

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130612

Docket: A-459-12

Citation: 2013 FCA 153

**CORAM: NOËL J.A.
GAUTHIER J.A.
STRATAS J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

JULIE GUINDON

Respondent

Heard at Ottawa, Ontario, on June 5, 2013.

Judgment delivered at Ottawa, Ontario, on June 12, 2013.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

**NOËL J.A.
GAUTHIER J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130612

Docket: A-459-12

Citation: 2013 FCA 153

**CORAM: NOËL J.A.
GAUTHIER J.A.
STRATAS J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

JULIE GUINDON

Respondent

REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] The Crown appeals from the judgment dated October 2, 2012 of the Tax Court of Canada (*per* Justice Bédard): 2012 TCC 287.

[2] The Tax Court set aside a penalty assessed against the respondent, Ms. Guindon, under section 163.2 of the *Income Tax Act*, R.S.C. 1985 c. 1 (5th Supp.). The Tax Court found that section 163.2 of the Act creates an “offence” within the meaning of section 11 of the Charter. Therefore, in the section 163.2 proceedings against Ms. Guindon, she was entitled to the rights guaranteed by section 11. In this case, Ms. Guindon was not given these rights. Therefore, the Tax Court set aside the assessment.

[3] For the reasons set out below, the Tax Court did not have the jurisdiction to find that section 163.2 of the *Income Tax Act* creates an offence, triggering the rights under section 11 of the Charter. That finding would require a ruling that, as a constitutional matter, some or all of section 163.2 was invalid, inoperable or inapplicable. The jurisdiction to make that ruling is present only when a notice of constitutional question has been served. None was served.

[4] In this Court, as an alternative submission, Ms. Guindon pointed to some of the section 11 rights, such as the requirement that liability be demonstrated only upon proof beyond a reasonable doubt. In her view, despite the failure to serve a notice of constitutional question, she could assert some of them because they supplemented section 163.2 and did not conflict with its wording.

[5] For the reasons set out below, Ms. Guindon could not assert only some of the section 11 rights – either all of the section 11 rights apply, or none of them. But even if she could assert only some of them, the *Wigglesworth/Martineau* test for criminality has not been met – proceedings under section 163.2 are not criminal by their nature, nor do they impose true penal consequences.

[6] Notwithstanding its finding that the assessment against Ms. Guindon should be set aside because of non-compliance with section 11 of the Charter, the Tax Court went on to consider the correctness of the assessment. It interpreted section 163.2 in a manner favourable to Ms. Guindon. However, on the facts, even on that favourable interpretation of section 163.2, the Tax Court confirmed the correctness of the assessment. Put another way, the Tax Court would have upheld the penalty against Ms. Guindon had it not found that proceedings under section 163.2 attract the protection of section 11 of the Charter.

[7] In this Court, the Crown submits that the Tax Court's interpretation of section 163.2 was incorrect. In the circumstances, we need not determine this issue: even under the interpretation of section 163.2 most favourable to Ms. Guindon, the Tax Court upheld the assessment.

[8] Therefore, I would allow the appeal, set aside the judgment of the Tax Court and restore the assessment against Ms. Guindon, with costs here and below.

B. The basic facts

[9] Ms. Guindon is a lawyer, practising mainly in the area of family law and wills and estates. She became involved in a charitable donation scheme called "The Global Trust Charitable Donation Program."

[10] Ms. Guindon provided a legal opinion vouching for the scheme. She signed tax receipts on behalf of the charity. In her legal opinion, she represented that she had reviewed certain

documentation. She had not. The scheme was a sham. A full account of the facts appears in the reasons of the Tax Court.

[11] The Minister assessed a penalty against Ms. Guindon under section 163.2 of the Act for 134 tax receipts issued to participants in the charitable donation scheme. For these receipts, she received penalties ranging from \$1,000 to \$25,114, on the basis that she knew, or would have known but for wilful disregard of the *Income Tax Act*, that the tax receipts issued and signed by her constituted false statements. These penalties totalled \$564,747.

[12] Subsection 163.2(4) is the key provision:

(4) Every person who makes or furnishes, participates in the making of or causes another person to make or furnish a statement that the person knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is a false statement that could be used by another person (in subsections (6) and (15) referred to as the “other person”) for a purpose of this Act is liable to a penalty in respect of the false statement.

