

Jull, Kenneth; Bismarji, Anna-Gabriella

Conference Paper

Wrongful Violations and Innocence in the Regulation of the Digital Economy

ITS 33rd European Conference 2025: "Digital innovation and transformation in uncertain times", Edinburgh, UK, 29th June – 1st July 2025

Provided in Cooperation with:

International Telecommunications Society (ITS)

Suggested Citation: Jull, Kenneth; Bismarji, Anna-Gabriella (2025) : Wrongful Violations and Innocence in the Regulation of the Digital Economy, ITS 33rd European Conference 2025: "Digital innovation and transformation in uncertain times", Edinburgh, UK, 29th June – 1st July 2025, International Telecommunications Society (ITS), Calgary

This Version is available at:

<https://hdl.handle.net/10419/331282>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.

Wrongful Violations and Innocence in the Regulation of the Digital Economy

By Kenneth Jull and Anna-Gabriella Bismarji

Would you make a major financial decision in the digital economy on behalf of yourself or your corporation on the basis of a flip of a coin? The probabilities on this coin flip are equal at 50%, provided that the person flipping the coin does not see the starting state of the coin before the flip.¹ Most participants in the digital economy would not be so precipitative as to base a major financial decision on the flip of a coin. If the odds were just slightly changed to 50.1% in your favour, would that change your risk analysis? In linguistic terms, would you make a decision risking millions of dollars on the basis that is “more probable than not”? In legal terms, would you make a decision involving the future of your corporation on a balance of probabilities?²

After answering the above questions, it may surprise you to learn that in some jurisdictions such as Canada, the innocence or liability of your company may be decided by administrative tribunals on this same 50.1% standard. For example, the Canadian Competition Tribunal applies the 50.1% standard in determining whether it will impose an administrative monetary penalty (“AMP”).³ Under some regimes these AMPs may be in the millions or even billions of dollars, described as “King Kong” AMPs.⁴ In Canada, a recent example of the potential magnitude of AMPs is the decision by Justice Little in the *Cineplex* case, imposing an AMP in the amount of \$38.978 million with respect to deceptive drip pricing.⁵ We use this case only as a recent example of a large AMP, but we believe that it was correctly decided on the merits and the constitutionality of the AMP was not challenged in that case.

¹ In 2007, researchers theorised that when a coin is flipped, the flipper’s thumb imparts a slight wobble to it, causing it to spend more time with one side facing upwards while in the air and making it more likely to land showing that side. They predicted that a coin should land showing the same side that was facing up when flipped approximately 51 per cent of the time. Now, František Bartoš at the University of Amsterdam in the Netherlands and a team of 49 others have conducted the most robust test of this theory yet carried out. The findings backed up the original research: coins are likely to land on the same side they started on 50.8 per cent of the time. Although the findings show coin flips have a bias, they can still be used for everyday decisions – as long as both parties don’t see the starting state of the coin before the flip. See <https://www.newscientist.com/article/2397248-coin-flips-dont-truly-have-a-50-50-chance-of-being-heads-or-tails/>

² What does “proof on a balance of probabilities” mean? The party who has the burden of proof on an issue must convince the finder of fact that what she or he asserts is more probable than not, or to put it another way that the balance is tipped in his or her favour. . If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal it is not. See *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41 at paragraph 49 and *Miller v. Minister of Pension*, [1947] 2 All E.R. 372. at 374 (K.B), cited in *401949 B.C. LTD v. 079858 B.C. LTD.*, 2022 BCPC 205 at paragraphs 54-55.

³ The standard of proof applied by the Tribunal is the civil standard of proof on a balance of probabilities: *Gestion Lebski inc.*, at paras 53, 152, 191; *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161, at para 66; *Toronto Real Estate Board v Canada (Commissioner of Competition)*, 2017 FCA 236, [2018] 3 FCR 563, at paras 48, 87; *FH v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, at paras 45-46, 49 as cited in *Canada (Commissioner of Competition) v. Cineplex Inc.*, 2024 Comp. Trib. 5 (Competition Trib.) at paragraph 234.

⁴ Archibald and Jull, *Profiting From Risk Management and Compliance* (Thomson Reuters 2025) Chapter 6.

⁵ *Canada (Commissioner of Competition) v. Cineplex Inc.*, 2024 Comp. Trib. 5 (Competition Trib.). Cineplex has announced that it is appealing this decision.

AMPs are increasingly used to police the digital economy. In Europe, a record EU antitrust fine of 4.3-billion-euro (\$4.5 billion) imposed on Google is being appealed.⁶ EU antitrust regulators imposed the first penalties under the Digital Markets Act (DMA) doling out total fines of 700 million euros (\$797 million) to Apple and Meta.⁷ In the European Union, while the term “balance of probabilities” is not commonly used in the same way as in common law jurisdictions, the standard applied in competition law proceedings is widely understood to be more stringent. The European Commission is required to present evidence that is “sufficiently precise and consistent to support the firm conviction that the alleged infringement took place.”⁸ This formulation has been upheld in several decisions of the General Court and the Court of justice of the European Union (CJEU), and is considered stricter than the civil standard of proof applied in Canada.

It is the thesis of this article that the danger lurking beneath AMPs is the risk of a wrongful finding of a violation. By contrast, in criminal law there is a collective worry about the risk of a wrongful conviction. The requirement of an exacting standard of proof for criminal conviction dates back centuries. English jurist William Blackstone wrote in the 18th century, “[As the] law holds, it is better that ten guilty persons escape than that one innocent suffer” (Blackstone 1769, p. 352).⁹ The standard of proof beyond a reasonable doubt has been defined by the Supreme Court of Canada using its contrast with the balance of probabilities standard:

In my view, an effective way to define the reasonable doubt standard for a jury is to explain that it ***falls much closer to absolute certainty than to proof on a balance of probabilities***. As stated in *Lifchus*, a trial judge is required to explain that something less than absolute certainty is required, and that ***something more than probable guilt*** is required, in order for the jury to convict. Both of these alternative standards are fairly and easily comprehensible. It will be of great assistance for a jury of the trial judge situates the reasonable doubt standard appropriately between these two standards.¹⁰ [emphasis added]

The importance and significance of the burden of proof is illustrated by the *Finkelstein*¹¹ case. Former Toronto Bay Street lawyer, Mitchell Finkelstein, was sanctioned by the Ontario Securities Commission (“OSC”) for misusing confidential information which he obtained while acting on deals and through his access to his firm’s document management database. The OSC found that in passing on the material non-public information to a friend and investment advisors, who then traded on that information, Finkelstein had abused his position of trust.¹²

On appeal the Divisional Court found that Finkelstein provided material non-public information to his friend on the basis that this was “***at least probable, if not compelling***.” At the very least, it

⁶<https://www.reuters.com/technology/record-45-bln-eu-fine-punished-its-innovation-google-tells-eu-court-2025-01-28/>. Google's appeal to the Luxembourg-based Court of Justice of the European Union comes two years after a lower tribunal sided with the European Commission which said the company used its Android mobile operating system to quash rivals.

⁷<https://www.reuters.com/sustainability/boards-policy-regulation/google-x-next-targets-europe-stays-tough-tech-regulation-2025-04-23/>

⁸ *Case T-203/0*, *Manufacture Francaise des Pneumatiques Michelin v Commission of the European Communities*, [2003] ECR II-4071.

⁹ “The Informational Role of an Elevated Standard of Proof” by Shmuel Leshem March 9, 2025 at page 3.

¹⁰ *R. v. Starr*, [2000] 2 S.C.R. 144, at para. 242

¹¹ *Finkelstein* Divisional Court 2016 ONSC 7508. See also *Finkelstein v. Ontario Securities Commission* 2018 CarswellOnt 972, 2018 ONCA 61

¹² Reasons and Decision on Sanctions and Costs, In the Matter of Mitchell Finkelstein at paragraph 22.

was open to the Panel to conclude that it was *more likely than not* that the source was Finkelstein. The Divisional Court stated that ,” one must always remember that the standard of proof before the Panel is proof on a balance of probabilities. It is not the higher criminal standard of proof beyond a reasonable doubt.”¹³

The implications of the balance of probabilities standard in that case are clear. Had Finkelstein been charged with the regulatory offence or crime of insider trading, he would have been acquitted on the same evidence. There has been no academic discussion about whether or not Finkelstein might have been wrongfully found liable. The potential reputational damage arising from a wrongful finding of a violation has largely been ignored in the literature. For someone like Finkelstein, who was a lawyer at a major Toronto Bay Street firm, the finding of liability was devastating. “In the case of Mr. Finkelstein, the panel took into account his age, that he had a young family, the significant professional and reputational damage the proceeding and the decision had on him, and the fact that it was unlikely he’d ever work in a major law firm again and therefore he would have a significantly diminished earning potential.”¹⁴

The collective worry about the risk of a wrongful conviction has not translated into the world of AMPs. There is very little, if any, discussion in the literature or jurisprudence about the risk of a *wrongful finding of a violation* in administrative proceedings. Historically, this lack of attention may be attributed to the fact that jail is not a risk in administrative proceedings and the AMPs were considered to carry much lower stigma than criminal penalties.¹⁵ As AMPs have now joined the million or even billion dollar club, it is time to re-evaluate the risks of wrongful findings of liability and the potential reputational harm that will flow from such a finding.

We argue that as a matter of policy and legislative reform, a more sophisticated and fair regulatory scheme would have two streams with different burdens of proof with the following typology:

- (1) At higher levels where AMPs are in the millions of dollars that may inflict significant reputation damage, a higher standard of proof of “clear and convincing” (75% in mathematical terms) would be appropriate. This would be an intermediate standard between the criminal law burden of proof and the civil balance of probabilities.
- (2) At levels below this, the more efficient balance of probabilities standard (50.1%) is more suited. In addition, we argue that procedural rights and appellate rights should escalate in proportion to escalating penalties.

This article is divided into five sections.

¹³ *Finkelstein* Divisional Court 2016 ONSC 7508 at paragraph 49. See also *Finkelstein v. Ontario Securities Commission*, 2018 ONCA 61, 2018 CarswellOnt 972 cited in *Hutchinson (Re)*, 2019 ONSC 36, 2019 CarswellOnt 17398 paragraph 61 for the proposition that circumstantial evidence does not itself establish the alleged fact; rather, the panel may draw an inference from the circumstantial evidence. Those inferences must be reasonably and logically drawn from a fact or group of facts established by the evidence. See also dismissal of leave to appeal by the Supreme Court of Canada in *Miller v. OSC* 2018 CarswellOnt21507.

¹⁴ Yamri Taddese, “Lawyer’s steep fine for insider tipping part of bigger trend”, Canadian Lawyer, (August 26, 2015) online: <https://www.canadianlawyermag.com/news/general/lawyers-steep-fine-for-insider-tipping-part-of-bigger-trend/273359>.

¹⁵ *Guindon v. Canada* [2015] 3 S.C.R. 3 at paragraph 84: “The amount is fixed without regard to other general criminal sentencing principles and no stigma comparable to that attached to a criminal conviction flows from the imposition of the penalty”.

Part I reviews the constitutional challenges to AMPs in Canada, with the backdrop of global AMPs in the digital economy. Not only are AMPs decided on a lower standard of proof than criminal law, they are decided in administrative settings with relaxed rules of evidence. If the penalty were found by a court to rise to a punitive level identical to the penalties in criminal cases, the argument is that the constitutional protections afforded to defendants fall short. In *Guindon*, the Supreme Court of Canada 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.¹⁶

A significant factor in the decision was the finding that “no stigma comparable to that attached to a criminal conviction flows from the imposition of the penalty”.¹⁷ As AMPs have increased in scope and magnitude, the door is open for renewed constitutional attacks. We submit that the Court’s focus on stigma has led us down the wrong path. The more appropriate inquiry is to consider the risks of a wrongful finding of liability.

Recent jurisprudence in the United States has challenged the logic employed in some Canadian legislation defining AMPs as promoting compliance and not punitive by definition. The United States Supreme Court has held that “a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment.”¹⁸

Part II compares the risks of a wrongful conviction to the risks of a wrongful finding of a violation in the context of AMPs. Wrongful convictions are the subject of numerous Hollywood movies and documentaries,¹⁹ as well as fictional writing.²⁰ A review of the “top ten” causes of miscarriages of justice reveals that seven of these causes could apply to some degree to administrative findings of liability as follows:²¹

- (i) Non-disclosure of evidence (and role of procedural fairness)
- (ii) Reliance on unreliable evidence including hearsay
- (iii) Officer misconduct
- (iv) Misconduct of those performing a prosecutorial capacity
- (v) Adjudicative failures
- (vi) Flawed expert evidence
- (vii) Tunnel Vision

¹⁶ *Guindon v. R.* (2015), 327 C.C.C. (3d) 308, 2015 SCC 41 (S.C.C.) at para. 76.

¹⁷ *Guindon v. Canada* [2015] 3 S.C.R. 3 at paragraph 84: “The amount is fixed without regard to other general criminal sentencing principles and no stigma comparable to that attached to a criminal conviction flows from the imposition of the penalty”.

¹⁸ *SEC v. Jarkesy* 603 U.S. (2024) at page 9.

¹⁹ <https://innocenceproject.org/news/wrongful-conviction-media/>

²⁰ Victims of Circumstantial Evidence: Murder, Proof, and Wrongful Convictions in Nineteenth-Century Crime Fiction, Simon Stern, Faculty of Law & Dept. of English, University of Toronto.

²¹ “Miscarriages of Justice in Immigration Detention” by Louis Century & Kent Roach UBC Law Review, Forthcoming (Draft)

The study of wrongful convictions reveals the potential for error, and parallels can be made to scientific methodology with respect to error rates.²² The potential for error increases to the extent that there is any vagueness or grey areas in the regulation. For example, abuse of dominance was decriminalized on the basis that it was hard to determine *ex ante* beyond a reasonable doubt and yet now is the subject of potential billion dollar administrative monetary penalties.²³

Part III assesses the reputational damage that could flow from a wrongful finding of a legislative or regulatory violation. For corporations that are wrongfully found liable, it is a more complex calculation of potential reputational harm.

The front loaded nature of the calculation of many AMPs reflects a presumption of guilt. An example is the issuance by the Canadian Radio-television and Telecommunications Commission of a notice of violation to Compu-Finder on March 5, 2015 assessing the penalty to be \$1.1 million.²⁴ The assessment of a \$1.1 penalty “front loads” the scheme by putting the penalty cart before the liability horse. The legislation provides a mechanism to contest the Notice of Violation, which shall “inform the person that they may make representations to the Commission within 30 days after the day on which the notice is served or any longer period set out in the notice, and set out the manner for making the representations”.²⁵

In a statement, Manon Bombardier, chief compliance and enforcement officer with the CRTC said Compu-Finder:

... flagrantly violated the basic principles of the law by continuing to send unsolicited commercial electronic messages after the law came into force to e-mail addresses it found by scouring web sites. Complaints submitted to the Spam Reporting Centre clearly indicate that consumers didn't find Compu.Finder's offerings relevant to them. By issuing this Notice of Violation, my goal is to encourage a change of behaviour on the part of Compu-Finder such that it adapts its business practices to the modern reality of electronic commerce and the requirements of the anti-spam law.²⁶

As it turns out, the regulator (the CRTC) reduced the magnitude of the AMP as set out in the original Notice of Violation (“NOV”). The CRTC concluded that the appropriate amount for an AMP in this case is \$200,000 rather than the \$1,100,000 set out in the NOV. This finding was upheld by the Federal Court of Appeal and leave to the Supreme Court of Canada was dismissed in 2021.²⁷

²² “Why Trust Adversarial Justice?” Jason M. Chin School of Law, Australian National University

²³ The Abuse of Dominance provisions entered Canadian law on June 19, 1986, as sections 50 and

51 of the Competition Act (now sections 78 and 79). These provisions replaced the prior criminal monopolization provision, which was essentially a dead letter due in large part to the difficulty of meeting the criminal “beyond a reasonable doubt” standard of proof. See “Canadians Behaving Dominantly: The Recent Transformation of Abuse of Dominance Under the Canadian Competition Act by James Musgrove, William Wu and Mishail Adeel https://mcmillan.ca/wp-content/uploads/2025/03/Vol24_Issue4_Feb2025_01_Musgrove_COPYRIGHT.pdf

²⁴ CRTC Notice of Violation, www.crtc.gc.ca/eng/archive/2015/vt150305.htm.

²⁵ CASL, s. 22(2)(d).

²⁶ Jennifer Brown, “Quebec company hit with \$1.1-million penalty under CASL” (March 9, 2015), In House, Canadian Lawyer Magazine, at www.crtc.gc.ca/eng/dncl/dnclc_2015.htm.

²⁷ Application for leave to appeal to the Supreme Court of Canada dismissed with costs March 4, 2021 (without reasons) [2020] S.C.C.A. No. 370 | [2020] C.S.C.R. no 370. Record updated: March 4, 2021.

Given that the AMP scheme “front loaded” the AMP with an NOV that stated the appropriate amount was \$1.1 million, it is an empirical question as to whether the subsequent reduction of that amount to \$200,000 repaired the reputational damage to CompuFinder. In this case, that question may never be answered given CompuFinder's proposal under the Bankruptcy Act.²⁸ We would speculate that the subsequent reduction of penalty by the CRTC did not receive the same level of press as the original fanfare of the Notice of Violation announcing a penalty of over \$1 million. CompuFinder did not involve a wrongful finding of liability, but rather the penalty amount was reduced.

In the case of a true wrongful finding of liability, the damage may be much more severe. We refer to the case example of Toyota, which in 2009, faced an unprecedented corporate crisis when reports of unintended acceleration in several vehicle models triggered massive recalls, regulatory penalties, and a firestorm of negative media coverage. The situation, fueled by early assumptions about electronic system failures, ultimately proved to be a case of wrongful attribution, with later findings confirming that driver error and mechanical issues were more likely culprits. However, by the time the facts emerged, Toyota had already suffered immense financial losses and reputational damage.

Part IV develops a philosophical framework for the evaluation of moral harm arising from wrongful findings of violations. Ronald Dworkin has argued that people drawn into the criminal process have a right to procedures that put a proper valuation on the “moral harm” flowing from a potential injustice.²⁹ By comparison we argue that people drawn into an AMP scheme have a right to a proper valuation of the moral harm flowing from a potential injustice, which is more likely to occur as a result of the lower standard of proof.³⁰

Part V proposes recommendations for reform based on two streams, with different burdens of proof. As noted above, we proposed a two level typology. At higher levels where AMPs are in the millions of dollars (and that may inflict significant reputation damage), a higher standard of proof of “clear and convincing” (75% in mathematical terms) would be appropriate. At levels below this, the more efficient balance of probabilities standard (50.1%) is more suited. In addition, we argue that procedural rights and appellate rights should escalate in proportion to escalating penalties.

PART I: CONSTITUTIONAL CHALLENGES TO AMPs: AN EVOLVING DEBATE

(a) King Kong AMPs

²⁸ 3510395 *Canada Inc. v. Canada (Attorney General)*, 2020 FCA 103, [2020] F.C.J. No. 674 at para. 234

²⁹ 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”. See “Principle, Policy, Procedure”, in *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworths, 1981) 193, at p. 214.

³⁰ Archbald and Jull, *Profiting From Risk Management and Compliance* (Thomson Reuters 2025) at Chapter 6. The Growth and Validity of Administrative Monetary Penalties VII. A Principled Approach § 6:58. Principle 1: AMPs Should be Capped at a Moderate Level to Minimize the Damage from the Possibility of a Wrongful Finding of a Violation.

In 2022, the Canadian government significantly increased certain penalties available under the [Competition Act](#). The administrative monetary penalties (“AMPs”) that could be awarded against a corporation under the deceptive marketing practices and abuse of dominance provisions increased from a maximum of \$10 million (and \$15 million for each subsequent order) to the greater of (a) \$10 million (and \$15 million for each subsequent order) and (b) three times the value of the benefit derived from the conduct in question or, if that amount cannot be reasonably determined, 3% of the corporation's annual worldwide gross revenues.

The AMPs that could be awarded against an individual under the deceptive marketing practices provisions increase from a maximum of \$750,000 (and \$1 million for each subsequent order) to the greater of (a) \$750,000 (and \$1 million for each subsequent order) and (b) three times the value of the benefit derived from the conduct in question, if that amount can be reasonably determined.

This change was intended to address the perception by some, that the penalties available in Canada pale in comparison to those available in other jurisdictions around the world, including, most notably, the United States and Europe. The poster child for this perspective was Facebook's \$9-million penalty in 2020 to settle the Competition Bureau's concerns that the company made false or misleading claims about the privacy of Canadians' personal information on Facebook and Messenger. In the U.S., Facebook's penalty for the same type of infraction was \$5 billion. The comparison between Canada and the U.S. was stark. The CEO of Facebook chose to not attend in Canada before the regulator, perhaps reflective of the different penalty risks. The amendments change that risk.

These ‘King Kong’ or “Super” administrative monetary penalties can be imposed by an administrative tribunal on a balance of probabilities³¹ with lower thresholds for the admissibility of evidence.³² The three times benefit formula creates bigger ‘King Kong’ AMPs than existed previously, and may potentially raise constitutional considerations.

