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The Imposition of Sanctions Outside the Criminal Justice System

Donald J. Sorochan, Q.C.
Miller Thomson LLP
Barristers and Solicitors
Vancouver, B.C., Canada

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Vancouver, BC

INTRODUCTION

Criminal Law defines crimes, establishes punishments, and regulates the investigation and prosecution of people accused of committing crimes. In common law legal systems the criminal law is distinguished from the civil law, the law regulating private relationships. The criminal law defines crime and sets punishments and seeks to avoid harm by prohibiting conduct that may lead to harmful results. The criminal law governs actions and relationships that are harmful to society as a whole. The object of the criminal law is to protect the public from harm by imposing punishment upon those who have done harm by violating prohibitions established by the law and by deterring by threatening with punishment those who are tempted to break the law and do harm in the future.

The civil law has two aspects. Regulatory (or administrative) and private litigation in the civil courts.

Regulatory or administrative law governs schemes aimed at regulating an activity in order to protect the public. Some schemes involve regulating specific activities through governmental agencies administered by the executive, rather than the judial, branch of a government (such as securities commissions, environmental agencies, combines investigative agencies or municipal boards). Other schemes involve private organizations (such as professional governing bodies, trade unions, hospitals, marketing boards) that touch upon the public in their operations. These regulatory schemes typically set standards for their regulatory spheres and have disciplinary powers to enforce their regulatory authority.

A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public. At the same time, the act may, if it involves injury and a breach of one's duty to another, constitute a private cause of action for damages, for which the actor must answer to the person he injured. It may also involve a breach

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[*] Donald J. Sorochan, QC is the Managing Partner of the British Columbia and Yukon offices of the Canadian national law firm, Miller Thomson, LLP. His practice includes complex securities litigation in judicial and regulatory proceedings, complex construction and commercial litigation, criminal defence and prosecution as a special prosecutor as well as acting as counsel in administrative proceedings and commission counsel to commissions of inquiry. The author gratefully acknowledges the research assistance of Stephanie Brodie, Phebe Chan, Cherisse Friesen and Linda Nguyen (all of whom were articled students-at-law at Miller Thomson Vancouver in 2004).

of the rules of a regulatory scheme which may result in sanctions being imposed by a regulatory agency or tribunal. [1]

The procedural safeguards required under the criminal law are well established and enforced by the judiciary directly. So, too, are the laws and rules of court which govern private litigation. Regulatory or administrative proceedings have more ambiguous strictures as to how they are to be conducted. The processes and procedures of administrative tribunals are established by enactments creating the tribunal and by the tribunals themselves. An administrative tribunal may be subject to judicial oversight of its processes and decisions by a right of appeal to the courts if such a right is provided for by legislation or by judicial review (which may be quite limited in scope).

The 1978 decision of the Supreme Court of Canada in the case of *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police* [2] and the 1980 decision of the court in *Martineau v. Matsqui Institutional Disciplinary Board (No.2)* [3] held that administrative tribunals must act in accordance with a duty to act fairly towards persons affected by the tribunals decision. Canadian courts have further defined and expanded upon the duty to act fairly since it was initially recognized in *Nicholson* and *Martineau*. In essence, fairness can now be described as a flexible concept that comprises various rights and obligations which, to varying degrees, must be upheld. As was stated by the Court in *Martineau*, "the content of the principles of natural justice and fairness in application to the individual cases will vary according to the circumstances of each case". The result is a procedural fairness continuum which varies from minimal procedural protection to procedures approaching those of a civil (not a criminal) trial.

This paper discusses the imposition of administrative sanctions for activities that are crimes. Of concern is the extent that the procedural safeguards of the criminal law and the accused's access to justice by a fair trial process are being circumvented by authorities utilizing administrative rather than criminal processes.

INTERNATIONAL NORMS

International norms recognize rights and set minimum standards for persons charged with an offence. The *International Covenant on Civil and Political Rights*, [4] in article 14 provides:

> ***Article 14***
>
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> > (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

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1 *R v. Wigglesworth*, [1987] 2 S.C.R. 541 at 540.

2 *Re Nicholson and Haldimand Norfolk Regional Board of Commissioners of Police*, (l978) 88 DLR (3d) 671

3 *Martineau v. Matsqui Institutional Disciplinary Board (No.2),* [1980] 1 S.C.R. 602,

4 International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

The *Standard Minimum Rules for the Treatment of Prisoners,* [5] also refers to legal assistance for untried prisoners in article 93:

93. **For the purposes of his defence, an untried prisoner shall be allowed** to apply for free legal aid where such aid is available, and **to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions**. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.

The *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, [6] provides:

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 2

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

Principle 3

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

….

Principle 16

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5 The Standard Minimum Rules for the Treatment of Prisoners: Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

6 The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

Principle 19

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

CONSTITUTIONAL ISSUES

The Canadian Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms*. states that the *Charter* guarantees the rights and freedoms set out in it and that, as provided for in Section 1 of the Canadian Charter, the rights and freedoms are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." There is a corresponding general limitation clause in the South African Constitution. In the European Convention on Human Rights (as in the American Bill of Rights) there is no such general clause although there are clauses of limitation within some individual articles of the Convention.

The provisions of the *Charter* which relate to criminal proceedings are sections 7 – 14 and section 24 which enforces Charter rights:

Legal Rights

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

a) to be informed promptly of the reasons therefor;

b) to retain and instruct counsel without delay and to be informed of that right; and

c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

a) to be informed without unreasonable delay of the specific offence;

b) to be tried within a reasonable time;

c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

e) not to be denied reasonable bail without just cause;

f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

> **Interpreter**
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> 14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.
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> . . . .
>
> **Enforcement**
>
> **Enforcement of guaranteed rights and freedoms**
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> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> Exclusion of evidence bringing administration of justice into disrepute
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Canadian Constitution – Division of Powers between Federal and Provincial Governments

The Federal government of Canada is given jurisdiction over "the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction" and including the "Procedure in Criminal Matters" pursuant to section 91(27) of the *Constitution Act, 1867*.

However under Section 92 the *Constitution Act* the provinces have jurisdiction over the administration of justice in each province which jurisdiction includes the maintenance and organization of provincial courts in both civil and criminal jurisdictions, and civil procedure as applied in provincial courts. Section 92 also confers upon the provinces power to enact legislation providing for "the imposition of punishment by fine, penalty, or imprisonment" [7] to enforce any law enacted pursuant to the valid provincial regulatory objectives within the enumerated provincial powers. [8] The prohibition contained in a provincial statute should be part of a comprehensive "regulatory scheme" the whole of which, in consideration of the scheme's pith and substance, is *intra vires* the authority of the legislature.

