described in the search warrant. The practical reality is that copies of records are typically produced by the bank, without the investigator conducting a physical search of the premises. In essence, it is really an order for the production of documents, and a search warrant may not be the most appropriate tool to effect this result. Moreover, justices may be more willing to authorize production orders if they did not contemplate an investigator physically entering the premises of a bank and disrupting bank operations, which we were told is not the practice in any event.

There may well be other regulated industries where the use of "production orders" sanctioned under the authority of the POA may be a more efficient and practical tool for the investigation and enforcement of regulatory offences. There may also be other large non-party institutions, other than banks, that hold records relevant to a POA prosecution (e.g., government, insurer). For some non-party record holders, issues of privacy may arise (e.g., a patient's medical records held by a physician that could be relevant to a

prosecution of a public health offence). With certain institutions, the retrieval and production of documents may involve significant time and cost, particularly if the records are not searchable or retained in an electronic format. A policy decision as to who will be responsible for those costs will have to be made. Related to the issue of how documents are stored by the non-party is how documents are to be produced – whether in electronic or paper format. We recommend that this topic be considered further.

The LCO recommends that:

32. The Ministry of the Attorney General, or body responsible for developing the newly updated POA procedural code, consider whether a tool to obtain production of documents or things to assist in the prosecution of POA offences (e.g., a production order) should be authorized in the POA or its rules/regulations, separate and apart from a search warrant.

The courts have held that defences such as "de minimis non curat lex" (or the law does not concern itself with small or trivial matters), necessity and officially induced error of law are available in POA matters. Yet the POA does not provide a comprehensive list of what defences are available to a defendant, nor does it attempt to codify them.

C. Codifying Common Law Defences in the POA

Section 80 of the POA states:

> Every 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 offences, except in so far as they are altered by or inconsistent with this or any other Act.

The courts have held that defences such as "*de minimis non curat lex*" (or the law does not concern itself with small or trivial matters),[560] necessity[561] and officially induced error of law[562] are available in POA matters. Yet the POA does not provide a comprehensive list of what defences are available to a defendant, nor does it attempt to codify them. As a tool to promote greater transparency and access to the courts, particularly for minor offences where defendants are often unrepresented, it has been argued that common law defences should be expressly codified in the POA. When the Law Reform Commission of Canada proposed a new Code of Substantive Criminal Law for Canada, it recommended including all the defences that had been developed at common law in the Code.[563]

This would undoubtedly be a major undertaking. The federal government has not yet implemented the Law Reform Commission of Canada's recommendation and there may be good policy reasons not to adopt such an approach. It may just be too difficult to translate complex common law defences into clean and simple statutory provisions that will achieve the goal of promoting access. We note that in the civil context, there is not a simple statute that codifies common law torts and defences that may be brought in the Small Claims Court even though that court also has a large number of unrepresented. Again, the difficulty of translating complex common law principles into a simple statute may be the explanation.

It was proposed that at least one common law defence, "*de minimis non curat lex*", may be simply and easily translated into the POA. General authority for the *de minimis* maxim in criminal law is not clear,[564] although the Supreme Court of Canada has said recently in *Canadian Foundation for Children, Youth and the* Law v. Canada[565] that its application is still open for judicial consideration. Justice Arbour described the *de minimis* doctrine and its rationale as follows:

> Generally, the justifications for a *de minimis* excuse are that: (1) it reserves the application of the criminal law to serious misconduct; (2) it protects an accused from the stigma of a criminal conviction and from the imposition of severe penalties for relatively trivial conduct; and (3) it saves courts from being swamped by an enormous number of trivial cases.[566]

A challenge with codifying any common law defence is that the court continuously amends and defines common law defences applicable in criminal and POA cases. Were legislative drafters to prescribe a common law defence for a POA matter, it would be stuck in time while the same common law defence in the criminal context might evolve and be further refined by the courts

Codifying a *de minimis* defence into the POA could potentially give justices express authority to dismiss provincial offences where the violation was trivial. If a decision were made to codify the *de minimis* defence, model provisions are available from The American Law Institute in its Model Penal Code,[567] and from the Canadian Bar Association's *Criminal Code Recodification Task Force Report* from 1992 where it recommends the adoption of a *de minimis* defence in the *Criminal Code*.[568]

A challenge with codifying any common law defence is that the court continuously amends and defines common law defences applicable in criminal and POA cases. Were legislative drafters to prescribe a common law defence for a POA matter, it would be stuck in time while the same common law defence in the criminal context might evolve and be further refined by the courts. Those refinements would not apply in the POA context unless the POA defences were amended by the legislature. This would create an anomaly that might be difficult to justify.

Therefore, we do not think a compelling case has been made to codify common law defences within the POA, including the *de minimis* defence. This would be a daunting task, and given the complexity of many defences, they could not be easily translated into a statute and be any more comprehensible to the public than they are today. It also raises a significant potential for discrepancies to arise between how defences are treated in the criminal versus POA context that cannot be rationalized. We do, however, believe that providing greater information to the public about common defences is a valuable exercise and to promote access to justice, reference to the more common defences be included in any guides that are created for unrepresented POA litigants.

The LCO recommends that:

33. Common law defences not be codified in the POA.

34. To promote access to justice and greater information to the public about POA defences, the Ministry of the Attorney General include a general summary of the most common defences in its public guides for the public on POA proceedings (see recommendation 7).

D. Notice of Constitutional Question

Subsection 109(1) of the *Courts of Justice Act* (CJA) requires a notice of constitutional question to be served in the following circumstances:

> (1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:
>
> 1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.
> 2. A remedy is claimed under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

Where such notice is not served, a ruling on the constitutional invalidity shall not be granted.[569]

Three issues were raised. First, whether municipalities and other prosecutors should also receive notice of constitutional question when the constitutionality of a law, rule or regulation is in question. Second, whether notice should be given to municipalities when a constitutional remedy arising from an act or omission *of a municipality* is sought under paragraph 2. Third, and related to the second issue, whether it is necessary to serve the Government of Canada or the Government of Ontario when a constitutional remedy arising from an act or omission *of a municipality* is sought under paragraph 2.

On the first issue, stakeholders have said that a notice of a constitutional question should also be served on prosecutors in a POA matter. Prosecutor is defined in subsections 1(1) and 167(2) of the POA. Subsection 1(1) reads:

> "prosecutor" means the Attorney General or, where the Attorney General does not intervene, means the person who issues a certificate or lays an information, and includes an agent acting on behalf of any them.

Subsection 167(2) incorporates municipal prosecutors where the Attorney General has entered into a transfer agreement with municipalities. This subsection reads:

> "prosecutor" means the Attorney General or, where the Attorney General does not intervene, means a person acting on behalf of the municipality in accordance with the agreement or, where no such person intervenes, means the person who issues a certificate or lays an information, and includes an agent acting on behalf of any them.

If notice of constitutional question is to be served on prosecutors in municipalities that have entered into transfer agreements with municipalities, should other prosecutors also be entitled to the same service? There are numerous other prosecuting agencies who are not captured under subsection 167(2) of the POA, such as transit authorities, conservation authorities, health departments, Travel Industry Council of Ontario, and the Ontario Motor Vehicle Industry Council. They might be captured under the definition of prosecutor in subsection 1(1) of the POA.

Currently, these prosecutors only become aware of the constitutional challenge by happenstance. Knowledge of such a challenge will have a direct bearing not only in the

case in which the challenge is brought, but it can also inform prosecutorial decisions in other similar cases. These may range in the tens, hundreds, or even thousands. Now that municipalities have assumed the responsibility for prosecuting most provincial offences, it seems only logical that they should also receive Notice of Constitutional Question when the constitutionality of a law, rule or regulation is in question.

On the second issue, some have said that paragraph 2 of subsection 109(1) of the CJA should be amended to require notice be served on a municipality when a remedy is sought that relates to the acts or omissions of a "municipality" or "local board" as defined in the *Municipal Act*. Most often, motions to stay a proceeding arise because of an unreasonable delay or abuse of process caused by a municipality's failure to prosecute on a timely basis.

Now that municipalities have assumed the responsibility for prosecuting most provincial offences, it seems only logical that they should also receive Notice of Constitutional Question when the constitutionality of a law, rule or regulation is in question.

The problem is readily apparent in the 2009 decision of *R. v. Vellone*, where it was held that the defendant did not have to provide notice of constitutional question to a municipality under section 109 of the CJA.[570] The case involved a charge of speeding that was prosecuted by a municipality pursuant to an agreement under Part X of the POA. The defendant brought a motion to stay the prosecution on the grounds that his right to be tried within a reasonable time under subsection 11(b) of the *Charter* had been violated. The court held that any delay was a result of the acts or omissions of the municipality, and paragraph 2 of section 109(1) only requires notice of constitutional question be served when an act or omission *of the Government of Ontario or Government of Canada* is alleged. Leave to appeal to the Ontario Court of Appeal on this issue has been granted,[571] but as of the time of writing, no decision on the appeal has been released.

R. v. Vellone appears to be a strict interpretation of the CJA, given that municipalities have assumed responsibility over POA prosecutions and court administration which was previously the responsibility of the provincial government. If the policy rationale to serve notice of constitutional question is still justified, then it would seem that notice should be given to a municipality since it has assumed responsibilities previously held by the provincial government. Most often, it will be the municipality's acts or omissions that are under attack and fairness suggests that it receive the notice that the Province would have received had it still had carriage over POA matters.

A further point raised was that the duty to serve notice of constitutional question on the federal and provincial governments in POA prosecutions should be limited to situations where a litigant seeks a declaration of constitutional invalidity under subsection 52(1) of the *Charter* (i.e., paragraph 1 of subsection 109(1) of the CJA). It should not be a requirement in all other situations where a litigant is seeking a case-specific remedy, such as a stay for unreasonable delay or abuse of process arising from an act or omission of a municipality (i.e., the proposed amended paragraph 2 of subsection 109(1) of the CJA). It was said that the Attorneys General of Canada and of Ontario have no direct interest in the matter, and imposing this burden on litigants is unnecessary and costly. However, the Attorney General, as Chief Law Officer of the Crown, has an interest in knowing about systemic issues in POA prosecutions, and therefore, the duty to serve the Attorney General should remain intact. We agree that the Attorney General of Ontario should remain aware of constitutional challenges in these circumstances and, therefore, do not recommend reform.

The LCO recommends that:

35. **The Attorney General table amendments to section 109(1) of the Courts of Justice Act that would:**
    a. **Require service of a Notice of Constitutional Question on prosecutors in all POA matters; and**
    b. **Require that a Notice of Constitutional Question must be served on a municipal prosecutor when a party seeks relief under subsection 24(1) of the Charter relating to an act or omission of a municipality.**

The reopening rule serves a useful purpose and should be maintained. It promotes fairness by allowing defendants to defend a POA prosecution, when through no fault of their own, they were unable to appear at an original hearing.

E. Reopening Rule

The POA allows for a Part I or II conviction to be reopened if a defendant has been convicted without a hearing, and the defendant seeks to have the case reopened within 15 days of becoming aware of the conviction. Subsection 11(1) states:

> If a defendant who has been convicted without a hearing attends at the court office during regular office hours within fifteen days of becoming aware of the conviction and appears before a justice requesting that the conviction be struck out, the justice shall strike out the conviction if he or she is satisfied by affidavit of the defendant that, through no fault of the defendant, the defendant was unable to appear for a hearing or a notice or document relating to the offence was not delivered.[572]

A justice may then strike out the conviction and order a new trial, in which case, a new notice of trial will be issued.[573]

The reopening rule serves a useful purpose and should be maintained. It promotes fairness by allowing defendants to defend a POA prosecution, when through no fault of their own, they were unable to appear at an original hearing. However, some have called for the reopening rule to be restricted to prevent abuse. For example, a defendant may seek a reopening of a case, not attend the newly scheduled trial, and then seek a second reopening of the case arguing that they were unable to attend the new trial. It has been proposed that a defendant be restricted to reopening a case only once.

It was also proposed that a defendant only be permitted to reopen a case within one year after the original conviction. A one-year limitation on reopenings may be justified if mechanisms were in place to ensure that defendants became aware of convictions within that time period, otherwise the limitation period may be seen as unfair.

Finally, it was suggested that justices be given discretionary power to order costs for witnesses or interpreters who had appeared at the original hearing where the conviction was entered, and that payment of these costs be a condition to granting the reopening. If the costs are not paid within a certain period of time, the reopening application would be deemed to be abandoned. On the one hand, this would reimburse the municipal partner

for unnecessary costs that were wasted and it could potentially minimize abuse of the reopening process. On the other hand, it may unfairly discourage defendants from seeking a trial on a charge for which they had no notice. A hybrid solution might be to make these costs payable upon a conviction being entered at the new trial, subject to any discretion in the justice to order otherwise.

The LCO recommends that:

36. The Ministry of the Attorney General, or body responsible for developing the newly updated POA procedural code, consider whether the re-opening rule should be restricted to prevent abuse, and whether the court should have the discretionary authority to award costs in cases where the re-opening process is abused.

F. Applicability of Certain POA Appeal Sections

Section 124 of the POA, under the heading "Appeals Under Part III", sets out circumstances where an appeal should not be allowed, but it refers to a "certificate" which suggests a proceeding commenced under Part I or II. It states:

> (1) Judgment shall not be given in favour of an appellant based on any alleged defect in the substance or form of an information, *certificate* or process or any variance between the information, *certificate* or process and the evidence adduced at trial unless it is shown that objection was taken at the trial and that, in the case of a variance, an adjournment of the trial was refused although the variance had misled the appellant. [emphasis added]
>
> (2) Where an appeal is based on a defect in a conviction or an order, judgment shall not be given in favour of the appellant, but the court shall make an order curing the defect.

As a result, there is uncertainty as to its application where the alleged defect or variance relates to a certificate. A certificate is defined by subsection 1(1) of the POA as meaning "a certificate of offence issued under Part I or a certificate of parking infraction issued under Part II". In a recent case it was held that section 124 did not apply to appeals of Part I and Part II POA matters. In holding that section 124 did not apply to certificates, the court observed the following:

> While I am puzzled by the reference in s.124 to "certificate", which by s.1(1) of the Act is defined to mean "a certificate of offence issued under Part I or a certificate of parking infraction issued under Part II", I am nonetheless satisfied that the section only applies to appeals under Part III of the Act.[574]

It was suggested that the confusion stemming from the reference to "certificate" in section 124 should be deleted given this decision.

In addition, we note that section 125 of the POA is tied to section 124. If section 124 of the POA is amended, the applicability of section 125 should be revisited. Section 125 reads:

> Where a court exercises any of the powers conferred by sections 117 to 124, it may make any order, in addition, that justice requires.

Others have proposed that other sections (section 117 regarding the powers of court on appeal, and section 118 regarding the right to representation) should apply to non-Part III appeals.

The policy rationale behind sections 124 and 125 and the other sections noted above governing appeals should be revisited to assess whether or not they should apply only to appeals of Part III offences or to other appeals as well.

The LCO recommends that:

37. **The Ministry of the Attorney General, or body responsible for developing the newly updated POA procedural code, review the policy rationale behind sections 124 and 125 of the POA to assess whether they are to apply to only Part III appeals, or to all appeals.**

G. Enforcement Tools for Unpaid Fines

Concerns with unpaid fines and available enforcement tools were brought to our attention. A media article from May 2010 reported that there are over $1 billion in outstanding fines owed largely by drivers in Ontario.[575] The Ministry of the Attorney General has advised us, however, that this total is for fines imposed under 243 statutes and it includes fines that date back to 1970. Many of these fines are old and uncollectable, more than 50% have been outstanding for more than five years, and some are owed by corporations that no longer exist. Also, municipalities now enforce the collection of most fines, rather than the Province.