The first example of the potential magnitude of these AMPs is the decision by Justice Little in the [Cineplex](#) case by imposing an AMP in the amount of \$38.978 million under [paragraph 74.1\(1\)\(c\) of the Competition Act](#).³³ This penalty related to the deceptive marketing practice of “drip pricing” which is defined in section 74.01(1.1) of the *Competition Act* as follows:

- **Drip pricing**
- **(1.1)** For greater certainty, the making of a representation of a price that **is not attainable due to fixed obligatory charges** or fees constitutes a false or misleading representation, unless the obligatory charges or fees represent only an amount imposed by or under an Act of Parliament or the legislature of a province.[emphasis added]

³¹ *Canada (Commissioner of Competition) v. Cineplex Inc.*, 2024 Comp. Trib. 5 (Competition Trib.) at paragraph 234.

³² The empowering legislation, properly interpreted, might allow an administrative decision-maker to admit material that courts would ordinarily reject as inadmissible. *Vancouver Airport Authority v. Commissioner of Competition* 2018 CarswellNat 3820, 2018 CarswellNat 98 at paragraph 25.

³³ [Canada \(Commissioner of Competition\) v. Cineplex Inc., 2024 Comp. Trib. 5 \(Competition Trib.\)](#). Cineplex has announced that it is appealing this decision. Tara Deschamps, The Canadian Press. “Cineplex ordered to pay \$38.9M by Competition Tribunal in ticket fee case”, BNN Bloomberg, (September 24, 2024), online: <https://www.bnnbloomberg.ca/business/company-news/2024/09/24/cineplex-ordered-to-pay-389m-by-competition-tribunal-in-ticket-fee-case/>.

The drip pricing related to an online booking fee of \$1.50 per ticket. The key to the case is from a consumer's view: when would a consumer realise in the process that the \$1.50 was being charged? The consumer is presented with various online "buttons" such as "Proceed" and "Get tickets" with a countdown timer that adds a sense of urgency. The Commissioner's argument in essence was that a consumer would not discover the \$1.50 dripped price until late in the process and just before payment. Cineplex argued that consumers could scroll down on the screen to discover the \$1.50 fee.

Justice Little concluded that the represented ticket prices are not attainable due to the Online Booking Fee, which is a fixed obligatory charge or fee that is added to the represented ticket prices.³⁴ The Court found that consumers can click PROCEED to the next page without scrolling down (and in practical terms are encouraged to do exactly that), they are not prevented from advancing to the next page without scrolling to the bottom (although they could be), and they are not given any indication that more information on the price is available by choosing to scroll down (again, some indication could be provided).³⁵

Justice Little accepted the behavioural evidence called by the Commissioner with respect to the way in which a consumer would be misled:

Beyond this analysis of the factual evidence, Dr Morwitz's expert opinion provides support for the finding of representations that are false or misleading under paragraph 74.01(1)(a). She testified that the Online Booking Fee is a "shrouded attribute" according to the academic literature. It is a fee separated from the price of the ticket and presented sequentially (i.e., the ticket price is presented first, and the fee is added later). She identified the shrouding or obfuscation of the fee owing to the number of steps that a consumer has to take to find or learn information about the per-ticket Online Booking Fee. She referred to: (i) the need to click on the ADD button for fee information to be displayed, (ii) the absence of any reference to a fee next to the displayed ticket price, (iii) the placement of Online Booking Fee information at the bottom of the Tickets Page (below the fold) and that consumers have to scroll down to find it, (iv) having to do mental math about the subtotal to otherwise become aware of the fee, (v) the font used to display it, (vi) the need to click the blue encircled "i" to get information about the added fee, and (vii) the use of the countdown clock to create a sense of urgency.³⁶

Justice Little applied the 50.1% standard in determining whether the Tribunal would impose an administrative monetary penalty ("AMP").³⁷ We are of the view that on the merits, Justice Little's finding of drip pricing in the *Cineplex* case is correctly decided. The merits of the drip pricing is beyond the scope of this paper and one of the authors has written about this previously.³⁸ For the

³⁴ Cineplex at paragraph 340.

³⁵ Cineplex at paragraph 399.

³⁶ Cineplex at paragraph 406.

³⁷ The standard of proof applied by the Tribunal is the civil standard of proof on a balance of probabilities: *Gestion Lebski inc.*, at paras 53, 152, 191; *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161, at para 66; *Toronto Real Estate Board v Canada (Commissioner of Competition)*, 2017 FCA 236, [2018] 3 FCR 563, at paras 48, 87; *FH v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, at paras 45-46, 49 as cited in *Canada (Commissioner of Competition) v. Cineplex Inc.*, 2024 Comp. Trib. 5 (Competition Trib.) at paragraph 234.

³⁸ See Kenneth Jull and Nicole Spadotto, "Digital Advertising and Purchasing: Fun or a New Type of Deception?" (2020), 33 Canadian Competition Law Rev 1, as cited in the Cineplex decision at paragraph 338.

purposes of this paper, we are NOT arguing that in Cineplex there was a wrongful finding of liability. The potential for a wrongful finding of liability is considered in Part II of this paper. For present purposes, the reference to the *Cineplex* decision is related to the potentially large quantum of AMPs.

Justice Little surveyed the range of penalties that could be imposed as follows:

The maximum AMP in this case is the greater of \$10 million and three times the benefit derived from the reviewable conduct (three times \$38.978 million or approximately \$116.9 million). The possible range for an AMP is therefore \$0 to \$116.9 million.

As noted, the purpose of an AMP is to promote conduct by the respondent that is in conformity with the deceptive marketing provisions: [subsection 74.1\(4\)](#). [Subsection 74.1\(5\)](#) sets out aggravating and mitigating factors, evidence of which shall be taken into account. As mentioned, one of the factors is any decision in relation to an application for an order under [paragraph 74.1\(1\)\(d\)](#).³⁹

The Tribunal considered that Cineplex is a large business enterprise. It is Canada's largest film exhibitor. The Agreed Statement of Facts advised that in 2022, Cineplex had revenues of approximately \$1.269 billion and in 2023, revenues of approximately \$1.389 billion.

The Commissioner submitted that Cineplex had collected approximately \$40 million from its deceptive conduct. According to the Commissioner in his opening submissions at the hearing, the quantum of the AMP should be “at least” \$40 million. His written argument in closing argued that the AMP should be “the amount Cineplex has gained from engaging in the misleading conduct”. The Commissioner observed that an AMP of \$40 million is “not even close” to the maximum AMP that the Tribunal may order under [paragraph 74.1\(1\)\(c\) of the *Competition Act*, 22](#)

Justice Little observed that “[a] remedy for proven reviewable conduct under Part VII.1 should not be a cost of doing business. That would undermine, rather than advance, the objectives of the deceptive marketing provisions and would not promote conformity with the statute.”⁴⁰ With respect to the potential for an order for restitution, Justice Little commented that “a refund to consumers could be an appropriate and significant part of an overall order in this proceeding, to promote conduct by Cineplex that is in conformity with the purposes of the deceptive marketing provisions of the *Competition Act*. The aggregate amount to be refunded for conduct up to December 31, 2023, would be \$38.978 million and Cineplex could be ordered to pay that sum under [paragraph 74.1\(1\)\(d\)](#).”⁴¹ Despite this comment, Justice Little decided to not make an order for restitution. From a practical perspective, there was no proposal or evidence on how to distribute individual refunds to consumers.

³⁹ [Canada \(Commissioner of Competition\) v. Cineplex Inc., 2024 Comp. Trib. 5 \(Competition Trib.\)](#) (“Cineplex”) at paras. 459-460

⁴⁰ Cineplex at paragraph 439.

⁴¹ Cineplex at paragraph 448.

Justice Little concluded that the Tribunal should impose an AMP in the amount of \$38.978 million under [paragraph 74.1\(1\)\(c\)](#). The following summary of factors offers a blueprint for future cases:

In my view, the Tribunal's overall order is proportional and respects Parliament's directions in [subsection 74.1\(4\)](#). In my view, its terms are proportional to the nature of Cineplex's reviewable conduct (including its severity, frequency, duration, materiality, and geographic scope), the number and proportion of Cineplex consumers affected, the quantum of Online Booking Fees collected, and Cineplex's financial position. In addition:

- (a) This is not a case in which the conduct was designed deliberately to deceive members of the public, nor were the representations directed at a vulnerable segment of the public.
- (b) Cineplex will suffer harm to its reputation and, as in *Chatr 2014*, will likely take steps to end the reviewable conduct.
- (c) No evidence suggested that Cineplex has any history of non-compliance with the [Competition Act](#).
- (d) While the reviewable conduct had been occurring for more than 19 months at the time of the hearing, Cineplex requested a prompt hearing on the merits of the Commissioner's application, which occurred.

The order also accounts for the fact that this is the first Tribunal case that has interpreted and applied [subsection 74.01\(1.1\)](#), which was recently added to the [Competition Act](#) adjacent to the long-standing provision concerning false or misleading representations to the public in [paragraph 74.01\(1\)\(a\)](#).⁴²

What stands out from the above is the fact that this was the first case under the new super AMP provisions and there was significant reputational cost. The issue of reputational costs is dealt with in Part III of this paper, below. Going forward, however, corporations should beware that the new super AMPs may be very significant.

Professor Poonan Puri argues that the cost-benefit model, which has been discounted as being unrealistic in “blue-collar” crimes, is perfectly suited to corporate crimes. Puri writes: “Thus, to deter corporate misconduct effectively, the fine (the expected cost) should be set, at a minimum, at an amount equal to the expected profit or loss resulting from the misconduct (the expected benefit)”.⁴³

Puri astutely recognizes the mathematical reality that a fine set exactly equal to corporate profit does not actually deter, unless there is 100% certainty of getting caught in each and every case of non-compliance. To compensate for this, she argues that a fine must be factored accordingly. Although this is an attractive argument from a mathematical probabilities perspective, it cannot be applied in the context of criminal or regulatory offences in the absence of proof beyond a

⁴² Cineplex at paragraphs 479-480.

⁴³ Poonan Puri, “Mandatory Minimum Sentences: Law and Policy [Sentencing the Criminal Corporation](#)” (2001), 39 *Osgoode Hall L.J.* 611 at p. 618.

reasonable doubt of previous offences or violations. It is an open question as to whether or not the rules are different in AMPs proceedings.

(b) The *Guindon* decision and culpable conduct

The Supreme Court of Canada has articulated the test to determine whether an AMP scheme strays across the constitutional line into offence territory (which then become subject to [Charter](#) rights) in the case of *Guindon v. Canada*⁴⁴ released on July 31, 2015. The court held that AMPs under [s. 163.2 of the *Income Tax Act*](#) are not offences that trigger constitutional protections such as the right to be presumed innocent.

In order to understand the context of the *Guindon* decision, it is imperative to explain the particular penalty provision in issue which is contained in the *Income Tax Act*.

The federal *Income Tax Act* contains an array of penalty provisions relating to various types of proscribed conduct. The particular penalty in issue in *Guindon* was the so-called “tax preparer penalty” contained in s. 163.2(4) of the Act, which reads:

Every person who makes, or participates in, assents to or acquiesces in the making of, a statement to, or by or on behalf of, another person (in this subsection, subsections (5) and (6), [paragraph 12\(c\)](#) and subsection (15) referred to as the “other person”) that the person *knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is a false statement that could be used by or on behalf of the other person for a purpose of this Act* is liable to a penalty in respect of the false statement. [emphasis added]

The above section refers to “but for circumstances amounting to culpable conduct”. This term is defined in terms that sound like criminal concepts in [s. 163.2\(1\)](#):

“**culpable conduct**” means conduct, whether an act or a failure to act, that

- (a) is tantamount to intentional conduct;
- (b) shows an indifference as to whether this Act is complied with; or
- (c) shows a willful, reckless or wanton disregard of the law.

The reference in the above section to “intentional conduct” and willful or reckless disregard of the law could be taken right out of a criminal law textbook of basic criminal law principles.

A parallel with the criminal provisions contained in [s. 239](#) shows that they are almost identical to the above AMP provisions as they also refer to acquiescence in the making of false statements and

⁴⁴ *Guindon v. R.* (2015), 327 C.C.C. (3d) 308, 2015 SCC 41 (S.C.C.) (“*Guindon*”).

that willfully, in any manner, evaded or attempted to evade compliance with the Act or payment of taxes imposed by the Act.⁴⁵

The above parallel with criminal law provisions has two implications. First, it is arguable that the civil or administrative provisions are no more than criminal provisions “in disguise” with the only real difference being a lower standard of proof. If a regulator is not seeking a jail term and the only penalty sought is a monetary penalty, it is predictable that the regulator would pick the provision with the lower evidentiary standard.

Secondly, a regulator might respond that the target cannot really complain because there is still a mental element of wilfulness that must be proven, albeit on a lower standard of proof. The problem with this argument is that the stigma and reputational harm to an individual or corporation of being found to have wilfully or recklessly participated in the making of false tax documentation is much higher. The topic of stigma is dealt with in more detail below.

The magnitude of the [s. 163.2\(4\)](#) penalty is the greater of \$1,000 and the lesser of two other amounts: (i) the penalty to which the third party would be subject to if they improperly used the false statement in their income tax filings (generally 50% of the amount of tax avoided); and (ii) \$100,000 plus the tax preparer's compensation for making the false statement. Given that a separate tax preparer penalty may be imposed for each false statement made (as was the case in *Guindon*), total penalty exposure will quickly add up where a tax preparer makes the same type of false statement to a number of clients or third parties.

Julie Guindon was assessed penalties under [s. 163.2\(4\)](#) totalling \$546,747 in respect of false statements made by her in donation receipts issued by her on behalf of a charity which, it is alleged, she knew or would reasonably be expected to have known could be used by taxpayers to claim an unwarranted tax credit.

Julie Guindon is a lawyer, practising mainly in the area of family law and wills and estates; it was accepted by the Supreme Court that she has no expertise in income tax law. She was approached by promoters of a leveraged donation program. Each participant in the program would acquire timeshare units of a resort in the Turks and Caicos Islands. The participants would donate these units to a charity at a fair market value greater than their cash payment for the timeshares. Ms. Guindon agreed, for a fee of \$1,000, to provide an opinion letter on the tax consequences of this program on the basis of a precedent provided by the promoters. She recommended that the promoters have a tax lawyer and an accountant review her opinion to ensure its accuracy, as the opinion did not fall within her field of expertise, but nonetheless provided the letter knowing that it was intended to be part of the promotional package for the scheme. She wrote that the transactions would be implemented based on supporting documents that she had been provided with and had reviewed. She had not reviewed the supporting documents.⁴⁶

The scheme was described by the Supreme Court as a sham: no timeshare units were created and no transfers from the donors to the charity occurred. The promoters prepared 135 tax receipts, which were issued by the charity and signed by Ms. Guindon and the treasurer of the charity. The

⁴⁵ Criminal Code, s. 239.

⁴⁶ [Guindon v. R. \(2015\), 327 C.C.C. \(3d\) 308, 2015 SCC 41 \(S.C.C.\)](#) (“Guindon”), para. 6.

total receipted amount was \$3,972,775. The Minister of National Revenue disallowed the charitable donation tax credits claimed by the donors. The Minister assessed Ms. Guindon for penalties under [s. 163.2 of the ITA](#) for each of the tax receipts issued on the basis that she knew, or would have known but for wilful disregard of the *ITA*, that the tax receipts constituted false statements.

In the view of Justices Rothstein and Cromwell for the majority, proceedings under [s. 163.2](#) are of an administrative nature. Ms. Guindon therefore is not a person “charged with an offence” and accordingly the protections under s. 11 of the Charter do not apply.

(c) The balancing test: Four Factors to determine whether an outcome is punitive:

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.⁴⁷

Applied to s. 163.2 of the 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, some other administrative regimes identify relevant factors in a manner that is far more similar to relying on principles used in criminal sentencing. Those other regimes will be open to constitutional challenges in the future.

The four factors in the balancing test can be broken out as follows:

- (1) the magnitude of the fine;
- (2) to whom it is paid;
- (3) whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing; and
- (4) whether stigma is associated with the penalty.

Applied to the facts in *Guindon*, the court analyzed the factors as follows.

(i) The Magnitude of the Fine

⁴⁷ *Guindon v. R.* (2015), 327 C.C.C. (3d) 308, 2015 SCC 41 (S.C.C.) at para. 76.

Ms. Guindon was assessed a penalty of \$546,747. The court recognized that this amount is very high for an individual. However, in the circumstances, it did not constitute a true penal consequence in light of the fact that there were 135 violations.

(ii) To Whom it Is Paid

The penalties in issue in *Guindon* were paid into the Consolidated Revenue Fund. While this factor weighed in favour of characterizing the penalties as having a true penal consequence, the majority of the Supreme Court determined that this was insufficient when weighed against the other factors.⁴⁸

(iii) Whether its Magnitude Is Determined by Regulatory Considerations Rather Than Principles of Criminal Sentencing

The court concluded that the magnitude of penalties under s. 163.2(4) is directly tied to the objective of deterring non-compliance with the Act. The amount is calculated pursuant to s. 163.2(5) and takes into account the penalty to which the other person (for whom or to whom the violator has made the false statement) would be liable in addition to the violator's gross compensation in respect of the false statement. These factors speak to the magnitude of the tax that could potentially be avoided and the violator's personal gain, both of which are relevant to deterring such misconduct. The amount is fixed without regard to other general criminal sentencing principles.⁴⁹

By way of contrast, AMPs under the [Telecommunications Act](#)⁵⁰ are used as a general enforcement mechanism for the Canadian Radio-television and Telecommunications Commission ("CRTC"). The listed factors listed in [s. 72.002\(1\)](#) are more analogous to criminal law sentencing principles.

The amount of the penalty is to be determined by taking into account the following factors:

- (a) the nature and scope of the violation;
- (b) the history of compliance with the [Telecommunications Act](#), the regulations or the decisions made by the Commission under this Act, by the person who committed the violation;
- (c) any benefit that the person obtained from the commission of the violation;
- (d) the person's ability to pay the penalty;
- (e) any factors established by any regulations; and
- (f) any other relevant factor.

⁴⁸ [Guindon v. R. \(2015\), 327 C.C.C. \(3d\) 308, 2015 SCC 41 \(S.C.C.\)](#) ("Guindon"), para. 88.

⁴⁹ [Guindon v. R. \(2015\), 327 C.C.C. \(3d\) 308, 2015 SCC 41 \(S.C.C.\)](#) ("Guindon"), para. 84.

⁵⁰ [S.C. 1993, c. 38](#)

Future constitutional challenges will be based on the argument that factors such as the above are very similar to the types of sentencing factors that are listed in the [Criminal Code](#), which characterize the resulting penalty as punitive in nature.⁵¹ This type of attack is further discussed below in the context of post *Guindon* cases and the *CompuFinder* case.

The *Competition Act* contains a similar balancing of factors in the assessment of an AMP that resemble criminal law sentencing principles. Section 74.1 sets out the following subsections.

- 74.1 (3) No order may be made against a person under paragraph (1)(b), (c) or (d) if the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

This provision resembles the due diligence defence that is provided for in classic regulatory offences.

- **Purpose of order**

74.1(4) The terms of an order made against a person under paragraph (1)(b), (c) or (d) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part **and not with a view to punishment**. [emphasis added]

This is an unusual section as it applies to an administrative penalty made under subsection (c). The Oxford Dictionary definition of “penalty” is “**punishment** for breach of law; fine or loss etc. incurred by this; disadvantage imposed by action or circumstances; disadvantage to which player or team in sport must submit for breach of rule”.⁵² On its face, the section states that **punishment** is **not** a purpose and yet the section also refers to it being a penalty.

The legislature has in effect declared by legislated fiat that an administrative monetary **penalty** is not a **penalty**.

If a legislature enacted a section that stated that in a given jurisdiction, the sum of 2 plus 2 equals 5, that legislature would be a laughing stock as departing from the basic rules of mathematics accepted globally. Yet the same result occurs when a legislature overrules the basic rules of English to declare that an administrative monetary penalty is not with a view to punishment.

We suspect that this semantic paradox was put in the legislation to safeguard it from a constitutional challenge (on the basis that the provision created an “offence” which would require [Charter](#) protections). Now that the Supreme Court of Canada has set out guidelines in the [Guindon](#) decision, it is no longer necessary to twist the English language in ways that make little sense, and consideration should be given to amending this provision. AMPs do **punish**. This is the only way that AMPs deter future conduct. Administrative *penalties* do **not** provide

⁵¹ [Criminal Code, s. 718](#) onward, “Purpose and Principles of Sentencing”.

⁵² The Pocket Oxford Dictionary (Clarendon Press, 1984).

restitution, nor do they remediate. They **punish** and deter. The case law supports this point. As stated by the Supreme Court of Canada in the [Guindon](#) decision, AMPs are necessary to deter:

Sometimes significant penalties are necessary in order *to deter* non-compliance with an administrative scheme: see [Rowan v. Ontario Securities Commission, 2012 ONCA 208, 110 O.R. \(3d\) 492, at para. 49](#). The amount of the *penalty should reflect the objective of deterring* non-compliance with the administrative or regulatory scheme.⁵³

A penalty that reflects the objective of deterring non-compliance **punishes** by creating an effect (the payment of money) which is unpleasant and unwanted. This is the mechanism that **punishes** and thereby deters future misconduct. If the penalty did **not punish**, it would have no deterrent effect.

