

Monetary Penalties Levied against Advisors in a Tax Case, *Guindon v. Canada*: Unconstitutional?

Presented by: Kenneth Jull
February 12, 2019

The views are those of the author and are not meant to represent the views of Gardiner Roberts LLP



Guindon v. Canada 2015 SCC 41 ("Guindon")

Agreed Facts before the Tax Court:

- The Settlor was going to acquire timeshare units called Biennial Vacation Ownership Weeks (“VOWs”) from TDL, which held the property of [Hawkes Nest Plantation Resort/Arawak Inn in Turks and Caicos Island](#) [sic];
 - After acquiring the VOWs the Settlor would gift the VOWs to the Trustee, who in turn would exchange the VOWs to the beneficiaries of the Trust, in return for the payment of a vendor take-back charge;
 - The amount of the vendor take-back charge that was to be paid by beneficiaries of the Trust was [\\$3,248](#) per VOW;
 - It was anticipated that the beneficiaries would donate the VOWs to a registered Canadian charitable organization for a receipt for the fair market value of the donated VOWs; and
 - The VOWs were valued at [\\$10,825](#) per VOW.

Turks and Caicos: Providenciales



Turks and Caicos: Providenciales



Guindon v. Canada 2015 SCC 41 ("Guindon")

Ms. Guindon agreed, for a fee of \$1,000, to provide an opinion letter on the tax consequences of this program on the basis of a precedent provided by the promoters. She recommended that the promoters have a tax lawyer and an accountant review her opinion to ensure its accuracy, as the opinion did not fall within her field of expertise, but nonetheless provided the letter knowing that it was intended to be part of the promotional package for the scheme. She wrote that the transactions would be implemented based on supporting documents that she had been provided with and had reviewed. She had not reviewed the supporting documents.

Guindon v. Canada 2015 SCC 41 ("Guindon")

Ms. Guindon was also the president and administrator of a registered charity, Les Guides Franco-Canadiennes District d'Ottawa. In November 2001, this charity agreed to become the recipient of the donated timeshares. The promoters would then sell the timeshares on behalf of the charity which would receive a minimum of \$500 per unit sold.

Guindon v. Canada 2015 SCC 41 ("Guindon")

The scheme was a sham: no timeshare units were created and no transfers from the donors to the charity occurred. The promoters prepared 135 tax receipts, which were issued by the charity and signed by Ms. Guindon and the treasurer of the charity. The total receipted amount was \$3,972,775. The Minister of National Revenue disallowed the charitable donation tax credits claimed by the donors. On August 1, 2008, the Minister assessed Ms. Guindon for penalties under s. 163.2 of the ITA for each of the tax receipts issued on the basis that she knew, or would have known but for wilful disregard of the ITA, that the tax receipts constituted false statements.

Hawkes Nest Plantation Development Parcel



Grand Turk
Cruise
Centre

Site



Hawkes Nest Plantation Development Parcel



Grand Turk Cruise Centre



Guindon v. Canada 2015 SCC 41 ("Guindon")

This appeal focuses on s. 163.2 of the ITA. Enacted in 2000, it contains two administrative penalties: the “planner penalty” in subs. (2) and the “preparer penalty” in subs. (4). The planner penalty is not at issue in this appeal. The preparer penalty reads:

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

Knows or Would Reasonably be Expected to Know

The penalty at issue is found in subsections 163.2(4) and (5) of the Act, which read:

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

Formula

(5) The penalty to which a person is liable under subsection (4) in respect of a false statement is the greater of

- (a) \$1,000, and
- (b) the lesser of:
 - (i) the penalty to which the other person would be liable under subsection 163(2) if the other person made the statement in a return filed for the purposes of this Act and knew that the statement was false, and
 - (ii) the total of \$100,000 and the person's gross compensation, at the time at which the notice of assessment of the penalty is sent to the person, in respect of the false statement that could be used by or on behalf of the other person.

