

1-1-1990

Suing the State

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Recommended Citation

David Cohen, *Suing the State*, 40 *U. Toronto L.J.* 630 (1990), <http://digitalcommons.pace.edu/lawfaculty/424/>.

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Introduction

As one examines the ways in which we have chosen to respond to claims of individuals and firms to compensation from the federal administration,¹ one is immediately struck by the rapid rate of growth in the number of claims and the magnitude of the compensation that has been sought in

* Faculty of Law, University of British Columbia. I am indebted to John Frecker, who provided me with the opportunity to develop the ideas articulated in this paper. I thank him for his invaluable comments, which have led to significant modification in the ideas I have developed on government liability. I am also indebted to several members of the conference, including William Bishop, Donna Greschner, Paul Craig, John Hogg, Gerald Mashaw, Robert Prichard, and Katherine Lippell, whose comments and criticisms of the paper were informative and constructive. Finally I would like to thank Deborah Garvey and Kathleen Mell, who ensured the accuracy of the material in the paper. The subject of this paper can legitimately comprise the entire range of public policies which are designed and instituted as part of regulatory programs in an effort to generate political support for the programs, to reduce public opposition to the program, or to complement existing redistributive programs that might be adversely affected by the proposals. There is no doubt that 'adjustment programs' of this sort are of enormous financial and political import. However, they have been studied and analysed in depth by a number of commentators, and though that debate informs what I say here, I have little to add to that discussion. In this paper I address a slightly narrower issue – how we might respond to losses incurred by firms and individuals as a product of bureaucratic activity. While I tend to focus on compensation, I admit that adjustment policies can include much more sophisticated and sensitive instruments.

¹ I have chosen to use the term 'federal administration' rather than 'the Crown' or 'government,' or 'state.' By 'administration' I mean the institutions and resources devoted to the design and implementation of policies and programs pursuant to federal legislation. See Law Reform Commission of Canada *The Legal Status of the Federal Administration*, Working Paper no. 40 (Ottawa: Law Reform Commission of Canada 1985). It reflects executive rather than legislative activity, although I recognize that the two are not easily separable. It also avoids the use of the archaic and often misleading denomination of 'the Crown.' See F. MacKinnon *The Crown in Canada* (Calgary: McClelland and Stewart 1976) 15. The description also avoids, at least at this stage of the inquiry, the distinctions which the term 'Crown' creates among the governor general, the cabinet, ministers of the Crown, individual (private) persons employed by the Crown, Crown corporations and agencies, and so on. I have decided to focus on the position of the 'federal' level of government because the limited information and data available relate to that institution.

recent years.² What is even more dramatic, however, is the shift in the focus of our attention away from low-level bureaucratic activity, and towards alleged administrative failures to ensure air traffic safety, combat international terrorism, regulate financial institutions, protect the interests of businesses in international trade negotiations, privatize the delivery of goods and services, and design mass transit systems. It has become obvious that regulatory activity and especially regulatory change almost always costs us;³ compensation claims represent one response to regulatory change, and the way we choose to respond to those claims reflects our attitudes to private property, individual rights, individual welfare, and collective action.

One might posit three distinct phenomena that have combined to produce these developments. First, until just after the Second World War, our legal system only imperfectly recognized claims against the administration. Judicial ideas derived from Dicey meant that one could sue individual bureaucrats to obtain compensation for losses incurred as a result of their individual activities, and presented only a limited avenue for redress. The current situation may reflect the typical lag between the formal introduction of legislation and the appearance of its consequences as we interpret the ambiguous ideas contained in it. Second, public bureaucracies have become increasingly active in what were previously considered private markets. The delivery of public services directly by public bureaucracies and the increased involvement of the administration in regulating market activities creates enormous potential for claims that the regulatory benefit was delivered inadequately if at all. Finally, one recognizes what might be

² The statistics on both of these topics at the provincial and federal levels of government are notoriously incomplete. For example, a senior policy adviser in the federal government has estimated that the contingent legal liability of the federal government was \$3 billion at the start of 1988. However, this statistic ignores both the 'non-legal' compensation mechanisms now operating in the federal government and the exclusion of claims which either are not cost-justified or do not track private legal rights and are thus not cognizable within the current system. One analysis of the experience in Britain suggests that 'far more money' is distributed through compensation programs than through the tort system, at least in part because of the expansion in the categories of 'losses' which would never be allocated to it by the law of torts. See C. Harlow *Compensation and Government Torts* (London: Sweet and Maxwell 1982) 117. Recent studies in Ontario suggest that perhaps 10 per cent of the total amount of compensation paid out under compensation programs was allocated through the private tort system. See *Final Report of the Ontario Task Force on Insurance* (Toronto: Ministry of Financial Institutions 1986) 61. The only analysis of the current system at the federal level does not even attempt to generate the statistical information one would want. See M.S. Kalson 'Federal Compensation Schemes' (1988) 4 *Admin. LJ* 12.

³ In this paper I examine what might be called 'second order' effects of regulation, which refers both to the unintended negative consequences of public programs and to the foreseeable but undesired costs of implementing those programs. I exclude an analysis of judicial review of deliberate redistributive activity.

called an 'entitlement mentality' – persons who perceive a private claim against the administration believe that all they need do is articulate the claim coherently and through the appropriate institutional processes, and the claim will be recognized. One does not need to go much further back than 1965 to discover that the idea that individuals have rights to government benefits represents a radical shift in liberal rights theory.⁴

Our responses to administratively generated losses have largely employed the courts and legal processes to define and allocate entitlements,⁵ and in this paper I address a central question in designing adjustment policies: should we transpose institutions and solutions which

4 Charles Reich developed this thesis in 'The New Property' (1964) 73 *Yale LJ* 733. Reich's argument that individuals have property rights to wealth which has been defined and allocated by the government through public programs is a radical transformation of traditional liberal ideas about property as 'an individual right to exclude others from the use or benefit of something.' See C.B. Macpherson 'Liberal Democracy and Property' in A. Kontos (ed.) *Domination* (Toronto: University of Toronto Press 1975).

5 There are several rudimentary systems now in place within the federal government which augment civil liability. Space does not permit me to analyse or evaluate fully the non-tort compensation systems. These include the Ex Gratia Payments Order, 1974, which provides for the payment of public funds for losses or expenditures 'when it is appropriate as a wholly gratuitous act of benevolence done in the public interest ... although there is no liability on the part of the Crown to do so.' The distinguishing characteristics of these payments include the denial of legal liability and the lack of formal, rule-based decision-making processes. In 1978, \$4,500,000 was paid out pursuant to the order, but from 1980 to 1983 payments decreased from \$1,400,000 to \$833,000. A second compensation mechanism is 'nugatory payments,' defined in the Public Accounts instruction manual as 'payments for which no value or service has been received by the Crown but for which a liability is recognized by the Crown.' The third compensation mechanism is the internal bureaucratic pre-review or pre-compensation settlement process. To the extent that a settlement process works effectively, it can render external review institutions unnecessary. Moreover, since the vast majority of claims will be reviewed in a pre-compensation administrative process, the operational effectiveness of all policies will be determined there. Finally, we should acknowledge the existence of statutory compensation mechanisms which operate outside of tort law.

Our current understanding of the operation of ex gratia nugatory payments and the settlement process within government is admittedly rudimentary. While the theoretical advantages of these internal administrative compensation programs include flexibility, a reduction in administrative costs, and the compensation of interests that would not be recognized in the current common law of tort, very little is known about the interaction of these systems with the civil liability of the government. The development of adjustment policies must be predicated on an understanding of the experience of the federal government with these mechanisms, focusing on the administrative process through which compensation claims are made, the identity of the potential and successful claimants, the number and amounts of claims, the expressed and actual criteria developed in the bureaucracy for determining the outcome of claims, the degree of centralization or decentralization of the claims process, the degree of publicity surrounding the process, the question whether the existence of the program and the relevant criteria for the allocation of funds are known to the public, the review mechanisms used within the bureaucracy, and the interests recognized through the allocation of public resources to private citizens through these mechanisms.

provide the framework for private ordering to administratively generated losses? If we answer that question in the negative and reject the 'private' law model, we face an enormous range of issues that must be addressed in thinking about adjustment policies. One seminal issue that has to be resolved in developing any coherent response to administratively generated injury involves defining those aspects of human welfare that should count in whatever adjustment policy we develop.

Adjustment policies, equality, and constitutionalism

Before one can begin thinking about adjustment policies to state action, one should recognize that adjustment policies and delivery systems will, if they interfere with vested rights, generate substantial constitutional challenge. The development of 'non-legal' adjustment policies will be severely constrained by constitutional limitations on policy development that begin with the unquestioned assumption that the administration (or the Crown, as judges archaically interpret it) should be treated as a private firm.

One might have thought otherwise in the light of recent decisions – in particular, the decision of the Supreme Court of Canada in *City of Kamloops v. Nielsen*,⁶ in which the question of government responsibility was addressed in a radically different manner from 'private' tort liability. The case represents a deliberate decision that the regulatory activities of public bureaucracies should be subject to compensation policies. This development has been accompanied by equally important shifts in the treatment of property claims,⁷ and of compensation for economic expectations.⁸

These cases contain the seeds of an important redefinition of the way in which we have regarded government activity. This redefinition moves away from models that have assimilated the government to the position of a private firm, and represents an attempt to create a new model of

6 [1984] 2 SCR 2, affg (1981) 129 DLR (3d) 111 (BCCA)

7 Recently the Supreme Court of Canada in *The Queen in Right of British Columbia v. Tener* (1985) 17 DLR (4th) 1 awarded compensation where mineral rights had been devalued as a result of modifications of park legislation by the British Columbia government.

