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Administrative Monetary Penalties for Liquor Violations

JOEL WELCH, M.A., J.D.*

Background

Liquor control has been a fixture in Ontario even before the dry teetotaler years of prohibition, 1916-1927. Inevitably after the arrival of the first Europeans, the regulation of liquor followed on their heels. Booze even made it into the founding legislation of the Dominion of Canada itself, the *British North American Act* of 1867, which mentions saloons and taverns in section 92(9), the division of powers part of the *Constitution*.¹ But the essential question remains the same over time: how does the state effectively enforce its liquor laws on the sellers, manufactures, and consumers of alcoholic beverages all whom are not overly enthusiastic about the liquor laws in the first place?

In 1996, the Ontario Government modified its approach to liquor control by passing the *Alcohol and Gaming Regulation and Public Protection Act* (“AGRPPA”). The act authorized the creation of the Alcohol and Gaming Commission of Ontario (“AGCO”) in 1998, merging the pre-existing Liquor Licence Board of Ontario and the Gaming Control Commission.²

But what should be of great interest to any legal practitioner interested in regulatory offences, the Act also set out the legislative authorization for the AGCO to use Administrative Monetary Penalties (“AMPs”). Section 14.1 of the AGRPPA states:

Monetary penalties

14.1 (1) The board of the Commission may establish, subject to the approval of the Minister, a schedule of monetary penalties that may be imposed with respect to contraventions of those Acts and regulations administered by the Commission that are prescribed by the regulations. 2006, c.34, s.1(2).

* Student-at-Law, Adler Bytensky Prutschi Barristers.

1 *The Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 at s. 92(9).

2 *Alcohol and Gaming Regulation and Public Protection Act*, 1996, S.O. 1996, c. 26 [AGRPPA].

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AUTHORS:

Mr. Justice Rick Libman, B.A., LL.B., LL.M.

Bernard Aron, B.A., J.D., LL.M.

John P. Allen, B.A., B.Sc., LL.B., LL.M.

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Registrar's power to impose penalty

(2) The Registrar may impose monetary penalties set out in the schedule established by the board of the Commission. 2006, c.34, s.1(2).

Guidelines to be considered

(3) In deciding to impose a monetary penalty, the Registrar shall have regard to the guidelines governing the imposition of such penalties established by the board under section 4. 2006, c.34, s.1(2).

Use of money

(4) Money received from monetary penalties may be used for the following purposes only:

1. Public awareness, education and training programs for the general public in relation to alcohol and gaming.
2. Education and training programs for licence holders, permit holders and other persons governed by the Acts and regulations administered by the Commission that are prescribed by the regulations. 2006, c.34, s.1(2).

But it was not until January, 2009, that the AGCO brought online a system of AMPs as compliance tools. Instead of being restricted to providing warnings or laying regulatory charges on offenders, an AGCO liquor inspector could now issue an AMP to a licensee for violations of the Ontario *Liquor Licence Act* and liquor regulations. Similar to a ticket issued after an investigation, an AMP can simply be paid out by the bar owner or liquor manufacturer who need not attend court nor has to suffer the uncertainty of not knowing if his or her liquor licence will be suspended, or the length of such suspension.

AGCO's Use of AMPs

According to the AGCO, AMPs are "to act as a bridge between a simple warning and a suspension of a licence or registration, and to provide the AGCO with an added compliance tool for working with licensees and registrants before a significant suspension or revocation may be necessary."³ AMPs act as part of an escalating regulatory set of options used by the AGCO to gain compliance. However, they are not used for all liquor violations.⁴ The offences of serving intoxicated patrons, serving to minors and permitting

narcotics in a licensed establishment remains subject only to a suspension or revocation of the licensee's licence.⁵

In terms of process, when the decision is made by the Registrar of the AGCO to issue an AMP which they refer to as an Order of Monetary Penalty ("OMP"), they must serve it with details of the alleged infraction on the licensee. The AGCO's webpage states starkly that an "OMP is a legal Order and non-payment may result in further action being taken against" the licensee.⁶ If the licensee wishes to dispute the AMP, they must file a completed Form 1236 within 15 days. The matter then goes to the Board of the Alcohol and Gaming Commission of Ontario ("the Board") who will adjudicate the matter.⁷ Generally, there are two AGCO Board members who will sit on the appeal. The Board only has the power to confirm or set aside the monetary penalty imposed by the Registrar and cannot change the penalty's monetary amount.⁸ It is a quasi-judicial hearing and uses its own Rules of Practice.⁹ Furthermore, section 14(7) of the AGRPPA states that "A decision of the board under subsection (6) is final and not subject to appeal to the Divisional Court under section 11."¹⁰

And the fines for AMPs lodged can be very substantial. Ontario *Regulation 282/07* sets out the mechanism of the prescribed fines as authorized by s. 14.1 of AGRPPA. If a licensee is found to permit drunkenness or overcrowding at his or her bar or restaurant, a fine of \$5000.00 can be leveled.¹¹ Service outside of proscribed hours or use of illegal liquor can cost the bar owner up to \$3000.00.¹² Permit removal of liquor from licensed premise or failure to clear signs of service within 45 minutes after last call can fetch a fine of \$2000.00.¹³ Whereas if the bar has no light meals available or if an unauthorized person is found behind the bar, the fine can be up to \$1000.00.¹⁴ Even the failure to post an awareness sign on alcohol fetal syndrome as per the 2007 Sandy's Signage Law can cost the bar owner up to \$750.00.¹⁵

⁵ *Ibid.*

⁶ *Hearings and Appeals under the Liquor Licence Act*, online: Alcohol and Gaming Commission of Ontario <<http://www.agco.on.ca/en/f.hearings/fl.alcohol.html>>.

