FROM OTTAWA TO THE INTERNATIONAL ORDER: HOW THE STATE USES ADMINISTRATIVE ENFORCEMENT TO IMPOSE PENAL SANCTIONS WITHOUT TRIAL OR CONSTITUTIONAL PROTECTION

A Doctrinal Analysis of Forum Choice, Administrative Sanctioning, and Constitutional Rights Allocation

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ABSTRACT

This paper examines how Canadian administrative enforcement allows the state, in some contexts, to impose sanctions that function like punishment without triggering the constitutional safeguards ordinarily associated with criminal process. Under current doctrine, the availability of heightened protection depends not simply on the seriousness of the consequence, but on the legal characterization of the proceeding. Through *R v Wigglesworth*, *Martineau v Canada (Minister of National Revenue)*, and *Guindon v Canada*, this paper argues that substantial financial, reputational, and regulatory consequences may be imposed through formally administrative proceedings that fall outside the full scope of s.11 of the *Canadian Charter of Rights and Freedoms*. The result is that the state's choice to proceed administratively rather than criminally affects the procedural safeguards, evidentiary standards, and constitutional protections that apply from the outset.

The paper also argues that ordinary administrative law doctrines do not fully address this problem. Procedural fairness, justification, and judicial review may discipline administrative decision-making, but they operate only after the state has already chosen the institutional form of enforcement. They cannot recreate protections that never formally attached in the first place. The paper concludes by briefly considering international sanctions and blacklisting regimes, where similarly serious consequences may be imposed through structures that remain formally non-criminal. Its central claim is that public law should pay closer attention to the state's prior choice of enforcement design, because that choice helps determine when meaningful rights protection will, and will not, arise.

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~ PART I — INTRODUCTION ~

A. Title

FROM OTTAWA TO THE INTERNATIONAL ORDER: HOW THE STATE USES ADMINISTRATIVE ENFORCEMENT TO IMPOSE PENAL SANCTIONS WITHOUT TRIAL OR CONSTITUTIONAL PROTECTION

B. Context and Relevance

The modern administrative state no longer functions only as an instrument of implementation, supervision, and regulatory coordination. It increasingly operates as a site of coercive enforcement through which the state imposes serious financial, reputational, professional, and sometimes liberty-restricting consequences outside the ordinary criminal process. Across a wide range of statutory regimes, administrative bodies now exercise powers that, while formally regulatory, may in substance resemble punishment. Administrative monetary penalties, professional exclusion, securities sanctions, immigration restraints, and blacklisting measures show that coercive state action is no longer confined to the criminal courtroom.[1] [2] [3]

This development raises a foundational public law problem. In Canadian law, heightened constitutional safeguards do not attach simply because state action is severe. Instead, they are triggered through legal classification. Whether a person receives criminal or penal protections

[1] Denis J Galligan, *Due Process and Fair Procedures* (1996) at 1-3.

[2] *R v Wigglesworth*, [1987] 2 SCR 541 at 560-62; *Martineau v Canada (Minister of National Revenue)*, 2004 SCC 81 at paras 19-24; *Guindon v Canada,* 2015 SCC 41 at paras 41-47.

[3] *Guindon*; *Kadi*; *Nada v Switzerland*, [2012] ECHR 1691.

depends on whether the matter is characterized as a "true penal consequence" or as part of an administrative or regulatory process. This structure gives the state significant power to shape the constitutional intensity of proceedings through institutional design and forum selection. The decision to proceed administratively rather than criminally is therefore not merely procedural, but constitutional.[4] [5] [6] [7]

Considerable doctrinal and scholarly attention has been directed toward fairness within administrative proceedings, including procedural fairness, judicial review, and rights-balancing. Far less attention has been paid to the state's antecedent decision to route coercive enforcement through administrative institutions. Yet that decision may determine whether core safeguards, including the presumption of innocence, proof beyond a reasonable doubt, and fuller constitutional protection, are engaged at all.[8] [9]

The issue is not whether all administrative enforcement is illegitimate, nor whether every serious regulatory sanction should be treated as criminal punishment. The concern is structural. Where the state can impose sanctions that are punitive in substance while preserving their formal administrative classification, due process becomes conditional on legal form and institutional pathway rather than the gravity of coercive state action. This raises a destabilizing question for Canadian public law: if severe and stigmatizing sanctions may be imposed administratively under attenuated safeguards, what meaningfully distinguishes punishment from regulation beyond the label the state uses?[10]

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[4] *Canadian Charter of Rights and Freedoms ("Charter")*, s 11.

[5] *Wigglesworth*; *Martineau*; *Guindon*.

[6] *Martineau*; *Guindon.*

[7] *Wigglesworth*; *Martineau*; *Guindon.*

[8] *Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817*; *Vavilov*; *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395.

[9] *Charter*, s 11(d); *Wigglesworth*.

[10] *Wigglesworth*; *Martineau*; *Guindon.*

The problem extends beyond the domestic administrative state. Comparable governance logics appear in international sanctions, blacklisting, and transnational regulatory regimes, where coercive measures may be imposed without criminal trial or conviction and where legal protections often fail to attach because of institutional design and classification. For that reason, the Canadian problem examined here has broader significance. It reflects a deeper shift in contemporary governance: the movement of punitive power away from the criminal process and into administrative structures that impose serious consequences while avoiding the full constitutional burdens historically associated with punishment.[11] [12]

C. Research Questions

This paper is guided by five interrelated research questions.

1. First, does administrative enforcement operate in Canadian public law as a structural mechanism through which the state may impose punitive consequences without activating the constitutional safeguards traditionally associated with criminal punishment?
2. Second, to what extent does the distinction between regulatory sanctions and "true penal consequences" rest on a doctrinal framework that privileges legal classification over the substantive severity of state coercion?

[11] *Kadi*; *Nada*.

[12] Benedict Kingsbury et al, "Foreword: Global Governance as Administration — National and Transnational Approaches to Global Administrative Law" (2005) 68:3 *Law & Contemp Probs* 1.

3. Third, how does the state's choice to proceed through administrative rather than criminal pathways affect the procedural protections, evidentiary standards, and constitutional safeguards available to the affected person?[13]
4. Fourth, does judicial review adequately cure the structural consequences of forum choice, or does it merely supervise outcomes within a framework already shaped by attenuated constitutional activation?[14]
5. Fifth, to what extent does the same logic of classification, institutional design, and conditional due process appear in international sanctions and blacklisting regimes?[15]

D. Thesis Statement

This paper argues that administrative enforcement has evolved into a structural gatekeeping mechanism through which the state may impose sanctions that are punitive in substance without activating the constitutional safeguards traditionally associated with criminal punishment. In Canadian law, the applicability of heightened protections turns not on the severity of the sanction, but on its legal characterization. Because safeguards are triggered through classification, the state's choice between criminal prosecution and administrative enforcement functions as a mechanism of rights allocation.[16] [17]

This paper further argues that this doctrinal structure produces a serious public law instability. Where sanctions involving major financial penalties, reputational harm, professional exclusion, or other coercive consequences are treated as regulatory rather than

[13] *Charter*, 11(d); *Martineau*.
[14] *Vavilov*; *Doré*.
[15] *Kadi*; *Nada*.
[16] *Charter*, s11; *Wigglesworth*.
[17] *Martineau*; *Guindon.*

penal, the distinction between punishment and administration becomes difficult to justify in substantive terms. Although administrative law offers important procedural protections and judicial supervision, these mechanisms do not resolve the deeper problem: they operate only after the state has selected the forum and shaped the constitutional intensity of the proceeding. Judicial review may scrutinize legality, justification, and fairness, but it does not recreate safeguards that never attached.[18] [19]

Accordingly, this paper contends that the central issue is not whether administrative proceedings are fair on their own terms, but whether public law has inadequately scrutinized the state's power to determine the terms governing coercive enforcement. By shifting attention from decision-making within institutions to the design of enforcement architecture, this paper shows that due process has become conditional rather than universal—dependent less on the substance of state coercion than on the legal pathway the state uses.