8 In several cases the courts have applied concepts of 'usual or apparent' authority to the administrative activities, thus exposing the government to liability where bureaucrats did not have authority to commit public funds. See *J.R. Verrault et Fils Ltd. v. Attorney-General for Quebec* [1977] 1 SCR 41; *Transworld Shipping v. The Queen* [1976] 1 FC 159 (FCA).

government liability.⁹ These developments, however, are challenged by Charter decisions, which apply equality concepts that ignore profound differences between administration and individual, and which lead to suggestions that the government should be treated like a private firm.¹⁰

Equality concepts, like so many liberal ideas, point in two contradictory directions. The first incorporates an explicit rule of law ideology, and reflects a concern with the 'most objectionable feature' of rules providing for special treatment of the government.¹¹ Here, equality means that adjustment policies should reflect the equal treatment *of the government*. The administration, at least when it is situated similarly to private firms, should be treated in a similar fashion. It is that idea which supports constitutional arguments that the government should not be afforded special privileges unavailable to private firms.¹²

Another conception of equality points us towards the equal treatment of individuals, reflecting a concern that individuals share equally in the benefits and risks of social and economic regulation and development. The principle that no one should be exposed to egregious sacrifice for the public good will play a central role in developing adjustment policies. An appreciation of the development of communities as vehicles to ensure and facilitate sharing conceives the community as a form of social ordering through which members can participate in sharing the losses experienced by others. We can exist as individuals and achieve our potential as

⁹ See also *Sutherland Shire Council v. Heyman* (1985) 60 ALR 1 (HC Aust.) at 26–7, where the liability of a public agency carrying out regulatory responsibilities required an adjustment to the common law principles of negligence.

¹⁰ Dickson CJ said in *R. v. Eldorado Nuclear*: '[The doctrine of Crown immunity] seems to conflict with basic notions of equality before the law. The more active government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject.' (1984) 8 CCC (3d) 449 (SCC). Another example is *Anns v. Merton London Borough Council* [1978] AC 728, [1977] 2 WLR 1024, [1977] All ER 492 (HL), which begins with the assumption that private tort law ought to be applied to governmental activities.

¹¹ See Law Reform Commission of British Columbia *Report on The Recovery of Unauthorized Disbursements of Public Funds* (Victoria: Ministry of the Attorney General 1980) 13.

¹² Chief Justice Dickson's statements in *Eldorado Nuclear* are supported by section 15 equality-rights decisions striking down the exclusive jurisdictional privileges of the federal administration established in section 17 of the Federal Court Act. See *Zutphen Bros. Construction Ltd. v. Dywidag Systems International Canada Ltd.* (1987) 76 NSR (2d) 398 (NSSC); leave to appeal to SCC granted. As well, specific limitation provisions applicable to governments in civil actions have been declared unconstitutional. See *Streng et al. v. Winchester* (1986) 37 CCLT 296 (Ont. SC). This point has been extensively litigated in the United States with conflicting outcomes. See *Reich v. State Highway Dept.* 194 NW 2d 700 (1972) (60-day notice of claim provision held unconstitutional); *Fritz v. Regents of University of Colorado* 586 P. 2d 23 (1978) (notice of claims provision upheld as furthering legitimate state interest in investigating claims promptly).

autonomous beings only if there is a social community in which we participate. Part of the reason we live together is so we can assist one another when we suffer losses as a result of events over which we have little or no control.

This notion of community, and of individual responsibility for the welfare of others, finds expression in decisions providing compensation when law enforcement activity results in losses by property-owners, and in responding to personal injury claims when public health measures result in injury to children who participate in public immunization programs.¹³ The community benefits as a result of the individual's sacrifice, and egalitarian ideals suggest that the loss should be shared equally across the community.¹⁴ In a sense, we can understand the concept as a reflection of ex post equal protection – that state action cannot arbitrarily discriminate among members of the public.¹⁵

These constitutional decisions, which focus on the equal treatment of the government, present difficult practical obstacles to policy reform. Yet I cannot see how adjustment policy that responds to administrative action can ignore that the actor is the federal administration! Appeals to formal equality cannot avoid the intractable, highly contentious, and overtly political character of an evaluation of the current system of government liability and the design of alternative adjustment policies.¹⁶ As Peter Schuck wrote, 'If we would design a just and effective system of public tort remedies, we must first ask ourselves *how we wish to be governed?*'¹⁷ Yet even this represents a severely circumscribed view of the exercise. Asking how we wish to be governed represents the problem of defining and delimiting the role of the modern Canadian state and public bureaucrats. Assuming that we can achieve some consensus on that point (a highly

13 See *Lapierre v. Attorney General of Quebec* (1985) 16 DLR (4th) 554 (SCC), dismissing an appeal from the Quebec Court of Appeal, 7 DLR (4th) 37, which had allowed an appeal from the Quebec Superior Court [1979] Que. sc 907. The Quebec decisions as well as the Civil Code perhaps incorporate an idea articulated in article 13 of the Declaration of the Rights of Man, 1789: 'For the maintenance of the forces of law and order and for the expenses of administration a general contribution is indispensable; it must be equally shared among citizens according to their means.'

14 We have recognized this idea for centuries, although (not surprisingly) judges have limited its applicability to land and perhaps property-like economic interests. The interpretive rule has been justified on the ground that the burden of public action ought to be borne by the community rather than imposed on a particular victim.

15 J.L. Sax 'Takings, Private Property and Public Rights' (1971) 81 *Yale LJ* 149

16 At the same time, if one wishes to raise formal arguments against government liability, one need only turn to Justice Holmes's remarks in *Kawananakoa v. Polblank*, 205 U.S. 349 (1907) at 353: 'A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but in the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.'

17 P. Schuck *Suing Government* (New Haven: Yale University Press 1983) 1

unlikely proposition, to say the least), we must still investigate how adjustment policies might affect public bureaucracies. We must address the ultimate question: *how do we define the responsibility of some members of the community to share resources with others?* In the absence of a consensus among Canadians as to the responsibility of the community and the role of the state in defining that responsibility, the task of designing adjustment policies if we choose to employ 'legal' instruments must be subject to the same dialogue we experience in answering these questions in the political arena.

Adjustment policies and human welfare

All of this brings us to the critical issue to which I alluded earlier. Adjusting to administrative action requires that we draw distinctions between aspects of individual and collective welfare—no workable liability regime or compensation system, insurance program, or any other adjustment policy can recognize all aspects of human welfare. Our choices of the subset of interests (or 'rights,' if we use rights language and the legal system to develop adjustment policies) must be subject to political debate; 'no scheme of rights and entitlements can plausibly claim to be neutral or natural.'¹⁸ Indeed, even the preliminary decision to think in terms of entitlements independent of their content cannot claim neutrality. The choice, expressed in both federal and provincial 'Crown' liability legislation, to define a system of private legal rights against the federal administration is a product of history, reflects a belief in a specific theory of human nature, and is predicated on a model of the proper role of the community, government, and state.

Traditionally we have responded to administrative action by calling aspects of human welfare 'rights and property,'¹⁹ but there is no reason to limit ourselves to rights-based adjustment policies. We can choose to compensate for interference with physical liberty, to develop community-based responses to personal physical injury, to establish entitlements to legislative benefits, to protect traditional property rights recognized between private individuals, to compensate for reductions in economic welfare, to respond to psychological needs, to offer re-education and retraining programs, to fund community programs, and so on; and those choices are based on a normative order that must be articulated and justified.

¹⁸ See A. Hutchinson and P.J. Monahan 'The Rights Stuff: Roberto Unger and Beyond' (1984) 62 *Tex. LR* 1477.

¹⁹ See L.C. Becker *Property Rights: Philosophic Foundations* (Boston: Routledge and K. Paul 1977).

Even a cursory review of the development of government liability in Canada indicates that very different interests have been recognized and protected over time.²⁰ Historically, the administration was afforded complete immunity from any general liability to compensate for private losses. The only exceptions to this immunity were personal liberty and property rights. Initially, physical liberty was protected through actions for false imprisonment applied against the police.²¹ Ownership rights have been protected over time through a variety of vehicles, including common law trespass actions against public officials as well as the 'Crown,'²² direct actions against the government for property takings,²³ and the interpretive fiction of 'implied rights of compensation' in the case of legislative action expropriating property.²⁴ Later, real property rights

²⁰ Of course, it is misleading to separate an analysis of the interests we protect from the context in which we protect them. Most government activity, and certainly all the government activity in which I am interested, benefits some people and hurts others, directly or indirectly. The range of interests that the law protects is often not nearly as interesting as the range of situations in which the law protects those interests, and the type of protection it affords. (I discuss this more fully below.) Furthermore, an analysis of the interests we protect from state action must be augmented by an analysis of the classes and individuals who benefit from such protection. Even a cursory examination of the current liability regimes and compensation programs indicates that a relatively circumscribed group of individuals is likely to receive a disproportionate share of public funds.

²¹ See *Davis v. Russell* (1829) 5 Bing. 355, 130 ER 1098 (Ct. of Common Pleas). Recent examples of this claim include *Oag v. Canada* (1987) 2 FC 511 (FCA) (action for false arrest and imprisonment on deprivation of freedom while on parole).

²² See *Semayne's Case* (1604) 5 Co. Rep. 91, 77 ER 194 (KB); *Entick v. Carrington and Three Others* (1765) 19 St. Tr. 1029, 2 Wils. KB 275, 95 ER 807 (KB).

²³ E.M. Borchard 'Governmental Responsibility in Tort, vi' (1926) *Yale LJ* 1, at 16. The idea was extended to permit recovery of personal and real property that had been unlawfully seized by the government. The leading case is *Massein v. R.* [1934] Ex. CR 223. See also *Deeks Sand & Gravel Co. Ltd. v. The Queen* [1953] 4 DLR 255, 10 WWR (n.s.) 77 (BCSC); *Esquimalt & Nanaimo R. Co. v. Wilson* (1920) 50 DLR 371, at 374-5, [1920] AC 358, at 364 (JCPC); G.S. Robertson *The Law and Practice of Civil Proceedings, by and against the Crown and Departments of the Government* (London: Stevens 1908) 330.

