Court File No.: 35519

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N :

JULIE GUINDON

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

-and-

ATTORNEY GENERAL OF ONTARIO and ATTORNEY GENERAL OF QUEBEC

Interveners

FACTUM OF THE RESPONDENT

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PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The appellant, a lawyer and an officer of a registered charity authorized to acknowledge gifts for the purposes of the *Income Tax Act*, recklessly issued 135 false official receipts. Each receipt was to be used by an individual in the computation of their tax as proof of a gift of timeshare units ostensibly acquired through participation in a leveraged donation gifting program.

2. When the Minister of National Revenue discovered that no timeshare units had actually been transferred, each charitable donation tax credit claim was disallowed. The Minister assessed the appellant for administrative penalties under ss. 163.2(4) of the *ITA*, applying the formula in ss. 163.2(5) to each of the 135 false statements to calculate the penalties.

3. No notice of constitutional question was given on the appeal of the assessment to the Tax Court which nevertheless characterized s. 163.2 as a criminal offence requiring the protections of s. 11 of the *Charter*. That judgment had far-reaching substantive and procedural legal consequences. As the Federal Court of Appeal recognized, the effective result would be that the assessment, objection and appeal procedures in the *ITA* would be invalid, inoperable or inapplicable. The failure to provide the required notice of constitutional question was fatal to the jurisdiction of the Tax Court and its decision on the application of the *Charter* is, by that fact, a nullity. The constitutionality of s. 163.2 is not properly before this Court and the appeal must be dismissed for that reason.

4. Even if the Court decides to answer the question, there is no infringement of s. 11 of the *Charter*. The proceedings that flow from an assessment of a s. 163.2 penalty are administrative in nature, intended to deter non-compliance with the *ITA*. They are neither criminal in nature, nor do they involve true penal consequences. When s. 163.2 was enacted, Parliament's intention was to fill a gap in the existing array of compliance measures in the *ITA* and create a civil penalty comparable to the gross negligence penalty under s. 163(2) but applicable to third parties who make or counsel false statements in respect of another person's tax liability. The goal was to

ensure the accuracy of information, honesty and integrity within an administrative system of self-assessment and reporting.

B. SUMMARY OF THE FACTS

5. The respondent accepts the facts stated by the appellant with two exceptions. On these facts, the assertions in paragraph 10, that the administrative penalty in s. 163.2 of the *ITA* can easily exceed the criminal fine in s. 239 of the *ITA*, and in paragraph 15, that a penalty of $1,000 representing the appellant's compensation for preparing the misleading tax opinion was also levied, are both incorrect. The following additional facts are also relevant.

6. The appellant is a lawyer practicing family and wills and estates law.[1] She had no expertise in income tax law when she was approached by promoters of a leveraged donation program in May 2001.[2]

7. The promoters had come up with a charitable donation gifting plan involving a resort in the Turks and Caicos Islands and the Global Trust of Canada, of which they were trustees. They told the appellant that each participant in their program would acquire timeshare units as beneficiaries of a trust, and would donate the units to a charity at a fair market value greater than their cash payment for the timeshares.[3]

8. The promoters wanted the appellant to provide an opinion letter regarding the tax consequences of their charitable donation program from a precedent they provided.[4]

9. She agreed to do so for a fee of $1,000. However, in a July 10, 2001 letter to the promoters accepting the retainer, she recommended that they have a tax lawyer and an accountant review her opinion to ensure its accuracy, as the opinion did not fall within her field of expertise. She also confirmed that she was waiting for the

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[1] Reasons for Judgment of the Tax Court of Canada at para 3, (ASF) at paras 2-3 (Tax Court Reasons) [**AppRecord, Tab 3** at 4].

[2] Tax Court Reasons at para 3, (ASF) at paras 4-5 [**AppRecord, Tab 3** at 4].

[3] Tax Court Reasons at para 3, (ASF) at paras 10-11 [**AppRecord, Tab 3** at 4]; Brennan & Guindon Opinion Letter, Sept. 19, 2001 at para 2 [**AppRecord, Tab 16** at 194].

[4] Tax Court Reasons at para 3, (ASF) at para 8 [**AppRecord, Tab 3** at 4].

promoters to provide her with documents from the Turks and Caicos establishing the program, in order to prepare her opinion.[5]

10. The next day, in her draft opinion letter dated July 11, 2001, addressed to one of the promoters, and in its final executed form of September 19, 2001, the appellant wrote that "this opinion is further addressed to potential donors who are individual Canadian residents who will acquire and hold vacation ownership weeks of capital property." She also wrote that the transactions would be implemented based on listed documents that she stated she had been provided with and reviewed.[6]

11. The promoters pressured the appellant for a signed final legal opinion as they wanted to proceed with the program in time for the 2001 taxation year. She knew that her opinion was intended to become part of their promotional package.[7]

12. Despite not having seen the final supporting documents that she had requested, the appellant nevertheless represented that she had reviewed these materials in her opinion letter and stated that "it is unlikely that the CCRA will challenge the arrangements proposed in the materials that you have provided to us."[8]

13. The appellant was the president and administrator of a registered charity, Les Guides Franco-Canadiennes District d'Ottawa which she involved in the donation program. In November 2001 the charity agreed with the promoters to become the recipient of the donated timeshares. The promoters were to sell the timeshares on behalf of the charity which would receive a minimum return of $500 per unit sold.[9]

14. The promoters said that timeshares had been created and the gifting documents from the ostensible donors to the charity had been completed. However, no such

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[5] Tax Court Reasons at para 3, (ASF) at para 11 [**AppRecord, Tab 3** at 5]; Letter, Brennan & Guindon to Tropical Development International, July 10, 2001 [**RespRecord, Tab 4**, at 8, 9].

[6] Tax Court Reasons at para 3, (ASF) at paras 12-13, 15 [**AppRecord, Tab 3** at 5-6]; Letter, Brennan & Guindon to KGR Tax Services Ltd, July 11, 2001, [**RespRecord, Tab 5** at 10]; Letter, Brennan & Guindon to KGR Tax Services Ltd, Sept. 19, 2001, [**AppRecord, Tab 16** at 192, 193].

[7] Tax Court Reasons at para 3, (ASF) at paras 16-17; para 105 [**AppRecord, Tab 3** at 6, 43].

[8] Tax Court Reasons at para 3, (ASF) at paras 11, 15; paras 75, 81, 105 [**AppRecord, Tab 3** at 5-6, 36, 38, 43]; Brennan & Guindon Opinion Letter, Sept 19, 2001 at paras 1, 12 [**AppRecord, Tab 16** at 192-193, 202]; Reasons for Judgment of the Federal Court of Appeal (Federal Court of Appeal Reasons) at para 10 [**AppRecord, Tab 5** at 50].

[9] Tax Court Reasons at para 3, (ASF) at paras 19-26 [**AppRecord, Tab 3** at 6].

documents ever existed, the donors never had legal title to the timeshares and no transfers from the donors to the charity occurred.[10]

15. The promoters prepared 135 tax receipts with a total receipted amount of $3,972,775. The appellant and the treasurer of the charity signed them. The tax receipts were issued by the charity on December 31, 2001.[11] When signing the tax receipts, the appellant knew that the promoters had used her opinion to confirm the legality of the program. She also knew that her opinion was flawed, misleading and unreliable.[12]

16. The Minister disallowed the charitable donation tax credits that were claimed by the donors but did not assess them for gross negligence penalties for the false statements in their returns.[13]

17. On August 1, 2008 the Minister assessed the appellant for penalties under s. 163.2 of the *ITA* for each of 135 tax receipts issued to participants in the charitable donation scheme on the basis that she knew, or would have known but for wilful disregard of the *ITA*, that the tax receipts issued and signed by her constituted false statements.[14]

18. Section 163.2 authorizes the Minister to assess civil penalties to third parties who knowingly, with wilful blindness or recklessly, make false statements or misleading omissions in respect of another person's tax matters. The section is applicable to persons such as tax return preparers, advisors or tax information providers who knowingly make or assist others in making false statements or who are wilfully blind to obvious errors in the filing of a document (ss. 163.2(4); a good faith reliance defence is available (ss. 163.2(6)). A second civil penalty under s. 163.2 applies to those who make false statements or misleading omissions in the preparation, promotion or sale of tax shelters or tax shelter like plans or arrangements (ss. 163.2(2)) with no good faith reliance defence available (ss. 163.2(7)).

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[10] Tax Court Reasons at para 1, para 3, (ASF) at paras 27, 42-43 [**AppRecord, Tab 3** at 3, 7, 10].
[11] Tax Court Reasons at para 3, (ASF) at paras 28-31 [**AppRecord, Tab 3** at 7].
[12] Tax Court Reasons at paras 105-107 [**AppRecord, Tab 3** at 43].
[13] Tax Court Reasons at para 3, (ASF) at paras 50-51 [**AppRecord, Tab 3** at 11].
[14] Federal Court of Appeal Reasons at para 11 [**AppRecord, Tab 5** at 51]; Tax Court Reasons at paras1-2, para 3 (ASF) at 52, 53, App. A [**AppRecord, Tab 3** at 3, 11-15].

19. Subsection 163.2(5) of the *ITA* quantifies the penalty under ss. 163.2(4) as the greater of $1,000 and lesser of (a) the penalty hypothetically payable by the taxpayer to which the statement relates, usually 50% of the amount of tax sought to be avoided and (b) $100,000 plus the person's gross compensation in relation to the statement. The appellant's penalties were based on the tax avoided, done separately for each of the 135 tax receipts.[15] The formula and calculation of the appellant's penalties under ss. 163.2(5) is shown in Appendix A of the Crown's Tax Court pleadings. The appellant's gross compensation of $1,000 for preparing the tax opinion, ($1,000 coincidentally being the minimum penalty in para. 163.2(5)(a)) is one variable in subpara. 163.2(5)(b)(ii) and the formula used to calculate the ss. 163.2(5) penalty, but was not, as the appellant mistakenly says, a separate penalty "also levied, representing the extent of the appellant's compensation for the preparation of the tax opinion".[16]

20. The penalty for false statements by planners or promoters ranges from a minimum $1,000 to the total compensation the person is entitled to receive in respect of the activity at the time the notice of assessment is sent (ss. 163.2(3)); there are special rules for the calculation if another assessment of the penalty is made at a later time (ss. 163.2(12)). The appellant was not assessed under ss. 163.2(2).

21. The appellant's notice of appeal in the Tax Court did not raise any *Charter* issue. Her lawyer referred to s. 11 of the *Charter* for the first time in oral argument.[17]

PROCEEDINGS IN THE COURTS BELOW

Decision of the Tax Court of Canada

22. The Tax Court identified two issues: (1) whether the third party penalty imposed by s. 163.2 of the *ITA* should be characterized as a civil or a criminal proceeding and (2)

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[15] Federal Court of Appeal Reasons at para 13[**AppRecord, Tab 5** at 51-52].

[16] Reply to Amended Amended Notice of Appeal, Appendix A [**AppRecord**, **Tab 7** at 96]; Appellant's factum at para 15.

[17] Amended Amended Notice of Appeal **[AppRecord, Tab 6** at 74-84**]**.

whether the appellant's conduct was culpable such that she would reasonably be expected to have known the donation receipts were false statements.[18]

23. On the second issue, the Tax Court found that the appellant's conduct was culpable within the meaning of s. 163.2 and the penalty would apply.[19]

24. However, on the first issue, the Tax Court accepted the appellant's argument that s. 163.2 creates an "offence" attracting the protections of s. 11 of the *Charter*.[20] Applying this Court's test in *Wigglesworth*, the Tax Court found that s. 163.2 was both by its very nature a criminal proceeding and involved a sanction that was a true penal consequence.[21]

25. The Tax Court found that s. 163.2 was by its nature a criminal proceeding because the conduct it prohibited was "so far reaching and broad in scope", considering the possibility that a third party could be held liable for a false statement that was never acted on and the striking similarity to the criminal conduct in s. 239 of the *ITA*.[22]

26. The Tax Court also concluded that s. 163.2 qualified as a true penal consequence because, as the Court understood the penalty calculation of ss. 163.2(5), it could potentially be greater than a criminal fine imposed under s. 239 of the *ITA*, and without a cap, the possibility of potentially unlimited false statements gave rise to the possibility of potentially unlimited penalties.[23]

27. Recognizing the far-reaching substantive and procedural legal consequences, the Tax Court concluded that the appellant was entitled to the rights guaranteed by s. 11 of the *Charter*. Because the procedures set out in the *ITA* for challenging the assessment did not provide her with those rights, the Tax Court allowed the appeal.[24]

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[18] Tax Court Reasons at paras 4-8 **[AppRecord, Tab 3** at 16**].**
[19] Tax Court Reasons at paras 108, 112 **[AppRecord, Tab 3** at 43-44**].**
[20] Tax Court Reasons at paras 20, 31, 57, 62, 112 **[AppRecord, Tab 3** at 19, 22, 33, 44**].**
[21] Tax Court Reasons at paras 51-53, 70 [**AppRecord**, **Tab 3** at 29-30, 35].
[22] Tax Court Reasons at paras 44-48, 56-58, 70 [**AppRecord, Tab 3** at 27-28, 35].
[23] Tax Court Reasons at paras 47, 60-63, 66, 68-70 [**AppRecord, Tab 3** at 28, 33-35].
[24] Tax Court Reasons at paras 5, 6, 70, 112 **[AppRecord, Tab 3** at 16, 35, 44**].**

Decision of the Federal Court of Appeal

28. The Court of Appeal allowed the Crown's appeal, holding that the failure to serve a notice of constitutional question deprived the Tax Court of jurisdiction to adjudicate whether s.163.2 of the *ITA* creates an "offence", triggering s. 11 *Charter* rights, for that issue required ruling that some or all of s. 163.2 and the associated assessment, objection and appeal procedures in the *ITA* were invalid, inoperable or inapplicable.[25]

29. The Court of Appeal went further. Relying on *Wigglesworth* and *Martineau* it found that proceedings under s. 163.2 were neither criminal by nature, nor imposed true penal consequences.[26] The Court of Appeal recognized that in a self-assessing and self-reporting tax system, the provision of reliable information to be used in the calculation of tax is essential. Compliance must be maintained and misconduct discouraged through administratively simple sanctions.[27] The imposition of a non-discretionary fixed formula penalty by way of assessment, challenged administratively and appealed to the Tax Court was not the same as being charged with a criminal offence.[28] The nature of the conduct was defined in the *ITA* to set out the elements that must be present before the Minister can assess, not to import a notion of "guilt" or a criminal standard of conduct. [29]

30. The Court of Appeal also rejected the notion that the amount of the potential penalties in s. 163.2 of the *ITA* demonstrated a purpose beyond deterrence to become a true penal consequence, recognizing that administrative monetary penalties may need to be large to deter conduct detrimental to the administrative scheme and avoid being regarded as simply another cost of doing business.[30]

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[25] Federal Court of Appeal Reasons at paras 3, 22-32 [**AppRecord, Tab 5** at 49, 60-63].
[26] Federal Court of Appeal Reasons at para 5 [**AppRecord**, Tab 5 at 49].
[27] Federal Court of Appeal Reasons at paras 38-40 [**AppRecord**, **Tab 5** at 65].
[28] Federal Court of Appeal Reasons at paras 24, 44, 55 [**AppRecord**, Tab 5 at 61, 66, 70].
[29] Federal Court of Appeal Reasons at para 48 [**AppRecord**, Tab 5 at 68].
[30] Federal Court of Appeal Reasons at paras 46-47 [**AppRecord**, **Tab 5** at 67-68].

PART II – POINTS IN ISSUE

31. The Chief Justice has stated the following constitutional questions:

(a) Does s. 163.2 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) infringe s. 11 of the *Canadian Charter of Rights and Freedoms*?

(b) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

32. This Court is not bound to answer these constitutional questions. The appeal should be dismissed because of the appellant's failure to comply with the mandatory requirement of s. 19.2 of the *Tax Court of Canada Act* to serve a notice of constitutional question on the Attorney General of Canada and the attorney general of each province before the question was argued and judgment given at trial.