E. Methodology and Sources

This paper adopts a primarily doctrinal and theoretical methodology grounded in Canadian public law. Its central analysis examines the Supreme Court of Canada's jurisprudence on the distinction between regulatory sanctions and true penal consequences, with particular focus on the constitutional significance of legal classification under section 11 of the Canadian Charter of Rights and Freedoms. The paper therefore proceeds first through close reading of the leading authorities that define the doctrinal boundary between penal and administrative

[18] *Guindon*; *Wigglesworth*.

[19] *Baker*; *Vavilov*; *Doré*.

proceedings, especially *R v Wigglesworth*, *Martineau v Canada (Minister of National Revenue)*, and *Guindon v Canada*.[20] [21]

The paper also draws on core administrative law authorities addressing procedural fairness, justification, and judicial supervision, including *Baker v Canada (Minister of Citizenship and Immigration)*, *Doré v Barreau du Québec*, and *Canada (Minister of Citizenship and Immigration) v Vavilov*. These cases are not treated as answers to the penal classification problem. Rather, they are used to assess the extent to which administrative law's safeguards can respond to a structural problem created at an earlier stage: the state's decision to route coercive enforcement through administrative rather than criminal channels.[22] [23]

The paper also examines selected statutory enforcement regimes in which serious sanctions are imposed administratively, including the *Income Tax Act* framework discussed in *Guindon*. These regimes illustrate how significant financial and reputational consequences may arise without the full procedural protections associated with criminal prosecution, and how burdens of proof, procedural design, and institutional form shape the legal status of coercive state action.[24]

Finally, the paper includes a limited comparative extension to international sanctions and blacklisting regimes. This serves to demonstrate that the same structural logic visible in Canadian administrative law—the allocation of legal protection through classification and institutional design—also appears in contemporary international legal ordering. The core

[20] *Charter*, s11.

[21] *Wigglesworth*; *Martineau*; *Guindon.*

[22] *Baker*; *Doré*; *Vavilov*.

[23] *Martineau*; *Guindon*; *Vavilov*.

[24] *Income Tax Act ("ITA")*, RSC 1985, c 1 (5th Supp), s 163.2.

argument remains rooted in Canadian public law doctrine, but the international materials show that the broader problem is not uniquely domestic.[25]

F. Structure of the Thesis

This paper proceeds in seven parts. Following this Introduction, Part II develops the theoretical framework by examining the rule of law, democratic accountability, and the relationship between legal classification, institutional design, and constitutional rights allocation. Part III sets out the Canadian doctrinal framework governing the distinction between regulatory sanctions and true penal consequences, focusing on section 11 of the *Canadian Charter of Rights and Freedoms* and leading Supreme Court authorities.[26] [27]

Part IV argues that forum choice functions as a mechanism of rights allocation by examining how the state may proceed through administrative rather than criminal pathways. Part V analyzes the procedural attenuation characteristic of administrative enforcement, including lower standards of proof, flexible evidentiary rules, and reduced adversarial safeguards, and explains why these features become constitutionally significant where sanctions are punitive in substance.[28] [29]

Part VI argues that judicial review does not fully cure the structural problem created by forum selection. Part VII extends the analysis to international sanctions and blacklisting regimes to show that the same governance logic operates beyond the domestic administrative

[25] *Kadi*; *Nada*; Kingsbury et al.

[26] *Roncarelli v Duplessis*, [1959] SCR 121; *Reference re Secession of Quebec*, [1998] 2 SCR 217; *Vavilov*.

[27] Charter*, s11*; *Wigglesworth*; *Martineau*; *Guindon*.

[28] *Martineau*; *Guindon*; *ITA*.

[29] *Baker*; *Guindon*.

state. The paper concludes that administrative enforcement functions as a constitutional site in which the state determines when robust procedural protection will apply.[30]

[30] *Wigglesworth*; *Guindon*.

~ PART II — THEORETICAL FRAMEWORK: PUBLIC LAW, RULE OF LAW, AND RIGHTS ALLOCATION ~

G. Rule of Law and Coercive State Power

The rule of law provides the first theoretical foundation for this paper because it addresses the conditions under which coercive public power may be exercised legitimately. In Canadian constitutional law, the rule of law is not exhausted by the existence of statutory authority. It reflects a commitment to legal constraint, the rejection of arbitrary power, and the maintenance of a normative framework within which individuals can know the basis on which the state may act. In that sense, legality is not simply acting through law, but ensuring that law disciplines the exercise of coercive authority.[31] [32] [33]

This concern becomes acute where the state imposes sanctions that are severe in substance but avoids the constitutional and procedural burdens associated with penal enforcement. If coercive consequences are imposed through administrative pathways that remain formally regulatory yet functionally punitive, the rule-of-law problem does not arise only once the proceeding is underway. It arises earlier, when the state characterizes the matter in a way that determines whether heightened safeguards attach. The central question is therefore not whether administrative actors remain within jurisdiction, but whether the legal architecture of

[31] *Secession Reference*.

[32] *Roncarelli*; *Vavilov*.

[33] David Dyzenhaus, "The Legitimacy of the Rule of Law" in David Dyzenhaus, ed, *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999) 129.

enforcement allows the state to shape the degree of protection available through classification and forum design.[34]

Canadian public law has long associated the rule of law with the rejection of arbitrary discretion. That principle is strained where serious sanctions attract different levels of constitutional protection depending less on their practical effect than on the route through which the state proceeds. A system in which punishment-like consequences are imposed without the evidentiary, procedural, and constitutional discipline attached to punishment risks preserving legality in form while weakening it in substance. Theoretical scholarship reinforces this point by treating legality as a safeguard against arbitrary public power, not merely as a requirement that public action be traceable to an enactment.[35] [36]

The institutional dimension of this problem is equally important. Contemporary accountability literature emphasizes that public power must remain answerable through structures capable of independence and restraint. Recent Canadian oversight materials likewise show that administrative legitimacy is closely connected to the adequacy, fairness, and responsiveness of adjudicative structures, rather than to delegated authority alone. For present purposes, the rule of law is not a decorative constitutional value, but a critical lens through which to assess whether administrative enforcement has become a mechanism for

[34] *Wigglesworth*; *Martineau*; *Guindon*.

[35] *Roncarelli*; *Secession Reference*.