²⁴ There is a rebuttable presumption that the government will pay compensation for any taking of property even though the taking is authorized. Traditionally, this 'presumption' was used to protect traditional real property rights. However, several recent decisions have expanded protection to 'economic expectations,' but only to economic expectations associated with corporate investment opportunities. See *Manitoba Fisheries Ltd. v. The Queen* [1979] 1 SCR 101, 88 DLR (3d) 462, and *Tener* supra note 7. A recent example of a case in which the court refused to apply this idea in the light of the demonstrable redistributive objective of the legislative program was *British Columbia Medical Association v. R. in Right of British Columbia et al.* [1985] 2 WWR 328 (BCCA) in which the court rejected doctors' claims for compensation when the government unilaterally altered the payment terms of the medical services plan.

were recognized through nuisance concepts and trust doctrines.²⁵ Analogous and subsidiary economic and proprietary interests have been recognized through the tort/property actions of conversion and detinue and through restitutionary claims.²⁶ And, of course, beginning in the early nineteenth century, comprehensive programs to define and allocate compensation for expropriation of real property claims were introduced.²⁷

Governments have been uniformly unsuccessful in defending takings, nuisance, or negligence actions involving property entitlements in cases where they justify their actions on utilitarian or wealth-maximization grounds. Judges simply refuse to recognize the legitimacy of arguments that the administration considered its activities to be in the best interests of the community, or that its activities were wealth-maximizing in the light of an assessment of alternative courses of action.²⁸

Later, protection was expanded to economic – that is, contract – expectations;²⁹ recently non-contract economic interests also have been protected from administrative action. Tort claims have been expanded to permit recovery of economic losses associated with the negligence of public bureaucracies.³⁰ Property concepts have been extended to include the

²⁵ *Managers of the Metropolitan Asylum District v. Hill and Others* (1881) 6 App. Cas. 193 (PC); *Metropolitan Board of Works v. McCarthy* (1874) LR 7 HL 243; *Penn v. Lord Baltimore* (1750) 1 Ves. Sen. 453, 27 ER 1132 (Ch.). (court would recognize and enforce trusts against the Crown)

²⁶ Both concepts were developed to permit recovery of property and money in possession of the government without authority. See *Massein v. R.* supra note 23.

²⁷ See E. Todd 'The Mystique of Injurious Affection in the Law of Expropriation' (1967) *UBC LR* 127, at 131; Land Clauses Consolidation Act, 1845, 8 & 9 Vict., c. 18.

²⁸ See *Scarborough Golf & Country Club v. City of Scarborough* (1986) 28 DLR (4th) 321 (Ont. HC) at 364–5; *Mayor, Councillors, & Citizens of Hawthorn v. Kannuluik* [1906] AC 105 (PC); *Northwood v. Township of Raleigh* (1882) 3 OR 347 (Ch. D.); *Johnson et al. v. Town of Dundas* [1945] 4 DLR 624, at 640 (Ont. HC).

²⁹ However, the treatment of contract claims against the state is not as simple as it might first appear. Only contract expectations derived from exchange relations with the government were recognized as compensable interests. Moreover, contract claims were limited to debt actions – the recovery of money loaned to the Crown (see *The Banker's Case* (1700) 14 How. St. Tr. 1 (Ex.)) and the recovery in contract for payment for goods supplied to the Crown (see *Feather v. The Queen* (1865) 6 B. & S. 257, 122 ER 1191 (KB)). In a sense, both these actions represented property claims against the state, and not until *Thomas v. The Queen* (1874) LR 10 QB 31 were property concepts extended to the right to recover unliquidated damages in contract.

³⁰ However, the courts, in labelling a particular action as an operational rather than a policy decision, have focused on the kind of losses suffered by the plaintiff. Where the claim is for personal injuries and perhaps property damage, it is more likely that the court will decide that the activity is 'operational' in character than if the claim is for economic losses. However, no factor is determinative, and many personal injury claims have been denied on the ground that the activity that gave rise to the injury was a policy decision: see *Williams v. St. John et al.* (1984) 24 MPLR 15 (NB QB); *Houle v. Calgary et al.* (1985) 28 Alta. LR (2d) 331 (CA); *Gerak v. R. in Right of British Columbia* (1985) 59

present value of business operations that have been devalued as a result of government decisions to compete with the private sector using government enterprises.³¹ Recovery has been permitted of money paid to the government pursuant to unauthorized statutory or regulatory provisions.³² Judges have expanded the concept of 'injurious affection' to provide compensation to property-owners where land has not been expropriated but has been devalued as a result of the construction or use of public projects.³³

The liability of governments for personal injury and property damage claims is largely an invention of the twentieth century. Even here, however, dramatic distinctions between the responsibility of private firms and those of the government have been articulated through decisions to immunize

- BCLR 273 (BCCA); *Just v. R. in Right of British Columbia* (1985) 64 BCLR 349 (BCSC); *Johnston v. Attorney-General of Canada* (1981) 128 DLR (3d) 459, at 468 (Ont. HC); *Canadian Pacific Airlines v. The Queen* (1978) 87 DLR (3d) 511, at 520 (FCA).
- 31 See *Manitoba Fisheries Ltd. v. The Queen* (1978) 88 DLR (3d) 462, [1979] 1 SCR 101 (compensations paid where federal government established Crown corporation with exclusive right to engage in business previously carried on by private firm). However, in *Home Orderly Services Ltd. et al. v. Government of Manitoba* (1987) 43 DLR (4th) 300 (Man. CA) compensation was denied where the provincial government decided to withdraw financial subsidies from the purchasers of products or services and to provide in-home health services without the involvement of private enterprises – the replacement of the market with the direct government provision of social services. In that case, the court said that the expansion of a subsidized social service system to replace private entrepreneurial activity would not necessarily give rise to compensation of private enterprise unless 'the State damages or destroys a self-sustaining private enterprise or private economic interest.' Similarly, in *British Columbia Medical Association*, supra note 24, the British Columbia Court of Appeal denied compensation to doctors whose income had been reduced as result of the enactment of legislation modifying contractual commitments made between the government and the medical profession. The court refused to call the contract expectations 'property.'
- 32 Until recently, money paid to the government 'voluntarily' under mistaken assumptions as to one's legal liability to make the payment were not recoverable: a court would not order the return of a payment made under a mistake of law. See *Hydro-Electric Commission of the Township of Nepean v. Ontario Hydro* (1982) 132 DLR (3d) 193 (SCC) (money paid to Ontario Hydro where Ontario Hydro did not have the statutory authority to demand the payment is not recoverable); *C. Gordon Foster Development Ltd. v. Landley* (1979) 14 BCLR 29 (BCCA); *A.J. Seversen Inc. v. Village of Qualicum Beach* (1982) 35 BCLR 192 (BCCA). However, in recent years several courts have said that if the payment is made under 'practical compulsion' or if the demand for payment is coupled with 'bad faith,' it will be recoverable. See *Hydro-Electric Commission of the Township of Nepean* at 230; R. Godd and G. Jones *The Law of Restitution* 3d ed. (London: Sweet and Maxwell 1986) 95–6.
- 33 Injurious affection claims arise 'when [losses are] caused to land by or in course of the exercise of statutory powers [and] the owner must resort to the remedy, if any, which is expressly or impliedly granted by the statute.' E.C.E. Todd *The Law of Expropriation and Compensation in Canada* (Toronto: Carswell 1976) 264.

the government from responsibility when it exercises 'policy' functions.³⁴ Obviously, the argument that the government activity was a 'policy' decision and that the government is not liable to private citizens is one that private firms are not entitled to make. The categorization of decisions as 'policy' expresses several values, all of which recognize the role of administrative actors in designing and implementing public policy.³⁵ The immunization of the administration from liability reflects an analysis of the kind and range of discretion exercised by public bureaucrats,³⁶ a concern with allocation of public resources, a consideration of the kinds of interests protected from administrative action as well as the interests of other potentially affected parties,³⁷ an assessment of alternative redress mechanisms, the availability of standards against which to assess the government activity, an analysis of the status of the bureaucrat who made the decision or engaged in the activity, and the articulation of an 'individualized' relationship between the administration and individual.³⁸

Recently, arguments have been made that expectations of receipt of

34 The distinction was adopted by the Supreme Court of Canada in *City of Kamloops v. Nielsen* supra note 6, after it had been articulated in *Anns v. Merton London Borough Council* supra note 10. The distinction is also found in the Federal Tort Claims Act, 1947 and was discussed in *Dalehite v. United States* 346 U.S. 15 (1953).

35 D. Cohen 'The Public and Private Law Dimensions of the UFFI Problem: Part II' [1983-4] 8 CBLJ 410

36 'Discretion' has no obvious meaning in this context. It may refer to authority to choose between two alternative courses of action, to the exercise of specialized or professional judgment, or to the formulation of policy through the balancing of competing public interests through the application of criteria which courts should not and cannot evaluate. See M. Aronson and H. Whitmore *Public Torts and Contracts* (Sydney: Law Book Co. 1982) 69. Others argue that the term ought to be limited to 'political' questions, including, for example, a claim to damages by an unemployed person on the grounds of 'negligent handling of the economy.' See S.H. Bailey and M.J. Bowman 'The Policy/Operational Dichotomy - A Cuckoo in the Nest,' (1986) 45 *Camb. LJ* 430, at 439.

37 References to this idea can be found in *Dorset Yacht Co. Ltd. v. Home Office* [1970] AC 1004 (HL), where a line of nuisance cases was distinguished on the ground that the interests at stake were much broader than those considered in the earlier cases.