33. The respondent's position is that the appellant has not been charged with an offence within the meaning of s. 11 of the *Charter* and her s. 11 rights are not engaged.[31]

34. If s. 163.2 of the *ITA* infringes s. 11 of the *Charter* because it is by nature a criminal proceeding or imposes a true penal consequence, the respondent would not seek to uphold it under s. 1 of the *Charter.* Parliament's intention was to extend an existing gross negligence civil penalty regime, to which the existing assessment, objection and appeal procedures of the *ITA* and the *Tax Court of Canada Act* would apply, not create a penal scheme in limitation of s. 11 *Charter* rights. The respondent would not seek to uphold s. 163.2 under s. 1 of the *Charter* in those circumstances.

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[31] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 s 1.

PART III – ARGUMENT

A. STANDARD OF REVIEW

35. The question of whether s. 11 of the *Charter* applies to s. 163.2 of the *ITA* and whether the Tax Court had jurisdiction to decide that question without a notice of constitutional question are questions of law to be reviewed on a standard of correctness.[32]

B. FAILURE TO SERVE A NOTICE OF CONSTITUTIONAL QUESTION

36. Service of a notice of constitutional question in the Tax Court is mandatory when the constitutional validity, applicability or operability of an Act of Parliament is put in question. The notice serves important purposes, and the Federal Court of Appeal correctly interpreted and applied the statutory rule by treating the failure as going to the Tax Court's jurisdiction.

37. Because the judgment that the Tax Court had no jurisdiction to decide the question was the only decision the Federal Court of Appeal could have given, this Court is similarly restricted by s. 45 of the *Supreme Court Act.*[33] As a general rule, the Supreme Court is only authorized to make the disposition that the court appealed from ought to have made.[34] As it did in similar circumstances for the Alberta questions in *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, this Court should decline to answer the constitutional question because "the constitutionality of these provisions was not properly before the Court."[35]

38. The appellant raised s. 11 of the *Charter* for the first time while making her closing argument in the Tax Court, contending that a s. 163.2 *ITA* penalty assessment was criminal in nature or consequence. As Stratas J.A. recognized, the effective result of her argument would be to make the assessment, objection and appeal procedures of

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[32] *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 58, [2008] 1 SCR 190 **[AppBA, Tab 5]**.
[33] *Supreme Court Act*, RSC 1985, c S-26, s 45.
[34] *AG Canada v Canard,* [1976] 1 SCR 170 at 216-217, Beetz J **[RespBA, Tab 1]**; *USA v Lépine*, [1994] 1 SCR 286 at 310 **[RespBA, Tab 110]**; *Eaton v Brant (County) Board of Education,* [1997] 1 SCR 241 at para 55 [*Eaton*] **[RespBA, Tab 32]**; *R v S (PL)*, [1991] 1 SCR 909 at 919(i) **[RespBA, Tab 83]**.
[35] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at paras 1, 18, 61, 262-264, 290, Appendix "C" #3 **[RespBA, Tab 93]**.

the *ITA* (and some of the trial procedures in the *Tax Court of Canada Act* and rules) inoperable or inapplicable.[36] The appellant recognizes these consequences in paragraphs 2, 107, 108, 117 and 118 of her factum yet continues to say no notice of constitutional question is required because she is merely asserting her *Charter* rights by construing a law in its light. Such a distinction was attempted in *Canada (Information Commissioner) v. Canada (Prime Minister)* and rejected by Rothstein J. (as he then was), who would not adjudicate the *Charter* issue based on the arguments made.[37] Also, with no assertion of ambiguity, the interpretive assistance of *Charter* values is precluded.[38]

39. Service of a notice of constitutional question on the Attorney General of Canada and the attorney general of each province as required by s. 19.2 of the *Tax Court of Canada Act* was mandatory before such a judgment could be given.[39] Subsection 19.2(1) reads:

> 19.2 (1) If the constitutional validity, applicability or operability of an Act of Parliament or its regulations is in question before the Court, the Act or regulations shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).
>
> 19.2 (1) Les lois fédérales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour ne peuvent être déclarés invalides, inapplicables ou sans effet, que si le procureur général du Canada et ceux des provinces ont été avisés conformément au paragraphe (2).

40. The Court of Appeal held that the failure to serve the notice in the Tax Court "took away the Tax Court's jurisdiction to consider whether s. 163.2 creates a criminal offence, triggering Ms. Guindon's *Charter* section 11 rights" and concluded that it

[36] Federal Court of Appeal Reasons at paras 25-27, 30-32 [**AppRecord**, **Tab 5** at 62, 63].
[37] *Canada (Information Comm.) v Canada (Prime Minister)* [1993] 1 FC 427 at 81, 86-92 **[RespBA, Tab 15]**
[38] *R v Clarke*, 2014 SCC 28 at paras 12-16 **[RespBA, Tab 67].**
[39] For example, see *Dumont v R*, 2008 FCA 32 at para 3 **[RespBA, Tab 30]**.

was not open to the Tax Court to find that s. 163.2 prescribes a criminal offence such that all the rights of s. 11 of the *Charter* apply.[40]

41. In an appeal from a Tax Court judgment, subpara. 52(c)(i) of the *Federal Courts Act* permits the Court of Appeal to make any order the Tax Court could have made. Having found that the Tax Court did not have the jurisdiction to render its *Charter* decision, the Court of Appeal was similarly without jurisdiction to decide the constitutional issue.[41]

42. All federal and provincial jurisdictions have statutes requiring notice to be given when the constitutionality of legislation is in issue. These notice requirements are described as procedural limitations that serve as conditions precedent to constitutional adjudication and regulate the jurisdiction of a court.[42] Most of these statutes do not expressly state the consequences of proceeding with a trial which finds a statute to be invalid, inoperative or inapplicable without a notice of a constitutional question. As a result, courts, including this Court, have interpreted the notice language of a particular statute and considered whether (i) the requirement is mandatory and any hearing conducted in its absence is a nullity or (ii) failure to give notice renders the proceedings voidable on a showing of prejudice.[43]

43. In *Eaton v Brant (County) Board of Education* Sopinka J. was clear that the absence of notice and a record developed in the courts below are far from technical defects.[44] He stated that because the power of the courts to invalidate laws that contravene the *Charter* is not be exercised except after the fullest opportunity has been given to government to respond, he was "inclined to agree with the opinion" that notice is

[40] Federal Court of Appeal Reasons at paras 3, 22-24, 27-28, 32 **[AppRecord**, **Tab 5** at 49, 60-61, 62, 63**]**.

[41] *Galway v MNR*, [1974] 1 FC 600 at paras 6-10 (FCA) **[RespBA, Tab 35]**; *Sharbdeen v Canada (Minister of Employment & Immigration),* [1994] FCJ No 371 at para 7 (FCA) **[RespBA, Tab 97]**; *Jada Fishing Co v Canada (Minister of Fisheries & Oceans)*, 2002 FCA 103 at para 10 **[RespBA, Tab 42]**.

[42] Peter W Hogg, *Constitutional Law of Canada*, 5th ed, Carswell, 2007 at 58-7, 58-8, 59-22, 59-23 **[RespBA, Tab 123]**, Barry L. Strayer, *The Canadian Constitution and the Courts*, 3rd ed, Butterworths, 1988 at 85-86 **[RespBA, Tab 115]**.

[43] *Eaton*, *supra* note 34 at para 49; *Paluska v Cava*, 59 OR (3d) 469 at paras 15, 20, 21 (CA) [*Paluska*] **[RespBA, Tab 65]**; *Newfoundland (Workplace Health, Safety & Compensation) v Ryan Estate,* 2011 NLCA 42 at paras 19-21, 38, 39, 308 Nfld & PEIR 1, rev'd on other grounds 2013 SCC 44 [*Newfoundland*] **[RespBA, Tab 62]**; *R v Nome*, 2010 SKCA 147 at paras 40, 43,44, 49, 362 Sask R 241 **[RespBA, Tab 78]**.

[44] *Eaton*, *supra* note 34 at paras 48, 53-55.

mandatory and the failure to give it invalidates the decision, whether or not the government shows prejudice (accepting there could be circumstances where, on consent, or with *de facto* notice, the failure to give notice would not be fatal).

44. Sopinka J. said the notice requirement had two related purposes: (i) that governments have full opportunity to support the constitutional validity of their legislation and (ii) to ensure that courts have an adequate evidentiary record in constitutional cases.[45]

45. Other courts have agreed with those purposes, emphasizing that constitutional cases are not to be decided in an evidentiary vacuum and that the evidential foundation should be established at the trial level, rather than at a court of appeal where it would be inappropriate and impractical to tackle the extensive documentary and oral evidence likely to be needed.[46] One salutary effect of the notice is that opposing parties learn that there is a specific constitutional question in issue.[47] Another is that notice alerts provincial attorneys general to challenges made to federal laws that may have an impact on their provinces even though the duty to sustain the constitutionality of these laws is not theirs.[48]

46. The decision on jurisdiction by the Court of Appeal here accords with a line of its decisions holding that the notice of constitutional question provision in s. 57 of the *Federal Courts Act* (found in *Wetzel v. The Queen* to be almost identical to s. 19.2 of the *Tax Court of Canada Act*) is not a mere formality or technicality but is mandatory, and that express the consequence of the failure as preventing the Court from dealing with the merits, precluding judgment, or as going to jurisdiction.[49] That said, many of

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[45] *Ibid* at para 48.

[46] *Bekker v R*, 2004 FCA 186 at paras 14-15 (judicial review) [*Bekker*] **[RespBA, Tab 4]**; *Paluska, supra* note 43 at paras 16, 24 (CA); *N (D) v New Brunswick (Minister of Health and Community Services),* 127 NBR (2d) 383 at para 7 (CA) [*N (D)*] **[RespBA, Tab 60]**; *R v Port Enterprises Ltd,* 1998 NLCA 73 at para 11 (Nfld CA), 169 Nfld & PEIR 315 **[RespBA, Tab 80]**.

[47] *Offshore Logistics Inc v Halifax Longshoremen's Assn, Local 269*, 257 NR 338 at para 58 (FCA) [*Offshore Logistics*] **[RespBA, Tab 63]**; *R v Nome*, *supra* note 43 at para 47.

[48] *Bekker*, *supra* note 46 at paras 9, 12.

[49] *Giagnocavo v R*, 95 DTC 5618 at para 4 (FCA) (judicial review) **[RespBA, Tab 37]**; *Langlois c R*, [1999] 4 CTC 258 at para 1 (FCA) (trial) **[RespBA, Tab 45]**; *Nelson v R*, [2000] 4 CTC 252 at paras 7-9 (judicial review) **[RespBA, Tab 61]**; *Bekker*, *supra* note 46 at para 8; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2004 FCA 66 at para 76, [2004] 3 FCR 436, Sharlow JA in dissent (judicial review), rev'd on other grounds 2005 SCC 69 **[RespBA, Tab 56]**; *Wetzel v R,* 2006 FCA 103 at paras 13-15, 17-18, 31 (FCA) **[RespBA, Tab 112]**; *Sports Interaction v Jacobs*, 2006 FCA 116 at paras 5, 7, 8 (judicial review) **[RespBA, Tab 101]**; *Dumont v R, supra* note 39 at para 3 (trial);

those decisions, like *Bekker v The Queen* to which Stratas J.A. referred, are appeals from judicial review proceedings, where the very nature of those appeals, limited to the record before the judge or board, foreclosed the determination of a new issue.[50]

47. In three appeals from judicial review proceedings, Rothstein J.A. (as he then was) recognized that the Supreme Court decision in *Eaton* had not decided conclusively that adherence to a notice of constitutional question provision was mandatory before the court could decide the question. Without settling the issue, he recognized and favoured the weight of judicial authority adopting that position (except in limited circumstances where the attorneys general consent or where there has been *de facto* notice) and the position that the presence or absence of prejudice is irrelevant.[51] The principles that Rothstein J.A. did distil from *Eaton* and apply in the Court of Appeal were that constitutional arguments should not be raised in a random and unstructured manner and an appeal court had to have the benefit of a record that was the result of a thorough examination of the constitutional issues in the court from which the appeal arose.[52]

48. In *Morine v L & J Parker Equipment Inc.* Cromwell J.A. (as he then was) held that Nova Scotia's *Constitutional Questions Act* required that the Attorney General have the opportunity to be heard prior to any adjudication of invalidity. While a complete failure to give notice would preclude a finding of invalidity, the Nova Scotia Court of Appeal had discretion to permit late notice if there was no prejudice to the Attorney General or other parties to address the substance of the issue.[53]

49. The prevailing view that notice is mandatory has been reflected in court of appeal decisions in New Brunswick,[54] British Columbia,[55] Saskatchewan,[56] Québec[57] and

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Mercier c Canada (Service correctionnel), 2010 FCA 167 at paras 53, 59 (judicial review) **[RespBA, Tab 55].**

[50] *Bekker*, *supra* note 46 at para 11.

[51] *Gitxsan Treaty Society v HEU*, [2000] 1 FC 135 (FCA) at para 10 **[RespBA, Tab 38]**; *Offshore Logistics, supra* note 47 at paras 57-59; *Misquadis v Canada (Attorney General),* 2003 FCA 473 at para 38 [*Misquadis*] **[RespBA, Tab 58]**.

[52] *Misquadis*, *supra* note 51 at para 38; *Offshore Logistics*, *supra* note 47 at 56-57.

[53] *Morine v L & J Parker Equipment Inc*, 2001 NSCA 51 at paras 33-34, 42-47, 193 NSR (2d) 51 **[RespBA, Tab 59]**.

[54] *N (D), supra* note 46 at paras 6-8; *Reference re an Act to Amend the Family Services Act (New Brunswick),* 157 NBR (2d) 241 at paras 10-11 (CA) **[RespBA, Tab 92]**.

Ontario. In *Paluska v Cava* the latter court noted the reservations about the conclusiveness of Sopinka J.'s opinion in *Eaton,* but held that the absence of notice, by itself, renders the decision invalid.[58] However, before finally concluding the order under appeal was invalid, the Ontario Court of Appeal also considered whether there was consent, *de facto* notice and prejudice to the Attorney General (prejudice was found), and concluded with a purposive analysis, finding that the two purposes of the notice requirement – giving government a full opportunity to defend its action and ensuring an adequate evidentiary record in constitutional cases could not be achieved.

50. Recently, a majority of the Newfoundland Court of Appeal in *Newfoundland (Workplace Health, Safety & Compensation Commission) v Ryan Estate* approached the interpretation of s. 57 of its *Judicature Act* purposively and construed the particular language of its notice provision as directory, rather than mandatory.[59] It endorsed the view that a trial decision rendered in the absence of notice is not by that fact itself invalid, but may be voidable in circumstances where the party entitled to notice can be said to be prejudiced as a result of non-compliance. Appeal courts could correct the omission and ameliorate the prejudice by adjourning so that notice could be provided, and by giving the Crown the opportunity to provide additional evidence of background material through legislative facts. The Court also recognized that in other jurisdictions where the notice provisions were worded differently and spelled out the consequences (such as "shall not be adjudged to be invalid or inapplicable") notice is mandatory and non-compliance renders the proceedings a nullity.[60]

51. The Federal Court of Appeal's conclusion here that a decision rendered in the absence of notice to the Crown is *ipso facto* invalid is supported by policy and precedent. There was no jurisdiction in the Tax Court to address the constitutional

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[55] *Citation Industries Ltd v CJA, Local 1928*, [1988] BCJ No 2470 at paras 35-36 (CA) **[RespBA, Tab 19]**.

[56] *R v Nome*, *supra* note 43 at paras 40, 43, 47, 49, 50; *Gorguis v Saskatchewan Government Insurance*, 2013 SKCA 32 at paras 20-41**[RespBA, Tab 39]**.

[57] Denis Ferland and Benoît Emery, *Précis de procédure civile du Québec*, 4th ed, Éditions Yvon Blais, 2003 at 233 **[RespBA, Tab 119]**; *Scierie Amos inc c Lord*, [2000] RJQ 1400 at para 11 **[RespBA, Tab 95]**; *Droit de la famille – 092186*, 2009 QCCA 1712 at para 18 **[RespBA, Tab 28]**; *Code of Civil Procedure* LRQ, c C-25, art 95**[RespBA, Tab 161]**; new *Code of Civil Procedure* RLRQ, c C-25.01, art 76 **[RespBA, Tab 162]**.

