



Justice Randall Boccock
IATJ 6th Assembly – 4th September
2015, Lucerne, Switzerland



Guindon v Canada

Large third party penalties under the *Income Tax Act*:
criminal offences or administrative sanctions?



Guindon v Canada 2015 SCC 41

- Supreme Court determines when administrative penalties are criminal sanctions & when related constitutional protections accrue to those assessed
- Facts -- Ms. Guindon:
 - authored opinion on documents and likely tax treatment
 - although a lawyer, was not a tax practitioner/expert and had not reviewed relevant documents
 - co-signed relevant tax receipts for charitable donation scheme
 - also claimed a deduction *qua* taxpayer
 - after donation scheme was disallowed, was assessed penalties of over \$540,000 under s 163.2 of the *ITA*



Excerpts of Relevant Statutes (I)

Income Tax Act, paras 163.2(4)-(5)

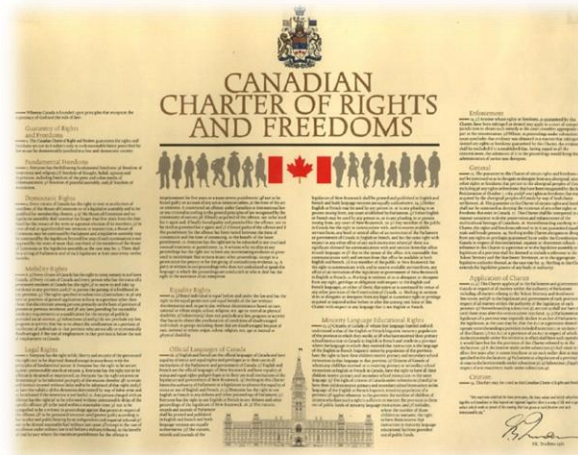
- 4) Every person who makes [...] a statement to [...] another person [...] that the person knows, or **would reasonably be expected to know but for circumstances amounting to culpable conduct**, is a false statement that could be used by [...] the other person for a purpose of this Act is liable to a penalty [...]
- 5) The penalty to which a person is liable under subsection (4) in respect of a false statement is the greater of:
 - (a) \$1,000, and
 - (b) the lesser of**
 - (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
 - (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.



Excerpts of Relevant Statutes (II)

Canadian Charter of Rights and Freedoms

- (11) Any person charged with an offence has the right [...]
- d) **to be presumed innocent until proven guilty** according to law in a fair and public hearing by an independent and impartial tribunal;





Common Issue Before All Levels of Court

- Are the s.163.2 penalty provisions reflective of a “criminal offence”?
- If so, certain substantive & procedural rights would apply:
 1. Presumption of innocence and elements of criminal offence apply
 2. Onus shifts from balance of probabilities to proof beyond a reasonable doubt.



Lower Court Decisions (I)

- Tax Court of Canada (2012):
 - Issue 1: Does the third party penalty imposed under s 163.2 of the *ITA* create a criminal offence?
 - Yes: the penalty is criminal by nature and the penalty is a true penal consequence.
 - Issue 2: If it is a civil penalty, is the Appellant liable to pay a third party penalty in respect of false statements made in the context of the program?
 - Yes: Ms. Guindon could reasonably have been expected to know, but for circumstances amounting to “culpable conduct,” that the legal requirements required to effect the transaction had not been fulfilled.



Lower Court Decisions (II)

- Federal Court of Appeal (2013):
 - Tax Court upheld assessment even under a generous interpretation.
 - Issue 1: Does section 11 of the *Charter* apply?
 - No; this is an administratively simple sanction and the magnitude of the penalty does not have an impact on whether it is a criminal offence.
 - Issue 2: Did the Tax Court have jurisdiction to hear constitutional issue?
 - No.



Decision of the Supreme Court of Canada (I)

- Do Section 11 and related rights apply?
- Applied test from *R v Wigglesworth* (1987), expanded upon in *Martineau v MNR* (2004):
 - A provision can be viewed as creating a criminal offence if it:
 - (a) involves a criminal proceeding by its very **nature**; or
 - (b) imposes a penalty that is a **true penal consequence**.



(a) Criminal by Nature

- Three Criteria:
 1. Legislative Objectives:
Held: the legislation has a primarily regulatory purpose.
 2. Objectives of the Sanction:
Held: the sanction helps the income tax system function by promoting honesty and deterring gross negligence or the intentional provision of inaccurate data.
 3. Process Leading to the Imposition of the Sanction:
Held: the process is administrative in nature. The violator is not charged or arrested, does not have to appear before a court of criminal jurisdiction, and will not receive a criminal record.



(b) True Penal Consequence

- Was the sanction imposed to redress the wrong done to society at large, or to induce cooperation?
- Monetary sanctions are true penal consequences only when purpose or effect is punitive.
- **Magnitude of the sanction is not determinative**; the amount must rather be in proportion to that required for regulatory purposes.
- Held: the magnitude of penalties is tied to the objectives of the *ITA*.
 - The amount is according to a formula without regard to criminal sentencing principles.
 - No stigma is attached to violator's acts.



Decision of the Supreme Court of Canada (II)

- Held:
 - The penalty is not a true criminal offence under the *Wigglesworth/Martineau* test:
 - It is not criminal by its nature
 - The sanction does not involve a 'true penal consequence.'
 - The sanction is not discretionary.
 - The taxpayer has other means of appealing the quantum of penalty.



Conclusion

- The magnitude of administrative penalties does not necessarily mean that they are criminal sanctions.
- Criteria that distinguish: the non-discretionary nature of the penalty, the process, legislative objectives, and the way that the magnitude is related to the objectives of the *Act*.

QUESTIONS?