As discussed in Section II.A, there are generally three modes of enforcement for unpaid fines authorized under the POA: (1) certificate of default and enforcement proceeding through the civil courts (i.e., Small Claims Court or Superior Court of Justice);[576] (2) suspension or refusal to renew a vehicle licence plate; and (3) suspension or refusal to renew a driver's licence.[577]

Enforcement through the civil courts typically results in a writ of seizure and sale being registered upon any land owned by the defaulting debtor and the money is usually only paid when the land is sold or any mortgages to the property are renewed. As a result, there can be delays through this enforcement tool. With respect to the suspension or renewal of driver's licences or vehicle plates, effective systems must be in place to allow municipalities to report unpaid fines to the Ministry of Transportation directly or through the Ministry of the Attorney General.

A further enforcement tool was established in 2009. Amendments to the *Municipal Act, 2001* and *City of Toronto Act, 2006* now permit municipalities to add to municipal property tax rolls any unpaid fines "for which all of the owners are responsible for paying the fine and collect it in the same manner as municipal taxes."[578] While helpful, it is not available when two or more people are registered owners of a property but only one registered owner has unpaid fines. In addition, under the 2009 amendments, the two year limitation period for the civil enforcement of POA fines was eliminated,[579] and municipalities may recover collection agency costs without approval from the Attorney General.[580]

The use of a tax diversion mechanism, as the one in place in Alberta, may serve as a possible further enforcement tool in Ontario and its merits should be assessed. Where fines have been ordered payable, the public's respect for the rule of law and the administration of justice is threatened if effective enforcement mechanisms are not in place. However, deducting income tax refunds or GST rebates may have a deleterious impact on the poor who may rely heavily on these sources of income for basic necessities of food, shelter and clothing.

In 2006, the Alberta government started a pilot project in Edmonton whereby unpaid fines arising from traffic tickets were deducted from income tax refunds and GST rebates through an arrangement with Canada Revenue Agency.[581] Media articles report that it was an effective enforcement tool, collecting $1.3 million in unpaid fines in less than a year, which money was largely diverted back to the municipality.[582] It appears that this fine enforcement program established by Alberta Justice is now being used elsewhere within the province,[583] and we were told that it has been an effective enforcement tool.[584] A similar program has been adopted in Saskatchewan through its Fine Collection Branch.[585]

The use of a tax diversion mechanism, as the one in place in Alberta, may serve as a possible further enforcement tool in Ontario and its merits should be assessed. Where fines have been ordered payable, the public's respect for the rule of law and the administration of justice is threatened if effective enforcement mechanisms are not in place. However, deducting income tax refunds or GST rebates may have a deleterious impact on the poor who may rely heavily on these sources of income for basic necessities of food, shelter and clothing. Indeed, one policy rationale for GST rebates is to lessen the burden of this tax on those with low or modest incomes.[586] We believe the impact of this reform option on low-income Ontarians ought to be given particular attention. The LCO understands that various organizations in Ontario continue to examine the enforcement of fines,[587] and that it was an issue considered by the Ministry of the Attorney General's POA Streamlining Review Committee. This work should continue with particular attention given to the impact of this reform option on the poor and with reference to the best available data as why certain fines remain unpaid. Where data needed to further assess this issue are unavailable, an assessment of the best means to collect this data should be undertaken.

The LCO recommends that:

38. The Government of Ontario, in consultation with Ontario municipalities and the Canada Revenue Agency, assess whether the use of a tax diversion program may provide an effective and fair method for the enforcement of unpaid POA fines with due policy consideration given to how this reform option would impact low-income Ontarians who rely on tax refunds and GST rebates as a significant source of income. Reference should be had to available data as to why fines remain unpaid, and if that data are not available, an assessment of the best means to collect them be undertaken.

H. Hearing Matters Electronically – Telephone or Video Conference

We heard that the POA should permit greater use of telephone or videoconferences for various POA hearings, and in particular, plea resolutions before justices of the peace. Where the appropriate equipment is available, the POA currently permits witnesses, defendants, prosecutors and interpreters to participate in a hearing by way of "electronic method", which is defined as including video conference, audio conference or telephone conference. Subsection 83.1(2) reads:

We heard that the POA should permit greater use of telephone or videoconferences for various POA hearings, and in particular, plea resolutions before justices of the peace.

> **Appearance by electronic method**
> (2) Subject to this section, in any proceeding under this Act or any step in a proceeding under this Act, if the appropriate equipment is available at the courthouse where the proceeding occurs,
> (a) a witness may give evidence by electronic method;
> (b) a defendant may appear by electronic method;
> (c) a prosecutor may appear and prosecute by electronic method; and
> (d) an interpreter may interpret by electronic method.

The POA, however, does not permit a justice to attend and conduct a hearing electronically. An amendment to the POA that has yet to be proclaimed would appear to address this. New subsection 83.1(3.1), once proclaimed, states:

> (3.1) A justice may attend and conduct a sentencing hearing under sections 5.1 and 7 and any other proceeding or any step in a proceeding determined by the regulations, by means of electronic method, if the appropriate equipment is available at the courthouse where the proceeding occurs, and the justice may,
> (a) adjourn the sentencing hearing to have the defendant appear in person before the justice for the purpose of ensuring that the defendant understands the plea; and
> (b) adjourn any other proceeding or step in a proceeding determined by the regulations if he or she is satisfied that the interests of justice require it or it is necessary for a fair trial.[588]

A paramount concern is that trial fairness not be jeopardized by the use of telephone or videoconference technology.

We also note that a 2002 amendment that has yet to be proclaimed would allow bail hearings to be conducted by a "telecommunications device".[589]

The use of telephone and videoconference technology can usher in significant advantages, particularly in remote areas of the province. It can also result in significant cost savings if distant witnesses are able to provide testimony through a video connection.

Once these provisions are proclaimed, their effectiveness should be reviewed and assessed. A paramount concern is that trial fairness not be jeopardized by the use of telephone or videoconference technology. A factor of the review should consider the extent to which telephone or videoconferences may reduce access to justice for litigants who cannot access these technologies.

The LCO recommends that:

39. The Ministry of the Attorney General, or body responsible for developing the newly updated POA procedural code, review the use of telephone and videoconference hearings (authorized under the existing POA and any new provisions once proclaimed), for their effectiveness, fairness and efficiency and recommend any improvements as it may deem appropriate.

I. Appeals of Cost Awards on Reviews

Under clauses 116(1)(e) and 116(2)(b) of the POA, the Superior Court of Justice has jurisdiction to hear appeals of cost orders made by a judge of the Ontario Court of Justice. Section 140 of the POA also confers jurisdiction on the Superior Court to review a decision arising under the Act and to grant mandamus, certiorari or prohibition. However, when such a prerogative order is sought and successfully obtained, the Superior Court does not appear to have jurisdiction to deal with any costs ordered by the lower court. Subsection 141(3) of the POA states that the Superior Court, on a review, does not have the authority to deal with costs since this is a matter that can be dealt with by way of appeal.

For example, if a prosecutor sought a review of a decision to stay certain charges that also included a cost award, it would have to commence an application for a review, plus an appeal of the cost order. This would result in an anomaly of two separate proceedings before the Superior Court arising from the same Ontario Court of Justice decision. We believe this is a procedural oversight that could be easily corrected.

The LCO recommends that:

40. To avoid fractured proceedings, section 140 of the POA be amended to provide jurisdiction to the Superior Court of Justice to review a cost award made by the Ontario Court of Justice when a prerogative remedy application is made under that section, notwithstanding that the POA allows for an appeal of a cost order under Part III.

J. Improving Access to Justice for Francophones

Access to justice for Francophones is not an issue unique to the POA context; it is an issue of concern for all matters before the court. The *Courts of Justice Act* states that the official languages of the courts of Ontario are English and French, and a party to a proceeding who speaks French has the right to require that it be conducted as a bilingual proceeding.[590]

These statutes, and any standards developed under them, must be considered by the body responsible for developing any new POA procedural code so that procedures are enacted that do not negatively impact the ability of Francophones and persons with disabilities to access the justice system. For example, a defendant who is served with a summons in a POA procedure must be given a return date to appear in court, but on that return date, there may not be a bilingual justice presiding if the defendant is Francophone.[591] The result will be a wasted court appearance that will require rescheduling, with inconvenience incurred by the court and the parties. Procedures, in our view, must allow for *early* identification of French language needs so that real court dates can be provided. For French language rights to have meaning, and to ensure access to justice for all, procedures must contemplate French speaking defendants.

Access to justice for Francophones is not an issue unique to the POA context; it is an issue of concern for all matters before the court.

The LCO recommends that:

41. The body responsible for developing the newly updated POA procedural code consider proactive procedures that will allow for the early identification of French language needs so that procedures can be put in place to respond to those needs early in each POA case and by the time of a first appearance in court.

K. Accommodating Persons with Disabilities

Following the release of the Interim Report for this project, the ARCH Disability Law Centre delivered submissions to the LCO proposing that the issue of the impact of any new POA procedure on persons with disability be more carefully considered and that it be the subject of further review.

Of course, court procedures can impact persons with disabilities in any number of different contexts, not just in POA proceedings. We note that the *Accessibility for Ontarians with Disabilities Act, 2005*[592] has set out a framework for governments to develop standards to remove barriers faced by persons with disabilities, and the *Human Rights Code*[593] require that persons with disabilities receive reasonable accommodation. We understand that Court Service Division of the Ministry of the Attorney General has implemented various standards to better accommodate persons with disabilities in court proceedings. The LCO is also working on a separate project that seeks to develop a coherent framework for the law as it impact persons with disabilities.

We believe that each of these statutes, along with the pending framework to be developed by the LCO, be considered by the body responsible for developing the newly updated POA procedural code so that the POA is responsive to persons with disabilities.

The LCO recommends that:

42. The body responsible for developing the newly updated POA procedural code consider the needs of persons with disabilities consistent with statutes and policies developed by the Ministry of the Attorney General and any framework developed by the LCO, so that POA procedures respond to those needs proactively early in each POA case.

[Relevant statutes], along with the pending framework to be developed by the LCO [in its project relating to persons with disabilities should] be considered by the body responsible for developing the newly updated POA procedural code so that the POA is responsive to persons with disabilities.

L. Filing Notices of Intention to Appear at the Courthouse

In response to a Part I certificate of offence, a defendant who wishes to enter a plea and have a trial must deliver a notice of intention to appear.[594] However, in certain prescribed municipalities (e.g., Toronto, Hamilton, Ottawa), the defendant must file the notice of intention to appear by attending the courthouse,[595] rather than simply delivering it by mail to the courthouse. A similar provision exists for defendants who wish to dispute a Part II parking infraction notice.

The LCO was advised that this relatively new requirement has created several challenges, particularly for lawyers or paralegals who represent clients across the province. For example, a paralegal who represents a national trucking business may wish to file notices of intention to appear in cases throughout Ontario, and the requirement to physically attend each courthouse can significantly increase costs for the defendant.

There may be several policy reasons for the requirement to attend a courthouse. First, a notice of intention to appear may get lost in the mail, and disputes as to whether or not it was indeed delivered can be avoided. Second, it provides an opportunity to meet with POA court staff to consider whether a parking "ticket" was issued correctly and as noted previously, staff may exercise discretion and cancel a ticket based on guidelines or directives. And a final rationale, questionable as it may be, is that the physical act of attending a courthouse creates a disincentive to dispute an offence notice or parking infraction. If this is the primary rationale, it is worthy of reconsideration.

In our view, options ought to be developed to reduce the burden on those who seek to file a notice of intention to appear, particularly where the defendant (or the defendant's representative) does not reside near the courthouse. These may include allowing for notices of intention to appear to be filed in any court location, and once stamped as received, it could be forwarded to the prosecuting court location by fax or electronically.

The LCO recommends that:

43. The body responsible for developing the newly updated POA procedural code consider options to reduce the cost and burden of attending courthouses to file notices of intention to appear, which may include allowing for notices of intention to appear to be filed in any court location.

M. Process Improvements Arising from the POA Streamlining Review

The Ministry of the Attorney General's POA Streamlining Review Working Group was established in August 2006 to consider proposals to simplify procedures, reduce demand for court resources, enhance fine enforcement and improve service to the public. Members on the Working Group included representatives from the Municipal Court Managers' Association, the Prosecutors' Association of Ontario, Association of Municipalities of Ontario, Ministry of the Attorney General and select other Ministries. Public input was sought through the distribution of a consultation paper.[596] In 2009, the Working Group made over 60 specific and detailed recommendations to the Attorney General. Many have already been implemented by the *Good Government Act, 2009* which makes numerous amendments to the POA.[597]

However, many recommendations were not included in the *Good Government Act, 2009*. The LCO was told that the Working Group engaged in much research, debate and discussion and it would be unfortunate if its recommended improvements were to get lost. We believe the recommendations of the POA Streamlining Review Working Group should be disclosed to the new body tasked with drafting a single set of POA rules or regulations so that they may be duly reviewed and considered.

The LCO recommends that:

44. The body responsible for developing the newly updated POA procedural code review the recommendations of the POA Streamlining Review Working Group to assess whether any recommended amendments not yet implemented should be adopted by way of rule, regulation or statutory amendment.

IV. FUTURE LAW REFORM INITIATIVES

There are three issues that are not dealt with in depth in this Report on which we make some general comments.

First, the Consultation Paper raised the issue of reforming the treatment of young persons charged with provincial offences. The federal *Youth Criminal Justice Act*[598] creates a separate criminal justice system for young people based on the concept that youths should be treated differently from both children and adults. This legislation is more comprehensive than Part VI of the POA which governs young people, and provides for a greater number of distinctions between the treatment of adults and younger people. Nova Scotia and the Northwest Territories have also enacted separate legislation to deal with young persons charged with provincial offences. Whether Ontario should adopt a similar approach is a significant and important policy issue that warrants separate consideration. The LCO recommends that this matter be the subject of further review in consultation with groups representing young persons.

[T]he LCO heard that many Aboriginal people are being convicted without a trial after being deemed not to dispute the charge, or after a trial in their absence, pursuant to sections 9 and 54 of the POA, respectively.

Second, concerns were raised about the POA's application in relation to Aboriginal people. As an example, the LCO heard that many Aboriginal people are being convicted without a trial after being deemed not to dispute the charge, or after a trial in their absence, pursuant to sections 9 and 54 of the POA, respectively.[599] The Ministry of the Attorney General does not collect data on the nature of a defendant and, in particular, whether or not a defendant identifies as being Aboriginal; therefore, it was not possible to confirm this perception with statistics. However, the LCO relied upon anecdotal information about enforcement agencies that are believed to have higher than average Aboriginal populations who are charged with POA offences.[600] We then extracted data on the number of charges brought by those enforcement agencies that resulted in a conviction from a failure to respond to an offence notice or a failure to attend at trial. Data reveal 43% of charges in 2007 and 2008, and 42% of charges in 2009 brought by these enforcement agencies, resulted in a conviction for a failure to respond or failure to attend at trial.[601]

To assess whether this is a disproportionately high percentage, we compared data on the same disposition outcomes in regions of the province where these enforcement agencies are located, namely the North East and North West Court Services regions. We did this to assess whether or not geographic issues had an impact on the failure to respond to POA charges. In the North East region, 27% of charges in both 2007 and 2008, and 26% of charges in 2009, resulted in a conviction from a failure to respond or failure to attend at trial. In the North West region, the percentages were 34% in both of 2007 and 2008, and 33% in 2009. Provincial data from all court regions similarly revealed a much lower percentage of charges resulting in convictions from a failure to respond or failure to attend trial; 29% in 2007, 30% in 2008 and 28% in 2009.[602]

While not conclusive, it does lend some statistical support to the concern raised that a disproportionate number of Aboriginal people are being convicted without a trial. Relying upon the above data, Aboriginal people may tend to be convicted from a failure to respond to a charge or failure to appear at trial anywhere between 8 to 15% higher than non-Aboriginals.

