

●●● CRA penalty against lawyer equals criminal sanction: court

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Tax lawyers and advisers now have greater protections from Canada Revenue Agency penalties following an Ottawa lawyer's successful appeal of a more than \$500,000 sanction of her actions in advising on a bogus charitable donation scheme.

In [Guindon v. Her Majesty the Queen](#)

[<http://www.canlii.org/en/ca/tcc/doc/2012/2012tcc287/2012tcc287.html>], the Tax Court of Canada allowed an appeal of the minister of national revenue's decision assessing penalties of \$546,747 against Ottawa lawyer Julie Guindon for statements made in the context of a donation program. The court found the penalties imposed under s. 163.2 of the Income Tax Act amount to criminal sanctions.

Consequently, tax lawyers and advisers prosecuted under this section are able to rely on protections under the Charter of Rights and Freedoms and must be prosecuted through the criminal courts rather than the Tax Court.

The ruling by Justice Paul Bédard also makes it more difficult to prosecute these cases as the higher burden of proof beyond a reasonable doubt applies. It comes as a number of prominent law firms have found themselves in hot water for their advice in questionable charitable donation arrangements. The litigation so far has often involved class actions against the firm that provided the advice.

"I think this is actually quite a favourable outcome for people who have backed abusive donation arrangements," says Adam Parachin, a professor at the University of Western Ontario Faculty of Law. "It's a good outcome for them probably; a negative outcome for taxpayers at large; and, in some ways, a clinic on how not to legislatively draft."

"It's such a negative decision for the tax regulator," he adds.

"Less cases will see the light of day because a decision along the way will be made that they just simply don't have the evidence to meet that greater burden of proof."

With the court's finding that s. 163.2 imposes criminal sanctions, Adam Aptowitz, who was counsel for Guindon, notes there are now protections for people facing prosecution under that section. He says that while the CRA previously had tremendous investigatory powers that required individuals to produce documents, "now they are going to be stopped from doing that and they will have to compel those documents if necessary under warrant and do searches."

Aptowitz says the court's decision is primarily going to affect tax lawyers and accountants. It may also affect law firms that have participated in providing tax opinions on various charitable donation tax shelters.

The court noted that s. 163.2 came about as "a reaction to cases in which individuals had made or been involved in making a false statement as a result of following the faulty advice of a third party" such as a tax lawyer or adviser. The section imposes a penalty on that third party.

Although the section was supposed to act as a deterrent to advisers involved in overly aggressive tax planning, Parachin says the effect of the penalties wasn't what was stopping law firms from advising on these arrangements.

"It can tarnish a firm's brand to be associated with arrangements that are widely regarded within the charitable sector as abusive."

He adds he would be very surprised if law firms that declined to provide advice on charitable donation arrangements in the past will suddenly decide now to advise in favour of them.

The case involved a donation program in which participants were supposed to acquire time-share units as beneficiaries of a trust for a fraction of their value and donate them to a charity in exchange for tax receipts for the actual value of the units. However, the court stated that no donation ever took place as the time-share units never existed and no trust was settled.

Guindon, a lawyer who had no experience in tax law and practised primarily in family and estates matters, prepared an opinion that the donation program's promoters used to attract potential donors. The court noted the opinion was "found to be badly flawed and purported to rely upon documentation which the appellant had never examined (and which, in fact, did not exist)."

Aptowitz says his client had faced pressure to sign the opinion before she had a chance to review the documents.

The decision noted Guindon wasn't only the legal professional responsible for the legal opinion concerning the program

but was also the administrator of the charity who got the organization involved in the program and who signed charitable donation tax receipts.

In relation to signing the receipts, the court said Guindon's "conduct is indicative either of complete disregard of the law and whether it was complied with or not or of wilful blindness. [Guindon] should have refrained from involving the charity and signing the tax receipts until she had either reviewed the documents herself or had another professional approve the program's activities."

The court went on to say that when Guindon issued the receipts, she could have reasonably been expected to know they were tainted by omission as no professional had ever verified the legal basis of the program.

According to the court, Guindon's conduct led to the conclusion that she could reasonably be expected to have known the tax receipts were false statements and the penalty would have been applicable if it were a civil one.

However, the court found that s. 163.2 "should be considered as creating a criminal offence" as it is so far-reaching and broad.

Parachin said in an e-mail that the decision "illustrates how excessively broad drafting can backfire on the government." He added that the section "was presumably left open-ended in order to minimize the scope for tax advisers to skilfully avoid the sanction. But the breadth of s. 163.2 has now come back to haunt the government as it was key to the provision being characterized as a criminal sanction in Guindon."

Aptowitz notes "our feeling has been that the CRA has gone after Ms. Guindon because they wanted the precedent to go after some of the big law firms that have written the opinions. Now, they have a precedent, but it's not the precedent they wanted." He presumes the CRA is going to appeal the decision or rewrite the law in a way that would overcome it.

CRA spokeswoman Mylène Croteau wrote in an e-mail that the agency and the Department of Justice are currently reviewing the decision and have until Nov. 1 to appeal.

Aptowitz notes that in this case, LawPRO didn't cover Guindon's defence "even though the appellant is a lawyer and that's because she wasn't acting in her capacity as a lawyer in signing the receipts." He adds that lawyers who provide tax advice on donation programs may not have insurance to protect themselves from a prosecution for penalties under s. 163.2.

Negative CRA decisions can go beyond Income Tax Act penalties against lawyers. Some situations have prompted class actions against law firms. Last year, Fraser Milner Casgrain LLP settled a class action in relation to the Banyan Tree Foundation gift program. That action followed a negative decision from the CRA about the program. Aptowitz, however, believes the Guindon case won't affect the class actions issue.

For more on this issue, see ["Tax class actions against 2 firms raise key questions."](#)

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