REGULATORY OFFENCES

The views expressed herein are those of the writer and not the Department of Justice (Canada).

These materials were prepared by Ohristine Haynes, of the Department of Justice (Canada), Saskatoon, Saskatchewan for the Saskatchewan Legal Education Society Inc. seminar, Criminal Law Update, May 2005.
TABLE OF CONTENTS

Introduction

What is a regulatory offence?

What activities are subject to regulation?

What is the standard of proof?

What are the sentencing factors?
INTRODUCTION

As a criminal law practitioner, you know the essentials of criminal procedure, and that your client has been accused of an offence. It is often difficult to understand why the offence exists, and why the legislator thought it was necessary to create an offence. When the client is charged with a regulatory offence, you may not regard it as seriously as a criminal offence.

Regulatory offences can result in very significant penalties. There are often immense commercial repercussions for business clients, including negative publicity. There are two reasons that you want to be familiar with the changing landscape of regulatory offences. The first is to know how to approach a file when you receive one. The second is to be proactive in advising clients who are operating in a regulated climate on how to avoid prosecution.

WHAT IS A REGULATORY OFFENCE?


Hence the name regulatory offences. As for the official view of their role in Canadian life, Cory, J. said:

It is difficult to think of an aspect of our lives that is not regulated for our benefit and for the protection of society as a whole. From cradle to grave, we are protected by regulations; they apply to the doctors attending our entry into this world and to the morticians present at our departure. Every day from waking to sleeping, we profit from regulatory measures which we often take for granted. R. v. Wholesale Travel Group [1991] 3 S.c.R. 154 at 221, 67 C.C.C. (3d) 193 at 239.

Speaking of morticians, I will continue with a reference to the inevitability of death and regulatory offences, by telling you that a regulatory statute can include a criminal offence. I
say this because the *Income Tax Act* is a regulatory statute, which contains the criminal
offence of tax evasion.

**WHAT ACTIVITIES ARE SUBJECT TO REGULATION?**

Generally speaking, government advances policy objectives through legislation. In order to
ensure its objectives are met, government establishes offences in the legislation and carries
out their enforcement.

As criminal law practitioners, we usually think of the *Criminal Code* as the main source of
business for the criminal courts. The number of regulatory offences in an industrialized
country such as Canada is overwhelming:

> The Law Reform Commission of Canada predicted over twenty-five years ago that "the regulatory offence ... is here to stay". At the time there were 700 Criminal Code sections, as opposed to 20,000 federal offences and 20,000 offences in provincial laws, not counting municipal laws. The Commission observed that approximately 70% of federal offences were offences of strict liability. *Libman on Regulatory Offences in Canada 2002* at 2-3 (Earlscourt Legal Press Inc.)

It is important to know that your corporate client is probably subject to regularly scheduled
inspections which are required by legislation and cannot be avoided. Therefore, it is important
to find out from that client which permits and licences it holds in order to assess the
regulatory regime, and the risks the client may be facing as it conducts its daily operations.
Most regulatory agencies provide information via a website and in printed format. This
applies to both federal and provincial regulators.

I also point out that there may be concurrent jurisdiction between provincial and federal
regulators and investigators. This concurrent jurisdiction and, in some cases, delegation of
enforcement authority, is most commonly found in environmental legislation, and wildlife
protection legislation. In the Saskatchewan context, the provincial and federal wildlife
agencies work very closely together to enforce the regulatory regime. The same occurs where there is overlap between fisheries and environmental statutes.

The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care. *R. v. Wholesale Travel* [1991] 3 S.C.R.154 at 219.

Note that the emphasis of the court in defining regulatory measures leads to the current emphasis on prevention in enforcement and sentencing. This does not mean that punishment of the conduct is not meted out, but it may not be the most significant portion of the sentence.

**WHAT IS THE STANDARD OF PROOF?**


Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the prescribed act. The over-all regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category. *Ibid.* 40 C.C.C. (2d) at 374:

"As for strict liability offences, they are neither *mens rea* offences nor absolute liability offences. An accused can avoid conviction though. See the test set out in *R. v. Pontes* [1995], 3 S.c.R. 44, 100 C.C.C. (3d) 353, where the defendant must prove on a balance of probabilities "either that he had an honest but mistaken belief in facts, which, if true, would render the act innocent, or that he
exercised all reasonable care so as to avoid committing the offence."

Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. *R. v. Sault Ste. Marie (City)* 40 C.C.C. at 374

**WHAT ARE THE SENTENCING FACTORS?**

The sentencing principles set out in Part 23 of the *Criminal Code* apply to sentencing in regulatory matters. In addition, particular statutes will include particular provisions relevant to the legislation.

It is always important to think about what the Crown prosecutor is going to say if you reach the sentencing phase of a prosecution. You need to think about this so that you can counter any arguments the Crown will make. The main focus for the Crown in a regulatory prosecution sentencing is "What harm is the legislation supposed to prevent?" The Crown will be telling the Court about the policy objectives which the regulating agency is trying to achieve - what harm was Parliament trying to prevent?

I would suggest that it is not sufficient to tell the Court about the individual circumstances of your client while the Crown focuses on the harm to society. General deterrence plays a greater part in the world of regulatory offences, so you must include this aspect of the case in your sentencing submissions. Essentially, I would suggest that you try to argue that your client's individual record (hopefully, a record of compliance) outweighs the fact that an offence has been committed.
Federal legislation often sets out remedial measures which can be applied by the
regulating department before reaching the stage of charging the perpetrator with an offence.
These measures may consist of warning letters or administrative measures. It is very
important that consideration is given to those previous events in formulating sentence
submissions. The failure to comply may be a factor in the Crown submissions and must be
addressed by defence.

It must also be recognized that if compliance is the regulator's goal, this may be a significant
part of the sentence which the Crown wants. There are various methods to achieve this. The
timing of sentencing can usually be arranged to accommodate a remedy which is planned for
the near term. Otherwise the court may order that remedial action occur within a specified
time period following sentencing.

The specific goals of the legislation must be examined. In the context of environmental
offences, the preamble to the *Canadian Environmental Protection Act, 1999* states:

> It is hereby declared that the protection of the environment is
> essential to the well-being of Canadians and that the primary
> purpose of this Act is to contribute to sustainable development
> through pollution prevention.

The sentencing principles are then set out in s.287 of the Act. The Supreme Court has also
approved the sentencing principle in environmental cases of having the polluter pay for the
damage in *Imperial Oil Ltd. v. Quebec (Minister of the Environment) [2003] S.C.J. No.59*

Although regulatory offences may be committed without intent, there is a place for discussion
of intent in sentencing submissions. Where the offender has deliberately set out to ignore the
law, this may be remarked upon and be a factor in sentencing.

Overall there is no escaping the majority decision in *R. v. Wholesale Travel Group Inc.*

Regulatory schemes can only be effective if they provide for significant penalties in the event
of their breach. Indeed, although it may be rare that imprisonment is sought, it must be
available as a sanction if there is to be effective enforcement of the regulatory measures. Nor is the imposition of imprisonment unreasonable in light of the danger that can accrue to the public from breaches of regulatory statutes. The spectre of tragedy evoked by such names as Thalidomide, Bhopal, Chemobyl and the Exxon Valdez can leave no doubt as to the potential human and environmental devastation which can result from the violation of regulatory measures. Strong sanctions including imprisonment are vital to the prevention of similar catastrophes. The potential for serious harm flowing from the breach of regulatory measures is too great for it to be said that imprisonment can never be imposed as a sanction.