

**THE JURY IS OUT:
THE CONTROVERSY ABOUT JURY TRIALS
UNDER THE ALBERTA SECURITIES ACT**

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After reviewing the place of securities law enforcement within the Canadian court system, the author traces the Peers and Aitkens decisions from the Provincial Court to the Supreme Court and outlines how these cases dealt with the question of what penalties trigger the right to a jury trial under section 11(f) of the Charter. The author explains how section 11(f) impacts the division of powers by creating a constitutional cap on the prison sentences that are available for violations of provincial law. In light of stiff maximum penalties for violations of securities laws, the Peers and Aitkens decisions raise the question of whether there are constitutional reasons to continue to try regulatory offences by judge alone in provincially appointed courts.

TABLE OF CONTENTS

I.	INTRODUCTION	1025
II.	SECURITIES REGULATION AND THE DIVISION OF POWERS	1027
III.	PROVINCIAL SECURITIES ENFORCEMENT PROVISIONS	1028
IV.	PARTIES AND PROSECUTIONS	1032
V.	PEERS' NOVEL ARGUMENT	1032
VI.	CROWN RESPONSE	1033
VII.	PROVINCIAL COURT DECISION ON JURY RIGHTS IN PEERS	1036
VIII.	REMEDY IN PROVINCIAL COURT	1036
IX.	JUDICIAL REVIEW IN THE COURT OF QUEEN'S BENCH	1037
X.	AITKENS IN THE PROVINCIAL COURT AND THE COURT OF QUEEN'S BENCH AND THE WIGGLESWORTH CASE	1038
XI.	AITKENS AND PEERS IN THE COURT OF APPEAL	1040
XII.	SUPREME COURT OF CANADA PROCEEDING	1042
XIII.	CONSEQUENCES OF THE SUPREME COURT OF CANADA DECISION	1043

I. INTRODUCTION

A few years ago, the Supreme Court of Canada issued a decision that dealt more squarely than any prior ruling with the question of what penalties trigger the constitutional right to trial by jury under section 11(f) of the *Canadian Charter of Rights and Freedoms*.¹ It did so in two appeals heard at the same time: *R. v. Peers*² and *R. v. Aitkens*.³

It is surprising in a few ways that the *Peers* and *Aitkens* proceedings reached the Supreme Court. Section 11(f) is not a *Charter* provision that courts or litigants had viewed as particularly difficult to apply in the past. This provision enshrines the right to a jury trial,

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¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

² 2017 SCC 13 [*Peers*].

³ 2017 SCC 14 [*Aitkens*].

“where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.”⁴ The Appellants in both *Peers* and *Aitkens* faced potential sentences under five years of prison per offence, so on the face of the provision it would seem they had no reason to ask for a jury trial. However, they argued that the total sentence they could receive, including fines and other consequences, constituted a “more severe punishment” than five years in prison alone. The workability of comparing a term of imprisonment to a bundle of different kinds of punishments was an obvious difficulty with the position, as several courts below noted. Yet, the Supreme Court still granted leave.

It is also perhaps surprising that the scope of section 11(f) protections came before the Supreme Court in a regulatory rather than criminal case. Both Appellants asserted a constitutional right to be tried by jury for *non-criminal* offences under *provincial* securities legislation. It might be expected that section 11(f) thresholds would be more controversial in a criminal setting, where longer prison terms have been more common.

What ultimately made the cases complex and interesting was that an “inferior” court, the Provincial Court of Alberta, was to try the allegations against *Peers* and *Aitkens*. This provincially appointed bench does not hold jury trials. Legislation in other provinces also places trials of regulatory matters in provincial courts that lack juries. Had the Appellants convinced the Supreme Court they were correct about their purported right to a jury, the Supreme Court would have had to select among a number of difficult remedy options with significant implications for how securities and other regulatory penal matters are dealt with across the country. Thus, the proposed jury right represented something of a challenge to the way regulatory offences are prosecuted in Canada.

The Supreme Court dismissed the existence of this jury right in a decision short enough to suggest the Appellants’ position had little merit. Yet, the *Peers* and *Aitkens* cases are still worth studying for several reasons. First, despite the short Supreme Court reasons, the *Charter* interpretation problem the cases raised represented enough of a legal tangle that the Supreme Court decided it needed to address the issue in a decision binding across the country. Second, the Alberta Court of Appeal decision that the Supreme Court upheld says important things about section 11(f) and its relationship to other *Charter* provisions, particularly section 7. Third, it is interesting in itself to examine why this proposed jury right represented such a challenge to the existing judicial and regulatory systems in Canada. In fact, the case opens an informative cross-section view of the complex court system in this federation and the very particular place regulatory offences have in it. Fourth, the cases suggest that the introduction of section 11(f) of the *Charter* may have had the unintended effect of creating a constitutional cap on the prison sentences available for violations of provincial law.

On account of these last two points, this article will first take a broad look at how securities law enforcement fits into the Canadian legal system, particularly its federal division of powers and its dual-level trial court system. We will then examine the specifics of the *Peers* and *Aitkens* cases, the arguments the Appellants raised, and how the numerous courts involved dealt with them.

⁴ *Charter*, *supra* note 1, s 11(f).

II. SECURITIES REGULATION AND THE DIVISION OF POWERS

Securities regulation in Canada falls primarily under provincial jurisdiction pursuant to section 92(13) of the *Constitution Act, 1867*.⁵ In *Reference re Securities Act*, the Supreme Court concluded that a plenary securities regime, dealing with matters such as trading in contracts and professional competence in a specific industry, is beyond the power of Parliament.⁶ The Supreme Court used the homey term “day-to-day” to describe this world of contracts, trades in property, and professional registration, distinguishing these “local and private” matters from the more abstract federal power to regulate trade and commerce (section 91(2)) on a national scale.⁷ However, the Supreme Court also confirmed that federal regulatory and financial legislation can incidentally affect securities regulation when it is passed pursuant to a clear federal competence, such as banking (section 91(15)). Moreover, when it comes to punishing serious misconduct in relation to securities, Parliament can pass legislation under its criminal law power.⁸

In fact, the *Criminal Code* has prohibitions against insider trading and tipping, market manipulation, and misrepresentations relating to securities — all conduct also proscribed by provincial securities law.⁹ These are indictable offences that can be tried in federally appointed superior courts by judge or jury and carry lengthy maximum prison sentences.

In a sense, while Parliament is limited in passing laws that *regulate* securities generally, its powers to *punish* securities-related misconduct are clear and substantial. In contrast, while the provinces’ regulatory powers over securities are clear, they face certain complications when drafting enforcement provisions that the federal Crown does not.

One thing the provinces *can* clearly do is seek to imprison someone for violating a provincial (non-criminal) law. Section 92(15) of the *Constitution Act, 1867* says provinces have the power to pass laws regarding:

The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.¹⁰

Although criminal law in Canada is exclusively federal, both levels of government have “penal” powers. It is worth noting that section 92 itself does not place any express limit on how severe penalties can be to enforce provincial laws.

