# If 33 Million Dollars Is Not Enough, Then What Is?: Administrative Monetary Penalties and Section 11 of the *Charter*

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## ABSTRACT

This article examines section 11 of the *Charter* and its application to administrative monetary penalties ("AMP" or "AMPs"), specifically through the true penal consequence test. It introduces the leading legal frameworks established by the SCC in *R v Wigglesworth* and *Guindon v Canada*. This article applies the *Wigglesworth* test and the four *Guindon* Factors to assess when AMPs attract section 11 scrutiny to the case of *R v Samji*, where the BC Securities Commission imposed a massive $33 million AMP on a notary who perpetrated a large-scale Ponzi Scheme contrary to the BC *Securities Act*. This article argues that while the current framework provides a workable analytical toolkit, it contains several unexplored weaknesses: the binary nature of the second *Guindon* Factor fails to account for when AMPs are used for a public purpose despite being collected outside of a consolidated revenue fund; the tension between potential and actual consequence approach remains unresolved, as illustrated by the Competition Tribunal in a recent decision involving Google; and the treatment of AMPs under the *Bankruptcy and Insolvency Act* suggests that AMPs lack the characteristics of true penal consequences. Two reform proposals are offered: (1) when AMPs are linked to imprisonment through immunity provisions, they should presumptively trigger section 11 *Charter* protections or at a minimum be an

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additional *Guindon* Factor; and (2) the implementation of a modified version of Professor Steven Penney's proposed bright-line limit which would better resist circumvention by administrative tribunals. This article concludes that it is unlikely that an AMP will ever be considered a true penal consequence, but that there is hope in a long overdue judicial clarification of the law in the context of the potential-versus-actual consequence approach through Google's recent statutory appeal to the Federal Court of Appeal ("FCA").

KEYWORDS: *Section 11 of the Charter, True Penal Consequence Test, Administrative Monetary Penalties ("AMP" or "AMPs"), Wigglesworth, Guindon Factors, R v Samji*

## I. INTRODUCTION

From 2003 to early 2012, Rashida Abdulrasul Samji, a licensed notary, operated an investment scheme.[1] She offered a wine investment opportunity through a private company known as the Mark Anthony Group Inc.[2] Samji told investors that they would receive a 6% return every six months with the option to collapse their investments or reinvest.[3] Samji promised investors that their money would be kept safe in her notary trust account and would be used to get secure letters of comfort for the Mark Anthony Group.[4]

The reality was that Samji was operating a large-scale Ponzi scheme.[5] She abused her position as a notary public, which "played a significant role in her perpetuation of the fraudulent scheme."[6]

The Mark Anthony Group was not involved in the Ponzi scheme, no money was ever held in Samji's trust account, no money was used in any wine investments, and no letters of comfort were ever provided.[7] Samji took investors' money and used it to pay other investors.[8] After the conclusion of an investigation, it was determined that a total of $16,503,397 was

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1 *R v Samji*, 2017 BCCA 415 at para 8 [*Samji* CA].

2 *Ibid*.

3 *Jer v Society of Notaries Public of British Columbia,* 2015 BCCA 257 at para 7.

4 *Samji* CA, *supra* note 1 at para 8.

5 *Ibid*.

6 *Ibid* at para 10.

7 *Ibid* at para 9.

8 *Ibid*.

deposited into Samji's bank accounts as a result of the Ponzi scheme.[9] Fourteen investors were involved, with thirteen of them incurring net losses totaling $10,497,217.[10]

As a result of Samji's conduct, the BC Securities Commission ("Commission") proceeded against Samji under sections 161 and 162 of the *Securities Act*.[11] Section 161(1)(g) and section 162 allow for, respectively, monetary sanctions and administrative monetary penalties ("AMP" or "AMPs").[12] An AMP is simply a civil financial penalty that can be imposed if a person is found to have contravened the relevant statute.[13]

The Commission then held a hearing over a period of 13 days which took place from November 2013 to March 2014.[14] The Commission found "that Samji perpetrated a fraud, contrary to section 57(b) of the [*Securities Act*]...for proceeds of not less than $100 million."[15] The Commission proceeded to determine sanctions, ultimately imposing the following: "under section 161(1)(g), the respondents pay to the Commission $10,811,799; under section 162, the respondents pay the Commission an administrative penalty of $33 million."[16]

The Commission, in coming to its order, considered factors similar to sentencing in criminal proceedings. They considered specific and general deterrence, mitigating and aggravating factors, and utilized previous decisions.[17]

Alongside the Commission hearings, Samji was also subject to criminal proceedings. An information was sworn on November 6, 2013,[18] alleging 14 counts of theft over $5000 and 14 counts of fraud over $5000 contrary to sections 334(a) and 380(1)(a) of the *Criminal Code*.[19] Samji was convicted

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9 *Ibid* at para 15.

10 *Ibid*.

11 *Ibid* at para 17.

12 *Securities Act*, RSBC 1996, c 418, ss 161–162.

13 Law Commission of Ontario, *Modernization of the Provincial Offences Act: Final Report* (Toronto: Law Commission of Ontario, 2011) at 3, online: <lco-cdo.org> [perma.cc/C35B-HYZU].

14 *Samji* CA, *supra* note 1 at para 18.

15 *Samji (Re)*, 2014 BCSECCOM 286 at para 52 [*Samji* 2014].

16 *Samji (Re)*, 2015 BCSECCOM 29 at para 57 [*Samji* 2015]. The use of the word respondents is because the Commission proceeded against multiple corporations that were used by Samji in perpetuating the fraud (see *Ibid* at para 2).

17 See *Ibid* at paras 6–28.

18 *Samji* CA, *supra* note 1 at para 16.

19 *R v Samji*, 2016 BCPC 145 at para 5 [*Samji* PC].

of all 14 counts of theft and 14 counts of fraud, with a stay of proceedings on the sentencing for the theft charges because of the rule against multiple convictions.[20] The sentencing judge determined "that a fit and proportionate sentence [was] six years to be served in a federal penitentiary"[21] along with multiple restitution orders for the victims pursuant to section 738 of the *Criminal Code*.[22] Section 11(h) of the Charter offers protection against double jeopardy, specifically stating:

> [a]ny person charged with an offence has the right…(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.[23]

In the Commission proceedings, Samji was found "guilty" under section 57(b) of the *Securities Act* and received punishment for the offences on January 16, 2015.[24] In the criminal proceedings, Samji was also found guilty and was sentenced to her punishment on September 28, 2016.[25] Samji wished to invoke section 11(h) of the *Charter* for her criminal proceedings arguing that she was being punished twice for the same conduct.[26] This raises the question: did Samji's administrative proceedings and massive $33 million AMP fall under the definition of section 11's "charged with an offence" such that Samji could rely on section 11(h) protection?