The LCO is not aware of options that have been presented to improve the manner in which Aboriginal people interact with Ontario's provincial offences system. This is in contrast to the criminal justice system where the Aboriginal Justice Strategy, funded by the Ontario and federal governments, seeks to "allow local communities to offer culturally appropriate ways to help Aboriginal people deal with the criminal justice system."[603] The centerpiece of the strategy is Community Based Justice programs, which have various objectives that could potentially apply in the POA context. These objectives include the reduction in the rates of crime and incarceration among Aboriginal people, allowing Aboriginal people to assume greater responsibility for the administration of justice in their communities, fostering improved responsiveness, fairness and inclusiveness, and improving the effectiveness of the justice system to better meet the needs of Aboriginal people.[604]

This Report does not evaluate the Aboriginal Justice Strategy or attempt to determine whether aspects of it might apply to our system of provincial offences.[605] Rather, we note that while efforts to address the needs of Aboriginal Peoples in the criminal justice system have been made, no similar attempt appears to have been made in relation to provincial offences. We conclude that this issue is sufficiently significant to warrant further study and review, and recommend that it be undertaken by the provincial government in consultation with Aboriginal communities and the federal government.

The centerpiece of the [province's Aboriginal justice] strategy is Community Based Justice programs, which have various objectives that could potentially apply in the POA context.

A further potential reform option was presented to the LCO very close to the completion of the Interim Report in the project. We table it briefly as an issue worthy of further review and consideration.

First Nation (FN) communities are not considered a "municipality" as this term is defined under the *Municipal Act*. Therefore, they have no authority to establish an AMP system or collect AMPS to enforce by-laws on FN communities. Under the federal *Indian Act*, FN communities have authority to establish by-laws, governing a wide variety of matters, including the regulation of traffic.[606] However, we were told that jurisdictional issues and an ineffective prosecutorial process render this by-law making authority useless in virtually all FN communities.[607]

At first glance, it seems to be a potentially worthwhile reform option since there would be no reason to treat the enforcement of traffic by-laws by a FN communities any differently from those of a municipality. However, we have not had a sufficient opportunity to consult or fully assess the legal or policy implications of this reform option, which we recommend be performed by the Ontario government in consultation with FN communities in Ontario.

The LCO recommends that:

45. The Ontario government undertake a review of the treatment of young persons charged with provincial offences under the POA, in consultation with youth groups, and that such review take into consideration the unique consideration given to young persons under the federal *Youth Criminal Justice Act* and legislation in other jurisdictions that create unique procedures for young persons charged with provincial offences.

46. The Ontario government, in consultation with Aboriginal communities and the federal government, undertake a review of the application of the POA in relation to Aboriginal peoples, and in particular, consider strategies to allow local communities to offer culturally appropriate ways to help Aboriginal peoples better respond to the provincial offences justice system.

47. The Ontario government, in consultation with First Nations communities, consider the legal and policy implications of expanding the definition of "municipality" within the *Municipal Act* to permit by-laws enacted by a First Nation band under the federal *Indian Act* to be enforced through an AMPS

V. LIST OF RECOMMENDATIONS

The following recommendations fall into one of three categories: (a) structural reforms to the *Provincial Offences Act* system, including the transition to administrative monetary penalties for certain offences; (b) procedural reforms to be considered within any newly structured *Provincial Offences Act* or new POA rules or regulation, to be developed by the Ministry of the Attorney General or body responsible for the newly updated POA procedural code; and (c) future law reform initiatives given the limited scope of this project.

The LCO recommends that:

1. Given the distinctions between regulatory offences and criminal offences, a separate procedural code for the prosecution, enforcement and sentencing of provincial offences should remain in place, separate and apart from the *Criminal Code* procedure.

2. The purpose section of the POA be amended to advance a procedure for the trial or resolution of provincial offence cases and to inform the development of any rules, forms or other subordinate authority or practice that is:
    a. fair;
    b. accessible;
    c. proportionate to the complexity and seriousness of the provincial offence;
    d. efficient;
    e. responsive to the offence-creating statute's objective; and
    f. reflective of the distinction between provincial offences and criminal offences.

3. The POA be significantly restructured to provide only the necessary foundational, jurisdictional and offence-creating provisions that are necessary to permit the POA regime to operate by removing the detailed procedural provisions to regulations.

4. The POA continue to prescribe different streams for the commencement of POA proceedings (i.e., Part I for less serious offences and Part III for more serious offences, although these parts may be renamed or renumbered in any new POA).

5. The four different sets of POA Rules and forms be consolidated into a single set of POA rules or regulation.

6. New POA rules or regulation prescribe a simplified and complete procedural code for the fair, accessible, most efficient trial, appeal or resolution of a POA proceeding based on the stream in which the proceeding is commenced. In particular, simplified trial rules be established for current Part I offences, and separate, more comprehensive trial rules established for current Part III offences. Further specialized and proportionate rules may be developed as necessary for the most common types of POA offences or for those offences that are unduly complex or would benefit from specialized rules that further the POA's objectives.

7. The Ministry of the Attorney General, in consultation with municipalities and legal and community organizations, develop simple, plain language procedural guides for POA defendants that are accessible on the Ministry of the Attorney General's website and at all POA court locations.

8. The Attorney General and the Chief Justice of the Ontario Court of Justice jointly agree on how the newly updated POA procedural code should be established and by whom, after consultation with the Criminal Rules Committee, the Chief Justices of the other levels of Court and municipalities who now have carriage over POA prosecutions and courts administration.

9. Amend subsection 70(2) of the Courts of Justice Act accordingly, to relieve the Criminal Rules Committee of jurisdiction to make POA rules and identify the new body or entity responsible for developing the newly updated POA procedural code.

10. Within three years, after the Ministry of the Attorney General has consulted with municipalities and an appropriate IT infrastructure has been developed to report defaulted AMPs, the POA be amended to remove the prosecution of Part II parking infractions in the Ontario Court of Justice.

11. Within three years, each municipality (or jointly with other municipalities or Municipal Partners) adopt and implement a by-law for administrative penalties to enforce by-laws relating to the parking, standing or stopping of vehicles, including by-laws relating to disabled parking.

12. Amend O. Reg. 333/07 under the *Municipal Act* (and O. Reg. 611/06 under the *City of Toronto Act*, 2006) to permit administrative penalties for the enforcement of by-laws establishing systems of disabled parking.

13. Increase the monetary limit for administrative penalties in section 6 of O. Reg 333/07 (and section 6 of O. Reg. 611/06) from $100 to $500, or such other amount as is necessary to permit enforcement of disabled parking by-laws through AMPS.

14. Each municipality and relevant government Ministries, including the Ministry of Transportation, immediately assess operational challenges to the successful implementation of an AMPS regime for parking enforcement (such as any required IT infrastructure), and put in place a plan to resolve those challenges within three years. Consultation with municipalities who have already implemented an AMP system may assist in overcoming any operational challenges.

15. The Ontario government conduct a review of minor provincial offences most typically commenced as Part I proceedings, and in particular, minor Highway Traffic Act offences currently prosecuted under Part I, to assess which offences may be better enforced under an AMPS regime. This review should consider, among other legal, policy and operational considerations:

    a. the most common offences currently prosecuted under Part I, their volume, and associated court and judicial resources required to dispose of these offences as compared to an AMPS regime;

b. the effectiveness of AMP regimes for other minor offences;

c. the nature of the offence (i.e., whether it is a strict or absolute liability offence), and whether due diligence defences could or should be maintained in an AMPS regime through appropriate guidelines to the administrative hearing officer;

d. the proposed penalty under an AMPS regime and whether it would be punitive or give rise to the potential of imprisonment;

e. whether the potential circumstances giving rise to the offence could potentially lead to allegations of infringements of Charter or other rights, and if so, how might those allegations be dealt with under an AMPS regime;

f. operational issues that would hamper the ability to transition the offence into an AMPS regime;

g. the impact on the Victims' Justice Fund; and

h. the merits of maintaining two separate and distinct systems for the resolution of the same provincial offences currently prosecuted under Part I (e.g., an AMPS and a POA court-based system).

16. The POA be amended to provide a statement of sentencing principles of general application that shall be used by the court as guidelines when sentencing all provincial offences, subject to other or different sentencing principles or provisions prescribed in the offence-creating statute.

17. The statement of sentencing principles should include the following four principles:

(i) Impose a sanction that remedies the violation, to the extent that such a sanction is possible and reasonable ("remediation");

(ii) If the offender is likely to continue to engage in the regulated activity after sentencing, but the offender's behaviour must change to prevent future breaches, impose a sanction that promotes the changes necessary to prevent future violations ("rehabilitation");

(iii) Impose a sanction that promotes change in the behaviour of other persons (e.g., dissuade others from committing the same or similar offence), but only if the court believes that that it could serve a regulatory objective and where the remedial and rehabilitative sanctions are insufficient given the circumstances of the case ("general deterrence");

(iv) Impose a sanction that denounces and punishes the offender's behaviour if aggravating circumstances make such a sanction appropriate ("denunciation").

18. At sentencing hearings, particularly in Part III offences, parties should be encouraged to submit joint submissions on aggravating and mitigating factors as well as the sentence to be imposed.

19. The POA be amended to confer broad authority on the court to make probation orders for all provincial offences in order to give effect to the remedial and rehabilitative sentencing principles. Permissible probationary terms that may be ordered by the court ought to include restitution and such other conditions that the court considers necessary and appropriate to prevent similar unlawful conduct or to contribute to the rehabilitation of the defendant, regardless of whether or not the offence is punishable by imprisonment. While available for all offences, probation orders should be made for less serious offences only where the circumstances of the case render probation a particularly appropriate sentencing option.

20. The POA be amended to include community service as a possible term of probation where it would achieve remediation for any harm caused, contribute to the rehabilitation of the offender, or serve as an alternative to the payment of a fine where a defendant is unable to pay a fine.

21. The POA be amended to permit alternative penalties to be issued by the court. In particular, authority for free-standing restitution or compensatory orders that may be enforced in civil courts be expressly created, as well as authority to order an embedded auditor to promote compliance with regulatory standards.

22. The POA be amended to expressly permit the use of victim impact statements for offences in which harm has been caused, subject to a residual discretion in the court to decide whether or not to admit them after considering the seriousness of the offence and any harm caused.

23. After consultation with municipalities and legal and community organizations, the Ministry of the Attorney General consider the adoption of alternative measure programs for less serious provincial offences.

24. The POA be amended to confer power on the court to make a probation order against a corporation or other business enterprise, whether incorporated or not, with conditions modeled on subsection 732.1(3.1) of the *Criminal Code* regarding probation conditions for an organization.

25. The Ministry of the Attorney General, after consultation with the judiciary, prosecutors, defence bar and paralegals, develop a non-exhaustive list of aggravating factors to be included within the POA for the court to consider when ordering a punitive or denunciatory penalty against a corporation or other business enterprise. Such factors may include degree of planning in the commission of the offence, efforts to deliberately conceal the offence from detection by regulatory officials, or if compliance could have been achieved at little or no cost.

26. The POA be amended to permit a justice to deny bail where detention is necessary for the protection or safety of the public, including any alleged victims or witnesses, having regard to all the circumstances. However, the LCO recommends

that bail may be denied only under this ground in very limited situations; the prosecutor must demonstrate a real and substantial likelihood that the defendant will commit a serious offence that will harm the public.

27. The Ministry of the Attorney General, in consultation with the judiciary, municipal prosecutors, defence bar, paralegals, and relevant legal and community organizations:

    a. review and consider any further bail conditions that ought to be added to the POA;

    b. prior to the introduction of any new bail conditions, develop judicial guidelines to promote their use by the court in a manner that is consistent with the principles outlined in the POA Reform Framework; and

    c. within five years after any new bail conditions are implemented, review the cases in which they are being used to ensure they are not being abused or overused in a manner that unduly infringes a defendant's pre-trial liberties.

28. The Ministry of the Attorney General or the body responsible for developing the newly updated POA procedural code consider the current POA bail procedure and assess whether it would benefit from process amendments after considering *Criminal Code* bail amendments and any other relevant considerations, including the principles under the POA Reform Framework. Any new bail procedure ought to be codified in the new POA procedural code.

29. The Ministry of the Attorney General, or body responsible for developing the newly updated POA procedural code, consider the search warrant powers within the POA and specifically propose legislative amendments to the Attorney General that will address search warrants for information from electronic sources.

30. The Ministry of the Attorney General, or body responsible for developing the newly updated POA procedural code, review and assess whether additional protections should be included within the search warrant powers currently found in section 160 of the POA:

    a. that would better protect documents or other things that are in the possession of a lawyer and subject to solicitor-client privilege, including electronic data, consistent with the Supreme Court of Canada's decision in *Lavallee, Rackel & Heintz*; and

    b. that would expand the protection to documents or other things that are in the possession of a client and for which the client asserts solicitor-client privilege, and propose corresponding legislative amendments to the Attorney General.

31. The Ministry of the Attorney General, in consultation with the Law Society of Upper Canada, prosecutors, paralegals and administrative tribunals or adjudicative bodies before which paralegals are lawfully entitled to appear,

consider whether a class of paralegal-client privilege ought to be prescribed by statute, and if so, propose amendments to section 160 of the POA.

32. The Ministry of the Attorney General, or body responsible for developing the newly updated POA procedural code, consider whether a tool to obtain production of documents or things to assist in the prosecution of POA offences (e.g., a production order) should be authorized in the POA or its rules/regulations, separate and apart from a search warrant.

33. Common law defences not be codified in the POA.

34. To promote access to justice and greater information to the public about POA defences, the Ministry of the Attorney General include a general summary of the most common defences in its public guides for the public on POA proceedings (see recommendation 7).

35. The Attorney General table amendments to section 109(1) of the Courts of Justice Act that would:
    a. Require service of a Notice of Constitutional Question on prosecutors in all POA matters; and
    b. Require that a Notice of Constitutional Question must be served on a municipal prosecutor when a party seeks relief under subsection 24(1) of the Charter relating to an act or omission of a municipality.

36. The Ministry of the Attorney General, or body responsible for developing the newly updated POA procedural code, consider whether the re-opening rule should be restricted to prevent abuse, and whether the court should have the discretionary authority to award costs in cases where the re-opening process is abused.

37. The Ministry of the Attorney General, or body responsible for developing the newly updated POA procedural code, review the policy rationale behind sections 124 and 125 of the POA to assess whether they are to apply to only Part III appeals, or to all appeals.

38. The Government of Ontario, in consultation with Ontario municipalities and the Canada Revenue Agency, assess whether the use of a tax diversion program may provide an effective and fair method for the enforcement of unpaid POA fines with due policy consideration given to how this reform option would impact low-income Ontarians who rely on tax refunds and GST rebates as a significant source of income. Reference should be had to available data as to why fines remain unpaid, and if that data are not available, an assessment of the best means to collect them be undertaken.

39. The Ministry of the Attorney General, or body responsible for developing the newly updated POA procedural code, review the use of telephone and videoconference hearings (authorized under the existing POA and any new provisions once proclaimed), for their effectiveness, fairness and efficiency and recommend any improvements as it may deem appropriate.

40. To avoid fractured proceedings, section 140 of the POA be amended to provide jurisdiction to the Superior Court of Justice to review a cost award made by the Ontario Court of Justice when a prerogative remedy application is made under that section, notwithstanding that the POA allows for an appeal of a cost order under Part III.

41. The body responsible for developing the newly updated POA procedural code consider proactive procedures that will allow for the early identification of French language needs so that procedures can be put in place to respond to those needs early in each POA case and by the time of a first appearance in court.

42. The body responsible for developing the newly updated POA procedural code consider the needs of persons with disabilities consistent with statutes and policies developed by the Ministry of the Attorney General and any framework developed by the LCO, so that POA procedures respond to those needs proactively early in each POA case.

43. The body responsible for developing the newly updated POA procedural code consider options to reduce the cost and burden of attending courthouses to file notices of intention to appear, which may include allowing for notices of intention to appear to be filed in any court location.