Provincial penal powers, however, may be constrained by some broad constitutional considerations. One such consideration is that provincial regulatory enforcement laws need to be distinguishable in some sense from criminal laws; otherwise, they can be ruled as ultra vires.¹¹ A broad question the *Peers* and *Aitkens* cases raised is whether another limitation on provincial penal powers is the tradition (or perhaps constitutional necessity) of trying provincial offence matters in inferior courts, where juries have not traditionally sat. This

⁵ (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

⁶ 2011 SCC 66.

⁷ *Ibid* at para 6.

⁸ *Ibid* at para 46.

⁹ RSC 1985, c C-46, ss 380(2), 382–84, 400.

¹⁰ *Constitution Act, 1867*, *supra* note 5.

¹¹ See *Westendorp v The Queen*, [1983] 1 SCR 43; *Scowby v Glendinning*, [1986] 2 SCR 226.

issue recently came up in part because the provinces have been flexing their penal powers in terms of the length of prison sentences for regulatory offences, particularly where securities laws are concerned. We will look next at provisions for enforcing provincial regulatory and securities laws.

III. PROVINCIAL SECURITIES ENFORCEMENT PROVISIONS

Under the power set out in section 92(15) of the *Constitution Act, 1867*, provinces have created mechanisms to ensure compliance with their securities regulatory regimes. Regulators have two main ways of dealing with misconduct that occurs involving securities:

- (1) Administrative: the regulator may lay allegations before an administrative panel and ask it to impose sanctions, which may include large fines and prohibitions against acting in certain roles in the securities industry (such as a trader, officer, or director of an issuer).
- (2) Quasi-Criminal/Penal: authorities can commence court proceedings where respondents are faced with imprisonment as a possible sentence.

Taking Alberta as an example, the key administrative enforcement provisions in the *Securities Act*¹² are section 198 (“[c]ease trading order, etc.”) and section 199 (“[a]dministrative penalty”). These provisions allow the Alberta Securities Commission to “ban and fine” entities and individuals.

The key penal or quasi-criminal provision is section 194(1) of the Alberta *Securities Act*:

General offences and penalties

A person or company that contravenes Alberta securities laws is guilty of an offence and is liable to a fine of not more than \$5 000 000 or to imprisonment for a term of not more than 5 years less a day, or to both.¹³

This section does two things. First, it sets maximum penalties for securities offences in terms of fines and imprisonment. These penalties are not exclusive; both can be applied to the same offence. Penalties in this range — five years less a day plus a large fine — became the norm across Canadian securities acts, with some exceptions discussed below.

Second, section 194(1) states that a violation of the Alberta *Securities Act* is an “offence.” The use of this term in section 194(1) invokes the jurisdiction of the *Provincial Offences Procedure Act*,¹⁴ which sets out the process for prosecuting violations of Alberta legislation that can lead to imprisonment.

¹² RSA 2000, c S-4 [*Securities Act*].

¹³ *Ibid.*

¹⁴ RSA 2000, c P-34 [*POPA*].

Section 2 of the *POPA* states:

Application of Act

Subject to any express provision in another Act, this Act applies to every case in which a person commits or is suspected of having committed an offence under an enactment for which that person may be liable to imprisonment, fine, penalty or other punishment.¹⁵

The Appellants in *Peers* and *Aitkens* were charged under section 194(1) of the Alberta *Securities Act* with having committed “offences” by violating specific sections.

In terms of establishing a process that can lead to imprisonment, the single most important procedural provision in the *POPA* is section 3:

Application of Criminal Code

Except to the extent that they are inconsistent with this Act and subject to the regulations, all provisions of the *Criminal Code* (Canada), including the provisions in Part XV respecting search warrants, that are applicable in any manner to summary convictions and related proceedings apply in respect of every matter to which this Act applies.¹⁶

As a result of this provision, provincial offence matters in Alberta are treated much like summary offence criminal matters under the *Criminal Code*. This includes court venue. “Court” in the *POPA* refers to the “Provincial Court of Alberta,” which would also have jurisdiction under the incorporated *Criminal Code* summary provisions.¹⁷

The *POPA* stipulates a default maximum term of imprisonment of six months, plus a \$2,000 fine.¹⁸ These presumptive punishments mirror earlier *Criminal Code* default penalties for summary offences and are very similar to the previous *Criminal Code* summary offence sentence of six months, plus a \$5,000 fine, that was in place at the time when the informations were filed against *Peers* and *Aitkens*.¹⁹ Both the *Criminal Code* and the *POPA* state that these maximums do not apply where specific offence provisions prescribe a penalty.

The provincial offence legislation in other provinces also relies heavily on incorporation of summary *Criminal Code* provisions.²⁰ Quebec and Ontario have made efforts to draft their own procedural rules.²¹ The express purpose of the Ontario legislation is to replace summary conviction procedures, including those borrowed from the *Criminal Code*, with a “procedure that reflects the distinction between provincial offences and criminal offences.”²² Still, even

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*, s 1; *Criminal Code*, *supra* note 9, s 785.

¹⁸ *POPA*, *supra* note 14, s 7.

¹⁹ *Criminal Code*, *supra* note 9, s 787. The maximum term of imprisonment in section 787 increased in 2019 to two years less a day.

²⁰ See *Provincial Offences Act*, SNL 1995, c P-31.1, s 6; *Summary Proceedings Act*, RSNS 1989, c 450, s 7; *The Summary Offences Procedure Act, 1990*, SS 1990-91, c S-63.1, s 4; *Offence Act*, RSBC 1996, c 338, s 133.

²¹ *Provincial Offences Act*, RSO 1990, c P.33 [*POA* (Ont)]; CPP.

²² *POA* (Ont), *ibid.*, s 2.

in the two provinces that created their own procedural rules, the legislation makes room for the application of criminal concepts, and the basic summary offence structure is retained — trial in a provincial court by judge alone with an appeal to superior court.²³

Thus, the provincial systems for securities misconduct borrow to one extent or another from criminal processes, particularly those used for lesser crimes tried on a summary basis in lower courts, despite the constitutional need for provincial offences to be distinguishable from criminal law. The use of summary criminal procedures and summary conviction courts may reflect the historical evolution of provincial offences. Presumably, offences for violating local liquor bylaws or territorial building regulations bore some similarity to misdemeanours and lesser offences in the *Criminal Code*, and the provinces were content to rely on magistrates or municipal courts to prosecute such cases.

However, it may have been inevitable that the use of this summary system would be questioned, as provinces expanded their public interest legislation and made it more forceful to deal with the negative social consequences that can flow from the failure to comply with environmental, worker safety, or other protective schemes. The Alberta *Securities Act* is an example of this evolution of provincial social welfare legislation. A compilation of Alberta securities laws, including regulations and instruments, now runs approximately 3,050 pages.²⁴ Penalties for violating these rules have become stiffer over time.

