Mind the Justificatory Gap: Fairness in Administrative Law through the Rule of Law as a Normative Exercise in Reviewing Regulated Conduct

by

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Abstract

Regulatory regimes alter the legal obligations on parties that engage in regulated conduct. Three claims are made: (1) In the sphere of regulated activities, the default assumption the law makes about one’s ability to take any action is altered from a presumption that one is at liberty to perform an action to a presumption that one requires permission insofar as that action is within the regulated sphere of activity; (2) This changed presumption about the lawfulness of conduct calls for a higher degree of justification; and (3) Oversight of administrative action, whether through appeals, legislative revision to regulation, or judicial review, requires an understanding of the Rule of Law as a normative exercise.

These claims are examined through three case studies: (i) Administrative Monetary Penalty Regimes and their enforcement; (ii) Unauthorized Practice Applications/Prosecutions by regulatory bodies; and (iii) exercises of the public interest jurisdiction by the Ontario Securities Commission.
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Chapter 1
Introduction

Administrative law principles are broadly concerned with the relationship between the state’s administration of the law and fairness. Regulatory bodies are gaining increasing powers in Canada, with new quasi-criminal administrative monetary penalty regimes, unauthorized practice applications, and broad public interest jurisdiction. Have these expanded powers deprived the public of meaningful discourse on the appropriateness of severe sanctions for regulated conduct? Does fairness – in providing due process at these tribunals, in selecting proportionate penalties and in the enactment of these regulatory schemes in the first place – become at best a secondary concern behind the goal of compliance? In the process of expanding regulatory power, are citizens’ rights subordinated to government fiat?

These questions are broader than what can be addressed here, and have been the subject of much academic literature.1 The immediate problem that concerns this thesis is the following: does the creation of a regulated sphere of activity and regulated conduct fundamentally alter the nature of the legal obligations on parties, such that justification is required where currently none is provided, or where regulators feel none needs to be provided? Parties can be either willing participants in a scheme of regulations, by signing up to join a regulated profession for example, or parties can merely be in the sphere of regulated activities because an act such as fishing has been subject to regulation. However, regardless of the willingness of the parties to be subject to the rules that govern that particular sphere of activities, does the regulation change the nature of the legal obligations on those parties?

This thesis will argue that it does. While there has been work done on the extent to which a right to fish subject to regulation constitutes an infringement of that right in the context of Aboriginal

law, this work tends to focus on the question of whether Aboriginal rights might permissibly be infringed at all, given their constitutional protection. In answering that question, the analysis focuses on the question of whether the infringement is reasonable, imposes undue hardship, and denies the holders of these rights their preferred means of exercising those rights. However, this thesis is not concerned with the infringement of rights by the regulations, but rather the infringement of liberties by regulation.

The structure of this thesis will run as follows, and depend upon establishing the following three claims: (1) In the sphere of regulated activities, the default assumption the law makes about one’s ability to take any action is changed – from being at liberty to perform an action to requiring permission insofar as that action is within the regulated sphere of activity (the “Obligation Claim”); (2) This reversed assumption calls for a higher degree of justification from administrative tribunals and state agents in exercising their considerable discretion (the “Justification Claim”); and (3) Oversight of administrative action, whether through appeals, legislative revision to regulation, or judicial review, requires an understanding of the Rule of Law as a normative exercise (the “Oversight Claim”).

After these claims are set out, this argument will be fleshed out through three case studies. These are specific instances where the state has not sufficiently made out the justification required by the argument above: (i) Administrative Monetary Penalty Regimes and their enforcement; (ii) Unauthorized Practice Applications/Prosecutions by regulatory bodies; and (iii) exercises of the public interest jurisdiction by the Ontario Securities Commission.

Each of these three examples serves to demonstrate all three claims, but some more than others. The Administrative Monetary Penalty Regimes analysis illustrates the strength of the Obligation Claim with regard to regulated conduct, and the means by which the state may penalize failures

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of compliance under comforting language that these regimes are merely another tool, and not a sea-change in regulatory policy. However, it will also demonstrate the Justification and Oversight Claims, by illustrating that more justification and oversight is needed.

The Unauthorized Practice Applications/Prosecutions analysis demonstrates the extent to which the Justification Claim is not made out when what constitutes regulated conduct is an expanding class of conduct – from the non-contentious core of unlicensed conduct, from which these bodies seek to protect the public, to the penumbra of activities, which might indicate an attempt to maintain the proprietary interests of the regulator’s members. However, these also serve to establish the Obligation Claim, as such an application transforms what was once a liberty into an activity requiring a license, and the Oversight Claim, insofar as these applications need to be constrained to a sphere of conduct logically related to the purposes of the legislation empowering the regulator.

An analysis of the Public Interest Jurisdiction of the Ontario Securities Commission – a power that allows this regulator to determine for itself what conduct is contrary to the public interest, and thereby expand its own jurisdiction – reveals how the Oversight Claim requires a fulsome understanding of the Rule of Law, and its preconditions, which are undermined by the exercise of this power without justification. However, this case study will also serve to demonstrate the Obligation Claim through how conduct that is not the subject of explicit prohibitions in empowering legislation is found to be prohibited, and the Justification Claim in that the considerable discretion granted produces a justificatory gap the farther the regulator strays from the purposes of its empowering legislation.
Chapter 2
The Obligation, Justification and Oversight Claims

1 The Obligation Claim

The argument for the Obligation Claim is an appeal to our intuitions, and runs as follows: in the Canadian legal system, what is illegal is prohibited by law. This prohibition can be found in statutes, regulations, or case law. What is legal, however, is anything that is not illegal. In other words, individuals are at liberty to do anything they are not prohibited from doing. In order for the state to punish an individual for an offense or breach of a statutory obligation, the onus is on the state to demonstrate that an offence has been committed.\(^4\) In a regulated environment, however, individuals are not at liberty to do anything that is not prohibited. Rather, the default assumption is that any activity in that sphere of activity is prohibited unless it has been licensed by way of delegated authority. I may not fish or hunt\(^5\) or sell securities\(^6\) or take real estate commissions\(^7\) or sell portions of a federal port\(^8\) unless have I been granted the privilege to do so. This privilege may be granted in the form of a license, a permit, a contract with the designated authority or some other grant of limited power to engage in the regulated conduct, but the fundamental legal obligation on me has changed in the regulated sphere of activity.

This distinction between presumptions the law makes about one’s behaviour arises from the following taxonomy of legal obligation: (1) Prohibitions; (2) Licenses; (3) Liberties; and (4) Requirements. At one end of the spectrum are Prohibitions: those acts that are strictly prohibited. These acts are likely to be set out in criminal statutes, and are the subject of criminal prosecutions. There may be defences and situations where an act is performed and is later found

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\(^4\) Similarly, in private law, in order for an individual to be awarded damages for breach of some obligation, that individual seeking to be paid must demonstrate that the potential Defendant has in fact breached an obligation at law. In both instances, a potential defendant is given the benefit of the assumption of innocence, or that whatever it is he or she did was lawful until it has been proven that it was not.

\(^5\) *Fish and Wildlife Conservation Act*, S.O. 1997, c. 41, s. 5

\(^6\) *Securities Act*, R.S.O. 1990, c. S.5, s. 25

\(^7\) *Real Estate and Business Brokers Act*, 2002, S.O. 2002, c. 30, s. 4

\(^8\) *Canada Marine Act*, S.C. 1998, c. 10 s. 46(2.1)
not to have been prohibited, such as a self-defence argument in a homicide trial. However, this would be an exception to the Prohibition, rather than some lesser legal obligation. Such a lesser legal obligation would be a License: by License, I mean not only driver’s and liquor licenses, but also any other grant of authority or permission by the state for an act that would be prohibited unless such a license has been given. On the other end of the spectrum are Requirements: acts that everyone is legally obligated to perform. An example would be to report one’s income. These are rare, unless they are understood as the converse of the Prohibitions: everyone is required not to commit homicide. Finally, a lesser legal obligation than Requirements are Liberties: acts that one is neither required to do nor prohibited from doing. Liberties make out the vast majority of the acts most people engage in. The law is silent on what time I wake up, how I dress, and which route I take to work. These four kinds of legal obligations – Prohibitions, Licenses, Liberties, and Requirements – are essential to the Obligation Claim, and this thesis is primarily concerned with Licenses and Liberties.

One might ask whether Licenses such as regulatory prohibitions that restrict my ability to fish are really that different from other Prohibitions, but my answer would be yes. Rather than asking for forgiveness in the case of a breach of a Prohibition, one is required to ask for permission in the case of a License. In the case of a Prohibition, the state has decreed that under no circumstances can an individual engage in that activity, whereas a License allows for that activity if state permission is first obtained. The question that concerns this paper is the distinction between Licenses and Liberties more than Licences and Prohibitions.

As argued below, this Obligation Claim is an essential feature of administrative legal regimes. In the sphere of regulated activities, the default assumption the law makes about one’s ability to take any action is changed – from being at liberty to perform an action to requiring permission insofar as that action is within the regulated sphere of activity (the “Obligation Claim”).

2 The Justification Claim

This reversed assumption identified in the Obligation Claim calls for a higher degree of justification from administrative tribunals and state agents in exercising their considerable

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9 *Income Tax Act*, R.S.C., 1985, c. 1, s. 2(1)
discretion, because by virtue of their authority these regulators can make orders and decisions that do not have to be justified in the same way as the initial grant of authority to these same administrative tribunals and state agents (the “Justification Claim”). As set out above, in setting up an administrative regime to govern certain regulated activity, the state is reversing the default obligations on law-abiding actors, insofar as they are law abiding. For non-regulated activities, individuals do not have to justify their actions unless these actions are prohibited. In regulated activities, however, the onus is on the participant in the regulated activity to demonstrate that he or she is actually abiding by the law when called upon, and must demonstrate that he or she has permission to perform the regulated activities in question. This claim is best borne out by unauthorized practice prosecutions by the staff of the regulator itself, at the hearing of which the staff of the regulator need to demonstrate only that the participant engaged in the activity regulated under the legislative scheme. As a substantive defense, the participant must justify this behaviour. This will be spelled out more fully below.

The argument for the Justification Claim depends upon an account of authority, best set out by philosophers Joseph Raz and John Finnis. Under this account of authority, a person treats something as authoritative if and only if he treats it as giving him sufficient reason for acting in accordance with it notwithstanding that he himself cannot otherwise see good reason for so believing or acting, or as Joseph Raz terms it, something is authoritative if a person sees it as an exclusionary reason.

Joseph Raz contends that for a legal system to be a legal system, it must claim justified authority over a population. Raz distinguishes the normal reasons we have for taking actions, such as going to the grocery store because we are out of groceries – which he terms “first-order reasons” from the exclusionary reasons authority provides. Authority, however, provides “second-order reasons” or exclusionary reasons, which push the first order reasons out of the way in our decision-making process. If law is to be said to be truly authoritative, then it must provide these second-order reasons: I will not drive to the grocery store because the conditions on my license

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11 John Finnis, Natural Law and Natural Rights, supra note 10 at p. 233
forbid me from doing so after midnight, for example. Law is authoritative if I do not consider such first-order reasons as whether it is fair or not that my license restricts me driving after midnight. If I can routinely ignore the conditions on my license with impunity, then these conditions are not sufficiently authoritative (or are inadequately enforced).

