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**Conference Paper**

## Encouraging Dialogue with a Telecommunications Regulator when Penalties are at Risk: East is East, and West is West, and never the two shall meet

27th European Regional Conference of the International Telecommunications Society (ITS): "The Evolution of the North-South Telecommunications Divide: The Role for Europe", Cambridge, United Kingdom, 7th-9th September, 2016

**Provided in Cooperation with:**

International Telecommunications Society (ITS)

*Suggested Citation:* Jull, Kenneth; Schmidt, Stephen (2016) : Encouraging Dialogue with a Telecommunications Regulator when Penalties are at Risk: East is East, and West is West, and never the two shall meet, 27th European Regional Conference of the International Telecommunications Society (ITS): "The Evolution of the North-South Telecommunications Divide: The Role for Europe", Cambridge, United Kingdom, 7th-9th September, 2016, International Telecommunications Society (ITS), Calgary

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**27<sup>TH</sup> ANNUAL EUROPEAN REGIONAL CONFERENCE OF  
THE INTERNATIONAL TELECOMMUNICATIONS SOCIETY**

**Cambridge, UK  
7<sup>th</sup> – 9<sup>th</sup> September, 2016**

**Encouraging Dialogue with a Telecommunications Regulator when Penalties are at Risk:  
East is East, and West is West, and never the two shall meet**

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## **INTRODUCTION**

John Braithwaite is well known for his articulation of a restorative justice “enforcement pyramid.”<sup>1</sup> Variations of the enforcement pyramid have been implemented in practice by sophisticated regulators around the world, including within the context of telecommunications.<sup>2</sup> A key to restorative justice is dialogue between regulators and industry. In this paper we argue that there is a gap in the literature between the development of restorative justice dialogue and the institutional framework which must accompany such dialogue.

It is common to speak of telecom as currently being in a kind of Regulation 3.0 mode. There has been a significant, global renovation of telecom regulation – to open up markets and then to transition to a world where markets can be relied upon as a primary agent for achieving choice and innovation.

What does Enforcement 3.0 look like in an internet world, with less regulation, less market power, and more of a focus on innovation? Restorative justice perspectives and dialogue with the regulator will be part of this new paradigm. We attempt to contribute to the shaping of Enforcement 3.0 by drawing a link between restorative justice pyramids and the institutional frameworks that will best promote positive dialogue with telecom regulators.

### **(i) Zone of non-discovery**

In areas such as the “zone of non-discovery” (where the telecom regulator has not discovered events of non-compliance), there must be incentives to encourage self-reporting and discussion with regulators. We argue that institutional reforms such as the availability of deferred prosecutions, use immunity and recognizing self-reporting as part of due diligence, are important elements to encourage dialogue. These institutional mechanisms offer a safety net to telecom companies that may have some fears about the ramifications of self-reporting. In Canada the Canadian Radio-television and Telecommunications Commission (“CRTC”) now has the power

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<sup>1</sup> John Braithwaite, “The Essence of Responsive Regulation” (2011) 44 UBC L Rev 475. See also John Braithwaite, “Responsive Excellence” (Paper prepared for the Penn Program on Regulation’s Best-in-Class Regulator Initiative, 2015) online: <[https://www.anu.edu.au/fellows/jbraithwaite/\\_documents/Articles/2015\\_Responsive-Excellence.pdf](https://www.anu.edu.au/fellows/jbraithwaite/_documents/Articles/2015_Responsive-Excellence.pdf)> [*Responsive Excellence*].

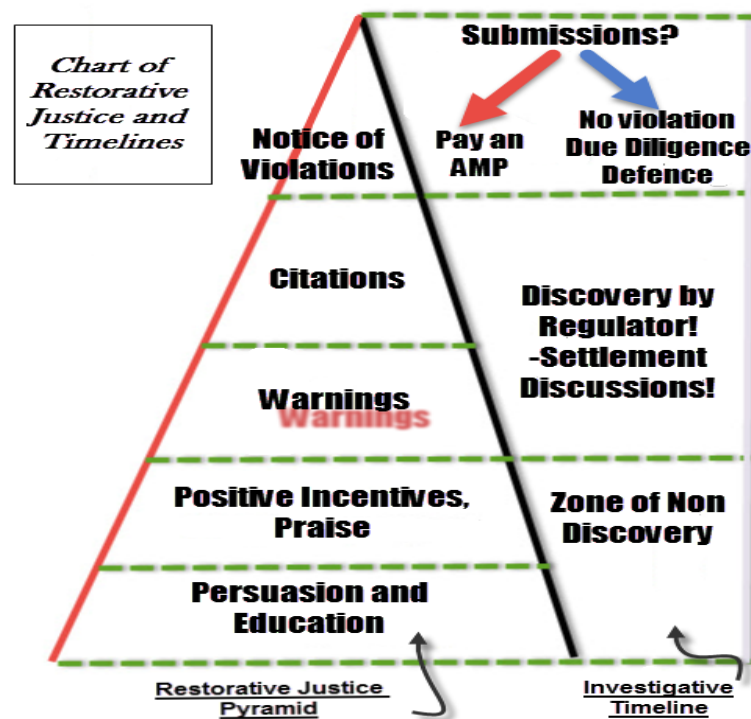
<sup>2</sup> Todd L. Archibald, Kenneth E. Jull & Kent W. Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management*, Release No. 37 (Toronto: Thompson Reuters, August 2016) at s 15:50:10.10. See also C Goglianese & S. Shapiro, “Summary Report: Alberta Dialogue on Regulatory Excellence” (April 2015); B. Hutter, “What Makes A Regulator Excellent? A Risk Regulation Perspective”, Paper prepared for the Penn Program on Regulation’s Best-in-Class Regulator Initiative, (June 2015) and N. Gunningham, “Compliance, Enforcement, and Regulatory Excellence”. Paper prepared for the Penn Program on Regulation’s Best-in-Class Regulator Initiative (June 2015).

to impose administrative monetary penalties (“AMPs”), in the case of an individual, not exceeding \$25,000 and in any other case, not exceeding \$10,000,000.<sup>3</sup> There are also offence provisions in the Act. The downside of dialogue is not imaginary and requires safe harbours if self-reporting is to be encouraged in the zone of non-discovery.

## (ii) Dark side of the pyramid

There is little discussion in restorative justice scholarship of the institutional framework that governs relations when restorative justice discussions *fail* and the matter proceeds to contested submissions on the merits. To paraphrase Rudyard Kipling,<sup>4</sup> restorative justice dialogue is east and administrative contested submissions are west, and never the two shall meet. When dialogue fails, the darker side of the pyramid comes into play where the parties will desire that the Tribunal be kept in the dark regarding any failed resolution discussions. As the potential remedies escalate up the pyramid, procedural and institutional protections should also escalate, as illustrated in the following Figure 1.

Figure 1:



<sup>3</sup> Telecommunications Act, SC 1993, c 38 at s 72.001.

<sup>4</sup> Rudyard Kipling, “The Ballad of East and West”, (1889), online: <[http://www.kiplingsociety.co.uk/rg\\_eastwest1.htm](http://www.kiplingsociety.co.uk/rg_eastwest1.htm)>. “Oh, East is East and West is West, and never the twain shall meet, Till Earth and Sky stand presently at God’s great Judgement Seat.”

### (iii) Storytelling and institutions

Part I of this paper tells some stories about the “zone of non-discovery” by regulators. In Canada, there are no official “deferred prosecution” programmes in the telecom sector nor is there a written policy on immunity in relation to matters disclosed in dialogue with the regulator. Despite the lack of formal programmes there are some positive policy initiatives which may facilitate dialogue with the regulator. The CRTC has specifically identified warning letters as one tool in the enforcement spectrum.<sup>5</sup> The next level above a warning letter, but below an AMP, is a citation letter. The CRTC process now includes issuing citations and compliance letters, as well as engaging in negotiated settlements. This is a good starting point, but in the absence of a policy for deferred prosecutions or use immunity, there are many grey areas.

Part II concerns the integrated institutional model that governs the CRTC, which combines the enforcement division within the same institution as the Tribunal. This integrated model has the advantage of efficiency and specialization in encouraging dialogue between the CRTC and telecom companies about compliance. A disadvantage is the concern by telecom companies that open and candid dialogue with the enforcement division may backfire where the regulator has decided to escalate up the pyramid to a notice of violation.

At the stage where the CRTC has decided to impose an AMP, there are two types of institutional questions. First, what are the procedures for the making of submissions about liability or penalty? Second, what is the composition of the Tribunal that will adjudicate these matters?

On the first issue, the Courts have ruled in the securities context that considering the amount of the potential administrative penalties at stake and their potential effect on the applicants' lives, this will mandate a “reasonably high level of procedural fairness”. There has been no comparative ruling in the telecom context and it is presently unclear what a “reasonably high level of procedural fairness” will look like. The present rules set out in CRTC guidelines only permit written submissions on liability or penalty and are a “one size fits all” model for the entire range of potential AMPs. We are of the view that a “one size fits all” model may fall short of the high requirement of procedural fairness as the penalties escalate and may also trigger constitutional review.

On the second issue of the composition of the Tribunal that will rule on AMPs, the Canadian model follows the classic integrated “shared house” model. Under the umbrella framework of the Commission, the enforcement division co-exists with the adjudicative functions of the Commission within one institution. Canadian courts have upheld multi-faceted tribunals generally, where the issues range from serious licence suspension to compensation re expropriation, although there has been no explicit ruling on the institutional framework for AMPs.

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<sup>5</sup> See Canadian Radio-television and Telecommunications Commission, “*Compliance and Enforcement and Telecom Information*”, Bulletin No 2015-111 (Ottawa, CRTC, 27 March 2015) at section 13, online: <<http://www.crtc.gc.ca/eng/archive/2015/2015-111.htm>> [Bulletin No 2015-111]. See also Canadian Radio-television and Telecommunications Commission, *Report on the Operation of the National Do Not Call List for the period April 1, 2011 to March 31, 2012*, presented to The Honourable Christian Paradis, Minister of Industry and Minister of State (Agriculture) (Ottawa, CRTC, 30 Sep 2012), online: <[www.crtc.gc.ca/eng/DNCL/rpt120930.htm](http://www.crtc.gc.ca/eng/DNCL/rpt120930.htm)>. [National Do Not Call List Report].

Part III of the paper considers comparative perspectives and alternatives. The alternative to an integrated model might be described as the “Court inspired model”. The Court inspired model utilizes a Tribunal which is separate from the regulator, and has some judicial membership and robust procedural rules.<sup>6</sup> The Canadian Competition Tribunal offers an example of the Court inspired model.<sup>7</sup> This model has found favour in Australia.

Part IV of this paper attempts to enhance the institutional link to restorative justice. We make some institutional recommendations that will hopefully enhance restorative justice in telecom enforcement in the future.

In the zone of non-discovery, we argue that dialogue with a regulator is best facilitated by institutional features such as use immunity, a deferred prosecution programme, and recognizing self-reporting as part of a compliance defence.

On the dark side of the pyramid, if the matter reaches a contested merits phase where the issue of due diligence may be considered, we apply the pyramid concept to procedural and institutional issues. As a matter is escalated up an enforcement pyramid, internal processes within an integrated shared house model should also escalate in terms of procedural protections. The following chart is an example of the type of internal processes and rules that telecom regulators might think about when considering remedies such as AMPs, which can range from small penalties in the range of thousands of dollars, to cumulative penalties well in excess of \$10,000,000:

<b>Class</b>	<b>Disclosure</b>	<b>Procedure</b>	<b>Appeal</b>
Minor AMPs	Reliance	Written submissions	Law alone, with leave
Middle range AMPs	Reliance subject to discretion of Tribunal	Written submissions with option to seek leave for an oral hearing	Law alone or Fact with Leave
Major AMPs	Relevance	Oral Hearing	Law alone as of right, or Fact with Leave

Outside of internal processes, and building on the comparative research in Part III, we recommend that a “leave” mechanism be created whereby a new Court inspired Tribunal would have the power, on application of either the regulator or industry, to decide whether a contested hearing should be held before that Tribunal or whether the issue should be decided by an integrated administrative tribunal.