Before 1989, the maximum punishment for natural persons under the provincial offence provision in the Alberta *Securities Act* had been a fine of up to \$5,000 and a term of imprisonment of not more than one year, or both. Corporations faced fines up to \$75,000. These are the sorts of penalties one could imagine being easily dealt with in a summary fashion in a lower court. However, it is more difficult to see how such modest sanctions would deter potentially profitable violations of securities law. Thus, in 1989, the Alberta legislature increased the maximum penalties to five years less a day of imprisonment, a fine of up to \$1,000,000, or both. When Ontario increased the maximum term of imprisonment in its legislation to five years less a day, it also raised the maximum for a provincial offence fine to \$5,000,000.²⁵ In 2005, the Alberta legislature followed suit, raising the maximum fine in section 194(1) to \$5,000,000.²⁶

By the time of the Supreme Court of Canada appeals, Manitoba, Nova Scotia, Newfoundland, and all three territories had legislated prison terms of five years less a day plus fines of up to \$5,000,000, or both, as maximum penalties a court can impose for violations of securities laws.²⁷ These are also the maximum penalties set out in the draft

²³ *Ibid*, ss 2(2), 29, 116(2); Arts 1, 3, 60–61, 270 CPP.

²⁴ Norton Rose Fulbright Canada LLP, ed, *Alberta Securities Act and Regulation 2018-2019* (Toronto: Carswell, 2018).

²⁵ *Securities Act*, RSO 1990, c S.5, s 122; *An Act to implement Budget measures and other initiatives of the Government*, SO 2002, c 22.

²⁶ *Securities Act*, SA 1981, c S-6.1, s 161(2); *Securities Amendment Act, 1989*, SA 1989, c 19, s 9, amending SA 1981, c S-6.1, s 161; *Securities Amendment Act, 2005*, SA 2005, c 18, s 22, amending RSA 2000, c S-4, s 194.

²⁷ *The Securities Act*, CCSM c S50, s 136; *Securities Act*, RSNS 1989, c 418, s 129; *Securities Act*, RSNL 1990, c S-13, s 122; *Securities Act*, SNWT 2008, c 10, s 164; *Consolidation of Securities Act*, SNU 2008, c 12, s 164; *Securities Act*, SY 2007, c 16, s 164.

legislation for the proposed *Capital Markets Act*²⁸ that would apply in jurisdictions participating in the Cooperative Capital Markets System. Quebec and New Brunswick are also at five years less a day in terms of imprisonment; the maximum fine in New Brunswick is \$1,000,000, and in Quebec it is the greater of \$150,000 or four times the profit realized in the case of an actual person.²⁹

The two outliers in different senses are British Columbia and Saskatchewan. In British Columbia, the maximum penalty for a violation of securities law is three years of imprisonment, while the maximum fine is \$3,000,000.³⁰ In Saskatchewan, the maximum fine is the standard \$5,000,000, but the maximum term of imprisonment is a full five years.³¹

Administrative penalties imposed by the regulators themselves also increased during these years. In Alberta, the maximum penalty rose to \$1,000,000 per contravention in 2005.³²

It is not surprising that these increases attracted challenges. In the *Criminal Code*, the longest summary offence prison term is two years less a day, or just under four times the default period of six months. The prison term set out in section 194(1) of the *Alberta Securities Act* is just less than ten times the standard summary procedure prison term set out in the *POPA*.

One question that such increases in regulatory offence penalties raised was whether at some point the provincial legislation had become criminal in nature. In general, the answer has been no. While there is some case law suggesting the severity of a sanction may be some indication that a law is criminal in nature, the bulk of authority states that the size of fines and the length of prison terms does not in itself render a regulatory scheme criminal in its pith and substance. In a recent decision on the *Alberta Securities Act*, Justice Yamauchi reviewed this case law and concluded:

Constitution Act, 1867 s 92(15) allows the provinces to impose punishment by fine, penalty, or imprisonment to enforce valid provincial laws. In *Morgentaler* at 512, the Supreme Court of Canada said, however, that “unusual severity of penalties may be taken into account in characterizing legislation.” As one can see, the penalties contained in *Securities Act* s 194 are not insubstantial. The severity of the penalties is something that the courts take into account. It is not, however, determinative of whether a provincial enactment is colourable criminal law. In the old case of *Wason* at para 72, Osler JA said the following:

The competency of the enactment cannot be tested by the severity of the sanction so long as the latter is limited to fine, penalty or imprisonment; in other words, it cannot be argued that the thing prohibited is brought within the range of the criminal law merely by reason of the high nature of the punishment which may be inflicted upon the offender.³³

²⁸ Cooperative Capital Markets Regulatory System, *Capital Markets Act: A Revised Consultation Draft* (August 2015), s 112, online: <ccmr-ocrmc.ca/wp-content/uploads/CMA-Consultation-Draft-English-August-2015.pdf>.

²⁹ *Securities Act*, SNB 2004, c S-5.5, s 179; *Securities Act*, CQLR c V-1.1, ss 202–203, 208.1.

³⁰ *Securities Act*, RSBC 1996, c 418, s 155.

³¹ *The Securities Act, 1988*, SS 1988-89, c S-42.2, s 131.

³² *Securities Amendment Act, 2005*, SA 2005, c 18, s 26, amending RSA 2000, c S-4, s 199.

³³ *R v Kirk*, 2014 ABQB 517 at para 90.

But how about integrating these weighty quasi-criminal punishments into the penal world created by the *Charter*? Broadly speaking, this was the question the *Peers* and *Aitkens* cases raised in relation to jury rights in provincial offence proceedings.

IV. PARTIES AND PROSECUTIONS

Mr. Peers was charged in Provincial Court with 33 violations of the Alberta *Securities Act*. The allegations related to selling securities without a prospectus (section 110(1)), unregistered trading in securities (section 75(1)), misrepresentations (section 92(4.1)), and fraud (section 93). On fairly different facts, Mr. Aitkens was charged with violating the same provisions of the Alberta *Securities Act*.

V. PEERS' NOVEL ARGUMENT

Peers' counsel noted a potential issue with prosecuting securities offences, with the high penalties we now see in provisions such as section 194(1) of the Alberta *Securities Act*, in a provincial court — the jury rights set out in section 11(f) of the *Charter*. It states:

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

...

(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.³⁴

As noted above, the maximum penalty under section 194(1) of the Alberta *Securities Act* is five years less a day in prison or a fine of up to \$5,000,000, or both. Peers' counsel decided to argue that five years less a day in prison plus a fine of up to \$5,000,000 was a “more severe punishment” than five years in prison. Peers would therefore have a right to a jury and, since the Provincial Court does not have juries, a remedy for the breach of his constitutional rights under section 24(1) of the *Charter*. The most appropriate remedy, Peers would later argue, was to stay the proceedings against him.

Peers' counsel filed a “Notice of Argument” in Provincial Court seeking this remedy. At this court level, Peers stressed the following arguments:

- (1) that the *Charter* applies to offences under the Alberta *Securities Act* when they are tried in provincial court;
- (2) that five years less a day in prison plus a fine of up to \$5,000,000 is simply a “more severe punishment” than five years in prison alone; and

³⁴ *Charter*, *supra* note 1.

- (3) that the possibility of time served in default of an unpaid fine is a further reason to view the penalties set out in section 194(1) as more severe than five years in prison alone.