Given this definition of authority, there is a justificatory gap between the decisions of those in authority – exclusionary, second order reasons – and the normal first order reasons of fairness and practicality that guide other decisions. Regulators – individual Commissioners, Registrars and Tribunal Chairs, or the regulatory bodies themselves – are charged with the authority to make, administer and apply the rules of a regulatory scheme. When a statute is first enacted, it must be justified to the public at large, but once a statute authorizes a regulator to make decisions concerning regulatory conduct, these decisions are second-order reasons and need not be justified in the same way or to the same degree. Whether the pronouncements of regulators can be seen as authoritative depends in large part on the extent to which there is reciprocity between administrators and administrated. Something is authoritative if and only if I treat it as giving me a sufficient reason for obeying that thing notwithstanding I cannot or would not treat it as a good reason myself. As I accept that my driving license is subject to a condition that I may not drive after midnight by virtue of that condition being placed on my license by the appropriate authority, this exclusionary reason trumps my own sense that this restriction is itself unfair or impractical. Law must be authoritative for it to be law, but the exercise of authority may or may not be fair. This leaves open a justificatory gap that must be filled. It is this justificatory gap that the third claim, the Oversight Claim, seeks to fill.

It may be suggested that this justificatory gap is closed by the initial grant of authority to exercise discretion to the regulator or administrative agent. However, as shown by the seminal case of Baker v. Canada (Minister for Citizenship and Immigration), grants of discretion are not sufficient to justify improper exercises of that discretion. This case concerned Mavis Baker, a Jamaican-born woman who was subject to a deportation order, and sought permanent residence

in Canada. Her application for permanent residence was rejected without written reasons, and she applied for judicial review of that decision. Once the case reached the Supreme Court, one of the questions to be addressed was the standard of review of discretionary decisions. Justice L'Heureux-Dubé, writing for the majority, defined discretionary decisions as “decisions where the law does not dictate a specific outcome, or where the decision maker is given a choice of options within a statutorily imposed set of boundaries.”¹⁴ A public officer has discretion where she has the freedom to make a choice among a number of possible courses of action. However, this range of possible courses of action is subject to general principles governing any exercise of discretion, chief among which is that the reasonableness of any exercise of discretion is determined in large part by its consistency with the underlying grant of power. As Justice L'Heureux-Dubé notes, “the reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of discretion. They therefore cannot stand up to the somewhat probing examination required by the standard of reasonableness.”¹⁵

The initial justification for the grant of authority that confers the discretion upon the public official cannot be used as cover for any and all exercises of discretion. Discretion is necessary as every potential decision a public official may have to make cannot be contemplated in advance. However, this is not enough to satisfy the justificatory gap inherent in an exercise of discretion where the discretion is exercised in a manner inconsistent with the underlying grant of power. Discretion is not absolute discretion, but is fettered by the purposes for which it was granted. Regulators and public officials are given limited powers to enforce certain Acts or regulatory regimes, and the extent to which these regulators deviate from the purposes of their initial grant of jurisdiction in exercising their discretion, the greater the justificatory gap. The Justification Claim is that in order for an exercise of discretion to be justified, the exercise of authority, whether discretionary or not, must be tied to the initial grant of the jurisdiction and purposes for which authority has been provided. This will be borne out by the case studies below.

¹⁴ Baker, supra note 13 at para. 52
¹⁵ Ibid, at paras. 64 and 65. In the case of Baker, the officer who denied her application had a hand-written note on the file that read: “[Ms. Baker] is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity.”
The Oversight Claim: The Rule of Law as a Normative Exercise

The argument for the Oversight Claim maintains that the Rule of Law, properly capitalized, is the overarching principle constraining administrative or regulatory action. In order to argue as much, an account of the Rule of Law must be given.

3.1 What is the Concept of the Rule of Law?

The Rule of Law is difficult to define, and an exhaustive account of it is perhaps impossible. It may be an “essentially contested concept”, with no non-contentious core of content over which differing schools of thought can agree.16 Nevertheless, intuitively, the Rule of Law means that laws do the ruling instead of the whims of those in power. This is meant to be good for a number of reasons, not the least of which is that it is a defense against arbitrariness. Laws, however, are made and administered by people, so how laws should rule our behaviour is also of concern. The Rule of Law has been taken to mean a cluster of things by different thinkers and Courts, so it cannot be easily defined as a single principle. For example, the Supreme Court of Canada has held the Rule of Law to be “a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.”17 Seventeen years later, the Court held that “at its most basic level, the Rule of Law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs.”18 In terms of setting out the features of the Rule of Law, the Court found that the Rule of Law meant three things: a) that the “law is supreme over the acts of both government and private persons”; b) that “the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order” obtains; and c) that the “exercise of all public power must find its ultimate source in a legal rule.”19

18 Reference re Secession of Quebec, [1998] 2 SCR 217 at para. 70
19 Reference re Manitoba Language Rights, [1985] 1 SCR 721 at 747-752
The Rule of Law, as evidenced by the attention paid to it by the Supreme Court of Canada, is taken as a central principle of constitutionalism. As Thomas Hobbes noticed, if the sovereign is unitary, there is no difference between changing the rules and breaking them. That is, if the actions and declarations of the state are the law, there is no way for the state itself to break the law, as every breach will simply be a new law. Some version of constitutionalism, then, is most obviously entailed by the Rule of Law, possibly involving a separation of powers into the executive, legislative and judiciary as in Western liberal democracies, but most importantly a means of determining what will and will not count as law.

3.2 Eight Desiderata as the Rule of Law

Philosopher of law Lon Fuller has persuasively argued that there is an “inner morality to law” best captured by eight principles: that (a) laws should be general; (b) laws should be promulgated; (c) laws should not be retroactive; (d) laws should be understandable; (e) laws should not be contradictory; (f) laws should not be impossible to obey; (g) laws should be relatively stable; and (h), the laws on the books are actually applied when administered. These eight threshold desiderata form the basis of the Rule of Law as an ideal and a basis for whether that a legal system qualifies as a legal system.

Given these desiderata and the three features identified by the Supreme Court, the Rule of Law requires impartial and public trials following due process with judges providing reasons for their decisions; the police are answerable for their conduct; criminal punishments are proportional to the crimes committed; compensation is owed for state-seized property; and, crimes are not committed under colour of law. None of this is particularly controversial.


21 Lon L. Fuller, “Positivism and Fidelity to Law—A Reply to Professor Hart”, (1958) 71 Harv. L. Rev. 630, reprinted in David Dyzenhaus and Arthur Ripstein, Law and Morality (Toronto: University of Toronto Press, 2001) at p. 88-89


23 Even Jeremy Waldron, who thinks the Rule of Law is an essentially contested concept, would agree: Jeremy Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida)?” (2002) 21 Law and Philosophy 137. at 156
Where there is much disagreement is on how broadly or narrowly we should construe the concept of the Rule of Law. There are broadly two schools of thought on the Rule of Law: the formal and the substantive.\textsuperscript{24}

3.3 The Formal Conception of the Rule of Law

The Formal Conception of the Rule of Law is that the Rule of Law functions exclusively as a constitutional principle to restrict how laws are made, and nothing further. It concerns how clear laws are, and whether they are retroactive, for example. A strong proponent of this school is A.V. Dicey. For his part, Dicey listed three principles:

1. The legal rights of a citizen should be determined by “regular” law, and not by arbitrary fiat or unchecked discretionary powers.

2. In a dispute between a private citizen and an official, recourse should be to the ordinary courts.

3. The fundamental rights of a citizen should not rest on any written constitution but should arise from ordinary law.\textsuperscript{25}

This last principle is unlikely to have wide acceptance. However, the first two at least are widely accepted, although there are more narrow conceptions.\textsuperscript{26} Even so, the first two at least show that those with a formal conception of the Rule of Law will allow for certain formal constraints on law.

3.4 The Substantive Conception of the Rule of Law

On this view, all of the formal considerations are part of the Rule of Law (with the exception of Dicey’s strange prohibition on written constitutions), but so too are more substantive claims


\textsuperscript{26} F.A. von Hayek, \textit{The Road to Serfdom} (London: Institute of Economic Affairs, 2005 [1944]). For Hayek, the Rule of Law meant only that government was bound by rules fixed and announced beforehand. What those rules are does not matter, as long as this principle is followed.
about justice. The Rule of Law will include a theory of justice, in addition to a set of formal constraints. It will require a set of rights be constitutionally protected, such as through the *Charter*.  

For the purpose of the Oversight Claim, I am advancing a Substantive Conception of the Rule of Law, but not a particularly thick one. The Rule of Law, properly capitalized, is best understood as the particular virtue of a legal system that is achieved to the extent Fuller’s eight desiderata are reached: that (i) the rules are prospective rather than retroactive and (ii) are not impossible to comply with; (iii) its rules are promulgated, (iv) clear, and (v) coherent with one another; that (vi) its rules are sufficiently stable to guide people’s action; that (vii) adjudication is guided by rules that are sufficiently promulgated, clear, stable and general; and (viii) that those in authority are accountable for their compliance with these rules and do administer them. These are all characteristics that can be achieved to a greater or lesser extent, but these desiderata make up the Rule of Law. However, I am not arguing that the Rule of Law is equivalent to democracy, or a tendency of governments and citizens to abide by the law peacefully, or any other, further set of substantive rights and obligations.

### 3.5 A Counter-Argument to a Substantive Conception of the Rule of Law

The counter-argument to this conception of the Rule of Law has been made by Joseph Raz. He argues that the Rule of Law does not have these eight desiderata, because the Rule of Law is not equivalent to the rule of good law. The Rule of Law cannot be taken to include every political ideal which has found some support, or else it loses its meaning, and would only be shorthand for a complete social philosophy.

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28 John Finnis, *Natural Law and Natural Rights* supra note 10 at 270

29 Such views are aptly critiqued: Joseph Raz, “The Rule of Law and Its Virtue” supra note 10 at 196

Instead, on Raz’s formal conception of the Rule of Law, institutions and laws must only take certain forms, but there is no role for the eight desiderata mentioned above.\textsuperscript{31} There are three loci of value in the Rule of Law: (1) The Rule of Law provides protection against a certain kind of authoritarian government, but not all kinds; (2) This conception protects a particular kind of liberty – the freedom that comes when power is exercised in a predictable manner. This might not protect political liberties or criminal action from others; (3) this version of the Rule of Law respects a certain kind of human dignity, but not all kinds. It presupposes that people are “rational autonomous creatures”.\textsuperscript{32}

This conception of the Rule of Law is as a negative value: it only prevents arbitrariness, rather than guarantees good law. Conformity with the Rule of Law does not bring about good. It merely prevents evil, and this evil is only the kind that is enacted through or by a legal system. That the Rule of Law cannot allow arbitrary force of violation of freedom and dignity is no moral credit to it.\textsuperscript{33}

\section*{3.6 In Defence of the Substantive Conception of the Rule of Law and the Oversight Claim}

Raz’s argument, however, is misplaced. The Rule of Law is not a guarantee that laws will themselves be good. Rather, there is something worthwhile about the law’s inability to sanction arbitrariness or violations of freedom and dignity, insofar as it realizes the Rule of Law – understood as an ideal encapsulated by the eight desiderata above. The Rule of Law being a negative value does not take away from its being a value. If it is infringed completely, we do not have a legal system.

If those who hold power are subject to the same laws as everyone else, they are less likely to create bad ones. The Rule of Law as a normative principle constrains the encroachment of administrative law into otherwise unregulated spheres of activity by demanding of the state a justification of this very same encroachment.

\begin{flushleft}
\textsuperscript{31} Ibid, at 214-218 \\
\textsuperscript{32} Ibid at 219-222 \\
\textsuperscript{33} Ibid at 224
\end{flushleft}
The argument for the Oversight Claim is that the Rule of Law, understood as the eight desiderata above, is the overarching principle constraining administrative or regulatory action. The state may have any number of purposes to proposing administrative regimes, such as preventing harm to otherwise vulnerable members of the public or conferring benefits on whose who meet certain criteria. These purposes are within the ambit of legislative prerogative, and may be more or less desirable for public policy reasons.