44. The body responsible for developing the newly updated POA procedural code review the recommendations of the POA Streamlining Review Working Group to assess whether any recommended amendments not yet implemented should be adopted by way of rule, regulation or statutory amendment.

45. The Ontario government undertake a review of the treatment of young persons charged with provincial offences under the POA, in consultation with youth groups, and that such review take into consideration the unique consideration given to young persons under the federal *Youth Criminal Justice Act* and legislation in other jurisdictions that create unique procedures for young persons charged with provincial offences.

46. The Ontario government, in consultation with Aboriginal communities and the federal government, undertake a review of the application of the POA in relation to Aboriginal peoples, and in particular, consider strategies to allow local communities to offer culturally appropriate ways to help Aboriginal peoples better respond to the provincial offences justice system.

47. The Ontario government, in consultation with First Nations communities, consider the legal and policy implications of expanding the definition of "municipality" within the *Municipal Act* to permit by-laws enacted by a First Nation band under the federal *Indian Act* to be enforced through an AMPS.

APPENDIX A

ORGANIZATIONS AND INDIVIDUALS PROVIDING INPUT

- Jim Andersen, Ministry of the Attorney General
- ARCH Disability Law Centre
- Association of Justices of the Peace of Ontario
- Association of Municipalities of Ontario
- Janice Atwood-Petkovski, City of Vaughan
- Chris G. Bendick, Solicitor, City of Vaughan
- Peter P. Blake
- City of Toronto, Legal Services
- Curry Clifford, Association of Municipal Managers, Clerks and Treasurers of Ontario
- Paul Davey, Paralegal
- Indigenous Bar Association
- Anna Kinastowski, City Solicitor, City of Toronto
- Sousanna Karas, Travel Industry Council of Ontario
- Licensed Paralegal Association
- Professor Richard B Macrory, Faculty of Law, University College London
- Jane Marshall, Ministry of the Attorney General
- Municipal Court Managers' Association of Ontario
- Ken Murphy, Carswell
- Sabrina Musilli, Ministry of the Attorney General
- Ramani Nadarajah, Canadian Environmental Law Association
- Paralegal Society of Ontario
- The Honourable John A. Payne, Associate Chief Justice, Ontario Court of Justice
- Prosecutors' Association of Ontario
- Real Estate Council of Ontario, Legal Services
- Brenda Russell, Municipal Law Enforcement Officers' Association (Ontario)
- Corporal Christopher D. Russell, Canadian Forces
- Elizabeth A. Silcox, Real Estate Council of Ontario
- Bill Theriault
- Tony Thompson, City of Vaughan, Enforcement Services
- Shayne Turner, City of Kitchener
- Ted Yao

APPENDIX B:

RESEARCH PAPERS COMMISSIONED BY THE LCO

The LCO issues a call for the preparation of research papers in particular subjects relevant to a project. It relies on these papers in the same way as any research. The papers do not necessarily reflect the LCO's views.

Stanley Berger, *Report into Administrative Monetary Penalties for Parking Infractions*. Summer 2010. Available online at http://www.lco-cdo.org/en/provincial-offences-call-for-papers-berger.

The Honourable Mr. Justice Rick Libman, *Sentencing Purposes and Principles for Provincial Offences*. Summer 2010. Available online at http://www.lco-cdo.org/en/provincial-offences-call-for-papers-libman

APPENDIX C:

TYPES OF HEARINGS FOR PARKING VIOLATIONS IN THE U.S.

State	City Specific	City	Type of Hearing
Alabama	Yes	Birmingham	Court
Alaska	Yes	Anchorage	Administrative
Arizona	Yes	Phoenix	Court
Arkansas	Yes	Little Rock	Court
California	No	N/A	Administrative
Colorado	Yes	Denver	Administrative
Connecticut	No	N/A	Court
Delaware	Yes	Wilmington	Court
District of Columbia	No	N/A	Administrative
Florida	No	N/A	Court
Georgia	Yes	Atlanta	Court
Hawaii	No	N/A	Court
Idaho	Yes	Boise	Court
Illinois	Yes	Chicago	Administrative
Indiana	Yes	Indianapolis	Administrative
Iowa	Yes	Des Moines	Administrative
Kansas	Yes	Wichita	Court
Kentucky	Yes	Louisville	Administrative
Louisiana	Yes	New Orleans	Court
Maine	No	N/A	Court
Maryland	No	N/A	Court
Massachusetts	Yes	Boston	Administrative
Michigan	Yes	Detroit	Court
Minnesota	Yes	Minneapolis	Administrative
Mississippi	Yes	Jackson	Administrative
Missouri	Yes	St. Louis	Administrative
Montana	Yes	Billings	Court
Nebraska	Yes	Omaha	Court
Nevada	Yes	Las Vegas	Administrative
New Hampshire	Yes	Manchester	Administrative
New Jersey	Yes	Newark	Court
New Mexico	Yes	Albuquerque	Court
New York	Yes	New York City	Administrative
North Carolina	Yes	Charlotte	Administrative
North Dakota	Yes	Fargo	Administrative
Ohio	Yes	Columbus	Administrative
Oklahoma	Yes	Oklahoma City	Court
Oregon	Yes	Portland	Court
Pennsylvania	Yes	Philadelphia	Administrative
Rhode Island	Yes	Providence	Administrative
South Carloina	Yes	Columbia	Court
South Dakota	Yes	Sioux Falls	Administrative
Tennessee	Yes	Memphis	Court
Texas	Yes	Houston	Administrative
Utah	Yes	Salt Lake City	Administrative
Vermont	Yes	Burlington	Administrative
Virginia	Yes	Arlington	Court
Washington	Yes	Seattle	Court
West Virginia	Yes	Charleston	Court
Wisconsin	Yes	Milwaukee	Court
Wyoming	Yes	Cheyenne	Court

Total Administrative **24**
Total Court **27**

ENDNOTES

1. *Provincial Offences Act,* RSO 1990, c. P.33 [hereafter *POA*].
2. Douglas Drinkwalter & Douglas Ewart, *Ontario Provincial Offences Procedure* (Toronto: The Carswell Company Limited, 1980) at iii. Subsequently, the Uniform Law Conference of Canada released a uniform statute relating to provincial offences, the Regulatory Offences Procedure Act (April 1996); the only province that adopted it was Newfoundland. Online: http://www.ulcc.ca/en/us/Table_3_En.pdf.
3. Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.
4. *Criminal Code*, RSC 1985, c. C-46.
5. Rick Libman, *Libman on Regulatory Offences,* looseleaf (Salt Spring Island: BC Earlscourt Legal Press Inc, 2002).
6. Todd Archibald, Kenneth Jull & Kent Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management,* looseleaf (Aurora, Ont. Canada Law Book, 2008) at 15-1; David Potts, "Municipal Systems of Administrative Penalties" in *Creating and Enforcing Municipal By-Laws* (Toronto: Canadian Institute, 2008).
7. John Swaigen, *Regulatory Offences in Canada: Liability and Defences* (Toronto: Carswell, 1992) at xxxv.
8. Ontario, Working Group for Provincial Offences Act Streamlining Review, *Provincial Offences Act Streamlining Review: Consultation Paper* (Toronto: Working Group for POA Streamlining, 29 January 2009). Online: Law Society of Upper Canada www.lsuc.on.ca/media/apro109_poa_streamlining_consultation.pdf.
9. The *Good Government Act, 2009*, SO 2009, c. 33, Schedule 4 (Bill 212) made numerous amendments to the *Provincial Offences Act*. See Sheilagh Stewart, *Stewart on Provincial Offences Procedure in Ontario,* 3rd ed. (Salt Spring Island, BC: Earlscourt Legal Press Inc., 2011) at 61-64. A smaller number of amendments were made by the *Good Government Act, 2011,* SO 2011, c. 1; however, these have not yet come into force.
10. The LCO is indebted to the Honourable Mr. Justice Rick Libman and Kenneth Jull for identifying a number of these trends in conversations with the LCO.
11. *R. v. Wholesale Travel Group Inc,* [1991] 3 SCR 154, at para 150 (SCC).
12. For a detailed review of the *Charter*'s application to the POA, see Libman, note 5 at c. 10.
13. *Lavallee* v. *Alberta (Securities Commission*), [2010] AJ No. 144 (CA) (QL) [hereafter *Lavallee*].
14. *An Act to Amend the Criminal Code (Sentencing) and Other Acts in Consequence Thereof,* SC 1995, c. 22 amending RSC 1985, c. C-46.
15. *An Act to amend the Criminal Code (Criminal Liability of Organizations),* SC 2003, c. 21 amending RSC 1985, c. C-46.
16. *Public Health Act*, SBC 2008, c. 28.
17. *R. v. Sault Ste. Marie (City),* [1978] 2 SCR 1299.
18. Libman, note 5 at 1-5 to 1-6.
19. *Securities Act*, RSO 1990, c. S.5, s. 122.
20. *Environmental Protection Act*, RSO 1990, c. E.19, s. 187 [hereafter *EPA*].
21. Archibald, Jull & Roach, note 6 at INT-4.
22. Archibald, Jull & Roach, note 6 at 15-1 (the authors note that the administrative system is thought to be less expensive than regulatory trials).
23. *Municipal Act, 2001*, SO 2001, c. 25 at s. 102.1. The City of Toronto is not governed by the *Municipal Act, 2001*, but by the *City of Toronto Act, 2006,* SO 2006, c.11 (Schedule A). The *City of Toronto Act, 2006* also authorizes implementation of AMPS.
24. Potts, note 6. In his paper, David Potts identifies 21 existing or proposed administrative penalty systems for the enforcement of Ontario statutes. A search of e-laws using "administrative /3 penalty and administrative /3 penalties" results in a listing of 21 statutes and some statutes, such as the *Environmental Protection Act*, may set up an AMP system and call it by a different name. The *Environmental Protection Act* creates a monetary penalty that it calls an environmental penalty.
25. City of Vaughan, By-Law No 156-2009, *A By-Law to Further Amend Parking By-Law 1-96, as amended, to provide for a system of administrative penalties and administrative fees* [hereafter Vaughan AMP By-law]. City of Oshawa, By-Law 25-2008, A By-Law to amend Licensing By-Law 120-2005, as amended, and the General Fees and Changes By-Law 13-2003, as amended. Also see City of Oshawa, By-Law 24-2011, Being a By-Law to establish system for administrative penalties respectively the stopping, standing or parking of vehicles.
26. *POA*, note 1, s. 162 and 165.
27. *Law Society Act*, RSO 1990, c. L.8.
28. By-Law 4, ss. 6(2), made under s. 62 of the *Law Society Act*, note 27.
29. Ontario, *Paralegal Rules of Conduct.* Online: Law Society of Upper Canada http://www.lsuc.on.ca/with.aspx?id=1072.
30. Ontario Law Reform Commission [OLRC], *Report on the Administration of Courts* (Toronto: Law Reform Commission of Ontario, 1973) Part I at 17.
31. Ministry of the Attorney General, Ontario Court Services Division, *ICON Database* (statistics) [unpublished]. The "date of first hearing request" is the date that the notice of intention to appear in court or the date on the summons is entered into the database. These numbers exclude prepaid fines and fail to respond.
32. Conversation with Barry Randell, Director, Court Services with the City of Toronto (April 2010).
33. *The Provincial Offences Act,* SO 1979, c. 4.
34. *POA*, note 1, ss. 1(1) definition of "offence". See also note 56 on the application of the POA to federal contraventions.
35. Law Reform Commission of Canada (LRCC), *Studies in Strict Liability* (Ottawa: Government of Canada, 1974) at 2.
36. According to the *ICON Database*, note 31, over 2 million charges were disposed of in each of 2007, 2008 and 2009. These numbers do not include tickets issued under Part II of the POA which governs the procedure for parking infractions.
37. *Summary Convictions Act*, RSO 1970, c. 450.
38. Drinkwalter & Ewart, note 2 at iii.
39. OLRC, note 30.
40. Attorney General's Statement, (April 1978) *Ontario Provincial Offences Procedure* (Toronto: The Carswell Company Limited, 1980) at 1.
41. Drinkwalter & Ewart, note 2 at iv.

42. *POA*, note 1, ss. 2(1).
43. Drinkwalter & Ewart, note 2 at iv- v.
44. Murray D. Segal & Rick Libman, *The 2010 Annotated Ontario Provincial Offences Act* (Toronto: Thomson Canada Limited, 2010) at 1.
45. *R. v. Jamieson* (1981), 64 CCC (2d) 550 (Ont CA) at 552, [1981] OJ No 1937 at para 5 (QL).
46. The Ministry of the Attorney General does not collect data on the number of self represented litigants in POA proceedings. However, there is a strongly held perception by those with whom the LCO consulted that the vast majority are self-represented.
47. *POA*, note 1, ss. 1(1).
48. The POA, with the exception of subsections 12(1), 17(5) and 18.6(5), applies to the prosecution of contraventions under the *Contraventions Act*, SC 1992, c. 47. Section 65.1 of the *Contraventions Act* provides the authority for the *Application of Provincial Laws Regulations* SOR/96-312, which states that the laws of the province referred to in the schedule apply to the contraventions designated under the Contraventions Regulations. Section 1 of Part 1 of Schedule 1 states that the POA and any regulations made under the POA and the rules of court made under the *Courts of Justice Act* of Ontario apply, with such modifications as are necessary, to contraventions alleged to have been committed on or after August 1, 1996, in Ontario or within the territorial jurisdiction of the courts of Ontario. Collectively, the offences to which the POA applies will be referred to as regulatory or public welfare offences.
49. *POA*, note 1, ss. 1(1).
50. *POA,* note 1.
51. Stewart, note 9 at 2.
52. *Highway Traffic Act*, RSO 1990, c. H.8, s. 33(1) [hereafter *HTA*].
53. *Liquor Licence Act*, RSO 1990, c. L.19, s. 31(2).
54. Section 12 of the POA states that imprisonment is not available for a proceeding commenced under Part I. Furthermore, while subsection 69(14) does allow for the incarceration of a person who does not pay a fine in limited circumstances (i.e., where person is able to pay the fine and incarcertation would not be contrary to the public interest), it is not truly available in Ontario. Subsection 165(3) of the POA states that the enforcement provisions found in ss. 69(6)-69(21) do not apply where a municipality has entered into a POA transfer agreement with the Attorney General. Since the entire province is now covered by agreements, these enforcement tools, including imprisonment for unpaid fines, are not used or available. See POA, note 1.
55. *POA*, note 1, s. 4.
56. *Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings* [Rules], O Reg 200, as amended by s. 6. The set fine is intended to reflect the average penalty for the offence charged and is somewhat above the minimum penalty for the offence, if any, and applicable to the average defendant in average circumstances. The Chief Justice fixes the amount since sentencing is a judicial act. See Stewart, note 9 at 4-5.
57. *POA*, note 1, ss. 8(1) and (2).
58. *POA*, note 1, s. 7.
59. *POA*, note 1, s. 5.
60. *POA*, note 1, s. 9.
61. *POA*, note 1, ss. 5(2).
62. *POA*, note 1, s. 28.
63. *POA*, note 1, ss. 15(4).
64. *POA*, note 1, ss. 18(1).
65. *POA*, note 1, s. 16.
66. *POA*, note 1, s. 17.
67. *Rules*, note 56, r. 6.
68. *POA*, note 1, ss. 17(3).
69. *POA*, note 1, s. 18.2 and 18.4.
70. *POA*, note 1, s. 18.6.
71. According to the *ICON Database*, note 31, all charges received in 2009 under ss. 186(1) and (2) of the EPA, note 20, for contraventions of the Act or failing to comply with orders under the Act, were brought under Part III.
72. Stewart, note 9 at 138.
73. *Occupational Health and Safety Act*, RSO 1990, c. O.1, ss. 25(1)(a) [hereafter *OHSA*].
74. *POA*, note 1, ss. 1(1).
75. Stewart, note 9 at 137.
76. *POA*, note 1, ss. 23(1).
77. *POA*, note 1, s. 24, 26.
78. *POA*, note 1, ss. 24(1)(a)(iii).
79. According to the *ICON Database*, note 31, 2,819 persons received jail sentences in 2007 under Part III and in 2008 that number was 2,898.
80. *POA*, note 1, s. 28.
81. *POA*, note 1, s. 56.
82. *POA*, note 1, s. 72.
83. *POA*, note 1, s. 58.
84. *POA*, note 1, s. 59.
85. *POA*, note 1, s. 60. See also *Costs*, RRO 1990, Reg 945.
86. *POA*, note 1, s. 60.1.
87. *POA*, note 1, s. 66.
88. *POA*, note 1, s. 68. Note that a potential for imprisonment may arise when enforcing a fine through the Small Claims Court or the Superior Court of Justice, but it is a remote possibility. For example, if a person fails to answer a question or attend a judgment-debtor examination after being ordered to do so, he or she may be incarcerated for contempt of court.
89. *POA*, note 1, ss. 69(2).
90. *POA*, note 1, ss. 69(6).
91. *POA*, note 1, ss. 69(14) and (16). Note the Supreme Court of Canada's decision in *R. v. Wu*, [2003] 3 SCR 530, where the concept of debtor's prison for those unable to pay fines was strongly disapproved by the court. As per Justice Binnie at para 3, "the purpose of imposing imprisonment in default of payment is to give serious encouragement to offenders with the means to pay a fine to make payment. Genuine inability to pay a fine is not a proper basis for imprisonment."