Guindon v. Canada 2015 SCC 41 ("Guindon")

The Appellant, Julie Guindon, was assessed penalties totaling **\$546,747** under subsection 163.2(4) of the Income Tax Act (the "ITA"). Ms. Guindon is a lawyer practicing mainly in the areas of family law and wills and estates. She was retained to provide a legal opinion on a charitable-donation plan called "The Global Trust Charitable Donation Program" (the "Program").

Ms. Guindon provided a legal opinion vouching for the plan. She provided a signed copy of her legal opinion without having reviewed all of the documents referred to in the opinion.

Ms. Guindon accepted a retainer of one thousand dollars (\$1,000) to prepare an opinion letter and advised that the area of tax law did not fall within her field of expertise.



Culpable Conduct

In turn, “**culpable conduct**” is defined by subsection 163.2(1) of the ITA as follows:

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

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

Culpable Conduct

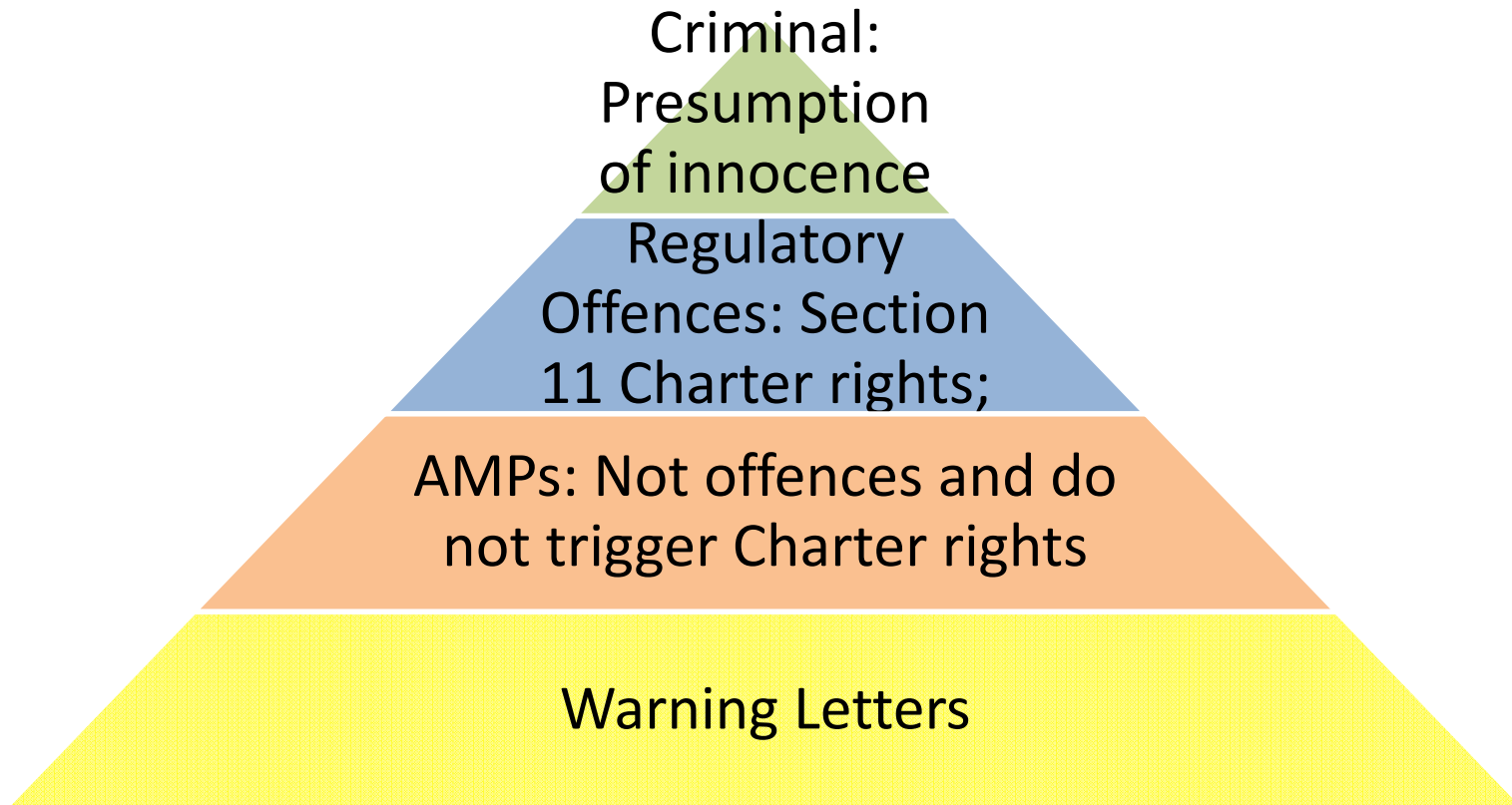
[61] Therefore, while there has been debate as to the scope of “culpable conduct” (as argued before the Tax Court in this matter), the standard must be at least as high as gross negligence under s. 163(2) of the ITA. The third party penalties are meant to capture serious conduct, not ordinary negligence or simple mistakes on the part of a tax preparer or planner.

