LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

THE MODERNIZATION OF THE PROVINCIAL OFFENCES ACT

CONSULTATION PAPER

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ABOUT THE LAW COMMISSION OF ONTARIO

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

The mandate of the LCO is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and study areas that are underserved by other research. The LCO has committed to engage in multi-disciplinary research and analysis and make holistic recommendations as well as to collaborate with other bodies and consult with affected groups and the public more generally.

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I. INTRODUCTION

The *Provincial Offences Act*[1] (POA) governs much of the process for the prosecution and enforcement of offences that are created by provincial legislation and regulation and municipal by-laws.[2] Each year the POA governs the procedure for millions of charges that are laid in such diverse areas as parking, driving, health and safety and the environment.[3] As a result the POA touches and affects many Ontarians.

The POA came into force nearly 30 years ago, and since that time the legal landscape in Canada has changed considerably. Some notable developments include the introduction of the *Canadian Charter of Rights and Freedoms*[4], amendments to the *Criminal Code*[5] and the increased use of administrative monetary penalties (AMPs) to deal with regulatory non-compliance in a forum other than a court. In December 2007, the Law Commission of Ontario (LCO) received a proposal from Kenneth Jull for a project to revise the POA and more generally there is great interest from a number of different organizations and individuals in reform of the POA. It was against this backdrop that on April 2, 2009 the Board of Governors of the LCO approved a project on the modernization of the POA.

After a review of the literature and informal discussions with many organizations and individuals, the LCO has identified several issues that may be vital to the modernization of the POA and warrant inclusion in this Consultation Paper. In addition to your responses to the specific questions that are set out in Part IV of this Consultation Paper, the LCO is interested in your comments on the threshold question of whether each identified issue should be pursued and ultimately addressed in the LCO's final report on the Modernization of the POA.

It is not possible for this Paper to address all the issues relating to the POA that require consideration, however, the LCO believes that the issues raised in this Paper would significantly contribute to the much needed modernization and reform of the POA and should not impede any future examination of other concerns that might occur. That being said, the LCO welcomes suggestions for the inclusion of issues in the final report that are not covered by the Consultation Paper. Submissions that relate to a specific part of Ontario (e.g. a particular municipality) are also of great interest to the LCO.

In addition, the LCO has chosen not to address any issues that are already being addressed in the *Provincial Offences Act* Streamlining Review consultation paper.[6] The Streamlining Review consultation paper contained a number of issues that the LCO might well have otherwise considered, including the use of audio and video appearances in POA proceedings, the reform of search warrant provisions to permit judicial authorization of modern investigative techniques and whether there is a need to codify the requirements for a plea comprehension inquiry.

Section II of the Consultation Paper briefly overviews the purpose of the POA and some of the tensions that underlie the various calls for reform. Section III of the Paper provides some background information to each of the specific issues and lists questions on which the LCO would like to receive input. For ease of reference, Section IV lists all of the questions that are spread throughout Section III.

This Paper marks the first step in the project. The LCO will carry out extensive consultations over the next three months. It welcomes your written comments in accordance with the instructions in Section V of this Paper, as well as any oral feedback that you would like to provide.

This Consultation Paper has been distributed to stakeholders for their input as well as posted on the LCO website. Based on the LCO's continued research and the input that it receives on this Paper, the LCO will identify the issues on which it will focus. We will engage in on-going consultation and benefit from the Advisory Group created in relation to this project. The members of the Advisory Group already include representatives from academia, the Ministry of the Attorney General, the defence bar, the municipalities and the Paralegal Society of Ontario. The representation of the completed Group may be even broader.

Finally, the LCO would like to thank those people with whom we consulted with in the preparation of this Consultation Paper.

II. THE PURPOSE OF THE POA AND THE TENSIONS UNDERLYING REFORM PROPOSALS

When the POA came into effect in 1980 it was hailed as "one of the most sweeping legislative reforms of procedures governing the prosecution of offences since the enactment of the Criminal Code in 1892."[7] It replaced the *Summary Convictions Act,*[8] which largely copied provisions from the *Criminal Code* and the POA's stated purpose is to create a summary conviction procedure that is more appropriate for provincial offences. Nearly thirty years after the POA made sweeping changes, there appears to be great interest in looking into the reform of the POA itself.

During the LCO's initial research and discussions with stakeholders and experts, many issues and concerns with the POA emerged. These issues and concerns emerged, in part, in response to changes in other areas of the law. One very significant change was the enactment of the *Canadian Charter of Rights and Freedoms.* It is clear that the *Charter* applies to regulatory offences, though the content of *Charter* rights in the regulatory context will often differ from the content in the criminal context.[9]

Second, developments in the *Criminal Code* and provincial legislation have an impact on, or at least raise questions in respect of, the POA. For example, *An Act to Amend the Criminal Code (Sentencing) and Other Acts in Consequence Thereof*[10] amended the *Criminal Code* by adding a statement of the principles and purposes of sentencing. *An Act to amend the Criminal Code (Criminal Liability of Organizations),*[11] made further significant changes to the *Criminal Code* including sentencing principles that are specifically designed for corporate/organizational offenders.

An example of an important development in provincial legislation is that maximum fines are now far more than the $2000.00 maximum set out in the residual penalty clause of the originally enacted POA. When the Supreme Court of Canada decided *R. v. Sault Ste. Marie (City)*[12] in 1978, the highest fine available for most environmental offences was $5000.00. By contrast many environmental laws now provide for maximum fines in the millions of dollars, imprisonment and other serious consequences such as forfeiture of property and business licences.[13]

Third, on April 1, 2002, the *Youth Criminal Justice Act*[14] took effect. It replaced the *Young Offenders Act*[15] and made significant changes to the way that youth are dealt with by the criminal justice system. Its key features include a declaration of purpose, the use of extrajudicial measures and a provision setting out sentencing principles and the purpose of sentencing.

A fourth important development in Ontario's laws has been the increasing use and acceptance of administrative monetary penalties (AMPs), which are thought by some to be more efficient and cheaper than the regulatory offence regime.[16] There are a number of AMPs regimes in Ontario, including the system created under the *Municipal Act, 2001*[17] that allows a municipality to establish an AMP system to enforce parking by-laws instead of pursuing a prosecution under Part II of the POA.[18]

Fifth, and this is closely related to the increase in the seriousness of penalties for regulatory offences, a number of people have questioned the distinction between criminal offences and regulatory offences or have commented that the line between the two has blurred. The policy rationale for the POA is explicitly tied to this distinction. Subsection 2(1) of the POA states the purpose of the Act as follows:

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

The distinction between criminal offences and provincial or regulatory offences reflects the view that provincial offences[19] are less serious than "true crimes".[20] In

addition, it was also felt that provincial offences had a different purpose than criminal offences and dealt with acts that were different in nature:

> The proposed Provincial Offences Act attacks directly the root of the present procedural problem, which springs from the fact that provincial offences are now being prosecuted under a code of procedure adopted by reference to the Criminal Code of Canada. Although the adopted procedure is the less rigid and formal of the two systems established in the Criminal Code, it is still steeped in centuries of assumptions about crimes and the persons who commit them. Neither of these assumptions nor the rigid technicalities they have engendered are appropriate for the 90% of provincial offences which are intended to regulate activities which are not only legal but also useful to society.[21]

The view that provincial offences are different from criminal offences is also found in many court decisions, including *R. v. Wholesale Travel Group Inc.*

> Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.
>
> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.[22]

Certainly there are differences between a *Criminal Code* and POA prosecution that can be significant for an accused person. A POA prosecution can be advantageous to a defendant in some ways. For example, it limits imprisonment for minor offences and reduces the number of court appearances required. There are also examples of disadvantages. Regulatory offences are presumed to be strict liability with the onus on the defendant to prove all reasonable care on a balance of probabilities. Further, the POA provides a defendant with fewer procedural protections than the *Criminal Code.*[23]

Despite this, people have questioned whether the distinction between true crimes and regulatory offences is a meaningful one. The Honourable Mr. Justice Libman, in his text on regulatory law, writes:

> Hence as regulatory offences continue the trend from no longer resembling "minor offences" but "true crimes" (particularly as the sanctions for the former escalate higher than the latter with greater frequency), one wonders whether the lines between these categories of "public welfare offences" will become in time, less and less apparent. Indeed, Dean Hogg describes the Supreme Court's decisions distinguishing between true crimes and regulatory offences as constituting a "silly distinction".[24]

Others have also questioned whether there is in fact less stigma attached to a prosecution for a regulatory offence than for a criminal offence.[25]

Sixth, there have been changes to court administration, the prosecution of provincial offences and the regulation of paralegals in Ontario. The addition of Part X of the POA allows the Attorney General and a municipality to enter into an agreement with respect to a specific area that authorizes the municipality to perform courts administration and court support functions. The agreements also allow the municipality to conduct prosecutions under Parts I and II of the POA and in proceedings under the *Contraventions Act (Canada)*.[26] Since 1999 the Attorney General has entered into 52 POA Transfer Agreements with municipalities and the transfer of these responsibilities to the municipalities is now complete.

Paralegals regularly represent people on POA matters and before administrative tribunals and are now regulated by the Law Society of Upper Canada.[27] As of March 30, 2009 over 2,300 paralegals have been licensed and insured in Ontario. There are educational requirements for new applicants and all paralegals are required to follow the Paralegal Rules of Conduct. Complaints about paralegals can be made to the Law Society and it can discipline or prosecute the paralegal where such response is appropriate.[28]

Seventh, while the disposition time of POA matters in courts changes over time and varies between municipalities, it is clear that there can be a significant waiting period to resolve a POA matter. In 2007, the average number of days from the date of the first hearing request to disposition of a Part I matter in the Ontario Court of Justice was 198.7 and for a Part III matter it was 291.9. In 2008, it was 207.1 days for Part I matters and 276.8 days for Part III matters.[29]

Finally, as is the case with all legislation and regulation, many years of experience have led those working with the POA to form judgments about which parts of the POA work well and which could be improved to better implement its purposes.

