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Ministère de la Justice Canada

DESIGNING REGULATORY LAWS THAT WORK

Administrative
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POUR UNE RÉGLEMENTATION PRÉVENTIVE

REGULATORY REFORM SERIES

SÉRIE RÉFORME RÉGLEMENTAIRE

Canada

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DESIGNING REGULATORY LAWS

THAT WORK

A MANUAL OF PRECEDENTS
FOR REGULATORY REFORM

REGULATORY REFORM SERIES

ACKNOWLEDGEMENTS

Thanks and acknowledgement is due to the many people who contributed to this Manual. Mohan Prabhu started the ball rolling with his collection of legislative precedents of compliance mechanisms from Canada, the U.S. and other jurisdictions. These were indexed and supplemented with others contributed by the members of the former Regulatory Compliance Project team, under the direction of Lyle Fairbairn. (In January 1994 that group joined the Administrative Law Section.)

In 1992, the Regulatory Compliance Project engaged Bill Neilson, formerly deputy minister of the British Columbia Department of Consumer Services and currently a professor at the University of Victoria Law School, to write a guide to legislating for compliance. Citing mostly provincial examples, Bill prepared a full "buffet" of civil enforcement options for federal regulators and legal counsel. These are served up in the Manual with a generous helping of practical legislative examples for each option. The legislative precedents were selected, organized, refined, and commented on by Janice Tokar, formerly a consultant with the Law Reform Commission of Canada and now a legislative drafting consultant in Ottawa.

Many Justice lawyers and policy makers from regulatory Departments commented on earlier drafts of the Manual and advised on its format and organization. Special thanks are in order to Jeffrey Gunter of the Legislation Section who contributed a series of additional compliance precedents from the database that he compiled for Justice lawyers, "Regulating in the 90's - Index of Federal Legislation". Thanks also to Robin de Carlo, Lucille Rochon and Odette Bourdeau who did the inputting and numerous revisions of the text.

Donald Macpherson & Lucie Dion

December, 1994

PREFACE

The *Manual* is a sequel to *A Strategic Approach to Developing Compliance Policies* produced by the former Regulatory Compliance Project in 1992. In January 1994, Regulatory Compliance became part of the Administrative Law Section (ALS) of the Department of Justice, directed by Martin Freeman. This publication is the first of series of new publications by ALS dealing with important legal issues in the field of regulatory reform.

Why this Manual

In its work to assist federal regulatory departments to develop compliance and enforcement policies in the late 80's, the Regulatory Compliance Project of the Department of Justice was struck by the gap between the law in the statutes for enforcing regulatory programs and the array of less coercive tools that enforcement officials use to get people to comply with regulatory laws in practice. In response to enforcement officials' frustration with the short-comings of the criminal prosecution as a means to secure compliance with regulatory objectives, the Project began gathering precedents that entrench in legislation the use of civil alternatives for enforcing regulatory laws.

In January 1993, the Finance Sub-Committee on Regulations and Competitiveness, established pursuant the announcement of a government wide regulatory review in the previous federal budget, recommended the increased use of non-criminal measures for regulatory enforcement. In its reply to the sub-committee's report, the government agreed to promote the use of alternatives to prosecution as part of a five-year government-wide project to develop more responsive regulatory programs. This *Manual* is the first of a series of initiatives by the Department of Justice to promote regulatory reform. The Administrative Law Section is responsible for policy development and coordination in the regulatory affairs area, which includes legal policy issues covering all aspects of federal regulation. Recently, the Regulatory Compliance Project has been integrated into the Administrative Law Section, and its work will continue in the context of regulatory affairs.

Who is the Manual for

The *Manual* is addressed to everyone who plays a role in developing, writing or administering regulatory legislation. If you are a policy advisor, legal advisor or writer of social or economic legislation or regulations, this book is for you. The regulatory departments or agencies that you work for are likely struggling to balance the need for cost efficiency of their programs against the public interest in health, safety, the environment or economic stability. They will be looking your way for advice on regulatory reform and ways to improve the efficiency and effectiveness of enforcement. You will need to understand what compliance is and how to get people to comply with regulatory laws. Help is at hand in *Designing Regulatory Laws that Work*.

What is in the Manual

This *Manual* contains practical advice on enforcement and compliance options for amending or designing new regulatory Acts or regulations. These legal options may be

- identified expressly in the empowering legislation
- spelled out in subordinate legislative instruments (regulations, directives, ministerial orders, etc.), or
- chosen as operating practices by the regulatory agency

The *Manual* identifies enforcement alternatives to the traditional "command" and "control" approaches to regulation, including strategic advice on the appropriateness of alternative approaches to a range of regulatory situations. It is based on a bias for *legislative* expression of compliance schemes, where the empowering legislation explicitly authorizes the parameters, if not the precise details, of the compliance choices available to the regulatory agency or authority.

You will find legislative precedents in the *Manual* for each option and citations of additional examples. A précis accompanies many of the additional examples of federal legislation. The precedents offer a range of compliance-enhancing tools from which to choose and a store of ideas on the elements you may want to include when drafting a particular compliance or enforcement mechanism. Some are accompanied by specific drafting advice and commentary on legislative design options.

How Were Precedents Selected

Many of the precedents in the *Manual* come from environmental protection and trade practices legislation, areas particularly rich in a variety of compliance-enhancing techniques. Precedents were selected to provide as broad a spectrum as possible of the enforcement options available to the drafter. Some were chosen because they give a typical or standard formulation for a particular mechanism; others because they were unique. Often a precedent provides a composite of elements found in various statutes. Sometimes it is the only available example to demonstrate a particular technique. The main selection criterion was the content of the precedent, not its style.

What is NOT in the Manual

This *Manual* does not comment on the administrative success or failure of the statutory examples presented from the point of view of either the regulator or the regulatee. Nor does it offer operational guidance to direct regulatory enforcement authorities in specific situations. The *Manual* focuses on alternatives to criminal law-based enforcement options. With the exception of the section on ticketing schemes, you won't find novel approaches for structuring regulatory penalties or sentencing offenders. There is also very little discussion of the fit between civil enforcement and criminal enforcement measures within the same statute.

You can Help

We have chosen a loose-leaf format so that users can add their own materials to this Manual. We hope that you will build on the basic structure provided and fill in the sections relevant to your work. Slip in a page when you

- come across a novel compliance mechanism or a useful precedent
- are aware of judicial consideration of a particular precedent or mechanism presented in this Manual, or
- can add a comment on the administrative efficiency or inefficiency of a particular scheme.

Send your contribution to the Administrative Law Section, Department of Justice, 239 Wellington Street, Ottawa, Ontario, K1A 0H8, to the attention of Donald Macpherson.

For More Information

The Administrative Law Section is doing detailed legal policy work in many of the areas covered in the *Manual*. We would be pleased, in particular, to give you further information or advice in the areas of administrative monetary penalties, self-regulation and negotiated solutions to non-compliance. (You can contact the Director of the Administrative Law Section at 957-4910). For help with alternative dispute resolution options, you may wish to call the ADR Section of the Department (957-4695).

NOTICE

The Administrative Law Section advises against indiscriminate use of the precedents in this Manual. They are presented as a *catalogue of ideas* - raw materials that might be shaped and sculpted into a compliance or enforcement regime suitable for a specific regulatory situation. They are not "precedents" in the sense that they can be plucked out and deposited verbatim into another legislative scheme. Some are poorly drafted from a technical point of view and do not conform to the Canadian drafting style.

For constitutional reasons, you may simply not be able to transplant a legal mechanism from another jurisdiction to yours. Likewise, a regulatory scheme from an area of economic regulation may not be transferable into an area of social regulation within the same jurisdiction. In some cases, however, the essential elements of an environmental scheme may be separated from its contextual detail, and then adapted with care and creativity to a trade practices regulatory context, for example. In others, the scheme may simply not fit.

Many of the regulatory options identified in the Manual raise legal policy issues that merit further consideration in your particular regulatory context. Both the legislative precedent and the choice of regulatory mechanism itself may need to be evaluated from a policy perspective.

Before using any of these legislative examples, check with your Legal Services lawyer. Vet it in terms of jurisdictional authority and Charter requirements. Redraft it in accordance with the conventions adopted by the enacting legislature. And adapt it with care to fit your particular regulatory program.

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INTRODUCTION

Regulatory Reform

The winds of regulatory reform are blowing in the capital cities of the industrialized world. The OECD countries are confronting global pressures to compete for international markets and increase domestic productivity; there is little tolerance for regulation that impedes productivity. Canadian regulatory programs and regulations that have the potential to create trade distortions are subject to close international scrutiny under the FTA, NAFTA and GATT. The dispute resolution mechanisms and sanctions now available to enforce these agreements will lead to significant domestic reforms, particularly in the area of economic regulation. The emergence of free trade areas and global markets for goods and services has also increased pressures for harmonization of regulatory programs and standards internationally.

The federal government is not immune to the need for adjustments that international competition has created for Canadian business. In January 1993, the Standing Committee on Finance issued a report that examined the hidden cost of government intervention in the market place, entitled *Regulations and Competitiveness*. The report identified a number of problems with the way that government intervenes, including

- a bias for regulation over other policy instruments
- haphazard consultations
- insufficient coordination and lack of centralized management
- deficient compliance mechanisms
- regulatory duplication and inconsistent regulations, and
- inadequate legislative overview

It called for "responsive regulation" to meet the rapid changes facing the Canadian economy. Responsive regulation is based on understanding regulatory impacts on private sector competitiveness, allowing for public participation in regulation making and adjudication and being sensitive to international regulation. Supported by members of all parties, the Regulations and Competitiveness sub-committee recommended

- changes to the federal regulatory process
- strengthening the role of Parliament in the creation and review of regulations
- more extensive use of industry performance standards
- elimination of overlap between federal and provincial regulations

- continuing departmental regulatory reviews, and
- more efficient implementation and enforcement of regulatory programs

This *Manual* is a direct response to the call for improved enforcement in recommendation 7.7 of the sub-committee's report, which reads as follows:

> "Those instructing the drafters of the regulations (both program people and legal advisors) should review legislated offences and associated penalties for their adequacy and appropriateness in light of: the Charter, other available compliance instruments, the increased sentencing options which are now available and information arising from public consultations. Increased emphasis should be put on the use of civil sanctions or monetary penalties, and civil penalty or administrative tribunal mechanisms, wherever possible."

The government, in its reply to the report, agreed that "regulatory programs have relied too heavily on using criminal prosecution as the basis of their enforcement." It pledged to "systematically consider the use of non-criminal measures, such as administratively imposed monetary penalties, where that appears appropriate." The reply, entitled *Responsive Regulation in Canada*, commits the Treasury Board Secretariat, the Department of Justice and other federal departments and agencies to working together over the next five years in the development of more responsive federal regulatory programs.

Some Basic Assumptions

A department or agency proposing a new or substantially revised regulatory program, or the adoption of significant new regulations, must satisfy, as a first requirement, the first five of the following evaluative standards set out in the 1992 Treasury Board Regulatory Policy.

"For existing regulatory programs, and substantive new or amended regulations, departments and agencies must demonstrate that:

1. *A problem or risk exists, government intervention is justified, and regulation is the best alternative.*

2. *Canadians have been consulted and have had an opportunity to participate in developing or modifying regulations and regulatory programs.*

3. *The benefits of the regulatory activity outweigh the costs, and the regulatory program is "structured" to maximize the gains to beneficiaries in relation to the costs to Canadian governments, businesses and individuals.*

4. *Steps have been taken to ensure that the regulatory activity impedes as little as possible Canada's competitiveness.*

5. *The regulatory burden on Canadians has been minimized through such methods as cooperation with other governments".*

6. *Systems are in place to manage regulatory resources effectively. In particular*

    - *compliance and enforcement policies are articulated, as appropriate, and*
    - *resources have been approved and are adequate to discharge enforcement responsibilities effectively, and to ensure compliance where the regulation binds the government."*

You may discover that the sponsoring department has reserved little energy or planning priority for step 6, the adoption of a compliance and enforcement policy that is customized for a proposed regulatory initiative. A compliance and enforcement policy is the 'closer' of any regulatory program. Since 1992, legislative frameworks for regulatory programs must be designed with compliance and enforcement considerations in mind; compliance should not be a legislative afterthought.

Who Needs Compliance

Compliance is defined in *Regulations and Competitiveness* as "the measure of the effectiveness of regulatory actions". If the public or the private sector complies with the regulations or standards, then presumably Parliament's legislative objectives, pursuant to which the regulations or standards were made, will be met. On the other hand, if the public or regulated group refuses to comply, the result will be high enforcement costs or frustration of Parliamentary intent, or both.

The recent development of an underground economy to avoid goods and services and excise taxes, for example, has demonstrated the limits of the criminal law as a means of guaranteeing compliance. Departments and agencies are increasingly skeptical about the effectiveness of legislative commands, backed by threats of fines and imprisonment, in changing public behaviour. Many are looking for cost-efficient alternatives that would result in demonstrable compliance.

Some definitions:

Enforcement refers to the range of coercive actions that might be taken by a regulatory authority to induce, encourage or require regulatee behaviour or other actions to conform to prescribed regulatory standards. A failure to meet these requirements or standards *may* result in a sanction, civil or criminal in nature, being applied by or at the request of the enforcement authority or an affected third party against the wrongdoer.

Compliance refers to the continuing conformity of the regulated group or a member of that group with the prescribed regulatory standards. That state of compliance is affected or determined primarily by the range of informal and formal enforcement activities undertaken by the regulatory department or agency pursuant to its public compliance and enforcement policy.

A *compliance policy* is "a general guide for day-to-day operations of enforcement officials and managers and [explaining]...to the regulated group, other stake holders, and the general public how the department expects to achieve compliance with the particular piece of legislation" (*A Strategic Approach to Developing Compliance Policies,* Regulatory Compliance Project, Department of Justice, Minister of Supply and Services Canada, 1992, p. 3).

Creating the Need for a Compliance Ethos

A Strategic Approach to Developing Compliance Policies, cited in the above definition, explains why regulatory departments and agencies need compliance policies. It offers a step by step approach to designing a compliance strategy and explains how it becomes the policy of the department.

The *Guide* reminds the legal adviser (who should be a member of the department's compliance strategy team from the outset) to consider these seven "key elements" in developing the particular compliance strategy

- the objectives of the regulatory program
- the rules and design of the program
- the roles and functions of key authorities
- the regulated group
- potential allies
- the factors that affect compliance, and
- a compliance profile.

In designing a regulatory program, policy advisers and legal counsel should continually ask themselves what it takes to achieve compliance. This requires more than simply thinking of legal sanctions or other penalties to back up the administration of the regulatory program in question. These programs exist to reinforce, change or deter behaviour (in most cases). Hence the ultimate goal of the regulatory designer is to construct a regime that will maximize *voluntary* compliance in the first instance. The regulated population should be *habitual* compliers in whom the system has inculcated a culture of compliance.

The objectives of the program should be stated in clear and understandable terms. These objectives and the required performance criteria are usually the product of extensive pre-legislative consultations and negotiations. Administrative principles of transparency, consistency and accountability should be central to the program's implementation. Criminal sanctions are reserved for wilful, persistent or flagrant offenders. Other, more supple enforcement tools will be available to bring about compliance (and, if necessary, corrective action, redress or restitution) in most cases. The synergy between compliance goals and enforcement tools should be articulated and shaped to the particular regulatory circumstances.

The primary responsibility of the legal adviser to the compliance strategy group is to develop an array of enforcement options that will best contribute to the group's overall objective of "maximizing leverage in securing compliance...by enhancing the natural incentives to comply and by minimizing the disincentives available to the regulated group" (p. 8 of the *Guide*).

The Civil Enforcement Options Continuum

The legal design of a regulatory program will incorporate a range of compliance-enhancing enforcement tools identified in the course of preparing the compliance and enforcement policy. This compliance strategy framework should comprehend the full continuum of appropriate enforcement choices initially identified by the compliance strategy project team. The range of choices will be context-specific and will reflect the regulatory objectives at hand, available resources, the legal powers granted and other relevant considerations.

The availability of compliance instruments will be dictated, of course, by the range of authority granted explicitly or implicitly by the host statute. The precedents cited in this Manual are tied to legislatively expressed compliance schemes. In many cases, the schemes are fleshed out in separate regulations, ministerial directives or other 'official' administrative guides. In each case, there is a direct legal connection between the subordinate instrument and the empowering statute. The compliance and enforcement policy, in other words, is spelled out in legal, published terms which invite open and consistent regulatory administration.

In many cases, particularly at the federal level, regulatory legislation does not reflect the regulator's actual or potential compliance and enforcement policy, particularly on the civil enforcement side. The *Competition Act*, for example, is silent on information visits, advisory

opinions, compliance guidelines and compliance undertakings. Yet each of these compliance-enhancing methods is regularly employed by the Bureau of Competition Policy without the benefit or constraint of legislative authority.

Similar enforcement flexibility is open to most federal regulators provided their empowering legislation does not provide otherwise. Parliamentary time for passing amendments to existing legislation in order to modernize federal compliance practice is limited. If you cannot have a legislatively expressed compliance scheme, it may nonetheless be open to you to adopt, as a matter of policy, the civil compliance and enforcement choices laid out in this Manual, tailored to your specific regulatory circumstances.

The civil compliance and enforcement choices are presented in the following pages along a spectrum ranging from the least intrusive to the most intrusive. The spectrum crosses into the domain of the criminal law with the discussion of ticketing schemes in Part E. These schemes are included because they offer less intrusive and less costly procedures than traditional criminal prosecutions to enforce regulatory offences. However the Manual does not cover the range of criminal law based options for sanctioning regulatory offenders. In principle, the focus is on alternatives to prosecution.

A. PROACTIVE VOLUNTARY COMPLIANCE MEASURES AND INCENTIVES

PROACTIVE VOLUNTARY COMPLIANCE MEASURES AND INCENTIVES

1. Advance Consultations on Proposed Regulations

Pre-Publication Requirements

In the U.S., *Executive Order (12291) 1981* requires the advance publication of regulations proposed pursuant to empowering legislation in a regulatory agenda and then in the annual regulatory plan. This scheme of mandatory regulatory notice is monitored by the Office of Management and Budget.

In Canada, regulatory departments and agencies have been encouraged since 1986 to publish advance notice of any regulatory initiatives proposed for promulgation in the next year in the annual Federal Regulatory Plan. However, it is estimated that only about 40% of the regulations made in 1991 had been listed in a previous regulatory plan. This rather uneven picture of advance consultations prompted the Sub-Committee on Regulations and Competitiveness to recommend that the Treasury Board Secretariat prepare standardized consultation guidelines for federal departments and agencies "adapted to fit different types and scales of proposed regulations" (p. 42). These guidelines would be accompanied by a standing requirement that "all intermediate and major proposed regulations" be published in the Federal Regulatory Plan before they are reviewed by Cabinet (the 'Special Committee of Council'). For provincial and territorial notice and consultation precedents, see Precedents A1.4 and A1.5 referring to recent Yukon and Ontario initiatives, respectively.

Our emphasis here is on administrative requirements for early or advance consultation (including publication) on proposed regulations, compliance guidelines, interpretation bulletins and similar administrative documents before they are put into effect or become part of the standard operating procedures of the issuing agency or department. Pre-publication requirements are meant to put the regulated community and other stake holders on notice as to the department's intentions and to provide an opportunity for representations and consultations. From a compliance point of view a general policy of advance consultation and pre-publication should be adopted by all regulatory agencies and departments regardless of their empowering legislation.

Precedent A1.1: *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ss. 261(2) & (3)

261.(2) Subject to subsection (3), the Minister shall publish in the *Canada Gazette* and in the [periodical prepared by the Director] at least sixty days before the proposed effective date thereof a copy of every regulation that the Governor in Council proposes to make under this Act and a reasonable opportunity shall be afforded to interested persons to make representations with respect thereto.

(3) The Minister is not required to publish a proposed regulation if the proposed regulation

(a) grants an exemption or relieves a restriction;

(b) establishes or amends a fee;

(c) has been published pursuant to subsection (2) whether or not it has been amended as a result of representations made by interested persons as provided in that subsection; or

(d) makes no material substantive change in an existing regulation.

Precedent A1.2: *Canadian Environmental Protection Act*, R.S.C. 1985 (4th Supp.), c. 16, ss. 48 & 89-97

48.(1) The Minister shall publish in the *Canada Gazette* a copy of every . . . . regulation proposed to be made under [specified sections].

(2) Within sixty days after the publication of a proposed . . . . regulation in the *Canada Gazette* under subsection (1), any person may file with the Minister a notice of objection requesting that a board of review be established under section 89 and stating the reasons for the objection.

89.(1) Where a person files a notice of objection under [subsection 48(2) in respect of a proposed regulation], the Minister . . . . may establish a board of review to inquire into the nature and extent of the danger posed by the substance in respect of which the . . . . regulation is proposed.

90. A board of review shall consist of not fewer than three members.

91. A board of review shall give any person or government a reasonable opportunity, consistent with the rules of procedural fairness and natural justice, of appearing before it, presenting evidence and making representations.

96.(1) As soon as possible after the conclusion of an inquiry, a board of review shall submit a report to the Minister . . . . who established the board, together with its recommendations and the evidence that was presented to it.

[The omitted sections 92-95 and 96(2)-97 address procedural details dealing with the withdrawal of a notice of objection, the powers and procedures of the board, etc.]

Additional Precedents:

Consumer Packaging and Labelling Act, R.S.C. 1985, c. C-38, s. 19

Occupational Safety and Health Act of 1970, 29 U.S.C., ss. 655(b)(2)-(4)

Consultation Requirements

This is not the place to lay out the set of standardized consultation processes called for by the Commons Sub-Committee. However, it is suggested that advance consultation be practised in the following circumstances:

- the proposed regulations are the first to be promulgated under the authorizing statute; or
- the proposed regulations amend or vary existing regulations, materially altering compliance standards, discretionary authority of the regulatory department, enforcement responsibilities and/or compliance costs borne by any party.

Treasury Board Guidelines recommending public consultation, particularly with those most affected by a proposed regulation, are in effect and are known to the public and to the regulated group. Treasury Board Guidelines are subject to change at the discretion of the government of course. In a climate where advance consultation is the prevailing federal regulatory norm, however, it may not be necessary to consider statutory models for mandatory consultation.

Public Consultation

The minister or regulatory agency may be required by statute to provide an appropriate and reasonable opportunity for public consultation and advice except in circumstances of an urgent or emergency nature. This requirement appears in a limited number of consumer protection statutes (provincial trade practices legislation) and environmental protection statutes.

Precedent A1.3: *The Business Practices Act,* S.M. 1990-91, c. 6 (C.C.S.M., c. B120), s. 32(2)

32(2) Except in circumstances that the minister considers to be of an urgent nature, the minister shall provide an opportunity for public consultation and seek the advice and recommendations of the public with respect to any regulation proposed to be made under subsection (1), before the regulation is made.

Precedent A1.4: *Environment Act,* S.Y.T. 1991, c. 5, ss. 30-32 & 34-36

30.(1) Subject to section 34, where the Commissioner in Executive Council proposes to make, amend or revoke a regulation under this Act . . . . , the proposal shall be referred to the Minister for public review, and the Minister shall then initiate a public review.

(2) On receipt of a proposal under subsection (1), the Minister shall cause notice of the proposal to be published along with an invitation to the public to make submissions to the Minister within a time limit set by the Minister not less than 60 days from the publication of the notice.

(3) The Minister shall maintain a register of persons to whom notice of a proposal under subsection (1) shall be sent.

(4) Any person or group of persons may request that the Minister place his, her or its name, address, telephone number or telecopier number on the register provided for under subsection (3), and, subject to any condition that may be prescribed by regulation, the Minister shall cause the name, address, telephone number or telecopier number to be placed on the register for a period of one year.

31.(1) The Minister shall, if the nature of a proposal under subsection 30(1) warrants,

(a) hold public hearings to receive oral submissions on the proposal; or

(b) refer the proposal to an advisory committee to hold public hearings and report to the Minister; and

(c) carry out economic, socio-economic and environmental analyses of the proposal.

(2) In determining whether a proposal under subsection 30(1) warrants a public hearing, the Minister shall consider

(a) expressions of public concern;

(b) the significance of the proposal for the economy or the environment;

(c) prior consultations on the proposal;

(d) a directive of the Commissioner in Executive Council;

(e) the extent to which the terms of the proposal reflect an order of the Supreme Court [granted in an action brought under the Act]; and

(f) any other relevant factor.

(3) Submissions to the Minister may be oral or in writing.

32.(1) After considering any submissions and any other information received under section 31, the Minister shall report to the Commissioner in Executive Council concerning the proposal.

(2) The Minister may recommend in a report under subsection (1) that the proposal

(a) be implemented without any changes;

(b) be implemented with changes specified by the Minister; or

(c) not be implemented.

(3) The Minister's report shall state the reasons for any recommendation.

(4) The Minister shall send a copy of the report to all persons who made submissions on the proposal.

34. Sections 30 to [32] do not apply to a proposed regulation expressed to be in force for a period of 90 days or less.

35. The Commissioner in Executive Council may make regulations

(a) respecting procedures to be followed in the conduct of a public review of a proposal under sections 30 to [32]; and

(b) notwithstanding subsection 30(1), designating a class of proposal to which subsection 30(1) does not apply.

36. The Minister may establish participant funding programs for Yukon First Nations, municipalities, businesses, non-governmental organizations and individuals participating in processes established under sections 30 to 32.

Precedent A1.5: *The Environmental Bill of Rights, 1993* (Ont.), c. 28 (1993), ss. 5-6 & 14-17

5. An environmental registry shall be established as prescribed.

6. The purpose of the registry is to provide a means by which notice of proposals and decisions that might affect the environment can be given to the public.

14. In determining, under section 15 or 16, whether a proposal for a policy, Act or regulation could, if implemented, have a significant effect on the environment, a minister shall consider the following factors:

1. The extent and nature of the measures that might be required to mitigate or prevent any harm to the environment that could result from a decision whether or not to implement the proposal.

2. The geographic extent, whether local, regional or provincial, of any harm to the environment that could result from a decision whether or not to implement the proposal.

3. The nature of the private and public interests, including governmental interests, involved in the decision whether or not to implement the proposal.

4. Any other matter that the minister considers relevant.

15.(1) If a minister considers that a proposal under consideration in his or her ministry for a policy or Act could, if implemented, have a significant effect on the environment, and the minister considers that the public should have an opportunity to comment on the proposal before implementation, the minister shall do everything in his or her power to give notice of the proposal to the public at least thirty days before the proposal is implemented.

(2) Subsection (1) does not apply to a policy or Act that is predominantly financial or administrative in nature.

16.(1) If a minister considers that a proposal under consideration in his or her ministry for a regulation under a prescribed Act could, if implemented, have a significant effect on the environment, the minister shall do everything in his or her power to give notice of the proposal to the public at least thirty days before the proposal is implemented.

(2) Subsection (1) does not apply to a regulation that is predominantly financial or administrative in nature.

17.(1) The Minister shall consider allowing more than thirty days between giving notice of a proposal under section 15 or 16 and implementation of the proposal in order to permit more informed public consultation on the proposal.

Additional Precedents:

Hazardous Materials Information Review Act, R.S.C. 1985, c. 24 (3rd Supp.), s. 48(1) - Governor in Council may make regulations only after the Minister has consulted the government of each province and representatives of labour, employers and industry

Hazardous Products Act, R.S.C. 1985, c. H-3, s. 19 - Governor in Council may make regulations or orders only after the Minister has consulted the government of each province and representatives of labour, employers and industry

Public Service Employment Act, R.S.C. 1985, c. P-33, s. 37.1(3) (enacted by S.C. 1992, c. 54, s. 25) - Treasury Board must, on request, consult with bargaining agents or representatives of the Public Service Commission with respect to any regulation that may be made under section 37.1 of the Act

Pilotage Act, R.S.C. 1985, c. P-14, s. 21 - persons who object to regulations proposed to be made by a pilotage authority may file a notice of objection with the Minister - Minister must appoint person to investigate the objection - investigation may include public hearing - on receipt of report, the Minister may, by order, approve, amend, or disapprove the proposed regulation and the authority shall make the regulation accordingly

The Environment Act, S.M. 1987-88, c. 26 (C.C.S.M., c. E125), s. 41(2)

Industry-specific Consultation

Advance consultation with a specific industry is usually employed in regulatory situations where

- the regulated group is well defined or represented by well known trade associations;
- the proposed regulations materially affect present methods of production, distribution or service;
- there is no immediate or short-run danger to public health or safety during the consultation and promulgation periods;
- the consultation process itself is acceptable to the principal interest groups; and
- the subject-matter of the consultation is clearly delineated in advance publicity.

In some cases, consultation requirements impose negotiated rulemaking on the regulator [Precedent A1.6] or prescribe such a procedure at the regulator's discretion. In other cases, rules or standards are formulated by the industry and approved by the regulator.

Precedent A1.6: *Negotiated Rulemaking Act of 1990*, 5 U.S.C. ss. 594-599d

596.(a) Determination of need by the agency. An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule, if the head of the agency determines that the use of the negotiated rulemaking procedure is in the public interest. In making such a determination, the head of the agency shall consider whether--

(1) there is a need for a rule;

(2) there are a limited number of identifiable interests that will be significantly affected by the rule;

(3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who--

(a) can adequately represent the interests identified under paragraph (2); and

(b) are willing to negotiate in good faith to reach a consensus on the proposed rule;

(4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;

(5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;

(6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and

(7) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

597.(a) Publication of notice. If, after considering the report of a convener or conducting its own assessment, an agency decides to establish a negotiated rulemaking committee, the agency shall publish in the Federal Register and, as appropriate, in trade or other specialized publications, a notice which shall include–

(1) an announcement that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;

(2) a description of the subject and scope of the rule to be developed, and the issues to be considered;

(3) a list of the interests which are likely to be significantly affected by the rule;

(4) a list of the persons proposed to represent such interests and the person or persons proposed to represent the agency;

(5) a proposed agenda and schedule for completing the work of the committee, including a target date for publication by the agency of a proposed rule for notice and comment;

(6) a description of administrative support for the committee to be provided by the agency, including technical assistance;

(7) a solicitation for comments on the proposal to establish the committee, and the proposed membership of the negotiated rulemaking committee; and

(8) an explanation of how a person may apply or nominate another person for membership on the committee, as provided under subsection (b).

598.(a) Establishment. (1) Determination to establish committee. If after considering comments and applications submitted under section [597], the agency determines that a negotiated rulemaking committee can adequately represent the interests that will be significantly affected by a proposed rule and that it is feasible and appropriate in the particular rulemaking, the agency may establish a negotiated rulemaking committee.

599.(a) Duties of committee. Each negotiated rulemaking committee . . . . shall consider the matter proposed by the agency for consideration and shall attempt to reach a consensus concerning a proposed rule with respect to such matter and any other matter the committee determines is relevant to the proposed rule.

[The omitted sections include a purpose clause, definition section, and provisions relating to the use of conveners and facilitators, applications for membership on the committee, powers and procedures of the committee, etc.]

Additional Precedents:

Canada Labour Code, R.S.C. 1985, c. L-2, s. 137.2(4) - Coal Mining Safety Commission, consisting of employers and non-supervisory employees, may make recommendations to the Minister for amending or revoking any provision of the regulations applicable to coal mines

Farm Products Marketing Agencies Act, R.S.C. 1985, c. F-4 - Governor in Council may establish agency to implement plan for the marketing of a designated product in international and export trade (s. 16) - agency may make regulations and orders for that purpose (s. 22(1)(f)) - regulations must be approved by Council (s. 7(1)) - Council consists of not more than nine members appointed by the Governor in Council, at least fifty percent of whom must be primary producers, and whose membership must reflect the regions of Canada (s. 3) - Council may set aside any order or regulation if it is satisfied that it is not necessary for the implementation or administration of the marketing plan (s. 7(1)(e))

Railway Safety Act, R.S.C. 1985, c. 32 (4th Supp.), ss. 7, 18, 19 & 46 - Governor in Council may make regulations respecting engineering standards, the operation of line works and the design of equipment, including performance standards, training, etc. - Minister may, by order, require railway company to formulate standards or rules governing matters that are not covered by the regulations and to file them with the Minister for approval - Minister must be satisfied that standards or rules are conducive to safe railway operations - procedures set out for the granting of approval - if approval refused, the Minister may, by order, after consulting the railway company and others, formulate own standards or rules.

Federal-Provincial Consultation

An obligation for inter-jurisdictional consultation may be imposed where there is concurrent regulatory jurisdiction between two governments or to avoid overlap and administrative inefficiencies of two regulatory regimes. This may entail a simple legislative requirement to consult before a regulation is made or federal-provincial agreement altered. Examples range from an obligation that the federal government consult the lieutenant governor in council of every province or of a province affected by the measure, to an obligation to "make a reasonable attempt to reach agreement with the province concerned". In some cases, agreement by both levels of government is a condition precedent to regulating. The *Canada Assistance Plan*, for example, requires provincial consent before a regulation is made that alters the effect of a federal-provincial agreement. Parliament may change these requirements, however, as happened recently when the terms of CAP agreement were changed.

Federal-Provincial advisory committees are another type of consultation mechanism to consider. For example, the Committee set up under the *Canadian Environmental Protection Act* [Precedent A1.7] advises on proposed regulations and other environmental matters of interest to both levels of government. Its mandate is to provide a framework for national and cooperative action on the environment and "to avoid conflict between, and duplication in, federal and provincial regulatory activity".

Precedent A1.7: *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.), s. 6

6.(1) For the purpose of establishing a framework for national action and taking cooperative action in matters affecting the environment and for the purpose of avoiding conflict between, and duplication in, federal and provincial regulatory activity, the Minister shall, in cooperation with the governments of the provinces, establish a federal-provincial advisory committee to advise the Minister on

(a) regulations proposed to be made under paragraph 34(1)(a), (b), (c), (d), (o) or (q); and

(b) other environmental matters that are of mutual interest to the federal and provincial governments and to which this Act relates.

(2) The Minister shall include in the annual report required by section 138 a report of the activities of the federal-provincial advisory committee.

Additional Precedents:

Aeronautics Act, R.S.C. 1985, c. A-2, s. 5.4(3) - Governor in Council may not make regulations unless the Minister makes reasonable attempt to reach agreement with the province concerned

Canada Assistance Plan, R.S.C. 1985, c. C-1, s. 9(2) - no regulation may alter effect of federal-provincial agreement unless the province consents

Canada Health Act, R.S.C. 1985, c. C-6, s. 22 - certain regulations cannot be made except with the agreement of each of the provinces or unless the Minister has consulted the provincial ministers of health

Canada Water Act, R.S.C. 1985, c. C-11, ss. 11 & 18 - water quality management areas may be designated under federal-provincial agreement by joint federal-provincial agency - Governor in Council may make regulations limiting the deposit of waste in designated areas, prescribing fees and charges and prescribing water quality standards - regulations may not be made unless they are recommended by the agency or jointly by the federal and provincial Ministers

Canada Oil and Gas Operations Act, R.S.C. 1985, c. O-7, s. 5.4 (enacted by S.C. 1992, c. 35, s. 12) - council consisting of provincial representatives and others shall advise federal and provincial ministers on administration of regulatory regime in force under the Act and other Acts

Canada-United States Free Trade Agreement Implementation Act, S.C. 1988, c. 65, s. 9(3) - Minister must consult the government of a province before certain regulation is made

Energy Supplies Emergency Act, R.S.C. 1985, c. E-9, s. 45 - the lieutenant governor in council of each province must be consulted before the Governor in Council makes certain orders

Farm Income Protection Act, S.C. 1991, c. 22, ss. 4 & 18(2) - Governor in Council may make regulations respecting the provisions of certain federal-provincial agreements but the Minister must consult the provinces before amendments to the regulations are made

Hazardous Materials Information Review Act, R.S.C. 1985, c. 24 (3rd Supp.), s. 48(1) - Governor in Council may make regulations only after the Minister has consulted the government of each province and representatives of labour, employers and industry

Hazardous Products Act, R.S.C. 1985, c. H-3, s. 19 - Governor in Council may make regulations or orders only after the Minister has consulted the government of each province and representatives of labour, employers and industry

Immigration Act, R.S.C. 1985, c. I-2, s. 114(3) (enacted by S.C. 1992, c. 49, s. 102(11)) - Minister may exercise power to exempt immigrant from the regulations only with consent of province in which the immigrant intends to reside

Patent Act, R.S.C. 1985, c. P-4, ss. 101(2) & 102 (enacted by the *Patent Act Amendment Act, 1992*, S.C. 1993, c. 2, s. 7) - before regulations are made, the Minister must consult provincial health ministers and representatives of consumer groups and the pharmaceutical industry - Minister may convene meetings of the federal regulatory board, provincial health ministers and representatives of consumer groups and the pharmaceutical industry to discuss administration or operation of certain provisions of the Act

Telecommunications Act, S.C. 1993, c. 38, s. 13 - Minister must consult provincial ministers before general directions or variation order is issued to CRTC

2. Education

It is not unusual for 'social' regulatory agencies (e.g. regulating the environment, occupational safety, product safety, etc.) to engage in research, training, information and public education activities as part of their operational responsibilities. The importance and clarity of those responsibilities might best be captured by expressly including them in the statutory profile of the agency. A positive declaration of educational responsibilities legitimates the allocation of limited resources to the task and, in turn, obligates the government to provide the resources to do the job. It is also more consistent with open, consultative regulation. The statutory models impose duties, often in mandatory language, to

- conduct and encourage research, information and training [Precedents A2.1 and A2.3]; or
- provide education and information tied directly to consumers' rights and compliance thresholds [Precedent A2.2].

These provisions expressly recognize the educational, research and information sharing responsibilities of the regulatory agency.

Publication of Information

An excellent example of this type of requirement may be found in the *Canadian Human Rights Act* [Precedent A2.1]. The Commission is expressly directed to conduct public information programs as part of its administrative responsibilities.

Another instructive precedent is the 1991 *Yukon Environment Act* [Precedent A1.4], which empowers the Council to promote environmental awareness and authorizes the Minister to develop information programs to promote the statutory objectives.

Precedent A2.1: *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 27(1)(a)

27.(1) [T]he Commission . . . .

(a) shall develop and conduct information programs to foster public understanding of this Act and the role and activities of the Commission thereunder and to foster public recognition of the principle described [previously in the Act];

Precedent A2.2: *Trade Practice Act*, R.S.B.C. 1979, c. 406, s. 5(c)

5. The director shall,

(c) inform consumers and suppliers on a continuing basis of the provisions of this Act and the regulations and of their respective rights and duties;

Precedent A2.3: *Health and Safety at Work Etc Act 1974*, c. 37, s. 11(2)(c), as amended (U.K.)

11.(2) It shall be the duty of the Commission

(c) to make such arrangements as it considers appropriate for securing that government departments, employers, employees, organisations representing employers and employees respectively, and other persons concerned with matters relevant to any of [the general purposes of this Part] are provided with an information and advisory service and are kept informed of, and adequately advised on, such matters;

Additional Precedents:

The Business Practices Act, S.M. 1990-91, c. 6 (C.C.S.M., c. B120), s. 13(c), as am. by S.M. 1992, c. 27, s. 2

Canada Labour Code, R.S.C. 1985, c. L-2, s. 138(5), as am. by R.S.C. 1985, c. 9, (1st Supp.), s. 4

Consumer Protection Act, R.S.Q. 1977, c. P-40.1, s. 292(c)

Environmental Protection Act, R.S.O. 1990, c. E.19, s. 4(f)

Environment Act, S.Y.T. 1991, c. 5, ss. 51(1)(a), 53(1)(e), 56

Resource Conservation and Recovery Act of 1976, 42 U.S.C., s. 6983

Educational and Training Programs

Educational and training programs may well take on several forms, including

- public or industry briefings on current or proposed regulatory programs

- initiatives to help public interest, consumer or employee groups to better understand the Act, to assist in private enforcement education, etc. and

- initiatives to make the public or other target groups better aware of their rights and responsibilities under the regulatory scheme.

The delegation of a legislative educational or training responsibility to the regulatory agency is most commonly found in regulatory programs concerned with occupational health and safety and environmental protection [Precedent A2.4].

Precedent A2.4: *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, ss. 16(1)(d) & (e)

16.(1) The functions of the [Workplace Health and Safety Agency] are, and it has the power,

(d) to develop and deliver educational and training programs, purchase programs from other institutions and contribute to the development of safety programs by other institutions;

(e) to make grants or provide funds, or both, for the purposes described in clause (d);

Additional Precedents:

Canada Labour Code, R.S.C. 1985, c. L-2, s. 135(6), as am. by R.S.C. 1985, *c. 9*, (1st Supp.), s. 4

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C., s. 9660a

Environment Act, S.Y.T. 1991, c. 5, s. 51(1)(b)

Environmental Protection Act, R.S.O. 1990, c. E.19, s. 4(e)

Occupational Safety and Health Act of 1970, 29 U.S.C., s. 670

Railway Safety Act, R.S.C. 1985, c. 32, (4th Supp.), s. 18(1)(c)(i)

Information Visits

There are two kinds of information visits, each designed to encourage ongoing compliance by a member of the regulated group. The warning information visit arises when the regulator identifies a minor violation of a regulatory standard. A "visit" (in person or otherwise) by the regulator alerts the firm in question to its breach (usually unintended) of the regulatory standard. The behaviour prompts a warning, but the message is really couched in educational or informational terms. Formal enforcement proceedings are not in order unless the breach is material and the firm in question unequivocally refuses to stop or otherwise correct its behaviour. Warnings are regularly given by all enforcement authorities but are rarely governed by an express power in the regulatory statute.

The second type of information visit might be best described as the regulatee-requested information visit [Precedent A2.5]. In this situation, the regulating agency is expressly empowered to conduct a compliance audit or inspection or to provide information at the request of the regulatee.

Precedent A2.5: *Weights and Measures Act*, R.S.C. 1985, c. W-6, ss. 15(2) & 20(1)

15.(2) In addition to any [inspections conducted at prescribed times], an inspector may inspect any [weighing or measuring] device at the request of the owner or person in possession thereof . . . .

[An inspection fee is charged for this service.]

20.(1) The fees and charges payable by a person in respect of any inspection or other service performed by an inspector under this Act shall, subject to the regulations, be paid to that inspector at the time the service is performed.

Technical Assistance

Sometimes the regulating agency is a principal repository of technical information, research results, compliance measurements or expert advice relating to the regulated sector. Responsible regulation requires that this type of information be shared by the regulator with the regulated group. Usually a statutory direction to conduct research and studies is tied to the provision of "advisory and technical services and information related thereto" [Precedent A2.6].

Precedent A2.6: *Canadian Environmental Protection Act*, R.S.C. 1985, *c. 16* (4th Supp.), s. 7(1)(c)

7.(1) The Minister may

(c) conduct research and studies relating to the nature, transportation, dispersion, effects, control and abatement of environmental pollution and provide advisory and technical services and information related thereto;

Additional Precedents:

The Environment Act, S.M. 1987-88, c. 26 (C.C.S.M., c. E125), s. 2(2)(f)

Publication of Particulars about Enforcement Activity

The flipside to a compliance profile is the regulator's enforcement profile. This usually consists of the regular publication (e.g. quarterly or semi-annually) of the enforcement proceedings (of every kind and description) taken by the regulator during the reporting period. The duty to report regularly on its enforcement activities confirms the accountability of the regulatory agency for the proper performance of its enforcement responsibilities. It ties directly into the agency's responsibility for the open and consistent performance of its regulatory responsibilities.

The key requirement here is the ongoing maintenance of a 'public record' of agency enforcement activities. This means the publication at regular intervals of a detailed and up-to-date account of the civil, criminal and administrative proceedings taken under the host statute.

There are two levels of record-keeping and publication. The first requires the ongoing maintenance of a public record of all administrative, civil and criminal enforcement proceedings. The record includes the current compliance policy, to which there is unimpaired public access. See Precedents A2.7 and A2.8.

The second level of disclosure requires the publication of an annual enforcement report. The report would include information "respecting the administration of the Act, including particulars of the investigations and enforcement procedures and policies, the number and disposition of enforcement proceedings, and of any other activities and programs, for the preceding year". Usually there is a requirement to file an enforcement report with the responsible minister, who is required to table it after the commencement of the next session of the legislature [Precedent A2.8].

Precedent A2.7: *Trade Practice Act*, R.S.B.C. 1979, c. 406, s. 5(e)

5. The director shall

(e) maintain public records of all

(i) enforcement proceedings taken under this Act or the regulations;

(ii) judgments and interim or permanent orders or injunctions rendered under this Act; and

(iii) written undertakings or assurances entered under this Act.

Precedent A2.8: *Trade Practice Act*, R.S.B.C. 1979, c. 406, s. 34

34. The director shall prepare annually, or more often as the minister requires, a report respecting the administration of this Act, including particulars of the investigations and enforcement procedures and policies, the number and disposition of enforcement proceedings, and of any other activities and programs, for the preceding year. He shall file the report with the minister, and, in respect of the annual report, the minister shall table it within 15 days after the commencement of the first session of the Legislature in the following year.

Additional Precedents:

Discriminatory Business Practices Act, R.S.O. 1990, c. D.12, s. 17

Fisheries Act, R.S.C. 1985, c. F-14, s. 42.1, as am. by S.C. 1991, c. 1, s. 11.1

Trade Practices Act, R.S.Nfld 1990, c. T-7, s. 8(c)

3. Cooperative Research and Other Programs to Support Compliance

Regulators sometimes prompt compliance by offering technical assistance, education and information to the regulated sector. There are a variety of programs of this type. A partnership approach to research and testing programs might be considered as a useful and positive element of an overall compliance policy. You might wish to consider this type of provision in the following circumstances:

- where there is a shared industry and regulator interest in jointly sponsored research programs. (The research might be concerned, for example, with tracking regulatee compliance costs, the industry's or consumers' perceptions of the regulator's compliance policy in practice, etc.);

- when cooperatively delivering technical assistance programs to encourage the establishment of internal compliance audits; or

- where similar research is being undertaken by another federal or provincial department or agency or other organization or person. (In this situation it is more efficient to undertake such research in cooperation with those other persons, provided the integrity of the research will not be compromised).