To answer this question, this article will introduce the leading SCC framework of the *Wigglesworth* test along with the *Guindon* Factor analysis to determine when significant AMPs attract section 11 *Charter* protections. This article will examine how these analytical tools provided by the SCC apply to Samji's $33 million AMP.

Beyond analyzing the existing law, this article will also identify several shortcomings in the current state of the law including the treatment of the penalty recipient, the tension between potential and actual consequences in the section 11 *Charter* analysis, and the nature of AMPs relative to criminal monetary penalties. The article will then conclude with recommendations for reform centred on immunity provisions and a bright-line threshold to better protect section 11 rights in the administrative enforcement context.

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20 *R v Samji*, 2016 BCPC 301 at para 13 [*Samji* PC Sentencing].

21 *Ibid* at para 51.

22 *Ibid* at para 54.

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

24 *Samji 2015*, *supra* note 16 at paras 57–58.

25 The date of judgment for Samji's sentence is above the first paragraph (see *Samji* PC Sentencing, *supra* note 20).

26 *Samji* PC, *supra* note 19 at para 6.

## II. THE CURRENT LAW — *R V WIGGLESWORTH*

Section 11 *Charter* rights are structured in a way where sections 11(a)–(h) only apply if a person is "charged with an offence."[27] Therefore, an important prerequisite to make out an infringement of any section 11 *Charter* right is to prove that a person falls under the meaning of "charged with an offence."[28] *R v Wigglesworth* is the major SCC case offering guidance on when section 11 *Charter* protections apply.[29]

In *Wigglesworth*, the appellant was a Constable of the Royal Canadian Mounted Police ("RCMP").[30] Donald Kerr was brought into an RCMP detachment for a breathalyzer test and was then questioned by Wigglesworth.[31] Wigglesworth was suspicious of the incident giving rise to Kerr's arrest.[32] Wigglesworth suspected Kerr was lying and "grabbed Kerr, who was seated in a chair at the time, by the throat and pushed him against a wall."[33] Wigglesworth in pursuit of the truth then "slapped Kerr across the face with his open hand."[34] After three or four more slaps, Kerr admitted to having recently driven a car.[35]

Wigglesworth was charged following this incident with common assault contrary to section 245(1) of the *Criminal Code*,[36] and was also charged with a "major service offence" under section 25 of the *Royal Canadian Mounted Police Act*.[37] Regarding the "major service offence", the maximum possible penalty was imprisonment for one year; Wigglesworth was assessed a fine of \$300.[38] At the trial level for the common assault, the judge quashed the information pursuant to section 24(1) of the *Charter* on the basis that proceeding with the criminal trial would violate the accused's right under

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27 *Charter*, *supra* note 23, s 11.

28 Department of Justice Canada, "Section 11 – General: legal rights apply to those 'charged with an offence'" (last modified 14 July 2025), online: <justice.gc.ca> [perma.cc/S82H-AHD2].

29 1987 CanLII 41 (SCC) [*Wigglesworth*].

30 *Ibid* at 546.

31 *Ibid*.

32 *Ibid*.

33 *Ibid* at 547.

34 *Ibid*.

35 *Ibid*.

36 *Ibid* (assault now falls under s 266 of the Criminal Code).

37 *Ibid*.

38 *Ibid* at 548.

section 11(h) of the *Charter* not to be tried and punished twice for the same offence.[39]

The main issue that the SCC had to address was whether Wigglesworth, having been found guilty of a "major service offence," could rely on section 11(h) of the *Charter* in relation to the common assault charge.

## A. *The Wigglesworth Test*

The test to determine if section 11 *Charter* protections apply is known as the *Wigglesworth* test. It is a two-part test which determines whether a person has been charged with an offence under the wording of section 11.[40] The SCC gives a summary in the following:

> While it is easy to state that those involved in a criminal or penal matter are to enjoy the rights guaranteed by s. 11, it is difficult to formulate a precise test to be applied in determining whether specific proceedings are proceedings in respect of a criminal or penal matter so as to fall within the ambit of the section. The phrase "criminal and penal matters" which appears in the marginal note would seem to suggest that a matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence. I believe that a matter could fall within s. 11 under either branch.[41]

In short, to attract the protections of section 11 of the *Charter*, a matter must either (1) be a criminal proceeding by nature, or (2) a conviction in respect of the offence which may lead to a true penal consequence.

## B. *Wigglesworth Test — Criminal by Nature*

If an offence satisfies the by nature test, section 11 protections are available. The exact wording of section 11 of the *Charter* is "[a]ny person charged with an offence has the right."[42] In interpreting the section, the SCC favoured the interpretation that "the rights guaranteed by s. 11 of the *Charter* are available to persons prosecuted by the State for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted."[43] Even minor traffic offences leading to a "very slight consequence, perhaps only a small fine" would fall under the wording of "charged with an offence."[44] In general, if a "particular matter is of a public nature, intended to promote public order

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39 *Ibid*.

40 *Samji* CA, *supra* note 1 at para 25.

41 *Wigglesworth*, *supra* note 29 at 559.

42 *Charter*, *supra* note 23, s 11.

43 *Wigglesworth*, *supra* note 29 at 554.

44 *Ibid* at 559.

and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11."[45]

The offences that attract section 11 of the *Charter* are distinguishable from offences which are "private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity."[46] For example, professional bodies conducting investigations[47] or protective proceedings[48] would not attract section 11 protections. Furthermore, the focus is on "the nature of the proceedings, not the nature of the act [from which the offence arises]."[49]

In the context of *Wigglesworth*, the criminal offence of common assault easily fell under the wording meant to be captured by section 11. However, examining the legislative intent in the *Royal Canadian Mounted Police Act*, a "major service offence" is closer to a matter of internal discipline when compared to the public nature of offences under the *Criminal Code*.[50]

The internal disciplinary nature of the "major service offence" suggests that Wigglesworth was never truly charged with an offence within the meaning of section 11 of the *Charter*. Consequently, section 11(h) would not apply in Wigglesworth's criminal proceedings. However, the SCC also created another distinct route known as the true penal consequence test in which section 11 protections may also arise.

## C. *Wigglesworth Test — True Penal Consequence*

As discussed above, the "major service offence" in *Wigglesworth* did not satisfy the by nature test. However, since Wigglesworth was in jeopardy of imprisonment,[51] the SCC ruled that he was facing a true penal

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45 *Ibid* at 560.

46 *Ibid.*

47 In Manitoba, Mr. Savino, a lawyer, was subject to professional conduct proceedings by the Law Society of Manitoba. Savino wanted to argue that section 11(d) of the *Charter* applied to the proceedings, but the MBCA determined that the professional conduct proceedings did not fall under the wording of section 11's "charged with an offence" (see *Law Society of Manitoba v Savino*, 1983 CanLII 2995 (MBCA) at para 15).