CANADIAN NON-CRIMINAL PROCESSES AFFECTING LIBERTY

Heroin Treatment Act (R.S.B.C. 1979) C. 166

Legislation relating to the possession and trafficking of drugs has long been held by Canadian courts to be within the criminal law legislative power of the Canadian federal government. [9] In 1978 the Province of British Columbia enacted Bill 18, The *Heroin Treatment Act.* [10] The

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[7] *Constitution Act*, Section 92(15)

[8] *Constitution Act*, Section 92 enumerates a number of areas of provincial authority.

[9] *R. v. Hauser*, [1979] 1 S.C.R. 984.

[10] The *Heroin Treatment Act* (R.S.B.C.) 1979, c. 166.

legislation was immediately challenged in the courts. Dickson, J. of the Supreme Court of Canada in *Schneider v. British Columbia*, [11] gives a brief yet comprehensive synopsis of the Act:

> The Act provides a comprehensive program for the evaluation, treatment and rehabilitation of narcotic dependent persons. It makes provision for the creation and administration of treatment centres and clinics for persons dependent on narcotics as defined in the Act, essentially heroin and methadone. Extraordinary powers are given to the directors and evaluation panels of the area coordinating centres which are charged with the task of examining persons believed to be dependent on narcotics. The evaluation panel consists of at least two medical practitioners and one other person. The panel conducts medical and psychological examinations at the centre and reports in writing to the director "as to whether the person is or is not in need of treatment for narcotic dependency and where, in its opinion, treatment is needed, make[s] recommendations to the director respecting the treatment" (section 4(2)). For the purpose of this examination a person may be detained at the centre for up to seventy-two hours and he must furnish a sample of blood and urine.
>
> Where treatment is recommended by the panel, the person may consent to committal for treatment. Where the panel is unanimous in recommending treatment and the person does not voluntarily submit to treatment, the director of the centre may apply, ex parte if need be, to the Supreme Court of British Columbia for a committal order. The Court must be satisfied that the person is in need of treatment for narcotics dependency.
>
> A director is required to develop programs for the treatment of patients generally, or for the treatment of an individual patient. A treatment program of a patient must last for three consecutive years and may include some or all of the following:
>
> 5 (2) …
>
> (a) where a director so directs, detention in a treatment centre for a period not exceeding 6 consecutive months;
>
> (b) attendance at a treatment clinic at such times and over such periods, not exceeding one year in total, as a director may require;
>
> (c) supervision and direction of such kind and of such duration as a director may require.
>
> Such a period of detention may not be shortened or rescinded but is subject to indefinite prolongation by a Board of Review. The Board of Review may also require a person who is not in detention but who is undergoing treatment to be detained in a treatment centre or clinic for up to seven days in order "to facilitate the assessment, monitoring, or review of a patient's needs" (s. 7(2)).
>
> The powers conferred are couched in language emphasizing the medical treatment aspect of the legislation. A person subject to such treatment is defined in the Act as a "patient" whether his treatment is voluntary or compulsory. The evaluation panel which recommends treatment must be composed of medical practitioners in the majority. The recommendation is based on a medical and psychological examination. The Act contains the following statutory definitions of "dependency" and of "patient" and of "treatment" from s. 1 of the Act:
>
> **"dependency"** means, in relation to a narcotic, a state of psychological or physical dependence, or both, on a narcotic following its use of a periodic or continuous basis;
>
> **"patient"** means a person who is required or voluntarily agrees to undergo treatment under this Act;

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[11] *Schneider v. British Columbia*, [1982] 2 S.C.R. 112.

> **"treatment"** means one, more, or all of direction, supervision, or treatment of a person for the purpose of terminating or diminishing his use of or dependency on a narcotic.
>
> The Act contains a number of sections embodying measures which, combined with the possibility of detention for a period of at least three years, are the major concern of the appellant. Section 13(1) of the Act provides that where a peace officer believes on reasonable grounds that a person has a dependency on a narcotic, he may give the person a written notice specifying a date and time, not less than twenty-four hours or more than forty-eight hours from the time of the giving of the notice, at which the person is required to attend and submit to examination at the area coordinating centre specified in the notice. Where a person does not comply with such a notice the Alcohol and Drug Commission of the province may apply ex parte to a judge for a warrant authorizing a peace officer to take the person into custody and take him to an area coordinating centre.
>
> By section 11(1) of the Act, a peace officer is authorized, without the necessity of obtaining a warrant, to take to a treatment centre for detention a person whose detention has been authorized or required under the Act. Section 16 creates several offences for non-compliance with the Act.
>
> There are certain safeguards built into the Act which demonstrate a concern for the protection of the individual who finds himself subject to the provisions of the Act. The evaluation panel must make a report in writing to the director within sixty hours of the admission of a person for examination and the director must "forthwith" provide the person examined with a copy. A court order of committal may be appealed to the Court of Appeal of British Columbia and nothing in the Act deprives a person of any remedies available upon judicial review. Where an application has been made for an extension of treatment or detention the patient has the right to be heard by the Board of Review.

In the initial court proceeding in the Supreme Court of British Columbia (the superior trial court of the Province), McEachern C.J.S.C. found the *Heroin Treatment Act* to be ultra vires the provincial legislature holding that the effect of *R. v. Hauser* was to bring narcotic control under exclusive federal jurisdiction. However, the British Columbia Court of Appeal allowed the appeal, unanimously holding that the *Act* was valid provincial legislation since it was not intended to control narcotics or to control and punish persons who use or deal in narcotics. Rather, the appeal court held, the subject matter of the *Act* to be health-related, created pursuant to provincial legislative authority over health.

The Supreme Court of Canada dismissed the appeal (and therefore held the Act to be *intra vires* the provincial legislature), agreed with the decision of the British Columbia Court of Appeal that: "public health falls under provincial competence (under s.92(16) of the *British North America Act* – now the *Constitution Act*) as does, what is in effect, civil committal in the implementation of health legislation."

Regarding the seemingly penal nature of the Act, the Supreme Court of Canada agreed with the Court of Appeal's statement that "legislation in the field of mental diseases and quarantine relative to communicable diseases can involve involuntary confinement, but clearly it is dealing with the health of the citizen, as opposed to the criminality…. That confinement is for the safety and security of the individual and does not invade the domain of criminal law." The Supreme Court of Canada reiterated that the Act is *intra vires* the province because it "the interface between criminal law and provincial legislation which might be seen as impugning upon the federal jurisdiction in the field of criminal law has not been closely drawn" .