The philosophy underlying AMPs is explored by Max Minzner in an article entitled “Why Agencies Punish”.⁵⁴ Scholars commonly assume that agencies have a straightforward goal when they **punish**: agencies penalize to induce compliance with their rules. Penalties aim to curb violations and prevent their reoccurrence. In the language of the criminal law, agencies are seen as consequentialists. Through their penalties, agencies seek to achieve positive social outcomes. For example, penalties might deter misconduct by raising the expected cost of violations above the cost of compliance, or might attempt to reinforce norms of compliance through **punishment**.⁴⁷

The *Competition Act* AMP provisions contains a balancing of aggravating and mitigating factors that have parallels to the type of factors considered in criminal sentencing provisions.

- **Aggravating or mitigating factors**

74.1 (5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

- **(a)** the reach of the conduct within the relevant geographic market;
- **(b)** the frequency and duration of the conduct;
- **(c)** the vulnerability of the class of persons likely to be adversely affected by the conduct;
- **(d)** the materiality of any representation;
- **(e)** the likelihood of self-correction in the relevant geographic market;
- **(f)** the effect on competition in the relevant market;
- **(g)** the gross revenue from sales affected by the conduct;

⁵³ [Guindon v. Canada, 2015 SCC 41, \[2015\] 3 S.C.R. 3 para. 77](#) (emphasis added).

⁵⁴ Max Minzner, “Why Agencies Punish” (2012), 53 *William and Mary Law Review*.

- **(h)** the financial position of the person against whom the order is made;
- **(i)** the history of compliance with this Act by the person against whom the order is made;
- **(j)** any decision of the court in relation to an application for an order under paragraph (1)(d);
- **(k)** any other amounts paid or ordered to be paid by the person against whom the order is made as a refund or as restitution or other compensation in respect of the conduct; and
- **(l)** any other relevant factor.

No doubt the Court will have the occasion to rule on the above subsection in the Google constitutional challenge (discussed below under new constitutional challenges) and will have to decide if these factors more closely resemble criminal sentencing factors. Comparison of similar factors is considered below under the post *-Guindon* cases.

(iv) Whether Stigma Is Associated With the Penalty

The Supreme court in *Guindon* found that “no stigma comparable to that attached to a criminal conviction flows from the imposition of the penalty”.⁵⁵ The decision does not elaborate on the reasons for this conclusion. There is no doubt that the stigma from a criminal conviction with the possibility of imprisonment and the imposition of a criminal record is higher than an AMP. Yet, the nature of the violation in this case suggests that the stigma would be higher than that associated with some other AMPs. The wording of the section itself, as noted above, requires that the false statement must be made knowingly or in circumstances amounting to culpable conduct. Moreover, the Supreme Court described the conduct at issue in very serious language. To put this into perspective, imagine a hypothetical conversation where a person admits the following conduct at a social or work event using the words chosen by the courts in *Guindon*:⁵⁶

- she was dishonest in her initial legal opinion;
- she compounded this dishonesty by signing charitable receipts that she should reasonably have known were tainted by her own failure to verify the legal basis of the program;
- she wrote and endorsed a legal opinion that she knew was flawed and misleading; and
- her conduct was indicative either of complete disregard of the law and whether it was complied with or not or of willful blindness.

Although income tax AMPs generally remain shielded from public view unless the violator appeals them to a Canadian court, the Supreme Court's (public) denunciatory statements in *Guindon* suggest that the stigma analysis may require further elaboration in the future. For

⁵⁵ [Guindon v. R. \(2015\), 327 C.C.C. \(3d\) 308, 2015 SCC 41 \(S.C.C.\)](#) (“Guindon”), para. 84.

⁵⁶ [Guindon v. R. \(2015\), 327 C.C.C. \(3d\) 308, 2015 SCC 41 \(S.C.C.\)](#) (“Guindon”), at paras. 85-86.

example, the measure of stigma could perhaps be the subject of expert evidence using an appropriate sample size in a future case.⁵⁷ This topic is discussed in more detail below under the heading of “Lack of empirical evidence with respect to stigma.”

Magnitude of the AMP: the Proportionality Test

With respect to the magnitude of a given AMP, the Supreme Court articulated a proportionality test:

The magnitude of the sanction on its own is not determinative. However, if the amount at issue is out of proportion to the amount required to achieve regulatory purposes, this consideration suggests that it will constitute a true penal consequence and that the provision will attract the protection of s. 11 of the *Charter*. This is not to say that very large penalties cannot be imposed under administrative monetary penalty regimes. Sometimes significant penalties are necessary in order to deter noncompliance with an administrative scheme: see [Rowan v. Ontario Securities Commission, 2012 ONCA 208, 110 O.R. \(3d\) 492, at para. 49](#). The amount of the penalty should reflect the objective of deterring noncompliance with the administrative or regulatory scheme.⁵⁸

This test contemplates that some AMP schemes may fail as being out of proportion to the amount required to achieve regulatory purposes, which then attracts the protection of [s. 11](#). If this occurs in respect of a particular penalty, and the provision in issue cannot be read as providing the relevant constitutional protections (such as being presumed innocent until proven guilty beyond a reasonable doubt), the penalty would be constitutionally invalid.

No Fixed Upper Limit or Ratio Test

With respect to potential bright-line tests, the court rejected the suggestion by the Canadian Constitution Foundation that there should be an upper limit on the quantum of an administrative monetary penalty. The court observed that an arbitrary upper limit on AMPs could undermine their goal: to deter actions that do not comply with the administrative regime. Moreover, the court rejected the suggestion that the 1:5 ratio of AMPs to criminal fines in the Ontario securities law context was a general rule applicable to all AMPs.

In our view, this rejection of a ratio test was unfortunate. A ratio test has the benefit of mathematical certainty and would have provided both proportionality and certainty for regulatory regimes going forward.

The Mental Element Is Not Dispositive

Ms. Guindon argued that the use of the term “culpable conduct” in s. 163.2(4) indicates a *mens rea* requirement, which is classically criminal in nature. Some academics have argued that

⁵⁷ Robert J. Currie, “The Contextualized Court: Litigating ‘Culture’ in Canada” (2005), 9 *International Journal of Evidence & Proof* 73 at 91. A recent decision underlines that judicial notice of cultural factors cannot be made in the absence of expert evidence: see [Quebec \(Attorney General\) v. 156158 Canada Inc. \(Boulangerie Maxie's\), 2015 QCCQ 354, 2015 CarswellQue 522 \(C.Q.\)](#) at paras. 46-47.

⁵⁸ [Guindon v. R. \(2015\), 327 C.C.C. \(3d\) 308, 2015 SCC 41 \(S.C.C.\)](#) (“Guindon”), at para. 77.

administrative penalties ought not to be used for intentional or reckless conduct but that they should instead be reserved for carelessness or negligence.⁵⁹ The court ruled that this is irrelevant to the analysis because the “criminal in nature” test is concerned with the process and the nature of the proceedings, not the conduct that attracts the imposition of the AMP. The court sets out a wide spectrum of conduct that may be the subject of an AMP:

While some regulatory penalties are imposed without consideration of the person's state of mind, in other cases it is rational that the state would only wish to impose a penalty on those who engage in misconduct knowingly, recklessly, or with a particular intention. Providing a due diligence defence or including a mental element as a component of the penalty does not detract from the administrative nature of the penalty.⁶⁰

If one applied the above test literally, it is possible to envision an AMP for fraud that would impose a civil penalty for intentional conduct or willful blindness. We do not think that the Supreme Court intended to suggest with the above wording that an AMP for fraud would be constitutional. Indeed, the court itself recognized that “[w]ilful, reckless or wanton disregard of the law” refers to concepts well known to the law, commonly encountered as degrees of *mens rea* in criminal law.⁶¹

We would argue that in future cases, the above wording must properly be read in the context of the four-part balancing test to determine whether a particular AMP is punitive. For example, the combination of an intentionality concept coupled with criminal sentencing-like principles would likely lead to the conclusion that an AMP is punitive in nature.

(d) Only 4 Judges ruled on the merits in *Guindon* leaving the door open to a more fulsome consideration by a majority of the Court

The decision in *Guindon* is somewhat unique in that only four judges of the court made a determination on the merits. The court sat in a panel of seven as Justice Côté had not yet been sworn in. The judgment of the four-judge majority was delivered by Rothstein and Cromwell JJ., while the three remaining judges dissented in reasons delivered by Abella and Wagner JJ. The dissenting judges concluded that the absence of notice of a constitutional question to the Attorneys General indicated that the court lacked the benefit of a full and tested evidentiary record and that it should refrain from deciding the merits of the AMP issue.⁶² It is therefore possible that, in a future challenge to an AMP scheme where notice is properly given, a fully constituted Supreme Court might adopt a different test or approach than the one set out in *Guindon* on a more fulsome

⁵⁹ Professor Richard Macrory, Regulatory Justice: Making Sanctions Effective, Final Report (November 2006). See Figure 3.1 and Effective Sanctioning System.

⁶⁰ [Guindon v. R. \(2015\), 327 C.C.C. \(3d\) 308, 2015 SCC 41 \(S.C.C.\)](#) (“Guindon”), at para. 72.

⁶¹ [Guindon v. R. \(2015\), 327 C.C.C. \(3d\) 308, 2015 SCC 41 \(S.C.C.\)](#) (“Guindon”), at para. 58.

⁶² It should be noted that one of the authors of this paper was co-counsel for Ms. Guindon at the Supreme Court of Canada level but was not counsel at trial and had no involvement in the notice issue.

evidentiary record.⁶³ The Supreme Court has been prepared to take a fresh look at legal frameworks where difficulties have been pointed out in their interpretation.⁶⁴

(e) Post *Guindon* cases: A disappointing lack of critical thinking

The post-*Guindon* cases have generally upheld the constitutional validity of various administrative monetary penalty regimes. Unfortunately, there has been a lack of critical thinking or analysis in many of these decisions.

In the *CompuFinder* decision,⁶⁵ Justice Nadon for the Federal Court of Appeal concluded that the Canadian Anti-Spam Legislation (CASL) AMP proceedings are not criminal in nature. Justice Nadon followed the reasoning in *Guindon* that very large penalties may be required to achieve deterrence.⁶⁶ In this case, the potential penalties were very significant, being \$1,000,000 in the case of an individual and \$10,000,000 in the case of any other person, including corporations:

The magnitude of fines levied under CASL may reach \$1,000,000 in the case of an individual and \$10,000,000 in the case of any other person, including corporations (CASL, s. 20(4)). Though considerable, these amounts do not necessarily signal that the sanction's purpose is to denounce or punish morally or socially reprehensible conduct. The Supreme Court has acknowledged that “significant penalties” may be required to achieve the regulatory purpose of deterring non-compliance by ensuring AMPs do not become simply a cost of doing business. To require that penalties reflect regulatory objectives “is not to say that very large penalties cannot be imposed under administrative monetary penalty regimes.” (*Guindon* at para. 77).⁶⁷

CompuFinder had argued that the absence of a “purely economic” or “mathematical” basis for determining penalties in CASL (unlike the more mathematical calculation in the tax section before the court in *Guindon*) led to the conclusion that criminal sentencing objectives rather than regulatory objectives determine the quantum of penalties under CASL. Justice Nadon disagreed with this argument, finding that there is also little overlap between the considerations for determining the magnitude of an AMP, enumerated in s. 20(3) of CASL, and the principles of criminal sentencing found at [s. 718 of the Criminal Code](#):

⁶³ See, e.g., [Fraser v. Ontario \(Attorney General\) \(2011\), 331 D.L.R. \(4th\) 64, \[2011\] 2 S.C.R. 3 \(S.C.C.\)](#) at para. 131, where the court commented as follows:

(The Supreme) Court's most recent pronouncement on the question of overruling was in [*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609]. Writing for the Court, Justice Binnie first noted at para. 44 that the Court's practice is against departing from precedent unless there are compelling reasons to do so. However, he also recognized that “while rare, departures [from precedent] do occur”. He further noted that constitutional decisions, including [Charter](#) decisions, are not immutable and may be overruled, though he held that “[t]he Court should be particularly careful before reversing a precedent where the effect is to diminish [Charter](#) protection.”

⁶⁴ [R. v. Grant, 2009 SCC 32, \[2009\] S.C.J. No. 32 \(S.C.C.\)](#) at paras. 3, 71.

⁶⁵ [3510395 Canada Inc. v. Canada \(Attorney General\), 2020 FCA 103, \[2020\] F.C.J. No. 674](#), application for leave to appeal to the Supreme Court of Canada dismissed with costs March 4, 2021 (without reasons) [2020] S.C.C.A. No. 370. Record updated March 4, 2021 [the *CompuFinder* case].

⁶⁶ [3510395 Canada Inc. v. Canada \(Attorney General\), 2020 FCA 103, \[2020\] F.C.J. No. 674](#) [the *CompuFinder* case] at para. 215.

⁶⁷ *CompuFinder* at paragraph 215.

There is also little overlap between the considerations for determining the magnitude of an AMP, enumerated in [subsection 20\(3\)](#), and the principles of criminal sentencing found at [section 718 of the Criminal Code](#). The absence of a “purely economic” or “mathematical” basis for determining penalties, which the appellant points to, does not compel the conclusion that criminal sentencing objectives rather than regulatory objectives determine the quantum of penalties under CASL.⁶⁸

The above conclusion is arrived at without a detailed enumeration or comparison of the factors in [s. 20\(3\)](#) and [s. 718](#) respectively. This is unfortunate. Some of the factors do appear to overlap, as illustrated in the following table:

<i>Criminal Code</i> s. 718	CASL s. 20(3)
(b) to deter the offender and other persons from committing offences;	(a) the purpose of the penalty;
(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;	(b) the nature and scope of the violation;
(d) to assist in rehabilitating offenders;	(c) the person's history with respect to any previous violation under this Act, any previous conduct that is reviewable under s. 74.011 of the Competition Act and any previous contravention of s. 5 of the Personal Information Protection and Electronic Documents Act that relates to a collection or use described in s. 7.1(2) or (3) of that Act;
(d) to assist in rehabilitating offenders;	(d) the person's history with respect to any previous undertaking entered into under s. 21(1) and any previous consent agreement signed under s. 74.12(1) of the Competition Act that relates to acts or omissions that constitute conduct that is reviewable under s. 74.011 of that Act;
(e) to provide reparations for harm done to victims or to the community;	(e) any financial benefit that the person obtained from the commission of the violation;
(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community	(f) the person's ability to pay the penalty;

⁶⁸ CompuFinder at paragraph 217.

- (e) to provide reparations for harm done to victims or to the community;
- (g) whether the person has voluntarily paid compensation to a person affected by the violation;
- (h) the factors established by the regulations; and
- (i) any other relevant factor.

The above comparison shows that there is some overlap between the myriad factors considered in both the [Criminal Code s. 718](#) and CASL [s. 20\(3\)](#). Given that CompuFinder was a corporation, a more appropriate comparison would have been with the corporate sentencing provisions in the [Criminal Code](#) in [s. 718.21](#). That comparison is shown in the following table:

Criminal Code s. 718.21	CASL s. 20(3)
(j) any measures that the organization has taken to reduce the likelihood of it committing a subsequent offence.	(a) the purpose of the penalty;
(b) the degree of planning involved in carrying out the offence and the duration and complexity of the offence;	(b) the nature and scope of the violation;
(g) whether the organization was—or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;	(c) the person's history with respect to any previous violation under this Act, any previous conduct that is reviewable under s. 74.011 of the Competition Act and any previous contravention of s. 5 of the Personal Information Protection and Electronic Documents Act that relates to a collection or use described in s. 7.1(2) or (3) of that Act;
(g) whether the organization was—or any of its representatives who were involved in the commission of the offence were — convicted of a similar offence or sanctioned by a regulatory body for similar conduct;	(d) the person's history with respect to any previous undertaking entered into under s. 21(1) and any previous consent agreement signed under s. 74.12(1) of the Competition Act that relates to acts or omissions that constitute conduct that is reviewable under s. 74.011 of that Act;
(a) any advantage realized by the organization as a result of the offence;	(e) any financial benefit that the person obtained from the commission of the violation;
(c) whether the organization has attempted to conceal its assets, or convert them, in order to show that it is not able to pay a fine or make restitution; (d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees;	(f) the person's ability to pay the penalty;

- | | |
|---|---|
| (i) any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; violation;
and
(e) the cost to public authorities of the investigation and prosecution of the offence; (f) and any regulatory penalty imposed on the organization or one of its representatives in respect of the conduct that formed the basis of the offence;
(h) any penalty imposed by the organization on a representative for their role in the commission of the offence; | (g) whether the person has voluntarily paid compensation to a person affected by the

(h) the factors established by the regulations; |
|---|---|

We hope that future cases may explore the potential parallels between the [Criminal Code](#) sentencing provisions and the factors listed in administrative monetary penalty schemes. The above comparison suggests that there is considerable overlap. Whether or not this overlap is enough to lead to the conclusion that an administrative scheme is punitive in nature to qualify as an offence under s. 11 of the Charter remains to be seen. It certainly could be argued, however, that the balancing of factors is much more similar to criminal sentencing than the more mechanical AMP that was reviewed in the [Guindon](#) decision.

Leave to the Supreme Court of Canada was dismissed in the *CompuFinder* case in 2021.⁶⁹ The decision dismissing the application for leave was without reasons. The door is still open for constitutional challenges to the myriad of other AMP schemes outside of the [Income Tax Act](#) considered in *Guindon*, if they fall within the “punitive paradigm”. The decision in *CompuFinder* and the denial of leave to appeal to the Supreme Court of Canada has moved the door, but we are still of the view that the door is not yet completely shut to meritorious challenges. New developments with respect to the comparison of administrative tribunals to Courts have wedged open the door again. We turn to these developments later in this paper.

(f) Lack of empirical evidence with respect to stigma

The concept of stigma has been recently revisited by the Supreme Court of Canada in the decision in the case of [R. v. Greater Sudbury \(City\)](#).⁷⁰ This appeal arose from a fatal accident and concerned the proper interpretation of Ontario's *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (“OSHA”).

The Corporation of the City of Greater Sudbury contracted with Interpaving Limited to act as constructor to repair a downtown water main. An Interpaving employee tragically struck and killed

⁶⁹ Application for leave to appeal to the Supreme Court of Canada dismissed with costs March 4, 2021 (without reasons) [2020] S.C.C.A. No. 370 | [2020] C.S.C.R. no 370 Record updated: March 4, 2021.

⁷⁰ [R. v. Greater Sudbury \(City\), 2023 SCC 28 \(S.C.C.\)](#).

a pedestrian when driving a road grader, in reverse, through an intersection. Contrary to the accompanying regulation, Construction Projects, [O. Reg. 213/91](#) (“Regulation”), no fence was placed between the construction project workplace and the public intersection, and no signaler was assisting the Interpaving worker (see ss. 65 and 104(3)). In separate proceedings, Interpaving was tried and convicted for breaching the duty of employers under s. 25(1)(c) of the OSHA to “ensure that ... the measures and procedures prescribed [in the Regulation] are carried out in the workplace”.

The legal issue on the appeal concerned the statutory liability, if any, of the City as an employer for breaching this same duty. In response to being charged and prosecuted by the Ontario Ministry of the Attorney General (Ministry of Labour, Immigration, Training and Skills Development) (“Ministry”) under s. 25(1)(c), the City conceded that it was the owner of the construction project, and acknowledged that it sent quality control inspectors to the project, but denied that it was an employer, arguing that it lacked control over the repair work and had delegated control to Interpaving.

Justice Martin J. (Wagner C.J. and Kasirer and Jamal JJ. concurring) provided a brief answer in the following paragraph:

The short answer is that while control over workers and the workplace may bear on a due diligence defence, nothing in the text, context or purpose of the Act requires the Ministry to establish control over the workers or the workplace to prove that the City breached its obligations as an employer under s. 25(1)(c).⁷¹

The Supreme Court decision in [R. v. Greater Sudbury \(City\)](#) attempts to justify the reversal of the legal onus with respect to control over subcontractors on the basis of reduced levels of stigma:

The legislature's choice to impose liability upon an employer, even absent a connection to or control over an activity, was driven not by a desire to express opprobrium of inherently blameworthy conduct but by a desire to modify behaviour and reduce the risk of workplace injury. The nature and purpose of strict liability offences **means that stigma will not attach to employers who are found to have breached s. 25(1)(c) of the Act.** Rather, shifting the burden to the employer to establish a due diligence defence incentivizes employers to take all steps within their control to achieve workplace safety and prevent future harm so that they may avail themselves of the defence should harm occur.¹ [emphasis added]

In the decision in [Guindon](#), the court found that “no stigma comparable to that attached to a criminal conviction flows from the imposition of the penalty”.⁷² The decision does not elaborate on the reasons for this conclusion. There is no doubt that the stigma from a criminal conviction with the possibility of imprisonment and the imposition of a criminal record is higher than an AMP, although this has not been subject to any empirical study or evidence.

⁷¹ [R. v. Greater Sudbury \(City\)](#), 2023 SCC 28 (S.C.C.) at paragraph 4.

⁷² [Guindon v. Canada](#), 2015 SCC 41, (*sub nom. Guindon v. Minister of National Revenue*) 473 N.R. 120 (S.C.C.) (“Guindon”), at para. 84.