[58] *Paluska*, *supra* note 43 at para 24, *Gitxsan Treaty Society v HEU*, *supra* note 51 at paras 23-24.

[59] *Newfoundland*, *supra* note 43 at paras 19-21, 38, 39, 41, 45, 47, 50, 51-53.

[60] *Ibid* at para 47.

question presented. Even if the consequence of non-compliance with the notice requirement is to be tested against prejudice which a court of appeal can in some manner correct, by the time the matter reaches this Court, "the absence of notice and the absence of a record developed in the courts and tribunals below are far from technical defects."[61] For Justice Sopinka, prejudice is found in this Court not having the benefit of a full and thorough examination of the constitutional issues in the trial and appellate courts where the appeal arose.[62]

52. Given the mandatory language of s. 19.2 of the *Tax Court of Canada Act,* just as the Court of Appeal found, this Court should dismiss the appeal because the constitutionality of s. 163.2 is not properly before it.

C. SECTION 11 IS NOT ENGAGED

53. If this Court does not accept the Crown's argument above, the focus turns to s. 11 of the *Charter*.

54. Section 11 of the *Charter* is not engaged. Proceedings which flow from the assessment of a s. 163.2 penalty are administrative in nature and intended to deter non-compliance with the *ITA*. They are neither by their nature criminal, nor do they involve true penal consequences. The rights contained in s. 11 are available to persons who are charged with a criminal offence.[63] In *Blencoe*, this Court cautioned against importing s. 11 rights into civil or administrative proceedings.[64]

55. This Court's decision in *Wigglesworth* established that two types of proceedings can attract the protections of s. 11 of the *Charter*: proceedings which are by their very nature criminal, and proceedings involving true penal consequences.[65] This Court further elaborated that "proceedings of an administrative nature instituted for the

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[61] *Eaton*, *supra* note 34 at para 55.
[62] *Ibid* at para 48.
[63] *R v Potvin*, [1993] 2 SCR 880 at 887(g) per McLachlin J (as she then was) **[RespBA, Tab 81]**.
[64] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 88, [2000] 2 SCR 307 [*Blencoe*] **[RespBA, Tab 8]**.
[65] *R v Wigglesworth*, [1987] 2 SCR 54 at 559(a-c) [*Wigglesworth*] **[RespBA, Tab 88]**; 21, [2004] 3 SCR 737 [*Martineau*] **[RespBA, Tab 52]**; *Whaling v Canada (Attorney General)*, 2014 SCC 20 at paras 44-49, [2014] 1 SCR 392 **[RespBA, Tab 11]**.

protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable."[66]

56. The appellant would have this Court construe s. 11 in a novel and expansive manner to prevent "grave social and personal consequences, including social stigma and ostracism from the community as well as ... economic harm from being inflicted on Canadians without the procedural protections that are their solemn right."[67] Support for such an expansive approach to s. 11 is absent.[68] In any event, such an approach significantly overshoots the section's purpose.[69]

1) S. 163.2(4) assessment is not by its nature criminal

57. As set out by this Court in *Martineau*, the question of whether a proceeding is by its nature criminal is to be determined by reference to three factors:

    (i) the objective of the statute and provision in question;

    (ii) the purpose of the sanction; and

    (iii) the process leading to the sanction.[70]

58. In the present case, each of these factors militate against a finding that s. 11 is engaged. The trial judge made only passing reference to *Martineau* and ignored this Court's direction that these three factors be examined.[71] The Federal Court of Appeal rightly overturned the trial judge's decision.

i. Objectives of the Act and of s. 163.2(4) are administrative and regulatory

59. The general objective of the *ITA* is to regulate the collection of income tax, a crucial source of funds for the federal government,[72] and for this reason the *ITA* has been

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[66] *Wigglesworth*, *supra* note 65 at 560(f); *Martineau v MNR*, *supra* note 65at para 22.
[67] Appellant's factum at para 39.
[68] *Trumbley and Pugh v Metropolitan Toronto Police,* [1987] 2 SCR 577 referring to the decision of the OCA at 579(h-j)-580(a-c)**[RespBA, Tab 108]**. *Trumbley v Metropolitan Toronto Police* 1986 CarswellOnt 2250 (OCA) at paras 64-66 **[RespBA, Tab 107]**.
[69] *Wigglesworth*, *supra* note 65 at 552(b), quoting from *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344.
[70] *Martineau*, *supra* note 65 at para 24.
[71] Tax Court Reasons at paras 39, 55 **[AppRecord Tab 3** at 25, 31**]**.
[72] *R v McKinlay Transport Ltd*, [1990] 1 SCR 627 at 636(g) **[***McKinlay Transport***]** **[RespBA, Tab 74]**; *R v Jarvis*, 2002 SCC 73 at para 48, [2002] 3 SCR 757 **[RespBA, Tab 70]**.

recognized by this Court as essentially a regulatory statute and of an administrative nature.[73]

60. The *ITA* is also used by Parliament to provide incentives in various private spheres of activity,[74] such as allowing registered charities to issue tax receipts.[75] The receipts enable donors to obtain non-refundable tax credits calculated on the value of their gifts. This tax incentive encourages private financial support of certain activities that are beneficial to the community.[76]

61. In *Martineau*, this Court equated taxation legislation with economic regulation; in *Stubart* this Court saw the *ITA* as "an instrument of economic and fiscal policy for the regulation of commerce and industry of the country through fiscal intervention by government".[77]

62. Due to the self-assessing and self-reporting nature of the Canadian tax system, Parliament's objectives can only be achieved if tax returns are honestly completed, accurate and truthful,[78] and in the case of charitable donations, tax receipts are accurate and issued in a responsible manner, reflecting actual contributions made by the donor. To ensure these objectives are achieved, tax receipts must, by regulation, contain prescribed information, recorded in such a manner as to ensure that it cannot readily be altered, and bear the signature of a responsible individual who has been authorized by the charity to acknowledge gifts received.[79] The charity must maintain books and records containing a duplicate of each receipt and such other information in such form as will enable the Minister to verify the donations for which a deduction or tax credit is available under the *ITA*. Moreover, the charity is subject to audit by

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[73] *R v Jarvis*, *supra* note 72 at paras 48, 99; *Del Zotto v Canada*, [1997] 3 FC 40 at para 56 (FCA), per Strayer J in dissent **[RespBA, Tab 26]**; aff'd [1999] 1 SCR 3 at para 1 **[RespBA, Tab 27]**; *McKinlay Transport*, *supra* note 72 at 641(a), 648(b-j)**.**

[74] *Stubart Investments Ltd v R*, [1984] 1 SCR 536 at 573(j)-574(a), 575(i-j)-576(a-c) **[RespBA, Tab 103]**.

[75] *Income Tax Act*, RSC 1985, c 1 (5th Supp), ss 118.1(1)(*a*) "total charitable gifts", 118.1(2)(*a*) and 118.1(3) [*ITA*] **[RespBA, Tab 168]**. See also *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency),* 2007 SCC 42 at para 6, [2007] 3 SCR 217 **[RespBA, Tab 3]**.

[76] Vern Krishna, *The Fundamentals of Canadian Income Tax*, 10th ed (Toronto: Carswell, 2009) at 511 **[RespBA, Tab 127]**.

[77] *Martineau*, *supra* note 65 at para 87; *Stubart, supra* note 74 at 574(a).

[78] *McKinlay Transport, supra* note 72 at 636(i), 637(a), 648(d); *R v Jarvis, supra* note 72 at paras 50, 51.

[79] *Income Tax Regulations*, CRC c 945, s. 3501(1), 3501 (1)(i), 3501(1.1) **[RespBA, Tab 169]**.

the Minister both in respect of the validity of its own status as a charitable organization under the *ITA* and the legitimacy of the donations it receives.[80]

63. Recognizing that some persons will attempt to take advantage of the system and violate the rules to avoid their full tax liability, Parliament has given broad power to the Minister to administer and enforce the *ITA*, including the power to pursue civil and criminal penalties.[81] These powers are given for the "instrumental" reason of ensuring compliance with the regulatory scheme of the Act.[82] This Court's decision in *Knox Contracting*, upon which the trial judge and appellant placed reliance in order to emphasize the supposed criminal law character of s. 163.2, is a division-of-powers case, and of limited assistance in the present context.[83]

64. The civil penalties in the *ITA* are intended to have a deterrent effect, being designed to govern the conduct of persons with a view to ensuring compliance with the tax legislation. This is reflected in the following excerpt from this Court's decision in *Jarvis*:

> For example, in promotion of the scheme's self-reporting aspect, s. 162 of the ITA creates monetary penalties for persons who fail to file their income returns. Likewise, to encourage care and accuracy in the self-assessment task, s. 163 of the Act sets up penalties of the same sort for persons who repeatedly fail to report required amounts, or who are complicit or grossly negligent in the making of false statements or omissions.[84]

65. Inducements to compliance play an important role, particularly having regard to the proliferation of tax shelter donation schemes.[85] In Canada, as of December 31, 2012, such schemes had attracted approximately 204,000 participants with $6.4 billion in

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[80] *ITA*, s 230(2)(b), (c). According to para (b) of the definition of "qualified donee" in s 149.1(1) of the *ITA*, a "registered charity" is a "qualified donee", and as such, is subject to the record keeping obligations imposed by s 230(2) of the *ITA* **[RespBA, Tab 168]**; *Redeemer Foundation v Minister of National Revenue*, 2008 SCC 46 at paras 12-13, 17-19, 23-27, [2008] 2 SCR 643, per McLachlin CJ and LeBel J **[RespBA, Tab 90]**.

[81] *R v Ling*, 2002 SCC 74 at para 3, [2002] 3 SCR 814 **[RespBA, Tab 72]**; *Martineau*, *supra* note 65 at paras 26-30; *McKinlay Transport*, *supra* note 72 at 650(g), per La Forest.

[82] *Del Zotto*, *supra* note 73 at para 65 (FCA). See also *McKinlay Transport*, *supra* note 72 at 641(a), 650(h) per Wilson and Laforest JJ and *R v Jarvis*, *supra* note 72 at para 57.

[83] Appellant's factum at para 20; *R v Jarvis*, *supra* note 72 at paras 59, 60.

[84] *R v Jarvis, supra* note 72 at para 50.

[85] OECD, "Study into the Role of Tax Intermediaries" (2008) at 17-21 **[RespBA, Tab 153]**.

donations reported.[86] As of January 14, 2014, more than $5.9 billion in donation claims had been denied, over 182,000 taxpayers had been reassessed, the charitable status of 47 charitable organizations revoked and $137 million in third-party penalties against the promoters and tax preparers involved had been assessed.[87]

66. The administrative gross negligence penalty in s. 163(2) of the *ITA* allows the Minister to assess a penalty against a taxpayer who knowingly, or under circumstances amounting to gross negligence, makes a false statement in a return by using a false charitable donation tax receipt.[88] The trial judge agreed that the gross negligence penalty is a civil penalty, consistent with longstanding authority holding that such penalties do not attract the protection of section 11 of the *Charter*.[89]

67. As has been the case with s. 163(2) penalties, courts and administrative tribunals have repeatedly upheld the use of administrative monetary penalties, particularly in the sphere of economic regulation, as an appropriate regulatory tool that does not engage s. 11 of the *Charter*.[90] Contrary to the appellant's argument, s. 163.2's targeting of third parties is not a departure from the *ITA*.[91] Third parties such as employers, corporations, banks, charities and tax shelter promoters are required to file

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[86] J. Paul Dubé, (Taxpayers' Ombudsman), "Donor Beware: Investigation into the Sufficiency of the Canada Revenue Agency's warnings about questionable tax shelter schemes" (Dec 2013) at 25-26 ["Donor Beware"] **[RespBA, Tab 139]**; see also *Report of the Auditor General to the House of Commons* (Fall 2010), chapter 7: Registered Charities at para 7.66 **[RespBA, Tab 145]**.

[87] Donor Beware, *supra* note 86 at 25-26; Canada Revenue Agency News Release, Jan 10, 2014 **[RespBA, Tab 141];** *Lipson v Cassels Brock & Blackwell LLP*, 2013 ONCA 165 at paras 2-6 **[RespBA, Tab 48]**.

[88] The amount of the penalty is the greater of $100 and 50% of the federal non-refundable tax credit claimed. See *ITA,* ss. 118.1(3), 248(1) "appropriate percentage" and 117(2) **[RespBA, Tab 168]**.

[89] Tax Court Reasons at paras 55-56 **[AppRecord, Tab 3 at 31]**; *R v Yes Holdings Ltd* (1987), 83 AR 81 at paras 20, 22 (Alta CA) **[RespBA, Tab 89]**; *Lavers v British Columbia (Minister of Finance)* (1989), 90 DTC 6017 at paras 89-95 [*Lavers*] **[RespBA, Tab 47];** *Sommers v Minister of National Revenue*, 91 DTC 656 at para 28 **[RespBA, Tab 100]**; *Cranston v R*, 2011 FCA 5 at para 7 **[RespBA, Tab 25]**; *R v Sharma*, 87 DTC 5424 at paras 3-4 **[RespBA, Tab 84]**; *Besner v R*, 2009 FCA 311 at para 8 **[RespBA, Tab 6].**

[90] *Rowan, (Re)*, 2012 ONCA 208 at para 49 **[RespBA, Tab 94]**; *Sextant Capital Management Inc, (Re)* (2011), 34 OSCB 5863 at paras 194-208, aff'd 2014 ONSC 2467 (Div Ct) [*Sextant*] **[RespBA, Tab 96]**; *Alberta Securities Commission v Brost*, 2008 ABCA 326 at paras 56-57 **[RespBA, Tab 2]**; *Lavallee v Alberta (Securities Commission)*, 2010 ABCA 48 at para 23 **[RespBA, Tab 46]**; *Canada (Attorney General) v United States Steel Corp*, 2011 FCA 176 at paras 52, 53 [*US Steel*] **[RespBA, Tab 10]**; *Reference re Petroleum Products Act (PEI)* (1986), 62 Nfld & PEIR 1 (PEI CA) at paras 8-12 **[RespBA, Tab 91]**; *Commissioner of Competition v Gestion Lebski*, 2006 Comp Trib 32 at paras 50-52, 58-60, 70 **[RespBA, Tab 13]**; *Canada (Commissioner of Competition) v Chatr Wireless*, 2013 ONSC 5315 at paras 548-549, 558 [*Chatr Wireless*] **[RespBA, Tab 12]**.

[91] Appellant's factum at paras 3, 44, 56.

information returns and to produce other information to enable the Minister to verify taxpayer compliance.[92] The person from whom information is sought need not be someone whose tax liability is under investigation, nor is the Minister precluded from requiring production of information that may disclose private transactions involving persons who are neither under investigation nor liable to tax.[93]

68. The class regulated under the *ITA* is not limited to taxpayers who file tax returns or who are liable to pay tax as residents of Canada.[94] As the president of a charity which issued 135 donation receipts for alleged donations of property valued at $3,972,775, the appellant was unquestionably "engaged in an activity which the tax system purports to regulate", and accordingly, was part of the "regulated class" as the appellant herself defines it.[95]

ii. Purpose of s.163.2 is to deter non-compliance, not to redress wrongs done to society or to promote public order

69. In enacting s. 163.2 in 2000, Parliament's intention was to create a civil penalty comparable to that under s. 163(2) of the *ITA*, but applicable to third parties who make or counsel false statements in respect of another person's tax liability.[96] The Department of Finance Technical Notes which accompanied the provision mentioned the availability of criminal sanctions where a person participates in tax evasion in respect of their or another person's taxes, and noted that "Canadian tax law has not provided clear rules for assessing civil penalties for making or counselling false statements in respect of another person's tax liability."[97]

70. The Technical Notes also referred to the report of the Technical Committee on Business Taxation, submitted to the Minister of Finance in December 1997 and

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[92] *McKinlay Transport Ltd*, *supra* note 72 at 636(h); *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 49 **[RespBA, Tab 102]**; *ITA*, s 221(1)(d)-(e), 237.1(5), (7), (7.4), (7.5); 237.3(2)(c), (8); 233.1(1), (2); 233.6(1), (2); 162(5), (7), (10); 150.1(2.2), (2.3); 66(12.68), (12.75); 230.1(1), (2); 204.86(1), (2); 153(1); 147.1(7), (16); 146.1(13.1) **[RespBA, Tab 168].**

[93] *McKinlay Transport Ltd*, *supra* note 72 at 639(d-j); *Redeemer Foundation, supra,* note 80 at paras 16, 17, 19, 24, 25, 27.