If these changes have contributed to a desire for reform of the POA, they do not point in an obvious direction for change. As early as 1992, John Swaigen listed

four factors that he felt were converging to require a re-evaluation of public welfare offences. After reviewing them he concluded as follows:

> Thus the modern public welfare offence is subject to competing pressures. There is pressure to do away with the distinction between crimes and regulatory offences and to re-criminalize public welfare offences. There is also pressure to decriminalize such offences further.[30]

These competing pressures are still there today with the considerations listed above seemingly pulling reform in different directions. Considerations such as overcrowded courts and the acceptance of AMPs are cited to support calls for further decriminalization. On the other hand, the increase in penalties and the blurring of the line between criminal and regulatory matters are raised to argue against making this distinction.

One possible answer to these competing pressures is to provide for more, or at least different, enforcement choices. This is the type of approach taken by Archibald, Jull and Roach who uphold the distinction between criminal and regulatory matters and propose an enforcement-based regulatory pyramid model:

> In our view, the idea of responsive regulation supports the maintenance of distinctions between regulatory and criminal liability. The idea is that regulators must calibrate their response to the extent of wrongdoing. This approach suggests that it will be useful in some cases for the State to initiate a regulatory prosecution that invites the accused to prove that it had exercised due diligence in trying to prevent the commission of the prohibited act. In other cases, perhaps especially in repeated violations, it will be more appropriate to lay criminal charges and to attempt to prove beyond a reasonable doubt not only the prohibited act, but also the required fault element.[31]

In reviewing the specific issues that are raised by this Consultation Paper, the LCO urges people to consider the competing pressures that POA reform is subject to and what the purpose of the POA should be. The Ontario Law Reform Commission's 1973 "Report on the Administration of Courts" observed:

> The primary goal of the court system is to serve the public; this involves adjudicative decisions which are not only fair, but made without delay and at reasonable cost and convenience.[32]

The goals of the court system have not changed and the question remains how to deliver on such fundamental concerns as access to justice, efficiency and natural justice. All of the issues that are considered in Section III of the Paper have the ability to impact on these fundamental concerns and the LCO seeks your input to assist it in developing recommendations.

III POTENTIAL ISSUES

A. Use of Administrative Monetary Penalties

1. Background and Discussion

Administrative monetary penalties (AMPs) are typically penalties where the regulator imposes a monetary penalty that is subject only to administrative review.[33] There are a number of AMP regimes in Ontario and AMP systems are thought to be less expensive than the regulatory offence regime.[34] An important example of an AMP regime is found in the *Municipal Act, 2001*.

On January 1, 2007, the *Municipal Statute Law Amendment Act, 2006*[35]came into force and made a number of significant changes to the *Municipal Act, 2001*. One of those changes was the addition of s. 102.1 to the *Municipal Act, 2001*, which gives municipalities the authority to require a person to pay an administrative penalty where the municipality is satisfied that the person has failed to comply with a by-law respecting the parking, standing or stopping of vehicles.[36]

Under the provisions of the *Municipal Act, 2001*, the decision to create an AMP system is with the municipality. If a municipality chooses to set up an AMP system for a parking violation, the POA no longer applies to that violation.[37]

The municipal power to require a person to pay an administrative penalty is subject to the Lieutenant Governor in Council making a regulation under subsection 102.1(3) of the *Municipal Act, 2001*. O. Reg. 333/07 has been made pursuant to this authority and allows for the creation of an administrative penalty system provided that certain requirements in the regulation are met.

Section 3 of O. Reg. 333/07 states that a municipality shall not exercise the authority under s. 102.1 of the *Municipal Act, 2001* to utilize administrative penalties unless it passes a by-law establishing a system of administrative penalties that meets the requirements of O. Reg. 333/07, it designates the by-laws, or parts of such by-laws, as one to which the system of administrative penalties applies, and it has met all other requirements of the regulation.

O. Reg. 333/07 creates rules dealing with monetary limits for administrative penalties. The monetary limit of an administrative penalty under the scheme is set out in section 6 of the regulation:

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

It also creates rules dealing with the administration of the administrative penalty system, procedural requirements that must be included in any administrative penalty by-law, enforcement (including plate denial), administrative fees and the requirement for making administrative penalty by-laws public.

In summary, this regime tries to create a system that improves efficiency while still respecting the requirements of natural justice through the imposition of standards in the regulation. The LCO is not aware of any municipalities that have created an AMP system for parking infractions, though some municipalities, such as Oshawa, have AMP systems to deal with non-compliance with other types of municipal by-laws passed pursuant to the *Municipal Act, 2001*.[38]

The option to use AMPs for parking infractions, the use of AMPs in other contexts and the argument that AMP systems are a better use of resources raises the possibility of extending their application to other provincial offences. For example, there are large numbers of speeding charges and many of them end up being contested in court. Some of the leading thinkers on regulatory law in Canada have advocated making minor speeding violations (e.g. speeding violations of exceeding the speed limit by less than 16 kilometers[39]) subject to an AMP:

> Resource considerations suggest that for minor provincial offences, we ought not to use our courts at all. Minor speeding offences are a perfect subject for administrative monetary penalties. In our view, the present practice of utilizing courts presided over by justices of the peace to adjudicate on minor speeding offences, may not make great practical sense. Moreover, the practice is inconsistent with the move towards administrative monetary penalties in other sectors, such as the environment.[40]

Similarly, AMPs could be extended to other minor offences. If so, should high-volume minor offences be targeted or are other qualities more important for determining which violations should be subject to AMPs?

The extended use of AMPs raises the question of whether the AMP system should be the only system available or whether the POA should continue to apply where there is an AMP option. Currently, there are

different answers to that question. For example, subsection 182.1(11) of the *Environmental Protection Act* states that a person may be charged, prosecuted and convicted of an offence under the Act even if that person or another person has paid an environmental penalty (a type of administrative penalty) for that same contravention.[41] On the other hand, where a municipality chooses to implement an AMP system for parking violations, the POA no longer applies.

2. Questions

A(1) (a) Should the municipalities be required to establish a system of administrative monetary penalties for enforcing by-laws respecting parking, standing or stopping of vehicles?

(b) If so, what should happen to the option to prosecute such offences under Part II of the POA?

(c) If there were no option to prosecute under Part II of the POA, are there any steps that could be taken to facilitate the move from Part II to an AMP system?

A(2) (a) Should AMPs be available for other provincial offences?

(b) If so, which offences should be the priority?

(c) If so, what should happen to the option to prosecute such offences under Part I of the POA?

B. Classification of Offences

1. Background and Discussion

In *R. v. Sault Ste Marie*, the Supreme Court of Canada held that there are three categories of regulatory offences. The categories of offences are offences in which *mens rea* must be proved, offences of strict liability and offences of absolute liability. [42]

The first category of offences requires the prosecution to prove *mens rea*, which consists of a positive state of mind such as intent, knowledge or recklessness. In addition, the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act.

The second category of offences that the court established is strict liability offences. For strict liability offences the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, but it

does not have to prove *mens rea.* The defendant can avoid liability by showing on a balance of probabilities that he/she took all reasonable care. The defence of reasonable care involves a consideration of what the reasonable person would do, and is available if the defendant reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if the defendant took all reasonable steps to avoid the particular event.

The third category of offences created by the court is that of absolute liability offences. As in strict liability offences, for absolute liability offences the prosecution must only prove beyond a reasonable doubt that the defendant committed the prohibited act. Unlike strict liability though, it is not open to the defendant to show that reasonable care was taken.[43]

The court went on to hold that public welfare offences would *prima facie* fall into the second category of strict liability offences. A public welfare offence would only be a *mens rea* offence where the statutory provision creating the offence used such words as "willfully", "with intent", "knowingly" or "intentionally". In addition, offences would only be absolute liability where "the legislature had made it clear that guilt would follow proof merely of the proscribed act."[44] To determine whether an offence is absolute liability, the primary considerations are the overall regulatory pattern adopted by the legislature, the subject matter of the legislation, the importance of the penalty and precision of the language used.

Despite the enunciation of this test, the classification of regulatory offences continues to take up court time. Recent cases such as *R. v. Felderhof*[45] illustrate that valuable court time and resources are still being used to classify the offence in question. Further, there are numerous cases where the same or almost identical offences have been classified differently by different courts. In *Brampton (City) v. Kanda*[46]*,* the defendant driver was charged with failing to ensure that a passenger wore the complete seatbelt assembly contrary to s. 106(6) of the *Highway Traffic Act*.[47] The trial judge held that the offence was absolute liability and convicted the defendant. On appeal to the summary conviction appeal judge, the offence was found to be one of strict liability. On further appeal, the Ontario Court of Appeal agreed with the appeal judge that the offence was a strict liability offence.

More effective use of court resources and predictability might be met if the POA contained a provision that would deal with the classification of provincial offences. For example, the POA could provide that an offence is a strict liability offence unless: (a) the offence provision explicitly states that it is an absolute liability offence; or (b) the offence provision expressly uses language importing *mens rea* such as "knowingly", "intentionally",

"maliciously", "willfully" "recklessly", "without lawful excuse" or other similar words.[48]

2. Questions

B(1) (a) Should the POA contain a provision setting out how to determine the classification of an offence as an absolute liability offence, a strict liability offence or a *mens rea* offence?

(b) If so, what should the substance of that provision be?

C. Sentencing

1. Background and Discussion

The POA does not contain a statement of the purpose and principles applicable to the sentencing of offences to which it applies. This is in contrast to sections 718 to 718.2 of the *Criminal Code* which set out the purpose and principles that are applicable to the sentencing of a person convicted of a criminal offence. Section 718.21 sets out additional factors that a court is to take into account when sentencing an organization. British Columbia's *Public Health Act*[49] also contains a statement of sentencing principles for offences committed under that Act.

It has been argued that in order for sentencing to be legitimate, it must be based "on a consistent and principled approach that aligns that part of the regulatory process with the underlying regulatory goals"[50] While the courts have identified over 20 principles applicable to regulatory offences,[51] the approach has not always been consistent and it is not clear how the principles relate and which, if any, take precedence.[52]

Numerous writers have advocated the inclusion of sentencing principles and additional sentencing options in regulatory acts.[53] In designing such provisions for regulatory legislation, it has been argued that a number of factors should be considered.