[36] TRS Allan, "First Principles: the Rule of Law and Separation of Powers" in *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001) 31.

imposing serious coercive consequences while avoiding the fuller legal accountability associated with criminal process.[37] [38] [39]

If so, the issue is not one of administrative efficiency or doctrinal categorization, but a deeper public law problem: whether the state may punish, constrain, or stigmatize individuals through forms of administrative action that remain lawful in appearance while withholding the safeguards that legitimate coercive authority.[40]

H. Democratic Accountability and Administrative Power

Administrative legitimacy is often defended by reference to delegation, expertise, and statutory mandate. Yet those justifications weaken when administrative bodies are used not simply to regulate, but to impose sanctions that are punitive in substance and severe in effect. The democratic concern is not that administrative actors are unelected, but that legislatures may design enforcement schemes that shift serious coercive power into institutional forms less constrained by the procedural and constitutional disciplines associated with criminal adjudication.[41] [42]

This makes enforcement architecture democratically significant. When the state proceeds administratively rather than criminally, it does more than allocate jurisdiction: it also shapes the level of procedural protection, evidentiary rigor, and constitutional scrutiny the affected

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[37] Public Policy Forum, *Independent and Accountable: Modernizing the Role of Agents of Parliament and Legislatures* (Ottawa: Public Policy Forum, 2018).

[38] Ontario Ombudsman, *Administrative Justice Delayed, Fairness Denied: Investigation into whether the Ministry of the Attorney General, Tribunals Ontario and the Landlord and Tenant Board are taking adequate steps to address delays and case backlogs at the Landlord and Tenant Board* (Toronto: Ombudsman Ontario, 2023).

[39] *Secession Reference*; Dyzenhaus.

[40] *Wigglesworth*; *Guindon*; Allan.

[41] *Vavilov*; Paul Craig, "Constitutional and Non-Constitutional Review" (2001) 54 *Current Legal Problems* 147.

[42] *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at paras 20–24; *Vavilov*.

person will receive. Expertise may justify a distinct institutional role, but it does not answer the legitimacy problem that arises when administrative mechanisms produce punishment-like outcomes. At that point, the question is not whether administrative bodies are well placed to decide specialized matters, but whether the state has designed a system in which serious coercive consequences may be imposed without the level of accountability expected of punitive power.[43] [44] [45]

Accordingly, democratic accountability in this paper refers not simply to formal delegation, but to the broader requirement that coercive public authority remain answerable to law, institutional justification, and those whose rights and interests are affected. Where administrative enforcement becomes a vehicle for punishment-like consequences under attenuated safeguards, the accountability deficit is not cured because the body acts within statutory jurisdiction.[46] [47]

I. Classification, Forum Choice, and Constitutional Activation

Classification is central to this paper because constitutional protection in Canadian public law does not attach solely by reference to the severity of state action. Instead, the level of protection depends on how the law characterizes the proceeding in which coercion is imposed. In the section 11 context, the key question is whether the matter is criminal in nature or gives rise to a true penal consequence. Classification therefore operates as a threshold mechanism of constitutional activation, determining whether the state's coercive act engages the

[43] *Martineau*; *Guindon*.
[44] Dyzenhaus; Allan.
[45] Craig; *Guindon*.
[46] *Secession Reference*; *Vavilov*.
[47] *Ocean Port*.

safeguards associated with punishment or remains within a regulatory framework subject to more limited protection.

This makes forum choice a public-law issue in its own right. When the state proceeds administratively rather than criminally, it does more than select an institutional venue: it also shapes the evidentiary standards, procedural safeguards, and constitutional guarantees governing the matter. If severe and stigmatizing sanctions can be imposed through formally regulatory proceedings, rights protection becomes dependent on legal form rather than substantive effect. Scholarship on true penal consequences and regulatory sanctioning reinforces this concern by showing that administrative penalties often sit uneasily between compliance-oriented regulation and punishment-like coercion.[48] [49]

The theoretical lens advanced here is straightforward: the state's institutional design choices affect when rights activate. Forum choice is not merely procedural. It is a prior act of legal ordering through which the state allocates the terms on which coercive power may be exercised. For that reason, classification must be understood not only as a doctrinal question, but as a structural question of public law.[50] [51]

[48] *Guindon*; *Martineau*.

[49] Department of Justice Canada, "Section 11 – General: legal rights apply to those 'charged with an offence'" in *Guide to the Charter* (14 July 2025), online: Government of Canada https://www.justice.gc.ca; Chris Rolfe, *Administrative Monetary Penalties: A Tool for Ensuring Compliance* (Victoria: West Coast Environmental Law, 1997) at 1–3.

[50] Craig; Dyzenhaus.

[51] *Wigglesworth*; *Martineau*; *Guindon*.

~ PART III — CANADIAN DOCTRINAL FRAMEWORK: PENAL CONSEQUENCES AND CONSTITUTIONAL CLASSIFICATION ~

J. Charter Section 11 and the Penal/Regulatory Distinction

Section 11 of the *Charter* is the doctrinal starting point because it confines its protections to persons "charged with an offence." Canadian law therefore does not ask only whether a sanction is serious, but whether the proceeding is criminal in nature or may result in a true penal consequence. That distinction is the hinge on which the penal/regulatory divide turns. *Wigglesworth* supplies the governing framework. It holds that section 11 is engaged where the proceeding is criminal in nature or exposes the person to a true penal consequence. *Martineau* and *Guindon* reaffirm that serious financial or regulatory sanctions do not become penal merely because they are burdensome; the inquiry remains tied to purpose, structure, and statutory context. The result is a doctrine in which classification performs the threshold constitutional work.[52]

That threshold matters because it determines whether core criminal-process protections attach at all. The jurisprudence therefore treats the penal/regulatory distinction not as a minor taxonomy, but as the mechanism through which section 11's reach is limited. Scholarship on true penal consequences and regulatory sanctioning criticizes this structure for allowing significant coercive consequences to remain outside the full scope of criminal constitutionalism, especially where administrative penalties are framed as compliance-

[52] *Martineau*; *Guindon*.

oriented rather than punitive. This paper builds on that concern: the doctrinal distinction is real, but it also makes the state's classificatory and institutional choices central to rights activation.[53] [54] [55] [56]

K. *R v Wigglesworth*, [1987] 2 SCR 541

Wigglesworth is the foundational authority because it establishes the threshold test for when section 11 applies. Justice Wilson held that section 11 is engaged where a matter is criminal in nature or where the sanction exposes the person to a true penal consequence. That formulation remains the doctrinal entry point for distinguishing penal from regulatory proceedings.

The case is important not only for its test, but for its method. *Wigglesworth* makes clear that section 11 does not turn on the seriousness of the proceeding in an everyday sense. The inquiry is legal and structural: courts must ask what kind of proceeding the state has created, what purpose it serves, and what consequences it authorizes. In that way, *Wigglesworth* frames constitutional protection as dependent on classification.

This is the central significance of the case for this paper. Once section 11 depends on whether the matter is criminal in nature or carries a true penal consequence, the state's institutional design choices become constitutionally decisive. A sanction may be severe, stigmatizing, and coercive, but if it remains classified as regulatory, the stronger protections tied to penal proceedings may never arise. Scholarship on true penal consequences treats *Wigglesworth* as both foundational and limiting because it created the governing test and

[53] *Charter*, s11; Department of Justice.
[54] *Wigglesworth*; *R v Shubley*, [1990] 1 SCR 3 at 18-19.
[55] Department of Justice Canada; Rolfe.
[56] *Wigglesworth*; *Martineau*; *Guindon*.

limiting because it allows substantial coercive consequences to remain outside full criminal constitutional protection.