(4) La personne qui fait un énoncé à une autre personne ou qui participe, consent ou acquiesce à un énoncé fait par une autre personne, ou pour son compte, (ces autres personnes étant appelées « autre personne » au présent paragraphe, aux paragraphes (5) et (6), à l’alinéa (12)c) et au paragraphe (15)) dont elle sait ou aurait vraisemblablement su, n’eût été de circonstances équivalant à une conduite coupable, qu’il constitue un faux énoncé qui pourrait être utilisé par l’autre personne, ou pour son compte, à une fin quelconque de la présente loi est passible d’une pénalité relativement au faux énoncé.

[13] Subsection 163.2(5) quantifies the penalty under subsection 163.2(4) as the lesser of (a) \$100,000 plus the person’s gross compensation in relation to the statement, and (b) the penalty hypothetically payable by the taxpayer to which the statement relates, usually 50% of the amount of

tax sought to be avoided. Ms. Guindon's fine was based on the latter calculation, done separately for each of the 134 tax receipts.

[14] This penalty provision was introduced in the 1999 Federal Budget. Ever since its enactment, the Canada Revenue Agency has viewed it as imposing a civil penalty: Canada Revenue Agency, Information Circular IC 01-1, "Third-Party Civil Penalties" (September 18, 2001). However, noting the penalty's potential scope, many outside of the Canada Revenue Agency have maintained that the penalty, in substance, is a criminal penalty as opposed to a civil penalty.

[15] In the Tax Court and in this Court, Ms. Guindon so maintains. She submits that if it imposes a criminal penalty, she is entitled to the rights under section 11 of the Charter. Section 11, and the rights it guarantees, are as follows:

11. Any person charged with an offence has the right

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

(b) to be tried within a reasonable time;

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

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

11. Tout inculpé a le droit :

a) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche;

b) d'être jugé dans un délai raisonnable;

c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

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

e) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable;

(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;

f) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;

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

g) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations;

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

h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;

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

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

[16] The full text of the portions of section 163.2 most relevant to this case is as follows:

163.2 (1) The definitions in this subsection apply in this section.

163.2 (1) Les définitions qui suivent s'appliquent au présent article.

“culpable conduct” means conduct, whether an act or a failure to act, that

(a) is tantamount to intentional conduct;

(b) shows an indifference as to whether this Act is complied with; or

(c) shows a wilful, reckless or wanton disregard of the law.

“entity” includes an association, a corporation, a fund, a joint venture, an organization, a partnership, a syndicate and a trust.

...

“false statement” includes a statement that is misleading because of an omission from the statement.

“gross compensation” of a particular person at any time, in respect of a false statement that could be used by or on behalf of another person, means all amounts to which the particular person, or any person not dealing at arm’s length with the particular person, is entitled, either before or after that time and either absolutely or contingently, to receive or obtain in respect of the statement.

“gross entitlements” of a person at any time, in respect of a planning activity or a valuation activity of the person, means all amounts to which the person, or another person not dealing at arm’s

« activité de planification » S’entend notamment des activités suivantes :

a) le fait d’organiser ou de créer un arrangement, une entité, un mécanisme, un plan, un régime ou d’aider à son organisation ou à sa création;

b) le fait de participer, directement ou indirectement, à la vente d’un droit dans un arrangement, un bien, une entité, un mécanisme, un plan ou un régime ou à la promotion d’un arrangement, d’une entité, d’un mécanisme, d’un plan ou d’un régime.

« activité d’évaluation » Tout acte accompli par une personne dans le cadre de la détermination de la valeur d’un bien ou d’un service.

[...]

« avantage fiscal » Réduction, évitement ou report d’un impôt ou d’un autre montant payable en vertu de la présente loi ou augmentation d’un remboursement d’impôt ou d’autre montant accordé en vertu de cette loi.

« conduite coupable » Conduite — action ou défaut d’agir — qui, selon le cas :

a) équivaut à une conduite intentionnelle;

b) montre une indifférence quant à l’observation de la présente loi;

c) montre une insouciance délibérée, déréglée ou téméraire à l’égard de la loi.

length with the person, is entitled, either before or after that time and either absolutely or contingently, to receive or obtain in respect of the activity.

“participate” includes

(a) to cause a subordinate to act or to omit information; and

(b) to know of, and to not make a reasonable attempt to prevent, the participation by a subordinate in an act or an omission of information.

“person” includes a partnership.

