

THE ENFORCEMENT OF ENVIRONMENTAL LAW THROUGH THE USE OF ADMINISTRATIVE PENALTIES

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INTRODUCTION

On October 4, 2011, the Quebec National Assembly adopted Bill 89 entitled *Act to amend the Environment Quality Act in order to reinforce compliance*,¹ which established new provisions measures to enhance the repressive nature of the *Environment Quality Act*² in order to ensure compliance.

These measures include: (1) overhauling criminal provisions to increase penalties that can be imposed by a court, to hold a greater number of individuals accountable and to give a criminal court enhanced power with regard to the environment; (2) enhancing the grounds on which the minister may amend, suspend or revoke or refuse to issue or renew an authorization certificate; (3) creating a new set of administrative monetary penalties; (4) increasing the government's ability to take civil action to ensure compliance with the *Environment Quality Act*; (5) increasing the power of the Minister and his officials to order, inspect and investigate.

It is difficult to know why all of these measures were justified except for the need to update certain provisions. It is not known if there was really a high level of delinquency with regard to the requirements of the *Environment Quality Act* or if the problem stemmed from the courts not imposing sufficiently severe penalties on offenders or if the *Ministère du Développement durable, de l'Environnement et des Parcs* (the "MDDEP") was not putting forward enough cases for criminal prosecution. The department's annual reports do not indicate any reasons why this host of new measures was necessary. All that is known is that the data published by the MDDEP in 2011 revealed that Quebec courts imposed \$894,400 in fines to 49 offenders who had committed 92 violations of the *Environment Quality Act*.³ When Bill 89 was introduced in the National Assembly, the Minister in charge did not provide much specifics to justify the introduction of the bill except to say that it was being done to "improve the efficiency of the department's response" or due to the delays in imposing fines through the criminal justice system.⁴ Among the reasons that were invoked, there was also the perception that the fines were inadequate and the fact the violation notices were not an effective enough vehicle to secure full environmental compliance.

The fact remains that there seems to be a movement towards modernizing the government's means of intervention and improving their efficiency to ensure

¹ Bill 89, *Act to amend the Environment Quality Act in order to reinforce compliance*, 2nd Sess, 39th Leg, Quebec, 2011 (assented to 5 October 2011), SQ 2011, c 20 [Bill 89].

² RSQ, c Q-2 [EQA].

³ Data compiled from the *Registre des déclarations de culpabilité du Ministère du développement durable, de l'environnement et des parcs du Québec*, online: <<http://www.registres.mddep.gouv.qc.ca/condamnations/recherche.asp>> (consulted 21 March 2012).

⁴ Quebec, National Assembly, Committee on Transport and the Environment, "Bill 89: An Act to amend the Environment Quality Act in order to reinforce compliance" (Tuesday, 10 May 2011, 5:10 pm) 42:8 Journal des débats de la Commission des transports et de l'environnement.

environmental compliance and crack down on environmental offences. Bill 89 is part of this trend.

SECTION I. THE NATURE OF MONETARY ADMINISTRATIVE PENALTIES

When Bill 89 was introduced for clause by clause study, the Minister of Sustainable Development, Environment and Parks made a point to emphasize that he would amend the bill by replacing the expression “*pénalités administratives*” in the French text with the words “*sanctions administratives pécuniaires*” (“monetary administrative penalties”).⁵ He felt that this change in terminology would lessen the punitive aspect of the provision. Nevertheless, it is doubtful that this change in terminology will really have any such effect.

The French word “*pénalité*” is defined as follows in the Nouveau Petit Robert:

“1. [Translation] Anything criminal in nature; the application of a sentence. 2. A sentence; financial penalty implemented by the State.”⁶

As for the French word “*sanction*”, it is defined as follows in the Nouveau Petit Robert:

« 1. [Translation] A penalty or reward set forth to ensure compliance with a law; a penalty or reward tied to a prohibition or order, based on merit or demerit; 2. A penalty established by law to suppress an infraction; a repressive measure tied to an unexecuted order or a broken prohibition; an action through which a country or an international organization suppresses violations of a right.”⁷

There is not a lot of difference between a “*pénalité*” and a “*sanction*”. Both essentially refer to a penalty aimed at suppressing violations of a law.

When we examine the monetary administrative penalty regime introduced in the *Environment Quality Act*, we find that the National Assembly codified it into seventeen sections.⁸ All conditions are specified, including the fact that it applies to practically all violations of the act and regulations.⁹ The National Assembly thought it appropriate to establish the regime’s parameters itself, without resorting to delegated legislation, as opposed to the federal parliament and the legislatures of almost every province, which all

⁵ Quebec, National Assembly, Committee on Transport and the Environment, “Bill 89: An Act to amend the Environment Quality Act in order to reinforce compliance” (Wednesday, 4 May 2011, 3:17 pm) 42:6 Journal des débats de la Commission des transports et de l’environnement.

⁶ Josette Rey-Debove & Alain Rey, Directors, *Le Nouveau Petit Robert* (Paris: Dictionnaires Le Robert, 1996) at 1624.

⁷ *Ibid* at 2031.

⁸ EQA, *supra* note 2, ss 115.13-115.28 & 118.5.1.

⁹ *Ibid*, ss 115.23-115.27.

resort to regulatory power to establish the conditions of the regime and determine the sections of the acts and regulations to which it applies.¹⁰ The Quebec National Assembly only delegated to the government the power to set by regulation monetary penalties applicable to violations of various regulations that have already been or will be adopted.¹¹

Therefore, for this regime, the National Assembly proceeded the same way it had when it established the regime of criminal penalties that apply to violations of the *Environment Quality Act*, which is codified in nineteen sections.

To set the monetary administrative penalty regime apart from the criminal sanction regime, the National Assembly refers to non-compliance with the act and regulations as “failures to comply”.¹² Despite this terminological particularism, the focus must be on the real substance of the new legal system created by the National Assembly and on the way the rights of litigants are handled by said regime, to determine its compliance with rights protected by the Charters of Rights and Freedoms, which we will discuss below.

Before addressing this issue, we should define what this monetary administrative penalty regime involves. In all respects, this regime is one in which a government official designated by the Minister imposes a monetary penalty, the amount of which may not exceed \$2,000 in the case of an individual and \$10,000 in the case of a body corporate, for failing or neglecting to comply with a provision of the *Environment Quality Act* or a regulation adopted under it. However, this official may not impose a prison sentence. Such a sentence may only be imposed through criminal sanction.¹³ Below, we will examine the mechanisms by which monetary administrative penalties are imposed and how they can be challenged, as well as the impact of this regime on the rights of litigants.

SECTION II. THE SCOPE OF THE QUEBEC REGIME

For environmental issues, Quebec adopted a monetary administrative penalty regime that is different from the types of plans found in enabling statutes enacted in Canada’s various provinces and territories and at the federal level. In fact, when we examine the enabling statutes of other Canadian provinces, we immediately notice that, to date, only the

¹⁰ *Environmental Management Act*, SBC 2003, c 53, ss 115 & 119 [EMA, BC]; *Environment Protection Act*, RSO 1990, c E.19, ss 14, 93 & 182.1 [EPA, Ont]; *Clean Air Act*, SNB, c C-5.2, s 31 [CAA, NB]; *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, ss 2 & 237 [EPEA, Alb]; *Environmental Management and Protection Act, 2010*, RSS, c E-10.22, s 88 [EMPA, Sask]; *Maritime Transportation Security Act*, SC 1994, c 40, ss 32-41 & 51 [MTSA]; *Canada Shipping Act, 2001*, SC 2001, c 26, ss 228-232.2 & 244 [CSA]; *Canada Environmental Protection Act (1999)*, SC 1999, c 33, ss 280, 280.1 & 330 [CEPA]; *Environmental Violations Administrative Monetary Penalties Act*, SC 2009, c 14, ss 126 & 5 [EVAMPA].

