

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

**September 9, 2016**

**Presented by:  
Ken Jull, Stephen Schmidt**

**27<sup>th</sup> European Regional Conference  
of the ITS, Cambridge, England**



**GARDINER ROBERTS**

# Dialogue with Telecom Regulators

We are in the world of *Regulation 3.0* – with competing platforms, less regulation, less market power, and more focus on enabling innovation and investment.

What does *Enforcement 3.0* look like in markets characterized by new and rapidly evolving technologies, business models, and rules?

How do firms -- and *regulators* -- navigate where rules are new, unclear, or absent?

## Dialogue with Telecom Regulators ...cont'd

Restorative justice perspectives and dialogue with the regulator will be part of this new enforcement paradigm.

We attempt to contribute to the shaping of *Enforcement 3.0* by drawing a link between restorative justice pyramids and the institutional frameworks that will best promote positive dialogue with telecom regulators.

## When dialogue does not occur: the zone of non-discovery

- Restorative justice storytelling about dialogue with the regulator
- Counsel was approached by a client who discovered evidence about a serious bribery scandal that they had discovered internally.
- This scheme had not been discovered by the authorities. (We refer to this as the “**zone of non-discovery**”).



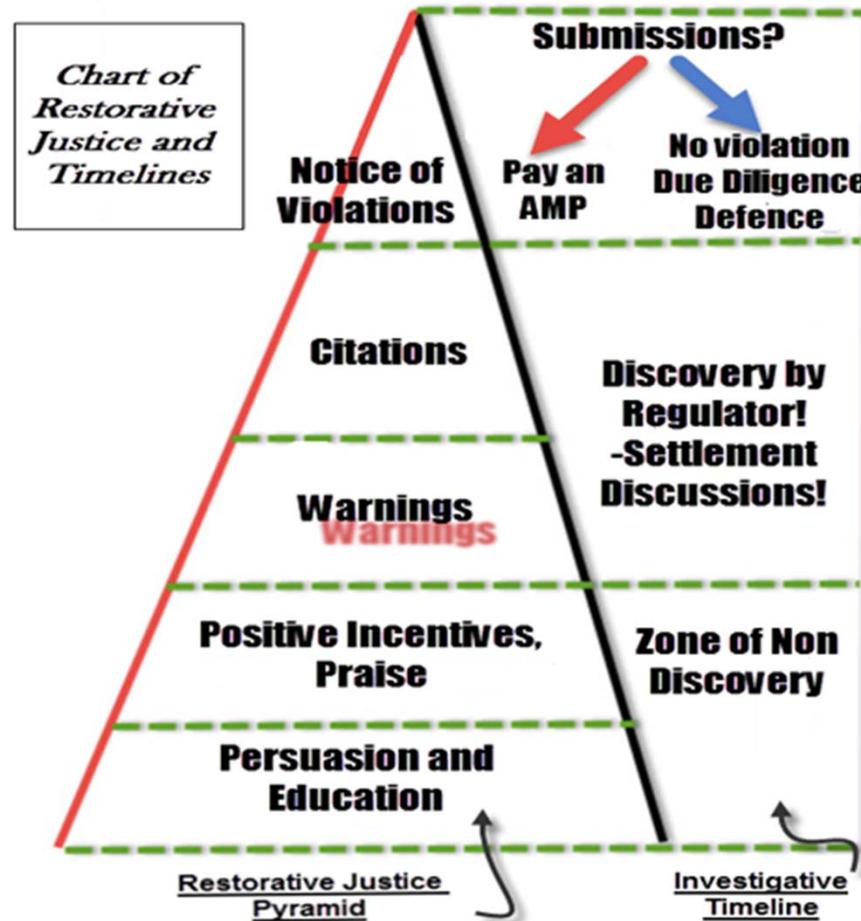
GARDINER ROBERTS

## When dialogue does not occur: the zone of non-discovery ...cont'd

- The company made the decision to not self-report, as they were concerned that it would put them on the government's radar going forward and there was no deferred prosecution programme: link between restorative justice and institutions for enforcement



# Restorative Justice and Investigative Zones



## Recommendations: zone of non-discovery

- In the **zone of non-discovery**, dialogue with a regulator is best facilitated by institutional practices such as
  - a) Use immunity,
  - b) A defined deferred prosecution program,
  - c) Recognition of self-reporting as a part of due diligence.