Peers only weakly suggested the number of counts he faced was a factor in the section 11(f) analysis, because *Criminal Code* sentencing principles apply via section 2 of the *POPA*. Those principles state that prison time for related offences will generally be served concurrently.³⁵ The real issue, therefore, was whether any of the individual counts Peers faced could lead to a more severe penalty than five years imprisonment and whether time served in default should count toward the calculation of the jeopardy Peers faced.

VI. CROWN RESPONSE

The Crown did not dispute that the *Charter* applies to section 194(1) proceedings. This is because these quasi-criminal prosecutions involve potential imprisonment, a “true penal consequence” pursuant to the reasoning in *R. v. Wigglesworth* and subsequent cases.³⁶ The Crown did note that a fine on its own is not penal in nature, which is why section 11 *Charter* rights do not apply to administrative proceedings carried out by securities regulators across the country. The implications of *Wigglesworth* subsequently became an issue in the *Peers* and *Aitkens* proceedings, as we will see below, but were not discussed in detail at the *Peers* Provincial Court hearing.

The Crown disputed Peers’ two other arguments. It first argued that section 11(f) jury rights only apply where the accused is faced with imprisonment of at least five years. The term “or a more severe punishment” refers to a period of imprisonment beyond five years. Such an interpretation is consistent, the Crown asserted, with both the plain language of section 11(f) and the purpose of the provision — to provide increased safeguards in the case of serious criminal offences, such as indictable offences, that may invite more substantial penal consequences affecting personal freedom.

The Crown noted section 11(f) case law consistent with this view. The Supreme Court of Canada in *R. v. Rowbotham*; *R. v. Roblin*³⁷ dealt with modifications to the procedure for directed verdicts in jury trials. The Supreme Court specifically addressed the potential concern that the proposed procedural changes infringed the accused’s right to trial by jury under section 11(f) of the *Charter*. Chief Justice Lamer for the unanimous Supreme Court stated that, “The guarantee set out in s. 11(f) of the *Charter* is to guarantee anyone accused of certain more serious offences not to have their *liberty*, guaranteed under s. 7, restricted as a result of a conviction unless by a court composed of a judge and jury.”³⁸

In *R. v. Gibbs*,³⁹ the accused faced “failing to file” charges under section 238 of the *Income Tax Act*.⁴⁰ Summary proceedings under that provision can lead to fines of up to \$25,000 and terms of imprisonment of up to a year. The accused argued that she was nonetheless entitled to a jury trial. The Court in *Gibbs* disagreed, stating as follows:

³⁵ *Criminal Code*, *supra* note 9, ss 718–19.

³⁶ [1987] 2 SCR 541 [*Wigglesworth*].

³⁷ [1994] 2 SCR 463 [*Rowbotham*].

³⁸ *Ibid* at 477 [emphasis added].

³⁹ 2001 BCPC 0361 [*Gibbs*].

⁴⁰ RSC 1985, c 1 (5th Supp).

Section 11(f) provides that with the exception under military law a person tried with an offence is entitled to the benefit of a trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment, and *in my view the reference to more severe punishment clearly relates back to the issue of imprisonment for five years*. The penalty provisions of the *Criminal Code* do have gradients of severity, but in Canada the most severe punishments available are imprisonment and then within that general term there are different maximum levels of imprisonment up to life imprisonment. *So the reference to imprisonment for five years or a more severe punishment in my view goes to the issue of the imprisonment and not some other punishment such as a significant fine or indeed the stigma that will attach or can attach to a person being convicted of an offence*. So in my view, s. 11(f) of the *Charter* does not supersede the words of the legislation which creates a summary conviction offence.⁴¹

In *Bridgman and The Queen, Re*,⁴² the accused argued that a Crown election violated his section 7 rights by denying him procedural protections available in superior court proceedings, including the right to be tried by a jury. In dismissing the application, the Court concluded that section 11(f) of the *Charter* applies when “the penalty of conviction is for five years or more.”⁴³

In *Re PPG Industries Canada Ltd. and Attorney-General of Canada*,⁴⁴ the British Columbia Court of Appeal considered the applicability of section 11(f) to corporations and whether non-natural persons could be denied a jury trial under federal competition legislation. Justice Anderson concluded that the purpose of section 11(f) was to guarantee jury trial rights to those “exposed to heavy penalties (imprisonment for five years or more),”⁴⁵ as opposed to those who faced only fines or shorter summary offence jail terms.

Perhaps the case with facts closest to the *Peers* situation was *R. v. Bondy*.⁴⁶ It involved an accused who faced summary sexual interference charges under sections 151 and 152 of the *Criminal Code*. Those offences carried a maximum sentence of 18 months, but also a minimum imprisonment term of 14 days. The accused in *Bondy* argued that the minimum 14-day sentence provision, together with the risk of up to 18 months further time in jail, constituted a more severe punishment than five years of potential imprisonment at the full discretion of the judge.

The Court in *Bondy* disagreed, stating as follows: “To my mind, the coordinating conjunction ‘or’ in front of the words *a more severe punishment* suggests to me an effort was made at refinement of the first clause ‘maximum punishment for the offence is imprisonment for five years’ and not intended as an alternative.”⁴⁷

It noted intrinsic evidence suggesting that the drafters of the *Charter* had intended section 11(f) to apply only to “serious criminal offences,” a term Parliament subsequently defined as offences attracting a penalty of five years or more. The Court stated as follows: “To my mind, the words ‘or a more severe punishment’ arose from the discussion about serious

⁴¹ *Gibbs*, *supra* note 39 at para 33 [emphasis added].

⁴² 1985 CanLII 3651 (Ont H Ct J).

⁴³ *Ibid* [emphasis added].

⁴⁴ (1983), 146 DLR (3d) 261 (BCCA).

⁴⁵ *Ibid* at 278 [emphasis added].

⁴⁶ 2013 ONCJ 268 [*Bondy*].

⁴⁷ *Ibid* at para 30 [emphasis in original].

criminal matters and serious offences. These were intended to be offences that would place an individual at greater risk of imprisonment for a considerable period of time.”⁴⁸

The Court therefore came to the following conclusion:

From all the foregoing, it is apparent to me the drafters were concerned that individuals who were facing the potential for severe punishment following conviction for indictable offences where the prospect of jail could be for a term of imprisonment for a period of five years or greater would have the benefit to be tried by a judge and jury if they so desired.⁴⁹

Further, the Crown in *Peers* pointed out that the Alberta legislature had read section 11(f) in exactly the same manner as these decisions propose when it drafted section 194(1). The Minister responsible for raising the term of imprisonment in 1989 told the legislature that a period less than five years was necessary to avoid issues about jury rights.⁵⁰

The Crown argued that time in default is irrelevant to section 11(f). It cited extensive Canadian criminal case law indicating that time in default of payment does not form part of the original sentence. Rather, it is a separate sanction, generally assessed only after non-payment, and designed not to punish the original offence but to encourage payment of fines generally and to sanction the non-payment of a fine.

