



Law Reform  
Commission of  
Saskatchewan

# Administrative Penalties

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## Final Report

March 2012

Administrative penalties are a mechanism for enforcing compliance with regulatory legislation. They are monetary penalties assessed and imposed by a regulator without recourse to a court or independent administrative tribunal. In most cases, administrative penalties are imposed on individuals and businesses that have been licensed to undertake regulated activities. Advocates of administrative penalties suggest that it is neither necessary nor appropriate to make regulation of licensees a matter for the courts. The delay and cost of court proceedings are avoided, and decisions are made by officials acquainted with the purposes of the regulations in issue, rather than by judges who lack such specific expertise. If they are to be an acceptable part of the regulatory framework, administrative penalties must be applied fairly and impartially. Because they are imposed without a hearing in a court, and usually without any other formal hearing, other procedural protections must be in place to ensure that the process for determination of the administrative penalty is fair, and is seen to be fair. The Law Reform Commission undertook an examination of administrative penalties to identify ways in which fairness could be ensured.

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission*, proclaimed in force in November, 1973, and began functioning in February of 1974.

The Commission is incorporated by an Act of the Saskatchewan Legislature. Commissioners are appointed by Order in Council. The Commission's recommendations are independent, and are submitted to the Minister of Justice for consideration.

Projects are initiated by the Commission in response to suggestions from the public and the legal community, or at the request of the Minister of Justice. After preliminary research, the Commission usually issues background or consultation papers to facilitate consultation. Tentative Proposals may be issued if the legal issues involved in a project are complex. Upon completion of a project, the Commission's recommendations are formally submitted to the Minister as final proposals.

At present, the Commission is funded by grants from the Law Foundation of Saskatchewan and the Ministry of Justice and Attorney General.

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## **SUMMARY OF RECOMMENDATIONS**

### **APPEALS**

1. An appeal to the Court of Queen's Bench should be permitted from the imposition of all administrative penalties.
2. Appeal provisions should follow the recommendations in the Commission's report, *Appeals from the Exercise of Statutory Powers of Decision: Final Report*, but consideration should be given in each case to whether appeals on questions of both law and fact would be appropriate.

### **PROCEDURAL FAIRNESS**

Minimum procedural rules should be included in all statutes creating administrative penalties. These should include:

1. Reasonable notice of intention to impose an administrative penalty;
2. An opportunity for the subject of the complaint to be heard and make a written submission before an administrative penalty is imposed; and
3. Reasons for decision given when an administrative penalty is imposed.

## 1. INTRODUCTION

Administrative penalties are a mechanism for enforcing compliance with regulatory legislation. They are monetary penalties assessed and imposed by a regulator without recourse to a court or independent administrative tribunal.<sup>1</sup> It is primarily in this respect that an administrative penalty differs from a fine levied by the court on conviction for a regulatory offence. An administrative penalty is payable when the regulator, not a court, determines that a breach of the regulatory legislation has occurred.<sup>2</sup> A recent survey of the use of administrative penalties in Canada observed that “it is only relatively recently that they have become a favorite tool among regulators, but they have been increasingly used to engender compliance and cooperation from the ‘regulated community’, to secure environmental or consumer protection.”<sup>3</sup> In Saskatchewan, administrative penalties were first introduced in *The Securities Act* in 1995.<sup>4</sup> They are now authorized under ten Saskatchewan statutes, covering subjects from forest management to electrical inspections and gaming.<sup>5</sup>

In most cases, administrative penalties are imposed on individuals and businesses that have been licensed to undertake regulated activities. Administrative penalties are used in these cases to enforce the terms of the license. Advocates of administrative penalties suggest that it is neither necessary nor appropriate to make regulation of licensees a matter for the courts. The delay and cost of court proceedings are avoided, and decisions are made by officials acquainted with the purposes of the regulations in issue, rather than by judges who lack such specific expertise.<sup>6</sup> As the Public Interest Advocacy Centre’s survey of the use of administrative penalties in Canada observed, they “have been heralded by regulators as providing a more flexible and responsive regulatory structure that balances the competing interests of stakeholders.”<sup>7</sup>

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<sup>1</sup> Thus, the Australian Law Reform Commission (ALRC) defined administrative penalties as “sanctions imposed by the regulator, or by the regulator’s enforcement of legislation, without intervention by a court or tribunal”: ALRC, *Principled Regulation: Federal Civil and Administrative Penalties in Australia (Final Report)* (March 2003) at 78.