However, it is not within the power of the legislature to enact unconstitutional administrative regimes that contravene the Rule of Law. As a consequence of respect for the Rule of Law, the state must justify why it is regulating certain activities. This is precisely because regulating certain activities means that the default obligations on actors in the proposed sphere of regulated activity is reversed, and that which individuals were formerly at liberty to do is now only legal to the extent allowed by the state. This change means that individuals who are engaged in similar activities are treated differently than others. The Rule of Law as a normative principle constrains the encroachment of administrative law into otherwise unregulated spheres of activity by demanding of the state a justification of this very same encroachment.

Perhaps the point has been put best by David Dyzenhaus when writing of the apartheid regime in South Africa:

“The rule of law has to be more than the fiat of officials… it establishes what during South Africa’s transition to democracy an eminent public lawyer called a “culture of justification”: “a culture in which every exercise of power is expected to be justified; in which leadership given by governments rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command.” For officials to play their role in such a culture, they have to offer not only reasons to those affected by their decisions, but also reasons that do adequately justify their decisions.”34

The Public Interest Jurisdiction of the Ontario Securities Commission illustrates the force of the Oversight Claim. As will be argued, this power is left up to the complete discretion of the

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regulator. It may determine what is and is not in the public interest, and fashion a broad range of remedies in the absence of any conviction for an enumerated offence. In so doing, it fails to fulfill the eight desiderata that are required by the Rule of Law, as articulated above.
Chapter 3
Administrative Monetary Penalty Regimes

Administrative Monetary Penalties (“AMPs”) sound very innocuous. While the word penalty may seem intimidating, it is modified by the word monetary, which puts to rest any fears that the penalty being sought requires jail time. Further, the word administrative makes AMPs sound routine and unthreatening, as though they are being imposed for regulatory infractions that are universally acknowledged to be trivial, and the need for the regulation in question is something no one would disagree with. However, AMPs constitute an unprecedented expansion of the administrative state and its powers. The agencies charged with the responsibility of enforcing the provisions of AMP statutes are granted considerable discretion in how they do so.

1 What are AMPs?

AMPs are statutory creations. At common law, criminal enforcement is done by the Crown, and civil disputes can only be brought by parties with standing to bring them. AMPs are often described as falling between criminal enforcement and administrative remedies, or quasi-criminal sanctions. The power to award AMPs has been granted to a host of regulators, who describe them in various ways. The Canadian Border Services Agency (CBSA) describes AMPs as “a civil penalty regime that secures compliance with customs legislation through the application of monetary penalties. AMPs authorize the CBSA to assess monetary penalties for non-compliance with customs legislative, regulatory and program requirements.” AMPs can be applied when a regulated entity breaches the Acts the CBSA enforces, or contravenes any license the CBSA has granted. The CBSA notes that “most penalties are graduated and will take the compliance history of the client into consideration” and claims that “AMPS does not impact businesses who comply with customs requirements [sic].”35

Other regulators describe AMPs in similar language, and assure the public and regulated individuals alike that there is nothing to fear. The Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”), which enforces money laundering legislation regulating

financial institutions, advises that AMPs are “an additional tool to criminal sanctions with the objective of supporting and enhancing efforts to ensure compliance on the part of reporting entities. AMPs allow for a measured and proportionate response to particular instances of non-compliance.”

The National Energy Board advises that “AMPs provide regulatory agencies with a flexible enforcement tool to complement other types of regulatory sanctions such as orders, directions, and prosecution.”

Regulators seem keen to establish that AMPs are nothing more than an additional means of completing their respective legislated mandates. However, the regulated individuals who find themselves the recipient of an administrative monetary penalty might disagree.

2 Examples of AMPs

AMPs can be found in many provincial and federal statutes, including consumer protection legislation, environmental legislation and securities legislation. These AMPs authorize regulators to seek as much as $1 million for each failure of a person or corporation to comply with the relevant statute.

The case of Mr. Mario Castillo will serve to illustrate how AMPs work, and the particular sort of unfairness they occasion. On January 25, 2012, Mr. Castillo arrived from El Salvador in Toronto, and completed the Declaration Card that all arriving passengers must complete. He answered “no” to the form’s question: “I am/we are bringing into Canada Meat/meat products; dairy products; fruits; vegetables; seeds; nuts; plants and animals or their parts/products; cut flowers; soil; wood/wood products; birds; insects”. The CBSA sent Mr. Castillo for a secondary inspection, and found that his luggage contained 15 pieces of fried chicken with an approximate value of $18. The CBSA issued a Notice of Violation under the Agriculture and Agri-Food...
Administrative Monetary Penalties Act\textsuperscript{39} with a penalty of $800, which could be reduced to $400 by paying within 15 days. Mr. Castillo, instead of paying the AMP, requested an oral hearing before the Canada Agricultural Review Tribunal. There, Mr. Castillo explained that he did not know the chicken was in his luggage because his mother had placed it there without his knowledge while he was in the shower in El Salvador. The tribunal found that the CBSA must prove that it gave Mr. Castillo a reasonable opportunity to justify the importation – a requirement not listed in the AMP regime – and it had not done so. The Tribunal found Mr. Castillo had not committed the violation and was not liable for the penalty.\textsuperscript{40}

The CBSA applied to the Federal Court of Appeal. The Court reviewed the legal framework, and noted its peculiarities: (i) that the purpose of this system is to protect Canada from the introduction of foreign animal diseases;\textsuperscript{41} (ii) that the penalty for a serious violation is $800 and a very serious violation is $1,300, and that this offence was classified as a serious violation;\textsuperscript{42} and (iii) that the defences of due diligence and reasonable and honest mistake of fact are not available to a person accused of contravening this AMP regime.\textsuperscript{43} Under this regime, the Court found that it was of no assistance to Mr. Castillo that he did not know he was importing chicken. It also noted that it was irrelevant that he could not have correctly completed the form, given that his mother had surreptitiously packed his bag for him. Instead, the Court noted:

“Mr. Castillo may have been unaware that the chicken was in his luggage, but this is of no assistance to him given a plain reading of the provisions and the clear intention of Parliament to provide for an absolute liability regime for these types of violations. As this Court has noted before, the AMP system can be harsh… but it is clear that Parliament

\textsuperscript{39} \textit{Agriculture and Agri-Food Administrative Monetary Penalties Act}, S.C. 1995, c. 40, subsection 7(2)

\textsuperscript{40} \textit{Canada Border Services Agency v. Castillo}, 2013 FCA 271 at paras. 1 - 9 [“Castillo”]

\textsuperscript{41} \textit{Ibid} at para. 15

\textsuperscript{42} \textit{Ibid} at paras. 17 and 18

\textsuperscript{43} \textit{Ibid} at para. 20
intended that it be so, given the important stated objective of protecting Canada from the introduction of foreign animal diseases.”

In short, the mere fact that Mr. Castillo had incorrectly completed a form, regardless of his inability to properly complete it because of his mother’s actions, was sufficient to trigger a penalty 444% of the value of the impugned product. For all the CBSA’s website’s comforting language about AMPs being only a means of completing their mandate, it is hard to describe this AMP regime as anything but draconian. An $800 penalty for an offence from which a party receives no financial gain, and for which he has been deprived of the defences of demonstrating that he properly searched his bag or that he honestly believed he was not importing the product, is in no way proportionate to the violation at issue. Further, no evidence that the fried chicken actually did pose a risk or threat of importing a foreign disease was presented. The CBSA may well have felt that this was irrelevant; that is, whether the harm the AMP regime seeks to curb had actually occurred or not was not an important consideration in determining a violation had taken place. Under the plain language of the legislation, they were right. AMPs grant regulators, such as the CBSA, the power to proceed with penalties completely untethered to the actual harm these offences cause. It should be noted that this AMP regime ties the penalty to the “seriousness” of the offence as defined in the legislation, but this is a different consideration than the actual harm the commission of the offence occasions. That this particular offence was classified as serious is set out in the regime. However, it is not tied to the actual harm the act causes, as no evidence is required that any harm was actually brought about.

Further, the penalty is reduced by half if it is paid promptly, which provides a real incentive to regulated individuals not to challenge any violation and allow the CBSA’s enforcement activities to go unchecked and without review. They allow regulators to completely bypass the procedural protections of criminal law and natural justice, and they allow for the imposition of fines that may have no bearing whatsoever on what would be a sufficient fine to deter regulated individuals from engaging in that conduct. This is unfair.

44 Ibid at para. 24
45 Ibid at paras. 17 and 18
3 In Defence of AMPs

In theory, AMPs are nothing more than fines. They are awarded by a tribunal or decision-maker acting under a statutory power to award them for breaches of the obligations of that same statute, or a statute that is listed as one for which AMPs may be awarded. As the rationales provided by the regulators cited above demonstrate, regulators argue that AMPs are merely another tool of enforcement. Without them, a regulator will typically have a number of common administrative remedies, such as seeking injunctive orders requiring a regulated individual to do or cease doing a regulated act, remedial orders such as those available in environmental legislation to require an entity to restore a parcel of land to a certain standard, or only the ability to impose conditions on a licence or revoke that license altogether. Of course, revoking a licence of a regulated individual, when that individual’s livelihood depends on having that license, is a severe punishment, and any such decision is subject to the full protection of procedural fairness and natural justice. Regulators, without AMPs, might also refer a matter for prosecution in provincial court by the Crown. However, the Crown would be required to prove the elements of the breach of the statute in question beyond a reasonable doubt, and would only pursue the most egregious of cases.

AMPs avoid the need for any of these problems, from the regulator’s perspective. The onus of proving its case is the civil standard of a balance of probabilities. The steps required before the hearing of the matter on the merits is considerably shorter, and may only consist of a prehearing. The formal rules of evidence and rules of Court required for a regulator to proceed criminally in the Ontario Court of Justice or bring an application under its governing legislation in the Ontario Superior Court of Justice are considerably less restrictive. Hearsay evidence may be admitted,

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46 See, e.g. Farm Products Marketing Act, R.S.O. 1990, c.F.9, s. 13
47 Environmental Protection Act - O. Reg. 153/04, ss. 27-35
48 See, e.g. Law Society Act, R.S.O. 1990, c.L.8, ss. 27-31
49 1657575 Ontario Inc. v. Hamilton (City), 2008 ONCA 570 at para. 19
50 See, e.g. Law Society Act, R.S.O. 1990, c.L.8, s. 26.2(1)
for example.\textsuperscript{51} In short, pursuing AMPs through tribunals is much better for regulators because the procedures are more cost-effective and simpler.\textsuperscript{52}

However, the same could be said of any administrative regime that allows a regulator to proceed by way of tribunal, rather than through a court of competent jurisdiction. What sets AMPs apart as a helpful remedy, from the regulator’s point of view, is that they allow considerable discretion on behalf of the regulator, and allow the regulator to craft a sizable “punishment to fit the crime”, for lack of a better phrase. AMPs allow regulators to set fines of sufficient magnitude to deter the regulatory breach in question, in both the specific individual so charged and the wider regulated public in general. In theory, regulators would also set fines that are not as great as to serve as a disproportionate response, as far as the regulator is concerned.