“planning activity” includes

(a) organizing or creating, or assisting in the organization or creation of, an arrangement, an entity, a plan or a scheme; and

(b) participating, directly or indirectly, in the selling of an interest in, or the promotion of, an arrangement, an entity, a plan, a property or a scheme.

“subordinate”, in respect of a particular person, includes any other person over whose activities the particular person has direction, supervision or control whether or not the other person is an employee of the particular person or of another person, except that, if the particular person is a member of a partnership, the other person is not a subordinate of the particular person solely because the particular person is a member of the partnership.

“tax benefit” means a reduction, avoidance or deferral of tax or other amount payable under this Act or an

« droits à paiement » Quant à une personne à un moment donné, relativement à une activité de planification ou à une activité d’évaluation qu’elle exerce, l’ensemble des montants que la personne, ou une autre personne avec laquelle elle a un lien de dépendance, a le droit de recevoir ou d’obtenir relativement à l’activité avant ou après ce moment et conditionnellement ou non.

« entité » S’entend notamment d’une association, d’une coentreprise, d’une fiducie, d’un fonds, d’une organisation, d’une société, d’une société de personnes ou d’un syndicat.

« faux énoncé » S’entend notamment d’un énoncé qui est trompeur en raison d’une omission.

« participer » S’entend notamment du fait :

a) de faire agir un subalterne ou de lui faire omettre une information;

b) d’avoir connaissance de la participation d’un subalterne à une action ou à une omission d’information et de ne pas faire des efforts raisonnables pour prévenir pareille participation.

« personne » Sont assimilées aux personnes les sociétés de personnes.

« rétribution brute » Quant à une personne donnée à un moment quelconque relativement à un faux énoncé qui pourrait être utilisé par une autre personne ou pour son compte, l’ensemble des montants que la personne donnée, ou toute personne avec laquelle elle a un lien de

increase in a refund of tax or other amount under this Act.

“valuation activity” of a person means anything done by the person in determining the value of a property or a service.

dépendance, a le droit de recevoir ou d’obtenir relativement à l’énoncé avant ou après ce moment et conditionnellement ou non.

« subalterne » Quant à une personne donnée, s’entend notamment d’une autre personne dont les activités sont dirigées, surveillées ou contrôlées par la personne donnée, indépendamment du fait que l’autre personne soit l’employé de la personne donnée ou d’un tiers. Toutefois, l’autre personne n’est pas le subalterne de la personne donnée du seul fait que celle-ci soit l’associé d’une société de personnes.

(2) Every person who makes or furnishes, participates in the making of or causes another person to make or furnish a statement that the person knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is a false statement that could be used by another person (in subsections (6) and (15) referred to as the “other person”) for a purpose of this Act is liable to a penalty in respect of the false statement.

(2) La personne qui fait ou présente, ou qui fait faire ou présenter par une autre personne, un énoncé dont elle sait ou aurait vraisemblablement su, n’eût été de circonstances équivalant à une conduite coupable, qu’il constitue un faux énoncé qu’un tiers (appelé « autre personne » aux paragraphes (6) et (15)) pourrait utiliser à une fin quelconque de la présente loi, ou qui participe à un tel énoncé, est passible d’une pénalité relativement au faux énoncé.

(3) The penalty to which a person is liable under subsection (2) in respect of a false statement is

(3) La pénalité dont une personne est passible selon le paragraphe (2) relativement à un faux énoncé correspond au montant suivant :

(a) where the statement is made in the course of a planning activity or a valuation activity, the greater of \$1,000 and the total of the person’s gross entitlements, at the time at which the notice of assessment of the penalty is sent to the person, in respect of the planning activity and the valuation activity; and

a) si l’énoncé est fait dans le cadre d’une activité de planification ou d’une activité d’évaluation, 1 000 \$ ou, s’il est plus élevé, le total des droits à paiement de la personne, au moment de l’envoi à celle-ci d’un avis de cotisation concernant la pénalité, relativement à l’activité de planification et à l’activité d’évaluation;

(b) in any other case, \$1,000.

b) dans les autres cas, 1 000 \$.

(4) Every person who makes, or participates in, assents to or acquiesces in the making of, a statement to, or by or on behalf of, another person (in this subsection, subsections (5) and (6), paragraph (12)(c) and subsection (15) referred to as the “other person”) that the person knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is a false statement that could be used by or on behalf of the other person for a purpose of this Act is liable to a penalty in respect of the false statement.

