

Tax Advisor Penalties - Guindon

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Tax Advisor Penalties

Guindon v Canada, [2015 SCC 41](#)

For a summary and analysis of the Federal Court of Appeal and Tax Court of Canada decisions see [HERE](#).

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This was a decision of a 7 member panel of the Supreme Court of Canada ("SCC"), with the majority dismissing the tax professional's appeal from the FCA decision (4:3).

The SCC majority held that the provisions of the ITA imposing penalties on tax professionals (planners and preparers) in certain circumstances ([Income Tax Act](#), section 163.2) are administrative, not criminal, in nature. As such, the provision does not result in the imposition of true penal consequences, with the result that the protections under section 11 of the [Charter](#) are not engaged (the person affected is not a person "charged with an offence").

The Facts are not repeated here but can be found [HERE](#).

ANALYSIS

The majority, after recognizing that the notorious complexity of Income tax law leads to many taxpayers relying on advisors, identified the purpose of section 163.2 (and its imposition of monetary penalties) as aiming to prevent tax preparers and planners from making false statement that could then be used by another person for purposes of the ITA.

The preliminary issue relating to the appellant's failure to give notice of a constitutional question was dealt with by the majority in paragraphs 15 - 40. The majority exercised the court's discretion to consider the constitutional arguments despite a lack of notice.

In addressing the merits of the appeal - whether section 163.2 is criminal in nature - the majority stated that the test of whether or not Charter section 11 is engaged is to be found in *R. v. Wigglesworth*, [\[1987\] 2 S.C.R. 541](#), with "additional analytical criteria" in *Martineau v. M.N.R.*, [2004 SCC 81](#). The court must look at whether: (1) the proceeding is in nature criminal, or (2) whether the sanctions imposed results in "true penal consequences" (para 44).

After analyzing the provision in question against the legal tests (at paragraphs 51 to 88), the majority concluded that section 163.2 is not criminal in process or in consequences. The court stated:

[89] We conclude that the proceeding under s. 163.2 is not criminal in nature and does not lead to the imposition of true penal consequences. We agree with Stratas J.A., writing for the Federal Court of Appeal, that “the assessment of a penalty under s. 163.2 is not the equivalent of being ‘charged with a [criminal] offence.’ Accordingly, none of the s. 11 rights apply in s. 163.2 proceedings”: para. 37.

[90] Finally, we note that even though s. 11 of the *Charter* is not engaged by s. 163.2 of the *ITA*, those against whom penalties are assessed are not left without recourse or protection. They have a full right of appeal to the Tax Court of Canada and, as the respondent pointed out in her factum, have access to other administrative remedies: R.F., at para. 99; see, e.g., *ITA*, s. 220(3.1).

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