48 In Ontario, Malartic challenged an order which halted all trading in the securities of Malartic on the basis that the order was "like an offence" such that section 11(d) of the Chater applied (see *Re Malartic Hygrade Gold Mines (Canada) Ltd and Ontario Securities Commission*, 1986 CanLII 2653 (ONHCJ)).

49 *Martineau v MNR*, 2004 SCC 81 at para 31 [*Martineau*].

50 *Inkster v Radey*, 1979 CanLII 4169 (FCA) at 459.

51 See *Royal Canadian Mounted Police Act*, RSC 1970, c R-9, ss 25(l), 36(1).

consequence, placing him in the realm where section 11 protections arise.[52] When there is a conflict between the by nature test and the true penal consequence test, the latter will take priority.[53] Simply put, the true penal consequence test is passed if one is in jeopardy of a true penal consequence.

### D. *Sufficient Correspondence between the Two Offences — A note on Section 11(h)*

This section specifically relates to section 11(h), which will be utilized later for the analysis of *R v Samji*. If the offence passes the "charged with an offence" prerequisite of section 11 of the *Charter*, then there must be a consideration of whether there is a sufficient correspondence between the two offences.[54] For example, in *McKinney v The Queen*, McKinney was charged and convicted under sections 16(1) and 19(1) of the *Wildlife Act*.[55] Although only one hunting incident occurred, the majority of the MBCA considered there to be two delicts which had little or no connection to each other.[56] Many instances of a single act involving two or more delicts can lead to multiple convictions for the same act.[57]

In *Wigglesworth*, the "major service offence" satisfied the true penal consequence test, but section 11(h) did not apply.[58] The key point was that the characteristics of the "major service offence" and the criminal offence of common assault were quite different.[59] The "major service offence" made him "[account] to his profession,"[60] while the common assault charge made him "account to society at large for his conduct."[61] The current law makes it clear that in order for section 11(h) to offer protection, the offences must have sufficient correspondence.

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52 *Wigglesworth*, *supra* note 29 at 562–63.

53 *Ibid*.

54 *R v Prince*, 1986 CanLII 40 (SCC) at para 23 [*Prince*].

55 1980 CanLII 164 (SCC); *R v McKinney*, 1979 CanLII 2926 (MBCA) at 568 [*McKinney* CA].

56 *McKinney* CA, *supra* note 55 at 568, 573 (see also *Prince*, *supra* note 54 at para 23).

57 Logeman was charged with driving while suspended and impaired driving. Logeman was convicted on both despite there only being one act of driving (see *R v Logeman*, 1978 CanLII 3916 (BCCA)).

58 *Wigglesworth*, *supra* note 29 at 563, 566.

59 *Ibid* at 566.

60 *Ibid*.

61 *Ibid*.

## E. *When is a Monetary Penalty a True Penal Consequence? — The Guindon Factors*

As discussed above, in *Wigglesworth*, the SCC ruled that section 11 protections arise when the person charged with an offence is in jeopardy of a true penal consequence. At the time of the *Wigglesworth* decision, the SCC did not give further guidance on when consequences such as monetary penalties constitute a true penal consequence. In 2015, the SCC in *Guindon v Canada* clarified the law and set out a list of analytical factors to assist in determining whether a monetary sanction is a true penal consequence.[62] The SCC first clarified that, if the person is in jeopardy of imprisonment, it will "always [be] a true penal consequence."[63] For monetary penalties, more consideration is required to determine if the monetary penalty amounts to a true penal consequence.[64]

A monetary penalty will be considered a true penal consequence when it is punitive in purpose or effect.[65] In arriving to the answer, one should consider the *Guindon* Factors: (1) the magnitude of the fine; (2) to whom the penalty is paid; (3) whether regulatory considerations or criminal sentencing principles are used in determining the fine; and (4) whether stigma is associated with the penalty.[66]

Judge Rideout for the Provincial Court of British Columbia provided a summary of the above factors:

> a) Magnitude of penalty - if the amount is out of proportion to the amount required to achieve regulatory purposes, then the oversized fine is a strong indication that the sanction constitutes a true penal consequence. For example, if the AMP [or fine] is significantly less than the maximum criminal penalty, then it is more likely that the consequence is non-penal;
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> b) Recipient of any penalty payments - if the recipient of the monetary sanction is not a consolidated revenue fund, then the fine is more likely to be an internal or private matter of discipline;
>
> c) Applicability of sentencing principles - if the monetary sanction is determined by regulatory considerations and not sentencing principles, the sanction is likely to have a regulatory purpose. It should be noted that an administrative body can impose monetary sanctions for a deterrence effect so long as the penalty does not aim to punish or denounce; and

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62 *Guindon v Canada*, 2015 SCC 41 [*Guindon*].

63 *Ibid* at para 76.

64 *Ibid*.

65 *Ibid*.

66 *Ibid*; see also *United States Steel Corporation v Canada (AG)*, 2011 FCA 176 at paras 76–77.

> d) Stigma of the penalty - if the stigma associated with the regulatory penalty is comparable to that attached to a criminal penalty, then it is more likely that the penalty has a true penal consequence.[67]

In addition to these factors, the SCC has also summarized when a monetary penalty can be a true penal consequence.

> A sanction's effects may be considered punitive once they are "assessed relative to the conduct in question and the regulatory objective" at issue…Where the effects of a sanction are "out of proportion" to what is required to achieve the regulatory purpose, the sanction will likely constitute a true penal consequence.[68]

Having established the relevant legal frameworks, Samji's argument can be thoroughly analyzed.

## F. *Application to R v Samji*

This section covers all of the applicable law required to deal with the issue arising from *R v Samji*. Starting with the *Wigglesworth* test, the BCCA immediately acknowledged that the AMP issued by the Commission under section 162 of the *Securities Act* was not a criminal proceeding in nature.[69] Since the by nature test failed, the only way for Samji to prove a section 11 infringement was through the true penal consequence test.

Following the first *Guindon* Factor in determining if a sanction is a true penal consequence, the BCCA started with the magnitude of the AMP. Samji argued that "the magnitude…is out of proportion to the amount required to achieve regulatory purposes, especially when considered in the context of the disgorgement order that was designed to strip away any profit."[70] The BCCA rejected this argument, noting that the magnitude of the fraud perpetrated by Samji was nearly $100 million.[71] Samji contravened the *Securities Act* hundreds of times, presenting the possibility of an extremely significant AMP.[72] The AMP scheme is for the purpose of providing the Commission with a substantial tool to effect meaningful deterrence.[73] Therefore the $33 million AMP could not be described as out of proportion to the amount required to achieve regulatory purposes.[74]

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67 *Samji* PC, *supra* note 19 at para 17.