(4) La personne qui fait un énoncé à une autre personne ou qui participe, consent ou acquiesce à un énoncé fait par une autre personne, ou pour son compte, (ces autres personnes étant appelées « autre personne » au présent paragraphe, aux paragraphes (5) et (6), à l’alinéa (12)c) et au paragraphe (15)) dont elle sait ou aurait vraisemblablement su, n’eût été de circonstances équivalant à une conduite coupable, qu’il constitue un faux énoncé qui pourrait être utilisé par l’autre personne, ou pour son compte, à une fin quelconque de la présente loi est passible d’une pénalité relativement au faux énoncé.

(5) The penalty to which a person is liable under subsection (4) in respect of a false statement is the greater of

(5) La pénalité dont une personne est passible selon le paragraphe (4) relativement à un faux énoncé correspond au plus élevé des montants suivants :

(a) \$1,000, and

a) 1 000 \$;

(b) the lesser of

b) le moins élevé des montants suivants:

(i) the penalty to which the other person would be liable under subsection 163(2) if the other person made the statement in a return filed for the purposes of this Act and knew that the statement was false, and

(i) la pénalité dont l’autre personne serait passible selon le paragraphe 163(2) si elle avait fait l’énoncé dans une déclaration produite pour l’application de la présente loi tout en sachant qu’il était faux,

(ii) the total of \$100,000 and the person's gross compensation, at the time at which the notice of assessment of the penalty is sent to the person, in respect of the false statement that could be used by or on behalf of the other person.

(ii) la somme de 100 000 \$ et de la rétribution brute de la personne, au moment où l'avis de cotisation concernant la pénalité lui est envoyé, relativement au faux énoncé qui pourrait être utilisé par l'autre personne ou pour son compte.

C. Does section 11 of the Charter apply?

(1) The existing jurisprudence, summarized

[17] The Tax Court found that section 163.2 of the Act creates an “offence” such that Ms. Guindon had the rights set out in section 11 of the Charter. In so finding, it applied the jurisprudence set out in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 and later cases such as *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737.

[18] The Tax Court's summary of that jurisprudence is essentially accurate. A person is entitled to the procedural protections under section 11 of the Charter in two circumstances:

- the matter is, by its very nature, intended to promote public order and welfare within a public sphere of activity. This is to be contrasted with proceedings of an administrative nature instituted for the protection of the public in accordance with

the policy of a statute: *Martineau, supra* at paragraphs 21-22; *Wigglesworth, supra* at page 560.

- the person is exposed to the possibility of a “true penal consequence,” for example imprisonment or a fine imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of discipline or compliance within a limited sphere of activity or an administrative field of endeavour: *Martineau, supra* at paragraph 57; *Wigglesworth, supra* at page 561.

[19] In light of these cases, the parties agreed that there is a line, albeit sometimes a fuzzy one, between cases to which section 11 protections apply, and those to which they do not.

[20] Drawing the line in matters arising under the *Income Tax Act* can be a challenge, particularly because the Act touches almost all Canadians, yet much of it is largely administrative in character. Nevertheless, indeed one can discern a line and, as this illustration shows, some cases are clearly on one side or the other:

- It is contrary to the Act to file a late tax return. Under the Act, a penalty may be imposed against a late-filing taxpayer. This is best regarded as a penalty imposed against a taxpayer for a transgression within the self-assessment and reporting system under the Act, and is not a wrong committed against society as a whole. It is aimed at ensuring the maintenance of discipline or compliance within a limited

sphere of activity or an administrative field of endeavour. A person subject to such a penalty is not entitled to the protections under section 11 of the Charter.

- It is contrary to the Act to evade or commit tax fraud and, if found guilty, fines or imprisonment can follow. This is best regarded as a sanction imposed for a wrong committed against society as a whole, every bit as much as the offence of fraud in the *Criminal Code*, R.S.C. 1985, c. C-46. A person charged with tax evasion or tax fraud is entitled to the protections under section 11 of the Charter.

(2) The Tax Court's conclusion

[21] The Tax Court applied this distinction between criminal and non-criminal matters. It found that section 163.2 of the Act “should be considered as creating a criminal offence” such that Ms. Guindon had the rights set out in section 11 of the Charter (at paragraph 70):

...[Section 163.2 of the Act] is so far-reaching and broad in scope that its intent is to promote public order and protect the public at large rather than to deter specific behaviour and ensure compliance with the regulatory scheme of the Act. Furthermore, the substantial penalty imposed on the third party – a penalty which can potentially be even greater than the fine imposed under the criminal provisions of section 239 of the Act, without the third party even benefiting from the protection of the Charter – qualifies as a true penal consequence.

