

Charter no protection in tax case

By DONALEE MOULTON

A recent ruling of the Federal Court of Appeal will have direct, some say dire, implications for accountants and professionals who provide tax advice.

"This decision will affect the legal rights that tax planners have when they are investigated and sanctioned under the advisor penalties provisions," said Brian Heller, a lawyer with Heller, Rubel in Toronto.

The case centres around Julie Guindon, a lawyer in Ottawa, who became involved in a charitable donation scheme called The Global Trust Charitable Donation Program. Guindon vouchered for the program and signed tax receipts on behalf of the charity. According to the federal court's decision in *Guindon v. Canada* [2013] F.C.J. No. 673, "The scheme was a sham."

Relying on section 163.2 of the tax act, the Canada Revenue Agency assessed a penalty of \$564,747 against Guindon for 134 tax receipts issued to participants in the program. The CRA's argument was that the lawyer knew or would have known but for "wilful disregard" — she had failed to read documentation about the scheme — that the tax receipts she signed constituted false statements.

"Any time you're involved in providing receipts, you have to be very diligent. Now the government is saying it will go after the third party that gave you the documents.



APTOWITZER

That is novel," said Adam Aptowitz, a lawyer with Drache Aptowitz in Ottawa who represented Guindon in this case.

Guindon appealed the penalties to the Tax Court of Canada, arguing that under section 163.2 of the *Income Tax Act* an "offence" as defined by the *Canadian Charter of Rights and Freedoms* is created in a situation like hers. Once the *Charter* comes into play, an individual is entitled to a range of rights, such as the right to be tried within a reasonable time, which Guindon was not given in this case.

"These rights are more than technical and can have a huge impact on the manner in which an investigation and court proceeding play out," Heller noted.

The tax court agreed with

"Any time you're involved in providing receipts, you have to be very diligent. Now the government is saying it will go after the third party that gave you the documents. That is novel."

That is novel."

Adam Aptowitz, Drache Aptowitz

Guindon and set aside the CRA's assessment. The taxpayer's victory was short-lived, however. The Federal Court overturned the tax court's finding, and opened the door to financial advisors and others being assessed what amount to administrative penalties under 163.2 of the *Income Tax Act*.

"The CRA will not need to adhere to the procedural requirements of s. 11 of the *Charter* when they seek to impose penalties on advisors," noted Heller. "There could be a chilling effect on advisors. The sanctions can be very severe, all in the absence of any of the protections afforded by s. 11."

Several of those protections deal with timeliness. Now, noted Aptowitz, "there is no limit on the penalty or the time the CRA has to go after [someone]."

This case marks the first time the issue has wound its way through the courts, he added.

The penalty provision was introduced in the 1999 federal budget, and the Canada Revenue Agency has consistently viewed this provision as imposing a civil penalty as detailed in its 12-year-old information circular *Third-*

Party Civil Penalties. However, given the penalty's potential scope, many outside of the CRA have maintained that the penalty, in substance, is a criminal penalty. This was the position Guindon took.

In reaching its decision, the Federal Court of Appeal relied on the test for criminality set down by the Supreme Court of Canada in 1987 in *R. v. Wigglesworth*, and found Guindon's arguments failed to pass legal muster. "[P]roceedings under section 163.2 are not criminal by their nature, nor do they impose true penal consequences," Justice David Stratas said in his decision.

He noted that penalties under the tax act are not for behaviour that is among the "most serious offences known to our law" as set out in the *Wigglesworth* test. "[P]enalties under the Act are not about condemning morally blameworthy conduct or inviting societal condemnation of the conduct. . . . Rather, the penalties are about ensuring that this discrete regulatory and administrative field of endeavour works properly."

Ultimately, said Justice Stratas, "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."

Many legal and tax experts are uncomfortable with the *Wigglesworth* test. "We criticize the test as impractical, as it is too easy to justify any result using the parameters and language of the test," said Heller. "In essence, the test provides too much 'wiggle room' for judges, which in turn could lead to unpredictable and inconsistent results."

There may be some wiggle room in the future for accountants and others who issue receipts and provide tax advice. It's unlikely the Federal Court of Appeal's decision will go unchallenged. "I expect there will be an appeal," said Aptowitz. "It's a question that is of national importance."

It is also a question that is still up for debate, the Federal Court of Appeal acknowledged in its decision. "The jurisprudence concerning section 163.2 is in an embryonic state," said Justice Stratas. "What now appears to some to be uncertain and worrying may later be addressed satisfactorily in the jurisprudence."