¹¹ EQA, *supra* note 2, s 115.27; Bill 89, *supra* note 1, s 61.

¹² This term appears for the first time in s 115.13 of the EQA. It is systematically used to designate violations of the law subject to an administrative monetary penalty.

¹³ EQA, *supra* note 2, ss 115.31-115.32, 115.34-115.35.

provinces of Ontario, Alberta and New Brunswick have monetary administrative penalty regimes that are operational and in full force. We set out to know to what extent these regimes were effectively applied. Data on the enforcement of these regimes can be found on the websites of the various provinces' departments of the environment. They seem to play some sort of back-up role¹⁴ except in Ontario, where the amounts collected are significant¹⁵ because the regime was designed to discipline a well-targeted clientele which is identified in the regulations¹⁶ and is subject to the province's industrial depollution program.

The Quebec regime is particularly characterized by its universal scope. Here again, contrary to what the other provinces and federal government did, Quebec, in fact, created a comprehensive and universal monetary administrative penalty regime in addition to the criminal penalty regime which is also universal because it applies to all violations of the *Environment Quality Act*.

Elsewhere in Canada, the regime of administrative penalties is usually targeted, complementary in nature and applicable to particular violations determined by regulation,¹⁷ in order to encourage compliance. These regimes also include an agreement, settlement or transaction mechanism which aims to bring an offender into compliance with the act and regulations. This demonstrates a real desire for such a regime to increase compliance because this mechanism offers a greater guarantee of results. Instead of suffering a financial penalty or to obtain a reduction of such a penalty,¹⁸ the offender can make written commitments or enter into an agreement with the person who imposed the penalty or expressed an intention to do so.¹⁹ Ontario regulations even state that a non-compliant company can have its monetary administrative penalty reduced if it implements an environmental management system²⁰ or if it implements preventive measures or environmental depollution measures.²¹ Officials may also enter into a transaction with anyone who violates the law in order to bring him/her into compliance.²² Quebec's monetary administrative penalty regime does not provide such mechanisms,

¹⁴ Environment and Water of Alberta, "Annual and Quarterly Reports – Compliance Assessment Enforcement Reports", online: <<http://environment.alberta.ca/01292.html>> (consulted 22 March 2012); New Brunswick, "*Clean Air Act* of New Brunswick – Public Access to Information Site", online: <<http://www.gnb.ca/0009/0355/0005/0023-f.asp>> (consulted 22 March 2012).

¹⁵ Ontario, *Environmental Penalty Annual Report for 2012*, online: <http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/stdprod_103899.pdf> (consulted 22 March 2012).

¹⁶ *Environmental Penalties*, O Reg 222/07, Table 1: This table identifies 115 industrial establishments subject to Ontario's monetary administrative penalty regime.

¹⁷ *Ibid*, Tables 2 and 3.

¹⁸ *Ibid*, ss 6-18.

¹⁹ *Ibid*, s 18; EPA, Ont, *supra* note 10, ss 182.1(9)-(10); EMA, BC, *supra* note 10, ss 115(4)-(7).

²⁰ *Environmental Penalties*, *ibid*, s 17.

²¹ *Ibid*, s 16.

²² CSA, *supra* note 10, s 229(1)(a).

which, nevertheless, would have been an irrefutable indication of the rapid environmental compliance objective sought out by the regime.

What is surprising about the Quebec regime is that emphasis is placed strictly on imposing financial penalties by administrative means for any violation of the *Environment Quality Act* without offenders having access to mechanisms for making commitments or entering into compliance agreements.

By acting this way, the Quebec National Assembly took a risk that might undermine the regime itself which, despite the apparent intention expressed in section 115.13, appears in reality to be designed to impose, by administrative means, monetary penalties on any person who violates the law and regulations, without that person having any of the guarantees that normally apply when a penalty is imposed on someone who does not comply with a law, such as the presumption of innocence, the notion of reasonable doubt, protection from self-incrimination and the right not to be convicted twice for the same violation. This is, in fact, a regime of financial penalties that are more modest than the criminal penalties found in sections 115.29 to 115.32. We note that the Quebec National Assembly chose to use four separate sections to create four categories of monetary administrative penalties ranked according to the environmental impact of each violation, which, in a way, closely mirrors the four categories of criminal penalties created in sections 115.29 to 115.32, which are ranked the same way. If this regime proves, legally, to be a mini criminal law system, it will be subject to all the legal guarantees protected by the Federal and Quebec Charters of Rights and Freedoms.²³

In an article published in 2010, Mr. Robert Daigneault questioned the true nature of the monetary administrative penalty regime in light of the decisions of Canadian courts that were asked to rule on the legality of certain monetary administrative penalty regimes established by laws adopted by Parliament and provincial legislative assemblies.²⁴ This questioning seems relevant here, given the characteristics of Quebec's monetary administrative penalty regime.

The monetary administrative penalties analyzed by the courts to date are essentially regimes that govern economic and financial activities such as the regulation of foreign investments in Canada, securities regulation, tax regulations, customs regulations, regulations for removing timber in the public forests, etc. These regimes aim to discipline

²³ *Canadian Charter of Rights and Freedoms*, part I of the *Constitution Act, 1982* attached as Appendix B of the *Canada Act, 1982* (UK), 1982, c 11 and *Charter of Human Rights and Freedoms*, RSQ, c C-12.

²⁴ Robert Daigneault, "Réforme des sanctions environnementales au Québec : droit pénal dérivé ou une dérive du droit pénal ?" in *Service de la formation continue du Barreau du Québec, Développements récents en droit de l'environnement 2010* (Cowansville: Yvon Blais, 2010) vol 329, EYB-2010DEV731 (REJB). See also Marie-Claude Bellemare & Jan-Martin Leblanc, "La Loi sur la qualité de l'environnement et les sanctions administratives pécuniaires: Où en sommes nous" in *Droit de l'environnement*, vol 18 (Cowansville : Yvon Blais, 2013) pp 1-72.

people who willingly performed a given economic activity.²⁵ The key decision in this area is *R. v. Wigglesworth*²⁶ which dealt with the application of section 11d) of the *Canadian Charters of Rights and Freedoms*²⁷ to a federal law which allowed for disciplinary sanctions to be imposed on Royal Canadian Mounted Police officers. In this case, Wilson J. had established the distinction between sanctions for criminal infractions to which the *Canadian Charter of Rights and Freedoms* applies, and sanctions imposed by other punitive regimes involving administrative authorities and quasi-judicial organizations:

[Translation] “In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind which falls within s. 11. It falls within the section because of its very nature. This is to be distinguished from private, internal or disciplinary matters which are regulatory, protective or corrective and are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity...”²⁸

However, the *Environment Quality Act* is a law of general application which aims to protect the environment and maintain public order and welfare through a system of prohibitions and obligations that apply to all citizens, companies and municipalities in Quebec, including all departments, public organizations and government corporations.²⁹ This law reflects society’s growing concerns about protecting the environment, as Justice Charles Gonthier of the Supreme Court of Canada acknowledged in the landmark *Ontario v. Canadian Pacific Ltd.* decision.³⁰ This law establishes public order rules aimed at preserving the environment. Sections 20, 21 and 22, for example, apply to any disposal of contaminants carried out by a person in Quebec, whether the contaminant is regulated or not. If it is not regulated, the disposal will be prohibited based on its impact on the environment, which affects both the environmental factors and resources as well as human quality of life factors.³¹ As for the notion of a “contaminant”, it is also very broad. As such, according to section 1(5), a “contaminant” is:

“a solid, liquid or gaseous matter, a microorganism, a sound, a vibration, rays, heat, an odour, a radiation or a combination of any of them likely to alter the quality of the environment in any way.”