(3) Did the Tax Court have jurisdiction to conclude as it did? Did its jurisdiction depend on the service of a notice of constitutional question?

[22] On appeal to this Court, the Crown submits that the Tax Court had no jurisdiction to find that section 11 of the Charter applied to section 163.2 of the Act because Ms. Guindon did not serve

a notice of constitutional question. Ms. Guindon was obligated to serve such a notice on the federal and provincial Attorneys General if she sought a finding that a section of the Act was invalid, inoperative or inapplicable: *Tax Court of Canada Act*, R.S.C. 1985 c. T-2, section 19.2 and, on appeal, the *Federal Courts Act*, R.S.C. 1985 c. F-7, section 57.

[23] In substance, Ms. Guindon sought that very thing in the Tax Court and seeks that very thing here.

[24] She contends that section 11 of the Charter applies to penalty proceedings under section 163.2 of the Act. If her contention is accepted, section 11 of the Charter renders the scheme of section 163.2 and related procedural sections invalid, inoperative or inapplicable. Section 11 of the Charter requires that a penalty can only be imposed until after charges are laid and a fair trial is conducted before an independent and impartial tribunal. Section 163.2 and related procedural sections do something quite different: under them, a person can be assessed a penalty and the assessment is binding unless it is varied or overturned by way of reconsideration or in an appeal to the Tax Court. Only in the Tax Court, after liability has been found, is there something akin to an independent and impartial trial of the matter.

[25] In her memorandum of fact and law filed in this Court, Ms. Guindon submitted that, once section 163.2 of the *Income Tax Act* is regarded as an offence provision, subsection 34(2) of the *Interpretation Act*, R.S.C. 1985 c. I-21 kicks in. That subsection requires that *Criminal Code* procedures be followed instead of *Income Tax Act* procedures. In her view, then, finding section

163.2 is an offence under section 11 of the Charter does not make any procedures in the *Income Tax Act* invalid, inoperative, or inapplicable.

[26] I disagree. This submission overlooks the language of subsection 34(2), which imposes the procedures of the *Criminal Code* to any offence, “except to the extent that [another] enactment otherwise provides.” The *Income Tax Act* otherwise provides. It provides for the assessment of a penalty under section 163.2, a reconsideration procedure and an appeal to the Tax Court.

[27] Therefore, I conclude that in these circumstances, Ms. Guindon was seeking the invalidity, inoperability or inapplicability of sections of the *Income Tax Act*. A notice of constitutional question had to be served.

[28] The failure to serve a notice of constitutional question took away the Tax Court’s jurisdiction to consider whether section 163.2 of the Act creates a criminal offence, triggering Ms. Guindon’s section 11 rights.

[29] Canadian courts regard the requirement that a notice of constitutional question be served on the Attorneys General as a matter going to the jurisdiction of the Court to consider the constitutional issues: see, e.g., *Paluska v. Cava* (2002), 59 O.R. (3d) 469 (C.A.). The requirement serves a “useful and essential purpose”: *Bekker v. Canada*, 2004 FCA 186 at paragraph 9. Attorneys General need notice of a constitutional challenge to the validity, applicability or operability of laws because if the challenge succeeds, their own laws may be affected.

[30] Once notice is provided to them, Attorneys General may intervene and participate in the constitutional challenge. They may wish to adduce important evidence, test other evidence, rebut that evidence, make submissions on the constitutional issues, or any and all of these things. Their participation can affect the outcome of the constitutional challenge.

[31] Before the Tax Court, the Minister objected to Ms. Guindon raising section 11 of the Charter because she had not served a notice of constitutional question. If asked, the Tax Court could have exercised its discretion to adjourn its proceedings to allow a notice of constitutional question to be served. However, in the face of the Minister's objection, Ms. Guindon did not ask for an adjournment in order to serve the notice. Similarly, in this Court, Ms. Guindon has neither served a notice of constitutional question nor asked for an adjournment.

[32] Therefore, I conclude that it was not open to the Tax Court to find that section 163.2 of the Act prescribes a criminal offence such that all of the rights under section 11 of the Charter apply.

(4) Is it open to Ms. Guindon to assert that only some section 11 rights apply in proceedings conducted under section 163.2 of the Act?