4 The Regulator’s Function

What is the mandate of a given regulator? Regulators are tasked with managing the industry- or profession-wide risk of certain harms, say for example, deceptive marketing practices.\textsuperscript{53} While the Competition Bureau proceeds with a proceeding before the Competition Tribunal against an individual or corporation is seeking an AMP of as much as $15 million for a subsequent offence by a corporation for example,\textsuperscript{54} it is also sending a clear message to the entire industry that deceptive marketing practices may be met with a similar sanction. The expectation, then, is that regulated entities will factor into any cost-benefit analysis a potential AMP of $15 million in marketing or labeling its products, and conclude that the risk of doing so deceptively is too great. These regulated entities will then, out of their own self-interest, undertake policies and procedures to curtail any deceptive marketing practices, and ensure that any representation made

\textsuperscript{51} Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s. 15(1)

\textsuperscript{52} R. M. Brown, “Administrative and Criminal Penalties in the Enforcement of Occupational Health and Safety Legislation”, 30 Osgoode Hall L.J. 691 at 727

\textsuperscript{53} Competition Act, R.S.C. 1985, c. C-34, s.74 [“Competition Act”]

\textsuperscript{54} Ibid, s.74.1(1)(c)
to the public is not deceptive. They may hire counsel to advise their marketing department on its work, and take other steps to ensure that the risk of an AMP does not materialize.\textsuperscript{55}

The language of the Act regulating deceptive marketing practices appears to uphold this view that the function of the Competition Bureau is to manage industry-wide risk. In subsection 74.1(4), the purpose of AMP is listed as the promotion of conduct that conforms to the purposes this part of the \textit{Competition Act}, and not with a view to punishment. While this is somewhat circular, these purposes have been found to be “the protection of consumers, competitive firms and competition from the harmful effects of untested performance claims”.\textsuperscript{56} In \textit{Canada (Commissioner of Competition) v. Chatr Wireless Inc.}, for example, the regulated entity Chatr Wireless was found to have made deceptive claims about having fewer dropped calls than its competition. The Court discussed AMPs through the lens of risk management rather than harm reduction. The amount of any AMP ordered must be proportional to the nature of the regulated individual whose conduct one seeks to change, and the Court held that “permitting untested claims to be made in the marketplace will decrease consumer confidence because some claims will turn out to be false or misleading. Section 74.01(1)(b) is preventative. It prevents untested false or misleading claims because it requires testing prior to publication.”\textsuperscript{57} Similarly, the Competition Tribunal has held that the deceptive marketing practices provisions are not intended for punishing people for harm caused to society in general; rather, they are a broad tool to allow the regulator to protect the public in accordance with the policy of the empowering statute, and “for the protection of the public against the adverse consequences of deceptive advertising and fraudulent commercial practices.”\textsuperscript{58}

Given this function, AMPs are just a more effective tool than criminal prosecution or other regulatory enforcement for managing industry-wide risks. To take another example cited above,

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\textsuperscript{56} \textit{Canada (Commissioner of Competition) v. Chatr Wireless Inc.}, 2014 ONSC 1146 at para. 8
\textsuperscript{57} \textit{Ibid}
\textsuperscript{58} \textit{Commissioner of Competition v. Gestion Lebski inc.}, 2006 CACT 32 at para. 51
\end{flushright}
the purpose of AMPs in environmental regulation is to “provide for the assessment of environmental penalties in a manner that encourages regulated persons to (a) take steps to prevent contraventions; (b) take steps to mitigate the effects of contraventions and to prevent their recurrence; (c) implement environmental management systems; and (d) enter into agreements… to take steps for the protection of the natural environment beyond the measures required by the Act…”⁵⁹ In short, this is an explicit attempt to price into corporate or a regulated person’s behaviour the externalised cost of the environmental impact that behaviour might have. It also goes further, and asks regulated entities to take upon themselves the mandate of the regulator: namely, the protection of the environment and the mitigation of risks to the environment that the regulated entities’ behaviour may pose.

5 The Regulator’s Role Revisited

There are a number of problems with managing industry-wide risk by way of AMPs. The first is that although AMPs may be seen as industry-wide signals of what is and is not acceptable behaviour in the mind of the regulator, these AMPs are not levied industry-wide but instead at a specific firm or person. That firm or person may turn to a number of defences: they may argue (i) that their particular circumstances or the circumstances in which the breach took place militate against a harsh AMP, or (ii) they may make a substantive due diligence defence or honest mistake defence.

Taking the first defence first, the deceptive marketing practices example addressed earlier provides precisely such a defence. If the regulated entity has been found to have engaged in deceptive marketing practices, it may tender evidence that (a) the conduct was restricted to a specific area; or (b) it was brief and only took place once; or (c) that the class of persons adversely affected are not especially vulnerable; or (d) that the misrepresentation at issue was not material; or (e) it would have likely self-corrected the mistake if given sufficient time; or (f) that there was little to no effect on competition; or (g) that the gross revenue generated by the

⁵⁹ *Environmental Penalties Regulation*, O. Reg. 22/07, s. 1
deceptive marketing practice was negligible; or (h) the entity is in a precarious financial position; or (i) that this was a first offence. 60

All of this evidence indicates that whatever AMP is levied is not a useful indicator of how similar conduct by another regulated entity would be treated, because these are highly individualised and contextual factors that are unlikely to apply to another entity in precisely the same way. They serve not to allow regulators to mitigate risk by encouraging regulated entities to internalise their otherwise externalised costs, but instead to demonstrate that each infraction of the regulations will be treated on its own merits, and differently. Although it could be argued that factor (i) encourages regulated individuals to demonstrate a history of compliance with the Competition Act, this history is only one of the factors listed, and would only be relevant if the transgression were minor and insignificant in comparison to the regulated entity’s otherwise spotless history of regulatory compliance.

This is not to say that AMPs will not be an effective enforcement tool because any case will be so individualised as not to be applicable to any other case. Rather, the extent to which an AMP takes into account the individual circumstances of a regulated person’s breach, the fairer the decision. However, engaging in the process of assessing each case through the lens of its individual circumstances takes time, effort, and reduces the speed with which these cases can be processed, and makes the AMP regime less different from the normal criminal, administrative and civil remedies already at the regulator’s disposal.

The second defence to which a regulated entity may turn is a due diligence defence. There is some dispute about when this defence will be available. There have been regulators who took the position that just as regulatory offences can be viewed as absolute liability offences (where fault is irrelevant) rather than strict liability offences (where a defendant can raise the absence of fault as a defence), so too AMPs are also imposed for a breach of a regulatory provision, and no due diligence defence is available. 61 For example, the Ontario Securities Commission took this

60 These are all listed as factors in the Competition Act, supra note 53, s. 74.1(1)(5)

61 The CBSA case of Castillo, supra note 40, is one example, and the Federal Court of Appeal agreed with this position.
However, the Federal Court of Appeal made a firm statement that the due diligence defence ought to be available to all regulated entities charged with a violation of an AMP regime:

“That a person should be susceptible of being penalized administratively by a public servant without any possibility of exculpating himself by demonstrating due diligence is not only extraordinary. It is abhorrent. It is no less abhorrent because it is mechanically and routinely imposed by anonymous revenue officials and therefore qualifies for the essentially meaningless rubric “administrative” rather than “criminal”. A punishment is a punishment. Neither its nature nor its effect is tempered by the use of palliative modifiers.”

This is strong language, and relies on the Supreme Court of Canada’s ruling that there ought to be a presumption that regulatory offences are strict liability offences rather than absolute liability offences. The Federal Court of Appeal noted that this same presumption ought to apply to AMPs as well, after considering four factors: (1) the precision of the statutory language; (2) the importance of the penalty; (3) the subject matter of the legislation; and (4) the overall regulatory pattern adopted by the legislature. This presumption can be rebutted, however, if the language of the statute is unequivocal that absolute liability for AMPs was intended, or if the due diligence defence is incompatible with the legislative scheme. Even then, however, it may be that the absence of a due diligence defence renders an injustice or unfairness such that a court is justified in reading into an Act words that permit a due diligence defence “if it can be shown that the

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66 Ibid, at para. 37
relief being granted is compatible with the legislative scheme and neither frustrates nor undermines its purposes.\textsuperscript{67}

While there is room to argue that it is not settled law a due diligence defence is available for AMPs, there is considerable support for the proposition that one ought to be available. A due diligence defence is necessarily only available if the facts of a particular case warrant it. A director or officer of a corporation can demonstrate that he or she has exercised the degree of care, diligence and skill to prevent the regulatory breach in question that a reasonably prudent person would have exercised in comparable circumstances.\textsuperscript{68} This can be done by demonstrating, for example, that the objective and subjective elements of the honest mistake of fact defence, such as that the officer or director was reasonably mistaken as to the facts leading to the violation in question, can be established. The subjective test is met if the defendant establishes that he or she was mistaken as to a factual situation which, if it had existed, would have made his or her act or omission innocent. In addition, for this aspect of the defence to be effective, the objective test is that the mistake must be reasonable, such that a reasonable person in the same circumstances would have made that mistake.\textsuperscript{69}

Any argument that the regulated individual in question demonstrated sufficient due diligence will require an individualized examination of whether that individual engaged outside expertise in arriving at the impugned decision, what investigative steps were taken in arriving at that decision, and any other facts that would tend to demonstrate that the regulated individual, through no fault of his or her own, contravened the regulatory provision in question, notwithstanding all proper attempts to avoid doing just that. These enquiries will necessarily be specific to the individual charged with the regulatory breach, and would make any application of the AMP to a more general class from that specific individual difficult. While it may be an open question whether a due diligence defence is available for all AMPs, the availability of a due diligence defence would go some way to satisfying the justificatory gap in the Justification Claim. This defence would reintroduce into the AMP regime a substantive defence and an

\textsuperscript{67} \textit{Ibid}, at para. 38
\textsuperscript{68} \textit{Hartrell v. Canada}, 2008 FCA 59 at para. 8
\textsuperscript{69} \textit{Norlock v. The Queen}, 2012 TCC 121 at para. 14
element of due process that is otherwise not available in the AMP regime, and would require the state to provide more in the way of justification for seeking AMPs against the likes of Mr. Castillo who had a perfectly valid reason and defence to the charge he faced.

6 So what is wrong with AMPs?

AMPs, unless given restrictions through legislation or the Courts, allow regulators to circumvent the demands of natural justice, fairness and proportionality. In criminal law, sentences for convicted persons must conform to Sentencing Principles. In crafting an appropriate sentence, the sentencing judge is required to take into account the proportionality of a sentence by 718.1 of the Criminal Code. The Criminal Code also sets out the purposes of sentencing in section 718 of the Criminal Code, which include: (a) to denounce unlawful conduct; (b) to deter the offender and other persons from committing offences; (c) to separate offenders from society, where necessary; (d) to assist in rehabilitating offenders; (e) to provide reparations for harm done to victims or to the community; and (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community. Although denouncement and the second purpose of deterrence are listed, so too is rehabilitation and providing reparations. These principles direct judges to consider more than the mere fact that an offence has been committed. No such sentencing principles apply to AMP regimes.

As argued above generally, AMPs pose a drastic and unprecedented expansion of the administrative state, and this expansion calls for justification. The ability of the state and its agents to marshal the penal aspects of law for regulatory infractions, while omitting the burdens of due process, the criminal burden and standard of proof, and availing themselves of a lesser standard when admitting evidence, requires the state to provide more in the way of justification than the platitudes provided above about AMPs being merely another tool of enforcement.