[62] We can conclude that the purpose of this proceeding is to promote honesty and deter gross negligence, or worse, on the part of preparers, qualities that are essential to the self-reporting system of income taxation assessment.

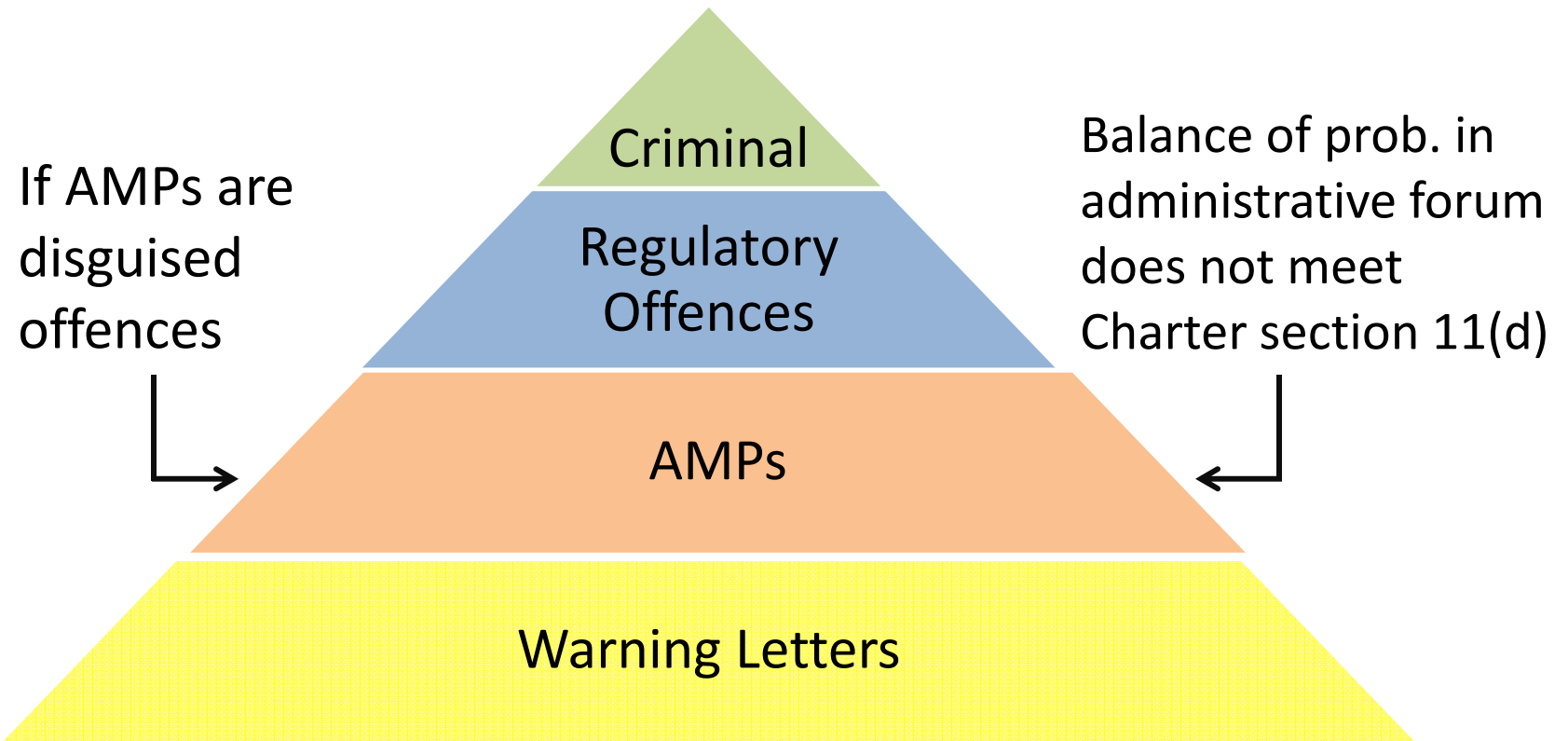
King Kong Amps: Are they Constitutional?



