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I. INTRODUCTION

Administrative Monetary Penalties ("AMPs") are monetary penalties where payment is ordered by a decision maker acting under a statutory power. AMPs are popular among regulators, including the Commissioner of Competition, because they fill the gap between true administrative remedies and criminal sanctions. They allow regulators to collect considerable sums without having to prove their cases on the "beyond a reasonable doubt" criminal standard. However, some AMPs are so large that they arguably amount to penal sanctions, triggering constitutional protections under the *Canadian Charter of Rights and Freedoms*.[2]

Recently, in *Rowan v. Ontario Securities Commission*, AMPs under Ontario's *Securities Act* survived a constitutional challenge.[3] The penalties imposed in that case totalled more than $1.2 million. Under the federal *Competition Act*, AMPs for an initial breach of the civil deceptive marketing practices provisions can be up to $750,000 for individuals and $10 million for corporations. These penalties increase to $1 million for individuals and $15 million for corporations for subsequent orders. Further, the AMPs for abuse of dominance are up to $10 million for the first breach and $15 million for subsequent orders.[4]

Rowan provides some constitutional comfort for regulators imposing extremely high AMPs. However, this does not mean that the AMPs under the *Competition Act* are impervious to constitutional scrutiny. A defendant subject to a financially devastating AMP under the *Competition Act* may insist on testing their constitutionality. The judicial analysis that would arise from such a constitutional test would be helpful, particularly since the AMPs under the *Competition Act* are far more severe than those available under the *Securities Act*.

II. THE WIGGLESWORTH "TRUE PENAL CONSEQUENCE TEST" AND ITS APPLICATION IN *ROWAN*

In *Rowan*, the Ontario Court of Appeal upheld a decision of the Ontario Securities Commission Tribunal (the "Tribunal"), which imposed AMPs and costs against an investment dealer and several of its officers for breaches of securities laws. These AMPs totalled over $1.2 million. The court concluded that the OSC's sanctions did not engage constitutional protections afforded under s. 11(d) of the *Charter*.[5]

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

[3] 110 O.R. (3d) 492 [*Rowan*]; R.S.O. 1990, c. S.5, s. 127(1) [*Securities Act*].

[4] R.S.C. 1985, c. C-34, ss. 74.1(1)(c) and 79(3.1) [*Competition Act*].

[5] *Supra* note 1.

Section 127(1)(9) of the *Securities Act* prescribes fines as high as $1 million for every trade or transaction in breach of the act.[6] The primary constitutional argument advanced by the appellants was that penalties imposed under s. 127(1)(g) are potentially so severe as to transcend from administrative to penal sanctions. Therefore, the appellant should have been afforded constitutional protection under s. 11(d) of the *Charter*, which provides that

> [any] person charged with an offence has the right … to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.[7]

The constitutional protection provided under this section would include a standard of proof of "beyond a reasonable doubt," rather than the civil standard used by the Tribunal.[8]

The underlying analysis of AMPs arose from the Supreme Court of Canada's interpretation of the phrase "[a]ny person charged with an offence" in *R. v. Wigglesworth*. There, the court rejected the argument that all persons subject to proceedings leading to the imposition of a penalty should be regarded as being charged with an offence under s. 11. Wilson J., writing for the majority, concluded that s. 11 should be restricted "to the most serious offences known to our law, i.e., criminal and penal matters". There are two categories of these "criminal and penal matters": (1) proceedings that by their very nature are criminal or quasi-criminal; and (2) proceedings where "a conviction in respect of the offence may lead to a true penal consequence."[9]

According to Wilson J., a matter is captured by s. 11 if it is of "a public nature, intended to promote public order and welfare within a public sphere of activity." Conversely, a matter is presumptively not captured by s. 11 if it is a "private, domestic or disciplinary [matter] which [is] regulatory, protective or corrective and which [is] primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity."[10] Wilson J. did note, however, that the latter category can sometimes attract rights guaranteed under s. 11 "not because they are the classic kind of matters intended to fall within the section but because they involve the imposition of true penal consequences." Wilson J. elaborated on what has become known as the "true penal consequence test":

> …a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.11

She added what she described as "two caveats" to this test. First:

> … the possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large.