⁷ AGRPPA, *supra* note 2, s. 14(5).

⁸ *Ibid.*, s. 14(6).

⁹ *Revised Rules of Practice (2008)*, online: Alcohol and Gaming Commission of Ontario <<http://www.agco.on.ca/pdf/Non-Forms/rules2008e.pdf>>.

¹⁰ AGRPPA, *supra* note 2, s. 14 (7).

¹¹ *Schedule of Monetary Penalties: Liquor Licence Act and its Regulations*, online: Alcohol and Gaming Commission of Ontario <http://www.agco.on.ca/pdf/Non-Forms/schedule_mon_pen_lla_en.pdf>.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

³ *Monetary Penalties*, online: Alcohol and Gaming Commission of Ontario <<http://www.agco.on.ca/en/b.alcohol/b12.monetarypenalties.html>> [Monetary].

⁴ *Ibid.*

Yet for the manufacturers of liquor, the fines are substantially greater in amount. For example, section 2(1) of the *Regulation 720/90* states: “A manufacturer of liquor or an agent or employee of a manufacturer shall not directly or indirectly offer or give a financial or material inducement to a person who holds a licence or permit under the Act or to an agent or employee of the person for the purpose of increasing the sale or distribution of a brand of liquor.”¹⁶ The fine for a breach of this section is up to \$50,000.

Anyone acquainted with the bar business knows that alcohol distributors and manufacturers provide a great deal of swag such as beer taps, t-shirts, golf bags, beer coasters, wall ornaments, and at times discounted product to bar owners in order to get their brand to the marketplace and to capture brand loyalty. There are also special trips, sporting events, and educational seminars for selected bar owners and their staff if the bar sells sufficient product. And the bar certainly does not pay for any of it except through regular sales. The section clearly is written to prohibit inducements by manufacturers to bar owners but as a business practice it happens in one form or another on a daily basis. AMPs may be the tool to use to enforce the regulation. Or in the alternative, the government should change the regulation because its non-enforcement makes a mockery of the law.

Issues of Fairness and Bias

AMPs can be seen as another tool in the liquor inspector’s toolkit to ensure compliance. This makes sense. It allows for greater discretion of the liquor inspector to do his or her job. Instead of giving a warning that may or may not be heeded or proceeding to the opposite end of the severity scale with a licence revocation or suspension, middle ground can be found. However, the danger is that AMPs will be used more like a sledgehammer rather than like a stick.

On the AGCO webpage, it states that the Registrar “will look at each case individually” and will consider the following criteria when deciding whether or not to impose a monetary penalty:¹⁷

- Is the monetary penalty likely to help ensure future compliance by the licensee or registrant?
- What is the disciplinary history of the licensee or registrant, such as prior written warnings, conditions or terms, monetary suspensions, revocations and/or prosecutions?
- How was the contravention discovered or disclosed?
- Did the contravention involve actual or potential injury or loss to persons, property, or both?

- What is the type size and location of the licensee, registrant or registered business?
- Are there any mitigating circumstances, including a good compliance history?
- Is there a need for general or specific deterrence?

But what does all of this mean? It means that the decision on whether to issue an AMP will be based on the liquor inspector’s discretion. It is all fact determinate and coloured by the circumstances. As such, it gives a liquor inspector tremendous power. This directly brings into play the credentials, professionalism, and the attitude of liquor inspectors.

Hence, due process is of critical importance precisely because of the wide latitude of discretion given to AGCO’s enforcement officers. Licensees, like anyone charged with a criminal or regulatory offence, may contest their guilt. Not all those who are charged are guilty. But unlike other types of charges, the fact that an AMP can only be appealed speaks for itself. It is not really an appeal. It is a trial. The privative clause in section 14(7) of the *APRPPA* is highly worrisome for this reason. Thankfully, section 96 courts have preserved the power of judicial review in the area of administrative law. Regardless of what the AGCO or the Ontario Government may think, the Board’s decision is not final *per se*. The Federal Courts can adjudicate on the Board’s decision based on its standard of review which entails the legal concepts of correctness and reasonableness. This makes the Board more palatable for licensees to accept.

However, an appeal of the Board’s decision to a Federal Court is expensive and generally has a poor chance of success. And judicial review does not alleviate issues of apparent bias of the Board. Some may argue that the Board is impartial and independent, thus there is no issue of bias. This is the view found on the AGCO webpage which states, “The Board hears evidence to make decisions on the merits of each case completely independent of all parties, including the Registrar of Alcohol and Gaming (the Registrar), the inspectors and investigators.”¹⁸ It goes on to say, “The Board is supported by the Hearings Department whose staff is neutral and impartial.”¹⁹ Yet, this view is vulnerable to attack.

Nice impartial language on the AGCO’s webpage cannot hide the fact that the Board is a part of the AGCO which also includes an enforcement branch called the Investigation and Enforcement Bureau.²⁰ This bureau includes members of the Ontario Provincial

¹⁸ *Message from the Manager of Hearings*, online: Alcohol and Gaming Commission of Ontario <<http://www.agco.on.ca/en/f.hearings/f.hearings.html>>.