There are not many legislative precedents in this area. Usually the authority to take on cooperative research and related programs may be implied in the administrative powers granted by statute to the regulatory agency or department. In such cases, it is important that the published compliance policy discloses any commitment of the regulator to cooperative research and enforcement programs. Current drafting practice illustrates three different approaches:

- the Regulator-directed approach - the minister or agency funds the research project, in whole or in part, where the minister or agency is satisfied that the project "is likely to promote, or make a contribution to" declared compliance goals [Precedent A3.1];

- the Shared or Cooperative Research Undertaking Approach - the minister is authorized to support, conduct, initiate research "in cooperation with any department or agency of the Government of Canada or with any or all provinces or with any organization" or any institution or person undertaking similar research [Precedent A3.2; see also *Canadian Environmental Protection Act,* R.S.C. 1985, c.16, (4th Supp.), s. 7(3)]. It is no longer novel to grant the general authority to enter into agreements with other governments or private organizations respecting various voluntary compliance programs and incentives (see *Environment Act,* S.Y.T. 1991, c. 5, ss.54 & 56 for general authority to enter into agreements with the Government of Canada or private organizations respecting various voluntary compliance programs and incentives); and

- the Comprehensive (U.S.) Approach - under this approach the enforcement authority "shall conduct, and encourage, cooperate with, and render financial and other assistance to appropriate public authorities, agencies and institutions, private agencies and institutions, and individuals in the conduct of and promote the coordination of research, investigations, experiments, training, demonstrations, surveys, public education programs and studies relating to..." (see *Resource Conservation and Recovery Act of 1976*, 42 U.S.C., s.6981, 6983, 6984 -the drafting is terrible but the intent is clear).

Precedent A3.1: *Railway Safety Act*, R.S.C. 1985, *c. 32*, (4th Supp.), ss. 14 & 15

14.(1) Where the Minister is satisfied that

(a) a program or study related to education or research, [or]

(b) a project relating to the design, demonstration or evaluation of railway works or railway equipment, ...

is likely to promote, or make a contribution to, safe railway operations, the Minister may authorize the making of a grant for the purpose of defraying the whole or part of the cost of undertaking that program, study [or project].

(2) In authorizing the making of a grant under subsection (1), the Minister may attach such terms and conditions to the grant as the Minister deems advisable, including requirements to provide the Minister with evidence of expenditure on the program, study [or project].

15. Grants authorized under section [14] shall be paid out of money appropriated by Parliament for that purpose.

Precedent A3.2: *Canada Labour Code*, R.S.C. 1985, c. L-2, ss. 138(4) & (6), as am. by R.S.C. 1985, *c. 9*, (1st Supp.), s. 4

138.(4) The Minister may undertake research into the . . . . means of preventing . . . . occupational illness and may, where the Minister deems it appropriate, undertake such research in cooperation with any department or agency of the Government of Canada or with any or all provinces or with any organization undertaking similar research.

(6) The Minister may undertake programs to reduce . . . . occupational illness and may, where the Minister deems it appropriate, undertake those programs in cooperation with any department or agency of the Government of Canada or with any or all provinces or any organization undertaking similar programs.

Additional Precedents:

Canadian Environmental Protection Act, R.S.C. 1985, c. 16, (4th Supp.), s. 7(3)

Environment Act, S.Y.T. 1991, c. 5, ss. 54 & 56

Resource Conservation and Recovery Act of 1976, 42 U.S.C., ss. 6981, 6984

4. Financial Incentives

The primary aim of a compliance strategy should be to obtain the maximum voluntary compliance by the regulatees for the regulatory program's available resources. Compliance incentives must be built into the administrative and legal design of the regulatory program.

This section focuses on legislative and administrative techniques for enhancing voluntary compliance. If non-coercive methods for encouraging compliance are successfully employed, then the need for more costly, coercive enforcement techniques will be reduced. Compliance incentives that are effectively employed make compliance more profitable for the regulatee than non-compliance.

Building economic incentives into a legislative scheme gives regulators a positive tool for encouraging voluntary compliance. The incentives operate as a reward to those who consistently meet or surpass regulatory standards or objectives. Incentives can take many forms, including:

- direct financial assistance in the form of subsidies, grants or loans;
- favourable tax treatment (such as accelerated depreciation on capital expenditures for pollution-control equipment);
- the structuring of licence fees or other levies on the basis of compliance history;
- government procurement policies that favour those with a sound record of compliance or those whose business practices conform to regulatory objectives;
- relaxation of reporting requirements or other monitoring mechanisms that may be costly and time-consuming for the regulatee; or
- favourable publicity (which may be viewed as providing an indirect financial benefit).

Consider, for example, how a policy of incentive rate-making might be applied to monopoly utilities by an energy regulatory commission. Proponents of incentive regulation distinguish it from their approach to traditional cost-of-service-based regulation for oil and gas pipelines and electric utilities. Properly designed incentive regulation, they agree, will achieve lower rates for consumers while offering a utility an opportunity to earn higher returns. The main difference between incentive and traditional regulation lies in the relationship between a utility's costs and its rates. Thus, traditional regulation puts a limit on a utility's profits. Rates reflect the allowed return on equity plus the cost of service. As long as rates reflect the utility's current costs, it has little incentive to cut those costs.

In many cases, the system could provide a built-in bias in favour of expansion to boost the rate base. In contrast, incentive regulation relaxes the tie between a utility's costs and the rates it

charges. Rather than reflecting changes in the company's own costs, the rates reflect changes in a general price index. The utility could not automatically apply for a rate increase if its cost of service goes up. If it can operate more efficiently though, thereby reducing its cost, the utility can increase its earnings. Energy regulatory commissions that favour incentive regulation have employed the following four design parameters:

- prospective rate setting - incentive mechanisms must be prospective. Existing rates are not to be used automatically as the basis for an incentive scheme. The commission must establish that the rates are just and reasonable at the inception of the incentive program;

- voluntary participation - participation in incentive rate setting is voluntary, not mandatory;

- transparency of benefits - the utility must clearly state the benefits of an incentive rate proposal relative to the cost of service regulation for itself and its customers; and

- quantifiable benefits - the benefits to customers must be quantifiable.

Incentive regulation by energy utilities often uses performance targets to encourage companies to cut costs. Under this approach, targets are set, for instance, for expenditures on salaries or operation and maintenance costs. If the subject utility beats the target, then it keeps part of the savings.

Environmental protection and worker safety legislation provide additional examples of how economic or market-based incentives might be used to influence rather than coerce industry to increase its compliance with the environmental standards promoted by the legislation. In designing a legislative scheme that employs direct or indirect financial incentives, there is substantial room for creativity on an industry-specific basis. Essentially, you should determine whether there are any benefits that could be increased or decreased, or privileges that could be dispensed or withheld, on the basis of the regulatee's compliance record. In addition to choosing a type of financial incentive you must specify the circumstances that give rise to awarding the incentive. Providing monetary rewards to all who comply with regulatory standards is both impractical and undesirable; people are not paid for simply obeying the law. Financial incentives that take the form of a reward should be reserved for those who surpass regulatory requirements, those who make innovative contributions in their fields, or those who further regulatory objectives (as opposed to meeting detailed standards).

Although financial incentives are generally considered from a positive point of view, they can also be designed in conjunction with "negative incentives". For example, licence fees can be reduced for those with a favourable compliance history, and increased for those with a history of non-compliance. Government procurement policies can favour those who comply, or exclude those who do not. Such cases belie any neat distinction between providing rewards and imposing penalties. Rewards and penalties can be employed on a continuum, and a particular measure can be classified as either, depending on one's point of view and particular objective.

Financial or economic incentives are an underused compliance-enhancing strategy whose considerable potential deserves to be recognized by regulatory designers. Moreover, with the possible exception of the compliance 'units or credits', it is generally open to regulators to develop an incentive-based approach to their compliance policy without the benefit of express statutory authorization in the host statute. In other words, the incentive-based strategy, in many regulatory schemes, can be implemented as an administrative policy.

Performance Incentives

There are various types of performance incentives that you might profitably consider. The cost of licence fees, for example, might be tied to the regulatee's compliance record. Recent amendments to federal air transport legislation offer an example of a negative performance incentive. The amendments require air carriers to pay the return passage of travellers that they transport to Canada who are "not in possession of a valid and subsisting visa [see *Immigration Act*, ss. 85(3) & 89.1]. Workers' compensation legislation may reward employers (by reducing their levy) if they enjoy a consistently good accident record, provide evidence that they have taken appropriate safety precautions and otherwise conform with work safety performance standards established by the Board. On the other hand, it may penalize them by compelling non-complying employers to make additional contributions to an Accident Fund.

Similar approaches include subsidies (or the reduction of subsidies as a consequence of non-complying behaviour), fees and taxes. Another type of performance incentive is based on variable rate structures. An example in the environmental field is volume-based rates for household solid waste which an agency might actively promote in order to reduce the need for landfill space to accommodate trash.

Precedent A4.1: *Broadcasting Act*, S.C. 1991, c. 11, s. 11(2)(b)

11.(2) Regulations [establishing schedules of fees to be paid by licensees] may provide for fees to be calculated by reference to any criteria that the Commission deems appropriate, including by reference to

(b) the performance of the licensees in relation to objectives established by the Commission, including objectives for the broadcasting of Canadian programs;

Precedent A4.2: *Western Grain Transportation Act*, R.S.C. 1985, c. W-8, ss. 18 & 21

18.(1) The [Grain Transportation Agency Administrator] shall

(c) [establish the grain transportation, shipping and handling performance objectives that, in any period, can and should be met by system participants];

(d) monitor the performance of

(i) the railway companies, and

(ii) such other system participants as the Administrator deems appropriate

to ascertain whether or not they are meeting the performance objectives referred to in paragraph (c);

(e) develop a notional scheme of

(i) sanctions applicable to the railway companies, and

(ii) awards and sanctions applicable to such system participants, other than the railway companies, as the Administrator considers appropriate

on the basis of the extent to which they meet or fail to meet the performance objectives referred to in paragraph (c) and administer that scheme as if it were implemented under section 21;

(f) report twice each year to the Minister, the Committee and such other persons as the Administrator deems advisable the awards and sanctions under the notional scheme referred to in paragraph (e) that would be applied to system participants if that scheme were implemented under section 21; and

(g) develop, for possible implementation under section 21, an actual scheme of awards and sanctions applicable to system participants and make recommendations to the Minister on the advisability of implementing that scheme.

(2) Where regulations implementing a scheme of awards and sanctions are in force pursuant to section 21, the Administrator

(a) shall administer that scheme and report to the Minister, the Committee and such other persons as the Administrator deems advisable the awards and sanctions applied thereunder; and

(b) may, to the extent he considers it advisable, cease any activities under paragraphs (1)(e) to (g) unless otherwise directed by the Minister.

21.(1) [T]he Governor in Council may, by regulation,

(a) provide for the establishment [of the grain transportations, shipping and handling performance objectives that can and should be met] by system participants or any classes thereof; and

(b) implement a scheme that provides for either or both of the following:

(i) awards to be applied to system participants or any classes thereof, other than the railway companies that meet the performance objectives related to in paragraph (a), and

(ii) sanctions to be applied to system participants or any classes thereof that do not meet the performance objectives referred to in paragraph (a).

(2) The sanctions referred to in subparagraph (1)(b)(ii) shall, in respect of any railway company, consist of a reduction in the government payment to the railway company under Part III, as prescribed by regulations made by the Governor in Council, not exceeding an amount that, in the opinion of the Commission, is equal to ten per cent of the volume-related variable costs of the railway company.

(3) Where a scheme that provides for awards or sanctions or both has been implemented under subsection (1), the Governor in Council may make regulations establishing a system of arbitration to resolve disputes concerning awards or sanctions or both applied under the scheme in accordance with any procedures prescribed by the regulations.

Comment on Precedent A4.2: Although the financial incentives scheme has not been implemented under the *Western Grain Transportation Act*, there are two somewhat unique features of the scheme that are worthy of note. First, the Act contemplates the development by the Administrator of a "notional" scheme of awards and sanctions prior to, or in addition to, the development of any actual scheme established by regulations. Showing industry members how awards and sanctions would have been assessed had the notional scheme been "real" could in itself have some impact on behaviour. Second, the Act contemplates the establishment of a system of arbitration to resolve any disputes concerning awards or sanctions.

Precedent A4.3: *Workers' Compensation Act*, R.S.O. 1990, c. W.11, ss. 103(4)-(9) & 117(2)-(3)

117.(2) It is not necessary for the assessments upon the employers in a class, subclass or group to be uniform, but they may vary for each individual industry or plant in relation to the hazard of such industry or plant, and the Board may levy a differential rate of assessment on each employer in the class, subclass or group accordingly.

(3) A system of merit rating may, if considered proper, be adopted.

103.(4) Where in the opinion of the Board sufficient precautions have not been taken for the prevention of accidents to workers in the employment of an employer or where the working conditions are not safe for workers or where the employer has not complied with [certain regulations], the Board may add to the amount of any contribution to the accident fund for which the employer is liable such a percentage thereof as the Board considers just and may assess and levy the same upon the employer.

(6) Where, in the opinion of the Board, the [machinery] in any industry conform[s] to modern standards in such manner as to reduce the hazard of accidents to a minimum and the Board is convinced that all proper precautions are being taken by the employer for the prevention of accidents, and where the accident record of the employer has in fact been consistently good, the Board may reduce the amount of any contribution to the accident fund for which such employer is liable.

(8) Where the work injury frequency and the accident cost of the employer are consistently higher than that of the average in the industry in which the employer is engaged, the Board, as provided in the regulations, may increase the assessment for that employer by such a percentage thereof as the Board considers just, and may assess and levy the same upon the employer . . . .

(9) The Board, if satisfied that the default was excusable, may in any case relieve the employer in whole or in part from liability under subsection (4).

Comment on Precedent A4.3: Under the Workers' Compensation Act, the Board administers an accident fund for compensating workers who are injured on the job. Employers, who are classified by type of work and product, pay assessments (insurance premiums) to the Board. The initial assessment rate for the members of a particular rate group is based on the collective experience (i.e., the expected claims costs) of all employers within that group. Under the authority of the following section, the Board has developed an incentive scheme whereby employers with a better-than-average safety record get a refund on their initial assessment, while those with a worse-than-average record pay a surcharge.

Several factors may have contributed to the successful utilization of financial incentives by the Ontario Workers' Compensation Board. The scheme was devised in cooperation with, and adopted by, the industries to whom it applies. It has been phased in gradually; at this time, only certain sectors are assessed refunds or surcharges on the basis of their accident cost records, although it is expected that the scheme will eventually apply to all sectors. Perhaps most significantly, performance by the regulatees can be readily quantified. The amount of refund or surcharge is based directly on the value of accident claims (or both the value and number of claims) for the particular regulatee as compared to the average expected for the class of employers to which the regulatee belongs.

The implementation of incentive schemes could prove more problematic in circumstances where it is difficult to quantify the degree to which a particular regulatee surpasses regulatory objectives. Regulators might be reluctant to exercise discretion respecting licence fees or financial rewards and sanctions in what might appear to be an arbitrary or ad hoc manner. As well, where licence fees are otherwise calculated on the basis of "quantifiable" criteria, factoring in hard-to-quantify performance histories might require the adoption of complex formulae for determining fees. Finally, a reliable monitoring system might have to be instituted prior to implementing a scheme of financial incentives, at least where sanctions as well as rewards are assessed. These considerations should be taken into account by policy advisers and drafters when contemplating the introduction of performance incentives in a regulatory scheme.

Precedent A4.4: *Environment Act*, S.Y.T. 1991, c. 5, ss. 57 & 145(h)

57. The Commissioner in Executive Council may

(a) provide for regulatory, economic or other incentives to encourage conservation of the natural environment and to promote sustainable development; and

(b) provide for funding or other support for demonstration projects, new technology, or other activities or things designed to promote the objectives of this Act.

145. [T]he Commissioner in Executive Council may make regulations . . . .

(h) prescribing economic regimes or the use of economic tools for encouraging efficiency in air quality protection [and] the use and conservation of water . . . .

Additional Precedents:

Immigration Act, R.S.C. 1985, c. I-2, as am. by R.S.C. 1985, c. 28, (4th Supp.), ss. 20 & 22, as am. by S.C. 1992, c. 49, ss. 74(2) & 78, s. 18 - senior immigration officer may require any visitor or group or organization of visitors arriving in Canada to provide a deposit as a guarantee that the visitor, group or organization of visitors will comply with any terms and conditions imposed under the Act.

85(3) - transportation company is liable to pay all removal costs of any person it is required to convey out of Canada because the person has not been granted admission and at the time of arrival in Canada was not in possession of a valid visa.

87(3) - Crown may recover costs of removing a person who is not granted admission - recoverable from a transportation company that fails to provide transportation promptly after having been notified by the Minister that a person must be removed from Canada.

92(1) - Deputy Minister may issue a direction to any transportation company requiring it to deposit a sum of money or other prescribed security as a guarantee that the company will pay all amounts for which it may become liable under the Act after the direction is issued.

Farm Products Marketing Act, R.S.O. 1990, c. F.9, ss. 7(1)(17) & 21(2)(d); R.R.O. 1990, Reg. 407, s. 16(4)

Compliance-favouring Grants

In the following examples, the regulatory agency has the discretionary authority to provide grants to promote research, training programs, public education programs, etc., that are deemed to advance primary regulatory objectives (e.g. product or workplace safety). For further explanation, please see cooperative research and programs (supra).

Precedent A4.5: *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 4(g)

4. The Minister, for the purposes of the administration and enforcement of this Act and the regulations, may, ...

(g) make grants and loans for,

(i) research or the training of persons relating to contaminants, pollution, waste or litter, and

(ii) the development of waste management facilities,

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

Precedent A4.6: *The Environment Act*, S.M. 1987-88, c. 26 (C.C.S.M., c. E125), ss. 45.1 & 45.2, as am. by S.M. 1989-90, c. 60, s. 26

45.1(1) A fund to be known as the "Environmental Innovations Fund" is hereby established.

(2) The object of the fund is to provide financial support for the development, implementation and promotion of environmental innovation projects.

(3) The fund shall be credited with any amounts appropriated by the Legislature for the purposes of the fund.

(4) On the recommendation of the minister, the Lieutenant Governor in Council may authorize expenditures from the fund for

(a) the payment of grants under section 45.2;

(b) the promotion, development, delivery or implementation of environmental innovation projects;

(c) research in the field of environmental innovation; and

(d) any other environmental innovation purpose that the Lieutenant Governor in Council considers necessary or advisable.

45.2(1) A person may, in accordance with the regulations, apply to the minister for a grant for an environmental innovation project.

(2) The Lieutenant Governor in Council may make a grant to a person from the fund in such amount and upon such terms and conditions as may be prescribed in the regulations.

Additional Precedents:

Railway Safety Act, R.S.C. 1985, *c. 32* (4th Supp.), ss. 12-15

Resource Conservation and Recovery Act of 1976, 42 U.S.C., s. 6981

Government Contracts - Procurement Policies

Government procurement policies might be changed to favour, for example, the purchase of recycled paper or other environmentally friendly products. Efforts such as these are not usually found in the host regulatory statute but nonetheless may have a substantial effect on compliance-supporting behaviour by the suppliers of goods and services to the public sector. On the negative side, non-compliers might be penalized by being barred from doing business with the government for a prescribed period. Under the new Yukon *Environment Act*, there is a broad duty to ensure that standards for conserving the environment are incorporated into the government's purchasing policies. This authority could support the development of a procurement policy based on the compliance history of the supplier community. The Ontario *Discriminatory Business Practices Act* is more direct. It imposes a five-year ban on suppliers convicted under the Act from obtaining government purchase contracts.

Several elements should be considered by the drafter when designing a provision that excludes non-compliers from doing business with the Crown:

- the circumstances giving rise to ineligibility - Conviction for a criminal offence under the governing Act is the most common triggering event, but having been subjected to other enforcement proceedings could also give rise to ineligibility. One variant would be to empower the regulator to place the names of chronic non-compliers on a "blacklist". This would, however, introduce a discretionary element into the scheme;

- the period of ineligibility - Where a fixed period of ineligibility is instituted, it should be proportional to the seriousness of the violation that gave rise to the ineligibility. An alternative to instituting a fixed period of ineligibility would be to provide that the regulatee shall remain ineligible "until the Administrator certifies that the condition giving rise to [the conviction or other enforcement proceeding] has been corrected" [*Clean Air Act*, 42 U.S.C., s. 7606(a)];

- notification - Procedures should be established for notifying the Crown and its agents as to the names of persons who are ineligible to enter into purchase contracts with the Crown and the period of their ineligibility; and

- exemption - Consideration could be given to empowering the appropriate minister to exempt a person from ineligibility in relation to a particular contract where the public interest or exceptional circumstances warrant an exemption.

Precedent A4.7: *Environment Act*, S.Y.T. 1991, c. 5, s. 39(1)(c)

39.(1) For the purposes of achieving the objectives of this Act, the members of the Executive Council shall

(c) ensure that standards for conservation of the environment and sustainable development are incorporated in the purchasing policies and practices of the Government of the Yukon.

Precedent A4.8: *Discriminatory Business Practices Act*, R.S.O. 1990, c. D.12, s. 10(1)

10.(1) Every person against whom [a compliance order is made] or who is convicted of an offence [under the Act] is ineligible to enter into a contract to provide goods or service to the Crown or any agency of the Crown for a period of five years from the date of the making of the order or of the conviction, as the case may be.

Additional Precedent:

Clean Air Act, 42 U.S.C., s. 7606

The Right to Create and/or Sell "Compliance Units"

Under this controversial approach, the regulatory department or agency may actually create 'compliance units' (e.g. market units of allowable emission of specific pollutants) and sell them to non-complying regulatees who will thereby buy themselves into compliance. The sale must normally be "consistent with established [regulatory] objectives" and the revenue proceeds may be applied to support compliance programs, regulatory contingency funds, etc., as required by the host statute [Precedent A4.9]. Another version of this approach, to be found in the *U.S. Clean Air Act* amendments of 1990, permits regulatees to trade (i.e. sell) unused portions of their pollution allowances to one another. A utility that is within its allowance, for example, rather than polluting to its limit may trade any unused portions to another utility that is exceeding its compliance allowance.

Precedent A4.9: *The Environment Act*, S.M. 1987-88, c. 26 (C.C.S.M., c E125), s. 45

45. The Lieutenant Governor in Council may, where it is consistent with established environmental quality objectives, market units of allowable emission of specific pollutants, in accordance with the regulations, and the revenue so generated may be held in trust by the Minister of Finance as an environmental contingency fund, to be used at the request of the minister in the event of an environmental emergency.

Precedent A4.10: *Motor Vehicle Safety Act*, S.C. 1993, c. 16, s. 8

8.(1) Regulations that prescribe standards in relation to emissions may provide for a system of credits by which

(a) a company may establish that a vehicle conforms to those standards by applying such credits against emissions of the vehicle in the prescribed manner and within prescribed limits;

(b) such credits may be obtained by a company in the prescribed manner

(i) by reference to emissions of a vehicle that more than satisfy the requirements of those standards, or

(ii) by the payment of an amount to the Receiver General determined at a prescribed rate in relation to emissions of a vehicle; and

(c) credits obtained by reference to emissions may be transferred to or from a company in the prescribed manner.

(3) Every company shall submit to the Minister, in the prescribed form and manner and at the prescribed time, a report setting out, with respect to a prescribed period, an account of any emission credits obtained or applied by the company and a description in the prescribed form of each vehicle in relation to which credits were obtained or applied . . . .

Additional Precedent:

Clean Air Act, 42 U.S.C. 7651 *et seq.*

5. Regulatory Compliance Advice

The central theme of this approach is to encourage regulatees to consult with the regulatory department or agency in advance of their undertaking activities which raise some reasonable apprehension of non-compliance, in whole or in part, with the instant regulatory program. The proactive regulatory agency, where resources permit, will provide compliance advice (letter of assurance, advisory opinion, etc.) to the inquiring regulatee. More formal types of regulatory advice may call for express legislative authorization, depending on their formality, specificity and legal consequences. The regulatory agency, for its part, is given the authority, either in discretionary or mandatory terms, to provide compliance advice to the inquiring regulatee. The various types of regulatory advice are distinguished by their formality, specificity and legal consequences. Legal advice should be built into any program for giving regulatory compliance advice in order to prevent legal problems arising in subsequent enforcement actions and to identify potential liabilities of the regulator.

Advance Rulings

Persons whose operations are affected by a regulatory program often seek advice from the regulator to ensure that their proposed activity will not raise a compliance issue. In some cases, corporate identity is not revealed. In all cases, the regulator limits the compliance opinion to the exact situation that has been presented for analysis. The enquiring party will also be advised that any future enforcement proceeding against the activities in question will not be prejudiced in the event that the facts presented either change or have not been accurately stated. Where the proposed activity attracts a non-compliance advisory opinion, the result is to place the inquiring party on notice that enforcement proceedings might be taken against that party if it continues with the proposed conduct.

Precedent A5.1: *Customs Act*, R.S.C. 1985, c. 1, (2nd Supp.), ss. 43.1, 63, 153(a.1)

43.1(1) Any officer, or any officer within a class of officers, designated by the Minister for the purposes of this section shall, prior to the importation of goods from a NAFTA country, on application by any member of a prescribed class, within the prescribed time, in the prescribed manner and in the prescribed form containing the prescribed information, give an advance ruling with respect to any matter concerning those goods that is set out in [specified sections of NAFTA, such as whether the goods satisfy the regional value-content requirements of NAFTA].

(2) The Governor in Council may make regulations prescribing

(a) the application of an advance ruling; and

(b) the modification or revocation of an advance ruling.

63.(1) Any person may

(a) within ninety days after the time the person was given an advance ruling under section 43.1 . . . ., or

(b) where the Minister deems it advisable, within two years after the time an advance ruling was given under section 43.1 . . . .,

request a review of the advance ruling . . . .

(3) On receipt of a request under this section, the Deputy Minister shall, with all due dispatch, affirm, revise or reverse the advance ruling . . . ., and give notice of that decision to the person who made the request.

153. No person shall

(a.1) make, or participate in, assent to or acquiesce in the making of, false or deceptive statements in an application for an advance ruling under section 43.1 . . . .

Precedent A5.2: *USCS Administrative Rules of Procedure*, FTC, 16 CFR, ss. 1.1-1.4

1.1(a) Any person, partnership, or corporation may request advice from the *[Federal Trade]* Commission with respect to a course of action which the requesting party proposes to pursue. The Commission will consider such requests for advice and inform the requesting party of the Commission's views, where practicable, under the following circumstances.

(1) The matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent; or

(2) The subject matter of the request and consequent publication of Commission advice is of significant public interest.

(b) The Commission has authorized its staff to consider all requests for advice and to render advice, where practicable, in those circumstances in which a Commission opinion would not be warranted. Hypothetical questions will not be answered, and a request for advice will ordinarily be considered inappropriate where: (1) The same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding involving the Commission or another governmental agency, or (2) an informed opinion cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry.

1.2(a) The request for advice or interpretation should be submitted in writing (one original and two copies) to the Secretary of the Commission and should: (1) State clearly the question(s) that the applicant wishes resolved; (2) cite the provision of law under which the question arises; and (3) state all facts which the applicant believes to be material. In addition, the identity of the companies and other persons involved should be disclosed. Letters relating to unnamed companies or persons may not be answered. Submittal of additional facts may be requested prior to the rendering of any advice.

1.3(a) On the basis of the materials submitted, as well as any other information available, and if practicable, the Commission or its staff will inform the requesting party of its views.

(b) Any advice given by the Commission is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the action [sic]. Notice of such rescission or revocation will be given to the requesting party so that he may discontinue the course of action taken pursuant to the Commission's advice. The Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all the relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval.

(c) Advice rendered by the staff is without prejudice to the right of the Commission later to rescind the advice and, where appropriate, to commence an enforcement proceeding.

1.4 Written advice rendered pursuant to this Section and requests therefor, including names and details, will be placed in the Commission's public record immediately after the requesting party has received the advice, subject to any limitations on public disclosure arising from statutory restrictions, the Commission's rules, and the public interest. A request for confidential treatment of information submitted in connection with the questions should be made separately.

Additional Precedent:

Telecommunications Act, S.C. 1993, c. 38, s. 59 - CRTC may advise applicant on proposed transactions that would utilize telecommunication service - advice is not binding

See also: Revenue Canada, Taxation, Information Circular 70-6R2 regarding the provision of advance rulings as an administrative service.

Compliance Certificate

A compliance certificate may be issued simply to confirm that a regulatee is in compliance with standards prescribed by regulations. A certificate may also cover prospective conduct by a regulatee. In this case, the enforcement authority is given the express power to issue a certificate or other notice of compliance, confirming that enforcement proceedings will not be taken against the author of the proposed transaction. The certificate is really a form of statutory comfort letter that binds the enforcement authority to refrain from interfering with or otherwise prejudicing the proposed course of conduct or transaction, provided that the applicant has made full and accurate disclosure of the circumstances in question. This approach appears in legislation where substantial commercial transactions (e.g. mergers) require maximum legal certainty and recognition from the outset, if financing risks and investor security are to be adequately accommodated.

Precedent A5.3: *Competition Act*, R.S.C. 1985, c. C-34, ss. 102 & 103, as am. by R.S.C. 1985, c. 19, (2nd Supp.), s. 45

102.(1) Where the Director [of Investigation and Research] is satisfied by a party or parties to a proposed transaction that he would not have sufficient grounds on which to apply to the *[Competition]* Tribunal under section 92 [for an order directing a person not to proceed with a merger or to dissolve a merger or to dispose of assets or shares because the merger is likely to lessen or prevent competition], the Director may issue a certificate to the effect that he is so satisfied.

(2) The Director shall consider any request for a certificate under this section as expeditiously as possible.

103. Where the Director issues a certificate under section 102, the Director shall not, if the transaction to which the certificate relates is substantially completed within one year after the certificate is issued, apply to the Tribunal under section 92 in respect of the transaction solely on the basis of information that is the same or substantially the same as the information on the basis of which the certificate was issued.

Additional Precedents:

Arctic Waters Pollution Prevention Act, R.S.C. 1985, c. A-12, s. 12(3) - Governor in Council may make regulations providing for issue of certificates to owners of ships as evidence of their compliance with standards that are prescribed by the regulations

Environmental Protection Act, R.S.O. 1990, c. E.19, ss. 76, 77, 186(4)

Motor Vehicle Safety Act, S.C. 1993, c. 16, s. 5(4) - agency of foreign government may certify that imported vehicle complies with foreign standard - where so certified, vehicle is deemed to comply with domestic standard

Compliance Guidelines

Here we move from the specific to more generic compliance advisory statements. The enforcement authority may issue compliance guidelines to cover a particular form of regulated conduct. Guidelines are often developed to deal with areas of newly regulated activity (for which few administrative or court rulings exist) to assist in the interpretation of the statutory standards and regulations issued thereunder. Guidelines are first issued in draft form and circulated to affected regulatees and other interest groups for comment. The final version of the guidelines should provide a comprehensive compliance guide for activity in the area in question. In issuing guidelines, the Regulator must take care not to fetter its discretion to decide on the application of a guideline or a question of policy that arises in a particular case with an open mind. Similarly, care must be taken not to draft the guidelines as if they were regulations made pursuant to a legislative power (as happened in the case of the environmental assessment guidelines considered in *Friends of Oldman River* [1992] 2 W.W.R. 193 case).

The *Competition Act* does not mention guidelines, practice statements or similar compliance guides. However, the Director of Investigation and Research has taken the initiative to issue merger guidelines under the Act as a matter of implied enforcement strategy. They represent the Director's best-considered interpretation of the business conduct rules laid down in general language by the Act. Regulatees are put on notice that the responsibility for authoritative interpretation of the legislation rests ultimately with the Courts. However the Director would not take civil or criminal enforcement proceeding against corporate actors who were clearly in compliance with the issued Guidelines. Of course private enforcement proceedings are beyond the Director's enforcement control.

Precedent A5.4: *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16, (4th Supp.), ss. 8-10

8.(1) For the purpose of carrying out the Minister's functions and duties related to the quality of the environment, the Minister shall formulate

(c) release guidelines recommending limits, including limits expressed as concentrations or quantities, for the release of substances into the environment from works, undertakings or activities; and

(d) environmental codes of practice specifying procedures, practices or release limits for environmental control relating to works, undertakings and activities during any phase of their development and operation . . . .

(3) In carrying out the responsibilities conferred by subsection (1), the Minister may

(a) consult with the government of any province, any government department or agency or any person interested in the quality of the environment or the control or abatement of environmental pollution; and

(b) organize conferences of representatives of industry and labour, provincial and municipal authorities and any interested persons described in paragraph (a).

10. The Governor in Council shall publish any . . . . guidelines or codes of practice formulated under section 8 . . . . ., or shall give notice thereof, in the Canada Gazette.

Additional Precedents:

Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 58 - Minister may issue guidelines and codes of practice respecting the application of the Act and regulations

Patent Act, R.S., c. P-4, s. 96 (enacted by the Patent Act Amendment Act, 1992, S.C. 1993, c. 2, s. 7) - Board may issue guidelines with respect to matters under its jurisdiction - Board must consult provincial health ministers and representatives of consumer groups and the pharmaceutical industry - guidelines not binding - Statutory Instruments Act does not apply to guidelines

Industry Codes of Practice

Codes of (compliance) practice, issued by a regulatory commission or agency pursuant to legislative authority, serve two purposes. They encourage voluntary compliance by affected industry interests and they provide practical guidance respecting regulatory requirements. Such codes are usually industry-specific, unlike guidelines which normally apply to specified activities by any regulatee or affected business interest. Codes of practice are most appropriate where the specific industry group is well identified and almost all of its members belong to the same trade association.

That association in turn may enjoy some limited self-regulatory powers. The association may, in fact, produce the proposed code of practice and seek approval of it from the responsible minister. Alternatively, the regulatory agency may produce the code of practice after extensive consultations with the affected industry group. In either case, the code of practice should enhance compliance at least as effectively as compliance guidelines.

Precedent A5.5: *Health and Safety at Work Etc Act 1974*, 1974, c. 37, ss. 16 & 17, as amended (U.K.)

16.(1) For the purpose of providing practical guidance with respect to the requirements of [certain statutory provisions] or of health and safety regulations . . . ., the [Health and Safety] Commission may, subject to the following subsection

(a) approve and issue such codes of practice (whether prepared by it or not) as in its opinion are suitable for that purpose;

(b) approve such codes of practice issued or proposed to be issued otherwise than by the Commission as in its opinion are suitable for that purpose.

(2) The Commission shall not approve a code of practice under subsection (1) above without the consent of the Secretary of State, and shall, before seeking his consent, consult

(a) any government department or other body that appears to the Commission to be appropriate (and, in particular, in the case of a code relating to electro-magnetic radiations, the National Radiological Protection Board); and

(b) such government departments and other bodies, if any, as in relation to any matter dealt with in the code, the Commission is required to consult under this section by virtue of directions given to it by the Secretary of State.

(3) Where a code of practice is approved by the Commission under subsection (1) above, the Commission shall issue a notice in writing

(a) identifying the code in question and stating the date on which its approval by the Commission is to take effect; and

(b) specifying for which of the provisions mentioned in subsection (1) above the code is approved.

(4) The Commission may

(a) from time to time revise the whole or any part of any code of practice prepared by it in pursuance of this section;

(b) approve any revision or proposed revision of the whole or any part of any code of practice for the time being approved under this section;

and the provisions of subsections (2) and (3) above shall, with the necessary modifications, apply in relation to the approval of any revision under this subsection as they apply in relation to the approval of a code of practice under subsection (1) above.

(5) The Commission may at any time with the consent of the Secretary of State withdraw its approval from any code of practice approved under this section, but before seeking his consent shall consult the same government departments and other bodies as it would be required to consult under subsection (2) above if it were proposing to approve the code.

(6) Where under the preceding subsection the Commission withdraws its approval from a code of practice approved under this section, the Commission shall issue a notice in writing identifying the code in question and stating the date on which its approval of it is to cease to have effect.

(8) The power of the Commission under subsection (1)(b) above to approve a code of practice issued or proposed to be issued otherwise than by the Commission shall include power to approve a part of such a code of practice . . . .

17.(1) A failure on the part of any person to observe any provision of an approved code of practice shall not of itself render him liable to any civil or criminal proceedings; but where in any criminal proceedings a party is alleged to have committed an offence by reason of a contravention of any requirement or prohibition imposed by or under . . . . a provision for which there was an approved code of practice at the time of the alleged contravention, the following subsection shall have effect with respect to that code in relation to those proceedings.

(2) Any provision of the code of practice which appears to the court to be relevant to the requirement or prohibition alleged to have been contravened shall be admissible in evidence in the proceedings; and if it is proved that there was at any material time a failure to observe any provision of the code which appears to the court to be relevant to any matter which it is necessary for the prosecution to prove in order to establish a contravention of that requirement or prohibition, that matter shall be taken as proved unless the court is satisfied that the requirement or prohibition was in respect of that matter complied with otherwise than by way of observance of that provision of the code.

(3) In any criminal proceedings

(a) a document purporting to be a notice issued by the Commission under section 16 shall be taken to be such a notice unless the contrary is proved; and

(b) a code of practice which appears to the court to be the subject of such a notice shall be taken to be the subject of that notice unless the contrary is proved.

Additional Precedents:

Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 58 - Minister may issue guidelines and codes of practice respecting the application of the Act and regulations

USCS Administrative Rules of Procedures, FTC, 16 CFR, ss. 1.5 & 1.6

B. COMPLIANCE MONITORING

COMPLIANCE MONITORING

1. Self-Monitoring

General Monitoring and Record-keeping

It is not unusual, particularly for licensing or certification schemes, for the regulatee or licensee to be required to maintain business or service records as a condition of the licence. In some cases, the record-keeping requirement amounts to the maintenance of an ongoing compliance record [Precedent B1.1]. The files are normally open to inspection by the regulatory authority. Sometimes there is a positive duty on the part of the regulatee to notify that authority of any case or circumstance reported in the records which appears to breach a regulatory standard.

For most regulatory programs, government inspections are the principal tool for assessing compliance and for giving credibility to self-monitoring programs. However, compliance information may be provided by the firms themselves, citizen complainants, disgruntled competitors, former employees or the media. The regulatory scheme may provide for a duty (mandatory or discretionary) to investigate or otherwise act on non-compliance reports. It may also provide for the handling of compliance data for investigatory and/or enforcement purposes.

Precedent B1.1: *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 26-28

26.(1) [A]n employer shall,

(c) keep and maintain accurate records of the handling, storage, use and disposal of biological, chemical or physical agents as prescribed;

(d) accurately keep and maintain and make available to the worker affected such records of the exposure of a worker to biological, chemical or physical agents as may be prescribed;

(e) notify a Director of the use or introduction into a workplace of such biological, chemical or physical agents as may be prescribed;

(f) monitor at such time or times or at such interval or intervals the levels of biological, chemical or physical agents in a workplace and keep and post accurate records thereof as prescribed;

(h) establish a medical surveillance program for the benefit of workers as prescribed;

(i) provide for safety-related medical examinations and tests for workers as prescribed;

27.(1) A supervisor shall ensure that a worker,

(a) works in the manner and with the protective devices, measures and procedures required by this Act and the regulations;

28.(1) A worker shall,

(a) work in compliance with the provisions of this Act and the regulations;

(c) report to his or her employer or supervisor the absence of or defect in any equipment or protective device of which the worker is aware and which may endanger himself, herself or another worker; and

(d) report to his or her employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he or she knows.

Additional Precedents:

Food and Drugs Act, R.S.C. 1985, c. F-27, s. 30 (1); and Food and Drug Regulations, CRC, Vol. VIII, c. 870, s. G02.014

Occupational Safety and Health Act of 1970, 29 U.S.C., s. 657(c)

Environment Act, S.Y.T. 1991, c. 5, ss. 115(1)(d) & 121(a)

Appointment of Internal Monitoring Agent or Committee

Self-monitoring or reporting may be imposed directly on a regulatee. Responsibility may be vested in

- the regulatee directly
- a compliance agent or employee of the regulatee; or
- a compliance committee composed of the regulatee's officers and representatives of interest groups most directly affected by the regulatee's compliance record (e.g. non-managerial employee representatives under work safety legislation) [see *Canada Labour Code*, ss. 135 & 147]

This requirement builds on the obligation of the regulatee to maintain proper activity records, as prescribed by the regulator. Those records are then subjected to a compliance review by the staff of the regulated firm at regular intervals. The requirements for the compliance review would normally be set by the regulatory agency pursuant to the appropriate statutory direction.

The reporting format should be the product of extensive consultations with the members of the regulated group and other affected interests.

In designing this kind of scheme, particular attention must be paid to issues of access to compliance monitoring data and the confidentiality of industry returns. This is especially true where freedom of information legislation exists and private enforcement proceedings are provided for. There is some uncertainty under the Charter as to the extent of the regulator's unimpaired access to the compliance activity records of firms subject to this type of legislation. Claims of solicitor-client privilege have been made in some cases. In addition, compliance records may be the prime source of due diligence evidence. This places an entirely different perspective on the purpose of the records and their evidentiary use. The end result, in at least those regulatory situations where enforcement options are predominantly criminal-law based, is that the Crown may not use the records in its formal enforcement proceedings.

Precedent B1.2: *Occupational Health and Safety Act*, R.S.O. 1990, c. 0.1, ss. 8-9

9.(2) A joint health and safety committee is required [at certain workplaces].

(7) At least half the members of a committee shall be workers employed at the workplace who do not exercise managerial functions.

(18) It is the function of a committee and it has power to,

(a) identify situations that may be a source of danger or hazard to workers;

(b) make recommendations to the constructor or employer and the workers for the improvement of the health and safety of workers;

(c) recommend to the constructor or employer and the workers the establishment, maintenance and monitoring of programs, measures and procedures respecting the health or safety of workers;

(d) obtain information from the constructor or employer respecting,

(i) the identification of potential or existing hazards of materials, processes or equipment, and

(ii) health and safety experience and work practices and standards in similar or other industries of which the constructor or employer has knowledge;

(e) obtain information from the constructor or employer concerning the conducting or taking of tests of any equipment, machine, device, article, thing, material or biological, chemical or physical agent in or about a workplace for the purpose of occupational health and safety; and

(f) be consulted about, and have a designated member representing workers be present at the beginning of, testing referred to in clause (e) conducted in or about the workplace if the designated member believes his or her presence is required to ensure that valid testing procedures are used to ensure that the test results are valid.

(22) A committee shall maintain and keep minutes of its proceedings and make the same available for examination and review by an inspector.

(23) [T]he members of a committee who represent workers shall designate a member representing workers to inspect the physical condition of the workplace.

(26) Unless otherwise required by the regulations or by an order by an inspector, a member designated under subsection (23) shall inspect the physical condition of the workplace at least once a month.

(27) If it is not practical to inspect the workplace at last once a month, the member designated under subsection (23) shall inspect the physical condition of the workplace at least once a year, inspecting at least a part of the workplace in each month.

(28) The inspection required by subsection (27) shall be undertaken in accordance with a schedule established by the committee.

(29) The constructor, employer and the workers shall provide a member designated under subsection (23) with such information and assistance as the member may require for the purpose of carrying out an inspection of the workplace.

(30) The member shall inform the committee of situations that may be a source of danger or hazard to workers and the committee shall consider such information within a reasonable period of time.

(33) A committee shall meet at least once every three months at the workplace and may be required to meet by order of the Minister.

[The omitted subsections deal with exceptions to the requirement to establish a committee and details as to the composition, selection and entitlements of committee members. Section 8 provides for the appointment of a health and safety representative at workplaces that are not required to have a committee.]

Additional Precedents:

Canada Labour Code, R.S.C. 1985, c. L-2, ss. 135 & 147(b), as am. by R.S.C. 1985, c. 9, (1st Supp.), s. 4 and R.S.C. 1985, c. 26, (4th Supp.), s. 2

Environment Act, S.Y.T. 1991, c. 5, s. 141(a)

Reporting Requirements

Under this approach, the regulatory agency directs the regulatee to report on its compliance-related actions. Examples of positive reporting requirements may be found in consumer legislation [Precedent B1.4], environmental legislation [see *Environmental Protection Act*, (Ont.), s. 18(1) and worker or public safety statutes [Precedent B1.3].

Issues of public, worker, consumer or environmental protection are the crux of these regulatory schemes. Also, the regulatee is in day-to-day possession of the performance data or other records that will tell the regulator whether the safety or environmental standards are being met. In these cases, the legislation imposes on regulated firms the double duty of maintaining records and reporting on the adequacy of their compliance.

Precedent B1.3: *Railway Safety Act*, R.S.C. 1985, *c. 32*, (4th Supp.), ss. 36-38

36. The Governor in Council may make regulations

(a) respecting notification of the Minister by railway companies

(i) of any accident or incident associated with the operation of railway equipment . . .

(ii) of any situation that could, if left unattended, induce such an accident or incident, and

(iii) of any contravention of a regulation, rule, emergency directive or order made pursuant to this Act; and

(b) respecting the preparation and filing with the Minister of a return in respect of each calender year and also in respect of any lesser period specified by the Minister, setting out particulars of each accident, incident, situation or contravention referred to in paragraph (a) occurring during that year or period.

37. The Governor in Council may make regulations

(a) respecting the keeping and preservation by each railway company of information, records and documents relevant to the safety of railway operations conducted by that company . . . .; and

(b) respecting the filing with the Minister at the request of the Minister of information, records and documents kept and preserved pursuant to regulations made under paragraph (a).

38. No person shall, either orally or in writing, knowingly make a false or misleading statement or knowingly provide false or misleading information to the Minister, to a railway safety inspector or to any other person acting on behalf of the Minister in connection with any matter under this Act.

Precedent B1.4: *Consumer Protection Act*, R.S.Q. 1977, c. P-40.1, s. 306.2, as am by S.Q. 1988, c. 45, s. 6

306.2 The president may at any time require that a merchant submit a report on his activities or on any matter relating to his reserve account or trust accounts, at such intervals and in the manner determined by the president.