²⁵ This is also a characteristic that was invoked by the Supreme Court of Canada to allow the admissibility as evidence, for the prosecution, of reports provided by fishermen to the Department of Fisheries and Oceans: *R v Fitzpatrick* [1995] 4 SCR 154.

²⁶ [1987] 2 SCR 541 [*Wigglesworth*]. See also: *Cartaway Resources Corp (Re)* [2004] 1 SCR 672; *Lavallée v Alberta (Securities Commission)*, 2009 ABQB 17; and *United States Steel Corporation v AG Canada*, 2011 FCA 176.

²⁷ *Supra* note 23.

²⁸ *Ibid* at 560.

²⁹ EQA, *supra* note 2, s 126.

³⁰ *Ontario v Canadian Pacific Ltd* [1995] 2 SCR 1028. See also *114957 Canada Ltd. (Spraytech, Société d’arrosage) v. Hudson (City of)* [2001] 2 SCR 241.

³¹ EQA, *supra* note 2, s 20, c 2 *in fine*.

The law, therefore, targets all phenomena that are likely to modify the quality of the environment. It applies to both private and public property.³² As for section 22, it governs all activities likely to emit contaminants into the environment. The *Environment Quality Act* is certainly not a law that governs “private, internal or disciplinary matters”, nor is it intended to “regulate conduct within a limited private sphere of activity” to quote Wilson J. in the *Wigglesworth* decision. The monetary administrative penalty regime can, therefore, be applied to any citizen or company who releases a contaminant into the environment or who conducts activities that are likely to affect the environment.

When determining whether or not section 11 of the *Canadian Charter of Rights and Freedoms* applies, the Supreme Court indicated, in the *Wigglesworth* and *Martineau* decisions,³³ that it was necessary to verify if the existing sanction regime is a criminal procedure in and of itself or if this sanction will have actual criminal consequences. And, in the *Martineau* case, Fish J. listed three (3) criteria that would help determine if we have a criminal procedure before us:

[Translation] “To determine the nature of the proceeding, the case law must be reviewed in light of the following criteria: (1) the objectives of the law and its relevant provisions; (2) the purpose of the sanction; (3) the process leading to imposition of the sanction.”³⁴

The objectives of the *Environment Quality Act* are to protect the environment and the public’s lives, health and quality of life. These objectives are quite broad and reach the whole of society. This is not legislation that regulates a specific economic activity. However, some sections of the *Environment Quality Act* do regulate certain specific activities such as, for example, division IV.2 of chapter I on depollution attestations, which apply to certain very precise categories of industrial activities, and sections 79 and ss., which regulate holders of residual hazardous waste management permits. Nevertheless, it must be noted that the monetary administrative penalty regime does not only apply to the field of activities conducted by depollution permit or attestation holders, but it applies to all citizens, companies and municipalities who might release a contaminant into the environment (sections 20 and 21) or who engage in an activity that is likely to modify the quality of the environment (section 22).

In the first paragraph of the second clause of section 115.13, the National Assembly indicates that administrative monetary penalties seek to achieve certain objectives, such as urging rapid compliance and deterring repeat violations. However, we notice the words “such as” (in the legislation), which indicates that these sanctions have other objectives, probably the one that, of course, is associated with the very definition of a “penalty”, i.e. penalizing a the person or entity that violates a law. In addition, a review of the regime

³² Yvon Duplessis, Jean C Héту & Jean Piette, *La protection juridique de l’environnement au Québec* (Montreal: Thémis, 1982) pp 49-50.

³³ *Martineau v MRN* [2004] 3 SCR 737.

³⁴ *Ibid*, para 24.

reveals characteristics which are hardly compatible with the regime's stated objective, namely to urge "*rapid*" compliance and deter repeat violations.

In the legislation,³⁵ the National Assembly introduced a two-year limitation period starting from the violation date, and a virtually unlimited limitation where the violation deals with misrepresentations, in the case of a violation of section 20 or in the case of a hazardous materials, since the two-year period, which is absolutely identical to the limitation period of a criminal sanction with regard the same three types of violations,³⁶ is calculated from the start date of the inspection or investigation which led to the discovery of the violation.³⁷ These long limitation periods are hardly compatible with objectives such as deterrence or urging "*rapid*" compliance (as the legislation says). A short limitation period is the only one that will really urge an offender into "*rapid*" compliance or deter him from reoffending. The deterrent effect of a monetary administrative penalty imposed, for example, a year and a half after a violation is not any different than a criminal penalty imposed after a comparable period following a violation. Similarly, a penalty imposed after such time is hardly compatible with the objective of urging "*rapid*" compliance.

In the *Martineau* decision,³⁸ the Supreme Court sought to determine if the monetary administrative penalty imposed pursuant to the *Customs Act*³⁹ produced a "true criminal consequence". Speaking for the Court, Fish J. looked at various factors that are likely to identify if there is a true criminal consequence and, among them, he mentioned that there was no such consequence in the case of a penalty imposed on goods illegally imported to Canada pursuant to the *Customs Act* because, in this case, it was an *in rem* penalty, meaning "on the thing", and not a penalty imposed on a person guilty of an offence.

However, Fish J. also took interest in the stigma associated with a criminal conviction compared to a monetary administrative penalty imposed pursuant to the *Customs Act*, which stigmatizes no one. The distinction that Fish J. makes in the case of the *Customs Act* cannot be applied in the case of the *Environment Quality Act* because the National Assembly provided identical public notice requirements for administrative monetary penalties and criminal penalties.⁴⁰ In both cases, monetary administrative penalties and criminal penalties will be posted in a public register that will be available on the website of the *Ministère du Développement durable, de l'Environnement et des Parcs*.⁴¹ The monetary administrative penalty will also be posted as soon as it is imposed, just like a criminal penalty.

³⁵ EQA, *supra* note 2, s 115.21, c 2.

³⁶ *Ibid*, s 115.46

³⁷ *Ibid*, s. 115.21.

³⁸ *Supra* note 33, para 63.

³⁹ RSC 1970, c C-40, s 124.

⁴⁰ EQA, *supra* note 2, ss 118.5.1-118.5.2.

⁴¹ *Ibid*, s 118.5.3.