38 In other words, the courts use the policy/operational distinction as a formal legal test embodying a number of ideas that should be articulated and justified independently. The concept is vague; it contains the seeds of a range of ideas which are too often unarticulated, and it has led to conclusory reasoning. In the end, it is a simplistic, formal test of liability which fails to disclose and thus subject to scrutiny several important economic, political, and cultural ideas that underlie judicial intuition. For example, it reflects an attitude of judicial deference to public bureaucratic discretion. Yet there is rarely any debate as to the justification for deference or why it does not apply when real property interests are at stake. At the same time the concept does acknowledge that administrative action should not be assimilated to private action.

economic and social welfare benefits should be protected from state action.³⁹ However, even this rudimentary development has not been implemented by judges, and the ability to recover for the non-receipt of regulatory benefits, if it ever existed, has been severely compromised in recent years.⁴⁰ The most recent developments relate to judicial recognition of at least some regulatory responsibilities through the application of common law 'fiduciary' obligations against the government.⁴¹ The application of this concept to the government recognizes elements of paternalism and public trust in the design and administration of public policies. Again, however, the courts have limited the application of this idea to cases where the government has assumed regulatory or supervisory jurisdiction over the private 'property' of firms or individuals.⁴² While

39 See D. Cohen and J.C. Smith 'Entitlement and the Body Politic: Rethinking Negligence in Public Law' (1986) 64 *Can. Bar Rev.* 1. For all of the reasons I expressed earlier, it is not surprising that in several recent cases the courts have denied government liability to compensate private individuals for losses arising from the non-delivery or inadequate delivery of public services (see, for example, fire protection services in *Gordonna Ltd. v. City of St John's* (1986) 30 DLR (4th) 720, at 740 (NSCTD)). To recognize this aspect of human welfare is to engage in redistributive justice, and most judges adhere to the idea that political legitimacy to deploy wealth, at least through grants of money, has been described as a 'constitutional' principle in *Auckland Harbour Board v. The King* [1924] AC 318, at 336 (JCPC). The requirement of parliamentary authorization for money to be taken from the consolidated revenue fund encourages comprehensive discussion and publicity, and reflects political concepts of democratic consent – in theory, it protects the collective tax-paying public from unauthorized use. Of course, the actual deployment of wealth is usually articulated in program terms, and only rarely has it been interpreted as conferring a right to receive the benefit as a particular individual. Administrative decisions to allocate wealth have not attracted the degree or kind of attention by the judiciary that decisions to allocate injury have.

40 The Supreme Court of Canada in *The Queen in Right of Canada v. Saskatchewan Wheat Pool* (1983) 143 DLR (3d) 9, [1983] SCR 205 held that a private firm, the Saskatchewan Wheat Pool, need not compensate the government for losses simply because it failed to comply with regulations under the Canada Grain Act regulating the delivery of infested wheat. Thus, some courts have held that there is no longer a tort of 'breach of statutory duty'; the implication of those decisions is that individuals cannot recover damages when bureaucrats have not complied with legislation. See *Gordonna Ltd.*, supra note 39.

41 The Supreme Court of Canada in *Guerin v. R.* (1985) 13 DLR (4th) 321 ordered the federal government to compensate the Musqueam Indian band for decades of losses that were incurred as a result of the failure of federal bureaucrats to act in the band's best interests in administering the band's property.

42 The majority judgment in *Guerin* made it clear that the fiduciary obligation was predicated on private 'proprietary' rights of the Indians. The existence of and the failure adequately to implement regulatory responsibilities arising as a product of executive or legislative action were not the justifications for compensation.

this idea can be used to enforce regulatory entitlements, the latter requirement significantly limits its potential beneficiaries.⁴³

But all of this simply represents my interpretation of the expanding universe of interests protected under current legal regimes from administrative action. The development of adjustment policies, whether through 'government liability' or other instruments, must attempt to articulate which interests ought to be recognized. The answer, which is implicit in the federal and provincial 'Crown' liability legislation, appears to be the simplest; the administration should be treated as a private firm, with the concomitant outcome that all those individual 'rights' protected from interference from private individuals are also protected from the administration. Equally important is the implicit idea that *no* interests other than those recognized between private individuals are protected.

There are several obvious difficulties with a policy that protects all of and only those interests recognized as deserving protection between private individuals. First, it fails to recognize that the administration is often collectively empowered to redistribute wealth—to injure non-consensually.⁴⁴ That is, liberal ideas that protect property and contract entitlements from administrative action have two implications. First, using private law means that courts will not impose liability if the result would be the redistribution of wealth from the 'state' and thus from taxpayers to others. While property is restored or compensated for and contract expectations recognized in both cases, one could assume that *ex ante* and almost always *ex post*, public capital would not be reduced.⁴⁵ Second,

43 This analysis of common law concepts that protect entitlements from administrative action is obviously incomplete. To understand fully the choices we make to compensate individuals or to design alternative forms, we should analyse the broad range of statutory schemes that define and create entitlements to compensation in specific circumstances. Thus, the compensation program under federal expropriation legislation must be analysed to assess its relationship to common law compensation concepts. More important, we must analyse a broad range of statutory provisions which provide for compensation in specific cases of government takings to determine their relationship to common law compensation principles, and to evaluate the implications of proposed reforms. As I pointed out earlier, that information does not exist.

44 The most obvious example of this is taxation, but the concept extends to all authorized infringements of liberty or welfare. Even the current Crown Liability Act acknowledges in section 4(6) that tort liability should not be imposed for acts that are legislatively authorized.

45 This, of course, is consistent with a view of common law decision-making, which incorporates the idea that the allocation and distribution of contract (and property) entitlements should reflect corrective justice or perhaps wealth-maximization norms, leaving the design and implementation of redistributive policies (if they are to exist at all) to the taxation and social welfare systems of government. See F. Hayek *The Constitution of Liberty* (Chicago: University of Chicago Press 1960) 93–102; R.A. Epstein

the classes of persons contracting with the administration and owning property that might be expropriated are such that public resources are distributed only to a narrowly circumscribed subgroup of the general population.

Similarly, treating the administration like a private firm represents a refusal to recognize the benefit-gaining function of the modern welfare state. The system cannot respond to losses generated through the delivery of public goods or private goods through non-market vehicles. The omission of public benefits and the protection of existing private property rights has been driven by an implicit anti-redistributive, anti-majoritarian ideology. The use of private law entails responding to administration action by focusing attention on individual bureaucrats. Leaving aside the symbolism of formal equality, that choice means that we have to ignore the modern Canadian welfare state. Redistributing wealth and responding to need through non-market institutions is and has been a central role of Canadian governments since Confederation; it is a virtual prerequisite to the development and implementation of all regulatory policy, and it does not matter whether the redistribution is the objective or means chosen by the government.

Finally, the use of legal liability as an adjustment policy implicitly assumes that the idea of corrective justice should apply to the administration. It incorporates normative assumptions which perhaps can be justified in the private law of tort and applies them to the government. Yet it makes little sense, for example, to argue that the 'state as judge' ought to interfere as little as possible with the liberty interest of private individuals – an idea central to an understanding of tort law in private relations – in the context of the administration as defendant. Both rule-of-law and constitutional equality arguments develop from the same rhetorical and ideological foundation, and both are used to support the assimilation of government adjustment policy with private tort law.

Although it is consistent with the dispensing of (corrective) justice according to law, this idea fails to answer several critical questions. It presumes that concepts of formal equality provide us with the appropriate definition of human welfare or 'rights.' It purposefully ignores the values that underlie judicialization and legalization of rights. It also ignores the legitimacy of collective action implemented by public bureaucracies. To say that the protection of individual rights demands government liability is to say the government ought to be constrained from acting and that

'Unconscionability: A Critical Reappraisal' (1982) 18 *J. of Law and Econ.* 293; R. Nozick *Anarchy, State and Utopia* (New York: Basic Books 1974) 149–53; J. Rawls *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press 1971) 87–8, 274–9.

individual rights as defined by judges must always prevail over the collective good. Adjustment policies, unlike tort law, must reconcile the tension between individual rights and the collectivity. It is naïve to assume that the interests we protect from interference by private individuals (and only those interests) should without analysis be protected from administrative action.

If I am right in all of this, the expression and articulation of the subset of 'essential' interests recognized in adjustment policies will reflect several ideas that comprise and characterize the Canadian community. First, the choice will always reflect the interests of the major actors who determine the liability rules, and a decision to recognize more than private legal entitlements, protect employment expectations and opportunities, promote neighbourhood stability, ensure property values, and so on must engage the communities that make up Canada in an effort to ensure that those voices are heard. Second, the identification of those interests reflects a concern with the redistributive impact of adjustment policies. In making our choices we will be creating 'victims' of administrative action and we will be redistributing wealth from some other group of individuals. Third, the interests we choose to recognize will reflect utilitarian or wealth-maximization norms – public insurance and welfare programs have obvious incentive effects on private behaviour, and adjustment policies must reflect the impact of particular choices on private accident-generating and accident-prevention measures.⁴⁶ In short, we must acknowledge the impact on private markets of the government activity associated with private losses. Administrative action may exclude private markets deliberately through the prohibition of certain activities, or, in a more subtle manner, may drive out private activity. This displacement of private markets, which has been referred to as 'general reliance,'⁴⁷ may justify compensation if the purpose of the regulatory activity is to replace the market.⁴⁸

Utilitarian arguments can justify broadly based compensation policies which reflect the idea that the aggregate utility of a group of individuals may be increased by taking a small amount of goods and services from all

⁴⁶ Instrumental arguments might suggest that we consider the administrative costs of identifying, measuring, and responding to private losses; we should recognize alternative institutional structures or vehicles through which the interest may be recognized; and we might take into account the disincentive effects of providing compensation on private activity.

⁴⁷ See *Anns v. Merton London Borough Council*, supra note 10, at 500 (All ER); P.P. Craig 'Negligence in the Exercise of a Statutory Power' (1978) 94 *Law QR* 428, at 451.

⁴⁸ If compensation is denied, private market or insurance arrangements will to some degree be regenerated, a cost that a priori was considered undesirable.

individuals to compensate highly focused losses⁴⁹ – that compensation-based adjustment policies, even if they have no effect on individual or administrative behaviour, may reduce the consequences of losses through loss-shifting arrangements. Here, adjustment policies are a mechanism through which collective groups can bribe victims of collective action. Centralized programs minimize the transaction costs otherwise associated with organizing the collective group, and prevent free-rider problems.

This argument is strongest in the context of enterprise–individual and thus administrative–individual relations. If the enterprise is ‘owned’ by large numbers of individuals, we can assume that it will be less risk-averse than the potential victim of its activities, and that welfare gains will be generated by shifting the risk of injury from the potential individual victim to the enterprise. The losses will be distributed across all private individuals who stood to gain from the deployment of those resources in their next best use as defined by the administration. The disappointed potential beneficiaries will be impossible to identify (they probably will not know that they are victims), and the forgone opportunity to benefit from administrative action is likely to be perceived as less significant than the actual loss suffered by the victim. If the losses are externalized by the bureaucracy over time, then the welfare gains associated with the loss-spreading will increase.⁵⁰ These ideas have even broader implications when the defendant is the community, and the loss-spreading mechanism is either taxation or increases in the money supply.