Additional Precedents:

Canadian Environmental Protection Act, R.S.C. 1985, c. 16 (4th Supp.), ss. 16, 18, 26, 27 - Minister may publish notice requiring any person described in the notice to provide information and samples that are in the possession of that person or that the person may reasonably be expected to have access to - Minister may under prescribed circumstances, prohibit any activity involving a substance until information regarding the substance is assessed - Minister may waive requirements for prescribed information.

Environmental Protection Act, R.S.O. 1990, c. E.19, s. 18(1), ss. 5 & 6

Duty to Notify Regulator of Potential Violation

Here the regulatee bears the positive duty of reporting apparent or potential violations to the regulatory authority. The approach has merit in situations of possible harm to public welfare, health or security [Precedents B1.5, B1.6 and B1.7; *Environmental Protection Act* (Ont.), s. 13 and *Fisheries Act*, ss. 38(4) & (9)].

It is more difficult to find instances of a blanket duty to notify a particular regulator of an apparent or potential violation that is not tied visibly to public safety or analogous circumstances. It is interesting, for example, that the *Railway Safety Act* [supra, Precedent B1.3, s. 36] provides that railway companies may be required to notify the Minister "of any contravention of a regulation, rule, emergency directive or order made pursuant to this Act", provided that the reporting requirement is provided for separately by regulation.

Precedent B1.5: *Environment Act*, S.Y.T. 1991, c. 5, ss. 113 & 187.1

113. Every person who releases a contaminant in an amount, concentration or level in excess of that prescribed by regulation or allowed under a permit shall, as soon as possible under the circumstances, report the release to an environmental protection officer or to a person designated by regulation.

187.1 Where an individual makes a report to an environmental protection officer under section 113 . . . or provides information to the Minister or an environmental protection officer pursuant to a requirement under this Act, the contents of the report and the information are not admissible as evidence in a prosecution of the individual for a contravention of this Act or the regulations, except to prove compliance or non-compliance with [certain sections that prohibit the making of false or misleading reports or statements].

Precedent B1.6: *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16, (4th Supp.), ss. 36 & 38

36.(1) Where there occurs or is a reasonable likelihood of a release into the environment of a [specified substance] in contravention of [a regulation or order], any person described in subsection (2) shall, as soon as possible in the circumstances,

(a) subject to . . . . any regulations made under paragraph 38(b), report the matter to an inspector or to such person as is designated by regulation; [and ....]

(b) make a reasonable effort to notify any member of the public who may be adversely affected by the release or likely release.

(2) Subsection (1) applies to any person who

(a) owns or has charge of a substance immediately before its initial release or its likely initial release into the environment; or

(b) causes or contributes to the initial release or increases the likelihood of the initial release.

(4) Where there are in force, by or under the laws of a province, provisions that the Governor in Council, by regulation, declares to be adequate for dealing with a release described in subsection (1), a report required by paragraph (1)(a) . . . . shall be made to a person designated by the provincial provisions.

38. The Governor in Council may make regulations

(a) designating persons for the purposes of paragraph 36(1)(a) . . . . and prescribing the form of the report to be made under those provisions and the information to be contained in the report;

(b) prescribing the circumstances in which a report is not required to be made under paragraph 36(1)(a);

(c) declaring provisions to be adequate for the purposes of subsection 36(4); and

(d) generally for carrying out the purposes and provisions of [section 36].

Additional Precedents:

Environment Act, S.Y.T. 1991, c. 5, ss. 133-134

Environmental Protection Act, R.S.O. 1990, c. E.19, ss. 13, 15, 92

Fisheries Act, R.S.C. 1985, c. F-14, ss. 38(4) & (9); s. 40(3)(c) as am. by S.C. 1991, c. 1, s. 10

Order to Monitor and Assume Preventive Measures

This type of directive may be particularly useful to prevent contraventions from occurring in environmental protection situations. Where an environmental safety officer identifies a high risk situation, the officer may make an order requiring the regulatee to monitor the situation and assume measures so as to minimize the danger of a contravention occurring. The regulatee may also have to report on its conduct to satisfy the terms of the compliance order. Refer to Precedent B1.7 for an excellent Yukon precedent on the assumption of preventive measures.

Precedent B1.7: *Environment Act*, S.Y.T. 1991, c. 5, s. 121

121. Where a person has possession, charge or control of a hazardous substance, an environmental protection officer may, where he or she considers it reasonable and necessary to lessen the risk of a release of the substance, order that person, at his, her or its expense,

(a) to undertake investigations, tests, surveys and any other action the environmental protection officer considers necessary to determine the magnitude of the risk and to report the results to the environmental protection officer;

(b) to prepare, in accordance with the environmental protection officer's directions, a contingency plan containing information the environmental protection officer requires; and

(c) to construct, alter or acquire any works, or carry out any measures that the environmental protection officer considers reasonable and necessary to prevent or abate a spill of the substance.

Precedent B1.8: *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 18

18.(1) The Director, in the circumstances mentioned in subsection (2), by a written order may require a person who owns or owned or who has or had management or control of an undertaking or property to do any one or more of the following:

1. To have available at all times, or during such periods of time as are specified in the order, the equipment, material and personnel specified in the order at the locations specified in the order.

2. To obtain, construct and install or modify the devices, equipment and facilities specified in the order at the locations and in the manner specified in the order.

3. To implement procedures specified in the order.

4. To take all steps necessary so that procedures specified in the order will be implemented in the event that a contaminant is discharged into the natural environment from the undertaking or property.

5. To monitor and record the discharge into the natural environment of a contaminant specified in the order and to report thereon to the Director.

6. To study and to report to the Director upon,

(i) measures to control the discharge into the natural environment of a contaminant specified in the order,

(ii) the effects of the discharge into the natural environment of a contaminant specified in the order,

(iii) the natural environment into which a contaminant specified in the order is likely to be discharged.

(2) The Director may make an order under this section where the Director is of the opinion, upon reasonable and probable grounds,

(a) that the nature of the undertaking or of anything on or in the property is such that if a contaminant is discharged into the natural environment from the undertaking or from or on the property, the contaminant will result or is likely to result in [an adverse effect]; and

(b) that the requirements specified in the order are necessary or advisable so as,

(i) to prevent or reduce the risk of the discharge of the contaminant into the natural environment from the undertaking or from or on the property, or

(ii) to prevent, decrease or eliminate [an adverse effect] that will result or that is likely to result from the discharge of the contaminant into the natural environment from the undertaking or from or on the property.

Additional Precedent:

Resource Conservation and Recovery Act of 1976, 42 U.S.C., s. 6934

Pre-Notification of Proposed Course of Conduct

It is not unusual in certain kinds of economic regulation for parties to a proposed major transaction to be required to give advance notice to the regulatory authorities of their intentions. This is meant to provide sufficient details of the proposed transaction to allow the regulator to vet it for compliance with the Act's requirements. Care must be taken to ensure that the regulator completes its compliance appraisal within a reasonable time and in an open and consistent manner. Otherwise the right to review may become a *de facto* injunctive remedy without the attendant safeguards. Conversely, the regulator must be granted the authority to 'unscramble the transactional omelette' in those cases where pre-notification requirements are not complied with and the results would contravene the regulatory standards.

Precedent B1.9: *Competition Act*, R.S.C. 1985, c. C-34, ss. 114 - 123, as am. by R.S.C. 1985, *c. 19*, (2nd Supp.), s. 45

114.(1) [W]here

(a) a person .... propose[s] to acquire assets [or shares in certain circumstances],

(b) two or more corporations propose to amalgamate [in certain circumstances], or

(c) two or more persons propose to form a combination [in certain circumstances],

the person or persons who are proposing the transaction shall, before completing the transaction, notify the Director that the transaction is proposed and supply the Director with [certain detailed information].

(2) Where more than one person is required to give notice and supply information under this section in respect of the same transaction, any of those persons who is duly authorized to do so may give notice or supply information on behalf of and in lieu of any of the others, and any of those persons may give notice and supply information jointly.

123. A proposed transaction referred to in section 114 shall not be completed before the expiration of [a specified number of days after the required information has been received by the Director] unless the Director, before the expiration of that time, notifies the persons who are required to give notice and supply information that the Director does not, at that time, intend to make an application under section 92 [for an order directing a person not to proceed with a merger or to dispose of assets or shares] in respect of the proposed transaction.

[The omitted sections deal with exemptions to the notification requirements, and contain provisions relating to certification of the information and the nature of the information required.]

Exemption Powers

The exemption powers of interest here are those that give official recognition to standards or practices developed by the regulatee that are equivalent in effect to those set out in the regulation. In effect, the standard or practice proposed by the regulatee is ratified by the regulator and any deviation from it is subject to enforcement action by the regulator. There are numerous legislative provisions that permit the regulator to exempt a regulated organization, person or thing from the application of a particular Act or regulation where its application would lead to an injustice. A regulator can use such powers to alleviate hardship or to enhance the efficiency and fairness of the regulatory scheme, and as an incentive to promote compliance. Precedent B1.10, for example, allows the Governor in Council to exempt motor vehicle manufacturers from emission control regulations where the manufacturer develops new technology with equal or better emission control features than required by the regulations. However, a company must first have tried, in good faith, to bring the motor vehicle into conformity with the regulatory standards.

Precedent B1.10 *Motor Vehicle Safety Act*, S.C. 1993, c.16, s. 9

9.(1) On application by a company in the prescribed form, supported by prescribed technical and financial information, the Governor in Council may, by order, grant an exemption for a specified period, subject to any conditions specified in the order, for any model of vehicle manufactured or imported by the company from conformity with any prescribed standard applicable to that model where conformity with that standard would, in the opinion of the Governor in Council,

(a) create substantial financial hardship for the company;

(b) impede the development of new safety or emission control features that are equivalent to or superior to those that conform to prescribed standards; or

(c) impede the development of new kinds of vehicles, vehicle systems or components.

(2) An exemption for a model may be granted for a period not exceeding

(a) three years, where paragraph (1)(a) applies; or

(b) two years, in respect of a stated number of units of that model not exceeding one thousand units, where paragraph (1)(b) or (c) applies.

(3) An exemption may not be granted for a model if the exemption would substantially diminish the safe performance of the model or the control of emissions from it or if the company applying for the exemption has not attempted in good faith to bring the model into conformity with all prescribed standards applicable to it.

[(4) This subsection limits the types of companies that can get exemption on the basis of financial hardship.]

(5) On expiration of the period of an exemption, a new exemption may be granted in accordance with this section.

Additional Precedents:

Canada Labour Code, R.S.C. 1985, c. L-2, s. 137.2(3) - Coal Mining Safety Commission, consisting of employers and non-supervisory employees, may, by order, exempt an employer from compliance with the regulations, subject to such conditions as may be specified in the order, or substitute for any provision of the regulations another provision having substantially the same purpose and effect

Canada Shipping Act, R.S.C. 1985, c. S-9, s. 305(2.1) - Board of Steamship Inspectors may exempt any ship from complying with any regulation relating to the design, construction, equipment, radio equipment, machinery, inspection, manning or operation of ships or permit the substitution for any of those regulations of any other provision that the Board views as providing an equivalent level of safety

Motor Vehicle Fuel Consumption Standards Act, R.S.C. 1985, c. M-9, s. 16 (not in force) - Governor in Council may, by order, exempt motor vehicles from compliance with fuel consumption standard if the Governor in Council is of the opinion that compliance is not desirable or would cause substantial financial hardship or prevent the development of new kinds of vehicles

Public Harbours and Port Facilities Act, R.S.C. 1985, c. P-29, s. 8(2) - Governor in Council may, by order, terminate application of Act to any harbour or port facility if the termination will enable the improvement of the administration of the port or facility

Radiation Emitting Devices Act, R.S.C. 1985, c. R-1, s. 13 - Governor in Council may make regulations exempting devices from the application of the Act or regulations and prescribing the conditions of the exemption

2. Monitoring by Regulator

Industry self-monitoring and government inspections are usually the most significant methods of compliance monitoring. A pervasive reality in many regulatory situations is the declining capacity of government inspectors to monitor the operations of regulated firms. Substitute or replacement methods of inspection must be carefully considered.

Most regulatory statutes set out the authority of the regulator to conduct both routine inspections and inspections for cause, with the attendant search and seizure powers. Please note the impact of the Charter on the law of search and seizure. Particular care must be taken when referring to older precedents or precedents from other jurisdictions relating to inspections and search and seizure powers. The "safest" precedents are to be found in statutes that have recently been enacted or revised to meet Charter requirements.

Routine Inspections

There are numerous examples of routine federal inspection powers. One recent standard drafting model may be found in the *Canada Labour Code* [Precedent B2.3].

The authority to conduct 'without cause' inspections is normally provided to a regulatory agency where activity monitoring is accepted as an appropriate preventive enforcement tool. The routine inspection power is also the legal authority for strategic enforcement inspections (where the regulatory agency, for example, may zero in on seasonal or regional enforcement priorities without any "for cause" suspicions prompting the inspection visits).

Precedent B2.1: *Canada Agricultural Products Act*, R.S.C. 1985, *c. 20*, (4th Supp.), ss. 21-23

21.(1) For the purpose of ensuring compliance with this Act and the regulations, an inspector may, subject to section 22, enter and inspect any place, or stop any vehicle, in which the inspector believes on reasonable grounds there is any agricultural product or other thing in respect of which this Act or the regulations apply, and the inspector may

(a) open any container that the inspector believes on reasonable grounds contains an agricultural product;

(b) inspect any agricultural product or other thing and take samples of it free of charge; and

(c) require any person to produce for inspection or copying, in whole or in part, any record or other document that the inspector believes on reasonable grounds contains any information relevant to the administration of this Act or the regulations.

(2) In carrying out an inspection under this section, an inspector may

(a) use or cause to be used any data processing system at the place to examine any data contained in or available to the data processing system;

(b) reproduce any record or cause it to be reproduced from the data in the form of a printout or other intelligible output and take the printout or other output for examination or copying; and

(c) use or cause to be used any copying equipment at the place to make copies of any record or other document.

(3) The owner or person in charge of a place referred to in subsection (1) and every person found in that place shall give the inspector all reasonable assistance to enable the inspector to carry out the inspector's duties and functions under this Act and shall furnish the inspector with such information with respect to the administration of this Act or the regulations as the inspector may reasonably require.

22.(1) An inspector may not enter a dwelling-place except with the consent of the occupant of the dwelling-place or under the authority of a warrant issued under subsection (2).

(2) Where on ex parte application a justice is satisfied by information on oath that

(a) the conditions for entry described in section 21 exist in relation to a dwelling-place,

(b) entry to the dwelling-place is necessary for any purpose relating to the administration of this Act or the regulations, and

(c) entry to the dwelling-place has been refused or that there are reasonable grounds for believing that entry will be refused,

the justice may issue a warrant authorizing the inspector named in the warrant to enter the dwelling-place subject to such conditions as may be specified in the warrant.

(3) An inspector who executes a warrant issued under subsection (2) shall not use force unless the inspector is accompanied by a peace officer and the use of force has been specifically authorized in the warrant.

(4) A peace officer shall provide such assistance as an inspector may request for the purpose of enforcing this Act or the regulations.

23. Where an inspector believes on reasonable grounds that this Act or the regulations have been contravened, the inspector may seize and detain any agricultural product or other thing

(a) by means of or in relation to which the inspector believes on reasonable grounds the contravention occurred; or

(b) that the inspector believes on reasonable grounds will afford evidence in respect of a contravention of this Act or the regulations.

Precedent B2.2: *Income Tax Act*, R.S.C. 1985, c. 1, (5th Suppl.), ss. 231-231.2

[The provisions relating to routine inspections are similar to those in Precedent B2.1, above, but the Act elaborates upon the meaning of "dwelling-house". As well, it provides a judge to whom an application is made for a warrant authorizing entry into a dwelling-house with the alternative power to make an order for the production of documents or property kept in the dwelling-house.]

231. In [section 231.1],

"dwelling-house" means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence and includes

(a) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passageway, and

(b) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence;

231.1(3) Where, on ex parte application by the Minister, a judge is satisfied by information on oath

(a) that there are reasonable grounds to believe that a dwelling-house is a premises or place [where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept],

(b) that entry into the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and

(c) that entry into the dwelling-house has been refused or that there are reasonable grounds to believe that entry thereto will be refused,

he shall issue a warrant authorizing an authorized person to enter that dwelling-house subject to such conditions as may be specified in the warrant but, where the judge is not satisfied that entry into that dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, he shall

(d) order the occupant of the dwelling-house to provide reasonable access to an authorized person to any document or property that is or should be kept therein, and

(e) make such other order as is appropriate in the circumstances to carry out the purposes of this Act

to the extent that access has been or may be expected to be refused and that the document or property is or may be expected to be kept in the dwelling-house.

Precedent B2.3: *Canada Labour Code*, R.S.C. 1985, c. L-2, ss. 141 - 144, as am. by R.S.C. 1985, *c. 9*, (1st Supp.), s. 4 and R.S.C. 1985, *c. 24*, (3rd Supp.), s. 6

141.(1) A safety officer may, in the performance of the officer's duties and at any reasonable time, enter any work place controlled by an employer and, in respect of any work place, may

(a) conduct examinations, tests, inquiries and inspections or direct the employer to conduct them;

(b) take or remove for analysis, samples of any material or substance or any biological, chemical or physical agent;

(c) be accompanied and assisted by such persons and bring with him such equipment as the safety officer deems necessary to carry out his duties;

(d) take photographs and make sketches;

(e) direct the employer to ensure that any place or thing specified by the safety officer not be disturbed for a reasonable period of time pending an examination, test, inquiry or inspection in relation thereto;

(f) direct the employer to produce documents and information relating to the safety and health of his employees or the safety of the work place and to permit the safety officer to examine and make copies of or extracts from those documents and that information; and

(g) direct the employer to make or provide statements, in such form and manner as the safety officer may specify, respecting working conditions and material and equipment that affect the safety or health of employees.

(2) The Minister shall furnish every safety officer with a certificate of the officer's authority and on entering any work place a safety officer shall, if so required, produce the certificate to the person in charge of that work place.

142. The person in charge of any work place and every person employed at, or in connection with, that work place shall give a safety officer all reasonable assistance to enable the officer to carry out his duties under this Part.

143. No person shall obstruct or hinder, or make a false or misleading statement either orally or in writing to, a safety officer engaged in carrying out his duties under this Part.

144.(1) No safety officer . . . . shall be required to give testimony in any civil suit with regard to information obtained by him in the discharge of his duties except with the written permission of the Minister.

(2) [N]o safety officer who is admitted to any work place pursuant to the powers conferred on a safety officer by section 141 or person accompanying a safety officer therein shall disclose to any person any information obtained by him therein with regard to any secret process or trade secret, except for the purposes of this Part or as required by law.

(3) No person shall, except for the purposes of this Part or for the purposes of a prosecution under this Part, publish or disclose the results of any analysis, examination, testing, inquiry or sampling made or taken by or at the request of a safety officer pursuant to section 141.

(4) No person to whom information obtained pursuant to section 141 is communicated in confidence shall divulge the name of the informant to any person except for the purposes of this Part or is competent or compellable to divulge the name of the informant before any court or other tribunal.

(5) A safety officer is not personally liable for anything done or omitted to be done by the officer in good faith under the authority or purported authority of this Part.

Additional Precedents:

Canadian Environmental Protection Act, R.S.C. 1985, c. 16, (4th Supp.), s. 100
Consumer Packaging and Labelling Act, R.S.C. 1985, c. C-38, s. 13, as am. by R.S.C. 1985, c. 31, (1st Supp.), s. 6
Consumer Protection Act, R.S.O. 1990, c. C.31, s. 10(1)
Environment Act, S.Y.T. 1991, c. 5, ss. 151, 152, 155
The Environment Act, S.M. 1987-88, c. 26, s. 20
Fisheries Act, R.S.C. 1985, c. F-14, s.49, as am. by R.S.C. 1985, c. 31, (1st Supp.), s. 35 and S.C. 1991, c. 1, s. 13
Health and Safety at Work Etc Act 1974, 1974, c. 37, s. 20 (U.K.)
Occupational Safety and Health Act of 1970, 29 U.S.C., s. 657
Unemployment Insurance Act, R.S.C. 1985, c. U-1, s. 59, as am. by R.S.C. 1985, c. 5, (2nd Supp.), s. 5
Weights and Measures Act, R.S.C. 1985, c. W-6, s. 15(1); s. 17, as am. by R.S.C. 1985, c. 31, (1st Supp.), s. 26; ss. 18-19

Inspections and Investigations "for Cause"

The drafting options under this heading are well known to most legal advisers and legislative counsel. The precedents refer to "reasonable grounds", the conditions governing *ex parte* search warrant applications, and the like. This is familiar drafting territory, particularly for 'command and control' regulatory statutes.

The regulator's power to conduct 'for cause' inspections, subject to procedural safeguards, is usually accompanied by the authority to investigate activities governed by the host statute (see *Environment Act* (Y.T.), ss. 151, 152, 154, 156). Some of the more recent precedents like the *Competition Act* [Precedent B2.6], are 'state-of-the-art' responses to Charter evidentiary and self-incrimination challenges, computer data retrieval realities, rights of access to seized records and the duty of the regulator to take reasonable care of seized records or other things [cf. Precedent B2.2].

Inspections (Searches)

Precedent B2.4: *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16, (4th Supp.), s. 101, as am. by S.C. 1992, c. 1, s. 143 (Schedule VI, s. 8) (English version) and s. 144 (Schedule VII, s. 20) (French version); ss. 102-107

101.(1) Where on ex parte application a justice is satisfied by information on oath that there are reasonable grounds to believe that there is in any place

(a) any thing by means of or in relation to which any provision of this Act or the regulations has been contravened, or

(b) any thing that there are reasonable grounds to believe will afford evidence with respect to the commission of any offence under this Act,

the justice may issue a warrant authorizing any inspector, or authorizing any other person named in the warrant, to enter and search the place and to seize any thing referred to in paragraph (a) or (b) subject to such conditions as may be specified in the warrant.

(2) A person authorized by a warrant issued under subsection (1) may

(a) at any reasonable time enter and search a place referred to in the warrant;

(b) seize and detain any thing referred to in the warrant; and

(c) exercise the powers [that may be exercised on a routine inspection (see precedents under Routine Inspections, above)].

(3) An inspector may exercise the powers described in subsection (2) without a warrant if the conditions for obtaining the warrant exist but by reason of exigent circumstances it would not be practical to obtain the warrant.

(4) For greater certainty, exigent circumstances include circumstances in which the delay necessary to obtain a warrant under subsection (1) would result in danger to human life or the environment or the loss or destruction of evidence.

(5) A person authorized under this section to search a place may

(a) use or cause to be used any computer system at the place to search any data contained in or available to the computer system;

(b) reproduce any record or cause it to be reproduced from the data in the form of a printout or other intelligible output;

(c) seize the printout or other output for examination or copying; and

(d) use or cause to be used any copying equipment at the place to make copies of the record.

(6) Every person who is in possession or control of any place in respect of which a search is carried out under this section shall permit the person carrying out the search

(a) to use or cause to be used any computer system at the place to search any data contained in or available to the computer system for data from which a record that the person is authorized by this section to search for may be produced;

(b) to obtain a physical copy of the record and to seize it; and

(c) to use or cause to be used any copying equipment at the place to make copies of the record.

102. The owner or the person in charge of a place entered by an inspector under [the sections authorizing a routine inspection or an inspection "for cause"], and every person found in the place, shall give the inspector all reasonable assistance to enable the inspector to carry out duties and functions under this Act and shall provide the inspector with such information with respect to the administration of this Act and the regulations as the inspector may reasonably require.

103. While an inspector is exercising powers or carrying out duties and functions under this Act, no person shall

(a) knowingly make any false or misleading statement, either orally or in writing, to the inspector; or

(b) otherwise obstruct or hinder the inspector.

104.(1) Whenever during the course of an inspection or a search an inspector has reasonable grounds to believe that any provision of this Act or the regulations has been contravened, the inspector may seize and detain any thing

(a) by means of or in relation to which the inspector reasonably believes the contravention occurred; or

(b) that the inspector reasonably believes will afford evidence of the contravention.

(2) An inspector shall not seize any thing under subsection (1) unless the thing is required as evidence or for purposes of analysis or the inspector is of the opinion that the seizure is necessary in the public interest.

[Subsection 104(3) - section 107 contain detailed provisions respecting the detention and disposition of seized things.]

Additional Precedents:

Canada Agricultural Products Act, R.S.C. 1985, c. 20, (4th Supp.), s. 24

Criminal Code, R.S.C. 1985, c. C-46, ss. 487-490

Environment Act, S.Y.T. 1991, c. 5, ss. 154-156

The Environment Act, S.M. 1987-88, c. 26 (C.C.S.M., c. E125), s. 21

Food and Drugs Act, R.S.C. 1985, c. F-27, s. 42, as am. by R.S.C. 1985, c. 27, (1st Supp.), s. 195

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 231.3

Precedent B2.5: *The Business Practices Act*, S.M. 1990-91, c. 6 (C.C.S.M., c. B120), ss. 15 - 17

15. Where the [Director of Business Practices] believes, on reasonable and probable grounds, that a supplier has contravened, is contravening or is about to contravene a provision of this Act or the regulations or an order made under this Act or an assurance [of voluntary compliance], the director may investigate any affairs of the supplier that may be relevant to the contravention and may, in particular

(a) at any reasonable time and with the consent of the supplier, enter the business premises of the supplier and examine any book, paper, document or thing found therein that may be relevant to the contravention and that the supplier consents to produce for purposes of the examination;

(b) with the consent of the supplier, make copies of any book, paper, document or thing examined under clause (a);

(c) with the consent of the supplier and subject to section 17, retain any book, paper, document or thing examined under clause (a) that may be required for use as evidence;

(d) inquire into any negotiations, transactions, loans or borrowings made by or on behalf of or in relation to the supplier, and into any property, assets or things owned, acquired or disposed of in whole or in part by the supplier, or by any other person acting on the supplier's behalf, that may be relevant to the contravention.

16(1) Where the director believes, on reasonable and probable grounds, that a supplier has contravened, is contravening or is about to contravene a provision of this Act or the regulations or an order made under this Act or an assurance [of voluntary compliance], the director may apply to the court ex parte for an order under subsection (2).

(2) Where a judge of the court is satisfied, on an ex parte application of the director under subsection (1), that there are reasonable and probable grounds for believing

(a) that an unfair business practice has occurred, is occurring or is about to occur; and; and

(b) that there is, in any building, dwelling house, vehicle, receptacle or place, any book, paper, document or thing relevant to the unfair business practice;

the judge may make an order authorizing the director, together with any peace officer the director may summon for assistance, to enter, by force if necessary, at the time set out in the order, the building, dwelling house, vehicle, receptacle or place described in the order and there search for the book, paper, document or thing, examine it and make copies thereof and, subject to section 17, retain it if required for use as evidence.

17(1) The director shall give or leave a receipt for any book, paper, document or thing retained for use as evidence under section 15 or 16.

(2) Any book, paper, document or thing retained under section 15 or 16 shall be returned to the owner within a reasonable time, and upon the request of the owner before it is returned and if the request is reasonable the director shall forthwith furnish the owner with a copy thereof without charge.

(3) No person shall conceal or destroy any book, paper, document or thing relevant to an investigation under section 15 or to a search under section 16 or in any way obstruct such an investigation or search.

Precedent B2.6 *Competition Act*, R.S.C. 1985, c. C-34, ss. 10 - 24 as am. by R.S.C. 1985 (2nd Supp.), c. 19, ss. 23 & 24

10.(1) The Director [of Investigation and Research] shall

(b) whenever he believes on reasonable grounds that

(i) a person has contravened or failed to comply with [certain administrative or court orders],

(ii) grounds exist for the making of an order [relating to restrictive trade practices or mergers], or

(iii) an offence under [the Act] has been or is about to be committed, or

(c) whenever he is directed by the Minister to inquire whether any of the circumstances described in subparagraphs (b)(i) to (iii) exists,

cause an inquiry to be made into all such matters as he considers necessary to inquire into with the view of determining the facts.

(2) The Director shall, on the written request of any person whose conduct is being inquired into under this Act . . . ., inform that person or cause that person to be informed as to the progress of the inquiry.

(3) All inquiries under this section shall be conducted in private.

11.(1) Where, on the ex parte application of the Director . . . ., a judge of a superior or county court or of the Federal Court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that any person has or is likely to have information that is relevant to the inquiry, the judge may order that person to

(a) attend as specified in the order and be examined on oath or solemn affirmation by the Director . . . . on any matter that is relevant to the inquiry before a [presiding officer] designated in the order;

(b) produce a record, or any other thing, specified in the order to the Director . . . . within a time and at a place specified in the order; or

(c) make and deliver to the Director . . . ., within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required.

(2) Where the person against whom an order is sought under paragraph (1)(b) in relation to an inquiry is a corporation and the judge to whom the application is made under subsection (1) is satisfied by information on oath or solemn affirmation that an affiliate of the corporation, whether the affiliate is located in Canada or outside Canada, has records that are relevant to the inquiry, the judge may order the corporation to produce the records.

(3) No person shall be excused from complying with an order under subsection (1) or (2) on the ground that the testimony, record or other thing or return required of the person may tend to criminate the person or subject him to any proceedings or penalty, but no testimony given by an individual pursuant to an order made under paragraph (1)(a), or return made by an individual pursuant to an order made under paragraph (1)(c), shall be used or received against that individual in any criminal proceedings thereafter instituted against him, other than a prosecution under section 132 or 136 of the *Criminal Code*.

(4) An order made under this section has effect anywhere in Canada.

[Sections 12 to 14 provide for witness fees, the representation by counsel of witnesses and the person whose conduct is being inquired into, and the appointment and powers of the presiding officer.]

15.(1) Where, on the *ex parte* application of the Director . . . ., a judge of a superior or county court or of the Federal Court is satisfied by information on oath or solemn affirmation

(a) that there are reasonable grounds to believe that

(i) a person has contravened or failed to comply with [certain administrative or court orders],

(ii) grounds exist for the making of an order [relating to restrictive trade practices or mergers], or

(iii) an offence under [the Act] has been or is about to be committed, and

(b) that there are reasonable grounds to believe that there is, on any premises, any record or other thing that will afford evidence with respect to the circumstances referred to in subparagraph (a)(i), (ii) or (iii), as the case may be,

the judge may issue a warrant under his hand authorizing the Director or any other person named in the warrant to

(c) enter the premises, subject to such conditions as may be specified in the warrant, and

(d) search the premises for any such record or other thing and copy it or seize it for examination or copying.

(2) A warrant issued under this section shall identify the matter in respect of which it is issued, the premises to be searched and the record or other thing, or the class of records or other things, to be searched for.

(3) A warrant issued under this section shall be executed between six o'clock in the forenoon and nine o'clock in the afternoon, unless the judge issuing it, by the warrant, authorizes execution of it at another time.

(4) A warrant issued under this section may be executed anywhere in Canada.

(5) Every person who is in possession or control of any premises or record or other thing in respect of which a warrant is issued under subsection (1) shall, on presentation of the warrant, permit the Director or other person named in the warrant to enter the premises, search the premises and examine the record or other thing and to copy it or seize it.

(6) Where the Director or any other person, in executing a warrant issued under subsection (1), is refused access to any premises, record or other thing or where the Director believes on reasonable grounds that access will be refused, the judge who issued the warrant or a judge of the same court, on the *ex parte* application of the Director, may by order direct a peace officer to take such steps as the judge considers necessary to give the Director or other person access.

(7) The Director . . . may exercise any of the powers set out in paragraph (1)(c) or (d) without a warrant if the conditions set out in paragraphs (1)(a) and (b) exist but by reason of exigent circumstances it would not be practical to obtain a warrant.

(8) For the purposes of subsection (7), exigent circumstances include circumstances in which the delay necessary to obtain a warrant under subsection (1) would result in the loss or destruction of evidence.

16.(1) A person who is authorized pursuant to subsection 15(1) to search premises for a record may use or cause to be used any computer system on the premises to search any data contained in or available to the computer system, may reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output and may seize the printout or other output for examination or copying.

(2) Every person who is in possession or control of any premises in respect of which a warrant is issued under subsection 15(1) shall, on presentation of the warrant, permit any person named in the warrant to use or cause to be used any computer system or part thereof on the premises to search any data contained in or available to the computer system for data from which a record that the person is authorized to search for may be produced, to obtain a physical copy thereof and to seize it.

(3) A judge who issued a warrant under subsection 15(1) or a judge of the same court may, on application by the Director or any person who is in possession or control of a computer system or a part thereof on any premises in respect of which the warrant was issued, make an order

(a) specifying the individuals who may operate the computer system and fixing the times when they may do so; and

(b) setting out any other terms and conditions on which the computer system may be operated.

(4) No order may be made under subsection (3) on application by a person who is in possession or control of a computer system or part thereof unless that person has given the Director twenty-four hours notice of the hearing of the application or such shorter notice as the judge considers reasonable.

(5) No order may be made under subsection (3) on application by the Director after a search has begun of the premises in respect of which the order is sought unless the Director has given the person who is in possession or control of the premises twenty-four hours notice of the hearing of the application or such shorter notice as the judge considers reasonable.

(6) In this section, "computer system" and "data" have the meanings set out in subsection 342.1(2) of the *Criminal Code*.

[Sections 17-19 contain detailed provisions respecting the preparation of post-seizure reports, the detention of seized property and the production or examination of records in relation to which a claim of solicitor-client privilege is made. Sections 21-24 provide for the appointment of counsel to assist in an inquiry, the discontinuance of an inquiry, the remission of evidence to the Attorney General and the making of regulations respecting practice and procedures.]

Additional Precedents:

Competition Act 1980, (U.K.) 1980, c. 21, s. 3, as am. by *Companies Act 1989*, 1989, c. 40, s. 153 (Schedule 20, para. 21)

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 231.4

Unfair Trade Practices Act, R.S.A. 1980, c. U-3, ss. 5 - 8, 20(1)(a)

3. Third-Party Monitoring

The legal recognition of third party monitoring of regulated activities has been growing in recent years. Third-party monitors may be present or former employees, customers or competitors of the alleged non-complier, citizen groups or other non-governmental organizations, the media, trade associations (particularly where a non-member is involved), another regulatory agency or even another level of government (e.g. federal Fisheries versus B.C. Environment).

One of the first precedents was introduced in 1911 in amendments to the *Combines Act*. The amendments allowed any six adult persons resident in Canada to apply to the director for an inquiry into circumstances that they believed contravened the Act. The same provision is found in section 9 of the present *Competition Act* [Precedent B3.5].

The encouragement of third-party monitoring takes on several statutory forms, including

- providing a formal procedure for third parties to lodge complaints, details of apparent violations, etc., with the enforcement authority [Precedent B3.4]
- providing a formal procedure for third party violation reports which must be acted on by the enforcement authority [Precedent B3.5]
- protecting the confidentiality of the informant [Precedent B3.6]
- providing rewards to third parties who provide information resulting in a conviction or other finding of violation [Precedent B3.3]
- underwriting programs to promote the reporting of detrimental acts and offences [Precedent B3.2]
- funding programs to support the work of third-party monitoring by non-governmental organizations [Precedent B3.1], and
- whistle-blower protection measures [Precedents B3.7, 3.8 and 3.10, *Canada Labour Code*, s. 147(a), *Canadian Human Rights Act*, s. 59 and *Clean Air Act, s. 7622*].

These measures, which support, facilitate and protect third-party monitoring activities, are not mutually exclusive; two or more of them may be combined in the legal design of the same regulatory measure.

Precedent B3.1: *Consumer Protection Act*, R.S.Q. 1977, c. P-40.1, ss. 292(b) & (e)

292. It is the duty of the [Office de la protection du consommateur] to protect consumers and, to that end,

(b) to receive complaints from consumers;

(e) to promote and subsidize the establishment and development of consumer protection services or bodies and to cooperate with such services and bodies;

Precedent B3.2: *"Environmental Protection and Enhancement Act"*, Bill 23, 22nd Leg, 4th Sess., 2nd Reading, June 4, 1992 (Alta.), cl. 183

183. The Minister may establish programs to promote the reporting of

(a) acts or omissions that are detrimental to the environment, and

(b) offences under this Act.

Precedent B3.3: *Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 42 U.S.C., s. 9609(d)

9609(d) The President may pay an award of up to $10,000 to any individual who provides information leading to the arrest and conviction of any person for a violation subject to a criminal penalty under this Act . . . . . The President shall, by regulation, prescribe criteria for such an award and may pay any award under this subsection from the [Hazardous Substance Superfund].

Precedent B3.4: *Trade Practice Act*, R.S.B.C. 1979, c. 406, s. 9(1)

9.(1) Where, by his own inquiries, or as a result of complaints, the director has reason to believe that a person has engaged in, is engaging in or is about to engage in a deceptive or unconscionable act or practice respecting a consumer transaction, he may investigate the matter and request that the person furnish information to him respecting the matter.

Precedent B3.5: *Competition Act*, R.S.C. 1985, c. C-34, ss. 9 - 10, as am. by R.S.C. 1985, c. 19, (2nd Supp.), ss. 22 & 23

9.(1) Any six persons resident in Canada who are not less than eighteen years of age and who are of the opinion that

(a) a person has contravened or failed to comply with [certain administrative or court orders],

(b) grounds exist for the making of an order [relating to restrictive trade practices or mergers], or

(c) an offence under [the Act] has been or is about to be committed,

may apply to the Director for an inquiry into the matter.

(2) An application made under subsection (1) shall be accompanied by a statement in the form of a solemn or statutory declaration showing

(a) the names and addresses of the applicants, and at their election the name and address of any one of their number, or of any attorney, solicitor or counsel, whom they may, for the purpose of receiving any communication to be made pursuant to this Act, have authorized to represent them;

(b) the nature of

(i) the alleged contravention or failure to comply,

(ii) the grounds alleged to exist for the making of an order, or

(iii) the alleged offence

and the names of the persons believed to be concerned therein and privy thereto; and

(c) a concise statement of the evidence supporting their opinion.

10.(1) The Director shall

(a) on application made under section 9,

cause an inquiry to be made into all such matters as he considers necessary to inquire into with the view of determining the facts.

(2) The Director shall, on the written request of any person whose conduct is being inquired into under this Act or any person who applies for an inquiry under section 9, inform that person or cause that person to be informed as to the progress of the inquiry.

(3) All inquiries under this section shall be conducted in private.

[For additional provisions relating to the inquiry, see Precedent B2.6 above.]

Additional Precedent:

Official Languages Act, R.S., 1985, c. 31 (4th Suppl.), s. 58 - the Commissioner is required to investigate any complaint about a breach of the Act by a federal institution - the Commissioner may refuse to investigate or discontinue an investigation in certain cases, but must inform the complainant

Whistle-Blower Protection

Provisions for whistle-blower protection, at least in the Canadian experience, are fairly recent innovations, concentrated in labour, worker safety, human rights and environmental protection statutes. They are a legislative attempt to protect employees who expose unlawful activities within their organizations from reprisals by their employers. Whistle-blower protection provisions usually appear within a specific regulatory framework and protect individuals who disclose violations in the regulated area. This is in contrast to a general whistle-blower protection statute (of which there are none in Canada) that extends protection for disclosure of any unlawful activity within the employee's place of work [see Precedent B3.9]

The elements that should be considered by the policy maker and drafter when designing whistle-blower protection provisions include:

- who is protected - Often, protection extends to "employees" (should the definition of "employee" include trainees or job applicants?)

- prohibited reprisals - Various statutes prohibit employers from taking one or more of the following retaliatory measures against employees who blow the whistle': dismissal, suspension, demotion, discipline, imposition of financial or other penalties, coercion, intimidation, harassment or discrimination. Threatening or attempting to commit any of the above-noted actions may also be expressly prohibited.

- protected activity - Some general whistle-blower protection statutes protect an employee who reports wrongdoing, including unlawful activities, unethical practices, mismanagement, abuse of authority or threats to public health and safety (e.g. Maine's legislation, cited below). Most whistle-blower protection provisions, however, cover only the disclosure of activities that would constitute a violation of the regulatory legislation. Enforcement-related procedures other than reporting may also fall under the umbrella of whistle-blower protection.

  Activities that are protected include:

  - disclosing information respecting a suspected violation to a public authority (Note that public disclosure to the media, as opposed to a regulatory authority, is not protected);

  - assisting an official engaged in the performance of duties under the Act;

  - applying for an investigation under the Act;

  - testifying at an inquiry or other enforcement proceeding under the Act;

- commencing a civil action against the employer under the governing Act;
- instituting a private prosecution respecting an offence under the Act; and
- generally seeking enforcement of the regulatory legislation.

Other protected activities that do not involve participating in enforcement proceedings *per se* include:

- acting in compliance with the regulatory legislation or any related regulation, order or permit;
- refusing to carry out an order or direction of the employer that would constitute a contravention of the Act, regulations, order or permit; and
- participating in the public consultation process for the making of legislation related to the regulatory scheme.

- good faith - It is fairly standard to require the employee to be acting in good faith, or to have reasonable grounds to believe that a regulatory violation had occurred or was about to occur. Employees who make disclosures which they know to be false, or who act recklessly or maliciously, are not protected.

- prior notification - One of the more controversial policy choices in developing whistle-blower protection provisions is whether or not to require that an employee notify their supervisor or employer about their concerns before reporting the alleged violation to a public authority [Precedent B3.9, s. 833(2)]. Proponents of prior notification argue that it provides employers with the opportunity to investigate and remedy the situation and encourages the resolution of non-compliance problems within the organization.

  Opponents say that the approach is unrealistic, since many employers are already aware of the problem and condone it, or are themselves engaged in the wrongdoing; a requirement of prior notification would only discourage employees from speaking out. There may be exemptions to prior notification provisions, where the employee reasonably believes that internal disclosure would not be effective, that superiors are already aware of the problem, or that he or she is in danger of physical harm.

- enforcement - There are a variety of sanctions for an employer who dismisses or punishes an employee for engaging in protected activities. Some statutes make it an offence for an employer to take adverse action against an employee who blows the whistle. A term of imprisonment or a heavy fine may be imposed on an employer who is convicted. Others contain a provision for the court, on conviction, to order reinstatement of the employee or the payment of lost wages or benefits [Precedent B3.7].

Many U.S. whistle-blower statutes provide for the filing of a civil suit against an employer who retaliates against an employee. Even in the absence of such a statutory remedy, an employee who is dismissed would likely be able to commence a civil proceeding on the basis of wrongful dismissal. A third option is to provide for an aggrieved employee to file a complaint with a labour relations board, human rights tribunal or other administrative authority. That authority is empowered to investigate the matter and attempt to effect a settlement or award an appropriate remedy. A time limit is often set for filing a complaint.

Burden of proof is a significant element of any statutory civil action or administrative complaint procedure. Should the burden be on the employee to establish that the employer retaliated against him or her for blowing the whistle? Or should the employer have to demonstrate that any adverse personnel actions were unrelated to whistle-blowing activity? One possible solution is to provide that any adverse personnel action taken within a specified period (say, one year) after the whistle-blowing incident is presumed to be retaliatory. In this case, the employer would have to demonstrate that the adverse action and whistle-blowing were unrelated. An employee dismissed or otherwise penalized outside of that time-frame, would carry the burden of proving a causal connection.

- remedies - Remedies available where a prohibited reprisal has been established include:

  - reinstatement of an employee who is terminated, with back pay and the restoration of seniority and fringe benefits;

  - compensation for lost earnings or other employment benefits;

  - damages for non-economic loss, such as emotional distress;

  - punitive or exemplary damages; and

  - orders directing the employer to cease doing the act complained of or to otherwise rectify the act.

  The employer could also be subjected to penalties in the form of civil fines. If the employer's actions constitute an offence, fines or imprisonment would be available.

- costs - In order to discourage frivolous charges by disgruntled employees, provision could be made for the awarding of costs in favour of the employer where the employee's claim is frivolous or without any basis in law or fact.

Precedent B3.6: "The Charter of Environmental Rights and Responsibilities", Bill 48, 22nd Leg., 2nd Sess., 1st Reading, June 9, 1992 (Sask.), cl. 10 & 11 (not passed)

10.(1) No person shall dismiss, threaten to dismiss, discipline, suspend, impose any penalty on, intimidate, coerce or discriminate in any way against any employee of that person because the employee has reported or proposed to report to a lawful authority any activity that is or is likely to result in an environmental offence or has applied under this Act to bring [a civil action to prevent an environmental offence or to obtain a remedy as a result of an environmental offence].

(2) Every person who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $100,000, imprisonment for a term of not more than one year or to both that fine and imprisonment.

11. No action or proceeding lies or shall be instituted against any person who reports an alleged environmental offence to a lawful authority if, in the opinion of the court or tribunal where the action or proceeding is being taken, the person who reported the alleged environmental offence had reasonable and probable grounds to believe that an environmental offence was being committed or was about to be committed.

Comment on Precedent B3.6: Subsection 10(1) of this precedent expands upon the basic whistle-blower protection provision by: extending protection to private sector employees; prohibiting reprisals for reporting or proposing to report unlawful activity, or for commencing a civil action to remedy unlawful activity; and enumerating in detail the types of retaliatory threats or actions that are prohibited. Subsection 10(2) backs up this prohibition by making it an offence, coupled with heavy fines or imprisonment, for an employer to contravene subsection 10(1). Section 11 is a somewhat unusual provision, protecting an informant who is acting in good faith from being sued for reporting an alleged environmental offence.

Precedent B3.7: *Environment Act*, S.Y.T. 1991, c. 5, s. 20

20.(1) In this section,

"employee" includes

(a) a person in receipt of or entitled to wages for labour or services performed for another;

(b) a person an employer allows, directly or indirectly, to perform work or service normally performed by an employee; and

(c) a person being trained by an employer for the purpose of the employer's business;

"employer" includes a person who

(a) has control or direction of; or

(b) is responsible, directly or indirectly, for the employment of

an employee, and includes a person who was an employer.