As for the indicator that might be represented by the destination of the administrative penalty or criminal penalty,⁴² the legislation calls for both to be paid into the Green Fund established under the *Act respecting the Ministère du Développement durable, de l'Environnement et des Parcs*.⁴³

This equal treatment of monetary administrative penalties and criminal penalties indicates that the National Assembly placed equal or comparable emphasis on both types of penalty, especially since the Minister is required to publish a host of information related to the offender's identity, the significance of the penalty and the events that led to the penalties being imposed. People penalized administratively will, therefore, be just as known to the general public as criminally penalized offenders and will have the same stigma on their reputation. Although the procedure for collecting monetary administrative penalties is a civil procedure, we can ask ourselves whether this is basically a procedure that produces actual criminal consequences.

SECTION III. GENERAL APPLICATION FRAMEWORK FOR ADMINISTRATIVE PENALTIES AND CRIMINAL REMEDIES

When Bill 89 was adopted, the National Assembly broke new ground in creating, within the law, an obligation for the Minister to develop and make public a general application framework for administrative and criminal penalties, by specifying five elements that must be found therein. Chapter 115.13 sets out this obligation and the elements that must be found within this general framework. Thus, the general framework must specify:

- 1) the purpose of the penalties, "such as":
 - a) urging "rapid" compliance; and
 - b) deterring repeat violations;
- 2) the categories of functions held by the persons designated to impose penalties;
- 3) the criteria that must guide the appointed officials, such as the type of failure, its repetitive nature, the seriousness of the effects or potential effects and the remedial measures taken by the person at fault;
- 4) the circumstances in which a criminal proceeding will be deemed to have priority;
- 5) the other procedures, such as the requirement to give advance notification of a notice of non-compliance.

This list of elements which must appear in the general application framework reveals the purpose of the monetary administrative penalties, i.e.:

⁴² *Wigglesworth, supra* note 26 at 561.

⁴³ RSQ, c M-30.001, ss 15.4 (5.1) & (6).

- urging rapid compliance;
- deterring to repeat violation of the Act and regulations.

A general application framework entitled “*Cadre général d’application des sanctions administratives pécuniaires*” (General application framework for monetary administrative penalties) was published on the department’s website on February 1, 2012, the date on which the monetary administrative penalty regime came into effect.⁴⁴ It is accompanied by an administrative directive issued on January 16, 2012, entitled “*Directive sur le traitement des manquements à la législation environnementale*” (Directive on processing violations of environmental legislation), which describes the administrative function of the *Environment Quality Act*’s enforcement measures.

The adoption of a general application framework addresses a request made by several stakeholders over the years. Ontario and British Columbia have theirs.⁴⁶ The federal government has its own.⁴⁷ The purpose of this general application framework is to inform the litigant of the circumstances surrounding the administration’s choice to proceed with a monetary administrative penalty, a criminal prosecution or simply a notice of non-compliance, as we will see later on. The review of these documents reveals that the monetary administrative penalty will be applied mainly for violations that have “minor” consequences, particularly in cases of recurring violations or an affront to the department’s authority.

⁴⁴ Ministère du développement durable, de l’environnement et des parcs du Québec, Centre de contrôle environnemental, *Cadre général d’application des sanctions administratives pécuniaires (s 115.13 of the Environmental Quality Act)* (2012), online: <<http://www.mddep.gouv.qc.ca/lqe/cadre-application-SAP.pdf>> (consulted on 21 March 2012).

⁴⁵ Ministère du développement durable, de l’environnement et des parcs du Québec, Centre de contrôle environnemental, *Directive sur le traitement des manquements à la législation environnementale* (2012), online: <<http://mddep.gouv.qc.ca/lqe/directive-traitement-manquements.pdf>> (consulted on 23 March 2012).

⁴⁶ Ontario, *Guideline for Implementing Environmental Penalties (Ontario Regulations 222/07 and 223/07)* (2007), online: <http://www.ene.gov.on.ca/stdprodconsume/groups/lr/@ene/@resources/documents/resource/std01_079164.pdf> (consulted on 21 March 2012); British Columbia, Ministry of Attorney General, Administrative of justice, *Administrative Monetary Penalties: A Framework for Earlier and More Effective Regulatory Compliance – A Discussion Paper*, online: <<http://www.ag.gov.bc.ca/ajo/down/amps092008.pdf>> (consulted on 21 March 2012).

⁴⁷ Environment Canada, “Administrative Monetary Penalty System – Consultation Document”, online: <<http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=465314E0-1>> (consulted on 22 March 2012); Environment Canada, *Compliance and Enforcement Policy for the Canadian Environmental Protection Act, 1999 [(CEPA 1999)] – March 2001*, online: <<http://www.ec.gc.ca/Publications/default.asp?lang=En&xml=326F7BE8-0483-4995-8E0E-F09719D202B8>> (consulted on 30 March 2012); Environment Canada, *Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the Fisheries Act* (November 2001), online: <<http://www.ec.gc.ca/Publications/default.asp?lang=En&xml=66448750-D3A2-4B5D-8278-543776ED7548>> (consulted on 30 March 2012).

SECTION IV. CODIFICATION OF THE NOTION OF NON-COMPLIANCE NOTICES

Another innovation of Bill 89 involves codifying what was previously known as a “notice of infraction”, which was nothing but a warning from a government official which identified an alleged infraction by the person to whom the notice of infraction was served. Obviously, this notice of infraction was not legally binding. It was, in a way, a warning from the government that officials had found certain irregularities during an inspection. The notice of infraction was not legally binding but could be used during forced intervention administrative measures like an order or the revocation of a certificate of authorization during judicial proceedings such as criminal prosecution or an injunction application.

The codification of the notice of infraction, which now bears the name “notice of non-compliance”, is an initiative that is found in no other provincial or federal law. The purpose of this procedure is to give the person to whom the notice of non-compliance is served a notice “*urging that the necessary measures be taken immediately to remedy the failure*”.⁴⁸ The legislation mentions that this notice must indicate that the violation could lead to a monetary administrative penalty or criminal proceedings. It is not known, however, who will issue these notices of non-compliance. The legislation merely states that such a notice can be served once a “violation” of the Act or a regulation has been identified. However, at this stage, no decision has been made yet as the imposition of an administrative or criminal penalty. The litigant does not yet know if he/she will be penalized or not. But serving this notice of non-compliance is no less a mandatory precondition for imposing an monetary administrative penalty.⁴⁹

In this respect, this notice reminds us of a formal notice sent before starting legal proceedings.

One can, however, question the adequacy of this type of notice in the context of a monetary administrative penalty. If the government deems that the violation should be subject to a criminal penalty, a notice of infraction will be sent to the subject and he/she will be entitled to all protections provided for in similar matters by the *Canadian Charter of Rights and Freedoms* and the *Charter of Human Rights and Freedoms*.

In some provinces,⁵⁰ an administrative penalty is preceded by a prior notice that clearly states the penalty the government intends to impose, which allows the person who receives it to make representations pursuant to the rules of natural justice that apply when the government makes an individual decision that is likely to affect a person’s rights. In

⁴⁸ EQA, *supra* note 2 **Error! Bookmark not defined.**, s 115.15.

⁴⁹ *Ibid*, s 115.13, c 2(5).

⁵⁰ *Environment penalties*, *supra* note 16, s 5; EMPA, Sask, *supra* note 10, s 88(2); CAA, NB, *supra* note 10, s 31(3).