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71 Ibid, s. 718
As set out by Justice Létourneau in *Doyon v. Canada (Attorney General)*\(^{72}\) in reference to the *Agriculture and Agri Food Administrative Monetary Penalties Act*,\(^{73}\) but which could equally apply to any similarly structured AMP regime, these are highly punitive systems that operate without any of the protections afforded by criminal law. These regimes punish diligent individuals who take reasonable steps to comply with the legislation if no due diligence is afforded to them. They deny individuals the right to make mistakes. They deny the benefit of any reasonable doubt to regulated individuals, and decide guilt on a balance of probabilities. “In short, the Administrative Monetary Penalty System has imported the most punitive elements of penal law while taking care to exclude useful defences and reduce the prosecutor’s burden of proof. Absolute liability, arising from an actus reus which the prosecutor does not have to prove beyond a reasonable doubt, leaves the person who commits a violation very few means of exculpating him- or herself.”\(^{74}\)

However, arguments that the magnitude of AMPs being levied against regulated individuals mean that regulated individuals are facing penal consequences without any of the protections of penal law have been rejected by the Federal Court of Appeal.\(^{75}\) In this case, U.S. Steel had been the subject of an AMP of $10,000 per day for failing to abide by its employment and production undertakings under the *Investment Canada Act*\(^{76}\) because of difficult economic circumstances arising from the 2008 financial crisis. The Court found that this AMP was not criminal and was justified, arguing that:

“A statutory power to impose fines that comes along with little statutory guidance will not [be criminal] as long as it is exercised in a way so as to achieve proper administrative aims. The deterrence goals of the Act will necessarily be front and centre. The fact that such an approach to setting penalties accords well with the goals of the Act and of the

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\(^{72}\) 2009 FCA 152 at paras. 21, 24 and 25

\(^{73}\) S.C. 1995, c. 40

\(^{74}\) *Doyon v. Canada (Attorney General)*, 2009 FCA 152 at para. 27

\(^{75}\) *United States Steel Corporation v. Canada (Attorney General)*, 2011 FCA 176 at para. 25, 78-81

\(^{76}\) R.S.C. 1985, c. 28
sanction further suggests that an approach to setting penalties that is focused on deterrence is appropriate.”

Despite this unfortunate ruling, the fact remains that AMPs provide regulators with discretion to pursue regulated individuals for failures to comply with regulation, however minor, and to impose AMPs of considerable magnitude without much of the checks and balances that normally attend criminal law proceedings, or even administrative law proceedings for this matter. This presents a real gap in terms of normative justification. The state has not fulfilled any of the obligations set out above in either the Obligation Claim or the Oversight Claim. AMPs allow regulators to be judge, jury and executioner over regulated individuals, with no right to due process.

The Obligation Claim and Oversight Claim allow for the law’s hold over us, and our respect for it, by requiring the state to justify its actions. This is as a function of the reciprocity of law. AMPs, however, are excellent demonstrations of how the Obligation Claim operates. Having one’s mother secretly pack fried chicken in your bag would normally be conduct – if it can be so characterized – one is at liberty to do. Further, one would not be required to make any statements about whether there are or are not pieces of fried chicken in one’s bag. However, under the operation of an AMP regime, this legal assumption is altered such that one is only permitted to have one’s mother pack fried chicken in one’s bag so long as one discloses this, and is granted permission by an appropriate CBSA officer. This leaves a justificatory gap. To illustrate the nature of this gap and argue for the Justification Claim, I turn next to the prosecution of unauthorized practice by regulatory bodies.

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77 United States Steel Corporation v. Canada (Attorney General), 2011 FCA 176 at para. 81
Chapter 4
Unauthorized Practice Applications/Prosecutions by Regulatory Bodies

In order to practice in many professions, an individual must satisfy the licensing requirements of the regulator of these professions. An individual who willingly applies for a license to practice law or medicine, and is granted a licence, is thereafter subject to the jurisdiction of that regulator. As the individual consented to this jurisdiction through his or her application, the individual ought to be aware that he or she may well be subject to discipline proceedings before that body for misconduct or incompetence in practicing that profession.

The same is not true of individuals who are not members of these same professions. As argued above, outside the sphere of regulated activities, an individual is at liberty to do anything that he or she is not prohibited from doing by law. It would seem then that these individuals would not be subject to prosecution from regulators.

However, this is not so. Regulators can still pursue non-regulated entities so long as they are engaging in a regulated act. Although each profession differs slightly, the general structure of much professional regulation is as follows: a statute sets out that a regulator is responsible for protecting the public interest in relation to some profession. That regulator is then charged with the responsibility of licensing individuals who seek to practice this profession, bringing discipline proceedings against members for professional misconduct, and may also be charged with other tasks. The regulator is also usually provided a statutory right or duty to pursue individuals who breach the act by failing to become licensed, and engaging in regulated conduct. However, as with much else in life, the devil is in the details. What constitutes regulated conduct is often not defined explicitly in the empowering legislation. Where regulators are granted power to interpret the ambit of regulated conduct, they are thereby given the power to extend their own jurisdiction, and this creates a justificatory gap where regulated conduct is extended the beyond the core of activity that actual poses a harm necessitating regulation in the first place. Where regulators must seek Court approval, this at least puts a check on the regulator’s ability to expand its own jurisdiction, as the Oversight Claim prescribes. However, given that the regulator merely has to establish that regulated conduct was engaged in without a license, there is a real danger
that Court oversight does not fully engage the Rule of Law as a normative exercise in circumscribing the ambit of regulated conduct.

1 The Law Society's Legislated Framework Example

As there are many instances, I will use the Law Society of Upper Canada ("LSUC") and its unauthorized practice applications as an example. LSUC is, among other things, responsible for protecting the public’s interest in relation to two regulated activities: (1) the practice of law and (2) the provision of legal services in Ontario. In this role, LSUC’s mandate includes ensuring that persons who practice law and provide legal services are properly qualified and insured. LSUC licenses paralegals (who provide legal services) and lawyers (who practice law). It is also tasked with enforcing the provisions of the Act, which prohibit the unlicensed provision of legal services and the unlicensed practice of law. This section also precludes a non-licensee from holding himself or herself out as a person who may practise law or provide legal services.

If LSUC is satisfied that an individual has engaged in the practice of law or providing legal services without being licensed to do so, LSUC may seek a summary conviction and a fine of $25,000, or it may bring an application before the Superior Court of Justice seeking a permanent injunction to enjoin that person from providing unauthorized legal services or practicing law or holding themselves out as a person who may provide legal services or practice law. Seeking a summary conviction carries with it all of the criminal law requirements for conviction, including the criminal standard of proof beyond a reasonable doubt. Once LSUC has successfully obtained an injunction, however, it can punish any further breaches of the Act through seeking a finding of contempt of court, and seek a jail sentence without having opted for the criminal prosecution route set out in its empowering statute.

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78 Law Society Act, R.S.O. 1990, c. L.8, ss. 4.1, 4.2 and 27(1) [“Law Society Act”]

79 Ibid, s. 26(1)

80 Ibid, s. 26.2(1)

81 Ibid, s. 26.3(1)
2 LSUC’s Regulated Conduct

The regulated activity that would warrant this judicial response is not completely spelled out. Providing legal services is defined broadly as engaging “in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person”. After this general definition, a list of specific instances of providing legal services is given: (1) giving legal advice; (2) drafting legal documents; (3) representing a person in a proceeding before an adjudicative body; and (4) negotiating the legal interests, rights or responsibilities of a person.

Practicing law, however, is undefined in the Act or the regulations promulgated under it. Case law has provided a host of instances where individuals were found to have practiced law for incorporating companies, drafting a separation agreement in a matrimonial dispute, or someone who “conducts an action or other legal proceeding on behalf of another, or advises that other persons on legal matters, or frames documents intended to have a legal operation, or generally assists that other person in matters affecting his legal position.”

3 A Monopoly Authorized by Statute

Lawyers are not unique in having a legislated monopoly over regulated conduct. Similar regimes have been set up to cover professions and occupations as diverse as doctors and other health care practitioners to foresters and land surveyors. In 1953, the Court of Appeal found it

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82 Ibid, s. 1(5)
83 Ibid, s. 1(6)
87 Regulated Health Professions Act, 1991, S.O. 1991, c. 18, s. 27(1), which prohibits unlicensed individuals from engaging in one of 14 controlled acts, chief among which is providing diagnosis.
88 Professional Foresters Act, S.O. 2000, c. 18, s 5(1)
89 Surveyors Act, R.S.O. 1990, c. S.29, s. 11(1)
perfectly acceptable that the purpose of this broad prohibition was not only the protection of the public, but the protection of the professionals themselves:

“One must not lose sight of the object of the legislation. It is twofold. It is to protect members of the legal profession who have been admitted, enrolled and duly qualified as solicitors against wrongful infringement by others of their right to practise their profession. It is also for the protection of the public and I quote … “To protect the public against persons who, for their own gain, set themselves up as competent to perform services that imperatively require the training and learning of a solicitor, although such persons are without either learning or experience to qualify them, is an urgent public service.”  

However, more recently, the B.C. Court of Appeal with respect to the regulation of Optometrists and the Manitoba Court of Queen’s Bench with respect to lawyers found that the purpose of these monopolies is exclusively the protection of public, and the regulated individual’s “proprietary interest, if it exists,… is of little significance”. 

Professional monopolies may be perfectly justified. If practicing law is merely doing what lawyers do, then the requirement to be licensed amounts to only the non-contentious and tautological proposition that “only lawyers may do what lawyers do.” Regulators, in restricting who can practice a profession, can ensure that a certain minimum standard of competency and knowledge has been obtained, at least at the licensing stage. Professionalism, understood as a set of skills and knowledge as well as a standard of conduct which all members possess by virtue of their education and training, is something a regulator may well be best positioned to judge and enforce. Even the Competition Bureau has taken the position that regulated professions, whose empowering legislation restricts the performance of activities to licensed individuals, are exempt


92 There is a healthy debate on the merits of professional monopolies, but it is at least arguable that they perform the function of ensuring a standard of professionalism. See, e.g., Manitoba Law Reform Commission, “Regulating Professions and Occupations” (Winnipeg: Manitoba Law Foundation, 1994); Margot Priest, "The Privatization of Regulation: Five Models of Self-Regulation" (1997-98) 29 Ottawa L. Rev. 233
from the prohibitions against anti-competitive behaviour in the *Competition Act*\textsuperscript{93} under a regulated conduct exemption; namely, if provincial legislation empowered a regulator to license individuals to pursue a profession and that legislation was not *ultra vires*, then provincial legislation could not be challenged by the Competition Bureau.\textsuperscript{94}

Instead, the argument here is concerned with the prosecution of individuals who are not subject to the jurisdiction of the regulator, but who are charged with having engaged in the unauthorized practice of some regulated conduct. Unauthorized practice applications directly engage the question of to what extent a legislated professional monopoly may restrict the activities of non-regulated individuals – members of the public at large – from intruding on that profession’s turf. It is worth noting that a monopoly on practice cannot be maintained unless the regulators charged with maintaining that monopoly are given the power to prevent unlicensed and unqualified parties from participating in that conduct. This is true. However, the question that engages the Justification and Oversight Claims is to what extent do unauthorized practice applications represent the legitimate regulatory purpose of protecting the public from unqualified practitioners, rather than an effort on the part of the regulator to expand its own jurisdiction and prevent perfectly qualified individuals from competing with members of the regulator’s profession.

4 What is Wrong with Unauthorized Practice Applications?

LSUC has the option to pursue criminal proceedings against unauthorized individuals, or it can circumvent the criminal law protections afforded to all criminally accused persons, and instead opt to pursue a civil remedy: the permanent injunction. Similarly, the Ontario Colleges of Chiropractors, Optometrists, Physicians and Surgeons, Psychologists and the Royal College of

\textsuperscript{93} Supra note 53.

\textsuperscript{94} Competition Bureau Canada, “Technical Bulletin on Regulated Conduct” (Ottawa: Competition Bureau, 2006); Competition Bureau Canada, “Self-regulating Professions: Balancing Competition and Regulation” (Ottawa: Competition Bureau, 2007)
Dental Surgeons of Ontario have a similar election. Unlike a criminal prosecution, an unauthorized practice application is not undertaken by the Crown, who would exercise a gatekeeper function and likely only pursue serious breaches. Instead, at its sole discretion, these regulators can pursue individuals for engaging in regulated conduct without a license.

