THE USE OF ADMINISTRATIVE MONETARY PENALTIES IN CONSUMER PROTECTION

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EXECUTIVE SUMMARY

The use of "Administrative Monetary Penalties", otherwise known as "AMPs", is a unique enforcement scheme that has gained significant attention from international regulators. AMPs are increasingly used to engender compliance and cooperation from the 'regulated community', to secure environmental or consumer protection, and to encourage the timely rectification of market problems. Regulators in Canada have used AMPs for some time; however, it is only relatively recently that they have become a favorite tool among regulators.

Generally, AMPs have been heralded by regulators as providing a more flexible and responsive regulatory structure that balances the competing interests of stakeholders. The use of AMPs, however, is not without controversy. Many critics argue that the use of AMPs represents a severe and unjust form of punishment on individuals and businesses that may have, whether intentionally or not, breached the law.

In this report, PIAC examines the use of AMPs in the Canadian regulatory field, with a particular emphasis on the use of AMPs in consumer protection. The Report examines the nature and scope of AMPs, as well as, the various theories that underscore the use of AMPs as a regulatory tool. The Report also addresses the objections to AMPs, as cited by AMP critics, and analyses the use and effectiveness of AMPs in Canada, and other countries that are actively engaged in their use. Finally, the Report draws conclusions, offers warnings, and proposes recommendations that PIAC believes will improve consumer protection regulation in Canada.

The Report finds that there are important constitutional and due process issues associated with the use of administrative penalties. Due to the fact that AMPs operate largely outside of the watchful eye of the courts, they are vulnerable to abuse. However, the Report does not agree with critics who suggest that AMPs are unconstitutional, in and of themselves.

The Report finds that the greater procedural flexibility and range of sanctions make AMPs the preferred mode of social control in situations where persuasion and negotiation can best secure compliance. However, the Report also finds that when it comes to regulating, regardless of the industry or sector, a multi-pronged enforcement approach is best. To be effective and efficient, regulators must rely on the ability to levy the most appropriate sanction or penalty to a particular violation of the law. As such, regulators need an array of enforcement tools, ranging from criminal to administrative, to best enforce the law and deter socially and economically harmful activities.

The use and appropriateness of AMPs will largely depend upon the nature of the unlawful activity and the aim of the regulatory intervention. AMPs may not be a suitable or effective penalty for perpetrators who commit unlawful activities with a malicious or fraudulent intent. Rather, such crimes may best be dealt with under the criminal law. On the other hand, AMPs have shown themselves to be particularly well suited to deal with issues of consumer protection. As such, PIAC advocates an increased use of AMPs in consumer protection. In

particular, PIAC advocates for the adoption of an AMPs enforcement scheme for violations of federal privacy laws, such as PIPEDA, as well as the re-introduction of an augmented AMPs system under the *Competition Act*.

The Report further suggests that AMPs may be an effective enforcement tool in regulating e-commerce and online communications. Additionally, AMPs have the potential to be an effective and efficient means of enforcing Canada's anti-spam measures.

The Report also examines the issue of enforcement, finding that the issues of jurisdiction and identification present a particularly difficult challenge in the online context. The global nature of the Internet means representations and transactions made online can attract liability under both domestic and foreign jurisdictions. Meanwhile, regulators and law enforcement officials are not always able to ascertain the identity of the violator.

Finally, in order to exploit the full potential and benefits of administrative monetary penalties, as well as ensure their legitimacy in the eyes of businesses and the public, PIAC advocates the adoption of a three-pronged strategy. When administrating an AMP scheme, regulatory agencies need: 1) increased cooperation with counterpart agencies in foreign jurisdictions; 2) more education and clearer guidelines for businesses and consumers; and 3) implementation of consistent and predictable rules.

INTRODUCTION

Regulation, in its broadest sense, has been defined as "a principle, rule, or condition that governs the behaviour of citizens and enterprises."[1] Regulation is used by governments, in combination with other instruments, such as voluntary standards, to achieve a wide range of public policy objectives.[2]

Today, regulators all over the world are under unprecedented pressure and face a myriad of demands from an increasing number of stakeholders. These demands can be (and often are) contradictory in nature. For instance, regulators are told to be effective, but don't interfere with the market; be consistent, but don't apply a "one-size-fits-all" approach; address important issues, but don't go beyond the limits of your statutory authority; be more responsive to the regulated industry, but don't let them walk all over you.[3]

As a result of these pressures, regulators are increasingly seeking to expand their regulatory regime by adding new tools to their enforcement toolkit. Enforcement is an essential component to any regulatory system because rules and regulations would be virtually meaningless if they were not adequately enforced. Regulators face the challenge of not only

[1] "Government of Canada Reports Progress on Regulatory Renewal" Treasury Board of Canada Secretariat [http://www.tbs-sct.gc.ca/media/nr-cp/2005/1028_e.asp#BG]
[2] *Ibid.*
[3] Austl., Commonwealth, Australian Law Reform Commission, *ALRC Background Paper 7 – Review of Civil and Administrative Penalties in Federal Jurisdiction* (June 2001), at 5 [*ALRC Background Paper 7*]. Online: ALRC <http://www.austlii.edu.au/au/other/alrc/publications/bp/7/bp7.rtf>.

identifying when a breach of the regulations has occurred, but also fashioning an appropriate response. The response itself must not only deal effectively with the breach, but also send a message to others in the regulated community that such violations will not be tolerated.

A unique enforcement scheme that has gained significant attention from international regulators is the use of "Administrative Monetary Penalties", otherwise known as "AMPs". AMPs have been used by regulators in Canada for some time, however, it is only relatively recently that they have become a favorite tool of regulators.

Civil and administrative penalties can be thought of as the 'teeth' of a regulatory regime. This is due to the sting inflicted by monetary penalties – large monetary penalties that can be levied against individuals and business entities. AMPs, in particular, can be imposed swiftly by regulators and can often involve considerable sums of money. As such, they are thought of as providing a strong deterrent effect within the regulated industry.

AMPs have been widely heralded as providing a more flexible and responsive regulatory structure that balances the competing interests of stakeholders. They are increasingly used to engender compliance and cooperation from the 'regulated community', to secure environmental or consumer protection and timely rectification of market problems.[4]

The use of AMPs, however, is not without controversy. Many critics decry the use of AMPs as a severe and unjust form of punishment on individuals and businesses that may have, whether intentionally or not, breached the law.[5]

In this Report, PIAC seeks to examine the use of AMPs in the Canadian regulatory field, with a particular emphasis on the use of AMPs in consumer protection. The Report will examine the nature and scope of AMPs as well as explore the various theories that underscore the use of AMPs as a regulatory tool. The Report will also address the objections to AMPs, as cited by AMP critics, and will analyse the use and effectiveness of AMPs in Canada, and other countries that are actively engaged in their use. Finally, the Report will draw conclusion, and offer warnings, regarding the effectiveness of AMPs, and will propose recommendations that PIAC believes will improve consumer protection regulation in Canada.

WHAT ARE AMPS?

'Administrative monetary penalties" as the name suggests, are sanctions in the form of a monetary penalty imposed by the government through a regulatory scheme. An AMP is a form of civil penalty in which an administrative body or regulator seeks monetary relief against an individual or corporate body as restitution for unlawful activity. The unlawful activity is typically defined through legislation and/or regulations.

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[4] Austl., Commonwealth, Australian Law Reform Commission, *Pamphlet 3 – Civil and Administrative Penalties* (December 2000) [*ALRC Pamphlet 3*]. Online: ALRC <http://138.25.65.50/au/other/alrc/publications/intro/3/index.html>.

[5] See for instance,

In 1981, the Law Reform Commission of Canada initially defined administrative sanctions as 'a means of implementing compliance with agency policy'. However, it acknowledged that this definition may be too broad because actions such as 'investigation, public inquiry, release of true but damaging information or even the imposition of a reporting requirement' may help implement compliance with agency policy but could not be described as sanctions.[6] The working definition of an administrative penalty finally adopted by the Commission contained three elements:

1. Administrative action authorized by law;
2. Taken to achieve client [sic] compliance with policy; and
3. Perceived by the client [sic] as significantly affecting his interests.[7]

To illustrate how an AMP would be used in practice, a straightforward case of environmental protection can be used. For instance, if a company were to dump toxic waste (accidentally or otherwise), in a location not approved for such dumping (e.g. a park or forest) the government may choose to impose a monetary penalty against the company as a means of recovering the cost of the clean-up and repairing the harm done to the state.

How AMPs Fit Into the Broader Regulatory Scheme

In order to understand how AMPs fit into the broader context of regulatory penalties, it is important to recognize the relationship between criminal, civil and administrative sanctions and the principles that guide the formulation and application of these sanctions.

Traditionally, sanctions have been divided into criminal punishments or penalties on the one hand, and civil remedies or penalties on the other. AMPs fall within the category of civil penalties. However, AMPs occupy a unique place within this broad civil category, as they are characterized by a number of distinct enforcement features, unknown to other civil penalty regimes.

Civil penalties represent an alternative to fines, prison sentences and other criminal punishments that are typically imposed by criminal courts. Civil penalties are typically characterized as a civil fine or monetary damages administered by a state entity or government agency and imposed through civil courts or tribunals.

A common and distinctive feature of an AMP is that it can be imposed by the regulator without intervention by a court or tribunal. This means that the regulator does not have to seek court approval of the AMP in order for it to be enforceable.[8] Administrative penalties can either arise automatically by operation of the law or at the discretion of the regulator. As such,

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[6] Law Reform Commission of Canada, *Sanctions, Compliance Policy and Administrative Law*, (1981) Law Reform Commission of Canada, Ottawa, 10-13; as cited in Austl., Commonwealth, Australian Law Reform Commission, *Discussion Paper 65: Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation* (April 2002) at para. 2.63-2.64 [*ALRC Discussion Paper 65*]. Online: ALRC <http://www.austlii.edu.au/au/other/alrc/publications/dp/65/DP65.pdf>.

[7] *Ibid. ALRC Discussion Paper 65* at 31.

[8] *Ibid*. at para. 2.62.

administrative penalties are often thought of as being negotiated or imposed in the shadow of the formal legal system.[9]

Civil and administrative penalties may be designed with varying goals in mind, such as deterrence, compensation or to make reparations for certain unlawful activity. However, a defining feature of civil and administrative penalties is that they are not punitive in nature – meaning they are not designed to punish wrongful activity. In contrast, one of the main purposes of criminal penalties has long been viewed as that of punishment. However, this presumption has been increasingly challenged by the restorative justice principles found in criminal law – principles which are often directed at remediation.[10] As well, punitive damages are playing an increasing role in the civil law system, presumably with a view to deterring certain conduct in the future. Thus, the traditional lines between criminal penalties and civil penalties are blurring, and it is not always easy to differentiate between the two.

In general, AMP schemes are designed to be an alternative to the criminal process. Under an AMP scheme, monetary penalties are established for particular classes of violations, rather than the imposition of a maximum fine or imprisonment (or both) that is typical of the criminal enforcement process.[11] In some cases, an AMP may be supplemented by other legal procedure, including criminal charges. In other cases, often involving public safety and consumer protection violations, the regulator may revoke permits and licences, seek injunctions, and order restitution to the victim, in addition to imposing an AMP.

How AMPs Differ From Criminal Penalties and Fines

As a civil penalty, an AMP is not considered to be a criminal punishment, because it is primarily imposed in order to compensate the state for harm done to it, rather than as a means of punishing the wrongful activity. Yet, despite its categorization as a civil administrative penalty, AMPs can look an awful lot like a monetary punishment. Consider for example the Ontario Securities Commission (OSC), which has the power (which it often exercises) to impose administrative penalties that are three times the illegal profits made, for offences such as insider trading. That clearly goes beyond compensation, and presumably is aimed at deterrence.[12]

Criminal penalties, on the other hand, are punitive in nature. They are considered criminal remedies which utilize fines or imprisonment rather than damages or restitution. As such, a ‘fine’ is distinguished from an ‘administrative monetary penalty’ in that a fine denotes a criminal monetary penalty. The AMP on the other hand does not contain a criminal element and is intended to merely reflect the violation of a law or rule that carries with it a monetary sanction. Unlike civil penalties, criminal penalties focus on the immorality of the act and the state of mind of the perpetrator, whereas, civil penalties and AMPs focus on compensation.

[9] *ALRC Pamphlet 3, supra* note 4.
[10] *ALRC Background Paper 7, supra* note 3 at 11.
[11] Paul Baker, “Monetary penalties are newest environmental enforcement tool”, *The Lawyers Weekly* 16:18 (September 1996) (QL) [Baker, “Monetary Penalties”].
[12] See also the triple damages available under U.S. anti-trust law.