For present purposes, *Wigglesworth* is the starting point of the paper's doctrinal argument. It shows that the penal/regulatory distinction is not merely descriptive, but the mechanism through which constitutional rights are activated or withheld.[57]

L. *Martineau v Canada (Minister of National Revenue)*, 2004 SCC 81

Martineau v Canada (Minister of National Revenue) is the key bridge between *Wigglesworth* and later administrative penalty cases because it clarifies that section 11 is not triggered simply because a consequence is serious or financially severe. The Court held that customs forfeiture proceedings remained administrative rather than penal, emphasizing that the scheme's purpose was regulatory and that section 11 applies only where the matter is criminal in nature or gives rise to a true penal consequence. In doing so, *Martineau* confirms that constitutional classification turns on the legal character of the proceeding, not on the weight of its practical impact.

This makes *Martineau* crucial to the doctrinal structure of this paper. It shows that substantial coercive consequences may fall outside section 11 where they are embedded in a regulatory scheme aimed at compliance, customs control, or administrative enforcement rather than punishment. Scholarship on administrative penalties and regulatory sanctioning reinforces this point by showing that modern regulatory systems often rely on sanctions that are severe in effect yet formally justified as non-penal instruments of compliance. *Martineau* therefore sharpens the public law concern identified in this paper: the state's choice of forum

[57] *Wigglesworth*; *Martineau*; *Guindon*.

and statutory design directly affects whether heightened constitutional safeguards activate.[58] [59]

M. *Guindon v Canada*, 2015 SCC 41

Guindon v Canada is the leading modern authority because it reaffirms *Wigglesworth* while applying it to an administrative monetary penalty regime. The Court held that section 11 was not engaged by the penalty under s 163.2 of the *Income Tax Act*, emphasizing that the provision formed part of a regulatory tax scheme and did not impose a true penal consequence. In doing so, *Guindon* confirms that the two *Wigglesworth* branches remain distinct: the "criminal in nature" test focuses on the process, while the "true penal consequences" test focuses on the proceeding's impact on the person subject to it.[60]

The importance of *Guindon* lies in its treatment of severity. The Court accepted that a substantial financial sanction may remain administrative where its purpose is compliance and enforcement within a regulatory framework rather than punishment for a public wrong. That conclusion is central to this paper because it shows how significant coercive consequences may fall outside section 11 through statutory design and legal classification. Scholarship on regulatory sanctioning and administrative penalties highlights the same tension: modern administrative regimes increasingly rely on sanctions that are functionally harsh yet formally non-penal.[61]

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[58] Rolfe.

[59] *Martineau*; Department of Justice Canada.

[60] *Guindon*; *ITA*.

[61] Rolfe.

For present purposes, *Guindon* is the clearest illustration of the paper's core concern. It shows that the doctrinal framework does not merely classify proceedings after the fact but gives decisive weight to the structure and purpose of the enforcement regime the state has chosen to create. The case therefore confirms that forum choice and institutional design are central to when constitutional safeguards activate.[62]

N. Doctrinal Instability of the Penal/Regulatory Distinction

The instability of the penal/regulatory distinction lies not in the absence of a test, but in the fact that the test permits significant coercive consequences to remain outside section 11 where they are embedded in a regulatory scheme. *Wigglesworth*, *Martineau*, and *Guindon* together establish that the decisive questions are whether the matter is criminal in nature and whether it gives rise to a true penal consequence. Yet those same cases also show that serious financial and regulatory sanctions may still be treated as administrative if the scheme is framed as compliance-oriented rather than punitive.

This is the core doctrinal instability. The distinction appears settled at the level of formal test, but unstable in application because severity alone is insufficient to trigger penal classification. Commentary on administrative monetary penalties and punitive administrative sanctions emphasizes this tension, noting that modern enforcement regimes increasingly rely on sanctions that are functionally harsh while remaining formally regulatory. Scholarship on the limits of the true penal consequences test similarly suggests that the doctrine may under-protect against sanctions that resemble punishment in effect but not in legal characterization.

[62] *Martineau*; *Guindon*.

For this paper, that instability is the basis of critique. The Canadian framework does more than classify proceedings: it determines when constitutional safeguards activate. The penal/regulatory divide is therefore unstable not only because its boundaries are contestable, but because those boundaries govern the distribution of procedural and constitutional protection.

~ PART IV — FORUM CHOICE AS A STRUCTURAL MECHANISM OF RIGHTS ALLOCATION ~

O. The State's Choice Between Criminal and Administrative Pathways

The state's choice between criminal and administrative pathways is central to this paper because it determines more than forum. It also shapes the procedural protections, evidentiary standards, and constitutional guarantees governing the proceeding from the outset. Under the Canadian framework, that choice matters because section 11 activates only where the matter is criminal in nature or gives rise to a true penal consequence. The result is that institutional design affects rights activation.[63] [64]

This is not merely a matter of efficiency or specialization. Administrative enforcement regimes are often justified as more flexible, expertise-driven, and compliance-oriented than criminal prosecution. Yet scholarship on administrative monetary penalties and regulatory enforcement shows that these regimes frequently perform quasi-punitive functions while remaining formally non-criminal. The state's pathway choice therefore becomes a structural public-law decision: it determines whether coercive consequences will be imposed under the discipline of criminal process or under a more attenuated administrative framework.[65] [66] [67]

This point is reinforced by contemporary Canadian legislation. A wide range of federal statutes authorize administrative monetary penalties as alternatives to prosecution, reflecting

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[63] *Charter, s11*; *Wigglesworth*.

[64] Craig; Dyzenhaus.

[65] *Vavilov*.

[66] Rolfe; Robert Baldwin, Martin Cave & Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice*, 2nd ed (Oxford: Oxford University Press, 2012) at 268–70.

[67] *Guindon*; *Martineau*.

a legislative preference for administrative enforcement in many contexts. This paper's claim is not that such schemes are inherently illegitimate. It is that the choice to proceed administratively has constitutional significance because it helps allocate when, and on what terms, legal rights will attach.[68] [69]

P. Administrative Monetary Penalties Under the Income Tax Act

The *Income Tax Act* illustrates how Parliament can channel serious enforcement through an administrative rather than criminal pathway. Section 163.2 authorizes substantial penalties against third parties who participate in false statements used for tax purposes, while the Act separately preserves criminal offences under s 239. The coexistence of these provisions is significant: it shows that the statute structures a choice between administrative monetary penalties and prosecution.[70]

Guindon confirms the constitutional importance of that design. The Court held that the s 163.2 penalty was administrative because it operated within a regulatory tax scheme and was directed to compliance and the integrity of the self-reporting system rather than punishment for a public wrong. Yet the sanction was still severe. The regime therefore demonstrates the paper's central point: substantial coercive consequences may be imposed through an administrative framework that does not trigger section 11. Commentary on administrative monetary penalties notes that such schemes are attractive to legislators because they are flexible, efficient, and easier to deploy than prosecution. But that efficiency has constitutional implications. Where Parliament chooses an AMP rather than an offence-based pathway, it

[68] *Office of the Superintendent of Financial Institutions Act*, ss 24-33; Proceeds of Crime (Money Laundering) and Terrorist Financing Act, ss 39.01–39.39; *Administrative Monetary Penalties (OSFI) Regulations*.