Now, the Court in [R. v. Greater Sudbury \(City\)](#) has ruled that the nature and purpose of strict liability offences means that stigma will **not attach** to employers who are found to have breached s. 25(1)(c) of the Act.

The jurisprudence on the topic of stigma is inconsistent, illogical, and simply a mess. With respect to the least punitive regime, being AMPs, the Court has described the stigma as not comparable to that attached to a criminal conviction. The logical implication of this is that there is **some stigma**, but just not a level of stigma that is comparable to that attached to a criminal conviction.

At the next level up from AMPs, which are strict liability offences, one would expect the level of stigma to be higher than that for an AMP, but below that of true criminal offences such as [Criminal Code](#) offences. Yet at this level, the Supreme Court makes the blanket statement that “**stigma will not attach** to employers who are found to have breached [section 25\(1\)\(c\)](#)”. This is clearly inconsistent with the pronouncements in [Guindon](#) that there is stigma, but just not to the level that is comparable to [Criminal Code](#) convictions.

At the highest levels, for offences such as price fixing, the Courts have described such offences as extremely serious. Price-fixing was aptly described in [R. v. Maxone Auto Parts](#)⁷³ as analogous to fraud and theft. Effectively, this was a fraud on the public.⁷⁴ For these offences, one would expect stigma to be at the highest.

We submit that the focus on stigma has led our courts down the wrong path. The more appropriate inquiry is the risk of a wrongful finding of a violation. In criminal law, there is a collective concern about the risk of a wrongful conviction. Yet this collective concern is not translated into a similar fear about the risk of a wrongful finding of a violation in administrative law. Translated into the world of strict liability offences, we would make the same comment. The finding by the Supreme Court that there is no stigma attached to a conviction, which could be a wrongful conviction, is troubling. The more appropriate question is to evaluate the risk of such a wrongful conviction of a regulatory offence and to build in safeguards to prevent such wrongful convictions.

(g) An inverted pyramid

From a public policy perspective, regulators ought to consider a “rational pyramid” approach to AMPs. The court in *Guindon* gave the example of parking tickets that can involve relatively small fines: where these are imposed in conformity with the general criminal process (e.g., pleading guilty or contesting the fine before a judge, prosecution by a Crown attorney), s. 11 rights apply.⁷⁵ By way of comparison, the penalty in the *Guindon* case exceeded \$500,000 but did not engage constitutional rights. This type of inverted enforcement pyramid reflects historical

⁷³ [R. v. Maxone Auto Parts \(Canada\) Corp.](#), 2012 FC 1117 (F.C.) at para. 54.

⁷⁴ [R. v. Canada Bread Co.](#), 2023 ONSC 3790 (Ont. S.C.J.)

⁷⁵ [Guindon v. R.](#) (2015), 327 C.C.C. (3d) 308, 2015 SCC 41 (S.C.C.) at para. 64.

anachronisms rather than sound policy. Various bodies have called for reform of these types of penalties and fines.⁷⁶

From the viewpoint of smart regulation, there is a need for bright lines between AMPs and offences. Historically a parallel can be drawn to the bright lines between true crimes and regulatory offences. The Law Reform Commission of Canada warned against the possible dilution of the criminal law's central core of moral prohibitions through the expansion of regulatory matters. The Commission proposed the remedy of *restraint*: “We must keep regulatory offences in their proper place and confine ‘real’ criminal law to its own proper job. That job is that of acting as an instrument of last resort for reaffirming values.”⁷⁷

Similar concerns are raised in the blurring of the lines between AMPs and offences, although there is no concern about the misuse of jail. If the AMPs are so large that they in effect replace the role of offences, the offence regimes (albeit with increased penalties) may become relics that are rarely used. A prosecutor could naturally drift toward the utilization of the scheme with lower procedural protections for the defence, if the practical result is the same as the former offence regime in terms of the magnitude of the fine. The result could well be the dilution of procedural standards.

Over 90 years ago Francis Sayre predicted that the lower standards of *mens rea* in regulatory offences might lead to a similar relaxation of the *mens rea* requirement in true criminal offences, particularly where the crimes were unpopular and convictions desirable.⁷⁸ In the same way, AMP schemes that utilize administrative procedures may further dilute standards.

(h) New constitutional challenges

In the matter of the *Commissioner of Competition and Google Canada Corporation and Google LLC*⁷⁹, the Commissioner of Competition has applied to the Competition Tribunal for pursuant to section 79 of the Competition Act for an order requiring Google Canada Corporation and Google LLC (collectively, “Google”) to divest Google’s publisher ad server, DFP, and Google’s ad exchange, AdX, along with any additional structural relief as needed to restore competition and overcome the effects of Google’s alleged anticompetitive practice in Canada. With respect to a proposed AMP, the Commissioner seeks an order directing Google to pay an administrative monetary penalty equal to three times the value of the benefit derived from Google’s alleged anticompetitive practice, or if that amount cannot be reasonably determined, 3% of Google’s worldwide gross revenues.⁸⁰

Google has filed a notice of constitutional challenge to a proposed AMP. Google argues that the “Commissioner of Competition seeks an unprecedented financial penalty against Google that

⁷⁶ See, e.g. Law Commission of Ontario, *Modernization of the Provincial Offences Act*, Final Report (Toronto, August 2011), www.lco-cdo.org/POA-Final-Report.pdf.

⁷⁷ Law Reform Commission of Canada, *Our Criminal Law* (Report 3) (Ottawa: Information Canada, 1976), p. 17.

⁷⁸ Francis Sayre, “Public Welfare Offences” (1933), 33 Colum. L. Rev. 55, cited in Victor Ramraj, “Disentangling Corporate Criminal Liability and Individual Rights” (2002), 45 C.L.Q. 29, at p. 35.

⁷⁹ <https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/521325/index.do>

⁸⁰ Notice of Application, November 28, 2024, <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/521324/1/document.do>

could well be measured in the billions of dollars—dwarfing any fine that has ever been imposed in a penal proceeding in Canada. The Commissioner does so by invoking a novel statutory provision that indisputably lacks the important constitutional safeguards available in all other penal proceedings. Google was thus compelled to challenge the constitutionality of this untested statutory provision.”⁸¹ The Commissioner has responded with a motion to strike the challenge as premature, arguing that “Google is not entitled to assume that the Tribunal will order it to pay an AMP amount that represents a true penal consequence. This is pure conjecture and stands in contradiction to the legal presumption that where a statute confers discretion on a decision-maker, it will be exercised in accordance with the Canadian Charter of Rights and Freedoms (the “Charter”).”⁸²

There is a comparison to the United States in the area of abuse of dominance. U.S. District Judge Leonie Brinkema in Alexandria, Va., ruled that Google unlawfully monopolized markets for publisher ad servers and the market for ad exchanges, which sit between buyers and sellers.

"For over a decade, Google has tied its publisher ad server and ad exchange together through contractual policies and technological integration, which enabled the company to establish and protect its monopoly power in these two markets." Brinkema wrote. "Google further entrenched its monopoly power by imposing anticompetitive policies on its customers and eliminating desirable product features."⁸³

In a statement, Google said it will appeal the ruling. "We disagree with the court's decision regarding our publisher tools," said Lee-Anne Mulholland, Google's vice-president of regulatory affairs. "Publishers have many options and they choose Google because our ad tech tools are simple, affordable and effective."⁸⁴

In a 17-page filing, Justice Department lawyers argued that U.S. District Judge Leonie Brinkema should punish Google by ordering the company to offload its AdX business and DFP ad platform, tools that bring together advertisers, who want to market their products, and publishers, who want to sell commercial space on their sites, to bring in revenue.⁸⁵

A major difference between the United States proceedings and the Canadian proceedings is that the United States proceeded via a Court, whereas the Canadian proceedings have been commenced before the administrative Competition Tribunal.⁸⁶ This leads to the next topic.

(i) Administrative Tribunals versus Courts, Deterrence and punishment: New angles from which the Guindon decision may be challenged

⁸¹ CASE CONFERENCE MEMORANDUM OF GOOGLE CANADA CORPORATION AND GOOGLE LLC (Case Conference, June 6, 2025)

⁸² MEMORANDUM OF FACT AND LAW (Commissioner of Competition's Motion to Strike) at <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/521412/index.do>

⁸³ <https://www.cbc.ca/news/business/google-adtech-ruling-1.7512889>

⁸⁴ <https://www.cbc.ca/news/business/google-adtech-ruling-1.7512889>

⁸⁵ <https://fortune.com/article/google-should-divest-from-adx-business-dfp-ad-platform-justice-department-filing/>

⁸⁶ All proceedings before the Tribunal are dealt with as informally and expeditiously as the circumstances and considerations of fairness permit. The Tribunal is composed of up to six judicial members appointed from among the judges of the Federal Court and not more than eight lay members. See <https://www.ct-tc.gc.ca/en/tribunal/mandate.html>

There is another angle of attack on AMPs which is formulating in the wings, on the basis of the fact that AMPs are imposed by administrative tribunals rather than Courts. In 2024, the Supreme Court of Canada confirmed that there is no afterlife for AMPs after bankruptcy except for disgorgement orders of amounts obtained as a result of fraudulent conduct in the case of [Poonian v. British Columbia \(Securities Commission\)](#)⁸⁷.

The majority judgment was written by Justice Cote who summarized the penalties and disgorgement order as follows:

The appellants, Thalbinder Singh Poonian and Shailu Poonian, are undischarged bankrupts. Between 2007 and 2009, the Poonians engaged in market manipulation that caused vulnerable investors to lose millions of dollars. The Commission found that the Poonians had contravened [s. 57\(a\)](#) (now [s. 57\(1\)\(a\)](#)) of the *Securities Act*. It ordered the payment of administrative penalties by both Mr. Poonian (\$10 million) and Ms. Poonian (\$3.5 million). The Commission also issued orders pursuant to s. 161(1)(g) of the *Securities Act* requiring Mr. Poonian to disgorge \$1,319,167 as well as \$1,126,260 jointly and severally with another participant, and requiring Ms. Poonian to disgorge \$3,149,935. The disgorgement orders represent the amounts the Poonians obtained as a result of the market manipulation scheme.⁸⁸

The question before the Court was whether the administrative penalties and/or the disgorgement orders imposed by the Commission can be characterized as either “any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail” ([s. 178\(1\)\(a\)](#)) or “any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim” ([s. 178\(1\)\(e\)](#)). If so, they will not be released by any order of discharge and will survive bankruptcy.

The Court concluded that the administrative penalties imposed by the Commission do not fall within the exceptions set out in either [s. 178\(1\)\(a\)](#) or [\(e\)](#) and therefore do not survive a discharge from bankruptcy on those bases. Justice Cote also concluded that the disgorgement orders imposed by the Commission do not fall within the [s. 178\(1\)\(a\)](#) exception and do not survive a discharge from bankruptcy on that basis. However, they are captured by [s. 178\(1\)\(e\)](#) and therefore will not be released by any possible future order of discharge.

Justice Cote rules that the fines, penalties, restitution orders, and other orders that the [BIA](#) exempts are not restricted to those imposed in a criminal or quasi-criminal context. To that extent, an AMP might fall within the exception. The stumbling block, however, are the words “imposed by a court”. The key passage in the decision deals with this stumbling block:

However, the word “court” in [s. 178\(1\)\(a\)](#) does not capture administrative tribunals or regulatory bodies. The term “court” implies that a dispute will be adjudicated by a judge or judges (Black's Law Dictionary (11th ed. 2019), at p. 444). By comparison, an

⁸⁷ [Poonian v. British Columbia \(Securities Commission\)](#), 2024 SCC 28 (S.C.C.).

⁸⁸ Poonian at para. 4.

“administrative tribunal” is “[a] court like decision making authority that resolves disputes [or] an administrative agency exercising a quasi judicial function” (p. 1814). A “regulatory agency” can be defined as “[a]n official body, esp. within the government, with the authority to implement and administer particular legislation” (pp. 77 78 and 1538). “Court” refers to the judiciary, whereas administrative bodies are hybrid entities “falling between the judiciary and government departments created to perform as separate bodies functions transferred from both” (L. Sossin, *Practice and Procedure Before Administrative Tribunals* (loose leaf), at § 2:1).⁸⁹

The above stumbling block may be used in the next round of constitutional attacks on AMPs. This decision highlights the fact that not only are AMPs decided on a lower standard of proof. AMPs are decided by administrative tribunals with relaxed rules of evidence.⁹⁰

AMPs are decided with lower procedural protections than those in a court, including different standards for receipt of evidence. AMPs vary widely in type, nature, seriousness, and administrative processes.

If regulators want penalties to survive bankruptcy, the better vehicle would be to rely on existing regulatory offences or [Criminal Code](#) offences that would be prosecuted in a Court, where the *actus reus* at least is proven beyond a reasonable doubt. The fines obtained in these forums presently live on in the afterlife of bankruptcy under [section 178 of the BIA](#) as it now exists. The criminal and regulatory route ensures that those who commit fraud cannot simply declare bankruptcy to avoid the consequences of their bad conduct. This approach would be consistent with a restorative justice pyramid.

This leads to a comparative discussion of recent cases in the United States that have ruled that constitutional considerations entitle defendants to adjudication from a court rather than an administrative tribunal in certain types of cases.

On June 27, 2024, the United States Supreme Court released its ruling on what has been a decade-long dispute between the Securities Exchange Commission (SEC) and hedge fund manager, George Jarkesy⁹¹ ultimately curtailing the SEC’s use of its in-house court system. In a 6-3 ruling, the Court upheld the Fifth Circuit’s decision that the SEC’s use of its in-house judicial forum and administrative law judges (ALJs) violates the Seventh Amendment of the U.S. Constitution, particularly when it is used to impose civil penalties on defendants accused of securities fraud. Jarkesy was accused of committing securities fraud, more specifically for deceiving various investors regarding the risks associated with investing in funds overseen by his company, Patriot 28, LLC.

Chief Justice Roberts of the United States Supreme Court wrote:

This case poses a straightforward question: whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud.

⁸⁹ Poonian at para. 46.

⁹⁰ The empowering legislation, properly interpreted, might allow an administrative decision-maker to admit material that courts would ordinarily reject as inadmissible. *Vancouver Airport Authority v. Commissioner of Competition*.

⁹¹ *SEC v. Jarkesy* 603 U.S. (2024)

Our analysis of this question follows the approach set forth in *Granfinanciera and Tull v. United States*, 481 U. S. 412 (1987). The threshold issue is whether this action implicates the Seventh Amendment. It does. The SEC’s antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury.⁹²

Per the majority, a civil sanction that fails to serve a purely remedial purpose but rather, advances either retributive or deterrent objectives, is in fact punishment. As explained by Roberts CJ for the majority, only courts of law can issue monetary penalties to punish culpable individuals, and because the civil penalties in this case were designed to punish and deter rather than compensate, they must be seen, in the majority’s view, as a “type of remedy at common law” enforceable only in courts of law. For greater clarity, the majority held that, because the SEC’s anti-fraud provisions replicate common-law fraud claims, such a civil sanction served a more retributive purpose, obtainable only through a court of law with a jury present.⁹³

As discussed earlier, Canadian courts have resisted the link between deterrence and punishment. In *Guindon* the Supreme Court referred to the deterrent impact of AMPs without linking that to a true penal consequence:

This is not to say that very large penalties cannot be imposed under administrative monetary penalty regimes. Sometimes significant penalties are necessary in order to deter non-compliance with an administrative scheme: See *Rowan v. Ontario Securities Commission*, 2012 ONCA 208, 110 O.R. (3d) 492, at para. 49. The amount of the penalty should reflect the objective of deterring non-compliance with the administrative or regulatory scheme.⁹⁴

With respect, the logic in the above paragraph is somewhat tortured. Deterrence prevents future violations by a form of punishment that is unpleasant. A very large AMP, which has no remedial or compensatory purpose and is imposed for the sole purpose of deterrence, achieves its objective **because it is unpleasant and punitive**. The U.S. Supreme Court recognizes this link in the following passage:

In this case, the remedy is all but dispositive. For respondents’ alleged fraud, the SEC seeks civil penalties, a form of monetary relief. While monetary relief can be legal or equitable, money damages are the prototypical common law remedy. See *Mertens v. Hewitt Associates*, 508 U. S. 248, 255 (1993). What determines whether a monetary remedy is legal is if it is designed to punish or deter the wrongdoer, or, on the other hand, solely to “restore the status quo.” *Tull*, 481 U. S., at 422. As we have previously explained, “a civil sanction that cannot fairly be said solely to serve a remedial purpose, **but rather can only be explained as also serving either retributive or deterrent purposes, is punishment.**” *Austin v. United States*, 509 U. S. 602, 610 (1993) (internal quotation marks omitted). And while courts of equity could order a defendant to return unjustly obtained funds, only courts of law issued monetary penalties to “punish culpable individuals.” *Tull*, 481 U. S., at 422. Applying these principles, we have recognized that “civil penalt[ies are] a type of remedy

⁹² *SEC v. Jarkesy* 603 U.S. (2024) at page 6.

⁹³ <https://www.osler.com/en/insights/blogs/risk/long-awaited-u-s-supreme-court-ruling-curtailed-secs-use-of-administrative-courts/>

⁹⁴ *Guindon* at paragraph 77.

at common law that could only be enforced in courts of law.” *Ibid.* The same is true here.⁹⁵[emphasis added]

The SEC had argued in *Jarkesy* that Congress has the power to create new statutory obligations within an administrative setting. The Supreme Court rejected this argument, ruling that Congress cannot “conjure away the Seventh Amendment” by mandating that traditional legal claims be taken to an administrative tribunal.⁹⁶

Canadian commentators have asked whether the majority’s reasons in *Jarkesy* are relatable in Canada. A tentative conclusion is that the reasoning may keep Canadian Tribunals “in their lane”:

Some of the reasoning underlying *Jarkesy* should resonate with Canadian tribunals to stay in their lane. As pressures mount on tribunals and regulators to demonstrate that they have enforcement ‘teeth’, yielding increasingly ratcheted up sanctions imposed against wrongdoers that may appear penal, (particularly in an environment in which enforcers go to tribunals for enforcement rather than the courts), *Jarkesy* should remind statutory tribunals that their jurisdiction is limited by law and the rights of the parties before them.⁹⁷

We would go farther and suggest that the reasoning in *Jarkesy* may be used in renewed constitutional attacks on AMPs in Canada. The Court’s logic is unimpeachable: “a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment.”⁹⁸ We prefer this logic in comparison to the following paragraph from the *Guindon* decision:

Considering first the purpose of the penalty, s. 163.2 was enacted in 2000 to discourage individuals from making false statements on behalf of others or from counselling others to make false statements: see the Tax Court’s reasons, at paras. 36-37. Thus its purpose is to promote compliance with the scheme. The fact that the penalty is intended to have a deterrent effect does not take it out of the realm of administrative penalties. As Fish J. pointed out in *Martineau*, penalties which are clearly not penal in nature, such as damages imposed in relation to civil liability and penalties imposed in disciplinary proceedings, have deterrent aspects: see para. 38.⁹⁹

In our view, a better approach is to consider the proportionality of AMPs schemes in a pyramid scale, rather than attempting to twist logic. The Supreme Court of Canada in the above passage points out that civil damages are not penal. The United States Supreme Court in *Jarkesy* agrees with that point to the extent that civil damages are remedial. But if civil damages (such as punitive damages) cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, the United States Supreme Court is correct in recognizing that as punishment. With respect, the reference by the Canadian Supreme Court to penalties in disciplinary proceedings are also punishment, as they do not serve a remedial purpose.

⁹⁵ *SEC v. Jarkesy* 603 U.S. (2024) at page 9.

⁹⁶ *SEC v. Jarkesy* 603 U.S. (2024) at page 21.

⁹⁷ <https://www.osler.com/en/insights/blogs/risk/long-awaited-u-s-supreme-court-ruling-curtailed-secs-use-of-administrative-courts/>

⁹⁸ *SEC v. Jarkesy* 603 U.S. (2024) at page 9.

⁹⁹ *Guindon* at paragraph 83.

Let's be clear and apply correct rules of logic. University of Toronto philosophy professor Joseph Heath argues for a reinstatement of rationality in social and political discourse in *Enlightenment 2.0*.¹⁰⁰ This book provides modern examples of statements by politicians that are not based on proper factual or logical foundations. AMPs have no remedial purpose. AMPs do not compensate. AMPs do not rehabilitate. AMPs by definition are punishment.

As will be discussed in Part V, we are not “anti-AMP”. They play an important role in an enforcement pyramid. But we do not think that language and logic should be twisted to justify disproportionate AMPs on the basis that they are said to not be punitive.

PART II: RISKS OF A WRONGFUL CONVICTION OR WRONGFUL FINDING OF LIABILITY

(a) Risks of a wrongful finding of liability

At the beginning of this article, we posed the question: would you make a major financial decision in the digital economy on behalf of yourself or your corporation on the basis of a flip of a coin? If the odds were just slightly changed to 50.1% in your favour, would that change your risk analysis? In linguistic terms, would you make a decision risking millions of dollars on the basis that is “more probable than not”? In legal terms, would you make a decision involving the future of your corporation on a balance of probabilities?¹⁰¹

In this section, we consider the risks that the coin lands on the wrong side and you lose the bet and make a bad financial decision. The chances of this are 49.9%.