General Structure of AMPs

Regulators vary widely in their functions and activities, as well as in the individuals and entities they regulate. Regulators such as the Competition Bureau regulate a wide range of individuals and entities and are engaged in diverse fields of activity. Others, such as the Financial Consumer Agency of Canada (FCAC) and the Alberta Ministry of the Environment supervise particular industries or activities and have a narrower compass of regulatory functions.[13]

Some AMPs are within the discretion of the regulator, while others automatically arise upon the occurrence of a specific event prohibited in the governing legislation (e.g. certain contraventions of the Customs Act and the Customs Tariff will automatically generate the imposition of an AMP)[14]. Regulators and government departments or agencies are typically granted the authority to exercise a variety of penalty-related discretions. These can include the interpretation of legal or factual points in determining whether the penalty applies; powers of investigation; the setting of enforcement priorities; the choice of penalty; and decisions about granting exemptions, leniency or immunity to those in breach of the law.[15]

Administrative penalty schemes generally involve a notification procedure setting out the details of the violation and the financial penalty determined by the regulator to be applicable. In addition, an administrative hearing on the appropriateness of the penalty (or possibly an appeal or review of the entire offence and penalty proceeding) will generally be set out in the governing legislation or regulation. Most administrative penalties provide for a right of review, although typically not before the penalty becomes enforceable. In spite of these general characteristics, AMPs can and do vary widely – some can be imposed without notice, without the penalized person having access to certain defences, and sometimes the right to review the penalty decision is limited.[16]

The Characterization of the Penalty

Questions of how and when sanctions are used, and which type, are a key part of understanding effective regulation. How a penalty is characterized at law will have significant practical consequences on an enforcement regime. Procedures, privileges and standard of

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[13] When there is evidence of a violation with regard to the consumer provisions, FCAC may take the following action, depending on the significance of the violation: 1) issue a letter of concern to the institution, requesting that it take steps to correct the problem when it is related to a minor issue; 2) enter into a formal compliance agreement with an institution to improve its level of compliance; and/or 3) issue a Notice of Violation and propose an Administrative Monetary Penalty (AMP). The AMP may range from $0 to $100,000. After receiving a Notice of Violation, a FRFI may make representations to FCAC, after which the Commissioner will issue a Notice of Decision that confirms, changes or withdraws the Notice of Violation and the AMP. For cases where violations have occurred, the Commissioner may make public the nature of the violation and the AMP. See "Program and Performance Management Evaluation Report" Financial Consumer Agency of Canada (April 1, 2005 to March 31 2006) at p. 20. Online: FCAC <http://www.fcac-acfc.gc.ca/eng/about/operations/pdfs/fcacprogperfmgmtevalrept2005_06_e.pdf>.

[14] For instance, though a system generated penalty.

[15] *ALRC Background Paper 7, supra* note 3 at 14.

[16] *ALRC Pamphlet 3, supra* note 4.

proof are all affected by the characterization of the penalty. There are also important social consequences to the characterization.[17]

There are three factors that must be weighed when classifying a penalty as either criminal, civil or administrative. First, the nature of the penalty must be examined. This is done by answering a threshold question - which form of punishment provides the most practical and effective means of coercing the desired behaviour?

The second factor involves an evaluation of the function of the penalty. What is the desired effect of the penalty? Does it aim to punish through imprisonment or social condemnation? Does it seek the payment of compensation or repatriation? Does it aim to deter similar unlawful activity?

Administrative penalties are said to be largely directed at promoting the smooth running of social and economic structures, and are thus broadly separable from criminal penalties. However, as it has been frequently pointed out, some crimes such as fraud, are frequently associated with conduct that also attracts a regulatory penalty.[18] Thus the true function of the penalty may not always be readily apparent. Without a clear understanding of the function of the penalty, the regulatory scheme may not provide the most appropriate sanction for the violation – thereby making the overall scheme less effective.

The final factor involved in classifying a penalty as either criminal, civil or administrative is that of the standard of proof to which the penalty is held. In this regard, one of the most noteworthy features of an AMP scheme is its simplification of the evidentiary requirements necessary to prove non-compliance. Generally, the enforcement of criminal or quasi-criminal offences involves a court hearing in which the regulator or prosecutor is required to meet the highest evidentiary burden, that of proof beyond a reasonable doubt. Under an AMP scheme, the regulator is subject to a much lower evidentiary requirement – generally at or above the "balance of probabilities" threshold.[19]

This lower standard of proof also has implications for other aspects of the enforcement regime, most notably with respect to regulatory investigations. When conducting investigations, regulators need only gather evidence necessary to balance the probabilities in favour of the defendant's guilt. This translates into a less rigorous requirement for investigators.

Moreover, under the AMP scheme, the burden of proof is often reversed, such that the alleged offender must demonstrate that the penalty was inappropriate or unfounded. In other words, there is a presumption that the penalty imposed was valid – a complete reversal of the presumption of innocence found in the criminal process.[20]

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[17] *Ibid.*
[18] *ALRC Discussion Paper 65, supra* note 6 at para. 2.31.
[19] Baker, "Monetary Penalties", *supra* note 11.
[20] *Ibid.*

THEORY

In order to understand the elements of effective regulation, it is important to understand the underlying theories that belay them. Administrative monetary penalties can be said to be founded on four general theories:

1. Criminal Law Not Always Appropriate

Depending upon the nature of the violation and the desired social consequences, criminal law is not always the most effective or appropriate avenue for sanctions. On the effects of applying civil versus criminal sanctions, Professor John Coffee noted that:

> [A]pplying the civil law to behaviour that has traditionally been punished criminally might deprive society of its ability to focus censure and assign blame with the moral force that the criminal law may uniquely possess. In short, even if the civil law could provide equivalent deterrence, it may not be able to perform as successfully the socialising and educative roles that the criminal law performs in our society. ... I would suggest that in its characteristic operation, the civil law `prices', while the criminal law `sanctions'. ... I would argue that the criminal law should be reserved to prohibiting conduct that society believes lacks any social utility, while civil penalties should be used to deter (or `price') many forms of misbehaviour (for example, negligence) where the regulated activity has positive social utility but is imposing externalities on others.[21]

2. Efficiency

An often cited theory behind the proliferation of AMPs is that this type of regulatory structure is more efficient for regulators. The pursuit of AMPs as an enforcement tool is expected to provide less costly and more expeditious enforcement than a similar pursuit through judicial routes. Due in large part to court backlogs and the cost of trying a case in court, AMPs are seen as a fast, cheap and effective way of curbing socially or economically disruptive activities.

Some commentators have suggested that AMPs may be considered more convenient from the perspective of offenders, who may welcome an administrative determination of the contravention since it does not result in a criminal record. For precisely this reason, however, some observers question whether AMPs will serve as an effective deterrent.[22]

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[21] J. Coffee, "Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It", *The Yale Law Journal* (1992) 101 (5); As cited in *ALRC Background Paper 7, supra* note at 12.
[22] Jamie Benidickson, "Administrative Monetary Penalties", *Environmental Law*, 2nd ed. (2002) (QL) [Benedickson, "Administrative Monetary Penalties"].

3. Less Social Stigma

AMPs have also developed under the theory that they attract less social stigma than criminal convictions. Criminal convictions are thought to carry a heavy social stigma and may lead to other negative civil implications, such as being barred from serving as a company director or public official.[23] A further distinction is that criminal penalties tend to be imbued with moral culpability; whereas AMPs are more likely to be thought of as carrying a less severe monetary culpability.

4. Deterrence Effect

Finally, perhaps the most important theory behind the societal value of AMPs is that they are seen to serve as a strong deterrence against certain social and economically disruptive behaviour. In order to serve as an effective deterrent, the AMP must provide a compelling motivation for compliance with the law. The underlying policy consideration when applying AMPs requires the regulator to conduct a form of cost-benefit analysis from the perspective of the violator. In setting the penalty of the AMP, the regulator must calculate the economic benefit of non-compliance and ensure that the penalty burden is at least as great as the benefit of the violation. The benefits of noncompliance can include such things as the benefit that the violator receives from delayed compliance.[24] AMPs are designed to provide a deterrence (not just compensation), but without the social stigma of a criminal offence, and therefore without having to invoke as heavy a procedural mechanism as the criminal law does.

OPPOSITION TO AMPS

There are important constitutional and due process issues associated with the use of administrative penalties. Many critics have warned that because AMPs operate largely outside of the watchful eye of the courts, they are vulnerable to abuse and may in fact be unconstitutional in and of themselves.[25]

In 2004, the debate over the constitutionality of AMPs flared up with the Federal Government's announcement of proposed legislative amendments to the *Competition Act*[26]. In evaluating the arguments put forward by supporter and opponents of AMPs, it is particularly instructive to examine this recent debate, as stakeholders from numerous sectors weighed in on the contentious issues surrounding AMPs.

Bill C-19

On November 2, 2004, then Minister of Industry, David Emerson, tabled *Bill C-19, An Act to amend the Competition Act and to make consequential amendments to other Acts.* Almost immediately, the Bill set off a firestorm of debate throughout the business community. Bill C-

[23] *ALRC Background Paper 7*, *supra* note 3 at 12.
[24] "Penalties and Other Remedies For Environmental Violations: An Overview" International Network for Environmental Compliance and Enforcement (INECE) Secretariat Staff, 299 at para 3.1. Online: INEC <http://www.inece.org/conference/7/vol1/48_INECE%20SECRETARIAT%20STAFF.pdf>.
[25] See for instance, Opinion Letter written on behalf of Diane J.Brisebois, President and Chief Executive Officer, Retail Council of Canada, by Peter Hogg of Blake, Cassels & Graydon LLP, *Bill C-19's proposals respecting Administrative Monetary Penalties*, October 17, 2005 [Hogg Opinion Letter].
[26] (R.S., 1985, c. C-34).

19 proposed a number of significant changes to the *Competition Act*, including expanding the scope of contraventions subject to AMPs as well as increasing the maximum dollar amount for contraventions of the Act. For instance, the Bill would have increased the level of AMPs that can be imposed for deceptive marketing practices by a corporation to a maximum of $15 million, and $1 million for individuals. The Bill would also have expanded the scope of AMPs to include abuse of dominant position by a corporation, again with a maximum penalty of $15 million.

Bill C-19 proposals to increase AMPs were, as to be expected, not popular with the business community. Besides the obvious objections regarding the size of the AMPs proposed under C-19, it was also suggested "the AMPs as amended would be unconstitutional".[27]

Professor Peter W. Hogg, a well-known expert in the area of constitutional law, outlined his views regarding the constitutionality of the proposed AMP amendments in an opinion letter written on behalf of the Retail Council of Canada. In his opinion letter, Prof. Hogg claimed that "the magnitude of [AMP] penalties is striking," especially when taken in conjunction with other proposed amendments, including the newly proposed restitutionary remedies.[28] Hogg went on to argue that the sheer monetary amounts proposed under C-19 would render the AMPs a criminal penalty (and therefore unconstitutional).

AMPs, as Proposed are Criminal Penalties

Professor Hogg acknowledged that "[p]arliament has the power to impose whatever monetary penalties it sees fit for breach of federal laws, and so the high numbers are not in themselves unconstitutional."[29] However, he went on to suggest that the magnitude of the AMPs proposed by Bill C-19 effectively rendered them criminal penalties; and as such, must be entitled to safeguards guaranteed by section 11 of the Charter of Rights and Freedoms for "any person charged with an offence." The section 11 Charter protections include such things

[27] Hogg Opinion Letter, *supra* note 24.
[28] *Ibid.* In addition to the increases to the AMP provisions, Bill C-19 proposed to introduce a new "restitution" remedy in the case of deceptive marketing practices, which could be imposed in addition to an AMP. This restitution remedy could be as high as "the total of the amounts paid for the products that were the object of the conduct". Professor Hogg's Opinion Letter did not address the constitutionality of the proposed restitution remedy, but simply noted that the "high maximums for AMPs are not necessarily the limit of the financial burden that Bill C-19 would impose on a person found guilty of deceptive marketing practices" and that these two amendments combined create significant "uncertainty regarding the financial burden that Bill C-19 would impose".
[29] *Ibid.*

as: the presumption of innocence,[30] disclosure of evidence,[31] and independent and impartial tribunal.[32] Hogg also contends that AMPs may be challenged on the basis of vagueness.[33]

By failing to provide these safeguards, Hogg claimed that the AMPs proposed by Bill C-19 were unconstitutional. Yet, Hogg conceded that if the penalties were not criminal in nature and are truly AMPs, then the safeguards are not needed. To support this claim that the AMPs were in fact criminal penalties, Hogg refered to *R v. Wigglesworth*[34] where the Supreme Court ruled that any proceeding that leads to a "true penal consequence," is subject to section 11 safeguards. Furthermore, the Court in *Wigglesworth* stated that fines would also be 'true penal consequences', if "by its magnitude … it would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity".[35]

The Federal Government issued a rebuttal to Hogg's opinion letter contesting his arguments, and asserting that they were inapplicable in the context of the *Competition Act*, or of Bill C-19.[36] Firstly, the Government contends that AMPs are not criminal fines and would not meet the *Wigglesworth* test (i.e. that they be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline). Furthermore, the Government contends that AMPs must allow for significant but flexible deterrence to ensure that the *Competition Act* disciplines activity within its scope. The Government views that magnitude of the AMPs as an effective way of achieving this purpose.

The Government cited the Supreme Court case of *Martineau v. MNR*,[37] which applied the *Wigglesworth* test to the penalty provisions in the *Customs Act*. In that case, the Court held that proceedings of an administrative nature instituted for the protection of the public in

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[30] As outlined in *R. v. Oakes* [1986] 1 S.C.R. 103, s.11(d) of the Charter requires all offences to be proven beyond a reasonable doubt. However, under the Competition Act, the "reviewable practices" that include deceptive marketing practices and abuse of dominant position need only be proved to the civil standard of the balance of probabilities. Thus, AMPs could be imposed without proof of the 'offence' to the rigorous criminal standard, which, he contends, is unconstitutional. See Hogg Opinion Letter , *ibid*. at 2.

[31] In *R v. Stinchcombe* [1991] 3 S.C.R. 326, the Supreme Court of Canada held that s.11(d) of the Charter obliges the Crown, in advance of the trial, to make full disclosure to the defense of all relevant information in the possession of the Crown. However, the Competition Tribunal Rules deviate from these fundamental criminal procedures. See Hogg Opinion Letter , *ibid*. at 3.