First, it should be remembered that the sentencing of regulatory offences is part of a cycle that does not typically end with sentencing. Normally the convicted person will continue to carry out the regulated activity, and for that matter, society usually has an interest in the person continuing to provide goods and services and employment.[54]

Second, regulatory standards are moving away from being design-based. Design-based regulations identify how an act is to be carried out (e.g. an operator must install a number 2 scrubber) and are clear. However,

design-based regulations have been criticized as being slow to adapt to changing technology and expertise which may lead to impaired efficiency and innovation.[55] Newer regulatory strategies include outcome-based, performance-based and principles-based regulations. These types of regulations can be distinguished as follows:

1. Outcome-based regulations provide for a measurable result to be achieved (e.g. an operator must ensure that emissions from a stack contain less than x parts per million of nitrous oxide);

2. Performance-based regulations provide for a non-measurable result to be achieved (e.g. an operator must ensure that emissions do not contain nitrous oxide in amounts that cause an adverse effect on the environment); and

3. Principles-based regulations establish standards of conduct (e.g. the operator must dispose of a dead farm animal in a manner that is environmentally sound).[56]

While the newer strategies provide regulated persons with more operational flexibility, the latter two can also create more uncertainty around what the obligation of the regulated person is. The obligation to install a particular scrubber is less flexible, but it may also be a more clear obligation than ensuring that the operation is run in an environmentally sound manner. If that is so, it has been argued that sentencing should be used to help an offender determine and comply with standards in the future.[57]

Third, the movement away from design-based regulation has been accompanied by a less adversarial approach to enforcement. Since the above-cited trend may lead to less certainty about whether an offence has been committed, warnings and more cooperative approaches such as negotiation are often used before investigation and prosecution. Sentencing has to consider past attempts at compliance as well as the future relationship between the regulator and the regulated person.[58]

One model that attempts to respond to these factors is that advocated by Sherie Verhulst. She writes that a court should move through the following five steps in sentencing a provincial offence:

> (1) encourage joint submissions on aggravating and mitigating factors and the sanctions to be imposed (the “Friskies Schedule”);
> (2) to the extent that is possible and reasonable, impose a sanction that remedies the violation (remediation);
> (3) if it is likely that the offender will continue to engage in the regulated activity after sentencing, but the offender’s behaviour

> must change to prevent future violations, impose a sanction that promotes the necessary changes (rehabilitation)
> (4) if it is appropriate in the circumstances and would likely have social value, impose a sanction that will promote change in the behaviour of other persons (general deterrence);
> (5) if aggravating circumstances make it appropriate, impose a sanction that denounces and punishes the offender's behaviour (punishment).[59]

Much of this approach is reflected in sections 105 to 110 of British Columbia's *Public Health Act,* which provide the judge with the authority to request a joint submission on circumstances that aggravate or mitigate the offence and the penalty to be imposed. These sections also set out the purposes of sentencing and provide the judge with a wide array of penalties beyond the imposition of a fine. As noted above, the *Criminal Code* also contains general sentencing provisions and additional provisions for organizations. Both of these acts may be useful in beginning to think about what the nature of any sentencing principles under the POA should be.

A related issue is whether the POA should provide for more sentencing options and if so what those options or tools should be. Below are just a few examples of possible tools that could be added.

Archibald, Jull and Roach have proposed an innovative sentencing tool which they refer to as the "imbedded auditor". This tool would be available where a corporation has been convicted of regulatory offences and would allow the court to order that a government inspector be placed at the convicted corporation for a period of time to monitor compliance. The corporation would have to pay the salary of the government inspector for the compliance period.[60]

In addition, Archibald, Jull and Roach suggest that in sectors where there are significant regulatory constraints, corporations be required to provide security (for example a bond or a lien on property) to the Crown to ensure that there is money to pay any potential fines or remediation if the corporation later defaulted on payment. The requirement for security is said to be consistent with the corporation's decision to do business in a regulated environment and costs to the corporation of the security can be offset by the interest earned on bonds. Further, any interest charges required to float the security could be made tax deductible to offset any costs to the corporation.[61]

It has also been suggested that in cases involving an individual defendant, a justice in a POA proceeding should have the option of imposing a conditional sentence as judges in criminal matters do pursuant to section 742.1 of the *Criminal Code*.[62] A conditional sentence allows a defendant to

serve a prison sentence in the community and is designed to deal with the problem of overincarceration and could be a valuable alternative to incarceration in the sentencing of some POA matters.[63]

The conditional sentencing provisions in the *Criminal Code* provide that a conditional sentence is only available in certain circumstances. For example, there must be no minimum term of imprisonment for the offence, the court must impose a sentence of imprisonment of less than two years and the court must be satisfied that such service would not endanger the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the *Criminal Code*. Section 742.3 of the *Criminal Code* requires that a conditional sentence be subject to a number of specified conditions, including reporting to a supervisor and appearing in court when required to do so. In addition, it gives the court broad powers to prescribe additional conditions.

The LCO has also heard that changes to probation under the POA could provide additional and valuable sentencing tools. Subsection 732.1(3.1) of the *Criminal Code* gives the court authority to prescribe additional conditions in a probation order made in respect of an organization. Subsection 732.1(3.2) directs the court to consider whether it would be more appropriate for a regulatory body other than the court to supervise the development or implementation of the policies, standards and procedures that the court can order. Section 72 of the POA deals with probation, but it does not distinguish between natural persons and organizations. Further, restitution can only be authorized where it is required or authorized by another act, and certain conditions are only permitted where the offence is punishable by imprisonment.

Other regulatory legislation may be helpful in developing a list of useful sentencing tools. For example, section 107 of the *Public Health Act* gives the court authority to order a convicted person to do or not do a broad array of things. Other examples of innovative sentencing provisions include section 79.2 of the *Fisheries Act*[64] and section 103 of the *Species at Risk Act.*[65]

2. Questions

C(1) (a) Should the POA contain a provision setting out sentencing purposes and/or sentencing principles?

(b) If so, what should those purposes and/or principles be?

C(2) Should sentencing purposes and/or principles apply only to the sentencing of Part III offences or should they apply to the sentencing of any offence to which the POA applies?

C(3) (a) Should there be more sentencing options available under the POA?

(b) If so, what should those options be?

D. Justice of the Peace or Judge: Making the Determination

1. Background and Discussion

A POA Proceeding may be presided over by a judge or a justice of the peace.[66] The decision as to who will preside in a POA matter is largely determined in accordance with the *Courts of Justice Act*[67] (CJA) and the *Justices of Peace Act*[68] (JPA). Subsection 36(1) of the CJA states that the Chief Justice of the Ontario Court of Justice shall direct and supervise the sittings of the Ontario Court of Justice and the assignment of its judicial duties. Subsection 36(2) states that a regional senior judge shall, subject to the authority of the Chief Justice, exercise the powers and perform the duties of the Chief Justice in his or her region. Pursuant to subsection 36(3), the regional senior judge may delegate specified functions to a judge of the Ontario Court of Justice in his or her region.

Subsection 15(1) of the JPA states that the senior regional judge, under the direction of the Chief Justice of the Ontario Court of Justice, shall direct and supervise the sittings of justices of the peace in his or her region and the assignment of their judicial duties. Pursuant to subsection 15(3), this authority can be delegated to the regional senior justice of the peace and to one or more justices of the peace. In addition, subsection 15(4) of the JPA permits a party to a matter to request that a trial be held before a judge where it would otherwise be held before a justice of the peace.

The Ontario Court of Appeal has examined the office of the justice of the peace and held that it does not violate the right to an independent and impartial tribunal as guaranteed by section 11(d) of the Charter.[69] In a later case, the Court of Appeal found that the evidence before them did not establish a reasonable apprehension of bias or lack of competence to adjudicate on the part of justices of the peace as a class such that the appellants' sections 7 and 11(d) rights were violated.[70]

Despite this legislative flexibility and the constitutional decisions, several Acts give the Crown, or the Attorney General or an agent for the Attorney General, the authority to require that a provincial judge preside over a

proceeding.[71] For example, section 185 of the *Environmental Protection Act* reads as follows:

> The Crown, by notice to the clerk of the Ontario Court of Justice, may require that a provincial judge preside over a proceeding in respect of an offence under this Act.

There have been various constitutional challenges to these clauses that have failed.[72] However, one court indicated that it thought that it was unfair that the Crown had a unilateral right to require a judge.[73] Another decision found that these sections recognize that it may be more desirable to have more complex cases heard by a judge.[74]

During initial consultations for this Consultation Paper, it was suggested that consideration be given to whether there should be a rule that certain types of offences must be heard by a provincial judge. This rule would not permit a specified party to require a judge, but instead would state that a judge is required for a certain type or class of offence. For example, subsection 108(1) of the POA requires that a judge preside where a young person is charged with an offence under s. 75 of the POA.

On the other hand, it could be argued that given the strengths and flexibility of the system created by the CJA, JPA and other Acts, this type of provision in the POA is unnecessary and undesirable. Should there be other types of offences (e.g. Part III offences) that the POA requires a judge to preside over?

2. Questions

D(1) Should the Attorney General or his or her agent be able to require a provincial judge to preside in certain types of proceedings? For example, should the Attorney General or his or her agent be able to require a provincial judge to preside in any Part III proceeding?

D(2) (a) Should others be able to require a provincial judge to preside in certain types of proceedings?

(b) Who should those others be and what types of proceedings should be covered?

D(3) Should a judge be required to preside in certain types of proceedings (e.g. Part III proceedings) by operation of law?

E. Rules of Practice and Procedure

1. Background and Discussion

The rules for the practice and procedure of the Court of Appeal, the Superior Court of Justice and the Ontario Court of Justice in relation to proceedings under the POA are made by a committee rather than the courts themselves. Some people have suggested that these rules should be made by the courts as is the case in matters of a criminal nature.

Pursuant to subsection 482(1) of the *Criminal Code*, the Ontario Court of Appeal and the Superior Court of Justice can make rules of court that "apply to any prosecution, proceeding, action or appeal, as the case may be, within the jurisdiction of that court instituted in relation to any matter of a criminal nature or arising from or incidental to any such prosecution, proceeding, action or appeal." Pursuant to subsection 482(2), the Ontario Court of Justice is also given broad rule making power in matters of a criminal nature, though its authority is subject to the approval of the Lieutenant Governor in Council (LGIC) for Ontario.