## The Dark Side of the Pyramid

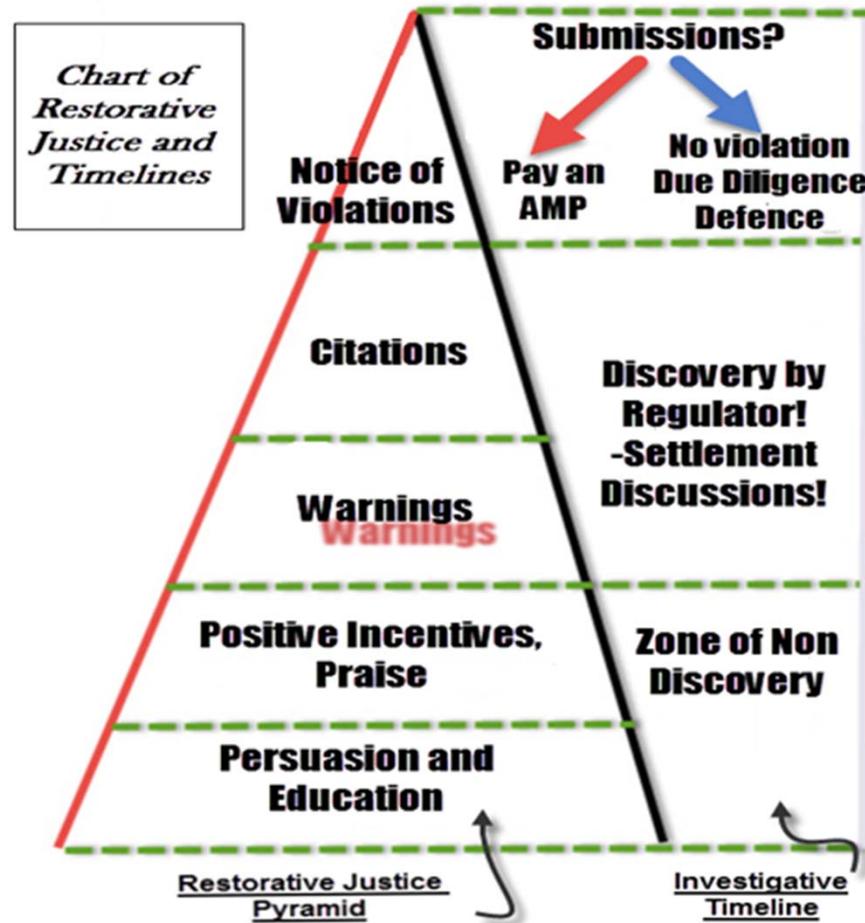
There is little discussion in restorative justice scholarship of the institutional framework that governs relations when restorative justice discussions *fail* and the matter proceeds to contested submissions on the merits. To paraphrase Rudyard Kipling, restorative justice dialogue is east and administrative contested submissions are west, and never the two shall meet. When dialogue fails, the darker side of the pyramid comes into play where the parties will desire that the Tribunal be kept in the dark.

## The Dark Side of the Pyramid: administrative monetary penalties

- In Canada the Canadian Radio-television and Telecommunications Commission (“CRTC”) now has the power to impose administrative monetary penalties (“AMPs”), in the case of an individual, not exceeding \$25,000 and in any other case, not exceeding \$10,000,000.
- First, what are the procedures for the making of submissions about liability or penalty?
- Second, what is the composition of the Tribunal that will adjudicate these matters?



# Restorative Justice and Investigative Zones



## Procedural Fairness and the Dark Side

The person served with the Notice of Violation has 30 days to either (i) pay the AMP, or (ii) make *written representations to the Commission* regarding whether the violation has occurred, the amount of the AMP, or both. However, the Commission may specify a longer period if it so chooses.

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

## Procedural Fairness and the Dark Side

*Kabul Farms Inc. v R.*, 2016 FCA 143, 2016  
CarswellNat 1458.