(2) No employer shall dismiss or threaten to dismiss, discipline, impose any penalty on, intimidate or coerce an employee because the employee, for the purpose of protecting the natural environment, or the public trust in relation to the natural environment, from material impairment,

(a) reports or proposes to report to the appropriate authority any adverse effect or likely adverse effect;

(b) commences or proposes to commence [a civil action under this Act];

(c) makes or proposes to make an application for an investigation [by the Minister under this Act];

(d) [institutes or proposes to institute a private prosecution under this Act];

(e) makes or proposes to make a complaint [to the Minister respecting a decision, act or omission of a governmental authority exercising power under this Act];

(f) lays an information or proposes to lay an information [in respect of an offence against this Act or the regulations]; or

(g) refuses to carry out an order or direction of the employer that would constitute a contravention of this Act, the regulations, or a term or condition of a permit or order.

(3) A person who contravenes subsection (2) is guilty of an offence and is liable on summary conviction to a fine of not more than $25,000 or to imprisonment for not more than 90 days or both.

(4) Where an employer is convicted of an offence under subsection (3), the court may, in addition to any other penalty imposed, order the employer to take or refrain from taking any action in relation to the employee, including the reinstatement of the employee to his or her former position or equivalent position or the payment to the employee of wages and benefits lost by reason of the contravention of subsection (2).

(5) This section applies notwithstanding any enactment or contractual provision which imposes a duty of confidentiality on an employee.

Comment on Precedent B3.7: This section extends protection to employees who engage in, or propose to engage in, a wide array of enforcement activities, including disclosing information to a public authority, commencing a civil action or prosecution under the Act, or applying for a Ministerial investigation. Paragraph (2)(g) goes beyond the scope of the basic whistle-blower provision by protecting an employee who refuses to carry out a task that would be unlawful under the Act.

In addition to creating an offence punishable by fine or imprisonment, the section empowers the court, upon conviction of the employer, to order reinstatement of the employee or payment of lost wages or benefits.

Subsection (5) adds to the standard whistle-blower protection provisions by providing that the right to 'blow the whistle' supersedes any duty of confidentiality owed by the employee.

Precedent B3.8: *The Environmental Bill of Rights, 1993, (Ont.)*, c. 28 (1993), ss. 104-115

104. In this Part, "Board" means the Ontario Labour Relations Board.

105.(1) Any person may file a written complaint with the Board alleging that an employer has taken reprisals against an employee on a prohibited ground.

(2) For the purposes of this Part, an employer has taken reprisals against an employee if the employer has dismissed, disciplined, penalized, coerced, intimidated or harassed, or attempted to coerce, intimidate or harass, the employee.

(3) For the purposes of this Part, an employer has taken reprisals on a prohibited ground if the employer has taken reprisals because the employee in good faith did or may do any of the following:

1. Participate in the making of a ministry statement of environmental values, a policy, an Act, a regulation or an instrument as provided in Part II.

2. Apply for a review under Part IV.

3. Apply for an investigation under Part V.

4. Comply with or seek the enforcement of a prescribed Act, regulation or instrument.

5. Give information to an appropriate authority for the purposes of an investigation, review or hearing related to a prescribed policy, Act, regulation or instrument.

6. Give evidence in a proceeding under this Act or under a prescribed Act.

106. The Board may authorize a labour relations officer to inquire into a complaint.

107. A labour relations officer authorized to inquire into a complaint shall make the inquiry as soon as reasonable possible, shall endeavour to effect a settlement of the matter complained of and shall report the results of the inquiry and endeavours to the Board.

108. If a labour relations officer is unable to effect a settlement of the matter complained of, or if the Board in its discretion dispenses with an inquiry by a labour relations officer, the Board may inquire into the complaint.

109. In an inquiry under section 108, the onus is on the employer to prove that the employer did not take reprisals on a prohibited ground.

110.(1) If the Board, after inquiring into the complaint, is satisfied that the employer has taken reprisals on a prohibited ground, the Board shall determine what, if anything, the employer shall do or refrain from doing about the reprisals.

(2) A determination under subsection (1) may include, but is not limited to, one or more of,

(a) an order directing the employer to cease doing the act or acts complained of;

(b) an order directing the employer to rectify the act or acts complained of; or

(c) an order directing the employer to reinstate in employment or hire the employee, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount assessed by the Board against the employer.

111. A determination under section 110 applies despite a provision of an agreement to the contrary.

112. If the employer fails to comply with a term of the determination under section 110 within fourteen days from the date of the release of the determination by the Board or from the date provided in the determination for compliance, whichever is later, the complainant may notify the Board in writing of the failure.

113. If the Board receives notice in accordance with section 112, the Board shall file a copy of its determination, without its reasons, with the [court], and the determination may be enforced as if it were an order of the court.

114.(1) If a complaint under section 105 has been settled, whether through the endeavours of the labour relations officer or otherwise, and the settlement has been put in writing and signed, a party to the settlement may file a written complaint with the Board alleging that another party to the settlement has failed to comply with the settlement.

(2) Sections 106 to 108 and 110 to 113 and subsection 114(1) apply, with necessary modifications, with respect to a complaint alleging failure to comply with a settlement.

115. For the purposes of sections 105 to 114, an act that is performed on behalf of the employer shall be deemed to be the act of the employer.

Comment on Precedent B3.8: This precedent expressly imposes a requirement of good faith on the employee (subsection 105(3)). This is typical of many whistle-blower protection schemes. Instead of making it an offence for an employer to retaliate against an employee, the precedent sets out a procedure for an aggrieved employee to file a complaint with the Labour Relations Board. If no settlement can be reached, the Board may conduct an inquiry to determine whether the employer has taken reprisals against the employee on a prohibited ground. Interestingly, the burden of proof is on the employer to establish his "innocence". The Board is empowered to provide redress, including an order directing reinstatement or compensation. Additional provisions ensure that an employer complies with any order made by the Board.

Precedent B3.9: *Whistleblowers' Protection Act*, 26 M.R.S.A., ss. 831 - 840 (Maine)

831. This subchapter may be cited as the "Whistleblowers' Protection Act".

832. As used in this subchapter, unless the context indicates otherwise, the following terms have the following meanings.

1. "Employee" means a person who performs a service for wages or other remuneration under a contract of hire, written or oral, expressed or implied, but does not include an independent contractor engaged in lobster fishing. Employee includes a person employed by the State or a political subdivision of the State.

2. "Employer" means a person who has one or more employees. Employer includes an agent of an employer and the State, or a political subdivision of the State.

3. "Person" means an individual, sole proprietorship, partnership, corporation, association or any other legal entity.

4. "Public body" means all of the following:

A. A state officer, employee, agency, department, division, bureau, board, commission, council, authority or other body in the executive branch of State Government;

B. An agency, board, commission, council, member or employee of the legislative branch of State Government;

C. A county, municipal, village, intercounty, intercity or regional governing body, a council, school district or municipal corporation, or a board, department, commission, council, agency or any member or employee thereof;

D. Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body;

E. A law enforcement agency or any member or employee of a law enforcement agency; and

F. The judiciary and any member or employee of the judiciary.

833.1. No employer may discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because:

A. The employee, acting in good faith, or a person acting on behalf of the employee, reports orally or in writing to the employer or a public body what the employee has reasonable cause to believe is a violation of a law or rule adopted under the laws of this State, a political subdivision of this State or the United States;

B. The employee, acting in good faith, or a person acting on behalf of the employee, reports to the employer or a public body, orally or in writing, what the employee has reasonable cause to believe is a condition or practice that would put at risk the health or safety of that employee or any other individual;

C. The employee is requested to participate in an investigation, hearing or inquiry held by that public body, or in a court action; or

D. The employee acting in good faith, has refused to carry out a directive that would expose the employee or any individual to a condition that would result in serious injury or death, after having sought and been unable to obtain a correction of the dangerous condition from the employer.

2. Subsection 1 does not apply to an employee who has reported or caused to be reported a violation, or unsafe condition or practice to a public body, unless the employee has first brought the alleged violation, condition or practice to the attention of a person having supervisory authority with the employer and has allowed the employer a reasonable opportunity to correct that violation, condition or practice.

Prior notice to an employer is not required if the employee has specific reason to believe that reports to the employer will not result in promptly correcting the violation, condition or practice.

834-A. An employee who alleges a violation of that employee's rights under section 833, and who has complied with the requirements of section 833, subsection 2, may bring a complaint before the Maine Human Rights Commission . . .

836. A person who violates section 839 is liable for a civil fine of $10 for each day of wilful violation which shall not be suspended. . .

837. This subchapter shall not be construed to diminish or impair the rights of a person under any collective bargaining agreement.

838. This subchapter shall not be construed to require an employer to compensate an employee for participation in an investigation, hearing or inquiry held by a public body in accordance with section 833.

839.1. The Department of Labour shall provide each employer with a notice as provided in this section. Each employer shall prominently post the notice in the employer's place of business so that the employees are informed of their protections and obligations under this subchapter.

2. The notice provided by the Department shall include:

A. A summary of this subchapter written in concise and plain language;

B. A telephone number at the department that employees may call if they have questions or wish to report a violation, condition or practice; and

C. A space where the employer shall write in the name of the individual or department to which employees may report violations, unsafe conditions or practices as required by section 833.

840. Nothing in this section [sic] may be construed to derogate any common-law rights of an employee.

Comment on Precedent B3.9: The most notable feature of this precedent is the requirement that an employee bring the alleged wrongdoing to the attention of his or her superior before reporting the matter to a public authority, unless there is specific reason to believe that doing so would not be effective. The employee is protected from reprisals for making this internal disclosure. Note as well the duty of the employer to post a notice informing employees of their obligations and protections under the Act, and listing the telephone number of the public authority to whom a report concerning regulatory violations may be made.

The provisions of s. 833(1)(D) deal with the right of an employee to refuse work that is unsafe. This type of provision is often found in workplace safety legislation, and would not normally be included in a whistle-blower protection scheme in other regulatory statutes. The right to refuse to carry out an employer's directive on the basis that it would constitute a regulatory offence, however, is a closely-related provision that does fall within the scope of whistle-blower protection schemes.

Additional Precedents:

Canada Labour Code, R.S.C. 1985, c. L-2, s. 147(a), as am. by R.S.C. 1985, c. 9, (1st Supp.), s. 4

Canadian Environmental Protection Act, R.S.C. 1985, c. 16, (4th Supp.), s. 37

Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 59

Clean Air Act, 42 U.S.C., s. 7622

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C., s. 9610

Employment Regulation Part II: Protection of Employees, C.G.S.A. s. 31-51m (Connecticut)

Environmental Protection Act, R.S.O. 1990, c. E.19, s. 174

Occupational Health and Safety Act, R.S.O. 1990, c. O.1, s. 50

Occupational Safety and Health Act of 1970, 29 U.S.C., s. 660(c)

C. ADVICE, WARNINGS AND SELF-CORRECTION

ADVICE, WARNINGS AND SELF-CORRECTION

1. Information, Advice and Assistance

Formal information and advice concerning the regulator's administration of the Act comes fairly close to previous options that we have discussed, such as education, informal visits and advisory opinions and compliance guidelines. It might be appropriate, given the particular regulatory objectives of an Act, for the regulator to be required to provide "information and advice pertaining to its administration and to the protection of [the public interest]...to persons and organizations concerned with the purposes of the Act" [Precedent C1.1]. This is an enlargement of the requirement suggested earlier, that the regulator regularly publish enforcement records and the compliance policy itself.

Since information and advice are a two-way street, the regulator might also be expressly authorized to offer corrective advice or other remedial service on request to bring a regulatee into compliance with the Act [Precedent C1.2]. Advice may be the last "soft" enforcement practice available to regulatory departments or agencies before formal enforcement powers are exercised.

Precedent C1.1: *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 12(3)

12.(3) A Director shall, in accordance with the objects and purposes of this Act, ensure that persons and organizations concerned with the purposes of this Act are provided with information and advice pertaining to its administration and to the protection of the occupational health and safety of workers generally.

Precedent C1.2: *Weights and Measures Act*, R.S.C. 1985, c. W-6, s. 16

16. When an inspector inspects a [weighing or measuring] device, the inspector may, with the consent of the owner or person in possession thereof, make such adjustments or alterations to that device as may be prescribed.

2. Warnings/Alerts

There are four levels of enforcement response to statutory breaches by regulatees. The first, in response to a *minor* breach, usually results in a warning by the regulator, perhaps in an information visit. In most cases, that is the end of the matter, particularly if public health, safety or security have not been endangered and if the breach was inadvertent (see Information Visits, *supra*).

The second situation involves a more formal enforcement warning in which the regulatee is put on notice "that, if he commits a further breach of a like nature, his licence may be cancelled" [Precedent C2.1]. The third situation uses civil or administrative proceedings against the regulatee; the fourth involves criminal sanctions. Formal enforcement warnings occupy a distinct position within a regulator's compliance and enforcement policy, and deserve separate consideration by policy makers and legal counsel.

Precedent C2.1: *The Consumer Protection Act*, R.S.M. 1987, c. C200, ss. 83 - 87

83(1) Where the director has cause to believe that any person who is licensed under this Act has committed a breach of any provision of this Act, or of any conditions or restrictions in respect of any license, he may serve on the person, by registered mail, a notice stating

(a) the act or omission complained of, and the approximate date on which it occurred;

(b) the section of this Act, or the conditions or restrictions of licence, of which the act or omission is a breach;

and warning the person that, if he commits a further breach of a like nature, his licence may be cancelled.

83(2) Where the director is satisfied that the breach committed was due to

(a) inadvertence; or

(b) a bona fide misunderstanding of the requirements of this Act;

he shall not serve such a notice.

84(1) Where any person who is licensed under this Act

(d) having been served with a notice by the director under section 83 commits, within two years after the date of the notice, a further breach of a like nature to the one stated in the notice;

the director may serve upon him, by registered mail, a notice of cancellation of his licence.

86(1) Where a person who receives a notice under section 83 wishes to contend that the act or omission complained of in the notice is not a breach of the section or of any conditions or restrictions of the licence, he may apply to the court by originating notice of motion, for the determination of the question.

86(2) Until a question before the court under subsection (1) has been finally determined, the director shall not give a notice of cancellation of the licence under clause 84(1)(d) based on the notice given under section 83, or serve any further notices on the person in respect of a like act or omission; but the court may, if it sees fit, on the application of the director, issue an interim injunction requiring the person to desist from the actions or course of conduct to which the director objected.

87(1) A person on whom a notice of cancellation under section 84 is served may appeal therefrom, by originating notice of motion, to the court on the ground that

(c) if the notice was served pursuant to clause 84(1)(d), that the further breach alleged was due to inadvertence.

[The omitted sections deal generally with the cancellation of a licence and related appeals.]

Precedent C2.2 *Occupational Safety and Health Act of 1970*, 29 U.S.C., s. 658(a)

658(a) If, upon inspection or investigation, the Secretary .... believes that an employer has violated [certain sections of the act or regulations], he shall with reasonable promptness issue a citation to the employer. .... The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

3. Opportunity for Self-Correction/Voluntary Redress

In terms of promoting 'voluntary' compliance, it would seem to make sense to statutorily recognize the right of a regulatee allegedly in violation of the statute to take steps to come into compliance (including restitution or other redress, as applicable) within a reasonable time after receiving the notice of the alleged violation. In those circumstances, the violation alert, coupled with the corrective conduct of the regulatee, closes the enforcement action. For example, the 1991 *Environment Act* (Yukon) [Precedent C3.1] provides for a public register of notices of non-compliance and the withdrawal of the notice from the register "where an environmental protection officer is satisfied that [the subject] person...has effected compliance pursuant to the notice".

Precedent C3.1: *Environment Act*, S.Y.T. 1991, c. 5, s. 158

158.(1) An environmental protection officer may issue a notice of non-compliance to a person where the environmental protection officer believes that the person .... is not in compliance with this Act, the regulations or a permit, order or direction.

(2) A notice under subsection (1) shall state

(a) the nature of the non-compliance;

(b) a request for voluntary compliance;

(c) the steps which should be taken to achieve compliance; and

(d) the date by which compliance should be effected.

(3) The Minister may establish a public register of notices of non-compliance and, where such a register is established, shall cause a copy of every active notice of non-compliance to be placed on the register.

(4) A register established under subsection (3) shall be accessible to the public without charge during normal business hours at an office of the Government of the Yukon to be specified by the Minister.

(5) Where an environmental protection officer is satisfied that a person to whom a notice of non-compliance was issued under subsection (1) has effected compliance pursuant to the notice, he or she shall withdraw the notice of non-compliance and the Minister shall then cause the copy of the notice to be removed from the public register.

(6) The Minister may cause all or part of the public register to be published.

Precedent C3.2: *Fisheries Act, R.S.C. 1985*, c. F-14, s. 69 (prior to amendment by S.C. 1991, c. 1, s. 21)

69. Every owner or occupier of a water intake [ ] in Canada, constructed [ ] for conducting water from any Canadian fisheries waters for irrigating [ ] purposes, who

(a) neglects or refuses to provide and maintain in a good and sufficient state of repair at its entrance or intake a fish guard [ ] fixed as to prevent the passage of fish from any Canadian fisheries waters into the water intake [ ];

is, after three days notice in writing from the Minister or a fishery officer, guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars for each day or part of a day during which the offence continues.

Although the drafting is somewhat obscure, the general intent appears to be that a person is guilty of an offence if they (a) contravene the Act (assuming the imposition of a duty to provide a fish guard), (b) receive notice in writing that they are in contravention and (c) fail to achieve compliance with the Act within 3 days after having received the notice.

D. FORMAL ENFORCEMENT POWERS: THE CIVIL SIDE

FORMAL ENFORCEMENT POWERS: THE CIVIL SIDE

1. Negotiated Settlements

Assurances of Voluntary Compliance (AVC)

The concept of negotiated settlements or voluntary undertakings in lieu of more formal enforcement proceedings has been with us for a long time. In the mid-19th century, the English Poor Law Commissioners frequently chose to drop charges against wrongdoers in exchange for assurances of future compliance. Similar choice patterns are often evident in the administration of human rights statutes, labour legislation and occupational health and safety measures.

Most AVC regimes have a three-step procedural approach. An enforcement authority has initial grounds for believing that a regulatee has contravened the statute, it can offer the regulatee an opportunity to give an undertaking to refrain from engaging in the acts or practices in question. Negotiations (usually through counsel) determine whether the regulatee will sign a suitably framed AVC. Depending on the circumstances of the case, other elements may be included in the assurance, including redress, modification of contract forms, full performance undertakings and future compliance reporting obligations.

The failure to enter into an undertaking satisfactory to the enforcement authority or a subsequent breach of an undertaking will usually result in formal civil or criminal enforcement proceedings. Proceedings are initiated by the regulatory agency pursuant to procedures set out in the legislation. Many regulatory authorities informally negotiate compliance undertakings without the benefit of supporting legislation (e.g. undertakings accepted by the Director of Investigation and Research under the *Competition Act*).

Federal Legislative Framework

The Canadian AVC examples in this Manual are all from provincial statutes, particularly business or trade practices statutes. There does not appear to be a formal legislative framework at the federal level for the AVC enforcement remedy. The federal practice is complicated by the fact that such assurances are sometimes taken under federal statutes based exclusively on the criminal law power. Others are taken under statutes based on a specific constitutional head of federal power, in combination with the federal power respecting criminal law and procedure. Where the constitutional basis for federal legislation in a particular field is the criminal law power, does the federal regulator have authority to enter into contractual agreements to enforce compliance with the statute? Are the agreements a form of diversion (or official extortion) somehow tied to prosecutorial discretion and plea bargaining? Are they enforceable through civil process for breach of contract or can a civil AVC enforcement scheme be included within a federal statute to sanction breaches of the agreements themselves without exceeding federal jurisdiction? The constitutionality of the AVC procedure is not subject to such nuances under

statutes based primarily on the trade and commerce power or other non-criminal federal powers (e.g. the *Competition Act*).

Where non-legislated undertakings are negotiated, the department or regulatory agency defers the enforcement proceeding by not referring the matter to the Attorney General. Once referred, the Attorney-General is charged with the discretionary responsibility of choosing whether to prosecute the matter. In effect, the assumption of the power to negotiate a civil undertaking amounts to the exercise of the power to not refer the matter to the Attorney General. Should the undertaking not be honoured, then the question of reference to the Attorney General may be revisited. It is interesting how the practical alternatives in the 'command and control' framework may condition the administrative resort to informal AVCs or compliance undertakings. Unfortunately, the day-to-day administration of informal AVC systems often results in a loss of transparency and consistency in enforcement decisions.

Conditions for Negotiating AVCs

The AVC procedure avoids civil litigation and criminal prosecution by allowing the enforcement authority to accept a written undertaking of compliance in lieu of other proceedings. The typical AVC commits the signing party to observe prescribed compliance steps. Sometimes the party is obliged to undertake a series of remedial and corrective steps as well, the performance of which will be monitored by the enforcement authority (usually through the submission of compliance reports by the AVC party).

The enforcement authority must have "reason to believe" that the regulatee is not complying with the statute before an AVC can be considered as an enforcement option. These grounds of "reasonable belief" are the same as required for injunctive proceedings or other court actions. [*Business Practices Act* (Ont.), s. 17]. Most precedents do not require the regulatee to acknowledge or confess violation of the statutory requirements as a condition of giving an undertaking of future compliance: [see *The Business Practices Act* (Man.), s. 20(1), but cf. Precedent D1.2, s. 10]. However, in all cases, the regulatee must satisfy the enforcement authority that its actions are now in conformity with the Act before AVC negotiations will be entertained (e.g. *Business Practices Act* (Ont.), s. 9(1)).

Possible Range of Compliance Undertakings

The remedial purpose of an AVC is to bring the regulatee into a position of full and complete compliance. Therefore, the cessation of any non-complying conduct is a prerequisite to discussions. This element is not open to negotiation. The remainder of the undertakings are negotiated by the parties. The guiding principle is to put the marketplace, the worksite, landfill, etc., into the condition that would have obtained if the regulatee had been in initial compliance.

Depending on the regulatory objectives, other AVC undertakings may address issues of restitution, corrective action (e.g. advertisements, repairs, etc.), reimbursement of investigation costs, new contracts, trust accounts, record keeping, public apologies, compliance reports, compliance education training, etc. [Precedent D1.1 and see *Trade Practices Act* (Nfld.), s. 13(2)].

The key drafting point here is not to close off the possible scope of the compliance undertakings (beyond the cessation question, *supra*). In essence, the regulatee provides assurances to the regulator "in a form and containing the terms and conditions the [enforcement authority] determines" and the AVC "may include any or all" of the terms and conditions described [Precedent D1.1].

Enforceability of AVCs

An AVC is a civil assurance or compliance undertaking by a regulatee to a regulator. It usually specifies a course of conduct and may provide for deadlines for the performance of any undertakings. It is not a court order. As noted above, some jurisdictions require the regulatee to admit specifically to its non-compliance (by an agreed statement of facts). Other AVCs simply commit the regulatee to a future course of conduct. The common element is that any violation of an undertaking may leave the regulatee open to a formal civil enforcement action (injunction or declaration) or criminal prosecution for the initial regulatory offence, subject to a due diligence defence [Precedent D1.1].

Public Record and Monitoring

AVCs are formal undertakings by regulatees. The prevailing practice in provincial trade practices legislation is that all formal enforcement proceedings must be maintained in a public record. Where an enforcement authority is empowered to settle a *prima facie* violation, it is incumbent on the regulatory agency that its exercise of discretionary authority be transparent. Like cases must be treated similarly. Informal, unpublicized settlements are to be avoided. An AVC should be a public document [Precedent D1.1].

The AVC is a temporal document. The underlying circumstances may change. One or more of the assurances given may become inappropriate with the passage of time. For those and other reasons, AVC legislation normally provides for the undertaking party to be able to seek variations of the AVC, either directly from the enforcement authority or from the court [Precedent D1.2].

The enforcement authority bears the responsibility of monitoring the compliance assurances given by the AVC party. That responsibility is not usually stated in the legislation. Compliance reports must usually be filed by the AVC party with the enforcement authority. The reports provide the first source of information to the regulator on how the AVC is being honoured.

Precedent D1.1: *Trade Practice Act*, R.S.B.C. 1979, c. 406, ss. 5(e)(iii), 10(1), 17, 25(1)(d)

5. The director shall,

(e) maintain public records of all

(iii) written undertakings or assurances entered under this Act.

10.(1) Where the director believes, on reasonable and probable grounds, that a person has contravened, is contravening or is about to contravene . . . . an undertaking or assurance made or given pursuant to this Act, he may order a full investigation of the matter . . . .

17.(1) Where the director has reason to believe that a supplier has engaged in, or is engaging in, a deceptive or unconscionable act or practice in connection with a consumer transaction, the director,

(a) instead of ordering an investigation of the supplier under this Act or taking proceedings against the supplier under this Act; and

(b) if he is satisfied that the supplier has ceased engaging in those acts or practices,

may accept from the supplier a written undertaking or assurance in a form and containing the terms and conditions the director determines; and, without limiting the foregoing, the undertaking or assurance may include any or all of the following terms and conditions:

(c) an undertaking to comply with this Act and the regulations;

(d) an undertaking to refrain from engaging in those acts or practices;

(e) an undertaking to reimburse to the consumers or class of consumers designated in the undertaking any money, property or other thing received from them in connection with a consumer transaction, including money necessarily expended in making and pursuing a complaint;

(f) an undertaking that consumer transactions involving the supplier and the consumers or class of consumers designated in the undertaking will be carried out by the supplier in accordance with terms and conditions specified in the undertaking;

(g) an undertaking to furnish a bond in accordance with the *Bonding Act*;

(h) an undertaking to reimburse to the director the costs of any investigation, as certified by the minister; or

(i) requirements for the form, content and maintenance of trust accounts, records, contracts, advertisements or other documents or papers respecting consumer transactions engaged in by the supplier.

(2) Where

(a) an investigation of a supplier has been ordered under *[the Act]*; or

(b) [civil] enforcement proceedings have been instituted by the director . . . . .,

the director may terminate the investigation or proceeding on the acceptance of a written undertaking or assurance from the supplier under subsection (1).

25.(1) Every person who

(d) fails to comply with a written undertaking or assurance, made or entered into under this Act, unless the undertaking or assurance has been rescinded by written consent of the director or minister, or by the court,

commits an offence and is liable on conviction to a fine of not more than $5,000, or to imprisonment for a term of not more than one year, or to both.

Precedent D1.2: *Unfair Trade Practices Act*, R.S.A. 1980, c. U-3, ss. 6(c), 10, 13(1), 20(1)

6. The Director [of Trade Practices] shall not publicly disclose the name of a person whose conduct is the subject of an inquiry under this Act unless

(c) that person is a party to an undertaking under section 10.

10.(1) When

(a) a supplier has engaged in or has been engaging in an unfair act or practice, and

(b) that supplier has satisfied the Director that he has ceased engaging in that act or practice,

that supplier may enter into an undertaking with the Director in the form and containing the provisions that the Director, on negotiation with that supplier, considers proper and without restricting the generality of the foregoing, the undertaking may contain specific undertakings by the supplier

(c) to refrain from engaging in those acts of practices that were unfair, and

(d) to redress those consumers who suffered damage or loss due to those unfair acts or practices.

(2) Any time after a supplier enters into an undertaking he may request the Director to vary or terminate that undertaking and on considering the request the Director may vary or terminate that undertaking.

(3) Notwithstanding subsection (2), any time after a supplier has entered into an undertaking he may apply to the court by way of originating notice for an order

(a) terminating the undertaking, if the court is satisfied that the act or practice that the supplier undertook to refrain from engaging in was not unfair, or

(b) varying the provisions of that undertaking, if the court is satisfied that the circumstances warrant varying the provisions of that undertaking.

(4) When an undertaking is terminated or varied under this section, that termination or variance does not invalidate anything done under that undertaking prior to the termination or variance of that undertaking.

(5) The Director shall maintain a public record of all undertakings entered into under this section.

13.(1) When the Director is of the opinion that a supplier

(b) has not complied with the terms of an undertaking which that supplier has entered into,

he may commence [civil enforcement proceedings] in the court against that supplier.

20.(1) The Director shall not, until he has been authorized to do so by the Attorney General,

(b) enter into an undertaking under section 10, or

(c) commence or maintain an action under [section 13].

Precedent D1.3: *Competition Act 1980*, 1980, c. 21, s. 4, as am. by *Companies Act* 1989, 1989, c. 40, s. 153 (Schedule 20, para. 22) (U.K.)

[Under the Act, where the Director General of Fair Trading believes that a person is engaging in anti-competitive practices and that it is appropriate to make a competition reference to the Monopolies and Mergers Commission, he may, instead of making the reference, accept an undertaking from that person. The Act then imposes a duty on the Director to monitor the circumstances related to the undertaking, and sets out procedures for the Director to release or vary the undertaking.]

4.(4) It shall be the duty of the Director

(a) to arrange for

(i) any undertaking accepted by him under this section, and

(ii) any variation or release of such an undertaking . . . .,

to be published in such manner as appears to him to be appropriate,

(b) to keep under review the carrying out of any such undertaking and from time to time to consider whether, by reason of any change of circumstances, the undertaking is no longer appropriate and either the person concerned can be released from the undertaking or the undertaking needs to be varied or superseded by a new undertaking, and

(c) if it appears to him that the person by whom an undertaking was given has failed to carry it out, to give that person notice of that fact.

(5) If at any time the Director concludes under subsection (4)(b) above

(a) that any person can be released from an undertaking, or

(b) that an undertaking needs to be varied or superseded by a new undertaking,

he shall give notice to that person stating that he is so released, or specifying the variation or, as the case may be, the new undertaking which in his opinion is required.

(6) Where a notice is served on any person under subsection (5) above specifying a variation or new undertaking, the notice shall state the change of circumstances by virtue of which the notice is served.

(7) Subject to subsection (8) below, the Director may at any time, by notice given to the person concerned

(a) agree to the continuation of an undertaking in relation to which he has given notice under subsection (5) above specifying a variation or new undertaking, or

(b) accept a new or varied undertaking which is offered by that person as a result of such a notice.

(8) If the Director makes a [competition reference because, after giving notice under subsection (5), he has neither accepted a new or varied undertaking from the person nor agreed upon the continuation of the original undertaking], he shall not, after the reference has been made, agree to the continuation of the undertaking in relation to which that notice was given or accept a new or varied undertaking which is offered as a result of that notice.

[Under section 9 of the Act, the Monopolies and Mergers Commission may, upon determining that a person was engaging in an anti-competitive practice, seek to obtain an undertaking from that person instead of issuing an order.]

Precedent D1.4: *An Act to revise and consolidate the Canada Elections Act, the Electoral Boundaries Readjustment Act and related Acts and to amend and repeal certain other Acts as a consequence,* Bill C-397, 34th Parl., 3rd Sess., 1st Reading, February 3, 1993, cl. 510 - 517, 520

510.(1) The Director of Enforcement may offer to enter into a voluntary compliance agreement with any person who is alleged to have committed an offence under this Act at any time before the filing of a notice of proceedings . . . ..

(2) A voluntary compliance agreement may not be entered into where the offence is listed [as one that is to be heard by a court rather than by the Canada Elections Commission].

511. The offer to enter into a voluntary compliance agreement shall be in writing and shall

(a) inform the alleged offender that a voluntary compliance agreement is being offered;

(b) set out the proposed clauses of the voluntary compliance agreement; and

(c) inform the alleged offender that, in exchange for the agreement, no prosecution in respect of the offence will be commenced.

512.(1) Before entering into a voluntary compliance agreement, the Director of Enforcement shall take into account the following factors:

(a) the nature and gravity of the alleged offence;

(b) the penalty provided for the alleged offence;

(c) the public interest;

(d) fairness to the alleged offender; and

(e) any other factor that the Director of Enforcement considers relevant.

(2) Evidence obtained through the negotiation of a voluntary compliance agreement shall be inadmissible in any subsequent proceedings relating to the offence.

513. A voluntary compliance agreement shall not take effect before it is approved by a member of the Commission.

514.(1) A member of the Commission who is considering whether to approve a voluntary compliance agreement shall take into account the factors listed in paragraphs 512(1)(a) to (d) and any other factor that the member considers relevant.

(2) The member of the Commission may suggest that changes be made to a voluntary compliance agreement submitted by the Director of Enforcement for approval.

(3) The member of the Commission shall notify the parties of the decision regarding approval of the voluntary compliance agreement.

(4) A voluntary compliance agreement that is approved by a member of the Commission has the force and effect of a decision of the Commission.

515. A decision not to approve a voluntary compliance agreement shall not be made public.

516. The Director of Enforcement shall, in the National Capital Region and in the constituency where the offence allegedly occurred, make public any approved voluntary compliance agreement, including the name of the alleged offender, the nature of the alleged offence and the main clauses of the agreement.

517. Where a voluntary compliance agreement is approved, no further proceedings under this Part shall be taken against the person in respect of the alleged offence, unless the person has not complied with the terms or conditions of the agreement.

520.(1) No proceedings may be commenced in respect of an offence under this Act more than one year following the time when the subject matter of the proceedings arose.

(2) Where a person has not complied with the terms or conditions of a voluntary compliance agreement, the limitation period in subsection (1) commences from the time when the non-compliance arose.

Precedent D1.5: *Uniform Consumer Sales Practices Act* (U.L.A.) s. 9(c)

9.(c) The Enforcing Authority may terminate an investigation or an action other than a class action upon acceptance of a supplier's written assurance of voluntary compliance with this Act. Acceptance of an assurance may be conditioned on a commitment to reimburse consumers or take other appropriate corrective action. An assurance is not evidence of a prior violation of this Act. However, unless an assurance has been rescinded by agreement of the parties or voided by a court for good cause, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation of this Act.

Additional Precedents:

The Business Practices Act, S.M. 1990-91, c. 6 (C.C.S.M., c. B120), ss. 15, 20, 33(1)(b)

Business Practices Act, R.S.O. 1990, c. B.18, ss. 5(c)(i), 9, 17(1)(c)

Consumer Protection Act, R.S.Q. 1977, c. P-40.1, ss. 314, 315, 277(d)

Discriminatory Business Practices Act, R.S.O. 1990, c. D.12, s. 7

Fair Trading Act 1973, 1973, c. 41, ss. 34-35, 37(3), 38(4), 39(3); ss. 75G-75K, 93A, as am. by *Companies Act* 1989, c. 40, ss. 147 & 148 (U.K.)

Fair Trading Act, 1987, c. 42, ss. 79-82 (South Australia)

Financial Institutions Act, S.B.C. 1989, c. 47, s. 243

Labour Code (now *Industrial Relations Act*), R.S.B.C. 1979, c. 212, s. 29, as am. by S.B.C. 1983, c. 10, s. 21 (Schedule 2) and S.B.C. 1987, c. 24, s. 3

Trade Practices Act, R.S.Nfld 1990, c. T-7, ss. 13, 15(1)(b), 20(1)(c)

Trade Practices Act 1974, 1974, c. 51, ss. 10.64 & 10.65, as am. by 1989, c. 34 (Australia)

Consent Agreements and Orders

The remedial purpose of an AVC, a consent order or a consent agreement is identical. Each is the result of a formal civil enforcement proceeding. Each legal instrument commits the regulatees to a course of compliance-directed conduct. In each case, the formal undertakings are given to the regulatory agency or department in lieu of it employing other enforcement tools. Why then the different terminology?

The distinction is quite simple. It rests in the fact that the enforcement instrument is legitimized by an order-making body, either the enforcement officer himself [Precedent D1.6] or, more often, a tribunal or commission which is empowered to approve a proposed settlement [Precedent D1.7] or is legitimized by an order jointly proposed for approval by the enforcement officer and the regulatee [Precedent D1.8]. In other regulatory situations, the enforcement officer or the regulatory board may be expressly authorized to issue a compliance order, the terms of which have been consented to by the regulatee [Precedent D1.6].

Precedent D1.6: *Discriminatory Business Practices Act*, R.S.O. 1990, c. D.12, s. 7(2)

7.(2) Where . . . . [a compliance order] is made by the Director with the consent of each person to be named in the order, the . . . . consent order has and shall be given for all purposes of this Act the force and effect, other than the disqualification provided by subsection 10(1), of [a compliance order] made by the Director.

[The disqualification in subsection 10(1), referred to above, results in those persons against whom a compliance order is made or who are convicted of an offence under the Act being ineligible to enter into contracts to provide goods or service to the Crown - see Precedent A4.8. By consenting to a compliance order, the person avoids this disqualification.]

Precedent D1.7: *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, ss. 48 & 60(1)(a)

48.(1) When, at any stage after the filing of a complaint and before the commencement of a hearing before a Human Rights Tribunal in respect thereof, a settlement is agreed on by the parties, the terms of the settlement shall be referred to the Commission for approval or rejection.

(2) If the Commission approves or rejects the terms of a settlement referred to in subsection (1), it shall so certify and notify the parties.

60.(1) Every person is guilty of an offence who

(a) fails to comply with the terms of any settlement of a complaint approved and certified under section 48; . . . .

Precedent D1.8: *Competition Act*, R.S.C. 1985, c. C-34, ss. 105 & 106, as am. by R.S.C. 1985, *c. 19*, (2nd Supp.), s. 45

105. Where an application is made to the Tribunal under this Part for an order and the Director and the person in respect of whom the order is sought agree on the terms of the order, the Tribunal may make the order on those terms without hearing such evidence as would ordinarily be placed before the Tribunal had the application been contested or further contested.

106. Where, on application by the Director or a person against whom an order has been made under this Part, the Tribunal finds that

(a) the circumstances that led to the making of the order have changed and, in the circumstances that exist at the time the application is made under this section, the order would not have been made or would have been ineffective to achieve its intended purpose, or

(b) the Director and the person against whom an order has been made have consented to an alternative order,

the Tribunal may rescind or vary the order accordingly.

Precedent D1.9: *USCS Administrative Rules of Procedure*, EPA, 40 CFR s. 22.18

22.18(a) The Agency encourages settlement of [enforcement proceedings for a civil penalty, or revocation or suspension of a permit] at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. The respondent may confer with the complainant concerning settlement whether or not the respondent requests a hearing . . . .

(b) The parties shall forward a written consent agreement and a proposed consent order to the Regional Administrator whenever settlement or compromise is proposed. The consent agreement shall state that, for the purpose of this proceeding, respondent (1) admits the jurisdictional allegations of the complaint; (2) admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; and (3) consents to the assessment of a stated civil penalty or to the stated permit revocation or suspension, as the case may be. The consent agreement shall include any and all terms of the agreement, and shall be signed by all parties or their counsel or representatives.

(c) No settlement or consent agreement shall dispose of any proceeding under these rules of practice without a consent order from the Regional Administrator. In preparing such an order, the Regional Administrator may require that the parties to the settlement appear before him to answer inquiries relating to the consent agreement or order.

[A "consent agreement" is defined in section 22.03(a) as "any written document, signed by the parties, containing stipulations or conclusions of fact or law and a proposed penalty or proposed revocation or suspension acceptable to both complainant and respondent".]

Precedent D1.10: *Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 42 U.S.C., s. 9622(d)

9622(d)(1)(A) Whenever the [administrator] enters into [a cleanup agreement] with any potentially responsible party with respect to remedial action . . . ., following approval of the agreement by the Attorney General . . . ., the agreement shall be entered in the appropriate [court] as a consent decree. . . .

(C) The [administrator] may fashion a consent decree so that the entering of such decree and compliance with such decree . . . . shall not be considered an admission of liability for any purpose.

(2)(A) At least 30 days before a final judgment is entered under paragraph (1), the proposed judgment shall be filed with the court.

(B) The Attorney General shall provide an opportunity to persons who are not named as parties to the action to comment on the proposed judgment before its entry by the court as a final judgment. The Attorney General shall consider, and file with the court, any written comments, views, or allegations relating to the proposed judgment. The Attorney General may withdraw or withhold its consent to the proposed judgment if the comments, views, and allegations concerning the judgment disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate.

Additional Precedents:

Labour Code (now *Industrial Relations Act*), R.S.B.C. 1979, c. 212, s. 28(3), as am. by S.B.C. 1987, c. 24, s. 3

USCS Administrative Rules of Procedure, FTC, 16 CFR ss. 2.31 - 2.34; see also SEC, 17 CFR, ss. 202.5(e) & (f)

Compliance Plans

Compliance plans are a variation of an AVC. As the name suggests, a compliance plan details the regulatee's compliance undertakings. This enforcement term is used in situations where compliance shortfalls have been identified by the regulator's inspectors. The regulatory scheme empowers an inspector to serve immediate notice of the apparent contraventions on the regulatee. The regulatee is then directed to submit particulars to the inspector or the agency itself on how the compliance problems will be remedied.

The statutory precedents anticipate that the regulatee has the knowledge and the means to prepare the compliance plan for submission to the regulator. Negotiations on the final terms of the plan may ensue but are not expressly referred to in the available precedents [Precedents D1.11 and D1.12].

Precedent D1.11: *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 10-12

[The Act prohibits the discharge into the environment of certain types and amounts of contaminants. The Director is empowered to issue control orders and stop orders respecting the discharge of contaminants.]

10.(1) A person responsible for a source of contaminant may submit to the Director a program to prevent or to reduce and control the discharge into the natural environment of any contaminant from the source of contaminant.

(2) When a program referred to in subsection (1) is submitted to the Director, the Director may, with the consent of the Minister, refer the program to the Environmental Council for its consideration and advice.

(3) The Director may issue a program approval, directed to the person who submitted the program.

11.(1) The Director shall, in a program approval,

(a) set out the name of the person to whom the approval is directed;

(b) set out the location and nature of the source of contaminant;

(c) set out the details of the program; and

(d) approve the program.

(2) The Director may, by order, amend or revoke a program approval that was issued in error or that no longer adequately provides for the protection and conservation of the natural environment.

(3) The Director may, by order, amend or revoke a program approval with the consent of the person to whom the program approval is directed.

12. Despite the issue of a program approval or order, when the Director is of the opinion, based on reasonable and probable grounds, that it is necessary or advisable for [the protection of the environment, human life or health, or property], the Director may issue a stop order or a control order directed to the person responsible.

Precedent D1.12: *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, ss. 57 & 59

57.(1) Where an inspector finds that a provision of this Act or the regulations is being contravened, the inspector may order [a person] to comply with the provision and may require the order to be carried out forthwith or within such period of time as the inspector specifies.

(4) An order made under subsection (1) may require [a person] to submit to the Ministry a compliance plan prepared in the manner and including such items as required by the order.

(5) The compliance plan shall specify what [the person] plans to do to comply with the order and when [the person] intends to achieve compliance.

59.(1) Within three days after [a person] who has received an order under section 57 believes that compliance with the order has been achieved, [the person] shall submit to the Ministry a notice of compliance.

(4) Despite the submission of a notice of compliance, [a person] achieves compliance with an order under section 57 when an inspector determines that compliance has been achieved.

Additional Precedents: *Occupational Safety and Health Act of 1970*, 29 U.S.C., s. 655(b)(6)

2. Financial Assurances of Compliance

This is really a subset of the assurance of voluntary compliance package under which 'good conduct' assurances are accompanied by

"a bond or other security to [the enforcement authority], in a form and amount and containing terms and conditions to be determined by the [enforcement authority], guaranteeing that the [regulatee] will comply with the Act..." [Precedent D2.1].

Similar provisions, which are calculated to bind the regulatee financially to the proper performance of a compliance undertaking, are found in environmental protection legislation [Precedent D2.2; also see *Environment Act* (Y.T.), ss. 167-169] in various industry licensing schemes [Precedent D2.3, s. 23] and in the area of immigration [see *Immigration Act*, ss. 92-93].

Precedent D2.1: *The Business Practices Act*, S.M. 1990-91, c. 6 (C.C.S.M., c. B120), ss. 20(1)(d) & 20(2)-(6)

[In this precedent, the financial assurance of compliance is one element of an assurance of voluntary compliance.]

20(1) Where the director believes, on reasonable and probable grounds, that a supplier has been committing unfair business practices, the director, if satisfied that the supplier has ceased to do so, may, with the minister's written approval, accept from the supplier a written assurance . . . ., undertaking not to commit any unfair business practices in the future, and, without limiting the generality of the foregoing, the assurance may include all or any of the following additional undertakings:

(d) to provide a bond or other security to the director, in a form and an amount and containing terms and conditions to be determined by the director, guaranteeing that the supplier will comply with this Act, the regulations and the assurance; . . . .

20(2) Every security provided under an assurance given pursuant to subsection (1) shall be forfeited upon demand in writing by the director, where the supplier in respect of whose conduct the security is conditioned breaches any part of the assurance.

20(3) A supplier to whom a demand of forfeiture is directed under subsection (2) may appeal there from to the court within 30 days after the date of the demand, and the court may make such order with respect to the forfeiture as it deems fit.

[Subsections 20(4) to (6) deal with disposition of the proceeds.]

Precedent D2.2: *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 131-136

131. In this Part,

"financial assurance" means one or more of,

(a) cash, in the amount specified in the approval or order,

(b) a letter of credit from a bank, in the amount and terms specified in the approval or order,

(c) negotiable securities issued or guaranteed by the Government of *[the province]* or the Government of Canada in the amount specified in the approval or order,

(d) a personal bond accompanied by collateral security, each in the form, terms and amount specified in the approval or order,

(e) a bond of [an approved guarantee company], in the form, terms and amount specified in the approval or order,

(f) a bond of a guarantor, other than a guarantee company, accompanied by collateral security, each in the form, terms and amount specified in the approval or order,

(g) an agreement, in the form and terms specified in the approval or order, and

(h) an agreement, in the form and terms prescribed by the regulations;

132.(1) The Director may include in an approval or order in respect of a works a requirement that the person to whom the approval is issued or the order is directed provide financial assurance to the [Crown] for . . . .,

(a) the performance of any action specified in the approval or order;

(2) A requirement under subsection (1) may provide that the financial assurance may be provided, reduced or released in stages specified in the approval or order.

(3) The Director may amend an approval or order to change a requirement as to financial assurance contained in the approval or order.

133.(1) Failure to provide financial assurance specified in an approval or in accordance with a stage specified in an approval is grounds for revocation of the approval and for an order in writing by the Director prohibiting or restricting the carrying on, operation or use of the works in respect of which the financial assurance is required.

(2) Failure to provide financial assurance specified in an order or in accordance with a stage specified in an order is grounds for an order in writing by the Director prohibiting or restricting the carrying on, operation or use of the works in respect of which the financial assurance is required.