68 *John Howard Society of Saskatchewan v Saskatchewan (AG)*, 2025 SCC 6 at para 30 (this rule applies generally to all sanctions).

69 *Samji* CA, *supra* note 1 at para 62.

70 *Ibid* at para 75.

71 *Ibid* at para 77.

72 *Ibid*.

73 *Ibid*.

74 *Ibid*.

The BCCA also noted that although the Commission did not give reasons for the $33 million AMP, it seemed to have been derived from a mathematical formula by multiplying the "ill-gotten" gains by a factor of two or three.[75] This parallels a similar penalty at issue in *Martineau v MNR* which was also calculated using a mathematical formula, in which case, the AMP was ruled to be closer to being non-punitive.[76]

Samji made one final argument regarding the magnitude of her fines, arguing that because the combination of her disgorgement order ($11 million) and AMP ($33 million) exceeded her profit from the fraud by so much, the combination of the two went beyond mere deterrence and into the territory of being punitive.[77] The BCCA did not agree with the argument saying that the disgorgement order "is neither punitive nor compensatory; rather it is to compel a wrongdoer to give up any ill-gotten amounts."[78] The disgorgement order was ruled to be irrelevant in assessing whether the AMP under section 162 of the *Securities Act* was a true penal consequence.[79]

Regarding the second *Guindon* Factor, to whom the penalty is paid, Samji acknowledged that the earnings from the AMP would be used to educate securities market participants and the members of the public and not towards a consolidated revenue fund.[80] Therefore, the second *Guindon* Factor was in favour of the AMP not being a true penal consequence.

The BCCA also considered the third *Guindon* Factor, the sentencing principles utilized in coming to the $33 million AMP. In both criminal and regulatory sentencing principles, general deterrence[81] and proportionality[82] are key factors. The BCCA followed the trial judge's ruling and the sentencing principles relevant to determining the AMP were confirmed to be the following:

> a) the seriousness of respondent's conduct,
> b) the harm suffered by investors as a result of the respondent's conduct,

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75 *Ibid* at para 85.

76 *Martineau*, *supra* note 49 at para 62.

77 *Samji* CA, *supra* note 1 at para 87.

78 *Ibid*.

79 *Ibid*.

80 *Ibid* at para 89.

81 Deterrence is codified under the sentencing principles of the *Criminal Code* (see *Criminal Code*, RSC 1985, c C-46, s 718). See also *R v Wholesale Travel Group Inc*, 1991 CanLII 39 (SCC) ("regulatory measures are generally directed to the prevention of future harm" at 219).

82 *Criminal Code*, *supra* note 81, s 718; see e.g. *Securities Act*, *supra* note 12, s 162.02(1)(b).

> c) the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> d) the extent to which the respondent was enriched,
> e) factors that mitigate the respondent's conduct,
> f) the respondent's past conduct,
> g) the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
> h) the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
> i) the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
> j) the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
> k) orders made by the Commission in similar circumstances in the past.[83]

The BCCA found that the Commission focused on deterrence of similar conduct to Samji's fraud. The Commission, however, did not go to the point of denouncing her conduct and reflecting the extent of her moral blameworthiness.[84] The analysis of the third *Guindon* Factor leaned towards suggesting that the AMP was not a true penal consequence.

The fourth *Guindon* Factor, stigma of the penalty, was the last consideration by the BCCA in determining whether the AMP constituted a true penal consequence. The BCCA noted that "[t]here is no dispute that the appellant [Samji] has been stigmatized."[85] Samji being labeled as a fraudster "is a very serious allegation which carries a stigma."[86] However, the focus of the fourth *Guindon* Factor is the stigma stemming from the penalty. The stigma Samji suffered resulted from significant media attention that "one should expect would be given to those who commit securities fraud" rather than the AMP itself.[87]

The BCCA also focused on the effect of the AMP order, determining that the effect of the $33 million AMP was also not punitive.[88] The BCCA noted that Samji could not be imprisoned for the failure of paying an AMP,

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83 *Re Eron Mortgage Corporation* (18 February 2000), online: BCSECCOM <bcsc.bc.ca> [perma.cc/7ENL-UA8J]; see also *Samji* CA, *supra* note 1 at paras 92, 96–97.

84 *Samji* CA, *supra* note 1 at para 102.

85 *Ibid* at para 103.

86 *Anderson v British Columbia Securities Commission*, 2004 BCCA 7 at para 29; see also *Samji* CA, *supra* note 1 at para 103.

87 *Samji* CA, *supra* note 1 at para 103.

88 *Ibid* at para 104.

and the Commission was unlikely to take any enforcement action to collect the AMP.[89]

Since the BCCA ruled that the AMP was not a true penal consequence, they ended their analysis without considering the sufficient correspondence between the fraud offence under the *Criminal Code* and the *Securities Act* for the arguments relating to section 11(h) of the *Charter*. However, had the BCCA considered this question, it is likely Samji would have been successful. In the Securities Commission proceedings relating to the liability for the fraud under section 57(b) of the *Securities Act*, the Commission used the same elements from *R v Théroux* to attribute liability.[90] The *Securities Act* contraventions and the criminal charges also involved the same 14 victims.[91] Therefore, it is likely that if the BCCA did find the AMP to be a true penal consequence, a section 11(h) argument would have been successful as the two offences have sufficient correspondence.

Considering the nature of the Commission proceedings and the *Guindon* Factors, the BCCA concluded that the AMP could not be considered to be a true penal consequence and a section 11 *Charter* infringement could not be made out.

## III. Additional Arguments, Criticisms and Considerations

The BCCA's ruling on Samji's case provides a comprehensive analysis for determining whether an AMP can be a true penal consequence such that section 11 *Charter* rights arise. There are, however, a few areas which could have been expanded on, arguments that could have been made, and additional considerations that could have further explained when AMPs constitute a true penal consequence. Specifically, this section will address the binary nature of the second *Guindon* Factor, the difficulties posed by hypothetical penalty ranges, and the distinction between AMPs and criminal monetary penalties.

The SCC ruled that, in determining whether a fine is a true penal consequence, something to consider is how the body which collects the fine

89 *Ibid* at para 106.

90 *Samji* 2014, *supra* note 15 at para 17 (the only difference was that the Commission's standard of proof is proof on a balance of probabilities whereas fraud under the *Criminal Code* must be proven with proof beyond a reasonable doubt); see also *R v Théroux*, 1993 CanLII 134 (SCC) at 20.