In many instances, a regulator will be perfectly justified in preventing unlicensed and unqualified persons from engaging in, say dentistry if there is a serious risk of harm to the public. It will be remarkably easy to make out the case that an unlicensed dentist who knows nothing of dental surgery ought to be prevented from carrying out dental surgery on an unsuspecting public. Dental surgery, however, is close to the core of what dentists do.

The problem is that the further a “regulated act” is from the core of what one thinks of a professional as doing qua professional, the more likely it is that the regulator is not engaged in protecting the public, but instead is protecting the “proprietary interests” of its members alluded to above against intrusion from an opposing profession. Two examples will illustrate this point: (1) immigration consultants, and (2) mediators.

### 4.1 Immigration Consultants

In *Law Society of British Columbia v. Mangat*, Mr. Jaswant Singh Mangat was an immigration consultant, and appeared before the Immigration and Refugee Board (“IRB”) on behalf of his clients during immigration proceedings. He was not a lawyer, had not studied law, and was not a member of the Law Society of British Columbia (“LSBC”). LSBC brought an unauthorized practice seeking a permanent injunction to prevent Mr. Mangat from practicing law. Mr. Mangat argued that while his conduct was practicing law, it was protected by the provisions of the *Immigration Act* permitting non-lawyers to represent clients at the IRB. At trial, the injunction was granted on the grounds that the Immigration Act did not permit the practice of law. The

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95 Section 87 to the *Health Professions Procedural Code*, being Schedule 2 to the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18, s.37(3)

96 2001 SCC 67 [“Law Society of British Columbia v. Mangat”]

97 R.S.C. 1985, c. I-2, ss. 30 and 69(1)
Court of Appeal reversed this decision on the constitutional grounds of the doctrine of interjurisdictional immunity.\(^9^8\)

The Supreme Court of Canada, again on constitutional grounds, dismissed LSBC’s appeal. While most of the decision concerns the constitutional doctrine of paramountcy, the Court noted the following about the different roles of lawyers and paralegals:

> “Provincial law societies or bars are entrusted with the mandate of governing the legal profession with a view towards protecting the public when professional services are rendered. In exchange for a monopoly on the exercise of the profession and in accordance with the primary purpose of protecting the public in its dealings with lawyers, the bar must establish criteria for jurists to qualify as members, rules of discipline and mechanisms to enforce them, the contours of professional liability, a system of professional insurance, and guidelines and rules on the handling of trust funds…”

> “Non-lawyers may provide a very useful service to people who are subject to IRB proceedings. It may be difficult to find lawyers who are fluent in other languages, as well as familiar with different cultures… The possibility to choose to be represented by a non-lawyer may be conducive to informality and expeditiousness…”\(^9^9\)

What the Court was too polite to say was that this was a clear attempt by LSBC to avoid immigration consultants taking work away from immigration lawyers. As the Court noted, there was a clear conflict between the provisions of the two Acts, such that immigration consultants were permitted to appear before the IRB by the federal legislation and prohibited from doing so by the provincial.\(^1^0^0\) LSBC ought to have been well aware of the constitutional consequences of this conflict, but decided to pursue a permanent injunction anyway. There was no evidence led that Mr. Mangat was incompetent or unethical or had acted improperly, other than his performance of the regulated act: practicing law.

\(^9^8\) *Law Society of British Columbia v. Mangat*, supra note 96, at paras. 2-9

\(^9^9\) *Ibid* at paras. 41 and 60

\(^1^0^0\) *Ibid* at para. 23
In short, despite having no evidence it sought to adduce that there was a risk of harm to the public from Mr. Mangat’s professional activities, the purpose behind LSBC’s legislated monopoly, it sought to permanently enjoin him from engaging in his livelihood. A decision to revoke the license of a regulated person, and thereby jeopardise his or her livelihood, would be subject to the full complement of natural justice. No such protection is available to a non-member. It is a reasonable inference that LSBC’s application was motivated much more by concerns for protecting the workflow of immigration lawyers than by any real risk of harm to the public. While it may well be said that appearing before administrative tribunals such as the IRB is at the core of activities that constitute regulated conduct, the federal legislative provisions allowing for this ought to have been a complete answer to a charge of unauthorized practice. It is hard to fathom any rationale for the LSBC taking this matter all the way to the Supreme Court other than its interest in retaining its monopoly on practicing law.

This particular unauthorised practice application was unsuccessful, and whatever the motivation of LSBC, the application was policed by the Court. Insofar as the Court adopts the Rule of Law as a normative exercise in restraining a regulator from overreaching outside its own jurisdiction, as the Supreme Court did here and as set out in the Oversight Claim, this does not pose a problem. However, the trial court of first instance obliged the LSBC and granted its application, and if not for the perseverance of the Respondent (who eventually went on to become a lawyer) in appealing the decision, the trial decision would have stood as an unjustified and unconstitutional expansion of LSBC’s role into ensuring that immigration lawyers face less competition. The Oversight Claim is that this justificatory gap can only properly be addressed by appellate intervention that ensures regulators do not exceed their own jurisdiction.

4.2 Mediators

While many lawyers and former judges become mediators in a later stage of their careers, there is no formal requirement on mediators to be lawyers as well. Mediation can be as informal as the

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parties wish it to be, and as an out-of-court process, is free from the more formal requirements of arbitration. 102

The case that directly engages the question of to what extent non-lawyers may engage in mediation is Law Society of Upper Canada v. Boldt. 103 Ms. Boldt is a particularly unsympathetic non-lawyer, who had twice been prosecuted for unauthorized practice, had entered into an agreement not to do so in future, and LSUC had been granted a permanent injunction enjoining her from doing so again. In breach of that agreement and injunction, Ms. Boldt charged a fee for commencing legal proceedings and in an attempt to defend her conduct as merely acting as a mediator, encouraged her client to lie and claim her client only wanted mediation. Her client deposed that at no point was she interested in mediation. She wanted a binding separation agreement in a matrimonial dispute. Ms. Boldt provided one, and this was regulated conduct that fell within the terms of LSUC’s earlier injunction. 104

This is justified. However, the Court goes on to make interesting comments about what mediation is, and who can practice it. In response to the question of what purpose mediation serves in the context of negotiating a separation agreement in a matrimonial dispute, the expert witness called by LSUC deposed that mediation provides an agreement to agree. The parties must be advised to obtain independent legal advice. At the end of the mediation, the mediator signs a report or Memorandum of Understanding, which sets out the terms to which the parties have agreed. However, mediators are supposed to advise that nothing in the end product of mediation is legally binding. Instead, this report or Memorandum of Understanding must be provided to lawyers for each party, who will then draft a binding separation agreement. 105

However, when the mediator is a lawyer, then the final product of the mediation may also be a binding legal document. 106

103 Supra note 85.
104 Ibid at paras. 2-30
105 Ibid at paras. 37 and 40
106 Ibid at para. 41
The Court accepted this as an accurate statement of the powers of non-lawyer mediators. This account is based entirely on the Ontario Association of Family Mediators’ rules, an organisation of which Ms. Boldt was admittedly a member. However, no other authority is cited for these requirements. Under the *Family Law Act*, separation agreements must be in writing, signed by the parties and witnessed. The only place a lawyer is mentioned is in relation to arbitration awards being enforceable. Nowhere in the legislation is it stated that a lawyer is needed for a separation agreement, or for a binding agreement to flow from mediation. A divorcing couple could, according to the language of the statute, enter into an agreement of their own making without the assistance of counsel or a mediator, and that fact alone would not make the agreement unenforceable.

The rationale and authority for the LSUC’s requirement to include lawyers at the mediations, and then further lawyers to draft a separation agreement if the mediator is a non-lawyer, and why parties must go to the expense of retaining counsel, is obliquely addressed by the Court as follows:

“The problems with access to justice are the subject of current comment within the profession and the community generally. It is a well-known fact that low and middle income persons often find the cost of legal services beyond their means. There are alternatives to the legal process for the resolution of disputes. Mediation is one of these alternatives. However, mediators should not be seen as a low-priced alternative to lawyers… Where individuals seek advice about creating documents that are legally binding and enforceable and will have an impact on their rights and entitlements, they are entitled to that advice only from lawyers who are regulated in the public interest.”

For members of the public, an agreement is an agreement. Questions of enforceability rarely fair in the minds of the millions of agreements members of the public strike with each other every day. The question of the enforceability of an agreement is only pressing when it must

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108 *Ibid*, s. 59.6(2).
be enforced. It may well be a good idea to have a lawyer advise on a separation agreement, but to require it as a matter of course runs contrary to the default assumptions of law, set out above, where individuals are at liberty to strike however many foolhardy agreements they so choose. If both parties abide by the agreement, the question of its enforceability never arises.

In any event, Ms. Boldt was subject to an Order enjoining her from drafting things like separation agreements, and did draft one. Her breach was clear. What is less clear is why the work-product of a mediator, agreed to by the parties, who mediates a resolution to a dispute, is only binding if he or she is a lawyer. This proposition is not a legal requirement, and has not been tested by LSUC in any further unauthorized practice applications.

The question of whether a Memorandum of Understanding is a binding agreement is a judicial one, and only by a judge declaring an agreement is binding on the parties to it (or third parties) is it so binding. The harm to the public in misleading people into thinking they are entering into legal agreements when they are not is a valid concern for LSUC, but this does not give LSUC license to restrict the work of non-lawyer mediators to mere facilitators of discussion.

5 The Reverse Onus of Regulated Conduct and the Justification Claim

As stated above, whether a regulator is justified in prosecuting a non-member for regulated conduct largely turns on the extent to which that conduct falls within the core of what that regulated profession does. The dental surgery example shows that this core activity presents a real and pressing risk of harm to the public at large if done by unlicensed, unqualified and uninsured individuals. The margins of regulated conduct, however, present problems of justification.

Unauthorized practice prosecutions by the staff of the regulator itself present a real justification problem when they verge away from the core of regulated conduct. As demonstrated by the immigration consultant and mediator examples, at the hearing of an unauthorized practice application, the regulator needs only to demonstrate that the participant engaged in the activity regulated under the legislative scheme. As a substantive defense, the participant must justify this behaviour. This is a clear instance of the reversed onus in the regulated sphere of activities, and suffers from a justificatory gap insofar as it applies to non-regulated participants. Instead of
being at liberty to perform an act, an individual is required to demonstrate that he or she did not actually engage in conduct that has been regulated or a non-regulated person must demonstrate that he or she has permission to perform the regulated activities in question. Rather than a non-regulated mediator having a Liberty as their legal obligation, he or she is subject to a License, as set out above.

The protection of harm to the public is simply a non-factor. The regulator is not required to demonstrate what harm to the public the non-regulated person’s conduct posed to the public. Instead, the regulator merely has to argue that the non-regulated individual engaged in regulated conduct. If there was no question that the conduct at issue was not within the regulated sphere, the regulator would have to demonstrate what harm the person’s conduct caused as part of the test for injunctive relief.\textsuperscript{110} A statutory injunction such as one available to LSUC for its unauthorised practice applications has no such requirement. Instead, “hardship from the imposition and enforcement of an injunction will generally not outweigh the public interest in having the law obeyed.”\textsuperscript{111} Where a regulator seeks a statutory injunction, the Court’s discretion is fettered, and the regulator will not have to prove that harm will result if the injunction is not granted, or that damages would be an adequate remedy.\textsuperscript{112} The onus normally borne by an Applicant is seeking an injunction to demonstrate he or she meets the test for that injunction is reversed in the context of unauthorised practice application such that the regulator only needs to demonstrate that regulated conduct has been engaged in, and the Respondent must demonstrate why this conduct was justified.