- *As part of procedural fairness, a party potentially liable for an administrative monetary penalty, such as the respondent, needs to know about any formula, guideline or supporting analysis the Director will rely upon in his assessment of penalties. ....Here, the unpublished formula and perhaps more was withheld from the respondent, leaving him in the dark.*



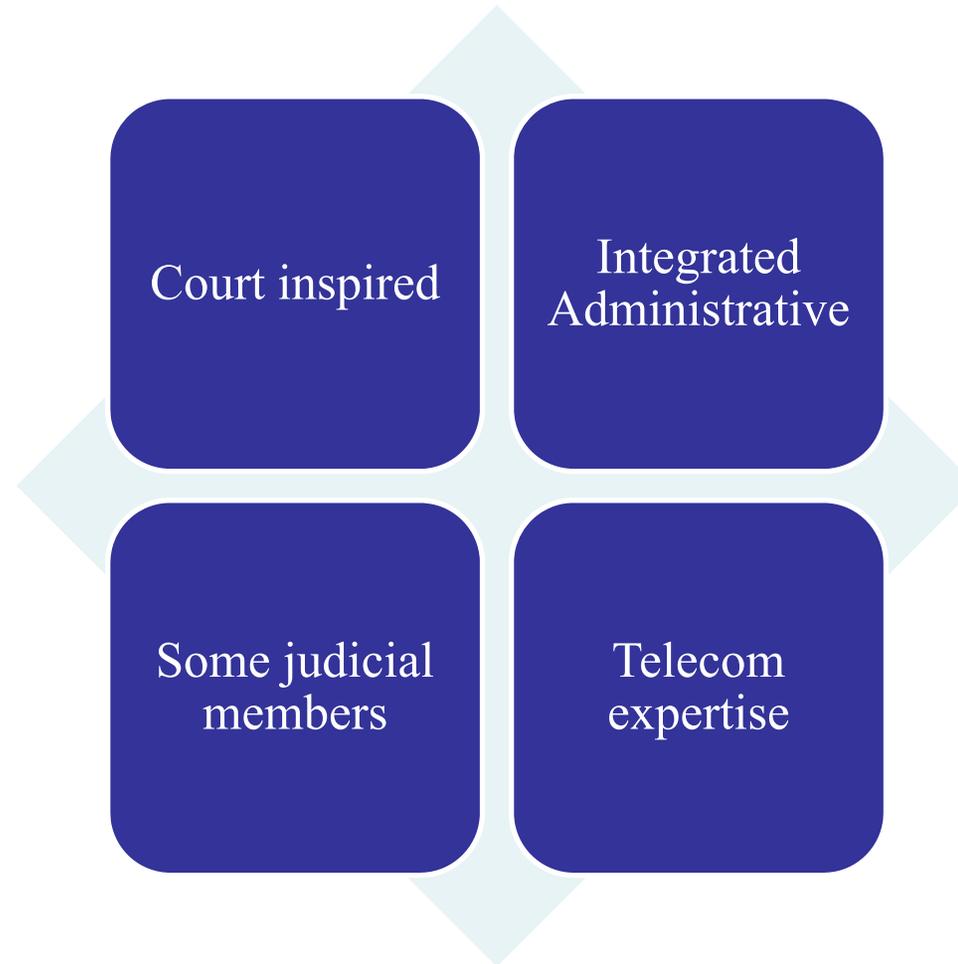
## Recommendations: Within integrated model

- A pyramid model of procedures within the integrated model allows for escalation of procedures with escalated liability to penalties
- For example, as the amount of penalties increase, the right to make *written submissions* should progress to rights to a *hearing before a CRTC panel*. At present this is not the case.

## Recommendations: Within integrated model

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

# Competing Institutional Models



## Recommendations: A New Tribunal at the top of the pyramid

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

## The Caveat and Thank You!

**NOTE: THE STATEMENTS AND OPINIONS EXPRESSED IN THIS PAPER REPRESENT THE VIEWS OF THE AUTHORS AND DO NOT NECESSARILY REPRESENT THE VIEWS OF GARDINER ROBERTS LLP AND TELUS COMMUNICATIONS**