92. *POA*, note 1, ss. 69(15).
93. *POA*, note 1, ss. 165(3) states that subsections 69(6)-(21) of the POA do not apply to fines that are governed by a POA transfer agreement.
94. *POA*, note 1, s. 67. See also *Fine Option Program*, RRO 1990, Reg 948.
95. *POA*, note 1, s. 76.
96. *POA*, note 1, s. 77 and 78.
97. *POA*, note 1, s. 80.
98. *POA*, note 1, s. 83.1.
99. *POA*, note 1, s. 91.
100. *POA*, note 1, s. 93.
101. *POA*, note 1, s. 95.
102. *POA*, note 1, s. 97, 100 and 101.
103. *POA*, note 1, s. 99.
104. Rules of the Ontario Court (General Division) and the Ontario Court (Provincial Division) in appeals under section 116 of the Provincial Offences Act, O Reg 723/94.
105. *POA*, note 1, s. 143-148.
106. *POA*, note 1, s. 149-150.
107. *POA*, note 1, s. 150.
108. *POA*, note 1, s. 154-157.
109. *POA*, note 1, s. 158-158.1.
110. *POA*, note 1, s. 158.2-160.
111. *POA*, note 1, s. 165.
112. *Courts of Justice Act*, RSO 1990, c. C.43, ss. 70(2) and (3).
113. *HTA*, note 52, ss. 128, 130, 106, 84.1, 182(2) and 33(1).
114. *HTA*, note 52, ss. 172(2) and 84.1(3).
115. *Compulsory Automobile Insurance Act*, RSO 1990 c. C.25, s. 2.
116. *OHSA*, note 73, s. 28 and 25.
117. *OHSA*, note 73, ss. 28(1)(b) and (d).
118. *OHSA*, note 73, s. 28(1)(d).
119. *OHSA*, note 73, ss. 26, 32.0.1(1)(a) and (b).
120. *OHSA*, note 73, s. 66.
121. David Rider *et al*, "Survivor of balcony tragedy suing firms, province", Toronto Star (17 August 2010). Online: Toronto Star http://www.thestar.com/news/gta/article/848749—survivor-of-balcony-tragedy-suing-firms-province.
122. *EPA*, note 20. Several offences are created under this Act, including the common offence of littering (s. 89).
123. *Clean Water Act, 2006*, SO 2006, c. 22 (*CWA*). Section 106 creates offences for breaches of the Act.
124. *Pesticides Act*, RSO 1990, c. P.11. Section 42 creates offences for breaches of the Act.
125. *EPA*, note 20, ss. 91.1(a) and (b)(ii).
126. *EPA*, note 20, ss. 86 and 89(1).
127. *CWA*, note 123, ss. 89(1).
128. *CWA*, note 123, ss. 63(1) and 106(2).
129. *Pesticides Act*, note 124, ss. 30(1).
130. *Liquor Licence Act*, note 53. Section 61 creates offences under the Act.
131. *Smoke-Free Ontario Act*, SO 1994, c. 10. Section 15 creates offences under the Act.
132. *Liquor Licence Act*, note 53, ss. 41(4), 32(1) and (2).
133. *Liquor Licence Act*, note 53, ss. 5(1).
134. *Liquor Licence Act*, note 53, ss. 61(3)(a) and (b).
135. *Smoke-Free Ontario Act*, note 131, ss. 3(1).
136. *Smoke-Free Ontario Act*, note 131, ss. 3.1(1).
137. *Smoke-Free Ontario Act*, note 131, ss. 15(9).
138. *Food Safety and Quality Act, 2001*, SO 2001, c. 20 (*Food Safety)*. Section 44 creates offences for contravention of this Act.
139. *Food Safety*, note 138, s. 31(1)(b).
140. *Fire Protection and Prevention Act*, *1997,* SO 1997, c. 4, Part VII.
141. *Family Law Act*, RSO 1990, c. F. 3, ss. 46(1) and (2).
142. *Trespass to Property Act*, RSO 1990, c. T.21, s. 2.
143. *Christopher's Law (Sex Offender Registry), 2000,* SO 2000, c. 1, s. 11.
144. *Safe Streets Act, 1999*, SO 1999, c. 8, s. 5.
145. *Safe Streets Act, 1999*, note 144, ss. 3(2)(f).
146. *Consumer Protection Act, 2002*, SO 2002, c. 30 (CPA). Section 23 creates offences under the Act.
147. CPA, note 146, ss. 14(1), 10 and 11.
148. CPA, note 146, s. 37, 28, 29 and 40.
149. CPA, note 146, ss. 39(1) and 40(1).
150. *Consumer Reporting Act, 1990*, RSO 1990, c. 30 (CRA). Section 23 creates offences under the Act.
151. CRA, note 150, s. 13(1).
152. CRA, note 150, ss. 23(1) and (2).
153. Ontario Court of Justice, *Biennial Report 2006/2007*. Online: Ontario Courts http://www.ontariocourts.on.ca/ocj/en/reports/annualreport/06-07.pdf at 59.
154. *ICON Database*, note 31.
155. *ICON Database,* note 31. 2.1 million charges were brought in each of 2007 and 2008; 1.9 million were brought under Part I; 165,000 were brought under Part II in 2007 and 173,000 were brought under Part II in 2008. *Highway Traffic Act* offences represented 80 – 81% of all Part I offences, or approximately 75% of all Part I and Part III offences combined.
156. *ICON Database*, note 31.
157. Casey Brendon, Acting Director for Revenue Services, City of Toronto, "Briefing Note to Mayor and City Council: 2009 Parking Ticket Activity" (30 April 2010). Online: City of Toronto http://www.toronto.ca/pay-toronto tickets/pdf/2009activitybn .pdf.
158. Data provided to LCO by Patrick Emard, Coordinator, POA Court Services, City of Ottawa (2 November 2010).
159. Data provided to LCO by Jane Iacobucci, Manager of Court Operations, Corporate Services City of Brampton (10 November 2010).
160. See subsequent discussion on *R. v. Sault Ste Marie*. In *Strasser v. Roberge*, [1979] 2 SCR 953, the court noted that for a provincial offence to require proof of *mens rea*, the statute would require

use of the words "knowingly", "willfully" and "intentionally".

161. *R. v. Wholesale Travel Group Inc*, note 11 at para 130. For a detailed review of the *Charter*'s application to regulatory offences, see Libman, note 5 at c. 10.
162. *Criminal Code*, note 4, s. 718.2 contains a list of sentencing principles. The POA, on the other hand, does not.
163. LRCC, *Our Criminal Law* (Report 3) (Ottawa: Information Canada, 1976).
164. LRCC, Working Paper 2, *The Meaning of Guilt: Strict Liability* (Ottawa: Information Canada, 1974) at 4.
165. LRCC, note 164 at 3.
166. LRCC, note 163 at 36.
167. LRCC, note 163 at 28.
168. *R. v. Sault Ste Marie,* note 17 at paras 60-61.
169. *R. v. Sault Ste Marie,* note 17 at para 61.
170. *R. v. Wholesale Travel Group*, note 11 at paras 24-26.
171. *R. v. Wholesale Travel Group*, note 11 at paras 27-28.
172. Libman, note 5 at 1-7.
173. LRCC, note 163 at 34-35.
174. Archibald, Jull & Roach, note 6 at 9-8 - 9-12; Swaigen, note 7 at 65.
175. Archibald, Jull & Roach, note 6 at 9-10.
176. *R. v. Transport Robert (1973) Ltée* [2003] OJ No 4306, 68 OR 3d 51 at para 27 (QL) [hereafter *Transport Robert*]
177. In Section II.E, the LCO also recommends that sentencing principles be included in the POA and that those principles should be different from those contained in the *Criminal Code*.
178. Sherie Verhulst, "Legislating a Principles Approach to Sentencing in Relation to Regulatory Offences" (2008), 12 Can. Crim. L. Rev. 281 at 283.
179. *ICON Database*, note 31.
180. Conversation with Barry Randell, Director, Court Services with the City of Toronto (April 2010): the City issued roughly 2.8 million parking tickets in 2009.
181. *ICON Database*, note 31. In 2009, 1,611,696 of the 2,159,185 Part I and Part III charges were for speeding.
182. LRCC, note 163 at 29.
183. *POA*, note 1, ss. 2(1).
184. Drinkwalter & Ewart, note 2 at v.
185. Drinkwalter & Ewart, note 2 at v.
186. Attorney General's Statement, note 40.
187. Drinkwalter & Ewart, note 2 at 4-7.
188. See Archibald, Jull & Roach, note 6 at 14-18 and ch. 11 for a review of *Charter* decisions in the regulatory context.
189. *Transport Robert*, note 146 at paras 27-28, appl'n for leave to appeal dismissed, [2004] SCCA No 8.
190. Lavallee, note 13 at paras 20-23.
191. Lavallee, note 13 at paras 20-23.
192. Lavallee, note 13 at para 29, appl'n for leave to appeal dismissed, [2010] SCCA No 119.
193. *R. v. Pontes*, [1995] SCJ No. 70 at para 26.
194. *R. v. Jarvis*, [2002] 3 SCR 757, 2002 SCC 73 at para 96.
195. See e.g., *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643 at 653. See also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] SCJ No. 39 at para 20.
196. *Knight v. Indian Head School Division No 19*, [1990] 1 SCR 653 at 682. See also *Baker v. Canada (Minister of Citizenship & Immigration)*, note 195, where the Court said at para 28:

    > The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.

197. Archibald, Jull & Roach, note 6 at 14-18, citing T. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990); T. Tyler and Y. Huo, *Trust and the Rule of Law* (New York: Russell Sage, 2001).
198. For an overview of the different aspects of "access to justice", see Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About?" [2008] 46 Osgoode Hall LJ 773.
199. Drinkwalter & Ewart, note 2 at iii.
200. Drinkwalter & Ewart, note 2 at iv.
201. Attorney General's Statement, note 40 at 1.
202. See Coulter A. Osborne, "Summary of Findings and Recommendations of the Civil Justice Reform Project" (November 2007), Chapter 19. Online: Ontario Ministry of the Attorney General http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/; ADR Institute of Ontario, Ontario Bar Association, and Ontario Association for Family Mediation, *Submission to Attorney General Chris Bentley - Creating a Family Process that Works: Final Report and Recommendations from the Home Court Advantage Summit* (unpublished, November 22, 2009) at 12. Online: Ontario Bar Association http://www.oba.org/En/publicaffairs_en/PDF/Interim_Report_Home_Court_Advatnage_FINAL_12dec09.pdf; Superior Court of Justice, *Family Law Strategic Plan* (unpublished, 2010) at 3. Online: Ontario Courts www.ontariocourts.on.ca/scj/en/famct/familylawstrategicplan.pdf.
203. *R. v. Jamieson*, note 45 at 552.
204. *R. v. Felderhof,* 68 FOR (3d) 481, 2003 CanLII 37346 (Ont CA) paras 40-43.
205. Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992).
206. Archibald, Jull & Roach, note 6 at 1-8 to 1-9, citing D. Yergin and J. Stanislaw, *The Commanding Heights: The Battle Between Government and the Marketplace That is Remaking the Modern World* (New York: First Touchstone Edition, 1999) at 335 and the political views of former British Prime Minister Margaret Thatcher and former American President Ronald Regan.
207. The Honourable Dennis O'Connor, *Report of the Walkerton Inquiry: The Events of May 2000 and Related Issues*, Part One (Toronto: Queen's Printer for Ontario, 2002) at 367.

208. Marianne Ojo, *Responsive Regulation: Achieving the Right Balance Between Persuasion and Penalisation*, (19 March 2009) [unpublished, Centre for European Law and Politics, University of Bremen] at 2. Online: Munich Peresonal RePEc Archive http://mpra.ub.uni-muenchen.de/14170/, citing Ayres & Braithwaite, note 205.
209. Ayres & Braithwaite, note 205 at 20-21.
210. Ayres & Braithwaite, note 205 at 22-25.
211. Ayres & Braithwaite, note 205 at 25.
212. Ayres & Braithwaite, note 205 at 25.
213. Ayres & Braithwaite, note 205 at 22.
214. Ayres & Braithwaite, note 205 at 19.
215. John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mining Safety* (Albany: State University of New York Press, 2002) at 30-31.
216. Archibald, Jull & Roach, note 6 at 14-10, citing J. Braithwaite, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002) at 39.
217. *R. v. Gladue,* [1999] 1 SCR 688 at para 71.
218. Archibald, Jull & Roach, note 6 at 14-12.
219. Archibald, Jull & Roach, note 6 at 14-13.
220. Braithwaite, note 215 at 31.
221. Braithwaite, note 215 at 33.
222. See Richard B Macrory, *Regulatory Justice: Making Sanctions Effective,* Final Report November 2006). Online: UK Department for Business Innovation and Skills http://www.berr.gov.uk/files/file44593.pdf. This report examined sanction options available in the UK and concluded that regulators were too reliant on criminal prosecutions and that more flexible and risk-based options were needed. One of its many recommendations was that government consider such tools as AMPS and introducing schemes that utilize restorative justice techniques.
223. Segal & Libman, note 44 at 1.
224. *R. v. Jamieson*, note 45 at para 5.
225. See e.g., *Transport Robert*, note 176.
226. *Ontario Society for Prevention of Cruelty to Animals Act*, RSO 1990, c. O.36, s. 11.2 and 18.1 make it an offence to cause an animal to be in distress. A similar offence is created in the *Criminal Code*, note 4, s. 445.1.
227. See e.g., *R. v. Jamieson*, note 44 at 552; *R. v. Felderhof*, note 204 at paras 40-43; *Attorney-General for Ontario v. Stephens*, 2006 ONCJ 269 (CanLII) at para 15.
228. Rules of Civil Procedure, RRO 1990, Reg 194, r. 1.04 states:

> (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
> (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

229. Family Law Rules, O Reg 114/99, r. 2(2)-2(4) states:
(2) The primary objective of these rules is to enable the court to deal with cases justly.
(3) Dealing with a case justly includes,
(a) ensuring that the procedure is fair to all parties;
(b) saving expense and time;
(c) dealing with the case in ways that are appropriate to its importance and complexity; and
(d) giving appropriate court resources to the case while taking account of the need to give resources to other cases.
(4) The court is required to apply these rules to promote the primary objective, and parties and their lawyers are required to help the court to promote the primary objective.
230. Rules of the Small Claims Court, O Reg 258/98, r. 1.03(1) states:

> These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding on its merits in accordance with section 25 of the *Courts of Justice Act*.