134.(1) Upon request, part or all of the financial assurance given in respect of a works may be returned or released pursuant to an order in writing by the Director.

(2) The Director may make an order mentioned in subsection (1) if satisfied that the financial assurance returned or released is not required in respect of the works.

135. The Director may convert a financial assurance to cash to be held by the Crown to the same purposes as the financial assurance or otherwise realize the financial assurance unless the financial assurance is renewed at least thirty days before it would otherwise expire.

136.(1) In the circumstances set out in subsection (2), the Director by order may require the performance of environmental measures for which the Crown holds financial assurance and may require the use of the financial assurance for the performance of the environmental measures.

(2) The Director may make an order mentioned in subsection (1) if the Director has reasonable and probable ground to believe that any environmental measure required by the approval or order in respect of which the financial assurance was given has not been or will not be carried out in accordance with the requirement.

(3) An order under this section shall be directed to the person to whom the approval or order under section 132 (financial assurance) was issued or directed and to any person that to the knowledge of the Director has provided the financial assurance for or on behalf of the person to whom the approval or order was issued, or shall be directed to the successor or assignee of that person.

(4) Upon the issuance of an order by the Director under subsection (1), the Crown may,

(a) use any cash;

(b) realize any bond or other form of security, and use the money derived therefrom; and

(c) enforce any agreement,

provided or obtained as the financial assurance for the performance of the environmental measures and may carry out the environmental measures.

Precedent D2.3: *Shipping Conferences Exemption Act, 1987*, R.S.C. 1985, c. 17, (3rd Supp.), s. 23

23.(1) The Commission may direct any member of a conference to deposit with the Commission such sum of money or other security as it deems necessary, not exceeding in amount or value ten thousand dollars, as a guarantee that the member will comply with this Act, and in the event of a failure to comply with a direction of the Commission under this subsection, the Commission may authorize the seizure and detention of any vessel of the member until such time as such sum of money or other security has been so deposited.

(2) Where a member of a conference is convicted of an offence under this Act or the *Competition Act* and fails to pay any fine imposed on it, the Commission may pay that fine out of any money, or from the proceeds of the sale of any security, deposited by that member pursuant to subsection (1).

(3) Any money or other security deposited with the Commission by a member of a conference under this section may be returned to that member or cancelled, as the case may be, where, in the opinion of the Commission, that security is no longer required.

Additional Precedents:

Business Practices Act, R.S.O. 1990, c. B.18, s. 9(3)

Environment Act, S.Y.T. 1991, c. 5, ss. 167-169

Immigration Act, R.S.C. 1985, c. I-2, s.18(1) - senior immigration officer may require any visitor or group or organization of visitors arriving in Canada to provide a deposit as a guarantee that the visitor, group or organization of visitors will comply with any terms and conditions imposed under the Act.

92(1) - Deputy Minister may issue a direction to any transportation company requiring it to deposit a sum of money or other prescribed security as a guarantee that the company will pay all amounts for which it may become liable under the Act after the direction is issued.

3. Alternative Dispute Resolution Options

A good starting point for policy thinking here is the U.S. *Administrative Dispute Resolution Act* [Precedent D3.1] which cautions that dispute resolution

- should be voluntary;
- should supplement other agency dispute resolution techniques; and
- is contraindicated in many situations.

This Manual includes examples of statutory invitations to the two sides to a dispute to negotiate a mutually satisfactory settlement [Precedent D3.2]. When disputes relate to very specific differences, perhaps confined to a particular site or other confined locality, legislation might direct disputes to be settled by the local enforcement officer [see *Fisheries Act*, s. 53]. The common factor in ADR techniques, in terms of regulatory design, is the recognition as a matter of compliance policy that regulatory disputes will arise, that the scheme of regulation will be materially affected by those disputes and that there should be an efficient and timely way to resolve those disputes without involving the courts.

The options presented in this section are progressively more structured dispute resolution techniques to which the parties voluntarily consent. From the base to the peak of the "ADR pyramid" the hierarchy of techniques is: negotiation, mediation, conciliation and arbitration.

Precedent D3.1: *Administrative Dispute Resolution Act*, 5 USC., s.582

582.(a) An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.

(b) An agency shall consider not using a dispute resolution proceeding if:

(1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) maintaining established policy is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) the matter significantly affects persons or organizations who are not parties to the proceeding;

(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances and a dispute resolution proceeding would interfere with the agencies fulfilling that requirement.

(c) Alternative means of dispute resolution authorized (here) are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques." (emphasis added)

Negotiation

Negotiation is the first level of the "ADR pyramid". It involves the self-resolution of a dispute by the parties in dispute without resort to a third party. In its 1989 report, *"Alternative Dispute Resolution: A Canadian Perspective"*, the Canadian Bar Association described negotiation as

> "any form of verbal communication, direct or indirect, whereby parties to a conflict of interest discuss, without resort to arbitration or other judicial processes, the form of any joint action which they might take to manage a dispute between them".

ADR-directed negotiation references are not commonly found in Canadian regulatory legislation. In most schemes, no provision would be made for interparty discussions directed at resolving disputes before they become a regulatory-based problem or issue. On the other hand, a statutory direction to parties that they should attempt "so far as possible...[to]...mutually work out a plan of proper [compliance] practices..." to govern their dealings may induce the affected private interests to develop their own compliance requirements in the first instance. [Precedent D3.2].

Precedent D3.2: *Agricultural Service Board Act*, R.S.A. 1980, c. A-11, ss. 15 & 16(1)

[If the administrative authority finds that a detrimental loss of soil is taking place on land, or that the productivity of land is seriously affected, the land may be declared to be subject to supervision.]

15(1) When land has been declared subject to supervision . . . ., the agricultural fieldsman and the representative of the Department on the [Agricultural Service B]oard shall consult with and advise the owner or occupant of the land, and so far as possible they shall mutually work out a plan of proper farming

practices which the owner or occupant shall undertake to follow over a specified period of years to restore the productivity of the land.

16(1) When the board

(b) is satisfied that in a case where land has been declared subject to supervision . . . .

(i) the agricultural fieldsman and the representative of the Department on the board were unable to work out a plan of proper farming practices that the owner or occupant would undertake to follow,

(ii) the owner or occupant has refused or neglected to follow a plan or proper farming practices so worked out, [or]

(iv) notwithstanding any plan . . . ., the results have been unsatisfactory,

it may recommend in writing that the control of the land be taken from the owner and occupant and that an order of reclamation of the land be issued by the council.

Mediation

The Canadian Bar Association, in its report on alternative dispute resolution, gives the following working definition of mediation:

> "the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no decision-making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute".

The need for a mediation function is most pronounced when the regulatory program covers a range of potential conflicts between the regulatee's interests and more diffused or community interests. The issues in dispute are not simply enforcement questions; rather, the parties must be brought together to bring about a measure of 'regulatory peace' in which compliance-supportive behaviour is maximized (given available technology and compliance costs) in terms of community expectations. One option is to provide for the appointment of a third party mediator with or without the consent of all parties. This approach is taken in Precedent D3.3 which empowers the Minister "where the conflicting parties concur, [to] appoint an environmental mediator acceptable to the parties to mediate between persons involved in an environmental conflict".

Another option is to give the regulatory agency the power to mediate complaints, disputes or other conflicts arising under the regulatory statute. Initially, this seems inconsistent with the

definition of mediation, which stresses that a mediator should be "an acceptable, impartial and neutral third party who has no decision-making power" since a regulatory agency has none of these attributes. Nonetheless, mediation powers are commonly extended to the enforcement or regulatory authority in two situations. In the first, complaints of non-complying behaviour by a regulatee are treated as questions of accommodation and dispute settlement rather than issues of investigation and enforcement by the regulatory agency. This approach has been uniformly followed in provincial trade practices legislation involving consumer complaint handling [Precedent D3.4]. In these cases the regulator is commonly faced with a large number of public or consumer complaints. Many of the complaints raise *prima facie* violations of the statute but many may be quite minor complaints, for which enforcement resources are neither available nor advisable. There is a fine line between exercising a mediation power and taking up the formal investigation power when that authority resides in the same person.

In the second situation, the regulator is empowered to settle disputes (e.g. over rates by regulated carriers, see Precedent D3.5) where the disputing parties voluntarily refer the problem for resolution to the regulator. This is quite different from the appointment of fact finders by a Labour Relations Board to help the parties reach agreement on an issue that is in dispute [see *Public Service Reform Act*, S.C. 1992, c. 54, ss. 54.1-54.6].

Precedent D3.3: *The Environment Act*, S.M. 1987-88, c. 26 (C.C.S.M., c. E125), s. 3(3)

3(3) The minister may, where the minister deems it advisable, and where the conflicting parties concur, appoint an environmental mediator acceptable to the parties to mediate between persons involved in an environmental conflict, and the mediator so appointed shall, within six weeks after completion of the mediation, report to the minister the results of the mediation.

Precedent D3.4: *The Business Practices Act*, S.M. 1990-91, c. 6 (C.C.S.M., c. B120), s. 14

14(1) The [Director of Business Practices] may attempt to resolve consumer complaints of unfair business practices by mediation.

14(2) The director may refuse to mediate or investigate a complaint if the subject matter of the complaint more closely relates to other applicable federal or provincial legislation or to municipal by-laws, or for any other reason.

Precedent D3.5: *National Transportation Act, 1987*, R.S.C. 1985, c. 28, (3rd Supp.)8, s. 46

46.(1) Where there is a dispute between

(a) a shipper and a carrier respecting rates or conditions associated with the movement of goods, or

(b) two or more carriers of goods respecting any matter to which this Act . . . . applies,

all the parties to the dispute may, by agreement, refer the dispute to the Agency for mediation.

(2) Except where in the opinion of the Agency it is not practicable to mediate a dispute referred to it under subsection (1), the Agency shall assign an officer or employee of the Agency to mediate the dispute.

(3) All matters relating to the mediation of a dispute shall be kept confidential unless the parties to the dispute otherwise agree, and information provided by a party for the purposes of the mediation shall not be used for any other purpose except with the consent of that party.

(4) Unless the parties to the dispute otherwise agree, mediation of the dispute shall be completed within thirty days after the dispute is referred to the Agency.

Additional Precedents:

Administrative Dispute Resolution Act, 5 U.S.C., ss. 583 - 584

Environmental Protection Act, R.S.O. 1990, c. E.19, s. 172

Public Service Reform Act, S.C. 1992, c. 54, ss. 54.1 - 54.6

Conciliation

Conciliation is virtually indistinguishable from mediation as an ADR procedure. The terms are used interchangeably. Under either heading, the regulatory program provides a staff expert or an independent third party who, with the consent of the disputants, listens to their arguments and attempts to guide the discussion towards a mutually acceptable resolution. Conciliation or mediation procedures leave final agreement in the hands of the parties but incorporates the assistance of a conciliator or mediator. In the ADR pyramid, if these efforts fail, or the parties prefer to have a neutral person make a decision for them or to adjudicate the dispute, then the parties may submit the dispute to arbitration or commence litigation.

Historically, conciliation (instead of mediation) has been used as a term of art in Canadian drafting practice in labour relations and human rights legislation [Precedent D3.6]. Strictly speaking, the parties in dispute are not required to give their consent to the appointment of a conciliator and neither side is bound by the actions of the conciliator, whose task is to bring the parties together to a mutually acceptable, self-imposed settlement of their dispute.

Precedent D3.6: *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, ss. 47 & 50(4)

47.(1) Subject to subsection (2), the [Canadian Human Rights] Commission may, on the filing of a complaint, or if the complaint has not been [otherwise settled or dismissed], appoint a person, in this Part referred to as a "conciliator", for the purpose of attempting to bring about a settlement of the complaint.

(2) A person is not eligible to act as a conciliator in respect of a complaint if that person has already acted as an investigator in respect of that complaint.

(3) Any information received by a conciliator in the course of attempting to reach a settlement of a complaint is confidential and may not be disclosed except with the consent of the person who gave the information.

50.(4) [A] conciliator appointed to settle a complaint is not a competent or compellable witness at a hearing of a [Human Rights Tribunal] appointed to inquire into the complaint.

Arbitration

Arbitration refers to a dispute resolution process in which the disputants present evidence and arguments to a neutral third party (other than a judge) who has the power to hand down a binding decision, generally based on objective standards. The reference to arbitration may arise after the breakdown of the negotiation or mediation. Or it might be the parties' first and last resort to a non-court resolution of their conflict.

Unlike mediation, arbitration provides for final, binding adjudication of a dispute between two or more parties whose relationship comes under the purview of the regulatory program. Both parties may be regulatees in the broad sense, or one might be a regulatee and the other a consumer, tenant or other non-regulated disputant.

Arbitration may be elective. In such a situation, the complainants are given the right to refer their case to the regulatory agency [Precedent D3.7] or to a third party arbitrator [Precedent D3.8; and see *Commercial Arbitration Act*, ss. 9-10]. The regulatory agency might be chosen where it has particular expertise and technical familiarity with the issues commonly in dispute. A right of review to an appeal body may also be provided for. Experience suggests that this type of approach be reserved for dispute resolution processes arising in regulatory programs where the disputants have ongoing and/or significant economic relationships with each other. As suggested by the U.S. *Administrative Dispute Resolution Act* [Precedent D3.1], the regulatory agency may be given the right to deny the resort to arbitration where the subject-matter in dispute raises issues of precedential significance beyond the two parties involved [see also Precedent D3.8, s. 48(3)].

Sometimes arbitration is compulsory. In recent years, particularly at the provincial level, regulatory statutes concerned with citizen protection measures (investors, tenants, consumers, etc.) have employed arbitration provisions as a required method of dispute resolution for complaints against regulatee firms. These statutes deem the affected transactions (giving rise to the dispute) to include an arbitration clause. In limited circumstances, the parties may waive or vary the arbitration provision [Precedent D3.9, s.13(3)].

Precedent D3.7: *Canada Agricultural Products Act*, R.S.C. 1985, c. 20, (4th Supp.), ss. 9-12

9.(1) A dealer may, within the prescribed time, file with the Board a written complaint against a dealer licensed under this Act for failure to comply with the regulations relating to grades, standards or marketing of prescribed agricultural products in import, export or inter-provincial trade.

(2) The Board shall hear a complaint and

(a) where it finds that the complaint is not well founded, the Board shall dismiss it;

(b) where it finds that the complaint is well founded, the Board shall make such order as it considers will provide adequate relief from the activity complained of, including, if necessary, an order for the payment of compensation and interest; and

(c) the Board shall give reasons for its decision where reasons are requested by any party to the proceedings.

10.(1) Where a party to any complaint proceedings considers itself aggrieved by a decision of the Board in those proceedings, the party may apply to the Tribunal for a review of the decision, and the application shall be brought within thirty days after the Board made the decision or within such longer period as the Tribunal may allow, either before or after the expiration of the thirty days.

(2) After considering the evidence and any other material that was before the Board, any additional evidence received and accepted by the Tribunal and any representations made to the Tribunal by or on behalf of any party to the proceedings, the Tribunal may affirm, vary or cancel a decision of the Board and, if it cancels a decision to make an order, the Tribunal may make such other order as it considers ought to have been made.

11.(1) Subject to subsection (3), any person affected (b) an order of the Board or the Tribunal may file in the Federal Court for immediate registration a copy of the order, exclusive of any reasons given for it, but the order shall not be filed until at least thirty days after the day on which the order was made, or the day provided in the order for compliance with it, whichever is the later day.

(2) On filing in the Federal Court, an order shall be registered in that Court and, when registered, it shall have the same force and effect, and all proceedings may be taken, as if the order were a judgment obtained in that Court.

12. Subject to section 11, the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law in relation to any matter over which the Board is given jurisdiction by section 9 and, subject to section 10 of this Act and section 28 of the *Federal Court Act*, decisions of the Board and the Tribunal are final and conclusive and shall not be appealed or reviewed.

Precedent D3.8: *National Transportation Act, 1987*, R.S.C. 1985, c. 28, (3rd Supp.), ss. 47 - 57

47. Sections 48 to 57 apply only in respect of matters arising between shippers and carriers that involve [the carriage of goods to which certain legislation applies].

48.(1) A shipper who is dissatisfied with the rate or rates charged or proposed to be charged by a carrier for the movement of goods or with any of the conditions associated with the movement of goods may, where the matter cannot be resolved between the shipper and the carrier, submit the matter, in writing, to the Agency for a final offer arbitration.

(2) A copy of a submission to the Agency under subsection (1) shall be served on the carrier by the shipper and the submission shall contain

(a) the final offer of the shipper to the carrier in the matter;

(b) the last offer received by the shipper from the carrier in the matter;

(c) an undertaking by the shipper to the Agency whereby the shipper agrees to pay to the arbitrator the fee for which the shipper is liable under section 53 as a party to the arbitration; and

(d) the name of the arbitrator, if any, chosen from the list of arbitrators referred to in section 56, that the shipper and the carrier have agreed should conduct the arbitration.

(3) The Agency shall not cause any matter submitted to it by a shipper under subsection (1) to be arbitrated if

(a) the shipper has not, at least fifteen days prior to the submission, served on the carrier concerned a written notice indicating that the shipper intends to submit the matter to the Agency for a final offer arbitration; or

(b) the Agency has, within ten days after receipt of the submission, advised the shipper in writing that the Agency is of the opinion that

(i) the matter raises issues of general public interest and that interests other than those of the shipper and carrier concerned may be materially prejudiced by the matter submitted, and

(ii) the matter should be investigated by the Agency [under the Act].

(4) Where a notice referred to in paragraph (3)(a) has been served on a carrier, the carrier may, within seven days after the notice is served, request that the shipper, in writing, agree with the carrier to ship the goods to which the arbitration relates in accordance with the decision of the arbitrator.

(5) Where the Agency finds that a shipper is not in a position to enter into an agreement as described in subsection (4) for any reason that is not likely to frustrate the arbitration, the Agency may allow the shipper to provide a written bona fide offer to ship the goods to which the arbitration relates, in accordance with the decision of the arbitrator, as compliance with that subsection.

(6) Where the Agency finds that the shipper has failed to comply with a request under subsection (4), the Agency shall not refer the matter for arbitration under section 49 unless the Agency finds that the terms of the requested agreement exceed the terms described in subsection (4).

49.(1) On the submission of a matter to the Agency for a final offer arbitration, the Agency shall refer the matter for the arbitration

(a) to the chosen arbitrator, if any, referred to in paragraph (48)(2)(d), if that arbitrator is available to conduct the arbitration; or

(b) where no arbitrator is chosen as contemplated by paragraph (a) or the arbitrator so chosen is, in the opinion of the Agency, unavailable to conduct the arbitration, to such other arbitrator, chosen by the Agency from the list of arbitrators referred to in section 56, as the Agency determines is appropriate and available to conduct the arbitration.

(2) The Agency may, at the request of the arbitrator, provide administrative, technical and legal assistance to the arbitrator.

50.(1) In the absence of an agreement by the arbitrator and the parties as to the procedure to be followed, a final offer arbitration shall be governed by such rules of procedure as the Agency may, with the approval of the Governor in Council, prescribe.

(2) The arbitrator shall conduct the arbitration proceedings as expeditiously as possible and, subject to the procedure referred to in subsection (1), in such manner as the arbitrator considers appropriate, having regard to the circumstances of the matter.

(3) Within fifteen days after the Agency refers the matter for arbitration, the parties shall exchange the information that they intend to submit to the arbitrator in support of their final offers.

(4) Within seven days after receipt of the information referred to in subsection (3) each party may direct interrogatories to the other, which shall be answered within fifteen days after receipt thereof.

(5) If a party unreasonably withholds information that is subsequently deemed to be relevant by the arbitrator, such withholding shall be taken into account by the arbitrator in his decision.

51.(1) The arbitrator shall, in conducting a final offer arbitration between a shipper and a carrier, have regard to the information provided to the arbitrator by the parties in support of their final offers and, unless the parties agree to limit the amount of information to be provided to the arbitrator, such additional information as is provided to the arbitrator by the parties at the request of the arbitrator.

(2) Unless the parties otherwise agree, in rendering a decision the arbitrator shall have regard to whether there is available to the shipper an alternative, effective, adequate and competitive means of transporting the goods to which the matter relates and to all considerations that appear to the arbitrator to be relevant to the matter.

52.(1) The decision of the arbitrator in conducting a final offer arbitration shall be the selection by the arbitrator of the final offer of either the shipper or the carrier and, for the purpose of this section, the final offer of

(a) the shipper shall be the shipper's final offer set out in the submission to the Agency under subsection 48(1); and

(b) the carrier shall be the last offer received by the shipper from the carrier as set out in the submission to the Agency under subsection 48(1) or such other offer as the carrier, within ten days after the service referred to in subsection 48(2), specifies in writing to the shipper and the Agency as the carrier's final offer.

(2) The decision of the arbitrator shall

(a) be in writing;

(b) unless the parties otherwise agree, be rendered within ninety days after the date on which the submission for the final offer arbitration was received by the Agency from the shipper; and

(c) unless the parties otherwise agree, be rendered so as to be applicable in respect of the parties to the arbitration for a period of one year or such lesser period as may be appropriate, having regard to the negotiations between the parties that preceded the arbitration.

(3) The carrier shall, forthwith after the arbitrator's decision, set out the rate or rates or the conditions associated with the movement of goods that have been selected by the arbitrator in a tariff of the carrier, unless, where the carrier is entitled to keep the rate or rates or conditions confidential, the parties to the arbitration agree to include the rate or rates or conditions in a contract that the parties agree to keep confidential . . . .

(4) No reasons shall be set out in the decision of the arbitrator.

(5) The arbitrator shall, where requested by all of the parties to the arbitration within thirty days after the decision of the arbitrator, give reasons in writing for the decision.

(6) Except where both parties otherwise agree,

(a) the decision of the arbitrator on a final offer arbitration shall be final and binding and be applicable to the parties as of the date on which the submission for the arbitration was received by the Agency from the shipper; and

(b) the arbitrator shall direct in the decision that interest at a reasonable rate specified by the arbitrator shall be paid to one of the parties by the other on moneys that, as a result of the application of paragraph (a), are owed by a party for the period between the date referred to in that paragraph and the date of the payment.

(7) Moneys and interest thereon referred to in paragraph (6)(b) that are owed by a party pursuant to a decision of the arbitrator shall forthwith be paid to the other party.

53 (1) The Agency may fix the fee to be paid to an arbitrator for the costs of, and the services provided by, the arbitrator in the final offer arbitration proceedings.

(2) The shipper and the carrier shall share in the payment of the fee fixed under subsection (1) and in the cost of the preparation of any reasons requested pursuant to section 52 in equal amounts, whether or not the proceedings are terminated pursuant to section 55.

54. Where the Agency is advised that any party to a final offer arbitration wishes to keep matters relating to the arbitration confidential,

(a) the Agency and the arbitrator shall take such measures as are reasonably necessary to ensure that the matters are not disclosed by the Agency or the arbitrator or during the arbitration proceedings to any person other than the parties thereto; and

(b) no reasons for the decision given pursuant to subsection 52(5) shall contain those matters or information included in a contract that the parties thereto agreed to keep confidential.

55. Where, prior to the rendering of the decision of the arbitrator on a final offer arbitration, the parties advise the Agency or the arbitrator that they agree that the matter being arbitrated should be withdrawn from arbitration, the arbitration proceedings in respect of the matter shall forthwith be terminated.

56.(1) The Agency shall, from time to time, in consultation with representatives of shippers and carriers, establish a list of persons who are agreeable to act as arbitrators in final offer arbitrations.

(2) A separate list of persons may be established under subsection (1) in respect of each or any mode of transportation, as the Agency sees fit.

(3) The Agency shall cause the list of persons to be made known to representatives of shippers and carriers throughout Canada.

57. A shipper who has submitted a matter to the Agency for a final offer arbitration under section 48 is not entitled to request an investigation of the same matter by the Agency under [the Act].

Precedent D3.9: *Residential Tenancy Act*, S.B.C. 1984, c. 15, s. 13, as am. by S.B.C. 1989, c. 60, s. 6 and S.B.C. 1990, c. 53, s. 5; ss. 38 - 45, as am. by S.B.C. 1986, c. 3, s. 53 and S.B.C. 1987, c. 24, s. 71 and S.B.C. 1989, c. 60, ss. 9-12 and S.B.C. 1989, c. 40, s. 187 and S.B.C. 1990, c. 53, s. 10

13.(1) A landlord and tenant shall be deemed to have agreed to submit [certain applications for orders in relation to certain disputes] to an arbitrator.

(2) Subsection (1) does not apply where

(a) an agreement has been entered into under subsection (3),

(c) a court, on application, orders otherwise, or

(d) in the case of a monetary claim the amount claimed is more than the monetary limit specified [for Small Claims court].

(3) A landlord and tenant may agree in writing at any time that subsection (1) does not apply.

(4) Subject to an order under subsection (2)(c), an agreement under subsection (3) is not enforceable unless

(a) it is in writing, and

(b) a copy of it is delivered to the other party as soon as practicable, and in any event not later than 21 days after it was entered into.

(5) Where an agreement is made under subsection (3), the agreement shall be conclusively deemed to apply with respect to all applications referred to in subsection (1).

38.(1) A landlord and tenant may, by agreement, designate an arbitrator to conduct an arbitration of an application referred to under section 13(1).

(2) Where a landlord requires a tenant or a tenant requires a landlord to reach an agreement under subsection (1)

(a) as a condition to entering into a tenancy agreement, or

(b) as a term of a tenancy agreement,

the agreement under subsection (1) is unenforceable.

39.(1) Where a landlord and tenant do not designate an arbitrator under section 38(1), either the landlord or tenant may apply to the registrar to designate an arbitrator.

(4) [On] receipt of an application under subsection (1), the registrar or a person authorized by him shall

(a) designate an arbitrator from among the arbitrators appointed under section 40(1), and

(b) specify the time, date and place of the arbitration hearing.

40.1(1) Where an arbitrator is designated to conduct an arbitration of an application referred to in section 13(1) and

(a) all parties to the arbitration give consent in writing to the making of an order under this section, and

(b) other landlords or tenants, who are not parties to the arbitration but whose disputes raise substantially similar issues in substantially similar circumstances, agree in writing to be bound by the arbitration decision,

the arbitrator may order that

(c) only one fee . . . . be paid in respect of this arbitration proceeding,

(d) landlords or tenants referred to in paragraph (b) are parties to and are bound by the outcome of the arbitration, and

(e) the hearing of other arbitrations under this Part respecting landlords or tenants referred to in paragraph (b) are deferred until this arbitration is heard and decided.

(2) An arbitrator may make an order under subsection (1)

(a) on application by any person before the date fixed for the commencement of the arbitration hearing, or

(b) on the motion of any person at the arbitration hearing.

41.(1) Notwithstanding any other provision of this Act, an arbitrator may refuse to conduct a hearing where he considers the matter is frivolous, vexatious, trivial or has not been initiated in good faith.

(4) An arbitrator may make any finding of fact or law which is necessary or incidental to the making of a decision or order under this Act.

42.(1) In a matter before him, an arbitrator

(a) may conduct the hearing in the manner he considers necessary,

(b) shall make his decision on the merits of the matter and is not bound by legal precedent,

(c) may receive and accept, on oath, affidavit or otherwise, the evidence or information he considers necessary and appropriate whether or not the evidence or information would be admissible in a court,

(d) shall, at the request of a party to an arbitration, make his decision available in writing,

(e) may, with the consent of the parties to the arbitration, hear a related matter over which he has jurisdiction under this Act, at the same time as the matter in respect of which he was designated an arbitrator, and may, in that event, order that section 39 or any part of it does not apply to that related matter, and

(f) may correct any clerical mistake or error in his decision arising from an accidental slip or omission.

(2) For the purposes of this section, a hearing may include a submission

(a) made orally including by telephone, or

(b) made in writing,

but another party to the hearing shall be given an opportunity, at that or a later time and in the manner the arbitrator considers appropriate, to rebut the submission.

(3) On [certain applications], an arbitrator may make an interim order.

(4) A party to a hearing may be represented by an agent or by a barrister and solicitor.

(5) An arbitrator may order a party to an arbitration to bear all or any part of the cost of the fee under section 39.

43.(1) An arbitrator may, at the request of a party to the hearing or on his own motion, summon and enforce the attendance of witnesses and compel them to give evidence on oath and to produce the records and things he considers requisite to a full consideration of matters before him, in the same manner as the Supreme Court.

(2) The failure or refusal of a person on the summons of an arbitrator to attend, to take an oath, to answer questions or to produce the records and things in his custody or possession makes the person, on application to the Supreme Court, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

44.(1) An arbitrator shall give his decision or order without delay and, in any event, no later than 30 days after the hearing.

(2) A decision or order of the arbitrator is final and binding on the parties.

(3) A decision or order of an arbitrator may be filed in the Supreme Court and, on being filed, has the same force and effect and all proceedings may be taken on it as if it were an order of the court.

(4) Notwithstanding subsection (3), a decision or order filed in a court under subsection (3) may not be appealed from.

Additional Precedents:

Administrative Dispute Resolution Act, 5 U.S.C., ss. 585 -591

Arbitration Act, 1991, S.O. 1991, c. 17 (based on the Uniform Law Conference of Canada, *Uniform Arbitration Act*)

Commercial Arbitration Act, R.S.C. 1985, c. 17, (2nd Supp.), as am. by R.S.C. 1985, c.1 (4th Supp.) ss. 8-10

Canada Petroleum Resources Act, R.S.C. 1985, c. 36 (2nd Supp.), s. 102 - disputes between occupier of frontier lands and statutory interest holder may be submitted to arbitration conducted in accordance with the regulations

4. Administrative Orders and Remedies

Every regulatory agency must have the necessary powers to deal quickly with actual or apprehended acts of non-compliance in cases where public safety is at stake or in other emergencies where the public could suffer serious damage. Such powers might also be resorted to where the non-compliance could prejudice the integrity of the regulatory program. In these cases, non-coercive enforcement options will have failed. The risk of real or expected harm or loss calls for direct regulatory intervention to curtail the continuing unlawful conduct. At a minimum, the regulator must be empowered to issue an activity cessation order or to apply to a court or other adjudicative body for a cease and desist order against the activity in question.

Every regulatory enforcement scheme incorporates, directly or indirectly, a cessation power. This front-line enforcement tool very often is declared to be the first of several related administrative remedies. Taken together, these remedial powers appear much like the list of compliance actions that might be included in an assurance of voluntary compliance. The difference here, of course, is that the regulator is directing a series of compliance steps to be undertaken by the regulatee; it is not a negotiation.

In a recent Alberta environmental Bill [Precedent D4.1], the Director is given authority to issue an enforcement order requiring the suspension, cancellation or shutting down of an activity and ordering the regulatee to take specific compliance steps. This is quite similar to the B.C. *Financial Institutions Act* which empowers the enforcement authority to order a regulatee to "do anything that the [enforcement authority] considers to be necessary to remedy the situation" [Precedent D4.2]. The exercise of these powers is tied tightly to the regulator's having "reasonable belief" that non-complying conduct has occurred, is occurring or is expected to occur.

Precedent D4.1: *Environmental Protection and Enhancement Act*, Bill 23, 22nd Leg, 4th Sess., 2nd Reading, June 4, 1992 (Alta.), cl. 198 - 201 (did not pass)

198.(1) Where in the Director's opinion a person has contravened [certain sections of the Act] the Director may, whether or not the person has been charged or convicted in respect of the contravention, issue an enforcement order ordering any of the following:

(a) the suspension or cancellation of an approval or certificate of qualification;

(b) the stopping or shutting down of any activity or thing either permanently or for a specified period;

(c) the ceasing of the construction or operation of any activity or thing until the Director is satisfied the activity or thing will be constructed or operated in accordance with this Act;

(d) the doing or refraining from doing of any thing referred to in [specified sections, including remedying the effects of a release of a substance into the environment, monitoring and measuring the release of a substance, installing or replacing equipment, refraining from distributing a contaminated product, maintaining records, reporting to the Director and preparing environmental audits], in the same manner as if the matter were the subject of an environmental protection order;

(e) specifying the measures that must be taken in order to effect compliance with this Act.

(2) Where an enforcement order specifies measures that must be taken under subsection (1)(e), the measures may impose requirements that are more stringent than applicable requirements in the regulations.

(3) An enforcement order issued under subsection (1) shall contain the reasons for making it and shall be served on the person to whom it is directed.

199.(1) Where an investigator or the Director has reason to believe that a person has contravened [certain sections of the Act concerning waste], the investigator or the Director may issue an enforcement order to that person in the form and containing the matters provided for in the regulations.

(2) If a person to whom an enforcement order is issued under subsection (1) complies with the order, no prosecution may be commenced for the offence under [the contravened section] in respect of the facts that gave rise to the order.

(3) An enforcement order issued under subsection (1) shall contain the reasons for making it and shall be served on the person to whom it is directed.

200.(1) The director may

(a) amend a term or condition of, add a term or condition to or delete a term or condition from an enforcement order,

(b) cancel an enforcement order, or

(c) amend a clerical error in an enforcement order.

(3) A copy of an enforcement order issued under subsection (1) must be served on the same person to whom the original order was directed.

201.(1) If the person to whom an enforcement order is directed fails to comply with the enforcement order, the Minister may apply to the Court of Queen's Bench for an order of the Court directing that person to comply with the enforcement order.

(2) This section applies whether or not a conviction has been adjudged for an offence under this Act.

Precedent D4.2: *Financial Institutions Act*, S.B.C. 1989, c. 47, ss. 243(1) & (2)

243.(1) In this section "committing an act or pursuing a course of conduct" includes failing or neglecting to perform an act or failing or neglecting to pursue a course of conduct.

(2) Where, in the opinion of the superintendent, a person is committing an act or pursuing a course of conduct that

(a) does not comply with this Act [or] the regulations . . . .,

(b) does not comply with a condition of [a licence, permit, business authorization, consent or order under this Act],

(c) might reasonably be expected to result in a state of affairs not in compliance with this Act [or] the regulations . . . ., [or]

(d) does not comply with an undertaking given to the superintendent or the minister, ...

then, the superintendent may

(f) order the person to

(i) cease doing the act,

(ii) cease pursuing the course of conduct, or

(iii) do anything that the superintendent considers to be necessary to remedy the situation, or

(g) where the person is a financial institution and the superintendent considers it appropriate to do so, give the financial institution an opportunity to make a written voluntary compliance agreement with the superintendent, by which the financial institution undertakes to rectify the act or course of conduct.

Additional Precedent: *Health and Safety at Work Etc Act 1974*, c. 37, ss. 21 - 24, as amended (U.K.)

Cease and Desist Order

Where non-complying conduct significantly impacts on health, safety, environmental well-being or public confidence in financial institutions, it is likely that the affected regulatory agency will be given the unilateral authority to order the cessation of the activity in question. The harm, actual or apprehended, must be stopped.

The main issue for the legislative drafter is to the procedural safeguards or requirements for the exercise of this unilateral power. Apart from requiring that the regulator have "reasonable and probable grounds", the terms and conditions for the exercise of the cessation order will vary from case to case. Precedent D4.3 is an example of a prospective order to take effect after 21 days, subject to court review. In Precedent D4.5, the tribunal may make an interim order on application by the director and notice to the parties [Also see *Environmental Protection Act* (Ont.), ss. 7-8, for detailed procedural requirements re notice, written reasons, etc; for an excellent overall treatment, see Precedent D4.4, ss. 159-163 and 166].

Precedent D4.3: *The Business Practices Act*, S.M. 1990-91, c. 6 (C.C.S.M., c. B120), s. 18

18.(1) Where the director believes on reasonable and probable grounds that a supplier is committing unfair business practices, the director may, after giving the supplier a reasonable opportunity to be heard and with the minister's written approval, order the supplier to cease committing the unfair business practices and, subject to subsection (3), the order takes effect upon the expiry of 21 days after it is served on the supplier.

(2) A supplier against whom an order is made under subsection (1) shall be served with a copy of the order together with written reasons for the making thereof.

(3) The supplier named in an order under subsection (1) may appeal from the order to the court within 21 days after being served therewith and in the event of such an appeal the order is stayed pending the outcome of the appeal.

(4) Where a supplier appeals from an order of the director in accordance with subsection (3), the court may

(a) confirm or vary the order;

(b) set aside the order;

(c) make such other order as it considers proper;

(d) attach such terms and conditions to the order of the director as it considers proper.

(5) The director and the supplier who is appealing, and such other persons as the court may direct, are parties to proceedings before the court in an appeal under this section.

(6) In an appeal under this section, the director has the burden of establishing that the appellant is committing or has committed the unfair business practices set out in the director's order.

Precedent D4.4: *Environment Act*, S.Y.T. 1991, c. 5, ss. 159-161 & 166

159.(1) Where an environmental protection officer has reason to believe

(a) that a development or activity is causing or is likely to cause irreparable damage to the natural environment; or

(b) . . . . that the development or activity is causing actual or imminent harm to public health or safety,

the environmental protection officer may in writing order the person in control of the development or conducting the activity to shut down the development or cease the activity causing the damage to the natural environment or the harm to public health or safety, or to take such other action as may be necessary to prevent, remedy or mitigate the damage to the natural environment or harm to public health or safety.

(2) An order issued under subsection (1) expires seven clear days from the date of issue or after such shorter period as may be provided for in the order.

(3) An environmental protection officer may extend the expiry date of an order issued under subsection (1) for one period of seven days.

(4) The Minister may extend the expiry date of an order issued under subsection (1).

160.(1) Where the Minister has reason to believe that

(a) a person has contravened or is contravening this Act or the regulations or a term or condition of a permit or order;

(b) a development or activity is causing or is likely to cause a significant adverse effect; or

(c) a development or activity constitutes an actual or likely threat to public health or safety,

the Minister may issue an environmental protection order in writing to the person in control of the development or conducting the activity

(d) to shut down the development or to cease the activity until the Minister is satisfied the development or activity is in compliance with this Act, the regulations, or a permit or order;

(e) to prevent, remedy or mitigate any significant adverse effect or threat to public health or safety;

(2) An environmental protection order issued under subsection (1) shall contain the reasons for making it and a deadline for compliance with a requirement in subsections (1)(d) [or] (e) . . .

(4) The Minister shall, wherever practicable, provide prior notification of his or her intent to issue an environmental protection order to the permit holder and to any other person directly affected and allow a reasonable opportunity for the person to make representations.

161.(1) In addition to any other requirements that may be included in an environmental protection order, such an order

(a) may require the submission of information;

(b) shall specify the measures that must be taken in order to effect compliance with this Act, the regulations, or a permit or order; and

(c) shall be in the form and contain the material required by the regulations.

(2) An environmental protection order may be issued notwithstanding that the development or activity that is the subject of the environmental protection order

(a) is the subject of a valid permit; or

(b) at the time the environmental protection order is made, is in compliance with this Act, the regulations or a permit or order.

166.(1) The Minister may,

(a) after giving reasonable notice, amend or suspend a term or condition in an environmental protection order, or add a term or condition to, or delete a term or condition from an environmental protection order; or

(b) cancel an environmental protection order.

(2) Before taking an action under subsection (1) the Minister may hold a hearing.

Precedent D4.5: *Competition Act*, R.S.C. 1985, c. C-34, s. 100, as am. by R.S.C. 1985, c. 19, (2nd Supp.), s. 45

[The Director of Investigation and Research may apply to the Competition Tribunal for an interim order forbidding actions directed toward the completion of a proposed merger pending the bringing of an application under section 92 to stop the merger. This administrative cessation order is similar to an interim injunction.]

100.(1) Where, on application by the Director, the Tribunal finds, in respect of a proposed merger in respect of which an application has not been made under section 92 or previously under this section, that

(a) the proposed merger is reasonably likely to prevent or lessen competition substantially and, in the opinion of the Tribunal, in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under section 92 because that action would be difficult to reverse, or

(b) there has been a failure to [notify the Director about the proposed merger and supply required information in accordance with the Act],

the Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of the proposed merger.

(2) Subject to subsection (3), at least forty-eight hours notice of an application for an interim order under subsection (1) shall be given by or on behalf of the Director to each person against whom the order is sought.

(3) Where the Tribunal is satisfied, in respect of an application made under subsection (1), that

(a) subsection (2) cannot reasonably be complied with, or

(b) the urgency of the situation is such that service of notice in accordance with subsection (2) would not be in the public interest,

it may proceed with the application ex parte.

(4) An interim order issued under subsection (1)

(a) shall be on such terms as the Tribunal considers necessary and sufficient to meet the circumstances of the case; and

(b) subject to subsection (5), shall have effect for such period of time as is specified therein.

(5) An interim order issued under subsection (1) in respect of a proposed merger shall cease to have effect

(a) in the case of an interim order issued on ex parte application, not later than ten days, or

(b) in any other case, not later than twenty-one days,

after the interim order comes into effect or, in the circumstances referred to in paragraph (1)(b), after [the requirements respecting the giving of notice and supplying of information are] complied with.

(6) Where an interim order is issued under paragraph (1)(a), the Director shall proceed as expeditiously as possible to commence and complete proceedings under section 92 in respect of the proposed merger.

Additional Precedent: *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 7-8 & 124-130

Compliance Order

A compliance order is the positive version of a cessation order, whereby the enforcement authority orders the regulatee to take affirmative steps to come into compliance with regulatory standards. It is much like an order of specific performance for immediate compliance. [Precedent D4.7 (order to comply within reasonable time specified in order); Precedent D4.6]

The procedural requirements for the exercise of the discretionary authority to issue a compliance order are exactly those discussed above for a cease and desist order.

Precedent D4.6: *Trust Companies Act*, R.S.A. 1980, c. T-9, s. 112

112 (1) If the Director is satisfied, on the basis of a return made by a company or on an inspection and examination of the company or otherwise, that the company is not complying with [certain sections of the Act], the Director may by order direct the company to so comply within 30 days after the day the order is served on the company.

(2) A company that fails to comply with an order of the Director under subsection (1) is guilty of an offence but it is a defence to a prosecution under this subsection that the company was not in default of compliance with the section or sections referred to in the order at the time the order was served on the company.

Precedent D4.7: *Fire Services Act*, R.S.B.C. 1979, c. 133, ss. 35 & 36

35. Where the owner or occupier of a hotel or public building fails to provide or keep in good repair . . . . a means of exit [or piece of equipment] required by this Part, the [inspector] may in writing order the owner or occupier to comply with the requirement within a reasonable time stated in the order. He shall deliver the order to the owner or occupier, who shall comply with it.

36. The owner or occupier may, within 10 days after the receipt of the order, appeal to the fire commissioner . . . .

Precedent D4.8: *Business Practices Act*, R.S.O. 1990, c. B.18, ss. 6, 7, 17(1)(c)

6.(1) Where the Director believes on reasonable and probable grounds that any person is engaging or has engaged in an unfair practice, the Director may order such person to comply with [the section prohibiting engagement in unfair practices] in respect of the unfair practice specified in the order.

(2) Where the Director proposes to make an order under subsection (1), the Director shall serve notice of the proposal on each person to be named in the order together with written reasons therefor.

(3) A notice under subsection (2) shall inform each person to be named in the order that the person is entitled to a hearing by [The Commercial Registration Appeal Tribunal] if he, she or it mails or delivers within fifteen days after the notice under subsection (2) is served notice in writing requiring a hearing to the Director and the Tribunal and the person may so require such a hearing.

(4) Where a person upon whom a notice is served under subsection (2) does not require a hearing by the Tribunal in accordance with subsection (3), the Director may carry out the proposal stated in the notice.

(5) Where a person requires a hearing by the Tribunal in accordance with subsection (3), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Director at the hearing, may by order direct the Director to carry out the proposal or to refrain from carrying out the proposal and to take such action as the Tribunal considers the Director ought to take in accordance with this Act and the regulations and for such purposes the Tribunal may substitute its opinion for that of the Director.

(6) The Tribunal may attach such terms and conditions to its order as it considers proper to give effect to the purposes of this Act.

(7) The Director and the person who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

7.(1) Despite section 6, the Director may make an order under subsection 6 (1) to take effect immediately where, in the Director's opinion, to do so is necessary for the protection of the public and, subject to subsections (3) and (4), the order takes effect immediately.

(2) Where the Director makes an order under subsection (1), he or she shall serve each person named in the order with a copy of the order together with written reasons therefor and a notice containing the information required to be in a notice referred to in subsections 6 (2) and (3).

(3) Where a person named in the order requires a hearing by the Tribunal in accordance with the notice under subsection (2), the Tribunal shall appoint a time for and hold the hearing and may confirm or set aside the order or exercise such other powers as may be exercised in a proceeding under section 6.

(4) Where a hearing by the Tribunal is required, the order expires fifteen days after the giving of the notice requiring the hearing but, where the hearing is commenced before the expiration of the order, the Tribunal may extend the time of expiration until the hearing is concluded.

(5) The Director and the person who has required the hearing and such other persons having a direct interest in the order as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

17.(1) Every person who, knowingly,

(c) fails to comply with any order . . . . made . . . . under this Act; . . . .

is guilty of an offence and on conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than one year, or to both.

Additional Precedents:

Environmental Protection Act, R.S.O. 1990, c. E.19, s. 44

Occupational Health and Safety Act, R.S.O. 1990, c. O.1, ss. 57-59

Resource Conservation and Recovery Act of 1976, 42 U.S.C., ss. 6928(a) - (c)

Other Administrative Orders

Administrative stop orders are for serious harm situations where the first enforcement priority is to stop the non-complying behaviour before further harm ensues. Administrative compliance orders are enforcement-directed, requiring immediate or early response from the regulatee. In some contravention situations, however, the enforcement authority may need ancillary remedial powers. The directions and detail in remedial orders should be tailored to the regulatory objectives in each case. The remedy chosen should restore the affected parties and interests, as closely as possible, to their positions prior to a contravention. This remedial goal might therefore require one or more of the following ancillary order-making powers:

- where the contravention is likely to cause serious damage to a financial institution or its customers, the right to order the freezing of assets, credits, funds, property, etc., belonging to the regulatee [Precedent D4.9]

- where the contravention poses a danger or hazard to the health or safety of workers or the public, the immediate right to direct a series of steps to ensure the restoration of site safety, etc. This can be done either by direction to the regulatee or, if necessary, by substituting the regulator for the regulatee in performing the required remedial actions [*Occupational Health and Safety Act* (Ont.), s. 57; Precedent D4.10]

- the power to direct specific compliance steps to remedy regulatory contraventions through itemized remedial action such as product recalls, compulsory substitutions, purchase or deposit refunds, repairs, clean-ups and site restoration [Precedent D4.11; *The Environment Act* (Man.), s. 24(4), *Environmental Protection Act* (Ont.), ss. 17, 43 & 97 and *Environment Act* (Y.T.), s. 160].