91 *Samji* PC, *supra* note 19 at para 79.

disposes of the fines it collects.[92] In the case of *Wigglesworth*, the $300 fine collected was to be used for the benefit of the force rather than placed in the Consolidated Revenue Fund.[93] This is essentially a binary analysis where either the money goes into a consolidated revenue fund or it does not. When the money does go into a consolidated revenue fund, the finding is that an AMP is closer to a true penal consequence, and vice versa if not. Following an effects-based approach by examining how the proceeds of the fine are used would allow for greater flexibility than the current binary analysis.

There is also a shortcoming in the true penal consequence test when the penalty amount remains hypothetical. In *Wigglesworth*, the "major service offence" easily passed the test because of the possibility of imprisonment. However, in the context of AMP schemes, possible penalties can be guided by mathematical formulas which create large varying ranges. Claimants wishing to invoke section 11 rights will certainly want to argue on the basis that the largest theoretical fine will be imposed. Whether considering the largest theoretical fine as the starting point for determining a true penal consequence under the *Wigglesworth* test is the correct approach remains a contentious issue. While addressed by Justice Sharpe, speaking for the ONCA in *Rowan*, the approach still has its issues.[94]

One issue that also has not been considered is the nature of criminal monetary penalties compared to AMPs. Whether an AMP could be discharged in bankruptcy was a contentious issue until 2024. Perhaps an AMP should never be considered a true penal consequence as it lacks the qualities of a criminal monetary penalty.

## A. *Recipient of Penalty Payment Factor — An Effects-Based Approach*

In *Guindon*, the SCC ruled that if the recipient of a penalty is a consolidated revenue fund, then the penalty is closer to a true penal consequence.[95] The reasoning is that if the proceeds of a penalty do not go

92 *Wigglesworth*, *supra* note 29 at 561.

93 *Ibid.* The purpose of using "the Consolidated Revenue Fund" in this sentence is because the SCC is specifically referring to the Consolidated Revenue Fund safeguarded by the Receiver General for Canada. "A Consolidated Revenue Fund" is used later for general purposes which can refer to any Consolidated Revenue Fund across Canada.

94 *Rowan v Ontario Securities Commission*, 2012 ONCA 208 [*Rowan*].

95 *Guindon*, *supra* note 62 at para 88.

into a consolidated revenue fund, the fine is more likely to be an internal or private matter of discipline.[96]

An interesting argument which could have been brought up regarding the recipient of the AMP was the fact that even though the AMP was not going into a consolidated revenue fund, the money was to be used for a public purpose. Generally, a consolidated revenue fund is a public account which all public money goes towards, with a few exceptions.[97] The money from the account is then used for public expenses such as health, education, social services, protection of persons and property, and general government operations.[98]

The proceeds of the AMP imposed on Samji would have gone towards a fund for the purpose of "operational regulation of the markets, investor education and payments to individuals making successful claims."[99] Even though the AMP payments are collected internally, their use would be akin to how the funds of a consolidated revenue fund are used. Essentially, the final outcome or the effect of the collected AMP is the same as if it were directed into a consolidated revenue fund. While this argument was not made, it could have leaned the analysis of the AMP towards it being closer to a true penal consequence.

### B. *The Potential vs Actual Approach to the True Penal Consequence Test with Monetary Penalties*

One of the considerations of the true penal consequence test is that the analysis focuses on the possible application of a sanction. A key point the SCC made in *Wigglesworth* was that the true penal consequence test was passed notwithstanding Wigglesworth being penalized only $300 for the "major service offence."[100] The true penal consequence test cares about the possibility, not the actuality of a consequence.

Many statutes with AMP schemes across Canada set out either maximum penalties per contravention of the act or a mathematical formula for calculating penalties.[101] The true penal consequence test may not have

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[96] *Samji* PC, *supra* note 19 at para 17.

[97] *Financial Administration Act*, RSBC 1996, c 138, s 12.

[98] Ministry of Finance Office of the Comptroller General, *Public Accounts 2024/25* (Victoria: Minister of Finance, 2025) at 122, online: <gov.bc.ca> [perma.cc/E4EA-QKGR].

[99] *Samji* CA, *supra* note 1 at para 40.

[100] *Wigglesworth*, *supra* note 29 at 548.

[101] The British Columbia *Securities Act* sets out that the Commission can order a person to

an issue with statutes that explicitly set out maximum penalties, but there may be issues with determining whether an AMP is a true penal consequence when the act utilizes a mathematical formula.

In Samji's case, the $33 million figure was certain as it was ordered by the tribunal. This allowed for thorough analysis of her *Charter* challenges. However, what if the monetary penalty is not certain? In *Commissioner of Competition v Google Canada Corp*, Google Canada Corporation and Google LLC (together, "Google") sought relief from a potential AMP under section 79(3.1) of the *Competition Act*.[102] Google argued that they were "charged with an offence"[103] under section 11 of the *Charter* because the potential AMP was a true penal consequence.[104] This case shows the weakness of the true penal consequence test when the ranges of potential punishments are so vast.

The SCC in *Guindon* reemphasized that the true penal consequence test "focuses on its potential impact on the person subject to the proceeding,"[105] but rejected an approach requiring an arbitrary upper limit on AMPs.[106] Google's case was not relying on an arbitrary upper limit but rather was based on a provision creating a mathematical formula that can hypothetically produce results of extraordinary magnitudes.

Section 79(3.1)(b) of the *Competition Act* utilizes a mathematical formula which could possibly make an AMP be 3% of Google's worldwide gross revenues.[107] Google adduced evidence from experts finding that 3% of their annual gross worldwide revenue would amount to a figure exceeding $91 billion (US$66.9 billion).[108] This figure would be an unprecedented monetary penalty in Canadian history. The fine would be hundreds of times

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pay the Commission an AMP of not more than $1 million per contravention of the act (see *Securities Act*, *supra* note 12, s 162); see also *Competition Act*, RSC 1985, c C-34, s 79(3.1)(b).

102 2026 Comp Trib 10 at para 1 [*Google*].

103 *Ibid* at para 2.

104 Corporations and other organizations can claim some section 11 *Charter* rights (see e.g. *R v CIP Inc*, 1992 CanLII 95 (SCC) at 844).

105 *Guindon*, *supra* note 62 at para 50.

106 *Ibid* at para 79.

107 *Competition Act*, *supra* note 101 at s 79(3.1)(b) (the *Competition Act* sets out that when a person has engaged or is in engaging in anti-competitive acts, the Competition Tribunal can order the person to pay an AMP of an amount not exceeding the greater of "three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues").

108 *Google*, *supra* note 102 at paras 94, 150–51.

larger than the largest criminal fines ever imposed.[109] Google argued that section 11 *Charter* rights should apply based on the magnitude of the potential AMP alone.