Justice Pyramid



Justice Pyramid



Guindon – Supreme Court decision

Decision: July 31, 2015

ITA AMPs are not “offences” with Charter protection

Door is still open if a penalty is punitive

Four point balancing test established:

[76] Imprisonment is always a true penal consequence. A provision that includes the possibility of imprisonment will be criminal no matter the actual sanction imposed: see *Wigglesworth*, at p. 562. A monetary penalty may or may not be a true penal consequence. It will be so when it is, in purpose or effect, punitive. ...cont'd

Guindon – Supreme Court decision

[76] (cont'd) ... Whether this is the case is assessed by looking at considerations such as the **magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty**: see, e.g., *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176, 333 D.L.R. (4th) 1, at paras. 76-77.

Guindon v. Canada 2015 SCC 41 ("Guindon")

[85] Ms. Guindon was assessed a penalty of \$546,747. This amount is very high for an individual. However, in the circumstances it does not constitute a true penal consequence: the Tax Court found that there were 135 violations (see paras. 1 and 112). In addition, that court found that Ms. Guindon was dishonest in her initial legal opinion when she stated that she had reviewed the supporting documents. She then compounded this dishonesty by signing charitable receipts that she should reasonably have known were tainted by her own failure to verify the legal basis of the program: paras. 107-9.

Guindon v. Canada 2015 SCC 41 ("Guindon")

...cont'd

Such dishonesty cannot be countenanced in a self-reporting system. As noted by the Federal Court of Appeal, “[s]ometimes administrative penalties must be large in order to deter conduct detrimental to the administrative scheme and the policies furthered by it”: para. 46.



Applied to s. 163.2 of the Act, the balancing test led to the conclusion that the penalty in question was administrative in nature and not punitive. An important factor was that s. 163.2 utilizes a somewhat mechanical formula for the assessment of the penalty. By way of contrast, other administrative regimes identify relevant factors in a manner that is far more similar to relying on principles used in criminal sentencing. Those other regimes will be open to constitutional challenges in the future.

Guindon: The Good News for Regulated Entities

Reference to robust appeal rights sets the bar high for other AMPS schemes that may be challenged if they do not meet that standard:

[90] Finally, we note that even though s. 11 of the Charter is not engaged by s. 163.2 of the ITA, those against whom penalties are assessed are not left without recourse or protection. They have a full right of appeal to the Tax Court of Canada and, as the respondent pointed out in her factum, have access to other administrative remedies: R.F., at para. 99; see, e.g., ITA, s. 220(3.1)

Procedural Fairness

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

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

New FINTRAC Guidelines

<http://www.fintrac-canafe.gc.ca/pen/2-eng.asp>



Guindon: The Bad News for Regulated Entities

- The AMP in the Income Tax Act was vulnerable to the argument that it was a disguised criminal offence due to the language of intent and the amount in excess of \$500,000 against a lawyer who only received a fee of \$1000.
- It is hard to imagine a worse case where the stigma would be higher; yet the Court did not find that there was significant stigma in these circumstances and there was no empirical analysis underlying this finding
- The Court rejects any upper limit or ratio test

Parallel Criminal Offence: Includes Acquiescence

The ITA in section 239 contains **criminal offence** provisions that cover much of the same ground as the Section 163.2(4) administrative monetary penalty. Section 239 of the ITA reads as follows:

- (1) Every person who has
 - (a) **made, or participated in, assented to or acquiesced in the making of, false or deceptive** statements in a return, certificate, statement or answer filed or made as required by or under this Act or a regulation;

Parallel Criminal Offense: Includes Acquiescence

- (b) to evade payment of a tax imposed by this Act, destroyed, altered, mutilated, secreted or otherwise disposed of the records or books of account of a taxpayer;
- (c) **made, or assented to or acquiesced in the making of, false or deceptive entries**, or omitted, or assented to or acquiesced in the omission, to enter a material particular, in records or books of account of a taxpayer;
- (d) **willfully, in any manner, evaded or attempted** to evade compliance with this Act or payment of taxes imposed by this Act; or

Criminal Offence: Willful Evasion

- (e) conspired with any person to commit an offence described in paragraphs 239(1)(a) to 239(1)(d);
- is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to:
- (f) a fine of not less than 50%, and not more than 200%, of the amount of the tax that was sought to be evaded; or
 - (g) both the fine described in paragraph 239(1)(f) **and imprisonment for a term not exceeding 2 years.**

Guindon: Whether Stigma is Associated with the Penalty

The court found that “no stigma comparable to that attached to a criminal conviction flows from the imposition of the penalty” (Para 84). The decision does not elaborate on the reasons for this conclusion. There is no doubt that the stigma from a criminal conviction with the possibility of imprisonment and the imposition of a criminal record is higher than an AMP. Yet, the nature of the violation in this case suggests that the stigma would be higher than that associated with some other AMPs.

Whether Stigma is Associated with the Penalty

- Although income tax AMPs generally remain shielded from public view unless the violator appeals them to a Canadian court, the Supreme Court's (public) denunciatory statements in *Guindon* suggest that the stigma analysis may require further elaboration in the future. For example, the measure of stigma could perhaps be the subject of expert evidence using an appropriate sample size in a future case.
- A recent decision underlines that judicial notice of cultural factors cannot be made in the absence of expert evidence: see *Quebec (Attorney General) v. 156158 Canada Inc. (Boulangerie Maxie's)*, 2015 QCCQ 354, 2015 CarswellQue 522 (C.Q.) at paras. 46-47.

Magnitude of the AMP: The Proportionality Test

[77] The magnitude of the sanction on its own is not determinative. However, if the amount at issue is out of proportion to the amount required to achieve regulatory purposes, this consideration suggests that it will constitute a true penal consequence and that the provision will attract the protection of s. 11 of the *Charter*. This is not to say that very large penalties cannot be imposed under administrative monetary penalty regimes. Sometimes significant penalties are necessary in order to deter noncompliance with an administrative scheme: see [*Rowan v. Ontario Securities Commission*, 2012 ONCA 208, 110 O.R. \(3d\) 492, at para. 49](#). The amount of the penalty should reflect the objective of deterring noncompliance with the administrative or regulatory scheme. (*Guindon*, at para. 77.)