Adjustment policies and bureaucratic incentives

But all of that is only a small part of the equation. Even if we were able, in the abstract, to decide which aspects of welfare to recognize, we would still have to consider their impact on bureaucratic conduct. The question of the incentive effects of adjustment policies on bureaucratic behaviour is an extraordinarily difficult one. To a very large degree the instrumental effect of our policies will depend upon the organization, function, and purpose of the institution upon which it acts, and it is obvious that the federal administration does not conform to one model of bureaucratic organization. As well, the incentive effects of personal bureaucratic liability and direct government liability are likely to be very different, and the concomitant instrumental effects of permitting contractual shifting of

49 See M. Spitzer ‘An Economic Analysis of Sovereign Immunity in Tort’ (1977) 50 *So. Cal. LR* 515, at 520.

50 Of course, those gains will be offset by an increase in the magnitude of loss perceived by the ‘insurers’ who will pay out a portion of their existing wealth rather than simply fail to receive some unknowable portion of state largess.

losses within government or to insurers makes prediction that much more difficult.

Moreover, if one assumes that government agencies and individual bureaucrats are motivated to maximize social welfare, then liability rules are both unnecessary and inappropriate regulatory instruments. Where the bureaucracy is already accounting for both private and social costs in its decision-making processes, using adjustment policies to force the institution to internalize those costs simply generates increased administrative costs and will not alter regulatory behaviour.

The trivial regulatory impact of compensation claims is exacerbated when the federal government does not procure market insurance in respect of contingent tort liability, and thus does not face risk-related premiums and is not subject to contractual regulation by the insurance industry. And because a substantial proportion of regulatory benefits is not distributed through competitive markets, liability costs will not be passed on to the community through increases in product prices⁵¹ and will not generate concomitant reductions in rates of product usage and thus exposure to risk. Whatever incentives financial risk have in the private sector, they are unlikely to operate in the same fashion in public institutions.

I am not certain that the analysis changes even if one assumes that administrative decision-making is not socially optimal. The administrative action, either because of incompetence or self-interest, is one that we would not make again, given accurate knowledge of its implications. There are strong arguments that the 'public interest' view of bureaucratic behaviour is simplistic, and that bureaucrats' motives include maximizing their budgets, their personal job and income security, their power, their professional prestige, and their personal wealth. To the extent that this is true the bureaucracy is acting like a private firm, and should be faced with both the private and social costs of its activities.⁵²

51 See A. Downs *Inside Bureaucracy* (Boston: Little, Brown 1967) 30. Downs points out that bureaus should not be measured by market standards not only because input costs are impossible to calculate, but also because there is no market on the output side. See also G. Calbresi *The Cost of Accidents* (New Haven: Yale University Press 1970), and T. Ison *The Forensic Lottery* (London: Staples P. 1967).

52 There is evidence that notwithstanding social-welfare-maximizing motives, bureaucracies underestimate social costs, and one purpose of liability rules may be to inform the bureaucracy of the costs its activities are generating. Compensation awards may influence state action if the bureaucratic decision-making process has a tendency to discount social costs. Errors in estimating social costs have been referred to as 'fiscal illusion' associated with state action in which the relevant state decision-makers fail to take into account the social costs of their activities. See L. Blume and D.L. Rubinfeld 'Compensation for Takings: An Economic Analysis' (1984) 72 *Cal. LR* 569, at 588-90; L. Tribe *American Constitutional Law* (Mineola, NY: Foundation Press 1978) 458-9; L. Kaplow 'An Economic Analysis of Legal Transitions' (1986) 99 *Harv. LR* 511, at 567 et

Adjustment policies that impose liability where the government engages in 'commercial activities' or adopts enterprise models of organization implicitly recognize this point. In these cases we might assume that at least to some extent the government enterprise is maximizing its private welfare, and thus will be discounting social costs. Using adjustment policies to force the government to internalize social costs would appear to some to be desirable. Allocating losses to the administration is theoretically defensible if the externality is a result of bureaucratic decision-making that emphasizes budgetary costs, notwithstanding a policy that is designed to take into account all private (bureaucratic and political) and social (victim) costs.⁵³

Even when the government is acting in a self-interested profit-maximizing fashion, or is exploiting its independence from its 'principal,' or is simply 'negligent,' the imposition of economic sanctions, without more, will not generate positive regulatory responses. The strongest argument against using adjustment policies to force the administration to internalize losses recognizes that the administration is far less likely than private firms to be constrained by competitive capital and product markets, and thus can shift costs to the general public through taxation policy. If this is so, then, even assuming that loss-shifting is desirable, the institutional characteristics of central governments permit the externalization of costs even if we would want to shift them to the 'government.'

The costs may be borne by another department, a bureaucracy independent from the one whose actions are most directly associated with the injury.⁵⁴ Many bureaucratic decisions are results of a complex series of

seq. While in a perfect world the bureaucracy may take into account all the social costs of its activity, reality may be quite different. This may be because those costs do not come out of the bureaucratic budget, or because the bureaucrat calculates costs not in terms of willingness to pay to avoid the state activity, but in terms of 'political costs.' In that case the costs may not be related to the preferences of the members of the relevant community. One should keep in mind, however, that full compensation is appropriate in this context only if there has been *full* government failure. If there has been only partial government failure, then only partial compensation is appropriate. What is critical to a full understanding of the issue from this perspective is to identify the cases where 'fiscal illusion' is likely to be taking place, and to measure the magnitude of the failure.

53 See the Treasury Board of Canada's administrative policy manual, *Benefit-Cost Analysis Guide* (Ottawa: Minister of Supply and Services 1976), chapter 490 ('Socio-economic Impact Analysis'), which directs bureaus to identify and calculate all costs and benefits associated with proposed regulatory action.

54 The separation in the government of the 'acting' department and the loss-bearing department will depend on the particular way in which economic signals are structured. If the signals are received by the correct department, and if the departmental budgets do not permit loss-shifting over time, we might predict modification of administrative activity at the institutional level. See Cordes and Weisbrod 'Government Behaviour in Response to Compensation Requirements' (1979) *J. of Pub. Econ.* 47.

interactions among individuals and institutions, and only very carefully designed adjustment policies will prevent externalization as a result of the inability of the reviewing institution to allocate costs precisely on a proportionate basis to the correct sector of the government.⁵⁵ A solution is to allocate the costs against the government, expecting the government, which has a comparative informational advantage, accurately to allocate the costs to the appropriate ministry, department, sector, or individual. Although this is theoretically appealing, if the government is motivated to shift the losses to the community rather than to a specific bureaucracy, the problem continues. And if it is not, then adjustment policies are not needed to make it act that way. Unless public bureaucrats are independently motivated to monitor the activities of their subsidiary bureaucrats, ascertain the welfare losses associated with administrative action, and take appropriate measures, the loss will remain external to the administration. Governments motivated to act in this fashion will do so without being 'signalled' by the economic impact of adjustment policy liability risks.

Adjustment policies and the many faces of Leviathan

Even if we were able to resolve all of these questions, talking about the aspects of individual and collective welfare to be responded to assumes that they would be the same across all administrative activities. Given the enormous range of regulatory activities of modern governments, that assumption appears to be unworkable. Leviathan is not a monolith, and adjustment policies must be sensitive to the enormous range of institutional structures and programs that characterize the modern Canadian state.

The administration provides information to the public to influence tastes and values, correct market dysfunction, and reduce transaction costs. It regulates information that private firms disseminate or keep undisclosed. It regulates the prices charged for a variety of services and goods which it provides directly through public enterprise or through private firms. It regulates the quality and quantity of goods and services through certification, testing, registration, and licensing programs, as well as through subsidies and taxes. It provides a range of insurance, welfare, and compensation programs to the public generally and to discrete subgroups

⁵⁵ Certainly the problem has been recognized in the corporate context. See Note 'Decision-Making Models and the Control of Corporate Crime' (1976) 85 *Yale LJ* 1091; C. Stone *Where the Law Ends: The Social Control of Corporate Behaviour* (New York: Harper and Row 1975). The problem has also been recognized in the case of administrative action. See Law Reform Commission of Canada *The Legal Status of the Federal Administration* Working Paper 40 (Ottawa: Law Reform Commission of Canada 1985) 70-1.

of the population. It provides both private and public goods directly to the public, including health care, transportation services, and national defence, and may in some cases prohibit private enterprise from engaging in competition with it. It redistributes wealth through tax policy. My intuition is that a universal adjustment policy could not respond optimally to losses generated across this range of regulatory activities, and even a brief analysis of three areas of administrative action that have generated claims to compensation in recent years confirms that idea.

ADMINISTRATION OF JUSTICE

One area of government operations that generates a substantial number of losses is the criminal and civil justice system and, in particular, the denial of compensation to individuals who claim that they have been wrongly convicted of criminal offences or incorrectly found to be liable to compensate another in private lawsuits. We have preserved historical immunities enjoyed by judges and Crown prosecutors,⁵⁶ and liability will not be imposed for negligence or even for malice in the case of quasi-judicial and judicial decisions.⁵⁷

There are several obvious explanations for this phenomenon. First, common law rhetoric may lead some to believe that judges who simply discover the law through reasoning cannot be 'negligent' in any sense that would permit judicial review for compensation to be differentiated from an appeal on the merits of the decision. Second, the redistribution of entitlements associated with judicial decision-making in this 'mediating'⁵⁸ context will often involve the definition of entitlements between non-governmental actors, and does not represent a reallocation of wealth to or from the state. Related to this idea is the naïve view that prosecutorial bureaucracies and the judiciary are not implementing a formal program.