The Supreme Court of Canada also considered the issue of paramountcy of federal over provincial legislation. Part II of the then federal legislation, the *Narcotic Control Act* [12] provided for the incarceration and examination of certain individuals convicted under the *NCA* who were dependent upon narcotics. However, Part II was never proclaimed to be in force by the federal government. The Court held that, therefore, there was no conflict of legislation which could lead to the result of the federal legislation trumping provincial legislation under the paramountcy doctrine.

By the time the case came before the Supreme Court of Canada, the *Canadian Charter of Rights and Freedoms* had been proclaimed. However, there was never any *Charter* argument made to the Court. Although the Supreme Court of Canada ruled the Act to be *intra vires* the provincial legislature, in 1990 the British Columbia government itself repealed the legislation through its new Health Minister. There had been so much controversy surrounding the Act that the government felt it could not continue in its quest to coerce treatment under this regime.

The Protection of Children Involved in Prostitution Act, RSA 2000, c.P-28.

In Canada, laws governing the protection of children are within provincial jurisdiction. In Alberta, that legislation of general application is the *Child Welfare Act.* [13]

Prostitution *per se* has never been a crime in Canada; rather, it has been, and continues to be, attacked indirectly. The Canadian federal *Criminal Code* contains the prostitution-related offences of solicitation for the purposes of prostitution,[14] procuring and living off the avails of prostitution,[15] and keeping a common bawdy house, [16] but does not criminalize prostitution itself.

The Canadian federal government had also legislated the *Young Offenders Act* [17] to govern criminal offences committed by young persons between the ages of 12 and 18 years of age. The *Act* contains conditions for an or that the offender be held in custody, including the following provisions in sections 24 (1) and (1.1) of the *Young Offenders Act:*

> **Conditions for Custody**
>
> 24. (1) The youth court shall not commit a young person to custody under paragraph 20(1)(k) unless the court considers a committal to custody to be necessary for the protection of society having regard to the seriousness of the offence and the circumstances in which it was committed and having regard to the needs and circumstances of the young person.

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[12] *Narcotic Control Act*, R.S.C. 1985, c.N-1. The entire *Narcotic Control Act* (the "Act" under this heading) came under judicial scrutiny at the Supreme Court of Canada in *Hauser*, supra. The Court held that this legislation was in fact valid federal legislation under the federal residuary power. Although Part II of the Act was published in repeated publications of the statutes of Canada, the Part was never proclaimed in force as required by the legislation. Part II was similar to the *Heroin Treatment Act* in that it allowed for incarceration, treatment and / or examination of a person who is convicted under the Act with leave of the court. The Act was repealed in 1996, without this Part ever having proclaimed.

[13] *Child Welfare Act*, R.S.A. 2000, c. C-12

[14] *Criminal Code*, s. 213

[15] *Criminal Code,* s. 212

[16] *Criminal Code,* s. 210 and s. 211

[17] *Young Offenders Act*, R.S.C., 1985, c. Y-1

Factors

(1.1) In making a determination under subsection (1), the youth court shall take the following into account:

(a) that an order of custody shall not be used as a substitute for appropriate child protection, health and other social measures;

(b) that a young person who commits an offence that does not involve serious personal injury should be held accountable to the victim and to society through non-custodial dispositions whenever appropriate; and

(c) that custody shall only be imposed when all available alternatives to custody that are reasonable in the circumstances have been considered.

On April 1, 2003 the *Young Offenders Act* was repealed and replaced by the *Youth Criminal Justice Act* [18] to govern criminal offences committed by young persons between the ages of 12 and 18 years of age. Sections 3 and 83 of the *Act* now set the conditions for imposing a sentence of custody.

3. (1) the following principles apply in this act:

(a) the youth criminal justice system is intended to

(i) prevent crime by addressing the circumstances underlying a young person's offending behaviour,

(ii) rehabilitate young persons who commit offences and reintegrate them into society, and

(iii) ensure that a young person is subject to meaningful consequences for his or her offence in order to promote the long-term protection of the public;

(b) the criminal justice system for young persons must be separate from that of adults and emphasize the following:

(i) rehabilitation and reintegration,

(ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,

(iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,

(iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and

(v) the promptness and speed with which persons responsible for enforcing this act must act, given young persons' perception of time;

(c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should

(i) reinforce respect for societal values,

(ii) encourage the repair of harm done to victims and the community,

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[18] *Youth Criminal Justice Act*, S.C. 2002, c. 1

(iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and

(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and

(d) special considerations apply in respect of proceedings against young persons and, in particular,

(i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,

(ii) victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,

(iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and

(iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

Act to be liberally construed

(2) this act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1).

. . . .

Custody and Supervision

Purpose

83. (1) the purpose of the youth custody and supervision system is to contribute to the protection of society by

(a) carrying out sentences imposed by courts through the safe, fair and humane custody and supervision of young persons; and

(b) assisting young persons to be rehabilitated and reintegrated into the community as law-abiding citizens, by providing effective programs to young persons in custody and while under supervision in the community.

Principles to be used

(2) in addition to the principles set out in section 3, the following principles are to be used in achieving that purpose:

(a) that the least restrictive measures consistent with the protection of the public, of personnel working with young persons and of young persons be used;

(b) that young persons sentenced to custody retain the rights of other young persons, except the rights that are necessarily removed or restricted as a consequence of a sentence under this act or another act of parliament;

(c) that the youth custody and supervision system facilitate the involvement of the families of young persons and members of the public;

> (d) that custody and supervision decisions be made in a forthright, fair and timely manner, and that young persons have access to an effective review procedure; and

In January, 1997 the Task Force on Children Involved in Prostitution, established by the Government of Alberta, released a report which included a number of recommendations. The Task Force sought ways to address issues of child prostitution through consultation with the public and community groups. The *Protection of Children Involved in Prostitution Act*[19] ("PCHIP") was the result of these recommendations. The Act, which allows the police and child welfare officials to, without prior judicial authorization, apprehend and confine children engaged in or attempting to engage in prostitution was proclaimed in force on February 1, 1999 and was amended on March 18, 2001. [20] Under the Act, the Alberta Government has introduced programs and services to help children end their involvement in prostitution. It has been called "the Alberta advantage" by proponents of the legislation and "the Alberta disadvantage by others. [21]

A child who wants to end his or her involvement in prostitution may access community support programs. A child who does not want to end his or her involvement in prostitution can be apprehended by Police or a Child Protection Worker. The Police or Child Protection Worker would then take the child to a protective safe house, defined as a secured facility with restricted access , where the child can be confined for up to five days. At this safe, secured facility, the child receives emergency care, treatment and an assessment. The development of a long-term plan to assist the child to exit prostitution begins.