[94] Appellant's factum at paras 3, 47, 48.

[95] Appellant's factum at paras 47-48. See "TOTAL" of "Amounts Receipted" in App. A to Agreed Statement of Fact, **[AppRecord, Tab 3** at 15]; see *US Steel, supra* note 90 at para 53.

[96] Tax Court Reasons at para 66 **[AppRecord Tab 3** at 34**]**. See also paras 36-37, 92-94.

[97] *Department of Finance Technical Notes (Income Tax)* s 163.2 (Dec 7, 1999 TN (budget)) **[AppBA, Tab 21** at page 2**]**. See also *Canada Trustco Mortgage Co v Canada*, [2005] 2 SCR 601 at para 15 **[RespBA, Tab 14]**.

released to the public on April 6, 1998 (the "Mintz report").[98] The Mintz report had referred to the absence of civil sanctions discouraging third parties from engaging in inappropriate tax avoidance schemes, and advocated "more effective penalties to deter the promotion of, and participation in, inappropriate tax-avoidance schemes."[99]

71. The Auditor General made a similar recommendation in a 1996 report, noting the pressures placed by abusive tax shelters on the tax system and on scarce audit resources. It observed that Canadian law did not contain a penalty for promoting an abusive tax shelter and noted that "[p]romoters of abusive tax shelters bear virtually no risks" and are "left untouched", unlike the situation in the United States, where legislation had been enacted in 1982 permitting the IRS to assert penalties against anyone who organizes, promotes or sells an abusive tax shelter.[100]

72. In February 1997, the House of Commons Standing Committee on Public Accounts urged Revenue Canada and the Department of Finance "to take prompt steps to introduce penalties for promoters of abusive tax shelters."[101] In June 1998, the Auditor General supported the Mintz report's recommendation,[102] and in December 1998 again raised the issue of third party penalties, commenting on the absence of a response from the Department of Finance to the Mintz report.[103]

73. Prior to enacting s. 163.2, the Minister was restricted to prosecutions under s. 239 of the *ITA* or for fraud if he or she sought to hold tax advisors and promoters of abusive tax avoidance schemes accountable for the consequences of their misstatements or omissions. Each of the Auditor General, the Standing Committee on Public Accounts,

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[98] *Report of the Technical Committee on Business Taxation* (Ottawa: Department of Finance, April 1998) [Mintz Report]**[AppBA, Tab 22]**.

[99] Mintz Report at 10.12, *supra* note 98.

[100] *Report of the Auditor General to the House of Commons* (May 1996), Chapter 11 at paras 11.62-11.70 **[RespBA, Tab 142]**. *Tax Equity and Fiscal Responsibility Act of 1982*, Report of the Committee on Finance United States Senate on HR 4961, pt. 1 (1982) at 266, 275 **[RespBA, Tab 154]**For a similar observation by an Australian court, see *Commissioner of Taxation of the Commonwealth of Australia v Ludekens*, 2013 FCA 142 at para 3, rev'd 2013 FCAFC 100 (AustLII) **[RespBA, Tab 20]**.

[101] House of Commons, The Standing Committee on Public Accounts, Reports to the House, *Fourth Report*, 10 February 1997 at 3(Chair: Michel Guimond) **[RespBA, Tab 137]**.

[102] Report of the Auditor General of Canada to the House of Commons and to the Ministers of Finance and National Revenue: Examination of the Requirement to Report Specified Foreign Property Under Section 233.3 of the *Income Tax Act*, (June 1998) at 22, para 42 **[RespBA, Tab 143]**.

[103] Report of the Auditor General to the House of Commons (Dec 1998) at paras 28.177-28.178 **[RespBA, Tab 144]**.

and the Mintz report expressed the need for a more effective deterrence mechanism to address blameworthy conduct. The problem had been illustrated in numerous cases in which gross negligence penalties imposed upon taxpayers were vacated by the court on the basis that the taxpayers relied on advisors who may well have been grossly negligent, but the taxpayers themselves were not.[104]

74. Section 163.2 was a response to these concerns. Parliament sought to extend existing civil penalties such that third parties could be sanctioned civilly rather than just criminally. Section 163.2 was intended to deter the making or counselling of false statements by third parties (not "incorrect documents" as the appellant describes them),[105] to discourage the promotion of and participation in abusive tax avoidance schemes and achieve greater tax fairness.[106] As noted by the Auditor General, abusive tax avoidance schemes are commonly based on false statements or omissions concerning alleged business activity, the value of assets, or the amounts invested by participants in circumstances where the investors themselves are typically not responsible for the false statements and omissions.[107]

75. Contrary to the appellant's contention, Parliament's intention in enacting s. 163.2 was not to punish tax advisors, lawyers and accountants or to condemn their activities, nor was it intended as a tool to recover unpaid tax.[108] Section 163.2 was intended to fill a gap in the existing array of compliance measures. Like those other measures, the overriding objective is one of deterring non-compliance. As stated by Justice Stratas:

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[104] For example, *Udell v Minister of National Revenue*, 70 DTC 6019 at paras 47-50 **[RespBA, Tab 109]**; *Venne v R*, 84 DTC 6247 at paras 17, 38 (FCTD) **[RespBA, Tab 111]**; *Findlay v R*, 2000 DTC 6345 at paras 24-27 **[RespBA, Tab 34]**.

[105] Appellant's factum at para 1.

[106] Department of Finance Technical Notes, s 163.2, 1999 Budget Supplementary Information, Dec 7, 1999 Technical Note, *supra* note 97 at 2; See also Report of the Auditor General of Canada (Spring 2014) at 3.35-3.37 **[RespBA, Tab 146]**.

[107] Report of the Auditor General to the House of Commons (May 1996), c 11, paras 11.60, 11.69, *supra* note 100; *Fourth Report* of the House of Commons Standing Committee on Public Accounts (Feb 10, 1997), *supra* note 101; Information Circular 01-1, "Third Party Civil Penalties" (Sept 18, 2001), Foreword, para 15 [IC 01-1] **[AppBA, Tab 23]**. *Isaza v R*, [2002] 3 CTC 2107 at para 25 **[RespBA, Tab 41]**. See also *Therrien c R*, [2002] 3 CTC 2141 at para 25 **[RespBA, Tab 105]**; *Côté v R*, 99 DTC 72 at paras 171, 210 **[RespBA, Tab 24]** and *Marcoux-Côté v Canada*, [2000] FCJ No 1805 at paras 21-26 **[RespBA, Tab 50]**.

[108] Appellant's factum at paras 44,74, 77-78.

> 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.[109]

76. It is not uncommon in regulatory statutes for the same conduct to be the subject of both criminal and civil sanctions, and this is true of the *ITA* as well.[110] Analogously, acts which are criminal can also give rise to a civil action.[111] It is of little consequence that the language of s. 163.2 is, as the appellant observes, "similar to the language of the criminal offence created in section 239".[112] The *Charter* does not preclude civil and criminal consequences flowing from the same conduct.[113] The language of the gross negligence penalty in s. 163(2) of the *ITA* is also very similar to the language in the criminal offence provisions. Even where the mental element required to establish liability under each of the civil and criminal provisions is identical in a particular case, it has been held that an acquittal on the criminal charges does not render the issue of *mens rea* with respect to the civil penalty *res judicata*.[114] In considering the policy dimension behind criminal/civil distinction for contraventions, the Australian Law Reform Commission refers to regulatory theorists warning against the over-use

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[109] Federal Court of Appeal Reasons for Judgment at para 42 [**AppRecord, Tab 5** at 66] .

[110] *ITA,* s 163(2), s 239(1); 162(1), 238(1) **[RespBA, Tab 168]**. *Wigglesworth*, *supra* note 65 at 566(c-i); *R v Shubley*, [1990] 1 SCR 3 at 19(a-j)-20(a-i), per McLachlin J (as she then was) **[RespBA, Tab 85]**; *Martineau*, *supra* note 65 at paras 31-32; *R v Tiffin*, 2008 ONCA 306 at paras 129-134 **[RespBA, Tab 86]**; *R v Klundert*, 190 OAC 36 at para 32 **[RespBA, Tab 71]**; *MNR v Panko*, [1972] SCR 319 at 321-323, per Judson J **[RespBA, Tab 57]**; *R v Hamilton*, [2006] GSTC 104 at para 43 **[RespBA, Tab 68]**; *Sextant*, *supra* note 90 at paras 200-201**;** *Ontario (Attorney General) v Chatterjee*, 2007 ONCA 406 at para 41, 86 OR (3d) 168 (OCA), aff'd [2009] 1 SCR 624 [*Chatterjee*] **[RespBA, Tab 64];** *Libman on Regulatory Offences in Canada* (Earlscourt Legal Press Inc) at 2-7 **[RespBA, Tab 126]**.

[111] *BG Checo International Ltd v. British Columbia Hydro and Power Authority*, [1993] 1 SCR 12 at 75(a-c) **[RespBA, Tab 7]**.

[112] Appellant's factum at para 4; see also Appellant's factum at para 53.

[113] *Martineau, supra* note 65 at paras 31-32.

[114] *ITA*, s 239(1)(a), (c) **[RespBA, Tab 168]**; *Dwyer v R*, 2003 FCA 322 at para 39 **[RespBA, Tab 31]**.

of the criminal law in the regulatory area.[115] Further, this Court recognized in *Jarvis* that the Crown should not be required to resort to criminal prosecution in every case in which there is evidence of culpable conduct.[116]

77. Since enactment, the Canada Revenue Agency ("CRA") has made use of the provision: by 2010, assessments had been raised under s. 163.2 relating to false invoices and fictitious expenses, fictitious business losses, fictitious farm losses and RRSP strips.[117] The Auditor General has reported that from 2010 to 2013, CRA recommended the application of s. 163.2 penalties to its CRA Third Party Penalty Review Committee in 118 cases. Of those cases, 48 were approved, 22 were denied and 48 were still being considered. The total amount of penalties assessed in the 48 approved cases was $63.3 million; the median penalty was $440,000. Although the Auditor General could not measure the extent to which penalties were a deterrent, he concluded that their use probably had some impact on the behaviour of promoters and tax preparers.[118]

(a) "Culpable conduct" does not convert an administrative penalty into a criminal offence

78. Choosing to focus on the nature of the prohibited conduct rather than on the nature of the proceeding in question, the appellant points to the concept of culpable conduct as an indication that the provision is "classically criminal in nature."[119] "Culpable conduct" is required to be found only in those instances in which the creation or provision of the false statement or omission is not done knowingly. It is not a definition of conduct which is sought to be punished. It serves as a proxy for conduct which fails to meet an expected standard of care.

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[115] Australian Law Reform Commission, Principled Regulation, Report*, Federal Civil and Administrative Penalties in Australia*, Report 95, December 2002, ss 3.36-3.68 [Australia Law Reform Commission] **[RespBA, Tab 151]**.

[116] *R v Jarvis*, *supra* note 72 at para 89. See also *Wilder v Ontario (Securities Commission)* (2001), 53 OR (3d) 519 at paras 18, 23-24 **[RespBA, Tab 113]**, and *City National Leasing v General Motors of Canada Ltd*, [1989] 1 SCR 641 at 687(a-c)-688(g-j) **[RespBA, Tab 36]**.

[117] Chartered Accountants of Alberta, Member Advisory, October 2010, 2010 Canada Revenue Agency (CRA) Tax Roundtable, Question 10, Civil Penalties – s. 163.2 **[RespBA, Tab 117]**.

[118] Report of the Auditor General (Spring 2014), *supra* note 106 at 3.35-3.37.

[119] Appellant's factum at para 79.

79. The legislative history of s. 163.2 indicates that "culpable conduct" was not intended to be different from the gross negligence standard in s. 163(2). The draft version of s. 163.2 presented in the February, 1999 Budget Plan included the "gross negligence" standard as proposed in the Mintz report.[120] During post-budget consultations, concerns were expressed by professional bodies that the proposed civil penalty could apply in cases where a tax professional makes an honest error of judgment or where there is an honest difference of opinion.[121] To address these concerns, the concept of "culpable conduct" was substituted for the concept of "gross negligence" in the September, 1999 legislative proposals. Under the September proposals, a definition of "culpable conduct" was supplied that referred to the types of conduct described in prior gross negligence penalty cases such as *Venne* and *Malleck*, as confirmed by the Parliamentary Secretary to the Minister of Finance during committee hearings.[122] Consistent with the legislative proposals of September, 1999, the trial judge found that "culpable conduct" was defined by reference to the types of conduct to which the courts had, in the past, applied the gross negligence penalty under the *ITA*.[123]

80. In contrast with true criminal offences, the purpose for including administrative monetary sanctions in regulatory statutes, like the purpose for including regulatory offences, is that of deterring non-compliance and the prevention of harm through the enforcement of minimum standards of conduct and care.[124] In the present context, the

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[120] *The Budget Plan 1999* (Ottawa: Department of Finance, February 16, 1999) at Annex 7, at 205-207, 240-241 **[RespBA, Tab 149]**.

[121] Department of Finance, Technical Notes, s. 163.2, December 7, 1999 TN (budget), *supra* note 106 at 2; Department of Finance letter to CICA & CBA dated July 30, 1999 *supra* note 97 at 5; testimony provided by R. Cullen, Parliamentary Secretary to the Minister of Finance, Standing Committee on Finance, Evidence, May 18, 2000 [Cullen testimony] **[RespBA, Tab 148]**, Proceedings of the Standing Committee on Banking, Trade & Commerce, June 21, 2000 [Cullen Testimony] **[RespBA, Tab 147]**. See also Institute of Chartered Accountants of Alberta, "Regulation Update" (June 2000), "Finance Canada Questions and Answers", Question 2 and Answer thereto, page 4 **[RespBA, Tab 121]**.

[122] Cullen testimony June 21, 2000, *supra* note 121; *Venne v R*, *supra* note 104 at paras 37, 40; *Malleck v R*, 98 DTC 1019 at paras 7-10 (TCC) **[RespBA, Tab 49]**. See also *Sirois v Canada*, [1994] TCJ No 1253 at paras 9-11 **[RespBA, Tab 98]**, referred to in Information Circular 01-1, *supra* note 107 at para 26. The definition in *Venne* was adopted by the Federal Court of Appeal in *Zsoldos v R,* 2004 FCA 338 at para 21 **[RespBA, Tab 114]**, and referred to in *Chabot c R*, 2001 FCA 383 at paras 18-19 **[RespBA, Tab 18]** and *Dwyer*, *supra* note 114 at para 31. See also *McCulloch v Murray* [1942] SCR 141 per Duff C.J. at 145 **[RespBA, Tab 53]**.

[123] Tax Court Reasons at paras 36-37, 92-94 **[AppRecord**, **Tab 3** at 24-25, 40**]**. See also Bruce Russell, "Note re Some Practical Aspects of the Tax Advisor Civil Penalties", (Paper delivered at the 2001 Atlantic Provinces Tax Seminar, 3 November 2001) [unpublished] at 3, 5 **[RespBA, Tab 116]**.

[124] *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154 at 219(a-c), per Cory J **[RespBA, Tab 87]**; see also *Québec (Autorité des marchés financiers) c Souveraine, cie d'assurance générale*, 2013 SCC 63 at

harm consists not merely in harm to taxpayers and to the tax system, but harm to an economic policy designed to support the charitable sector more generally, as a result of incredulous donors and a potentially diminished flow of donations.[125]

81. The presence of a mental element such as "knowingly" in an administrative penalty such as s. 163(2) or 163.2 of the *ITA* is fully compatible with the deterrence purpose that is characteristic of regulatory statutes, and does not transform such purpose into a quintessential criminal law.[126] Parliament is free to impose an administrative penalty as its chosen instrument to promote compliance on a wide range of conduct, from the knowing to the inadvertent.