¹⁹ *Ibid*.

²⁰ *Organizational Structure*, online: Alcohol and Gaming Commission of Ontario <<http://www.agco.on.ca/en/a.about/a2.orgstructure.html>>.

¹⁶ R.R.O. 1990, Reg. 720, s. 2(1).

¹⁷ *Monetary*, *supra* note 4.

Police and contains a unit known as the Liquor Enforcement Section which officially “works independently and in partnership with local police services to conduct Liquor Licence Act investigations at licensed premises, monitor liquor licensed premises for compliance with the Liquor Licence Act and investigate complaints/breaches of the LLA.”²¹

But the “independently” wording does not square with the fact that both the Board and the Liquor Enforcement Section have offices in the same building at 90 Sheppard Avenue East in Toronto.²² One can imagine that members of both groups interact on a daily basis perhaps while having a cigarette outside the building or waiting in line for coffee. Indisputably they both receive their pay cheque from the same organization. This close fraternization hurts the perception of impartiality of the Board. As with the example of Justice of the Peaces, which were removed from police stations several decades ago because of the exact same kind of issue, the Board and its Hearing Department staff should be located elsewhere.

Moreover, members of the Board are appointed by the Lieutenant Governor in Council of Ontario on the advice of the Ontario Government. These positions are largely political in nature. Partisan politics is by definition biased. Hence the process of selecting Board members itself is problematic. Perhaps the only way to lessen this type of criticism is to have an open and transparent selection process based on merit rather than the current method of using political appointees.

AMPs: Effective Law Enforcement?

When making empirical assessments, one generally must rely on statistics and measureable data. Unfortunately to the author's knowledge, the AGCO has not publically released any statistics either in written form or through a spokesperson on the number of AMPs its inspectors have issued nor the number of which have been contested. But since AMPs only took effect on January 1, 2009, the numbers may merely not be there to any significant degree. The only statistics which may provide context to the reader is that in March of 2009 when an AGCO spokesperson told CTV News that in 2008 there were only 404 suspensions given out among the 17,500 licensed establishments in Ontario.²³

²¹ *Ibid.*

²² *Contact Information*, online Alcohol and Gaming Commission of Ontario <<http://www.agco.on.ca/en/t.tools/t1.contact.us.html>>.

²³ “How responsible should bar establishments be for our drunkenness?” CTV (21 March 2009), online: CTV <http://www.ctv.ca/CTVNews/W5Archive/20090320/WFIVE_bars_090321>.

As such, we do not know how often AMPs are being used by liquor inspectors. But something we do know is that drunken people will arrive drunk, get drunk, or leave drunk at places where alcohol is served. Since being drunk at a licensed establishment is an offence under the regulations, it is impossible for a bar to be in compliance with the liquor laws 100 per cent. Saying that you will not find an intoxicated person at a bar is like saying you will not find a fish in water. It happens occasionally despite everything a bar owner does to prevent it. All enforcement has limits. What AMPs and other liquor enforcement tools can do is make the incidents of liquor infractions less common. They can never be completely eliminated.

Then there is the danger of push back. If AMPs are overused and the quasi-judicial process is perceived as unfair and biased, licensees may simply calculate AMPs as a cost of doing business. In fact, many bar owners like AMPs because they know what happens to them immediately when they are caught violating the regulations and can plan accordingly in advance. As a result, liquor control compliance may actually decline. The AGCO has tacitly acknowledged this problem by bringing online a system of risk-based licensing which is being phased in across the province in 2010.²⁴ The system involves categorizing licensees during the initial granting or renewal of the licence into a Level I, Level II or Level III risk designation, or with no designation based on a risk assessment.²⁵ This new system of risk-based licensing allows the AGCO to scrutinize and focus its resources at the more problematic licensees.

Conclusion

Overall, the effectiveness of the use of AMPs in ensuring compliance with Ontario liquor laws remains unknown. But the practical concern of effectiveness is indubitably linked to the principle of fairness. The relationship between these two elements is not artificial. It is human nature to want to be treated fairly or people will push back. If the process is not perceived as fair, key stakeholders will not accept it and will view it as just another aspect of the game. In fact, they will do everything they can to manipulate the process. The result will be that AMPs will become ineffective in what they are supposed to do: an additional compliance tool for liquor inspectors to use. On the other hand, if AGCO utilizes AMPs in a reasonable and fair way, bar owners and liquor manufacturers may accept it more readily resulting in greater compliance. Mutual respect is the essential ingredient.

²⁴ *Risk-Based Licensing*, online: Alcohol and Gaming Commission of Ontario <<http://www.agco.on.ca/en/b.alcohol/b11.riskbasedlicensing.html>>.

²⁵ *Ibid.*

Rules Away: *Provincial Offences Act* Rules of Court

JUSTICE RICK LIBMAN

One of the curious omissions in the Ontario *Provincial Offences Act*¹ is the lack of statutory authority to create rules of court. Perhaps curious is not quite the right word, since there is, as I shall discuss, a mechanism for making such rules of court. However, the *Criminal Code*² does expressly create a rule making authority for the courts that possess jurisdiction under it, unlike the provincial offences court which does not have a similar power under the *Provincial Offences Act*. In this article I would like to comment on the rule making authority of courts, and to raise the question whether the provincial offences court should be given a similar power to enact rules of court for itself.