[32] Hogg argues, "a criminal penalty like an AMP should not be imposed by a majority of Tribunal members who are not judges", referring to the composition of the Tribunal, which is made up both judicial and lay members. This is particularly problematic given that AMP proceedings for abuse of dominant positions could be heard by Tribunals composed of one judicial member and two lay members, which in his opinion may hold to be unconstitutional. See Hogg Opinion Letter , *ibid*. at 4.

[33] "Perhaps the most fundamental concern about the increased AMPs is that they are to be levied for breach of provisions that do not provide clear standards of conduct for those subject to the penalties". See Hogg Opinion Letter , *ibid.* at 4.

[34] [1987] 2 S.C.R. 541, para 23.

[35] As quoted in Hogg Opinion Letter, *supra* note 24 at 2.

[36] Government of Canada Rebuttal Paper: "Constitutionality of the AMPs scheme in the Competition Act and in Bill C-19" [*Government Rebuttal Paper*]. See too, Evidence submitted to the Industry Committee, October 27, 2005, at pp.3 and following, online: <http://parl11.parl.gc.ca/infocomdoc/38/1/INDU/Meetings/Evidence/INDUEV59-E.PDF>.

[37] [2004] 3 S.C.R. 737, 2004 SCC 81.

accordance with the policy of a statue are not "penal in nature" and do not involve "offences" for the purpose of s. 11 of the Charter. As such, the Court upheld the penalty provisions of the *Customs Act*[38]. The Government went on to reason that "if the ascertained forfeiture fine in the *Customs Act* found constitutional in *Martineau* are administrative – not criminal – in nature (because it is instituted for the protection of the public in accordance with the policy of a statue), so too are the AMPs currently in the *Competition Act* and supplemented by C-19…"

PIAC agrees. To be effective, individuals or corporations cannot view AMPs as simply the "cost of doing business" – they need to negate whatever economic benefit a violator gained from a violation(s) or else the deterrent value of such penalties is practically non-existent. High maximum penalty AMPs do not in themselves constitution a criminal fine. The nature and function of the AMP are what define whether or not it is extending beyond its administrative enforcement function and into the range of criminal enforcement (i.e. attempting to punish an offender for an illegal act). Moreover, Bill C-19's proposed AMP structure set out *maximum penalties* – and as such, was only intended to give the courts room to apply the AMP appropriately in relation to the severity of the conduct.

A similar view was expressed by the Alberta Environmental Appeals Board.[39] In connection with an earlier review of an Alberta AMP, where the level of the penalty assessed was challenged, the Alberta appeal board had remarked:

> The Board believes the amount of the penalty must reflect the regulatory matrix associated criteria. The Board believes that to achieve the goal of deterrence, the penalty must also be high enough so that those who violate the law without reasonable excuse will not be able to "write off" the penalty as an acceptable trade-off for the harm or potential harm done to Alberta's environment.[40]

Hogg further argued that AMPs, as modified by Bill C-19, could be classified by the courts as criminal penalties because the factors assessed in each case by the Competition Tribunal would be similar to those "considered by a criminal court in imposing a sentence on a convicted accused." Under C-19, when assessing the amount of the AMP, the Competition Tribunal (or court), was to take into account a range of mitigating and aggravating factors. According to Hogg, these factors bear directly "on the blameworthiness of the defendant." Such factors included the frequency and duration of the offending practice and the history of compliance with the Act by the defendant.

The Government disputed this contention, stating: "The factors to be considered in reaching an appropriate AMP… are not akin to "sentencing guidelines" nor do they bear on the "blameworthiness of the defendant". The Government went on to highlight a number of other federal statutes that have a similar list of factors to those found in C-19.

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[38] [R.S.C. 1985, c. 1 (2nd Supp.).

[39] The Alberta Environmental Appeals Board is an independent board that hears appeals made under the *Alberta Environment under the Environmental Protection and Enhancement Act* (AEPEA) and the *Water Act*.

[40] *Hayspur Aviation Ltd. v. Alberta (Department of Environmental Protection)* [1997] A.E.A.B.D. No. 9; As cited in Benidickson, "Administrative Monetary Penalties", *supra* note 21.

Once again, PIAC agrees. One need only look to the extensive AMP scheme used by the Canada Border Services Agency (CBSA). The CBSA has implemented an extensive civil penalty regime known as the Administrative Monetary Penalty System (AMPS) that works to secure compliance with customs legislation through the application of monetary penalties. The AMPS regime applies to contraventions of the *Customs Act* and the *Customs Tariff*[41] and the regulations thereunder. Of particular interest, AMPS imposes monetary penalties in proportion to the type, frequency, and severity of the infraction. Moreover, most penalties are graduated and will take the compliance history of the client into consideration. The CBSA's AMPS regime has been very successful and has largely replaced the use of seizures and forfeiture provisions for technical infractions.[42]

An argument can also be made that AMPS must be larger, and perhaps *much* larger, than the size of the benefit to the infringing party. Given that much of the time, the offender will not be caught, the AMPs, when caught, should be grossed up by the probability of not being caught. Otherwise, the offender would take its chances and be better off in the long run.

Finally, Hogg claimed that Bill C-19 was unconstitutional because the anticompetitive practices subject to the AMPs could, if applied without regard to the express directions in C-19, lead to a penalty that is so high as to punish a party as opposed to promote compliance with the Act.

The Government dismissed this claim, stating that such an argument ignores the fact that Bill C-19 provides for maximum penalties, and provides clear direction that they are not meant to punish offenders. Furthermore, as stated by the Supreme Court in *Slaight Communications v. Davidson*:[43]

> [S]imply because an order – in this case an order to pay an AMP – *could* be issued that is contrary to the Charter, does not render the statute under which the order is made unconstitutional, unless the statute mandates [the unconstitutional] order. Thus, if the Competition Tribunal ignored the express direction of C-19 and imposed an AMP that is penal in its magnitude, the AMP would be invalid, not the Act.[44]

The Government contends, and PIAC agrees, that, based on this argument, the legislature's desire to promote compliance is preserved, as are Charter protections. In conclusion, the Government found that the proposed AMP provisions in C-19 are unlikely to be considered "criminal", and as such, "the constitutional concerns with respect to burden of proof, disclosure of evidence, Tribunal independence, and vagueness, disappear."

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[41] (1997, c. 36).
[42] Seizure and forfeiture will only be used for the most serious offences. See "The Administrative Monetary Penalty System (AMPS)" Canada Border Services Agency. Online: CBSA <http://www.cbsa-asfc.gc.ca/general/amps/menu-e.html>.
[43] [1989] 1 S.C.R. 1038.
[44] *Government Rebuttal Paper, supra* note 35 at 4.

Other Contentious Issues

AMPs can be Imposed Retroactively

Some critics views AMPs as inherently unfair because they are, in a sense, retroactive. For instance, the civil provisions of the *Competition Act* govern behaviour that is not anti-competitive *per se*, and is prohibited only after the Competition Tribunal determines it is anti-competitive. Such critics believe that penalties should be limited to forward-looking remedies such as cease and desist orders, rather than AMPs.

PIAC does not support this stance. Rather, PIAC views the retrospective nature of AMPs as contributing to their effectiveness. Statutes and government guidelines cannot predict all of the schemes and scenarios that human ingenuity can dream up, nor should they try to preempt all conduct that might run afoul of our laws and regulation. For instance, within the marketplace, firms must be allowed discretion to design business strategies and otherwise operate their businesses. However, it is important for proper boundaries to be in place so that firms, in exercising their discretion, remain cautious of potentially anti-competitive activities and related consequences. Such experiments in "pushing the envelope", must not go without consequences, where it amounts to anti-competitive conduct within the meaning of the Act.

Furthermore, in some sectors, such as telecommunications, there is a push by industry to substitute *ex ante* regulation for *ex post* regulation.[45] The theory being to simply lay out the broad principles and objectives of the regulatory regime, and come down hard on industry players only if they infringe, i.e. results-based regulation rather than rules-based regulation. However, such an approach works only if there are very significant AMPs to discourage industry players to try to get away with infringements. AMPS are absolutely crucial to any move from *ex ante* to *ex post* (or from rules-driven to results-driven) regulation.

Availability of a "Due Diligence Defence"

Although it had typically been assumed that AMPs would, apart from administrative reviews, operate more or less without legal challenge, questions have been raised about the availability of a due diligence defence.[46]

In criminal law, the defence of "due diligence" is available to strict liability offences. These are criminal offences in which the prosecutor need only prove that the prohibited act took place, and does not require the prosecutor to show that the accused had a guilty mind (i.e. a crime that only requires the establishment of *actus reus* and not *mens rea*). Once the criminal

[45] Regulators commonly distinguish between "ex ante regulation" and "ex post regulation." *Ex-post* translated from Latin means "after the fact". *Ex post* regulation aims to redress misconduct that has already taken place through a range of enforcement options including fines, injunctions, or bans. *Ex ante* regulation, on the other hand represents anticipatory intervention designed to address misconduct before it takes place. *Ex ante* is Latin for "beforehand".

[46] See *MacMillan Bloedel Ltd. v. British Columbia* (1997), 23 C.E.L.R. (N.S.) 47 (B.C. Forest Appeals Commission) at 51; As cited in Benidickson, "Administrative Monetary Penalties", *supra* note 21.

offense is proven, the burden of proof shifts to the defendant who must prove on the balance of probabilities that they did everything possible to prevent the act from happening. Thus, the accused can avoid liability if it can show that it took all reasonable steps to avoid the particular event giving rise to the charge. This lies in contrast to an absolute liability offence, which requires only that the prosecution prove that the accused person is responsible for the action or neglect causing the offence. The defence of due diligence is not available for absolute liability offences.

There has been much debate as to whether or not AMPs, especially those arising automatically on the happening of a prohibited act, are subject to a due diligence defence – making them more analogous to strict liability offences under the criminal law. Others contend that AMPs ought to be considered as the administrative penalty equivalent to an absolute liability offence, in which the accused is not provided the opportunity to mount an affirmative defence. To date, there seems to be little consensus as to what, if any, defences apply to AMPs.

In some cases, the regulatory authorities have taken the position that the due diligence defence does not apply to AMPs, and evidence of any effort made to avoid a contravention is only relevant to the quantum of the penalty.[47] Some regulatory authorities have relied on the Ontario Divisional Court decision in *Gordon Capital v. Ontario Securities Commission*,[48] for support for their position that such a defence cannot be raised outside the traditional criminal or quasi-criminal scenario.[49]

However, as was pointed out in a decision from the British Columbia Court of Appeal in *Twilight ZoneCabaret v. Liquor Licensing Board*,[50] failing to recognize the existence of a due diligence defence to administrative penalty sanctions would create the anomalous situation where a person would have a due diligence defence if he were charged with an offence, but not if he were simply levied a penalty for the very same violation.[51]

Judge Bowman's influential decision in *Pillar Oilfield Projects Ltd. v. The Queen*,[52] addressed the issue of whether a "due diligence" defence is available to persons otherwise subject to an automatic penalty under the *Excise Tax Act*[53]. Judge Bowman held that it would be contrary to the principles of "fundamental justice" and "fairness" to withhold the right to plead due

[47] For instance, under the *Environmental Enforcement Statute Law Amendment Act*, passed by the Ontario Legislature on June 9, 2005, Ontario's new environmental enforcement regime states that environmental penalties must be paid whether a pollution incident (such as an unlawful discharge) was deliberate or an unfortunate incident. The Ontario Ministry of the Environment argues that allowing due diligence to be considered a factor for a reduction rather than a defense, will help ensure that time and effort is focused on bringing about compliance, mitigating negative impacts, and ensuring that the spill does not happen again.
[48] (1991), 14 O.S.C.B. 2713.
[49] Paul Baker, "Monetary penalties are newest environmental enforcement tool" The Lawyers Weekly 16:18 (September 1996) (QL).
[50] (1995), 5 B.C.L.R. (3d) 280.
[51] Paul Baker, "Monetary penalties are newest environmental enforcement tool" The Lawyers Weekly 16:18 (September 1996) (QL).
[52] [1993] 2 G.S.T.C. 1005 (T.C.C.).
[53] (R.S., 1985, c. E-15).

diligence with regard to penalties imposed under s. 280 of the *Excise Tax Act*. In opining about the lack of a due diligence, Judge Bowman stated:

That a person should be susceptible of being penalized administratively by a public servant without any possibility of exculpating himself by demonstrative due diligence is not only extraordinary. It is abhorrent. It is not less abhorrent because it is mechanically and routinely imposed by anonymous revenue officials and therefore qualifies for the essentially meaningless rubric "administrative" rather than "criminal." A punishment is a punishment. Neither its nature nor its effect is tempered by the use of palliative modifiers.[54]

Similarly, in *Consolidated Canadian Contractors Inc. v. Canada*,[55] the Court considered whether a "due diligence" defence is available to persons otherwise subject to an automatic penalty for failing to remit the correct amount of goods and services tax ("GST"), as required under the *Excise Tax Act*. As that Act does not expressly provide for such a defence, the issue turned on whether it may be validly implied.[56] In doing so, the Court considered whether the defence of due diligence may, as a matter of principle, be raised in the context of administrative penalties.[57] The Court found that the monetary penalty provisions of the *Excise Tax Act* did not give rise to an absolute liability offence. The Court went on to state that "an implied due diligence is neither incompatible with the legislative scheme [i.e. the automatic penalty provisions under the *Excise Tax Act*], nor does it frustrate or undermine the purposes underlying that scheme."[58]

The debate over whether or not a due diligence defence should (or must) be available to AMPs is still ongoing – with little sign of resolution on the horizon. Recent changes to provincial legislation suggests that the availability of a "due diligence" defence for administrative penalties will vary widely by province.