82. Section 163.2 shares the same deterrence objective which inspires the civil sanction in s. 163(2) of the *ITA*, and contrary to the appellant's suggestions, does not amount to a "departure from the general purpose of the Act."[127] In particular the use of the phrase "culpable conduct" in s. 163.2 did not signal a departure from Parliament's compliance objective into one of singling out and punishing those persons falling within s. 163.2's ambit for wrongs done to society.

(b) A penalty which is imposed "ex post" and to generally deter is administrative in nature

83. A penalty which is imposed "ex post" and for purposes of general deterrence is not indistinguishable from a criminal offence.[128] The appellant's submission misunderstands criminal law which has a number of purposes in addition to general deterrence, including the public expression of societal disapproval and moral

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para 32, [2013] 3 SCR 756 [*Souveraine*] **[RespBA, Tab 44]**; *Canada (Procureure générale) v Hydro-Québec*, [1997] 3 SCR 213 at para 46 **[RespBA, Tab 69]**; *US Steel*, *supra* note 90 at para 74; *Consolidated Canadian Contractors Inc v R,* [1998] GSTC 91 at paras, 37, 46 (FCA) **[RespBA, Tab 23]**.

[125] Donor Beware, *supra* note 86 at 7, 34, 37-38; see also *Lipson v Cassels Brock & Blackwell LLP*, 2013 ONCA 165 at para 40, *supra* note 87; Report of the Auditor General of Canada (Fall 2010), Chapter 7 at para 7.71, *supra* note 86.

[126] *R v Jarvis*, *supra* note 72 at para 50; see also *McDonald v Canada (Employment and Immigration Commission)* (1991), 81 DLR (4th) 736 at 742 at paras 10-11 (FCA) **[RespBA, Tab 54]**; *AG v Gates*, [1995] 3 FC 17 at para 1**[RespBA, Tab 9]**; *Sextant*, *supra* note 90 at paras 196-198; *Alberta Securities Commission v Brost*, *supra* note 90 at paras 43, 45; *R v Tiffin*, 2008 ONCA 306 *supra* note 110 at para 130.

[127] Appellant's factum at para 44.

[128] Appellant's factum at para 84; *US Steel*, *supra* note 90 at para 78; *Cartaway Resources Corp, Re*, 2004 SCC 26 at paras 58-60 [2004] 1 SCR 672 **[RespBA, Tab 17].**

reprimand, retribution, denunciation, specific deterrence, reparation for harms done to the community, and rehabilitation, among others.[129] Her argument also discounts penalty theory, which sees general and specific deterrence, both of which can be forward looking, as the primary rationale for the imposition of penalties in areas of economic regulation.[130]

84. Further, the assessment of a s. 163.2 penalty is a purely administrative matter and shares few, if any, of "the essential characteristics of a proceeding on a public, criminal offence."[131] A prosecution for a criminal offence may be initiated by any member of the public, is brought on behalf of the public, is subject to control by the Attorney General, and a criminal record will result if there is a conviction.[132] In contrast, a s. 163.2 penalty may be initiated exclusively by the Canada Revenue Agency after extensive internal review,[133] and unless and until an appeal to the Tax Court of Canada is initiated, remains a purely private matter between the assessed party and the Agency as a result of the confidentiality provisions in the *ITA*.[134]

85. The appellant's attempt to equate administrative penalties with criminal fines also ignores the importance of the stigma intended to result from a criminal conviction. There is little or no stigma associated with an administrative penalty;[135] to the extent that there is, in civil matters, as noted by this Court in *Blencoe*, there is no right to be free from stigma.[136] Furthermore, in the case of a criminal conviction, stigma results

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[129] *Criminal Code*, RSC 1985, c C-46, ss 718, 718.2 **[RespBA, Tab 165]**; *Whaling v Canada (Attorney General)*, *supra* note 65 at paras 46-48; *R v Nasogaluak*, 2010 SCC 6 at paras 41-44 **[RespBA, Tab 75]**; *R v M (CA)* [1996] 1 SCR 500 (SCC) at paras 79 -81**[RespBA, Tab 73]; ***Sivia v British Columbia (Supt Motor Vehicles)*, 2014 BCCA 79 at paras 142-143 **[RespBA, Tab 99]**

[130] Australian Law Reform Commission, *supra* note 115, ss 25.1-26.18.

[131] *R v Shubley*, *supra* note 110 at 20(f).

[132] *Trumbley v Metropolitan Toronto Police* 1986 CarswellOnt 2250 *supra* note 68 at para 73; aff'd, *Trumbley and Pugh v Metropolitan Toronto Police, supra* note 68.

[133] IC 01-1, *supra* note 107 at paras 74-89.

[134] *ITA*, ss 241(1)-(3); IC01-1, *supra* note 107 at para 91.

[135] *Martineau, supra* note 65 at para 64; *Consolidated Canadian Contractors*, *supra* note 124 at para 23; *US Steel*, *supra* note 90 at para 77; New Zealand Law Reform Commission, Civil Pecuniary Penalties (2013) at para 3.20 **[RespBA, Tab 152]**; *Thomson Newspapers Ltd v Canada*, [1990] 1 SCR 425 at 516(e) **[RespBA, Tab 106]**; *Wholesale Travel*, *supra* note 124 at 224(b-e); *Transport Robert (1973) Ltée*; *R v 1260448 Ontario Inc* (2003), 68 OR (3d) 51 at para 27 (Ont CA) **[RespBA, Tab 66];** *Chatterjee*, *supra* note 110 at paras 23, 43.

[136] Per Bastarache J in *Blencoe*, *supra* note 64 at paras 59, 74, 80, in the context of an assertion that section 7 of the *Charter* guaranteed freedom from the stigma associated with a human rights complaint.

irrespective of whether the accused was convicted after a trial or pled guilty before trial.

iii. Assessment and objection/appeal process is not a criminal one

86. As affirmed by this Court in *Martineau*, in applying the "by nature" test, the focus of the inquiry must be on the nature of the proceeding in question, not on the nature of the prohibited conduct.[137] The s. 163.2 assessment, objection and appeal process, which provides appropriate procedural safeguards, is as follows:

(a) the Minister imposes the penalty directly upon a person by issuing an assessment following a rigorous internal administrative review of the relevant circumstances as described in Information Circular 01-1[138]

(b) the person assessed has 90 days to ask the Minister to reconsider the assessment by serving a notice of objection;[139]

(c) the Minister then reconsiders the assessment and vacates, confirms or varies the assessment or reassesses, and notifies the person in writing of the action taken;[140] and

(d) within 90 days after the notice in (c) above is sent, the person may appeal to the Tax Court of Canada to have the assessment vacated or varied.[141]

87. Like the ascertained forfeiture process reviewed by this Court in *Martineau*, the s. 163.2 assessment process bears none of the hallmarks of a penal proceeding. As this Court stated:[142]

> This process thus has little in common with penal proceedings. No one is charged in the context of an ascertained forfeiture. No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the administrative proceeding is complete and all appeals are exhausted, if the notice of ascertained forfeiture is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of a civil action.

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[137] *Martineau, supra* note 65 at paras 30-31; also *R v Shubley*, *supra* note 110 at 18(j)-19(a).
[138] IC 01-1, *supra* note 107 at paras 74-89.
[139] *ITA*, s 165(1) **[RespBA, Tab 168]**.
[140] *ITA*, s 165(3). **[RespBA, Tab 168].**
[141] *ITA*, s 169(1) **[RespBA, Tab 168]**.
[142] *Martineau, supra* note 65 at para 45; *US Steel*, *supra* note 90 at paras 58-60.

88. In contrast to the civil penalties contained in s. 163.2, s. 163 and other sections of the *ITA*, provision is also made for criminal offences such as in s. 239. Parliament has clearly attempted to distinguish the legal consequences of offences from those of civil penalties in the language used in the *ITA* to describe those consequences: "being convicted" under s. 239, and being "liable to pay a penalty" under s. 163 or 163.2.[143]

89. The appellant mischaracterizes the s. 163.2 assessment process as "not part of the typical administrative and/or regulatory process applied by the CRA."[144] The assessment of a third party penalty involves the application of a statutory provision to facts disclosed during an audit, whether "egregious" in nature or not, in much the same way that the assessment of a civil gross negligence penalty occurs under s. 163(2) of the *ITA*.

90. The appellant is further mistaken when she likens the role of the Third Party Penalty Review Committee (TPPRC) to that of a criminal investigator under s. 239.[145] The TPPRC was established in order to ensure that s. 163.2 is properly administered, monitored and applied, in keeping with the Minister of Finance's commitment to such a process.[146] Other committees have been established within the Canada Revenue Agency having regard to the specialized nature of the subject matter the Agency is called upon to administer, such as the Transfer Pricing Review Committee[147] and the GAAR committee.[148] To liken a referral to the TPPRC to the turning over of an auditor's files to an investigator is a misstatement of the process described in paragraphs 70-91 of Information Circular 01-1. It is not analogous to the transfer of an auditor's files and materials to the investigators discussed in *Jarvis*.[149]

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[143] Amendment to s 239(3) (enacted along with s 163.2) **[RespBA, Tab 168];** Federal Court of Appeal Reasons at paras 43-45 [**AppRecord, Tab 5** at 66-67].

[144] Appellant's factum at para 68.

[145] Appellant's factum at paras 55, 67.

[146] Letter from P. Martin to CBA/CICA dated Jan 12, 2000, reproduced in TaxNetPro, Technical Notes, s. 163.2 **[AppBA, Tab 21** at 1**]**. Information Circular 01-1, *supra* note 107 at para 79.

[147] Information Circular 87-2R ("International Transfer Pricing") at paras 46, 178 **[RespBA, Tab 129]**.

[148] See Income Tax Technical News, No 22, (Jan 11, 2002), Questions 4, 5 and Answers thereto **[RespBA, Tab 128]**. The GAAR committee was established in Nov. 1988 "in the interest of obtaining consistent and fair application of section 245 of the Act": TEI Liaison (Dec. 4, 2001) Question 8 **[RespBA, Tab 150]**.

[149] Appellant's factum at para 55; *R v Jarvis*, *supra* note 72 at paras 22, 24-25, 92, 97.

91. As for the appellant's speculation that a criminal investigator might refer a matter to the TPPRC after concluding that insufficient evidence existed to prove an offence beyond a reasonable doubt, such an outcome might be entirely appropriate since conduct can give rise to both civil and criminal consequences. Similarly, the appellant is indeed correct when she suggests at paragraph 61 of her Factum that "the Minister has the ability to investigate for the purposes of Section 163.2 and only afterwards to make a decision about laying section 239 criminal charges." Provided the Minister's officials have not used audit powers to investigate penal offences after forming the predominant purpose of determining penal liability, i.e. "cross[ed] the Rubicon" in the words of this Court in *Jarvis*, such an outcome complies with the *Charter*.[150]

92. The appellant also overstates the significance of the absence of a limitation period for assessing a penalty.[151] Section 163.2 is not at all exceptional in this respect, as it is only one of many provisions in the *ITA* where the Minister may assess at any time.[152] Indeed abusive tax shelters are commonly designed in such a fashion as to escape scrutiny,[153] which accounts for the relaxation of the normal limitation period for issuing third party penalty assessments in Canada as well as the US.[154]

93. As has been repeatedly affirmed by this Court, the focus in applying the third branch of the test must be on the nature of the proceeding, not on the nature of the prohibited conduct.[155] Had the trial judge focused on the nature of the proceeding, he would have come to the conclusion that the third party penalty process is the same as that under s. 163(2), which he agreed is undoubtedly administrative, not penal, in

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[150] Appellant's factum at para 61; *R v Jarvis*, *supra* note 72 at para 88; *R v Nolet*, 2010 SCC 24 at para 45, [2010] 1 SCR 851 **[RespBA, Tab 77]**.

[151] Appellant's factum at para 59.

[152] See for example *ITA,* ss 80.04(12), 129(2.2)(c), 131(3.2)(c), 132(2.2)(c), 133(7.02)(c), 152(4), 152(4.2), 159(3), 160.1(3), 160.2(3), 160.3(2), 160.4(3), 164(3.1)(c), 164(4)(c), 185(5), 189(7), 191.3(5), 227(10) and 227(10.1) **[RespBA, Tab 168]**.

[153] *"US Tax Shelter Industry: The Role of Accountants, Lawyers and Financial Professionals – Four KPMG Case Studies"*, Report, Permanent Subcommittee on Investigations, Committee on Governmental Affairs, United States Senate (2003) at 13-15, 91-99 **[RespBA, Tab 158];** *The Role of Professional Firms in the U.S. Tax Shelter Industry*, Report Prepared by the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs, United States Senate (April 13, 2005), at 6, 56-66, 117-118 **[RespBA, Tab 155]**.

[154] *In re Mdl-731 - - Tax Refund*, 989 F.2d 1290 (1993) at paras 35, 68, 70 endnotes 1 & 2 **[RespBA, Tab 40]**.

[155] *R v Shubley*, *supra* note 110 at 18(j)-19(a); *Martineau*, *supra* note 65 at paras 31-32.

nature.[156] As such, s. 163.2(4) does not attract the protection of section 11 of the *Charter* under the first branch of the *Wigglesworth* test.

2) S. 163.2(4) assessment does not impose a true penal consequence

94. A second route by which s. 11 may be engaged is that the proceedings result in a "true penal consequence." In *Wigglesworth*, this Court articulated the set of sanctions that constitute true penal consequences in the following terms:

> In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.[157]

95. In *Wigglesworth*, it was the possibility of imprisonment that led this Court to find the existence of true penal consequences.[158] Importantly, s. 163.2(4) does not provide for the possibility of imprisonment.

96. Merely calling something a "penalty" does not mean that the sanction necessarily involves "true penal consequences."[159] None of the cases referred to by the trial judge in which s. 163(2) civil penalties are described as "penal" applied the "true penal consequences" test.[160]

97. The overriding consideration in determining whether a monetary penalty constitutes a true penal consequence is the rationale for imposing the penalty. A penalty levied for the purpose of punishing the offender or expressing general societal condemnation of a practice may constitute a true penal consequence. By contrast, penalties that are

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[156] Tax Court Reasons at paras 56-58, 70 **[AppRecord, Tab 3** at 31-32, 35**].**
[157] *Wigglesworth*, *supra* note 65 at 561(a-b).
[158] *Wigglesworth*, *supra* note 65 at 561(i), 562(a-c); *Trumbley and Pugh v Metropolitan Toronto Police* (SCC) at 580(h-i), *supra* note 68.
[159] As illustrated by the "penalties" under Reg. 649 in *R v Shubley*, *supra* note 110 at 21(j)-22(a-g).
[160] Tax Court Reasons at paras 41-43, **[AppRecord**, **Tab 3** at 26**]** *Boileau* mentions *Wigglesworth* but does not purport to apply the true penal consequences test.

intended to deter conduct or promote compliance with a regulatory statute will not constitute true penal consequences.[161]

i. Magnitude must be assessed in context

98. The magnitude of a penalty is not determinative as to whether such a penalty constitutes a true penal consequence.[162] Indeed, the potential magnitude of a penalty is only relevant when it sheds light on the penalty's purpose.[163] The purpose of the s. 163.2 penalty is to deter non-compliance and ensure accuracy, honesty and integrity within the administrative self–assessing and reporting system under the Act.[164] Although it can be significant in amount, it is not intended to redress a wrong done to society at large.[165] In no respects does the mathematical calculation of s. 163.2 penalty take into account the principles of criminal liability or sentencing.[166]

99. Although the presence or absence of discretion in the calculation of a penalty is not a factor in its characterization, the absence of discretion in an income tax penalty has deep roots in the history of the *ITA* and merits explanation. Responding to expressions of concern as to the absence of uniformity in the manner in which widespread ministerial discretions were exercised, arbitrary rulings and the theoretical power of the Minister to discriminate between one taxpayer and another, ministerial discretion was almost entirely eliminated in sweeping changes to Canadian tax legislation when the *Income Tax Act* replaced the *Income War Tax Act* in 1949.[167]

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[161] *US Steel*, *supra* note 90 at paras 74, 77; *Wigglesworth*, *supra* note 65 at 561(e); *Rowan*, *supra* note 90 at para 53; *Cartaway Resources Corp, Re*, *supra* note 128 at paras 55-61; *Lavallee v. Alberta (Securities Commission) supra* note 90 at para 25**.**

[162] *Martineau*, *supra* note 65 at paras 55-56; *US Steel*, *supra* note 90 at para 74; *Rowan*, *supra* note 90 at para 53.