This legislation also introduces legal penalties for johns and pimps, who can be charged with causing the child to be in need of protection and fined up to $25,000, jailed for up to two years, or both fined and imprisoned.

The constitutional validity of the PCHIP was decided in *Alberta v. K.B*. 2000 ABQB 976.[22] In *K.B*. the province and the Director of Child Welfare made an application to quash the decision of the lower court [23] which had struck down the PCHIP as contrary to sections 7, 8 and 9 and not saved by section 1 of the *Charter of Rights and Freedoms*.

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19 RSA 2000, c.P-28.

20 By the *Protection of Children Involved in Prostitution Amendment Act,* 2000, 4th Sess., 24th Leg., Alberta, 2000 (assented to 4 December 2000). Under s. 2(10) confinement was originally permitted for up to 72 hours, but amendments to the legislation in 2000 increased this period to five days, with the possibility of two extensions by judicial order of up to 21 days each where "the Court is satisfied that release of the child … presents a risk to [her] life and safety because [she] is unable or unwilling to stop engaging in prostitution, less intrusive means are not adequate to reduce the risk, and it is in the best interests of the child to order a period of further confinement for the purposes of making programs or services available … in a safe and secure environment"

21 Koshan, Jennifer, *Alberta (Dis)Advantage: The Protection of Children Involved in Prostitution Act and the Equality Rights of Young Women; 2003,* Journal of Law & Equality 210.

22 Also at http://www.walnet.org/csis/court_records/ab.v.kb-001221.html. Note that this case deals with the original version of the Act which was enacted in 1999. The Act has been subsequently amended. For instance, section 2.1 has been added. Also, under section 2(10) a director may now confine a child to up to 5 days instead of the original 72 hours.

23 Alberta (Director of Child Welfare) v. K.B., 2000 ABPC 113 also at http://www.albertacourts.ab.ca/jdb/1998-2003/pc/Civil/2000/2000abpc0113.pdf

The Queen's Bench court at paragraph 56 quotes the Supreme Court of Canada decision of L'Heureux-Dubé J. in *Winnipeg Child and Family Services v. K.L.W.* that "the interests at stake in the child protection context dictate a somewhat different balancing analysis from that undertaken with respect to the accused's s.7 and s.8 rights, in the criminal context." The constitutionality of the Act was essentially justified through the notion that the state has the duty to intervene to protect children's welfare through its *parens patriae* jurisdiction on the premise that that children involved in prostitution are victims of sexual abuse and that they have a right to physical and emotional safety and well-being. The court determined that the legislative purpose was valid and necessary and, since the confinement of the child must be reviewed by a judge within the allotted time (now 5 days), the impugned sections met with the dictates of section 7 of the *Charter*.[24]

The court also found that sections 2(9) and 2(10) did not constitute arbitrary detention within the meaning of section 9 of the *Charter*. The court determined that section 2(9) requires that the police officer or director have reasonable and probable grounds, prior to apprehending the child, that the child is engaging in or attempting to engage in prostitution. Moreover, section 2(10) requires that the director confine a child only if he or she believes it is necessary to ensure the safety of the child. Confinement, therefore, was determined not to be automatic.

In considering section 1 of the *Charter* the court held that the legislation had a pressing and substantial purpose in that the "legislation as a whole is premised on the idea that children involved in prostitution are victims of sexual abuse who require support, not punishment."[25] The court further held that the emergency apprehension and confinement of a child who may be imminent danger is a rational connection to protecting that child from abuse and exploitation.

CANADIAN NON-CRIMINAL PROCESSES WITH "PENAL CONSEQUENCES" – WHAT ARE "PENAL CONSEQUENCES"?

As referred to above, the provisions of the *Charter* which relate to proceedings in which the liberty of the subject is at risk (criminal of quasi-criminal proceedings) are sections 7 – 14 and section 24 which enforces Charter rights. Many of the rights in those sections are, on the plain reading of the provisions, only applicable to situations where the liberty of the citizen is touched upon by the actions of the state. Section 9 of the *Charter* refers to detention and imprisonment, section 10 to rights upon arrest and detention, section 12 to cruel and unusual punishment.

Other provisions are clearly of broader application. The right of the citizen to be secure against unreasonable search and seizure, guaranteed by section 8 of the *Charter*, is not restricted to criminal processes. The right against self-incrimination, guaranteed by section 13 of the *Charter*, relates to testimony given in any proceeding, not merely criminal proceedings. More debatable are the rights contained in sections 7 and 11 of the Charter.

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[24] At paragraph 78.

[25] At paragraph 104.

Section 7 of the **Charter**

The right guaranteed by section 7 of the *Charter*, to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". The rights guaranteed are concerned with the individual's interaction with the justice system and its administration [26] Section 7 does not include property or economic rights, except perhaps those fundamental to human life or survival. [27] Nevertheless, while the "liberty" it protects is not unconstrained freedom, it is more than mere freedom from physical restraint. [28] Section 7 can extend beyond the penal context, at least where there is "state action which directly engages the justice system and its administration. [29] .Further, the right to security of the person protects both the physical and psychological integrity of the individual, but does not extend to the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. [30]

The "principles of fundamental justice" referred to in section 7 have been held to not constitute an independent protected interest, but rather to serve as a qualifier of the right not to be deprived of life, liberty and security of the person. As a qualifier, the phrase serves to establish the parameters of the interests but it cannot be interpreted so narrowly as to frustrate or stultify them. [31] . It has also been held that the inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law, including *jus cogens*: [32] In *United States v. Burns*, [33] a case that arose in the context of extradition of accused persons facing capital murder charges in the United States, the Supreme Court of Canada invoked section 7 to deny extradition unless the receiving state waived the death penalty and held that the governing principle was a general one -- namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than the government of Canada, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected.

Section 7 may, in certain contexts, provide residual protection to the interests protected by specific provisions of the Charter. It does so in the case of section 11(c) which protects a person charged from being compelled to be a witness in proceedings against that person and section 13 which protects a witness against self-incrimination, but it has been held that section 7 does not give an absolute right to silence or a generalized right against self-incrimination on the American model: [34]

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[26] *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46.

[27] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Gosselin v. Quebec (Attorney General),* [2002] 4 S.C.R. 429, 2002 SCC 84)

[28] *B.(R.) v. Children's Aid Society*, [1995] 1 S.C.R. 315.

[29] *Blencoe v. B.C. (Human Rights Commission,*[2002] 2 S.C. R. 307.