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<sup>6</sup> For an example of this type of model, see the Canadian Competition Tribunal, online: <<http://www.ct-tc.gc.ca/Home.asp>>.

<sup>7</sup> See Josephine Palumbo, “Striking the Right Balance Between Fairness, Efficiency and Expediency: The Competition Tribunal Revisits Its Governing Rules of Practice and Procedure” (2007) 32 Adv Q 437, which sets out the features of this strictly adjudicate body that operates independently from any government department.



We recognize that the four parts of this paper may seem over ambitious and over inclusive of a multitude of institutional issues. We offer this broad institutional roadmap in the spirit of the past political science scholars who dared to dream and theorize about what a comprehensive program would look like and how the many moving parts might work together.<sup>8</sup>

## **PART I: THE ZONE OF NON DISCOVERY AND INCENTIVES TO SELF-REPORT**

John Braithwaite has recently observed that “Regulatory cultures obsessively oriented to procedures manual or to risk analytics kill off transformative storytelling.”<sup>9</sup> Accordingly, we start our paper with some storytelling about dialogue with regulators.

### **(i) Stories about the merits of dialogue**

Braithwaite tells the story of the Australian Competition and Consumer Commission (“ACCC”) that used a conversational process with Aboriginal victims. This led to significant change as the result of disgrace among top management of insurers involved in misrepresentations about insurance policies that in some cases were totally useless.<sup>10</sup> The story is compelling. As Braithwaite tells it, in the early 1990s it was discovered that some insurance companies were selling policies in remote Aboriginal areas that provided no real benefits, but were paid for in some cases by deductions from welfare cheques.

Braithwaite was a Commissioner in the ACCC who argued at the time that given the seriousness of the conduct, criminal charges were warranted. With the benefit of hindsight, Braithwaite’s insight is that criminal charges would *not* have been effective in this particular fact situation. At best, some moderate fines would have been imposed but at worst, the Aboriginal witnesses (who may not have kept copies of the contracts) might have been challenged on the witness stand and the case could have been lost.

Braithwaite speculates that had the criminal approach been taken, it would not have led to the discovery of the widespread nature of the practice. By way of contrast, the discovery of the true scope of the problems only occurred as a result of Aboriginal victims and their representatives sitting in a circle with top insurance industry officials. Some of the executives went back to their companies after having met with victims of misleading advertising, deeply ashamed of what their companies had done. What followed was meetings between industry, the regulator and politicians to prevent disadvantaged consumers from misleading tactics. One insurance company took the lead by voluntarily compensating policy holders and establishing a consumer education fund to prevent future abuses. This company conducted an internal investigation to examine why its compliance programme had failed and to determine which corporate officers were responsible.

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<sup>8</sup> An inspirational taxonomy of rules and principles is found in the work of John Rawls in a *Theory of Justice* (Boston: Harvard 1971) discussed in Ken Jull & Stephen R. Schmidt, “From Behind the Veil of the Unknown: Justice and Innovation in Telecommunications” (28 June 2010), (Paper delivered at the 18<sup>th</sup> Biennial Conference of the International Telecommunications Society, Tokyo, Japan, June 28, 2010), online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1648951](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648951)>.

<sup>9</sup> *Responsive Excellence*, *supra* note 1 at 3.

<sup>10</sup> *Ibid* at 4-5.

Braithwaite illustrates the collateral benefits of restorative dialogue for enforcement, with a follow up story. As a result of a press conference called by the shamed insurance company, a police union realised that its members were also a victim of a similar fraud by another company. Police officers made for good witnesses who could account very precisely about the misrepresentations that were made to them. This allowed for more robust law enforcement. The upshot of this process was regulatory changes in the way that welfare cheques were processed, and changes in the law governing the licencing of agents. Braithwaite notes that all of this problem solving was accomplished without going to court, except in the case of a couple of individuals who refused to cooperate with the restorative justice process.

Taking a page from Braithwaite, we offer the following story about dialogue with a Competition law regulator. One of the authors of this article was counsel to a company whose marketing department created a new advertising plan which included sending out flyers and placing advertisements for various products nationwide. Out of an abundance of caution, the company asked the Competition regulator if it would be willing to review the proposed ads to ensure that they were being compliant. The regulator agreed to review the proposed advertisements, with the surprising result that the regulator found several of the proposed ads would violate the law in different ways. For example, one ad claimed that the product was a “best buy” which implied that it was either a superior quality or at a lower price than competitors. This “best buy” claim could not be substantiated or proven by any hard data and as such was potentially misleading. The company revised the advertisements to bring them into compliance and pro-actively avoided a regulatory problem. This was a result of dialogue with a regulator, and a relationship that counsel had with a senior member of the regulator.

The telecom world evolves quickly with changes in technological knowledge, which will double almost every five years. This rapid pace of change creates the need for regulators to anticipate a framework that can react to future unknown risks as they develop.<sup>11</sup> Dialogue between telecom companies and the regulator will be essential in this evolving process.

## **(ii) When dialogue does not occur**

In the telecom world, the CRTC has established the beginnings of a restorative justice pyramid, with remedies such as warning letters and citations. We have experienced dialogue on academic and practical levels with the CRTC. But, as will be detailed later in this paper, much work needs to be done. The policies and criteria to determine whether a warning letter is sent or whether a case goes to enforcement of a violation are not clear, and in the absence of a formal deferred prosecution programme, the waters are both uncharted and contain shoals.

There is little discussion in restorative justice scholarship about the failure of dialogue to occur in some cases and the link to potential institutional reasons for such failure. We offer a story from the world of anti-corruption that illustrates an example of why dialogue did not occur. The

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<sup>11</sup> Jull & Schmidt, *supra* note 8.

field of anti-corruption is becoming more relevant to telecom as it becomes a global and inter-continental industry.<sup>12</sup>

Counsel was approached by a client who discovered evidence about a serious bribery scandal that they had discovered internally. The scheme had been created by a senior officer in a subsidiary of the company and involved the creation of a paper trail of paying false and overinflated invoices from a supplier. The supplier was actually paid about 50% less than the documents showed. The other 50% of the money paid out by the company was used to pay a foreign public official to ensure that the company received government tenders for work. The effect of the false and inflated invoices was to hide the bribery payments so that they would never be discovered by company auditors or governmental officials. This scheme had not been discovered by the authorities. We refer to this as the “zone of non-discovery”.

The company did not have a legal duty to report the bribery as the Canadian *Corruption of Foreign Public Officials Act* (“CFPOA”)<sup>13</sup> does not contain a statutory obligation to self-report past misconduct. If the company chose to self-report, counsel advised that in Canada there was no deferred prosecution programme and the likely result would be a conviction, but the fine would be reduced to recognize the act of self-reporting.

Counsel cautioned that all illegal conduct must stop immediately. Paying a bribe is illegal under the *Corruption of Foreign Public Officials Act* in Canada and the false bookkeeping would be a further and different offence.<sup>14</sup>

The company made the decision to not self-report, as they were concerned that it would put them on the government’s radar going forward. The company did a risk analysis. Given the perceived relatively low risk of apprehension, the reduced fine was not a sufficient incentive to self-report. In addition, the company was concerned that once they were on the government radar, other aspects of the company’s activities might be investigated and it was unclear what other government departments the information would be shared with. This leads to a discussion of the relationship between restorative justice guidelines and the timelines of an investigation.

### **(iii) Restorative Justice pyramids and timelines of investigations**

Braithwaite started to develop the concept of the regulatory pyramid in his important book, *To Punish or Persuade: Enforcement of Coal Mining Safety*,<sup>15</sup> published in 1985. In order to make optimal use of both punishment and persuasion, Braithwaite invoked the metaphor of an “enforcement pyramid”, which created a complex scheme of escalating corporate and individual penalties tied to different fault elements. Braithwaite explained the virtues of the enforcement pyramid as follows:

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<sup>12</sup> For a provocative and controversial perspective, see Ewan Sutherland, “Bribery and Corruption in Telecommunications – Best Practice in Prevention and Remedies” (Paper delivered at the 40<sup>th</sup> Research Conference on Communication, Information and Internet Policy, Arlington, Virginia, 21-23 September 2012), online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2014665](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2014665)>.

<sup>13</sup> *Corruption of Foreign Public Officials Act*, SC 1998, c 34 [“CFPOA”].

<sup>14</sup> *Ibid* at ss 3-4. Note that the company was privately owned. Publically-traded companies raise different issues related to disclosure of material changes.

<sup>15</sup> John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mining Safety* (Albany: State University of New York Press, 1985) at 13.

An enforcement pyramid in which most offences are at the base, receiving gentle sanctions, and progressively fewer suffer the tougher options, puts offenders in fear of the possibility that they will be among the few who will have the book thrown at them. Equally, it can give them hope that, even though they are guilty of a more serious offence, if they do all the inspector bids by way of reform — and do it quickly — they might receive more lenient treatment. Even when ‘plea bargaining’ of this sort does not really take place, the very fact that officials can and do escalate punishment can generate a suspicion among offenders that it is best to toe the line.<sup>16</sup>

At the base of the pyramid, Braithwaite encourages positive education and uses instruments such as formal warnings and civil penalties. The CRTC has referred to these types of instruments in *Compliance and Enforcement and Telecom Information Bulletin 2015-111*.<sup>17</sup>

The Commission’s approach to compliance and enforcement has three principal components:

- promoting compliance;
- monitoring compliance; and
- conducting enforcement activities.<sup>18</sup>

The Commission may engage in a wide variety of activities to promote compliance and awareness of non-compliance. For example, the Commission may promote compliance with legislative and regulatory requirements through public education and outreach activities.

Warning letters sent by the regulator may serve to reduce the amount of damage as soon as a complaint is made, and fit well into the regulatory pyramid of proportionate responses. There is precedent for this type of approach in the United Kingdom’s *Communications Act 2003* and in the Canadian *Telecommunications Act*<sup>19</sup> as interpreted by the CRTC, to name only two examples from the telecommunications world. Under the U.K. regime, the Office of Communications (“OFCOM”) may send a warning letter which specifies a period during which the person notified may make representations, bring itself into compliance, or remedy the consequences of the contravention.<sup>20</sup> The CRTC has specifically identified warning letters as one tool in the enforcement spectrum.<sup>21</sup>

In the U.K., following the warning letter, if appropriate compliance steps have not been taken, the next step up in the pyramid is an “enforcement notification”.<sup>22</sup> This notification may impose a requirement to take specific steps to comply, and may be enforced by injunctive relief. In Canada, the next level above a warning letter, but below an AMP, is a citation letter. The CRTC

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<sup>16</sup> *Ibid* at 142.

<sup>17</sup> *Bulletin No 2015-111*, *supra* note 5.

<sup>18</sup> *Ibid* at s 6.

<sup>19</sup> *Telecommunications Act*, *supra* note 3.

<sup>20</sup> *Communications Act*, 2003 c 21 at s 94 (UK) [*Communications Act*].

<sup>21</sup> *Supra* note 5 at s 13. See also *National Do Not Call List Report*, *supra* note 5.

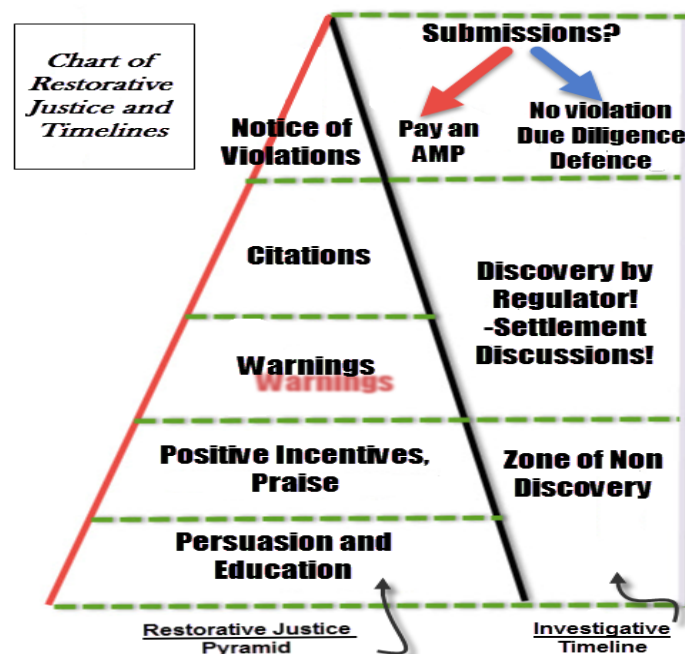
<sup>22</sup> *Communications Act*, *supra* note 20 at s 95.

process now includes issuing citations and compliance letters, as well as engaging in negotiated settlements.