In nearly every case, these ancillary remedial powers are entrusted to the regulatory agency so that it can deal with fast-breaking non-compliance. An inability to respond quickly in such circumstances might mean that regulatee assets are dissipated, thereby ruling out the prospects for restitutionary relief or other redress for aggrieved members of the public. There is little incentive for private parties to seek restitution if the regulatee has no assets.

Similarly, in product safety, work-site regulation and environmental protection statutes, the inability of the regulator to move quickly in emergency situations could seriously impair the public credibility of the regulatory agency. This is why the power to issue stop orders is necessary, though it is best accompanied by the remedial authority to restore the adversely affected persons or interests to their compliance-equivalent position. In the regulatory schemes that we have looked at, the regulator is in the best position, in terms of effectiveness and efficiency, to know how to restore the compliance situation. Failure to employ these powers in a proper and timely manner may expose the regulator to civil liability for economic loss caused by the failure to intervene.

Precedent D4.9: *Financial Institutions Act*, S.B.C. 1989, c. 47, s. 244

244.(1) When

(a) the superintendent . . . . has ordered, orders or is about to order an investigation of a person,

(b) grounds that a person has contravened this Act or the regulations in a way which materially damages or is likely to materially damage the interests of the financial institution or its customers, [or]

(d) criminal proceedings that in the superintendent's opinion involve the conduct of the affairs of a financial institution have been instituted, are being instituted or are about to be instituted, ...

the superintendent may make orders requiring

(f) a person having in the Province on deposit or under control or for safe keeping any assets of a person named in the order to hold the assets in trust,

(g) a person named in the order not to withdraw any of the person's assets from the possession of another person named in the order having them on deposit, under control or for safe keeping,

(h) a financial institution named in the order or a subsidiary of one named in the order not to trade in or otherwise part with assets left with it by customers or other persons, or

(i) a lessor, named in the order, of safety deposit boxes, safes or compartments in safes, not to permit the opening or removal of a safety deposit box, safe or compartment in a safe leased to a person named in the order.

(2) Particular assets affected by an order made under subsection (1) continue to be affected by the order and remain frozen under it until

(a) all of the assets are released because of a revocation under subsection (5)(a)of the order, or

(b) an order is made under subsection (5)(b) releasing the particular assets.

(3) An order under subsection (1) does not apply to assets in a stock exchange clearing house or to securities in process of transfer by a transfer agent unless the order expressly so states.

(4) Where a bank, trust company or credit union is the holder of assets described in subsection (1)(f) or (g) or is the lessor described in subsection (1)(i), an order under that subsection applies only to officers, branches or agencies specified in the order.

(5) On the superintendent's own motion, or on the written application of a person named in or directly affected by an order under subsection (1), the superintendent may

(a) revoke an order made under subsection (1), or

(b) order the release of particular assets among the assets affected by an order made under subsection (1).

Precedent D4.10: *Fisheries Act*, R.S.C. 1985, c. F-14, ss. 38(6) & (9), **40(3)(f)**

38.(6) Where an inspector . . . . is satisfied on reasonable grounds that [a deleterious substance has been deposited in water frequented by fish and that the deposit endangers fish habitat] and that immediate action is necessary in order to carry out any reasonable measures [to counteract, mitigate or remedy any adverse effects that may result therefrom], he may, subject to . . . . the regulations, take any such measures or direct that they be taken by any person [who owns or controls the substance or caused the deposit].

(9) The Governor in Council may make regulations prescribing

(b) the manner in which inspectors may take any measures or give any directions under subsection (6) and the conditions to which such measures or directions are subject; *[and]*

(c) the manner and circumstances in which any measures taken or directions given under subsection (6) may be reviewed, rescinded or varied . . . .

40.(3) Every person who

(f) fails to comply with the whole or any part of a direction of an inspector under subsection 38(6),

is guilty of an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding two hundred thousand dollars and, for any subsequent offence, to a fine not exceeding two hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both.

Precedent D4.11: *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16, (4th Supp.), s. 40, as am. by S.C. 1992, c. 1, s. 144 (Schedule VII, s. 16) (French version)

40. Where, in respect of a substance or a product containing a substance, there is a contravention of this Part or any regulation made under this Part, the Minister may, in writing,

(a) direct any manufacturer, processor, importer, retailer or distributor of the substance or product to take any or all of the following measures:

(i) give public notice in a manner directed by the Minister of any danger to the environment or to human life or health posed by the substance or product,

(ii) mail a notice as described in subparagraph (i) to every manufacturer, processor, distributor or retailer of the substance or product, or

(iii) mail a notice as described in subparagraph (i) to every person to whom the substance or product is known to have been delivered or sold; and

(b) direct any manufacturer, processor, distributor, importer or retailer of the substance or product to take any or all of the following measures:

(i) replace the substance or product with one that does not pose a danger to the environment or to human life or health,

(ii) accept the return of the substance or product from the purchaser and refund the purchase price, or

(iii) any other measures for the protection of the environment or of human life or health.

Precedent D4.12: *Environment Act*, S.Y.T. 1991, c. 5, s 136

136. Where there has been a spill, the Minister or an environmental protection officer may issue an environmental protection order to the person who owns or who had possession, charge, or control of the spilled substance at the time it was spilled ordering that person to take any measures that the Minister or the environmental protection officer considers necessary to protect, restore or rehabilitate the natural environment, including any or all of the following measures:

(a) to investigate the spill;

(b) to minimize or remedy the effects of the spill;

(c) to restore the area affected by the spill to a condition reasonably equivalent to the condition that existed immediately before the spill occurred;

(e) to install, repair or alter any equipment or thing designed to control or eliminate the release of the substance spilled;

(f) to monitor, measure, contain, remove, store, destroy or otherwise dispose of the substance spilled, or to lessen or prevent further spills of or control the rate of release of the substance spilled; and

(g) to report on any matter ordered to be done in accordance with directions set out in the order.

Additional Precedents:

Environment Act, S.Y.T. 1991, c. 5, s. 160

The Environment Act, S.M. 1987-88, c. 26 (C.C.S.M., c. E125), s. 24(4)

Environmental Protection Act, R.S.O. 1990, c. E.19, ss. 17, 43, 97

Occupational Health and Safety Act, R.S.O. 1990, c. O.1, ss. 57(6) - (11) & 58 - 61

Licence Suspension or Revocation

We assume here that the choice of a licensing system or scheme as the form of regulation is not in question. A regulator who is also a licensing authority has significant administrative leverage over the members of the regulated group. Licensing regulators are usually in regular contact with their licensees (inspections, self-monitoring reports, joint education, accreditation reviews, etc.). In cases of non-compliance, the licensing authority is normally empowered to review the status of the licence of the regulatee in question. Many enforcement options are available to licensing regulators. Enforcement is tied ultimately to the threat that the regulator may move

against the licence (which, in most situations, means the 'right to enter or remain in business') as the sanction for failing to comply with the performance requirements. Actions against the licence could include

- warning in case of future breaches
- suspension, withdrawal, cancellation or revocation, and
- modification of licence conditions.

It should be emphasized, however, that the courts will hold the regulator to the strictest performance and review requirements if the sanction sought against the non-complying regulatee is the cancellation or serious impairment of the operating licence.

Warning Against Future Breaches

This is really a more serious form of the information visit discussed earlier. Under this approach, the regulator puts the licensee on notice that the Act or the conditions of the licence have been breached ('reasonable cause to believe'). The licensee is warned that if a further breach is committed, the licence may be cancelled [Precedent C2.1]. A saving clause may be added directing that such a notice not be served where the regulator "is satisfied that the breach committed was due to inadvertence or a *bona fide* misunderstanding of the requirements" of the Act [Precedent C2.1].

The advantage of this approach is its direct empowerment of the regulator to issue a non-compliance warning to licensees. This promotes transparent and consistent administration. Warnings are not necessarily a part of the public enforcement record unless ignored and the non-complying conduct continues, resulting in a formal enforcement action or proceeding.

Licence Suspension or Cancellation

The right of the licensing authority to suspend the license of a regulatee is usually included as an alternative sanction to revocation or cancellation. Suspended licensees may be required to take various corrective measures to come into compliance with the regulatory program as a condition of licence restoration. The agency may be empowered to make the regulations or rules governing its own exercise of the licensing sanction [Precedent D4.15] or it may be empowered to suspend or cancel a licence where it believes on reasonable grounds that the licensee has contravened the conditions of its license, the Act or any regulations or order made under the Act [see *National Transportation Act, 1987,* par. 75(1)(b)]. Legislative drafters will be familiar with the procedural requirements governing the exercise of licence suspensions or revocations (notice, reasons, applications for review, etc.) [see Precedent D4.14 and *The Environment Act* (Man.), S.M. 1987-88, c. 26, ss. 19-28]. The courts will ensure that the regulator meets its duty of

fairness to the licensee if it suspends or cancels a licence, whether or not the regulation requires that the rules of procedural fairness be respected.

The violation of another statute (federal or provincial) by a licensee may constitute grounds for the licensing authority to review the status of the wrongdoer's licence. It is not uncommon for a licence to be revoked or subjected to particular performance conditions if the licensee commits an act of bankruptcy or is convicted of a *Criminal Code* offence. The B.C. *Trade Practice Act* for example, Precedent D4.16, declares that a "deceptive or unconscionable act or practice" committed by a person or firm

> "in respect of a consumer transaction in carrying on [their licensed] profession, occupation, business, trade or other activity...may be a ground for suspension, revocation or cancellation of the registration or licence".

Thus the breach of an omnibus consumer protection statute by a person or firm licensed under another statute may be brought to bear against the licensee's right to continue in the licensed activity. The offence raises the question of fitness and propriety attaching to the licensee's method of doing business and dealing with the public. It is left to the licensing authority to decide whether the circumstances of the particular contravention provide grounds for a licence review.

Licence Modifications

Licence modifications in this Manual refers to the legal right of the licensing authority to attach compliance terms and conditions to a licence. The right to maintain a licence issued under the regulatory program is tied to certain performance standards, bonding requirements or other accreditation stipulations. While the right to suspend a licence may imply the ancillary power to attach conditions for the restoration of a licence, it would be preferable, and may be necessary, to spell out that authority in the statute. Moreover, for reasons of transparency and consistency, the power to make modifications and the conditions for their discharge should be clear in the empowering legislation.

Precedent D4.13: *The Consumer Protection Act*, R.S.M. 1987, c. C200, ss. 83 - 88

83.(1) Where the director has cause to believe that any person who is licensed under this Act has committed a breach of any provision of this Act, or of any conditions or restrictions in respect of any licence, he may serve on the person, by registered mail, a notice stating

(a) the act or omission complained of, and the approximate date on which it occurred;

(b) the section of this Act, or the conditions or restrictions of licence, of which the act or omission is a breach;

and warning the person that, if he commits a further breach of a like nature, his licence may be cancelled.

(2) Where the director is satisfied that the breach committed was due to

(a) inadvertence; or

(b) a bona fide misunderstanding of the requirements of this Act;

he shall not serve such a notice.

84.(1) Where any person who is licensed under this Act

(a) is convicted

(i) of any offence against the *Criminal Code* (Canada), or

(ii) of any offence against this Act[;] or

(d) having been served with a notice by the director under section 83 commits, within two years after the date of the notice, a further breach of a like nature to the one stated in the notice; or

(e) fails to comply with any of the terms, conditions or restrictions to which his licence is subject; or

(f) has made a material misstatement or otherwise failed to disclose full information as required in his application for a licence;

the director may serve upon him, by registered mail, a notice of cancellation of his licence.

(2) A notice of cancellation of a licence shall state

(a) the reasons for cancellation; and

(b) that the licence will be cancelled 14 days after the mailing of the notice unless, within that time, the person licensed appeals to the court in accordance with section 87 and serves on the director a notice of appeal.

(3) Unless an appeal is taken under section 87, and notice thereof given to the director within the 14 days, the director shall cancel the licence 14 days after the mailing of the notice under subsection (2) without any further notice.

86.(1) Where a person who receives a notice under section 83 wishes to contend that the act or omission complained of in the notice is not a breach of the section or of any conditions or restrictions of the licence, he may apply to the court by originating notice of motion, for the determination of the question.

(2) Until a question before the court under subsection (1) has been finally determined, the director shall not give a notice of cancellation of the licence under clause 84(1)(d) based on the notice given under section 83, or serve any further notices on the person in respect of a like act or omission; but the court may, if it sees fit, on the application of the director, issue an interim injunction requiring the person to desist from the actions or course of conduct to which the director objected.

87.(1) A person on whom a notice of cancellation under section 84 is served may appeal therefrom, by originating notice of motion, to the court on the ground that

(a) any material fact alleged in reasons for the cancellation is not correct; or

(b) the reasons set forth in the notice are not sufficient in law to justify cancellation of the licence; or

(c) if the notice was served pursuant to clause 84(1)(d), that the further breach alleged was due to inadvertence.

(2) The notice of motion must be filed and served on the director within 14 days of the mailing of the notice under section 84.

(3) Where the court allows the appeal, the notice of cancellation is of no effect.

(4) Where the court dismisses the appeal, the director shall cancel the licence.

88.(1) Where an appeal is taken under section . . . . 87, the court shall determine any fact in dispute in such manner as it considers appropriate.

(2) Every notice of motion appealing from a decision or action of the director shall be served on the director, and he shall be named as the respondent thereto.

Precedent D4.14: *Environment Act*, S.Y.T. 1991, c. 5, ss. 91 & 92

91.(1) The Minister, after giving the permit holder reasonable notice and an opportunity to make representations, may, by order directed to the permit holder, suspend or cancel a permit

(a) where the permit holder has contravened a term or condition of the permit, or a provision of this Act or the regulations, and

(b) in the opinion of the Minister

(i) the development or activity to which the permit relates has caused or is likely to cause irreparable or costly damage to the natural environment, or

(ii) on the advice of a health officer, the development or activity to which the permit relates has caused or is likely to cause a threat to public health or safety.

(2) The Minister shall immediately on suspending or cancelling a permit

(a) give notice of the suspension or cancellation to the permit holder, including the reasons therefor; and

(b) publish notice of the suspension or cancellation in the manner prescribed by regulation.

(3) Where the Minister is satisfied that adequate steps have been taken by the person to whom an order under subsection (1) was directed to remedy the conditions which led to the making of the order, the Minister shall reinstate the permit or issue a new permit.

(4) Where the Minister suspends a permit under subsection (1), the right of the permit holder to obtain or hold a permit is suspended until the Minister reinstates the permit under subsection (3).

92. A person aggrieved may appeal a decision of the Minister pursuant to . . . . subsection 91(1) to the Supreme Court on a question of law or jurisdiction.

Precedent D4.15: *Farm Products Marketing Act*, R.S.O. 1990, c. F.9, s. 7(1) para. 5(ii)

7.(1) The [Ontario Farm Products Marketing Commission] may make regulations generally or with respect to any regulated product,

5. providing for the refusal to grant or renew or the suspension or revocation of a licence,

(ii) where the applicant or licensee has failed to comply with or has contravened any provision of this Act, the regulations, any plan or any order or direction of the Commission, Director or local board or of a marketing agency of Canada; . . .

Precedent D4.16: *Trade Practice Act*, R.S.B.C. 1979, c. 406, s. 32

32. Where a supplier who is registered or licensed under an Act to carry on a profession, occupation, business, trade or any other activity, engages or participates in a deceptive or unconscionable act or practice in respect of a consumer transaction in carrying on that profession, occupation, business, trade or other activity, the deceptive or unconscionable act or practice may be a ground for suspension, revocation or cancellation of the registration or licence.

Additional Precedents:

Consumer Protection Act, R.S.Q. 1977, c. P-40.1, ss. 328 & 329, as am. by S.Q. 1984, c. 47, s. 130 and S.Q. 1986, c. 95, ss. 265-266 and S.Q. 1988, c. 45, s. 9

The Environment Act, S.M. 1987-88, c. 26 (C.C.S.M., c. E125), s. 19

National Transportation Act, 1987, R.S.C. 1985, c. 28, (3rd Supp.), s. 75(1)(b)

Administrative Monetary Penalties

The available precedents, both federal and provincial, confirm the usefulness of administrative monetary penalties as a compliance tool to complement criminal or other civil enforcement sanctions.

Precedent D4.17 is an example of an AMPS regime that operates as an alternative to criminal prosecution. Specified regulatory violations subject to fixed monetary penalties which must be confirmed before an independent administrative tribunal before they become enforceable. The distinction between regulatory violations would be subject to monetary penalties and regulatory offences subject to criminal prosecution is crucial in setting up this type of regime. So are the constitutional and other legal constraints under which the regulatory department is operating. (What due process must be provided where the state imposes liability for AMPS in order to meet the requirements of the *Charter*, the *Canadian Bill of Rights* and the rules of natural justice? Does the government have the constitutional competence to establish special adjudicative tribunals to deal with administrative monetary penalties?)

Administrative or regulatory fines are most commonly employed for relatively minor contraventions, for continuing contraventions that put public health or safety at serious risk, and for non-payment of administrative levies due under a regulatory program.

The Relatively Minor Contravention

Under this approach, the regulatory fine is a fast-track sanction which may be exercised against the regulatee who is alleged to have contravened "a designated provision" [Precedent D4.17, ss. 7.6(2) & 7.7]. Penalty guidelines providing for a maximum fine of $10,000 for example, are published by the Minister or the regulatory agency. The penalty is levied by the regulator against the alleged wrongdoer who avoids summary prosecution on the alleged contravention by paying the fine. On the other hand, the regulatee may elect to put the matter to a hearing on its merits before a separate review body where the regulator carries the burden of proving the contravention. Procedural fairness, natural justice and self-incrimination issues must also be addressed in these provisions [Precedent D4.17, ss. 7.9(4) & (5)].

The Daily-Cumulative Contravention

Where issues of risk to public safety, worker protection or environmental health arise because of an apparent statutory violation by a regulatee, several statutes vest substantial powers in the oversight agency to levy a daily penalty against the regulatee whose actions have given rise to the problem. The aim of the penalty power is to provide a quick-response capacity to the regulator. The penalty provides a significant economic disincentive to the wrongdoer against continuing their course of action.

This approach is evident in some federal U.S. environmental legislation [see Precedent D4.18 and the American *Comprehensive Environmental Response, Compensation, and Liability Act of 1980,* ss. 9609(a) and (b)]. These statutes provide maximum 'civil penalties' of $25,000 per day per violation, including penalty assessment criteria when second or subsequent violations are alleged. Each approach is based on a standard notice and hearing procedure.

Likewise, Alberta environmental legislation enables the Director to levy "an administrative penalty in the amount set out in the notice for each day the contravention continues". A person who pays the levy avoids prosecution under the statute for the contravention cited, failing which "the Government may recover the amount owing in respect of the penalty in an action in debt" [see *Environmental Protection and Enhancement Act*, s. 221].

The incentive is to pay the administrative penalty quickly since the amount payable rises with each day that the offending conduct continues. The alternative is to face a civil action in debt mounted by the government for a sum not less than the cumulative administrative penalty from the date of the levy or the non-compliance notice.

The Failure to Pay a Statutory Levy

In this case, the person or firm who may be liable to pay an administrative levy is most often an employer. The regulatory program makes the employer responsible either to collect monies and remit them to the government or to pay into a contributory benefits scheme. Either way, the failure to pay the levy or the contributions may result in a claim by the regulatory agency in question against the employer or firm. The regulator's claim is for immediate payment of monies equal to or greater than the amount unpaid or not contributed. These 'automatic' penalty levies are found in unemployment insurance legislation [Precedent D4.20] and workers' compensation legislation [Precedent D4.19].

A monetary penalty is a reverse collection device. In terms of additional sums owed, the penalty scheme may levy a multiple of benefits unlawfully received [Precedent D4.20] or subject the non-complier to liability for covering the losses of others who have suffered by reason of their contravention [Precedent D4.19].

Incentives, Abatements and Related Factors

Where administrative monetary penalties are used against minor contraventions or continuing contraventions, the regulatee will usually respond very quickly with corrective action, including the payment of the administrative penalty. This avoids further enforcement proceedings and keeps the possible penalty down.

Another approach is to create a prospective administrative penalty which only comes into effect if satisfactory abatement, remedial or corrective measures are not taken by the regulatee. In tax

reduced on evidence of cooperation and assistance by the taxpayer [Precedent D4.22]. Similarly, a penalty scheme could be designed that places violation levies in a performance trust or good-conduct fund. Funds could then be remitted as prescribed, in whole or in part, in subsequent compliance periods in recognition of the regulatee's compliance record. Finally, administrative penalties (perhaps by another name) may be assumed voluntarily by a regulatee as a term or condition of a compliance agreement or as an assurance of voluntary compliance.

Precedent D4.17: *Aeronautics Act*, R.S.C. 1985, c. A-2, ss. 7.6 - 8.3, as am. by R.S.C. 1985, c. 33, (1st Supp.), s. 1 and S.C. 1992, c. 1, s. 5 and S.C. 1992, c. 4, ss. 19 - 22

7.6(1) The Governor in Council may, by regulation,

(a) designate any regulation or order made under this Part, in this section and in sections 7.7 to 8.2 referred to as a "designated provision", as a regulation or order the contravention of which may be dealt with under and in accordance with the procedure set out in sections 7.7 to 8.2; and

(b) prescribe, in respect of a designated provision, the maximum amount payable in respect of a contravention of that provision, which amount shall not exceed

(i) five thousand dollars, in the case of an individual, and

(ii) twenty-five thousand dollars, in the case of a corporation.

(2) A person who contravenes a designated provision is guilty of an offence and liable to the punishment imposed in accordance with sections 7.7 to 8.2 and no proceedings against the person shall be taken by way of summary conviction.

7.7(1) Where the Minister believes on reasonable grounds that a person has contravened a designated provision, the Minister shall notify the person of the allegations against the person in such form as the Governor in Council may by regulation prescribe, specifying in the notice, in addition to any other information that may be so prescribed,

(a) subject to any regulations made under paragraph 7.6(1)(b), the amount that is determined by the Minister, in accordance with such guidelines as the Minister may make for the purpose, to be the amount that must be paid to the Minister by the person as the penalty for the contravention in the event that the person does not wish to appear before a member of the Tribunal to make representations in respect of the allegations; and

(b) the time, being not less than thirty days after the date the notice is served or sent, at or before which and the place at which the amount is required to be paid in the event referred to in paragraph (a).

(2) A notice under subsection (1) shall be served personally or by ordinary mail sent to the latest known address of the person to whom the notice relates.

7.8(1) Where a person served with a notice under subsection 7.7(1) pays the amount specified in the notice in accordance with the requirements set out therein, the Minister shall accept the amount as and in complete satisfaction of the amount of penalty for the contravention by that person of the designated provision and no further proceedings under this Part shall be taken against the person in respect of that contravention.

(2) Where a person served with a notice under subsection 7.7(1) fails to pay the amount specified in the notice in accordance with the requirements set out therein, the Minister shall, within fifteen days after the time referred to in paragraph 7.7(1)(b), forward a copy of the notice to the Tribunal.

7.9(1) On receipt of the copy of the notice forwarded by the Minister under subsection 7.8(2), the Tribunal shall

(a) in writing, served personally or by registered or certified mail, request the person to whom the notice was sent to appear before a member of the Tribunal at the time and place set out in the request to hear the allegations referred to in subsection 7.7(1); and

(b) in writing, advise the Minister of the time and place set out in the request referred to in paragraph (a).

(2) Where a person served with a request under subsection (1) fails to appear before the member of the Tribunal at the time and place set out in the request, the member of the Tribunal shall consider all the information that is presented to him by the Minister in relation to the contravention referred to in the request.

(3) Where, at the conclusion of the proceedings in respect of allegations against a person referred to in subsection (2), the member of the Tribunal determines that

(a) the person has not contravened the designated provision that the person is alleged to have contravened, the member of the Tribunal shall forthwith inform the person and the Minister of the determination and, subject to section 8.1, no further proceeding under this Part shall be taken against the person in respect of the alleged contravention; or

(b) the person has contravened the designated provision that the person is alleged to have contravened, the member of the Tribunal shall forthwith

(i) issue to the Minister a certificate in such form as the Governor in Council may by regulation prescribe, setting out the determination of the member and setting out therein the amount that was specified in the notice that was sent to the person under subsection 7.7(1) in respect of the contravention, and

(ii) by registered or certified mail, send to the person at the person's latest known address a copy of the certificate issued under subparagraph (i).

(4) Where a person served with a request under subsection (1) appears before the member of the Tribunal at the time and place set out in the request, the member of the Tribunal shall provide the Minister and the person with a full opportunity consistent with procedural fairness and natural justice to present evidence before the member of the Tribunal and make representations in relation to the alleged contravention.

(5) On a proceeding before a member of the Tribunal under subsection (4),

(a) the burden of proving that the person appearing before the member has contravened the designated provision that the person is alleged to have contravened is on the Minister; and

(b) the person is not required and shall not be compelled to give any evidence or testimony in the matter.

8. Where, at the conclusion of the proceedings in respect of allegations against a person referred to in subsection 7.9(4), the member of the Tribunal determines that

(a) the person has not contravened the designated provision that the person is alleged to have contravened, the member of the Tribunal shall forthwith inform the person and the Minister of the determination and, subject to section 8.1, no further proceedings under this Part shall be taken against the person in respect of the alleged contravention; or

(b) the person has contravened the designated provision that the person is alleged to have contravened, the member of the Tribunal shall forthwith inform the person and the Minister of the determination and, subject to any regulations made under paragraph 7.6(1)(b), of the amount determined by the member of the Tribunal to be payable by the person in respect of the contravention and, where the amount is not paid to the Tribunal by or on behalf of the person within such time as the member of the Tribunal may allow, the member of the Tribunal shall issue to the Minister a certificate in such form as the Governor in Council may by regulation prescribe, setting out the amount required to be paid by the person.

8.1(1) The Minister or any person affected by the determination of a member of the Tribunal under subsection 7.9(3) or section 8 may, within ten days after the determination, appeal the determination to the Tribunal.

(2) The member of the Tribunal from whose determination an appeal is taken shall not be a member of the panel of members of the Tribunal appointed to hear the appeal.

(3) An appeal to the Tribunal shall be on the merits based on the record of the proceedings of the member of the Tribunal from whose determination the appeal is taken but the Tribunal shall allow oral argument and, if it deems it necessary for the purposes of the appeal, shall hear evidence not previously available.

(4) The Tribunal may dispose of the appeal by dismissing it or allowing it and in allowing the appeal, the Tribunal may substitute its decision for the determination appealed against.

(5) Where the Tribunal finds on an appeal that a person has contravened the designated provision that the person is alleged to have contravened, the Tribunal shall forthwith inform the person of the finding and, subject to any regulations made under paragraph 7.6(1)(b), of the amount determined by the Tribunal to

be payable by the person in respect of the contravention and, where the amount is not paid to the Tribunal by or on behalf of the person within such time as the Tribunal may allow, the Tribunal shall issue to the Minister a certificate in such form as the Governor in Council may by regulation prescribe, setting out the amount required to be paid by the person.

8.2(1) Where the time limit for an appeal under subsection 8.1(1) has expired or an appeal taken under section 8.1 has been dismissed, on production in the superior court of any province, a certificate issued under subsection 7.9(3), section 8 or subsection 8.1(5) shall be registered in the court and when registered has the same force and effect, and all proceedings may be taken thereon, as if the certificate were a judgment in that court obtained by Her Majesty in right of Canada against the person named in the certificate for a debt of the amount set out in the certificate.

(2) All reasonable costs and charges attendant on the registration of the certificate are recoverable in like manner as if they had been certified and the certificate had been certified and the certificate had been registered under subsection (1).

(3) An amount received by the Minister or the Tribunal under this section shall be deemed to be public money within the meaning of the *Financial Administration Act*.

8.3(1) Any notation . . . . of a penalty imposed in accordance with sections 7.6 to 8.2 shall, on application by the person affected by the . . . . penalty, be removed from the record respecting that person kept by the Minister after the expiration of two years from the date . . . . the penalty amount has been paid unless

(a) in the opinion of the Minister, the removal from the record would not be in the interest of aviation safety; or

(b) a . . . . penalty under this Act has been recorded by the Minister in respect of that person after that date.

Precedent D4.18: *Toxic Substances Control Act*, 15 U.S.C., s. 2615(a)

[For detailed rules of practice governing adjudicatory proceedings for the assessment of civil penalties conducted under s. 2615(a), see 40 CFR Part 22.]

2615.(a)(1) Any person who violates [a specified section of the Act] shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of [the specified section].

(2)(A) A civil penalty for a violation of [the specified section] shall be assessed by the Administrator by an order made on the record after opportunity (provided in accordance with this subparagraph) for a hearing in accordance with [certain provisions]. Before issuing such an order, the Administrator shall give written notice to the person to be assessed a civil penalty under such order of the Administrator's proposal to issue such order and provide such person an opportunity to request, within 15 days of the date the notice is received by such person, such a hearing on the order.

(B) In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

(C) The Administrator may compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed under this subsection. The amount of such penalty, when finally determined or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

(3) Any person who requested in accordance with paragraph (2)(A) a hearing respecting the assessment of a civil penalty may file a petition for judicial review of such order . . . . Such a petition may only be filed within the 30-day period beginning on the date the order making such assessment was issued.

(4) If any person fails to pay an assessment of a civil penalty

(A) after the order making the assessment has become a final order and if such person does not file a petition for judicial review of the order in accordance with paragraph (3), or

(B) after a court in an action brought under paragraph (3) has entered a final judgment in favour of the Administrator,

the Attorney-General shall recover the amount assessed (plus interest at currently prevailing rates from the date of the expiration of the 30-day period referred to in paragraph (3) or the date of such final judgment, as the case may be) in an action brought in any appropriate district court of the United States. In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review.

Precedent D4.19: *Workers' Compensation Act*, R.S.O. 1990, c. W.11, ss. 7(3) - (4)

7.(3) If the [Workers' Compensation Board] finds that an employer has not complied with its obligations [to make contributions, throughout the first year after an injury to a worker, for employment benefits in respect of the worker when the worker is absent due to the injury], the Board may levy a penalty on the employer to a maximum of the amount of one year's contributions for employment benefits in respect of the worker.

(4) The employer is liable to a worker for any loss the worker suffers as a result of the employer's failure to make the [required contributions].

Precedent D4.20: *Unemployment Insurance Act*, R.S.C. 1985, c. U-1, s. 53(7), as am. by R.S.C. 1985, c. 46, (4th Supp.), s. 2 and S.C. 1991, c. 49, s. 226

[Under this Act, an employer must deduct from an employee's remuneration an amount equal to the premium payable by the employee, and remit it, together with the premium payable by the employer, to the Receiver General.]

53.(7) Every employer who in a calendar year fails to remit to the Receiver General an amount that the employer is required to remit at the time when he is required to do so is liable to a penalty of

(a) ten per cent of the amount; or

(b) twenty per cent of the amount where, at the time of the failure, a penalty under this subsection had been payable by the employer in respect of a previous failure during the year.

Precedent D4.21: *Occupational Safety and Health Act of 1970*, 29 U.S.C., ss. 658, 659 & 666

658(a) If, upon inspection or investigation, the Secretary . . . . believes that an employer has violated [certain sections of the Act or regulations], he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the [Act or regulation] alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. . . . .

(b) Each citation issued under this section, or a copy or copies thereof, shall be prominently posted, as prescribed in regulations issued by the Secretary, at or near such place a violation referred to in the citation occurred.

(c) No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

659(a) If, after an inspection or investigation, the Secretary issues a citation under [section 658(a)], he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed . . . . and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) within such time, the citation and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(b) If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed . . . . by reason of such failure, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the Secretary's notification or the proposed assessment of penalty. If, within fifteen working days from the receipt of notification issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the notification or proposed assessment of penalty, the notification and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(c) If an employer notifies the Secretary that he intends to contest a citation issued under section [658(a)] or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section [658(a)] any employee or representative of employees files a notice

with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing . . . . The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming of modifying the abatement requirements in such citation. . . . .

666.(a) Any employer who wilfully or repeatedly violates [certain sections of the Act or regulations] may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each wilful violation.

(b) Any employer who has received a citation for a serious violation of [certain sections of the Act or regulations], shall be assessed a civil penalty of up to $7,000 for each such violation.

(c) Any employer who has received a citation for a violation of [certain sections of the Act or regulations], and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty up to $7,000 for each such violation.

(d) Any employer who fails to correct a violation for which a citation has been issued under section [658(a)] within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding . . . . initiated by the employer in good faith and not solely for delay or avoidance of penalties), may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues.

. . . .

(i) The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(j) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Precedent D4.22: *Finance Act 1985*, 1985, c. 54, s. 13 (U.K.) [See also ss. 14 - 17 for additional penalty schemes for various contraventions.]

13.(1) In any case where,

(a) for the purpose of evading tax, a person does any act or omits to take any action, and

(b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),

he shall be liable, subject to subsections (4) and (7) below, to a penalty equal to the amount of tax evaded or, as the case may be, sought to be evaded, by his conduct.

(4) If a person liable to a penalty under this section has co-operated with the Commissioners in the investigation of his true liability for tax or, as the case may be, of his true entitlement to any payment, refund or repayment, the Commissioners or, on appeal, a value added tax tribunal may reduce the penalty to an amount which is not less than half what it would have been apart from this subsection; and in determining the extent of any reduction under this subsection, the Commissioners or tribunal shall have regard to the extent of the co-operation which the person concerned has given to the Commissioners in their investigation.

(7) Where, by reason of conduct falling within subsection (1) above, a person is convicted of an offence (whether under the principal Act or otherwise), that conduct shall not also give rise to liability to a penalty under this section.

Precedent D4.23: *Farm Products Marketing Act*, R.S.O. 1990, c. F.9, ss. 7(1) para. 6, 7(2)

7.(1) The [Ontario Farm Products Marketing Commission] may make regulations generally or with respect to any regulated product,

6. providing for the imposition, amount, disposition and use of penalties where, after a hearing, the Commission, Director or local board is of the opinion that the applicant or licensee has failed to comply with or has contravened any term or condition of a licence or any provision of this Act, the regulations, any plan or any order or direction of the Commission, Director or local board;

(2) A penalty imposed on a producer under paragraph 6 of subsection (1) shall not exceed 10 per cent of the price payable to the producer for the regulated product marketed during the immediately preceding twelve month period by the producer and a 20 per cent reduction in the amount of regulated product which may be marketed during any twelve month period by the producer.

Additional Precedents:

Atlantic and Pacific Fisheries Boards Act, Bill C-129, Third Session, 34th Parliament (Bill died on the Order Paper) - Bill establishes licensing scheme and mechanism for determining and imposing sanctions for fisheries violations by licence holders - violations are designated as either major violations or minor violations - minor violations are prescribed by the regulations - violations are dealt with by a ticketing procedure - administrative board established by the Act may assess monetary penalty up to a limit of $2,000 for a minor violation and $10,000 for major violation -in case of minor violation, penalty is reduced by 50% if paid within fifteen days - in case of major violation, other sanctions may be imposed including the suspension or revocation of the licence

National Transportation Act, 1987, R.S.C. 1985, c. 28 (3rd Supp.), s. 107 - makes ss. 7.7 to 8.2 of the *Aeronautics Act* (ticketing offences) applicable to offences designated by regulations made by the National Transportation Agency

Patent Act, R.S.C. 1985, c. P-4, ss. 79 to 87 (enacted by the *Patent Act Amendment Act, 1992*, S.C 1993, c. 2, s. 7) - patentee of medicine must provide the Patented Medicine Prices Review Board with information regarding the price at which the medicine is sold or is intended to be sold - if the Board, after a hearing, finds that the medicine is or has been sold at an excessive price, it may, inter alia, direct patentee to pay such an amount to Her Majesty as will, in the Board's opinion, offset the amount of any excess profits derived by the patentee - if the Board finds that the patentee engaged in a policy of selling the medicine at an

excessive price, it may direct patentee to pay such an amount to Her Majesty as will, in the Board's opinion, offset twice the amount of the excess profits - the amounts payable by a patentee constitute a debt due to Her Majesty

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C., ss. 9609(a), (b)

Unemployment Insurance Act, R.S.C. 1985, c. U-1, s. 33, as am. by S.C. 1990, c. 40, s. 25

Forfeiture

Forfeiture is mentioned here for the sake of completeness. Its utility as an administrative enforcement remedy is limited to those situations in which the property or other assets of the non-complying regulatee are in the possession of the regulator or otherwise accessible (physically or legally) to the regulator. Seizure may amount to forfeiture if the regulatee's title to the goods is completely extinguished upon seizure. For a full seizure and forfeiture scheme, see Precedent D4.24, ss. 110-142.

Precedent D4.24: *Customs Act*, R.S.C. 1985, c. 1, (2nd Supp.), ss. 110 - 142, as am. by S.C. 1990, c. 8, s. 49 and S.C. 1992, c. 1, ss. 62 & 143 and S.C. 1992, c. 28, ss. 26 & 27

[The precedent below contains only selected provisions. For the full seizure and forfeiture scheme, see sections 110 - 142 of the Act, as amended.]

110.(1) An officer may, where he believes on reasonable grounds that this Act or the regulations have been contravened in respect of goods, seize [the goods] as forfeit . .

(4) An officer who seizes goods . . . . as forfeit . . . . shall take such measures as are reasonable in the circumstances to give notice of the seizure to any person who the officer believes on reasonable grounds is [an innocent third party with an interest in the goods].

113. No seizure may be made under this Act . . . . more than six years after the contravention . . . in respect of which such seizure is made . . . .

114.(1) Anything that is seized under this Act shall forthwith be placed in the custody of an officer.

117. An officer may, subject to this or any other Act of Parliament, return any goods that have been seized under this Act to the person from whom they were seized . . . . on receipt of

(a) [a specified sum of money]; or

(b) where the Minister so authorizes, security satisfactory to the Minister.

121. Goods . . . . in respect of which money or security is received under section 117 . . . . shall cease to be forfeit from the time the money or security is received and the money or security shall be held as forfeit in lieu thereof.

122. Subject to the reviews and appeals established by this Act, any goods . . . . that are seized as forfeit under this Act within the time period set out in section 113 are forfeit

(a) from the time of the contravention of this Act or the regulations in respect of which the goods . . . . were seized, ...

and no act or proceeding subsequent to the contravention . . . . is necessary to effect the forfeiture of such goods . . . .

123. The forfeiture of goods . . . . seized under this Act or any money or security held as forfeit in lieu thereof is final and not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by section 129.

128. Where goods [have] been seized under this Act, ... the officer who seized the goods . . . . shall forthwith report the circumstances of the case to the Deputy Minister.

129. (1) Any person

(a) from whom goods [are] seized under this Act,

(b) who owns goods [that are] seized under this Act,

(c) from whom money or security is received pursuant to section 117 . . . . in respect of goods . . . . seized under this Act, ...

may, within thirty days after the date of the seizure . . . . request a decision of the Minister under section 131 by giving notice in writing to the officer who seized the goods . . . .

130.(1) Where a decision of the Minister under section 131 is requested pursuant to section 129, the Deputy Minister shall forthwith serve on the person who requested the decision written notice of the reasons for the seizure . . . . in respect of which the decision is requested.

(2) The person on whom a notice is served under subsection (1) may, within thirty days after the notice is served, furnish such evidence in the matter as he desires to furnish.

(3) Evidence may be given pursuant to subsection (2) by affidavit made before any justice of the peace, commissioner for taking oaths or notary public.

131.(1) After the expiration of the thirty days referred to in subsection 130(2), the Minister shall, as soon as is reasonably possible having regard to the circumstances, consider and weigh the circumstances of the case and decide, in respect of the goods [that were] seized . . . .,

(a) in the case of goods . . . . seized . . . . on the ground that this Act or the regulations were contravened in respect thereof, whether the Act or the regulations were so contravened; . . . .

(2) The Minister shall forthwith, on making a decision under subsection (1) serve on the person who requested the decision written notice thereof.

(3) The Minister's decision under subsection (1) is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with except to the extent and in the manner provided by subsection 135(1).

132.(1) [W]here the Minister decides, pursuant to section 131, that there has been no contravention of this Act or the regulations in respect of the goods . . . . referred to in that section, the Minister shall forthwith authorize the removal from custody of the goods . . . . or the return of any money or security taken in respect thereof.

133.(1) Where the Minister decides, pursuant to section 131, that there has been a contravention of this Act or the regulations in respect of the goods . . . . referred to in that section, ... the Minister may, subject to such terms or conditions as he may determine,

(a) return the goods . . . . on receipt of [a specified sum of money];

(b) remit any portion of any money or security taken; and

(c) where the Minister considers that insufficient money or security was taken or where no money or security was received, demand such amount of money as he considers sufficient . . . .

135.(1) A person who requests a decision of the Minister under section 131 may, within ninety days after being notified of the decision, appeal the decision by way of an action in the Federal Court . . . .

138.(1) Where anything has been seized as forfeit under this Act, any person, other than the person in whose possession the thing was when seized, who claims an interest therein as owner, mortgagee, lien-holder or holder of any like interest may, within sixty days after such seizure, apply by notice in writing to the court for an order under section 139 [declaring that his interest is not affected by such seizure and declaring the nature and extent of his interest].

141.(1) The Deputy Minister . . . . shall, after forfeiture of a thing has become final and on application made to the Deputy Minister by a person who has obtained a final order under section 139 [declaring that his interest is not affected by the seizure and declaring the nature and extent of his interest in respect of the thing, direct that

(a) the thing be given to the applicant; or

(b) an amount calculated on the bias of the interest of the applicant in the thing as the time of the contravention . . . . in respect of which the thing was seized, as declared in the order, be paid to him.

142.(1) Anything that has been abandoned to Her Majesty in right of Canada under this Act and anything the forfeiture of which is final under this Act shall [be exported, sold by public auction or public tender, or disposed of otherwise than by sale as the Minister may direct.]

Performance by Regulator and Recovery of Expenses

Where a non-complying regulatee is unable or unwilling to correct a breach of a regulatory standard, it may be necessary to authorize corrective measures to be taken by the regulator or a person acting under the regulator's direction. This is really a form of specific performance. The costs of the corrective measures are charged back to the defaulting regulatee or perhaps levied against a performance bond or other security required as a condition of licensing in that type of regulatory program.

The right to take over performance should include the right "to enter and have access to any place or property...[to]...do such reasonable things as may be necessary in the circumstances" [Precedent D4.25, s. 36(7); see also *Environmental Protection Act* (Ont.), s. 99(2) and *Fisheries Act*, s. 38(6)]. The regulator should also have the right to recover the costs and expenses of the substitute performance "to the extent that they can be established to have been reasonably incurred in the circumstances" [see *Fisheries Act*, ss. 39 & 42 and Precedent D4.26, s. 165].

Precedent D4.25: *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16, (4th Supp.), ss. 36(5) - (8), 39, 77

[Where a toxic substance is released, or is reasonably likely to be released, into the environment in contravention of the regulations, subsections 36(1) & (2) place a duty on the owner of the substance and the person who causes, or increases the likelihood of, the release to report the matter to an inspector and take all reasonable measures to prevent the release or to mitigate any resulting danger to the environment or human health.]

36.(5) Where any person fails to take any measures required under subsection (1), an inspector may take those measures [or] cause them to be taken . . . .

(7) Any inspector or other person authorized . . . . to take any measures under subsection . . . . (5) may enter and have access to any place or property and may do such reasonable things as may be necessary in the circumstances.

(8) Any person [other than the owner of the substance or the one who causes the release] who takes any measures authorized under subsection (5) is not personally liable either civilly or criminally in respect of any act or omission in the course of . . . . taking [those measures] unless it is established that the person acted in bad faith.

39.(1) Her Majesty in right of Canada may recover the costs and expenses of and incidental to taking any measures under subsection 36(5) from

(a) [the owner of the substance]; and

(b) [the person who caused the release] to the extent of the person's negligence in causing or contributing to the release.

39.(2) The costs and expenses referred to in subsection (1) shall only be recovered to the extent that they can be established to have been reasonably incurred in the circumstances.

77. Where the Minister directs any action to be taken by or on behalf of Her Majesty in right of Canada to remedy any condition or mitigate any damage resulting from any act or omission by a person that is an offence arising out of this Part, the costs and expenses of and incidental to taking that action, to the extent that they can be established to have been reasonably incurred in the circumstances, are recoverable by Her Majesty in right of Canada from that person with costs in proceedings brought or taken therefor in the name of Her Majesty in any court of competent jurisdiction.

Precedent D4.26: *Environment Act*, S.Y.T. 1991, c. 5, s. 165

165.(1) If the person to whom a direction is issued under this Act or to whom an environmental protection order is directed fails to comply with the direction or the order, the Minister may take whatever action he or she considers necessary to effect compliance with the direction or order.

(2) The Minister may recover expenses he or she incurs in effecting compliance under subsection (1)

(a) by an action in debt against a person described in subsection (1); and

(b) by ordering any purchaser of land from a person described in subsection (1) to pay to the Minister instead of to the vendor the lesser of

(i) an amount not exceeding the amount owing in respect of the expenses; and

(ii) the amount owing to the vendor.

(3) For the purposes of this section the expenses that may be recovered include, without limitation, any costs incurred in investigating and responding to any matter to which a direction or an environmental protection order relates or to a violation of an environmental protection order.

(4) Where a purchaser pays an amount to the Minister under paragraph 2(b), the purchaser is discharged from his, her or its obligation to pay that amount to the vendor.