[69] *Wigglesworth*; *Martineau*; *Guindon*.

[70] *ITA*.

shapes the procedural protections and constitutional guarantees available to the person targeted. The *Income Tax Act* regime is therefore not merely an example of tax enforcement, but a concrete illustration of forum choice as a mechanism of rights allocation.[71] [72] [73]

Q. Securities Enforcement and Administrative Sanctioning

Ontario securities law provides a clear example of administrative sanctioning as an alternative to criminal enforcement. The *Securities Act* empowers the Capital Markets Tribunal to make protective orders in the public interest and impose administrative penalties, while also preserving offence-based enforcement through prosecution. Securities regulation therefore does more than regulate markets; it institutionalizes a choice between administrative and penal pathways.[74]

That structure matters because securities sanctions can be severe. Administrative penalties may reach millions of dollars and often operate alongside market-access bans, director and officer prohibitions, and disgorgement orders. The Supreme Court has nonetheless treated these sanctions as part of a public-interest enforcement framework rather than as criminal punishment. Securities law thus reinforces the paper's central claim: substantial coercive consequences may be imposed through administrative mechanisms that remain formally regulatory.[75] [76] [77]

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[71] Rolfe.

[72] *Martineau*; *Guindon*.

[73] *ITA*; *Guindon*.

[74] *Securities Act*; Ontario Securities Commission ("OSC"), *Guide to OSC Tribunal Proceedings* (2021) at 3–4.

[75] OSC, "Sanctions" (2026); *Securities Act*.

[76] Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission), 2001 SCC 37, [2001] 2 SCR 132 at paras 41–45; *Cartaway*.

[77] *Asbestos*; OSC, "Sanctions" (2026).

The point is not that securities enforcement is illegitimate, but that the regime illustrates how the state can pursue punishment-like consequences through an administrative structure justified by expertise, investor protection, and market integrity. In that sense, securities enforcement shows that forum choice is not incidental, but a mechanism through which the law allocates when stronger constitutional protections will attach.[78] [79]

R. Federal Administrative Penalties Under the *Financial Consumer Agency of Canada Act*

The federal AMP model provides a strong third regime because it makes the logic of administrative sanctioning explicit. Under the *Financial Consumer Agency of Canada Act*, designated breaches are treated as "violations," and the statute authorizes substantial monetary penalties against individuals and financial institutions. Crucially, the Act states that the purpose of the penalty is to promote compliance, not to punish.[80]

That design closely tracks the doctrinal concerns raised in *Martineau* and *Guindon*. A sanction may be severe, but the statutory scheme frames it as administrative and compliance-oriented rather than penal. The regime therefore shows how Parliament can impose significant financial consequences while structuring them to remain outside the ordinary language of punishment.[81]

For this paper, the value of this regime is conceptual as much as practical. It demonstrates that rights allocation can occur through legislative drafting: by classifying misconduct as a "violation," assigning enforcement to an administrative process, and declaring the penalty non-punitive, Parliament shapes the likelihood that stronger constitutional safeguards will

[78] OSC, "Investor protection" (2026).

[79] *Securities Act*; *Cartaway.*

[80] Financial Consumer Agency of Canada Act ("FCA"), ss 19–20.1.

[81] FCA, s 20(2).

attach. This makes the state's pathway choice a structural public law issue rather than a technical one.

S. The Structural Consequence of Forum Selection

The structural consequence of forum selection is that it changes not only venue, but the legal conditions under which state coercion is exercised. As the *Income Tax Act*, Ontario securities legislation, and the *Financial Consumer Agency of Canada Act* show, legislatures can authorize serious monetary and reputational consequences through administrative regimes operating alongside, or instead of, offence-based enforcement. In each setting, the choice of pathway affects burden, procedure, exposure, and constitutional posture from the outset.[82] [83]

This consequence is doctrinally significant because *Wigglesworth*, *Martineau*, and *Guindon* make rights activation depend on classification rather than severity alone. If the matter remains regulatory, section 11 may not attach even where the sanction is substantial. Securities enforcement illustrates the point: public-interest orders, administrative penalties, and market bans can be severe, yet remain rooted in an administrative framework justified by investor protection and market integrity rather than criminal punishment. The same logic appears in federal AMP regimes, where Parliament may define penalties as compliance-oriented and non-punitive while still authorizing significant financial consequences.[84] [85]

Scholarship on administrative penalties and coercive governance explains why this matters. Administrative design is not neutral. It determines how coercive authority is

[82] *Wigglesworth*; *Martineau*; *Guindon*.
[83] FCA; *Securities Act*; *Guindon*.
[84] *Asbestos*; *Cartaway*.
[85] *FCA*.

structured, how much process is available, and whether stronger constitutional safeguards arise. Forum choice is therefore not an abstract question, but the mechanism through which the state allocates rights by selecting the legal form of enforcement.[86] [87] [88]

T. Why the State Chooses Administrative Enforcement

Administrative enforcement is institutionally attractive to the state for both practical and constitutional reasons. At a practical level, administrative pathways are typically faster, less resource-intensive, and more scalable than criminal prosecution. They allow legislatures and regulators to address large volumes of non-compliance through specialized bodies, lower procedural burdens, and sanctions calibrated to deterrence and compliance rather than the full machinery of penal adjudication. In complex regulatory fields such as taxation, securities, and financial supervision, these features make administrative enforcement an efficient governance tool.[89] [90]

But the attraction of administrative enforcement is not exhausted by efficiency. It is also linked to institutional design. By proceeding administratively, the state may secure serious coercive effects—financial penalties, reputational injury, professional restriction, market exclusion, or similar consequences—without necessarily triggering the heightened safeguards associated with criminal prosecution. This does not imply bad faith. Rather, the administrative pathway offers structural advantages: it permits enforcement through a framework that is

[86] Rolfe; Baldwin.
[87] Craig; Dyzenhaus.
[88] *Martineau*; *Guindon*; Craig.
[89] *Guindon*; Rolfe.
[90] *ITA*; *Securities Act*; *FCA*.

cheaper, procedurally lighter, and constitutionally less demanding than the criminal process.[91] [92] [93]

This helps explain why forum choice matters in public law. Where the state has access to both criminal and administrative pathways, the decision to proceed administratively may be attractive because it preserves coercive capacity while reducing the evidentiary, procedural, and constitutional burdens associated with prosecution. Regulatory scholarship emphasizes that modern enforcement systems rely on a range of escalating tools, with prosecution often reserved as a later or exceptional step. Preventive justice scholarship similarly shows that contemporary governance increasingly manages risk through measures operating outside the core criminal law, even where their effects are serious.[94] [95] [96]

For this paper, the key point is not that every administrative sanction reflects a deliberate attempt to evade rights. It is that the state has strong institutional incentives to prefer administrative enforcement, and those incentives have constitutional consequences. Administrative pathways may be justified by expertise, efficiency, and regulatory responsiveness, but they also facilitate a form of coercive governance in which the degree of legal protection available depends heavily on classificatory and institutional choice.[97] [98] [99]

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[91] Andrew Ashworth & Lucia Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014), ch 3.