[163] *US Steel*, *supra* note 90 at paras 76-78; *Rowan*, *supra* note 90 at para 53; *Lavallee v. Alberta (Securities Commission) supra* note 90 at para 23; *Alberta Securities Commission v Brost, supra* note 90 at para 54.

[164] Federal Court of Appeal Reasons at para 42 [**AppRecord, Tab 5** at 66].

[165] *R v Rodgers* [2006] 1 SCR 554 at para 60 **[RespBA, Tab 82]**.

[166] *Martineau*, *supra* note 65 at paras 39, 62, 65; *Chatterjee*, *supra* note 110 at para 42; Federal Court of Appeal Reasons at para 44[**AppRecord, Tab 5** at 66]; *Lavers, supra* at note 89, paras 101-102.

[167] *House of Commons Debates*, 20th Parl, 4th Sess (June 7, 1948) at 4877 per Minister of Finance **[RespBA, Tab 134]**; *Debates of the Senate*, 20th Parl, 4th Sess, No 34 (June 24, 1948) at 658 per Hon Mr. Davies **[RespBA, Tab 130];** *Journals of the Senate of Canada*, Final Report of the Senate Committee on Taxation (28 May 1946) at 221-223 & Appendix A, **[RespBA, Tab 140];** *House of Commons Debates*, 20th Parl, 3rd Sess (April 29, 1947) at 2257 per Minister of Finance **[RespBA, Tab 132]**; *House of Commons Debates*, 20th Parl, 3rd Sess (July 12, 1947) at 5505 per Minister of Finance**[RespBA, Tab 133]**; D.A. MacGibbon, "The Administration of the Income War Tax Act" (1946) 12 The Canadian Journal of Economics and Political Science 75 at 75, 77-78 **[RespBA, Tab 118]**; John Willis, "Recent Trends in Canadian Income Tax Law", (1951) University of Toronto Law

However, while there is no discretion in its calculation, the possibility of administrative relief is provided in ss. 220(3.1) of the *ITA* which permits the Minister to waive or cancel all or a portion of any penalty.[168]

100. As discussed, one component of the mathematical calculation of the ss. 163.2(5) third party penalty is the s. 163(2) gross negligence penalty to which the other person would be liable. In the June 1987 White Paper on Tax Reform the government identified the need to improve the method of dealing with tax avoidance activity in the tax law. Among other ways the government proposed to strengthen existing tax penalties by increasing them to improve the government's ability to deal with non-compliance. One of the changes was an increase in the ss. 163(2) gross negligence penalty from 25% of the tax on the understatement of income to 50%. The government explained that existing penalty provisions were failing to achieve their objective and that there was growing non-compliance with provisions of the *ITA*. The Minister of Finance looked to the positive compliance experience in other countries from stronger penalties to support the government's proposal.[169]

101. The "magnitude of the fine" test in *Wigglesworth* does not entail the simple identification of an arbitrary number over which Parliament cannot go.[170] Rather, a contextual analysis is required.[171] The context at issue includes abusive tax avoidance schemes targeted at a broad range of participants. Some are directed at taxpayers with large incomes; others are mass-marketed schemes intended to attract hundreds or even thousands of participants.[172] Enormous sums can be involved in either scenario,

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Journal Vol 9, No 1, 42 at 46-49 **[RespBA, Tab 122];** Gwyneth McGregor, "The Old Order Changes" (1953) 1 Canadian Tax Journal 47 **[RespBA, Tab 120]**.

[168] *ITA,* ss. 220(3.1) **[RespBA, Tab 168]***;* Court of Appeal Reasons at para 56 [**AppRecord, Tab 5** at 70].

[169] The Hon Michael H. Wilson, Minister of Finance, House of Commons, *The White Paper, Tax Reform 1987* (June 18, 1987) at 55-58 **[RespBA, Tab 135]**; The Hon Michael H. Wilson, Minister of Finance, House of Commons, *Tax Reform 1987, Income Tax Reform* (June 18, 1987) at 145-148 **[RespBA, Tab 136]**; The Hon Michael H. Wilson, Minister of Finance, House of Commons, *Supplementary Information Relating to Tax Reform Measures*, (December 16, 1987) at 106-107 **[RespBA, Tab 138]**.

[170] *US Steel*, *supra* note 90 at para 74.

[171] *R v Jarvis*, *supra* note 72 at para 63.

[172] For example, *Edwards v R*, 2012 FCA 330 at para 3 (18,000 participants of whom 8000 were reassessed, involving $500 million in donations) **[RespBA, Tab 33]**, and *Klotz v R*, 2005 FCA 158 at paras 2-3 (660 participants, as mentioned in *AG v Nash*, *supra* note 100 at para 33 **[RespBA, Tab 43]**). See also Report of the Auditor General to the House of Commons (May 1996), *supra* note 100 at para 11.62; Donor Beware*, supra* note 86 at 25; US Senate, "US Tax Shelter Industry", *supra* note 153 at 2, 22; UK

both in terms of the amounts invested by participants and the federal tax at stake.[173] Those that promote and market such schemes stand to earn substantial fees or commissions.[174] At times, the fee is calculated as a percentage of the tax saving that is produced for the client. In some instances, promoters' fees have been reported to be in the millions of dollars.[175]

102. Numerous decisions have affirmed the appropriateness of sizeable penalties in order for the penalty not simply to be regarded as a licence fee or cost of doing business by those who may be compelled to pay it.[176] As noted by this Court in *Martineau*, it is completely understandable that sanctions in a self-reporting system are designed to produce a deterrent effect.[177] In order for sanctions to be effective deterrents, they must be capable of removing the ability to make a profit from non-compliance.[178] As such, the large potential size of a penalty is not necessarily indicative of a penal purpose.[179] In the regulatory area, deterrence theory emphasizes both pricing the illegal behaviour and having a penalty large enough to deter the well-resourced.[180] In *Wigglesworth*, Wilson J. contemplates that even an unlimited power

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HMRC, *Discussion Paper – approaches to preventing charities being set up to avoid tax* at para 14 (March 14, 2014) **[RespBA, Tab 156]**.

[173] *Cannon v Funds for Canada Foundation*, 2012 ONSC 399 at paras 13, 16, 18 **[RespBA, Tab 16]**, leave to appeal to Div Ct. dismissed, 2012 ONSC 6101. *Maréchaux v R*, 2009 TCC 587 at paras 11, 26, aff'd 2010 FCA 287 **[RespBA, Tab 51]**.

[174] *Cannon*, *supra* note 173 at para 82. US Senate, "US Tax Shelter Industry" *supra* note 153, at 3, 13, 26 - 28 101-103, (at 13 referring to internal KPMG email quoting fees of $360,000 for "our average tax shelter deal" in 1998); *The Role of Professional Firms in the U.S. Tax Shelter Industry*, *supra* note 153 at 79-80, 82-83, 98-99, 116 (at 116 reporting First Union bank received $100,000 per client and $13 million in "client referral" fees over 5 years from promoters).

[175] OECD, *Study into the Role of Tax Intermediaries* (2008) at 48, also at 11, n 2, referring to *Prudential plc v Revenue & Customs*, *supra* note 85; US Senate, "US Tax Shelter Industry", *supra* note 153 at 3, 101; *The Role of Professional Firms in the U.S. Tax Shelter Industry*, *supra* note 153 at 82, 99, 116.

[176] Federal Court of Appeal Reasons at paras 46-47, [**AppRecord**, **Tab 5** at 67]; *US Steel , supra* note 90 at para 77, *Rowan*, *supra* note 90 at para 49; *Lavallee*, *supra* note 90 at para 23; *Chatr Wireless*, *supra* note 90 at paras 553, 555. *The Role of Professional Firms in the U.S. Tax Shelter Industry*, *supra* note 153 at 57, 58.

[177] *Martineau*, *supra* note 65 at para 38.

[178] External Advisory Committee on Smart Regulation, *Report to the Government of Canada: Smart Regulation: A Regulatory Strategy for Canada* (September 2004) at 54 **[RespBA, Tab 131]**. *US Steel*, *supra* note 90 at para 77; US Senate, "US Tax Shelter Industry", *supra* note 153 at 13.

[179] *US Steel*, *supra* note 90 at paras 77-78.

[180] Australian Law Reform Commission*, supra* note 115, s 26.14.

to fine may be exercised for regulatory purposes and not for the purpose of redressing harm done to society at large.[181]

103. The s. 163.2(4) penalty is not limitless.[182] As was correctly noted by the Federal Court of Appeal, a maximum penalty is provided in s. 163.2(5)(b)(ii) for each false statement or omission.[183] Where penalties under each of s. 163.2(2) and s. 163.2(4) apply, no more than the greater of the two applies, not both.[184] In any event, the nature of the penalty is to be assessed on the basis of the penalty imposed rather than on penalties that are theoretically possible.[185]

104. In the present case, the penalty assessed to the appellant in respect of each false statement was much less than the maximum applicable under s. 163.2(5), and was calculated with reference to s. 163.2(5)(b)(i) of the *ITA*. Except in respect of three participants whose penalties were the $1,000 minimum, the result was to fix the amount of the penalty for each false statement at half of the amount of federal tax that would have been avoided had the statement been accepted as true by the Minister. In this case, taking into consideration all 135 false statements, the amount of federal tax that would have been avoided exceeded one million dollars.[186]

105. There is no maximum number of false statements or omissions in respect of which a penalty may be assessed under s. 163.2(4), consistent with other Canadian administrative monetary penalty regimes,[187] and consistent with similar promoter and preparer penalty provisions in other jurisdictions.[188] Many Canadian statutes deem

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[181] *Wigglesworth, supra* note 65, at 561(f); *US Steel*, *supra* note 90 at para 79.
[182] Appellant's factum at paras 1, 59, 96.
[183] Federal Court of Appeal Reasons, at para 47 [**AppRecord, Tab 5** at 68].
[184] *ITA*, s 163.2(14).
[185] *Rowan*, *supra* note 90 at para 46; *Summitt Energy Management Inc v Ontario (Energy Board)*, 2013 ONSC 318 at para 69 **[RespBA, Tab 104]**.
[186] Appendix "A" to (ASF), Total of $1,090,616 under column entitled "Amount of Tax Avoided" **[AppRecord Tab 15** at 191**]**, also at Tax Court Reasons at para.3, Appendix A **[AppRecord, Tab 3** at 15]; see also Institute of Chartered Accountants of Alberta, *supra* note 121, Question 11 and Answer thereto, page 7 **[RespBA, Tab 121]**.
[187] For example, *Canada Pension Plan*, RSC 1985, c C-8, s 90.1 **[RespBA, Tab 160]**; *Old Age Security Act*, RSC 1985, c O-9, s 44.1(1), (2) **[RespBA, Tab 173]**.
[188] *Internal Revenue Code*, s. 6694(a)(1), (b)(1); s. 6700(a); s. 6701(a) (per person per period)**[RespBA, Tab 170]**; US Code Congressional & Administrative News (vol 4), 101st Cong (1st session) (1989), HR No 101-247, 1381-1406, at 1395-97 **[RespBA, Tab 157]**. *Tax Administration Act 1994* (NZ) 1994/66, s 141EB(4); s 3(1) (definition of "tax shortfall") **[RespBA, Tab 175]**. In Australia, a cap applies equal to the greater of twice the consideration received or receivable and AUS $850,000 for an individual or

each day on which a violation continues to be a separate violation, attracting its own penalty.[189] In some instances, multiple minor violations can be reclassified as a more serious violation, potentially attracting a higher penalty than would have been the case had they been treated as minor violations.[190]

106. The absence of a legislated ceiling on the overall amount of penalties applicable when multiple infractions are involved does not transform the amounts assessed under s. 163.2 into a true penal consequence. Such a ceiling is unusual in administrative monetary penalty regimes found in Canadian statutes,[191] and its absence does not contravene s. 11 of the *Charter*, which concerns itself with *duplication* of punishments, not with *excessive totality* of punishments.[192] As noted by the Federal Court of Appeal, allegedly excessive punishments are within the purview of s. 12 of the *Charter*.[193]

107. The appellant's claim that a "limitless" penalty can apply to a single false statement when numerous third parties rely on it is based on a misunderstanding of the facts.[194] This is not a case involving reliance by numerous third parties on a single false statement; rather, there were 135 false statements, each describing an alleged donation by a different individual, of a particular number of non-existent timeshare weeks, and reliance by a different individual on each false statement.

108. Analogously, albeit in a penal setting, in *La Souveraine v AMF*, the majority of this Court chose not to interfere with the $560,000 fine imposed following a prosecution for 56 infractions of an insurance regulatory offence, each attracting a

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AUS $4.25 million for a corporation: *Taxation Administration Act 1953*, Schedule 1, Div 290-50(3)(4); *Crimes Act 1914*, s 4AA (definition of "penalty unit") **[RespBA, Tab 164];** Robert McMechan, *Economic Substance and Tax Avoidance,* (2013) at 326-354 **[RespBA, Tab 125].**

[189] *International Bridges and Tunnels Act*, SC 2007, c 1, s 45(2), 43(b) **[RespBA, Tab 171]**, *Canada Marine Act*, SC 1998, c 10, s 126, 128(1), 129.02, 129.03(d) **[RespBA, Tab 159]**, *National Energy Board Act*, RSC 1985, c N-7, s 141 **[RespBA, Tab 172]**.

[190] *Proceeds of Crime (Money Laundering) and Terrorist Financing Administrative Monetary Penalties Regulations*, SOR/2007-292, s 4-5 **[RespBA, Tab 174]**.

[191] A rare exception is the *Employment Equity Act*, s 36(2)(b), which imposes a limit of $50,000 "for repeated or continued violations." **[RespBA, Tab 166]**

[192] *R v Hamilton*, *supra* note 110 at para 39; *Lavers*, *supra* note 89 at para 70, per Lambert J.A. in dissent.

[193] Federal Court of Appeal Reasons at para 60 [**AppRecord, Tab 5** at 71].

[194] Appellant's factum at para 104.

minimum sanction of $10,000.[195] In the present case, the discretion to assess one penalty as opposed to 135 was not available under the statute. Further, s. 163.2(8) of the *ITA*, which deems two or more false statements to be one false statement in certain circumstances, is not applicable to s. 163.2(4) and (5) of the *ITA*.

ii. Prosecution could have resulted in harsher sanctions

109. A person involved in the making or use of false charitable donation tax receipts may also be charged with an offence under s. 239(1) of the *ITA*. The appellant erroneously claims that a penalty under s. 163.2(4) "can easily exceed the criminal fine under s. 239." The trial judge also focused his analysis on this comparison.[196]

110. A criminal fine under s. 239 is calculated with reference to the amount of federal tax that was sought to be evaded. Except where the federal tax sought to be evaded by means of a false statement is less than $2,000 (in which case the minimum penalty of $1,000 would apply), even in the summary conviction scenario, the maximum penalty under ss. 163.2(4) would only be equal to the lowest permissible fine, that is, 50% of the federal tax sought to be evaded but without the prospect of two years imprisonment.[197] If the appellant were prosecuted by indictment for breach of s. 239(1) of the *ITA*, the potential punishment would be a fine of not less than 100% of the federal tax sought to be evaded ($1,090,616 x 100%) and not more than 200% thereof ($1,090,616 x 200% = $2,181,232), or both a fine and imprisonment for a term not exceeding five years.[198]

111. Further, a prosecution for fraud contrary to s. 380 of the *Criminal Code* might be sustainable on the facts, potentially exposing the appellant to the significantly harsher punishments of a maximum sentence of 14 years in jail, or a fine under s. 734 of the *Criminal Code* for which no minimum or maximum is provided, or both.