The *Courts of Justice Act* creates the Criminal Rules Committee and under subsection 70(1) the Committee can prepare rules for the purposes of section 482 of the *Criminal Code* for the consideration of the relevant court.

However, under subsection 70(2) of the *Courts of Justice Act* the Committee can, subject to approval by the Attorney General, "make rules for the Court of Appeal, the Superior Court of Justice and the Ontario Court of Justice in relation to the practice and procedure of those courts in proceedings under the *Provincial Offences Act*". In short, the courts make their own rules in matters of a criminal nature (subject to LGIC approval in the case of the Ontario Court of Justice), but in proceedings under the POA, the Criminal Rules Committee, (subject to the Attorney General's approval) makes the rules.

2. Question

E(1) Should the Court of Appeal, the Superior Court of Justice and the Ontario Court of Justice have the authority to make their own rules of practice and procedure in proceedings under the POA?

F. Due Diligence

1. Background and Discussion

A defendant will not be liable for a strict liability offence if she can prove that she took all reasonable care. The defence of reasonable care is available if the defendant reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent. It is also available if the defendant can show that she took all reasonable steps to avoid the particular event.[75] This second branch of the defence of reasonable care is often referred to as due diligence.[76]

Due diligence is a complicated area of the law. The courts have identified at least 14 factors[77] that are relevant to the determination of due diligence. Not all of these factors are relevant in every case, though several would be, including regulatory compliance and skill level expected of the defendant. [78] The 14 factors are as follows:

- the nature and gravity of the adverse effect;
- the forseeability of the effect, including abnormal sensitivities;
- the character of the neighbourhood;
- the alternative solutions available;
- legislative or regulatory compliance;
- industry standards;
- what efforts have been made to address the problem;
- over what period of time, and promptness of response;
- matters beyond the control of the accused, including technological limitations;
- skill level expected of the accused;
- the complexities involved;
- preventative systems;
- economic considerations; and
- actions of officials[79]

The case law has not attempted to prioritize the 14 factors and in some cases the factors may well conflict in a determination of due diligence. For example, industry standards could conflict with technology considerations where standards have not kept up with technology. [80]

Archibald, Jull and Roach argue that the present unstructured balancing of the 14 factors may be unwieldy and they maintain it would be better to put the factors into one of two competing categories and use the categories to generate a risk management matrix.[81] This matrix can be used by both regulated persons and courts to determine what preventative steps should

be (or should have been) given priority. Further, it can be used in any given area whether it is food safety, environment or occupational health and safety.[82]

The two categories are "systems to measure potential gravity and likelihood of impact" versus "precautions taken to avoid the event including burden of adequate precautions".[83] The first three factors are said to fall into the first category and the next 10 into the second category (actions of officials are not included in a category). The authors set out several examples of the matrix in their text, but the general idea is that priorities for action are developed by placing risks on a matrix that measures likelihood on its vertical axis and severity on its horizontal axis.[84]

Archibald, Jull and Roach do not argue that the matrix approach or something similar could or should be legislated. One approach to clarifying the defence of due diligence, however, is to legislate the factors or some combination of them. Even if the factors are not legislated, there may be legislative changes that might make it easier for regulated parties and the courts to work with the 14 factors and determine the requirements of due diligence.

2. Question

F(1) (a) Can the POA be amended to clarify the defence of due diligence?

(b) If so, how should the POA be amended to clarify this defence?

G. Section 160 of POA: Examination or Seizure of Documents Where Privilege is Claimed

1. Background and Discussion

Section 488.1 of the *Criminal Code* sets out the procedure for determining a claim of solicitor-client privilege in relation to documents seized from a law office under a warrant. In the case of *R. v. Lavallee, Rackel & Heintz,*[85] the Supreme Court of Canada held that section 488.1 was contrary to section 8 of the *Charter* and struck it down pursuant to section 52 of the *Constitution Act, 1982.*[86] Section 160 of the POA has many of the attributes that led the Supreme Court to strike down section 488.1 of the *Criminal Code*, including the potential breach of solicitor-client privilege without the client's consent, or even the client's knowledge, and the absence of judicial discretion in determining the validity of an asserted claim of privilege where an application is not brought in accordance with the applicable timeline. Section 160 of the POA reads as follows:

(1) Where under a search warrant a person is about to examine or seize a document that is in the possession of a lawyer and a solicitor-client privilege is claimed on behalf of a named client in respect of the document, the person shall, without examining or making copies of the document,

(a) seize the document and place it, together with any other document seized in respect of which the same claim is made on behalf of the same client, in a package and seal and identify the package; and
(b) place the package in the custody of the clerk of the court or, with the consent of the person and the client, in the custody of another person.

(2) No person shall examine or seize a document that is in the possession of a lawyer without giving him or her a reasonable opportunity to claim the privilege under subsection (1).

(3) A judge may, upon the motion made without notice of the lawyer, by order authorize the lawyer to examine or make a copy of the document in the presence of its custodian or the judge, and the order shall contain such provisions as are necessary to ensure that the document is repackaged and resealed without alteration or damage.

(4) Where a document has been seized and placed in custody under subsection (1), the client by or on whose behalf the claim of solicitor-client privilege is made may make a motion to a judge for an order sustaining the privilege and for the return of the document.

(5) A motion under subsection (4) shall be by notice of motion naming a hearing date not later than thirty days after the date on which the document was placed in custody.

(6) The person who seized the document and the Attorney General are parties to a motion under subsection (4) and entitled to at least three days notice thereof.

(7) A motion under subsection (4) shall be heard in private and, for the purposes of the hearing, the judge may examine the document and, if he or she does so, shall cause it to be resealed.

(8) The judge may by order,

(a) declare that the solicitor-client privilege exists or does not exist in respect of the document;
(b) direct that the document be delivered up to the appropriate person.

> (9) Where it appears to a judge upon the motion of the Attorney General or person who seized the document that no motion has been made under subsection (4) within the time limit prescribed by subsection (5), the judge shall order that the document be delivered to the applicant.

In his text, the Honourable Mr. Justice Rick Libman notes that it remains to be seen whether regulatory schemes such as the POA will be treated differently should they be challenged as being contrary to section 8 of the *Charter*.

> While there may well be a lowered expectation of privacy in the regulatory arena such that the standard of reasonableness must be assessed in this manner, concerns with respect to the solicitor-client relationship and the importance of ensuring that it is safe guarded during the execution of a search warrant may be no less deserving of enhanced protection.[87]

Indeed, the Supreme Court of Canada made it clear that solicitor-client privilege is a "principle of fundamental justice and civil right of supreme importance".[88] Therefore, even if section 160 of the POA were found to be constitutional, there is still the question of whether it is desirable to amend section 160 to further protect this right.

In addition, section 160 refers to a document "that is in the possession of a lawyer". This raises the question of whether a different standard would apply if the client were in possession of the document.

Further, should any procedural protections be put in place where a licensed paralegal is in possession of the document? A recent case considered whether the communications between a paralegal and a client should be privileged in the way that communications between a lawyer and a client are. The court stated the following:

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

> inextricably linked with the very legal system which desires the disclosure of the communication. The paralegal-client relationship, no less than the solicitor-client relationship, is a part of that system, not ancillary to it.[89]

2. Questions:

G(1) Should section 160 of the POA be amended to address the constitutional issues raised by the decision of the Supreme Court of Canada in *Lavallee*?

G(2) Even if section 160 of the POA is constitutional, should it be amended to better protect solicitor-client privilege?

G(3) What procedure should be followed where a claim of solicitor-client privilege is made in respect of documents that are in the client's possession?

G(4) Should the procedure applying to documents in possession of a lawyer also apply to documents in the possession of a paralegal licensed to provide legal services in Ontario?

H. Young Persons

1. Background and Discussion

Part VI of the POA governs the procedure for young persons charged with an offence that falls under the POA. Section 93 of the POA defines a young person as a person who is, or appears to be in the absence of evidence to the contrary, twelve years old or older, but less than sixteen years old. The procedures under the POA for a young person are similar to those for an adult. There are notable exceptions including: prohibiting issuing an offence notice under subsection 3(2) (therefore, where a proceeding is commenced by filing a certificate of offence under Part I of the POA, a young person must be given a summons to attend court); rules regarding notice to a young person and their parents; consequences if the youth fails to attend court; and rules governing maximum sentences.

Federally, the *Youth Criminal Justice Act* (YCJA) creates a separate criminal justice system for youths that is based on the idea that youths should be treated differently from both children and adults.[90] Key features of the YCJA include a declaration of principles, its definition of a young person, the use of extrajudicial measures including extrajudicial sanctions and a provision setting out sentencing principles and the purpose of sentencing.[91]

Other Canadian provinces and territories also have provisions or entire Acts mandating different treatment for young people who commit provincial offences.[92] Of note are both Nova Scotia and the Northwest Territories, which have separate Acts to deal with offences committed by young persons. The Northwest Territories' *Youth Justice Act* was based on the YCJA, and the *Youth Justice Act* also contains provisions that establish the principles that apply to it, that allow for extrajudicial measures and that set out sentencing principles and the purpose of sentencing. These provisions are very similar to their counterparts in the YCJA.

Nova Scotia's *Youth Justice Act* contains a statement of purpose, provisions for extrajudicial measures and deals with the sentencing of young persons. In the *Youth Justice Act* of Nova Scotia, the *Youth Justice Act* of the Northwest Territories and the YCJA, "young person" is defined as a person who is, or in the absence of evidence to the contrary appears to be, twelve years old or older, but under the age of eighteen. However, Nova Scotia's *Youth Justice Act* does not apply where a young person of sixteen or seventeen years of age is charged with an offence under the *Motor Vehicle Act* or any other motor vehicle related offence designated in the regulations.[93]

Informal discussions with interested parties raised several concerns about the current Part VI POA provisions. What follows is a list of some of the most significant issues:

(a) If a young person commits a provincial offence, the only enforcement option is to issue a summons and require the young person to attend at court. Requiring a young person to attend court is a cumbersome process and may be unnecessarily trying for all involved parties.
(b) Current sentencing options for young persons under Part VI of the POA do not create a sense of meaningful consequence for the actions of a young person.
(c) Part VI of the POA is not as comprehensive as its criminal counterpart (the YCJA) or as comprehensive as similar legislation in some provinces.
(d) Part VI's definition of a "young person" is out of step with the approach of other jurisdictions in Canada, which generally define a young person as a person who is 12 or older but less than 18 years of age.