The Crown cited *The King v. Doherty*⁵¹ as an example where the Court considered if an offender fined under the *Intoxicating Liquor Act, 1916*⁵² had been “sentenced to imprisonment” in light of the possibility of serving time in default. Framing his sentence as “imprisonment” would allow the offender to appeal his conviction. The Court declined to view the fine as amounting to imprisonment. It held as follows:

Where a statute assigns imprisonment as a mode of punishment in the first instance, it follows immediately upon, and is the legal consequence of the judgment. But where it is merely subsidiary to enforcing payment of a pecuniary penalty, a commitment cannot legally follow until default is made in payment of the fine. The defendant has not, I think, been “sentenced to imprisonment” within the meaning of the subsection under discussion, so as to give him a right of appeal.

...

Obviously, he need not suffer imprisonment at all if he pays the fine; so that I think the imprisonment cannot be said to be the sentence of the court, but rather a consequence which the accused brings upon himself by defaulting in the payment of the fine; the imprisonment is merely a means which the law authorizes for collecting the penalty. See *Reg. v. Flory* (1889) 17 O.R. 715.⁵³

⁴⁸ *Ibid* at para 41.

⁴⁹ *Ibid* at para 43.

⁵⁰ Legislative Assembly, *Alberta Hansard*, 22-1 (31 July 1989) at 1127 (Hon Dennis Anderson). (1918), 42 DLR 102 at 103 (NBSC) [*Doherty*].

⁵¹ SNB 1916, c 20.

⁵² *Doherty*, *supra* note 51 at 104–105.

⁵³

Similarly, Justice Binnie in *R. v. Wu* commented: “Jail only entered [the trial judge’s] calculation as a default provision for non-payment. As such, jail was triggered by the default, not the offence. No default, no jail.”⁵⁴

VII. PROVINCIAL COURT DECISION ON JURY RIGHTS IN *PEERS*

Despite these arguments, Judge Fred Day of the Alberta Provincial Court concluded *Peers* was right. Providing reasons from the bench, he ruled that section 194(1) of the *Alberta Securities Act* set out a “more severe punishment” than five years imprisonment.⁵⁵ He found that the bulk of the case law the Crown cited was informative but not directly on point, while he expressly rejected the finding in *Bondy* that the term “more severe punishment” was defined by the prior reference to “imprisonment for five years.”⁵⁶ Judge Day noted that the two phrases were linked by the conjunction “or.” Rather than the term “more severe punishment” being a “refinement” of “imprisonment for five years,” it represented an “alternative.”⁵⁷

This alternative, Judge Day asserted, could be any combination of punishments — imprisonment, fines, or even probation — that were collectively more severe than five years of incarceration. Judge Day offered no clear rules for comparing five years’ imprisonment to various combinations of jail time and other penalties. He concluded that decisions would have to be made on a “case-by-case” basis. In the case of section 194(1) of the *Alberta Securities Act*, the combination of a prison term one day short of five years and a very large fine was simply “more severe” than five years of prison alone.

Judge Day appears to have been influenced primarily by a plain reading of section 11(f). Parliament didn’t expressly limit “more severe punishment” to imprisonment and — using common-sense reasoning — \$5,000,000 is simply worth a day spent in prison. He attempted to find a similarly common-sense solution to the issue of remedy.

VIII. REMEDY IN PROVINCIAL COURT

Judge Day issued a separate decision on remedy.⁵⁸ His task was simplified somewhat by the fact it was common ground among the parties that the Provincial Court could not conduct a jury trial. The *POPA* includes no reference to jury trials. Nothing in other provincial legislation grants this statutory Court the power to hold jury trials or provides a procedure for doing so. One of the characteristics of the summary procedure the *POPA* incorporates from the *Criminal Code* is trial by judge alone.

In these circumstances, *Peers* argued, the Court’s only option would be to declare the proceeding a nullity. It could not carry on a trial that violated a *Charter* right. The Crown argued that any violation of the *Charter* could be saved under section 1. It noted the background to the penalties contained in section 194(1). The Crown cited Hansard excerpts and other extrinsic evidence indicating that the purpose of the 1989 amendment was to

⁵⁴ 2003 SCC 73 at para 27. See also *R v Waselenchuk*, 2005 ABQB 182 at para 21, and *R v Bourque*, 2005 CanLII 3580 at para 16 (Ont CA).

⁵⁵ *R v Peers* (18 October 2013), Edmonton 120790480P1 (Alta Prov Ct).

⁵⁶ *Bondy*, *supra* note 46 at para 30.

⁵⁷ *R v Peers*, 2015 ABQB 129 at para 9 [*Peers* (QB)].

⁵⁸ *R v Peers* (22 July 2014), Edmonton 120790480P1 (Alta Prov Ct).

increase deterrence, particularly in light of the collapse of a large Alberta-based financial operation.⁵⁹ The 2005 increase of the fine from \$1,000,000 to \$5,000,000 was also intended to increase deterrence and to bring the Alberta *Securities Act* in line with other Canadian securities legislation.

Judge Day decided he did not need to quash the proceeding or make a ruling on section 1, because he found a way to avoid any breach of section 11(f). He ruled that the Alberta Court of Queen’s Bench could take jurisdiction over the matter and conduct a jury trial. He therefore put the matter on the list for a first appearance in the Alberta Court of Queen’s Bench, much like any *Criminal Code* proceeding moving from inferior to superior court.⁶⁰

IX. JUDICIAL REVIEW IN THE COURT OF QUEEN’S BENCH

The Crown initiated a judicial review of Judge Day’s decision on the grounds that the maximum penalties set out in section 194(1) of the Alberta *Securities Act* do not cross the threshold for constitutional jury rights and, in any case, the Court of Queen’s Bench had no jurisdiction to try Peers.⁶¹

The parties put forward largely the same arguments as they had in Provincial Court, with some elaboration in each case. In general, Justice Topolniski accepted the Crown’s position. She returned the matter to the Provincial Court for trial.⁶²

Justice Topolniski reviewed the same section 11(f) case law cited above that the Crown had presented to Judge Day and appears to have found decisions such as *Bondy* persuasive. She declined to dismiss the precedents on the basis that most of the commentary on section 11(f) was *obiter*. She also accepted the idea that potential time in default is irrelevant, because it is not part of the sentence that follows from the original offence.⁶³

Justice Topolniski further agreed with an argument the Crown developed more fully in the Court of Queen’s Bench review — that the *ejusdem generis* or limiting class rule could have some applicability to section 11(f). According to this view, the specific reference to “imprisonment” in section 194(1) may determine or influence the meaning of the more general term “punishment.”⁶⁴ However, the Court noted that an overly restrictive application of the limited class rule could lead to an absurd result that was raised by defence counsel: section 11(f) would guarantee jury rights to accused facing long jail terms, but not to those who might face the death penalty (should it be reintroduced).⁶⁵ In order to deal with this issue, Justice Topolniski emphasized an argument that the Crown had introduced before Judge Day, but expanded upon on judicial review — that section 11(f) is focused on the more fundamental rights of liberty and personal integrity, not on economic interests.⁶⁶

⁵⁹ Legislative Assembly, *Alberta Hansard*, 22-1 (15 June 1989) at 285 (Hon Dennis Anderson); Legislative Assembly, *Alberta Hansard*, 22-1 (26 June 1989) at 536 (Hon Dennis Anderson); Legislative Assembly, *Alberta Hansard*, 22-1 (28 July 1989) at 1109–10 (Hon Dennis Anderson).