In criminal and regulatory law, the courts have never gone so far as to permit the prosecution to only prove the basic contravention (the *actus reus*) on a balance of probabilities. Part of the reason for this is the concern with a wrongful conviction, which is abhorrent to our system of justice.

The criminal law most dreads the conviction of the innocent. This is sometimes referred to as a “false positive” type of error. Criminal law prefers a false negative result reflected in William Blackstone's maxim: “It is better that ten guilty escape than one innocent suffer.”¹⁰²

The danger inherent in a balance of probability standard with respect to the basic act is not a wrongful *conviction*, but rather is a wrongful finding of a *violation*. A balance of probability

¹⁰⁰ Joseph Heath, *Enlightenment 2.0: Restoring Sanity To Our Politics, Our Economy, and Our Lives* (HarperCollins Publishers, 2014). See the review by Benjamin Leszcz in National Post (April 25, 2014), at <http://news.nationalpost.com/arts/books/book-reviews/enlightenment-2-0-by-joseph-heath-review>.

¹⁰¹ What does “proof on a balance of probabilities” mean? The party who has the burden of proof on an issue must convince the finder of fact that what she or he asserts is more probable than not, or to put it another way that the balance is tipped in his or her favour. . If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal it is not. See *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41 at paragraph 49 and *Miller v. Minister of Pension*, [1947] 2 All E.R. 372. at 374 (K.B), cited in *401949 B.C. LTD v. 079858 B.C. LTD.*, 2022 BCPC 205 at paragraphs 54-55.

¹⁰² Sir William Blackstone, *Blackstone's Commentaries on the Laws of England*, Book IV, Ch. 27, p. 352. See also Dayna Scott, “Shifting the Burden of Proof: The Precautionary Principle and Its Potential for the ‘Democratization of Risk’” in Law Commission of Canada, ed., *Law and Risk* (Vancouver: UBC Press, 2005), at 66.

standard only requires that it be more probable than not that the statute was contravened. Lord Denning defined the burden in the following terms:

It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: “we think it more probable than not”, the burden is discharged, but if the probabilities are equal, it is not.¹⁰³

In mathematical terms, on a pure theoretical level, more probable than not is equivalent to a 50.1% chance. There is a 49.9% chance that the statute was not in fact contravened.

Justice Richard Posner has argued that error rates will be linked to the credentials of the trier of fact:

Generally in civil cases, the plaintiff must persuade the factfinder that it is more likely than not that his version of the facts is true. Taken literally, this would mean that an erroneous decision was as likely to be in the plaintiff's favor as in the defendant's, since “more likely than not” implies a percentage barely greater than 50 per cent. It would not follow that half of the judgments in civil cases were erroneous; presumably most are correct. But within the fraction of the erroneous, about as many judgments would be for plaintiffs as for defendants.¹⁰⁴

The idea here is that judges are not simply flipping coins. Judges apply legal methodology that follows precedent and logical analysis to the facts.

But maybe Judges are in fact flipping coins that are already weighted by their own backgrounds and ideologies. Critical legal theory suggests that the legal equivalent of the coin may be influenced by ideology. As Duncan Kennedy has written, “On the one hand, the consensus of American postrealist legal theory is that there are many questions, and the number is a function of legal work, with large ideological stakes, that cannot be resolved without the jurist bringing his personal beliefs into the equation to direct the work.”¹⁰⁵

Although Justice Richard Posner posited that it would not follow that half of the judgments in civil cases were erroneous, he has been less charitable in his comments about administrative tribunals having the power to impose monetary penalties. Posner 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”.¹⁰⁶ Courts, he argues, do not

¹⁰³ [Miller v. Minister of Pensions, \[1947\] 2 All E.R. 372 \(Eng. K.B.\)](#), at p. 374, cited in Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999), at p. 155.

¹⁰⁴ Richard Posner, “An Economic Approach to Legal Procedure and Judicial Administration” (1973), 2 J. Leg. Stud. 399, at p. 408.

¹⁰⁵ <https://duncankennedy.net/wp-content/uploads/2024/01/social-psychological-interpretation.pdf>: Duncan Kennedy, *A Social Psychological Interpretation of the Hermeneutic of Suspicion in Contemporary American Legal Thought*, in Justin Desautels-Stein and Christopher Tomlins eds., *Searching for Contemporary Legal Thought* (Cambridge University Press, 2017)

¹⁰⁶ Richard Posner, *The Economic Analysis of Law*, 6th ed. (New York: Aspen Publishers, 2003), at p. 642

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 inflicted very heavy costs on defendants, the social costs of biased agency adjudication would be much greater than they are.¹⁰⁷

(b) Weaker evidentiary rules will increase the risks of a wrongful finding of liability

The extent to which administrative tribunals will relax evidentiary rules, such as hearsay, varies widely between different levels of Tribunal. For example, in the context of assessing abuse of dominance, the Competition Tribunal has ruled that it will generally follow conventional rules of evidence, and recognized a sliding scale:

As such, absent consent, the Tribunal will be reluctant to depart from the regular and usual rules of evidence when the underlying rationale for the evidentiary rules is procedural fairness, as is the case for the hearsay rule or for the rules governing expert evidence (*Pfizer Canada* at paras. 95-98; *Imperial Brush* at para. 13). In the same vein, the more critical the evidence will be and the more it will go to the core of the issue before the Tribunal, the more closely the Tribunal will adhere to the rules of evidence. When applying other evidentiary rules that are not based on procedural fairness, the Tribunal may be prepared to be more flexible (FCA Privilege Decision at para. 87), considering that regular admissibility rules have been increasingly liberalized by the courts (*Pfizer Canada* at para. 83).¹⁰⁸

At the provincial level, the tribunals are more likely to admit hearsay evidence under more relaxed rules. Under the [Ontario Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s. 15](#), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

- (a) any oral testimony; and
- (b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

[Section 15](#) permits the admission of hearsay evidence but this is subject to the discretion of the tribunal to order cross-examination. For example, in the case of [Stenka v. Garten](#),¹⁰⁹ the court held that efficiency is not to be divorced from the requirement to conduct hearings fairly. In that case,

¹⁰⁷ Richard Posner, *The Economic Analysis of Law*, 6th ed. (New York: Aspen Publishers, 2003), at p. 643.

¹⁰⁸ <https://www.canada.ca/en/competition-bureau/news/2019/11/competition-bureau-will-not-appeal-ruling-in-case-against-vancouver-airport-authority.html>, at para. 144.

¹⁰⁹ [Stenka v. Garten, 2023 ONSC 6120 \(Ont. Div. Ct.\)](#) at paras. 40-43.

the appellant tenant was held to have a right to cross-examine the landlord on the existence and substance of any contracts.

In the case of *Floria v. Toronto Police Service*,¹¹⁰ the court reviewed the jurisprudence on the issue of cross-examination and summarised the principle that where there is “key evidence on which the party in jeopardy had not had an opportunity to cross-examine”, the admission of hearsay evidence may be a denial of natural justice. The discretion of the tribunal then relates to determining whether or not the proposed hearsay evidence constitutes such key evidence.

The British Columbia Court of Appeal has reviewed the law with respect to the relationship between procedural fairness and the right to cross-examine witnesses in the context of an abuse of process motion in the decision in *Morabito v. British Columbia (Securities Commission)*.¹¹¹ The Court held that a denial of cross-examination of the investigator about some of the investigative tactics used and relevant to potential abuse of process was a denial of procedural fairness.¹¹² In the context of an abuse of process allegation, the Court cited the Supreme Court of Canada decision in *R. v. Lyttle* referring to cross-examination as “a faithful friend in the pursuit of justice and an indispensable ally in the search for truth” that should be “jealously protected and broadly construed”¹¹³

In summary, the risks with respect to wrongful findings of liability will vary depending upon the particular evidentiary regime and the sliding scale of procedural fairness.

(c) Defining innocence in wrongful conviction cases and wrongful findings of violations

Scholars have developed a continuum or typology of wrongful convictions:

Based on these definitional disagreements, something of a continuum emerges to define profiles of potentially wrongfully convicted persons: (1) the individual who conclusively did not commit the crime; (2) the individual about whose guilt a reasonable doubt exists, often because of evidence discovered after trial; and (3) the individual whose trial was fundamentally unfair in some way, but about whose guilt there is no specific, fact-based concern other than an implicit assumption about the correlation between unfair process and inaccurate results.¹¹⁴

We can develop the same continuum for AMPs, as follows:

(1) the individual or corporation who conclusively did not commit the violation;

¹¹⁰ *Floria v. Toronto Police Service*, 2021 ONSC 842 (Ont. Div. Ct.)

¹¹¹ *Morabito v. British Columbia (Securities Commission)*, 2024 BCCA 377 (B.C. C.A.)

¹¹² *Morabito* at paragraphs 86-88.

¹¹³ *Morabito v. British Columbia (Securities Commission)*, 2024 BCCA 377 (B.C. C.A.)

at para. 66 citing *R. v. Lyttle*, 2004 SCC 5 (S.C.C.) at paras. 1, 44.

¹¹⁴ Carrie Leonetti, “The Innocence Checklist” 58 *American Criminal Law Review* 97 at 106. Electronic copy available at: <https://ssrn.com/abstract=4036921>

(2) the individual or corporation about whose guilt or liability may be in error based on the burden of proof of 50.1%, often because of evidence discovered after trial; and

(3) the individual or corporation whose hearing was fundamentally unfair in some way, but about whose liability there is no specific, fact-based concern other than an implicit assumption about the correlation between unfair process and inaccurate results.

Factual innocence is the innocence on which innocence projects focus. It is why Barry Scheck (made famous for his role in the O.J. Simpson case) and his colleagues chose to name their landmark book *Actual Innocence*: to distinguish factual from mere technical innocence.

Canadian courts define miscarriages of justice as "virtually any kind of error that renders a trial unfair in a procedural or substantive way".¹¹⁵ The Innocence Project and a few scholars tend to define wrongful convictions more narrowly as having occurred when a convicted individual is conclusively proven to be factually innocent.

Canadian criminal justice reforms were similarly driven by a recognition of the role that postconviction barriers and finality concerns played in wrongful convictions. After DNA testing exonerated Guy Paul Morin of the murder of a nine-year-old girl for which he was convicted in 1995, the Province of Ontario formed a Commission of Inquiry into his wrongful conviction. The Inquiry affirmed many of the common causes of wrongful conviction known to scholars and advocates in other cases and countries, including misleading scientific evidence, the use of jailhouse informants, and prosecutorial discovery failures. The Inquiry also drew attention to a cause of Morin's wrongful conviction not often discussed in the American context: the need for more liberal acceptance of new evidence by appellate courts and for less reluctance to disturb jury verdicts by way of a lower threshold showing required to establish a miscarriage of justice.¹¹⁶

(d) The top ten reasons for wrongful convictions and a parallel to AMPs

A leading scholar in the area of wrongful convictions is Professor Kent Roach.¹¹⁷ Roach argues that the wrongful conviction lens asserts that miscarriages of justice are not the result of idiosyncratic mistakes but of systemic failures and human fallibility. Through decades of study into the causes of wrongful convictions, there emerged a body of knowledge about the causes of, and corresponding steps necessary to prevent, miscarriages of justice in the criminal justice

¹¹⁵ Kent Roach, More Procedure and Concern About Innocence but Less Justice? Remedies for Wrongful Convictions in the United States and Canada, in *WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS* 288 (C. Ronald Huff & Martin Killias, eds., 2013) (quoting *R v. Truscott* (2009) O.A.C. 575, para 110).

¹¹⁶ Carrie Leonetti, "The Innocence Checklist" 58 *American Criminal Law Review* 97 at 106. Electronic copy available at: <https://ssrn.com/abstract=4036921> at page 115.

¹¹⁷ Professor Kent Roach was a co-author with Kenneth Jull and Todd Archibald in a book on Regulatory and Corporate Liability From Due Diligence to Risk Management (Thomson Reuters). See Kent Roach LESSONS FROM THE AMERICAN INNOCENCE PROJECTS 1 Apr 2024 *University of Toronto Law Journal* 74(2):229-242; Wrongful Convictions, Wrongful Prosecutions and Wrongful Detention in India 16 Feb 2024; International and Comparative Law on Compensating Miscarriages of Justice: From Proven Innocence to Wrongful Detention Jan 2024 *Columbia Journal of Transnational Law* 62(3):721-812 and Wrongfully Convicted Guilty Pleas, Imagined Crimes, and What Canada Must Do to Safeguard Justice 18 Apr 2023 400 pages Simon and Schuster

system.¹¹⁸ A review of the “top ten” causes of miscarriages of justice reveals that seven of these causes could apply to some degree to administrative findings of liability as follows:¹¹⁹

- (i) Non-disclosure of evidence
- (ii) Reliance on unreliable evidence including hearsay
- (iii) Officer misconduct
- (iv) Misconduct of those performing a prosecutorial capacity
- (v) Adjudicative failures
- (vi) Flawed expert evidence
- (vii) Tunnel Vision

We will consider each of these in turn.

(i) Non-disclosure of evidence

Non-disclosure of evidence has played a role in most of this country’s notorious wrongful convictions. The inquiry into Donald Marshall Jr.’s wrongful murder conviction concluded that the disclosure of prior inconsistent statements that witnesses made to the police before they lied at trial, that they saw Marshall commit the murder, would have prevented his wrongful conviction. The inquiry recommended in 1989 that the Criminal Code be amended to require mandatory pre-trial disclosure to the accused. When Parliament did not act, the Supreme Court recognized a constitutional right to disclosure in *Stinchcombe* as part of the right to make full answer and defence under section 7 of the Charter.

The Royal Commission concluded the Marshall's wrongful conviction resulted as well from the failure of others - including both the Crown prosecutor and Marshall's own defence counsel - to discharge their professional obligations. The Crown prosecutor should have interviewed the witnesses who had given contradictory statements. He did not. He should also have disclosed the contents of those earlier inconsistent statements to the defence. He did not.¹²⁰

In the context of administrative monetary penalties, the rules of disclosure as set out in the *Stinchcombe* case do not apply. There is, however, a duty of procedural fairness. Justice Stratas of the Federal Court of Appeal has 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.*,¹²¹ Justice Stratas found that the regulator in the Financial Transactions area did not sufficiently explain the reasoning for assessing monetary penalties in relation to the 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 agents.

¹¹⁸ Century, Louis and Roach, Kent (2024) "Miscarriages of Justice in Immigration Detention," UBC Law Review: Vol. 57: Iss. 3, Article 2. Available at: <https://commons.allard.ubc.ca/ubclawreview/vol57/iss3/2>

¹¹⁹ “Miscarriages of Justice in Immigration Detention, Ibid.

¹²⁰ Royal Commission on the Donald Marshall, Jr., Prosecution Digest of Findings and Recommendations December; 1989: https://www.novascotia.ca/just/marshall_inquiry/_docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution_findings.pdf at page 4.

¹²¹ [Kabul Farms Inc. v. R., 2016 CAF 143, 2016 FCA 143 \(F.C.A.\)](#)

Fairness, as defined by the sliding scale in *Baker*, is informed by Charter values.¹²²

The decision of the Federal Court of Appeal in the case of *Montecristo Jewellers Inc. v. Canada (Attorney General)*¹²³ involved the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). In this case, FINTRAC did not disclose the summary of the employee interviews to Montecristo Jewellers Inc. (MJJ). The Court commented that “it would have been a better practice for FINTRAC to have provided MJJ with the summary of the employee interviews before the Director made her decision. No reason has been offered for why FINTRAC withheld the employee interview notes.”¹²⁴

Given the fact that the disclosure obligations in the context of AMPs do not rise to constitutional status and fall below the criminal law requirements of *Stinchcombe*, the above cases give some comfort but leave open the possibility that non-disclosure may lead to a wrongful finding of a violation.

(ii) Reliance on unreliable evidence including hearsay

The Supreme Court has recognized the role of evidentiary rules such as the rule against hearsay in preventing wrongful convictions: “It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception.”¹²⁵

As noted above, the extent to which administrative tribunals will relax evidentiary rules, such as hearsay, varies widely between different levels of Tribunal. The risks of wrongful findings of violations will also vary with the level of hearsay that is permitted and or the restriction on the right of cross-examination in administrative proceedings.

(iii) Officer misconduct

The Supreme Court acknowledged in *Hill* that “negligent policing has now been recognized as a significant contributing factor to wrongful convictions in Canada” and “the record shows that wrongful convictions traceable to faulty police investigations occur.”¹²⁶ Citing findings from numerous commissions of inquiry the Supreme Court stressed: “Police misconduct that is not malicious, not deliberate, but merely fails to comply with standards of reasonableness can be a significant cause of wrongful convictions.”¹²⁷ The decision in *Hill* to recognize a civil cause of action for negligent police investigations was viewed by the Court as a means to address wrongful convictions.

¹²²See Lorne Sossin and Mark Friedman, “[Charter](#) Values and Administrative Justice” (2014), Osgoode Legal Studies Paper Series, Paper No. 62 at 20: <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1061&context=olsrps>.

¹²³ *Montecristo Jewellers Inc. v. Canada (Attorney General)*, 2024 FC 309 (F.C.)
¹²⁴ *Montecristo Jewellers Inc. v. Canada (Attorney General)*, 2024 FC 309 (F.C.) at para. 203.

¹²⁵*R. v. Khelawon*, 2006 SCC 57 at para 47, citing *R. v. Starr*, 2000 SCC 40 at para 200

¹²⁶Century, Louis and Roach, Kent (2024) "Miscarriages of Justice in Immigration Detention," UBC Law Review: Vol. 57: Iss. 3, Article 2.at 687-688 Available at: <https://commons.allard.ubc.ca/ubclawreview/vol57/iss3/2>

¹²⁷ *Ibid.*

We are unaware of any cases in Canada where an official has been disciplined or sanctioned for misconduct in the context of investigating AMPs. We are unaware of any cases in Canada where an official has been successfully sued for negligent investigation in the context of investigating AMPs. These are potentially large gaps in the system.

(iv) **Misconduct of those Performing in a Prosecutorial Capacity**

Roach and Century observe that prosecutors, as well as the police, contribute to wrongful convictions. Prosecutors are often responsible for lack of disclosure or the use of unreliable evidence including statements made by jailhouse informants and other incentivized and unreliable witnesses. At the same time, Canadian prosecutors have taken an interest in preventing miscarriages of justice, as well as correcting them in individual cases.¹²⁸

The Supreme Court of Canada has said, “The role of the prosecutor excludes any notion of winning or losing.”¹²⁹ More recently, the Court found that prosecutorial independence grounds a section 7 principle that prosecutors not act for improper purposes and this principle “safeguards the rights of the individual and the integrity of the justice system.”¹³⁰

Therein lies the problem with AMPs. Until and unless a constitutional challenge is successful, an individual or corporation facing an AMP does not have constitutional rights in relation to the offence provisions. (Note that rights in other contexts such as unreasonable search and seizure will continue, and to that extent AMPs are not completely a Charter free zone).

The platitude that the role of the prosecutor excludes any notion of winning or losing ignores human nature to some extent. Lawyers, like most people, hate to lose. While trial lawyers can be overtly or quietly aggressive in court, their common character trait is competitiveness. There is an exception to hating to lose for those trial lawyers who are prosecutors. Their role is not to win but to present the facts and law to the judge. Yet prosecutors must be competitive to fulfill that role.¹³¹

There is not a lot of empirical study of prosecutors and their personality types. Most lawyers have only anecdotal evidence about the attitudes of prosecutors. One of the authors of this paper is a trial lawyer who both prosecutes and defends regulatory offences in various areas ranging from the environment to occupational health and safety, as well as defending corporations in AMP proceedings. From an anecdotal perspective, the following trends have been observed:

- The COVID-19 pandemic has created social distance between defence and prosecutors. This distance has not disappeared post pandemic;

¹²⁸ Century, Louis and Roach, Kent (2024) "Miscarriages of Justice in Immigration Detention," UBC Law Review: Vol. 57: Iss. 3, at p. 690. Article 2. Available at: <https://commons.allard.ubc.ca/ubclawreview/vol57/iss3/2>

¹²⁹ *Boucher v. The Queen*, [1955] SCR 16 at 24.

¹³⁰ *R. v. Cawthorne* 2016 SCC 32 at para 26.

¹³¹ <https://mysteriesandmore.blogspot.com/2017/09/lawyers-hate-to-lose.html>

- Of interest during the COVID-19 pandemic, studies have shown that dishonesty increases with social distance.¹³² It is easier to lie over the internet than it is to lie to a person's face. Prosecutors will not lie, but the level of omission of details may have increased post pandemic;
- The old system where prosecutors and defence counsel socialized before and after trials has been eroded

The world of AMPs is one step removed from the role of prosecutors. Lawyers who represent regulators seeking AMPs are civil servants, but they are not prosecutors and are not formally subject to the doctrine that the role of the prosecutor excludes any notion of winning or losing.

We would hope that civil servants seeking AMPs would exercise balanced discretion. We have some concerns however. There is no equivalent of a cause of action for malicious prosecution. There are fewer mechanisms to enforce accountability of government lawyers in their role as enforcing AMPs.