231. Rules of the Ontario Court of Justice in Criminal Proceedings, SI/97-133, r. 1.04(1) reads:

> These rules are intended to provide for the just determination of every criminal proceeding, and shall be liberally construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

232. See e.g., the requirement for the clerk to give Notice of Trial in the *POA*, note 1, ss. 5(2) and compare with the requirement of the clerk to set a date and time for trial in the *Rules of the Ontario Court (Provincial Division)* in *Provincial Offences Proceedings*, note 56, ss. 13(1).
233. *POA*, note 1. Sections 5.1 and 17.1 require that a Notice of Intention to Appear be filed in person in certain parts of Ontario that are prescribed. These sections are the subject of amendments that could potentially reduce their complexity, but they have not yet been proclaimed, and in any event would not drastically reduce the level of complexity for an unrepresented defendant (*Good Government Act 2009*, note 9, ss. 1(5) and 1(22)).
234. *Proceedings Commenced by Certificate of Offence*, RRO 1990, Reg 950.
235. *POA*, note 1, ss. 17.1(2) and 18.1(2).
236. Rules of the Small Claims Court, note 230.
237. Ministry of the Attorney General, Small Claims Court. Online: Ontario Ministry of the Attorney General http://www.attorneygeneral.jus.gov.on.ca/english/courts/scc/default.asp.
238. *Rules of the Ontario Court (Provincial Division)* in *Provincial Offences Proceedings*, note 56.
239. *Rules of the Ontario Court (Provincial Division) in Appeals under Section 135 of the Provincial Offences Act*, O Reg 722/94.
240. *Rules of the Ontario Court (General Division) and the Ontario Court (Provincial Division) in Appeals under Section 116 of the Provincial Offences Act*, O Reg 723/94.
241. *Rules of the Court of Appeal in Appeals under the Provincial Offences Act*, O Reg 721/94.
242. *Courts of Justice Act*, note 112, s. 70(2).

243. *Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings*, note 56, was last amended in 2000 by O Reg 567/00. The three remaining rules were enacted in 1994 and have never been amended.
244. Ministry of the Attorney General, note 237.
245. Ministry of the Attorney General, *Civil Cases: Suing and Being Sued in the Superior Court of Justice*. Online: Ontario Ministry of the Attorney General http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/suing_and_being_sued_main.asp.
246. Ministry of the Attorney General, Family Justice, various resources including *Guide to Procedures in Family Court*. Online: Ontario Ministry of the Attorney General http://www.attorneygeneral.jus.gov.on.ca/english/family/default.asp.
247. See e.g., *Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings,* note 56; *Rules of Civil Procedure*, note 238; *Family Law Rules*, note 229.
248. See e.g., The Honourable Coulter A. Osborne, note 202 at 128.
249. See Lorne Sossin, "Constitutional Accommodation and the Rule(s) of Courts" (2005) 42 Alta L Rev 607, for a proposal that calls for the creation of an independent commission to resolve rules-related disputes that arise between the judiciary and government.
250. As one possible example, a new POA Rules Committee might be comprised of:
    1. Chief Justice of the Court of Appeal (or designate)
    2. Chief Justice of the Superior Court of Justice (or designate)
    3. Chief Justice of the Ontario Court of Justice (or designate)
    4. One Justice of the Peace appointed by the Chief Justice of the Ontario Court of Justice
    5. Attorney General (or designate)
    6 Crown Attorney, appointed by the Attorney General
    7 Municipal Prosecutor / City Solicitor, appointed by the Law Society of Upper Canada
    8 Paralegal, appointed by the Law Society of Upper Canada
    9 Lawyer, appointed by the Law Society of Upper Canada
    10 Municipal Court Manager appointed by the Attorney General.
251. *Criminal Code*, note 4, s 482(2).
252. OCJ, *Biennial Report 2006/2007*, note 153.
253. *ICON Database,* note 31.
254. Brendon, note 157.
255. The LCO was advised that the City of Ottawa issued 343,000 parking tickets in 2009; the City of Brampton issued 89,285.
256. Calculations derived from reports prepared from the ISCUS Database and Ontario Court of Justice, by the Management Information Unit, Court Services Division, Ministry of the Attorney General, *Number of Courtroom Hours for Matters Heard by a Justice of the Peace, Ontario Court of Justice, Provincial Offences Act, Provincial Values 2009* (23 November 2010, unpublished) and *Justice of the Peace Expenditures 2009/2010* (17 November 2010, unpublished).
257. Discussion with Barry Randell, Director, Court Services, City of Toronto (13 October 2010).
258. Amanda Tait (prepared by the Public Interest Advocacy Centre), *The Use of Administrative Monetary Penalties in Consumer Protection* (May 2007) at 9. Online: Public Interest Advocacy Centre www.piac.ca/files/amps.pdf.
259. Tait, note 258 at 9.
260. Archibald, Jull & Roach, note 6 at 15-1.
261. Ramani Nadarajah, "Environmental Penalties: New Enforcement Tool of the Demise of Envionmental Prosecutions?" in Stan Berger & Dianne Saxe, eds, *Environmental Law, The Year in Review, 2007* (Aurora, Ont: Canada Law Book, 2008) 111 at 112.
262. Gus Van Harten, Gerald Heckman & David J. Mullan, *Administrative Law: Cases, Text, and Materials* (6th ed) (Toronto: Edmond Montgomery Publications Ltd, 2010) at 25.
263. *Municipal Act, 2001*, note 23. (Sections 81 and 118 of *The City of Toronto Act, 2006,* note 23, establish an almost identical option for the City of Toronto.)
264. *Municipal Statute Law Amendment Act, 2006*, SO 2006, c. 32.
265. *Municipal Act*, note 23, s. 102.1 reads, in part, as follows:

    > Without limiting sections 9, 10 and 11, a municipality may require a person to pay an administrative penalty if the municipality is satisfied that the person has failed to comply with any by-laws respecting the parking standing or stopping of vehicles.
    >
    > Despite subsection (1), the municipality does not have the power to provide that a person is liable to pay an administrative penalty in respect of the failure to comply with by-laws respecting parking, standing or stopping of vehicles until a regulation is made under subsection (3).

266. Administrative Penalties, O Reg 333/07, s. 4 [hereafter *AMP Regulation*]. The equivalent regulation under the *City of Toronto Act, 2006,* is O Reg 611/06 and references to O Reg 333-07 should also be taken as a reference to O Reg 611/06.
267. *Municipal Act*, note 31, ss. 7.1(1).
268. *City of Toronto Act, 2006*, note 23, ss. 81 and 118.
269. Administrative Penalties, O Reg 611/06, s. 4.
270. Letter from Anna Kinastowki, City Solicitor, City of Toronto to the Law Commission of Ontario, (20 April 20 2011).
271. Discussion with David Potts, City Solicitor, City of Oshawa (31 January 2011). See also Report to Finance and Administration Committee of the City of Oshawa, Re: Parking Administrative Penalty By-Law (13 January 2011). Online: The City of Oshawa http://www.oshawa.ca/agendas/Finance_and_Administration/2011/01-20/FA-11-21_Parking_Administrative_Penalty_System_By-law.pdf.
272. For example, ss. 151(1) of the *Municipal Act, 2001* provides municipalities with the authority to establish an AMP system to deal with systems of licenses. The City of Oshawa has implemented AMPs for licensing and the enforcement of other Municipal Act by-laws.
273. Tait, note 258 at 7.
274. *EPA,* note 20.
275. *Metrolinx Act, 2006*, SO 2006 c. 16, ss. 211(1).

276. *Administrative Fees*, O Reg 282/10, ss. 7, 8. See also City of Toronto, by-law No. 7, *Metrolinx*. Online: Go Transit http://www.gotransit.com/public/en/docs/bylaws/By-law%20No.%207.pdf.
277. Michael Cardozo, "Administrative Law at the Local Level: The New York City Experience" (Speech to the American Bar Association, Administrative Law and Regulatory Practice Section, 8 August 2008). Online: New York City Government http://www.nyc.gov/html/law/downloads/pdf/asp8_8_08.pdf.
278. James M. Reilly, Joseph D. Condo & Mathew W. Beaudet, "The Department of Administrative Hearings for the City of Chicago: A New Method of Municipal Code Enforcement" (1998) 18 Journal of the National Association of Administrative Law Judges 89 at 98.
279. Tait, note 258 at 12; Archibald, Jull & Roach, note 6 at 15-1; Paul Baker, "Monetary Penalties are the Newest Environmental Enforcement Tool", *The Lawyers Weekly* 16:18 (September 1996).
280. Nadarajah, note 261 at 115; David Schmeltzer and William Kitzes, "Administrative Penalties Are Here to Stay – But how Should They Be Implemented?" (1977), 26 Am UL Rev 847 at 852; Tait, note 258 at 12.
281. Richard Macrory, "Regulatory Justice: Sanctioning in a post-Hampton World" (May 2006) at 36. Online: Restorative Justice Consortium http://www.restorativejustice.org.uk/Better_Regulation/macrory.pdf.
282. Macrory, note 281 at 36-39.
283. R.M. Brown, "Administrative and Criminal Penalties in the Enforcement of Occupational Health and Safety Legislation" (1992), 30:3 Osgoode Hall LJ 691 at 708-710, 732-733.
284. Brown, note 283 at 710.
285. Nadarajah, note 261 at 115; Neil Parpworth, Katherine Thompson & Brian Jones, "Environmental Penalties Utilizing Civil Penalties" (2005) JPlL 561 at 581.
286. Law Reform Commission of Saskatchewan (SLRC), *Administrative Penalties Consultation Paper,* (June 2009) at 4. Online: Law Reform Commission of Saskatchewan http://sklr.sasktelwebhosting.com/adminpens.pdf.
287. David J. Mullan, *Essentials of Canadian Law: Administrative Law* (Toronto: Irwin Law, 2001) at 232.
288. For example, the AMP system created by Saskatchewan's *Forest Resources Management Act* does not provide for a hearing and does not set out what the "right to make representations" entails. In practice, members of the same government department make all decisions. See SLRC, note 286 at 13-14.
289. Brown, note 283 at 735.
290. For example, it has been suggested that where a regulator has the option to pursue both AMPS and prosecutions and there is a general or basket AMP provision created to enforce any or all of the regulations, the maximum amount for the AMP should not exceed 50% of the maximum available fine for a successful prosecution. See Archibald, Jull & Roach, note 6 at 15-10.
291. Archibald, Jull & Roach, note 6 at 15-5.
292. *R. v. Sault Ste Marie*, note 17.
293. Parpworth, Thompson & Jones, note 285 at 575-576; Tait, note 258 at 12.
294. Tait, note 258 at 13.
295. *Municipal Act, 2001,* note 23, s. 102.1 reads, in part, as follows:

> Without limiting sections 9, 10 and 11, a municipality may require a person to pay an administrative penalty if the municipality is satisfied that the person has failed to comply with any by-laws respecting the parking standing or stopping of vehicles.
>
> Despite subsection (1), the municipality does not have the power to provide that a person is liable to pay an administrative penalty in respect of the failure to comply with by-laws respecting parking, standing or stopping of vehicles until a regulation is made under subsection (3).

296. *AMP Regulation*, note 266, s. 4.
297. *AMP Regulation*, note 266, ss. 8(4).
298. *AMP Regulation*, note 266, s. 9.
299. *AMP Regulation*, note 266, s. 10.
300. Vaughan AMP By-law, note 25.
301. Stan Berger, "Report into Administrative Monetary Penalites (AMPS) for Parking Infractions" (Prepared for the Law Commission of Ontario, 11 June 2010) at 11-12.
302. Brendon, note 157.
303. See e.g., *City of Toronto Parking Ticket Cancellation Guidelines*, May 2010. Online: City of Toronto http://www.toronto.ca/pay-toronto-tickets/pdf/cancellation_guidelines.pdf.
304. Justices of the Peace receive approximately $115,000 per year in salary. Ontario Ministry of Finance, *Public Sector Salary Disclosure 2010*, Online: Ontario Ministry of Finance http://www.fin.gov.on.ca/en/publications/salarydisclosure/2010/judiciary10.html.
305. *AMP Regulation*, note 266, ss. 3(3); AMP Regulation under *The City of Toronto Act*, note 266 ss. 3(3).
306. Brendon, note 157.
307. See Toronto City Council, *Decision Document: item GM31.12* (8 June 2010), online: City of Toronto http://www.toronto.ca/legdocs/mmis/2010/cc/decisions/2010-06-08-cc50-dd.htm.
308. *AMP Regulation*, note 266, s. 10.
309. *R. v. Pontes*, note 193 at para 26.
310. *R. v. Pontes*, note 193 at para 26.
311. *Transport Robert*, note 176.
312. *Transport Robert*, note 176 at para 24.
313. *Transport Robert*, note 176 at paras 27-28.
314. *Lavallee*, note 13.
315. *Securities Act*, RSA 2000, c. S-4, s. 29.
316. *Lavallee*, note 13 at paras 28-29.
317. *Lavallee v. Alberta (Securities Commission)*, 2010 CanLII 39752 (SCC).
318. *R. v. Wigglesworth*, [1987] 2 SCR 541.
319. Archibald, Jull & Roach, note 6.
320. *Wigglesworth,* note 318 at para 22.
321. *Wigglesworth,* note 318 at para 23.
322. *Wigglesworth,* note 318 at para 23.