Citations are now issued by the CRTC to those entities that may not be aware that they are violating rules such as telemarketing rules. A citation is issued to notify telemarketers that the CRTC has received consumer complaints alleging that the telemarketer has violated the Rules. The citation identifies the alleged violations, notes the specific corrective action to be taken, and sets out the process to be followed should the telemarketer choose to refute the alleged violation. The citation also advises the telemarketer that further violations may result in a Notice of Violation with the possible imposition of an AMP.<sup>23</sup>

Moving up the pyramid, in the U.K., penalties may be imposed for contravention of the enforcement notification. A pyramid approach is built into the penalty section by explicit reference to the prior failure to comply with lower remedies such as the warning letters.<sup>24</sup> In Canada, the CRTC now has the power to impose AMP, in the case of an individual, not exceeding \$25,000 and in any other case, not exceeding \$10,000,000.<sup>25</sup>

We see a gap in the literature between the development of restorative justice paradigms and the institutional framework which must accompany such paradigms. An investigation timeline needs to be placed beside the pyramid to illustrate the institutional dynamics. Figure 1 set out above is an attempt to accomplish this. For ease of reference we set it out again:



<sup>23</sup> *National Do Not Call List Report*, *supra* note 5 at s 6.

<sup>24</sup> *Communications Act*, *supra* note 20 at s 96.

<sup>25</sup> *Telecommunications Act*, *supra* note 3 at s 72.001.

#### (iv) Zone of non-discovery

If a telecom company discovers non-compliance with rules that have not yet been discovered by the authorities, it must first determine whether there is a legal obligation to self-report. In Canada, there are some statutory requirements to report violations of the law to the authorities. Examples of this include the obligation to report spills<sup>26</sup> and the obligation to report any material change that could affect a publicly traded company's share value.<sup>27</sup> This is a complex area that requires its own risk analysis. If the non-compliance is criminal in nature, such as the payment of a bribe to a foreign public official, and an internal investigation confirms that there is a scheme of bribery where there is no compliance defence, this will be a material change.<sup>28</sup>

The Canadian *Telecommunications Act*<sup>29</sup> does not impose a legal duty to self-report past misconduct although it does give the government rights of inspection for the purpose of verifying compliance or preventing non-compliance.<sup>30</sup> Moreover, although there are offence provisions, enforcement tends to focus on AMPs rather than true criminal remedies. As most telecom companies are publicly traded the issue of materiality will focus on whether the potential imposition of monetary penalties could be a material change requiring reporting to the market.

A telecom company that discovers non-compliance with the rules (that the CRTC is not aware of) is faced with a choice. Assuming that the violation is not material to the company's stock price, there is no duty to self-report. In the realm of AMPs, there is an argument that such penalties are very different from criminal offences and the potential for their imposition will have a limited impact on stock price. Indeed, the legislation defines the purpose of these administrative penalties as being "to promote compliance with this Act, the regulations or the decisions made by the Commission under this Act, and not to punish."<sup>31</sup>

In the absence of a legal obligation to self-report, a company will have to weigh the costs and benefits of self-reporting. In this situation, there are several options that begin to look like game theory.<sup>32</sup> In the situation where an organization believes that it is likely to be caught in any event, the option of self-reporting makes sense, to show remorse on sentencing. The more difficult situation is posed where there are inadequate state resources applied to enforcement, and detection is far less likely. A corporation may be tempted in such a situation to rectify the problem to prevent a repeat, but not to self-report the problem or its remediation. In this zone there will be concerns about the risks of putting oneself on the government radar. Any such

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<sup>26</sup> *Environmental Protection Act*, RSO 1990, c E-19 at s 92 [EPA].

<sup>27</sup> *Securities Act*, RSO 1990, c S-5 at s 75.

<sup>28</sup> See Dan K. Webb, Robert W. Tarun & Steven F. Molo, *Corporate Internal Investigations* (New York: Law Journal Press, 2012) at s 11.02. A separate issue relates to a director's obligations. See also Paul Blyschak, "Corporate Foreign Corrupt Practices and Director Liability" (2014) 51:3 *Alta L Rev* 555. Civil liability may also follow a failure to disclose to the market. This is the allegation at the heart of a civil lawsuit in the SNC Lavalin case. See "Judge certifies \$1 billion class action lawsuit against SNC-Lavalin", *CBC News* (20 September 2012), online: <<http://www.cbc.ca/news/canada/montreal/judge-certifies-1-billion-class-action-lawsuit-against-snc-lavalin-1.1169847>>.

<sup>29</sup> *Telecommunications Act*, *supra* note 3.

<sup>30</sup> *Ibid* at s 71(4).

<sup>31</sup> *Ibid* at s 72.002(2).

<sup>32</sup> Michael Ilg, "Imposing Self-Interest: Behavioural Law and Economics, the Ultimatum Game, and Value Possibilities" (2005) 28 *Dal LJ* 141.

calculation must weigh the reputational harm that will occur and whether it will be mitigated by the act of self-reporting.

In the zone of non-discovery, there is considerable uncertainty. For example, there is a considerable debate about whether self-reporting can be part of a due diligence defence in law (considered below). In this area, the best regulators reduce the uncertainty by developing public policy guidelines about deferred prosecutions, use immunity, and the factors that are weighed in discretionary decision making.

**(v) Zone of discovery and potential settlement**

Regulators may become aware of non-compliance in various ways, including complaints and old fashioned investigative work. The Regulator may choose to issue warning letters, or citations, or have discussions with the industry player involved with respect to a resolution short of a penalty. In this zone, from an institutional perspective, both the regulator and the telecom provider will be concerned that any settlement discussions remain confidential, should the matter escalate to the violation stage where submissions are made to the adjudicative tribunal on liability and penalty.

When negotiations fail, both a telecom company and the regulator itself will not want the panel that hears the dispute to know about the existence or content of settlement discussions.<sup>33</sup> In the context of civil litigation, the Supreme Court of Canada has recently recognized the sacrosanct nature of settlement discussions in *Sable Offshore Energy Inc. v Ameron International Corp.*<sup>34</sup>: “The settlement privilege created by the “without prejudice” rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed.”<sup>35</sup>

**(vi) Self Reporting in the zone of non-discovery: Can this constitute due diligence to be a defence of taking all reasonable measures?**

It is a defence for a person in a proceeding in relation to a telecommunications violation to establish that the person exercised due diligence to prevent the violation.<sup>36</sup>

A controversial issue is whether or not self-reporting can constitute due diligence such that it rises to a defence of taking all reasonable measures. If self-reporting may contribute toward building a legal defence, obviously there is greater incentive to do so.

The key is the existence of a robust compliance system. For example, in *Home Depot of Canada Inc. v. R.*<sup>37</sup> upon discovery of an accounting error, Home Depot immediately remitted a further tax payment and paid interest. In the *Home Depot* case, the company had a system and worked

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<sup>33</sup> On the importance of settlement discussions being privileged, see *Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37, [2013] 2 SCR 623 at para 13, Abella J [*Sable*].

<sup>34</sup> *Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37, [2013] 2 SCR 623, Abella J [*Sable*].

<sup>35</sup> *Ibid* at para 13.

<sup>36</sup> *Telecommunications Act*, *supra* note 3 at s 72.15.

<sup>37</sup> *Home Depot of Canada Inc. v The Queen*, 2009 TCC 281 [*Home Depot*].

with an accounting firm which took all reasonable precautions. This constitutes due diligence and any subsequent act of self-reporting is part of that due diligence system.<sup>38</sup>

The link between self-reporting and a compliance system is discussed by the Competition Bureau in its "Corporate Compliance Programs" Bulletin which provides guidance regarding credible and effective corporate compliance programs designed to ensure compliance with competition law.<sup>39</sup> The Bulletin recognizes the important role that a compliance programme will play in establishing a due diligence defence in the deceptive marketing area:

For certain false or misleading representations and deceptive marketing practices provisions under the Act, a company may argue that it had exercised due diligence to prevent the conduct.

The pre-existence of a program is not, in itself, a defence to allegations of wrongdoing under any of these provisions. At the same time, a credible and effective program may enable a business to demonstrate that it took reasonable steps to avoid contravening the law. Documented evidence of a credible and effective corporate compliance program will assist a company in advancing a defence of due diligence, where available.<sup>40</sup>

An organization that has a credible compliance system will have the incentive to self-report as part of this compliance programme. A skeptic may say, however, that it is illogical to argue that self-reporting is part of a compliance programme. The skeptic may say, if there is past non-compliance, is this not evidence that any due diligence system has *failed* and if this is the case, how can self-reporting it help to build a compliance defence? There are two answers to this. First, psychologists have known for a while about a phenomenon called the "representative heuristic", which reflects the tendency of people to jump to conclusions without considering a statistical baseline.<sup>41</sup>

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<sup>38</sup> In *Home Depot*, the Tax Court in very strong language ruled that this constituted due diligence, and commented that the regulator should have considered a resolution short of charges by saying the following: "It is easy to be critical of behaviour after an error has been committed. In considering whether a taxpayer acted with due diligence to minimize the possibility of error, one can always find something else the taxpayer might have done. But that is not the test. The test is whether what the taxpayer in fact did was sufficient reasonable precaution — not that the taxpayer did not hold the hand of the employee throughout every single task no matter how menial, though Deloitte Tax went a long way to doing exactly that. I have been convinced Home Depot took all reasonable precautions and can rely on the defence of due diligence." The *Home Depot* decision has been referred to in subsequent cases, although distinguished on the particular facts. See e.g. *Ciobanu v The Queen*, 2011 TCC 319 and *Homelife/Experience Realty Inc. v Canada (Minister of Finance)*, 2014 FC 657.

<sup>39</sup> Competition Bureau Canada, "Corporate Compliance Programs", (Gatineau: Competition Bureau, 3 June 2015), online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html>>.

<sup>40</sup> *Ibid* at s 3.2.3

<sup>41</sup> Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, "Inside the Judicial Mind" (2001) 86 Cornell L Rev 777. A simple example illustrates the point. Suppose you are doing dishes the old fashioned way and, for some unexplained reason, an expensive wine glass rolls out of the dish rack and smashes on the floor, resulting in a splinter of glass going into a person's foot. The doctrine of *res ipsa loquitur* requires that you must prove that you were not negligent. The representativeness heuristic may contribute to the presumption (most likely made by a trier of fact) that you were negligent in dropping the glass. This fails to consider context, time horizons or benchmarks. Suppose this is the first wine glass broken in ten years and that a system existed for wine glass placement. If this is the case, the broken glass is merely an anomaly in a due diligence system that cannot by definition require perfection. Equally, if one breaks a wine glass every week, chances are that there is something negligent in your system that at least calls out for an explanation. See Archibald, Jull & Roach, *supra* note 4 at s 4:30.



The second answer relates to the virtuous nature of self-reporting. The Department of Justice/Security Exchange Commission's ("DOJ/SEC") Resource Guide comments on remedial measures which may be considered by prosecutors:

In addition, prosecutors may consider a company's remedial actions, including efforts *to improve an existing compliance program* or appropriate disciplining of wrongdoers. A company's remedial measures should be meaningful and illustrate its recognition of the seriousness of the misconduct, for example, by taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated.<sup>42</sup>

## **PART II: ENFORCEMENT AND ADJUDICATION LIVING IN THE SAME HOUSE: DOES MONEY CHANGE THINGS?**

The CRTC follows the classic integrated "shared house" model. Under the umbrella framework of the Commission, the enforcement division co-exists with the adjudicative functions of the Commission. This integrated model has been upheld in the *Ocean Port* decision, considered in more detail below. The questions considered in this part is whether the power to impose monetary penalties changes this balance.

