

## Five Million Dollars Versus One Night in Jail

By: Drew Yewchuk

**Case Commented On:** *R v Peers*, [2015 ABQB 129 \(CanLII\)](#), *R v Peers*, [2015 ABCA 407 \(CanLII\)](#), leave to appeal [granted](#) May 26, 2016

On May 26, 2016 the Supreme Court of Canada (SCC) granted leave to appeal from the decision of the Alberta Court of Appeal in *Peers*. The three appellants are all charged with a variety of offences under [section 194 of the Securities Act, RSA 2000, c S-4](#), which provides for a maximum penalty of “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”. The basis of their appeal is that section 11(f) of the [Canadian Charter of Rights and Freedoms](#) — which guarantees “the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment” — entitles them to a jury trial, because a penalty of five years less a day of imprisonment and a \$5 000 000 fine is “a more severe punishment” than “imprisonment for five years”. This appeal raises a constitutional question left open 27 years ago in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [\[1989\] 1 SCR 927 \(CanLII\)](#) (*Irwin Toy*): can some personal economic rights be protected by the section 7 *Charter* guarantee of “life, liberty, and security of the person?”

### Background

The details of the offences under the *Securities Act* are not particularly interesting or relevant to the constitutional question. The appellants are seeking a stay of the charges, a *Charter* remedy all the Court of Appeal Justices dismissed as inappropriate, even if the appellants succeeded with their constitutional argument ([R v Peers 2015 ABCA 407 \(CanLII\)](#) at paras 17-23) (*Peers CA*). The scope of the *Charter* right to jury trials, important though it may be, is not even the most intriguing question that these cases have brought before the courts. The more general question is whether the legal rights in the *Charter* can protect economic interests.

For clarity, there have already been six decisions in this litigation at this point: The two Mr. Peers (Jeremy and Robert) succeeded in Provincial Court (unreported), had the decision reversed at Queen’s Bench ([R v Peers, 2015 ABQB 129 \(CanLII\)](#)) (*Peers QB*), and appealed to the Court of Appeal. Mr. Aitken was unsuccessful in Provincial Court ([R v Aitken, 2015 ABPC 21 \(CanLII\)](#)) (*Aitken PC*), unsuccessful on appeal to Queen’s Bench (unreported), and appealed to the Court of Appeal. The two appeals were heard together at the Court of Appeal (*Peers CA*), where a majority rejected their constitutional argument and dismissed the appeal. Justice O’Ferrall, concurring in the result, did not decide the constitutional question, but dismissed the appeal because the remedy sought was inappropriate. Finally, the Peers made an application for a stay order that was denied ([R v Peers, 2016 ABCA 22 \(CanLII\)](#)).

### The Argument For the Appellants

The appellants' argument is based on a plain, non-technical reading of section 11(f) of the *Charter*. Section 11(f) reads:

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;

The factum of the appellant Robert Peers at the Court of Appeal explained their argument thus: "...how much is a night in jail worth to a reasonable Canadian? If a night in jail is worth \$5 million or less then the appeal must succeed" (*Peers CA* at para 9). The argument has intuitive appeal. Alberta Provincial Court Judge Day accepted the argument in an unreported decision and transferred the proceedings to the Court of Queen's Bench, as provincial courts cannot hold jury trials. Justice Topolinski summarized Judge Day's decision as follows:

The determination of whether a penalty can be characterized as a more severe punishment must be reviewed on a case by case basis, taking into consideration the magnitude of the fine. Positing whether a punishment of 1,774 days imprisonment plus a five million dollar fine is a more severe punishment than 1,775 days in prison, the Judge's answer was "yes". (*Peers QB* at para 9)

Justice O'Ferrall of the Court of Appeal said that he was not satisfied this argument was "without merit" (*Peers CA*, at para 21).

### **The Argument Against the Appellants**

The result sought by the appellants was criticized as unworkable by other judges because it would create uncertainty about when a sentence was more severe than five years imprisonment:

...subjectivity would apply at both ends of the equation: a judge's view, would, of necessity be subjective; and each accused is different and accordingly his view of whatever punishment might be imposed on him, would be subjective. The infinite variables of length of imprisonment coupled with size of fine, and the application of any combination of the two, as applied to an individual accused, require little illustration. Suffice it to say that, for example, while a fine in the range of millions of dollars is completely beyond the ability of the average Canadian to pay, people do exist (especially perhaps in the investment industry) to whom a fine of several million dollars may mean comparatively little; while even a month in gaol with concomitant loss of reputation, prestige etc. would be catastrophic. (*Aitken PC* at para 40)

What would be the result, for example, if the maximum penalty were "four years imprisonment plus a \$5 million fine"? Is that a "more severe punishment" than five years imprisonment? The problem with the appellants' argument is that it is impossible to measure how much "a night in jail is worth" when compared in a qualitative sense to imprisonment. (*Peers CA* (majority decision, per Justices Berger and Slatter) at para 9)

The remaining arguments against the appellants are more complicated. I will quickly review the reasoning of the Court of Queen's Bench and the Court of Appeal.