<sup>2</sup> Because administrative penalties are not characterized as offences, they are not quasi-criminal in nature. Assessment of a penalty is not an offence, nor is a conviction registered.

<sup>3</sup> Amanda Tait, *The Use of Administrative Monetary Penalties in Consumer Protection* (Ottawa: Public Interest Advocacy Centre (PIAC), 2007) at 5.

<sup>4</sup> Section 135.1, titled “Administrative penalty,” of *The Securities Act, 1988*, SS 1988-89, c S-42.2 was adopted by amendment, SS 1995, c 32, s 57.

<sup>5</sup> See Appendix: Administrative penalties in Saskatchewan, below. For a description and analysis of these administrative penalties, see Law Reform Commission of Saskatchewan, *Administrative Penalties: Consultation Paper* (June 2009).

<sup>6</sup> Paul Baker, “Monetary penalties are newest environmental enforcement tool”, *The Lawyers Weekly* 16:18 (September 1996).

<sup>7</sup> Tait, *supra* note 3 at 5.

If they are to be an acceptable part of the regulatory framework, administrative penalties must be applied fairly and impartially. Because they are imposed without a hearing in a court, and usually without any other formal hearing, other procedural protections must be in place to ensure that the process for determination of the administrative penalty is fair, and is seen to be fair. The Law Reform Commission undertook an examination of administrative penalties to identify ways in which fairness could be ensured.

In 2009, the Commission issued a consultation paper on administrative penalties. The paper included a discussion of the use of administrative penalties in Saskatchewan and the issues of process and fairness they raise, and suggested ways in which fairness might be ensured. We received comments from agencies that use administrative penalties, and from members of the Administrative and Labour Law Section of the Canadian Bar Association, Saskatchewan Branch. We thank all those who contributed to this project.

Regulators welcomed the suggestions made in the paper. Two administrative penalty provisions have been amended to incorporate the tentative recommendations made by the Commission,<sup>8</sup> and two newly created administrative penalties have also followed our approach.<sup>9</sup>

This report sets out the Commission's final proposals on administrative penalties. It provides a guide that we believe should be followed in all administrative penalty legislation in Saskatchewan.

## **2. ENSURING FAIRNESS**

### ***2.1. Criticisms of administrative penalties***

Exclusion of the courts or other decision-makers independent of the regulator, when administrative penalties are imposed, has been controversial. The issue is most acute when there is no statutory appeal from the regulator's decision, leaving an aggrieved party only the

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<sup>8</sup> *The Forest Resources Management Amendment Act, 2010*, SS 2010, c 13, and *The Environmental Management and Protection Act, 2010*, SS 2010, c E-10.22.

<sup>9</sup> *The Management and Reduction of Greenhouse Gases Act*, SS 2010, c M-2.01, and *The Payday Loans Act*, SS 2007, c P-4.3.

limited and often uncertain option of seeking judicial review under the general powers of the courts to supervise administrative action. In Saskatchewan, the question of review of administrative penalties was raised in the legislature when *The Forest Resources Management Act* was amended in 2002 to extend their use.<sup>10</sup> In 2006, the report of the *Minister's Task Force on Forest Sector Competitiveness* recommended that "a process be established for allowing appeals of administrative penalties to an independent board."<sup>11</sup> This recommendation was adopted in part in 2010, when the Act was amended to allow for an appeal to the court.<sup>12</sup> It has been observed that, because administrative penalties are imposed directly by the regulator, they "are often thought of as being negotiated or imposed in the shadow of the formal legal system."<sup>13</sup>

Some critics have argued that administrative penalties are, despite their characterization by regulators and legislators, essentially criminal or quasi-criminal offences. If this is the case, extra-judicial assessment of "guilt" would likely conflict with section 11 of the *Charter of Rights and Freedoms*.<sup>14</sup> Other commentators are troubled by the dual role of the regulator as investigator of breaches of the administrative regime and adjudicator of the issues. If there is a dispute about liability, the regulator appears to sit in judgment of its own case. In most administrative contexts, prosecution and adjudication are separated.<sup>15</sup>