For instance, in 2002, the British Columbia Government passed the new *Forest and Range Practices Act*,[59] which ushered in a new "results-based" regulatory scheme for logging, road building, reforestation and other related forestry activities. A key point of interest in the new Act was the reversal of the longstanding AMP enforcement provisions regarding the due diligence. The new Act now recognizes due diligence as a full defence to administrative monetary penalties.[60]

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[54] *Pillar Oilfield Projects Ltd. v. R.*, [1993] 2 G.T.C. 1005 at 1009 (T.C.). Now see *Canada (Attorney General) v. Consolidated Canadian Contractors Inc.* (1998), 231 N.R. 92 (FCA); as cited in Benidickson, "Administrative Monetary Penalties", *supra* note 21.
[55] [1998] F.C.J. No. 1394.
[56] *Ibid*. at para 1.
[57] *Ibid.* at para 20.
[58] *Ibid.* at 59.
[59] SBC 2002, c. 69.
[60] Caroline Findlay, "New Results-based Regime for B.C. Forest Practices" Blakes, Cassels & Graydon LLP. Online: <http://www.blakes.com/english/publications/belb/december2002_ontario/forest.asp>.

More recently, *Bill 133, An Act to amend the Environmental Protection Act*, was passed by the Ontario Legislature and given Royal Assent on June 9, 2005. Although Bill 133 makes a number of changes to the enforcement of environmental laws in Ontario, its controversial nature stems from its new environmental penalty regime. The amendments provide for administrative monetary penalties, called "Environmental Penalties", and would allow senior Ministry of the Environment (MOE) officials to hand out fines of up to $20,000 a day for an individual or $100,000 a day for corporations. No charge or finding of guilt is required, and in some cases, AMPs can be imposed regardless of fault or the exercise of due diligence.[61]

THE USE OF AMPS

Although AMPs are generally considered a relatively new phenomenon in regulatory and administrative enforcement circles, they have actually existed for some time in Canadian legislation. For instance, the *Customs Act*, *Unemployment Insurance Act*, *Aeronautics Act*, *Transportation Act*, *Marine Transportation Security Act*, *Income Tax Act*, *Competition Act*; not to mention numerous provincial environmental protection acts - have all contained various forms of AMPs for many years. More recently, AMPs have appeared in the *Agriculture and Agri-Food Administrative Monetary Penalties Act* and the *Financial Consumer Agency of Canada Act*.

Perhaps the most well-known application of AMPs is in regard to environmental protection. Administrative penalties are increasingly being used for clear contraventions that have minimal environmental impacts (while the more serious environmental breaches are typically reserved for criminal prosecutions). Regulatory agencies in Canada and throughout North America have been using monetary penalties as an abatement tool for many years. The effectiveness of AMPs in curbing environmental abuses has been much debated; however, regulatory agencies contend that such penalties play a complementary role to other enforcement tools which agencies use to regulate.

AMPs have also been used, to varying degrees, on the international front. For instance, the United States has adopted the widespread use of AMPs in legislation ranging from *Clayton (Anti-trust) Act*, *Webb-Pomerene (Export Trade) Act*, *Wool Products Labeling Act*, *Fur Products Labeling Act*, and the *Energy Policy and Conservation Act*. Another leader in the adoption of AMPs has been Australia. Australian federal legislation imposes administrative penalties in such areas of taxation, social security, financial institutions and services, corporations law, insurance, broadcasting, customs, immigration, and the licensing of nursing homes, airlines, navigation, fishing and most recently, food technology. Moreover, Australia's state and territory administrative penalty regimes cover an even broader range of activities.[62]

[61] Katherine M. van Rensburg, "Bill 133: 'You Spill, You Pay' Enacted in Ontario" Gowlings LLP. Online: <http://www.gowlings.com/resources/publications.asp?Pubid=1079>.
[62] *ALRC Pamphlet 3*, *supra* note 4.

Use of AMPs in Consumer Protection

Administrative monetary penalties have been especially popular in the field of consumer protection. Many governments around the world employ the use of AMPs, along with other criminal and civil penalties to enforce their consumer protection legislation.

What is Consumer Protection?

Consumer protection is a form of government regulation that protects the interests of consumers. It is linked to the idea of consumer rights – i.e. that consumers are entitled to certain fundamental rights as consumers.[63] Consumer protection law is considered an area of public law that regulates the private law relationships between individual consumers and other actors in the marketplace that provide consumers with goods and services. Most countries have enacted consumer protection laws and set up government agencies to protect the consumer from such things as: inferior, dangerous and deceptively advertised products, and deceptive or fraudulent sales practices. In Canada, issues of consumer protection are largely governed by provincial legislation, with the provinces overseeing ministries of consumer affairs and consumer-protection bureaus. The Federal Government also provides protection for consumers through consumer-related provisions in various federal statutes. Consumer protection laws cover a wide range of consumer transactions in the marketplace, including:

> Protection Against Dangerous Products: Federal examples of this type of legislation include the *Food and Drugs Act*, the *Hazardous Products Act*, the *Motor Vehicle Safety Act* and the *Motor Vehicle Tire Safety Act*.
>
> Protection Against Fraudulent and Deceptive Practices: The federal *Weights and Measures Act* is an early example of this type of legislation. More recent examples include the *Competition Act* with its important provisions concerning misleading advertising. Many of the provinces also adopted "trade practices" or "business practices" acts with the same objectives but employing different enforcement techniques.

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[63] The origin of the modern views of "consumer rights" arose from a speech given by President John F. Kennedy in 1962 on "Protecting the Consumer Interest". In his speech, JFK outlined the "rights" applicable to every consumer:

1) The right to safety -- to be protected against the marketing of goods which are hazardous to health or life.
2) The right to be informed -- to be protected against fraudulent, deceitful, or grossly misleading information, advertising, labeling, or other practices, and to be given the facts he needs to make an informed choice.
3) The right to choose --to be assured, wherever possible, access to a variety of products and services at competitive prices; and in those industries in which competition is not workable and Government regulation is substituted, an assurance of satisfactory quality and service at fair prices.
4) The right to be heard-- to be assured that consumer interests will receive full and sympathetic consideration in the formulation of Government policy, and fair and expeditious treatment in its administrative tribunals.

See President John F. Kennedy, "Special Message on Protecting the Consumer Interest" (Speech given to the United States Congress, March 15, 1962).

> Better Access to Information: Modern consumers are not always given sufficient information to make an informed choice between competing products or services, or else the information is presented in a confusing form. The "truth in lending" provisions in the provincial consumer-protection acts and the federal *Banking Act* are designed to provide the needed information in consumer-credit contracts. Important disclosure requirements with similar objectives are found in the federal *Consumer Packaging and Labelling Act* and the *Textile Labelling Act*.[64]

Given the wide range of consumer protection legislation, and the vast numbers of people who are affected by these laws, administrative monetary penalties have been widely employed by regulators as an efficient means of enforcing consumer protection laws. This paper will highlight two important areas of consumer protection that implement the use of AMPs: 1) misleading representation and deceptive marketing; and 2) telemarketing.

1) Misleading Representations & Deceptive Marketing

The general prohibitions against employing misleading representations and deceptive marketing practices are contained in the federal *Competition Act*. The Act is designed to promote competition and efficiency in the Canadian marketplace. It is a law of general application, meaning it applies, with few exceptions, to all industries and levels of trade. It is administered by the Competition Bureau, an independent law enforcement agency who's mandate is to "promote and maintain fair competition so that all Canadians can benefit from competitive prices, product choice and quality service."[65]

The *Competition Act* contains criminal and civil provisions prohibiting misleading representations and deceptive marketing practices. Any representation, in any form, which is false or misleading in a material respect is prohibited. According to the Bureau, the test for materiality is whether the representation could influence a consumer to buy a product or service and will involve evaluating the general impression conveyed by the representation in addition to its literal meaning.[66] In those situations where the Commissioner has a choice of proceeding on either the civil or criminal track, most often the civil track will be pursued unless there is clear or compelling evidence that the party making the representation in question had knowingly or recklessly made a false or misleading representation to the public, and it would be in the public interest to pursue the matter criminally.[67]

Administrative Monetary Penalties fall under the Act's civil provisions. Despite recent attempts to expand the scope of AMPs under the Act, they are presently only provided for in the narrow area of certain deceptive marketing practices and misrepresentations.

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[64] "Consumer Law", The Canadian Encyclopedia. Online <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0001880>.
[65] "What is the Competition Bureau" Competition Bureau Canada. Online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=18&lg=e>.
[66] "Information Bulletin: Application of the Competition Act to Representations on the Internet" Competition Bureau [Competition Bureau, "Representations on the Internet"]. Online: <http://www.competitionbureau.gc.ca/PDFs/ct02500e.pdf>.
[67] *Ibid.* Further information on the Bureau's policy on choice of track can be found online at: <http://strategis.ic.gc.ca/SSG/ct01181e.html>.

Part VII.1 of the *Competition Act* outlines the reviewable matters under the Deceptive Marketing Practices provisions. Sections 74.01(1) and (2) of the Act make the following conduct reviewable:

(a) representations that are false or misleading in a material respect;
(b) representations in the form of statements, warranties or guarantees that are not based on adequate and proper tests;
(c) misleading ordinary price claims; and
(d) representations in the form of warranties, guarantees or promises to replace, maintain or repair an article, where the warranty, guarantee or promise is materially misleading or there is no reasonable prospect that it will be carried out.

Other reviewable offences under the Act's civil regime include bait-and-switch selling and the supplying of a product at a price higher than it is advertised.

The Competition Tribunal (or court) may order a person to cease the activity, publish a notice and/or pay an administrative monetary penalty. The maximum penalty under the AMP scheme is currently set at $50,000 for an individual (and a max. of $100,000 for each subsequent order) and in the case of a corporation, the maximum is set at $100,000 (and $200,000 for each subsequent order).

Provisions under the civil regime are "strict liability" contraventions and therefore the accused is entitled to present a defence of due diligence. In addition, the Tribunal may take into account aggravating or mitigating factors when determining the amount of the AMP.[68]

Examples of Successfully Applied AMPs

Recently, the Competition Bureau, often in conjunction with the Competition Tribunal, has stepped up its efforts aimed at curbing misleading and deceptive marketing practices. This has meant an increase in the number, and dollar amount, of AMPs that have been handed down. In particular, two categories of prohibited conduct have garnered increased attention due to the large AMP amounts handed down by the Bureau.

The first involves the “ordinary selling price” provisions under the *Competition Act*. The “ordinary price” provisions contain a civil prohibition against advertising goods and services as being sold at a discount to their ordinary price if the ordinary price is not legitimate. In other words, a bargain must be a bargain. These provisions, which act to ensure that an advertised sale is a "genuine" sale, contain both a time test (i.e., the product must have been offered at the higher price for a substantial period of time before the sale advertisement) and a

[68] Under section 74.1(5), the Tribunal may consider the following factors: (a) the reach of the conduct within the relevant geographic market; (b) the frequency and duration of the conduct; (c) the vulnerability of the class of persons likely to be adversely affected by the conduct; (d) the materiality of any representation; (e) the likelihood of self-correction in the relevant geographic market; (f) injury to competition in the relevant geographic market; (g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and (h) any other relevant factor.

volume test (i.e., a substantial volume of the product must have been sold within a reasonable period of time before the sale advertisement).

A. Ordinary Selling Price Provisions

Sears Case

On January 24, 2005, the Competition Tribunal delivered a "landmark decision" relating to violations of the "ordinary pricing" provisions of the *Competition Act*. The Tribunal found that Sears Canada, Inc. had violated the Act by exaggerating the possible savings to consumers across Canada when advertising tires on sale. In particular, the Tribunal found that Sears quoted inflated regular prices when promoting tires to consumers at so-called sale prices. Sears' advertisements contained "save" and "percentage off" representations which purported a substantial discount off Sears' regular prices on tires. Sears admitted it sold less than two percent of the tires at full regular price before they were advertised on sale. The Tribunal found that the tires had not been offered in good faith at the "regular" price and issued an order requiring Sears to pay an AMP in the amount of $100,000 plus an additional $387,000 towards the Bureau's legal costs.[69]

Forzani Group Case

In July, 2004, The Forzani Group Ltd., Canada's largest sporting goods retailer, reached a consent agreement with the Bureau in relation to allegations that it had inflated its "original prices" used for promoting its "sale" items, as well as its competitor's prices used in comparative advertising promotions for its Sport Chek and Sport Mart stores across Canada. Under the consent agreement with the Bureau, Forzani was required to pay an AMP of $1.2 million, in addition to $500,000 to cover the costs of the Bureau's inquiry. The Forzani Group was also required to publish corrective notices in newspapers across Canada, in Sport Chek and Sport Mart flyers, on its corporate websites and in its stores across Canada. Forzani must also stop making reference to inflated regular prices in its advertisements.[70]

B. Misleading Product Claims Provisions

The second category that has seen as increase in AMP enforcement is that of the Misleading Product Claims provisions under section 74.01(1) of the Act. According to this section, a person engages in reviewable conduct who makes a representation to the public that is false or misleading in a material respect, or makes guarantees as to the performance, efficacy or length of life of a product that is not based on an adequate and proper test, or makes representations as to warranties or guarantees about the product that are materially misleading.

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[69] "Competition decision warrants increased caution in comparative price advertising", *The Lawyers Weekly*, 25:2 (May 2005) (QL).

[70] "Competition Law Report: Canadian Competition Bureau "Energizes" Its Attack on Misleading Advertising" Miller Thomson LLP (January 2005) [*Competition Law Report*]. Online: <http://www.millerthomson.com/mtweb.nsf/web_files/mtte6a97qc/$File/Competition_Report_January_2005.pdf?openelement>.