[33] In the event that her failure to serve a notice of constitutional question prevented the Tax Court from finding that all of the section 11 rights apply in section 163.2 proceedings, Ms. Guindon submitted that, nevertheless, some section 11 rights could still apply. She pointed out that some of the section 11 rights do not conflict with the words of section 163.2 and related procedural sections in the Act.

[34] For example, section 11 requires that guilt be found only upon proof of the commission of the offence beyond a reasonable doubt. This does not conflict with the wording of section 163.2 or any other provision of the Act.

[35] In my view, this submission cannot be entertained. It is not open to Ms. Guindon to assert that some of the section 11 rights apply but not others. Under the text of section 11, set out above, either a person is “charged with an offence” and all of the section 11 rights apply, or a person is not “charged with an offence” and none of the section 11 rights apply. Section 11 is not a buffet table where one can pick and choose the rights on offer. The Supreme Court of Canada confirmed this in the context of extradition proceedings, using words of broad application:

To say that some provisions of s.11 apply to extradition hearings, while others do not, involves giving varying meanings to “any person charged with an offence.” The expression must have a constant meaning throughout, one that harmonizes with the various paragraphs of the section.

(*R. v. Schmidt*, [1987] 1 S.C.R. 500 at page 519.)

(5) Section 163.2 of the Act does not create an “offence” within the meaning of section 11 of the Charter

[36] Even if it were open to Ms. Guindon to submit that only some of the section 11 rights apply, the submission still fails.

[37] In my view, the assessment of a penalty under section 163.2 is not the equivalent of being “charged with a [criminal] offence.” Accordingly, none of the section 11 rights apply in section

163.2 proceedings. In this regard, I disagree with the Tax Court's conclusion on this question of law.

[38] The *Income Tax Act* contains a complex web of provisions constituting a discrete regulatory and administrative field of endeavour with unique characteristics. Justice Wilson of the Supreme Court of Canada described it in this way:

A chief source of revenue for the federal government is the collection of income tax. The legislative scheme which has been put in place to regulate the collection of tax is the *Income Tax Act*. The Act requires taxpayers to file annual returns and estimate their tax payable as a result of calculations made in these returns. In essence, the system is a self-reporting and self-assessing one which depends upon the honesty and integrity of the taxpayers for its success.

(*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627.)

[39] The provision of accurate information that permits the proper calculation of tax is another aspect of self-compliance. This is achieved through tax returns, reports, certificates, forms and other information supplied. Timely elections, designations, reports and payments also allow for the efficient administration of the tax system.

[40] Conduct that is antithetical to the proper functioning of this system must be deterred. Compliance and order within this self-assessment system must be maintained. This is done – in this administrative field of endeavour as in many others – through the imposition of administratively simple sanction or, as the Act calls them, penalties. Given the complexity and breadth of the discrete regulatory and administrative field of endeavour set up by the Act, the sanctions must be administratively simple.

[41] Seen in this way, penalties under the Act are not about condemning morally blameworthy conduct or inviting societal condemnation of the conduct. They are not among the “most serious offences known to our law”: *Wigglesworth, supra*, at page 558. Rather, the penalties are about ensuring that this discrete regulatory and administrative field of endeavour works properly.

[42] In my view, section 163.2 is mainly directed to ensuring the accuracy of information, honesty and integrity within the administrative system of self-assessment and reporting under the Act. The imposition of a section 163.2 penalty by way of assessment and the subsequent procedures for challenging the assessment are proceedings of an administrative nature aimed at redressing conduct antithetical to the proper functioning of the administrative system of self-assessment and reporting under the Act. Put another way, proceedings under section 163.2 aim at maintaining discipline, compliance or order within a discrete regulatory and administrative field of endeavour. They do not aim at redressing a public wrong done to society at large.

[43] This conclusion is confirmed by a particular feature of the *Income Tax Act*. The Act contains approximately sixty penalty provisions, including section 163.2. This is in contradistinction from the provisions in the Act that create “offences.” A comparison of the penalty provisions and the offence provisions in the Act reveals something most salient to the question before us.

[44] Each of the penalty provisions, including section 163.2, prescribes a non-discretionary fixed amount or a non-discretionary formula for the calculation of the penalty to be included in the assessment. In no way does the Minister evaluate the moral blameworthiness or turpitude of the

conduct, including any mitigating circumstances. Indeed, based on the rather mechanical nature of the task of preparing an assessment and the type of information available to the Minister, the Minister is not equipped to do such a thing. Accordingly, these provisions, including section 163.2, seem directed to maintaining discipline or compliance within a discrete regulatory and administrative field of endeavour, rather than redressing and condemning morally blameworthy conduct or a public wrong.