It has been suggested that there should be a more comprehensive system for dealing with young persons who commit a provincial offence. Proposed reforms have included: (i) changing the definition of a "young person" to include those twelve years old or older but under the age of eighteen (perhaps with exceptions to the application of the young person provisions such as that effectively provided for in section 13A of Nova Scotia's *Youth Justice Act*); (ii) increasing discretion available to officers and the Crown through 'extrajudicial' measures such as warnings, cautions, referrals and sanctions; (iii) and altering priorities and increasing options available for sentencing. These changes could take the form of an entirely new Act or amendments to the current Part VI provisions.

2. Questions

H(1) (a) Should there be a more comprehensive system for youth charged with a provincial offence?

(b) If so, what should the key features of that regime be?

H(2) Should a more comprehensive system remain part of the POA or should it be set out in a separate Act?

I. Section 39: Service of Summons

1. Background and Discussion

Section 39 of the POA states that a justice may issue a summons requiring a person to attend court if the justice is satisfied that the person is able to give material evidence in a POA proceeding. Subsection 39(2) states that the summons shall be served on the witness in accordance with section 26. Subsection 26(2) of the POA reads as follows:

> A summons shall be served by a provincial offences officer by delivering it personally to the person to whom it is directed or if that person cannot conveniently be found, by leaving it for the person at the person's last known or usual place of abode with an inmate thereof who appears to be at least sixteen years of age.

The LCO has heard that by requiring the service to be carried out by a provincial offences officer, the POA makes it difficult for a defendant, or a private person who has laid an information pursuant to section 23, to serve a summons under section 39 to compel the attendance of a witness at a POA proceeding. It has been argued that process servers should be able to serve a summons under section 39.

2. Question

I(1) Should the authority to serve a summons under section 39 of the POA be restricted to provincial offences officers?

I(2) If the answer to I(1) is no, who else should be provided with this authority?

J. Service of Summons on a Corporation Outside of Ontario

1. Background and Discussion

Initial consultation has revealed that there may be confusion about the ability to serve a summons for an offence on a corporation based outside of Ontario where a proceeding is governed by Part III of the POA. While subsection 26(3) of the POA explicitly provides for service to an individual outside of Ontario, the POA does not distinguish between service inside or outside of Ontario for corporations.

A similar issue is being considered by the civil and criminal sections of the Uniform Law Conference of Canada. The criminal section passed the following resolution in August, 2008:

> To ensure that provincial offence notices are properly served on accused persons in other jurisdictions, civil and criminal sections of the Uniform Law Conference of Canada should jointly examine the issue to develop a consistent statutory approach for consideration by all jurisdictions.[94]

In consultations, the LCO heard that this issue should include an examination of potential constitutional and conflict of laws considerations.

2. Question

J(1) Should section 26 of the POA be amended to specifically include service of corporations outside of Ontario?

J(2) If so, what types of service should be permitted?

K. Service of Offence Notice or Summons on Corporations

1. Background and Discussion

Section 3 of the POA sets out the requirements for service of an offence notice and a summons on a person where a certificate of offence is used to commence the process. Subsection 3(3) reads as follows:

> The offence notice or summons shall be served personally upon the person charged within 30 days after the alleged offence occurred.

Section 3 does not explicitly state how service of the summons or offence notice is to be carried out if that person is a corporation. The LCO has heard that it would be helpful to have some explicit direction as to how a corporation should be served.

2. Question

K(1) (a) Should the POA set out how a corporation is to be served with a notice of offence or summons in a proceeding commenced by a certificate of offence?

(b) If so, what should the rules for service be?

L. Use of Technology

1. Background and Discussion

The *Provincial Offences Act* Streamlining Review Paper examines the use of technology in a number of areas. The LCO is very interested in the use of technology to improve access to justice and is keen to learn if there are additional technology use issues that have not been covered by the Streamlining Paper or this Consultation Paper that should be addressed in the LCO's final report.

One technology related issue that was raised in consultations, that was not covered in the Streamlining Review Paper, was that of permitting additional methods of service in Section 87, including service by electronic means. Section 87 of the POA sets out the general rules for service of notices or documents required or authorized to be given under the POA. Subsection 87(1) provides as follows:

> Except as otherwise provided by this Act or the rules of court, any notice or document required or authorized to be given or delivered under this Act or the rules of court is sufficiently given or delivered if delivered, whether personally or by mail.

It has been suggested that the default rule for service in section 87 is too restrictive and that it should be amended to permit service of notices and documents by courier or electronic means such as facsimile. If any method of service authorized by section 87 was not appropriate in a particular circumstance, the applicable POA provision or rule of court could override the section 87 rule.

Another suggestion provided in response to this and other issues is the approach taken in Acts such as the *Highway Traffic Act* (HTA) and the *Photo Card Act, 2008*[95]. Section 4.1 of the HTA reads as follows:

> (1) Anything that the Minister, the Ministry or the Registrar is required or authorized to do or to provide under this Act may be done or provided by electronic means or in an electronic format.
>
> (2) Anything that any person is required or authorized to do or to provide to the Minister, the Ministry or the Registrar under this Act

> may be done or provided by electronic means or in an electronic format, in the circumstances and in the manner specified by the Ministry.

This approach deals with more than just service of documents and admittedly overlaps with the technology issues addressed in the Streamlining Paper. However, a provision along these lines might, depending on its content, partly address the concern noted above with methods of service (a separate amendment would still be needed to permit service by courier) and it approaches the technology issues raised in the Streamlining Paper in a very different way.

2. Questions

L(1) Should the default service rule in section 87 of the POA include courier and specified electronic means as permitted methods of service for notices and documents?

L(2) Should the POA adopt the type of approach taken by section 4.1 of the *Highway Traffic Act* and section 19 of the *Photo Card Act, 2008?*

M. Section 80: Common Law Defences

1. Background and Discussion

Section 80 of the POA provides as follows:

> Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of offences, except in so far as they are altered by or inconsistent with this or any other Act.

The courts have held that defences such as "*de minimis non curat lex*" (the law does not concern itself with trifles)[96], necessity[97], and officially induced error of law[98] are available in POA matters. However, the POA does not provide a comprehensive list of what defences are available to a defendant, nor does it attempt to codify those defences. When the Law

Reform Commission of Canada proposed a new Code of Substantive Criminal Law for Canada, it recommended including in the Code all the defences that had been developed at common law.[99] It was suggested in consultations that a defendant should be able to read the POA and know what defences are available and under what circumstances those defences are available.

2. Question

M(1) Should the POA list and codify some or all of the defences that are available to a defendant under section 80?

N. Section 32: The Right to Stay a Proceeding

1. Background and Discussion

Subsection 32(1) of the POA states that only the Attorney General or his or her agent may stay a proceeding. Subsection 32(1) reads as follows:

> In addition to his or her right to withdraw a charge, the Attorney General or his or her agent may stay a proceeding at any time before judgment by direction in court to the clerk of the court and thereupon any recognizance relating to the proceeding is vacated.

As noted, the Attorney General has entered into agreements with municipalities under Part X whereby the municipalities are responsible for the prosecution of provincial offences and contraventions where the proceeding was commenced under Part I or II of the POA. Section 169 of the POA makes it clear that when a municipality acts under a transfer agreement it does not do so as an agent of the Attorney General.

There are other offences for which the Attorney General is not responsible for the prosecution of offences. For example, provided that certain requirements are met, the *Safety and Consumer Statutes Administration Act, 1996*[100] permits the Lieutenant Governor in Council (LGIC) to designate an administrative authority to administer legislation that the LGIC also designates. A number of organizations have been designated in the regulations. For example, much of the *Travel Industry Act, 2002*[101] is

administered by the Travel Industry Council of Ontario and it conducts prosecutions under the Act.

It has been suggested that the power to stay a prosecution should also be given to the organization that is responsible for the prosecution.

2. Questions

N(1) (a) Should some or all of the organizations that are responsible for prosecutions have the power to stay those prosecutions?

(b) If so, which organizations should be given this authority?

O. Appeal of an Order to Quash

1. Background and Discussion

Subsection 116(1) of the POA sets out what may be appealed where a proceeding is commenced under Part III of the Act:

> 116(1) Where a proceeding is commenced by information under Part III, the defendant or the prosecutor or the Attorney General by way of intervention may appeal from a conviction or dismissal or from a finding as to ability, because of mental disorder, to conduct a defence or as to sentence.

Subsection 135(1) describes what may be appealed where a proceeding is commenced under Part I or II of the POA:

> 135(1) A defendant or the prosecutor or the Attorney General by way of intervention is entitled to appeal an acquittal, conviction or sentence in a proceeding commenced by certificate under Part I or II and the appeal shall be to the Ontario Court of Justice presided over by a provincial judge.

Neither of these provisions explicitly allow for an appeal where a matter is quashed. The POA has a number of sections that permit a justice to quash a certificate or information for the reasons specified in the section. For example, section 9 of the POA permits a justice to quash a certificate of offence where a defendant has been deemed not to wish to dispute a charge, but the justice has examined the certificate and has found it is not complete and regular on its face. Section 9 reads as follows:

> (1) Where at least fifteen days have elapsed after the defendant was served with the offence notice and the offence notice has not been delivered in accordance with section 6 or 8 and a plea of guilty has not been accepted under section 7, the defendant shall be deemed to not wish to dispute the charge and a justice shall examine the certificate of offence and,
>
> (a) where the certificate of offence is complete and regular on its face, the justice shall enter a conviction in the defendant's absence and without a hearing and impose the set fine for the offence; or
>
> (b) where the certificate of offence is not complete and regular on its face, the justice shall quash the proceeding.