⁶⁰ *R v Peers* (22 July 2014), *supra* note 58.

⁶¹ *Peers* (QB), *supra* note 57.

⁶² *Ibid* at para 87.

⁶³ *Ibid* at paras 16–17, 28–62.

⁶⁴ *Ibid* at paras 64–66.

⁶⁵ *Ibid* at para 67.

⁶⁶ *Ibid* at paras 70, 82.

Justice Topolniski found that the class of penalties established by the reference in section 11(f) to imprisonment were those affecting liberty. She followed *Rowbotham* in that respect,⁶⁷ but also cited the following paragraphs from *Reference Re BC Motor Vehicle Act*⁶⁸ on the relationship between section 7 “life, liberty and security of the person” interests and the subsequent specific rights set out in provisions such as section 11(f):

Sections 8 to 14, in other words, address specific deprivations of the “right” to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7. It would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14. The alternative, which is to interpret all of ss. 8 to 14 in a “narrow and technical” manner for the sake of congruity, is out of the question (*Law Society of Upper Canada v. Skapinker, supra*, at p. 366).

Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the “right” to life, liberty and security of the person; they are examples of instances in which the “right” to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice. To put matters in a different way, ss. 7 to 14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections the oft utilised provision in our statutes, “and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person’s rights under this section”. Clearly, some of those sections embody principles that are beyond what could be characterized as “procedural”.⁶⁹

Combining the “limiting class” rule and a purposive reading of section 11(f) in light of section 7 interests, Justice Topolniski concluded that only penalties “affecting the right to life, liberty and security of the person” are relevant to the section 11(f) analysis.⁷⁰ Since a fine does not affect such interests, the fact that Peers may have to pay up to \$5,000,000 for violating the Alberta *Securities Act* did not mean he had a right to a jury trial when the prison sentence he might receive was under five years. As a result, he had no right to trial by jury, and there was no barrier to the Provincial Court having jurisdiction.

Justice Topolniski’s blending of statutory interpretation principles with a purposive reading of section 11(f) seemed to result in a solution that both explained the language in section 11(f) and conformed to how the regulatory penal system presently operates. However, her stress on purpose over plain language and her comments on the relationship between section 7 and section 11(f) were challenged on appeal, as we will see below.

X. AITKENS IN THE PROVINCIAL COURT AND THE COURT OF QUEEN’S BENCH AND THE WIGGLESWORTH CASE

After oral and written submissions were made in the *Peers* Queen’s Bench proceeding, counsel for Aitkens brought an application in Provincial Court for an order that his matter be transferred to the Court of Queen’s Bench, which alone could decide if it had inherent jurisdiction to conduct a jury trial. The grounds for the application were largely similar to

⁶⁷ *Rowbotham, supra* note 37 at 477.

⁶⁸ [1985] 2 SCR 486 [*BC Motor Vehicle*].

⁶⁹ *Ibid* at 502–503.

⁷⁰ *Peers* (QB), *supra* note 57 at para 70.

those advanced by Peers — Aitkens had a right to a jury trial that the Provincial Court could not satisfy.⁷¹

Judge Camp instead concluded that Aitkens did not enjoy any jury rights. Unlike Justice Topolniski, he was concerned that the “limited class rule” did not apply, because section 11(f) only includes one specific term defining the “class,” not a list of specific terms.⁷² However, Judge Camp was persuaded by the section 11(f) cases cited above and found that the “clear preponderance of authority” interprets constitutional jury rights only to apply “where the accused faces five years or more of imprisonment.”⁷³

Aitken’s counsel raised one issue in the Court of Queen’s Bench that Peers’ counsel had not brought before Judge Day — the case of *Wigglesworth*.⁷⁴ This is a seminal case on what legal proceedings in the justice system attract the list of classic civil rights set out in section 11 of the *Charter*. *Wigglesworth* turned on the meaning of “offence” in the introductory lines of section 11: “Any person charged with an offence has the right.”⁷⁵ Section 11 goes on to list specific rights, such as the right to a jury trial.

The Supreme Court of Canada in *Wigglesworth* decided two kinds of legal proceedings involve an “offence”:

- (1) those of “a public nature, intended to promote public order and welfare within a public sphere of activity,” such as criminal law, versus “private, domestic or disciplinary matters which are regulatory, protective or corrective” and that maintain discipline in a specific field;⁷⁶ or
- (2) those that can lead to the “imposition of true penal consequences,” which could involve imprisonment or even a fine large enough “to be imposed for the purpose of redressing the wrong done to society” rather than to maintain “internal discipline within the limited sphere of activity.”⁷⁷

According to the Provincial Court Judge, defence counsel raised this issue in order to suggest that any ambiguity in the legislation should be resolved in favour of Aitkens, since the proceeding was essentially criminal in nature. The Crown responded that the Alberta *Securities Act* is regulatory in nature and not criminal. However, Judge Camp noticed another problem with this argument — the ambiguity is not in the legislation so much as it is in the *Charter*.⁷⁸

Counsel for Peers had caught wind of this *Wigglesworth* argument and put the case before Justice Topolniski. Peers focused, however, on the Supreme Court’s comment that a fine could be a “penal consequence.” The idea seemed to be that the potential fine set out in section 194(1), as a true penal consequence, must be added to the jail term in assessing the

⁷¹ *R v Aitkens*, 2015 ABPC 21 [*Aitkens* (PC)].

⁷² *Ibid* at paras 43–46.

⁷³ *Ibid* at para 54.

⁷⁴ *Supra* note 36.

⁷⁵ *Ibid* at 550–51.

⁷⁶ *Ibid* at 560.

⁷⁷ *Ibid* at 561.

⁷⁸ *Aitkens* (PC), *supra* note 71 at paras 31–35.

application of section 11(f). The Court concluded the *Wigglesworth* case was irrelevant, because the Crown had admitted that section 11 of the *Charter* applies to section 194(1) proceedings.⁷⁹

Aitkens launched a judicial review of the decision of Judge Camp dismissing his application. Justice Wilson at the Court of Queen's Bench upheld the lower Court's decision, stressing in unreported reasons the impossibility of comparing jail time to other forms of punishment that do not affect liberty.⁸⁰

XI. AITKENS AND PEERS IN THE COURT OF APPEAL

Both Appellants appealed their respective Court of Queen's Bench decisions to the Alberta Court of Appeal. The appeals were heard together.⁸¹ Aitkens emphasized a difference between the *POPA* and the *Criminal Code* in terms of time served in lieu of payment of a fine. Under the *Criminal Code*, there are protections against the sentencing of individuals for time in default when they lack the means to pay their fines. One protection is that a court needs to be satisfied, at the time of sentence, that the offender can pay.⁸² The other is a hearing after non-payment to determine if the offender was at fault for their failure to pay.⁸³ The *POPA* keeps the first protection, but drops the post-default hearing.⁸⁴

Peers' counsel focused on two new points. First, their brief pointed out extensive legislation and case law suggesting that a fine is a "punishment." Therefore, it should be added to prison terms when considering if an offence provision crosses the section 11(f) threshold. Second, they noted a potential conflict between a Supreme Court decision, *R. v. CIP Inc.*,⁸⁵ and Justice Topolniski's conclusion that "*Charter* s 7 is the springboard for the procedural rights in ss 8-14" such that section 11 rights must refer back to "life, liberty and security of the person" interests.⁸⁶ In its *CIP* decision, the Supreme Court ruled that a corporation could rely on the section 11(b) right to be tried in a reasonable time, even though it had no "life, liberty and security of the person" interests. The Supreme Court concluded that "[s]ection 7 does not define the scope of the rights contained in the provisions that follow it."⁸⁷ Therefore, section 11(f) should not be read as only applying to punishments that affect liberty.