Under the *Code*, every superior court of criminal jurisdiction and every court of appeal is given authority to make rules of court. Section 482(1) states in this regard that such rules are not to be “inconsistent” with the *Code* or any other Act of Parliament. Further, any such rules may be made to “apply to any prosecution, proceeding, action or appeal, as the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to any such prosecution, proceeding, action or appeal.”

There is a similar rule making power for the Ontario Court of Justice. Under the terms of s. 482(2), the Court may likewise enact rules of court which are not inconsistent with the *Code* or any other Act of Parliament, and which are “applicable to any prosecution, proceeding, including a preliminary inquiry or proceeding within the meaning of Part XXVII [summary convictions], action or appeal, as the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to the prosecution, proceeding, action or appeal.”

Subsection (3) sets out the matters for which rules of court may be made. These include:

- generally to regulate the duties of the officers of the court and any other matter considered expedient to attain the ends of justice and carry into effect the provisions of the law;³

- to regulate the sittings of the court or any division thereof, or of any judge of the court sitting in chambers, except in so far as they are regulated by law;⁴
- to regulate the pleading, practice and procedure in criminal matters, including pre-hearing conferences held under section 625.1, proceedings with respect to judicial interim release and preliminary inquiries.⁵

Rules of court which are enacted by the Ontario Court of Justice are subject to the approval of the lieutenant governor in council of the province of Ontario.⁶ Rules of court that are made under the authority of s. 482 must be published in the *Canada Gazette*.⁷ The Governor in Council has the authority to “secure uniformity in the rules of court in criminal matters”; all such “uniform rules” so made prevail and have effect as if enacted by the *Code*.⁸

Acting under s. 482, both the Ontario Superior Court of Justice and Ontario Court of Justice have enacted rules of court. For our purposes, I will note some of the subjects that have given rise to rules of court made under the authority of s. 482(2), that is, by the Ontario Court of Justice. One of the reasons for focusing on these rules is that if a rule making power were to be added to the *Provincial Offences Act*, it would be the Ontario Court of Justice, consisting of judges and justices of the peace, which would be responsible for enacting and implementing such rules of court.

The Rules of the Ontario Court of Justice in Criminal Proceedings went into effect on 1 January 1998. This marked the first time in the Court’s history that such rules were enacted. In accordance with the procedure mandated under s. 482(2), the rules were passed by the Court and approved by the Lieutenant Governor in Council; they have been published in the *Canada Gazette*.⁹ The rules are also available on the website of the Ontario Court of Justice on the province’s Guide to Ontario Courts.¹⁰

4 Section 482(3)(b).

5 Section 482(3)(c).

6 Section 482(2).

7 Section 482(4).

8 Section 482(5).

9 *SI/97-133*. See *Canada Gazette*, Part II, Vol. 131, No. 24, dated 26 November 1997.

10 www.ontariocourts.on.ca

1 R.S.O. 1990, c. P33.

2 R.S.C. 1985, c. C-46.

3 Section 482(3)(a).

Among the rules provisions are those permitting the Chief Justice or Regional Senior Justice of the Ontario Court of Justice to issue practice directions;¹¹ applications for removal as counsel of record;¹² applications for adjournment;¹³ constitutional issues;¹⁴ pre-hearing conferences;¹⁵ and exclusion of evidence applications¹⁶ under s. 24(2) of the *Charter of Rights and Freedoms*.¹⁷ There is also a rule giving the Court discretion to permit non-compliance with the rules.¹⁸ Time periods are imposed which regulate the giving of notice of applications under the rules, as well as filing and serving requirements so as to make the opposite party and the Court aware of the position of both parties on the merits of the matter.

The power to make rules pursuant to s. 482(2) of the *Code*, as the above rules provisions demonstrate, is restricted to matters which are within the jurisdiction of the Court. That is, the Court cannot add to its jurisdiction through the enactment of rules of court.¹⁹ The rule-making authority of the Court is thus limited to enacting rules which are consistent with the provisions of the *Code*, and not creating matters of substance. In summary, the rules contemplated by s. 482 of the *Code* are rules of procedure; they do not confer substantive jurisdiction or give the Court a power it does not already possess.

Under the *Provincial Offences Act*, there is a regulation which addresses matters such as the notice period required for bringing applications in provincial offences proceedings, entitled, *Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings*.²⁰ It contemplates the bringing of applications and motions which are provided for by the Act or the Rules, without specifying their nature.²¹ As a result, there is a process in place for giving notice of an application, for example, to seek an adjournment, since the provincial offences court has a power to adjourn a trial or hearing.²²

11 Rule 7.

12 Rule 24.

13 Rule 25.

14 Rule 26.

15 Rule 27.

16 Rule 30.

17 *Canadian Charter of Rights and Freedoms*, Schedule B, *The Constitution Act*, 1982.

18 Rule 2.

19 *R. v. H. (E.F.)* (1997), 1997 CarswellOnt 1262, [1997] O.J. No. 1110, (sub nom. *R. v. H. (E.)*) 33 O.R. (3d) 202, 98 O.A.C. 363, 115 C.C.C. (3d) 89 (Ont. C.A.); *R. v. Daniels* (1997), 1997 CarswellOnt 4112, 35 O.R. (3d) 737, 119 C.C.C. (3d) 413, 103 O.A.C. 369, 11 C.R. (5th) 331 (Ont. C.A.).