⁵⁶ Most 'Crown' liability statutes continue immunities for criminal and penal law enforcement, and for activities involving the discharge of judicial responsibilities. See Proceedings against the Crown Act, RSO 1980, c. 393, ss. 2(2)(d), 5(6). See *Nelles v. The Queen in Right of Ontario et al.* (1986) 21 DLR (4th) 103 (Ont. CA). In *Nelles* the Ontario Court of Appeal held that at common law the attorney general as well as Crown attorneys are immune from civil liability even for malicious prosecution. The Supreme Court of Canada overturned the decision of the Ontario Court of Appeal on this issue, holding that Crown prosecutors who act maliciously may be liable to compensate their victims. However, the court preserved the historical immunities from liability in negligence. See *Nelles v. The Queen* [1989] 2 SCR 170.

⁵⁷ See *Sirros v. Moore* [1975] QB 118 (CA); *Mackenzie v. Martin* [1954] SCR 361. The Canadian decisions parallel American and British policies. See *Gregoire v. Biddle et al.* 177 F. 2d 579 (1949) cert. den. 339 U.S. 949. The immunity in the United States has been extended to deny prosecutorial liability even in the case of so-called constitutional torts. See *Imbler v. Pachtman* 424 U.S. 409, 96 S. Ct 984 (1976) (prosecutor enjoys absolute immunity from civil liability under the Civil Rights Act of 1871).

⁵⁸ J. Sax 'Takings and the Police Power' (1964) 74 *Yale LJ* 141

For both these reasons, concerns with bureaucratic self-interest which might otherwise justify adjustment policies are attenuated. Further, judicial and professional norms of conduct are likely to be powerful regulators of behaviour, and thus our choices might reflect the view that prosecutors and judges are 'regulated' by these norms of conduct, and incentives created through threats of liability are less justified.⁵⁹ As well, the design of the judicial process is relevant; the identity of the relevant state actors—judges and prosecutors—is easily ascertained, which facilitates formal and informal internal review.⁶⁰ The number of potential state actors subject to review is also relevant, since internal bureaucratic review is unlikely to be overwhelmed by resource demands.⁶¹

Justifications for prosecutorial immunities include protecting prosecutors from harassment by unfounded claims, conserving limited prosecutorial resources to be employed in law-enforcement activities, preserving the 'independence of judgment' required in prosecutorial decision-making, recognizing post-conviction review procedures, including the remedial power of trial judges and appellate review, employing criminal proceedings against the prosecutor, and regulating prosecutorial conduct through professional review and sanctions.⁶²

GOVERNMENT AS ENTERPRISE

Our responses to prosecutorial and judicial administrative errors can be contrasted with the treatment of administrative action consisting of the direct provision of services to the public – that is, cases where the regulatory tool the state has chosen to use is direct participation in the market. Judges have responded aggressively to situations in which the state is engaged in commercial and 'business' activities and have treated the government or its sub-agents as if they were a private firm in most cases.⁶³

59 Some of these ideas are canvassed and criticized by M. Pilkington in 'Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms' (1984) 62 *Can. Bar Rev.* 517, at 560–1.

60 In *Richman v. McMurtry et al.* (1983) 41 OR (2d) 559, 147 DLR (3d) 748 (Ont. HC) one finds references to the alternative institutional processes through which prosecutors are regulated.

61 See *Everett v. Griffiths* [1921] 1 AC 631 (HL); *O'Reilly v. Mackman* [1982] 3 WLR 604 (CA), aff'd [1982] 3 WLR 1096 (HL).

62 These ideas are canvassed in *Nelles*, supra note 56, at 122–4; *Imbler v. Pachtman* supra note 57, at 991 (S. Ct); and *Pearson v. Reed* 44 P 2d 592, at 597 (Dist. CA 1935).

63 This is one of the significant elements of the Supreme Court of Canada's decision in *Welbridge Holdings Ltd. v. Greater Winnipeg* [1971] SCR 957. where Laskin J, in dismissing a claim for damages resulting from the enforcement of a subsequently invalidated by-law, stated that a municipality, while it may enjoy immunities when exercising legislative and quasi-judicial functions, will 'incur liabilities in contract and in tort, including

It is obvious that adjustment policies that respond to compensation claims where the government engages in market activities and delivers programs and services through institutions organized like private enterprises raise dramatically different issues than claims generated by prosecutorial and judicial error. Whether the administration is competing with private firms or chooses to replace private entrepreneurial activity with a public monopoly, adjustment policies must be directed at two categories of loss-generating activities. The first is represented by claims by private firms for economic losses suffered as a result of the introduction of an additional 'non-market' competitor; the second consists of claims of firms that suffer losses as a result of the administrative activity as a continuing process.

In the first case, adjustment policies might reflect the idea that the risk of competition by the government should be analogized to competitive risks generally, for which private firms are not compensated and which are reflected in the rates of return on capital investment – in a sense, the firm is compensated *ex ante*. Unless one thinks that pecuniary externalities should be compensated for generally, or believes that government activity is necessarily less desirable than private activity, it should be irrelevant that the competition consists of the administration rather than private enterprise.⁶⁴ This approach views the administration as a private firm and argues for compensation in the same circumstances in which a private firm would be obliged to compensate.⁶⁵

The question of 'intra-activity' adjustment policies can be analysed along the same lines. If the administration is acting as a firm, and if we believe that wealth-maximization norms argue for the establishment of property, contract, and tort entitlements, the optimal 'adjustment policy' for administratively generated losses would seem to be whatever system we

liability in negligence ... [where] there may ... be an individualization of responsibility for negligence in the exercise of business powers.'

64 If the state expropriates property, or makes it illegal to engage in an activity in order to establish a monopoly, competition is not taking place, and this analysis would justify compensation. This is the approach that was adopted in the *Manitoba Fisheries* case, *supra* note 31, where the court held that the creation of a federal agency to market fish and the resulting devaluation of the plaintiff's commercial enterprise constituted a taking for the purposes of justifying compensation.

65 The argument that competition by the government constitutes unequal treatment under section 15 of the Charter was recently rejected. See *Sebastian v. Saskatchewan* (1987) 10 CRD 475-03 (government promotion of public campgrounds does not constitute unequal treatment of private campground owner who suffered business losses as a result of advertising).

apply to private firms.⁶⁶ This argument is strengthened if one assumes that the administration, when it is producing and distributing goods through corporate and market mechanisms, may not be accounting for all of the exogenous costs of its activities, but rather may be motivated by private wealth-maximization or utility-maximization objectives. Adjustment policies should be designed to restrain administrative action and to ensure that the administration faces cost incentives analogous to private industry.⁶⁷ While government failure may be characteristic of all administrative activity, the fiscal illusion generated by the phenomenon is likely to be more prevalent in state enterprise activities.

Adjustment policies analogous to those applicable to private firms should also be implemented when the administration uses relatively independent vehicles to engage in market activities. That is, when the government establishes relatively independent economic units to deliver public services, the economic organization of the public firm will permit 'regulation' through economic incentives that are absent when the signal is directed at general revenues. Moreover, our ability to articulate standards of conduct to regulate administrative conduct is likely to be enhanced when the administration provides goods and services through market vehicles, an activity with which we have considerable experience in the private sector. The administration, when it engages in market activity, may be indistinguishable from private enterprise, and our sense of outrage associated with inequalitarian treatment may be enhanced as the administratively generated injuries become indistinguishable from private injuries; and the private costs incurred in distinguishing the public firm from the private will increase when the public firm is engaged in market activities. We may interpret administrative choices to organize activity through markets and enterprise arrangements as a signal that a political decision has been reached to have that activity subject to market constraints, and thus subject to a regime that establishes property entitlements, exchange relations, and non-consensual relations upon which market behaviour is based. Finally, the public enterprise may be organized so that the beneficiaries of the administrative activity bear a proportionate share of the costs of that activity. Redistributive goals, which may justify non-compensation in situations involving implicit taxation and subsidy decisions, are replaced by objectives that may justify compensation. The 'insurance program'

⁶⁶ Sax, *supra* note 58, 63–7, argues for this approach when he suggests that compensation should be payable when the state is acting as an enterprise organization. This analysis does not offer any insights, however, as to whether special *additional* responsibility is justified, or whether one should design alternative policies where the state firm is not simply maximizing its net expected profits, but is motivated by social welfare objectives.

⁶⁷ Blume and Rubinfeld, *supra* note 52, 573, 620–2

established through adjustment policies is thus funded by the class of persons exposed to the risk rather than by the public at large.

GOVERNMENT AS INFORMATION BROKER

The final confirmation of my suggestion that adjustment policies must be context-dependent involves an assessment of our response to losses generated by the administration when it distributes information about its own or private activities. The motivations for informational programs are varied, and it is clear that liability rules must be sensitive to the context of and rationales for state action in cases where the provision of information causes private losses.

One obvious rationale for information-disclosure programs is the correction of market dysfunction by reducing private search, uncertainty, and mistake costs. When markets underproduce information,⁶⁸ the government may choose to regulate the information-generating activities of private firms,⁶⁹ or the administration may choose to provide it directly in government information programs. Both cases represent relatively low-cost, non-intrusive regulatory instruments.

Regulatory programs which direct private firms to disclose information may result in a range of private victims who are identifiable as a class in the regulatory action and as individuals in the case of private lawsuits. Where the government obliges private firms to disclose information, the administrative action involves both restrictions on liberty on the firm and mandatory transfers of wealth to the recipient of the information. Even if the information is accurate, firms who were benefiting from the imperfect information and transaction costs will lose wealth. If private firms were to provide accurate information to the public, however, compensation would not be payable, and we might ask why the administration should be treated any differently. Where our regulatory objective is to create efficient markets, we do so not by expropriating wealth, but by facilitating choice. What 'expropriates' wealth is the consumer's change in taste, and the concomitant inability of the 'victim' to exploit mistake and search costs. No one believes that private competitive activity should justify compensation, and unless we think that state action reflecting changes in taste is different

68 Information may be underproduced because it is a public good, and producers therefore cannot easily capture all of the demand that would be expressed in market transactions. When adverse information is required to be disclosed, the private costs of disclosure may exceed the private benefits associated with receipt of the information, and it is likely that market participants will ignore the aggregate social benefits associated with disclosure regardless of their magnitude.

