Section 163.2 Not Penal in Process or Penalty [OVERTURNED]

Section 163.2 Not Penal in Process or Penalty

Guindon v The Queen, 2013 FCA 153

[This decision was overturned by the FCA in *Canada v Guindon*, 2013 FCA 153, on the basis that, in relation to the provision in question, the *Wigglesworth*/*Martineau* test for criminality had not been met – and that proceedings under section 163.2 are not criminal by their nature, nor do they impose true penal consequences.]

There were two issues before the FCA:

1. Whether the TCC decision that section 163.2 is a criminal provision engaging section 11 *Charter* rights was correct?
2. Whether the TCC interpretation of section 163.2 was correct

The FCA held that the TCC did not have jurisdiction to find that section 163.2 is a criminal provision constituting an "offence" within the meaning of Section 11 of the *Charter* as such a finding would require a charter challenge to the provision (a finding that some or all of the provision was invalid, inoperable or inappropriate), and in this case no notice of constitutional question was filed.

Even if some of section 11 rights applied – which is not possible as either all or none apply – the *Wigglesworth/Martineau* test for criminality was not met. Proceedings under section 163.2 are not criminal by their nature, and the consequences are not penal in nature. Though the penalties are potentially large, this is not determinative. In the circumstances, the difficulty in detecting false statements, large penalties are needed to prevent them from being regarded as just another cost of doing business.

The FCA did not address the correctness of the TCC's interpretation of section 163.2, which was the one most favourable to the taxpayer.

FACTS

Guidon was a lawyer who became involved in a charitable donation scheme by providing a legal opinion vouching for the scheme, and where she signed tax receipts on behalf of the charity. She represented having reviewed documents which she had not. The donation scheme was a sham. The full facts are set out in the TCC decision (2012 TCC 287).

The MNR assessed section 163.2 penalties against Guidon totaling $564,747.

The TCC Decision

[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.

The FCA analysis

The FCA began by reviewing the wording of subsection 163.2(4), which reads:

> (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.

Subsection 163.2(5) limits the penalty to either (a) the lesser of $100,000 plus the person's gross compensation in relation to the false statement, and (b) the penalty hypothetically payable by the taxpayer to which the false statement relates (usually 50% of the ta sought to be avoided).

The court the summed up the existing *Charter* jurisprudence on section 11, being *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. The FCA agreed with the TCC's summary:

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.
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> ? 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.

The FCA notes that it may be hard to draw a line between criminal and non-criminal provisions in the ITA, but that 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.
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> ? 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.

There were two ways to approach the issue of what Guidon was seeking: (1) the application of section 11 of the *Charter*, and therefore the application of *Criminal Code* procedures by operation of subsection 34(2) of the *Interpretation Act* (which the FCA rejected); Or (2) the invalidity, inoperability, or impropriety of section 163.2 of the *Income Tax Act* in light of *Charter* section 11 requirements (which is what the FCA accepted). Given the remedy the FCA determined that Guidon sought, she was required to file a notice of constitutional question, the failure of which took away the TCC's jurisdiction (*Paluska v. Cava* (2002), 59 O.R. (3d) 469 (C.A.)).

The FCA then went on to consider whether section 163.2 constitutes an offence within the meaning of section 1 of the *Charter*. The Court stated:

> [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 [*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627] described it in this way:
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> 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.

The self-assessment system relies on the provision of accurate information that allows for the proper calculation of tax achieved through tax returns, reports, certificates, forms, and so on. Conduct that interferes with the administration of the system must be deterred, and this can be done through the imposition of simple administrative penalties. The FCA stated:

> [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.

In finding that section 163.2 is not an offence the FCA stated:

> 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.
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> [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.
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> [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.
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> [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.

The Court agreed that the potential penalties can be very large, but stated that the size of the penalty does not determine whether *Charter* protection is engaged. "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*.". In the circumstances, the difficulty in detecting false statements, large penalties are needed to prevent them from being regarded as just another cost of doing business. Relief from large penalties may be obtained through other means, such as ITA subsection 220(3.1), or through the application of section 12 of the *Charter*.