The Court of Appeal recently considered the issue of whether a decision to quash a certificate pursuant to section 9 of the POA can be appealed under section 135 or whether it has to be challenged by way of an application for an order in the nature of mandamus under section 140 of the POA.[102] The court stated that a decision to quash under section 9 was not a verdict on the merits tantamount to an acquittal. Since subsection 135(1) provides an appeal against acquittal, conviction and sentence, no appeal of a decision to quash a certificate under section 9 was available. Therefore, the court held that an application under section 140 was the correct approach.

An application under section 140 must be made to the Superior Court of Justice. Section 140 reads as follows:

> On application, the Superior Court of Justice may by order grant any relief in respect of matters arising under this Act that the applicant would be entitled to in an application for an order in the nature of mandamus, prohibition or certiorari.

The LCO has heard that the process of making an application under section 140 is more onerous than bringing an appeal under section 116 or section 135 of the POA. Further, there are concerns that it does not make

sense that when someone challenges a decision to convict made under paragraph 9(1)(a) and argues that a certificate of offence should have been quashed, the challenge must be made by way of appeal, but a decision to quash under paragraph 9(1)(b) can only be challenged by application to the Superior Court of Justice.

Finally, other cases have found a decision to quash a certificate under section 36 of the POA is a decision that can be appealed under section 135.[103]

2. Question

O(1) (a) Should the POA clarify if a decision to quash can be appealed or whether an application must be made to the Superior Court under section 140 to challenge the decision?

(b) If so, should the POA permit the appeal of a decision to quash or should it require an application under section 140?

P. The Application of Sections 124 and 125 of the POA

1. Background and Discussion

Section 124 of the POA sets out circumstances where an appeal should not be allowed. Section 124 reads as follows:

> (1) Judgment shall not be given in favour of an appellant based on any alleged defect in the substance or form of an information, certificate or process or any variance between the information, certificate or process and the evidence adduced at trial unless it is shown that objection was taken at the trial and that, in the case of a variance, an adjournment of the trial was refused although the variance had misled the appellant.
>
> (2) Where an appeal is based on a defect in a conviction or an order, judgment shall not be given in favour of the appellant, but the court shall make an order curing the defect.

It appears that there is some uncertainty as to the application of section 124 where the alleged defect or variance relates to a certificate. A certificate is defined by subsection 1(1) of the POA as meaning "a certificate of offence issued under Part I or a certificate of parking infraction issued under Part II". Although the section explicitly refers to a certificate, it is included with a number of sections under the heading "Appeals Under Part III", and in a recent case it was held that section 124 did not apply to appeals of Part I and Part II POA matters.[104] While holding that section 124 did not apply to certificates, the Honourable Mr. Justice Epstein did observe the following:

> While I am puzzled by the reference in s.124 to "certificate", which by s.1(1) of the Act is defined to mean "a certificate of offence issued under Part I or a certificate of parking infraction issued under Part II", I am nonetheless satisfied that the section only applies to appeals under Part III of the Act.

The LCO has heard that the confusion stemming from the reference to "certificate" in section 124, which has been found to apply only to Part III of the Act, should be addressed through changes to the POA.

Further, section 125 of the POA is tied to section 124, and if section 124 of the POA is clarified, the question arises as to whether section 125 should continue to apply to section 124. Section 125 reads as follows:

> Where a court exercises any of the powers conferred by sections 117 to 124, it may make any order, in addition, that justice requires.

2. Question

P(1) (a) Should the application of section 124 to a certificate of offence and a certificate of parking ticket be clarified?

(b) If so, what should the substance of the clarification be?

(c) If so, and given the substance of the clarification, should section 125 continue to apply to section 124?

Q. Notice of Constitutional Question

1. Background and Discussion

Section 109 of the *Courts of Justice Act* (CJA) establishes the requirement to provide notice of a constitutional question in specified circumstances. Where the circumstances exist in a POA proceeding, section 109 would apply. Subsection 109(1) reads as follows:

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

A number of stakeholders have stated that section 109 should be amended to require that a notice of a constitutional question also be served on the prosecutor in a POA matter. Prosecutor is defined in subsections 1(1) and 167(2) of the POA. Subsection 1(1) reads as follows:

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

The latter section modifies the definition for the purposes of Part X of the POA. Subsection 167(2) reads as follows:

> "prosecutor" means the Attorney General or, where the Attorney General does not intervene, means a person acting on behalf of the municipality in accordance with the agreement or, where no such person intervenes, means the person who issues a

> certificate or lays an information, and includes an agent acting on behalf of any them.

So, for example, under the stakeholder proposal, where section 109 of the CJA was engaged in relation to a proceeding in which the municipality was the prosecutor pursuant to an agreement with the Attorney General, the municipality would also get notice.

It has also been suggested that paragraph 2 of subsection 109(1) of the CJA should be amended to add the acts or omissions of a "municipality" or "local board" as defined in the *Municipal Act, 2001*. In a recent case it was held that the defendant did not have to provide notice under section 109 to bring a motion for a stay of a POA prosecution on the grounds that his right to be tried within a reasonable time under subsection 11(b) of the *Charter* had been violated.[105] The proceeding in which the *Charter* challenge was brought involved a charge of speeding that was prosecuted by a municipality pursuant to an agreement under Part X of the POA. The court held that any violation of subsection 11(b) of the *Charter* was a result of the actions of the municipality and therefore section 109 did not apply. Leave to appeal to the Ontario Court of Appeal on this issue has been granted.[106]

2. Questions

Q(1) (a) Should the list of persons that receive a notice of constitutional question be expanded where a circumstance described in subsection 109(1) of the *Courts of Justice Act* arises in a POA proceeding?

(b) If so, who should be added to the list of persons for whom notice is required?

Q(2) (a) Should paragraph 2 of subsection 109(1) of the *Courts of Justice Act* include acts and omissions of additional parties?

(b) If so, who should those parties be?

R. Section 112: Motion to Stay Conviction

1. Background and Discussion

Section 112 of the POA reads as follows:

> The filing of a notice of appeal does not stay the conviction unless a judge so orders.

According to subrule 10(6)(b) of O.Reg. 723/94 and subrule 11(6)(b) of O.Reg. 722/94 a motion to stay a conviction under section 112 can be brought without notice to the respondent. In a recent decision, the Honourable Mr. Justice Jennis criticized the lack of notice with respect to environmental offences and occupational health and safety offences:

> Although it is not necessary to this judgment, I note that the provision allowing applications for staying convictions pending appeals do not require notice to the respondent. See section 112. In the ordinary course of parking infractions, speeding tickets, and other relatively simple matters that are dealt with under the umbrella of the Provincial Offences Act, this is probably not of great consequence. However, in matters involving environmental offences or occupational health and safety matters, where non-compliance with court orders can have significant effects, it seems to me that notice to the respondent would be preferable. This, however, is a matter that may have to be dealt with by the legislature.[107]

2. Questions

R(1) Should the prosecutor be given notice and be permitted to make submissions when a defendant brings a motion to stay a conviction under section 112 of the POA?

S. Housekeeping

In addition to the larger issues that have been canvassed above, the LCO would appreciate your feedback on a number of smaller housekeeping issues that have been identified.

1. Section 3(4): Signatures

Background

Subsection 3(4) of the POA reads as follows:

> Signature- Upon the service of an offence notice or summons, the person charged may be requested to sign the certificate of offence, but the failure or refusal to sign as requested does not invalidate the certificate of offence or the service of the offence notice or summons.

This section of the POA appears to have become irrelevant as the required form for a certificate of offence has been amended so that the optional signature box is no longer included. Subsection 1(1) of O. Reg. 950 states that a certificate of offence shall be in Form 1. Form 1 is also found in the regulation and no longer has a signature box for the signature of the person charged.

Question

S(1) Should subsection 3(4) of the POA be repealed?

2. Section 6: Dispute without Appearance

Background

This section allows a defendant to dispute an offence in writing without being physically present at a hearing. However, this option can only be used in areas of Ontario that have been designated by regulation which, to date, has never happened. Initial consultation suggests that this section should either be: a) used for the purpose it was created; or b) repealed.

Question

S(2) Should the government be encouraged to utilize section 6 of the POA or should it be repealed?

3. Section 9: Adding Reference to sections 5 and 5.1

Background

Section 9 sets out when a defendant shall be deemed not to dispute a charge. It reads, in part, as follows:

> (1) Where at least fifteen days have elapsed after the defendant was served with the offence notice and the offence notice has not been delivered in accordance with section 6 or 8 and a plea of guilty has not been accepted under section 7, the defendant shall be deemed to not wish to dispute the charge . . .

In addition to delivering an offence notice in accordance with section 6 or 8 or where a plea of guilty has been accepted under section 7, the defendant would not be deemed not to wish to dispute a charge where they give notice of intention to appear in court for the purpose of entering a plea and having a trial of the matter pursuant to section 5 or section 5.1. Subsection 5(1) reads as follows:

> A defendant who is served with an offence notice may give notice of intention to appear in court for the purpose of entering a plea and having a trial of the matter by so indicating on the offence notice and delivering the notice to the court office specified in it.

Section 5.1 applies in designated areas of Ontario and is similar to section 5, except that it requires the defendant or an agent of the defendant to attend at the court office for the purpose of giving the notice of intention to appear in court for the purpose of entering a plea and having a trial of the matter.

The LCO has been told that section 9 should be amended to make it explicit that deeming under section 9 will not happen where a person has given the notice contemplated by section 5 or 5.1.

Question

S(3) Should section 9 be amended to make it explicit that a defendant who gives notice of intention to appear in court for the purpose of entering a plea and having a trial of the matter pursuant to section 5 or 5.1 will not be deemed under section 9 to not wish to dispute the charge?

IV. LIST OF CONSULTATION QUESTIONS

This section provides a comprehensive and convenient list of all the questions that are found throughout Section III of this Consultation Paper. In addition to submissions on the substance of the listed questions, the LCO welcomes submissions on the threshold question of whether the issue should be pursued and ultimately addressed in the project's final report. Further, the LCO is very interested in hearing if there are any issues that are not covered in this Consultation Paper that should be addressed in the final report on the Modernization of the *Provincial Offences Act*. The questions in Section III are the following:

A(1) (a) Should the municipalities be required to establish a system of administrative monetary penalties for enforcing by-laws respecting parking, standing or stopping of vehicles?

(b) If so, what should happen to the option to prosecute such offences under Part II of the POA?