69 Information disclosure, whether it originates in judicial, legislative, or regulatory sources, is designed to impose direct and indirect costs on information providers: direct costs are represented by expenses incurred in disseminating the information, and indirect costs by demand shifts in response to the information.

from private competition, adjustment policies should not be implemented in this context.

However, a different analysis applies when the administration is producing information about its own current or future behaviour. It is obvious that a significant proportion of government information activity is a product of its monopoly with respect to information about regulatory programs and its own present and future activity. Here the administration is engaged in activity that represents a self-correcting mechanism for its monopoly on the information. Assuming the information is accurate, firms which, if the state were to give access to the information, might operate as information brokers incur losses represented by the forgone profits that would have been available in the absence of administrative action. In other cases the administration may disseminate information it believes ought to be available to all members of the public without the discriminatory impact of the market. Since the information is distributed at a zero price, the program necessarily injures market participants who would otherwise engage in the production of the information; and if the information is accurate, compensation simply represents a cost of replacing market information with public information and the decision to compensate will reflect the willingness of government to incur the true social costs of public programs.

Adjustment policies will be quite different, however, when the administration inadvertently or deliberately provides inaccurate information to the public with resulting personal, property, or economic losses. The information may be provided explicitly in information programs, in individual responses to requests for information, or through the creation of expectations of government behaviour associated with government practices or conduct-generating reliance-based losses.⁷⁰

Here we have treated the administration like a private firm, using negligence and contract doctrines to impose liability on individual bureaucrats and public institutions.⁷¹ Yet compensation may be an

⁷⁰ See *Sutherland Shire Council*, supra note 9; see also E. Weinrib 'The Case for a Duty to Rescue' (1980) 90 *Yale LJ* 247, at 258.

⁷¹ Generally, the courts have held that decisions of bureaucrats to disseminate information to individual members of the public upon which the latter rely in planning their economic activity will give rise to liability. See *Cardinal Construction Ltd. v. Brockville* (1984) 25 MPLR 116 (Ont. HC); *Grand Restaurants of Canada Ltd. v. City of Toronto* (1981) 123 DLR (3d) 349 (Ont. HC); *Windsor Motors Ltd. v. District of Powell River* (1969) 4 DLR (3d) 155 (BCCA). See also *Shaddock & Associates Pty Ltd. v. Parramatta City Council [No. 1]* (1981) 36 ALR 385, 150 CLR 225 (HC Aust.) (city liable to firm that relied on information regarding town planning proposals); *Dubnick v. Winnipegosis* [1985] 5 WWR 758 (Man. CA) (laundromat owner recovered losses incurred in purchasing water where city incorrectly informed him, six years earlier, that he could not drill well to obtain water on property).

inappropriate policy adjustment to government-produced inaccurate information. Private entitlements – including an entitlement to accurate information – may be protected by either liability or property rules. That is, after deciding that private firms and individuals are entitled to accurate information, we must decide whether to protect the entitlement through compensation awards or through requiring the administration to act in a particular fashion. Adjustment policies that focus on compensation reflect a concern that if the government were committed to act consistently with the information we would effectively be permitting low-level bureaucratic activity to trump legislative direction.⁷² Yet adjustment policies can legitimately take into account the protection of investment decisions and attempt to constrain administrative action through decisions that commit the government to particular programs.⁷³ As well, process values might justify preventing administrative action that is inconsistent with information provided by bureaucrats.⁷⁴

All of this is further complicated when one recognizes that the administration may be disseminating information about its future activities, policies, and programs, or perhaps about the economic implications of regulatory action. If we respect the exercise of legislative choice we should be very careful about developing adjustment policies.⁷⁵ At the same

72 Judges have refused to hold that the government is committed to act consistently with representations that are beyond the authority of individual bureaucrats, or that would result in unlawful actions. See *Woon v. Minister of National Revenue* [1951] Ex. CR 18; *Stickel v. Minister of National Revenue* [1972] 1 FC 672 (FCTD); reversed on other grounds [1973] FC 259 (FCA), [1975] 2 SCR 233; *Minister of National Revenue v. Inland Industries Limited* [1974] SCR 514. Representations by bureaucrats leading to irrevocable economic losses will not give rise to an 'estoppel' against the government or its agencies; as one judge put it, '[A]ny commitment which the Commission or its representatives may give ... to act in a way other than that prescribed by law would be absolutely void.' See *Granger v. CEIC* (1986) 69 NR 212, at 215 (FCA) (information given that pension fund could be transferred to a retirement plan without adverse tax consequences would not prevent Canadian Employment and Immigration Commission from deducting benefits).

73 See *Robertson v. Minister of Pensions* [1948] 2 All ER 767 (KB); *Lever (Finance) Ltd. v. Westminster Corporation* [1970] 3 All ER 496 (CA).

74 See *R. v. Inland Revenue Commissioners, ex parte Preston* [1985] 1 AC 835 (income tax reassessment set aside as 'unfair' in that it constituted an abuse of process in light of the inaccurate information given by IRC employees on which the plaintiff relied); *HTV Ltd. v. Price Commission* [1976] 1 CR 170; *Sous-Ministre du revenu du Québec et Procureur général de la province de Québec v. Transport Lessard (1976) Limitée* (28 August 1985, Quebec CA) discussed in *Granger*, supra note 72, at 215 (claim for sales tax dismissed on ground that it infringed rules of natural justice in light of information relied upon by taxpayer regarding purchase of business); *Secretary of State for the Home Dept. ex parte Khan* [1985] 1 All ER 40.

75 Several decisions suggest that the government will not be liable when it fails to disclose future administrative or legislative activity: *Laurie's Caterers Ltd. and McConville v. North Vancouver and Johnston* (1985) 64 BCLR 134 (BCCA); *Executive Holdings Ltd. v. Swift Current* [1985] 1 WWR 341 (Sask. QB). Judges have used concepts of intention (*Lethbridge Collieries v. R.* [1951] SCR 138; *Joy Oil Co. Ltd. v. R.* [1951] 3 DLR 582 (SCC); *Administration*

time, we can respond to misinformation about current and existing government programs through the development of non-compensatory adjustment mechanisms. In fact the monopolistic characteristics of the state as an information provider, and concerns with investment decisions may justify compensation based adjustment policies even here.⁷⁶

Nonetheless adjustment policies which include compensation or which attempt to direct administrative action will interfere with the dynamic, environmentally-sensitive nature of administrative decision-making; and to attempt to regulate administrative choices as to the most appropriate timing of disclosure of regulatory activities is obviously problematical. There may very well be valid reasons to compensate losses associated with modifications in regulatory programs but we should not deceive ourselves into believing that we are doing so in order to compensate for losses associated with inaccurate information.

The future of tort law

Our thinking about the interests we protect under current liability systems, the ideas that might inform a decision to expand or contract those interests, and my description of three administrative activities that generate private losses suggest that adjustment policies must be department- and perhaps program-specific. Their design cannot possibly be carried out without an examination of the ways in which specific departments and programs generate losses and an evaluation of the implications of providing compensation in some or all of these cases. We would want to

of Papua and New Guinea v. Leahy (1961) 105 CLR 6 (HC)); agency and authority (*The Queen v. Transworld Shipping Ltd* (1975) 61 DLR (3d) 304 (FCA); *A-G Ceylon v. Silva* [1953] AC 461 (JCPC); *Comeau v. Province of New Brunswick* (1973) 36 DLR (3d) 763 (NBCA)); prohibitions against fettering administrative discretion (*Birkdale District Electric Supply Company v. Corp. of Southport* [1926] AC 355 (HL); *The King v. Dominion of Canada Postage Stamp Vending Company Ltd.* [1930] SCR 500); legislative supremacy (*Winter v. City of Saskatoon* (1964) 47 DLR (2d) 53 (Sask QB); *Re Galt-Canadian Woodworking Machinery Ltd. et al. and City of Cambridge* (1982) 135 DLR (3d) 58 (Ont. HC)); and duty of care (*Winter v. City of Saskatoon*, and *Re Galt-Canadian Woodworking*) to distinguish these cases from others.

⁷⁶ The New Zealand courts have recently expanded government liability to include compensation for losses associated with reliance on statements of future government policy. In *Meates v. Attorney-General* [1983] NZLR 308 (CA) Meates had relied on discussions with the Labour government regarding regional economic expansion financial subsidies. The promised subsidies were not granted, and the court awarded compensation. Senior government officials had given specific advice regarding the application of government policy in circumstances where they should have known that their advice would be relied upon. It should be noted, however, that the court recognized the legitimacy of a 'free and effective' administrative system, and acknowledged that the officials were not guaranteeing the subsidy but merely undertaking to act in a non-negligent fashion in attempting to fulfil their undertaking.

know about the implementation of the particular program; we would require information about the fiscal organization of the relevant bureaucracy; we would have to understand the mix of regulatory objectives which the administration is attempting to achieve; we would require information about the existing losses generated by the program or department (which would require a broad-ranging study of its constituents to the extent that they are identifiable to determine the ways in which their welfare is adversely affected by departmental action); we would want to evaluate the implications of various adjustment policies on individual bureaucratic and institutional behaviour; we would have to explore the distributional implications of the adjustment policy; and all of this would have to take into account existing or alternative adjustment mechanisms.⁷⁷

So my original question – what aspects of individual welfare ought to be recognized in designing adjustment policies? – cannot be answered in the abstract. A solution that addresses the question in context will generate policies that are appropriate within a severely circumscribed universe, but that may bear no relationship to one another. And yet we want adjustment policies that are coherent across programs and departments; therefore, we must provide some general ideas to inform the debate.