PVI Case

In May, 2004, Federal Court of Appeal upheld a Competition Tribunal ruling that determined that Edmonton-based PVI International Inc. (PVI) had made false and misleading claims to consumers of reduced exhaust emissions and increased mileage for its fuel-saving device, known as the Platinum Vapour Injector. PVI had made representations that its product, when installed in the gasoline-fuelled internal combustion engines, increased combustion efficiency from 68 percent to 90 percent and as a result increased fuel efficiency by an average of 22 percent and reduced emissions. PVI also said that the United States government has endorsed the accuracy of these statements. Following a Competition Bureau investigation, the Competition Tribunal found that these statements were false or misleading in a material respect and not based on adequate and proper tests, as required under the *Competition Act*. The Tribunal made orders prohibiting PVI from repeating these representations and imposed a total of $125,000 in administrative monetary penalties ($75,000 on the company and $25,000 on each of its two owners).[71]

This increased vigilance on the part of the Competition Bureau and Tribunal in pursuing cases involving misleading and deceptive advertising means that retailers and marketers will likely start exercising greater caution in the how they market their products to the public.

2) Telemarketing

Telemarketing is a term used to describe the range of marketing related functions that can be performed using the telephone. It often refers to the use of the telephone to solicit products or services, or otherwise communicate with consumers.

Rules respecting prohibited telemarketing practices are found in both the *Competition Act* and the *Telecommunications Act.* However, the Competition Act is much more limited in its ability to regulate the telemarketing industry. The Act is largely limited to regulating "deceptive" telemarketing practices. In addition, unlike other prohibited deceptive and misleading practices, the telemarketing provisions under the Competition Act are not subject to administrative monetary penalties.

As such, this section will concentrate on the telemarketing provisions found in the *Telecommunications Act*,[72] administered by the Canadian Radio-television and Telecommunications Commission (the "CRTC"). In Decision 2004-35, the CRTC defined "telemarketing" as "the use of telecommunications facilities to make unsolicited calls for the purpose of solicitation, where solicitation is defined as the selling or promoting of a product or service, or the soliciting of money or money's worth, whether directly or indirectly and whether on behalf of another party. This includes the solicitation of donations by or on behalf of charitable organizations."

[71] "Imposing Corrective Advertising Under the Competition Act" Marketing Law e-Communique (July 2004) 17:3. Online: Cassels Brock LLP <http://www.casselsbrock.com/publicationdetail.asp?aid=611&pid=4>.
[72] (1993, c. 38).

The CRTC has established a set of general telemarketing rules that apply to all unsolicited calls made for the purpose of solicitation (including calls made by or on behalf of charitable organizations), but do not extend to calls where there is no attempt to advertise or offer a product or service. These rules require that upon a customer's request, a telemarketer must remove the customer's name and telephone number from its calling list and maintain a company-specific "Do Not Call" list which is to remain active for three years. Furthermore, for each call made, telemarketers must identify the person or organization they represent and, upon request, provide the contact information of a responsible person to whom the called party can write.[73]

With the recent enactment of Bill C-37, which makes important amendments to the *Telecommunications Act*, the CRTC now has significantly increased enforcement tools at its disposal. These amendments, which took effect on October 24, 2005, now provide the CRTC with two important new powers in the enforcement of telemarketing rules.

The first major change to the Act amends the investigation and enforcement powers contained in section 72 of the Act. Importantly, the CRTC now has the power to levy substantial monetary penalties against telecommunications carriers that violate CRTC decisions or provision of the *Telecommunications Act*, including those applicable to telemarketing. Notably, the Act now provides for an AMP scheme in which the CRTC has the ability to impose AMPs that can be applied against each offence – meaning that each telemarketing call made to a number that is on the Do Not Call List can be the subject of an AMP. Individuals may be subject to an AMP of $1,500 per offence while corporations face an AMP of $15,000 per offence.[74]

Previously, only limited recourse existed against companies or individuals who violated the Act or CRTC decision. One approach was through a criminal proceeding in the courts, which was expensive, time consuming and complex. The other approach was to rely on the service providers who were suppose to discontinue service to telemarketers who repeatedly violated the rules. Unfortunately, this option failed because it was not in the service providers interests to discontinue service to what were profitable customers. AMPs now give the CRTC the necessary tools to act quickly to address violations directly, without going to court. This enables AMPs to serve as a deterrent for any company or individual that would consider operating in a manner that contradicts telecommunications rules and regulations.[75]

The second major change to the Act is the creation of a legislative framework for a national Do Not Call Registry. The amendments give the CRTC the green light in the establishment of

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[73] Michael E. Piaskoski, "Telemarketing restrictions recognize importance for charity fund-raising", *The Lawyers Weekly*, 25:29 (December 2005) (QL) [Piaskoski, "Telemarketing Restrictions"].
[74] *Ibid.*
[75] "Government of Canada Announces Amendments to the Telecommunications Act" Industry Canada (November 14, 2005). Online: IC <http://www.ic.gc.ca/cmb/welcomeic.nsf/ICPagesEPrint/85256a5d006b9720852570b900564830!OpenDocument&Click=>.

a national registry system and allows the CRTC to delegate the operation of this service to third parties.[76]

National Do Not Call Registers

With the introduction of the national Do Not Call (DNC) Registry, consumers will no longer need to contact each telemarketer individually in order to remove themselves from a specific calling list. Rather, they will be able to sign up for a national registry by, for example, by placing a single 1-800 call to a centralized registry or by completing an on-line form. Telemarketers would then be expected to access the list on a regular basis and ensure that those persons on the list are not called.[77]

The legislation contemplates that the national DNC Register will be subject to the same AMP scheme as is currently in place for individual telemarketing companies. This means that the consequences of non-compliance with the new registry may be sever. The penalty of $15,000 is not a maximum, but rather $15,000 for "every contravention of the prohibition or requirement of the Commission…" Further, the amendments provide that a violation continued on more than one day constitutes a separate violation for each day.[78]

Bill C-37 received royal assent on November 25, 2005. However, efforts to set up the long awaited national DNC Registry - where consumers can declare their phone numbers off-limits to telemarketers - has been delayed, in part by controversy over how to pay for it. It is not known when the Registry will be up and running.

Canada's DNC Register is based in large part on the successful model implemented in the United States. The U.S. was the first country to establish a DNC registry back in 2003. Since that time, the registry has proven to be a huge success and very popular among Americans, with over 65 million registrants - representing over half of all U.S. households.

The American DNC Registry is jointly enforced by the Federal Trade Commission (FTC) and its sister department, the Federal Communications Commission (FCC). The maximum penalty for wrongfully calling individuals whose numbers appear on the registry is a civil damages award in the amount of $11,000 (U.S) per violation. However, unlike the Canadian DNC registry, the U.S. model does not provide for AMPs as an enforcement mechanism. Under the U.S. model, the FTC must bring a civil lawsuit against an alleged violator in district court in order to obtain civil monetary penalties.

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[76] Sunny Handa & Maria Amore, "Bill C-37 – A National Do-not-call Registry in Canada?" Blake, Cassels & Graydon LLP (QL).

[77] These rules do not apply to telecommunications "made by or on behalf of a registered charity within the meaning of the Income Tax Act". The rules also contain express exemptions for telecommunications that are made by registered political parties and their candidates, made for the purposes of conducting polls or soliciting newspaper subscriptions, and where a prior business relationship exists between the caller and the person called. However, all persons who are exempt from the national register are still required to maintain their own company-specific Do Not Call List and are subject to those applicable rules. See Piaskoski, "Telemarketing Restrictions", *supra* note 71.

[78] "Do Not Call" Comes to Canada, Lang Michener LLP. Online: <http://www.langmichener.ca/index.cfm?fuseaction=content.contentDetail&ID=8710&tID=244>.

The enormous success of the U.S. DNC registry has proven to be a bit of a challenge for the FTC. According to FTC registration and complaint figures, during the first year of operation, consumers submitted over 428,764 complaints against 130,000 companies. At present, FTC officials indicate that there are now over 600,000 complaints pending and that the system for processing complaints is "full".[79]

Furthermore, actions in civil court have not proven overly efficient. Although the FTC secured its first enforcement action for civil damages in connection with the DNC registry, the case took almost a year to reach a successful completion. The FCC took a company to court for violating the registry for the first time in August 2004. The agency accused a Las Vegas telemarketing company, Braglia Marketing Group, of making more than 300,000 calls to numbers on the registry. In February of 2005, the FTC secured a settlement with the company to pay more than $500,000 in civil penalties – although all but $3,500 of it was suspended because the company was unable to pay. In addition, the owners of Braglia Marketing are barred from violating the DNC registry in the future and are banned from owning or controlling any telemarketing operations in the future.[80]

Other companies have settled without going to court after the FTC said they broke the rules. Among them, AT&T Corp. shelled out $490,000 in civil penalties in July 2004 and Primus Telecommunications Group Inc. agreed to pay $400,000 two months later.[81]

USE OF AMPS IN E-COMMERCE & ONLINE COMMUNICATIONS

E-commerce and Internet advertising are rapidly growing industries, largely because they provide both consumers and businesses with increased advantages over traditional commercial transactions. Consumers now have access to a plethora of information that can help them to compare products, prices and can lead to more informed purchasing decisions. Many consumers also find e-commerce appealing because it offers them increased choice and a convenient shopping alternative. Businesses, on the other hand, are finding that they can reach a virtually endless number of consumers and are reaping the benefits of increased access to global markets. Smaller firms are also utilizing the power of the Internet as it has provided them the opportunity to compete on an equal footing with larger firms. In 2005, Canadian consumer e-commerce spending amount to $7.9 billion; while the value of Canadian Business-to-Consumer (B2C) e-commerce sales reached $11.85 billion.[82]

There is little doubt that the Internet has fundamentally reshaped the way businesses and consumers communicate, interact and transact in Canada and around the world. However, there exists underlying concerns about the potential for falling victim to misleading

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[79] *Ibid.*
[80] "Do not call: Hanging up on telemarketers ", CBC News Indepth: Telemarketing (November 25, 2005). Online: CBC <http://www.cbc.ca/news/background/telemarketing>.
[81] *Ibid.*
[82] "The Digital Economy in Canada: Canadian E-commerce Statistics", Industry Canada (November 2006). Online: IC <http://www.e-com.ic.gc.ca/epic/site/ecic-ceac.nsf/en/gv00163e.html>.

representations or deceptive marketing practices.[83] In the on-line environment, as in other forms of distance selling such as catalogue or mail order, consumers cannot physically inspect products available for sale, and therefore rely significantly upon representations made by the seller. Because the Internet is more anonymous, there is greater temptation for unethical companies to try to get away with fraud and deceptive advertising practices. Such prohibited behaviour undermines consumer confidence in e-commerce and threatens the growth of this increasingly important sector of our economy.[84]

In Canada, AMPs have been used to regulate certain e-commerce and online communications. In the previous section, we outlined how AMPs are broadly used by the Competition Bureau to prohibit false or misleading representations. However, the same provisions as outlined above, can also be applied in the online context.

The *Competition Act* prohibits false or misleading representations to "the public". As such, the Act is indifferent to the medium used – meaning that the misleading and deceptive marketing provisions apply regardless, whether perpetrated online or via traditional routes. In an Information Bulletin released by the Competition Bureau in 2003, the Bureau addressed how the Act applies to representations on the Internet, stating:

> The same basic rules that govern truthfulness in traditional advertising and marketing practices apply to online representations and online marketing practices. The relevant provisions of the Act address the substance of a representation rather than the means by which it is made.[85]

In addition, the Act's provisions apply to Internet representations which could influence both on-line purchases as well as off-line purchase.[86] In the online context, representations to "the public" can mean representations via: websites, e-mail, chat rooms, news groups, message boards, etc. (depending on circumstances).

According to Raymond Pierce, Deputy Commissioner of the Competition Bureau: "The Bureau is committed to applying the Competition Act to the online marketplace and pursuing scams on the Internet to ensure continuing consumer confidence in buying on-line."[87] Moreover, it is clear from the recent enforcement activities undertaken by the Bureau, that AMPs are an important part of the Bureau's enforcement effort. The following are examples of successfully applied AMPs involving consumer protection and online representations.

Successfully Applied AMPs Involving Online Representations

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[83] Competition Bureau, "Representations on the Internet", *supra* note 64 at 2.
[84] Sheridan Scott, Commissioner of Competition, (Speech presented to the Canadian Marketing Association, Regulatory Affairs Conference, September 22, 2205) [Speech by Sheridan Scott]. Online: < http://www.competitionbureau.gc.ca/PDFs/2005-09-22_ss_speech_e.pdf>.
[85] Competition Bureau, "Representations on the Internet", *supra* note 64 at 2-3.
[86] Speech by Sheridan Scott, *supra* note 82.
[87] "Competition Bureau shuts down Internet-based job scams" Competition Bureau (February 22, 2206) [Competition Bureau, "Internet Job Scams"]. Online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2024&lg=e>.