The Justification Claim is that the regulator’s unauthorized practice application presents an exclusionary reason. At the hearing of these applications, the Court is faced with a very uneven contest. The alleged unauthorized practitioner has been found to have been an authorized practitioner by the regulator. The regulator, as an authority, has merely to demonstrate that regulated conduct was engaged in. The alleged unauthorized practitioner, on the other hand, has no opportunity to challenge whether the regulator is justified in regulating this conduct. It may be

\textsuperscript{110} R.J.R Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311
\textsuperscript{112} Ibid
suggested that there is no justificatory gap if the Court is satisfied that regulated conduct has
been engaged in. However, in the case of statutory injunctions, the Court’s normal discretion is
circumscribed, and the regulator can define for itself, without any statutory justification in the
case of LSUC, what constitutes “practicing law”. The Court, in questioning this definition and
restricting the reach of the regulator, performs an essential oversight function. The Oversight
Claim holds that the Rule of Law as a normative exercise may fill the justificatory gap created by
the regulator interpreting its own jurisdiction. The Court is the arbiter of whether the conduct
engaged in is properly or improperly characterised as regulated conduct.

However, in the case of the Ontario Securities Commission’s public interest jurisdiction, the
Court may not be given a chance to fulfill its oversight function.
Chapter 5
Exercises of the Public Interest Jurisdiction of the Ontario
Securities Commission

1 What is the Public Interest Jurisdiction of the Ontario
Securities Commission?

The Ontario Securities Act\textsuperscript{113} grants the Ontario Securities Commission (“OSC”) the power to
make a number of orders if these orders are, in the OSC’s opinion, “in the public interest.”
These are orders granted where the OSC has not demonstrated a breach of any provision of the
Act, but instead to prevent unethical schemes.\textsuperscript{114} These orders include the power to terminate a
market participant’s registration, cease trade a security, reprimand an individual or corporation,
force a director or officer to resign or impose an AMP of $1 million for each infraction.\textsuperscript{115} The
term “public interest” is not defined in the legislation, but the purpose and guiding principles to
be applied are set out: \textsuperscript{116} (1) the purposes are (i) to provide protection to investors from unfair,
improper or fraudulent practices, and (ii) to foster fair and efficient capital markets and
confidence in those capital markets; and (2) the guiding principles to be applied are: (i) the
balancing the two purposes; (ii) the importance of disclosure, of restricting fraudulent market
practices and or maintaining standards of business conduct; (iii) timely, open and efficient
enforcement; (iv) using the enforcement capability of self-regulatory organizations (such as the
Mutual Fund Dealers Association); (v) the harmonization of securities regulation regimes; and
(vi) the regulatory costs and restrictions on market participants should be proportionate to the
regulatory objectives. This list highlights the broad objectives of the OSC, and the reach of its
mandate. Nevertheless, the term “public interest” has been left to only be clarified by cases.

\textsuperscript{113} Securities Act, R.S.O. 1990, c. S.5, s. 127 [“Securities Act”]

\textsuperscript{114} Cablecasting Ltd. (Re), [1978] OSCB 37 at 43

\textsuperscript{115} Securities Act, supra note 113, ss. 127(1)(1 – 9)

\textsuperscript{116} Ibid, ss. 1.1 and 2.1
Thankfully, this very broad power is subject to the basic procedural right to a hearing for the subject of any such order, and case law has provided some guidance on how this public interest jurisdiction ought to be applied. The Supreme Court of Canada has clarified that the OSC’s public interest jurisdiction is not a carte blanche to do as it choses, but instead is limited in two important ways. First, it is animated by both of the purposes of the Securities Act, which means that an order must consider both the fair treatment of investors and the effect of an intervention on capital market efficiencies and public confidence in the capital markets. Second, it is a regulatory provision, such that the focus of regulatory law is on the protection of societal interests, not punishment of an individual’s moral faults.

This same Court, however, clarified that the public interest power is meant to deter clearly abusive conduct. General deterrence, the Court suggested, was a sufficient and perhaps necessary consideration in making an order, as orders made under the OSC’s public interest jurisdiction are meant to be preventative. These orders are meant to discourage similar wrongdoing in others.

In short, the OSC is tasked with restraining future conduct that is not in the public interest by relying on its very broad powers under its public interest jurisdiction, and it need not find that some provision of the Securities Act has indeed been breached. In doing so, it is limited only by the purposes of the Securities Act and that it is not punishing but correcting behaviour.

It may be argued that the fact the OSC has to provide written reasons is sufficient to close the justificatory gap created by the regulator interpreting its own jurisdiction and what counts as conduct that is contrary to the public interest. However, as an administrative law principle, the duty of procedural fairness requires the provision of a written explanation for a decision where the decision has important significance for an individual or when there is a statutory right of

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117 Ibid, s. 127(4).

118 Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), 2001 SCC 37 at paras. 40 and 41 [“Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)”]

119 Cartaway Resources Corp. (Re), 2004 SCC 26 at paras. 60 and 61
Complying with the duty of procedural fairness is not sufficient to close the justificatory gap completely, as this requirement is the minimum procedural safeguard against arbitrary decisions by public officials such as the OSC. It does not, in and of itself, resolve the larger issue: that the OSC has been granted the power to decide for itself what counts as action contrary to the public interest in the absence of a prohibition in the legislation. In the taxonomy of the legal obligation set out above, the OSC, in the absence of a Prohibition, turns a Liberty into a License.

This may not give the importance of written reasons its due. David Dyzenhaus has argued that the requirement to give reasons, in writing, arises from the value of individual dignity. Written reasons provide a solution to the justificatory gap that arises where discretion is granted (or “grey holes” in Dyzenhaus’ parlance). Written reasons do more than restrict completely arbitrary decisions. The “grey hole” metaphor is apt. These “grey holes” arise where public officials are given discretion in how they exercise their powers, but very little in the way of guidance on how to exercise this discretion. Power that can be exercised with discretion is not a legal “black hole”, as these decisions are not free from review, but neither is it completely transparent, as it may be exercised in a number of ways. Written reasons provide an insight into these “grey holes” that arise when discretionary authority is exercised. Written reasons provide a window into these “grey holes”, and amount to an accountability check on discretionary power. In setting out the reasons for some decision in writing, the public at large has a means of learning the rationale behind decisions, and a basis to challenge them. As Dyzenhaus argues, a commitment to the Rule of Law requires that law cannot be suspended by way of “grey holes”, so written reasons provide a solution to the justificatory gap problem. The requirement to give written reasons goes someway to a “substantive instantiation of the rule of law, [which] provides a basis for the effective conduct of judicial review and statutory appeals” beyond only procedural fairness.

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120 Baker, supra note 13 at para. 43; Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, 2000 SCC 14 at para. 36; Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1 at para. 127  
While written reasons may be more than merely an attribute of procedural fairness, they do not go all the way to resolving the justificatory gap if these reasons are not subject to oversight, or depart from the purposes of the public official’s empowering statute. Being forced to write down why an official is making a decision may be a window into the thought process involved, but is no guarantee that the reasons are themselves reasonable or correct or legally sound or in keeping with the mandate of the public official. The justificatory gap is only partially closed by the provision of written reasons where these reasons are themselves unreasonable. Further, in criminal law, “an appeal is against the verdict, not the reasons for the verdict. The only part played by the reasons is that they may disclose an error in reasoning that taints the lawfulness of the verdict.” While this is less true in the administrative law context, as a practical matter, if the regulated entity is happy with an Order but the reasons for that Order are arbitrary or unreasonable or simply terrible law, there is no basis to appeal or seek judicial review. These reasons, however, may be used as persuasive authority in subsequent cases, and do nothing to close the justificatory gap involved in the public official’s unjustified exercise of discretion.

2 How might the Public Interest Jurisdiction be abused?

Two decisions made under the OSC’s public interest jurisdiction highlight the issues that this power presents, from the perspective of the Rule of Law. The first concerns the OSC’s decision that despite a finding that an officer of a public issuer had not issued a misleading press release, his actions were contrary to the public interest, and the second concerns an individual who was not found to have engaged in insider trading, but whose actions were also found to be contrary to the public interest nonetheless.

2.1 Biovail

In Biovail Corp. (Re), the OSC brought proceedings against the company and four of its directors, three of whom settled with the OSC before the proceeding. As a result, the OSC maintained that the remaining director, former CEO Eugene Melnyk, made misleading statements about the impact of a motor vehicle accident involving one of the company’s trucks.

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123 Polgrain Estate v. Toronto East General Hospital, [2008] O.J. No. 2092 at para. 31 (C.A.)
124 Biovail Corp. (Re), (2010), 33 OSCB 8914 at para. 4 [“Biovail Corp (Re)’”]
would have on its reported earnings. The OSC alleged that although Mr. Melnyk was aware before the accident that the company would not make its earnings projections, it attempted to blame the issue on the motor vehicle accident, alleging that this accident and the consequent loss of product were responsible for the disappointing revenue performance in a series of press releases. The panel hearing the matter concluded that the public statements were not misleading and not in contravention of the relevant provision because this provision only applies to documents that were required to be filed with the OSC, and since the press releases were not required to be filled, the provision had not been breached.

However, the panel went further and made a finding that Mr. Melnyk’s actions were contrary to the public interest. The panel found that regardless of what Mr. Melnyk knew or should have known, his position as Chairman and CEO of the company meant that he had the responsibility of ensuring that the company did not make any inaccurate, misleading or untrue public statements, and that he failed to demonstrate he had acted with due care and diligence. In this decision, the OSC relied on the same facts to establish the basis for the finding that Mr. Melnyk acted contrary to the public interest as it did to support its allegations that he had breached the Securities Act.

The panel explicitly rejected the suggestion that the OSC had not established Mr. Melnyk had engaged in any abusive or egregious conduct, and that such a finding was required in order for it to exercise its jurisdiction in the absence of an actual breach of the Securities Act:

“In our view, where market conduct engages the animating principles of the [Ontario Securities Act], the [OSC] does not have to conclude that an abuse has occurred in order to exercise its public interest jurisdiction. . . . We should not interpret or constrain our public interest jurisdiction in a manner that condones inaccurate, misleading or untrue

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125 Ibid, at paras. 13 to 46
126 Ibid, at paras. 366 to 370
127 Ibid, at paras. 401 and 406
public disclosure regardless of whether that disclosure contravenes Ontario securities law.” 128

In so finding, the OSC expanded its own jurisdiction. No appeal was made from this decision as Mr. Melnyk and the OSC reached an agreement that he would not appeal and he would not make any public statements in relation to the matter. He was reprimanded, barred from acting as an officer or director of a public issuer for five years, and required to pay $565,000 in costs. 129

The decision is quite lengthy, and proponents of an ever-expanding public interest jurisdiction will no doubt argue that the OSC took into consideration all of the facts, all of the policy considerations at play, all of the underlying circumstances of the case, and all of the interests affected by the matter. There is considerable space given to considerations of how inaccurate or misleading information may affect the “reasonable investor”, and it is clear that full and accurate disclosure are of paramount importance to the securities regulation regime.

Having said as much, it is inherently problematic for a regulator such as the OSC to define for itself what is and is not within the public interest, and then make orders that were intended for egregious conduct where there has been no breach of the governing legislation found. Other regulators, and the OSC in its other prosecutions, are tasked with enforcing specific provisions and finding individuals and companies culpable for breaches of specific provisions. When acting through its public interest jurisdiction, however, the OSC grants itself license to determine what counts as an offence and what the remedy for this offence will be, only circumscribed by the purposes of the Securities Act and its guiding principles.