[30] *New Brunswick (Minister of Health and Community Services) v. G.(J*).

[31] *Reference re S. 94(2) Motor Vehicle Act*, [1985] 2 S.C.R. 486

[32] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1.

[33] *United States v. Burns,* [2001] 1 S.C.R. 283

[34] *Thomson Newspapers Ltd. v. Canada*, [1990] 1 S.C.R. 425; *R. v. Brown, [2002] 2 S.C.R. 185*, 2002 SCC 32.

Section 11 of the Charter

Section 11 of the Charter provides that any person "charged with an offence" has the rights enumerated in the sub-sections to section 11. Only sub-sections 11(e) and 11(f) are by their language restricted to situations where liberty is at risk:

> 11. Any person charged with an offence has the right
>
> e) not to be denied reasonable bail without just cause;
>
> f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

The other sub-sections of section 11 could, on their language, be applicable in proceedings where liberty is not a risk:

> **Proceedings in criminal and penal matters**
>
> 11. Any person charged with an offence has the right
>
> a) to be informed without unreasonable delay of the specific offence;
>
> b) to be tried within a reasonable time;
>
> c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
>
> g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
>
> h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
>
> i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

The issue of the applicability of section 11 was considered by the Supreme Court of Canada in *R. v. Wigglesworth*[35] which set out the test for determining whether a person subject to penalties in respect of a regulatory proceeding would constitute a "person charged with an offence" for purposes of section 11 of the Charter. The Court held that section 11 of the Charter applies when the effect of a regulatory proceeding is to impose "true penal consequences" upon a person charged. That is where either by the very nature of the proceeding it is a criminal proceeding or where a conviction in respect of the offence may lead to a true penal consequence due to its punitive measures.

True penal consequences are established if there is the risk of imprisonment or a fine, which by its magnitude, appears to be imposed for the purpose of redressing the wrong done to society at large. The Supreme Court of Canada stated: [36]

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[35] *R. v. Wigglesworth,* [1987] 2 S.C.R. 541, (1987) 45 D.L.R. (4th) 235.

[36] At pages 560 and 561 of its decision in *Wigglesworth.*

> In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.

A Case Study - British Columbia Securities Commission Administrative Sanctions

I wish to explore this issue in the contest of administrative proceedings before a Canadian provincial securities commission (the example I will use is the British Columbia Securities Commission) since there has been frequent litigation in this area over a number of years which have touched upon issues related to rights enumerated in section 11: the right to be informed of the specific offence a respondent is facing, the right to have proceedings brought within a reasonable time, the right not to be compelled to give testimony against oneself, the right to be tried before an independent and impartial tribunal and the right not to be tried twice for the same offence.

The reason for doing so is my concern that there has been a deliberate attempt to circumvent the procedural safeguards of the criminal justice system which have as their aim the assurance of justice, while at the same time imposing sanctions which, by their magnitude, are true penal consequences. The change in the focus is evident with a historical analysis of the reach of the Commission over the years.

The British Columbia Securities Commission (the "Commission") was created by the *Securities Act*, S.B.C. 1962, c.55 and continued by successor legislation British Columbia has had securities legislation since 1930's; however, prior to 1962 the legislation was effectively administered by the Registrar of Companies, subsequently the Superintendent of Brokers, and enforced by the Attorney General. The Registrar had powers to conduct investigations and to seek an injunction from the Supreme Court to enjoin someone from trading.

It should be noted that apart from the power to cancel or refuse registration, the Commission had relatively little power to discipline registrants under the *Securities Acts* until 1974, when the Commission was given powers to suspend or cancel registrations in the public interest. Prior to that, it appears that the Superintendent or Commission could simply recommend prosecutions of "offences". In 1974, the Superintendent was given the power to seek injunctive type relief from the Supreme Court of British Columbia to ensure compliance with or restrain violations of the Act.

In 1987 the Superintendent and Commission were given new powers to issue cease trade orders and remove a person's rights to use certain registration and prospectus exemptions under the Act (effectively limiting the person's right to trade). It was only in 1989 the Commission was given powers to levy administrative fines of not more than $100,000.

The increases in magnitude of monetary administrative penalties that the Commission may impose are illustrated in the following chart:

Statute	Section	Maximum Administrative Penalty
1985, S.B.C., c. 83	s. 144	None. Cease trading and removal of exemptions only

1988, S.B.C., c. 58	s. 145.1	None. Power to remove as a director added
1989, S.B.C., c. 78	s. 144.1	Administrative penalty to a maximum of $100,000 added
1996, S.B.C., c. 418	s. 162	Administrative penalty to a maximum of $100,000
2002, S.B.C., c. 32	s. 162	Administrative **penalty increased to a maximum of $500,000 for an non-individual and $250,000 for an individual**
2004, Bill 38., Not yet in force.	s. 60	Administrative penalties **increased to a maximum of $1,000,000 for all persons for each contravention of the Act**.

It should be noted that the amendments to come in place in 2004 increasing the administrative penalty to $1 million, further increase the potential liability of a respondent by setting that maximum penalty per contravention of the Act rather than for each proceeding before the Commission. The Commission staff had previously attempted to have such multiple penalties imposed but the propriety of doing so was rejected by the British Columbia /court of Appeal in *B.C. Securities Commission v. Biller* [37] In rejecting the Commission's position Mr. Justice Low, for the Court, held:

> [7] It is my opinion that s. 162 empowers the Commission to impose only one penalty per hearing. I think this is plain from the wording of the section as interpreted in the context of the statute as a whole. The section essentially says that " ... the commission, after a hearing ... may order ... an administrative penalty of not more than $100,000." In the context of the present case, the preconditions to the ordering of an administrative penalty are a determination that the person charged has contravened a provision of the Act and a consideration of the public interest. Contravention of a provision of the Act or regulations is simply a minimum requirement for the imposition of a penalty.
>
> [8] The words "a provision" in s. 162(a)(i) do not suggest to me that the Legislature intended to permit the imposition of administrative penalties for each contravention. Those words must be read in accordance with s. 28(3) of the *Interpretation Act*, R.S.B.C. 1996, c. 238:
>
> 28(3) In an enactment words in the singular include the plural, and words in the plural include the singular.
>
> [9] Therefore, the words "a provision" should be read to mean "one or more provisions".
>
> [10] Consideration of the statute as a whole does not persuade me that the above conclusion is incorrect. To the contrary, it strengthens the conclusion.
>
> [11] This is a regulatory statute. Its overall purpose is described in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at 589:
>
> It is important to note from the outset that the Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary

[37] B.C. Securities Commission v.Biller, 2001 BCCA 208.

goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system: David L. Johnston, *Canadian Securities Regulation* (1977), at p. 1.