Since no AMP had yet been imposed on Google, the Competition Tribunal dealt with the true penal consequence test by holding, through statutory interpretation, that the AMP scheme of the *Competition Act* was designed to make proportional penalties for anti-competitive practices.[110] Essentially, the Competition Tribunal is saying an AMP under section 79(3.1)(b) of the *Competition Act* cannot be a true penal consequence because the Competition Tribunal, if they decide to order an AMP, will follow the statutory guidelines (which are non-punitive) when administering an AMP. This reasoning is circular and avoids the real question of whether the potential $91 billion AMP is a true penal consequence such that section 11 *Charter* rights arise.

There is however a line of established authority, though not endorsed by the SCC, that, in the context of monetary penalties imposed by administrative tribunals, analysis of the *Wigglesworth* test should be "on the basis of the penalty imposed rather than on penalties that are theoretically possible."[111] Justice Sharpe speaking for the ONCA in *Rowan v Ontario Securities Commission* endorsed this *ex post* approach[112] through an interpretation of Justice Wilson's ruling in *Wigglesworth*.

> [T]he possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose.[113]

Rather than following the potential consequence analysis, Justice Sharpe interpreted the above quotation to indicate that, in the context of administrative bodies imposing potentially unlimited or extremely large fines, such as in Google's case,

> the appropriate remedy to protect the rights guaranteed by s. 11...is not to nullify the power altogether, but rather to limit the tribunal's discretion so that it may

109 *Ibid* at para 94.

110 *Ibid* at paras 237–38.

111 *Rowan*, *supra* note 94 at para 46.

112 An *ex post* approach means to analyze the actual imposed penalty rather than hypothetically possible penalties.

113 *Wigglesworth*, *supra* note 29 at 561 (quoted by Justice Sharpe in *Rowan*, *supra* note 94 at para 39).

> only impose penalties that are consistent with the purpose of maintaining discipline and order within a particular sphere of activity.[114]

Another reason that Justice Sharpe shifted away from the potential penalty approach is because *Wigglesworth* was an exceptional case where a domestic tribunal was given the power to imprison.[115] Justice Sharpe declined to "follow and to extend reasoning intended to meet the exceptional and rarely encountered power to imprison" to the circumstances of monetary penalties.[116] Following this line of reasoning, an *ex post* approach would follow the plain language of *Wigglesworth*[117] while also being consistent with the general principle that "legislation conferring an imprecise discretion does not confer the power to infringe the *Charter* unless that power is conferred expressly or by necessary implication"[118] and that "[l]egislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed."[119]

Until further guidance from the SCC, it is uncertain whether AMPs derived from schemes similar to the *Competition Act*, should be analyzed through the potential consequence or *ex post* approach. Nevertheless, following either approach brings issues. On one hand, some AMP schemes which are similar to the AMP scheme in the *Competition Act* make the potential-consequence approach unworkable. Under these circumstances, decision makers avoid the actual question of whether the "worst" potential consequence is a true penal consequence. On the other hand, the *ex post* approach may leave people without meaningful *Charter* protections until after a substantial penalty is imposed.

### C. *The Nature of AMPs through the Eyes of Bankruptcy Law — Unlike Criminal Monetary Penalties*

When comparing AMPs to other monetary penalties that are consequences of a finding of guilt[120] in criminal proceedings, such as restitution orders and criminal fines, there are significant differences in

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114 *Rowan*, *supra* note 94 at para 41.

115 *Ibid* at para 44.

116 *Ibid* at para 45.

117 *Ibid* at para 46.

118 *Slaight Communications Inc v Davidson*, 1989 CanLII 92 (SCC) at 1079 [*Slaight Communications*] (quoted in *Rowan, supra* note 94 at para 46).

119 *Ibid* at 1078 (quoted in *Rowan*, *supra* note 94 at para 46).

120 The term "finding of guilt" is used as some of the criminal monetary penalties available that a court can impose can be ordered from a conviction or a discharge.

nature through the eyes of bankruptcy law which may indicate that AMPs are not a true penal consequence.

In Canada, restitution orders may be imposed if an offender in a criminal proceeding is convicted or discharged of an offence.[121] The purpose of restitution orders is to rehabilitate the accused and make them responsible for a victim's loss.[122] For the purposes of section 11, there is no need to analyze whether they are a true penal consequence as a restitution order would be derived from a criminal charge that would fall under the by nature test. As an additional note, the Supreme Court of the United States has also ruled that under the USA's *Mandatory Victim Restitution Act* it is "abundantly clear that restitution is criminal punishment."[123]

Courts in criminal proceedings which convict a person, other than an organization, may also fine the offender under the terms set out in sections 734 and 734.1 of the *Criminal Code*.[124] These fines, since they are a consequence of a conviction of a criminal charge, would also fall under the by nature test.

The SCC explained in *Poonian* that the *Bankruptcy and Insolvency Act* (*BIA*) furthers "two important purposes: the equitable distribution of a bankrupt's assets among creditors and the bankrupt's financial rehabilitation. Financial rehabilitation means that a debtor will be afforded a 'fresh start' when appropriate."[125] However, the "fresh start principle yields to certain overriding policy objectives which demand that such a claim survive a discharge from bankruptcy."[126] Essentially, if an obligation survives a discharge in bankruptcy, the legislature has made clear that the obligation has other underlying purposes than equitably compensating creditors and financial rehabilitation. Whether AMPs were a type of penalty such that the fresh start principle should yield was a contentious issue until 2024.[127]

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121 *Criminal Code*, *supra* note 81, s 738(1).

122 *R v Fitzgibbon*, 1990 CanLII 102 (SCC) at 1012.

123 *Ellingburg v United States*, 607 US 163 at 167 (2026).

124 See *Criminal Code*, *supra* note 81, ss 734–734.1.

125 *Poonian v British Columbia (Securities Commission)*, 2024 SCC 28 at para 1 [*Poonian*].

126 *Ibid* at para 2.

127 The Poonians engaged in a market manipulation scheme. Ultimately, the BC Securities Commission ordered approximately a $5 million disgorgement order as well as $13.5 million in AMPs. The Poonians made assignments in bankruptcy and at the BCSC and BCCA, the two courts held that the debts relating to the AMPs would not be released under the exemptions set out in section 178 of the *Bankruptcy and Insolvency Act*. They then brought their case to the SCC (see *Poonian*, *supra* note 125).

When AMPs are compared to restitution orders and criminal fines under the *BIA*, their nature is completely different.[128] For example, the *BIA* plainly states that an order of discharge does not release the bankrupt from "any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail."[129]

The SCC states in *Poonian* that "administrative penalties imposed by [an administrative tribunal] do not fall within the exceptions set out in s. 178(1)(a) or (e) [of the *Bankruptcy and Insolvency* Act] and therefore do not survive a discharge from bankruptcy on those bases."[130] This would indicate that there are no public policy objectives which override the "fresh start" principle. Criminal monetary penalties such as restitution orders and fines, by contrast, would be captured under the plain language of section 178(1)(a).