Anecdotal experience suggests that institutional culture makes a difference. We would encourage interchange agreements between regulators and industry to build relationships that transcend conflict and encourage principles and academic discussion. The Community of Federal Regulators (CFR) Working Group on AMPs is an example of a forward looking group that enhances transparency and integrity in the application of AMP regimes.¹³³

(v) **Adjudicative failures**

Roach and Century stress that the importance of an independent judiciary in preventing wrongful convictions cannot be overstated. Judges are entrusted with the formidable task of scrutinizing the evidence and guarding against errors by all the other actors in the prosecution process, including police officers, crown attorneys, expert witnesses, defence counsel, and juries.¹³⁴

¹³² Daniel Hermann and Andreas Ostermaier, "Be Close to Me and I will be Honest: How Social Distance Influences Honesty", Center for European, Governance and Economic Development Research, Discussion Papers Number 340 (February 2018), online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3131732. The authors observe: "The influence of social distance on honesty is interesting because it relates to most interactions that involve honesty. For example, public authorities usually appear as a distant and impersonal interaction partner to people, and honesty is indeed a major concern in tax collection. In this and other areas, people often interact through intermediaries, who increase social distance between the interaction partners. More generally speaking, the wide use of the internet has profoundly simplified but also depersonalized communication" (at p. 4). Participants were less willing to lie at the expense of fellow students than at the expense of the experimenter (at p. 14).

¹³³ The Community of Federal Regulators (CFR) is a Government of Canada interdepartmental community working together to strengthen the capacity of federal regulatory professionals, thereby supporting the building of a regulatory community Canadians trust to maintain and strengthen regulations affecting health, safety, security and prosperity in a sustainable society. The CFR Administrative Monetary Penalties Community of Practice was established to provide a forum for members to share best practices, discuss and identify solutions to common challenges, and work, where possible, towards a consistent approach to AMPs across government. See https://wiki.gccollab.ca/CFR_collaboration. Kenneth Jull has presented to this group on numerous occasions, both while working with the Competition Bureau Legal Services Branch on **interchange** and subsequently.

¹³⁴ Century, Louis and Roach, Kent (2024) "Miscarriages of Justice in Immigration Detention," UBC Law Review: Vol. 57: Iss. 3, Article 2.at 695. Available at: <https://commons.allard.ubc.ca/ubclawreview/vol57/iss3/2>

By contrast, administrative tribunals adjudicating about AMPs do not have the same level of impartiality.¹³⁵ The Supreme Court of Canada has permitted overlapping jurisdictions in the context of enforcement of administrative schemes. In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*¹³⁶ 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.¹³⁷

Cory J. observed in the *Newfoundland Telephone* case that there is a spectrum of administrative boards ranging from those that are primarily adjudicative to those based more in policy. Procedural standards will vary along this spectrum. The following passage describes a public utility commission:

Janisch published a very apt and useful *Case Comment on Nfld. Light & Power Co. v. P.U.C. (Bd.)* (1987), 25 Admin. L.R. 196. He observed that Public Utilities Commissioners, unlike judges, do not have to apply abstract legal principles to resolve disputes. As a result, no useful purpose would be served by holding them to a standard of judicial neutrality. In fact, to do so might undermine the legislature's goal of regulating utilities since it would encourage the appointment of those who had never been actively involved in the field. This would, Janisch wrote at p. 198, result in the appointment of "the main line party faithful and bland civil servants". Certainly there appears to be great merit in appointing to boards representatives of interested sectors of society including those who are dedicated to forwarding the interest of consumers.¹³⁸

Despite this characterization, the Board in issue had wide powers, similar to the present day CRTC, to inquire into violations of the law and to enforce the Act. The monopolistic nature of

¹³⁵ See **Profiting from Risk Management and Compliance § 6:41** by Todd L. Archibald, Kenneth E. Jull Chapter 6. The Growth and Validity of Administrative Monetary Penalties IV. Administrative Law Principles

§ 6:41. Introduction

¹³⁶ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)* (2001), 204 D.L.R. (4th) 33, [2001] 2 S.C.R. 781 (S.C.C.) remitted (2002), 213 D.L.R. (4th) 273, 40 Admin. L.R. (3d) 103 (B.C. C.A.).

¹³⁷ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)* (2001), 204 D.L.R. (4th) 33, [2001] 2 S.C.R. 781 (S.C.C.) remitted (2002), 213 D.L.R. (4th) 273, 40 Admin. L.R. (3d) 103 (B.C. C.A.), at paras. 41-42. The decision in *Ocean Port* was followed in *Restaurant Innovation Inc. v. Ontario (Alcohol & Gaming Commission)* (2012), 213 A.C.W.S. (3d) 255, 2012 ONSC 543 (Ont. Div. Ct.).

¹³⁸ *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* (1992), 89 D.L.R. (4th) 289, [1992] 1 S.C.R. 623 (S.C.C.), at p. 639

the enterprise in issue may have assisted in the characterization, as demonstrated in the following passage:

It can be seen that the Board has been given the general supervision of provincial public utilities. In that role it must supervise the operation of Newfoundland Telephone which has a monopoly on the provision of telephone services in the Province of Newfoundland. The Board, when it believes any charges or expenses of a utility are unreasonable, may of its own volition summarily investigate the charges or expenses. As a result of the investigation it may order a public hearing regarding the expenses. In turn, at the hearing the utility must be accorded the fundamental rights of procedural fairness. That is to say, the utility must be given notice of the complaint, the right to enforce the attendance of witnesses and to make submissions in support of its position.

When determining whether any rate or charge is “unreasonable” or “unjustly discriminatory” the Board will assess the charges and rates in economic terms. In those circumstances the Board will not be dealing with legal questions but rather policy issues. The decision-making process of this Board will come closer to the legislative end of the spectrum of administrative boards than to the adjudicative end.¹³⁹

In the last 15 years, the [*Ocean Port*](#) case has been broadly followed to uphold the powers of various tribunals and the penalties they impose, ranging from serious licence suspensions to compensation re: expropriation. The [*Ocean Port*](#) decision has also had a significant impact on the way our courts interpret the specific rules and requirements of administrative tribunals.

In [*Ocean Port*](#), the imposed penalty was a mere two-day liquor licence suspension, but its reasoning has been used to uphold more serious penalties and decisions enforced by administrative tribunals, such as serious licence suspensions and cancellations,¹⁴⁰ spousal support variations,¹⁴¹ compensation for expropriation of land,¹⁴² and labour dispute grievances.¹⁴³ From the severe consequences imposed in these cases, it likely follows that [*Ocean Port*](#) will be followed in the context of administrative tribunals with the power to impose monetary penalties, even though no court has explicitly ruled on this point.

A fascinating article in the *Cambridge Law Journal* by Nuno Garoupa, Anthony Ogus and Andrew Sanders tackles the investigation and prosecution of regulatory offences and asks whether there is an economic case for integration. 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.¹⁴⁴

¹³⁹ [Newfoundland Telephone Co. v. Newfoundland \(Board of Commissioners of Public Utilities\) \(1992\), 89 D.L.R. \(4th\) 289, \[1992\] 1 S.C.R. 623 \(S.C.C.\), at pp. 641-42.](#)

¹⁴⁰ Hon. C.A. Osborne, D.J. Mullin and B. Finlay, “Report of the Fairness Committee to the Ontario Securities Commission” (March 5, 2004).

¹⁴¹ [Waterman v. Waterman, 2014 NSCA 110, 2014 CarswellNS 930 \(N.S. C.A.\)](#)

¹⁴² [Eckervogt v. British Columbia \(Minister of Employment & Investment\), 2004 BCCA 398 \(B.C. C.A.\)](#)

¹⁴³ [Vaughan v. R., 2005 SCC 11, 2005 CarswellNat 676 \(S.C.C.\)](#)

¹⁴⁴ Nuno Garoupa, Anthony Ogus and Andrew Sanders, “The Investigation and Prosecution of Regulatory Offences: Is There an Economic Case for Integration?” (2011), 70:1 Cambridge L.J. 229.

The article also identifies the disadvantages of integration as including the costs of errors. In other words, two separated 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 behavioural considerations related to lack of transparency.

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.

When the economic stakes are higher in the context of more punitive remedies, a separation of the regulatory and adjudicated functions ensures fairness, albeit at some cost in efficiency. Tribunals such as the CRTC, who can levy \$10 million AMPs against corporations, should take note. We would recommend that Regulators create a bifurcated two-track process, in accordance with the approach of scholars such as Garoupa, Ogus and Sanders. For *more minor matters*, an integrated model that reduces transaction costs and fast tracks *ex ante* intervention is more appropriate. This is further developed in Part V of this Paper.

In the world of AMPs, tribunals such as the Competition Tribunal hold hearings either in person or virtually, using the Zoom platform.¹⁴⁵ A leading administrative law scholar, Paul Daly, has written about “Virtual Hearings at Administrative Tribunals”. Daly summarizes the present law in this regard:

Courts and tribunals have regularly taken the view that there is nothing “inherently unfair” about virtual hearings: *Miller v. FSD Pharma, Inc.*, 2020 ONSC 3291, at para. 10; see also *Natco Pharma (Canada) Inc. v. Canada (Health)*, 2020 FC 618, at paras. 31-36; *Law Society of Ontario v. Regan*, 2020 ONLST 15, at para. 7. Courts and tribunals have held virtual hearings even when findings of credibility have had to be made, a point on which in-person proceedings have long been favoured: *Law Society of Ontario v. Roper*, 2019 ONLSTH 152, at para. 13; *McHayle v. Ontario* (CEO of FSRA), 2020 ONFST 10, at paras. 25-28; *Hart (Re)*, 2020 LSBC 39, at para. 13; *Law Society of Ontario v. Marusic*, 2020 ONLSTH 18, at para. 104; *Ontario College of Teachers v Mammarella*, 2022 ONOCT 87, at para. 93.¹⁴⁶

Daly comments that more complex matters may justify an in-person hearing but there does not seem to be any hard-and-fast rule in this regard. Other administrative tribunals use virtual means either exclusively or by default.¹⁴⁷ Daly concludes that “In summary, virtual hearings can enhance access to justice, efficiency and transparency. To the extent that there are obstacles to achieving enhanced access to justice, efficiency and transparency, courts have explained how these can be surmounted.”

¹⁴⁵ <https://www.ct-tc.gc.ca/en/cases/upcoming-hearings.html>

¹⁴⁶ <https://www.administrativelawmatters.com/blog/2024/07/23/virtual-hearings-at-administrative-tribunals/>

¹⁴⁷ *Chisholm v. Ontario* (CEO of FSRA), 2021 ONFST 11, at para. 20)

Our concern in this paper is the risk of wrongful findings of liability. This is an area that could benefit from some empirical measurement or mock trial studies to determine whether the risk of a wrongful finding of liability increases when virtual platforms are used.

(vi) Flawed expert evidence

Misleading forensic evidence is the largest single contributing cause to wrongful convictions in Canada, playing a role in 31 of 89 cases listed in the Canadian Registry of Wrongful Convictions.¹⁴⁸ The Supreme Court of Canada has subsequently required trial judges to balance the prejudice versus the probative value of even properly qualified experts.¹⁴⁹

Crown Attorneys may wish to call expert evidence, depending on a matrix of factors. If the case involves technical issues beyond the experience of the trier of fact, this may be appropriate.¹⁵⁰

For example, a Crown Attorney should call expert evidence where there is an issue with respect to engineering practices for hoisting and rigging in the occupational health and safety sector.¹⁵¹

An example is found in the case of *Ontario (Ministry of Labour, Immigration, Training and Skills Development) v. Limen Group Const. (2019) Ltd.*¹⁵² The Court followed the “Mohan factors” in the following analysis:

(1) Logical Relevance

The principles of structural engineering and engineering practices for hoisting and rigging are logically relevant to the issue before the court of what a suitable attachment point is for hoisting loads of waste concrete.

(2) Necessity

What constitutes a suitable attachment point and why are technical questions that are outside of my experience and knowledge. They are questions that can be answered by an engineer.

(3) Absence of an Exclusionary Rule

There is no exclusionary rule in play here.

¹⁴⁸ The Canadian Registry on Wrongful Convictions, launched in 2023, is a growing repository of data on remedied wrongful convictions in Canada, publicly accessible at: <https://www.wrongfulconvictions.ca/>.

¹⁴⁹ *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. For an application of this case to restrain expert evidence about the cause of death see *R. v. France* 2017 ONSC 2040. See **Profiting from Risk Management and Compliance** by Todd L. Archibald, Kenneth E. Jull Chapter 8. The Actus Reus: A Risk-Based System

VI. The Role of Expert Evidence in the Proof of the Actus Reus § 8:29. Evidence law with respect to expert evidence

¹⁵⁰ See *Yukon (Director of Occupational Health and Safety) v. Venture Elevator Inc.*, 2022 YKTC 50 (Yukon Terr. Ct.).

¹⁵¹ *Ontario (Ministry of Labour, Immigration, Training and Skills Development) v. Limen Group Const. (2019) Ltd.*, 2023 ONCJ 535 (Ont. C.J.), upheld on appeal 2025 ONSC 3297.

¹⁵² *Ontario (Ministry of Labour, Immigration, Training and Skills Development) v. Limen Group Const. (2019) Ltd.*, 2023 ONCJ 533 (Ont. C.J.).

(4) Properly Qualified Expert

An expert witness must have acquired special or peculiar knowledge through study or experience.

Mr. Khorsand is the Acting Provincial Engineer for the Ministry of Labour. He has been employed as an engineer with the Ministry since 2008 and has a master's degree in civil engineering from Ryerson University. Prior to his employment with the Ministry, he held various positions at private corporations as a structural engineer.¹⁵³

Stage Two — Discretionary Gatekeeping

The question to be addressed at this stage is, do the benefits in admitting this evidence outweigh any potential harm to the trial process. The only potential prejudicial effect in the admission of this evidence, in the circumstances of this judge alone case, is the undue consumption of time.

The voir dire alone consumed the better part of two days of court time. Much of that was taken up with the cross-examination of Mr. Khorsand. Additionally, the defence called Mr. Jeffries. While this was, in my view, an undue consumption of court time, there was no reason to expect Mr. Khorsand's evidence at trial to be unduly complex or time consuming.

There is benefit to the admission of this evidence and little to no harm.¹⁵⁴

The jurisprudence provides authority for the admissibility of outside consulting engineers who attend on site to evaluate complex industrial machinery.¹⁵⁵

With respect to the objectivity of an expert, it is important that an expert consider both sides of an issue. In context of an occupational health and safety case, the Court gave little weight to a defence expert who had only interviewed management side workers and had not interviewed the workers.¹⁵⁶

The importance of expert testimony is underscored by the decision in *Ontario (Ministry of Labour) v. Samuel, Son & Co. Limited*.¹⁵⁷ In this case, the defence called a forensic engineer as an expert witness. The trial Justice was initially reluctant to qualify the witness as an expert forensic engineer in the investigation of workplace accidents. However, after a recess, he reversed his ruling and heard the expert's evidence. However, he made no reference to it in his judgment and did not seem to have considered it. The appellate court characterized this as important evidence because the expert testified that in his opinion, “the design and layout of the staging area and the established work procedures for preparing the coils for the slitter were both adequate and sufficient

¹⁵³ *Ontario (Ministry of Labour, Immigration, Training and Skills Development) v. Limen Group Const. (2019) Ltd.*, 2023 ONCJ 533 (Ont. C.J.), at para. 20-24.

¹⁵⁴ *Ontario (Ministry of Labour, Immigration, Training and Skills Development) v. Limen Group Const. (2019) Ltd.*, 2023 ONCJ 533 (Ont. C.J.), at paras. 36-38.

¹⁵⁵ *Ontario (Ministry of Labour) v. Alpa Lumber Mills Inc.*, 2019 ONCJ 223 (Ont. C.J.).

¹⁵⁶ *Ontario (Ministry of Labour) v. Magna Seating Inc.*, 2015 ONCJ 7 (Ont. C.J.), at para. 93.

¹⁵⁷ *Ontario (Ministry of Labour) v. Samuel, Son & Co. Limited*, 2017 ONCJ 611 (Ont. C.J.).

to ensure the stability of the coils and prevent the coils from tipping.” On appeal, the Court held that the failure of the trial Justice to consider this expert evidence was a palpable and overriding error.¹⁵⁸

The above law provides examples from regulatory prosecutions in the area of occupational health and safety. Expert evidence may play a prominent role in AMPs proceedings. The law of expert evidence in administrative tribunals is comprehensively reviewed in the *Cineplex* case.¹⁵⁹ Cineplex challenged the admissibility of the evidence provided by the Commissioner’s experts as being neither relevant nor necessary. In addition, according to Cineplex, Dr. Morwitz who was called as a government witness did not provide independent and objective evidence to the Tribunal and therefore should not be qualified to give opinion evidence to the Tribunal as an expert.

Justice Little concluded that the Commission’s expert evidence was relevant to the general impression which the Tribunal is required to take into account under section 74.01. Dr. Morwitz’s report described concepts such as drip pricing, partitioned pricing and shrouded attributes in the academic literature, and provided Dr Morwitz’s observations and conclusions about the likely impact of how Cineplex presents price information. Justice Little concluded that Dr Morwitz’s evidence was relevant to the behaviour of consumers and necessary as it is outside the Tribunal’s scope of knowledge of consumer behaviour. Moreover, he dismissed the argument by Cineplex that Dr Morwitz’s “advocacy” for stronger laws on drip pricing or partitioned pricing implies that she unfairly favours one party’s position over another. A quote from the decision summarizing some of the evidence of Dr. Morwitz’s evidence was set out earlier in this paper.

The decision of Justice Little in the *Cineplex* case provides some comfort with respect to risks of a wrongful finding of liability based on flawed evidence. In the *Cineplex* case the rigorous methodology applied by Justice Little ensured that the expert evidence was not flawed or biased and was accorded appropriate weight. If administrative tribunals apply the rigorous analysis that Justice Little followed, this significantly reduces risks of wrongful findings. Only time will tell.

(vii) Tunnel Vision

Tunnel vision was defined by Justice Fred Kaufman in the *Morin Inquiry* as “the single minded and overly narrow focus on an investigation or prosecutorial theory so as to unreasonably colour the evaluation of information received and one’s conduct in response to the information.” Also referred to as confirmation bias, tunnel vision “[occurs] naturally in our everyday living when we seek to affirm what we already thought was the case.” Tunnel vision “is the antithesis of an open mind. It causes prosecutors to overreach to save a weak case.”¹⁶⁰

Recent empirical research confirms the potential for tunnel vision where norms (such as criminal or regulatory conduct) are introduced into the equation.¹⁶¹ Levin Güver and Markus Kneer apply

¹⁵⁸ [Ontario \(Ministry of Labour\) v. Samuel, Son & Co. Limited, 2017 ONCJ 611](#) (Ont. C.J.), at para. 35

¹⁵⁹ [Canada \(Commissioner of Competition\) v. Cineplex Inc., 2024 Comp. Trib. 5 \(Competition Trib.\)](#).

¹⁶⁰ Century, Louis and Roach, Kent (2024) "Miscarriages of Justice in Immigration Detention," UBC Law Review: Vol. 57: Iss. 3, Article 2.at 701

¹⁶¹ Profiting from Risk Management and Compliance by Todd L. Archibald, Kenneth E. Jull
Chapter 8. The Actus Reus: A Risk-Based System
VII. Behavioral Research and Proof of the Actus Reus

behavioural research to the concept of foreseeability in their article entitled “Causation, Foreseeability, and Norms”.¹⁶² A growing body of psychological literature has revealed that ordinary causal judgement is susceptible to the violation of norms: when two agents perform the same action (yet one does so in violation of a norm), the norm-violating agent is taken to be the cause of the harmful outcome.

Güver and Kneer pose the following Rollerblading hypothetical to illustrate the concept:

Imagine the following scenario (Rollerblading): Mark is rollerblading on a path while Lauren is walking ahead of him. Suddenly, a cat jumps in front of Lauren, startling her. Lauren sidesteps to the left, directly into the lane of Mark, who is unable to break[sic] in time. The two collide. Who caused the accident?

Participants overwhelmingly point to the cat (Güver & Kneer, 2023).

Güver and Kneer then inject a norm into the hypothetical:

Now imagine a slight change to the vignette – the addition of a norm prohibiting Mark from rollerblading on the path – and ask again: who caused the accident? This slight change leads to a drastic shift in participants' judgements, the majority now considering Mark the cause (Güver & Kneer, 2023). This is an example of the Norm Effect, and several accounts compete to explain the underlying causal mechanisms.

In this example, the norm shifts blame onto Mark. The cat is now forgotten. The norm introduces an emotive judgment element. Participants may assume that Mark is a bad person because he is engaging in a prohibited activity. People in this scenario may want to blame someone for the collision. The prohibition allows them to blame someone and forget about other variables such as the cat. But, what if Mark had missed seeing the sign prohibiting rollerblading and he was unaware that his activity was prohibited? Mark will still be blamed for the collision unless the new variable about his lack of knowledge is introduced.

The introduction of the norm in the Rollerblading example illustrates a type of tunnel vision. The norm with respect to the prohibition against rollerblading leads down a tunnel to the conclusion that Mark was at fault, without consideration of other variables such as the cat and Lauren's reaction to cats.