Urus Industrial Corp. Case

In July 2004, the Bureau reached a settlement agreement with Urus Industrial Corporation (doing business as Koolatron) stemming from claims made in the company's advertisements, television infomercials and on its website regarding its muscle stimulating device, the "AB Energizer." According to the Bureau, the company's various representations gave the impression that the AB Energizer would result in consumers losing weight and looking "fantastic" without any need for physical exercise. The Bureau was successful in obtaining a number of significant settlement terms, including the payment by Urus of a $75,000 administrative monetary penalty.[88]

Internet Job Scam Cases

In 2006, the Competition Bureau successfully shut down two Edmonton-based Internet scams promoting resumé distribution services. Matthew Hovila and Strategic Ecomm Inc. admitted to contraventions of the Competition Act and agreed to pay a $100,000 administrative monetary penalty, as part of a consent agreement filed with the Competition Tribunal.[89]

The Bureau's investigation centered on concerns of false and misleading representations, phony testimonials and exaggerated ordinary selling price claims with regard to the resumé distribution services promoted on two commercial websites.[90]

According to the Bureau, consumers from around the world, including Canada, the United States and Australia, registered on www.oilcareer.com or www.governmentaljobs.com seeking employment in the oil and gas industry. Consumers paid between $397USD and $1,197USD to the company on the promise of employment in the lucrative Alberta oil fields. The Bureau received an onslaught of complaints after consumers did not receive job offers and were unable to get a refund from the company.[91]

The investigation uncovered numerous misrepresentions regarding: the number of companies to which resumés were forwarded; their relationships with potential employers, and the effectiveness of their services; the validity of a "money-back risk-free guarantee"; and their endorsement by an on-line third-party watchdog. The investigation also uncovered that they had provided phony customer testimonials and misled customers to believe their services were "on sale" for a time limited special price.[92]

Under the consent agreement, Strategic Ecomm Inc. and Matthew Hovila, agreed, among other things, to: admit to having committed reviewable conduct under the Competition Act; pay an administrative monetary penalty of $100,000; publish corrective notices; and

[88] In addition to the $75,000 AMP, Urus agreed to cease selling and marketing the AB Energizer in Canada; provide a full refund to certain consumers; develop a written corporate compliance policy; broadcast a notice; and post a notice about the settlement on its website for a period of twelve weeks. See *Competition Law Report*, *supra* note 68.
[89] Competition Bureau, "Internet Job Scams", *supra* note 85.
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*

discontinue the offending conduct on the www.oilcareer.com and www.governmentaljobs.com websites.[93]

Competition Bureau's "Project FairWeb"

In April, 2004, the Competition Bureau launched "Project FairWeb", the country's first dedicated Internet surveillance and enforcement program aimed at combatting misleading and deceptive advertising found on the Internet. As part of this project, Bureau officers conduct regular Internet sweeps to identify potentially problematic sites.[94]

To date, Project FairWeb's initial focus has been on misleading and unsubstantiated claims relating to bogus weight-loss products. According to the Bureau, "these unsubstantiated claims account for a large proportion of Internet health fraud, targeting particularly vulnerable consumers - the overweight or obese who are desperate to find a solution to their weight problems."[95]

In December 2004, the Bureau resolved its first case under this new initiative. The case involved Zyapex and Dyapex Diet Patches sold on-line by an American company, Performance Marketing Ltd. The Bureau's investigation focused on claims the company made on its website that the patches were a safe and natural weight-loss product, and that gave the false impression that, without performing any physical exercise or dieting, users could lose weight, reduce their appetite, control their cravings and speed up their metabolism. The company also failed to enforce its own anti-spam policy. In addition to the full refund to those who purchased the diet patches, the company agreed in a consent agreement registered with the Competition Tribunal to: cease making any performance claims to the public unless the Bureau agreed that the claims are based on adequate and proper tests; assure that SPAM was not used as a means of marketing its products; and post a corrective notice on its website.[96]

Of particular note is that the consent agreement did not involve the use of AMPs, or any other form of civil monetary penalty. It is not known why the Bureau has not pursued AMPs under its FairWeb Project, considering its considerable use of AMPs in other cases involving misleading and deceptive marketing practices, both on- and off-line.

Since its launch in April 2004, the Bureau has identified close to 600 "questionable" websites and has delivered notices to the most problematic sites. Since then, over 80 percent of the businesses have either removed the suspect performance claims or have expressed their intent to comply with the Act.[97] The Bureau has not indicated what measures it will pursue against the remaining 20 percent of businesses who have not expressed their intent to comply with the Act. Hopefully, the Bureau will begin imposing strong AMPs on companies who fail to play by the rules. Otherwise, there will be little incentive for these unscrupulous marketers to

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[93] *Ibid.*
[94] "Project FairWeb" Competition Bureau (December 13, 2004). Online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=237&ig=e>.
[95] *Ibid.*
[96] *Competition Law Report, supra* note 68.
[97] "Miracle Cures: A Prescription for Fraud" Competition Bureau (March 28, 2007). Online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2291&lg=e>.

change their anti-competitive practices and more vulnerable consumers may fall victim to their deceptive and fraudulent claims.

SPAM

There is no universally agreed upon definition of spam. However, it is largely agreed that spam is, at a minimum, unsolicited and unwanted e-mail. Industry Canada has defined spam as "bulk unsolicited mail, most of which is of a commercial nature, promoting products or services." According to the Canadian Internet Policy and Public Interest Clinic (CIPPIC), the characteristics typical of spam include:

- Untargeted and indiscriminate distribution;
- Disguised identity and address of the originator;
- No valid or functional address to which recipients can respond in order to opt out of receiving further unsolicited messages OR failure to respect recipients' requests to stop sending unsolicited messages; and
- Illegal or offensive content.[98]

CIPPIC warns that spam should not be simply dismissed as a mere inconvenience or annoyance to recipients. Rather, its effects are much more seditious. "[Spam] shifts the costs of marketing from marketers to consumers, displaces legitimate e-mail, wastes resources, and reduces the productivity of those who have to deal with it." In particular, spam has saturated email communications to the point that it threatens the viability of email as a reliable communications medium for businesses and consumers.[99]

To date, Canada has not enacted specific anti-spam legislation, choosing instead, to proceed with the enforcement of existing laws that address spam-related concerns. As such, the availability of AMPs as a tool to combat spammers depends on the particular legislation or regulations in question.

Today, there is generally considered to be three regulatory routes available to combat spammers. First, the Competition Bureau can take action against spammers when the spam in question includes information that is false or misleading in a material respect. For instance, the Bureau can act against spammers (either under civil or criminal processes) who make representations about the performance or effectiveness of products when those representations are not based on proper tests. On the civil side, administrative monetary penalties of $50,000 for an individual and $100,000 for a corporation are available for first offences. These amounts double for subsequent offences.

Second, the CRTC has limited authority over wireless and fax-based spam. In 1999, the CRTC held a public proceeding to consider how, if at all, it should regulate the Internet. In the resulting decision, Telecom Public Notice CRTC 99-14, the Commission did not address the problem of spam and chose to leave the Internet largely unregulated. However, the CRTC,

[98] "What is Spam?" CIPPIC. Online: <http://www.cippic.ca/en/faqs-resources/spam/#faq_what-is-spam>.
[99] "What is the Problem with Spam?" CIPPIC. Online <http://www.cippic.ca/en/faqs-resources/spam/#faq_problem-spam>.

under section 41 of the *Telecommunications Act*, does have authority over unsolicited telecommunications (which would include wireless and fax-based spam).

Finally, the Office of the Privacy Commissioner can take action against spammers under the Personal Information Protection and Electronic Documents Act (PIPEDA) in cases where personal information is used without the subject's consent.

In addition, provincial and local police forces can take enforcement action under a variety of provisions under the Criminal Code of Canada, such as those dealing with abuse of computers and networks (including brining down a server), and other fraudulent activities.

Thus, the use of AMPs is largely limited to enforcement by the Competition Bureau, as the CRTC's powers with respect to spam are extremely limited and the federal Privacy Commissioner is not authorized under PIPEDA to impose administrative monetary sanctions on violators.[100]

On May 11, 2004, the Government of Canada established the Task Force on Spam to examine ways in which to curtail the continuing flood of unsolicited commercial e-mail.
One year later, the Task Force delivered a final report entitled, *Stopping Spam: Creating a Stronger, Safer Internet*. The Report calls for new, targeted legislation, as well as more rigorous enforcement, in order to strengthen the legal and regulatory tools available to regulators in the global battle against spam. It also supports the creation of a focal point within government for coordinating the actions taken to address the spam issue and other related problems like spyware. The Report found that there are gaps in current Canadian laws and weaknesses in their enforcement systems, noting that "it has become evident that there are limitations on the scope and enforcement of these acts as they relate to spam offences."[101]

For instance, non-deceptive spam is beyond the reach of the *Competition Act*; spam sent other than wirelessly or via fax is beyond the authority of the CRTC; and the Privacy Commissioner has limited enforcement authority. Of particular note is a recommendation of the Task Force for creating a dual-track enforcement regime (civil and criminal) similar to that employed under the *Competition Act.*

International SPAM Prevention Measures

United States

Unlike Canada, the United States has chosen to enact specific anti-spam legislation, which has been in place since early 2004. The *Assault of Non-Solicited Pornography and Marketing Act,*[102] better known as the CAN-SPAM Act, establishes requirements for those who send

[100] Enforcement is limited to applications made to the Federal Court of Canada, either by the Office of the Privacy Commissioner of Canada or by complainants, for damages arising from a breach of PIPEDA.
[101] *Stopping Spam: Creating a Stronger, Safer Internet*, Report of the Task Force on Spam (May 2005). Online: <http://www.e-com.ic.gc.ca/epic/site/ecic-ceac.nsf/vwapj/stopping_spam_May2005.pdf/$file/stopping_spam_May2005.pdf>.
[102] (CAN-SPAM) 15 USC c. 103.

commercial email, spells out penalties for spammers and companies whose products are advertised in spam if they violate the law, and gives consumers the right to ask emailers to stop spamming them.

The Federal Trade Commission (FTC), the nation's consumer protection agency, is authorized to enforce the CAN-SPAM Act. CAN-SPAM also gives the Department of Justice (DOJ) the authority to enforce its criminal sanctions. Other federal and state agencies can enforce the law against organizations under their jurisdiction, and companies that provide Internet access may sue violators, as well.

The CAN-SPAM Act makes it a civil violation to do any of the following: use false or misleading header information; use deceptive subject lines; fail to include identification that the message is an advertisement, or the sender's valid physical postal address; fail to include a warning label; or fail to meet certain requirements for the initially viewable part of the email in sexually explicit messages.

It should be noted that the *Federal Trade Commission Act*[103] does not provide for AMPs *per se*, however, it has used its ability to impose monetary penalties on violators as terms of mutually agreed-upon consent agreements reached between the FTC and the alleged violator. According to the FTC, it enforces the substantive requirements of various consumer protection laws under its authority through both administrative and judicial processes. Under Section 5(b) of the Act, the FTC may attack "unfair or deceptive practices" (or violations of other consumer protection statutes) through maintenance of an administrative adjudication. When there is "reason to believe" that a law violation has occurred, it may issue a complaint setting forth its charges. If the respondent elects to settle the charges, it may sign a consent agreement (without admitting liability) by which it consents to entry of a final order and waives all right to judicial review. If the FTC accepts the proposed consent agreement, it places the order on the record for thirty days of public comment before determining whether to make the order final.[104]

The Canadian Competition Bureau uses a similar administrative process when it enters into consent agreements with Canadian companies. The consent agreements, which usually contain AMPs, are registered with the Competition Tribunal (or court) before being officially imposed.

The consent agreements used by the FTC have proven very effective. For instance, in 2006, the FTC announced that it had entered into a consent agreement with JumpStart Technologies requiring the company to pay a $900,000 (USD) civil penalty for violating the CAN-SPAM Act by sending "disguised" and misleading commercial spam. According to the FTC, the payment was the largest penalty ever for illegal spam. The consent agreement also

[103] (1914) 15 U.S.C. §§ 41-51.
[104] "A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority" Federal Trade Commission (September 2002). Online: <http://www.ftc.gov/ogc/brfovrvw.htm>.

permanently prohibits JumpSart from engaging in future practices prohibited by CAN-SPAM and FTC Acts.[105]

Over the last several years, the FTC has continued to call on Congress for broader enforcement powers to combat spam, spyware and phishing schemes. Specifically, the FTC has asked Congress for the ability to levy AMPs on those found to commit unfair and deceptive practices. At present, the FTC's ability to fine wrongdoers is very restricted.[106] The FTC has also called for the enactment of the *Undertaking Spam, Spyware and Fraud Enforcement Beyond Borders Act*,[107] commonly referred to as the "Safe Web Act", to enable increased cooperation with foreign law enforcement and regulatory agencies. If approved, the Bill would allow the FTC and parallel foreign law enforcement agencies to share information while investigating allegations of unfair and deceptive practices that involve foreign online commerce operations that cause harm to people on U.S. soil. However, the bill has drawn criticism from some privacy advocates because the FTC would not be required to make public any of the information it obtained through foreign sources.[108]

Netherlands

In the Netherlands, the *Dutch Personal Data Protection Act* also provides some protection against spam. While criminal prosecution powers are available, the Netherlands primarily uses administrative powers to enforce anti-spam legislation, with various administrative agencies being responsible for the enforcement of anti-spam laws. OPTA (the Dutch communications authority) can order an administrative penalty of up to €450 000 for violations of the *Telecommunications Act*. The Dutch Data Protection Authority can apply administrative measures of constraint, and can fine violators up to €4500. It can also inform the public prosecutor of breaches of penal legislation.[109]

EFFECTIVENESS OF AMPS IN COMPELLING COMPLIANCE

Enforcement

Enforcement presents a particularly difficult challenge in the online context.

a) Jurisdiction

The global nature of the Internet means representations and transactions made online can attract liability under domestic laws as well as foreign jurisdictions. When a representation is made online by a person living in Canada, it can typically be viewed by consumers all over

[105] "FTC Announces "Largest Civil Penalty Yet" for Illegal Spam Under CAN-SPAM Act" Privacy and Security Law Blog (March 30, 2006). Online: <http://www.privsecblog.com/archives/17166-print.html>.
[106] Anne Broache, "FTC wants beefed-up powers against Net scammers" CNet News.com (July 24, 2006). Online: <http://news.com.com/2102-7348_3-6097867.html?tag=st.util.print>.
[107] S. 1608-109th Congress (2005).
[108] *Ibid.*
[109] "International Spam Measures Compared," Industry Canada (May 2005). Online: IC <http://www.e-com.ic.gc.ca/epic/site/ecic-ceac.nsf/en/gv00345e.html>.

the world. This global exposure raises the possibility of incurring liability not only under Canadian domestic laws, but also under foreign legislation. The reverse is also true. Canadians have access to representations originating from outside of Canada; representations that may run afoul of Canadian laws and regulations.