Additional Precedents:

Arctic Waters Pollution Prevention Act, R.S.C. 1985, c. A-12, s. 6 - persons exploring for natural resources on lands adjacent to or in arctic waters are liable for clean-up costs incurred on behalf of Crown resulting from deposit of waste - maximum amount of liability determined by regulations - costs recoverable in any court of competent jurisdiction

Immigration Act, R.S.C. 1985, c. I-2, s. 87(3) - Crown may recover costs of removing a person who is not granted admission - recoverable from a transportation company that fails to provide transportation promptly after having been notified by the Minister that a person must be removed from Canada.

Transportation of Dangerous Goods Act, 1992, S.C. 1992, c. 34, s. 22 - Crown may recover costs and expenses of preventing or responding to accident or remedying non-compliance - recoverable from persons whose fault requires measures to be taken - civil remedies not affected

The Environment Act, S.M. 1987-88, c. 26 (C.C.S.M., c. E125), ss. 24(5) - (9)

Environmental Protection Act, R.S.O. 1990, c. E.19, ss. 94-95 & 99

Fisheries Act, R.S.C. 1985, c. F-14, ss. 38(6) & (8), 42

Enforcement of Administrative Orders

In the event that an administrative enforcement order has not been complied with, the question of an effective sanction remains. What statutory mechanisms are available to deal with an unpaid regulatory fine, an unhonoured stop order or a failure to pay the substitute performance expenses incurred by the regulator?

Whatever the non-compliance, the regulatee remains in breach of the administrative enforcement order. In these circumstances, the legislative scheme may permit the regulator to apply to a named court "for an order of the Court directing that person to comply with the (civil) enforcement order" [see *Environmental Protection and Enhancement Act* (Alta.), s. 201(1), and Precedent D4.27]. It would seem advisable, as well, to ensure that the costs incurred by the regulator in seeking the enforcement of the compliance order are recoverable. Once a court order is obtained, the regulatee is liable to contempt if he fails to comply with it.

Precedent D4.27: *Environment Act*, S.Y.T. 1991, c. 5, s. 164

164.(1) If the person to whom an environmental protection order is directed fails to comply with its terms, the Minister may apply to the Supreme Court for an injunction

(a) ordering that person to comply with the environmental protection order under such terms and conditions as the Supreme Court may determine, or

(b) where the person fails to provide financial assurance according to the terms of the environmental protection order, ordering the person to cease or restrict the operation of the development or activity in respect of which the financial assurance is required.

(2) This section applies whether or not the person has been convicted of an offence under this Act.

Precedent D4.28: *Canada Agricultural Products Act*, R.S.C. 1985, c. 20, (4th Supp.), s. 11

11.(1) Subject to subsection (3), any person affected by an order of the Board [of Arbitration] or the [Review] Tribunal may file in the Federal Court for immediate registration a copy of the order, exclusive of any reasons given for it, but the order shall not be filed until at least thirty days after the day on which the order was made, or the day provided in the order for compliance with it, whichever is the later day.

(2) On filing in the Federal Court, an order shall be registered in that Court and, when registered, it shall have the same force and effect, and all proceedings may be taken, as if the order were a judgment obtained in that Court.

(3) The Tribunal may make an order staying the filing in the Federal Court of any order pending review by the Tribunal.

(4) In subsection (1), the expression "order of the Board" includes an order as varied by the Tribunal, but does not include an order made by a decision that has been cancelled by the Tribunal.

Additional Precedents:

Environmental Protection and Enhancement Act, Bill 23, 22nd Leg, 4th Sess., 2nd Reading, June 4, 1992 (Alta.), cl. 201 (did not pass)

Financial Institutions Act, S.B.C. 1989, c. 47, s. 245

Occupational Health and Safety Act, R.S.O. 1990, c. O.1, s. 60

5. Court Orders Sought by Regulator

Every statute-based regulatory scheme ultimately provides for resort to the courts to enforce the compliance requirements in the empowering legislation. The power to go to the courts for enforcement orders usually is reserved to the regulatory agency and arises in one or more of the following enforcement situations:

- the court has the exclusive jurisdiction to issue all civil and penal enforcement orders;
- the regulator has limited authority to issue emergency stop or cease and desist orders of limited duration which, if they are to be continued, must be reviewed by the court;
- in the case of non-compliance with the regulator's enforcement order, the regulator seeks to add the court's authority to the legal force of the original order;
- the regulator has the option of seeking an appropriate enforcement order or remedy from the court, in lieu of or in addition to instituting its own administrative enforcement proceeding; and
- where continued regulatee conduct endangers the public welfare, the regulator may seek an *ex parte* court order to halt the endangering conduct. In some cases, the court may make an order to freeze assets or confiscate property pending an open court review of the case at the behest of the regulator or the regulatee.

Usually the regulator has the right of standing to seek a court enforcement order. However, provincial consumer and environmental protection statutes are more diversified in this respect. In some cases "affected" or "aggrieved" private parties may be given the right to seek declaratory and injunctive orders against non-complying regulatees. These private plaintiffs may also be permitted to take on a representative capacity. However, their remedial reach (declarations/injunctions/corrective advertisements/restitutionary orders) is much more limited than that of plaintiffs who are empowered to sue for damages under the *Class Proceeding Act, 1992* (Ont.).

The range of enforcement remedies available by court order will be more limited than the enforcement options potentially available to regulatory agencies. Courts are loathe to take on supervisory responsibility for the execution of compliance orders and, by definition, are not alternative dispute resolution agencies. Damages are usually reserved for civil suits maintained by private plaintiffs, not enforcement proceedings brought by regulators. At the same time, however, the precedents show a degree of flexibility and inventiveness by legislative drafters in developing judicial remedies for enforcement proceedings brought by regulators.

Precedent D5.1: *"Financial Consumers Act, 1992"*, Bill 13, 35th Leg., 2nd Sess., First Reading, April 22, 1992 (Ont.), cl. 38 (Private Member's Bill)

38.(1) If the Director has reason to believe that an agent, financial planner or supplier is contravening, has contravened or is about to contravene this Act or the regulations, or has not complied with an [assurance of voluntary compliance or a compliance order made by the Director], he or she may apply to the court for an order against the agent, financial planner or supplier.

(2) In a proceeding under this section, the court may make any order it considers appropriate, taking into consideration,

(a) the purposes of this Act and the regulations;

(b) the rights, duties and responsibilities of persons under this Act and the regulations;

(c) the need to protect the public against unfair practices; and

(d) the appropriateness of an award of punitive damages.

Precedent D5.2: *Unfair Trade Practices Act*, R.S.A. 1980, c. U-3, ss. 13, 16, 17, 20(1)(c)

13.(1) When the Director is of the opinion that a supplier

(a) has engaged in or is engaging in an unfair act or practice, or

(b) has not complied with the terms of an undertaking which that supplier has entered into,

he may commence and maintain an action in the court against that supplier.

(2) In an action brought under subsection (1), the court may

(a) make an order declaring that the act or practice is an unfair act or practice;

(b) make an order requiring the supplier to provide any redress the court considers proper to those consumers who suffered damage or loss arising out of the unfair act or practice;

(c) grant an order in the nature of an injunction restraining the supplier from engaging in the unfair act or practice;

(d) grant any other relief the court considers proper.

(3) In addition to any order made or relief granted under subsection (2), the court may, in an action brought under subsection (1)(b), award punitive or exemplary damages.

(4) Damages awarded under this section are a debt owing to the Crown.

16.(1) On the commencement of an action under section [13], a plaintiff may apply for an order in the nature of an interim injunction and if the court is satisfied that

(a) there are reasonable and probable grounds for believing that there exists an immediate threat to the interests of persons dealing with the defendant supplier by reason of an alleged unfair act or practice, or

(b) the applicant has established a prima facie case of the existence of an unfair act or practice being committed by the defendant supplier,

the court may grant an order in the nature of an interim injunction, on any terms and conditions the court considers proper, restraining the supplier from carrying on that act or practice that is alleged to be unfair.

(2) In an application for an order in the nature of an interim injunction,

(a) the applicant need not establish that irreparable harm will be done to himself or all other consumers or any designated class of consumers in Alberta if the interim injunction is not granted, and

(b) the court may dispense with any requirement by the applicant to post a bond or give any undertaking as to damages.

17.(1) When the court grants relief under section [13], the court may make a further order requiring the supplier to advertise to the public particulars of any order, judgment or other relief granted by the court.

(2) In making an order under subsection (1), the court may prescribe

(a) the methods of making the advertisement so that it will assure prompt and reasonable communication to consumers;

(b) the content or form or both of the advertisement;

(c) the number of times the advertisement is to be made;

(d) any other conditions the court considers proper.

20.(1) The Director shall not, until he has been authorized to do so by the Attorney General,

(c) commence or maintain an action under section [13].

Additional Precedents:

Environment Act, S.Y.T. 1991, c. 5, ss. 8 & 12

Trade Practices Act, R.S.Nfld 1990, c. T-7, ss. 15, 17, 18

Compliance Order

Two approaches are employed here. In the first, the court, on the request of the regulator, may issue a compliance order prompted by specifically defined non-complying behaviour by the regulatee. The compliance order speaks to these specified circumstances in directing how the violation is to be cured, most often through the immediate cessation of the non-complying conduct and other corrective action [see *Competition Act*, s. 32].

In the second approach, the regulator is empowered to seek one or more enforcement orders where it is of the opinion that the regulatee is not complying with the statute in one or more respects. For example, in several provincial trade practices statutes, the Director may seek, in the same proceeding, a declaration, an injunction, a restitutionary order (in favour of those consumers whose funds are being held by the wrongdoer), a freeze order on assets, the appointment of a receiver, trustee or receiver-manager, a corrective advertising order or an order for the payment of all or a portion of the Director's investigation costs [see *Trade Practice Act* (B.C.), s. 18; and *Trade Practices Act* (Nfld.), ss.15 & 17-18].

On the other hand, the new *Environment Act* (Y.T.) represents a drafting approach which sets out the general judicial remedies (injunction, declaration, damages, costs or "such other remedy that the Supreme Court considers just"). Then it lists the specific compliance orders (in addition to or in lieu of these remedies) that are tailored to the statutory scheme in question, such as requiring the defendant "to establish and maintain a monitoring and reporting system" or "to prepare a plan for...compliance".

In most cases, only the regulator has standing to seek judicial enforcement of the compliance requirements set out in the statute or the regulations [see *Securities Act* (Alta.), s. 164]. More recently, however, in some provincial and territorial enactments, the right of standing in civil enforcement proceedings has been extended to private plaintiffs. The private enforcer may be "any other person whether or not that person has a special, or any, interest under this Act..." [see *Trade Practices Act* (Nfld.), s. 18(1)]. Under the *Environment Act* (Y.T.), the criteria are even broader. They include any person resident in the Yukon who has reasonable grounds to believe that the environment will be impaired or that the government is not adequately protecting it [Precedent D6.2, s. 8(1)].

Where the right to maintain a civil enforcement proceeding is given to a person other than the regulator, the private plaintiff is usually required to give notice of their action to the regulator. The regulator may then "on application to the court, intervene in the action as a party, on the terms and conditions the court considers just" [see *Trade Practice Act* (B.C.), s. 21(2)]. A related issue, to be addressed below, is whether a private plaintiff should be subjected to separate security for costs in any proceeding for an interim or interlocutory injunction.

There are several reasons for giving private plaintiffs standing to seek judicial enforcement of compliance orders. One is to shift enforcement costs to the most affected private interests, such

as competitors, trade associations and non-governmental organizations; another is to provide an enforcement competitor to keep the regulator on its toes, particularly where there is a danger that the regulator might be "captured" by the regulated industry. The limited Canadian experience with these provisions suggests that their bark is worse than their bite. The provisions are infrequently used, often because the threat of an action is sufficient to prompt a regulatory response. Also, enforcement litigation in superior courts is expensive and requires well-briefed counsel. It is fair to say that the private right of standing is given in those statutory schemes where private and public remedies have been thoughtfully integrated as a core part of the compliance and enforcement policy.

Precedent D5.3: *Motor Dealer Act*, R.S.B.C. 1979, c. 287, s. 20

20. Where it appears to the registrar that a person is not complying with this Act, the regulations or an order made under this Act, notwithstanding that a penalty may have been or could be imposed in respect of noncompliance, the registrar, in addition to any other rights he may have, may apply to the court for an order directing that person to comply, and the court may make an order it considers proper.

Additional Precedents:

Competition Act, R.S.C. 1985, c. C-34, s. 32, as am. by R.S.C. 1985, c. 10, (4th Supp.), s. 18 and S.C. 1990, c. 37, s. 29

Environment Act, S.Y.T. 1991, ss. 8-12

The Consumer Protection Act, R.S.M. 1987, c. C200, s. 74(2)

Securities Act, S.A. 1981, c. S-6.1, s. 164, as am. by S.A. 1984, c. 64, s. 47 and S.A. 1988, c. 7, s. 1(29)

Trade Practice Act, R.S.B.C. 1979, c. 406, ss.18 & 21

Trade Practices Act, R.S. Nfld 1990, C.T. 7, ss. 15 & 17-18

Injunctive Relief (Permanent and Interim)

Injunctive relief is a standard element in any legislative scheme that relies on court orders for enforcement. This is the judicial version of the administrative cease and desist or stop orders. Four design issues are raised: the right of standing, the several kinds of injunctions available, security for costs, and the proof required of the plaintiff to obtain this highly discretionary judicial remedy.

Our preceding discussion on the right of standing obtains here. The traditional approach, typified by s. 135 of the *Canadian Environmental Protection Act*, empowers the Minister to apply to a court of competent jurisdiction for an injunction to order any person

> "a) to refrain from doing any act or thing that it appears to the court may constitute or be directed towards the commission of an offence under this Act; or
>
> b) to do any act or thing that it appears to the court may prevent the commission of an offence under this Act."

Where a named official administers a regulatory scheme, it is quite common, in light of the seriousness of a court injunction, that the Minister provide written approval for the commencement of the enforcement proceeding. The official is expected to have "reasonable and probable grounds" for believing that the Act has been contravened and that an injunction is the most appropriate judicial remedy in the circumstances [Precedent D5.4].

By its nature, an application for an interim injunction is brought on an emergency basis. The application is frequently *ex parte*, seeking the immediate cessation of non-complying conduct which, if continued, would allegedly cause irreparable harm to statutorily protected interests. The proceeding is based on affidavit evidence and stops well short of inquiring into the full merits of the case. This is reserved for the permanent injunction hearing or other enforcement proceedings. Under the law of equitable remedies (supported by the Rules of Civil Procedure), the parties seeking an interim or interlocutory injunction must normally give security for costs, post a bond or give an undertaking as to damages as a condition of their seeking the remedy. Where the plaintiff is the regulator or the responsible Minister however, the empowering legislation may explicitly exempt the government plaintiff from any obligation to post security [Precedent D5.6]. This exemption has also been extended to private plaintiffs, regardless of the remedy asked for, provided that they satisfy the right of standing requirements [Precedent D6.8, ss. 18(6) & 19(b)]. The reasoning here is that the security for costs exemption strikes down an economic barrier to private enforcement. The drafter may opt for this approach or leave the issue to the court's discretion in the particular circumstances.

What is the measure of proof required of the public or private plaintiff for an injunction against a regulatee? Our remarks here apply to the interim injunction where allegedly non-complying conduct is sought to be stopped before a review on the merits will be heard. The normal standard of proof required of the plaintiff is to establish that "irreparable harm" will be done to the regulatory scheme and/or designated interests that are to be protected by the statute if the interim injunction is not granted. The Canadian experience on this point is varied. There are three approaches to setting the standards of proof:

- public protection priority - The court is directed explicitly to give "greater weight, importance and the balance of convenience to the protection of [designated interests] than to the carrying on of business of [the regulatee]". Moreover, the applicant is not required to establish that irreparable harm would result if the interim injunction were not

granted [Precedent D6.8, s. 19(a) and (c)].

- the only adequate remedy - The interim injunction prevents the incipient violation because there is no other adequate remedy available under the statute to avoid obvious harm or injury to the designated interests [Precedent D5.7, s. 33].

- the supplementary remedy - Some federal and provincial legislation expressly states that an action to enjoin by the regulator (or the Attorney General) is not prejudiced by the fact that prosecution proceedings have already been separately instituted [see *Fisheries Act*, s. 41(4)]. A recent Ontario statute simply declares that the Minister or "any person who complains of injury" may ask the Court for an order prohibiting continuation or prohibition "despite any other remedy or any penalty" [see *Discriminatory Business Practices Act*, s. 11]. The Quebec *Consumer Protection Act* takes a much more restrictive approach to this issue. It provides that the regulator may only bring an application for an interlocutory injunction after the prosecution for "repeated offences" has been instituted. If granted, the injunction stays in place until the final judgment in the penal proceeding [Precedent D5.6].

Strict conditions understandably govern the issuance of interim injunctions granted at *ex parte* hearings where only the regulator is represented. Two federal examples are s. 135 of the *Canadian Environmental Protection Act* and s. 33 of the *Competition Act* [Precedent D5.7].

Precedent D5.4: *The Business Practices Act*, S.M. 1990-91, c. 6 (C.C.S.M., c. B120), s. 21

21. Where the director believes, on reasonable and probable grounds, that it is necessary for the protection of the public, the director may, with the minister's written approval, apply to the court ex parte for an interim or permanent injunction order restraining a supplier from committing or attempting to commit an unfair business practice.

Precedent D5.5: *Trade Practice Act*, R.S.B.C. 1979, c. 406, ss. 18 - 20

18.(1) The court, in an action brought by the director . . . , may grant . . . .

(b) an interim or permanent injunction restraining a supplier from engaging or attempting to engage in a deceptive or unconscionable act or practice in respect of a consumer transaction,

and may then make a further order requiring the supplier to advertise to the public in the media in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions the court considers reasonable and just, particulars of any . . . , order or injunction granted against the supplier under paragraph . . . (b) or subsection (3).

(3) In an action for a permanent injunction under subsection (1)(b), the court may restore to any person who has an interest in it any money or property that may have been acquired by reason of a deceptive or unconscionable act or practice by the supplier.

(4) In an action for a permanent injunction under subsection [(1)(b)], the court may award to the director costs, or a reasonable proportion of them, of the investigation of a supplier conducted under this Act.

(5) The director may apply, ex parte, for an interim injunction under subsection (1)(b), and, if the court is satisfied that there are reasonable and probable grounds for believing there is an immediate threat to the interests of persons dealing with the supplier by reason of an alleged deceptive or unconscionable act or practice in respect of a consumer transaction, the court shall grant an interim injunction on the terms and conditions it considers just.

(6) In an action brought under this section, or in an appeal from it, the plaintiff shall not be required to furnish security for costs.

19. In any application under section 18 for an interim injunction,

(a) the court shall give greater weight, importance and the balance of convenience to the protection of consumers than to the carrying on of the business of a supplier;

(b) the director or any other person applying under that section shall not be required to post a bond or give an undertaking as to damages; and

(c) the applicant need not establish that irreparable harm will be done to himself or all other consumers, or any designated class of consumers, in the Province, if the interim injunction is not granted.

20. Notwithstanding any other Act, an appeal to the Court of Appeal does not stay an interim or permanent . . . . injunction made under section 18(1)(b) . . . .

Precedent D5.6: *Consumer Protection Act*, R.S.Q. 1977, c. P-40.1, ss. 266 & 290

266. The Attorney General and the president are exempt from the obligation to give security in order to obtain an injunction under this act.

290. If a person commits repeated offences against this act or the regulations, the Attorney General, after instituting penal proceedings against him, may apply to the Superior Court for a writ of interlocutory injunction enjoining such person, his directors, agents or employees to cease committing the offences complained of until a final judgment has been rendered in the penal proceedings.

After such judgment has been rendered, the Superior Court shall itself render a final judgment on the application for an injunction.

Precedent D5.7: *Competition Act*, R.S.C. 1985, c. C-34, s. 33

33.(1) Where it appears to a court, on an application by or on behalf of the Attorney General of Canada or the attorney general of a province,

(a) that a person named in the application has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence [related to competition], and

(b) that if the offence is committed or continued

(i) injury to competition that cannot adequately be remedied under any other provision of this Act will result, or

(ii) a person is likely to suffer, from the commission of the offence, damage for which he cannot adequately be compensated under any other provision of this Act and that will be substantially greater than any damage that a person named in the application is likely to suffer from an injunction issued under this subsection in the event that it is subsequently found that an offence [related to competition] has not been committed, was not about to be committed and was not likely to be committed

[the court may, by order, issue an interim injunction forbidding any person named in the application from doing any act or thing that it appears to the court may constitute or be directed toward the commission of an offence, pending the commencement or completion of proceedings [to prohibit that person, after conviction for an offence, from continuing or repeating the offence].

(2) Subject to subsection (3), at least forty-eight hours notice of an application for an injunction under subsection (1) shall be given by or on behalf of the Attorney General of Canada or the attorney general of a province, as the case may be, to each person against whom the injunction is sought.

(3) Where a court to which an application is made under subsection (1) is satisfied that

(a) subsection (2) cannot reasonably be complied with, or

(b) the urgency of the situation is such that service of notice in accordance with subsection (2) would not be in the public interest,

it may proceed with the application ex parte but any injunction issued under subsection (1) by the court on ex parte application shall have effect only for such period, not exceeding ten days, as is specified in the order.

(4) An injunction issued under subsection (1)

(a) shall be in such terms as the court that issues it considers necessary and sufficient to meet the circumstances of the case, and

(b) subject to subsection (3), shall have effect for such period of time as is specified therein.

(5) A court that issues an injunction under subsection (1), at any time and from time to time on application by or on behalf of the Attorney General of Canada or the attorney general of a province, as the case may be, or by or on behalf of any person to whom the injunction is directed, notice of which application has been given to all other parties thereto, may by order,

(a) notwithstanding subsections (3) and (4), continue the injunction, with or without modification, for such definite period as is stated in the order; or

(b) revoke the injunction.

(6) Where an injunction is issued under subsection (1), the Attorney General of Canada or the attorney general of a province, as the case may be, shall proceed as expeditiously as possible to institute and conclude any prosecution or proceedings arising out of the actions on the basis of which the injunction was issued.

(7) A court may punish any person who contravenes or fails to comply with an injunction issued by it under subsection (1) by a fine in the discretion of the court or by imprisonment for a term not exceeding two years.

Precedent D5.8: *Environmental Protection and Enhancement Act*, Bill 23, 22nd Leg, 4th Sess., 2nd Reading, June 4, 1992 (Alta.), cl. 207 (did not pass)

207.(1) Where, on the application of the Director, it appears to the court .... that a person has done, is doing or is about to do any act or any thing constituting or directed toward the commission of an offence under the Act, the Court may issue an injunction ordering any person named in the application

(a) to refrain from doing that act or thing, or

(b) to do any act or thing that it appears to the Court may prevent the commission of an offence under this Act.

(2) At least 48 hours' notice of the application must be given to the party or parties named in the application unless the Court is of the opinion that the urgency of the situation is such that giving of notice would not be in the public interest.

Additional Precedents:

Energy Supplies Emergency Act, R.S.C. 1985, c.E-9, s. 42 - where it appears to the Board that any person is engaged in or is about to be engaged in any act or practice that is contrary to the Act, the Board may request the Attorney General to bring action in the Federal Court to enjoin the act or practice

Discriminatory Business Practices Act, R.S.O. 1990, c. D.12, s.11

Fisheries Act, R.S.C. 1985, c. F-14, s.41(4)

Occupational Safety and Health Act of 1970, 29 U.S.C., s. 662

Unfair Trade Practices Act, R.S.A. 1980, c. U-3, s. 16 *[See Precedent D5.2, above]*

Declaration

Declarations or declaratory judgments are rulings by the court that an act or practice engaged in or about to be engaged in by a regulatee violates the statute in question [Precedent D5.9, s. 9(a)(1)]. The remedy speaks to a judicial finding of statutory violation that usually precedes the granting of a follow-up remedy, most often an injunction restraining the regulatee from continuing or repeating the prohibited act or practice.

Declarations obtained by the regulator from the courts add to the interpretative jurisprudence of the governing legislation.

Precedent D5.9: *Uniform Consumer Sales Practices Act* (U.L.A.) s. 9(a)(1)

9.(a) The Enforcing Authority may bring an action:

(1) to obtain a declaratory judgment that an act or practice violates this Act; ....

Precedent D5.10: *Trade Practices Act*, R.S.Nfld 1990, c. T-7, s. 15

15.(1) Where the director is of the opinion that a supplier

(a) has engaged in or is engaging in an unfair trade practice, or unconscionable act or practice; or

(b) has not complied with the terms of an assurance of voluntary compliance,

the director may begin and maintain an action against the supplier in a court.

(2) In an action brought under subsection (1) the court may [make an order declaring the act or practice to be an unfair trade practice or unconscionable act or practice].

Precedent D5.11: *Competition Act*, R.S.C. 1985, c.C-34, s.32, as am. by R.S.C. 1985, c. 10, (4th Supp.), s.18 [This section has been restructured with similar content by S.C. 1990, c. 37, s. 29.]

32. In any case where use has been made of the exclusive rights and privileges conferred by one or more patents for invention .... so as to [unduly restrain trade], the Federal Court, on an information exhibited by the Attorney General of Canada, may, for the purpose of preventing any use in the manner defined above of the exclusive rights and privileges conferred by any patents for invention ...., make one or more of the following orders:

[(a)] declaring void, in whole or in part, any agreement, arrangement or licence relating to that use,

Damages

An order for damages arising from a breach of a regulatory standard by a regulatee is not usually available to the regulator-plaintiff. In some jurisdictions in the U.S. and in some Canadian provinces, the regulator may maintain a representative action on behalf of consumers or affected private interests [Precedent D5.9, s. 9(a)(3) or by way of substitute proceedings maintained by the regulator in the name of private plaintiffs [Precedent D6.16, s.24]. Damages may also be recoverable by a private plaintiff who is given the statutory right of taking an enforcement proceeding [Precedent D5.12, ss.9(1) & 12(1) or a right of action for damages arising out of unlawful conduct by the regulatee [Precedent D6.16, s.22].

Representative actions are discussed in greater detail below (see "Substitute Enforcement Proceedings").

Precedent D5.12: *Environment Act*, S.Y.T. 1991, c.5, ss.8(1) & (4), 9(1)(a), 12

8.(1) Every adult or corporate person resident in the Yukon who has reasonable grounds to believe that

(a) a person has impaired .... the natural environment; ....

may commence an action in the Supreme Court.

(4) The Government of the Yukon may commence an action under paragraph 8(1)(a).

9.(1) It is a defence to an action under paragraph 8(1)(a) that

(a) the activity of the defendant that caused .... the impairment of the natural environment was in compliance with a permit, licence or other authorization issued or a standard established

(i) under an enactment; ....

12.(1) In respect of an action under subsection 8(1), the Supreme Court may

(a) grant an .... injunction;

(b) grant a declaration;

(c) award damages;

(d) award costs; and

(e) grant such other remedy that the Supreme Court considers just.

(2) In addition to, or instead of, any order or award made under subsection (1), the Supreme Court may

(b) order the defendant to .... pay to the Minister an amount to be used for the restoration or rehabilitation of the part of the natural environment impaired by the defendant;

(5) Where the Supreme Court makes an award of damages under this section, it shall order that the damages be paid to the Minister.

(6) Any money received by the Minister pursuant to an order under paragraph 2(b) or subsection (5) shall be deposited in an account in the Consolidated Revenue Fund to be known as the Environmental Account and disbursed for the following special purposes:

(a) the restoration or rehabilitation of any part of the natural environment impaired by the conduct of the defendant; or

(b) where action under paragraph (6)(a) is not practicable, the enhancement or improvement of the natural environment.

Order for Seizure or Forfeiture

Court orders for seizure or forfeiture and related remedies are important parts of the legislative design in at least three enforcement situations:

- security for enforcement costs - providing for a court-ordered seizure and detention of the regulatee's property as security for the payment of statutory charges or penalties unpaid to date by the regulatee [Precedent D5.13].

- the removal of non-complying goods from the market - allowing for a forfeiture order from a court on application by an inspector [Precedent D5.14].

- seizure of goods to prevent dissipation against creditors, owners or other claimants - allowing for seizure, receiver or trustee appointment, etc., to preserve assets in situations where the regulator believes, on reasonable and probable grounds, that a regulatee has contravened the Act and that the property must be protected pending the completion of a full investigation [see *Trade Practice Act* (B.C.), ss. 14-15].

The feature common to these approaches is that the enforcement authority must make the application to a court and satisfy the court that all statutory requirements for the exercise of the discretionary order by the court have been met.

Precedent D5.13: *Aeronautics Act*, R.S.C. 1985, c.A-2, ss. 4.5 & 4.6, as am. by R.S.C. 1985, *c. 33*, (1st Supp.), s.1

4.5(1) Where the amount of any charge and interest thereon due by a person that has been imposed [for the use of facilities or services provided by the Minister to in-flight aircraft or at airports] has not been paid, the Minister may, in addition to any other remedy available for the collection of the amount and whether or not a judgment for the collection of the amount has been obtained, on application to the superior court of the province in which any aircraft owned or operated by the person is situated, obtain an order of the court, issued on such terms as the court deems necessary, authorizing the Minister to seize and detain the aircraft.

(3) Subject to subsection (4), except where otherwise directed by an order of a court, the Minister is not required to release from detention an aircraft seized under subsection (1) or (2) unless the amount in respect of which the seizure was made is paid.

(4) The Minister shall release from detention an aircraft seized under subsection (1) or (2) if a bond or other security in a form satisfactory to the Minister for the amount in respect of which the aircraft was seized is deposited with the Minister.

4.6(1) Any aircraft of a person referred to in subsection 4.5(1) or (2) that would be exempt from seizure under a writ of execution issued out of the superior court of the province in which the aircraft is situated, is exempt from seizure and detention under that subsection.

(2) The Governor in Council may by regulation exempt any aircraft from seizure and detention under section 4.5.

Precedent D5.14 *Food and Drugs Act*, R.S.C. 1985, c.F-27, s.27(3)

27.(3) [A] judge of a superior, county or district court of the province in which any article is seized under this Part may, on the application of an inspector and on such notice to such persons as the judge directs, order that the article and any thing of a similar nature found therewith be forfeited to Her Majesty, to be disposed of as the Minister or the Minister of Consumer and Corporate Affairs may direct, if the judge finds, after making such inquiry as he considers necessary, that the article is one by means of or in relation to which any of the provinces of this Act or the regulations have been contravened

6. Private Enforcement Proceedings

Authorizing private plaintiffs to enforce regulatory legislation is becoming more common in Canada, particularly in provincial trade practices and environmental protection statutes. The statute may authorize the private individual to initiate a variety of enforcement proceedings ranging from the statutory right to ask the enforcement authority to undertake an investigation to the maintenance of a private action to enjoin unlawful conduct. The inclusion of private enforcement remedies is always in addition to those provided to the regulator, the responsible Minister or the Attorney General.

The longest standing precedent is found in the federal *Competition Act* which, in its original form around 1912, provided a mechanism for any six adult persons resident in Canada to apply to the Director "for an inquiry" into an apparent contravention of the Act [see *Competition Act*, s.9(1) for current version]. From this useful but rather minor access provision, one may move to the *Environmental Bill of Rights, 1993, (Ont.)*, c. 28 (1993), ss. 83-102 [Precedent D6.3]. It incorporates the following enforcement tools to provide "reasonable and affordable methods of empowering the public to help government to meet its [enforcement] responsibility":

- the creation of a duty to protect public resources
- an expanded civil cause of action for environmental harm
- an expanded right of standing for environmental claims
- expanded provisions for judicial review of government action, and
- exemption of certain types of environmental harm from any ultimate limitation.

The statutory right of citizens to compel investigations provides a convenient and low-risk incentive for private monitoring of regulated conduct by consumers, interest groups and competitors. There is little pressing evidence that the right to call for an inquiry impairs or interferes with the regulator's exercise of its discretionary enforcement authority.

A second access point for private enforcement is the right to maintain a civil enforcement action on behalf of an aggrieved private plaintiff or class of persons recognized in the statute as a representative group. The private action stands on its own, quite apart from any public enforcement proceeding. Our discussion at this point concentrates solely on the statutory recognition of civil enforcement actions in the courts by private plaintiffs. Private prosecutions and class actions are beyond the scope of our inquiry here. The design of private enforcement rights raises several familiar issues, including the right of standing, notification to the regulator, permissible remedies and the connection to separate public enforcement proceedings.

Precedent D6.1: *The Business Practices Act*, S.M. 1990-91, c. 6 C.C.S.M., c. B120), s.23

23.(1) A consumer may commence a court action against a supplier for relief from an unfair business practice.

(2) Where the court finds in an action under subsection (1) that an unfair business practice has occurred, it may, subject to subsections (3) and (4),

(a) award damages for any loss suffered by the consumer;

(b) rescind the consumer transaction, if any;

(c) grant an injunction restraining the supplier from continuing the unfair business practice;

(d) order the supplier to repay all or part of any amount paid to the supplier by the consumer or relieve the consumer from the payment to the supplier of any amount or any further amount, as the case may be, in respect of the consumer transaction, if any;

(e) make an order of specific performance against the supplier;

(f) give such other directions and grant such other relief as the court deems proper.

(3) In determining whether to grant any relief under this section and the nature and extent thereof, the court shall consider whether or not the consumer made a reasonable effort to minimize any damage resulting from the unfair business practice and to resolve the dispute with the supplier before commencing the court action.

(4) A judgment under subsection (2) may include an award of exemplary or punitive damages against the supplier, except where the supplier took reasonable precautions and exercised due diligence to avoid the unfair business practice.

Comment on Precedent D6.1: The engagement in an unfair business practice by a supplier constitutes a contravention of the Act. Section 23 of the Act creates a statutory cause of action by which a consumer may seek various forms of relief in relation to the unfair practice. The cause of action is available to "a consumer"; other trade practices legislation expressly limits the cause of action to "a consumer [who] has entered into a consumer transaction with a supplier and has suffered damages as a result of an unfair trade practice..." (*Trade Practices Act*, R.S.Nfld 1990, c. T-7, s.14(1)). The latter formulation clearly contemplates that only those who are personally harmed by the practice may institute proceedings. The court is empowered to award various forms of relief, including an injunction, rescission of contract, specific performance and damages for any loss suffered by the consumer. Exemplary or punitive damages may be awarded, unless the supplier exercised due diligence. Note that due diligence provides only a limited shield in this precedent whereas, in Precedent D6.3, below, it operates as a full defence to an action. Subsection (3) is somewhat unusual in that it directs the court, in exercising its discretion to award relief, to consider whether the consumer has made reasonable efforts to resolve the dispute prior to instituting a court action. This is no doubt intended to encourage informal resolution of disputes, and to discourage the institution of court proceedings other than as a last recourse.

Precedent D6.2 **Environment Act, Yukon Stats 1991, c. 5, ss. 6 - 13**

6. The people of the Yukon have the right to a healthful natural environment.

7. It is hereby declared that it is in the public interest to provide every person resident in the Yukon with a remedy adequate to protect the natural environment [ ].

8. (1) Every adult or corporate person resident in the Yukon who has reasonable grounds to believe that

(a) a person has impaired or is likely to impair the natural environment; [ ]

may commence an action in the Supreme Court.

9. (1) It is a defence to an action under paragraph 8(1)(a) that

(a) the activity of the defendant that caused or is likely to cause the impairment of the natural environment was in compliance with a permit, licence or other authorization issued or a standard established

(i) under an enactment; or

(ii) under [certain Acts] of the Parliament of Canada [ ];

(b) the activity of the defendant has not caused and is not likely to cause material impairment of the natural environment;

(c) the defendant has established that there is no feasible and prudent alternative to the activity; or

(d) the activity of the defendant

(i) has not impaired and is not likely to impair the natural environment outside residential property; and

(ii) is caused or authorized by the person using the property as a residence.

(2) No action under subsection 8(1) shall be commenced after 15 years from the date the cause of action arises.

10. (1) No person is prohibited from commencing an action under subsection 8(1) by reason only that he or she is unable to show

(a) any greater or different right, harm or interest than any other person; or

(b) any pecuniary or proprietary right or interest in the subject matter of the proceeding.

12. (1) In respect of an action under subsection 8(1), the Supreme Court may

(a) grant an interim, interlocutory or permanent injunction;

(b) grant a declaration;

(c) award damages;

(d) award costs; and

(e) grant such other remedy that the Supreme Court considers just.

(2) In addition to, or instead of, any order or award made under subsection (1), the Supreme Court may

(a) order the defendant to establish and maintain a monitoring and reporting system in respect of any of its activities that may impair the natural environment;

(b) order the defendant to restore or rehabilitate any part of the natural environment, or to pay to the Minister an amount to be used for the restoration or rehabilitation of the part of the natural environment impaired by the defendant;

(c) order the defendant to take preventative measures specified by the Supreme Court;

(d) suspend or cancel a permit issued to the defendant, or the defendant's right to obtain or hold a permit;

(e) order the Minister to conduct a review of the environmental impact of a development;

(f) order the defendant to provide financial assurance for the performance of a specified action;

(g) order the defendant to prepare a plan for or present proof of compliance with the order of the Supreme Court; and

(h) make any other order that the Supreme Court considers just.

(3) Where the Supreme Court makes an order under subsection (1) or (2), it may, on the application of a party, direct the Minister to monitor compliance with the order.

(4) Where the Minister is directed to monitor compliance with an order of the Supreme Court under subsection (3), the Minister may exercise for that purpose the powers of inspection of an environmental protection officer ....

(5) Where the Supreme Court makes an award of damages under this section, it shall order that the damages be paid to the Minister.

(6) Any money received by the Minister pursuant to an order under paragraph (2)(b) or subsection

(5) shall be deposited in an account in the Consolidated Revenue Fund to be known as the Environmental Account and disbursed for the following special purposes ....

(a) the restoration or rehabilitation of any part of the natural environment impaired by the conduct of the defendant; or

(b) where action under paragraph (6)(a) is not practicable, the enhancement or improvement of the natural environment.

13.(1) the plaintiff in an action under paragraph 8(1)(a) shall serve a copy of the writ of summons on the Minister.

(2) The Minister is entitled, upon application, to be added as a party to an action under paragraph 8(1)(a).

Comment on Precedent D6.2: This precedent expressly embraces 'public interest litigation' or 'citizen suits' by declaring, in section 7, the desirability of providing every Yukon resident with an adequate remedy to protect the natural environment. Philosophically, it is made clear that the right or responsibility to enforce environmental legislation is not one that falls exclusively into the hands of the government, but rather, is shared with the citizens at large: the suit is made available to "every adult or corporate person resident in the Yukon" (s.8(1). Any common law restriction as to standing are expressly swept aside in subsection 10(1).

The new statutory cause of action rests on the impairment or likely impairment of the natural environment. The link to contravention is made, not in the positive formulation of the cause of action, but in the statement of available defences. Under paragraph 9(1)(a), the fact that challenged activity was in compliance with a permit, licence or other authorization, or conformed to legislative standards, affords a complete defence to the action.

Section 12 contains a comprehensive and creative array of remedies that may be awarded by the Court. It is somewhat unusual for damages to be made available in a public interest suit, but special provision is made whereby any damages awarded must be paid to the Minister and used for the enhancement or improvement of the natural environment.

As is the case with most legislation providing for public interest litigation, the government - in this case the Minister - is served with a copy of the document by which proceedings are commenced, and is entitled to be added as a party to the action.

Precedent D6.3: *The Environmental Bill of Rights*, 1993 (Ont.), c.28 (1993), ss. 83-102

84.(1) Where a person has contravened or will imminently contravene an Act, regulation or instrument prescribed for the purposed of Part V and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario, any person resident in Ontario may bring an action against the person in the court in respect of the harm and is entitled to judgment if successful.

(2) Despite subsection (1), an action may not be brought in respect of an actual contravention unless the plaintiff has applied for an investigation into the contravention under Part V [See Precedent D6.5, below] and

(a) has not received one of the responses required under sections 78 to 80 within a reasonable time; or

(b) has received a response under section 78 to 80 that is not reasonable.

(3) In making a decision as to whether a response was given within a reasonable time for the purposes of clause (2)(a), the court shall consider but is not bound by the times specified in section 78 to 80.

[Subsections (4) and (5) require a person who wishes to bring an action in respect to harm to a public resource from odour, noise or dust to meet the conditions of the *Farm Practices Protection Act* and first exhaust his or her remedies under it.]

(6) Subsections (2) and (4) do not apply where the delay involved in complying with them would result in significant harm or serious risk of significant harm to a public resource.

(7) An action under section 84 may not be commenced or maintained as a class proceeding under the *Class Proceedings Act, 1992*.

(8) The onus is on the plaintiff in an action under this section to prove the contravention or imminent contravention on a balance of probabilities.

(9) This section shall not be interpreted to limit any other right to bring or maintain a proceeding.

85.(1) For the purposes of section 84, an Act, regulation or instrument is not contravened if the defendant satisfies the court that the defendant exercised due diligence in complying with the Act, regulation or instrument.

(2) For the purposes of section 84, an Act, regulation or instrument is not contravened if the defendant satisfies the court that the act or omission alleged to be a contravention of the Act, regulation or instrument is authorized by an Act of Ontario or Canada or by a regulation or instrument under an Act of Ontario or Canada.

(3) For the purposes of section 84, an instrument is not contravened if the defendant satisfies the court that the defendant complied with an interpretation of the instrument that the court considers reasonable.

(4) Nothing in this section affects a defence otherwise available.

86.(1) The plaintiff in an action under section 84 shall serve the statement of claim on the Attorney General not later than ten days after the day on which the statement of claim is served on the first defendant served in the action.

(2) The Attorney General is entitled to present evidence and make submissions to the court in the action, to appeal from a judgement in the action and to present evidence and make submissions in an appeal from a judgement in the action.

88.(1) At any time in the action, the court may order any party to give any notice that the court considers necessary to provide fair and adequate representation of the private and public interest, including governmental interests, involved in the action.

(2) The court may make any order relating to the notice, including an order for the costs of the notice, that the court considers appropriate.

89.(1) In order to provide fair and adequate representation of the private and public interests, including governmental interests, involved in the action, the court may permit any person to participate in the action as a party or otherwise.

(2) Participation under subsection (1) shall be in the manner and on the terms, including terms as to costs, that the court considers appropriate.

(3) No order shall be made under subsection (1) in an action after the court has made an order under section 93 in the action.

. . . .

90.(1) The court may stay or dismiss the action if to do so would be in the public interest.

(2) In making a decision under subsection (1), the court may have regard to environmental, economic and social concerns and may consider,

(a) whether the issues raised by the proceeding would be better resolved by another process;

(b) whether there is an adequate government plan to address the public interest issues raised by the proceeding; and

(c) any other relevant matter.

92. In exercising its discretion under the rules of court as to whether to dispense with an undertaking by the plaintiff to pay damages caused by an interlocutory injunction or mandatory order, the court may consider any special circumstance, including whether the action is a test case or raises a novel point of law.

93.(1) If the court finds that the plaintiff is entitled to judgment in an action under section 84, the court may,

(a) grant in injunction against the contravention;

(b) order the parties to negotiate a restoration plan in respect of harm to the public resource resulting from the contravention and to report to the court on the negotiations within a fixed time;

(c) grant declaratory relief; and

(d) make any other order, including an order as to costs, that the court considers appropriate.

(2) No award of damages shall be made under subsection (1).

94. The court shall not order the parties to negotiate a restoration plan if the court determines that,

(a) adequate restoration has already been achieved; or

(b) an adequate restoration plan has already been ordered under the law of Ontario or any other jurisdiction.

95.(1) This section applies to restoration plans negotiated by the parties and to restoration plans developed by the court under section 98.

(2) A restoration plan in respect of harm to a public resource resulting from a contravention shall, to the extent that to do so is reasonable, practical and ecologically sound, provide for,

(a) the prevention, diminution or elimination of the harm;

(b) the restoration of all forms of life, physical conditions, the natural environment and other things associated with the public resource affected by the contravention; and

(c) the restoration of all uses, including enjoyment, of the public resource affected by the contravention.

(3) A restoration plan may include provisions to address harm to a public resource in ways not connected with the public resource, including,

(a) research into and development of technologies to prevent, decrease or eliminate harm to the environment;

(b) community, education or health programs; and

(c) the transfer of property by the defendant so that the property becomes a public resource.

(4) A provision under subsection (3) shall be included in a restoration plan only with the consent of the defendant.

(5) A provision under clause (3)(c) shall be included in a restoration plan only with the consent of the defendant and the transferee.

(6) A restoration plan may include provisions for monitoring progress under the plan and for overseeing its implementation.

(7) When negotiating or developing a restoration plan in respect of harm, the negotiating parties or the court, as the case may be, shall consider,

(a) any orders under the law of Ontario or any other jurisdiction dealing with the harm; and

(b) whether, apart from the restoration plan, the harm has been addressed in the ways described in subsection (2).

(8) A restoration plan may provide for money to be paid by the defendant only if,

(a) the money is to be paid to the Minister of Finance;

(b) the money is to be used only for the purposes mentioned in subsections (2) and (3); and

(c) the Attorney General and the defendant consent to the provision.

96. If the court orders the parties to negotiate a restoration plan, the court may,

(a) make any interim order that the court considers appropriate to minimize the harm; and

(b) make any order that the court considers appropriate.

(i) for the costs of the negotiations,

(ii) requiring a party to prepare an initial draft restoration plan for use in the negotiations,

(iii) respecting the participation of non-parties in the negotiations, and

(iv) respecting the negotiation process, including, on consent of the parties, an order concerning the use of a mediator, fact finder or arbitrator.

97.(1) If the parties agree on a restoration plan within the time fixed by the court under clause 93(1)(b) and the court is satisfied that the plan is consistent with section 95, the court shall order the defendant to comply with the plan.

(2) For the purpose of determining whether an agreed plan is consistent with section 95, the court may,

(a) appoint one or more experts under the rules of court; and

(b) on consent of the parties, hear submissions or receive reports from any mediator, fact finder or arbitrator involved in the negotiation.