323. *Wigglesworth,* note 318 at para 24.
324. *Martineau v. MNR,* [2004] 3 SCR 737, 2004 SCC 81.
325. *Martineau,* note 324 at paras 23-24.
326. *Martineau* note 324 at para 31.
327. In *R. v. Cartaway* [2004] 1 SCR 672, 2004 SCC 26, the Supreme Court of Canada examined whether British Columbia's Securities Commission could consider general deterrence when issuing an administrative penalty and held that that it could. Archibald, Jull & Roach, note 6 at 5-43 to 5-44 caution that this case does not represent the Supreme Court's "constitutional stamp of approval" of AMPS, since it did not examine the issue of whether an AMP qualifies as an offence, it does not engage in an analysis of the *Martineau* criteria and it falls within the internal discipline category so that "one cannot draw conclusions that will apply to more public AMPs, such as those proposed in the area of competition or telecommunications."
328. *Martineau,* note 324 at paras 36–39.
329. *Martineau*, note 324 at paras 30–45.
330. *Martineau*, note 324 at para 60.
331. *Lavallee*, note 13 at para 21.
332. *Lavallee*, note 13 at para 22.
333. *Lavallee*, note 13 at para 23.
334. *Lavallee*, note 13 at para 25.
335. *AMP Regulation*, note 266, s. 6.
336. See Berger, note 301 at 11 and 41.
337. *R. v. Pontes*, note 193 at para 26.
338. *R. v. Bowman*, [2002] O J No 3803, paras 81–105.
339. *R. v. Bowman*, note 338 at para 105.
340. *ICON Database,* note 31. Information relating to these data was supplemented by Sabrina Musilli, Court Services Division, 6 January 2011.
341. Rules of the Small Claims Court, note 230, r. 20.11.
342. Berger, note 301 at 10-11.
343. *London (City) v. Polewsky,* 202 CCC (3d) 257, [2005] O.J. No. 4500 (CA), leave to appeal refused 2006 CanLII 18505 (SCC).
344. Berger, note 301 at 19.
345. *Martineau,* note 324 at para 38.
346. Berger, note 301 at 20.
347. Berger, note 301 at 23.
348. Effective March 14, 2008, the City of Toronto increased fines relating to parking in disabled parking spots to $450, see "Fines increased for accessible parking in fire routes," online: City of Toronto http://www.toronto.ca/transportation/news/parking_fines/index.htm.
349. *Cardinal v. Director of Kent Institution,* note 195 at para 14.
350. *Knight v. Indian Head School Division No 19*, note 196 at 682.
351. *Baker,* note 196 at paras 21-28.
352. *Baker,* note 196 at para 18.
353. *AMP Regulation*, note 266, ss. 3(3).
354. See e.g., *Reference Re Canada Assistance Plan (BC),* [1991] 2 SCR 525.
355. City of Toronto, *City of Toronto Parking Ticket Cancellation Guidelines* (May 2010), online: http://www.toronto.ca/pay-toronto-tickets/pdf/cancellation_guidelines.pdf.
356. Berger, note 301, also notes a Brampton Committee Council Report where other grounds were proposed to cancel a parking ticket, at 31.
357. Vaughan AMP By-Law, note 25, s. 10.1.
358. *AMP Regulation*, note 266, ss. 8(2).
359. City of Vaughan, By-Law No. 157-2009, *A By-Law to establish the position of Screening Officer and Hearings Officer and to appoint persons as Screening Officers and Hearings Officers*, (14 April 2009), s. 3 and 5.
360. *Building Code Act, 1992,* SO 1992, c. 23, s. 3.
361. Archibald, Jull & Roach, note 6 at 15-5.
362. Kinastowki letter, note 270.
363. Access to Justice Committee of the Law Society of Upper Canada, Report to Convocation (April 28, 2011), para 27. Online: http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147484608.
364. *POA*, note 1, s. 12.
365. *POA*, note 1, s. 61.
366. *POA*, note 1, s. 56.
367. *POA*, note 1, s. 72.
368. *POA*, note 1, s. 91.
369. *POA*, note 1, s. 58.
370. *POA*, note 1, s. 59.
371. *POA*, note 1, s. 60. See also *Costs*, note 85.
372. *POA*, note 1, s. 60.1.
373. *POA*, note 1, s. 66.
374. *POA*, note 1, s. 68.
375. *POA*, note 1, ss. 69(2).
376. *POA*, note 1, ss. 69(6).
377. *POA*, note 1, ss. 69(14), (16).
378. See *R. v. Wu*, note 91 where the concept of debtor's prison for those unable to pay fines was strongly disapproved by the court. As per Justice Binnie at para 3, "the purpose of imposing imprisonment in default of payment is to give serious encouragement to offenders with the means to pay a fine to make payment. Genuine inability to pay a fine is not a proper basis for imprisonment."
379. *POA*, note 1, ss. 69(15).
380. *POA*, note 1, s. 67. See also *Fine Option Program*, note 94.
381. *Criminal Code*, note 4, s. 718-718.2.
382. *Public Heath Act*, note 16.
383. *EPA*, note 20, s. 188.1.
384. Archibald, Jull & Roach, note 6 at 12-10.
385. *R. v. Fraser Inc.* 1993 CarswellNB 442 at para 89.
386. Rick Libman, "Sentencing Purposes and Principles for Provincial Offences," (Research Paper prepared for the Law Commission of Ontario, Summer 2010) at 38-39 [hereafter Libman Research Paper]; Verhulst, note 178 at 282; Archibald, Jull & Roach, note 6 at 12-9.

387. Verhulst, note 178 at 282.
388. Archibald, Jull & Roach, note 6 at 12-10; Libman Research Paper, note 386 at 62-63 (under subsections 131(1) and 139(1) an appeal can only be brought to the OCA where it determines that "it is essential in the public interest or for the due administration of justice that leave be granted").
389. *R. v. Cotton Felts*, (1982) 2 CCC (3d) 287.
390. *Cotton Felts*, note 389 at para 19.
391. *Cotton Felts*, note 389 at para 22.
392. Libman Research Paper, note 386 at 65.
393. Verhulst, note 178; Archibald, Jull & Roach, note 6 at ch. 12; Libman Research Paper, note 386 at 38-39. See also LRCC, *Sentencing in Environmental Cases* (Ottawa: Law Reform Commission of Canada, 1985) at 6 (the LRCC notes that there is no consensus as to what principles or factors should be taken into account and what weight to give those principles or factors when sentencing an environmental matter).
394. Verhulst, note 178; Archibald, Jull & Roach, note 6 at ch. 12; Libman Research Paper, note 386; John D. Wilson, "Re-thinking Penalties for Corporate Environmental Offenders: A View of the Law Reform Commission of Canada's Sentencing in Environmental Cases" (1986) 31 McGill LJ 313 at 325.
395. Libman Research Paper, note 386 at 87-131.
396. *R. v. Ellis Don*, [1987] OJ 1669 (Dist Ct).
397. *R. v. Ellis-Don*, (1990), 1 OR (3d) 193, [1990] OJ No. 2208 (CA).
398. Libman Research Paper, note 386 at 93.
399. *R. v. Henry Heynick Construction Ltd.,* (1999) 118 OA C 261, [1999] OJ No. 238 (CA).
400. *R. v. Inco Ltd.*, (1998), 37 CCEL (2d) 86, [1998] OJ No 2322 (OCJ Prov. Div.).
401. *R. v. Inco Ltd.*, [1999] OJ No 464 at paras 54-63.
402. *R. v. Inco Ltd.*, (2000), 132 OAC 268, [2000] OJ No 1868 (CA).
403. Libman Research Paper, note 386 at 94-100.
404. *R. v. Browning Arms Co.*, [1973] OJ No 1308 (Ontario General Sessions of the Peace Court) at para 2 (QL).
405. *R. v. Browning Arms Co.,* (1974) 18 CCC (2d) 298, [1974] OJ No 502 (QL).
406. *R. v. Epson*, (1987), 19 CPR (3d) 195, [1987] OJ No 2708 (Ont Dist Ct) (QL); R. v. Epson (1990), 32 CPR (3d) 78, [1990] OJ No 1003 (CA) (QL).
407. *R. v. Total Ford Sales Ltd.*, (1987), 18 CPR (3d) 404, [1987] OJ No 1421 (Ont. Dist. Ct.) (QL).
408. *R. v. Bata Industries Ltd.*, (1992), 9 OR (3d) 329, [1992] OJ No 236 (Ont. Prov. Div.) (QL).
409. *R. v. Bata Industries Ltd.,* (1993), 14 OR (3d) 354, [1993] OJ No 1679 (Ont. Ct.) (QL).
410. Verhulst, note 178.
411. Libman Research Paper, note 386 at 86.
412. Verhulst, note 178; Libman Research Paper, note 386.
413. Verhulst, note 178 at 282.
414. Standing Committee on Justice and Solicitor General, *Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections* (Ottawa: Government of Canada, 1988) at 43.
415. Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof,* SC 1995, c. 22.
416. Allan Manson, "The Reform of Sentencing in Canada" in Don Stuart, R.J. Deslisle and Allan Manson, eds, *Towards a Clear and Just Criminal Law* (Toronto: Thomason Canada Ltd, 1999) 457 at 460.
417. Sections 718.01 and 718.02 are not reproduced as they relate to specific sections of the *Criminal Code*.
418. Dale E. Ives, "Inequality, Crime and Sentencing: Borde, Hamilton and the Relevance of Social Disadvantage in Canadian Sentencing Law" (2004) 30 Queen's LJ 114 at 118; Anthony Doob, "Punishment in Late-Twentieth Century Canada: An Afterword" in Carolyn Strange ed, *Qualities of Mercy: Justice, Punishment and Discretion* (Vancouver: University of British Columbia Press, 1996) at 168; Manson, note 416 at 472; Kenneth E. Jull, "Reserving Rooms in Jail: A Principled Approach" (1999) 42 Crim LQ 67 at 77-79; Andrew J. Ashworth, "Sentencing Reform Structures" (1992) 16 Crime and Just 181 at 189.
419. Verhulst, note 178 at 55.
420. *Public Health Act*, note 16, c. 28.
421. Verhulst, note 178 at 283.
422. Libman Research Paper, note 386 at 131.
423. Libman Research Paper, note 386 at 131.
424. Libman Research Paper, note 386 at 283.
425. Libman Research Paper, note 386 at 284.
426. Libman Research Paper, note 386 at 284.
427. Libman Research Paper, note 386 at 284.
428. The Financial Services Authority, "Principles-based regulation: focusing on the results that matter" (April 2010). Online: The Financial Services Authority http://www.fsa.gov.uk/pubs/other/principles.pdf.
429. Libman Research Paper, note 386 at 284.
430. Verhulst, note 178 at 284; Libman Research Paper, note 386 at 158.
431. Verhulst, note 178 at 284-285.
432. Verhulst, note 178 at 286.
433. Libman Research Paper, note 386 at 162.
434. *Offence Act*, RSBC 1996, c. 338.
435. Verhulst, note 178 at 286.
436. Verhulst, note 178 at 286.
437. Libman Research Paper, note 386 at 172-173; Manson, note 416 at 472; Jull, note 418 at 77-79.
438. Verhulst, note 178 at 287.
439. Ayres & Braithwaite, note 205 at 25.
440. Verhulst, note 178 at 288-289. See also Archibald, Jull & Roach, note 6 at 12-2 (the authors also believe that the courts should look at restorative and remedial remedies first before progressing to deterrence, although they add that these values should not trump deterrence).

441. Libman Research Paper, note 386 at 175.
442. Libman Research Paper, note 386 at 177; Verhulst, note 178 at 289.
443. Verhulst, note 178 at 288-289.
444. Libman Research Paper, note 386 at 176.
445. Richard Johnstone, "From Fact to Fiction- Rethinking OHS Enforcement" (Working Paper 11) (Paper presented to the Australian OHS Regulation for the 21st Century Conference, National Research Centre for Occupational Health and Safety Regulations & National Occupational Health and Safety Commission, Gold Coast, 20-22 July 2003).
446. Ellen Baar *et al*, *Positive Compliance Programs: Their Potential as Instruments for Regulatory Reform* (Canada: Department of Justice, 1991) at 20 and 24.
447. See also Archibald, Jull & Roach, note 6 at 12-1 and 12-2.
448. Ayres & Braithwaite, note 205 at 22.
449. Verhulst, note 178 at 290-291.
450. Verhulst, note 178 at 291.
451. Verhulst, note 178 at 291; Libman Research Paper, note 386 at 182-183.
452. Verhulst, note 178.
453. *R. v. CAM,* (1996) 1 SCR 500, [1996] SCJ No 28 at para 81 (QL).
454. Verhulst, note 178 at 292.
455. Ayres & Braithwaite, note 205 at 19.
456. Verhulst, note 178 at 286.
457. Libman Research Paper, note 386 at 204.
458. *POA*, note 1, ss. 72(1) and (7).
459. See e.g., New Brunswick's *Provincial Offences Procedure Act*, SNB 1987, c. P-22.1, ss. 74(3)(a); British Columbia's *Offence Act* RSBC 1996, c. 338, ss. 89(3)(a) states that where a judge makes a suspended sentence, s/he may specify as a condition of recognizance that the defendant make restitution and reparation to any person aggrieved or injured from the commission of the offence.
460. Drinkwalter & Ewart, note 2 at 245.
461. See e.g., British Columbia *Public Health Act*, note 16, ss. 107(1)(d); New Brunswick *Provincial Offences Procedure Act,* note 459, ss. 74(3)(b).
462. In *R. v. Wu*, note 91 at para 52, the Supreme Court of Canada noted that the trial judge would have ordered the defendant to enroll in community service had a fine option program been in place in Ontario.
463. Libman Research Paper, note 386 at 220.
464. See e.g., British Columbia *Public Health Act*, note 16, ss. 107(1)(d) that limits community service terms to up to 3 years.
465. *Fisheries Act*, RSC 1995, c. F-14.
466. *Criminal Code*, note 4, ss. 738 and 732.1(3.1).
467. See e.g., Alberta's *Provincial Offences Procedure Act*, RSA 2000, c. P-34, ss. 8(1) [*Provincial Offences Procedure Act (Alta)*], which authorizes an award of up to $2,000 as compensation for the victim's loss. If the amount awarded is not paid within the time ordered by the justice, the victim may file the order and have it entered as a judgment in the Court of Queen's bench where it is enforceable in the same manner as if it were a judgment rendered against the defendant in the Court of Queen's bench in civil proceedings; ss. 8(2).
468. Archibald, Jull & Roach, note 6 at 12-2.
469. *Criminal Code,* note 4, s. 722, 722.1 and 722.2.
470. *R. v. Hutchings*, (2004), WCB (2d) 144, [2004] OJ No 3950 (OCJ) (QL); *R. v. Trigiani*, [2000] OJ No 5872 (OCJ) (QL), aff'd, (2001), 18 MVR (4th) 222, [2001] OJ No 6111 (SCJ) (QL).
471. Norm Keith, "Sentencing the Corporate Offender: From Deterrence to Corporate Social Responsibility" 2010 56 CLQ 294 at 296.
472. P. Puri, "Sentencing the Criminal Corporation" (2001) 39 Osgoode Hall LJ 611 at 614.
473. John Swaigen and David Estrin, *Environment on Trial: A Guide to Ontario Environmental Law and Policy,* 3rd ed (Toronto: Emond Montgomery Publications Ltd, 1993) at 454.
474. Keith, note 471 at 301 and 313.
475. Ayres & Braithwaite, note 205 at 22-25.
476. Ayres & Braithwaite, note 205 at 25.
477. Ayres & Braithwaite, note 205 at 22.
478. Archibald, Jull & Roach, note 6 at 12-5.
479. See Libman Research Paper, note 386 at 182 for examples of other types of creative probationary terms that might be imposed by a court when sentencing a corporation.
480. *Criminal Code,* note 4, s. 2 :

"organization" means

(*a*) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or

(*b*) an association of persons that

(i) is created for a common purpose,

(ii) has an operational structure, and

(iii) holds itself out to the public as an association of persons.

481. Keith, note 471 at 299.
482. Verhulst, note 178 at 293.
483. E.g., in *R. v. Virk*, (2002), 5 W.C.B. (21) 464, (OCJ) (QL), [2002] OJ No 4102 at para 56, the court said where there is a *mens rea* element in a regulatory offence, and thus some degree of moral blameworthiness or fault, this has "significance for sentencing" and should be reflected in the court's disposition, since such offences are "much more serious and therefore more comparable to criminal offences than to public welfare offences."
484. *ICON Database*, note 31. Some examples of provincial or regulatory offences which may lead to arrest and detention include: speed racing or stunt driving offences arising under s. 172 of the *Highway Traffic Act*, note 52; environmental protection offences arising under s. 186 of the *Environmental Protection Act*, note 20; and consumer protection offences arising under s 116 of the *Consumer Protection Act*, *2002*, note 146.
485. Drinkwalter & Ewart, note 2 at 422.
486. Segal & Libman, note 44 at 3; *POA*, note 1, ss. 24(1)(a)(iii). See also *R. v. Bennett*, [2001] OJ No 436 (OCJ) (QL), in particular para 30. We note, however, s. 54 of the POA which allows an arrest warrant where a defendant fails to appear at a hearing.