[12] The court cited these observations in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at p. 26 and added at p. 27:

The Act aims to protect the public from unscrupulous trading practices which may result in investors being defrauded. It is designed to ensure that the public may rely on honest traders of good repute able to carry out their business in a manner that does not harm the market or society generally.

[13] It is necessary to consider s. 162 in the context of the overall purpose of the statute as described in these judgments and in the context of the enforcement and penalty provisions in the statute.

[14] A person who has allegedly contravened one of the many regulatory provisions in the statute and the regulations might be prosecuted in criminal court or might be the subject of proceedings before a panel of the Commission.

[15] Section 155 creates numerous criminal offences for failing to comply with specific requirements of the Act. The section prescribes fines of up to $1,000,000, 3 years in prison, or both. Certain offences can result in fines that are commensurate with profits. Unlike s. 162, the penalties in s. 155 are related to the offences, not to the hearing or trial. Section 155 is penal in nature as a conviction can result in imprisonment.

[16] Section 162 creates an administrative penalty. Section 15(3) of the statute requires the Commission to apply administrative penalties collected "only for the purpose of promoting knowledge of participants in the securities market of the legal, regulatory and ethical standards that govern the operation of the securities markets in British Columbia." Although written in a different context, I think the words of Wilson J. in *Regina v. Wigglesworth,* [1987] 2 S.C.R. 541 at 561 are apt: "One *indicium* of the purpose of a particular fine is how the body is to dispose of the fines that it collects." Unlike the criminal sanctions under s. 155, the administrative penalties under s. 162 are intended to further the remedial purposes of the legislation. I think that to keep them proportionate to that purpose, the Legislature's wording of s. 162 makes it plain that the penalties are to apply to each hearing, not to each contravention.

[17] The mandatory application to public education of any penalties collected suggests that the penalty is related to the overall conduct of the person before the Commission and not to specific contraventions. The administrative penalty under s. 162 is not to recover the cost of the proceedings because the power of the Commission panel to order costs is found in s. 174. Specific penalties for individual offences are enacted by s. 155. Those penalties focus on punishment and on redressing the harms done to the public at large. The penalties under s. 162, read with s. 15(3), clearly are part of the regulatory nature of the statute. They are designed to deter conduct that contravenes the Act and to provide a public education fund for that purpose.

[18] The respondent argues that the above interpretation of s. 162 would permit the Commission to conduct a separate hearing for each contravention. That is so only theoretically. The Commission has to act in good faith. I would think that conducting separate hearings with respect to related conduct for the purpose of collecting more money through administrative penalties would be an abuse of process.

[19] For the above reasons, I conclude that the panel exceeded its jurisdiction by ordering Mr. Biller to pay administrative penalties in excess of $100,000. I would allow the appeal.

This judgment makes reference to a number of issues relating to the justness of the process. First, that the same legislation which provides for the administrative penalties that may be imposed by the Commission in administrative proceedings also creates offences which may be prosecuted in the courts, in which case the accused would be subject to fines and imprisonment for each count charged. In practice, after losing several high profile cases in court proceedings,

because they could not be substantiated by the evidence, the Commission almost always proceeds in administrative, rather than judicial, proceedings.

When the allegations involve securities fraud, the underlying facts would usually support fraud, forgery or other criminal charges. As a result of post-Enron amendments to the *Criminal Code* [38], with these amendments, most serious securities-related offences are covered by the Criminal Code provisions. The lack of distinction between the criminal and the regulatory regimes also applies to Securities Commission investigators, many of whom are also designated to be police officers as special provincial constables.

In addition to the administrative penalties, the Commission has an unusual ability to deter Respondents from challenging allegations against them by ordering the Respondent who have the temerity to take allegations to a hearing to pay the costs of the hearing and administrative investigation. There is no provision in the enactments governing the Commission for the Commission to pay the costs of a respondent wrongly charged.

The change in the provincial legislation whereby the maximum penalty of ($1 million) may be imposed per contravention makes the potential liability virtually unlimited since allegations typically involve many transactions or trades, each of which can now be alleged to be a separate contravention.

Judicial Consideration of "true penal consequence" after Wigglesworth

Subsequent to the *Wigglesworth* decision in 1987, courts have continued to give substance to the phrase "true penal consequence." The decision in *Wigglesworth* has been adopted most frequently in cases involving professional discipline. Outside the context of professional discipline, however, the contours of the phrase "true penal consequence" have not been well-defined. Nevertheless, there is jurisprudence interpreting the meaning of "true penal consequence" in particular contexts; namely, in the areas of securities law, customs law, and tax law.

In the area of securities law, *Wigglesworth* has often been raised in judicial proceedings related to the B.C. *Securities Act*[39]. To date, the courts have only considered lower penalties than those that are now provided for and the Commission has succeeded in resisting the challenges. With respect to characterizing the penalty provided for under s.162 of the *Securities Act*, the B.C. Court of Appeal decision in *Johnson v. British Columbia (Securities Commission)*[40] drew a clear distinction between administrative penalties provided for under s.162 and the penalties that could be ordered by a court and held that the penalties provided for under s.162 are regulatory

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[38] The new provisions, which are in addition to existing prohibitions against insider trading under provincial securities law and the *Canada Business Corporations Act*. introduce new *Criminal Code* offences for insider trading and employment-related threats or retaliation, new sentencing provisions for capital markets fraud, and new evidence-gathering techniques. Maximum sentences would be raised from 10 to 14 years' imprisonment for current *Criminal Code* offences of fraud and fraud affecting the public market. The maximum prison term for fraudulent manipulation of stock exchange transactions are raised from five to 10 years. The new insider trading offence carries a maximum imprisonment sentence of 10 years, and the new employment-related threats or retaliation offence carries a five years' imprisonment maximum.

[39] *Securities Act,* R.S.B.C. 1996 c. 418.

[40] *Johnson v. British Columbia (Securities Commission),* [2001] B.C.J. No. 2103 (B.C.C.A.).

sanctions that do not constitute "true penal consequences," and therefore, are properly classified as administrative penalties.[41] It is important to note that at the time *Johnson* was decided, the administrative penalties prescribed under s.162 were capped at $100,000 (in the case of a "person").