(c) If there were no option to prosecute under Part II of the POA, are there any steps that could be taken to facilitate the move from Part II to an AMP system?

A(2) (a) Should AMPs be available for other provincial offences?

(b) If so, which offences should be the priority?

(c) If so, what should happen to the option to prosecute such offences under Part I of the POA?

B(1) (a) Should the POA contain a provision setting out how to determine the classification of an offence as an absolute liability offence, a strict liability offence or a *mens rea* offence?

(b) If so, what should the substance of that provision be?

C(1) (a) Should the POA contain a provision setting out sentencing purposes and/or sentencing principles?

(b) If so, what should those purposes and/or principles be?

C(2) Should sentencing purposes and/or principles apply only to the sentencing of Part III offences or should they apply to the sentencing of any offence to which the POA applies?

C(3) (a) Should there be more sentencing options available under the POA?

(b) If so, what should those options be?

D(1) Should the Attorney General or his or her agent be able to require a provincial judge to preside in certain types of proceedings? For example, should the Attorney General or his or her agent be able to require a provincial judge to preside in any Part III proceeding?

D(2) (a) Should others be able to require a provincial judge to preside in certain types of proceedings?

(b) Who should those others be and what types of proceedings should be covered?

D(3) Should a judge be required to preside in certain types of proceedings (e.g. Part III proceedings) by operation of law?

E(1) Should the Court of Appeal, the Superior Court of Justice and the Ontario Court of Justice have the authority to make their own rules of practice and procedure in proceedings under the POA?

F(1) (a) Can the POA be amended to clarify the defence of due diligence?

(b) If so, how should the POA be amended to clarify this defence?

G(1) Should section 160 of the POA be amended to address the constitutional issues raised by the decision of the Supreme Court of Canada in *Lavallee*?

G(2) Even if section 160 of the POA is constitutional, should it be amended to better protect solicitor-client privilege?

G(3) What procedure should be followed where a claim of solicitor-client privilege is made in respect of documents that are in the client's possession?

G(4) Should the procedure applying to documents in possession of a lawyer also apply to documents in the possession of a paralegal licensed to provide legal services in Ontario?

H(1) (a) Should there be a more comprehensive system for youth charged with a provincial offence?

(b) If so, what should the key features of that regime be?

H(2) Should a more comprehensive system remain part of the POA or should it be set out in a separate Act?

I(1) Should the authority to serve a summons under section 39 of the POA be restricted to provincial offences officers?

I(2) If the answer to I(1) is no, who else should be provided with this authority?

J(1) Should section 26 of the POA be amended to specifically include service of corporations outside of Ontario?

J(2) If so, what types of service should be permitted?

K(1) (a) Should the POA set out how a corporation is to be served with a notice of offence or summons in a proceeding commenced by a certificate of offence?

(b) If so, what should the rules for service be?

L(1) Should the default service rule in section 87 of the POA include courier and specified electronic means as permitted methods of service for notices and documents?

L(2) Should the POA adopt the type of approach taken by section 4.1 of the *Highway Traffic Act* and section 19 of the *Photo Card Act, 2008*?

M(1) Should the POA list and codify some or all of the defences that are available to a defendant under section 80?

N(1) (a) Should some or all of the organizations that are responsible for prosecutions have the power to stay those prosecutions?

(b) If so, which organizations should be given this authority?

O(1) (a) Should the POA clarify if a decision to quash can be appealed or whether an application must be made to the Superior Court under section 140 to challenge the decision?

(b) If so, should the POA permit the appeal of a decision to quash or should it require an application under section 140?

P(1) (a) Should the application of section 124 to a certificate of offence and a certificate of parking ticket be clarified?

(b) If so, what should the substance of the clarification be?

(c) If so, and given the substance of the clarification, should section 125 continue to apply to section 124?

Q(1) (a) Should the list of persons that receive a notice of constitutional question be expanded where a circumstance described in subsection 109(1) of the *Courts of Justice Act* arises in a POA proceeding?

(b) If so, who should be added to the list of persons for whom notice is required?

Q(2) (a) Should paragraph 2 of subsection 109(1) of the *Courts of Justice Act* include acts and omissions of additional parties?

(b) If so, who should those parties be?

R(1) Should the prosecutor be given notice and be permitted to make submissions when a defendant brings a motion to stay a conviction under section 112 of the POA?

S(1) Should subsection 3(4) of the POA be repealed?

S(2) Should the government be encouraged to utilize section 6 of the POA or should it be repealed?

S(3) Should section 9 be amended to make it explicit that a defendant who gives notice of intention to appear in court for the purpose of entering a plea and having a trial of the matter pursuant to section 5 or 5.1 will not be deemed under section 9 to not wish to dispute the charge?

V. NEXT STEPS

The LCO invites your comments on one or more of the issues raised in this Consultation Paper. In addition to submissions on the substance of the listed questions, the LCO welcomes submissions on the threshold question of whether the issue should be pursued and ultimately addressed in the project's final report. Further, the LCO is very interested in hearing if there are any issues that are not covered in this Consultation Paper that should be addressed in the final report on the Modernization of the *Provincial Offences Act*. Submissions that relate to a specific area of Ontario (e.g. a particular municipality) are also of great interest to the LCO.

Your comments will assist the LCO in determining which issues to address and will assist the LCO in the preparation of its final report. Comments

can be sent by fax, mail or by using the LCO website comments form at http://projects.lco-cdo.org/ModernizationofPOA.

You can mail, fax, or e-mail your comments to:

Law Commission of Ontario
Modernization of the Provincial Offences Act Project
276 York Lanes, York University
4700 Keele Street
Toronto, ON
M3J 1P3
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Submissions must be received by February 1, 2010.

The LCO will undertake ongoing consultations and research after the release of this Paper until this project is complete and a final report is released. A final report is anticipated in late 2010.

LCO staff would also be pleased to meet to discuss the issues raised in this Consultation Paper, by telephone or in person. If you wish to set up a consultation meeting with the LCO at your organization, you may contact the Project head to discuss possible arrangements. Meetings can take place in person, by conference call or via other interactive technologies.

If you have questions regarding this consultation, please call (416) 650-8406 or use the e-mail address above.

Endnotes

[1] R.S.O. 1990, c. P. 33. (For a detailed description of those procedures or for supplementary reading on the POA see Sheilagh Stewart, *Stewart on Provincial Offences Procedure in Ontario,* 2d ed. (Salt Spring Island, BC: Earlscourt Legal Press Inc., 2005). Be aware that there have been amendments to the POA since the publication of this edition of the book.)

[2] The POA, with the exception of subsections 12(1), 17(5) and 18.6(5), also applies to the prosecution of contraventions under the *Contraventions Act,* S.C., 1992. c.47. Section 65.1 of the *Contraventions Act* provides the authority for the Application of Provincial Laws Regulations SOR/96-312, which states that the laws of the province referred to in the schedule apply to the contraventions designated under the Contraventions Regulations. Section 1 of Part 1 of Schedule 1, states the POA and any regulations made under the POA and the rules of court made under the *Courts of Justice Act* of Ontario apply, with such modification as are necessary, to contraventions alleged to have been committed on or after August 1, 1996 in Ontario or within the territorial jurisdiction of the courts of Ontario.

[3] According to the Ministry of the Attorney General of Ontario Court Services Division, *ICON Database* (statistics) [unpublished], over 2 million charges were disposed of in each of 2007 and 2008. These numbers do not include tickets issued under Part II of the POA which governs the procedure for parking infractions.

[4] Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

[5] R.S.C. 1985, c. C-46.

[6] Ontario, Working Group for Provincial Offences Act Streamlining Review, *Provincial Offences Act Streamlining Review: Consultation Paper* (Toronto: Working Group for POA Streamlining, 29 January 2009) online: Law Society of Upper Canada <www.lsuc.on.ca/media/apr0109_poa_streamlining_consultation.pdf>

[7] Douglas Drinkwalter & Douglas Ewart, *Ontario Provincial Offences Procedure* (Toronto: The Carswell Company Limited, 1980) at iii.

[8] R.S.O. 1970, c. 450 as rep. by *Provincial Offences Act*, *1979,* S.O. 1979, c. 4.

[9] For a detailed review of the *Charter's* application to regulatory offences see Rick Libman, *Libman on Regulatory Offences*, looseleaf (Salt Spring Island, BC: Earlscourt Legal Press Inc., 2002) at c. 10.

[10] S.C. 1995, c. 22 amending R.S.C. 1985, c. C-46.

[11] S.C. 2003, c. 21 amending R.S.C. 1985, c. C-46.

[12] 1978 CanLII 11, 1978 CarswellOnt 24, (S.C.C) (WLeC).

[13] Libman, note 9 at 1-5 to 1-6.

[14] S.C. 2002, c.1 [YCJA].

[15] R.S.C. 1985, c. Y-1, as rep. by *Youth Criminal Justice Act*, S.C. 2002, c. 1.

[16] Todd Archibald, Kenneth Jull & Kent Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management,* looseleaf (Aurora, Ont: Canada Law Book, 2008) at 15-1 (The authors note that the administrative system is thought to be less expensive than regulatory trials).

[17] S.O. 2001, c. 25 at s.102.1.

[18] David Potts, "Municipal Systems of Administrative Penalties" in *Creating and Enforcing Municipal By-Laws* (Toronto: Canadian Institute, 2008). (In his paper, David Potts identifies 21 existing or proposed administrative penalty systems for the enforcement of Ontario statutes).

[19] The terms regulatory, public welfare and provincial offences are used interchangeably in this paper.

[20] John Swaigen, *Regulatory Offences in Canada: Liability & Defences* (Toronto: Carswell, 1992) at 16-19.

[21] Hon. R. Roy McMurtry Q.C., Attorney General for Ontario, Attorney General's Statement, published in *Provincial Offence Procedure*, Ministry of the Attorney General (April, 1978), cited in Drinkwalter, note 7 at 19-20.

[22] 1991 CarswellOnt 117 at para. 24-25 (S.C.C.) (WLeC).

[23] Swaigen, note 20 at 18-19**;** Libman, note 9 at 3-2.

[24] Libman, note 9 at 1-7.