### **(i) New power to order a general administrative monetary penalty**

The CRTC has the power to impose, in the case of an individual, an AMP not exceeding \$25,000 and in any other case, not exceeding \$10,000,000.<sup>43</sup>

In Canada, if a telecommunications company is served with a Notice of Violation and believes that it has a due diligence defence,<sup>44</sup> it has a right to make representations with respect to the alleged violation.<sup>45</sup> The representations will be reviewed by a Commission panel, which will decide, on a balance of probabilities, whether the person committed the violation.<sup>46</sup> The issues involving due diligence at this stage may be complex as the law of due diligence has its own jurisprudence which has considered at least fourteen factors and a balancing of issues.<sup>47</sup>

In March of 2015 the CRTC issued Guidelines regarding the general AMP regime under the *Telecommunications Act*.<sup>48</sup> This document states as follows:

The person served with the Notice of Violation has 30 days to either (i) pay the AMP, or (ii) make *written representations to the Commission* regarding whether the violation has

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<sup>42</sup> United States, U.S. Department of Justice, Criminal Division & U.S. Securities and Exchange Commission, Enforcement Division, *FCPA Resource Guide to the U.S. Foreign Corrupt Practices Act* at 54 [emphasis added], online: <<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>> [Resource Guide].

<sup>43</sup> *Telecommunications Act*, *supra* note 3 at s 72.001.

<sup>44</sup> *Ibid* at s 72.15 (1) states: "It is a defence for a person in a proceeding in relation to a violation to establish that the person exercised due diligence to prevent the violation."

<sup>45</sup> *Ibid* at s 72.005(2)(b).

<sup>46</sup> *Ibid* at s 72.007(2).

<sup>47</sup> Archibald, Jull & Roach, *supra* note 2 at ss 4:70.

<sup>48</sup> *Bulletin No 2015-111*, *supra* note 5.

occurred, the amount of the AMP, or both. However, the Commission may specify a longer period if it so chooses.<sup>49</sup>

It is significant, and perhaps surprising, that the Commission does not afford a telecom company the right to an oral contested hearing when the stakes may be as high as \$10,000,000. We will have more to say about this below.

The Guidelines describe the process as follows:

If the person does not agree with the Notice of Violation and decides to make representations, the representations will be reviewed by a *Commission panel*, which will decide, on a balance of probabilities, whether the person committed the violation and, if so, whether the AMP amount is appropriate. In doing so, the Commission may impose the penalty set out in the Notice of Violation, a lesser amount, or no penalty.<sup>50</sup>

When the institutional timeline is set out beside the pyramid as in Figure 1, the tensions become apparent. A telecom company may be concerned that information or strategies revealed in previous dialogue with the regulator will somehow influence the decision by the Commission on the issue of liability, whether due diligence has been made out, or what the appropriate penalty ought to be. Restorative justice dialogue is east and administrative contested hearings are west.

Presumably the panel chosen to adjudicate the matter will have had no dealings with any potential resolution discussions, which is a standard requirement in administrative law. In the *mediation* context of the *Broadcasting Act*,<sup>51</sup> the CRTC has recognized the need for “ethical firewalls”, and presumably these will also be implemented in the context of AMPs, but this has not yet been formalized.<sup>52</sup>

The CRTC has its own rules of procedures for hearings, but curiously these rules are explicitly exempted for AMPs, unless the AMP is issued in the course of a public proceeding. (A matter may be brought before the Commission for consideration in a public proceeding either on the Commission’s own motion or by way of an application)<sup>53</sup>.

## **(ii) Sliding scales of procedures as penalties increase**

The present rules set out in CRTC guidelines which only permit written submissions on liability or penalty could be described as a “one size fits all” model for the entire range of potential AMPs. The CRTC Guidelines regarding the general AMPs have not yet been subject to

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<sup>49</sup> *Ibid* at s 22 [emphasis added].

<sup>50</sup> *Ibid* at s 24 [emphasis added].

<sup>51</sup> *Broadcasting Act*, SC 1991, c 11.

<sup>52</sup> See Canadian Radio-television and Telecommunications Commission, “*Practices and procedures for staff-assisted mediation, final offer arbitration, and expedited hearings*”, Bulletin No 2009-38 (Ottawa, CRTC, 29 January 2009) at Appendix 3, online: < <http://www.crtc.gc.ca/eng/archive/2009/2009-38.htm>>.

<sup>53</sup> *Bulletin No 2015-111*, *supra* note 5 at s 24; Canadian Radio-television and Telecommunications Commission, “Rules of Practice and Procedure”, *SOR/2010-277* at s 2(1), online: < <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2010-277/page-1.html#h-2>>. For a recent example, see *Toronto Breeze Air Duct Cleaning Services Inc. - Violations of the Unsolicited Telecommunications Rules*, (8 March 2016) CRTC 2016-88, File No. PDR 9174-1136, online: < <http://www.crtc.gc.ca/eng/archive/2016/2016-88.htm>>.

administrative challenge. The Courts will in the future be required to characterize the nature of a specific AMP along a spectrum of impact, which will then provide guidance as to the level of procedural protections that fairness requires. We are of the view that a “one size fits all” model may fall short of the high requirement of procedural fairness as the penalties escalate and may also trigger constitutional review, for the following reasons.

In defining the parameters of due process and procedural fairness, the Supreme Court of Canada has set out a five-factor balancing test in the decision of *Baker v Canada*.<sup>54</sup> “The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.”<sup>55</sup>

The decision of the Alberta Court of Queen's Bench in *Lavallee v Alberta (Securities Commission)*<sup>56</sup> held that with respect to a \$1 million AMP in the securities context, “it is clear that considering the amount of the potential administrative penalties at stake and their potential effect on the applicants' lives, a *Baker* analysis will mandate a reasonably high level of procedural fairness”.<sup>57</sup> The Alberta Court of Appeal affirmed this decision, and made the following comments about the application of procedural fairness as it applied to evidentiary issues in a proceeding dealing with AMPs:

It does not follow that Commission panels are required to hold a *voir dire* as a matter of course to determine the admissibility of evidence. That is not required by the legislation or by the principles of procedural fairness. As the chambers judge noted at para. 205 of his reasons, “in a regulatory context the admission of hearsay or compelled testimony or the lack of opportunity to cross-examine will not necessarily breach procedural fairness”: see also *Alberta (Securities Commission) v. Brost*, 2008 ABCA 326, 2 Alta. L.R. (5th) 102 (Alta. C.A.) (“*Brost*”). It is clear from the *Securities Act* that panels are to employ less formal procedures than would be required in a court. It is therefore open to a panel to admit, for example, hearsay evidence without holding a *voir dire*. By the same token, a panel has the discretion to refuse evidence; for example, evidence that it considers to be inherently flawed. The provisions of the statute must be read so as to give effect to the legislative intent that relevant evidence will be generally admissible, while at the same time honouring the requirements of procedural fairness and giving the Commission control over its own process.<sup>58</sup>

Justice Stratas of the Federal Court of Appeal has recently affirmed the importance of procedural fairness in the context of knowing the case that one has to meet in relation to the imposition of AMPs. In the case of *Kabul Farms Inc. v R.*<sup>59</sup> Justice Stratas found that the regulator in the Financial Transactions area did not sufficiently explain the reasoning for assessing monetary penalties in relation to failures to develop and apply written compliance policies and procedures, to perform a risk assessment, and to create a written training program for its employees and

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<sup>54</sup> *Baker v Canada*, [1999] 2 SCR 817, 174 D.L.R. (4th) 193.

<sup>55</sup> *Ibid* at para 25.

<sup>56</sup> *Lavallee v Alberta (Securities Commission)*, 2008 ABQB 17, affirmed 2010 ABCA 48.

<sup>57</sup> *Ibid* at para 201.

<sup>58</sup> *Ibid* at para 17.

<sup>59</sup> *Kabul Farms Inc. v R.*, 2016 FCA 143, 2016 CarswellNat 1458.

agents. What is interesting is the aspect of the judgment of Justice Stratas as it relates to procedural fairness in the context of AMPs:

My second serious concern about the Director's apparent use of an unpublished formula is procedural fairness. In a case such as this — the potential imposition of a *monetary penalty* against a party for a regulatory violation — the party has a right to know the case to meet and to make informed submissions on it: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 (S.C.C.). In this case, the Director is aware of the obligation to some extent: he afforded the respondent an opportunity to respond to many aspects of the case against him. But the apparent existence and non-disclosure here of an unpublished formula and perhaps more — material counsel for the appellant advises was relied upon by the Director to select the base amounts — worked unfairness to the respondent.

*As part of procedural fairness*, a party potentially liable for an *administrative monetary penalty*, such as the respondent, needs to know about any formula, *guideline* or supporting analysis the Director will rely upon in his assessment of *penalties*. In response, that party is entitled to suggest that any formula, *guideline* or supporting analysis is wrong, inappropriate, unacceptable or indefensible on the facts, or inconsistent with legislative provisions supplying decision-making criteria, such as section 73.11 of the Act. A formula, *guideline* or supporting analysis might also show that the Director is adopting a particular interpretation of the legislation, and the affected party is entitled to make submissions on that too. Here, the unpublished formula and perhaps more was withheld from the respondent, *leaving him in the dark*.<sup>60</sup>

The reference to leaving a person in the dark dovetails with our arguments that procedural fairness will apply on the dark side of the pyramid.

As can be seen from the above, the cases on procedural fairness have not required court like procedures or evidence in the context of AMPs, but they have also not abandoned fair principles such as evidentiary discretion to refuse flawed evidence or the right to know the case that one has to meet. Applying these principles, it may be argued that in certain circumstances the restriction in the CRTC Guidelines to written representations may not permit adequate review of evidentiary issues or the nuances of the methodology employed by the CRTC. In our recommendations section we offer a blended model of procedure that escalates procedural protections as the penalty exposure escalates.

Fairness, as defined by the sliding scale in *Baker*, is informed by *Charter* values.<sup>61</sup> The *Canadian Bill of Rights*<sup>62</sup> may be of some assistance in an argument that a hearing is required for more serious AMPs, although to date the Courts have resisted the reach of the Bill.<sup>63</sup>

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<sup>60</sup> *Ibid* at paras 43-44 [emphasis added].

<sup>61</sup> See Lorne Sossin & Mark Friedman, "Charter Values and Administrative Justice" (2014), Osgoode Legal Studies Paper Series, Paper No 62 at 20, online: <<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1061&context=olsrps>>.

<sup>62</sup> *Canadian Bill of Rights*, SC 1960, c 44.

### (iii) Ocean Port and the integrated model: Money may not change this balance

Now that the CRTC has power to order general AMPs, the question arises as to whether this presents a challenge to the integrated model. The integrated shared house administrative model has been approved by the Supreme Court of Canada in the context of licence suspensions in the context of alcohol and gaming regulation.<sup>64</sup> In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*,<sup>65</sup> the issue was whether members of the Liquor Appeal Board are sufficiently independent to render decisions on violations of the Act and impose the penalties it provides. With respect to the issue of separation of the prosecution branch from the adjudicative, the court in *Ocean Port* endorsed remedial flexibility, particularly where economic interests only are at stake:

The overlapping of investigative, prosecutorial and adjudicative functions in a single agency is frequently necessary for a tribunal to effectively perform its intended role: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623. Without deciding the issue, I would note that such flexibility may be appropriate in a licensing scheme involving purely economic interests.

Further, absent constitutional constraints, it is always open to the legislature to authorize an overlapping of functions that would otherwise contravene the rule against bias.<sup>66</sup>

The *Ocean Port* case has been followed to uphold multi-faceted tribunals generally, where the issues range from serious licence suspension to compensation re expropriation. The *Ocean Port* decision has had a significant impact on the way courts interpret the rules and requirements of administrative tribunals. In the last 15 years, *Ocean Port* has been followed to uphold the powers of various tribunals, and the penalties they impose. A common concern that has been brought to the attention of the courts is the lack of judicial independence present in many statutorily created tribunals. In *Saskatchewan Federation of Labour v Saskatchewan (Attorney General)*,<sup>67</sup> the Court recognized that the structure of the Saskatchewan Labour Relations Board was substantially similar to the Liquor Licensing board considered in *Ocean Port*, sitting closer to the executive end of the spectrum.<sup>68</sup> With these similarities in mind, the Court maintained that tribunals created for the primary purpose of implementing government policies will not be afforded judicial independence.<sup>69</sup> *Sam Levy & Associates Inc. v Mayrand*<sup>70</sup> cited *Ocean Port* in making the assertion that, subject to constitutional restraints, courts may not override statutory powers given to tribunals, even in the face of a perceived denial of natural justice.<sup>71</sup> In *Ocean Port*, the imposed penalty was a mere two day liquor license suspension, but its reasoning has

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<sup>63</sup> Lorne Sossin, “The Quasi-Revival of the Canadian Bill of Rights and Its Implications for Administrative Law” (2004) 25 SCLR (2d) 191, online: < <http://digitalcommons.osgoode.yorku.ca/sclr/vol25/iss1/6/>>.