Criminal monetary penalties remain with the individual even through a discharge in bankruptcy because of an overriding public policy to ensure that only honest but unfortunate debtors can obtain a discharge from debts.[131] AMPs on the other hand, are not specifically targeted by Parliament. This finding strengthens the argument that AMPs should not be a true penal consequence as they lack the "following" qualities that criminal monetary penalties possess.

## IV. SUGGESTIONS AND REFORM

This section of the article aims to give recommendations for reform that would clarify the law related to AMPs and section 11 of the *Charter*. The current framework anchored in the *Guindon* Factors offers a robust toolkit for examining whether an AMP is a true penal consequence. However, two areas, (1) the underexplored area of immunity provisions in AMP schemes, and (2) the risk of evading section 11 scrutiny by relying on general regulatory objectives, require further development in the law.

In general, AMP schemes across Canada seem to only have regulatory and non-punitive purposes. However, the availability of immunity provisions in AMP schemes across Canada may open a new area of argument. Some provinces have legislation such that if an AMP is imposed for a contravention of the act, a payment of the AMP would preclude that

128 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

129 *Ibid*, s 178(1)(a).

130 *Poonian, supra* note 125 at para 6.

131 *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 77.

person from being charged with an offence. In instances such as these, further protection should be given for the reasons discussed below.

Another prominent reform suggestion has been a bright-line limit, where if an AMP crosses a certain threshold, section 11 rights will be granted, and any failure of its protections would make out a *prima facie* breach. This approach is justified by Professor Steven Penney but could also be slightly modified to address foreseeable arguments in cases such as imposing AMPs just below the proposed bright-line limit.

## A. *Immunity Provisions — A Presumption of Section 11 or Perhaps a Factor in the Guindon Analysis*

Some AMP schemes across Canada have provisions which set out that when a person pays an AMP for a contravention of the specific act, that person is immune from being charged with an offence under the same act.[132] Those offences are clearly under the definition of section 11 of the *Charter*'s "charged with an offence." For example, section 237(3) of Alberta's *Environmental Protection and Enhancement Act* (*EPEA*) sets out that when an AMP is paid in respect of a contravention, a person "may not be charged under this Act with an offence in respect of that contravention."[133] Some of the offences available under the *EPEA* can result in imprisonment.[134]

For example, in an Alberta Environmental Appeals Board decision, 1144365 Alberta Ltd and Badger Daylighting Calgary Inc ("the appellants") were investigated,[135] and were found to have contravened section 61 of the *EPEA*.[136] As a consequence, under section 227 of the *EPEA*, since the appellants contravened section 61, they could possibly be found guilty of an offence.[137] It seems that rather than being charged with an offence under the *EPEA*, the contraventions of sections 61 and 227 led to the issuing of an AMP pursuant to section 237(2)(b) of the *EPEA*. Following section 237(3), the appellants, if they pay the administrative penalty, cannot be charged with an offence under the Act. Hypothetically, a similar situation could happen where a person contravenes one of the following sections: 60,

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132 See e.g. Environmental Protection and Enhancement Act, RSA 2000, c E-12, s 237(3) [*EPEA*].

133 *Ibid*.

134 *Ibid*, s 228(1)(a).

135 1144365 Alberta Ltd v Director, Environmental Investigations South, Regulatory Assurance Division, Alberta Environment and Protected Areas, 2025 AEAB 13 at paras 1–11.

136 *Ibid* at para 16.

137 EPEA, *supra* note 132, s 227(j).

87, 108(1), 109(1), 227(a), (d), (f) or (h). If this were to happen, under section 228(1), they could be liable "to imprisonment for a period of not more than 2 years or to both fine and imprisonment."[138] A payment of an AMP in this case would result in immunity from the possible imprisonment.[139]

In cases such as the above, where paying an AMP can result in immunity from being charged with an offence that could possibly result in imprisonment, the legislation implicitly suggests that both an AMP and imprisonment would address the contravention at a comparable level of seriousness. This would mean that an AMP is a sufficient alternative to imprisonment—which is always a true penal consequence.[140] Following this reasoning, an AMP which is connected to a provision granting immunity from imprisonment, may itself be a true penal consequence.

A counterargument to the above proposal would be that the legislation simply includes the immunity provision for pragmatic reasons such as administrative efficiency. This, however, would ignore the fact that the statute still connects an AMP to imprisonment. It seems unlikely that the legislature drew a direct line between an AMP and imprisonment for mere pragmatic reasons, especially when imprisonment is the most serious consequence that the state can impose.[141]

When a statute provides for immunity from imprisonment through the payment of an AMP, the traditional approach of the true penal consequence test and analysis of the AMP with the *Guindon* Factors would fail to account for the immunity provision. Therefore, there is a compelling argument that when such an immunity provision exists in the statute the AMP is derived from, an AMP would be a true penal consequence and section 11 of the *Charter*'s "charged with an offence" prerequisite should be satisfied. If claimants who have had an AMP imposed on them can point to an immunity provision which prevents them from receiving potential imprisonment, then section 11 *Charter* rights should be presumptively available. This presumption can be justified because it would follow the reasoning of *Wigglesworth*, where the claimant would be in jeopardy of an AMP which is equated to imprisonment.

However, if the consequences of the offences—which can be charged for the contravention to which the AMP is attached—do not place them in

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138 *Ibid*, s 228(1).

139 *Ibid*, s 237(3).

140 Imprisonment is always a true penal consequence (see *Wigglesworth*, *supra* note 29; *Guindon*, *supra* note 62 at para 76).

141 See Department of Justice Canada, "How sentences are imposed" (last modified 7 July 2021), online: <justice.gc.ca> [perma.cc/YUV3-ZER6].

jeopardy of imprisonment, then the usual analysis with the *Guindon* Factors should take place.

Another way to possibly address these immunity provisions is to make it a part of the *Guindon* Factor analysis. When an immunity provision is written in statute, it could possibly be a separate category of analysis where if a payment of an AMP precludes an individual from the possibility of imprisonment, then the AMP should lean closer to being a true penal consequence. If the immunity provision only provides for avoidance of other penalties with only regulatory purposes, then the AMP would lean away from being a true penal consequence. This approach would respect the current law and rather than creating more drastic measures such as presumptions, it would only be another factor to consider in the *Guindon* analysis.

With either the presumptive approach or as an additional factor in the *Guindon* analysis, the issue of when AMPs are implicitly equated to true penal consequences through immunity provisions would be adequately addressed.