In this globalized environment, potential liability under foreign laws presents a difficult legal minefield for consumers, businesses and regulators. Canadian laws governing jurisdiction online is continually evolving with the growth of electronic commerce. It is therefore difficult to predict how the courts will interpret jurisdictional questions in respect of transactions or communications carried out in whole or in part over the Internet.[110] Enforcement is made especially difficult when individuals or entities are located outside of Canada. Although Canadian courts and regulators will generally seek to enforce jurisdiction over foreign individuals or entities that are found in violation of Canada's laws, it is not always possible to do so.

The challenge to law enforcement is identifying that location and deciding which laws apply to what conduct. The question is how sovereign nations can meaningfully enforce national laws and procedures on a global Internet.

As such, Canadian prosecutors and regulators have sought increased cooperation with foreign jurisdictions through agreements and arrangements at both the government and agency level. For example, the Competition Bureau actively seeks the assistance and co-operation of foreign agencies to address misleading representations and deceptive marketing practices impacting the Canadian market.[111] On its website, the Bureau addresses the issue of jurisdiction, stating: "The Bureau will assert Canadian jurisdiction over foreign entities to the fullest extent authorized by law whenever necessary to protect the Canadian market from misleading representations and deceptive marketing practices."[112] However, it is unlikely that an AMP would be enforceable against an individual or entity located outside of Canada, unless there were assets within the jurisdiction.

b) Identification

Regulators and law enforcement officials are not always able to ascertain the identity of the violator; especially if the violator is what is known as an "outlaw" spammer, hacker, fraudster, etc.

Another problematic issue stems from the lack of identification mechanisms on global IP networks, and the fact that individuals can be anonymous or take on veiled or fraudulent identities. Many Internet users, whether involved in unlawful activity or not, chose to adopt false personas in order to maintain their anonymity by providing inaccurate biographical information and misleading screen names. This presents a difficult challenge for regulators and law enforcement officials who are not always able to ascertain the identity of the perpetrator; especially if the perpetrator is what is known as an "outlaw" spammer, hacker,

[110] Competition Bureau, "Representations on the Internet" Competition Bureau, *supra* note 64 at 12.
[111] *Ibid.* at 12-13.
[112] *Ibid.* at 12.

fraudster, etc. These so-called Internet "outlaws" ignore the law and go to great lengths to conceal their identities and whereabouts. Adding to these difficulties is the fact that most fraudulent online operations originate from outside of Canada.

Simply stated, given the current state of technology, it can be difficult (if not impossible) for regulators and law enforcement officials to accurately identify an individual on the Internet; especially sophisticated users who take affirmative steps to hide their identity. Moreover, it may be possible to obtain an AMP against a "John Doe", particularly where time limitations exist; however, there still remains the issue of enforceability if the perpetrator is located outside the jurisdiction.

Caution in the Use of AMPs

It is important to note that AMPs may not, however, always be an appropriate penalty when in comes to regulating online conduct. For instance, when there is clearly a fraudulent or malicious purpose behind the unlawful act, the criminal law is likely better suited to the distribution of justice. Indeed, the problem with civil penalties is that often, one of the statutory criteria that must be considered is to preserve the companies' ability to continue in business.

For example, the AMP provision under the *Competition Act* is not intended to financially impair the offending company; rather, it is to remove any financial incentive to break the rules. To ensure this, the regulator is required to take into account certain criteria, including the financial position of the company, the volume of gross sales and the profits generated by the conduct. AMPs are not meant to be a punishment and should not serve as such. Therefore, AMPs may not be an appropriate penalty for online fraudsters or those who engage in malicious online assaults through the use of phishing, malware,[113] and spyware[114].

The act of "phishing" is a good way to illustrate this point. "Phishing" is a particularly egregious form of criminal activity that is often used in the perpetration of identity theft. Phishers attempt to fraudulently acquire sensitive information - such as usernames, passwords and credit card details - by masquerading as a trustworthy entity in an electronic communication. Online banks and companies such as Ebay and Paypal are frequent targets for phishers. Phishing is typically carried out using email or an instant message that directs users to a phony website that deceives users into thinking they are on a legitimate website (such as their online bank). Unfortunately, the incidents of phishing scams continue to rise. A recent

[113] "Malware", or perhaps more commonly referred to as a computer "virus", is software designed to infiltrate or damage a computer system without the owner's informed consent. Software is considered malware based on the perceived intent of the creator rather than any particular features. It includes computer viruses, worms, trojan horses, spyware, adware, and other malicious and unwanted software. See definition for "malware" on Wikipedia.org

[114] "Spyware" is computer software that collects personal information about users without their informed consent. Personal information is secretly recorded using a variety of techniques, including: keystroke logging, recording web browsing history, and scanning documents on the computer's hard disk. Purposes can range from overtly criminal (theft of passwords and financial details) to the merely annoying (recording Internet search history for targeted advertising, while consuming computer resources). See definition for "spyware" on Wikipedia.org

U.S. report found that phishing attacks grew 28 percent from May 2004 to May 2005. Moreover, 11 million Americans reported opening up a phishing communication; while almost 2.5 million Americans reported losing money because of phishing attacks with a combined loss of $992 million (USD).[115]

Other Enforcement Options

In an interesting new legislative development, California legislators have adopted a new approach to combat phishing. In October 2005, California enacted Senate Bill 355, the *Anti-Phishing Act*, which makes phishing schemes illegal in California. What is unique about this Act is that rather than pursuing enforcement through the use of AMPs, California has chosen to empower businesses and individuals to pursuit civil suits against violators.

Specifically, a provision of the law allows an entity that is "engaged in the business of providing Internet access service to the public, owns a Web page, or owns a trademark" to bring an action when the entity is "adversely affected" by a violation of the law. This means that even an indirect effect on a business, such as phishing attacks directed at the company's customers, may trigger liability. Notably, companies can elect to seek either actual damages or $500,000, whichever is greater. Also, plaintiffs can ask a court for treble damages (i.e. triple the amount of damages) "in cases in which the defendant has engaged in a pattern and practice of violating" the law, and to seek legal costs.

In addition, the law allows individuals to pursue a civil suit against a person who has directly violated the law. Individuals may seek the greater of three times actual damages or $5000 per violation. The new law also permits an action by the Attorney General against phishers.

Some commentators have speculated that the availability of statutory damages will result in aggressive action by victims of phishing attacks; especially by those who are skilled at tracking perpetrators online. The lure of $5000 may turn ordinary citizens into bounty hunters. Businesses may also be more motivated to go after perpetrators, as the $500,000 statutory damages will likely prove a strong incentive.

ALRC

As previously mentioned, Australia has been a leader in the use of administrative monetary penalties as an enforcement tool in a wide range of regulatory sectors. However, in 2003, the Australian Law Reform Commission (ALRC), tasked with undertaking an extensive three-year inquiry to review Australia's regulatory structures, issued a caution to regualtors, finding that the growing variety of civil and administrative penalty schemes lacked any real common structure, foundation or operational theory. The 1043-page Report, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, calls for more transparent, consistent

[115] "Phishing Scams Continue to Rise" Privacy and Security Law Blog (October 25, 2005). Online: <http://www.privsecblog.com/archives/17071-print.html>.

and 'principled' regulation and identifies areas in need of clearer structure and improved laws and procedures.[116]

Among ALRC's findings was that Australia's federal regulators run a growing variety of civil and administrative penalty schemes that lack any real common structure, foundation or operational theory. ALRC President, Prof. David Weisbrot, cautioned that:

> In the criminal law, we have developed and tested rules and safeguards over a long period of time, such as the presumption of innocence, the burden of proof, the right to silence, and double jeopardy… However, in the regulatory area, we are increasingly likely to use civil and administrative penalties, because they are quicker and easier to enforce.[117]

The Report calls on the Australian Parliament to enact a 'Regulatory Contraventions Statute'. According to ALRC, such a Statute would parallel Australia's Criminal Code and provide a set of principles and standards relating to civil and administrative penalties, as well as to the processes that apply to their imposition. "We also need to sharpen the legislative distinction between criminal offences and civil and administrative penalties, especially where there the regulator has a choice of which one to use for basically the same behaviour. This choice has many consequences in terms of the nature and cost of proceedings, the safeguards that may apply, the penalties available, and stigma faced upon conviction," said ALRC Commissioner, Ian Davis.[118]

Other key recommendations of the ALRC Report include:

- Utilizing a greater variety of penalties-not just monetary ones - especially in relation to corporations, so that the courts can tailor penalties to the particular circumstances and severity of the breach, and encourage compliance in future; and
- Improving the transparency of decision-making processes by federal regulators, who should develop and publish guidelines about, e.g. how they will use adverse publicity, and how they will exercise a range of discretions (such as leniency policies).[119]

CONCLUSION

AMPs are an Important Regulatory Tool

Many people assume that civil and administrative penalties represent less onerous, less effective, and more lenient penalties when compared with punishments meted out at criminal law. This view may be true in particular circumstances, but it does not accurately reflect their role in a broader regulatory scheme. The greater procedural flexibility and range of civil and

[116] Media Release, "ALRC calls for more transparent, consistent and 'principled' regulation" Australian Law Reform Commission (March 19, 2003). Online: ALRC <http://www.alrc.gov.au/media/2003/mr0319.htm>.
[117] *Ibid.*
[118] *Ibid.*
[119] *Ibid.*

administrative sanctions make them the preferred mode of social control in situations where persuasion and negotiation can best secure compliance.[120]

There is little doubt that when it comes to regulating, regardless of the industry or sector, a multi-pronged enforcement approach is best. To be effective and efficient, regulators rely on the ability to levy the most appropriate sanction or penalty to a particular violation of the law. AMPs are one of many tools in the enforcement arsenal of regulatory agencies. They serve as an important tool, but are by no means the only tool, for ensuring proper enforcement of the country's laws and regulations. Regulators need an array of enforcement tools, ranging from criminal to administrative, to best enforce the law and deter socially and economically harmful activities.

The use and appropriateness of AMPs will largely depend upon the nature of the unlawful activity and the aim of regulatory intervention. As previously mentioned, AMPs may not be a suitable or effective penalty for perpetrators who commit unlawful activities with a malicious or fraudulent intent. Rather, such crimes may best be dealt with under the criminal law. On the other hand, AMPs have shown themselves to be particularly well suited to deal with issues of consumer protection. Regulators have found the use of AMPs to be an effective means of curbing socially and economically disruptive behaviour, especially in the marketplace. For instance, AMPs allow regulators to control such behaviour by handing out swift, efficient penalties that create an effective deterrent in the industry; while avoiding the stigmatism associated with criminal indictment. In fact, AMPs are the tool of choice for many regulators in a wide range of regulatory sectors – from environmental protection to transportation, agriculture and financial services.

As such, PIAC advocates an increased use of AMPs in consumer protection. In particular, PIAC advocates for the adoption of an AMPs enforcement scheme for violations of federal privacy laws, such as PIPEDA, as well as the re-introduction of an augmented AMPs system under the *Competition Act*. [See "Recommendations" section below].

Moreover, an increased reliance on AMPs as regulatory remedy goes hand-in-hand with the government's Smart Regulation Initiative. Smart Regulation is a government-wide initiative aimed at improving the Government of Canada's regulatory performance. The goal of the Smart Regulation initiative is to reduce the overall cost and burden of regulations and improve their quality by removing outdated or unnecessary aspects of regulatory enforcement. The core directive of Smart Regulation is the facilitation and promotion of 'Responsive Government' – i.e. government that regulates only when necessary; uses alternatives to direct regulations wherever applicable; and simplifies regulations whenever possible.

These sentiments were echoed by former Industry Minister, David Emerson while discussing the recent amendments to the *Telecommunications Act*: "The CRTC's new ability to act quickly to impose [AMPs] will enable it to better regulate the industry by responding quickly

[120] *ALRC Pamphlet 3, supra* note 4.

and effectively to violations of the Act and its decisions… This will lead to smarter regulation, stronger competition and more choice for consumers."[121]

AMPs an Effective Tool in Regulating E-commerce and Online Communications

The Internet is rapidly transforming the way individuals communicate with one another and transact in the global marketplace. However, as the Internet's potential to provide unparalleled benefits to society continues to expand, there has been an increasing recognition that the Internet can also serve as a powerful new medium for those who wish to flout the law.

The Internet is an important medium for commerce and communication both domestically and internationally. As such, it is important that regulators be given the appropriate range of tools to ensure the continued growth and maturation of this new medium. The ultimate success of the world wide web will depend on taking a balanced approach that ensures the Internet does not become a haven for unlawful activity that drives commerce away.