<sup>64</sup> For an interesting article on the history of this type of regulation, see Sarah E. Hamill, “The Alberta Liquor Control Board and the Question of Administrative Independence, 1924-1939” (2016) 53:3 Alta L Rev 747.

<sup>65</sup> *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781, remitted 2002 BCCA 311 (CanLII) [*Ocean Port*].

<sup>66</sup> *Ibid* at paras 41-42. The decision in *Ocean Port* was followed in *Restaurant Innovation Inc. v Ontario (Alcohol & Gaming Commission)*, 2012 ONSC 543, 213 ACWS (3d) 255.

<sup>67</sup> *Saskatchewan Federation of Labour v Saskatchewan (Attorney General)*, 2015 SCC 4, [2015] 1SCR 245.

<sup>68</sup> *Ibid* at para 76.

<sup>69</sup> *Ibid* at para 75.

<sup>70</sup> *Sam Levy & Associates Inc. v Maryrand*, 2005 FC 702, 2005 CarswellNat 1678.

<sup>71</sup> *Ibid* at para 123.

been used to uphold more serious penalties and decisions enforced by administrative tribunals – such as: serious license suspensions and cancellations<sup>72</sup>, spousal support variations,<sup>73</sup> compensation for expropriation of land<sup>74</sup>, and labour dispute grievances.<sup>75</sup> It likely follows from the severe consequences imposed in these cases, that *Ocean Port* will be followed in the context of administrative tribunals with the power to impose monetary penalties, but no case has explicitly ruled on this point.

#### **(iv) Constitutionality of the Telecom AMP: Uncharted waters and institutional factors**

The constitutional validity of AMPs have been upheld by the Supreme Court of Canada in the income tax context, in the case of *Guindon v Canada*,<sup>76</sup> released on July 31, 2015. The court held that AMPs under s. 163.2 of the *Income Tax Act*<sup>77</sup> are not offences that trigger constitutional protections such as the right to be presumed innocent.

The door is still open for constitutional challenges to the myriad of other AMP schemes if they fall within the "punitive paradigm". In *Guindon*, the Supreme Court articulated a balancing test to determine whether an outcome is punitive:

Whether this is the case is assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty.<sup>78</sup>

Applied to s. 163.2 of the *Income Tax Act*, the balancing test led to the conclusion that the penalty in question was administrative in nature and not punitive. An important factor was that s. 163.2 utilizes a somewhat mechanical formula for the assessment of the penalty. By way of contrast, the telecom AMP provisions identify relevant factors in a manner that is far more similar to relying on principles used in criminal sentencing.<sup>79</sup>

The court noted that even though traditional constitutional protections under s. 11 of the *Charter of Rights and Freedoms*<sup>80</sup> are not engaged by s. 163.2 of the Act, those against whom penalties are assessed are not left without recourse or protection. They have a full right of appeal to the Tax Court of Canada and have access to other potential administrative remedies.<sup>5</sup> This reference to appeal rights and other remedies sets a high bar for comparing the regime in issue in *Guindon* with other AMPs regimes.

To the extent that other regimes do not provide such robust appeal rights and administrative remedies, there may be an Achilles heel for a constitutional challenge. The Telecommunications

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Waterman v Waterman*, 2014 NSCA 110, 2014 CarswellNS 930.

<sup>74</sup> *Eckervogt v British Columbia (Minister of Employment & Investment)*, 2004 BCCA 398, 2004 CarswellBC 1635.

<sup>75</sup> *Vaughan v R.*, 2005 SCC 11, 2005 CarswellNat 675.

<sup>76</sup> *Guindon v Canada*, 2015 SCC 41, [2015] 3 SCR 3 ["*Guindon*"].

<sup>77</sup> RSC 1985, c 1 (5<sup>th</sup> Supp.)

<sup>78</sup> *Ibid* at para 76.

<sup>79</sup> *Telecommunications Act*, *supra* note 3 at s 72.002(1).

<sup>80</sup> *Constitution Act*, 1982, c 11 (U.K.), Schedule B.

Act AMP has not yet been the subject of a constitutional challenge, and this will have to wait for a future day.<sup>81</sup>

It is beyond the scope of this paper to offer an exhaustive constitutional analysis of the telecommunications AMP in Canada.<sup>82</sup> We would observe, however, that the restriction of submissions on AMPs to written submissions only, without a right to a hearing in cases where the AMP reaches a magnitude of \$10,000,000 leaves the door open to a future constitutional attack.

In conclusion on this section, for now, the shared house model in telecommunications is here to stay. That does not mean however that as a matter of policy this is the best model in the context of the new role of the CRTC in imposing significant AMPs. In terms of considering other policy models, we therefore turn to consider other alternatives such as the Court inspired model.

### **PART III: COMPARATIVE INSTITUTIONS**

#### **(i) Competing models in Canada for the imposition of administrative penalties**

There is a competing institutional model that could be described as the “Court inspired model”. The Court inspired model utilizes a Tribunal which is separate from the regulator, has some judicial membership, and robust procedural rules. An example of this model is the Canadian Competition Tribunal.<sup>83</sup> The Competition Tribunal has the power (as does the Federal Court and the Superior Court) to order AMPs for deceptive marketing practices such as representations to the public that are false or misleading in a material respect. The AMP may be an amount not exceeding

- (i) in the case of an individual, \$750,000 and, for each subsequent order, \$1,000,000; or
- (ii) in the case of a corporation, \$10,000,000 and, for each subsequent order, \$15,000,000.<sup>84</sup>

The Competition Tribunal offers an example of the Court inspired model and a point of comparison with the CRTC which follows the integrated model.

The Competition AMP is almost identical to the telecom AMP, with the exception that individual liability in the competition regime is up to \$750,000 whereas individual liability in the telecom AMP is \$25,000. For corporations, liability is \$10,000,000 for a first order under both the competition and telecom AMPs. It might be asked, then, why does the competition regime provide a Court inspired model for AMPs when the telecom regime does not? The Competition Tribunal is a specialized tribunal that combines expertise in economics and business with expertise in law. The Tribunal is a strictly adjudicative body that operates independently of any government department. The cases it hears are complex and deal with matters such as mergers, misleading advertising and restrictive trade practices.

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<sup>81</sup> For a fulsome discussion, see Archibald, Jull & Roach, *supra* note 2 at ss 15:10-15:80.

<sup>82</sup> *Ibid.*

<sup>83</sup> Canadian Competition Tribunal, online: <<http://www.ct-tc.gc.ca/>> [Competition Tribunal].

<sup>84</sup> *Competition Act*, RSC 1985, c C-34 at s 74.1(1)(c).

The Competition Tribunal should be distinguished from the Competition Bureau. The Competition Bureau investigates complaints and decides whether to proceed with the filing of an application to the Tribunal.<sup>85</sup>

The following chart summarizes some of the key features of the Competition Tribunal as a court inspired model, in contrast to the class administrative model<sup>86</sup>:

<b>Court Inspired Administrative Model</b>	<b>Integrated Administrative model</b>
Tribunal is a separate institution <sup>87</sup>	Tribunal performs multi functions
Judicial membership is a requirement for a percentage of the Tribunal, <sup>88</sup>	Sector Specific expertise is the focus
Judicial members have the exclusive right to decide the issue of administrative monetary penalties. <sup>89</sup>	Administrative monetary penalties are imposed by a panel of the Commission which has a focus on telecom expertise

Referring back to Figure 1, the Competition Bureau (as contrasted with the Competition Tribunal) will be involved in self reporting or immunity/leniency applications, as well as in settlement discussions along the spectrum of the compliance continuum.<sup>90</sup> The Bureau may employ a blended approach depending on the facts in facilitating voluntary compliance before requiring contested hearings. The mechanisms to encourage voluntary compliance range

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<sup>85</sup> Competition Tribunal, *supra* note 83. The Government appoints judicial members from the Federal Court to the Competition Tribunal on the recommendation of the Minister of Justice. Lay members are appointed by the Government on the recommendation of the Minister of Innovation, Science and Economic Development. They provide expertise based on their individual backgrounds in economics, business, finance, accounting or marketing. Lay members are appointed on a part-time basis. The members are appointed for fixed terms of up to seven years and may be reappointed. One of the judicial members is appointed Chairman of the Tribunal by the Cabinet.

<sup>86</sup> Josephine Palumbo, “Striking the Right Balance Between Fairness, Efficiency and Expediency: The Competition Tribunal Revisits Its Governing Rules of Practice and Procedure” (2007) 32 Adv Q 437. It should be noted that this analysis should be updated, as the Rules of Procedure were changed in 2008. Section 16 of the *Competition Tribunal Act* provides that the Competition Tribunal may make general rules for regulating its practice and procedure with the approval of the Governor in Council. On May 14, 2008, the new *Competition Tribunal Rules*, SOR/2008-141, online: <<http://laws-lois.justice.gc.ca/eng/regulations/SOR-2008-141/>> came into effect. They set the framework for informal and expeditious proceedings.

<sup>87</sup> *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp.)

<sup>88</sup> *Ibid* at s 3(2). As per this section, the Tribunal shall consist of (a) not more than six members to be appointed from among the judges of the Federal Court by the Governor in Council on the recommendation of the Minister of Justice; and (b) not more than eight other members to be appointed by the Governor in Council on the recommendation of the Minister.

<sup>89</sup> *Ibid* at s 11(2). This section states: “Applications for orders under Part VII.1 of the *Competition Act* {Deceptive Marketing Practices Administrative Remedies} and any related matters shall be heard and disposed of by the Chairman of the Tribunal, sitting alone, or by a judicial member designated by the Chairman, sitting alone.”

<sup>90</sup> Canada, Competition Bureau, “Competition and Compliance Framework” (Gatineau: Competition Bureau, 10 November 2015) at Figure 1, online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03982.html#figure1>>.



from warning letters to standards based inspections and compliance meetings.<sup>91</sup> The Bureau explicitly recognizes the importance of dialogue in promoting resolutions<sup>92</sup>.

If the matter cannot be resolved and proceeds to a contested hearing on an AMP, for example, a judicial member of the Competition Tribunal will hear that matter. Under this model there is complete transparency and separation as the adjudicative Tribunal (The Competition Tribunal) is formally a separate institution from the Bureau.

## **(ii) Comparative approaches**

In Australia, almost all administrative adjudication is performed by the Australian Administrative Appeals Tribunal, a non-specialized adjudicating agency, or other specialized tribunals that are independent of the enforcing agency. Commentators have observed that these tribunals, which evolved out of concerns for separation of powers, have achieved great legitimacy and North America should give thought to following the independent model.<sup>93</sup>

In the United Kingdom, the Regulatory Enforcement and Sanctions Act 2008 (RESA 2008) creates a set of “administrative sanctions” that enforcement bodies will be able to impose. These include monetary penalties, fixed and variable. Prior to this, in the context of the Financial Services Authority (“FSA”), the “Strachan Report” had recommended a reformed structure with more external accountability. This led to the creation of a Litigation and Legal Review Unit within the enforcement division, which promoted some separation between investigation and prosecution.<sup>94</sup> This solution was an attempt to keep strengths of both models (Court inspired and Integrated Administrative) by the addition of separate legal departments within the enforcement division.

## **PART IV RECOMMENDATIONS FOR REFORM**

Our recommendations for reform are organized along the lines in Figure 1, to recognize the distinction between the zone of non-discovery and subsequent discussions or contested submissions.