### B. *A Bright Line Test for AMPs? — A Slight Modification*

Some academics have noted that there are some concerns with the current approach of the third *Guindon* Factor (sentencing principles) for AMPs and the true penal consequence test. One concern relates to the fact that "[i]n almost any realm of commercial or financial activity, large fines or monetary penalties will at least sometimes be necessary to deter infractions."[142] Section 11 of the *Charter* could simply be evaded by adverting to such (legitimate) objectives such as deterrence and, as a consequence, AMP schemes would never fall into the scope of section 11.[143]

From this reasoning, Professor Steven Penney has suggested that the best way to deal with an AMP scheme and section 11 is to have a bright-line limit on monetary penalties.[144] The bright-line limit can be structured as follows:

> The quantum could vary according to prescribed conditions, such as whether the penalty would be imposed on an individual or a corporation. In addition, it could be based on a relative value rather than absolute value, such as a fixed percentage of the maximum fine for any parallel penal offence. However the limit is

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142 Steven Penney, "'Chartering' in the Shadow of Lochner: Guindon, Goodwin and the Criminal-Administrative Distinction at the Supreme Court of Canada" (2016) 76 SCLR 307 at 325.

143 *Ibid*.

144 *Ibid*.

> calculated, if it were exceeded, section 11 would apply, and the failure to afford any of its protections would constitute a *prima facie* infringement.[145]

Having a bright-line test such as above would necessarily make many AMP schemes fall under the protection of section 11 of the *Charter*. The bright-line limit would transform section 11 to be closer to the *ex ante*[146] role of section 8 of the *Charter*. It is generally acknowledged that section 8 of the *Charter* has been interpreted to "prevent unjustified investigative intrusions into privacy."[147] This same *ex ante* reasoning can be used for section 11 in the administrative context. The *ex ante* transformation is justified by Professor Penney because when there are serious social and financial harms, there should be a presumptive constitutional entitlement to basic adjudicative fairness.[148] Moreover, there is little evidence that applying section 11 to these administrative processes would embolden wrongdoers, gut enforcement, or induce the collapse of regulatory regimes.[149]

There is, however, the concern, that if a bright-line limit for AMPs is a part of a section 11 *Charter* analysis, administrative bodies could simply order AMPs that are barely under the limit to avoid section 11 scrutiny. In these cases, a foreseeable argument would be that the AMP was imposed in such a way as to avoid crossing the bright-line limit. At the end of the day, an analysis will still have to be done with the *Guindon* Factors in order to determine whether the AMP is a true penal consequence.

Perhaps a better way to implement Professor Penney's bright-line proposal, is to make it a heavy factor to consider in the *Guindon* analysis, where rather than creating a firm presumptive line, it simply becomes another element which can heavily influence the analysis in favour or against a finding of an AMP to be a true penal consequence. For example, if the imposed AMP is close to the bright-line, the factor would still hold significant weight and bring the analysis of the AMP closer to it being a true penal consequence. This approach would prevent the foreseeable possibility of administrative tribunals imposing AMPs just below the proposed bright-line limit to avoid falling under section 11 scrutiny.

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145 *Ibid* [emphasis in original] [footnotes omitted].

146 *Ex Ante* in this context means an analysis before the impugned event.

147 Penney, *supra* note 142 at 326.

148 *Ibid* at 325.

149 *Ibid* at 326.

## V. CONCLUSION

This article aimed to give a comprehensive overview of the law between AMPs and accessing the protections guaranteed by section 11 of the *Charter*. *R v Wigglesworth* is the leading case giving rise to the true penal consequence test, and if satisfied, offers a gateway to section 11 protection. This framework was later supplemented by *Guindon* where four major factors can be considered in determining whether an AMP is a true penal consequence. The article also applied the law from *Wigglesworth* and *Guindon* to the facts of *R v Samji*, complemented with a specific focus on section 11(h) of the *Charter*.

Additional arguments, such as changing the current binary approach of the second *Guindon* Factor to a more effects-based approach, would offer greater flexibility and properly address the issue of when money is being taken privately but used for public purposes. The article also raised criticism of the current framework, especially surrounding the issue of following the potential consequence or the actual consequence approach with AMPs through Google's challenge of the constitutionality of section 79(3.1)(b) of the *Competition Act*. Lastly, comparing the nature of how AMPs are treated compared to criminal monetary penalties under the *Bankruptcy and Insolvency Act* suggests that AMPs may not be a true penal consequence.

This article concluded by addressing two potential areas for reformation regarding section 11 *Charter* rights. Specifically, the area of immunity provisions under some AMP schemes across Canada, and the area surrounding the concern that section 11 can be evaded by adverting to legitimate objectives such as deterrence.

In the introduction, the motivating question was whether Samji's AMP fell under section 11's wording of "charged with an offence." This article has answered the question in the negative. So will an AMP ever be a true penal consequence?

Claimants trying to argue that section 11 of the *Charter* applies because of an imposed or potential AMP being a true penal consequence have largely been unsuccessful. In Samji's case, Samji was ordered to pay a massive $33 million AMP; and in Google's case an unbelievable $91 billion potential AMP was the basis of their argument. In both cases, the AMPs were determined to be non-punitive and did not attract section 11 *Charter* protections.

In general, it appears that courts and tribunals are reluctant to ever consider an AMP to be a true penal consequence. In *R v Samji*, the BCCA even made clear that "an AMP imposed under s. 162 [of BC's *Securities Act*] by its very nature is limited to the objectives under the *Act*, and unless directly challenged on appeal, it is presumptively valid and not a true penal consequence."[150] It seems that for now, if an AMP ever reaches the true penal consequence threshold, the preferred remedy for guaranteeing rights under section 11 is to adjust the AMP such that it is not captured by the true penal consequence test.[151]

There is, however, hope for clarification in the future. The decision *Commissioner of Competition v Google Canada Corp* made by the Competition Tribunal is being challenged. Google recently filed a statutory appeal of the decision on March 13, 2026.[152] The appeal will be heard by the FCA and possibly, if appealed again, the SCC. There could be a clarification of how a section 11 analysis should proceed in the case of tremendous potential AMPs. Until that day arrives, an AMP will likely never be found to be a true penal consequence attracting section 11 protections.

150 *Samji* CA, *supra* note 1 at para 116.

151 This approach was first adopted by the ONCA (see *Rowan*, *supra* note 94). The BCCA has now seemed to agree with the ONCA through the decision of *R v Samji* (see *Samji* CA, *supra* note 1 at para 115).

152 *Google Canada Corporation v Commissioner of Competition* (13 March 2026), FCA A-106-26 (Statutory Appeal – Competition Tribunal).