20 R.R.O. 1990, Reg. 200.

21 Rule 7.

22 Section 49.

However, since the Rules are generic in nature, the materials to be served on such an application are not specified, other than setting out the requisite time periods to provide notice of such an application. According to rule 7, there is to be at least three days between the giving of notice of application or notice of motion and the day for hearing the application or motion;²³ the applicant must file notice of application or notice of motion at least two days before the day for hearing the application or motion.²⁴ Rule 7 also provides that evidence on an application or motion may be given by affidavit; with the permission of the court, orally; or in the form of a transcript of the examination of a witness.²⁵ The Court also has the power to hear the application or motion without notice on consent, or, where having regard to the subject matter or the circumstances of the application or motion, it would not be unjust to hear the application or motion without notice.²⁶

Given that the *Provincial Offences Act* clearly contemplates rules of court, and there are in fact some rules of court, one might ask how is it, then, that such rules are enacted, given the absence of a rule making authority under the Act? The answer is that the authority to make rules for the provincial offences court is set out in a different statute, the *Courts of Justice Act*.²⁷ Under Part IV of this Act, rules of court may be enacted. To this end there is established a Civil Rules Committee, Family Rules Committee and Criminal Rules Committee.

The Criminal Rules Committee is comprised of judges and lawyers and lay persons.²⁸ These include judges from all levels of Court in Ontario, that is the Court of Appeal, Superior Court of Justice and Ontario Court of Justice, as well as Crown attorneys and persons employed in court administration. Lawyers are also appointed to the Criminal Rules Committee by the Law Society of Upper Canada, the Chief Justice of Ontario, the Chief Justice of the Superior Court of Justice and the Chief Justice of the Ontario Court of Justice. In total, there are approximately 20 members of the Criminal Rules Committee.

With respect to the *Provincial Offences Act*, there is provision, subject to the approval of the Attorney General, for the Criminal Rules Committee to make rules for the Court of Appeal, the Superior Court of Justice and the Ontario Court of Justice “in relation to the practice and procedure of those courts in proceedings

23 Rule 7(3).

24 Rule 7(4).

25 Rule 7 (5).

26 Rule 7(7).

27 *R.S.O. 1990, c. C.43*.

28 Section 69(2).

under the *Provincial Offences Act*.²⁹ Such rules may be made in relation to regulating any matters relating to the practice and procedure of proceedings under the *Provincial Offences Act*, prescribing forms, among other matters.³⁰

As can be seen, in order for rules of court to be enacted for provincial offences proceedings, the Criminal Rules Committee, rather than the court itself, is cloaked with the statutory authority to craft such rules. That is, there is no equivalent to s. 482 of the *Code* which allows the provincial offences court itself to enact rules for matters over which it has jurisdiction. The Criminal Rules Committee has, in fact, enacted rules of court governing appeals.³¹ However, rules in areas such as those put in place by the Ontario Court of Justice with respect to trial proceedings, e.g., adjournment applications, *Charter of Rights* applications, have yet to be enacted.

The absence of a rules making authority under the *Provincial Offences Act* results in the provincial offences court having to rely on the Criminal Rules Committee to make rules on its behalf. It is the only trial court in Ontario that operates under this limitation.

By way of example, the recent amendments to the *Provincial Offences Act* made by the *Good Government Act*, 2009,³² which have resulted in a provision that, for the first time, authorizes the holding of judicial pre-trial conferences under the *Provincial Offences Act*,³³ as is the case for both the Superior Court of Justice and the Ontario Court of Justice under the *Code*, means that no accompanying rule of court for pre-hearing conferences can be developed unless one is put in place by the Criminal Rules

Committee. Under the Rules of Court of the Ontario Court of Justice governing pre-hearing conferences,³⁴ there is a requirement that the parties who appear are “each fully briefed in respect of the issues to be discussed at the pre-hearing conference,”³⁵ and that prior to attending the pre-hearing conference, the parties shall prepare a pre-hearing conference report in the approved form.³⁶ This rule goes on to stipulate the specific inquiries to be made by the pre-hearing conference judge, e.g., the extent of disclosure.³⁷ There is also a provision governing the completion of the pre-hearing conference report,³⁸ and a prohibition against its being disclosed to the presiding judge absent the express consent of the parties.³⁹ In order for such procedures to apply to the provincial offences court, a rule of court under the *Provincial Offences Act* would be required in order for pre-hearing conferences to be treated in a similar manner.

In its recent consultation paper on Modernization of the *Provincial Offences Act*, the Law Commission of Ontario has drawn attention to the lack of a rules making power under the legislation.⁴⁰ As the consultation paper notes, the suggestion has been made “that these rules should be made by the courts as is the case in matters of a criminal nature.”⁴¹ Such an amendment to the *Provincial Offences Act* would certainly be in keeping with the rules making authority given to other trial courts in the province, as set out in s. 482 of the *Code*, as well as furnishing the Court with the ability to respond to amendments such as the new power to hold pre-hearing conferences, in a timely and efficient manner, rather than relying on the Criminal Rules Committee. It will be interesting to see the Law Commission’s position on the issue in its Interim Report, which is anticipated to be released in the fall of 2010.