There are two additional cases which confirm the characterization of penalties under s.162 of the *Securities Act* as being regulatory and not constituting "true penal consequences" according to *Wigglesworth*. In *British Columbia (Securities Commission) v. Simonyi-Gindele*,[42] the respondent argued that the introduction of administrative penalties by s.144.1 (now s.162) of the B.C. *Securities Act* converted the statute from a regulatory act to a penal statute. The court rejected the argument, declaring that, "I do not think the introduction of administrative penalties changes the whole character and scheme of the act. In my opinion, the *Securities Act* remains a regulatory statute." Consequently, the Court upheld the summons issued by the B.C. Securities Commission requiring the respondent to attend an examination in connection with an investigation of the respondent company for market manipulation of stock. Note again, that at the time of this decision, administrative penalties under the *Securities Act* were capped at $100,000 (in the case of a "person").

The B.C. Securities Commission was called upon to decide the same issue in *Re Connor Financial Corp*.[43] The Commission sought various orders under the *Securities Act*, including the imposition of administrative penalties of $60,000 against Connor Financial Corporation ("CFC") for retaining the interest on its client's funds and failing to submit an advertisement for approval. CFC argued that s.144.1 (now s.162) of the B.C. *Securities Act* amounted to penal legislation. In this regard, the Commission held that:

> In our view, section 144.1 of the Act is not penal legislation in that it does not create an offence and does not impose a sanction that constitutes a true penal consequence. Section 144.1 is a remedial provision intended to regulate the conduct of persons who participate in the securities market by enforcing their compliance with the legislation. Accordingly, in applying section 144.1, the Commission is entitled, if not required, to give the Act or Regulation a "fair, large and liberal construction and interpretation as best ensures the attainment of its objects", pursuant to section 8 of the Interpretation Act, R.S.B.C. 1979, c. 206.

As a result, CFC was ordered to pay the Commission an administrative penalty of $40,000.

The phrase "true penal consequences" from *Wigglesworth* has also been considered in relation to provisions under the federal *Customs Act*.[44] In *Martineau v. Canada (Minister of National Revenue)*,[45] the Federal Court of Appeal considered the issue of administrative penalties under the *Customs Act*. In this case, the appellant was subjected to an ascertained forfeiture under the *Customs Act.* To avoid submitting to an examination for discovery, the appellant argued that he

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[41] . The Ontario *Securities Act* has no power to impose fines (or "administrative penalties") under section 127 but large financial "voluntary settlements are frequently extracted by that Commission from Respondents who seek to settle regulatory proceedings.

[42] *British Columbia (Securities Commission) v. Simonyi-Gindele* [1992] B.C.J. No. 2893 (B.C.S.C.).

[43] *Re Connor Financial Corp.,* 1995, online: QL (BCSD).

[44] *Customs Act,* R.S.C. 1985, c.1 (2nd Supp.).

[45] *Martineau v. Canada (Minister of National Revenue)* [2003] A.C.F. no 557, 2003 CAF 176 (F. Crt. Appl.).

was a “person charged with an offence” was therefore entitled to the protection of 11(c) of the Charter.

Letourneau J.A., speaking on behalf of the Court of Appeal, stated that:

> It is now accepted that these proceedings, including those under the Act, and the administrative penalties imposed, are civil, not criminal, proceedings and penalties: Time Data Recorder International Ltd. v. Canada (Minister of National Revenue -- M.N.R.), [1997] F.C.J. No. 475 (F.C.A.), Lavers v. British Columbia (Minister of Finance), [1989] B.C.J. No. 2239 (B.C.C.A.), R. v. Yes Holdings Ltd., [1987] A.J. No. 1040 (Alta C.A.)...The reason is that these penalties imposed in fiscal matters, including customs, and the seizure and forfeiture proceedings resulting therefrom, are, in a system of voluntary reporting, designed to govern the conduct of taxpayers with a view to preventively ensuring compliance with the tax legislation. These proceedings are administrative in nature. And to use the words of Madam Justice Wilson in R. v. Wigglesworth, [1987] 2 S.C.R. 541, at page 560, paragraph 23, "Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are ... not the sort of 'offence' proceedings to which b,s. 11 is applicable."[46]

In coming to this decision, the Court of Appeal placed great weight on the fact that it was the appellant who had initiated the proceedings to challenge an existing decision by the Minister of National Revenue in regards to the ascertained forfeiture. Therefore, Letourneau J.A., on behalf of the Court of Appeal, concluded that, “The proceeding he has initiated himself cannot result in any conviction, fine or penal consequence in the criminal or penal sense of the word, making him a person charged with an offence under the Charter's paragraph 11(c).”[47]

The B.C. Court of Appeal applied the “true penal consequences” test from *Wigglesworth* to penalty assessments issued by the Minister of Finance for tax evasion under the federal *Income Tax Act* and the B.C. *Income Tax Act* in *Lavers v. British Columbia (Minister of Finance).*[48] The taxpayers in this case did not attack the quasi-criminal proceedings brought against them pursuant to s.239 of the *Income Tax Act* that creates offences (similar to s.155 of the *Securities Act*) resulting in their criminal convictions. Instead, the taxpayers took issue with the penalty assessments issued in accordance with provisions of both Income Tax Acts, claiming that the issuance of the assessments amounted to the taxpayers being punished twice for the same offence, violating s.11(h) of the Charter. The assessment penalties were restricted in amount to 25 percent of the tax sought to be evaded and, in the case of a wilful attempt to evade the payment of taxes, to 50 percent of such tax.

The Court of Appeal rejected the taxpayers’ argument in this respect. In doing so, the Court of Appeal applied the two tests enunciated in *Wigglesworth* and held, first, that penalty assessments failed the “by nature test” since they do not constitute a finding of guilt nor a punishment for an offence.

In applying the “true penal consequences” test from *Wigglesworth,* the Court of Appeal held that the penalties did not carry with them any threat of imprisonment nor give a discretionary range

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46 *Ibid*,.

47 *Ibid*.

48 *Lavers v. British Columbia (Minister of Finance),* [1989] B.C.J. No. 2239 (B.C.C.A.). This decision has been questioned on a different point by the Nova Scotia Court of Appeal in *Mousseau v. Canada (AG)*, (1993) 107 D.L.R. (4th) 727, (1993) 126 N.S.R. (2d) 33.

of punishment. By contrast, the penalties imposed under s.239 carried both a threat of imprisonment and a fine ranging from 25 percent to 50 percent of the amount of tax sought to be evaded. Moreover, the Court of Appeal strongly considered the distinction in severity of the respective penalties, concluding that:

> Parliament intended that the imposition of the statutory penalty following assessments by the Minister would reflect a sufficiently significant monetary punishment to deter taxpayers from failing to comply with the Income Tax Acts and would thereby achieve the objective of this administrative procedure…the severity of the public sentence which could be imposed following a conviction under s. 239 clearly points to Parliament's intention to provide a punishment designed to redress a public wrong.[49]

As a result, the Court of Appeal held that the assessment penalties did not constitute "true penal consequences" required for a wrongdoer to invoke the protection of s.11 of the Charter.