[92] *Vavilov*.

[93] Craig; Baldwin, Cave & Lodge.

[94] *Wigglesworth*; *Guindon*.

[95] Cave & Lodge; P Kellett, "Securing High Levels of Business Compliance with Environmental Laws: What Works and What Has Failed and Why?" (2020) 32:1 *Journal of Environmental Law* 57.

[96] Ashworth.

[97] *Vavilov*.

[98] *Martineau*; *Guindon*; Baldwin, Cave & Lodge.

[99] Dyzenhaus; Craig.

~ PART V — PROCEDURAL ATTENUATION IN ADMINISTRATIVE ENFORCEMENT ~

U. Lower Standard of Proof

A central feature of administrative enforcement is the use of the civil standard of proof rather than the criminal standard of proof beyond a reasonable doubt. This distinction matters because many administrative regimes authorize serious financial, professional, and reputational consequences while proceeding on a balance of probabilities. The attenuation is therefore not merely technical: it changes the level of certainty the state must meet before imposing coercive consequences.[100] [101] [102]

Canadian law confirms this structure. Administrative proceedings generally apply the civil standard unless legislation provides otherwise, even where the allegations are serious. This is visible across the regimes discussed in this paper: tax penalties under the *Income Tax Act*, administrative proceedings under Ontario securities law, and federal AMP schemes all operate within processes that do not require proof beyond a reasonable doubt.[103] [104]

For this paper, the significance of the lower standard is both constitutional and procedural. Where the state chooses an administrative pathway, it does not simply avoid criminal court; it also gains access to a lower burden of persuasion while pursuing sanctions that may be

[100] *F H v McDougall*, 2008 SCC 53, [2008] 3 SCR 41 at paras 40–46.
[101] *Guindon*; *Securities Act*; FCA.
[102] *McDougall*.
[103] *Law Society of Upper Canada v Neinstein*, 2010 ONCA 193, 99 OR (3d) 1 at para 98.
[104] *ITA*; *Securities Act*; *FCA*.

severe in effect. Forum choice therefore changes not only where the matter is heard, but the degree of epistemic protection afforded to the person subject to enforcement.[105] [106]

V. Relaxed Evidentiary and Procedural Rules

Administrative enforcement also differs from criminal process through more flexible evidentiary and procedural rules. Tribunal statutes and procedural regimes commonly permit broader admissibility, written processes, and streamlined hearings directed toward efficiency and expertise rather than the stricter adversarial form associated with criminal adjudication. These features are often justified as necessary to effective regulation, but they also reduce the procedural intensity governing serious enforcement action.[107] [108]

This flexibility is visible across the regimes discussed in this paper. Ontario securities proceedings are governed by tribunal rules designed for public-interest adjudication rather than criminal trial, while federal AMP schemes employ administrative notice-and-response procedures rather than full criminal process. Administrative law does impose fairness constraints, but those constraints are variable and context-dependent rather than fixed at the level associated with penal prosecution.[109]

For this paper, the significance of relaxed procedure is cumulative. When combined with administrative classification and a lower standard of proof, procedural flexibility reinforces the extent to which forum choice alters the legal conditions of coercion. The issue is therefore

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[105] *Martineau*; *Guindon*.

[106] *McDougall*; Craig.

[107] Statutory Powers Procedure Act ("SPPA"), ss 15, 15.1.; Capital Markets Tribunal, *Rules of Procedure and Forms* (1 April 2024), rr 21–23.

[108] *Baker*; *Ocean Port*.

[109] Capital Markets Tribunal; FCA.

not merely that administrative regimes differ from criminal courts, but that they permit serious sanctions to be imposed under a thinner procedural framework.[110]

W. The Problem of Punitive Consequences Under Attenuated Procedure

The core difficulty is not simply that administrative procedure differs from criminal process. It is that significant punitive consequences may be imposed under attenuated procedural conditions. *Martineau* and *Guindon* confirm that substantial financial sanctions can remain administrative where the scheme is characterized as regulatory and compliance-oriented rather than penal. Yet once such sanctions are imposed through lower burdens of proof, flexible evidentiary rules, and context-dependent fairness standards, the gap between formal classification and substantive effect becomes difficult to justify.[111] [112]

This is the constitutional pressure point of the paper. Administrative law accepts variable procedure, but that variability becomes more troubling where the state pursues sanctions that are coercive, stigmatizing, and severe in practice. Scholarship on fair procedures and quasi-penal administration emphasizes that procedural legitimacy cannot be assessed in the abstract; it must be measured against the gravity of the interests at stake and the nature of the sanction imposed. Commentary on AMPs and punitive administrative sanctions makes the same point: regulatory design may preserve formal non-penality while still exposing individuals to punishment-like consequences.[113] [114] [115]

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[110] *Guindon*; Craig.

[111] *Martineau*; *Guindon*.

[112] *McDougall*; *Baker*; *Guindon*.

[113] *Baker*; *Asbestos*.

[114] Galligan.

[115] Rolfe; Paul Daly, "Administrative Penalties" in *A Culture of Justification: Vavilov and the Future of Administrative Law* (Vancouver: UBC Press, 2023) 201.

The problem, then, is cumulative. When severe sanctions are combined with civil burdens, streamlined procedure, and flexible evidentiary rules, the administrative pathway can produce outcomes that are punitive in substance while remaining insulated from safeguards that would normally accompany punishment. That is why forum choice matters: it affects not only jurisdiction, but the procedural thickness of coercive state action.[116] [117]

X. Procedural Fairness and Its Limits

Procedural fairness doctrine does not eliminate the paper's central concern. *Baker* confirms that administrative decision-making is subject to fairness obligations, but also that the content of fairness is variable, context-specific, and shaped by the nature of the decision, the statutory scheme, and the interests at stake. *Knight* similarly affirms that fairness is required where public decisions affect rights, privileges, or interests, but does not equate administrative fairness with the fixed protections of criminal process.[118] [119]

This distinction is crucial. A fair administrative process may remain structurally thinner than criminal adjudication. It may operate with a civil burden of proof, relaxed evidentiary rules, written rather than oral process, and fewer entrenched adversarial safeguards, while still satisfying administrative law standards. The problem identified in this paper therefore lies deeper than ordinary fairness review: even a procedurally fair administrative regime may function as an attenuated substitute for criminal process where the state imposes severe, punishment-like consequences.[120] [121]

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[116] *Martineau*; *Guindon*; *McDougall*.

[117] Craig; Galligan.

[118] *Baker*.

[119] *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 682-83.

[120] *McDougall*; *SPPA*; Capital Markets Tribunal.

[121] *Martineau*; *Guindon*; Galligan.

This section therefore marks an important limit in the argument. The claim is not that administrative regimes are unlawful whenever they provide less procedure than criminal courts. It is that procedural fairness doctrine, standing alone, does not answer the constitutional concern raised when forum choice permits serious coercive consequences to be imposed under a framework that remains formally fair yet structurally less protective than penal adjudication.[122]

[122] Craig; *Baker*; *Knight*.