### **A. Zone of Non-Discovery**

Dialogue with a regulator is best facilitated by institutional features such as a deferred prosecution program, use immunity, and recognition of self-reporting as part of the compliance defence. These programmes facilitate dialogue because they set the parameters and expectations

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<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.* The Bureau generally communicates with parties whose conduct is being inquired into under the *Competition Act*, as well as industry participants, complainants and the general public after an inquiry has been commenced. Communications during inquiries aim to provide timely and predictable opportunities to engage in dialogue to resolve matters in a manner that preserves the Commissioner’s discretion and other enforcement interests, including applicable privileges and statutory obligations. As a means of promoting compliance, such communications reflect the Bureau’s recognition that dialogue with parties generally facilitates resolutions and helps to avoid protracted litigation.

<sup>93</sup> Michael Asimow & Jeffrey S. Lubbers, “The Merits of “Merits” Review: A Comparative Look at the Australian Administrative Appeals Tribunal” (2010) 28 Windsor YB Access Just 261.

<sup>94</sup> Nuno Garoupa, Anthony Ogus & Andrew Sanders, “The Investigation and Prosecution of Regulatory Offences: Is There an Economic Case for Integration?” (2011) 70:1 Cambridge LJ 229.

of dialogue, and give companies a safety net that gives them comfort and incentives to self-report. Even where it is a legal obligation to self-report this may not occur, as there is fear of damage to reputation and concerns about the reaction of the regulator. Deferred prosecutions and use immunity reduce these fears.

**(i) Non-prosecution and deferred prosecution agreements**

Deferred prosecution agreements are defined as follows in the DOJ/SEC Enforcement Guide:

Under a deferred prosecution agreement, or a DPA as it is commonly known, DOJ files a charging document with the court, but it simultaneously requests that the prosecution be deferred, that is, postponed for the purpose of allowing the company to demonstrate its good conduct. DPAs generally require a defendant to agree to pay a monetary penalty, waive the statute of limitations, cooperate with the government, admit the relevant facts, and enter into certain compliance and remediation commitments, potentially including a corporate compliance monitor. DPAs describe the company's conduct, cooperation, and remediation, if any, and provide a calculation of the penalty pursuant to the U.S. Sentencing Guidelines. In addition to being publicly filed, DOJ places all of its DPAs on its website. If the company successfully completes the term of the agreement (typically two or three years), DOJ will then move to dismiss the filed charges. A company's successful completion of a DPA is not treated as a criminal conviction.<sup>95</sup>

The United States is in the forefront of the use of non-prosecution and deferred prosecution agreements in areas such as foreign corruption. Under a non-prosecution agreement, or an NPA as it is commonly known, DOJ maintains the right to file charges but refrains from doing so to allow the company to demonstrate its good conduct during the term of the NPA.<sup>96</sup> The Securities and Exchange Commission ("SEC") has declined to take enforcement action against both individuals and companies based on the facts and circumstances present in those matters, where, for example, the conduct was not egregious, the company fully cooperated, and the company identified and remediated the misconduct quickly.

A recent example of a non-prosecution agreement negotiated with an administrative tribunal is the Securities and Exchange Commission ("SEC") settlement with Ralph Lauren. On April 22, 2013 the SEC announced a non-prosecution agreement ("NPA") with Ralph Lauren Corporation in which the company will disgorge more than \$700,000 in illicit profits and interest obtained in connection with bribes paid by a subsidiary to government officials in Argentina from 2005 to 2009.<sup>97</sup> The misconduct was uncovered during an internal review under-taken by the company and was promptly reported to the SEC.

The SEC determined not to charge Ralph Lauren Corporation with violations of the U.S. *Foreign Corrupt Practices Act*<sup>98</sup> due to the company's prompt reporting of the violations on its own initiative, the completeness of the information it provided, and its extensive, thorough, and real-

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<sup>95</sup> *Resource Guide*, supra note 42 at 74.

<sup>96</sup> *Ibid.*

<sup>97</sup> U.S. Securities and Exchange Commission, "SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct" Press Release No 2013-65, online: <[www.sec.gov/news/press/2013/2013-65.htm](http://www.sec.gov/news/press/2013/2013-65.htm)>.

<sup>98</sup> *Foreign Corrupt Practices Act*, 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq.

time cooperation with the SEC's investigation. Ralph Lauren Corporation's cooperation saved the agency substantial time and resources ordinarily consumed in investigations of comparable conduct. In parallel criminal proceedings, the Justice Department entered into an NPA with Ralph Lauren Corp., whereby the company will pay a \$882,000 penalty.

The SEC recognizes the tension between enforcement and providing incentives to entities to voluntarily come forward. The basic approach of the SEC is set out in the following policy statement:

As with any cooperation program, there exists some tension between the objectives of holding individuals fully accountable for their misconduct and providing incentives for individuals to cooperate with law enforcement authorities. This policy statement sets forth the analytical framework employed by the Commission and its staff for resolving this tension in a manner that ensures that potential cooperation arrangements maximize the Commission's law enforcement interests. Although the evaluation of cooperation requires a case-by-case analysis of the specific circumstances presented, as described in greater detail below, the Commission's general approach is to determine whether, how much, and in what manner to credit cooperation by individuals by evaluating four considerations: the assistance provided by the cooperating individual in the Commission's investigation or related enforcement actions; the importance of the underlying matter in which the individual cooperated; the societal interest in ensuring that the cooperating individual is held accountable for his or her misconduct; and the appropriateness of cooperation credit based upon the profile of the cooperating individual. In the end, the goal of the Commission's analysis is to protect the investing public by determining whether the public interest in facilitating and rewarding an individual's cooperation in order to advance the Commission's law enforcement interests justifies the credit awarded to the individual for his or her cooperation.<sup>99</sup>

It is important to stress that non prosecution and deferred prosecution programs are designed for companies who have robust compliance programs and who come forward from the zone of non-discovery. In the United States there is a wealth of literature on the topic of corporate internal investigations.<sup>100</sup> The basic concept is as follows: a corporation will retain a law firm or accounting firm, or a team of both, to carefully conduct a private and confidential internal investigation where there is reason to believe that non-compliance may have occurred. This will include extensive document review (hard copies and electronic), interview of witnesses, and legal analysis to be presented (usually to a special committee set up for the purposes of the review). When this investigation is complete (or substantially complete), the corporation will authorize the firm conducting the investigation to approach the authorities in a cooperative fashion within guidelines such as those set out by the SEC. This process saves significant resources by transferring the costs of the investigation to the regulated entity. The *quid pro quo* for that expenditure is the hope and incentive that the entity will not be formally punished, thus avoiding financial penalties and reputational damage.

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<sup>99</sup> United States, Security and Exchange Commission, "Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions", Policy Statement No 17 CFR Part 202, Release No. 34-61340 (19 January 2010) at note 22, online: <[www.sec.gov/rules/policy/2010/34-61340.pdf](http://www.sec.gov/rules/policy/2010/34-61340.pdf)>.

<sup>100</sup> Webb, Tarun & Molo, *supra* note 28.

Under a strictly operated deferred prosecution agreement (“DPA”), enforcement authorities gain the benefit of internal investigations that are funded by industry and disclosed voluntarily, which saves government resources and brings to light misconduct that might otherwise never become public. It is in this “zone of non-discovery before the Authorities are aware” that DPAs have the most impact.

In order for a company to be eligible for any cooperation credit, the company must completely disclose to the Department all relevant facts about individual misconduct. The U.S. Attorney General, in the “Yates memo”, has stated that, absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.<sup>101</sup>

In Canada there is no formal programme for non-prosecution agreements or deferred prosecution agreements in the criminal context. Immunity of prosecution is not provided to companies who self-disclose the wrongdoings of employees”.<sup>102</sup> The Institute for Research on Public Policy (“IRPP”) has called on the Federal government to adopt a programme for deferred prosecution programmes as one way Canada can deal more effectively with corporate wrongdoing and white-collar crime.<sup>103</sup>

Recent developments in the U.K. demonstrate that deferred prosecution agreements are the wave of the future. Prosecutors in England and Wales now have powers to enter into DPAs with organizations suspected of economic crime. Under the new scheme, businesses under investigation for theft, fraud, bribery or money laundering offences will be able to strike a deal with the Crown Prosecution Service or Serious Fraud Office to defer (and ultimately discontinue) a prosecution, pending compliance with a set of stringent conditions which would serve to punish the perpetrator, compensate victims and encourage compliance going forward.<sup>104</sup>

The U.K. scheme differs from the American programme in a major respect: the U.K. scheme requires court approval. Following the commencement of DPA negotiations, but before its terms are agreed, a Crown Court judge will need to give a preliminary declaration that a DPA is likely to be in the interests of justice and that its proposed terms are fair, reasonable and proportionate. The prosecutor will provide the court with evidence to include an outline of the agreed basic facts and the proposed DPA terms. The court must give a reasoned decision on whether or not to make the preliminary declaration. If the court makes such a declaration, the prosecutor and the

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<sup>101</sup> United States Department of Justice, Office of the Deputy Attorney General, “Individual Accountability for Corporate Wrongdoing”, Memorandum by The Deputy Attorney General, Sally Quillian Yates (Washington: U.S. Department of Justice, 9 September 2015), online: <<https://www.justice.gov/dag/file/769036/download>>.

<sup>102</sup> John Lorinc, “RCMP finally cracks down on Canadian companies that bribe foreigners”, *Canadian Business* (4 April 2013), online: <[www.canadianbusiness.com/companies-and-industries/the-crackdown](http://www.canadianbusiness.com/companies-and-industries/the-crackdown)>.

<sup>103</sup> Institute for Research on Public Policy, “Finding the Right Balance: Policies to Combat White-Collar Crime in Canada and Maintain the Integrity of Public Procurement” (10 March 2016), online: <<http://irpp.org/research-studies/report-2016-03-10>>. In this report, the IRRP catalogued the pros and cons of DPAs that were discussed at a roundtable convened on white collar crime: “Weighing the pros and cons of DPAs, Jull and Burkett (2015) offered a nuanced view that DPAs ‘should not be viewed as a panacea, but rather as an available prosecutorial tool to be employed in the right circumstances.’ Several participants agreed and said that if they are adopted in Canada they should involve effective checks and balances, such as mandatory court-appointed monitors for cases above a specified threshold. This would be essential due to the potential for (or perceptions of) their misuse, including excessive prosecutor power and companies paying hefty fines and avoiding fundamental improvements to corporate practices.”

<sup>104</sup> Andrew Keltie, Charles Thomson, Tim Pountain-Holes & Ben Ko, “Deferred Prosecution Agreements in Practice”, *Lexology* (12 March 2013), online: <<http://www.lexology.com/library/detail.aspx?g=9d564620-fc1e-4c9d-be57-f3733be34f52>>.

alleged offender will proceed to finalize the terms of the DPA. If the court declines to do so, the prosecutor may amend and renew its application to the court. This preliminary application is held in private, with any declaration and the court's reasoning also remaining confidential at this stage. Once the terms of the DPA are agreed, the prosecutor will apply to the Crown Court for a final declaration that the DPA is in the interests of justice and that its terms are fair, reasonable and proportionate. The hearing may be held in private and the court is again required to give a reasoned decision on whether or not to make the declaration. If it orders a final declaration, both this and its reasons must be given in open court. The DPA only comes into force once approved by the court as a final declaration.

The Serious Fraud Office's first application for a DPA was approved on November 30, 2015 by Lord Justice Leveson at Southwark Crown Court, sitting at the Royal Courts of Justice in the *Standard Bank* case.<sup>105</sup> Standard Bank was the subject of an indictment alleging failure to prevent bribery contrary to s. 7 of the *Bribery Act 2010*.<sup>106</sup> This indictment, pursuant to DPA proceedings, was immediately suspended. As a result of the DPA, Standard Bank will pay financial orders of US\$25.2 million and will be required to pay the Government of Tanzania a further US\$7 million in compensation. The bank has also agreed to pay the SFO's reasonable costs of £330,000 in relation to the investigation and subsequent resolution of the DPA.