[45] On the other hand, each of the offence provisions is punishable by a fine, imprisonment, or both, none of which is fixed or calculated by a rigid formula. Instead, each is punishable by a range of sanctions – for example, in the case of tax evasion under section 239, a term of imprisonment up to a maximum or a fine between a certain minimum or maximum. The judge's task is not mechanical, but discretionary. In sentencing, the judge is entitled to take into account, among other things, the moral blameworthiness or turpitude of the conduct, including any mitigating circumstances. Accordingly, the offence provisions do more than merely maintain discipline or compliance within a discrete regulatory and administrative field of endeavour. They also redress and condemn morally blameworthy conduct or a public wrong.

[46] Ms. Guindon points out that the penalties under section 163.2 can be large. This is true, but the size of a penalty does not alone dictate whether section 11 of the Charter applies: *Martineau*, *supra*. Sometimes administrative penalties must be large in order to deter conduct detrimental to the administrative scheme and the policies furthered by it: *Re Cartaway Resources Corp.*, 2004 SCC 26, [2004] 1 S.C.R. 672. Many cases confirm that large penalties, indeed very large penalties, can qualify as administrative monetary penalties governed by administrative law principles, free from

the requirements of section 11 of the Charter: *United States Steel Corporation v. Canada (Attorney General)*, 2011 FCA 176; *Rowan v. Ontario Securities Commission*, 2012 ONCA 208; *Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48; *Martineau, supra*.

[47] Under subsection 163.2(4), the provision engaged in the present case, the maximum possible penalty for a person making a false statement is \$100,000 plus the person's gross compensation in relation to that statement. Such a magnitude does not demonstrate a purpose extending beyond deterrence to denunciation and punishment of the offender for the "wrong done to society": *Wigglesworth, supra*, at page 561. Rather, in light of the possibility of false statements going undetected, penalties of such magnitude are necessary to prevent them from being regarded as just "another cost of doing business": *United States Steel Corporation, supra*, at paragraph 77.

[48] Ms. Guindon also draws our attention to the reference to "culpable conduct" in section 163.2 and urges that it imports a notion of criminality into the matter. Taken in isolation, assessed in the abstract, and understood in its colloquial meaning, "culpable conduct" does suggest "guilty" conduct. But in the Act "culpable conduct" has a defined meaning that sets out the elements that must be present before the Minister can assess a penalty under section 163.2 of the Act. This definition does not bring within it the notion of "guilt" or conduct violating some criminal standard.

[49] Incidentally, in this appeal, the parties debated the meaning of "culpable conduct." Accepting the more exacting definition of "culpable conduct" proposed by Ms. Guindon, the Tax Court nevertheless found on the facts that Ms. Guindon had engaged in such conduct. Therefore, it is unnecessary for us in this appeal to decide this issue.

[50] In another submission before us, Ms. Guindon emphasizes the need for section 11 Charter rights to apply given the serious sanctions that may be imposed under section 163.2 of the Act. She warns that unless section 11 protections are afforded, great unfairness will result. The short answer is that section 11 Charter rights apply only when the *Wigglesworth/Martineau* test is met. The discussion above shows that it has not been met.

[51] Some commentators have also expressed concerns about the unfairness of section 163.2 of the Act and the potential for misuse of the section: see, *e.g.*, William I. Innes and Brian J. Burke, “Adviser Penalties: How Will the Courts Construe Section 163.2?”, *2001 Conference Report, Report of Proceedings of the Fifty-Third Tax Conference* (Toronto: Canadian Tax Foundation, 2002); Warren J.A. Mitchell, “Civil Penalties: A Wolf in Sheep’s Clothing?”, *2000 Conference Report, Report of Proceedings of the Fifty-Second Tax Conference* (Toronto: Canadian Tax Foundation, 2001); Brian Nichols, “Civil Penalties for Third Parties”, *1999 Ontario Tax Conference* (Toronto: Canadian Tax Foundation, 2000). In light of these well-considered expressions of concern, some additional words may be appropriate.

[52] In my view, many of the concerns expressed are overstated.

[53] The jurisprudence concerning section 163.2 is in an embryonic state. What now appears to some to be uncertain and worrying may later be addressed satisfactorily in the jurisprudence.