The constitutionality of administrative penalties was addressed in 2004 by the Supreme Court of Canada in *Martineau v MNR*.<sup>16</sup> The *Martineau* decision establishes the proposition that administrative penalties are not objectionable in principle; but the decision is unlikely to end questions about administrative penalties. Although the adequacy of safeguards was not directly in issue in *Martineau*, the court assumed that the administrative regime met the

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<sup>10</sup> Saskatchewan, Legislative Assembly, *Legislative Debates (Hansard)*, 24th Leg, 3rd Sess (3 July 2002) at 2486 [Hansard].

<sup>11</sup> *Minister's Task Force on Forest Sector Competitiveness*, (Regina: Saskatchewan Environment, 2006) at 18.

<sup>12</sup> *The Forest Resources Management Amendment Act, 2010*, SS 2010, c 13.

<sup>13</sup> Tait, *supra* note 3 at 9 [footnote omitted].

<sup>14</sup> Peter Hogg, who has written extensively on the *Charter*, made the contention in strong terms in an Opinion Letter dated October 17, 2005, written on behalf of the Retail Council of Canada and presented at hearings on Bill C-19, *An Act to amend the Competition Act*.

<sup>15</sup> Thus independent tribunals or review panels are often created by legislation. Nearly 50 administrative tribunals adjudicate disputes between citizens and government agencies in Saskatchewan. See Law Reform Commission of Saskatchewan, *Model Code of Administrative Procedure for Saskatchewan Administrative Tribunals* (October 2005).

<sup>16</sup> 2004 SCC 81, [2004] 3 S.C.R. 737. The court upheld provisions in the *Customs Act* allowing customs officials to declare property illegally imported into Canada forfeit without obtaining a court order. Although the provision in question was not an administrative penalty in the strict sense, it is analogous in allowing a regulatory sanction to be imposed without recourse to the courts.

minimum standards of natural justice, and that its purpose was truly regulatory rather than punitive.

The Supreme Court of Canada has held that:

[T]here is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual....<sup>17</sup>

Administrative penalties have become part of Saskatchewan administrative law, and are likely to be more widely used in the future. In the Commission's opinion, a successful challenge of administrative penalties on the ground that they exclude the courts is unlikely. However, procedural fairness is a core concept in administrative law. The courts have developed "principles of natural justice" to ensure procedural fairness in all regulatory and administrative contexts. Natural justice requires that administrative rules be applied in an unbiased fashion, and that persons subject to them should have an opportunity to be heard before a decision is finalized. If an administrative penalty regime fails to meet this test, it will almost certainly be held to be unacceptable by the courts.

This report does not question the usefulness or desirability of administrative penalties. Rather, it seeks to identify the requirements of an administrative penalty regime that will meet the fairness requirements the courts can be expected to impose under the rules of natural justice.

## **2.2. Appeals**

The principles of natural justice are flexible. The courts have not insisted on rigid formulas. The question is essentially practical: does the administrative regime produce fair results? Administrative penalties have been accepted by the courts in principle, even without a formal hearing before an independent adjudicator. But the courts will undoubtedly expect procedural fairness to be protected in other ways. A broad right to appeal to an independent adjudicator is an effective means of ensuring fairness, perhaps even a cure for some inadequacies when the

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<sup>17</sup> *Cardinal v Kent Institution*, [1985] 2 SCR 643 at para 14. This principle has frequently been reiterated by the court.

penalty is initially imposed.

A right to appeal an administrative action, including imposition of an administrative penalty, exists only if it is specifically provided by statute. As Jones and de Villars state in their *Principles of Administrative Law*:

There is no legal or constitutional requirement that an appeal should exist from any decision made by a statutory delegate.