Güver and Kneer cite the “Responsibility View” whereby causal judgements are intimately connected with responsibility judgements. When ordinary people use locutions such as “Mark caused the accident”, they take themselves to be saying something akin to “Mark is responsible for the accident”. Thus, when people use the expression “cause”, they are referring to a normative

§ 8:31. Behavioral Research and Foreseeability

¹⁶² Levin Güver and Markus Kneer, “Causation, Foreseeability, and Norms” in M. Goldwater, F. K. Anggoro, B. K. Hayes, & D. C. Ong (Eds.), *Proceedings of the 45th Annual Conference of the Cognitive Science Society*. © 2023 <https://philarchive.org/archive/GVECFA>. See also “Causation, Norms and Cognitive Bias” Electronic copy available at: <https://ssrn.com/abstract=4685693>.

concept. The Norm Effect, then, is simply the upshot of people correctly applying this normative concept of causation.

Güver and Kneer canvass an alternate explanation known as the “Bias View”. According to the Bias View the concept of causation is, in fact, descriptive, and the Norm Effect constitutes a bias. Our “desire to praise or denigrate those whose actions we applaud or deride” leads to a performance error, *i.e.*, a norm-sensitive attribution of causal contribution to the agent.

A more sophisticated version of the Responsibility View, accounts for the potential mediating role of several potentially inferred factors. Returning to our opening example, Rollerblading, participants may infer that Mark (i) wanted to crash into Lauren (desire), (ii) knew he'd crash into Lauren (foresight), or (iii) should have foreseen a crash (foreseeability).

This research has potentially profound implications for the analysis of foreseeability within the context of regulatory offences and AMPs. There is a risk of tunnel vision if inspectors assume that a norm has been violated and as such this may lead to a premature conclusion of causality or foreseeability. In the Rollerblading example, imagine the inspector arriving at the path and being advised that Mark was rollerblading on the path despite the prohibition from doing so. The research suggests that the inspector will jump to the conclusion that Mark caused the accident, without taking the time to analyze that perhaps the cat caused the accident.

In the context of regulations and AMPs, there are many different levels of rules that create norms. This creates the potential that larger conclusions with respect to liability may be arrived at through a process of tunnel vision that is divorced from a logical analysis of the true facts.

Güver and Kneer test the norm effect by experiments that introduced nonpertinent or silly norm violations. These are norms that are either irrelevant to the outcome at hand, or patently silly. Güver and Kneer show that nonpertinent and silly norm violations do provoke the Norm Effect and that this effect cannot be exhaustively explained by recourse to potential intermediary factors such as desire, foresight, or foreseeability. In one experiment, where all “Mark” did was violate the dress policy — participants rated him more causal, blameworthy, and responsible towards the accident, as well as more deserving of punishment.

Güver and Kneer designed one specific experiment to test foreseeability. This experiment set out to explore whether the findings of the previous experiments could be explained by recourse to the reasonable foreseeability of an accident, *i.e.*, the agent's negligence. In order to account for the hindsight bias which frequently besets foreseeability judgements, they presented participants with both *ex ante* (outcome information not yet available) and *ex post* (outcome information available) conditions of another scenario, the Shooting Range vignette.

The story has Mark shooting at an outdoor shooting range while Lauren is hiking in the nearby forest. The sudden appearance of a wild boar frightens Lauren, who tumbles down a hill and comes to halt right in front of the bullet Mark shot moments earlier. The bullet lodges itself in her leg and Lauren has to be taken to the hospital.

The “no norm” condition mentions a shooting range in regular operation. In the pertinent norm condition, Mark was at the shooting range despite it being closed. In the nonpertinent norm

condition, it was prohibited to use the shooting range unless one wore protective gear such as gloves and glasses, and Mark did not wear any. In the silly norm condition, it was forbidden to bring any type of food or drinks to the shooting range, and Mark snuck in a bag of potato chips and a soft drink.

Participants in the *ex post* conditions were given the vignette in full (*i.e.*, including the injury of Lauren). Participants in the *ex ante* conditions were given the vignette only up to the mention of Lauren hiking and were asked to make an initial evaluation as to the foreseeability of an accident. Afterwards, participants were told about the accident and asked to rate the causal contributions of Mark and the boar and assess the moral variables.

In the *ex post* conditions, participants — having read the full vignette — were asked to rate the causal contributions of Mark and the boar, before turning to an *ex post* assessment of the foreseeability of the accident, followed by the three moral variables.

The results of the experiment revealed that the main effect of norm type on Mark's perceived causal contribution was significant and large. Participants in the *ex ante* presentation order assessed Mark's causal contribution, his blameworthiness, responsibility, and deserved punishment differently between the no norm and non-pertinent norm conditions. There was, however, no difference in their assessment as to how foreseeable the accident was. This changed in the *ex post* presentation order: participants now judged all dependent variables — including foreseeability — differently between the no norm and nonpertinent norm conditions with moderate to large effect sizes throughout.

Güver and Kneer conclude that factors peripheral to moral responsibility will influence causality judgments:

The Responsibility View and the Bias View come apart in their treatment of factors peripheral to moral responsibility: the former, unlike the latter, holds that such factors will not influence causality judgments. In three experiments, we have shown that they do, and that this influence cannot be explained by recourse to legitimate responsibility-enhancing factors such as desire, foreknowledge, or foreseeability.¹⁶³

Let us return to the implications for the analysis of foreseeability within the context of regulatory offences and AMPs. There is a risk of tunnel vision if inspectors assume that a norm or rule has been violated and as such this may lead to a conclusion of causality or foreseeability. The doctrine of foreseeability does not correct the bias.

Regulators must educate inspectors and staff to the potential for the norm effect and resulting tunnel vision that presumes guilt based on the perceived violation of a norm, rather than looking at actual causation. The remedy is to focus on a logical and empirical analysis of the various potential causes of an adverse event without jumping to conclusions.

¹⁶³ Levin Güver and Markus Kneer, “Causation, Foreseeability, and Norms” in M. Goldwater, F. K. Anggoro, B. K. Hayes, & D. C. Ong (Eds.), *Proceedings of the 45th Annual Conference of the Cognitive Science Society*. ©2023 at p. 893.

CONCLUSION WITH RESPECT TO RISKS OF A WRONGFUL CONVICTION OR WRONGFUL FINDING OF LIABILITY

In this Part II, we have outlined the risks of a wrongful finding of liability associated with a lower standard of proof on a balance of probabilities and weaker evidentiary protections. These lower protections create risk that an individual or corporation who conclusively did not commit the violation may nevertheless be found liable for that violation.

A review of the “top ten” causes of miscarriages of justice in the criminal and regulatory world reveals that seven of these causes could apply to some degree to administrative findings of liability as follows:¹⁶⁴

- (i) Non-disclosure of evidence
- (ii) Reliance on unreliable evidence including hearsay
- (iii) Officer misconduct
- (iv) Misconduct of those performing a prosecutorial capacity
- (v) Adjudicative failures
- (vi) Flawed expert evidence
- (vii) Tunnel Vision

In some cases, the risks of these potential causes of miscarriages of justice are *higher* than the risks in the criminal world which has constitutional protections that do not apply in the administrative world.

Despite these heightened risks, there does not appear to be much discussion or concern in the literature about the risks of wrongful findings of liability and imposition of AMPs. We suspect that the main reason for this is that an individual cannot go to jail for an AMP and corporations are viewed as able to pay penalties as a cost of doing business. This lack of attention ignores the potential reputational and monetary damages that flow from a wrongful finding of liability and the imposition of AMPs, which is the subject of the next section.

PART III: REPUTATIONAL DAMAGE OF A WRONGFUL FINDING OF A LEGISLATIVE VIOLATION

(a) Reputational harm: a case example

Recall that Justice Little did recognize that Cineplex will suffer harm to its reputation from the imposition of an AMP.¹⁶⁵ As we have stated, we believe that this case was correctly decided. But imagine the scenario of an AMP that is imposed after a wrongful finding of liability.

¹⁶⁴ “Miscarriages of Justice in Immigration Detention, Ibid.

¹⁶⁵ Cineplex at paragraphs 479-480.

It is an empirical and historical question to assess the reputational damage that could flow from a wrongful finding of a legislative or regulatory violation. For corporations that are wrongfully found liable, it is a more complex calculation of potential reputational harm.

In 2009, Toyota faced an unprecedented corporate crisis when reports of unintended acceleration in several vehicle models triggered massive recalls, regulatory penalties, and a firestorm of negative media coverage. The situation, fueled by early assumptions about electronic system failures, ultimately proved to be a case of wrongful attribution, with later findings confirming that driver error and mechanical issues were more likely culprits. However, by the time the facts emerged, Toyota had already suffered immense financial losses and reputational damage.

The Toyota crisis began in 2009 with widespread reports in the United States alleging that Toyota vehicles were accelerating unexpectedly, leading to several high-profile accidents and fatalities. In response, Toyota recalled over 8 million vehicles globally, suspended sales of some models, and halted production in several plants.¹⁶⁶ The United States National Highway Traffic Safety Administration (NHTSA) imposed a record \$16.4 million civil penalty, accusing the automaker of failing to promptly inform regulators of the potential safety defects.¹⁶⁷

However, later investigations, including a comprehensive study by NASA engineers in collaboration with NHTSA, found no electronic defect in Toyota's throttle control systems.¹⁶⁸ The report concluded that mechanical issues (like sticky pedals) and driver error were the main contributors to the unintended acceleration events.¹⁶⁹ Despite these findings, the regulatory presumption of fault in the early stages had already inflicted severe damage on Toyota.

The financial toll of the recall was staggering; recall costs exceeded \$2 billion,¹⁷⁰ stock value plummeted by more than 20% in the months following the crisis, sales dropped sharply in the U.S. and other markets, particularly in early 2010, and Toyota faced hundreds of lawsuits, resulting in a \$1.2 billion settlement with the U.S. Department of Justice in 2014, which included an admission that the company misled regulators, even though the technical fault was ultimately unsubstantiated.¹⁷¹ Much of this financial loss stemmed not from proven negligence but from the early regulatory narrative and the assumption of guilt.

As for reputational harm, Toyota had been viewed as a global benchmark for reliability and safety. The wrongful association with deadly accidents severely damaged this brand equity. Consumer

¹⁶⁶ Marc Gunther, "Toyota's Recall Crisis: Full of Surprises" *Harvard Business Review* (10 February 2011), online: <https://hbr.org/2011/02/toyotas-recall-crisis-full-of>.

¹⁶⁷ *Ibid.*

¹⁶⁸ United States, Department of Transportation, *NHTSA and NASA Report No Electronic Flaws in Toyota Vehicles; Mechanical and Driver-Related Causes Remain Most Likely* (8 February 2011), online: U.S. Department of Transportation <https://www.transportation.gov/briefing-room/us-department-transportation-releases-results-nhtsa-nasa-study-unintended-acceleration>

¹⁶⁹ *Ibid.*

¹⁷⁰ Ken Bensinger, "Toyota Reports \$2 Billion Profit but Cuts Sales Forecast" *Los Angeles Times* (4 February 2010), online: <https://www.latimes.com/archives/la-xpm-2010-feb-04-la-fi-toyota-profit5-2010feb05-story.html> [Besinger]

¹⁷¹ Amy Goldstein, "Toyota Reaches \$1.2 Billion Settlement to End Criminal Probe" *The Washington Post* (19 March 2014), online: https://www.washingtonpost.com/business/economy/toyota-reaches-12-billion-settlement-to-end-criminal-probe/2014/03/19/5738a3c4-af69-11e3-9627-c65021d6d572_story.html [Goldstein].

confidence eroded, and for years following the crisis, Toyota had to rebuild its reputation through aggressive marketing, extended warranties, and safety overhauls.¹⁷²

Similar to the *Finkelstein* case reviewed earlier, Toyota's corporate reputation was deeply impaired before the full evidence had even emerged. In both cases, the reputational costs were irreversible, even in the face of later vindication.

In conclusion, Toyota's 2009 recall crisis remains a landmark example of the disproportionate harm that can arise from wrongful or premature regulatory findings. The case affirms our thesis, that AMP style enforcement tools, when wielded without appropriate safeguards, can devastate corporations as effectively as criminal convictions, yet without the procedural protections afforded to criminal defendants. This is why we need a higher standard of proof; to minimize the harm from a wrongful finding, which is considered in Part V.

(b) Corporations do not have constitutional protection against cruel and unusual punishment

In *Quebec (Attorney General) v. 9147-0732 Québec inc.*¹⁷³ the Supreme Court of Canada unanimously agreed that s. 12 of the Canadian Charter of Rights and Freedoms does not protect corporations from cruel and unusual punishment or treatment. The crux of the matter centered on whether the word "cruel" could apply beyond human beings to corporations. The court ruled that "cruel" denotes human pain and suffering, either physical or mental.¹⁷⁴ A corporation, as a non-human entity, cannot be subject to human pain or suffering. In other words, the legal fiction of a corporation benefitting from legal personhood does not mean that the corporation can be subject to cruelty. Therefore, the court ruled that cruel and unusual punishment cannot apply to corporations given their inability to feel human pain or suffering.

As a material fact, while it is true that a corporation, as a non-human entity, cannot be subject to human pain or suffering, a wrongful conviction can result in the death of the corporation. The poster child for a corporate death sentence is the case of Arthur Andersen, implicated in the Enron case and accused of wrongdoing. Subsequently the Supreme Court of the United States, in a 9-0 opinion, concluded that "jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing." Chief Justice William Rehnquist wrote the opinion, saying, "Indeed, it is striking how little culpability the instructions required."¹⁷⁵

The conviction had essentially forced Arthur Andersen out of business. The company, which is down to a couple of hundred employees handling the remaining legal issues facing it, said it was pleased by the Supreme Court decision even if it did nothing to bring the former Big Five accounting firm back to life.

¹⁷² Marc Gunther, "Toyota's Recall Crisis: Full of Surprises" *Harvard Business Review* (10 February 2011), online: <https://hbr.org/2011/02/toyotas-recall-crisis-full-of>.

¹⁷³ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, 395 C.C.C. (3d) 1, 451 D.L.R. (4th) 367 (S.C.C.) See also *R. v. 1806369 Alberta Limited* (2021), 170 W.C.B. (2d) 399, 2021 ONCJ 179, 2021 CarswellOnt 4250 (Ont. C.J.).

¹⁷⁴ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, 395 C.C.C. (3d) 1, 451 D.L.R. (4th) 367 (S.C.C.), See also *R. v. 1806369 Alberta Limited* (2021), 170 W.C.B. (2d) 399, 2021 ONCJ 179, 2021 CarswellOnt 4250 (Ont. C.J.) at para. 14.

¹⁷⁵ https://money.cnn.com/2005/05/31/news/midcaps/scandal_andersen_sctus/

"We are very pleased with the Supreme Court's decision, which acknowledges the fundamental injustice that has been done to Arthur Andersen and its former personnel and retirees," the firm said in a statement.

"We pursued an appeal of this case not because we believed Arthur Andersen could be restored to its previous position, but because we had an obligation to set the record straight and clear the good name of the 28,000 innocent people who lost their jobs at the time of the indictment" and protect the firm against a flood of civil lawsuits.¹⁷⁶

(c) But aren't AMPs different from convictions with less stigma?

A critic could argue that the above discussion of reputational harm arising from corporate convictions does not apply to AMPs or applies to a much lesser degree.

As discussed in the section on constitutional challenges, the Courts have ruled that the stigma attached to an AMP is not comparable to that of a conviction.

This has been described as the **silver lining of AMPs** for industry, as the level of reputational damage is not as high as created by regulatory or criminal proceedings.¹⁷⁷ For example in June of 2011 the Competition Bureau announced that Bell Canada had agreed to stop making what the Bureau had concluded were misleading representations about the prices offered for its services. Under the terms of a consent agreement filed with the Competition Tribunal, Bell was also required to pay an administrative monetary penalty of \$10 million, the maximum amount allowed under the [Competition Act](#).

The Bureau determined that, since December 2007, Bell has charged higher prices than advertised for many of its services, including home phone, Internet, satellite TV and wireless. The advertised prices were not in fact available, as additional mandatory fees, such as those related to TouchTone, modem rental and digital television services, were hidden from consumers in fine-print disclaimers.¹⁷⁸

The Bell **AMP** illustrates a paradox. On the one hand, the large amount seems more appropriate for a criminal proceeding. On the other hand, this **AMP** received little attention in the popular press and certainly less than it would have received had it been prosecuted under the criminal misleading advertising provisions (assuming for the sake of argument that there was an element of

¹⁷⁶ https://money.cnn.com/2005/05/31/news/midcaps/scandal_andersen_scotus/

¹⁷⁷ **Profiting from Risk Management and Compliance § 6:6**

Profiting from Risk Management and Compliance

Todd L. Archibald, Kenneth E. Jull

Chapter 6. The Growth and Validity of Administrative Monetary Penalties

II. Administrative Monetary Penalties: History and Types

A. Competition Civil Track

§ 6:6. Generally

¹⁷⁸ "Competition Bureau Reaches Agreement with Bell Canada Requiring Bell to Pay \$10 Million for Misleading Advertising" (June 28, 2011), available at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/home.

intention to mislead that could be proved). This may be the **silver lining of AMPs** for industry, as the level of reputational damage is not as high as created by regulatory or criminal proceedings.

Moreover, it could be also said that the description of “deceptive advertising” enforced by AMPs is less ominous sounding than misleading advertising. It is definitely less serious than had Bell been charged with the criminal offence of fraud, which would be a true parallel to the Arthur Anderson case.

The operative question is whether or not the potential for billion dollar AMPs changes the calculation or risk of reputational harm significantly. As noted earlier in this paper, Google argues that the “Commissioner of Competition seeks an unprecedented financial penalty against Google that could well be measured in the billions of dollars—dwarfing any fine that has ever been imposed in a penal proceeding in Canada. The Commissioner does so by invoking a novel statutory provision that indisputably lacks the important constitutional safeguards available in all other penal proceedings. Google was thus compelled to challenge the constitutionality of this untested statutory provision.”¹⁷⁹

A further unanswered question is the predicted reaction that the Canadian public might in the event that the Competition Tribunal were to find that Google “abused its dominant position” and was therefore penalized with an AMP. Although abuse of dominance is within the civil/administrative menu of items in the *Competition Act*, it sounds more ominous and has the connotation of a large corporation crushing its rivals.

(d) The New New Value of Corporate reputation

From a philosophical perspective, corporate reputations are the “new new” of corporate governance. For example, scholars argue that corporations should attempt to secure strong reputations in diversity in order to help lower their cost of capital, secure top talent, and grow revenue.¹⁸⁰ While our courts recognize the new role of corporate reputation in governance, in the same breath, the courts assert that corporations cannot suffer. As corporations evolve and develop a social conscience recognized in governance, perhaps corporate law needs to evolve as well.

There are numerous examples of reputational harm to companies ensnared in corporate wrongdoing. Enron, VW, Wells Fargo, Loblaws, Lac-Megantic, British Petroleum, Boeing 737 Max 8, Facebook. The list goes on.

In recent business history, especially since the global financial crisis of the 2000s, there have been cases of corporate decline and failure as in the cases of Enron and Worldcom, for example, due to factors ranging from sheer lack of managerial or leadership competence to poor management and other issues. Scholars have drawn a link between a lack of emotional intelligence and corporate decline:

¹⁷⁹ CASE CONFERENCE MEMORANDUM OF GOOGLE CANADA CORPORATION AND GOOGLE LLC (Case Conference, June 6, 2025)

¹⁸⁰ Chris Brummer and Leo Strine, “[Duty and Diversity](#)” 75 *Vand. L. Rev.* 1 [2022] at 39.

Some of these issues hinge squarely on critical lack of emotional intelligence with regard to individuals' behavior and performance detrimental to corporate excellence. In this changing world, characterized by advancements in information and communications technology (ICT), marketing competitiveness, and narrow profit margins, elements of trustworthiness, passion, empathy, discipline, vision and service-orientation are skills seriously lacking in some people put in positions of corporate responsibility which often leaves the doors and windows open for corporate decline.¹⁸¹

The recognition of corporate reputation in some ways paints a picture of corporations as almost human. Indeed, the advertising of many companies draws on human-like comparisons to evoke a bonding process with consumers. Sixteen years ago, Spike Jonze directed a quirky little ad for Ikea that quickly became a classic of modern advertising. "Lamp 1" played on your heartstrings, while amping up the melodrama of an old lamp being tossed onto the street by its owner. By the end of the spot, you actually felt sorry for the lamp — until Swedish actor Jonas Fornander wanders onscreen and admonishes the viewer for being so easily manipulated.

"Many of you feel bad for this lamp", he says in one of the great rug-pulls in ad history. "That is because you're crazy. It has no feelings, and the new one is much better."¹⁸² "The genius was in how it so quickly was able to establish an emotional connection between the viewer and a lamp, then hilariously douse it all, with actor Jonas Fornander dropping a ... truth bomb."¹⁸³

Ikea Canada decided to resurrect the story for a sequel, while putting a modern twist on the sad little lamp's end. Made with agency Rethink Canada and directed by Mark Zibert, "Lamp 2" picks up where the original left off, but instead of the landfill, we get a serving of responsible consumerism when a little girl finds another use for our hero. Earnest optimism replaces the original wisecrack, but we still get Fornander dropping back in, this time to remind us that it is not crazy to reuse things. The change in tone and messaging reflects how our attitudes and behaviour have evolved over the last decade and a half. Responsible consumerism has gone far beyond companies such as Patagonia to major corporations like P&G, Unilever and Ikea which have begun talking more about waste. This focus on smart consumption is moving from the fringes to a more significant part of how brands and people think about their ongoing relationships with stuff. All that, and the little red lamp finally had a nicer ending.¹⁸⁴

Corporate image advertising is sometimes used to counter negative perceptions, but also to bolster a company's existing positive image. For example, British Petroleum (BP) was found to use corporate image advertising to make the case that the company operates in a safe way. Such ads

¹⁸¹ John Nkeobuna Nnah Ugoani, "Role of Emotional Intelligence in Corporate Decline and Successful Turnaround Strategy in This Changing World" *International Journal of Economics and Business Administration* Vol. 6, No. 3, 2020 at 116-126, online: <http://www.aiscience.org/journal/ijeba>.