The OSC can define its own jurisdiction for itself by defining what constitutes the public interest. This power, although granted by the statute, leaves a justificatory gap where there ought to be a basis upon which to find authority.

128 Ibid at paras.382 and 383.
129 Ibid, Order dated May 5, 2011 in Biovail Corp. (Re)
2.2 Donald

In *Donald (Re)*,\(^{130}\) the OSC staff attempted to prove that an officer of troubled Blackberry maker Research in Motion (“RIM”) had violated the insider trading provisions of the *Securities Act*. Mr. Paul Donald was at a company golf tournament when he learned that RIM had an interest in acquiring a company, that the company had not demonstrated an interest in dealing with RIM and that a senior colleague felt the shares of that company were undervalued.\(^{131}\) The next day, Mr. Donald instructed his broker to acquire $300,000 worth of the company’s shares at a price of $1.50 per share or less.\(^{132}\)

Four months later, RIM commenced a hostile take-over bid, which ended with a Court-approved plan of arrangement in which all of the target company’s shares were purchased by RIM for $3.00 per share.\(^{133}\) Mr. Donald doubled his investment. The OSC staff alleged that Mr. Donald had traded on information about material facts that were not disclosed to the public at large, and was successful in proving that the facts Mr. Donald acquired at the golf tournament were undisclosed material ones.\(^{134}\) However, the OSC was unable to successfully prosecute Mr. Donald for this offence. The reasons for this are outside the scope of this argument, but in short, RIM was not in the process of acquiring the target technology company at the time Mr. Donald learned the material undisclosed facts and executed his trade, which meant that he was not within the class of relationships with the target company that would trigger the insider trading rules.\(^{135}\)

However, the OSC did find that Mr. Donald had engaged in behaviour that was contrary to the public interest. His behaviour, in trading the next day on material information that had not been publically disclosed while an officer of RIM, was found to be “abusive of capital markets and to

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\(^{130}\) 2012 LNONOSC 546 [“Donald”]

\(^{131}\) *Ibid*, at paras. 2-20, but specifically para. 49

\(^{132}\) *Ibid*, at para. 63

\(^{133}\) *Ibid*, at paras. 86 to 115

\(^{134}\) *Ibid*, at paras. 192 to 202

\(^{135}\) *Ibid*, at paras. 229, 286-288
confidence in the capital markets”.

As noted above, protection of the capital markets is the second of the two purposes, as set out in the Securities Act. In particular, the OSC found that Mr. Donald ought to be subject to the OSC’s public interest jurisdiction because his conduct engaged the fundamental principles of securities regulation and the purpose of the Securities Act. This finding was made on the basis of the same facts that failed to substantiate the insider trading charge.

This finding, like the one in Biovail noted above, illustrates the justificatory gap at the heart of this argument. There was no breach of the Securities Act. The OSC staff had not demonstrated that an offence had been committed. If Mr. Donald had consulted with counsel before executing his trades and that counsel advised that those trades complied with securities law, that advice was legally defensible, and would have ultimately been upheld by the OSC’s decision here.

By invoking its public interest jurisdiction, the OSC effectively rewrote the act requirements for the offence of insider trading to include conduct that does not pass the OSC’s self-administered smell test. Given that the contours of the public interest jurisdiction are so broad and only constrained by the purpose and principles of the Securities Act, as well as the importance of the OSC’s regulatory function, it would have been impossible for Mr. Donald to make a full answer and defence to an offence about which he can only learn after he has been found to have committed it. This is not radically dissimilar to the predicament the main character finds himself in in Franz Kafka’s “The Trial”.

Mr. Donald was reprimanded, prevented from working as an officer or director of a public issuer for five years, and had to pay $150,000 in costs.

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136 Ibid, at para. 324

137 Ibid, at para. 323

138 Kafka, Franz. “The Trial” New York: Schocken Books: 1968, in which the main character is charged with a crime that is never disclosed and about which he can learn nothing.

139 Order dated January 30, 2013 in Donald (Re), supra note 130
3 What is wrong with the OSC’s public interest jurisdiction?

As these two cases show, the OSC’s public interest jurisdiction is a paragon example of the justificatory gap that has concerned this paper. As market participants are engaged in regulated behaviour, the default assumption on these regulated individuals is that they must be granted permission to perform any acts in the regulated sphere, rather than the normal default assumption that an individual is at liberty to do anything he or she is not prohibited by law from doing.

It may be argued that the OSC’s public interest jurisdiction serves a gap filling function only, and is unproblematic in so doing. It is impossible to anticipate in advance all of the creative ways in which market participants might seek an unfair advantage, and the OSC’s public interest jurisdiction provides a means of remedying a legislative oversight. To argue that every instance of the OSC’s exercising its public interest jurisdiction where a breach of the Securities Act has not been found is to unnecessarily fetter the legislatively conferred discretion on the OSC to protect the public interest. Is this never allowed?

The answer, to my mind, depends upon the extent to which the OSC has deviated from its mandate. The OSC’s public interest jurisdiction is an elastic jurisdiction clause. Because the OSC has the power to determine its own jurisdiction, none of its actions can ever be ultra vires. The ambit of the OSC’s discretion, in exercising its public interest jurisdiction, is limited by the purposes of the Securities Act, and a focus on the protection of societal interests rather than punishment of an individual’s moral faults. In the two cases cited above, the OSC was going beyond gap filling to create two new positive offences: (i) making inaccurate, misleading or untrue public disclosure while in a senior executive position of a public issuer in the Bioval case; and (ii) trading on material information that had not been publically disclosed while an officer of a public issuer in the Donald case. Before these decisions, an individual would have been at liberty to do these things, but after them, that same individual is prohibited from so doing. It might be argued that these are the sorts of things that people ought to be precluded from doing generally, but such prohibitions should find their source in the Securities Act. The OSC, is deciding for itself what constitutes an offence, has created a discretionary scheme that converts a legislative power into a discretionary power. The extent to which this deviates from the reasonable expectations of market participants creates a justificatory gap. The capital markets
need a system of rules, not a system of discretionary powers, and the exercise of discretion to create *post hoc* offences turns Liberties into Prohibitions.

The rejoinder to this claim is that a system of rules renders the public interest jurisdiction of the OSC empty. If all of the Prohibitions are spelled out in legislation, what function does the public interest power have? The answer, to my mind, is that the public interest jurisdiction serves as a means of crafting appropriate remedies for breaches of the Act, rather than as a means of creating new Prohibitions. The public interest jurisdiction of the OSC is subject to a standard of reasonableness for judicial review.\(^\text{140}\) The OSC may restrict registration, make cease trade orders, deny exemptions, disseminate information, reprimand an individual or prohibit that person from acting as an officer or director of a public issuer for a given period, all dependent on the nature of the individual circumstances of the case, in the public interest.\(^\text{141}\) This is hardly an empty power, but a grant of tremendous discretion to craft remedies applicable to the situation in the public interest, as the OSC defines that term. However, to create new substantive offences that are not set out in the legislation is a bridge too far, and creates a justificatory gap that calls out for oversight. Turning Liberties into Prohibitions, as the Obligation Claim sets out, is a reversed assumption about what a market participant may do.

This reversed assumption requires a regulator such as the OSC to justify its exercise of discretion. However, as the OSC is using its public interest jurisdiction to find breaches of securities law where behaviour would otherwise comply with legislation, and on the same facts that failed to substantiate any specific offence prosecutions, this creates precisely the justificatory gap set out here. Such a failure to justify undermines the very authority the OSC seeks to marshal, as authority requires a reciprocity between regulated and regulator to regard the latter as authority. Fairness is at the heart of regulated persons recognizing a regulator as having sufficient authority. The normative function of the Rule of Law in administrative law is to require regulators to provide fair decisions, which agree not only with the principles of natural

\(^{140}\) *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, supra note 118

\(^{141}\) *Securities Act*, supra note 113, s. 127(1), (2)
justice, but also allow regulated individuals who are fined or reprimanded to understand the basis of such a reprimand.

The OSC’s public interest jurisdiction, in contrast, violates the desiderata of the Rule of Law set out above. It is retroactive, as Mr. Melnyk’s and Mr. Donald’s conduct did not amount to an offence until the OSC declared that this conduct was contrary to the public interest. It does not allow for laws that are general, public and clear, as there is no way to know how the OSC will exercise its public interest jurisdiction until it has done so. Regulated individuals, and their counsel, are left to make at best educated guesses on the conduct that the OSC may declare is contrary to the public interest.

In these cases and through its exercise of the public interest jurisdiction, the OSC has failed to appreciate the normative force of the Rule of Law, and failed to realise most of the eight desiderata set out above. (i) In deciding conduct was contrary to the public interest after the fact, the OSC’s rulings are retroactive rather than prospective. (ii) The rulings are impossible to comply with in advance of being made, as it would be impossible to know how the OSC would exercise its public interest jurisdiction until it has done so. (iii) The conduct the OSC will find is contrary to the public interest are non-promulgated, (iv) unclear, and (v) impossible to determine if they are coherent with one another, as the class of conduct will continue to expand. (vi) It could be argued that the rulings are sufficiently stable to guide a regulated entity’s action. However, (vii) it is clear that adjudication is not guided by rules that are sufficiently promulgated, clear, stable and general, because these rulings are based on the OSC’s findings. (viii) Finally, the OSC can maintain that those in authority are accountable for their compliance with these rules and do administer them, and there is no indication that this is not so.
Chapter 6
Conclusion

The powers of regulatory bodies in Canada need to be exercised with fairness in mind. Regulated individuals are required to seek permission where otherwise they would be at liberty to act. Any expansion of the sphere of regulated conduct must be justified, and such justification must take into account the normative requirements of the Rule of Law. As the AMP regimes, unauthorized practice applications, and the public interest jurisdiction of the OSC demonstrate, compliance is not a legitimate goal in and of itself, especially where there is a justificatory gap at play.

Regulators and public officials are granted considerable flexibility in how they enforce their respective mandates, and this grant of discretion in necessary. It cannot be the legislature’s task to set up a complete code that properly anticipates every possible future circumstance. Indeed, regulators are granted discretion at least in part because their members and the public officials that administer regulatory regimes have expertise in these areas, and are in theory best placed to assess the seriousness of conduct that falls under their purview, and craft appropriate responses. Further, Courts provide a means of oversight if these regulators and public officials exceed their proper jurisdiction, through judicial review and appeals.

The difficult question to answer is how this discretion ought to be exercised. Decision making is difficult, and there is no way to properly answer this question in the abstract. However, as I have argued here, the further a regulator strays from the purposes of its empowering legislation and the public policy rationales from granting their power in the first place, the greater the justificatory gap in exercising this public power in that fashion. It is true that regulators would be unnecessarily encumbered by a system of pure rules, but discretion cannot be completely unlimited or unfettered discretion. A regulator such as the OSC cannot satisfy the justificatory gap inherent in its exercise of its public interest jurisdiction by merely stating that its decision relates, however marginally, to securities.

The import of the Obligation Claim, Justification Claim and Oversight Claim is that the justificatory gap is especially troubling where former Liberties are now Licenses, and the ambit of what constitutes regulated conduct or what might be sanction to regulatory sanction is within the discretion of the regulator. The justificatory gap is increased where the regulator defines for
itself what constitutes its jurisdiction without due regard to the regulator’s empowering legislation and the harms the regulatory scheme is meant to guard against. Oversight through the Courts is necessary to ensure the Rule of Law is a normative exercise rather than merely a lovely and evocative phrase. As the administrative state expands, it is incumbent on regulators to ensure that the reach of the Rule of Law does not thereby shrink.