The Alberta Court of Appeal issued two reasons for its decision dismissing the appeals. In terms of the time in default arguments, the Court of Appeal majority reiterated the Court of Queen's Bench findings that imprisonment "for nonpayment of a fine is not a punishment for the original offence."⁸⁸ It also noted protections in the *Criminal Code* against imprisoning those who cannot pay, though it did not address the fact that the *POPA* removes one of these safeguards.⁸⁹

⁷⁹ *Peers* (QB), *supra* note 57 at paras 46–47.

⁸⁰ *R v Aitkens* (8 May 2015), Edmonton 131151698U1 (Alta Prov Ct).

⁸¹ *R v Peers*, 2015 ABCA 407 [*Peers* (CA)].

⁸² *Criminal Code*, *supra* note 9, s 734(2).

⁸³ *Ibid*, s 734.7(1).

⁸⁴ *Procedures Regulation*, Alta Reg 63/2017, s 12.

⁸⁵ [1992] 1 SCR 843 [*CIP*].

⁸⁶ *Peers* (QB), *supra* note 57 at paras 69–70.

⁸⁷ *CIP*, *supra* note 85 at 854.

⁸⁸ *Peers* (CA), *supra* note 81 at para 12.

⁸⁹ *Ibid*.

In terms of Peers' arguments, the Court of Appeal majority found that the interpretation of the word "penalty" varies throughout the *Criminal Code* and, in any case, the real question is whether a fine could be a "more severe penalty" than five years' imprisonment. The Court noted that a fine and imprisonment are "qualitatively" different.⁹⁰ Including fines in the determination of whether a penalty was more severe than five years' imprisonment would be "entirely unworkable."⁹¹ The Court also referenced the *Bondy* and *Gibbs* decisions described above.⁹²

The Court of Appeal majority agreed with the *Peers* Queen's Bench decision that the purpose of section 11(f) was to add additional protections for more serious offences where the risk to liberty interests are greater. Addressing the issues raised by the *CIP* decision, the majority made some comments about the relationship between section 7 and section 11(f):

The two sections obviously arise from common principles, but it does not follow that the provisions of s. 11 have no independent operative effect. Whatever the conceptual relationship between s. 7 and s. 11, s. 7 is neither a floor nor a ceiling on the s. 11 rights. Section 11(f) is clearly related to "liberty" and engages a fundamental principle of criminal procedure, the jury trial. Section 11(f), however, must be interpreted in its own context, according to its specific purpose.⁹³

Although the Court of Appeal majority arguably loosened the relationship between section 7 and section 11, as compared to the *Peers* Queen's Bench decision, the continuing stress on liberty interests also allowed it to reason that some other forms of punishment may be comparable to imprisonment under section 11(f):

On a proper purposive interpretation of s. 11(f), in its context, the expression "imprisonment for five years or a more severe punishment" should be interpreted as primarily engaging the deprivation of liberty inherent in the maximum sentence of imprisonment imposed by the statute. This interpretation appropriately serves the purpose of the *Charter* in distinguishing between those crimes that are serious enough to warrant a jury trial, and those that are not. A maximum penalty of "five years less one day" does not become a "more severe punishment" just because some collateral negative consequences are added to it. From a purposive perspective, that is not enough to change the offence into one that is "serious" enough to warrant a jury trial. *This is not to say that there might not be some forms of punishment that could be added to a term of imprisonment which would be so punitive that they might constitute a "more severe punishment". Examples might possibly include corporal punishment, banishment from the community, forced labour, or revocation of citizenship.* However, the mere prospect of a fine or financial penalty does not qualify.⁹⁴

As a result of the above reasoning, the Court of Appeal majority concluded that section 194(1) of the *Alberta Securities Act* did not cross the threshold for jury rights set out in section 11(f) of the *Charter*. The Court noted in *obiter* that, in any case, the Appellants would not be entitled to the extraordinary remedy of a stay of proceedings. Rather, the charging provision could be read down to make it *Charter* compliant, as the legislature had always intended it to be.⁹⁵

⁹⁰ *Ibid* at para 5.

⁹¹ *Ibid* at para 9.

⁹² *Ibid* at para 13.

⁹³ *Ibid* at para 7.

⁹⁴ *Ibid* at para 15 [emphasis added].

⁹⁵ *Ibid* at para 19.

Justice O’Ferrall issued concurring reasons focused on the issue of remedy. On the substantive issue, he showed some openness to the arguments of the Appellants:

I am not entirely satisfied that the appellants’ argument concerning their right to a jury trial, due to the application of section 11(f) of the *Charter*, is without merit. A plain, purposive, contextual and non-technical reading of section 11(f) of the *Charter* suggests to me that a jury might well be required in the prosecution of an offence for which the maximum punishment is five years less a day plus a \$5 million fine.⁹⁶

However, Justice O’Ferrall concluded he did not need to decide on the jury rights issue, as the appeal could be dealt with on the question of remedy. He did not think the Appellants were entitled to a stay for two reasons. First, they were trying to avoid a trial, not seeking a jury trial. Second, a less severe remedy, such as “reading down” the penalties (presumably to below the section 11(f) threshold) would be more appropriate. Justice O’Ferrall hinted, without elaborating, to other potential remedies, potentially including some kind of jury trial.⁹⁷

XII. SUPREME COURT OF CANADA PROCEEDING

The Appellants sought and were granted leave to appeal to the Supreme Court of Canada. In that appeal, Aitken’s arguments remained largely the same. Peers again stressed the fact that fines are treated as punishments in *Criminal Code* provisions and *Charter* case law and therefore can form part of a “more severe punishment” under section 11(f). He also argued, pursuant to the *CIP* case, that a section 11 procedural right should not be limited in scope to a section 7 interest, such as liberty.

In order to deal with the Court of Appeal’s concern that Judge Day’s reading of section 11 would not be workable in practice, Peers appealed to the experience of courts in the United States in terms of recognizing jury rights. His counsel noted extensive US case law that identified whether an offence was “petty,” and therefore not grave enough to merit the broad right to a jury trial set out in the Sixth Amendment.⁹⁸ Some of these cases, applying judicially created tests limiting express constitutional jury rights, looked at both the length of the prison sentence *and* other factors, such as fines. A “multi-factor” approach to jury entitlement was therefore workable and could applied to section 11(f), Peers’ counsel submitted.