In addition to the financial penalty that has been imposed, Standard Bank has agreed to continue to cooperate fully with the SFO and to be subject to an independent review of its existing anti-bribery and corruption controls, policies and procedures regarding compliance with the *Bribery Act 2010* and other applicable anti-corruption laws. It is required to implement recommendations of the independent reviewer (Price Waterhouse Coopers LLP).

Commenting on the DPA, David Green, Director of the SFO said:

"This landmark DPA will serve as a template for future agreements. The judgment from Lord Justice Leveson provides very helpful guidance to those advising corporates. It also endorses the SFO's contention that the DPA in this case was in the interests of justice and its terms fair, reasonable and proportionate. I applaud Standard Bank for their frankness with the SFO and their prompt and early engagement with us."

## **(ii) Telecom equivalents of deferred or Non-Prosecution Agreements**

In Canada, there is no official "deferred prosecution program" in the Telecom sector although as noted above there is the potential that the CRTC may decide to use warning letters or citations, neither of which carry penalties. Unlike the deferred prosecution programs in the United States, there is little guidance as to when a warning letter or a citation will be used, or what the impact of self-reporting will be in the zone of non-discovery. For example, the CRTC *Compliance and*

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<sup>105</sup> Serious Fraud Office, "SFO agrees first UK DPA with Standard Bank" (30 November 2015), online: <<https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/>>.

<sup>106</sup> The suspended charge related to a US\$6 million payment by a former sister company of Standard Bank, Stanbic Bank Tanzania, in March 2013 to a local partner in Tanzania, Enterprise Growth Market Advisors (EGMA). The SFO alleges that the payment was intended to induce members of the Government of Tanzania, to show favour to Stanbic Tanzania and Standard Bank's proposal for a US\$600 million private placement to be carried out on behalf of the Government of Tanzania. The placement generated transaction fees of US\$8.4 million, shared by Stanbic Tanzania and Standard Bank.

*Enforcement Information Bulletin 2015-111* contains the following points which may be subject to varying interpretations, depending on the context:

11. The Commission responds to non-compliance using the most appropriate tool or tools available.
12. There are numerous tools that can be used to ensure appropriate, timely, and effective responses. The appropriate tool to use in a particular situation will depend on the factual context of each case.
13. *In some cases*, the Commission may attempt to resolve a non-compliance issue by providing notice that certain activities could lead to non-compliance, thereby allowing a person to independently take measures to *self-correct* without requiring the Commission to take additional enforcement actions.
14. Commission staff may also attempt to work with a person to find a mutually acceptable solution whenever possible. This approach generally relies on consent and includes negotiated settlements and undertakings, which may or may not include AMPs.
15. *More strict responses may be appropriate, depending on the context*, to bring a person into compliance, deter future non-compliance, and prevent harm. In these circumstances, the Commission may decide on other enforcement measures, such as issuing a warning letter, an AMP, or a mandatory order, or prosecution.<sup>107</sup>

A telecom company must therefore engage in a risk analysis. In the absence of a legal duty to self-report and without a formal deferred prosecution program, it is unclear to what extent an existing compliance programme will result in the deferral of charges or violations. The company has to run the following risk analysis:

### **Scenario 1    Self report**

Upside:        If there is a robust compliance programme in place, self-reporting may lead to the decision by the CRTC to not lay charges or violations and to proceed with a warning and or citation. The self-reporting builds relations with the CRTC in the tradition of Braithwaite's restorative justice.

A second upside to self-reporting is that the act of self-reporting may itself be part of a due diligence defence as discussed above.<sup>108</sup>

Downside:    Self-reporting may put the company on the radar and lead to the laying of charges and or violation notices leading to the potential imposition of AMPs. As noted above, the CRTC has not issued a policy guideline as to the criteria that will be considered in deciding whether a warning is appropriate or notices of violation should be issued. In the absence of guidelines, the downside is hard to predict.

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<sup>107</sup> *Bulletin No 2015-111*, *supra* note 5 [emphasis added].

<sup>108</sup> Archibald, Jull & Roach, *supra* note 2 at s 7:20:45.05.

## **Scenario 2: No self-reporting: staying quiet**

**Upside:** In the absence of a legal duty to self-report, the upside of staying quiet is the potential that the violation will never be discovered. The risk analysis that operates here relates to the resources devoted by the government to the CRTC for enforcement. If the regulator is underfunded with respect to its enforcement budget, this will decrease the risk of getting caught.

**Downside:** If the telecom entity is caught, it cannot argue that self-reporting constituted part of its due diligence program. If the entity is found liable, on the penalty assessment stage, it will get no credit for self-reporting, although it may be able to argue that it has shown remorse by an early admission of liability, if indeed this position is taken.

Even in the context of a formal legal duty to self-report, there is some research that companies may run a risk assessment and not fulfill their duty to self-report. This may be a product of a series of factors, including excessive optimism, concerns over the regulator's response as being too costly, and protecting the firm's reputation.<sup>109</sup> Unless there is robust prosecution of those who fail to self-report, (if this is subsequently discovered), there will be less incentive to self-report.

In light of these dynamics, for all of the reasons stated above, we recommend that telecom regulators should create and implement forms of non-prosecution agreements and deferred prosecution agreements. This would involve a telecom regulator such as the CRTC setting out a specific policy and criteria for the application of non-prosecution and or deferred prosecution agreements which would supplement the existing guidelines referencing warning letters and citations.

### **(iii) The dark side of the pyramid and use immunity**

Where there is a defined deferred prosecution programme, there is an expectation that self-reporting the results of an internal investigation to the regulator will result in the negotiation of either a non-prosecution agreement or a deferred prosecution agreement. In this context, the report will waive privilege in the report, although sometimes this waiver is a limited waiver, which does not waive all solicitor client communications and is limited to the regulator and not third parties.<sup>110</sup>

In the absence of a deferred prosecution program with clear criteria, there is created a "backfire potential". What happens if the regulator receives the self-report with the waiver of privilege, and then decides to not grant the deferred prosecution option (such as a warning letter or citation) but rather to proceed with the issuance of a notice of violation, seeking a substantial monetary penalty? This is the potential for the self-report to "backfire". If the regulator decides to proceed with an aggressive enforcement option, can it use the internal investigation results and evidence against the telecom company in submissions on liability and or penalty before the Commission?

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<sup>109</sup> Julien Etienne, "Self-Reporting Untoward Events to External Controllers: Accounting for Reporting Failure by a Top-Tier Chemical Plant" (2010), The London School of Economics and Political Science, Centre for Analysis of Risk and Regulation, Monograph (Discussion Paper) No DP 66, online: <<http://eprints.lse.ac.uk/36546/1/Disspaper66.pdf>>.

<sup>110</sup> Webb, Tarun & Molo, *supra* note 28 at ch 11.

In the absence of a formal “use immunity” program, it appears that a waiver of privilege in providing the results of an internal investigation will permit the regulator to use the material against the company. Some government organizations have created internal use immunity policies to encourage self-reporting and to avoid the “backfire” problem. For example, the Canadian Revenue Agency has a voluntary disclosure programme which has an anonymous disclosure period of up to 90 days.<sup>111</sup> One of the authors of this article has negotiated a similar anonymous disclosure with Canada Customs. The initial disclosure of non-compliance was made on an anonymous basis. Customs took the position that they would then ask for the name of the person involved to determine whether there was an active investigation into that person. If there was an investigation (in other words the person was about to be caught anyway), Customs would not offer a non-prosecution agreement but in order to avoid the “backfire” problem agreed to not use any of the information disclosed in any prosecution. In that case there was no active investigation, customs duty were paid retroactively and there was no prosecution.

One of the authors of this article does some prosecuting on behalf of Conservation Authorities of offences which have a “due diligence” defence, similar to the defence available in the Telecommunications Act in relation to AMPS. We have developed a use immunity policy to avoid the “backfire” problem as follows. We invite organizations to submit evidence that they acted with due diligence. After a review of this evidence, we may decide to not proceed or withdraw charges already laid if satisfied that there is a valid due diligence defence. This is a very efficient process as it saves all parties, including a Court, from protracted and contested proceedings. If on the other had after a review of the evidence purporting to show due diligence, we are not satisfied that it qualifies as due diligence, we offer use immunity: we will not use the evidence disclosed as part of our case. We are of course aware of the existence of the evidence, and may shape our case in anticipation of it, but that is the only advantage. Most importantly, the Court is not aware of this disclosure given the use immunity. (This leads to the discussion in the next part in the context of telecommunications where there is no separate Court but rather the Tribunal is integrated with the regulator, thus raising the need for appropriate firewalls.)

The use immunity that we offer in the context of environmental prosecutions has only two caveats. First, we reserve the right to use any material self-disclosed to impeach a witness who testifies under oath in a manner that is contrary to the evidence. The Supreme Court of Canada has recognized that evidence that is subject to an implied undertaking not to be disclosed may still be used to impeach the credibility of a witness.<sup>112</sup> The second caveat is that if the information is relevant to a third party or co-accused it may be disclosed to that third party as part of ongoing disclosure obligations. A recent case in the competition context of immunity negotiations has affirmed this ongoing disclosure obligation.<sup>113</sup>

In conclusion of this part, the restorative justice literature often presumes that dialogue with the regulator will produce positive results, which is often the case. However, there is little discussion of the dark side of the pyramid or the backfire problem. There are however some techniques such as use immunity which will mitigate these risks.

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<sup>111</sup> Canada Revenue Agency, “Voluntary Disclosures Program”, (Ottawa: Canada Revenue Agency, 13 April 2016), online: <<http://www.cra-arc.gc.ca/voluntarydisclosures/>>.

<sup>112</sup> *R. v Nedelcu*, 2012 SCC 59, [2012] 3 SCR 311.

<sup>113</sup> *R. v Nestlé Canada Inc.*, 2015 ONSC 810 (CanLII).



#### **(iv) Recognizing self-reporting as part of the compliance defence**

We recommend that the act of self-reporting in the zone of non-discovery, be recognized as part of a compliance due diligence defence (if there is an existing credible compliance system). This reform could be accomplished by statutory recognition of self-reporting as being part of due diligence. Alternatively, the CRTC or reviewing Courts could recognize self-reporting as part of the evolution of due diligence at common law and in tribunal jurisprudence.

#### **B. Adjudication on the merits of due diligence or the magnitude of penalties**

If the matter reaches a contested merits phase where the issue of due diligence may be considered, we apply the pyramid concept to procedural and institutional issues.

Ronald Dworkin has argued that people drawn into the criminal process do not have a right to the most accurate possible procedure, but they do have (1) "the right to procedures that put a proper valuation on moral harm in the calculations that fix the risk of injustice that they will run", and (2) "the related and practically more important right to equal treatment with respect to the evaluation".<sup>114</sup>

By analogy, we argue that people drawn into the AMP scheme do not have a right to the most accurate possible procedure, but they do have (1) "the right to procedures that put a proper valuation on moral harm in the calculations that fix the risk of injustice that they will run", and (2) "the related and practically more important right to equal treatment with respect to the evaluation".

A risk of injustice in the criminal sphere relates to the potential for a wrongful conviction. The parallel in the AMPs world is the risk of a wrongful finding of liability. The Supreme Court in *Guindon* found that "no stigma comparable to that attached to a criminal conviction flows from the imposition of the penalty."<sup>115</sup> Clearly the stigma from a wrongful AMP finding is less than a criminal conviction, but it should not be totally discounted as there are potential reputational harm issues. This is an area that calls out for future empirical analysis.

As we have surveyed, at present the CRTC works within an integrated model. We make some recommendations within this model that attempt to put procedures in place that recognize the potential moral harm that would flow from a wrongful finding of liability and attempt to avoid that result.

#### **(i) Internal processes within the integrated model**

As a matter is escalated up an enforcement pyramid, internal processes within an integrated model should also escalate in terms of procedural protections. For example, as the amount of penalties increase, the right to make written submissions should progress to rights to a hearing before a CRTC panel. At present this is not the case although as noted above, the common law of procedural fairness may ultimately require a sliding scale of procedures that escalates with the

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<sup>114</sup> Ronald Dworkin, "Principle, Policy, Procedure" in *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworths, 1981) 193 at 214.