PIAC feels that AMPs can be an effective enforcement tool in regulating e-commerce and online communications. At present, AMPs are being used sporadically by the Competition Bureau against online sellers and marketers who engage in deceptive and misleading advertising. However, to date, the Competition Bureau has yet to levy a single AMP under its "Project FairWeb" initiative, which is specifically designed to monitor the compliance of online marketers. It is hoped that the Bureau will increase the use of AMPs for those who violate Canada's competition laws in the online context.

Additionally, AMPs could be an effective and efficient means of enforcing Canada's anti-spam measures. Unfortunately, the lack of specific anti-spam legislation in Canada makes enforcement difficult, as enforcement is left up to a handful of departments and agencies who each have very limited enforcement authority. If Canada chooses to follow the lead of other countries - such as the United States, Austria, Denmark, Italy, Spain, Ireland, Australia, Japan, and South Korea - who have enacted anti-spam legislation, AMPs could prove to be an effective and efficient means of enforcement for regulators.

Strategy to Strengthen the Effectiveness of AMPs

In order to exploit the full potential and benefits of administrative monetary penalties, as well as ensure their legitimacy in the eyes of businesses and the public, PIAC advocates the adoption of the following three-pronged strategy. When administrating an AMP scheme, regulatory agencies need: 1) more education and clearer guidelines for businesses and consumers; 2) implementation of consistent and predictable rules; and 3) increased cooperation with counterpart agencies in foreign jurisdictions.

1) Education and Guidelines for Businesses and Consumers

[121] "Government of Canada Announces Amendments to the Telecommunications Act " Industry Canada (November 14, 2005). Online: IC <http://www.ic.gc.ca/cmb/welcomeic.nsf/ICPagesEPrint/85256a5d006b9720852570b900564830!OpenDocument&Click=>.

In order for AMPs to be an effect enforcement tool, they need to be seen as legitimate and "fair" in the eyes of the individuals and businesses to which they potentially apply. To accomplish this, both the AMP scheme used by the regulator, as well as the rules and regulations to which individuals and businesses must conform, must be clear and accessible to all stakeholders. As such, regulators need to continue to educate all stakeholders (including businesses, consumers and the public) as to their rights and responsibilities under applicable laws. For instance, regulators such as the Competition Bureau and Canada Border Services Agency, publish 'Guidelines' and 'Information Bulletins' to educate stakeholders as to their potential liability under the AMPs scheme and how to ensure their activities and practices are in conformity under the law. It is also important to communicate that AMPs are a regulatory tool used for deterrence, not punishment.

The Competition Bureau also allows business to request written opinions to facilitate compliance with the *Competition Act*. The Competition Commissioner is specifically authorized to provide written opinion on the applicability of any provision of the Act, including AMPs, to proposed business conduct. These opinions are binding on the Commissioner (if all material facts have been submitted and are accurate) and are available to help businesses in Canada understand their obligations under the Act.

It is also the role of the sectoral regulators to encourage businesses, through education and enforcement, to implement compliance programs. Every stakeholder shares an interest in maintaining public confidence in the regulatory system and to ensure such things as a safe environment, competitive marketplace, and open and transparent rules and regulations.

2) Consistent and Predictable Rules

The Director of the U.S. Securities and Exchange Commission, Michael Mann, stated that there are two aspects of any effective regulatory regime: 1) the legal structure or the rules must be easily understandable, and 2) the implementation of the rules must be done in a predictable and consistent manner.[122]

The latter point may seem obvious, but it is easier said than done. The nature of the penalty, as well as its function or goal, sought by regulators is not always clear cut. For instance, in commenting on the increasingly blurred distinction between civil and criminal penalties, the Australian Law Reform Commission stated that:

> The traditional dichotomy between civil and criminal procedures and penalties no longer describes the modern position. The functions and purposes of civil, administrative and criminal penalties overlap in several respects, and even some procedural aspects, such as the different standards of proof for civil and criminal sanctions, are not always clearly distinguishable.[123]

[122] M. Sparrow, *The Regulatory Craft*, Brookings Institution Press, 2000, 17; As cited in *ALRC Background Paper 7, supra* note 3 at 5.
[123] *Pamphlet 3, supra* note 4.

It is important for the legitimacy of the regulatory system, that like violations receive like penalties. However, when the lines between criminal, civil and administrative penalties become blurred, there is an increasing risk that such distinctions will become less readily apparent. The consequences, however, of failing to provide consistent penalties has significant repercussions for the alleged violators. Standards of proof, evidentiary requirements, applicable defences – all are impacted, depending on the penalty imposed.

Regulators face a particularly difficult challenge in designing and implementing a regulatory system that provides clear, predictable and transparent enforcement of penalties in an expanding range of sectors and over an expanding range of subjects. This however, is not to suggest the implementation of a 'one-size-fits-all' approach to cover all of market transactions, environmental protection, tax, customs, social insurance, and so on. Rather, what PIAC is advocating is simply an understanding of the need for predictability and transparency in the regulatory and enforcement fields, as well as a continued scrutiny and oversight of enforcement procedures and penalties to ensure continued compliance with constitutional protections.

3) Cooperation with Foreign Agencies

The problem of jurisdiction and the inability to extend Canada's laws extraterritorially into foreign jurisdictions means that Canada's regulators must work with their foreign counterparts to identify and penalize individuals and entities abroad who violate Canadian laws. Increased cooperation through cooperation agreements with foreign regulators and enforcement officials would enable a two-way communication and enforcement effort against those who attempt to use the anonymity of cyberspace to evade sanctions.

RECOMMENDATIONS

Given the many examples of successfully applied AMPs, PIAC recommends an increased use of AMPs in consumer protection. As previously stated, PIAC believes that the use of AMPs is a particularly effective enforcement mechanism in the area of consumer protection. Not only are consumers often at a disadvantage due to the information deficit that typically exists between consumers and the providers of goods and services, they are also more vulnerable to unfair, deceptive and fraudulent practices of unscrupulous individuals and entities that seek to take advantage of unsuspecting consumers.

Unfortunately, these unscrupulous individuals and companies are only likely to change their practices when it is in their financial interest to do so. As such, it is imperative that regulators impose penalties that will provide the necessary incentives to promote compliance.

Based upon research conducted to date, as well as an understanding of the nature, purpose and effectiveness of AMPs, PIAC considers there to be two areas in which AMPs may prove

particularly effective – privacy and competition. As such, PIAC strongly advocates for the adoption of an AMPs enforcement scheme for violations of federal privacy laws, such as PIPEDA, as well as the re-introduction of an augmented AMPs system under the *Competition Act*.

Privacy

A recent study by the Canadian Internet Policy and Public Interest Clinic (CIPPIC) highlighted the urgent need for increased enforcement of Canadian privacy laws.[124] The CIPPIC study, entitled *Compliance with Canadian Data Protection Laws: Are Retailers Measuring Up?*, was designed to assess the compliance level of retailers with certain key provisions of PIPEDA. Funded by the Privacy Commission of Canada, the study assessed 64 online retailers on their observance of legal requirements for Openness, Accountability and Consent under PIPEDA. It also assessed the compliance of 72 online and offline retailers with the PIPEDA requirement for "Individual Access" – the PIPEDA requirement to inform individuals of the existence, use and disclosure of their personal information upon request, and to give individuals access to that information.

The study's findings are hardly encouraging, with 39 percent of the companies surveyed found in violation of PIPEDA's rules. In evaluating the results of their study, CIPPIC concluded that the results "indicate widespread non-compliance with all four areas."[125] In the area of consent especially, the study found numerous opt-outs, incomplete or non-existent descriptions of personal information handling and onerous steps for the individual to understand the companies' uses and disclosure of their personal information. All of these practices violate PIPEDA's consent standard. According to CIPPIC the survey confirms that the five-year-old Personal Information Protection and Electronic Documents Act (PIPEDA) is ineffective.

The Ottawa-based public policy organization seeks tougher rules to rein in offending retailers. "This light-handed approach has not been successful... alternatives should be considered," said the study. Philippa Lawson, executive director and general counsel for CIPPIC, concurred, saying: "It's time to beef up the enforcement regime."[126]

These, and other similar findings, suggest that the current regulatory approach to privacy is not working.[127] At present, the Office of the Privacy Commissioner relies on complaints-based system – it is only when (and if) a complaint is lodged with the Privacy Commissioner

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[124] CIPPIC, *Compliance with Canadian Data Protection Laws: Are Retailers Measuring Up?* (April 2006), online: CIPPIC <http://www.cippic.ca/en/news/documents/May1-06/PIPEDAComplianceReport.pdf>.
[125] *Ibid.* at 37.
[126] As cited in Nestor E. Arellano, "Tough penalties sought to rein in retailers flouting privacy laws" IT World Canada (May 5, 2006) [Arellano, "Tough Penalties"]. Online: <http://www.itworldcanada.com/Mobile/ViewArticle.aspx?title=&id=idgml-7b8fbc6c-a78e-49f5-a8d1-f15800e70c25&format=Print>.
[127] The Canadian Marketing Association (CMA) has said that CIPPIC's findings were similar to those found by CMA in its own survey. However the CMA does not agree with CIPPIC that the poor compliance performance of Canadian businesses is a reflection of the need for increased enforcement. Rather, the CMA suggests that businesses simply need more time to come into compliance with the PIPEDA.

that the Office will look into a matter. Moreover, the Commissioner's enforcement abilities are severely limited and her decisions are not binding on violators. This means that consumers seeking restitution have to go to Federal Court, which is costly and onerous. The Commission can recommend remedial action to companies facing complaints, but is then faced with an enforcement dilemma if the company chooses not to comply with the Commissioners decision. In such situations, the Privacy Commissioner has the authority to take the case to the federal courts; however, to date, the Privacy Commissioner has shown a reticence to do so, except in rare circumstances.

The widespread non-compliance with federal privacy laws means that we cannot rely solely on the current complaints-based system alone to ascertain compliance with PIPEDA. As stated by Philippa Lawson, "[s]ome companies need to be hit in the pocket for them to appreciate that non-compliance with privacy rules has a cost."[128]

PIAC believes that an appropriate response to this widespread non-compliance with federal privacy laws would be the introduction of AMP-style penalties handed out by the Office of the Privacy Commissioner. Obviously, this would require significant reorganization on the part of the Office, including increased funding and manpower, as it is currently not equipped for enforcement (as the poor compliance record clearly reflects). However, PIAC would argue that such a reorganization is needed regardless and that the use of AMPs as an enforcement tool would be efficient, effective, and would provide a huge incentive for companies to re-evaluate their privacy practices to ensure compliance with the law. It would only take a couple of high profile AMPs to awaken businesses to the need for appropriate corporate privacy practices.

Competition

The second recommendation involves the re-introduction of the increased AMP enforcement powers along the lines of those originally proposed in Bill C-19. PIAC strongly feels that the proposed changed to the current AMP scheme under the *Competition Act* would have amounted to a stronger, more robust enforcement system with significantly increased incentives for companies to comply with the existing consumer protection provisions under the Act. AMPS are also crucial to making s. 79, Abuse of Dominance, work effectively.

Bill C-19, which was tabled in November 2004, contained significantly beefed up AMP provisions. Bill C-19 would have increased the existing level of AMPs for deceptive marketing practices, to a maximum of:

- $750 000 for individuals and $1 million for each subsequent order; and
- $10 million for corporations and $15 million for each subsequent order.

The Bill died as a result of the change is government and, unfortunately, is unlikely to reemerge in the near future thanks to strong opposition from industry and weak political will. PIAC believes these proposals would have strengthened the remedies available under the Act

[128] As cited in Arellano, "Tough Penalties", *supra* note 124.

and provided strong incentives for businesses to comply with the law in a timely and voluntary fashion.

In a 2005 speech to the Canadian Marketing Association, the Commissioner of Competition, Sheridan Scott, put it bluntly: "The current AMP levels are not sufficient deterrents."[129] According to the Bureau, the current AMP limits "may represent only a small fraction of the gains businesses make by these practices, thereby providing little incentive for them to comply with the Act."[130] It is for this reason that the Bureau has sought larger AMPs – i.e. larger AMPs will increase compliance with the Act through helping deter reviewable deceptive marketing practices. "These changes would also ensure coherence and consistency across all civil reviewable matters in the Act."[131]

In her 2005 speech, Commissioner Scott outlined the problem with the current AMP levels:

> Misleading advertising causes serious harm to the Canadian economy - in terms of direct and indirect losses to both consumers and competitors. In many instances, deceptive marketing campaigns have generated revenues in the millions of dollars. To unscrupulous practitioners, the existing maximum AMPs of $100,000 for a first contravention or $200,000 for subsequent orders are merely seen as a cost of doing business.[132]

The Commissioner went on to note that the proposals dealing with AMPs are "designed to encourage compliance" not punish offenders.[133] As such, advertisers who can establish that they exercised due diligence to prevent consumers from being deceived can avoid paying an AMP.

PIAC feels that re-introducing amendments to the Competition Bureau's AMP scheme, similar to those proposed under now-defunct Bill C-19, would strengthen Canada's competition framework by creating penalties that are high enough to create a strong incentive for firms to abide by the law, while not being so high as to unfairly punishment violating firms. The proposed structure would have allowed the courts or Competition Tribunal to assess the level of the penalty based on many factors, including the financial viability of the offending firm. Despite the decries of some critics, AMPs are not a severe and unjust form of punishment; rather, create a level playing field for businesses to compete and curtail the activities of those actors who do not want to play by the rules.

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[129] Speech by Sheridan Scott, *supra* note 82.
[130] "Proposed changes to the Competition Act" Competition Bureau (November 2004). Online: < http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=243&lg=e>.
[131] *Ibid.*
[132] Speech by Sheridan Scott, *supra* note 82.
[133] *Ibid.*