It is possible to find numerous examples where legislation has made no provision for an appeal, whether to another step in the administrative hierarchy or to the courts.<sup>18</sup>

However, appeals from many types of administrative decision are provided by statute. The Commission has concurrently recommended that appeals should lie from almost all administrative decisions.<sup>19</sup> Until 2010, three of the eight Saskatchewan statutes authorizing administrative penalties did not allow appeals to the courts. Now only *The Alcohol and Gaming Regulation Act, 1997* does not, and it permits the person facing a penalty to apply for a hearing before the Liquor and Gaming Licensing Commission.<sup>20</sup> Two newly-adopted administrative penalty systems also allow appeals. A recent review of administrative penalties in Canada observed that “most administrative penalties provide for a right of review, although typically not before the penalty becomes enforceable.”<sup>21</sup> The lack of a right of appeal under *The Forest Resources Management Act* prior to 2010 was criticized by both the forest industry and others. Failure to provide for appeals from all administrative penalties was the most obvious and contentious issue regarding administrative penalties in Saskatchewan. In the Commission’s opinion, it is important to ensure that all administrative penalties created under Saskatchewan legislation include a right of appeal.

It appears that, at least in one case, Saskatchewan legislators were content to create

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<sup>18</sup> David Phillip Jones & Anne S de Villars, *Principles of Administrative Law*, 4th ed (Scarborough, Ont: Carswell, 2004) at 546.

<sup>19</sup> Law Reform Commission of Saskatchewan, *Appeals from the Exercise of Statutory Powers of Decision: Final Report* (March 2012).

<sup>20</sup> SS 1997, A-18.011. Under this Act, a person against whom an administrative penalty is imposed may apply for a hearing before the Liquor and Gaming Licensing Commission. In practice, this review mitigates the lack of a right of appeal to the courts. However, since the Commission has recommended in its report *Appeals from the Exercise of Statutory Powers of Decision: Final Report*, *supra* note 19, that appeals should ordinarily be available from administrative decisions, it is reluctant to make an exception here.

<sup>21</sup> Tait, *supra* note 3 at 10.

administrative penalties without a right of appeal because judicial review will be available in any case.<sup>22</sup> Judicial review is essentially a common law right. The courts have always exercised a jurisdiction to supervise decisions made by public officials. On judicial review, a court has the power to set aside decisions where the regulator has exceeded his or her jurisdiction or failed to adhere to the rules of natural justice. There is little doubt that judicial review of all administrative penalties is available.

However, the scope of judicial review is limited, and the law governing it is difficult and uncertain. It is not an appeal proceeding, and not a replacement for an appeal in cases in which a review on the merits is appropriate. In its report *Appeals from the Exercise of Statutory Powers of Decision: Final Report* the Commission has argued that a properly structured appeal process is preferable to judicial review.

If the regulatory system is to work smoothly and efficiently, the imposition of penalties and other administrative sanctions should be informed by knowledge of the structure and purpose of the regulatory regime and final decisions should be reached with a minimum of delay and expense. Some regulators and administrative law experts argue that appeals can compromise these goals. Thus Baldwin and Cave, in *Understanding Regulation: Theory, Strategy and Practice*, while recognizing that appeals are often viewed as a useful safeguard, also note that:

1. Appeals may increase delays and costs;
2. Differences between the policies favored by regulators and those applied on appeal may produce confusion and misunderstanding of the expectations of the regulatory system;
3. Appeals involving legalistic arguments before judges or other generalist decision makers may provide less timely and less expert decisions than decisions by specialists; and
4. Appeals may be regarded as the “real decision,” leading to a proliferation of appeals, delay, and expense.<sup>23</sup>

There is little evidence that these are serious problems in Saskatchewan when appeals from administrative penalties and other administrative decisions are allowed. Particularly when a penalty can be imposed without a hearing, as is the case under most Saskatchewan administrative penalty legislation, the balance of rights and efficiency must favour a right to

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<sup>22</sup> Hansard, *supra* note 10 at 2486, regarding Bill 65: *The Forest Resources Management Amendment Act, 2002*.

<sup>23</sup> Robert Baldwin & Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (Oxford: Oxford University Press, 1999) at 295.

appeal. As the Australian Law Reform Commission has observed:

When penalties are imposed administratively by a regulator, many of the benefits of independence and transparency that are inherent in a court-imposed penalty scheme may be lost. Here...the value of an appeal and review mechanism becomes more pronounced.