~ PART VI — JUDICIAL REVIEW DOES NOT CURE THE STRUCTURAL PROBLEM ~

Y. Review After the Fact

Judicial review does not cure the structural problem because it operates only after the state has selected the administrative pathway. By that stage, the matter has already been shaped by a lower standard of proof, more flexible procedural rules, and a narrower constitutional posture. Review may correct legal error or procedural unfairness, but it does not undo the prior institutional decision that determined the framework within which coercive power was exercised.[123] [124] [125]

This is the limit of after-the-fact control. *Vavilov* strengthens judicial review by insisting on legality, justification, and reasoned decision-making. But even robust review remains retrospective: it assesses the lawfulness of decisions within the chosen regime; it does not reopen whether the state's initial choice of administrative rather than criminal process produced a structurally attenuated substitute for penal adjudication.[126] [127]

For this paper, that point is decisive. If the central problem lies in forum choice as a mechanism of rights allocation, review cannot be a complete answer because it arrives after the allocation has occurred. Judicial review remains important, but it supervises administrative

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[123] *Vavilov*.

[124] *McDougall*; *Baker*; *Martineau*.

[125] *Vavilov*; Knight.

[126] Paul Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (Vancouver: UBC Press, 2023) at 1–4.

[127] *Martineau*; *Guindon*.

power within the regime. It does not remedy the constitutional significance of placing serious coercive consequences in that regime to begin with.[128] [129]

Z. *Vavilov* and the Supervisory Role of Courts

Vavilov reasserts the supervisory role of courts by grounding judicial review in legality, reasonableness, and justification. The Court made clear that administrative decision-makers must provide reasons that are internally coherent and justified in light of the legal and factual constraints bearing on the decision. In that sense, *Vavilov* strengthens judicial oversight of administrative power.

But that supervisory role remains limited in the way that matters for this paper. *Vavilov* disciplines the exercise of authority within an administrative regime; it does not question the prior legislative and institutional choice to place serious coercive consequences in that regime rather than in criminal process. Courts review the legality and reasonableness of decisions, not the structural fact that rights activation may already have been narrowed by forum selection.

Vavilov therefore supports, but does not resolve, the paper's central argument. It confirms that administrative power must be justified but also illustrates the limits of after-the-fact supervision: judicial review can improve legality within the chosen framework without curing the structural consequences of that choice.[130] [131]

[128] Craig; *Vavilov*.
[129] *Vavilov*; *Martineau*; *Guindon*.
[130] Daly.
[131] *Vavilov*; Craig.

AA. Doré and Rights Reasoning Within Administrative Law

Doré confirms that rights reasoning can occur within administrative law itself. Where an administrative decision engages Charter values, the decision-maker must proportionately balance the relevant statutory objectives with the affected Charter protection, and courts review that balance through an administrative law framework rather than importing the full structure of constitutional adjudication. In that sense, *Doré* integrates rights reasoning into ordinary administrative decision-making.

That integration, however, does not resolve the structural concern advanced in this paper. *Doré* addresses how rights are considered within an administrative regime once that regime has already been chosen. It does not question the prior legislative and institutional choice to channel serious coercive consequences through administrative rather than criminal process.[132] Rights may therefore be weighed inside the administrative framework while the framework itself remains structurally thinner than penal adjudication.[133]

For present purposes, *Doré* illustrates both the sophistication and the limit of contemporary administrative law. It shows that rights are not absent from administrative decision-making, but it also shows that rights reasoning within administration is not the same as the activation of the stronger safeguards that attach when the law treats the matter as penal.[134]

BB. Why Review Cannot Eliminate the Consequences of Forum Choice

Judicial review is not a full answer because it operates within, rather than before, the consequences of forum choice. *Vavilov* strengthens supervision by requiring legality,

[132] *Martineau*; *Guindon*.
[133] *Doré*; *Baker*.
[134] *Doré*; *Wigglesworth*.

justification, and coherent reasoning, while *Doré* shows that rights reasoning can occur inside administrative law itself. But both frameworks engage only after the state has already chosen the administrative pathway.[135]

That timing matters. Once the matter is placed in an administrative regime, the applicable burden of proof, procedural intensity, evidentiary flexibility, and constitutional posture are already shaped by that choice.[136] Review may correct unfairness, legal error, or unreasonable reasoning, but it does not reverse the fact that the individual was exposed to a structurally thinner substitute for criminal process in the first place.[137] Scholarship on deference and constitutionalism in the administrative state makes the same point: judicial supervision may discipline administrative legality without eliminating the prior institutional allocation of rights and risks.[138]

For this paper, the implication is straightforward. Judicial review remains important, but it cannot fully cure the problem of constitutional under-activation because it arrives after the decisive act of forum selection has already occurred. The structural issue is anterior to review itself.

[135] *Vavilov*; *Doré*.
[136] *McDougall*; *Baker*; *Martineau*.
[137] *Vavilov*; *Guindon*.
[138] Dyzenhaus; Daly.

~ PART VII — FROM OTTAWA TO THE INTERNATIONAL ORDER: A LIMITED COMPARATIVE EXTENSION ~

CC. Why the Domestic Logic Travels

The domestic logic developed in this paper travels because the underlying issue is institutional rather than uniquely Canadian.[139] The core problem is not tied to any single statute or tribunal. It is that the state can structure coercive action through legal forms that remain formally administrative or regulatory while producing consequences that are severe in effect.[140] Once rights activation depends on classification and forum, the same structural concern can arise wherever public power is organized through parallel pathways of enforcement.[141]

This limited comparative extension does not claim that foreign or international regimes replicate Canadian constitutional doctrine. The point is narrower. Domestic public law shows how institutional design can allocate procedure, burden, exposure, and constitutional posture before any review occurs.[142] That insight can travel to other legal settings in which blacklisting, sanctions, or regulatory restrictions are imposed through administrative mechanisms rather than criminal trial.[143]

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[139] *Wigglesworth*; *Martineau*; *Guindon*.

[140] *Guindon*; FCA.

[141] Craig; Dyzenhaus.

[142] *McDougall*; *Baker*; *Vavilov*.

[143] Special Economic Measures Act ("SEMA"), ss 4–4.1; United Nations Act, s 2.; United Nations Security Council, *The Consolidated United Nations Security Council Sanctions List* (2026), online: https://www.un.org.

The value of the comparison is therefore analytical, not formal.[144] It suggests that the Canadian experience is part of a broader pattern in contemporary governance: coercive consequences are increasingly administered through regimes justified by expertise, security, compliance, or regulatory necessity, even where the practical effects resemble punishment.[145] In that sense, the domestic framework developed from *Wigglesworth* to *Vavilov* provides a useful lens for understanding how modern governance can under-activate rights through institutional design.[146]

DD. UN Sanctions and Blacklisting Regimes

UN sanctions and blacklisting regimes provide a useful comparative extension because they show the same structural pattern in a different legal setting.[147] Under the 1267 regime, individuals and entities may be listed through a Security Council sanctions framework that triggers targeted measures including asset freezes, travel bans, and arms embargoes.[148] These are not criminal convictions, but they can produce severe practical consequences.

The significance for this paper lies in form. The 1267 regime operates through listing, designation, review, and delisting mechanisms rather than through criminal trial.[149] The UN has introduced procedural safeguards, most notably the Office of the Ombudsperson, to

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[144] Daly.