Quebec, this rule is codified in section 2 of the *Administrative Justice Act*.⁵¹ In fact, for this notice to meet the criteria applicable in similar cases, the notice must generally be detailed enough so that the subject can know what he is being accused of and present his/her case. To uphold such standards, the notice would have to list, rather clearly, not only the violation of which the subject is accused, but also the monetary administrative penalty he/she faces. Moreover, section 4 of the *Administrative Justice Act*⁵² requires that the government take appropriate measures to ensure that the citizen is given the opportunity to provide any information useful for the making of any decision which affects him/her.

However, the legislation sets no mechanism or period within which the person named in such a notice can respond or provide explanations. It is not known whether the person who issues the notice will invite the person named therein to respond. In any event, it is highly likely that the subject will be able to further exercise his/her rights when a monetary administrative penalty is reviewed, as we will see below.

SECTION V. THE INITIAL DECISION: IMPOSING A MONETARY ADMINISTRATIVE PENALTY

The monetary administrative penalty devised by the Quebec National Assembly is not imposed by the Minister but by “*persons designated by the Minister*”.⁵³ The monetary administrative penalty takes the shape of a complaint that states the claimed amount, the reasons for the claim, the time from which it bears interest, the right to challenge the complaint through a review and information related to the way in which the monetary administrative penalty is to be collected, including the issuance of a recovery certificate set forth in section 115.53 and the consequences of this penalty with respect to the risk of having a certificate of authorization denied or revoked and the risk of criminal penalties that the government reserves the right to take.⁵⁴ A monetary administrative penalty may deal with several “failures” and may involve failures having occurred on several different dates because a failure that continues over several days constitutes as many separate “failures”.⁵⁵ The cumulative effect of several distinct failures and of failures that continue for several days can lead to claims of tens or hundreds of thousands of dollars, especially in the case of a body corporate.

The amount due bears interest starting from the 31st day following the notice of claim, at the rate set forth in the first clause of section 28 of the *Tax Administration Act*,⁵⁶ except

⁵¹ *Administrative Justice Act*, RSQ, c J-3, s 2. [AJA]

⁵² *Ibid*, s 4.

⁵³ EQA, *supra* note 2, s 115.16.

⁵⁴ *Ibid*, s 115.48.

⁵⁵ *Ibid*, s 115.22.

⁵⁶ RSQ, c A-6.002. [AFA].

that the interest can be suspended if the review decision is rendered more than 30 days after the receipt of the application,⁵⁷ and the Administrative Tribunal of Quebec can adjudicate on this question in an action disputing the administrative monetary function.⁵⁸ The person who imposes the penalty has significant discretion because it is up to him/her to determine the most “appropriate” penalty⁵⁹ when several sanctions could be applied in the case. However, he/she does not have any discretion with regard to the amount of the penalty because the amounts for each violation are set forth in sections 115.23 through 115.26 and will be different for a physical person than for a body corporate. The decision-maker’s discretion will include whether to impose a monetary administrative penalty, which the section of the Act to associate the violation with and how many days to penalize.

The official who imposes the monetary administrative penalty is not bound by any particular procedural rules except those related to the formalism of the content of his/her decision as explained above. He is not required to give notice. He/she must adhere to the Directive on processing violations of environmental legislation and the General application framework.⁶⁰ He/she is not required to produce or attach to his/her decision any exhibits, photographs or other reports.

Imposing a monetary administrative penalty according to such a procedure is akin, in some respects, both the accusation and the judgement being rendered against an individual, body corporate or municipality that is alleged to have committed an infraction, except that the person making the accusation is acting as both the prosecutor and the judge because he/she not only has the power to assess the accuracy of the facts in a notice of non-compliance, but also to impose the penalty. He/she is, in a way, both judge and jury. As for the person being penalized, he/she obviously has no right to reasonable doubt. He/she is, for all intents and purposes, presumed to have committed the violation of which he/she is being accused. The person imposing the penalty is not required to provide any evidence. Compared to the criminal system, it is as if the prosecutor demonstrated the *actus reus* of the violation committed.

Starting from the time the penalty is imposed, the burden of proof is reversed⁶¹ and it will fall upon the defendant to demonstrate that the penalty is not appropriate or justified. There is, therefore, from this point on, a reversal of the burden of proof. The person being

⁵⁷ EQA, *supra* note 2, s 115.20, c 2.

⁵⁸ *Ibid*, s 115.49, c 2.

⁵⁹ *Supra* note 44 at 4.

⁶⁰ *Ibid*.

⁶¹ In *R v Wholesale Travel Group Inc* [1991] 3 SCR 154, the Supreme Court of Canada ruled that reversing the burden of proof in a case involving a strict liability offence violates s 11(d) of the *Canadian Charter of Rights and Freedoms* because it goes against the presumption of innocence, which is constitutionally protected, but the Court deemed that infringing upon the presumption of innocence is justified in the context of a free and democratic society as set forth in s 1 of the *Charter*.

penalized must, by a preponderance of evidence, seek to have the penalty reviewed or challenge it, under the procedure and conditions defined by the legislation.

SECTION VI. THE SECOND STEP: REVIEWING THE PENALTY

Upon receipt of a monetary administrative penalty, the person or municipality involved can ask for a review of the decision within thirty days of the notice of claim.⁶² The review is performed by a person designated by the Minister, who must not come under the same administrative authority as the initial decision-maker.⁶³ It is unknown how many people will be designated to review monetary administrative penalties, but the minister announced, in a press release dated February 1, 2012, the creation of a “monetary administrative penalty review office”.⁶⁴ We do not know anything about these people’s training or skills, but we do know that they will be managed by a chief reviewer who has been appointed by the Minister.

The legislation provides that the applicant in a review must have the opportunity to submit observations and produce documents to “*complete the record*”.⁶⁵ Nowhere is it indicated that the applicant is entitled, at this stage, to have access to his/her record even though one can assume that such access is implicit if the applicant wants the opportunity to “*complete the record*”. How can he/she complete something when he/she is unaware of its content? At this point, the applicant cannot keep quiet. He/she does not have the right to silence or else he/she will be bound by the presumption of guilt created by the penalty imposed by the initial decision-maker. In light of the file that he will have surely reviewed,⁶⁶ the applicant will be entitled to submit arguments and produce evidence to support his/her arguments, if necessary. Section 115.19 states that the person conducting the review decides “*on the basis of the record*”, which means that the applicant is not entitled to a proper hearing which includes the right to produce witnesses and the right to cross-examine the initial decision-maker, the inspector or other witnesses from the department. Nevertheless, the legislation gives the reviewer the opportunity to “*proceed in some other manner*”, at his/her full discretion.⁶⁷ This could possibly allow for hearings and the presentation of a more elaborate defence.

⁶² EQA, *supra* note 2, s 115.17.

⁶³ *Ibid*, s 115.18.

⁶⁴ Cabinet du ministre du Développement durable, de l’Environnement et des Parcs du Québec, Press Release, “Application de la Loi sur la qualité de l’environnement - Mise en place du bureau de réexamen des sanctions administratives pécuniaires” (1 February 2012), online: <<http://www.mddep.gouv.qc.ca/Infuseur/communiqu.asp?no=2035>> (consulted on 21 March 2012).

⁶⁵ EQA, *supra* note 2, s 115.19; AJA, *supra* note 51, s 4(2).

⁶⁶ In criminal matters, the disclosure of evidence to the defendant is mandatory: see *R v Stinchcombe* [1991] 3 SCR 326.

⁶⁷ EQA, *supra* note 2, s 115.19.

Among the “*observations*” that the litigant can make, he/she will be free to invoke the means of defence and exculpation described below in section VIII.