The Australian Commission concluded that:

Despite [the] disadvantages, the ALRC considers that the public interest in regulators acting in a consistent, fair and transparent manner demands that regulators be accountable for their decisions through the provision of systems of appeal and review.<sup>24</sup>

Some commentators suggest that no appeal is necessary when an administrative penalty involves matters that are not really open to dispute. An example might be a penalty for failure to obtain a required permit to carry out a specified undertaking. The penalties imposed under *The Electrical Inspection Act* and *The Gas Inspection Act* may fit within this definition, although these Acts in fact provide for both internal review and appeal. It may be that the drafters of legislation such as the former *Forest Resources Management Act* omitted to permit appeals on this ground. However, there is room for doubt. Under *The Forest Resources Management Act*, penalties can be imposed for a variety of purposes that may involve questions of judgment and assessment of evidence. For example, a penalty may be imposed if the subject “harvests forest products in contravention of the terms of a licence, an approved plan or any applicable standards.”<sup>25</sup> In any event, there is no harm in making provision for appeals even if circumstances in which an appeal will be taken are rare.

The Commission does not believe that the arguments against permitting appeals from imposition of administrative penalties are persuasive. In the Commission’s opinion, making an appeal available in all cases when an administrative penalty is imposed is the most important reform of the administrative penalty regime that the province can make.

Statutes permitting appeals from administrative decisions may allow appeals on questions of

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<sup>24</sup>ALRC, *supra* note 1 at 688-689, 704.

<sup>25</sup>SS 1996, c F-19.1, s 78(1)(c).

law or questions of law and fact. If the penalty is imposed after a hearing, the appeal is analogous to an appeal from a lower court in ordinary civil proceedings. In most cases, such appeals are limited to questions of law. Some administrative penalties are imposed after a hearing (as, for example, under *The Securities Act, 1988*) but others can be imposed by an official without a hearing.

Obviously, there are greater concerns about fairness when there is no hearing. It may be more appropriate in at least some cases to allow appeals on questions of fact as well as law when there is no hearing, but it is difficult to state a general rule. The extent to which procedural safeguards are in place, the subject matter the penalty relates to, and the size of the penalty are all factors that might be considered. In its report, *Appeals from the Exercise of Statutory Powers of Decision: Final Report*, the Commission concluded that, as a general rule, appeals on questions of fact as well as law should be allowed. However, policy makers should give careful consideration to the question of whether an appeal on questions of fact should be allowed in a particular penalty regime.

### **Recommendations: Appeals**

1. An appeal to the Court of Queen's Bench should be permitted from the imposition of all administrative penalties.
2. Appeal provisions should follow the recommendations in the Commission's report *Appeals from the Exercise of Statutory Powers of Decision: Final Report*, but consideration should be given in each case to whether appeals on questions of both law and fact would be appropriate.

### **2.3. Procedural fairness**

The principles of natural justice apply to all administrative proceedings, including imposition of an administrative penalty. The principles have been summarized as follows:

The first two...principles of natural justice are that...person[s] whose interests may be affected by a decision should firstly be given notice of the case to be met or the allegations...against them and secondly, an opportunity to be heard. The third fundamental principle of natural justice is that the decision maker should

be disinterested and impartial. The policy reason behind all three aspects of the rules of natural justice is the same: namely, not only must justice be done, but it must manifestly be seen to be done. It is a matter of important public policy that there be no lack of public confidence in the impartiality of adjudicative tribunals.<sup>26</sup>

The courts will undoubtedly expect regulators applying administrative penalties to act fairly and they can be expected to overturn penalties if minimum standards of fairness, as defined by the courts, have not been observed. It should be noted that, because the courts are concerned that justice must be seen to be done, even actions that are motivated by an intention to be fair may fail to meet the required standard. However, the extent of the duty imposed on regulators varies. It has been noted that:

The content of procedural fairness ranges across a spectrum. At one end of the spectrum procedural fairness emulates the procedures of adversarial litigation whereby affected persons are given notice that a decision will be made, and are allowed an oral hearing with a right to legal representation and to cross-examination. As one moves along the spectrum, depending on the circumstances of each case and the relevant statutory provisions, the content of procedural fairness may reduce, for example, by allowing for written submissions rather than an oral hearing, or by not providing for legal representation.<sup>27</sup>

When the principles of natural justice are applied to administrative penalties, a basic question is where the procedure imposing the penalty fits in the spectrum of procedural fairness. Although administrative penalties are usually imposed by the regulator instead of an independent decision maker, and often without holding a full hearing, the courts have not found these procedures to be in violation of the principles of natural justice for those reasons alone. It is clear from the *Martineau* decision that hearings are not always necessary when administrative penalties are imposed. Generally, administrative penalties fall on the lower end of the spectrum, but basic procedural protections will still be required by the courts.

When a hearing is required before a penalty is imposed, procedural protections based on the

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<sup>26</sup> James T Casey, *The Regulation of Professions in Canada*, loose-leaf (Scarborough, Ont: Carswell, 1994) at 9-1.

<sup>27</sup> ALRC, *supra* note 1 at 494. See also Jones and de Villars, *supra* note 18 at ch 9.

principles of natural justice are usually in place. For example, hearings conducted by the Saskatchewan Financial Services Commission under *The Securities Act, 1988* give the subject of the complaint an opportunity to be heard, present evidence, and respond to allegations. The standards of procedural fairness applied by the Commission are high. Basic procedural protections are specified in some statutes that do not require hearings. For example, *The Electrical Inspection Act* requires notice of the intention to impose a penalty and gives the subject of the complaint the right to make a written response. In the past, no procedural rules were specified in many administrative penalty provisions. This is changing; for example, the amendments to *The Forest Resources Management Act* in 2010 incorporate procedural rules.

The Commission believes it would be desirable to include some minimum procedural rules in all Acts creating administrative penalties. These should include:

1. Reasonable notice of intention to impose an administrative penalty;
2. An opportunity for the subject of the complaint to be heard and make a written submission before an administrative penalty is imposed; and
3. Reasons for decision should be given when an administrative penalty is imposed.

Basic rules such as these serve to remind decision-makers that procedural fairness must be maintained when administrative penalties are imposed. They are minimums. Agencies should be encouraged to develop procedural guidelines adapted to their circumstances and to provide training for staff charged with adjudication of penalties.

### **Recommendations: Procedural Fairness**

Minimum procedural rules should be included in all statutes creating administrative penalties. These should include:

1. Reasonable notice of intention to impose an administrative penalty;
2. An opportunity for the subject of the complaint to be heard and make a written submission before an administrative penalty is imposed; and
3. Reasons for decision should be given when an administrative penalty is imposed.

## **APPENDIX: Administrative penalties in Saskatchewan**

*The Alcohol and Gaming Regulation Act, 1997, S.S. 1997, c. A-18.011, s. 39.1 (as amended 1998, c.16, s.8; 2000, c.36, s.14)*

*The Electrical Inspection Act, 1993, S.S. 1993, c. E-6.3, s. 28.2 (as amended 2004, c.56, s.15)*

*The Environmental Management and Protection Act, 2010, S.S. 2010, c. E-10.22, s. 88, 89*

*The Forest Resources Management Act, S.S. 1996, c. F-19.1, s. 78, 78.1 (as amended 2002, c.31; 2010, c.13, s. 45)*

*The Gas Inspection Act, 1993, S.S. 1993, c. G-3.2, s. 35.2 (as amended 2004, c.11, s.16)*

*The Management and Reduction of Greenhouse Gases Act, S.S. 2010, c. M-2.01, s.78, 79*

*The Payday Loans Act, S.S. 2007, c. P-4.3, s. 17, 42, 51*

*The Saskatchewan Insurance Act, R.S.S. 1978, c. S-26, s. 475.3 (as amended 1998, c.35, s.40)*

*The Securities Act, 1988, S.S. 1988-89, c. S-42.2, s. 135.1 (as amended 1995, c.32, s.57)*

*The Trust and Loan Corporations Act, 1997, S.S. 1997, c. T-22.2, s.76*