The reference to US case law was a creative idea. However, transplanting the American approach is problematic for a number of reasons, including the wording of section 11(f). While courts may find it useful to define what a “petty” offence is by using a number of factors, the wording of section 11(f) itself suggests a “bright-line” approach: a specific long term of imprisonment determines which cases merit trial by jury. In oral argument, the Supreme Court of Canada showed little interest in the US case law.

The Supreme Court did show more interest in a purposive reading of section 11(f), and there was some discussion of how to go about applying section 11(f) with an eye to what it is meant to protect. When pressed by the Supreme Court in oral argument on whether section

⁹⁶ *Ibid* at para 21.

⁹⁷ *Ibid* at paras 21–23.

⁹⁸ *R v Peers*, 2017 SCC 13 (Factum of the Appellant at paras 42–52).

11(f) was defined by “liberty interests,” counsel for Peers referred to the *CIP* decision and its *ratio* that section 7 does not strictly define rights set out in sections 8 to 14 of the *Charter*. This was again a challenge to the *BC Motor Vehicle* case that Justice Topolniski had followed. Echoing the Court of Appeal, Chief Justice McLachlin responded from the bench that even if section 7 does not strictly limit sections 8 to 14 rights, one can still read section 11(f) as protecting section 7 liberty interests given its reference to imprisonment.⁹⁹

In the end, the Supreme Court of Canada issued a very short decision, stating: “The appeal is dismissed. We conclude that the appellant was not entitled to a trial by jury, substantially for the reasons of the majority of the Court of Appeal, 2015 ABCA 407, 609 A.R. 352.”¹⁰⁰

XIII. CONSEQUENCES OF THE SUPREME COURT OF CANADA DECISION

The brevity of the Supreme Court decision indicates it did not grant leave in order to clarify some principle the courts below had misapplied. This author suspects that the Supreme Court may have been concerned about delays in the court system, as it addressed in the *R. v. Jordan*¹⁰¹ decision. Had a court outside Alberta chosen not to follow the Alberta Court of Appeal, but rather to make a remedial order as Judge Day did, a great deal of delay and confusion may have ensued. Thus, there was a need for a ruling that applied across the country. The fact that Justice O’Ferrall at the Alberta Court of Appeal showed some sympathy in his concurring decision for the approach Judge Day took to section 11(f) may have added to these concerns.

As a practical result of the Supreme Court’s decision, Peers and Aitkens did not have their proceedings stayed, nor did they get a jury trial in the Alberta Court of Queen’s Bench, as Judge Day had ordered. Rather, their cases were dealt with in Provincial Court.

In terms of legal principle, by endorsing the Alberta Court of Appeal’s decision, the Supreme Court of Canada made clear that “more severe punishment” in section 11(f) refers to prison terms of five years or longer, or possibly to other grave infringements on “life, liberty and security of the person,” such as capital punishment.¹⁰² Viewed purposively, section 11(f) protects liberty interests that may be affected by terms of imprisonment. Thus, fines and other subordinate penalties do not factor into the calculation of whether an accused faces a “more severe punishment” than five years of imprisonment.

This purposive interpretation is consistent with earlier cases, such as *Rowbotham*. The Alberta Court of Appeal decision that the Supreme Court of Canada upheld refined this purposive analysis: section 7 interests inform a purposive reading of section 11(f), but that does not mean section 7 strictly limits all rights set out in sections 8 to 14 of the *Charter*.¹⁰³ This later notion essentially reconciled the *Rowbotham* and *BC Motor Vehicle* rulings with the *CIP* decision.

⁹⁹ *R v Peers*, 2017 SCC 13 (Oral argument, Appellant), online: <cpac.ca/en/programs/supreme-court-hearings/episodes/50538399>.

¹⁰⁰ *Peers*, *supra* note 2.

¹⁰¹ 2016 SCC 27.

¹⁰² *Charter*, *supra* note 1.

¹⁰³ *Peers (CA)*, *supra* note 81 at para 15.

However, the exact relationship between section 7 and section 11 rights in general is still somewhat unclear. As Chief Justice McLachlin noted, the reference in section 11(f) to a term of imprisonment suggests the section is about protecting liberty. Therefore, reliance on section 7 was not necessary to decide the case as the Supreme Court did. The degree to which section 7 defines or informs sections 8 to 14 of the *Charter*, as discussed in the *BC Motor Vehicle* and *CIP* cases, is an issue the Supreme Court may need to revisit in the future.

In a sense, the Supreme Court decision in *Peers* had an impact in terms of what it did not say, because the Supreme Court did not have to deal with remedy issues. In particular, the Supreme Court did not have to decide whether it was necessary or possible to interfere with the traditional means of dealing with penal matters described above; that is, two levels of trial courts, with criminal jury trials reserved for superior courts, and provincial offence matters reserved for lower courts and judge-alone trials.¹⁰⁴ Both the Appellants and Judge Day were of the view that this system no longer worked in light of the increased penalties for violating the Alberta *Securities Act*. The Appellants asserted that, as a result, the process had to stop (a stay), while Judge Day thought the process could change (a superior court jury trial of a provincial offence). The Alberta Court of Appeal hypothesized that — had *Peers* and *Aitkens* been entitled to a remedy — the Court could have changed the Alberta *Securities Act*, that is, read it down to make it comply with the *Charter*. Then, the proceedings could have gone ahead in Provincial Court in the usual manner.

It would have been interesting to see the Supreme Court of Canada opine on such issues, had it concluded that a remedy was necessary. Could the Court of Queen's Bench possibly have jurisdiction over a provincial offence matter? Would a jury trial in superior court involving such significant penalties not have started to look like criminal law, raising division of powers concerns? Is there any way the Provincial Court could have conducted a jury trial using models borrowed from the *Criminal Code* or other provincial legislation, or with some form of Court of Queen's Bench assistance? Or, would a jury trial in an inferior court have infringed upon the jurisdiction of federally appointed, section 96 superior courts? In general, the question the *Peers* and *Aitkens* cases raised, but have left unanswered, is whether there are legal reasons we must continue to follow the traditional pattern of trying regulatory offences by judge alone in provincially appointed courts.

In so much as this regulatory enforcement system does continue, whether for constitutional reasons or as a matter of practice and convention, then the *Peers* case indicates something important about section 11(f) of the *Charter*. Despite the fact that it is a provision aimed at protecting individual civil rights in the justice system, rather than regulating the relationship between levels of government, it has a division of powers impact. Section 92(15) does not put any express limit on the length of prison sentences that the provinces can impose. As well, we cited case law above indicating that the severity of a provincial offence penalty does not determine if provincial penal legislation has strayed into the criminal realm and is *ultra vires*. However, so long as provincial offences are tried in a forum that does not (or cannot) provide trial by jury, the penal powers of the provinces are limited by the section 11(f) threshold of five years of imprisonment.

¹⁰⁴ For a wider discussion on this issue, see Peter H Russell, ed, *Canada's Trial Courts: Two Tiers or One?* (Toronto: University of Toronto Press, 2007).