[145] SEMA; *Asbestos*.

[146] *Wigglesworth*; *Vavilov*.

[147] United Nations Security Council ("UNSC), "Sanctions" (2026), online: United Nations https://main.un.org/securitycouncil/en/sanctions/information.

[148] UNSC, *ISIL (Da'esh) & Al-Qaida Sanctions List Materials* (2026), online: United Nations https://main.un.org/securitycouncil/en/sanctions/1267/aq_sanctions_list; United Nations Security Council, *Security Council Committee pursuant to resolutions 1267, 1989 and 2253 concerning ISIL (Da'esh), Al-Qaida and associated individuals and entities* (2026), online: United Nations https://main.un.org/securitycouncil/en/sanctions/1267.

[149]United Nations Security Council, "Procedures for Delisting" (2026), online: United Nations https://main.un.org/securitycouncil/en/sanctions/1267/aq_sanctions_list/procedures-for-delisting; United Nations Security Council, "Resolutions" (2026), online: United Nations https://main.un.org/securitycouncil/en/sanctions/1267/resolutions.

review delisting requests and improve fairness within the regime.[150] But those safeguards do not transform the system into criminal adjudication.[151] The regime remains one in which serious coercive consequences are imposed through an administrative-style structure justified by security governance rather than penal process.

This makes the comparison analytically useful. The claim is not that UN sanctions are constitutionally identical to Canadian administrative enforcement. It is that the domestic logic travels: when coercive consequences are structured through listing and regulatory form, procedure and review may exist, yet the stronger safeguards associated with criminal process may never activate. Blacklisting therefore reinforces the paper's broader point that institutional design can under-activate protection while still presenting itself as lawful governance.

EE. *Kadi and Al Barakaat International Foundation v Council and Commission* **and** *Nada*

Kadi and *Nada* show that blacklisting regimes can generate serious coercive consequences without taking the form of criminal adjudication.[152] In *Kadi*, the Court of Justice of the European Union held that EU measures implementing UN terrorist listing obligations remained subject to review for compliance with fundamental rights within the EU legal order. In *Nada*, the European Court of Human Rights held that Switzerland's implementation of UN sanctions engaged Convention rights and required a proportionate approach to the restrictions imposed.

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[150]United Nations Security Council, "Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee" (2026), online: United Nations https://main.un.org/securitycouncil/en/ombudsperson; Office of the Ombudsperson to the Security Council ISIL (Da'esh) and Al-Qaida Sanctions Committee, *Booklet* (July 2024) at 2–4, online: United Nations https://main.un.org/securitycouncil/sites/default/files/2024/booklet_web_July%202024_0.pdf.

[151]Office of the Ombudsperson to the Security Council ISIL (Da'esh) and Al-Qaida Sanctions Committee, *Booklet* (July 2024) at 2–4.

[152] *Kadi*; *Nada*.

Together, the cases are significant not because they convert sanctions into criminal law, but because they expose the same structural tension identified in the domestic part of this paper. Listing regimes may impose severe practical burdens—mobility restrictions, asset freezes, stigma, and exclusion—through administrative or executive mechanisms rather than criminal trial. Both courts responded by insisting on review and rights sensitivity within the regime, but neither case displaced the basic fact that the consequences were imposed through a framework structurally different from penal adjudication.[153]

Kadi and Nada matter here for a narrower reason. They show that even where review mechanisms improve, blacklisting regimes still operate through a structure far removed from criminal adjudication. Even where review and rights reasoning are strengthened, the underlying problem of forum and form remains serious coercive consequences may still be administered through blacklisting structures that do not activate the full safeguards associated with criminal process.

FF. Comparative Insight

The comparative value of the international materials is limited but important. They show that the same basic logic identified in the domestic part of this paper—classification, institutional design, and weakened safeguards—also appears beyond the Canadian state. Global administrative law scholarship has long argued that contemporary governance increasingly operates through regulatory, listing, and supervisory mechanisms that exercise

[153] *Kadi*; *Nada*.

public power without fitting traditional models of legislation, adjudication, or criminal punishment.[154]

Sanctions and blacklisting scholarship makes the same point in a more concrete register.[155] Targeted sanctions regimes are typically justified as preventive, security-oriented, and administrative rather than penal, yet they may impose severe practical consequences through listing structures that remain procedurally thinner than criminal adjudication. Preventive justice and blacklisting scholarship therefore helps explain why *Kadi* and *Nada* matter here: they expose a broader pattern in which legal form and institutional design shape the level of protection available to those subject to coercive measures.[156]

This comparative section does not propose a full theory of international sanctions law. Its more modest point is that the domestic Canadian logic travels. In both settings, classification and forum design help determine whether strong safeguards will attach, or whether serious coercive consequences will instead be administered through formally non-penal structures.[157]

[154] Kingsbury et al.

[155] Fassbender; Thomas J Biersteker, Sue E Eckert & Marcos Tourinho, eds, *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action* (Cambridge: Cambridge University Press, 2016) at 190–219.

[156] *Kadi*; *Nada*; Kingsbury.

[157] Fassbender; *Kadi*; *Nada*.

~ PART VIII — CONCLUSION ~

GG. Restating the Core Claim

This paper has argued that the modern administrative state can impose sanctions that are punitive in substance while avoiding the procedural and constitutional safeguards historically associated with criminal process.[158] Canadian doctrine does not deny this possibility; rather, it permits it through the penal/regulatory distinction and through the classificatory logic that governs when section 11 is activated.[159] The result is that rights protection depends not only on the severity of state coercion, but on the legal form and institutional pathway through which that coercion is organized.[160]

HH. Public Law Significance

The public law significance of this argument is structural.[161] Forum choice is not merely administrative housekeeping. It affects burden, procedure, evidentiary rigor, review posture, and the extent to which constitutional safeguards will attach at all.[162] Once that is recognized, the selection of an administrative pathway must be understood as part of the allocation of rights within the legal order, not simply as a neutral choice of venue.[163]

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[158] *Wigglesworth*; *Martineau*; *Guindon*.
[159] *Charter, s11*; *Wigglesworth*.
[160] *Martineau*; *Guindon*; Craig.
[161] Dyzenhaus.
[162] *McDougall*; *Baker*; *Vavilov*.
[163] *Vavilov*; Craig.

II. Normative Implication

The normative implication is not that all administrative sanctioning is illegitimate or that all severe penalties must be constitutionalized as criminal law. It is that public law should attend more directly to the constitutional significance of classification, statutory design, and institutional form where the state imposes serious coercive consequences.[164] The deeper concern is not only unfair administration, but lawful under-protection through design.[165]

JJ. Final Reflection

From domestic administrative penalties to international blacklisting, the same basic lesson emerges: classification matters because it structures the conditions under which coercive power is exercised.[166] If modern governance increasingly relies on formally non-penal mechanisms to achieve punishment-like effects, then the central challenge for public law is not only to supervise decisions after the fact, but to confront the rights consequences of the institutional forms through which those decisions are made.[167]

[164] Galligan; Dyzenhaus.
[165] *Vavilov*; *Doré*.
[166] *Kadi*; *Nada*.
[167] Kingsbury et al.

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