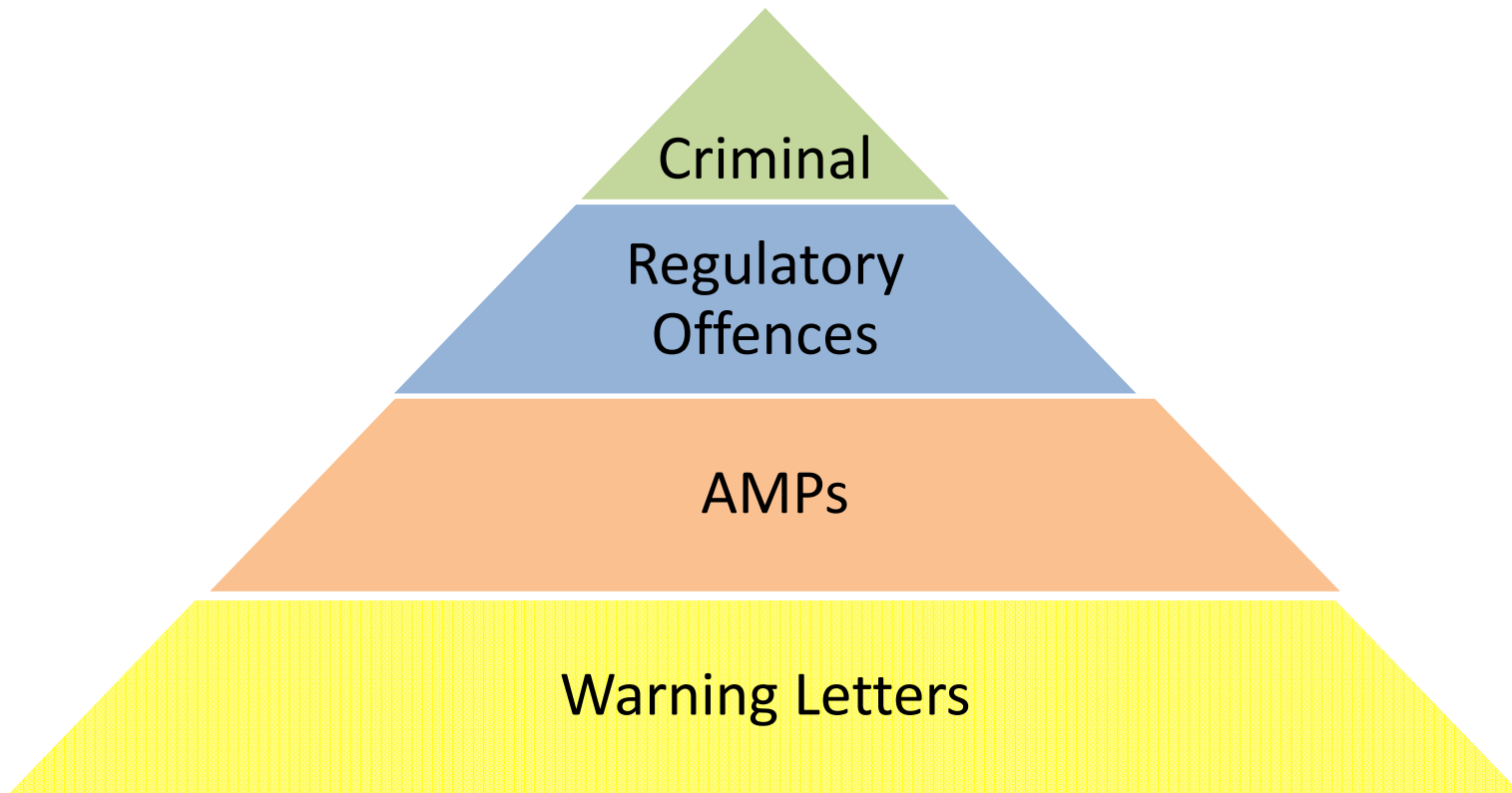
Penalties Must Exceed the Cost of Doing Business



Prices and Calculations

Soltes, “Why They Do It” example of Ritchie, KPMG, advised his firm not to register a tax shelter with the IRS as required by law. “First, the financial exposure to the firm is minimal. Based on our analysis of the applicable penalty sections, we conclude that the penalties would be no greater than \$14,000 per \$100,000 in KPMG fees.” (p. 90)

No Fixed or Upper Limit is Constitutionally Mandated



No Fixed Upper Limit or Ratio Test

[79] We cannot agree with these approaches. First, the one-to-five ratio suggested by Ms. Guindon is not a general standard. She derives the proposed rule from the Ontario Court of Appeal's decision in *Rowan*, yet in that decision, the court merely recognized the ratio between a particular administrative monetary penalty in the Ontario Securities Act and the maximum criminal penalty that could apply for the same misconduct: see Securities Act, ss. 122(1) and 127(1)9; *Rowan*, at para. 54. The Court of Appeal did not find that this was a general rule applicable to all administrative monetary penalties or that this was the only relevant consideration. Second, and most fundamentally, an arbitrary upper limit on administrative monetary penalties could undermine their goal: to deter actions which do not comply with the administrative regime. The analysis must ask whether the amount of the penalty, considered with the other relevant factors, is in keeping with the nature of the misconduct and the penalty necessary to serve regulatory purposes, such as promoting compliance and deterring non-compliance, not focus on an arbitrary threshold which may bear no relation to the particular administrative regime and policy goals: see *United States Steel Corp.*, at para. 74.