As for the reviewer, he/she has the power to confirm, quash or vary the original decision.⁶⁸ The word “*vary*” may cause confusion since the initial decision-maker has no discretion with regard to the fine that he/she can impose for each “*failure*”. The amounts of the monetary administrative penalties⁶⁹ set forth by the legislation are set amounts that depend on the nature of the “*failure*” identified. We believe that the power to “*vary*” the initial decision-maker’s decision may include the number of days for which a failure will be penalized or maybe the classification of this “*failure*” among the four categories set forth in sections 115.23 to 115.26. The legislation expressly requires that a review request be dealt with promptly,⁷⁰ which is, in any case, already provided for in similar terms in section 4(3^o) of the *Administrative Justice Act*. The same goes for the requirement that the reviewed decision be drafted in clear and concise terms and that the right to challenge it before the Administrative Tribunal of Quebec and the period allowed for such a challenge be mentioned.⁷¹ The legislation states that a review decision must be rendered within thirty days after receipt of the application or within the time prescribed for the applicant to submit observations or documents, otherwise the interest is suspended until the decision is rendered.⁷²

It is not known what will be the value of such a review, conducted by one government official, of an initial decision made by another official in the same department, even though the reviewing is “not from the same administrative authority”. Usually, the trier of fact responsible for reviewing an administrative or quasi-judicial decision must have a certain “distance”, a certain detachment or independence from the initial decision-maker. This is required to guarantee the credibility of the process and ensure the applicant that he/she is addressing an impartial body. Credibility is, indeed, an essential ingredient in the success of a process of this nature.

SECTION VII. THE THIRD STEP: RECOURSE BEFORE THE ADMINISTRATIVE TRIBUNAL OF QUEBEC

If the applicant is dissatisfied with the decision rendered at the review stage because he/she was unable to successfully convince the “reviewer” of his/her due diligence or any other motive that warrants the monetary administrative penalty being quashed or varied,

⁶⁸ *Ibid.*

⁶⁹ An amount of \$250, \$500, \$1,000 or \$2,000 for a natural person and \$1,000, \$2,500, \$5,000 or \$10,000 for a body corporate or municipality based on the classification of the “failure” of which the litigant is accused. EQA, *ibid*, ss 115.23-115.26.

⁷⁰ EQA, *ibid*, s 115.20, c 1.

⁷¹ AJA, *supra* note 51, ss 4(3) & 8.

⁷² EQA, *supra* note 2, s 115.20, c 2.

he/she can bring it before the Administrative Tribunal of Quebec (the “TAQ”).⁷³ This challenge will take place before a tribunal that is completely separate and independent from the MDDEP and the two government officials who rendered the first and second rulings regarding the monetary administrative penalty imposed on the applicant.

For several years, the TAQ has been the tribunal that acts as the appeal (or “challenge”) body for administrative decisions rendered pursuant to the *Environment Quality Act*.⁷⁴ It is before this tribunal that the applicant can expect to have a truly impartial hearing. He/she can, indeed, present evidence and have witnesses heard.⁷⁵ He/she can invoke the exculpatory means described in section VIII. He/she must submit a preponderance of proof for each defence chosen. Looking at the TAQ’s jurisprudence with respect to the appeals rendered under the *Environment Quality Act*, we note that its rulings have almost always upheld the MDDEP’s decisions. Ours is not to analyze the reasons for such rulings in the MDDEP’s favour, but it is clear that the litigants had a better chance before the Court of Quebec and the Superior Court.⁷⁶

Within 30 days after receipt of the application to contest, the file for the challenged decision is sent to the TAQ and the applicant.⁷⁷ This is somewhat equivalent to the prosecutor disclosing evidence in a criminal case. During an appeal before the TAQ, the tribunal will rule on the merit of the means of challenge invoked by the applicant. It may also be called upon to determine whether the MDDEP’s decision is reasonable. In fact, the TAQ holds a sort of *de novo* trial. It can substitute its discretion for that of the two preceding decision-makers and even determine whether or not the penalty is appropriate. Since this involves a challenge to a ruling, the second clause of section 15 of the *Administrative Justice Act* allows the TAQ to confirm, vary or quash the decision and “*if appropriate, make the decision which, in its opinion, should have been taken initially*”.

With regard to the exculpatory means raised by the applicant, the TAQ’s role will be similar to that of a criminal court asked to rule on a defence made in regard to a charge involving a criminal infraction. The difference is that, before the TAQ, the applicant is not presumed innocent and has no right to reasonable doubt. However, before the TAQ,

⁷³ EQA, *ibid*, s 115.49.

⁷⁴ *Ibid*, s 96.

⁷⁵ AJA, *supra* note 51, ss 128-142.

⁷⁶ See also: 9007-5193 *Québec inc v Québec (Ministre de l’Environnement)*, 2006 QCCS 4527, J Carol Cohen (Request for suspension of upheld enforcement (CA, 2006-11-17), 500-09-017036-062. Appeal denied (CA, 2007-05-10)); *Ferme René Gagnon, senc v Tribunal administratif du Québec*, 2006 QCCS 968, J Michel Richard; *Girard v Tribunal administratif du Québec, Section du territoire et de l’environnement*, JE 2001-1282, J Micheal Sheehan (CQ); *Les atocas de l’érables inc v AG*, 2012 QCCS 912, 9047-4784; *Québec inc v Bécharde*, 2007 QCCS 710, J Luc Lefebvre (out-of-court settlement); *AG v Aliments Breton inc*, 2008 QCCQ 4715, J Sylvie Marcotte; *AG v Produits JCV inc*, JE 95-1943, J Denis R Lanctôt (CQ); *AG v Ultramar Canada inc*, JE 98-745, J Jean-Yves Tremblay (CQ).

⁷⁷ AJA, *supra* note 51, s 114, c 1.

MDDEP inspectors and the applicant can be cross-examined because the rules of procedure are those that apply in civil cases.

SECTION VIII. THE MEANS OF DEFENCE AND EXCULPATION

The National Assembly did not provide for means of defence or exculpation that could be invoked by a person who receives a monetary administrative penalty, unlike the regime in force in Ontario which has, in section 181(6) of the *Environmental Protection Act*,⁷⁸ excluded certain means of defence that, could otherwise have been raised by a regulated company, even though it remediated this in the regulations by allowing a company targeted by a penalty to obtain a reduction of the amount if it could demonstrate certain elements of diligence.⁷⁹ Since the Quebec legislation does not make any provision to rule out one or several means of defence, one may outline those that could likely be invoked to challenge a monetary administrative penalty. It would indeed go against the elementary rules of justice if a person could be penalized while the violation he/she is accused of can be explained by facts and circumstances that can exonerate him/her. The list of exculpatory means described below is not exhaustive. These means can be raised both at the review stage and the challenge stage before the TAQ, even though the applicant will have more elaborate procedural means before the TAQ (particularly the production of witnesses, examination and cross-examination).

1. Due diligence

The notion of “due diligence” is part of the means of defence that a person can invoke against any accusation of “strict liability” as stated by the Supreme Court of Canada in *R. v. Sault Ste. Marie*.⁸⁰ This means of defence applies, among others, to regulatory infractions like environmental infractions. Due diligence was also recognized as a legitimate means of defence against monetary administrative sanctions.⁸¹ In the context of a monetary administrative sanction, the applicant must demonstrate that he/she took all necessary measures to obey the law and avoid the violation of which he/she is accused.

