THE BOTTOM LINE
The Independent Voice for Canada's Accounting and Financial Professionals

www.lexisnexis.ca Vol. 29, No. 14 November 2013

Court of appeal overturns Guindon

By Jeff Buckstein

November 2013 issue

A landmark 2012 decision by the Tax Court of Canada to vacate a $546,747 tax penalty levied by the Canada Revenue Agency against Ottawa lawyer Julie Guindon has been overturned by the Federal Court of Appeal.

The Federal Court of Appeal's decision in *Guindon v. Canada* [2013] F.C.J. No. 673 muddied the waters and leaves open the possibility that the Supreme Court of Canada will ultimately have to decide whether the financial penalties levied under section 163.2 of the *Income Tax Act* warrant protection under the *Charter,* as initially ruled by Tax Court of Canada Justice Paul Bedard in 2012 (*Guindon v. Canada* [2012] T.C.J. No. 272).

'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*,' FCA Justice David Stratas wrote for the three-judge panel in the June 12 decision. '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.'

Section 163.2 of the act states that a person who engages in 'culpable conduct' with respect to his or her involvement in issuing a false statement that could be used by another is liable for a financial penalty. This penalty can go as high as the amount of damages to whoever relied on that statement.

Justice Stratas also ruled that the test for criminality, as cited by jurisprudence from past cases (*R. v. Wigglesworth* [1987] 2 S.C.R. 541, and others such as *Martineau v. M.N.R.* [2004] SCC 81, [2004] 3 S.C.R. 737) was not met.

'Proceedings under section 163.2 are not criminal by their nature, nor do they impose true penal consequences,' he said. '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.'

Vern Krishna, tax counsel for Borden Ladner Gervais in Ottawa and a columnist with *The Bottom Line*, said that is one of the key lessons from the FCA decision. 'The act is essentially an administrative statute that does not usually — except in extremely limited circumstances — engage the *Charter*. There is a remarkable tolerance in the system for extreme penalties, which the CRA uses frequently against taxpayers with the blessing of the courts,' he said.

The FCA judgment not to set aside the penalty against Guindon will have implications for lawyers and accountants, according to Ian MacGregor, a tax partner with Osler, Hoskin & Harcourt in Ottawa. This is going to impact the provision of advice, he said, particularly because of the lack of clarity surrounding application of the *Wigglesworth* principles in a variety of circumstances.

But Krishna thinks the message is clear. Lawyers providing tax opinions must be certain that the underlying structure accords with the commercial and technical requirements of the act, he stressed.

Guindon had been assessed her penalty for offering a legal opinion about what was supposed to be a tax reduction through a leveraged donation structure involving timeshare units to be acquired in the Turks and Caicos Islands. Those units were then supposed to be gifted to a trustee company, which would exchange the units to beneficiaries of a trust in Ontario, in return for a vendor take-back charge. The beneficiaries were to donate the timeshare units to a Canadian charitable organization in return for a receipt for the fair market value.

However, the TCC judgment noted that 'no donation ever took place as the timeshare units never existed and no trust was settled.'

Justice Bedard also said in his ruling last year that Guindon's conduct had been culpable. He wrote that she had endorsed a legal opinion regarding the charity without properly reviewing it, and had lied to CRA authorities with respect to certain claims regarding a donation. Bedard wrote that the financial

penalty imposed would have applied had he thought the penalty was a civil one.

The $546,747 penalty amount assessed against Guindon was calculated by adding up the penalties that would have otherwise applied to each of the 134 donors involved in the scheme.

Instead, Bedard ruled the third-party penalty imposed under section 163.2 of the act 'should be considered as creating a criminal offence because it 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*.'

An appeal of the TCC decision was launched by the federal government, culminating in the FCA ruling against Guindon.

'Clearly the court went at the interpretation of the case law in a different manner,' said Guindon's attorney Adam Aptowitzer, a principal with Drache Aptowitzer in Ottawa.

'I think there's an arguable case to be made that the Court of Appeal judgment did not take into account all of the facts that should have been taken into consideration,' Aptowitzer added. 'But if anything it illustrates the ambiguities that exist in the law currently and the need for clarification by the Supreme Court.'

Aptowitzer has applied for leave to the Supreme Court, hoping that a final interpretation for this case can be determined in the nation's highest court.

'What's interesting, I think, is that both the Tax Court of Canada and the Federal Court of Appeal clearly adopted the *Wigglesworth* principles — but applied them in a different manner,' said MacGregor. The FCA felt the penalty was regulatory in nature and that it was necessary to ensure compliance under the *Income Tax Act*, he added.

'It certainly gives the Supreme Court two diverse judgments [and] some real issues to reflect upon because although the *Wigglesworth* principles had been set out earlier, and were accepted by both courts, the issue is largely 'where is the intersection between tax law and the regulatory environment in which it mainly sits, and criminal law?'' MacGregor said.

Matthew Williams, a tax lawyer with Thorsteinssons in Toronto, said he wasn't astonished the FCA overturned the TCC decision, given a number of factors including the way in which the act is constructed, the formulaic nature of its penalties, the lack of discretion in applying them, the kind of conduct it's trying to stop, and the type of integrity in the tax system it is trying to promote.

'They're trying to make sure the act works properly for a self-assessing system,' he said. 'I wasn't surprised when they came back and said, 'no, these [penalties] are not going to engage your constitutional rights.''

Justice Stratas wrote that drawing the line with respect to the act can be a challenge, because it touches all Canadians, but that much of it is largely administrative in character.

'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,' he said. 'However, relief against harsh penalties can potentially be had under a different provision of the *Act*, subsection 220 (3.1).'

'I really don't know how you divorce those two things when it comes to the *Income Tax Act*, because by making sure the act works administratively, that is the very foundation of public order and welfare in our tax system,' said Williams. 'Making sure that system works properly seems to me to be inherently tied to protecting public order and welfare.'

But Aptowitzer argued the act is very broad and contains both a number of administrative provisions, and a number of criminal provisions.

'The unique thing here is that this particular provision [section 163.2] is one which is … seemingly right down the middle. The fact that we have one very strong Tax Court decision, and another Federal Court of Appeal decision in the opposite direction is indicative of the fact that this particular provision is unique,' he said. 'The bottom line is we need the Supreme Court to discuss it.'

Krishna does not expect the Supreme Court will give leave to appeal because he believes the FCA correctly applied the *Wigglesworth* test.

Williams isn't certain.

'I think part of the problem here is that from the Federal Court of Appeal's decision, there wasn't proper notice of the constitutional question given. So I don't know if the Supreme Court will want to hear something where it's really all hypothetical. It might take another case to come up … perhaps with slightly more sympathetic facts to actually take a proper run at this,' he said.

In Williams' opinion, this issue might become more problematic in a future case that involves a 'much more arguable innocent mistake and misrepresentation' than in this instance, which he believes is black and white in terms of culpability.

The Bottom Line approached the federal government for its reaction to the FCA ruling. 'As this matter is still before the courts, and by virtue of the confidentiality provisions of the *Income Tax Act*, the CRA cannot comment on details of this case,' said agency spokesman Philippe Brideau.

Back **Print This Article**