The Mental Element is Not Dispositive



Guindon: The Mental Element is Not Dispositive

[72] While some regulatory penalties are imposed without consideration of the person's state of mind, in other cases it is rational that the state would only wish to impose a penalty on those who engage in misconduct knowingly, recklessly, or with a particular intention. Providing a due diligence defence or including a mental element as a component of the penalty does not detract from the administrative nature of the penalty". (See the Federal Court of Appeal's reasons, at para. 48)

Rashida Abdulrasul Samji v. Her Majesty the Queen (B.C.) (Criminal) (By Leave) ([37862](#))

The application for leave to appeal is dismissed by the Supreme Court of Canada May 31, 2018



Rashida Abdulrasul Samji v. Her Majesty the Queen (B.C.) (Criminal) (By Leave) ([37862](#))

The application for leave to appeal is dismissed by the Supreme Court of Canada May 31, 2018

'Magic Lady' behind \$110M Ponzi scheme going to jail after losing last shot at appeal

Rashida Samji, who defrauded 284 investors, was ordered to surrender on Wednesday, CBC News · Posted: Jun 01, 2018

Samji was a former Vancouver notary who ran a \$110-million Ponzi scheme. Samji was convicted on fraud charges for scamming nearly 300 investors, leading them to believe their money was being invested in a winery's planned expansion.

She was sentenced to six years in prison on Sept. 28, 2016.



Rashida Abdulrasul Samji v. Her Majesty the Queen (B.C.) (Criminal) (By Leave) (37862)

The application for leave to appeal is dismissed by the Supreme Court of Canada May 31, 2018

In 2015, the B.C. Securities Commission [fined Samji \\$33 million](#) for the same scheme.

At the time, the association said it was the biggest Ponzi scheme it had ever heard.

Samji had tried to claim that criminal charges on top of that penalty amounted to double jeopardy — meaning she was wrongfully being prosecuted twice for the same crimes.

Rideout rejected her bid, saying the fine didn't begin to address her "moral blameworthiness."

Samji was also ordered to pay victims more than \$10 million in restitution.

The Supreme Court of Canada did not provide reasons for dismissing her application.

R. v Samji, 2017 BCCA 415: Formula of a Factor of Three

[85] It is unfortunate that the Commission did not more fully explain how it arrived at the amount of **\$33M**. The respondent submitted that it appears to have been determined by way of the formula used in previous orders, such as *Michaels*, where the amount of the “ill-gotten” gain is multiplied by a factor of two or three. It does appear to conform to this formula using a factor of three, as the ill-gotten gain in this case, reflected in the disgorgement order, is almost **\$11M**.

Most Recent Word

***Weisdorf v. The City of Toronto* 2019 ONSC 692**

- In 2017, the City of Toronto, City Council enacted By-Law No. 799-2017, which established an administrative penalty system for certain parking tickets; i.e., for parking, standing, or stopping of vehicle violations. Before 2017, these parking tickets were prosecuted under the Provincial Offences Act[1] before a Justice of the Peace through the court system.

Most Recent Word

***Weisdorf v. The City of Toronto* 2019 ONSC 692**

- [58] In the immediate case, By-Law 799-2017 does not have the indicia of a criminal process. Rather, for vehicle owners who wish to challenge a parking by-law violation, it substitutes an administrative dispute resolution process governed by the Statutory Powers Procedures Act. There is no laying of an information or complaint. There is no arrest. There is no penal sanction imposed by a court of criminal jurisdiction. There is no criminal record. The administrative penalty imposed is not imposed to punish a wrong committed against society at large and there is no social stigma attached to parking ticket violations.

Contact Us

Kenneth Jull



T **416.865.2964**



E **kjull@grllp.com**



W **grllp.com**



[@grllp](https://twitter.com/grllp)