In conclusion, there is no decision in Canada yet where a regulatory penalty has been found under the "true penal consequences test" to be transformed into a penal offence based on the magnitude of the penalty. However, the "true penal consequences test" has been repeatedly affirmed by various courts since the *Wigglesworth* decision in 1987. At present, there has been no case under which the much greater administrative penalties under s.162 of the *Securities Act* which came in force as of May 2002 (in the case of a person, $500,000, and in the case of an individual, $250,000) have been questioned by a respondent on the basis that it constitutes a "true penal consequence." It is inevitable that the increase in administrative penalty under s.60 of Bill 38 to $1 million for each contravention of the *Securities Act* or regulations will provide a substantial basis for such an argument to be advanced in the future.

Judicial Review of Administrative Tribunal Decisions

A further access to justice issue is the extent to which decisions of the Securities Commission are immune from judicial scrutiny. It is not doubted that superior courts have an inherent supervisory jurisdiction over the decisions of administrative tribunals. The more vexing question that has attracted much debate is what standard of review should be applied by the courts in reviewing the decisions of administrative tribunals.

In this regard, the Supreme Court of Canada has continually crafted some basic principles of approach, the result of which is a grouping of different standards of judicial review that can be difficult to reconcile or apply in particular factual contexts.

The latest decision of the Supreme Court of Canada dealing with the appropriate standard of review was handed down recently in *Re Cartaway Resources Corp*.[50] In *Cartaway*, the respondents attacked the decision of the B.C. Securities Commission to impose upon them an administrative penalty provided for under s.162 of the B.C. *Securities Act*.

The approach to judicial review endorsed by the Court is described by it as a "pragmatic and functional analysis" and was adopted from the Court's earlier decisions in *Dr. Q v. College of*

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[49] There re no page or paragraph references available. This quote can be found under the heading, 'II. The "Offence" and then under subheading "(b) True Penal Consequence."

[50] *Re Cartaway Resources Corp*. (2004) 238 D.L.R. (4th) 193 (*Cartaway*).

Physicians and Surgeons of British Columbia[51] and *Pezim v. British Columbia (Superintendant of Brokers).*[52] Thus, it appears that this approach is here to stay. In *Cartaway*, the Court explained that the pragmatic and functional analysis involves the weighing of four factors, none of which is dispositive:

1. the presence or absence of a privative clause or statutory right of appeal;
2. the expertise of the administrative tribunal relative to the reviewing court regarding the question at issue;
3. the purpose of the legislation and the provision in particular; and
4. the nature of the question - law, fact, or mixed law and fact.

The above four factors should inform the degree of deference that a court should apply when reviewing the decision of a tribunal. In this particular case, Mr. Justice Lebel, on behalf of the Court, stated that, “deference is due to matters falling squarely within the expertise of the [B.C. Securities] Commission even where there is a right of appeal.”[53]

In addition, Mr. Justice Lebel, on behalf of the Court, added:

> The balance of factors in the pragmatic and functional analysis point towards the standard of review of reasonableness and away from the more exacting standard of correctness. The reviewing court must therefore ask whether there is a rational basis for the decision of the Commission in light of the statutory framework and the circumstances of the case...In applying the standard of reasonableness, the reviewing court should not determine whether it agrees with the determination of the tribunal. Such a conclusion is irrelevant…The focus should be on the reasonableness of the decision or the order, not on whether it was a tolerable deviation from a preferred outcome.[54]

It is also of interest to note that in British Columbia, the *Administrative Tribunals Act*[55] was put into force as of June 30th of this year. The stated purpose of the Act (enunciated during its second reading) was to codify current case law regarding the standard of review of decisions made by administrative tribunals in order to increase efficiency, consistency, transparency, and make the system itself more comprehensible to the public it serves.

Consistent with case law, the Act provides that where a tribunal possesses a substantial amount of subject-matter expertise, a reviewing court should give significant deference to decisions of these tribunals unless the decision is patently unreasonable or the tribunal acted unfairly. Examples of tribunals with subject-matter expertise were stated to include the Employment Standards Tribunal, the Workers Compensation Appeal Tribunal, and the Farm Industry Review Board. With respect to other tribunals, such as the Human Rights Tribunal and mental health review panels, the Act provides that, with limited exceptions, the court must adopt a standard of correctness in reviewing these tribunal’s decisions.

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[51] *Dr. Q v. College of Physicians and Surgeons of British Columbia,* [2003] 1 S.C.R. 226.

[52] *Pezim v. British Columbia (Superintendant of Brokers)*, [1994] 2 S.C.R. 557.

[53] *Cartway supra*

[54] *Cartway supra*.

[55] *Administrative Tribunals Act,* S.B.C., 2004, c.45.

The following are the two provisions of the Act dealing with the standard of review of decisions made by administrative tribunals. First, section 58 provides for the standard of review if a tribunal's enabling Act has privative clause:

> 58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> >
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
> >
> > (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
>
> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
>
> > (a) is exercised arbitrarily or in bad faith,
> >
> > (b) is exercised for an improper purpose,
> >
> > (c) is based entirely or predominantly on irrelevant factors, or
> >
> > (d) fails to take statutory requirements into account.

Second, section 59 of the Act provides for the standard of review if a tribunal's enabling Act has no privative clause:

> 59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
>
> (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
>
> (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
>
> (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
>
> > (a) is exercised arbitrarily or in bad faith,
> >
> > (b) is exercised for an improper purpose,
> >
> > (c) is based entirely or predominantly on irrelevant factors, or
> >
> > (d) fails to take statutory requirements into account.
>
> (5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

The pragmatic and functional analysis is the most recent approach endorsed by the Supreme Court of Canada to be adopted by a court in reviewing the decision of an administrative tribunal. Particularly where a tribunal has subject-matter expertise, a reviewing court should afford significant deference to the decision of such a tribunal.

Conclusion

In each of the examples of sanctions being imposed by administrative rather than judicial processes that I have considered in this paper, the use of such processes has been justified by those who have advocated the process as being in the public interest. But the public interest, like the related concept of "public policy", is a two way street. Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you. [56] It cannot be in the public interest, nor can it be sound public policy, to perpetrate injustice through processes which do not have safeguards appropriate to the gravity of the consequences of the decision.

[56] *Richardson v. Mellish*, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824) (opinion of Burrough, J.).