112. Nonetheless, in a scenario where the penalty under s. 163.2 could exceed the criminal fine under s. 239, this does not mean that the civil penalty amounts to a true

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[195] *Souveraine*, *supra* note 124 at paras 83-94. The view expressed by Fish and LeBel JJ in dissent was that only one infraction had occurred: see paras 96, 118; see also *R v Hamilton*, *supra* note 110 at para 39.
[196] Appellant's factum at para 10. Tax Court Reasons at para 51 [**AppRecord, Tab 3** at 29].
[197] *ITA*, s 239(1), 243 **[RespBA, Tab 168]**.
[198] *ITA*, s 239(2), 243**[RespBA, Tab 168]**.

penal consequence. The notion that the criminal fine must exceed a civil penalty which arises out of the same conduct is based on a false premise.[199] Even where a fine without imprisonment is considered to be a sufficient sanction, part of the punishment associated with a conviction for a criminal offence has to do with the stigma of being labelled a criminal in the eyes of the community.[200]

113. The appellant's reference to a "one to five" ratio of administrative penalties to criminal fines developed in the securities law context[201] is not a rule of law which has been held to apply more generally, nor could it be relied on to override the scale of civil and criminal sanctions Parliament has already provided in the *ITA*. In addition, the *ITA* contains a further measure for ensuring proportionality as between any civil and criminal sanctions imposed, in the form of ss. 238(3) and 239(3) of the *ITA*, which provide that a person convicted under s. 238 or 239 is not liable to a civil penalty under s. 162, 163, 162.3 or 227 for the same act unless the penalty is assessed before the criminal information or complaint is laid.[202] The rationale for this rule is that the imposition of civil penalties ought to be a factor to be taken into account in the exercise of discretion performed by the sentencing judge, with the possibility that a lower fine or sentence may be imposed at the time of sentencing than might have been appropriate had civil penalties not been imposed.[203]

iii. Sanction's purpose is not to promote public order and welfare within a public sphere of activity

114. A provision's breadth is not necessarily an indication that it "promotes public order." The appellant correctly asserts that a penalty can apply even if the public purse has not suffered any loss attributable to the false statement, and the trial judge correctly observed that the false statement need not have been relied on by any

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[199] *Martineau*, *supra* note 65 at paras 61-62.

[200] As noted in the Employment Insurance context: P. Issalys, "Les sanctions administrative de l'assurance-emploi: entre solidarité, assurance et rétribution", (2009) 50 Cahiers de droit 825 at 849-850 **[RespBA, Tab 124]**. See also Australia Law Reform Commission, *supra* note 115 at paras 3.48.

[201] Appellant's factum at paras 88-90.

[202] Pursuant to ss 238(3) and 239(3) of the *ITA* **[RespBA, Tab 168]**.

[203] *ITA*, s 239(3) **[RespBA, Tab 168]**; *Lavers*, *supra* note 89 at paras 110-112; *Besner v R*, 2008 TCC 404 at para 16 (TCC) **[RespBA, Tab 5]**; *R v Nelma Electronics Ltd*, [1981] OJ No 920 at para 1**[RespBA, Tab 76]**, *R v Palmer*, [1995] NBJ No 414 at paras 7-13 **[RespBA, Tab 79]**.

particular taxpayer to achieve any actual reduction in tax.[204] These features illustrate Parliament's intent that the provision be a broadly based and effective deterrent, but are not an indication that the provision is intended to promote public order as opposed to being part of a regulatory scheme.

115. Similar to the Australian third party penalty and the penalty provided in the US's Internal Revenue Code s. 6700,[205] the making of false statements can be subject to sanction under s. 163.2 irrespective of whether the maker knows for certain that the false statement will eventually be used by another person. As such, s. 163.2 targets not only conduct which results in harm, but conduct which creates a risk of harm, and in this respect, is typical of the sanctions available under many regulatory schemes.[206]

116. The appellant's role as president of a registered charity participating in a leveraged donation program brought her within the discrete regulatory and administrative system of self assessment and reporting under the *ITA* and its rules. The 163.2 proceedings were aimed at maintaining compliance with those rules and not at the promotion of public order within a public sphere of activity.[207]

117. Even if s. 163.2 does not involve the maintenance of "internal discipline within a limited sphere of activity", it falls within the category of sanctions identified by Wilson J. in *Wigglesworth*, consisting of "[p]roceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute"[208] which also do not attract s. 11 protection.

iv. Preferable to restrict s. 11 to serious offences

118. In *Wigglesworth*, Justice Wilson cautioned that only rarely would a proceeding fail to qualify for s. 11 rights under the first branch of the test but qualify under the

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[204] Appellant's factum at para 44; Tax Court Reasons at para 56 **[AppRecord**, **Tab 3** at 27**].**

[205] *Internal Revenue Code*, s 6700 *supra* note 188; see also *Tax Equity and Fiscal Responsibility Act of 1982*, Report of the Committee on Finance United States Senate on HR 4961, pt. 1 (1982) at 267, *supra* note 100**;** "Tax exploitation scheme" defined in Div 290-65(1) of Schedule I to the *Taxation Administration Act 1953, supra* note 188; *Ludekens*, 2013 FCAFC 100 at paras 7, 12, 224-227. See also *Ludekens* 2013 FCA 142 at para 190 **[RespBA, Tab 20]**.

[206] *Thomson Newspapers Ltd v Canada, supra*, note 135 at 510(h)-511(b), 512(d); *Wholesale Travel, supra* note 124 at 219(c), *Committee for the Equal Treatment of Asbestos Minority Shareholders v OSC*, 2001 SCC 37 at paras 42,43,45 **[RespBA, Tab 22]**.

[207] Federal Court of Appeal Reasons at para 42 [**AppRecord**, **Tab 5** at 66].

[208] *Wigglesworth*, *supra* note 65 at 560(f-g).

second branch.[209] She also stated that "[I]t is preferable to restrict s. 11 to the most serious offences known to our law, i.e. criminal and penal matters and to leave other 'offences' subject to the more flexible criteria of fundamental justice in s. 7."[210] This Court has subsequently expressed agreement with that proposition[211] and, in *Martineau*, recognized the significant implications of extending the reach of s. 11 to civil penalties on the entire body of legislation whose purpose is taxation and economic regulation.[212]

D. SECTION 1 OF THE *CHARTER* NOT RELIED ON

119. If s. 163.2 of the *ITA* infringes s. 11 of the *Charter* because it is by nature a criminal proceeding or imposes a true penal consequence, the respondent would not seek to uphold it under s. 1 of the *Charter*. Parliament's intention was to extend an existing gross negligence civil penalty regime, to which the existing assessment, objection and appeal procedures of the *ITA* and the *Tax Court of Canada Act* would apply, not create a penal scheme in limitation of s. 11 *Charter* rights. The respondent would not seek to uphold s. 163.2 under s. 1 of the *Charter* in those circumstances.

PART IV – COSTS

120. The respondent seeks an order for costs.

PART V – NATURE OF ORDER SOUGHT

121. The respondent asks that the appeal be dismissed, and that the judgment of the Federal Court of Appeal be allowed to stand, with costs to the respondent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa, Ontario this 30th day of September, 2014.

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Gordon Bourgard/Eric Noble

Counsel for the Respondent

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[209] Wilson J in *Wigglesworth*, *supra* note 65 at 561(i). *Rowan*, *supra* note 90 at para 40.
[210] Wilson J in *Wigglesworth*, *supra* note 65 at 558(i).
[211] McLachlin J (as she then was) in *R v Shubley*, *supra* note 110 at 23(i).
[212] *Martineau*, *supra* note 65 at para 87.

PART VI – TABLE OF AUTHORITIES

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1	*AG Canada v Canard,* [1976] 1 SCR 170 Beetz J	Para 36 fn 34
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3	*AYSA Amateur Youth Soccer Association v Canada (Revenue Agency),* 2007 SCC 42**,** [2007] 3 SCR 217	Para 60 fn 75
4	*Bekker v R*, 2004 FCA 186	Para 45 fn 46 Para 45 fn 48 Para 43 fn 50
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7	*BG Checo International Ltd v. British Columbia Hydro and Power Authority*, [1993] 1 SCR 12	Para 76 fn 111
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13	*Canada (Commissioner of Competition) v Gestion Lebski Inc*, 2006 Comp Trib 32	Para 67 fn 90
14	*Canada Trustco Mortgage Co v Canada*, 2005 SCC 54, [2005] 2 SCR 601	Para 69 fn 97
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16	*Cannon v Funds for Canada Foundation*, 2012 ONSC 399, leave to appeal to Div Ct. dismissed, 2012 ONSC 6101	Para 101 fn 173 Para 101 fn 174
17	*Cartaway Resources Corp (Re)*, 2004 SCC 26, [2004] 1 SCR 672	Para 83 fn 128 Para 97 fn 161
18	*Chabot c R*, 2001 FCA 383	Para 79 fn 122
19	*Citation Industries Ltd v CJA, Local 1928*, 1988, 53 DLR (4th) 360	Para 49 fn 55
20	*Commissioner of Taxation of the Commonwealth of Australia v Ludekens*, 2013 FCA 142 (AustLII)	Para 71 fn 100 Para 115 fn 205
21	*Commissioner of Taxation v Ludekens*, 2013 FCAFC 100 (AustLII)	Para 115 fn 205
22	*Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 SCR 132	Para 115 fn 206
23	*Consolidated Canadian Contractors Inc v R*, [1998] GSTC 91 (FCA)	Para 80 fn 124
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29	*Dumont v R,* 2005 TCC 790 [Informal Procedure] (trial)	Para 46 fn 49
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31	*Dwyer v R*, 2003 FCA 322	Para 76 fn 114 Para 79 fn 122
32	*Eaton v Brant (County) Board of Education,* [1997] 1 SCR 241	Para 37 fn 34 Para 42 fn 43 Para 43 fn 44 Para 47 Para 49 Para 51 fn 61 Para 51 fn 62
33	*Edwards v R*, 2012 FCA 330	Para 101 fn 172
34	*Findlay v R*, 2000 DTC 6345	Para 73 fn 104
35	*Galway v Minister of National Revenue*, [1974] 1 FC 600 (FCA)	Para 41 fn 41
36	*General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641	Para 76 fn 116
37	*Giagnocavo v R*, 95 DTC 5618 (FCA) (judicial review)	Para 46 fn 49
38	*Gitxsan Treaty Society v HEU*, [2000] 1 FC 135 (FCA)	Para 47 fn 51 Para 49 fn 58
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42	*Jada Fishing Co v Canada (Minister of Fisheries & Oceans)*, 2002 FCA 103	Para 41 fn 41
43	*Klotz v R*, 2005 FCA 158	Para 101 fn 172
44	*La Souveraine, Compagnie d'assurance générale c Autorité des marchés financiers*, 2013 SCC 63, [2013] 3 SCR 756	Para 80 fn 124 Para 108 fn 195
45	*Langlois c R,* [1999] 4 CTC 258 (FCA)	Para 46 fn 49
46	*Lavallee v Alberta (Securities Commission)*, 2010 ABCA 48, 474 AR 295	Para 67 fn 90 Para 97 fn 161
47	*Lavers v British Columbia (Minister of Finance)* (1989), 41 BCLR (2d) 307, per Lambert J.A. in dissent	Para 66 fn 89 Para 98 fn 166
48	*Lipson v Cassels Brock & Blackwell LLP*, 2013 ONCA 165	Para 65 fn 87 Para 80 fn 125
49	*Malleck v R*, 98 DTC 1019 (TCC)	Para 79 fn 122
50	*Marcoux-Côté v Canada*, **[**2000**]** FCJ No 1805	Para 74 fn 107
51	*Maréchaux v R*, 2009 TCC 587, aff'd 2010 FCA 287	Para 101 fn 173
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56	*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage),* 2004 FCA 66, [2004] 3 FCR 436, Sharlow JA in dissent, rev'd on other grounds 2005 SCC 69	Para 46 fn 49
57	*Minister of National Revenue v Panko*, [1972] SCR 319	Para 75 fn 110
58	*Misquadis v Canada (Attorney General),* 2003 FCA 473	Para 47 fn 51 Para 47 fn 52
59	*Morine v L & J Parker Equipment Inc*, 2001 NSCA 53, 193 NSR (2d) 51	Para 48 fn 53
60	*N (D) v New Brunswick (Minister of Health and Community Services),* 127 NBR (2d) 383 (NBCA)	Para 45 fn 46
61	*Nelson v R*, [2000] 4 CTC 252 (FCA) (judicial review)	Para 46 fn 49
62	*Newfoundland (Workplace Health, Safety & Compensation) v Ryan Estate,* 2011 NLCA 42, 308 Nfld & PEIR 1, rev'd on other grounds 2013 SCC 44	Para 42 fn 43 Para 50 fn 59
63	*Offshore Logistics Inc v Halifax Longshoremen's Assn, Local 269,* 25 Admin LR (3d) 224 (FCA)	Para 45 fn 47 Para 47 fn 51 Para 47 fn 52
64	*Ontario (Attorney General) v Chatterjee*, 2007 ONCA 406, 86 OR (3d) 168	Para 76 fn 110 Para 85 fn 135 Para 98 fn 166
65	*Paluska v Cava,* 59 OR (3d) 469 (OCA)	Para 42 fn 43 Para 49 fn 58
66	*R v 1260448 Ontario Inc* (2003), 68 OR (3d) 51 (Ont CA)	Para 85 fn 135
67	*R v Clarke*, 2014 SCC 28	Para 38 fn 38
68	*R v Hamilton*, [2006] GSTC 104	Para 76 fn 110
69	*R v Hydro-Québec*, [1997] 3 SCR 213	Para 80 fn 124

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70	*R v Jarvis*, 2002 SCC 73, [2002] 3 SCR 757	Para 59 fn 72 Para 59 fn 73 Para 64 fn 84 Para 76 fn 116 Para 81 fn 126 Para 90 fn 149 Para 91 fn 150
71	*R v Klundert* 2004, 190 OAC 36	Para 76 fn 110
72	*R v Ling*, 2002 SCC 851, [2002] 3 SCR 814	Para 63 fn 81
73	*R v M (CA)*, [1996] 1 SCR 500	Para 83 fn 129
74	*R v McKinlay Transport Ltd*, [1990] 1 SCR 627 at 636	Para 59 fn 72 Para 59 fn 73 Para 62 fn 78 Para 63 fn 81 Para 63 fn 82
75	*R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206	Para 83 fn 129
76	*R v Nelma Electronics Ltd*, [1981] OJ No 920	Para 113 fn 203
77	*R v Nolet*, 2010 SCC 24 [2010] 1 SCR 851	Para 91 fn 150
78	*R v Nome*, 2010 SKCA 147, 362 Sask R 241	Para 42 fn 43 Para 45 fn 47 Para 49 fn 56
79	*R v Palmer*, [1995] NBJ No 414	Para 113 fn 203
80	*R v Port Enterprises Ltd,* 1998 NLCA 73, 169 Nfld & PEIR 315 (Nfld CA)	Para 45 fn 46
81	*R v Potvin*, [1993] 2 SCR 880, per McLachlin J (as she then was)	Para 54 fn 63
82	*R v Rodgers, 2006 SCC 15*, [2006] 1 SCR 554	Para 98 fn 165
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98	*Sirois v Canada*, [1994] TCJ No 1253 (TCC)	Para 79 fn 122
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102	*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299	Para 67 fn 92
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104	*Summit Energy Management Inc v Ontario (Energy Board)*, 2013 ONSC 318	Para 103 fn 185
105	*Therrien c R*, [2002] 3 CTC 2141	Para 74 fn 107
106	*Thomson Newspapers Ltd v Canada*, [1990] 1 SCR 425	Para 85 fn 135 Para 115 fn 206
107	*Trumbley v Metropolitan Toronto Police Force* (1986), 55 OR (2d) 570	Para 56 fn 68 Para 84 fn 132
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129	Canada Revenue Agency, Information Circular 87-2R "International Transfer Pricing" (27 September 1999)	Para 90 fn 147
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CANADA

A Consolidation of

THE CONSTITUTION ACTS 1867 to 1982

DEPARTMENT OF JUSTICE
CANADA

Consolidated as of January 1, 2013

Limitation

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

(*a*) to be informed promptly of the reasons therefor;

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

(*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence;

(*b*) to be tried within a reasonable time;

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without just cause;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Codification administrative des

LOIS CONSTITUTIONNELLES DE 1867 à 1982

MINISTÈRE DE LA JUSTICE
CANADA

Lois codifiées au 1er janvier 2013

Affaires criminelles et pénales

11. Tout inculpé a le droit :

a) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche;

b) d'être jugé dans un délai raisonnable;

c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

e) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable;

f) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;

g) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations;

h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

Cruauté

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

Témoignage incriminant

13. Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.