29 Section 70(2).

30 Section 70(3).

31 See, for example, O. Reg. 721/94 [Rules of the Court of Appeal in Appeals under the *Provincial Offences Act*]; O. Reg. 723/94 [Rules of the Ontario Court (General Division) and the Ontario Court (Provincial Division) in Appeals under Section 116 of the *Provincial Offences Act*]; O. Reg. 722/94 [Rules of the Ontario Court (Provincial Division) in Appeals under Section 135 of the *Provincial Offences Act*]. Note that as these appeal rules were made more than 15 years ago, they do not refer to the current names of the Superior Court of Justice and the Ontario Court of Justice.

32 S.O. 2009, c. 33.

33 Schedule 4, s. 1(38) enacting s. 45.1.

34 Rule 27.

35 Rule 27.02(1).

36 Rule 27.02(3).

37 Rule 27.03(2).

38 Rule 27.04(1).

39 Rule 27.04(2).

40 Ontario Law Commission, *The Modernization of the Provincial Offences Act*. (Consultation Paper, November 2009) (Toronto: Law Commission of Ontario, 2009).

41 *Ibid.*, at 20.

What You have Always Wanted to Know about Simultaneous Interpreting but were Afraid to Ask

EVELYN CHAU, CANTONESE INTERPRETER*

As Canada welcomes more and more immigrants each year, the courts in major cities reflect this reality in real time. Interpreters are needed in court to assist those accused, sureties and witnesses who don't speak enough English to understand court proceedings. There are currently about 800 interpreters representing 108 languages used at the Provincial Courts in Toronto and vicinity. In other urban centres the numbers are smaller but no less significant.

Interpreters have become a fixture in all levels of the criminal justice system. They are not only a conduit in communications between the mainly English-speaking judiciary but a cultural bridge as well. Language and culture are inextricably woven together. How an Ethiopian expresses his thoughts has everything to do with how he views the world. The job of an interpreter is to translate the words and the thoughts behind them to accurately express both sides of the communication. It is not usually an easy thing to do in a split second, having to first comprehend the legal terminology from the judiciary, translate the words and put them in the correct order for the mother tongue, and say them in an understandable way to the person in front of the court. The sequence is then done in reverse for the reply.

It is a common misconception that an interpreter only has to interpret whatever he or she hears, and accurately translate court proceedings word for word. Nothing can be farther from the truth. Anyone who has had exposure to a second language, such as French, would realize that the "word for word" instruction is neither possible nor very useful. A Tamil sentence, for example, is arranged quite differently from an English one.

Here is a comparison between English and Tamil syntax:¹

English syntax: SUBJECT, PREDICATE, OBJECT

Tamil syntax: SUBJECT, OBJECT, PREDICATE

English prepositions: Before the noun (on the table)

Tamil prepositions: After the noun (table - on)

English adverbs: Before or after the verb (Barking dogs seldom bite; We moved slowly)

¹ Vellupillai, Mani, Tamil interpreter.

Tamil adverbs: Before the verb only

English gender: e.g., friend, cousin (common gender)

Tamil gender: Gender must be ascertained before interpretation

Behaviour that seems odd to an English-speaking court usually has a cultural explanation. Examples that spring to mind include seeming avoidance of a straight answer, lack of eye contact and speaking out of turn. A court that is informed in cultural differences enables proceedings to go ahead in an effective, smooth and just manner.

Here is what lawyers and agents should have in mind when using an interpreter in court.

- Do speak in a clear, audible voice. It helps to listen to the flow of the interpreting periodically. If the interpreter seems to be behind, just take a breath and let him or her catch up. There is actually no need to slow down to a snail's pace, however, because interpreters are trained professionals.
- Some sympathetic lawyers or Crowns make frequent stops in one sentence only to see interpreters waiting for them to finish so they can make sense of it all. Without the complete sentence, the interpreting would be incoherent and incomprehensible.
- Do break down long sentences into segments, or better still, express your ideas one by one.
- Do slow down rapid exchanges with the Crown over procedures because the speed and tone make these very difficult to interpret.
- Do let interpreters have copies of relevant material such as case law or transcripts. When something is read out in court, the word count per minute is usually above 170, which is the normal speed that allows for accurate and comfortable interpreting.
- During a long trial, let the interpreter have breaks. These are necessary for the voice and the brain. Long days that lead to the exhaustion of the interpreter are counter-productive.

- Don't just use acronyms in court assuming that everyone knows what they stand for. Spell out CAMH, or other organizations, when you first mention them.
- Don't (or try not to) use acronyms such as YUPPIE without explanations because they are unique to the North American culture and are almost untranslatable.

In his book, "Liberating Voices: A Pattern Language for Communication Revolution,"² co-author Douglas Schuler says this about translation, which is equally true for interpreting: "Totally accurate translation is impossible but imperfect translation is ubiquitous – and essential."

Martin Luther reportedly took up to four weeks researching a single word when he translated the Bible. Even if 'perfect interpreting' of every single word is possible in the seconds a court interpreter has during a witness testimony, it would not be ideal. Why? The effort it takes to be absolutely correct by the dictionary may mean omitting or sacrificing other parts of the speaker's message.³ This is especially true with complex syntax or when the message is meant to be ironic, resigned or humorous. That brings us to context.

Interpreting requires empathy. It means understanding the speaker's intent and point of view. For any given word in Portuguese, there can be several possible equivalents in English, depending on

² MIT Press.

³ Nolan, James. *Translatability and Untranslatability in Simultaneous Interpreting* (The ATA Chronicle/July 2010).

the context. An interpreter with a wide range of word options can be more nimble in conveying the exact meaning of the speaker, whether that is the judge, lawyer, or accused. That is also why interpreting can never be done by machines.