[25] Archibald, note 16, c. 9.
[26] S.C. 1992, c. 47.
[27] *Law Society Act*, R.S.O. 1990, c. L.8.
[28] Online: Law Society of Upper Canada <www.lsuc.on.ca/paralegals>.
[29] Ministry of the Attorney General of Ontario Court Services Division, *ICON Database* (statistics) [unpublished]. (The "date of first hearing request" is the date that the notice of intention to appear in court or the date on the summons is entered into the data base. These numbers exclude prepaid fines and failed-to-respond).
[30] Swaigen, note 20 at 214.
[31] Archibald, note 16 at 14-4.
[32] Law Reform Commission of Ontario, *Report on the Administration of* Courts (Toronto: Law Reform Commission of Ontario, 1973) Part I at 17.
[33] Archibald, note 16 at 15-1.
[34] Archibald, note 16 at 15-1. (The authors note that the administrative system is thought to be less expensive than regulatory trials).
[35] S.O. 2006, c. 32.
[36] *Municipal Act*, note 17, s. 102.1 reads as follows:

> (1) Without limiting sections 9, 10 and 11, a municipality may require a person to pay an administrative penalty if the municipality is satisfied that the person has failed to comply with any by-laws respecting the parking standing or stopping of vehicles.
> (2) Despite subsection (1), the municipality does not have the power to provide that a person is liable to pay an administrative penalty in respect of the failure to comply with by-laws respecting parking, standing or stopping of vehicles until a regulation is made under subsection (3).
> (3) Upon the recommendation of the Attorney General, the Lieutenant Governor in Council may make regulations providing for any matters which, in the opinion of the Lieutenant Governor in Council, are necessary or desirable for the purposes of this section, including,
> (a) granting a municipality powers.

[37] O. Reg. 333/07, s.4.
[38] For example, the *Municipal Act, 2001,* note 17, s. 151(1) provides municipalities with the authority to establish an AMP system to deal with systems of licenses and Oshawa has implemented AMPs for licensing.
[39] Exceeding the speed limit by less than 16 kilometers does not attract demerit points. Of course, the threshold for demerit points could be changed (to 20 for example) to facilitate a broader AMP regime if such a change was good policy in light of relevant considerations. Sixteen kilometers is put forward by the LCO as an example of what might be meant by a minor speeding offence.
[40] Archibald, note 16 at 15-71.
[41] R.S.O. 1990, ch. E.19.
[42] *Sault Ste. Marie,* note 12 at para. 60.
[43] *Sault Ste. Marie*, note 12 at para. 60.
[44] *Sault Ste. Marie*, note 12 at para 61.
[45] 2007 ONCJ 345, [2007] 224 C.C.C. (3d) 97 (Ont. C.J.) cited in Archibald, note 16 at xx; see also *City of Lévis v. Tétreault*, 2006 SCC 12, 266 D.L.R. (4th) 165.
[46] 2008 ONCA 22, 2008 CarswellOnt 79 (Ont. C.A.) (WLeC).
[47] R.S.O. 1990, c. H.8.
[48] See also Alberta Institute of Law Research and Reform, *Defences to Provincial Charges* (Report No. 39) (Edmonton: Alberta Institute of Law Research and Reform, 1984) at 50, 84 & 88-89.
[49] S.B.C. 2008, c. 28.
[50] Sherie Verhulst, "Legislating a Principled Approach to Sentencing in Relation to Regulatory Offences" (2008) 12 Can. Crim. L. Rev. 281 at 281 (WLeC).
[51] Libman, note 9 at 11-18 to 11-19.
[52] Verhulst, note 50 at 281.

[53] Verhulst, note 50 at 281-295; Archibald, note 16 at c. 12 & 13.
[54] Verhulst, note 50 at 283.
[55] Verhulst, note 50 at 284.
[56] Verhulst, note 50 at 284; See also Julie Black, Martyn Hopper and Christa Band, "Making Success of Principles-based Regulation" online: LSE Department of Law <http://www.lse.ac.uk/collections/law/projects/lfm/lfmr_13_blacketal_191to206.pdf>.
[57] Verhulst, note 50 at 284.
[58] Verhulst, note 50 at 284-286.
[59] Verhulst, note 50 at 286.
[60] Archibald, note 16 at 12-2, 12-33 to 12-35.
[61] Archibald, note 16 at 13-13.
[62] Archibald, note 16 at 12-7.
[63] *R. v. Proulx,* [2000] 1 S.C.R. 61 cited in Libman, note 9 at 11-61.
[64] R.S.C. 1985, c. F-14, s.79.2.
[65] S.C. 2002, c.29 s. 103.
[66] (Subsection 1(1) of the POA defines a justice as "a provincial court judge or a justice of a peace". Subsection 39(2) of the CJA states that a justice of the peace may preside over the Ontario Court of Justice in a proceeding under the POA).
[67] R.S.O. 1990, c. C.43.
[68] R.S.O. 1990, c. J.4.
[69] *Currie v. Ontario (Niagara Escarpment Commission)* 1984 CarswellOnt 1173 (Ont. C.A.) (WLeC).
[70] *Eton Construction Co. v. R*., 1996 CarswellOnt 941(Ont. C.A.) (WLeC).
[71] See e.g. *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 68(2).
[72] *R. v. DDM Plastics Inc*., 1994 CarswellOnt 353 (Ont. C.J.), aff'd 1997 CarwellOnt 168 (Ont. C.A.) (WLeC) [*DDM Plastics*].
[73] *DDM Plastics*, note 72 (Ont. C.J.).
[74] *R. v. Aurora Quarrying Ltd*., 2003 CarswellOnt 1309 (Ont. C.A.) aff'd 2002 CarswellOnt 5108 (Ont. Sup. Ct. Jus.) (WLeC), leave to appeal to S.C.C. refused, [2003] 195 O.A.C. 192.
[75] *Sault Ste. Marie*, note 12 at para. 60.
[76] Swaigen, note 20 at 75.
[77] *R. v. Commander Business Furniture Inc.,* 1992 CarswellOnt 222 (Ont. Ct. (Prov. Div.)) (WLeC); and *R. v. Woolworth,* 2000 CarswellOnt 175 (Ont. C.J.) (WLeC).
[78] Archibald, note 16 at 4-32.
[79] Archibald, note 16 at 4-31.
[80] Archibald, note 16 at 4-62.7.
[81] Archibald, note 16 at c.4 (The authors argue that the matrix will deal with other potential problems that they identify in chapter 4 of their book including hindsight bias and the risk that courts will focus on risk assessment instead of risk management).
[82] Archibald, note 16 at 4-62.8. For examples of the matrix see p. 4-62.8 & 4-62.10 to 4-62.11.
[83] Archibald, note 16 at 4-62.7 to 4-65.
[84] Archibald, note 16 at 4-62.10 & 4-62.11.
[85] 2002 SCC 61, 2002 CarswellAlta 1818 (WLeC), [*Lavallee*] .
[86] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.
[87] Libman, note 9 at 10-56.
[88] *Lavallee*, note 85 at para. 36.
[89] *Chancey v. Dharmadi* 2007 CarswellOnt 4664 at para. 34 (Ont. S.C.J. – Master Dash) (WLeC).
[90] Nicholas Bala, "Youth Criminal Justice Law" (Toronto: Irwin Law, 2003) at 63.
[91] The Department of Justice began a formal review of the YCJA in 2008. A report is expected and might help determine whether concepts such as extrajudicial measures and modified sentencing principles are an effective way to adjust to the particular challenges presented by young persons.
[92] See for example: *Youth Justice Act*, S.B.C. 2003, c. 85; *Youth Justice Act*, R.S.A. 2000, c. Y-1; *Summary Offences Procedure Act*, *1990*, S.S. 1990-91, c. S-63.1; *Provincial Offences Procedure*

for Young Persons Act, S.N.B. 1989, c. P-22.2; *Youth Justice Act,* R.S.N.S. 2001, c. 38; *Youth Justice Act*, S.N.W.T. 2003, c. 31; *Young Offenders Act (Nunavut)*, R.S.N.W.T. 1988, c. Y-1.

[93] See: *Youth Justice Act*, R.S.N.S. 2001, c. 38, s.13A(1). However, subsection 13A(2) does provide that the Governor in Council may, by regulation, require that certain provisions of the *Youth Justice Act* apply to young persons described in subsection 13A(1).

[94] Uniform Law Conference of Canada, Quebec City August 10-14, 2008 Criminal Section Minutes, online: The Uniform Law Conference of Canada <http://www.ulcc.ca/en/poam2/2008%20ULCC%20Criminal%20Section%20minutes%20%20EN%20FINAL.pdf>.

[95] S.O. 2008, c. 17, s. 19.

[96] *R. v. Webster,* (1981), 15 M.P.L.R. 60 (Ont. Dist. Ct.).

[97] *R. v. Mardave Construction (1990) Ltd*., 1995 CarswellOnt 4174 (Ont. C.J.) (WLeC).

[98] *R. v. Cancoil Thermal Corp.,* (1988), C.O.H.S.C. 169 (Ont. Prov. Ct.).

[99] Law Reform Commission of Canada, *Report on Recodifying Criminal Law*, (Ottawa: Law Reform Commission of Canada, 1987) Report 31 at 28. (Defences of a procedural nature were left to be dealt with in a proposed Code of Criminal Procedure).

[100] S.O. 1996, c. 19.

[101] S.O. 2002, c. 30, Schedule D.

[102] 2008 ONCA 429, *London (City) v. Young*, 2008 CarswellOnt 3091 (Ont. C.A.) (WLeC).

[103] *R. v. Alves*, 1994 CarswellOnt 5630 (Ont. Ct. (Prov. Div.)) (WLeC).

[104] 2009 ONCJ 65, *R. v. Hargan*, 2009 CarswellOnt 1002 (Ont. C.J.) (WLeC).

[105] 2009 ONCJ 150, *R. v. Vellone*, 2009 CarswellOnt 1969 (Ont. C.J.) (WLeC).

[106] *R. v. Vellone*, 2009 CarswellOnt 3118 (Ont. C.A.) (WLeC).

[107] *R. v. Veri*, 2002 CarswellOnt 2494 (Ont.C.J.) (WLeC).