Most of us agree that some category of ‘essential interests’ should be protected from interference by legislative and presumably administrative action.⁷⁸ We know that we cannot leave it to the majority to define those interests, or to the bureaucracy, since they are precisely the groups from which we are trying to protect the minority. It is relatively uncontroversial to suggest that personal physical liberty and individual freedom from state coercion in one’s speech, thoughts, and religion are important liberal democratic ideals.⁷⁹ Similarly, non-arbitrary treatment incorporated in process-fairness values and judicial institutions as part of the rule of law

77 Even if we were to resolve all of these problems, we would still have to consider institutional design questions, which will significantly influence the delivery of the program benefits. As well, adjustment policies must take into account the question of political accountability for the appropriation and distribution of public funds. A system that protects the interests of aggrieved individuals necessarily constrains the capacity of government to manage public finances in a politically responsible fashion. What is expended in adjustment programs is not available for other public programs. More important, the reallocation of wealth may deteriorate into a zero-sum game, with resources that are allocated to the claimant victim effectively denied to an invisible member of the community who would otherwise have enjoyed the public benefit.

78 See R.A. Dahl *A Preface to Economic Democracy* (Berkeley: University of California Press 1985) 15–16; and J. Fishkin *Tyranny and Legitimacy* (New Haven: Yale University Press 1979).

79 These, of course, conform to John Rawls’s ‘basic goods’ as the minimum prerequisites for personal freedom. See J. Rawls *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press 1972) 92.

can be explained in most liberal democracies as a reflection of a concern with economic as well as psychological security.

There is, sadly, no agreement that the role of government is or should be to secure individual and group well-being achieved through social policies designed to meet basic needs such as food, health care, and shelter – perhaps through guaranteeing a minimal level of income and education. There is even less chance that one could articulate a consensus that the community, through its government, provides the infrastructure for a particular kind of economic system and should compensate, at least to some degree, for the insecurities associated with it.⁸⁰

Such a consensus, even if we were able to interpret it, is so abstract as to be unworkable for policy development. The modern ‘welfare’ role of the Canadian government is subject to philosophical and political debate. Not only is there debate over the obligation to redistribute resources so that basic needs are satisfied,⁸¹ there is also disagreement on the underlying reasons for the provision of welfare. In the end, the ‘essential interests’ that should be protected from administrative action will depend upon the political ideology one chooses as defining the appropriate role of the modern Canadian state.

Suppose, for example, we choose to adopt a minimalist, libertarian, definition of the state – a belief that the only function of the state is to define entitlements as between private individuals, to provide for rules that permit and facilitate private exchange, and to provide for police and national defence systems to protect entitlements from interference by private individuals.⁸² It follows inexorably from that definition that we should compensate only when the state interferes with those private entitlements.⁸³ That is the ideology one finds implicit in history, and it

80 It would be naïve to suggest that members of Canadian society exhibit any consensus on the legitimacy of the welfare state.

81 This idea leads to arguments against recognizing property-like entitlements in government benefits. Rather than increasing independence from the state (the traditional justification for recognizing private property by non-utilitarians), proponents of the conservative position argue, that protection of such benefits increases dependency, and represents wealth transfers from others rather than the protection of independently created increases in wealth as do traditional judicially recognized property rights. See S. Williams ‘Liberty and Property: The Problem of Government Benefits’ (1983) 12 *J. of Legal Studies* 3.

82 That is not precisely the way Robert Nozick would have put it, but it certainly captures his ideas, and is sufficient to explain the point. See *Anarchy, State and Utopia* supra note 45.

83 It should be obvious that my two definitions are not meant to be exclusive; rather, they illustrate the connection between our philosophy of government and the way we choose to respond to compensation claims. For example, a different theory of the state might posit that the only explanation for state action is the private return to both political and bureaucratic decision-makers associated with their choices. This would mean that bureaucrats would focus on compensation choices that increase their program budgets,

is precisely what is implicit in all federal and provincial Crown liability legislation.

We could, however, conceive of the state quite differently,⁸⁴ and take as our starting-point the liberal idea that the state is constituted as a political and social institution through which all individuals are able to achieve their full potential – as defined by themselves, both as individuals and members of a community. Further, our egalitarian ideas of the state mean that members of the community ought to share equally in the benefits and losses associated with social and economic development. Finally, our vision of the state can include a role that can justify redistribution of wealth on utilitarian grounds – an admittedly difficult empirical calculation, but one that can justify responses to anticipated or actual losses which focus on net increases in aggregate welfare.

Those assumptions radically transform our choices of the interests that ought to be recognized in adjustment policies. Deciding to recognize certain aspects of private welfare means deciding on those entitlements which we think ought to be distributed collectively rather than through market forces. Recognizing the redistributive role of the welfare state means that the interests we protect are those we prefer to respect in the light of individual need rather than demand.⁸⁵ In the end, adjustment policies will require us to identify aspects of human well-being which we as a community decide should be enjoyed relatively equally by all participants

bureaucratic decision-makers associated with their choices. This would mean that bureaucrats would focus on compensation choices that increase their program budgets, personnel, intragovernmental influence, and the effective implementation of their programs, while legislators would focus on the compensation claims that produce votes. In this model of the state, we should discover bureaucratically initiated adjustment programs that 'bribe' marginal special interest actors to agree to suspend their opposition to programs and perhaps to support programs they would otherwise oppose, and legislatively initiated programs that 'bribe' marginal voters. It may also justify compensation programs that serve only to silence otherwise embarrassing claims. This thesis might explain a broad range of 'non-legal' compensation claims now operating within the federal government. See Government Employees Compensation Act, RSC 1970, c. G-8.

⁸⁴ That is, we respond to claims that reflect desires uninfluenced by considerations of economic trade-offs, and independent of economic considerations in general. Of course, because the claims do not involve private costs, we face the intractable and quite dangerous problem of claims uninhibited by the 'natural' choices that must be made by individuals who must give up something in order to participate in exchange relations. The point is that we can respond to these needs through non-market devices so long as we replace the market by alternative (and probably centralized) demand-constraining devices.

⁸⁵ This is the idea behind the 'rule of law' argument, which is ubiquitous in debates about government liability, and which is usually justified by reference to 'fairness' and equal treatment. It is not that fairness and equality are irrelevant; it is that those ideas can be employed to generate quite different outcomes.

in society; in a sense, we will be asking when we should assume and undertake responsibility to respond to the needs of individuals as members of our community.

Having said all of that, I will add that a choice to reject the current 'private' regime established in provincial and federal Crown liability legislation need not necessarily mean rejecting 'tort' law and the court system to resolve individual-administration conflict. Unlike the current regime, the development of program-specific adjustment policies will take into account the effect of the program on private markets, including capital investment decisions and private accident reduction and insurance responses; the availability of private market insurance which might develop in response to the administratively generated injury; a concern with ex post equality that responds to the impact of the injury on the firm or individual; a concern with market solutions that discriminate on the basis of wealth; the utilitarian advantages of loss-spreading or sharing; the identification of the costs of adjustment policies in the sense that the resources devoted to that end must be generated by taxation, government borrowing, or alternative programs; our concern with individual sacrifice that we demand for the public good; the impact of the adjustment policy on bureaucratic activity; and the institutional mechanisms that should be used to implement the program.

In contrast to the apparently homogeneous 'tort' system, the products of this analysis will vary dramatically across programs. But a normative order must be identified and created which guides our choices and establishes the continuity in our policies that constitutes Canadian society. We might seek this continuity by working backwards from the second-order program-specific choices; or we might articulate the multidimensional purposes of the Canadian state, which we believe generates the administrative policies and programs we develop. The normative order of the Canadian state, if there is one, will produce the continuity across the adjustment policies we develop.

But choosing to design program-specific adjustment policies only partially addresses the seminal question I posed at the outset: should we retain 'private' tort law and associated curial institutions to respond to government-generated losses? We might retain tort law as a default system that operates until the program-specific adjustment policy is developed. Alternatively, we might retain tort law as a default system that would continue to operate simultaneously and as an alternative to the program-specific adjustment mechanisms.

The question that is particularly problematic is whether we should continue to employ private law and thus combine its benefits with those generated by the program-specific adjustment mechanisms. There is

obvious symbolic and legitimating authority in a system that treats public bureaucrats with the same rules applied to private firms, and a system that preserves tort law would continue to reflect that authority.⁸⁶ Permitting complainants to employ the court process may enable them to generate a degree of debate and awareness that otherwise might be absent in a program-specific adjustment mechanism. Complainants might want to be able to employ the legal system as a component of a broader political strategy to seek compensation and associated adjustment responses from governments. And, as I suggested earlier, the continuation of private tort law might be particularly appropriate if the government appears to be engaging in activities comparable to those in which private firms engage.

The benefits associated with retaining tort law to redress public wrongs, though not inconsiderable, are simply not enough to justify proposals that would retain private law ideas and the courts in the case of accidents generated by administrative action. First, tort law, given its public and private delivery costs, should not be conceived of as a *compensation* system; and in so far as our adjustment policy is designed to achieve that end, retaining tort law is simply irrelevant. Second, the symbolic and public aspects of private law can be generated through alternative institutions, and articulated justifications and explanations for compensation or its denial – the hallmark of the rule of law – are not monopolized by it. Third, while the government might appear to be acting like a private firm, there is no reason to think that it will respond to economic signals when it is not constrained by private capital, product, and labour markets. Thus, a primary idea behind tort law – that both actors bear the full cost of the activity that generated the loss – is inapt when the government is one of the actors.

Fourth, the private law regime used to define personal legal responsibility permits private actors the liberty to act in their private self-interest, and only protects entitlements based on property ownership, contract, and personal physical integrity. There is no reason to think that representatives of the community ought to be subject to the same liberal ideas, and even less reason to believe that the only responsibilities of the community involve not depriving individuals of their property. Although virtually any result can be obtained by using the tort system, we run the risk of distorting a system that operates to define relations among private actors so that it is able to respond to administrative action. Most important,

86 This is the idea behind the 'rule of law' argument, which is ubiquitous in debates about government liability, and which is usually justified by reference to 'fairness' and equal treatment. It is not that fairness and equality are irrelevant; it is that those ideas can be employed to generate quite different outcomes.

retaining tort law means that the wealth distributed through that compensation system will be unavailable to the program-specific system, or perhaps to other programs. I cannot see why history should compel us to give priority to the interests respected in private law. The choices we face in responding to government-generated losses represent enormously difficult political choices involving competing claims to public and private resources. Those questions cannot be answered by turning to a system designed to define relations between individuals, and that is precisely what tort law represents.