Using numbers to gauge interpreters' performance in court is akin to using machines to interpret human languages. James Nolan, in his article "Translatability and Untranslatability in Simultaneous Interpreting", raises this point: "In some simultaneous interpreting examinations a passing performance is 'getting 70% of the meaning across'. But what if the 30% that was lost in an interpreter's 'passing performance' contained some of the speaker's main points (for example, because they came at the end and the interpreter fell behind while struggling with details)?"⁴

The answer to this may not be music to the Court's ears. An interpreter must exercise editorial judgement to convey the meaning and intent of the speaker while omitting what can be safely left out. This kind of judgement comes with practice, experience and motivation to do one's best under trying circumstances. While not striving to be 100% word perfect, an interpreter should always try to convey 100% of the speaker's meaning by focusing on the main ideas even if it means condensing, abridging and cutting out repetitions. The Court, in the meantime, should give interpreters the leeway to do so. Mutual trust and respect can only help in an environment such as a criminal court where adversarial positions are the order of the day.

⁴ Nolan, James, *ibid.*

CASE COMMENT

JOHN P. ALLEN

Displaying a sign without a permit – a continuing offence

Ellis operated a paralegal business from his home. In 2003, he erected a mobile sign on his property to advertise his "traffic ticket services" business and obtained a Ministry of Transportation permit for the sign. The Ministry permit, however, indicated that Ellis also needed to obtain all other necessary permits. He was charged with contravening a City of Hamilton sign bylaw. Ellis testified that he thought he didn't need a Hamilton permit because his sign had been erected before the bylaw came into force and was therefore "grandfathered". However, prior to the

City of Hamilton bylaw, Ellis was subject to the sign bylaw of the former Town of Flamborough, which he apparently ignored.

Ellis raised a number of arguments, including that he reasonably believed that the Ministry of Transportation permit was sufficient. The argument was rejected: Although the offence is strict liability and includes the defence of honest and reasonable mistake, ignorance of the (sign) law is no excuse. Furthermore, Ellis is a paralegal and he should have realized that a city permit was required.

Ellis also argued that the offence occurred at the time he erected the sign, in 2003, and by the time he was charged in 2009, the charge was beyond the six-month limitation period. In other words, the erection of the sign was the offence; not the continuous displaying of the sign. The argument was rejected: The offence

under s. 4.1(a) of City of Hamilton Bylaw #06-243 provides that: “No Person shall erect, locate, or display or cause to be erected, located, or display a Sign: (a) for which a permit has not been obtained, if a permit is required under this By-law. . .” The inclusion of the word “or display” shows that the offence was a continuing offence since “the act of displaying a sign in general is not one discreet and complete act, but an act that could be done on more than one occasion”. Thus, the limitation period did not expire.

Ellis was found guilty.

***Hamilton (City) v. Ellis*¹**

Tar sands – Syncrude convicted for contaminating birds

Syncrude Canada, the extractor of oil from the Alberta tar sands, was charged with failing to store a hazardous substance in a manner that ensured that it did not come into contact with any animals, contrary to Alberta’s *Environmental Protection and Enhancement Act*, and with depositing a substance harmful to migratory birds in an area frequented by migratory birds, contrary to Canada’s *Migratory Birds Convention Act*.

In April 2008, a citizen reported to a Senior Wildlife Biologist that a number of birds had landed on Syncrude’s Aurora Settling Basin. The Basin contains a tailings pond, which includes water, sand and bitumen. Tailings are deposited through large pipes into the Basin, located some distance from the extraction plant. The tailings pond is contained within a berm. The area of the berm is the size of 640 football fields. The mat of bitumen in the pond is several inches thick, viscous and cohesive, with the consistency of a frothy roofing tar.

The Basin lay beneath the Central and Mississippi Flyways for migratory waterfowl. Many birds, including ducks, geese, loons and grebes, settled in the area and others stopped on their northward migration in the spring. Most water birds migrating through the oil sands region were travelling to or from the Peace Athabasca Delta, 200 kilometres north. It was the largest fresh water delta in the world and was an ideal staging area for migratory birds on their way to their final breeding grounds.

Birds were drawn to the tailings pond because it appeared to be open water. (The tailings retained heat from the extraction process, thus melting later than the surrounding natural lakes.) As bitumen contamination increased, birds lost buoyancy and the insulating effect of feathers. There was a loss of the feathers’ waterproofing, leading to hypothermia or drowning. Birds lost their ability to fly. Approximately 1600 birds died during the course of the incident. An estimated 500 waterfowl were found trapped in the bitumen mat on the Basin and they apparently sank with the bitumen.

At issue was whether or not Syncrude did enough to deter birds from landing on the tailings pond.

HELD: Syncrude was found guilty on both counts. There was ample evidence that the bitumen in the basin was toxic to birds. It was known that migratory birds frequented the area. Syncrude’s efforts and expenditures over many years to deter birds from landing on the Basin showed that Syncrude knew that migratory birds would be in the area and attracted to the pond surface. Effective operating deterrents could have reduced the number of birds that would land on the water body. There were several reasonable alternatives of which Syncrude knew or should have known. Syncrude did not establish a proper system to ensure that wildlife would not be contaminated in the Basin or take reasonable steps to ensure the effective operation of the system.