<sup>115</sup> *Guindon*, *supra* note 76 at para 84.

magnitude of penalties and the complexity of issues involved. It would be preferable if the CRTC would pro-actively implement a sliding scale of procedures as the result of an industry consultation rather than as a result of administrative litigation. We recommend that the CRTC develop further guidelines that recognize the escalation of AMPs from the low \$1000s to the potential \$millions with multiple counts.

A leading administrative law scholar, David Mullan, has argued for a flexible approach that would combine different models of administrative procedure, depending upon the type of interests at stake.<sup>116</sup> Mullan observes that there has been a "due process" explosion in administrative law, with the result that in many cases, tribunals emulate court proceedings. This is particularly the case where the administrative proceedings have a "passing similarity to the charging of persons with offences" (which surely is the case with AMPs):

In contexts which have any passing similarity to the charging of persons with offences, some courts (and agencies for that matter) have accepted the applicability of the *Stinchcombe* criminal process rules of full pre-trial discovery of the relevant fruits of the investigation. Thus, in Ontario, the Human Rights Commission has been held subject to this obligation, while the Supreme Court of Canada has recently sustained as not unreasonable the Ontario Securities Commission's adoption of such a regime.<sup>117</sup>

Mullan cautions that the origins and objectives of most administrative agencies should preclude wholesale transportation of court-like rules of procedure. Mullan steps back to suggest a more flexible approach that would have different levels of hearing process. He cites the American 1981 *Model State Administrative Procedure Act*<sup>118</sup> as a flexible model with four levels of hearing, including formal hearings, "conference hearings", "summary adjudicative hearings" and "emergency hearings". Aside from emergencies, the least formal method is a summary hearing, and the "conference hearing" is a hybrid that permits the parties to testify, but there is no formal discovery process or presentation of evidence. The Model statute sets out certain criteria that guide the regulator in deciding which type of hearing process is best suited to the interests at stake.

Mullan concludes with a recommendation for a flexible model:

In this lecture, I have suggested that, at present, for many tribunals, there is in fact no real middle ground between the "informality" of ADR and the "formality" which characterizes those tribunals' constitutive statutes or procedural rules and, indeed, a statute such as Ontario's *Statutory Powers Procedure Act*. More needs to be done in terms of experimenting with alternative decision-making modes and opening up the possibility of the same tribunal functioning with varying levels of formality depending on the nature of the matters in issue and, at least in some contexts, the wishes of the tribunal's clientele. While some tribunals have in fact moved in this direction, it is my sense that this is an initiative that requires explicit legislative recognition and encouragement. At present,

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<sup>116</sup> David Mullan, "Tribunals Imitating Courts — Foolish Flattery or Sound Policy" (2005) 28 Dalhousie LJ. 1.

<sup>117</sup> *Ibid* at 11, citing *Deloitte & Touche LLP v Ontario (Securities Commission)*, 2003 SCC 61, [2003] 2 S.C.R. 713.

<sup>118</sup> *Model State Administrative Procedure Act* (1981), online: <http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa81.pdf>.

such a model exists in the form of the 1981 *Model State Administrative Procedure Act*, with its provisions for four levels of hearing process. This model deserves serious evaluation in a Canadian setting and the best way of ensuring that may well be to persuade the Uniform Law Conference to revisit the question of administrative procedures, something it did last in 1991.<sup>119</sup>

A flexible model may be implemented by creating separate classes of case, or by permitting the Tribunal itself to decide which level of procedure is appropriate to a given case.

There are various techniques or methods for creating procedural options for an AMP scheme that we recommend the CRTC ought to consider. First, a scheme can be divided by "subject matter". This method is used in the *Office of the Superintendent of Financial Institutions Act*,<sup>120</sup> which provides Cabinet with the power to make regulations classifying each violation into categories such as minor or serious. The *Administrative Monetary Penalties (OSFI) Regulations*<sup>121</sup> create a very detailed schedule that lists various sections of the Act and then places them into categories such as minor or serious.

A second technique is the division of categories by "magnitude of the maximum penalty". Procedural rights increase with the category created by the maximum penalties that are sought, as indicated by the AMP notice. This method gives the regulator discretion to elect which category of penalty it is seeking in a given case. This method allows for maximum flexibility as the regulator can tailor the penalty sought to a given fact situation, and procedural rights will vary according to the category chosen. Scholars have proposed a pyramid model of AMPs that escalate disclosure rights, types of hearing (written to oral) and appeal rights, all of which escalate with the magnitude of the AMP that is sought.<sup>122</sup>

The following chart shows a recommended procedural model with separate classes. The categories are not written in stone but offer an example of what a sliding scale model could look like:

Class	Disclosure	Procedure	Appeal
Minor AMPs	Reliance	Written submissions	Law alone, with leave
Middle range AMPs	Reliance subject to discretion of Tribunal	Written submissions with option to seek leave for an oral hearing	Law alone or Fact with Leave
Major AMPs	Relevance	Oral Hearing	Law alone as of right,

<sup>119</sup> *Ibid* at "Conclusion".

<sup>120</sup> *Office of the Superintendent of Financial Institutions Act*, RSC 1985, c 18 (3rd Supp.)

<sup>121</sup> Canada, Department of Justice, *Administrative Monetary Penalties (OSFI) Regulations*, SOR/2005-267, online: <<http://laws-lois.justice.gc.ca/eng/regulations/SOR-2005-267/page-1.html>>.

<sup>122</sup> Peter Hogg & Kenneth Jull, "Reform Proposals For New Remedies in a De-Regulated Telecommunications Act" (2006) [unpublished, available upon request].

			or Fact with Leave
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The reliance model of disclosure only requires disclosure of what the enforcement division relies on in support of the AMP whereas a relevance based model is much wider and more akin to the disclosure rights in criminal cases. As is illustrated by the recent decision of Justice Stratas discussed above, the level of disclosure will be fact specific but must meet the requirements of procedural justice. In our view a classification of types of AMPs with escalating procedures will assist in the definition of procedural fairness.

## **(ii) A leave mechanism by a Court inspired Tribunal**

The comparative research surveyed in this paper shows that some regimes utilize a Court inspired model for the more serious penalties or complex cases.

A recent article in the *Cambridge Law Journal* by Nuno Garoupa, Anthony Ogus and Andrew Sanders entitled “The Investigation and Prosecution of Regulatory Offences: Is there an Economic Case for Integration?” tackles the investigation and prosecution of regulatory offences and asks whether there is an economic case for integration.<sup>123</sup> The article identifies many advantages of integration, including reduction of transaction costs, specialisation, and fast track *ex ante* intervention. An integrated agency can mitigate procedural formalism which reduces costs for all parties and which allows for a speedier solution.

The article also identifies the disadvantages of integration as including error costs. Two institutions (such as the Competition Bureau and the Competition Tribunal) are likely to make fewer errors. A further disadvantage of integration is “rent seeking” whereby fines are imposed to fund the regulator which may create bias, and behavioral considerations related to lack of transparency.

Scholars such as Justice Richard Posner have identified the potential for an agency to have some bias in assessing penalties that may justify the agency's own existence. Agencies have a statutory goal or agenda, such as preventing the deception of consumers. A sector may change with time such that the agency in question ought to play a less intrusive role. The problem, according to Justice Posner, is that an administrative agency that would dismiss the majority of complaints before it would be “inviting its liquidation by Congress”.<sup>124</sup> Courts, he argues, do not have similar inhibitions, and may dismiss complaints according to the merits. The result is that legislatures are wary of giving administrative agencies significant sanctions:

The danger of agency bias may be responsible for the refusal of legislatures to give agencies strong remedial powers. The normal administrative remedy is the cease and desist order, in essence an injunction, and the absence of other remedies is, as we have seen (see s. 13.2 *supra*), a source of weakness. If agencies could impose sanctions that

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<sup>123</sup> Nuno, Ogus & Sanders, *supra* note 94.

<sup>124</sup> Richard Posner, *The Economic Analysis of Law*, 6th ed. (New York: Aspen Publishers, 2003) at 642.

inflicted very heavy costs on defendants, the social costs of biased agency adjudication would be much greater than they are.<sup>125</sup>

Garoupa, Ogus and Sanders observe on a general level that the integrated model shines when the case is complex and requires extensive specialisation, but is more challenged when the economic stakes are higher in the context of more punitive remedies such as AMPs.

We recommend that a “leave” mechanism be created whereby a Court inspired Tribunal would have the power, on application of either the regulator or industry, to decide whether a contested hearing should be held before that Tribunal or whether the issue should be decided by an integrated administrative tribunal.

We recognize that at present, there is no Court inspired model available in the Canadian telecom world. It is not that long ago that there was a proposal to create a new Tribunal, the Telecommunications Competition Tribunal.<sup>126</sup> Our thesis is that institutional procedures need to match a restorative justice pyramid and future institutional reforms are appropriate in this venture.

## CONCLUSION

We have attempted to contribute to the shaping of Enforcement 3.0 by drawing a link between restorative justice pyramids and the institutional frameworks that will best promote positive dialogue with telecom regulators. This link is weak in restorative justice scholarship and needs to be better developed. The restorative justice pyramid needs to be aligned with the stages of an investigation timeline, as we have done in Figure 1.

In the zone of non-discovery, dialogue with a regulator is best facilitated by institutional features such as use immunity, a defined deferred prosecution program, and recognition of self-reporting as a part of due diligence. These programmes facilitate dialogue because they set the parameters and expectations of dialogue, and give companies a safety net that gives them comfort and incentives to self-report. As we noted, even where it is a legal obligation to self-report this may not occur, as there is fear of damage to reputation and concerns about the reaction of the regulator. Deferred prosecutions and use immunity reduce these fears.

As one moves up the pyramid to discovery by the regulator, our recommendations for a pyramid model of procedures within the integrated model will ensure that in the appropriate cases, the east of enforcement never meets the west of contested hearings.

Near the top of the pyramid in dealing with more serious violations, our recommendations for a new adjudicative tribunal, with a leave mechanism to elevate cases, is based on comparative models provided by the Canadian Competition Model as well as models in Australia and the U.K.

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<sup>125</sup> *Ibid* at 643.

<sup>126</sup> Gerri Sinclair, Hank Intven & Andre Tremblay, as Telecommunications Policy Review Panel, “Final Report 2006”, Innovation, Science and Economic Development Canada, Report to The Hon. Maxime Bernier, Minister of Industry (March 2006), online: < [https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/tprp-final-report-2006.pdf/\\$FILE/tprp-final-report-2006.pdf](https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/tprp-final-report-2006.pdf/$FILE/tprp-final-report-2006.pdf)>.

We come back to and end with Braithwaite's encouragement of storytelling. The stories that resonate the most are those that result in cooperation and proactive action, such as the story about cooperation with the Competition regulator told earlier. Perhaps this reflects the need for a sense of community between the regulator and business. In his seminal work on the hierarchy of human needs, Abraham Maslow wrote that love, affection and belongingness needs would be ranked higher than esteem needs, although he recognized that the hierarchy was not rigid.<sup>127</sup> The Behavioural Economics movement attempts to inject behavioural empiricism into rational choice models. For example, Richard Thaler has written on "fairness games" and methods to encourage cooperation in business, which applies behavioural theory. The following is one example of this type of thinking that reflects Maslow's community priority with a grain of reality, which is necessary in the field of risk management:

A farmer would put some produce for sale out on a table in front of his farm. There was a box with a small slot to insert the payment, so money could be put in but not taken out. The box was also nailed to the table. I thought then, and think now, that farmers who use this system have a pretty good model of human nature in mind. There are enough honest people out there (especially in a small town) to make it worthwhile for the farmer to put out some fresh corn or rhubarb to sell. But they also knew that if the money were left in an open box where anyone could take all of it, someone eventually would.<sup>128</sup>

In the same way, we should expect that dialogue with a regulator will lead to positive results and telecom companies should not be afraid to self-report and engage the regulator. If that dialogue backfires however, there needs to be a method of transparency that is nailed down.

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<sup>127</sup> A. H. Maslow's classic model was developed in his work, *Motivation and Personality*, 2nd ed. (New York: Harper & Row, 1970).

<sup>128</sup> Richard Thaler, *Misbehaving: The Making of Behavioral Economics* (New York: Norton & Co., 2015) at 146-147.