[54] In addition, there are many available tools to address procedural or substantive unfairness and any misuse of the section.

[55] As is well-known, an appeal ultimately lies to the Tax Court from the assessment of penalties. In that appeal, pursuant to subsection 163(3) of the Act, the burden lies on the Minister to demonstrate the facts justifying the imposition of the penalty. A number of procedural rules – including the right to adduce evidence, to test the Minister’s evidence, and to obtain disclosure of relevant documents – give the appellant a meaningful opportunity to challenge the assessment. The Tax Court must construe these rules to ensure, among other things, the just determination of every proceeding, and can modify them “as necessary in the interests of justice” – in other words, if it is appropriate and necessary in order to achieve procedural fairness: See *Tax Court Rules*, SOR/1990-688a, Rules 4 and 9. That Court also has a plenary jurisdiction to take necessary steps to ensure the fairness of proceedings before it and, further, to restrain any abuses of its process: *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50 at paragraph 35 (by analogy to the Federal Courts, also courts of statutory jurisdiction).

[56] Undoubtedly, in certain individual circumstances, penalties set by formulae or in fixed amounts – while administrative in nature and not triggering section 11 of the Charter – can be harsh. However, relief against harsh penalties can potentially be had under a different provision of the Act, subsection 220(3.1). Under that subsection, those subject to a section 163.2 penalty can ask the Minister to exercise her discretion to cancel all or part of the penalty. Before us, the Crown conceded the availability of this remedy.

[57] Some might question the meaningfulness or effectiveness of this remedy. After all, it is the Minister imposing the penalty who considers whether it should be cancelled. But that is too facile a view of the matter. Subsection 220(3.1) of the Act imposes on the Minister an entirely different task. The Minister does not have a free hand to do whatever she wants, act on whim, or unthinkingly rubber-stamp her earlier penalty assessment. A few more words on this are apposite.

[58] The Minister's discretion on an application for relief must be based on the purposes of the Act, the fairness purposes that lie behind subsection 220(3.1) of the Act, and a rational assessment of all the relevant circumstances of the case. Her discretion must be genuinely exercised and must not be fettered or dictated by policy statements such as Information Circular 07-1: *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 at paragraph 27.

[59] On an application for judicial review from a subsection 220(3.1) decision, the Federal Court may quash unreasonable exercises of discretion by the Minister – *i.e.*, exercises of discretion that fall outside the range of the acceptable and defensible on the facts and the law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Depending on the circumstances, the range available to the Minister can be quite narrow: *Canada (Attorney General) v. Abraham*, 2012 FCA 266 at paragraphs 37-50; and in a different context, see *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paragraphs 13 and 14.

[60] Finally, I note that section 12 of the Charter prohibits cruel and unusual punishment or treatment, *i.e.* a disproportionate sanction that “outrage[s] standards of decency”: *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at page 736. In the

administrative context, section 12 remains largely untested and its applicability remains a matter of debate. Further, since penalties under section 163.2 are calculated by formulae that attempt to gauge the extent to which the impugned conduct may have affected the tax system, I am sceptical whether a section 12 claim against a section 163.2 penalty could ever succeed. Nevertheless, at this early point in the development of the jurisprudence under section 163.2, it cannot yet be ruled out as a possible avenue of exceptional recourse.

[61] In the case at bar, resort to these recourses was not made. Accordingly, I offer no further comment on them.

D. Proposed disposition

[62] For the foregoing reasons, I would allow the appeal with costs, set aside the judgment of the Tax Court, and giving the judgment the Tax Court should have given, I would dismiss Ms. Guindon's appeal with costs.

"David Stratas"

J.A.

"I agree
Marc Noël J.A."

"I agree
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-459-12

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BÉDARD
DATED OCTOBER 2, 2012, NO. 2009-3368(IT)G**

STYLE OF CAUSE: Her Majesty the Queen v. Julie
Guindon

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: June 5, 2013

REASONS FOR JUDGMENT BY: Stratas J.A.

CONCURRED IN BY: Noël J.A.
Gauthier J.A.

DATED: June 12, 2013

APPEARANCES:

André LeBlanc
Paul Klippenstein

FOR THE APPELLANT

Adam Aptowitzer
Joel Sector

FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney
Deputy Attorney General of Canada

FOR THE APPELLANT

Drache Aptowitzer
Ottawa, Ontario

FOR THE RESPONDENT