⁷⁸ EPA, Ont, *supra* note 10.

⁷⁹ *Environmental Penalties*, *supra* note 16, ss 16-18. See also EVAMPA, *supra* note 10, s 11.

⁸⁰ *R v Sault Ste-Marie* [1978] 2 SCR 1299 [*Sault Ste-Marie*].

⁸¹ See also: *Pillar Oilfield Projects Ltd v R* [1993] TCJ No 764; *Whistler Mountain Shi Corp v British Columbia (Liquor Control & Licensing Branch)*, 2002 BCCA 426; *504174 NB Ltd v New Brunswick (Minister of Public Safety)*, 2005 NBCA 18; *Consolidated Canadian Contractors Inc v Canada* [1999] 1 FC 209; *Installations électriques Aubert inc v Corp des maîtres électriciens du Québec* (1985) DTE 85T-671 (CA) at 5.

2. Misinterpretation of facts or law

The applicant should be entitled to bring up any error of law in the interpretation of an Act or a regulation, or any error related to the assessment of facts alleged in the violation of which the applicant is accused. The applicant may also find arguments in the enforcement of the *General application framework for monetary administrative penalties (section 115.13 of the Environment Quality Act)* which was established by the Minister pursuant to section 115.13. This is one “official” normative document with unclear legal status adopted by the Minister pursuant to the *Environment Quality Act*, which does not have the binding nature of a regulatory text but provides a framework for exercising discretionary powers conferred by law, particularly the powers set forth in sections 115.16 and 115.19.

3. Errors in procedural legality

The applicant should be able to obtain redress if there was a breach of the rules of procedural fairness prescribed in section 2 of the *Administrative Justice Act*, including failure send a prior notice of non-compliance, failure to provide an opportunity to submit observations at the review stage and failure to comply with any of the procedural requirements prescribed in sections 115.14 to 115.22, 115.48 and 115.49 of the *Environment Quality Act*.

4. Reasonable error of fact

The notion of a “reasonable error of fact” is a means of defence related to due diligence, which was also recognized in *R. v. Sault Ste-Marie*⁸² and which allows an individual to be exonerated of a charge by invoking an error involving a material fact of the violation of which the person being penalized is accused.⁸³ This error must be reasonable, meaning that it refers to the behaviour of a reasonable person placed in similar circumstances. As in criminal proceedings, an error of law should not constitute an acceptable means of exculpation except if it is caused by a government official as indicated below.

5. Defence of mistake caused by the authorities

If a government official has, through his/her writing, words or behaviour, suggested to an applicant that something was allowed, the applicant may invoke a defence of mistake caused by the authorities.⁸⁴ To be admissible, the means of defence must always be

⁸² *Sault Ste-Marie*, *supra* note 80 at 1326.

⁸³ *R v Chapin* [1979] 2 SCR 121.

⁸⁴ Paule Halley, *Le droit pénal de l'environnement: l'interdiction de polluer* (Cowansville, Yvon Blais, 2001) pp 242-260.

reasonable, based on the rule of reasonable behaviour by a person placed in similar circumstances. This means of defence may not be used to justify an applicant's bad faith or negligence. In criminal proceedings, this means of defence may lead to stay of proceedings⁸⁵ or an acquittal.⁸⁶ In the case of a monetary administrative penalty, this means of exculpation should be grounds to quash the decision.

6. Defence of necessity

This means of defence applies when a person performs an act in an emergency context because this act seems to be one that will have the fewest consequences on the environment or on the protection of life and property. It must be an act that was not really voluntary because the applicant really did not have any other choices.

7. Defence of impossibility

This means of defence refers to a physical impossibility to act due to a fortuitous event or *force majeure* that was out of the applicant's control. Such events create a situation in which the applicant is no longer able to act in compliance with the law.

8. *De minimis non curat lex*

To be able to invoke this means of defence, the penalty must be trivial or a case of little importance that does not warrant a penalty. This means of defence applies, for instance, when the legislation establishes a legal requirement in general terms, which allows for a certain degree of assessment of the facts with respect to the terms of the law. This means of defence was recognized more notably in *Ontario v. Canadian Pacific Ltd.*⁸⁷

SECTION IX. CLASSIFICATION OF ADMINISTRATIVE MONETARY PENALTIES

The legislation divides all possible "violations" of the *Environment Quality Act* into four distinct categories, which group the violations together based on their seriousness or their environmental consequences as determined by the legislation. Thus, the model is the same for the monetary administrative penalty regime as for the criminal penalty regime. In addition, we note that the four categories of violations each replicate approximately the same violations referred to as "offences" for the purposes of the criminal penalty regime found in sections 115.29 to 115.32 and "failures" for the purposes of the monetary

⁸⁵ *Lévis (City of) v Tétreault; Lévis (City of) v 2629-4470 Québec Inc* [2006] 1 SCR 420.

⁸⁶ *AG of Quebec v Allard*, JE 2001-401.

⁸⁷ *Supra* note 30.

administrative penalty regime. Here is the table of monetary administrative penalties set forth by the legislation:

Table 1: Classification of monetary administrative penalties set forth by the *Environment Quality Act*

E.Q.A. Section	Natural Person	Body Corporate
115.23	\$250	\$1,000
115.24	\$500	\$2,500
115.25	\$1,000	\$5,000
115.26	\$2,000	\$10,000

The legislation provides that a monetary administrative penalty imposed pursuant to this regime would be of a fixed amount. Whoever has the power to impose it has no discretion over the amount that can be claimed from the person who committed the violation. He/she can neither increase nor decrease it due to the circumstances of the case.⁸⁸ The penalty will be lesser if the violator is a natural person. As such, the most minor violations are punished with fines of \$250 for a natural person and \$1,000 for a body corporate. The most significant violations are punished with fines of \$2,000 for a natural person and \$10,000 for a body corporate.

These monetary administrative penalties are about the same as those provided for in other provincial environmental laws. Thus, in Alberta and New Brunswick, the monetary administrative penalty may not exceed \$5,000.⁸⁹ However, the *Environment Protection Act* in Ontario states that such a penalty can be, in the most serious cases, up to \$100,000.⁹⁰ A violation that goes unaddressed for some time may be considered a separate violation for each day it continues, which could multiply the total amount of the penalty.⁹¹

⁸⁸ Contrary to Ontario and Alberta where regulations allow for modulation of the penalty due to the facts and circumstances surrounding the violation. See: *Environmental Penalties*, *supra* note 16, ss 7-18; *Administrative Penalty Regulation*, Alta Reg 23/2003, s 3.

⁸⁹ *Administrative Penalty Regulation*, *ibid*, s 3(3); CAA, NB, *supra* note 10, s 31(5).

⁹⁰ EPA, Ont, *supra* note 10, s 182.1(5).

⁹¹ EQA, *supra* note 2, s 115.22.