The Court of Queen's Bench accepted an argument based on the Limiting Class Rule (*ejusdem generis*) of statutory interpretation. Justice Topolniski applied the rule contextually, noting that *Reference Re BC Motor Vehicle Act (British Columbia) s 94(2)*, [\[1985\] 2 SCR 486 \(CanLII\)](#) at paras 27-28 established a connection between section 7 and sections 8 to 14 of the *Charter*. The Court interpreted section 11(f) to only apply where the punishments interfere with the rights to life, liberty and security of the person (*Peers* QB, at paras 69-70). In determining if a punishment is more severe than 5 years' imprisonment, the court should only consider those aspects of the punishment that interfere with section 7 rights.

Justice Topolniski noted that section 7 does not include a right to property, "[e]xcepting a limited class of interests fundamental to human survival" (*Peers* QB at 80) and hence the rights that spring from it do not include economic interests. She concluded:

The interrelationship between *Charter* ss 7 and 11(f) precludes consideration of the fine available under *Securities Act* s 194 in assessing the meaning of the words or a more severe punishment in *Charter* s 11(f). I conclude that s 11(f) applies only where the rights to life, liberty and security of the person are affected. (at para 82)

The majority of the Court of Appeal appears to have disagreed at least slightly with the Court of Queen's Bench, writing that "s. 7 is neither a floor nor a ceiling on the s. 11 rights." (*Peers* CA at para 7) The Court reached a similar conclusion though, finding that "our system of criminal justice does not recognize an equivalency between imprisonment and money" (at para 13) and that "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" (at para 15). The purpose of section 11(f) is to distinguish the crimes that are serious enough to warrant a jury trial from those that are not. The majority concluded that fines do not increase the severity of a punishment for the purposes of section 11(f):

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. (at para 15)

### **What Issue(s) Might Interest the Supreme Court?**

This case gives the Supreme Court the opportunity to decide on a number of matters. The case deals with the constitutional interpretation of sections 7-14 of the *Charter*. The circumstances in which section 11(f) entitles a person to a jury trial is the immediate issue to be decided. But the decision of whether fines and economic penalties can be considered for the purposes of section 11(f) is given greater importance when considered in light of particular discussions in the lower court decisions. The Court of Queen's Bench determined that there is a body of law finding *Charter* relief inapplicable to economic rights (*Peers* QB at paras 4, 80, 81; also see *Aitkens* PC at para 62-64 for similar findings by Judge Camp). The Court of Queen's Bench cites (amongst other authorities) *Irwin Toy Ltd. v. Quebec (Attorney General)*, [\[1989\] 1 SCR 927 \(CanLII\)](#) (*Irwin Toy*) (at para 80). Consider a portion of *Irwin Toy* about economic rights made by the Supreme Court:

The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property -- contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights. (at 1003-1004)

The *Peers* case offers the Supreme Court a chance, 27 years after *Irwin Toy*, to pronounce upon whether there are situations where economic penalties do fall within the scope of sections 7-14. There are definitely issues of uncertainty that will be created if section 11(f) is determined to allow for considerations of fines and economic penalties. Exactly what constitutes a more severe penalty than five years imprisonment would doubtless be the subject of litigation. However, the decision illustrates how strange it is that sections 7-14 of the *Charter* are currently considered to be unresponsive to economic penalties and concerns. It is bizarre to think that a \$5 million fine will have no impact on the life, liberty, or security of the person of an individual, and yet that seems to be the state of the law. The majority in the Court of Appeal stated that "loss of liberty cannot be monetized" (*Peers* CA at para 10). If that is the case, then even a brief period of confinement is an interference with liberty that the *Charter* can address, but potentially being driven to bankruptcy or poverty is not.

If the Supreme Court prioritizes clarity and decides that section 11(f) includes no consideration of economic penalties, that decision comes at the price of stating that the legal rights in the *Charter* are unable to recognize the immense impact of economic penalties on life, liberty and security of the person. If they decide that *Charter* section 11(f) can address the impacts of economic penalties, they open up new and uncertain territory for *Charter* litigation relating to economic conditions. So the question that is going before the Court is effectively: can the *Charter* fathom why people would prefer one extra night in jail to a five million dollar fine?

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