487. *POA*, note 1, ss. 149(1).
488. *POA*, note 1, ss. 149(2).
489. *POA*, note 1, ss. 150(1).
490. Stewart, note 9 at 354-355.
491. *POA*, note 1, ss. 150(3).
492. Stewart, note 9 at 335. The rungs, in order, are: release on an undertaking; release on a recognizance; where available, release with sureties and/or cash bail; or a detention order.
493. Drinkwalter & Ewart, note 2 at 422-423.
494. *R. v. Banka*, [1999] OJ No 5646 (Prov Div) (QL).
495. *Family Law Act*, note 141, s. 46.
496. *Banka*, note 494 at para 16.
497. *Banka*, note 494 at para 16.
498. See Gary T. Trotter, *The Law of Bail in Canada*, 3d ed (Toronto: Carswell, 2010) at 1-6-8.
499. Drinkwalter & Ewart, note 2 at iv.
500. See e.g., *R. v. Hall* [2002] 3 SCR 209, 2002 SCC 64 (2002); Trotter, note 498 at 1-33-36.
501. *R. v. Hall*, note 500.
502. *R. v. Hall*, note 500 at para 31.
503. *R. v. Hall*, note 500 at para 27.
504. See e.g., *R. v. Thompson* (2004), 21 CR (6th) 209 (Ont SCJ); *R. v. B(A)* (2006), 204 CCC (3d ed) 490 (Ont SCJ); *R. v. Heyden* (2009), 250 OAC 162, [2009] OJ No 2492, 2009 ONCA 494 (CA) (QL). See also discussion in Trotter, note 498 at 3-48-53.
505. See e.g., *R. v. BS* (2007) 49 CR (6th) 397, [2007] OJ No 3046, 2007 ONCA 560 (CA)(QL).
506. *R. v. BS*, note 505 at para 9. See also *R. v. Stevenson*, (2007), 224 OAC 129, [2007] OJ No 1955, 2007 ONCA 378 (CA) at para 7.
507. Gary T. Trotter, "Bail in Canada: Reflections on Reform" in Don Stuart, R.J. Delisle and Allan Manson, eds, *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Carswell, 1999) at 415.
508. LRCC, *Compelling Appearance, Interim Release and Pre-Trial Detention* (Working Paper 57) (Ottawa: Ministry of Supply and Service, 1988) at 27.
509. Louis P. Strezos, "Section 515(10)(c) and the *Criminal Code:* Resurrecting the Unconstitutional Denial of Bail" (1988) 11 CR (5th) 43 at 55.
510. See Cheryl Marie Webster, Anthony N. Doob and Nicole M. Myers, "The Parable of Ms Baker: Understanding Pre-Trial Detention in Canada" (2009) 21 Current Issues Crim Just 79. See also *Sanchez v Ontario (Superintendent of the Metropolitan Toronto West Detention Centre*), (1996), 34 CRR (2d) 368 (Ont CA).
511. See Margaret Gittens and David Cole (Co-Chairs), *Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995); Anthony N. Doob, *Race, Bail and Imprisonment* (an unpublished study for the Commission on Systemic Racism in the Ontario Criminal Justice System, 1994); The Honourable Murray Sinclair, *Report of the Aboriginal Justice Inquiry in Manitoba* (Winnipeg, Manitoba, 1991); John S. Goldkamp, "Bail: Discrimination and Control" (1984) 16 Criminal Justice Abstracts 103; National Council on Welfare, *Justice and the Poor* (2000). Online: National Council on Welfare http://www.ncwcnbes.net/documents/researchpublications/OtherPublications/2000Report JusticeAndThePoor/Report ENG.htm.
512. *R. v. Morales,* [1992] 3 SCR 711, [1992] SCJ 98 (SCC) at para 39.
513. R. Ouimet (Chair), *Report of the Canadian Committee on Corrections*: *Towards Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969) at 11.
514. Clifford Chatterton, *Bail: Law and Practice* (London: Butterworths, 1986) at 143.
515. *R. v. Desroches,* (1986), 57 OR (2d) 378, 30 CCC (3d) 191 (Dist Ct).
516. *Desroches*, note 515 at 192.
517. Trotter, note 498 at 6-25.
518. For a discussion of these requirements, see Trotter, note 498 at 6-21-38. The requirement to carry release documents as a bail condition has been described as contentious. It has been argued that it can be used as a mechanism for enforcement officials to harass an accused person.
519. See *Football (Disorder) Act 2000* (c 25)(United Kingdom); *R. v. Skordas* (2001) 290 AR 191 (Alta Prov Ct); *R. v. Hammond* [2009] AWLD 2575, 2009 ABPC 26 (Alta Prov Ct); *R. v. Weavers* (2009), 2009 ONCJ 437 (Ont CJ).
520. *R. v. Morales*, note 512 at para 35.
521. *R. v. GCK,* [2003] SJ No 705, 59 WCB (2d) 275; *R. v. Bain,* (2009), 2009 CarswellOnt 4965 (Ont SCJ).
522. *R. v. Sexton,* (1976), 1976 CarswellNfld 1, 12 Nfld & PEIR 197 (Nfld Dist Ct) at paras 54-57; *R. v. Saunter,* (2006) Carswell Alta 2531, 2006 ABQB 808 at paras 17-18.
523. *R. v. Legere,* (1995), 95 CCC (3d ed) 555 (Ont CA).
524. *Keenan v. Stalker,* (1979), 57 CCC (2d) 267 (Que CA), Lamer JA (as he was then):

> At this stage of events [when an accused is awaiting trial], the nature of the functions of the Judge differs greatly from that of determining sentence. The accused is presumed innocent. Society did not intend to give itself the right to invade the private life of the accused to the same extent that it recognizes it has in the case of someone whose marginality ('marginalité') has been proven beyond a reasonable doubt (at 277).

525. J.W. Raine and M.J. Wilson, "The Imposition of Conditions in Bail Decisions: From Summary Punishment to Better Behaviour on Remand" (1996), 35 Howard Journal 256 at 258-9.
526. Stewart, note 9 at 356.
527. See *Re Degerness and the Queen* (1980), 57 CCC (2d) 535: it would amount to review and contrary to the principle of *stare decisis* for a court exercising provincial jurisdiction to conduct a bail hearing for an accused already detained by a superior court on a more serious criminal charge (at 536).
528. LRCC, note 508 at 62-63.
529. Trotter, note 498 at 6-36. See also *R. v. Kwame,* (1974), 60 Cr App R 65 (CA) at 69-70; *R. v. Sharma*, (1992), 71 CCC (3d ed) 184 (SCC) at 383-384 [Lamer CJC in dissent].

530. See Alec Samuels, "No Driving as a Requirement or Condition of Bail," [1988] Crim L R 739. See also Tamsin McMahon, "Defiant and Deadly: Keeping Suspended Drivers Off the Road is a Losing Battle," *Waterloo Region Record* (9 September 2008) A1.
531. See Trotter, note 498 at 6-28.
532. *POA*, note 1.
533. B.P. Block, "Bail Conditions: Neither Logical nor Lawful" (1990) 154 JP 83.
534. Trotter, note 498 at 6-23-24.
535. For example, Block, note 533 at 84 states:

> They are all too often made by justices who want to grant bail but who do not wish to appear too soft, or do not want the defendant to think he has got bail too easily, or who want to make some concession to a prosecutor who has opposed bail, none of which are motives related to the reasons for withholding bail.
>
> Other researchers have found that under these circumstances, defence counsel is unlikely to challenge a decision to impose bail conditions for fear that the defendant will be remanded into custody instead. See e.g., Anthea Hucklesby, "The Use and Abuse of Conditional Bail" (1994) 33 The Howard Journal 258 at 266.

536. *Criminal Code,* note 4, ss. 517(1).
537. *Criminal Code,* note 4, ss. 518(1)(b).
538. *R. v. Bishop*, 2007 ONCJ 441 (CanLII) at para 22.
539. *An Act to Amend the Criminal Code and Certain Other Acts*, SC 1997, c. 18, s. 41
540. James A. Fontana & David Keeshan, *The Law of Search and Seizure in Canada*, 7th ed (Markham: LexisNexis Canada Inc., 2007) at 974.
541. *R. v. Morelli,* [2010] 1 SCR 253, 2010 SCC 8, [2010] SCJ No 8 (SCC) at para 105.
542. *Sedona Canada Principles*. Online: E-discovery Canada http://www.lexum.umontreal.ca/e-discovery/.
543. See e.g., *Criminal Code*, note 4, s. 489, 487.01 and 487.02. See also OHSA, note 73, ss. 56.1(2).
544. *Lavallee, Rackel & Heintz v. Canada,* [2002] 3 SCR 209, 2002 SCC 61 at para 36.
545. *Lavallee, Rackel & Heintz,* note 544 at para 44.
546. *Lavallee, Rackel & Heintz,* note 544 at para 49.
547. *Lavallee, Rackel & Heintz,* note 544 at para 49.
548. Libman, note 5 at 10-56.
549. *Lavallee, Rackel & Heintz,* note 544 at para 35.
550. See e.g., *Pritchard v. Ontario (Human Rights Commission)*, (2003), 63 OR (3d) 97, 2003 CanLII 8701 (Ont CA) at para 27.
551. Law Society of Upper Canada, *Guidelines for Law Office Searches* (September 26, 2011). online: http://www.lsuc.ca
552. *Chancey v. Dharmadi,* 2007 CarswellOnt 4664 at para 39 (Ont SCJ – Master Dash).
553. *Chancey v. Dharmadi,* note 552 at para 37.
554. *Chancey v. Dharmadi,* note 552 at para 34.
555. Thomas Claridge, "Paralegal Communication Found Privileged" *The Lawyer's Weekly* 27:13 (10 August 2007). Online: Capilano University http://www.capilanou.ca/Assets/paralegal/pdf/paralegal-lawyersweekly.pdf.
556. Law Society of Upper Canada, By-Law 4, ss. 6(2) states that paralegals may represent clients before the Small Claims Court on POA matters, on certain summary conviction offences, and before administrative tribunals.
557. *Travel Industry Act*, SO 2002, c. 30, Sch. D.
558. *Evidence Act*, RSO 1990, c. E.23, ss. 33(4).
559. *Canada Evidence Act*, RSC 1985 c. C-5, ss. 29(6).
560. *R. v. Webster,* (1981) 15 MPLR 60 (Ont Dist Ct).
561. *R. v. Mardave Construction (1990) Ltd*, 1995 CarswellOnt 4174 (Ont CJ).
562. *R. v. Cancoil Thermal Corp.,* (1988) COHSC 169 (Ont Prov Ct).
563. LRCC, *Report on Recodifying Criminal Law* (Ottawa: Law Reform Commission of Canada, 1987) Report 31 at 28: defences of a procedural nature were left to be dealt with in a proposed Code of Criminal Procedure.
564. Don Stuart, *Canadian Criminal Law: A Treatise,* 5th ed (Scarborough: Thomson Carswell, 2007) at 624.
565. *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] 1 SCR 76, 2004 SCC 4.
566. *Canadian Foundation for Children, Youth and the Law*, note 565 at para 204.
567. American Law Institute, *Model Penal Code: Proposed Official Draft* (Philadelphia: The American Law Institute, 1962), s. 2.12.
568. Canadian Bar Association, *Criminal Code Recodification Task Force Report* (18 November 1992) [unpublished, submitted to the Sub-Committee of the Standing Committee of Justice on Recodification of the General Part of the Criminal Code].
569. *Courts of Justice Act*, note 112, ss. 109(2).
570. *R. v. Vellone,* 2009 ONCJ 150 (Ont CJ).
571. *R. v. Vellone,* [2009] OJ No 1607 (Ont CA in Chambers).
572. *POA*, note 1, ss. 11(1). See also s. 19 which is a similar provision for reopening Part II convictions. Both of these sections will be amended once legislative amendments are proclaimed by the *Good Government Act 2009*, c. 33, Sched 4, however, they do not impose additional restrictions on reopening which is the reform that was proposed during our consultation.
573. *POA*, note 1, ss. 11(2).
574. *R. v. Hargan*, 2009 CarswellOnt 1002 (Ont CJ).
575. CBC News, "Unpaid traffic tickets in Ontario Total $1B" (May 17, 2010), online: CBC News http://www.cbc.ca/canada/toronto/story/2010/05/17/ont-unpaid-tickets.html.
576. *POA*, note 1, s. 68.
577. *POA*, note 1, ss. 69(2).
578. *Municipal Act, 2001*, note 23, s. 441.1; *City of Toronto Act, 2006*, note 23, s. 381.1.
579. *Good Government Act 2009*, note 9, ss. 1(44) repealed ss. 68(2) of the *POA* which prohibited filing a certificate of default more than 2 years after a fine default occurred.

580. *POA*, note 1, ss. 165(9).
581. Edmonton Journal, "Province to Expand Crackdown on Unpaid Tickets" (5 April 2007). Online: Edmonton Journal http://www.canada.com/edmontonjournal/news/cityplus/story.html?id=e5fa7c13-0a73-454d-adbb-bbb05bf437a0&k=33430.
582. Edmonton Journal, note 581.
583. See generally Government of Alberta Justice and Attorney General, *Fine Enforcement Program*. Online: Government of Alberta Justice and Attorney General http://justice.alberta.ca/programs_services/fines/Pages/default.aspx.
584. LCO conversation with staff at the Fines Enforcement Office, Alberta Justice (4 November 2010) where it was reported that over $2.7 million has been recovered on unpaid traffic tickets since 2006, representing approximately 33% of the total amount recovered by that office.
585. Government of Saskatchewan, "New Changes Improve Fine Collection Process in Saskatchewan" (News Release, February 12 2008). Online: Government of Saskatchewan www.gov.sk.ca/news?newsId=bd8eef68-8581-40d1-86f4-fce3c9d227f1
586. Service Canada, *GST/HST Credit*. Online: Service Canada http://www.servicecanada.gc.ca/eng/goc/gst_credit.shtml.
587. The Ontario Association of Police Services Board has called upon the Attorney General to improve the enforcement of POA fines, and it has also resolved to work with the Association of Municipalities of Ontario, the Municipal Finance Officers' Association, The Municipal Court Managers' Association and other entities with an interest in improved fine enforcement mechanisms. See Ontario Association of Police Services Board, Resolutions Package 2010, 2010 Annual General Meeting (unpublished: April 30 2010). Online: Ontario Association of Police Services Board www.oapsb.ca/resolutions/2010/05/06/resolutions_2010-agm_final2.doc
588. *Good Government Act 2009*, note 9, ss. 1(49).
589. *Statutes of Ontario, 2002*, chapter 18, Schedule A, subsection 15(1), creating new subsections 150(8) and 150(9) to the POA.
590. *Courts of Justice Act*, note 112, ss. 125 and 126(1).
591. This was a concern identified by the French Language Services Commissioner. See Office of the French Language Services Commissioner, *Open For Solutions Annual Report 2009-2010* (Toronto: Queen's Printer for Ontario, 2010) at 39. Online: Office of the French Language Services Commissioner, http://www.flsc.gov.on.ca/files/files/FLSC-AnnualReport2010-Web-21mai.pdf
592. *Accessibility for Ontarians with Disabilities Act, 2005*, SO 2005, c. 11.
593. *Ontario Human Rights Code*, RSO 1990, c. H.19.
594. POA, note 1, s. 5.
595. POA, note 1, s. 5.1.
596. Ontario, Working Group for Provincial Offences Act Streamlining Review, *Provincial Offences Act Streamlining Review: Consultation Paper* (Toronto: Working Group for POA Streamlining, 29 January 2009). Online: Law Society of Upper Canada, www.lsuc.on.ca/media/apro109_poa_streamlining_consultation.pdf.
597. *Good Government Act, 2009*, note 9.
598. *Youth Criminal Justice Act*, SC 2002, c. 1.
599. *POA*, note 1, s. 9 and 54.
600. Based on information provided by Chief of Police John Domm, Rama Police Services, on March 19 2010, enforcement agencies perceived to have a high proportion of provincial offence charges laid against aboriginal people are: OPP Lac Seul First Nations, Treaty 3 Police-Kenora, Anishinabeck Police Service, OPP Wikwemikong First Nation, OPP UCCM, Thunder Bay City and Thunder Bay Police Force.
601. *ICON Database*, note 31.
602. *ICON Database*, note 31.
603. Government of Ontario, Backgrounder, "Aboriginal Community Justice Programs" (January 26, 2009). Online: Ontario Ministry of the Attorney General www.attorneygeneral.jus.gov.on.ca/english/news/2009/20092601-acj-bg.asp.
604. Department of Justice Canada, "The Aboriginal Justice Strategy" (February 24, 2010). Online: Department of Justice www.justice.gc.ca/eng/pi/ajs-sja/index.html.
605. Opportunities to take advantage of the existing programs for Aboriginals should be examined. The same is true of any consideration of the young person provisions of the POA.
606. *Indian Act*, RSC c. I-5, ss. 81(1)(b).
607. E-mail from John C. Domm, Chief of Police, Rama Police Services, to Mohan Sharma, MAG LCO Counsel in Residence, Law Commission of Ontario (14 January 2011).

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