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[6] *Securities Act*, *supra* note 2.
[7] *Charter, supra* note 1.
[8] *R. v. Oakes* [1986] 1 S.C.R. 103 ¶ 32.
[9] [1987] 2 S.C.R. 541 at 558-559.
[10] *Id.* at 560.
[11] *Id.* at 561.

> Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose.[12]

Second, Wilson J. held that only rarely will a proceeding fail to qualify for s. 11 protection under the "by nature" test but be captured by s. 11 under the "true penal consequence test."[13]

The appellants in *Rowan* relied on the true penal consequence test, submitting that they faced true penal consequences because of the magnitude of potential and actual AMPs imposed by the Tribunal. Writing for a unanimous court, Sharpe J.A. concluded that "Wilson J.'s first caveat is fatal to the appellant's argument," observing that:

A. "Penalties of up to $1 million per infraction are … entirely in keeping with the Commission's mandate to regulate the capital markets where enormous sums of money are involved and where substantial penalties are necessary to remove economic incentives for non-compliance with market rules";

B. The Securities Act Five Year Review Committee recommended that such large penalties be available so that "the administrative penalty would not simply be viewed as a 'cost of doing business' or a 'licensing fee' for unscrupulous market participants";

C. The AMPs imposed in the matter, which totalled over $1.2 million, were "within a constitutionally permissible range," having particular regard to the number of infractions involving over $1 billion in securities and over $2 million in commissions; and

D. "The constitution does not impose a defined limit on what is permissible by way of administrative monetary sanctions. The limit can only be determined by reference to the purpose of the penalty in relation to the regulatory mandate of the tribunal."[14]

III. THE AMPS UNDER THE COMPETITION ACT

AMPs have become a significant part of the *Competition Act*. With the enactment of Bill C-10 in 2009, potential AMPs arising from breaches of the act have increased to unprecedented levels.[15]

Potential AMPs for an individual or corporation's first breach of the *Competition Act*'s deceptive marketing practices provisions are $750,000 and $10 million, respectively. The fines increase to $1 million for individuals and $15 million for corporations for subsequent breaches.[16] Recently, in *Commissioner of Competition v. Yellow Page Marketing*, Lederman J. of the Ontario Superior Court of Justice ordered $8 million in AMPs against companies operating a business directory scam and $1 million against their principles.[17]

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[12] *Id.* at 561.

[13] *Id.* at 561.

[14] *Rowan*, *supra* note 2 at ¶¶. 2, 9, and 49-55.

[15] Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2nd Sess., 40th Parl., 2009, cl. 424(2) and 428(1) (assented to 12 March 2009).

[16] *Competition Act, supra* note 3, s. 74.1(1)(c).

[17] 2012 ONSC 927.

The AMPs for the abuse of dominance provisions of the *Competition Act* are now $10 million for the first breach and $15 million for subsequent orders. AMPs have yet to be awarded in an abuse of dominance case.[18]

Sharpe J.'s reasons in *Rowan* suggest that AMPs under the *Competition Act* may survive a constitutional challenge. In particular, the conclusion that there are no constitutionally defined limits for AMPs suggests that the large AMPs under the *Competition Act* are not *prima facie* penal. However, this does not mean that these AMPs are impervious to constitutional scrutiny.

According to the *Competition Act*, the purpose of AMPs is to ensure "conformity with the purposes of [the Competition Act] and not with a view to punishment."[19] However, a defendant subject to an AMP under the *Competition Act* may wish to resort to the *Wigglesworth* "true penal consequence test." If so, a court will consider a number of questions that the Ontario Court of Appeal considered in the context of the *Securities Act* in *Rowan*. These questions include:

A. What is the true purpose of AMPs under the Competition Act? Is the imposition of these AMPs consistent with the regulatory mandate of the Commissioner of Competition?

B. Do these AMPs represent appropriate legislative recognition of the need to impose sanctions that are more than "the costs of doing business" or are they grossly disproportionate vis-à-vis the actual "costs of doing business"?

C. Have these AMPs been effectively imposed to redress a wrong done to society at large, or are they truly aimed at a limited sphere of activity?

An analysis of these issues by the court would be helpful, particularly since the AMPs under the *Competition Act* are far more severe than those available under the *Securities Act* and otherwise.

[18] *Competition Act, supra* note 3, s. 79(3.1).
[19] *Id.*, s. 74.1(4).