98.(1) If the parties do not agree on a restoration plan or if the court is not satisfied that a plan agreed to by the parties is consistent with section 95, the court shall develop a restoration plan consistent with section 95 and, for the purpose, the court may,

(a) order the parties to engage in further negotiations for a restoration plan on the terms that the court considers appropriate;

(b) order one or more parties to prepare a draft restoration plan;

(c) appoint one or more persons to investigate and report back on any matter relevant to the development of a restoration plan;

(d) appoint one or more non-parties to prepare a draft restoration plan; and

(e) make any other order that the court considers appropriate.

(2) The rules of court respecting court appointed experts apply, with necessary modifications, to the appointment of a person under clause (1)(c) or (d).

(3) The court shall order the defendant to comply with the restoration plan developed by the court.

99. The doctrines of cause of action stopped and issue estoppel apply in relation to an action under section 84 as if all past, present and future residents of Ontario were parties to the action.

100. In exercising its discretion under subsection 13(1) the *Courts of Justice Act* with respect to costs of an action under section 84 of this Act, the court may consider any special circumstance, including whether the action is a test case or raises a novel point of law.

Comment on Precedent D6.3: As with Precedent D6.2, above, this precedent recognizes the interest of members of the public in the enforcement of environmental protection legislation, and creates a new statutory cause of action for environmental harm to a public resource. The right of action is afforded to every resident of Ontario - there is no requirement that the plaintiff have suffered personal harm.

There is, however, a restriction placed on a citizen's ability to institute public interest proceedings: prior to commencing proceedings, the citizen must have applied to the government for an investigation of the alleged contravention and the government must have failed to provide a reasonable response. (Subsection 84(6) lifts this restriction in exceptional circumstances.) This provision appears to recognize that it is the government that holds the primary responsibility for enforcing regulatory standards, and that civil litigation by a private citizen is desirable only where the government fails to meet this responsibility. In a comparable fashion, subsection 2619(b) of the *Toxic Substances Control Act*, 15 U.S.C. (see Precedent D6.7, below) precludes a private citizen from commencing a civil action respecting a violation of regulatory standards prior to giving the government 60 days' notice of the alleged violation. That subsection also precludes an action if the government "has commenced and is diligently prosecuting" enforcement proceedings.

In contrast to Precedent D6.2, above, the cause of action is framed to lie where the defendant has caused or will imminently cause significant harm to the environment as a result of non-compliance with a prescribed statute, regulation or instrument. One possible consequence of making non-compliance an element of the cause of action, as opposed to making compliance with a legislative standard a defence to the action (as in Precedent D6.2), is that no action would lie in relation to harm caused by unregulated activities of the defendant. As well, under this precedent, the burden of proving that the harm is, or is likely to be, significant lies with the plaintiff, while under Precedent D6.2, it is a defence for the defendant to establish that he has caused no material impairment to the environment.

Section 85 establishes two interesting defences to an action: 1) that the defendant exercised due diligence (normally seen as a defence in criminal proceedings), and 2) that the defendant complied with an interpretation of the legislation that the court considers reasonable. Both these defences appear aimed at exonerating the defendant who has acted in good faith.

In addition to providing for service on the Attorney General, provision is made for service on other parties who may fairly represent the private and public interests at stake (ss. 87-89; section 87, which provides for notice to the public in a special environmental registry, has not been included in the precedent.)

In recognition of some of the problems that may arise in allowing a private citizen to bring suit on behalf of the public at large, section 90 permits the court to stay or dismiss the action if to do so would be in the public interest, and sets out factors for the court to consider in exercising its discretion. Another approach to this issue may be found in "The Charter of Environmental Rights and Responsibilities", Bill 48, 22nd Leg., 2nd Sess., 1st Reading, June 9, 1992 (Sask.), cl. 4-5, wherein the citizen must apply to the court for leave to commence proceedings. Although in that case the application for leave is to be determined on the basis of whether the action appears frivolous or vexatious, and whether sufficient evidence is presented, a similar provision could be framed in which the public interest is among the factors to be taken into account.

The available relief, set out in section 93, includes an injunction, declaration and "any other order . . . that the court considers appropriate". Damages, however, are expressly excluded. A somewhat novel remedy is an order for the parties to negotiate a restoration plan - in effect, an alternate dispute resolution mechanism initiated and supervised by the court. Details respecting this remedy appear in sections 94-98.

Additional Precedents:

An Act to Provide a Charter of Environmental Rights and Responsibilities, Bill 48, 22nd Leg., 2nd Sess., 1st Reading, June 9, 1992 (Sask.), cl. 4 - 8

Resource Conservation and Recovery Act of 1976, 42 U.S.C., s. 6972

Trade-marks Act, s. 53.1 enacted by S.C. 1993, c. 44, s. 234 (the *North American Free Trade Agreement Implementation Act*) - the owner of a registered trademark can initiate a court proceeding to compel the Minister of National Revenue to detain goods that are being imported contrary to the Act - the Court may require the owner to provide security before the Minister acts.

Trade Practices Act, R.S.Nfld 1990, c. T-7, ss. 14, 17, 18

Unfair Trade Practices Act, R.S.A. 1980, c. U-3, ss. 11, 15 - 17

Uniform Consumer Sales Practices Act (U.L.A.) s. 11

Application for Investigation

The standard formula found in several federal and provincial statutes permits any two, four or six persons (the numbers vary) resident in the jurisdiction to ask the enforcement authority to investigate an apparent contravention of the regulatory statute. The evidentiary requirements of their complaint or application range from statutory declarations and "a concise statement of the evidence supporting their opinion" [*Competition Act*, s. 9 and Precedent D6.4, ss. 108-109] to a simple complaint in writing [*The Trade Practices Inquiry Act* (Man.), s. 2].

The call for an investigation compels the regulator or enforcement authority to begin an investigation. A duty to report to the complainant on the results of the inquiry may be written into the empowering legislation. However, both legislative and judicial precedent clearly confirm that the regulator is expected to investigate all alleged contraventions in an objective and prudent manner. The regulator must also respect all requirements of confidentiality imposed by the statute.

On the other hand, a pro-active compliance and enforcement policy which supports private enforcement initiatives may codify how a regulator is to handle serious contravention complaints by members of the public. This is certainly the approach taken in the *Environmental Bill of Rights, 1993* (Ont.) [Precedent D6.5]. The statute requires the Minister, on reference from the Environmental Commissioner, to investigate the documented complaint unless

> "(a) the application is frivolous or vexatious;
>
> (b) the alleged contravention is not serious enough to warrant an investigation; or

(c) the alleged contravention is not likely to cause harm to the environment."

Time limits are set up for activating and completing an investigation. The Minister, within 30 days after completing an investigation, "must give written notice of the outcome of the investigation" and "what action, if any, the Minister has taken or proposes to take as a result of the investigation". For a similar precedent, see the *Environment Act* (Y.T.), ss. 14-18.

Precedent D6.4: *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16, (4th Supp.), ss. 108-110

108.(1) Any two persons resident in Canada who are not less than eighteen years of age and who are of the opinion that an offence has been committed under this Act may apply to the Minister for an investigation of the alleged offence.

(2) An application for an investigation shall be accompanied by a solemn or statutory declaration

(a) stating the names and addresses of the applicants;

(b) stating the nature of the alleged offence and the name of each person alleged to be involved in its commission; and

(c) containing a concise statement of the evidence supporting the allegations of the applicants.

109.(1) On receipt of an application under section 108, the Minister shall acknowledge receipt of the application and investigate all matters that the Minister considers necessary for a determination of the facts relating to the alleged offence.

(2) Within ninety days after receiving an application under section 108, the Minister shall report to the applicants on the progress of the investigation and the action, if any, that the Minister proposes to take.

(3) The Minister may discontinue an investigation where the Minister is of the opinion that the alleged offence does not require further investigation.

(4) Where an investigation is discontinued, the Minister shall

(a) prepare a report in writing describing the information obtained during the investigation and stating the reasons for its discontinuation; and

(b) send a copy of the report to the applicants and to any person whose conduct was investigated.

110. At any stage of an investigation under section 109, the Minister may, in addition to or in lieu of continuing the investigation, send any records, returns or evidence to the Attorney General of Canada for consideration of whether an offence has been or is about to be committed against this Act and for such action as the Attorney General of Canada may wish to take.

Precedent D6.5: *The Environmental Bill of Rights, 1993*, (Ont.), c. 28 (1993), ss. 74-80

74.(1) Any two persons resident in Ontario who believe that a prescribed Act, regulation or instrument has been contravened may apply to the Environmental Commissioner for an investigation of the alleged contravention by the appropriate Minister.

(2) An application under this section shall be in the form provided for the purpose by the office of the Environmental Commissioner and shall include,

(a) the names and addresses of the applicants;

(b) a statement of the nature of the alleged contravention;

(c) the names and addresses of each person alleged to have been involved in the commission of the contravention, to the extent that this information is available to the applicants;

(d) a summary of the evidence supporting the allegations of the applicants;

(e) the names and addresses of each person who might be able to give evidence about the alleged contravention, together with a summary of the evidence they might give, to the extent that this information is available to the applicants;

(f) a description of any document or other material that the applicants believe should be considered in the investigation;

(g) a copy of any document referred to in clause (f), where reasonable; and

(h) details of any previous contacts with the office of the Environmental Commissioner or any ministry regarding the alleged contravention.

(3) An application under this section shall also include a statement by each applicant or, where an applicant is a corporation, by a director or offices of the corporation, that he or she believes that the facts alleged in the application are true.

. . . .

75. Within ten days of receiving an application under section 74, the Environmental Commissioner shall refer it to the minister responsible for the administration of the Act under which the contravention is alleged to have been committed.

76. The minister shall acknowledge receipt of an application for investigation to the applicants within twenty days of receiving the application from the Environmental Commissioner.

77.(1) The minister shall investigate all matters that the Minister considers necessary in relation to a contravention alleged in an application

(2) Nothing in this section requires a minister to conduct an investigation in relation to a contravention alleged in an application if the minister considers that,

(a) the application is frivolous or vexatious;

(b) the alleged contravention is not serious enough to warrant an investigation; or

(c) the alleged contravention is not likely to cause harm to the environment.

(3) Nothing in this section requires a minister to duplicate an ongoing or completed investigation.

78.(1) If the minister decides that an investigation is not required under section 77, the minister shall give notice of the decision, together with a brief statement of the reasons for the decision, to,

(a) the applicants;

(b) each person alleged in the application to have been involved in the commission of the contravention for whom an address is given in the application; and

(c) the Environmental Commissioner.

(2) A minister need not give notice under subsection (1) if an investigation in relation to the contravention alleged in the application is ongoing apart from the application.

(3) The notice referred to in subsection (1) shall be given within 60 days of receiving the application for investigation.

79.(1) Within 120 days of receiving an application for an investigation in respect of which no notice is given under section 78, the Minister shall either complete the investigation or give the applicants a written estimate of the time required to complete it.

(2) Within the time given in an estimate under subsection (1), the minister shall either complete the investigation or give the applicants a revised written estimate of the time required to complete it.

(3) Subsection (2) applies to a revised estimate given under subsection (2) as if it were an estimate given under subsection (1).

80.(1) Within thirty days of completing an investigation, the minister shall give written notice of the outcome of the investigation to the persons mentioned in clauses 78(1) to (c).

(2) The notice referred to in subsection (1) shall state what action, if any, the minister has taken or proposes to take as a result of the investigation.

Comment on Precedent D6.5: Any citizen is free to complain to the government about a contravention of regulatory legislation. Precedents D6.4 and D6.5, however, establish a formal process by which members of the public can request that the government investigate apparent contraventions. They provide, as well, for an accounting by the government as to what action, if any, it proposes to take in respect of the complaint. Of the two precedents, Precedent D6.5 is somewhat more comprehensive with respect to these follow-up procedures. As well, in section 77(2), it expressly delineates the circumstances in which the government may decline to carry out an investigation: where the application is frivolous or vexatious, or where the contravention is not serious or is not likely to cause harm. Under a comparable scheme, the *Environment Act*, Yukon Stats. 1991, c. 5, s. 18 creates a specific offence for knowingly making a false statement in an application for an investigation and thereby causing an investigation to be commenced.

Additional Precedents:

Competition Act, R.S.C. 1985, c. C-34, s. 9, as am. by R.S.C. 1985, c. 19, (2nd Supp.), s. 22

Environment Act, S.Y.T. 1991, c. 5, ss. 14 - 18

The Trade Practices Inquiry Act, R.S.M. 1987, c. T110, s. 2, as am. by R.S.M. 1987 Supp., c. 4, s. 22

Action for Injunctive Relief

Our discussion of the injunctive remedy bears repeating here (see supra "Court Orders Sought by Regulator"). Exactly the same issues must be canvassed - the right of standing, evidentiary requirements ("irreparable harm") and the balance of convenience test, security for costs and the framing of the remedy as a separate or connected enforcement tool.

In consumer protection legislation, the right to maintain an injunctive action is usually broadly framed [Precedent D6.1, s. 23; see also *Trade Practices Act*, R.S Nfld 1990, c. T-7, s. 14]. An Alberta consumer protection statute expressly extends the right to non-profit consumer organizations [*Unfair Trade Practices Act*, R.S.A. 1980, c. U-3, s. 15]. A more restrictive approach is to confine the right to bring an injunctive proceeding to a person "who suffers or is about to suffer loss or damage as a result of conduct that is contrary" to the Act [Precedent D6.6].

As we have seen above, the *Environmental Bill of Rights, 1993,* (Ont.), ss. 84, 93(1)(a) [Precedent D6.3] provides an integrated approach to designing the private remedy, as follows:

- any resident of the province may bring an action in the court where an imminent contravention will cause significant harm to a public resource;
- an action may not be brought in respect of an actual contravention by a private plaintiff unless the person has already asked for an investigation by the minister and the Minister is not carrying out the requirements of the Act;
- the private plaintiff bears the onus of proving the contravention "on a balance of probabilities"; and
- any right of private action otherwise available is not affected by the exercise of this right of action.

It should be noted that the remedies available under this provision include an injunction, specific performance ("restoration plan") and declaratory relief, but not damages.

Precedent D6.6: *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16, (4th Supp.), s.136(2)

136.(2) Any person who suffers or is about to suffer loss or damage as a result of conduct that is contrary to any provision of this Act or the regulations may seek an injunction from a court of competent jurisdiction ordering the person engaged in the conduct

(a) to refrain from doing any act or thing that it appears to the court causes or will cause the loss or damage; or

(b) to do any act or thing that it appears to the court prevents or will prevent the loss or damage.

Comment on Precedent D6.6: Under this precedent, an action for an injunction may be commenced only by a person who suffers or is about to suffer loss or damage. No provision is made for the bringing of an action by a concerned, but personally-unaffected, citizen. Either a prohibitive or mandatory injunction may be awarded by the court.

Precedent D6.7: *Toxic Substances Control Act*, 15 U.S.C., s. 2619

2619.(a) Except as provided in subsection (b), any person may commence a civil action

(1) against any person . . . . who is alleged to be in violation of this Act [or certain rules or orders] to restrain such violation . . . .

(b) No civil action may be commenced

(1) under subsection (a)(1) to restrain a violation of this Act or rule or order under this Act

(A) before the expiration of 60 days after the plaintiff has given notice of such violation (i) to the Administrator, and (ii) to the person who is alleged to have committed such violation, or

(B) if the Administrator has commenced and is diligently prosecuting a proceeding for the issuance of an order . . . . to require compliance with this Act or with such rule or order or if the Attorney General has commenced and is diligently prosecuting a civil action . . . . to require compliance with this Act or with such rule or order, but if such proceeding or civil action is commenced after the giving of notice, any person giving such notice may intervene as a matter of right in such proceeding or action; . . . .

Comment on Precedent D6.7: This precedent establishes an action for relief in the nature of an injunction which may be instituted by "any person", whether or not that person is affected by the conduct he seeks to restrain. Under subsection (b), 60-days notice must be given to the government prior to commencing the action, and no action may be commenced if the government is actively engaged in enforcement proceedings in relation to the contravention.

Precedent D6.8: *Trade Practice Act*, R.S.B.C. 1979, c. 406, ss. 18 & 19

18.(1) The court, in an action brought by [any person] whether or not that person has a special, or any, interest under this Act or the regulations, or is affected by a consumer transaction, may grant either or both of

(a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction is a deceptive or unconscionable act or practice; or

(b) an interim or permanent injunction restraining a supplier from engaging or attempting to engage in a deceptive or unconscionable act or practice in respect of a consumer transaction,

and may then make a further order requiring the supplier to advertise to the public in the media in a manner that will assure prompt and reasonable communication to consumers, and on terms or conditions the court considers reasonable and just, particulars of any judgment, declaration, order or injunction granted against the supplier under paragraph (a) or (b) or subsection (3).

(2) In an action under subsection (1), any person . . . . may sue on his own behalf and, at his option, on behalf of consumers generally, or a designated class of consumers in the Province.

(3) In an action for a permanent injunction under subsection (1)(b), the court may restore to any person who has an interest in it any money or property that may have been acquired by reason of a deceptive or unconscionable act or practice by the supplier.

(6) In an action brought under this section, or in an appeal from it, the plaintiff shall not be required to furnish security for costs.

19. In any application under section 18 for an interim injunction,

(a) the court shall give greater weight, importance and the balance of convenience to the protection of consumers than to the carrying on of the business of a supplier;

(b) [the applicant] shall not be required to post a bond or give an undertaking as to damages; and

(c) the applicant need not establish that irreparable harm will be done to himself or all other consumers, or any designated class of consumers, in the Province, if the interim injunction is not granted.

Comment on Precedent D6.8: The precedent makes it very clear that any person may commence proceedings to restrain a supplier from engaging in deceptive or unconscionable trade practices. Subsection 18(2) also appears to contemplate the bringing of a class action. By virtue of subsection 18(3), restitution may be ordered. Section 19 alters the common law rules respecting the awarding of an interim injunction, placing a less onerous burden on the applicant than is normally the case.

Action for Declaration

See the discussion above, "Court Orders Sought by Regulator". [Also see Precedents D5.5, s. 18, *Environment Act,* S.Y.T. 1991, s. 49(1) and D6.8, s. 18]

Action for Damages

The initial question for the policymaker and legal counsel is whether to create a statutory action for damages or simply to expand the rule of standing at common law. The latter approach is exemplified by the *Environmental Bill of Rights, 1993,* (Ont.) [Precedent D6.12]:

> "No person who has suffered or may suffer a direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment shall be barred from bringing an action in respect of the loss only because the person has suffered or may suffer direct economic loss or direct personal injury of the same kind or to the same degree as other persons."

A feature common to either approach is the inclusion of a "no derogation" provision which expressly states that the Act "does not restrict, limit or derogate from the rights of a [plaintiff] under any other law" [see *Trade Practice Act* (B.C.), s. 29].

The creation of a statutory right to sue for damages is tied directly to the proof of loss or damage. The damage arises from conduct of the regulatee that is contrary to the Act or regulations [Precedent D6.6, s. 136] or the regulatee's failure to comply with a court or tribunal ruling directly affecting the private plaintiff [see *Competition Act*, s. 11]. The costs and complexity of mounting civil proceedings in environmental and competition law situations are recognized in the right of the court to award additional compensation to the successful private plaintiff for the costs of investigation and of the proceedings [Precedent D6.6, s. 136(1); see *Competition Act*, s. 36].

In addition, where the regulatee's conduct has already been the subject of a successful prosecution, the record of proceedings, including the evidence given in the criminal proceedings, will be sufficient proof of the damages claimed by the private plaintiff [see *Competition Act*, s. 36(2)]. Under this type of provision, a would-be private plaintiff must await the results of the prosecution against the regulatee in order to use the evidence accepted in the criminal proceeding in a civil claim for damages. In practice, however, the *Competition Act* has prompted regulatees to negotiate compliance undertakings or consent orders with the Director of Investigation and Research rather than proceed to a criminal trial. The result may well satisfy the immediate compliance objectives of the Director, but it dispenses with the evidentiary record sought by the would-be private plaintiff because the criminal proceedings are avoided.

Another factor working against the likelihood of civil damage actions under a regulatory statute like the *Competition Act* is that the extent of individual loss or damage suffered by a potential private plaintiff may be relatively small compared to the full costs of litigation to recover compensation. In Ontario, the *Class Proceedings Act, 1992* may make certain existing claims more viable, including actions for civil damages under the *Competition Act* (e.g. bid rigging, conspiracy and misleading advertising) by a class of *either* consumers or competitors. Certainly this prediction has been made in respect to existing small claims that may be aggregated under the statute into large environmental and toxic tort actions or product liability actions. If this analysis is correct, the new Ontario statute will add a significant remedial sidewind to both Ontario and federal civil enforcement regimes.

The right of a court to award damages to a private plaintiff has been extended in a few cases to include punitive or exemplary damages, where the regulatee's conduct has been particularly egregious. It may be argued that this is inherent in the court's remedial powers, making the provision unnecessary. The point, however, is far from certain and the precedents prefer to underline the scope of damages recoverable [see *Business Practices Act* (Ont.), s. 4 and Precedent D6.9].

In some regulatory schemes, there may be a specific loss that ought to be separately identified as recoverable where it is attributable to statutory contraventions. The clearest example of this approach is found in the federal *Fisheries Act*, s. 42(3). It makes polluters of fishing grounds absolutely liable for the "loss of income" suffered by fishers. Where there is a contractual relationship between the private plaintiff and the regulatee whose contravention of the statute has brought harm or loss to the plaintiff, then the remedy of rescission (if possible) is added to the right to claim damages [Precedent D6.16, s. 22].

Precedent D6.9: *Discriminatory Business Practices Act*, R.S.O. 1990, c. D.12, s. 9

9.(1) A person who incurs loss or damage as a result of an act that is a contravention of this Act has the right to compensation for the loss or damage and to punitive or exemplary damages from the person who committed the contravention.

(2) The right to compensation mentioned in subsection (1) may be enforced by action in a court of competent jurisdiction.

Comment on Precedent D6.9: The statutory cause of action for damages established in this precedent is available only to a person who suffers loss or damage as a result of a contravention. The same is true in Precedents D6.10 and D6.11, below.

Precedent D6.10: *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16, (4th Supp.), s. 136

136.(1) Any person who has suffered loss or damage as a result of conduct that is contrary to any provision of this Act or the regulations may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct an amount equal to the loss or damage proved to have been suffered by the person and an amount to compensate for the costs of any investigation in connection with the matter and of proceedings under this section.

(3) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of this Act.

Precedent D6.11: *The Business Practices Act*, S.M. 1990-91, c. 6 (C.C.S.M., c. B120), s. 23

23.(1) A consumer may commence a court action against a supplier for relief from an unfair business practice.

(2) Where the court finds in an action under subsection (1) that an unfair business practice has occurred, it may, subject to subsections (3) and (4),

(a) award damages for any loss suffered by the consumer;

(3) In determining whether to grant any relief under this section and the nature and extent thereof, the court shall consider whether or not the consumer made a reasonable effort to minimize any damage resulting from the unfair business practice and to resolve the dispute with the supplier before commencing the court action.

(4) A judgment under subsection (2) may include an award of exemplary or punitive damages against the supplier, except where the supplier took reasonable precautions and exercised due diligence to avoid the unfair business practice.

Precedent D6.12: *The Environmental Bill of Rights*, 1993, (Ont.), c. 28 (1993), s. 103(1)

103.(1) No person who has suffered or may suffer a direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment shall be barred from bringing an action without the consent of the Attorney General in respect of the loss only because the person has suffered or may suffer direct economic loss or direct personal injury of the same kind or to the same degree as other persons.

Comment on Precedent D6.12: No cause of action is established by this precedent: rather, it removes a common law barrier in relation to actions for public nuisance. Under the common law, an individual could institute proceedings for harm suffered by him (other than with the Attorney General's consent to relator proceedings) only if the harm was of a greater degree and of a different kind than the harm suffered by the public at large.

Precedent D6.13: *Environment Act*, S.Y.T. 1991, c. 5, ss. 6 - 13

8.(1) Every adult or corporate person resident in the Yukon who has reasonable grounds to believe that

(a) a person has impaired or is likely to impair the natural environment; . . . .

may commence an action in the Supreme Court.

10.(1) No person is prohibited from commencing an action under subsection 8(1) by reason only that he or she is unable to show

(a) any greater or different right, harm or interest than any other person; or

(b) any pecuniary or proprietary right or interest in the subject matter of the proceeding.

12.(1) In respect of an action under subsection 8(1), the Supreme Court may

(c) award damages;

(5) Where the Supreme Court makes an award of damages under this section, it shall order that the damages be paid to the minister.

(6) Any money received by the Minister pursuant to an order under . . . . subsection (5) shall be deposited in an account in the Consolidated Revenue Fund to be known as the Environmental Account and disbursed for the following special purposes . . . .

(a) the restoration or rehabilitation of any part of the natural environment impaired by the conduct of the defendant; or

(b) where action under paragraph (6)(a) is not practicable, the enhancement or improvement of the natural environment.

Comment on Precedent D6.13:

Only selected sections are included. See Precedent D6.2, above, for the remaining provisions, dealing with defences to the action, limitation periods, additional remedies and notice to the Minister. See also the comment accompanying that precedent.

Additional Precedents:

Arctic Waters Pollution Prevention Act, R.S.C. 1985, c. A-12, s. 6 - persons exploring for natural resources on lands adjacent to or in arctic waters are liable for actual loss or damage incurred by other persons resulting from deposit of waste - maximum amount of liability determined by regulations

Radiocommunication Act, R.S.C. 1985, c. R-2, s. 19 - grants right of civil action for damages and other remedies to persons who suffer loss as a result of conduct that is contrary to certain provisions of the Act - damages recoverable in any court of competent jurisdiction - grants right of civil action to prevent disclosure or to recover damages for disclosure of telephonic communication - damages recoverable in any court of competent jurisdiction

Telecommunications Act, S.C. 1993, c. 38, s. 72 - grants right of civil action for damages and other remedies to persons who suffer loss as a result of a contravention of the Act or regulations - damages recoverable in any court of competent jurisdiction

Business Practices Act, R.S.O. 1990, c. B.18, s. 4

Competition Act, R.S.C. 1985, c. C-34, s. 36, as am. by R.S.C. 1985, c. 1, (4th Supp.), s. 11

Environmental Protection Act, R.S.O. 1990, c. E.19, s. 99

"Environmental Protection and Enhancement Act", Bill 23, 22nd Leg, 4th Sess., 2nd Reading, June 4, 1992 (Alta.), cl. 205

Fisheries Act, R.S.C. 1985, c. F-14, ss. 42(3) - (8)

Other Court Orders

Under this heading, the drafting approaches may be characterized in three ways:

- the basket clause - where the court is enabled to make "any other order, including an order as to costs, that the court considers appropriate" [*Environment Act*, S.Y.T. 1991, s. 49(1)(d)];

- statutory-specific performance - an approach taken in recently enacted environmental legislation whereby (for example) detailed restoration plans are to be prepared and performed by the wrongdoer, subject to monitoring and reporting requirements [see *Environment Act*, S.Y.T. 1991, s. 12(2) and *Environment Act*, S.Y.T. 1991, s. 49(1)(b)]; and

- contract protection - where the unlawful act or practice of the regulatee has induced the citizen plaintiff into a contract, the contract is rendered unenforceable by the regulatee, providing the consumer with the remedies of rescission, restitution and damages, as may be appropriate in the circumstances [see *Consumer Protection Act* (Que.), ss. 271-272 and *Trade Practice Act* (B.C.), ss. 4(3) & 22].

The important point here is to tailor the array of court remedies to particular compliance objectives, where private plaintiffs are seeking relief or other compensation against firms that

are not complying with the governing legislation. There is a clear congruity between public and private remedies in those statutes in which compliance planning has been practised at the front-end of the drafting process.

For examples of additional court orders, see the Precedents listed under "Private Enforcement Proceedings", above [Precedent D6.1 offers examples of an order for rescission of contract (s. 23(2)(b), and specific performance (s. 23(2)(e)); Precedent D6.2 contains various remedies including orders to the defendant to monitor and report on their activities, to restore the environment, to take preventive measures, to provide financial assurances of conduct or to prepare a compliance plan and orders suspending or cancelling the defendant's permit (s. 12(2)); for a court order for parties to negotiate a restoration plan, see *Environment Act,* S.Y.T. 1991, ss. 49(1)(b) and 50-54].

Relief On Criminal Conviction

As seen above, the *Competition Act* allows private plaintiffs to use the record of conviction as full proof to support a damages action against a guilty regulatee. An alternative found in both federal and provincial legislation is to let the criminal court, at the time of conviction, order the regulatee to pay the person who has suffered loss or damage by reason of the regulatee's unlawful conduct. This sanction is in addition to any fine levied against the guilty individual or firm.

This approach is most likely to be successful where the complainant's evidence speaks directly to the loss or damage incurred and was principally relied on by the prosecutor in the successful proceeding against the regulatee. The remedy is only appropriate in cases where financial compensation is the most appropriate remedy and where there is no dispute over the quantum of the loss or damage. Criminal courts refuse to become civil courts in disguise, especially since an unrealized compensation order may usually be filed in the civil court as if it were a civil order in the first instance [Precedents D6.14, s. 131 and D1.1, s. 25.1].

Precedent D6.14: *Canadian Environmental Protection Act,* R.S.C. 1985, c. 16, (4th Supp.), s. 131

131.(1) Where an offender has been convicted of an offence under this Act, the court may, at the time sentence is imposed and on the application of the person aggrieved, order the offender to pay to that person an amount by way of satisfaction or compensation for loss of or damage to property suffered by that person as a result of the commission of the offence.

(2) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith, the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the offender in the same manner as if it were a judgment rendered against the offender in that court in civil proceedings.

Additional Precedents:

Radiocommunication Act, s. 18(3), as enacted by S.C. 1991, c. 11, s. 85

Trade Practice Act, R.S.B.C. 1979, c. 406, s. 25.1, as am. by S.B.C. 1980, c. 5, s. 12 and S.B.C. 1989, c. 38, s.39

Relationship to Other Enforcement Proceedings

The interrelationships among the various types of enforcement provisions in a particular statute are complex, and are the proper subject for detailed analysis in a department's or agency's compliance and enforcement policy. From a legal point of view, careful consideration should be given to spelling out the relationship between civil and criminal processes in the statute itself. You may also wish to consider adding a "no derogation" provision similar to the one in the *Canadian Environmental Protection Act* [Precedent D6.15].

Precedent D6.15: *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16, (4th Supp.), s. 137

[A person who has suffered loss as a result of a contravention of the Act may commence an action for damages or an injunction.]

137. No civil remedy for an act or omission is suspended or affected by reason only that the act or omission is an offence under this Act . . . and nothing in this Act shall be construed so as to repeal, remove or reduce any remedy available to any person at common law, under any Act of Parliament or of a provincial legislature.

Precedent D6.16: *Trade Practice Act*, R.S.B.C. 1979, c. 406, ss. 22(3) & 25.1(3), as am. by S.B.C. 1980, c. 5, ss. 11 & 12

22.(3) A consumer shall not commence an action [under the Act for damages, rescission of a consumer transaction or restitution] where he or a person on his behalf has made application to the court in respect of the same defendant and transaction [, at the time the defendant is sentenced for an offence under the Act, for an order that the defendant pay compensation to the consumer].

25.1(3) An aggrieved consumer or a Crown prosecutor on his behalf shall not make an application [at the time the defendant is sentenced for an offence under the Act, for an order that the defendant pay compensation to the consumer] if the aggrieved consumer has commenced a civil action against the defendant in respect of the same transaction and is claiming [damages, rescission of the consumer transaction or restitution under the Act].

Precedent D6.17: *Resource Conservation and Recovery Act* of 1976, 42 U.S.C., s. 6972(b)

6972 (b) No [civil action by a citizen seeking enforcement of a permit, order or regulation or the imposition of civil penalties against a person alleged to be in violation of the permit, order or regulation] may be commenced under [the Act]

(2) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court . . . . to require compliance with such [permit or regulation].

7. Substitute Enforcement Proceedings

Right of Intervention

If a regulatory statute provides for private enforcement proceedings (declaratory and injunctive relief), the regulator will have an interest in the conduct and outcome of those proceedings. The regulator will want to know their possible effect on its own enforcement priorities and how the courts interpret the host legislation. A private proceeding could involve a defendant firm currently under investigation by the regulator. Or the pattern of conduct under review might make the proceeding a test case whose outcome is of crucial importance to the affected industry group. In either situation, the regulator will have a substantial interest in the civil action.

From a compliance policy point of view, the goal is not to bar the right to take a private civil action. That would simply restore the monopoly of civil enforcement to the regulator. The better approach is to give the regulator a clear right to be a party to such proceedings.

Quebec and British Columbia have taken different approaches to a regulator's right of intervention. In the *Consumer Protection Act* (Que.) [Precedent D7.1], the enforcement authority ["President"] "may intervene, of right, at any time before the judgment" in any action relating to any statute or regulation under the supervision of the Consumer Protection Office. The British Columbia approach in s. 21 of its *Trade Practice Act* is more restricted. The Director "may, on application to the court, intervene in the action as a party, on the terms and conditions the court considers just". The definition of "action" is any private suit for a declaration or injunction (or both) brought by "any...person whether or not that person has a special, or any, interest under [the] Act...". The private plaintiff must notify the Director of their suit by providing the Director with a copy of the writ of summons. Interestingly, the court, if it wishes, may proceed with the action even if the Director has not been notified.

The right of intervention gives the enforcement authority the opportunity, subject to the direction of the court, to participate as a party in the private enforcement proceeding. The private plaintiff remains in charge of the proceeding and is not replaced by the enforcement authority. The procedure recognizes the regulator's legitimate interest in the case due to its responsibilities for ongoing public enforcement, and the possible influence of the case on judicial interpretation of the governing statute. Experience suggests that the right of intervention is sparingly exercised and is reserved for very contentious or obvious test cases.

The right of the regulator to receive notice of any private injunctive or declaratory enforcement proceeding allows the regulator to keep abreast of enforcement initiatives being undertaken by private actors. It should be noted that the duty to notify does not usually apply in proceedings based on a contractual relationship between the private plaintiff and the defendant regulatee, or where the claim is based on loss or damage allegedly attributable to an act or practice in contravention of regulatory standards. This kind of case is characterized as a contractual dispute

and is left to be decided between the parties. The regulator may well be interested in the arguments and the outcome, but the proceeding is not seen in the same public interest terms as an injunctive/declaratory proceeding (where the plaintiff may well be a consumer organization or other representative person).

The Right to Take Over Private Enforcement Proceedings

There may be considerable merit in providing for a procedure to allow the regulator (the Director or other enforcement authority) to take over a private enforcement proceeding with the consent of the plaintiff. Substitute actions are integral parts of the enforcement options available to trade practice Directors in several provinces, including Manitoba, Alberta and British Columbia [see *The Business Practices Act* (Man.) s. 24; Precedent D7.2; and *Trade Practice Act* (B.C.), s. 24].

The right to take substitute proceedings is very carefully framed. In the B.C. *Trade Practice Act,* the Director must be satisfied that the consumer has a cause of action, a defence, grounds for setting aside a default judgment or grounds for an appeal or to contest an appeal. The case must be "in the public interest" and can only be taken over with the "irrevocable written consent of the consumer and the separate written consent of the Minister". The "public interest" rationale is defined in these terms:

> "...with a view to enforcing or protecting the rights of the consumer respecting a contravention or suspected contravention of those rights or of any enactment or law relating to the protection or interests of consumers."

In practice, the B.C. provision has been used in the following situations:

- to press the claim of a particularly meritorious plaintiff to get a court ruling that will not only help the particular plaintiff but other similarly situated potential plaintiffs, and

- to inject a greater parity of litigation resources into cases where a meritorious consumer is defending an action or appealing (or contesting an appeal) where they lack the resources and the outcome of the case could have important consequences for consumer interests generally.

In the U.S., the enforcement authority may be given additional rights to take over class action proceedings [Precedent D5.9, ss.9(a)(3) & (b)]. The closest Canadian parallel is the right of the Director under the (B.C.) *Trade Practice Act* (B.C.) [Precedent D6.8, s. 18(4)] to ask the court to order restitution "to any person" whose "money or property" had been acquired "by reason of a deceptive or unconscionable act or practice by the supplier" defendant. Indeed, the right to seek the restitutionary remedy is also available to any private plaintiff who took the injunctive or declaratory proceeding.

Precedent D7.1: *Consumer Protection Act*, R.S.Q. 1977, c. P-40.1, s. 318

318. In any action relating to any act or regulation the application of which is under the supervision of the Office, the president may intervene, of right, at any time before the judgment.

Precedent D7.2: *Unfair Trade Practices Act*, R.S.A. 1980, c. U-3, ss.14 & 20(1)(c)

[Under section 11, a consumer who has suffered damage due to an unfair act or practice may commence a civil action against the supplier for declaratory relief, damages, specific performance, restitution, rescission, an injunction or other relief.]

14.(1) Subject to this section, the Director may, when in his opinion it is in the public interest to do so,

(a) commence and maintain an action under section 11 if a consumer has a cause of action under that section,

(b) maintain an action under section 11 after it has been commenced, or

(c) bring and maintain an appeal in an action under section 11.

(2) When, pursuant to subsection (1), the Director brings or maintains an action or an appeal under section 11, he shall do so in the name of and on behalf of that consumer and he is entitled to take the same steps in and have the same control over the action or appeal including the right to settle the action or appeal or any part of it, as that consumer would have had in respect of that action or appeal.

(3) The Director shall not bring or maintain an action or an appeal under this section without first obtaining the written consent of the consumer in whose name the action is brought.

(4) On the consumer giving written consent under subsection (3), the Director may, without consulting or seeking any further consent of the consumer, conduct the action or appeal in any manner the Director considers appropriate and proper.

(5) In an action or appeal commenced, brought or maintained by the Director pursuant to subsection (1),

(a) any money recovered, excluding costs of the action or appeal, shall be paid to the consumer;

(b) any money payable by the consumer, excluding costs of the action or appeal, are not recoverable from the Director or the Government;

(c) the costs of the action or appeal shall be paid to or borne by the Director.

(6) Nothing in this section abrogates or restricts any right of set-off that a supplier has or may have against a consumer on whose behalf the Director is acting under this section.

(7) When the Director, while acting on behalf of a consumer under this section, releases a supplier from a liability or an obligation arising out of the cause of action, that release extinguishes that claim to the liability or obligation referred to in that release which that consumer may have against that supplier.

20.(1) The Director shall not, until he has been authorized to do so by the Attorney General,

(c) commence or maintain an action under section 11 . . . . .

Precedent D7.3: *Uniform Consumer Sales Practices Act* (U.L.A.) s. 9

9.(a) The Enforcing Authority may bring an action:

(3) to recover actual damages, or obtain relief under subsection (b)(2), on behalf of consumers who complained to the Enforcing Authority before he instituted enforcement proceedings under this Act.

. . . . .

(b)(2) On motion of the Enforcing Authority and without bond in an action under this subsection, the court may make appropriate orders, including appointment of a master or receiver or sequestration of assets, to reimburse consumers found to have been damaged, or to carry out a transaction in accordance with consumers' reasonable expectations, or to strike or limit the application of unconscionable clauses of contracts to avoid an unconscionable result, or to grant other appropriate relief. The court may assess the expenses of a master or receiver against a supplier.

(c) The Enforcing Authority may terminate an investigation or an action other than a class action upon acceptance of a supplier's written assurance of voluntary compliance with this Act. Acceptance of an assurance may be conditioned on a commitment to reimburse consumers or take other appropriate corrective action. An assurance is not evidence of a prior violation of this Act. However, unless an assurance has been rescinded by agreement of the parties or voided by a court for good cause, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation of this Act.

Additional Precedents:

The Business Practices Act, S.M. 1990-91, c. 6 (C.C.S.M., c. B120), s. 24

Trade Practice Act, R.S.B.C. 1979, c. 406, ss. 21 & 24

E. TICKETING SCHEMES

TICKETING SCHEMES

1. The *Contraventions Act*:

The *Contraventions Act* creates a ticketing scheme for minor federal offences. Mirroring other provincial offence schemes, the Act creates a new tool for enforcement authorities that complements the present *Criminal Code* sanction. The Act allows an enforcement authority to issue a ticket instead of charging an offender under the *Criminal Code*.

The *Contraventions Act* is included in this Manual because it attempts to distinguish between criminal offences and regulatory offences; the Act creates a scheme that deals with minor federal offences in a less intrusive and less costly way than *Criminal Code* prosecution. It is designed to remove a large number of minor offences from the courts by encouraging offenders to plead guilty and pay a fine. An offender does not have to appear in court at all if they pay the fine set out in the ticket.

An offender may dispute a ticket by appearing in court to ask for time to pay the fine, to ask the court to reduce the fine, to ask the court to return any seized goods or to plead not guilty. An enforcement authority need not attend court unless an offender pleads not guilty and a trial is held.

Whether the offender pleads guilty or not guilty, there is no criminal record involved.

If the offender ignores the ticket, the offender can be convicted without appearing in court. If the offender does not pay, the enforcement authority can try to collect the fine in several ways:

- by filing the conviction in a civil court and collecting the debt by any civil action that is available, such as garnishment proceedings
- by suspending or refusing to issue any related licence or permit it has the power to issue or suspend, or
- by arrest and imprisonment.

The *Contraventions Act* has received royal assent but is not yet in force.

Precedent E1.1: *Contraventions Act*, S.C. 1992, c. 47

[The following contains a selection of the central provisions of the Act only. For the full details of the ticketing scheme, refer to the complete Act.]

2. In this Act,

"contravention" means an offence that is created by an enactment and is designated as a contravention by regulation of the Governor in Council;

4. The purposes of this Act are

(a) to provide a procedure for the prosecution of contraventions that reflects the distinction between criminal offences and regulatory offences and that is in addition to the procedures set out in the *Criminal Code* for the prosecution of contraventions and other offences; and

(b) to alter or abolish the consequences in law of being convicted of a contravention, in light of that distinction.

5. The provisions of the *Criminal Code* relating to summary conviction offences and the provisions of the *Young Offenders Act* apply to proceedings in respect of contraventions that are commenced by filing a ticket, except to the extent that this Act, the regulations or the rules of court provide otherwise.

8.(1) The Governor in Council may, for the purposes of this Act, make regulations

(a) designating as contraventions offences created by any enactment, other than offences for which an offender may be prosecuted only on indictment;

(c) establishing, in respect of a contravention, an amount as

(i) the amount of the fine that is to be paid on pleading guilty or imposed if an offender does not respond to a ticket, and

(ii) the maximum amount of the fine that may be imposed in proceedings commenced by filing a ticket;

(3) An amount established under paragraph (1)(c) may not exceed the lesser of

(a) the maximum amount prescribed for the relevant offence by the enactment creating the offence, and

(b) one thousand dollars.

9.(1) An enforcement authority who believes on reasonable grounds that a person has committed a contravention may, within thirty days after the day on which the contravention is believed to have been committed, complete a ticket in respect of that contravention and cause it to be served on the person.

17.(1) A proceeding in respect of a contravention may be commenced by filing a ticket in the office of the contraventions court .....

21. A person may, within thirty days after being served with a ticket,

(a) plead guilty and pay the amount of the fine set out in the ticket ....;

(b) plead guilty but make representations ....; or

(c) request a trial .....

44.(1) An enforcement authority may, for the purpose of obtaining a default conviction, commence a proceeding in respect of a contravention by filing a ticket in the office of the contraventions court if

(b) more than thirty but not more than sixty days have elapsed since the date of service of the ticket; *[and]*

(c) the person alleged to have committed the contravention has not exercised any of the options referred to in section 21; ....

(3) The contraventions court or justice of the peace shall

(a) if the ticket is complete and regular on its face, convict the defendant, impose a fine in the *[prescribed amount]*, award the prescribed costs, and order that any forfeitable thing seized from the offender be forfeited ....; or

(b) quash the proceeding, if the ticket is not complete and regular on its face.

(4) As soon as practicable after an offender .... is convicted under paragraph (3)(a), the clerk of the court shall cause a notice of the conviction to be sent to the offender by ordinary mail.

46.(1) A defendant who is convicted .... in a proceeding commenced by filing a ticket or the Attorney General of Canada may apply to the court, within thirty days after becoming aware of the conviction, to set it aside.

50.(1) Where a proceeding in respect of a contravention is commenced by laying an information, the Attorney General of Canada may elect that the proceeding be dealt with and disposed of as if it had been commenced by filing a ticket.

63. Except in respect of a conviction for a contravention that is entered after a trial on an indictment,

(a) a person who has been convicted of a contravention has not been convicted of a criminal offence; and

(b) a contravention does not constitute an offence for the purposes of the *Criminal Records Act*.

[Although not a central feature of the Act, the following section may be of interest to legislative drafters:

79. Subsection 35(1) of the Interpretation Act is amended by adding thereto, in alphabetical order, the following definition:

"contravene" includes fail to comply with;]

[Note: The provisions of the Acts listed below authorize the Governor in Council to make regulations designating offences in respect of which an official may lay an information and serve a summons by serving a ticket on an offender, and establishing procedures for entering a plea and paying fines. The sections cited below will all be repealed on the coming into force of the *Contraventions Act*, Precedent E1.1, above.]

Canada Agricultural Products Act, R.S.C. 1985, c. 20, (4th Supp.), s. 34

Canadian Environmental Protection Act, R.S.C. 1985, c. 16, (4th Supp.), s. 134

Fisheries Act, R.S.C. 1985, c. F-14, s. 79.7, as am. by S.C. 1991, c. 1, s. 24

Fishing and Recreational Harbours Act, R.S.C. 1985, c. F-24, s. 25

Health of Animals Act, S.C. 1990, c. 21, s. 69

Non-Smokers' Health Act, R.S.C. 1985, c. 15 (4th Supp.), s. 14

Plant Protection Act, S.C. 1990, c. 22, s. 52

Radiocommunication Act, R.S.C. 1985, c. R-2, s. 12

Transportation of Dangerous Goods Act, R.S.C. 1985, c. T-19, s. 7 (enacted by S.C. 1980-81-82-83, c. 36, s.7)

Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act, S.C. 1992, c. 52, s. 23

Additional Precedents:

Offence Act, R.S. B.C. 1979, c. 305

Provincial Offences Act, R.S.O. 1990, c. P.33

Code of Penal Procedure, R.S.Q., c. 25-1

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