¹⁸² <https://musebycl.io/advertising/ikea-made-sequel-lamp-flipping-script-ad-didnt-age-well>.

¹⁸³ Jeff Beer, "Check Out Ikea's Smart Sequel to Spike Jonze's Classic 2002 Lamp Ad" *FastCompany* (9 October 2019), online: <https://www.fastcompany.com/90234381/check-out-ikeas-smart-sequel-to-spike-jonzes-classic-2002-lamp-ad>.

¹⁸⁴ Jeff Beer, "Check Out Ikea's Smart Sequel to Spike Jonze's Classic 2002 Lamp Ad" *FastCompany* (9 October 2019), online: <https://www.fastcompany.com/90234381/check-out-ikeas-smart-sequel-to-spike-jonzes-classic-2002-lamp-ad>.

counter the horrendously negative publicity received by the company after the 2010 Gulf of Mexico oil spill.¹⁸⁵

If a corporation can have emotional intelligence, and if corporate images can evoke powerful emotional reactions, is it not a logical extension that those same corporations could “suffer” from a cruel and unusual sentence that would damage that very corporate reputation? This is an issue that goes far beyond the narrow constitutional argument about whether a corporation can argue that it has been subjected to cruel and unusual punishment. We need to start thinking about new corporate roles, and maybe even new corporate paradigms. This leads to the next part.

PART IV: A PHILOSOPHICAL APPROACH TO THE VALUATION OF MORAL HARM

Ronald Dworkin has argued that people drawn into the criminal process have a right to procedures that put a proper valuation on the “moral harm” flowing from a potential injustice. Dworkin contends 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”.¹⁸⁶ By analogy, we argue that people drawn into the AMP scheme have a right to a proper valuation of the moral harm flowing from a potential injustice, which is more likely to occur as a result of the lower standard of proof. This moral harm relates to the reputational harm discussed in the above Part.

One response from the drafters of AMP schemes might be that the danger of a wrongful violation is no more serious than the danger of a wrongful finding of liability in a civil case, as both only result in the award of a monetary amount (there is no risk of jail) and both are decided on a balance of probabilities standard. This parallel does not hold water, however.

First, there is more stigma attached to a finding that an entity has “violated” a statute than a civil finding that an entity is liable in damages to another party. The violation is against a government statute, reflecting societal interests, as contrasted against the case of two private parties who have a dispute.

Secondly, the Supreme Court of Canada has ruled in *H. (F.) v. McDougall*¹⁸⁷ that there is only one standard of proof in a civil case and it is the balance of probabilities standard. Justice Rothstein notes that civil cases do not involve the government's power to penalize or take away the liberty of the individual and he refers to the difficulties of different mathematical probabilities with a shifting standard of proof necessitated by stricter scrutiny:

By contrast, in civil cases, there is no presumption of innocence. As explained by J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence* (2nd ed. 1999), at p. 154:

¹⁸⁵ Karen Loveland, Katherine Taken Smith and L. Murphy, “An Examination of Corporate Image Advertising in the Oil and Gas Industry”, online: <https://ssrn.com/abstract=3415750>.

¹⁸⁶ Principle, Policy, Procedure”, in *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworths, 1981) 193, at p. 214.

¹⁸⁷ *C. (R.) v. McDougall*, 2008 SCC 53, 2008 CarswellBC 2041, [2008] 3 S.C.R. 41, 83 B.C.L.R. (4th) 1

“... Since society is indifferent to whether the plaintiff or the defendant wins a particular civil suit, it is unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities.

“It is true that there may be serious consequences to a finding of liability in a civil case that continue past the end of the case. However, *the civil case does not involve the government's power to penalize* or take away the liberty of the individual.”¹⁸⁸

Civil cases do not involve the government's power to penalize, but AMPs do, although they do not obviously take away the liberty of the individual.

Civil damages are designed to compensate, and rarely is their purpose to punish. Monetary damages can play a punitive and deterrence role in rare cases, as recognized by the Supreme Court of Canada. Punitive damages are very much the exception rather than the rule, and they are imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.¹⁸⁹ This high standard offers another reason to keep the levels of AMPs low, when they can be awarded without meeting such a high test.

The Supreme Court of Canada has affirmed that to attract punitive damages, “the impugned conduct must depart markedly from ordinary standards of decency—the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court's sense of decency”.¹⁹⁰ The court comments about the distinction between civil and quasi-criminal arenas in the following passage, which highlights the need for bright line tests:

The misconduct must be of a nature as to take it beyond the usual opprobrium that surrounds breaking a contract. As stated in *Whiten*, at para. 36, “punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment)”. Criminal law and quasi-criminal regulatory schemes are recognized as the primary vehicles for punishment. It is important that punitive damages be resorted to only in exceptional cases, and with restraint.¹⁹¹

Courts have awarded punitive damages for breach of fiduciary duty and where there is deliberate misconduct. Punitive damages may be appropriate where the conduct is egregious, abhorrent or dismissive of court authority and must be proportionate to the level and duration of misconduct.¹⁹²

The courts therefore recognize criminal law and quasi-criminal law as the *primary* vehicles for punishment. This accords with the higher burden of proof in criminal and regulatory law. Monetary damages, assessed on a balance of probabilities, should only be used to punish in exceptional cases,

¹⁸⁸ [C. \(R.\) v. McDougall, 2008 SCC 53, 2008 CarswellBC 2041, \[2008\] 3 S.C.R. 41, 83 B.C.L.R. \(4th\) 1](#) at paragraph 42.

¹⁸⁹ [Whiten v. Pilot Insurance Co. \(2002\), 209 D.L.R. \(4th\) 257, \[2002\] 1 S.C.R. 595 \(S.C.C.\)](#) at para. 94.

¹⁹⁰ [Fidler v. Sun Life Assurance Co. of Canada \(2006\), 271 D.L.R. \(4th\) 1, \[2006\] 2 S.C.R. 3 \(S.C.C.\)](#) at para. 62. In this case, the court reversed the Court of Appeal decision, which had awarded punitive damages despite the absence of finding of bad faith by the trial judge. As cited in *Gesualdi v. Conti* 2025 CarswellOnt 3897.

¹⁹¹ [Fidler v. Sun Life Assurance Co. of Canada \(2006\), 271 D.L.R. \(4th\) 1, \[2006\] 2 S.C.R. 3 \(S.C.C.\)](#) at para. 62.

¹⁹² *Walker v. Walker* 2025 NSCA 16.

and with restraint, in civil law. AMP schemes enacted by the legislature displace this principle. This leads to our recommendations for reform.

PART V: RECOMMENDATIONS FOR REFORM: TWO TRACKS AND MATHEMATICS

We propose a two level typology. At higher levels where AMPs are in the millions of dollars (and that may inflict significant reputation damage), a higher standard of proof of “clear and convincing” (75% in mathematical terms) would be appropriate. At levels below this, the more efficient balance of probabilities standard (50.1%) is more suited. In addition, we argue that procedural rights and appellate rights should escalate in proportion to escalating penalties.

(a) The legislative regime will specify the applicable burden of proof

Allegations of criminal or regulatory violations are often made in the civil and administrative law world. A securities broker may be alleged to have defrauded investors by making false statements regarding the use of their funds, and by using invested funds for improper purposes.¹⁹³ In the administrative regime, the securities broker may face restrictions on professional activities or an administrative monetary penalty (“AMP”) of not more than a \$1 million for each failure to comply. A train attendant may be faced with an allegation of adding unauthorized tips to credit card receipts and face disciplinary proceedings.¹⁹⁴ A police officer may face misconduct proceedings based on allegations of unnecessary force used during an arrest.¹⁹⁵ A student may claim to have been sexually assaulted by a teacher in a civil torts action.¹⁹⁶

When allegations of criminal conduct or serious regulatory breaches are pursued in civil and administrative forums, the question arises as to whether there is a “third standard of proof” that falls between the civil balance of probabilities and the criminal standard of proof beyond a reasonable doubt.¹⁹⁷ In Canada, the answer to this question lies in the specific legislation that governs each separate regulatory regime.

Where the legislation in issue contains no statutory provision relating to the requisite standard, the default standard of proof will be based upon the classic balance of probabilities as articulated by the Supreme Court of Canada in *F.H. v. McDougall*.¹⁹⁸ For example, section 127 of the *Ontario Securities Act*, which provides for orders in the public interest, is silent about the standard of proof; accordingly the standard of proof applicable to Securities Commission proceedings is the balance of probabilities. The decision in *F.H. v. McDougall* integrated the test of clear, convincing and

¹⁹³ *Meharchand (Re)*, 2019 ONSEC 7, 42 O.S.C.B. 1135, 2019 CarswellOnt 1504 (Ont. Securities Comm.).

¹⁹⁴ *Via Rail Canada Inc. and Unifor (Beebejwan), Re*, 2016 CarswellNat 5661 (Can. R.O.A.).

¹⁹⁵ *Jacobs v. Ottawa Police Service*, 2016 ONCA 345, 400 D.L.R. (4th) 148, 2016 CarswellOnt 7339 (Ont. C.A.) leave to appeal refused 2017 CarswellOnt 178, 2017 CarswellOnt 179 (S.C.C.).

¹⁹⁶ *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, 297 D.L.R. (4th) 193 (S.C.C.).

¹⁹⁷ Stephen Wexler and Gavin Cameron, “The Two Forms of Legal Proof: The Third Standard of Proof and *F.H. v. McDougall*” (2009), 88 Can. Bar Rev. 169.

¹⁹⁸ *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, 297 D.L.R. (4th) 193 (S.C.C.).

cogent evidence into the question as to whether it is more likely than not that the alleged events occurred.¹⁹⁹

A higher standard of proof was recognized by the Supreme Court of Canada in [Penner v. Niagara Regional Police Services Board](#).²⁰⁰ The Court recognized that the legislature has explicitly set out a higher standard in the *Police Services Act* (“PSA”) in the following passage:

It cannot necessarily be said that issue estoppel “works both ways” here. As the Court of Appeal recognized, because the PSA requires that misconduct by a police officer be “*proved on clear and convincing evidence*” (s. 64(10)), it follows that such a conclusion might, depending upon the nature of the factual findings, properly preclude relitigation of the issue of liability in a civil action *where the balance of probabilities—a lower standard of proof*—would apply. However, this cannot be said in the case of an acquittal. The prosecutor's failure to prove the charges by “clear and convincing evidence” does not necessarily mean that those same allegations could not be established on a balance of probabilities. *Given the different standards of proof*, there would have been no reason for a complainant to expect that issue estoppel would apply if the officers were acquitted. Indeed, in *Porter*, at para. 11, the court refused to apply issue estoppel following an acquittal in a police disciplinary hearing because the hearing officer's decision “was determined by a high standard of proof and might have been different if it had been decided based on the lower civil standard”. Thus, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would be determinative of the outcome of Mr. Penner's civil action.²⁰¹ [Emphasis added.]

Subsequent developments in the jurisprudence confirm that [Penner](#) did clarify the law concerning the two standards of proof. The Ontario Court of Appeal in [Jacobs v. Ottawa Police Service](#)²⁰² specifically addressed the discrete issue of the standard of proof applicable to a finding of misconduct under s. 84(1) of the *PSA*. Hourigan J.A. opined that “McDougall did not purport to establish a universal standard applicable to statutory standards of proof. It is well-settled that it is within the authority of a legislature to create a standard of proof specific to a particular statute”.²⁰³ Justice Hourigan rejected the argument that the Supreme Court of Canada's decision on standard of proof in [Penner](#) was *obiter*. His Honour underscored that all courts are “bound by

¹⁹⁹ [Hutchinson \(Re\)](#), 2019 ONSEC 36, 42 O.S.C.B. 8543, 2019 CarswellOnt 17398 (Ont. Securities Comm.) at para. 56, additional reasons 2020 ONSEC 1, 43 O.S.C.B. 431, 2020 CarswellOnt 30, citing [F.H. v. McDougall](#), 2008 SCC 53, [2008] 3 S.C.R. 41, 297 D.L.R. (4th) 193 (S.C.C.) at paras. 40, 46 and 49; [Azeff, Re](#), 2015 ONSEC 11, 38 O.S.C.B. 2983, 2015 CarswellOnt 4300 (Ont. Securities Comm.) at paras. 41-42, reversed in part [Finkelstein v. Ontario \(Securities Commission\)](#), 2016 ONSC 7508, 135 O.R. (3d) 590, 274 A.C.W.S. (3d) 656 (Ont. Div. Ct.), reversed in part 2018 ONCA 61, 421 D.L.R. (4th) 278, 139 O.R. (3d) 161 (Ont. C.A.), leave to appeal refused [Howard Jeffrey Miller v. Ontario Securities Commission](#), 2018 CarswellOnt 21507, 2018 CarswellOnt 21508 (S.C.C.).

²⁰⁰ [Penner v. Niagara Regional Police Services Board](#), 2013 SCC 19, [2013] 2 S.C.R. 125, 2013 CarswellOnt 3743 (S.C.C.)

²⁰¹ [Penner v. Niagara Regional Police Services Board](#), 2013 SCC 19, [2013] 2 S.C.R. 125, 356 D.L.R. (4th) 595 (S.C.C.) at para. 60.

²⁰² [Jacobs v. Ottawa Police Service](#), 2016 ONCA 345, 400 D.L.R. (4th) 148, 265 A.C.W.S. (3d) 790 (Ont. C.A.) leave to appeal refused 2017 CarswellOnt 178 (S.C.C.).

²⁰³ [Jacobs v. Ottawa Police Service](#), 2016 ONCA 345, 400 D.L.R. (4th) 148, 265 A.C.W.S. (3d) 790 (Ont. C.A.), leave to appeal refused 2017 CarswellOnt 178 (S.C.C.), at para. 7.

the Supreme Court's statement in *Penner* that the standard of proof in PSA hearings is a higher standard of clear and convincing evidence and not a balance of probabilities".²⁰⁴

(b) A Mathematical approach

James Ming Chen explores the intersection of mathematics and law in his article, "Legal Quanta: A Mathematical Romance of Many Dimensions".²⁰⁵ Chen reminds us that truth often manifests itself by mathematical proof. A key problem, identified by Chen, is that lawyers tend to shy away from mathematics: "Admittedly, [i]t is an open secret that lawyers, including those who teach rather than practice for a living, (stereo)typically don't like math."²⁰⁶

Once it is accepted that mathematical models can be applied in law, numbers can be ascribed to correspond to the various standards of proof. In mathematical terms, the balance of probabilities is met by 50.1%. A higher standard of clear and convincing might be viewed as requiring 70% proof. We would advocate for 75% because we believe it is a precise milestone and can be easily understood and assimilated by any triers of fact.²⁰⁷ Proof beyond a reasonable doubt should be viewed as 99%. Our 75% proposal sits squarely between the 50.1% balance of probabilities and the 99% of proof beyond a reasonable doubt.

The conventional probability account defines standards of proof as thresholds on a scale between zero and one. Under this scheme, the number "one" represents certain truth and "zero" represents certain falsity, and the standards of proof are typically interpreted as follows: "preponderance of evidence" as a probability of greater than 0.5; "beyond a reasonable doubt" as a probability of 0.9 (or greater); and "clear and convincing evidence" as in between the two polarities, typically a probability around 0.75. For each disputed legal element, fact-finders assess how probable the element is (along the spectrum between zero and one). An element is considered proven if its probability exceeds the threshold for the applicable standard of proof. The element is not proven when its probability is at or below the threshold.²⁰⁸

(c) A New pyramid

The discussion in this paper about potential reputational harm of wrongful findings of violations leads us to recommend a blended and pyramid approach to reform. As penalty amounts increase, the level of procedural fairness and appellate rights should escalate as well in a proportionate way.²⁰⁹

²⁰⁴ Jacobs at paragraph 12.

²⁰⁵ James Ming Chen, "Legal Quanta: A Mathematical Romance of Many Dimensions" (2016), Mich. St. L. Rev. 313.

²⁰⁶ James Ming Chen, "Legal Quanta: A Mathematical Romance of Many Dimensions" (2016), Mich. St. L. Rev. 313, at p. 314, citing Lisa Milot, "Illuminating Innumeracy" (2013), 63 Case W.L. Rev. 769, 769.

²⁰⁷ See Archibald and Jull, "Clear and Convincing" Evidence Cannot Reside in the House of Balance of Probabilities: A Scientific Approach" 51 *The Advocates Quarterly* 315.

²⁰⁸ Allen and Pardo, "Relative Plausibility and Its Critics", available on SSRN at 8. Published in the *International Journal of Evidence and Proof*, at <https://journals.sagepub.com/doi/10.1177/1365712718813781>.

²⁰⁹ **Profiting from Risk Management and Compliance § 6:65**

Profiting from Risk Management and Compliance

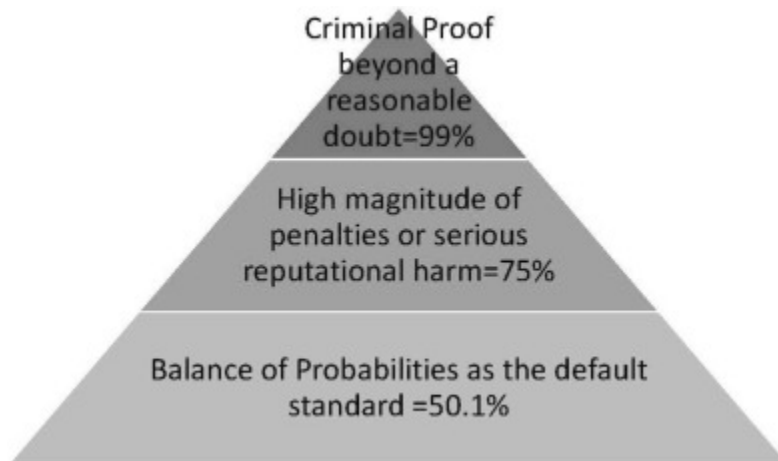
Todd L. Archibald, Kenneth E. Jull

Chapter 6. The Growth and Validity of Administrative Monetary Penalties

VII. A Principled Approach

A pyramid approach would also support separation of the administrative branch from the adjudicative branch as the penalties increase in scope, as well as the injection of judicial members into the tribunals. The Competition Tribunal²¹⁰ presently assesses AMPs with the assistance of judicial members. We would suggest that this type of model be utilized where the stakes are higher.

We recommend that legislatures should review their regulatory statutes which provide for administrative remedies such as licence revocation, suspension, and administrative monetary penalties. In this legislative review, as a matter of policy, we would submit that the higher standard of proof of 75% should be statutorily specified through the clear and convincing evidence standard where the magnitude of the potential penalty is high or there is a risk of significant professional or reputational impact. The proposed pyramid model is depicted in the following figure:



For individuals facing King Kong AMPs in the \$100,000 range and up, in our view this should require the higher burden of proof of clear and convincing as a matter of policy. With respect to

§ 6:65. Principle 6: Procedure Should Precisely Match the Escalating Penalty Sought, and can be Varied at Each Level

²¹⁰ The Competition Tribunal is comprised of both judicial members (judges of the Federal Court) and lay members. The Competition Tribunal describes its own composition on its website as follows:

The Competition Tribunal was created in 1986 when Parliament enacted major reforms of Canada's competition law and replaced the *Combines Investigation Act* with the [Competition Act](#). The Tribunal is a specialized court that combines expertise in economics and business with expertise in law. It hears and decides all applications made under Parts VII.1 and VIII of the *Competition Act* as informally and quickly as the circumstances and consideration of fairness allow. The Tribunal is a strictly adjudicative body that operates independently of any government department. It does not have investigative powers nor does it provide advice to government. It has no function other than that associated with the hearing of applications and issuance of orders. The Tribunal is composed of not more than six judicial members and not more than eight lay members, which are appointed by the Governor in Council. Under the [Competition Act](#), the Tribunal qualifies as a court which may impose an administrative monetary penalty, along with the Federal Court and a Provincial Superior Court. The Tribunal panel will vary in composition, according to the type of case: Most cases, or cases under Part VIII of the Act (matters reviewable by the Tribunal), are heard by a panel of three members. This panel must include one judicial member. The rest of the panel is usually made up of two lay members. Cases heard under Part VII.1 of the Act (deceptive marketing practices) are heard by a judicial member, who sits alone.

corporations facing potential King Kong AMPs of \$10 million or more, in our view this should require the higher burden of proof of clear and convincing as a matter of policy.

We believe that a higher standard of clear and convincing, or 75% in mathematical terms, will reduce (although not eliminate) the risk of wrongful findings of liability which can cause very significant harm.

As we move forward in the development of the digital economy we hope that our argument appeals to logic and compassion. And we hope that our argument is not assessed on the mere flip of a coin.