SECTION X. ENFORCEMENT OF MONETARY ADMINISTRATIVE PENALTIES

The monetary administrative penalty in the *Environment Quality Act*, technically, takes the shape of a notice of claim from the person who imposed the penalty.⁹²

The amount due bears interest starting on the 31st day following the notice of claim at the rate set forth in the first clause of section 28 of the *Tax Administration Act*.⁹³ The interest may be suspended if a review decision is not rendered within thirty (30) days of the application or within the time prescribed for the applicant to submit observations or documents.⁹⁴ In addition, the TAQ may, when it renders its decision on the challenge of a monetary administrative penalty, rule on the interest incurred during the length of the recourse.⁹⁵

The government has many ways of ensuring that a monetary administrative penalty is paid. For example, section 115.50 states that the directors and officers of a legal person are solidarily liable, with the legal person, for the payment of the monetary administrative penalty. They can exonerate themselves of this responsibility by establishing that they have exercised due care and diligence to prevent the failure which led to the claim. Here we are dealing with a sort of defence of due diligence in civil proceedings. This is referred to as “exercising due care and diligence”. Exercising due care and diligence should relate not to the non-payment of the penalty, but to the prevention of the violation which led to the penalty..

To ensure payment of the penalty, the government also has a legal hypothec on the payer’s movable and immovable property.⁹⁶ The legislation also provides that the debtor and the Minister may enter into a payment agreement with regard to the amount owing, and also that such an agreement, or the payment owing, does not constitute an acknowledgement of the facts giving rise to the penalty.⁹⁷

If the amount owing is not paid in its entirety or the payment agreement is not adhered to, the Minister may issue a recovery certificate upon the expiry of any of the following periods:

- (i) the time for applying for a review of the decision;
- (ii) the period for contesting the decision before the TAQ; or

⁹² *Ibid*, s 115.48.

⁹³ TAA, *supra* note 56.

⁹⁴ EQA, *supra* note 2, s 115.20, c 2.

⁹⁵ *Ibid*, s 115.49, c 2.

⁹⁶ *Ibid*, s 115.51.

⁹⁷ *Ibid*, s 115.52.

(iii) thirty (30) days following the TAQ's final decision.⁹⁸

The Minister may even issue a recovery certificate before the expiry of these periods if he/she deems that the debtor is attempting to evade payment.⁹⁹ Once a recovery certificate has been issued, any refund owed to the debtor by the Minister of Revenue may be withheld.¹⁰⁰ This process was designed to facilitate the collection of monetary administrative penalties as well as any other amounts owing to the Minister under the *Environment Quality Act* and its regulations.¹⁰¹

In addition, the Minister may file his recovery certificate at the office of the competent court, together with a copy of the final decision stating the amount of the debt, which makes the certificate enforceable as if it were a final judgment of that court.¹⁰² The debtor is also required to pay a recovery charge in the cases, under the conditions and in the amount determined by ministerial order.¹⁰³ Finally, the Minister may delegate to another department or body its powers relating to the recovery of an amount owing.¹⁰⁴

SECTION XI. MULTIPLE ADMINISTRATIVE MONETARY PENALTIES AND CRIMINAL PENALTIES

One of the most controversial aspects of Bill 89 involves multiple monetary administrative penalties and criminal penalties. This means that the MDDEP may, when there is a violation of the *Environment Quality Act*, claim from the offender both a monetary administrative penalty followed by a criminal penalty for the same violation. The legislation thus provides that a person could, therefore, be penalized twice for the same violation, albeit in different forms. However, section 115.14 states that no monetary administrative penalty may be imposed if a statement of offence was served for failure to comply with the same provision of the *Environment Quality Act* on the same day, based on the same facts.

The concept of penalizing the same person twice for the same violation goes against the rules that usually apply when sentencing an individual. This important rule was recognized by the Supreme Court of Canada in the *Kienapple* case.¹⁰⁵ It is a rule that is now entrenched in the Constitution and protected in section 11(h) of the *Canadian*

⁹⁸ *Ibid*, s 115.53.

⁹⁹ *Ibid*, s 115.53, c 2.

¹⁰⁰ *Ibid*, s 115.54.

¹⁰¹ For example, *ibid*, ss 115.01 & 115.1 and the *Règlement sur la redevance exigible pour l'utilisation de l'eau*, RRQ 1981, c Q-2, r 42.1.

¹⁰² EQA, *ibid*, s 115.55.

¹⁰³ *Ibid*, s 115.56.

¹⁰⁴ *Ibid*, s 115.57.

¹⁰⁵ *Kienapple v R* [1975] 1 SCR 729.

*Charter of Rights and Freedoms*¹⁰⁶ and section 37.1 of the *Charter of Human Rights and Freedoms*.¹⁰⁷

The appropriateness of allowing a double penalty for a violation of the *Environment Quality Act* seems quite debatable to us. Indeed, one might wonder why the government would bring criminal proceedings against people that it has already chosen to penalize administratively. After all, a penalty is a penalty. Furthermore, this type of legislation is not common in the environmental laws of other provinces and at the federal level. In fact, double penalties for the same violation are prohibited under section 41 of the *Maritime Transportation Security Act*,¹⁰⁸ section 223 of the *Canada Shipping Act, 2001*,¹⁰⁹ section 237(3) of the *Environmental Protection Enhancement Act* of Alberta,¹¹⁰ section 115(8) of the *Environmental Management Act* of British Columbia,¹¹¹ section 31(8) of the *Clean Air Act* of New Brunswick¹¹² and section 13(1) of the *Environmental Violations Administrative Monetary Penalties Act*.¹¹³ Only Ontario allows for criminal proceedings to be taken, even when a person has already been subjected to an administrative penalty.¹¹⁴

It must be said that deterrence is also a relevant consideration for determining a criminal sentence¹¹⁵ and that a return to compliance may be achieved through the implicit threats of the notice of non-compliance process. Finally, aside from the dual conviction aspect, which seems debatable to us, the management of evidence produced during review or before the TAQ is an issue that will also need to be addressed.

CONCLUSION

The new monetary administrative penalties regime, which was adopted to facilitate the enforcement of the *Environment Quality Act*, raises serious concerns, particularly with regard to respect for human rights and freedoms. This regime, undoubtedly, allows violators to be penalized more quickly and generates more money for the Green Fund. In this sense, it is a sort of accelerated eco-justice. But does this form of eco-justice comply with the standards of our rules of justice?

¹⁰⁶ *Supra* note 23.

¹⁰⁷ *Ibid.*

¹⁰⁸ MTSA, *supra* note 10.

¹⁰⁹ CSA, *supra* note 10.

¹¹⁰ EPEA, Alb, *supra* note 10.

¹¹¹ EMA, BC, *supra* note 10.

¹¹² CAA, NB, *supra* note 10.

¹¹³ EVAMPA, *supra* note 10, s 126.

¹¹⁴ EPA, Ont, *supra* note 10, s 182.1(11).

¹¹⁵ *R v Kenaston Drilling (Arctic) Limited* (1973) 12 CCC (2d) 383; *AG v Laidlaw Environmental Services (Mercier)*, JE 98-117 (SC) at 13; *R v United Keno Hill Mines Limited* (1980) 10 CELR 43 (Territorial Court of the Yukon).

By implementing a universal regime, i.e. a monetary administrative penalty regime that applies to all of the provisions of the *Environment Quality Act* parallel to the criminal penalties that apply to the same provisions, the National Assembly has, in the same law, enacted two regimes that aim to impose penalties on anyone who violates the *Environment Quality Act* and its regulations, even though the monetary administrative penalty regime seems primarily aimed at certain specific objectives. Although it does not impose prison sentences, the monetary administrative penalty regime is likely to have a significant impact on persons who could then be penalized without enjoying all the rights that normally apply when the government seeks to punish someone who violated the law.