Note: The World Wildlife Fund and National Geographic have criticized the Alberta tar sands as an environmental catastrophe, because of its carbon and pollution emissions, and because of its effect on wildlife. As mentioned in a National Geographic article (“The Canadian Boon; Scraping Bottom”, National Geographic, March 2009):

Nowhere on Earth is more earth being moved these days than in the Athabasca Valley. To extract each barrel of oil from a surface mine, the industry must first cut down the forest, then remove an average of two tons of peat and dirt that lie above the oil sands layer, then two tons of the sand itself. It must heat several barrels of water to strip the bitumen from the sand and upgrade it, and afterward it discharges contaminated water into tailings ponds like the one near Mildred Lake. They now cover around 50 square miles. Last April some 500 migrating ducks mistook one of those ponds, at a newer Syncrude mine north of Fort McKay, for a hospitable stopover, landed on its oily surface, and died. The incident stirred international attention—Greenpeace broke into the Syncrude facil-

1 2010 CarswellOnt 3934, 2010 ONCJ 217, [2010] O.J. No. 2442 (Ont. C.J.).

ity and hoisted a banner of a skull over the pipe discharging tailings, along with a sign that read “World’s Dirtiest Oil: Stop the Tar Sands.”

R. v. Syncrude Canada Ltd.²

Regulatory inquiries and the Charter, in a hunting context

A conservation officer received a complaint that a moose had been killed during closed season. Later, he found part of the remains of a moose. He stopped the accused and two others to see if they had been hunting, and to obtain information about wildlife possessed by them, as he was authorized to do pursuant to s. 95 of the *Wildlife Act*, R.S.B.C. 1996, c. 488.

The conservation officer asked: “Did you shoot anything?” and Mr. Rice replied “Yes, a moose.” He then asked: “Who shot it?” and Mr. Rice replied, “I did.”

The officer then searched the vehicle and found the carcass of a moose.

The trial judge ruled that Rice’s answer was inadmissible as a breach of his Charter right to counsel, because the officer was in an adversarial relationship once he knew that a moose had been killed in the closed season. The summary conviction appeal judge agreed as the officer had completed his inspection; he had reasonable grounds to believe an offence had been committed; and he was embarking on the evidence gathering phase of the investigation.

The Crown disputed the finding of the trial judge that the conservation officer had reasonable and probable grounds to believe an offence had been committed, because he did not yet know who had shot the moose. If it was the local aboriginal man, then no offence would have been committed.

² 2010 CarswellAlta 1157, 2010 ABPC 229, [2010] A.J. No. 730 (Alta. Prov. Ct.).

Held: Under section 95 of the *Wildlife Act*, an officer may stop a vehicle to determine if the occupants have been hunting. Applying the principles described by La Forest J in *R. v. Fitzpatrick*,³ there are four factors to consider in determining whether or not the state is in an adversarial relationship: (i) existence of coercion; (ii) existence of an adversarial relationship between the state and the accused; (iii) the risk of unreliable confessions in the statutorily compelled statement; and (iv) whether the use of the statement would increase the likelihood of abusive conduct by the state.

Regarding (i) coercion, the thrust of the *Wildlife Act* regulations is for conservation management and enforcement. There are compulsory reporting sections for hunters. One who chooses to hunt must accept the regulatory constraints. It was not coercive to ask the regulated questions.

Regarding (ii) existence of an adversarial relationship, the predominant purpose of the question was to determine compliance with the regulations. It was not an adversarial relationship.

Regarding (iii) and unreliable confessions, it is highly improbable that this type of questioning would yield an unreliable confession.

Regarding (iv) and abusive conduct of the state, it is not abusive for the state to prosecute illegal hunting on the basis of true reports that hunters are required to complete as a condition of their voluntary participation in hunting.

Thus, the questions and answers were admissible. The appeal was allowed and the case was remitted for a new trial.

R. v. Charlie⁴

³ 1995 CarswellBC 904, 1995 CarswellBC 2496, EYB 1995-67070, [1995] S.C.J. No. 94, 43 C.R. (4th) 343, 129 D.L.R. (4th) 129, 102 C.C.C. (3d) 144, 188 N.R. 248, 18 C.E.L.R. (N.S.) 237, 65 B.C.A.C. 1, 106 W.A.C. 1, 32 C.R.R. (2d) 234, [1995] 4 S.C.R. 154 (S.C.C.).

⁴ 2009 CarswellBC 3401, 72 C.R. (6th) 133, 2009 BCCA 569, (sub nom. *R. v. Rice*) 279 B.C.A.C. 76, 473 W.A.C. 76, 250 C.C.C. (3d) 303, [2009] B.C.J. No. 2510 (B.C. C.A.).

EDITORS-IN-CHIEF

Mr. Justice Rick Libman, B.A., LL.B.,
LL.M.

Bernard Aron, B.A., J.D., LL.M.

John P. Allen, B.A., B.Sc., LL.B., LL.M.

Tel: (416) 865-0303

Email: jpallen@virtual-law.com

CARSWELL®

One Corporate Plaza, 2075 Kennedy Road,
Scarborough, Ontario M1T 3V4
Tel: (416) 609-3800 from Toronto
1-800-387-5164 from elsewhere in Canada/U.S.

Internet: <http://www.carswell.com>

E-mail: www.carswell.com/email

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Content Editor: Rajbir Sandhu

Product Development Manager: Ken Murphy

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