Interprète

14. La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdité, ont droit à l'assistance d'un interprète.

CONSOLIDATION

CODIFICATION

Federal Courts Act

Loi sur les Cours fédérales

R.S.C., 1985, c. F-7

L.R.C. (1985), ch. F-7

Current to September 15, 2014

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judge shall file a copy of the reasons in the Registry of the court.

R.S., 1985, c. F-7, s. 51; 2002, c. 8, s. 48.

pose une copie de l'énoncé des motifs au greffe du tribunal.

L.R. (1985), ch. F-7, art. 51; 2002, ch. 8, art. 48.

JUDGMENTS OF FEDERAL COURT OF APPEAL

Powers of Federal Court of Appeal

52. The Federal Court of Appeal may

(*a*) quash proceedings in cases brought before it in which it has no jurisdiction or whenever those proceedings are not taken in good faith;

(*b*) in the case of an appeal from the Federal Court,

(i) dismiss the appeal or give the judgment and award the process or other proceedings that the Federal Court should have given or awarded,

(ii) in its discretion, order a new trial if the ends of justice seem to require it, or

(iii) make a declaration as to the conclusions that the Federal Court should have reached on the issues decided by it and refer the matter back for a continuance of the trial on the issues that remain to be determined in light of that declaration; and

(*c*) in the case of an appeal other than an appeal from the Federal Court,

(i) dismiss the appeal or give the decision that should have been given, or

(ii) in its discretion, refer the matter back for determination in accordance with such directions as it considers to be appropriate.

(*d*) [Repealed, 1990, c. 8, s. 17]

R.S., 1985, c. F-7, s. 52; 1990, c. 8, s. 17; 2002, c. 8, s. 50.

JUGEMENTS DE LA COUR D'APPEL FÉDÉRALE

Pouvoirs de la Cour d'appel fédérale

52. La Cour d'appel fédérale peut :

a) arrêter les procédures dans les causes qui ne sont pas de son ressort ou entachées de mauvaise foi;

b) dans le cas d'un appel d'une décision de la Cour fédérale :

(i) soit rejeter l'appel ou rendre le jugement que la Cour fédérale aurait dû rendre et prendre toutes mesures d'exécution ou autres que celle-ci aurait dû prendre,

(ii) soit, à son appréciation, ordonner un nouveau procès, si l'intérêt de la justice paraît l'exiger,

(iii) soit énoncer, dans une déclaration, les conclusions auxquelles la Cour fédérale aurait dû arriver sur les points qu'elle a tranchés et lui renvoyer l'affaire pour poursuite de l'instruction, à la lumière de cette déclaration, sur les points en suspens;

c) dans les autres cas d'appel :

(i) soit rejeter l'appel ou rendre la décision qui aurait dû être rendue,

(ii) soit, à son appréciation, renvoyer l'affaire pour jugement conformément aux instructions qu'elle estime appropriées.

d) [Abrogé, 1990, ch. 8, art. 17]

L.R. (1985), ch. F-7, art. 52; 1990, ch. 8, art. 17; 2002, ch. 8, art. 50.

EVIDENCE

Taking of evidence

53. (1) The evidence of any witness may by order of the Federal Court of Appeal or the Federal Court be taken, subject to any rule or order that may relate to the matter, on commission, on examination or by affidavit.

Admissibility of evidence

(2) Evidence that would not otherwise be admissible is admissible, in the discretion of the Federal Court of Appeal or the Federal Court and subject to any rule that may relate to the matter, if it would be admissible in a similar

PREUVE

Déposition

53. (1) La déposition d'un témoin peut, par ordonnance de la Cour d'appel fédérale ou de la Cour fédérale, selon le cas, et sous réserve de toute règle ou ordonnance applicable en la matière, être recueillie soit par commission rogatoire, soit lors d'un interrogatoire, soit par affidavit.

Admissibilité de la preuve

(2) Par dérogation à l'article 40 de la *Loi sur la preuve au Canada* mais sous réserve de toute règle applicable en la matière, la Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire d'admettre une preuve qui ne serait

Income Tax Act, RSC 1985, c 1 (5th Supp), s 163.2 as it appeared on August 1st, 2008

Misrepresentation of a Tax Matter by a Third Party

Definitions

163.2 (1) The definitions in this subsection apply in this section.

"culpable conduct"
« conduite coupable »

"culpable conduct" means conduct, whether an act or a failure to act, that

- (*a*) is tantamount to intentional conduct;
- (*b*) shows an indifference as to whether this Act is complied with; or
- (*c*) shows a wilful, reckless or wanton disregard of the law.

"entity"
« entité »

"entity" includes an association, a corporation, a fund, a joint venture, an organization, a partnership, a syndicate and a trust.

"excluded activity"
« activité exclue »

"excluded activity", in respect of a false statement, means the activity of

- (*a*) promoting or selling (whether as principal or agent or directly or indirectly) an arrangement, an entity, a plan, a property or a scheme (in this definition referred to as the "arrangement") where it can reasonably be considered that
  - (i) subsection 66(12.68)

Information trompeuse en matière fiscale fournie par des tiers

Définitions

163.2 (1) Les définitions qui suivent s'appliquent au présent article.

« activité de planification »
"planning activity"

« activité de planification » S'entend notamment des activités suivantes :

- *a*) le fait d'organiser ou de créer un arrangement, une entité, un mécanisme, un plan, un régime ou d'aider à son organisation ou à sa création;
- *b*) le fait de participer, directement ou indirectement, à la vente d'un droit dans un arrangement, un bien, une entité, un mécanisme, un plan ou un régime ou à la promotion d'un arrangement, d'une entité, d'un mécanisme, d'un plan ou d'un régime.

« activité d'évaluation »
"valuation activity"

« activité d'évaluation » Tout acte accompli par une personne dans le cadre de la détermination de la valeur d'un bien ou d'un service.

« activité exclue »
"excluded activity"

« activité exclue » Quant à un faux énoncé, activité qui consiste :

- *a*) soit à promouvoir ou à vendre (à titre de principal ou de

applies to the arrangement,

- (ii) the definition "tax shelter" in subsection 237.1(1) applies to a person's interest in the arrangement, or
- (iii) one of the main purposes for a person's participation in the arrangement is to obtain a tax benefit; or

- (*b*) accepting (whether as principal or agent or directly or indirectly) consideration in respect of the promotion or sale of an arrangement.

"false statement"
« faux énoncé »

"false statement" includes a statement that is misleading because of an omission from the statement.

"gross compensation"
« rétribution brute »

"gross compensation" of a particular person at any time, in respect of a false statement that could be used by or on behalf of another person, means all amounts to which the particular person, or any person not dealing at arm's length with the particular person, is entitled, either before or after that time and either absolutely or contingently, to receive or obtain in respect of the statement.

"gross entitlements"
« droits à paiement »

"gross entitlements" of a person at any time, in respect of a planning activity or a valuation activity of the person, means all amounts to which the person, or another person not dealing at arm's length with the

mandataire ou de façon directe ou *e*) un arrangement, un bien, une entité, un mécanisme, un plan ou un régime (appelés « arrangement » à la présente définition), s'il est raisonnable de considérer, selon le cas :

- (i) que le paragraphe 66(12.68) s'applique à l'arrangement,
- (ii) que la définition de « abri fiscal » au paragraphe 237.1(1) s'applique au droit d'une personne dans l'arrangement,
- (iii) que l'un des principaux objets de la participation d'une personne à l'arrangement est l'obtention d'un avantage fiscal;

- *b*) soit à accepter (à titre de principal ou de mandataire ou de façon directe ou *e*) une contrepartie au titre de la promotion ou de la vente d'un arrangement.

« avantage fiscal »
"tax benefit"

« avantage fiscal » Réduction, évitement ou report d'un impôt ou d'un autre montant payable en vertu de la présente loi ou augmentation d'un remboursement d'impôt ou d'autre montant accordé en vertu de cette loi.

« conduite coupable »
"culpable conduct"

« conduite coupable » Conduite — action ou défaut d'agir — qui, selon le cas :

person, is entitled, either before or after that time and either absolutely or contingently, to receive or obtain in respect of the activity.

"participate"
« participer »

"participate" includes

- (*a*) to cause a subordinate to act or to omit information; and
- (*b*) to know of, and to not make a reasonable attempt to prevent, the participation by a subordinate in an act or an omission of information.

"person"
« personne »

"person" includes a partnership.

"planning activity"
« activité de planification »

"planning activity" includes

- (*a*) organizing or creating, or assisting in the organization or creation of, an arrangement, an entity, a plan or a scheme; and
- (*b*) participating, directly or indirectly, in the selling of an interest in, or the promotion of, an arrangement, an entity, a plan, a property or a scheme.

"subordinate"
« subalterne »

"subordinate", in respect of a particular person, includes any other person over whose activities the particular person has direction, supervision or control whether or not the other person is an employee of the particular person or of another person,

- *a*) équivaut à une conduite intentionnelle;
- *b*) montre une indifférence quant à l'observation de la présente loi;
- *c*) montre une insouciance délibérée, déréglée ou téméraire à l'égard de la loi.

« droits à paiement »
"gross entitlements"

« droits à paiement » Quant à une personne à un moment donné, relativement à une activité de planification ou à une activité d'évaluation qu'elle exerce, l'ensemble des montants que la personne, ou une autre personne avec laquelle elle a un lien de dépendance, a le droit de recevoir ou d'obtenir relativement à l'activité avant ou après ce moment et conditionnellement ou non.

« entité »
"entity"

« entité » S'entend notamment d'une association, d'une coentreprise, d'une fiducie, d'un fonds, d'une organisation, d'une société, d'une société de personnes ou d'un syndicat.

« faux énoncé »
"false statement"

« faux énoncé » S'entend notamment d'un énoncé qui est trompeur en raison d'une omission.

« participer »
"participate"

« participer » S'entend notamment du fait :

except that, if the particular person is a member of a partnership, the other person is not a subordinate of the particular person solely because the particular person is a member of the partnership.

"tax benefit"
« avantage fiscal »

"tax benefit" means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act.

"valuation activity"
« activité d'évaluation »

"valuation activity" of a person means anything done by the person in determining the value of a property or a service.

Penalty for misrepresentations in tax planning arrangements

(2) 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

- *a*) de faire agir un subalterne ou de lui faire omettre une information;
- *b*) d'avoir connaissance de la participation d'un subalterne à une action ou à une omission d'information et de ne pas faire des efforts raisonnables pour prévenir pareille participation.

« personne »
"person"

« personne » Sont assimilées aux personnes les sociétés de personnes.

« rétribution brute »
"gross compensation"

« rétribution brute » Quant à une personne donnée à un moment quelconque relativement à un faux énoncé qui pourrait être utilisé par une autre personne ou pour son compte, l'ensemble des montants que la personne donnée, ou toute personne avec laquelle elle a un lien de dépendance, a le droit de recevoir ou d'obtenir relativement à l'énoncé avant ou après ce moment et conditionnellement ou non.

« subalterne »
"subordinate"

« subalterne » Quant à une personne donnée, s'entend notamment d'une autre personne dont les activités sont dirigées, surveillées ou contrôlées par la personne donnée, indépendamment du fait que l'autre personne soit l'employé de la personne donnée ou d'un tiers. Toutefois, l'autre personne n'est pas le subalterne de la personne donnée du seul fait que celle-ci soit l'associé

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.

Amount of penalty

(3) The penalty to which a person is liable under subsection (2) in respect of a false statement is

- (*a*) where the statement is made in the course of a planning activity or a valuation activity, the greater of $1,000 and the total of the person's gross entitlements, at the time at which the notice of assessment of the penalty is sent to the person, in respect of the planning activity and the valuation activity; and
- (*b*) in any other case, $1,000.

Penalty for participating in a misrepresentation

(4) Every person who makes, or participates in, assents to or acquiesces in the making of, a statement to, or by or on behalf of, another person (in this subsection, subsections (5) and (6), paragraph (12)(*c*) and subsection (15) referred to as the "other person") 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 or on behalf of the other person for a purpose of this Act is liable to a penalty in respect of the false statement.

Amount of penalty

(5) The penalty to which a person is

d'une société de personnes.

Pénalité pour information trompeuse dans les arrangements de planification fiscale

(2) La personne qui fait ou présente, ou qui fait faire ou présenter par une autre personne, un énoncé dont elle sait ou aurait vraisemblablement su, n'eût été de circonstances équivalant à une conduite coupable, qu'il constitue un faux énoncé qu'un tiers (appelé « autre personne » aux paragraphes (6) et (15)) pourrait utiliser à une fin quelconque de la présente loi, ou qui participe à un tel énoncé, est passible d'une pénalité relativement au faux énoncé.

Montant de la pénalité

(3) La pénalité dont une personne est passible selon le paragraphe (2) relativement à un faux énoncé correspond au montant suivant :

- *a*) si l'énoncé est fait dans le cadre d'une activité de planification ou d'une activité d'évaluation, 1 000 $ ou, s'il est plus élevé, le total des droits à paiement de la personne, au moment de l'envoi à celle-ci d'un avis de cotisation concernant la pénalité, relativement à l'activité de planification et à l'activité d'évaluation;
- *b*) dans les autres cas, 1 000 $.

Pénalité pour participation à une information trompeuse

(4) La personne qui fait un énoncé à une autre personne ou qui participe, consent ou acquiesce à un énoncé fait par une autre personne, ou pour son compte, (ces autres personnes étant appelées « autre personne » au présent paragraphe, aux paragraphes (5) et (6), à l'alinéa (12)*c*) et au paragraphe (15)) dont elle sait ou aurait vraisemblablement su, n'eût été de circonstances équivalant à une conduite

liable under subsection (4) in respect of a false statement is the greater of

- (*a*) $1,000, and
- (*b*) the lesser of
  - (i) the penalty to which the other person would be liable under subsection 163(2) if the other person made the statement in a return filed for the purposes of this Act and knew that the statement was false, and
  - (ii) the total of $100,000 and the person's gross compensation, at the time at which the notice of assessment of the penalty is sent to the person, in respect of the false statement that could be used by or on behalf of the other person.

coupable, qu'il constitue un faux énoncé qui pourrait être utilisé par l'autre personne, ou pour son compte, à une fin quelconque de la présente loi est passible d'une pénalité relativement au faux énoncé.

Montant de la pénalité

(5) La pénalité dont une personne est passible selon le paragraphe (4) relativement à un faux énoncé correspond au plus élevé des montants suivants :

- *a*) 1 000 $;
- *b*) le moins élevé des montants suivants :
  - (i) la pénalité dont l'autre personne serait passible selon le paragraphe 163(2) si elle avait fait l'énoncé dans une déclaration produite pour l'application de la présente loi tout en sachant qu'il était faux,
  - (ii) la somme de 100 000 $ et de la rétribution brute de la personne, au moment où l'avis de cotisation concernant la pénalité lui est envoyé, relativement au faux énoncé qui pourrait être utilisé par l'autre personne ou pour son compte.

Reliance in good faith

(6) For the purposes of subsections (2) and (4), a person (in this subsection and in subsection (7) referred to as the "advisor") who acts on behalf of the other person is not considered to have acted in circumstances amounting to culpable conduct in respect of the false statement referred to in subsection (2) or (4) solely because the advisor relied, in good faith, on information provided to the advisor by or on behalf of the other person or, because of such reliance, failed to verify, investigate or correct the information.

Crédit accordé à l'information

(6) Pour l'application des paragraphes (2) et (4), la personne (appelée « conseiller » au paragraphe (7)) qui agit pour le compte de l'autre personne n'est pas considérée comme ayant agi dans des circonstances équivalant à une conduite coupable en ce qui a trait au faux énoncé visé aux paragraphes (2) ou (4) du seul fait qu'elle s'est fondée, de bonne foi, sur l'information qui lui a été présentée par l'autre personne, ou pour le compte de celle-ci, ou que, de ce fait, elle a omis de vérifier ou de corriger l'information ou d'enquêter à son sujet.

Non-application of subsection (6)

(7) Subsection (6) does not apply in respect of a statement that an advisor makes (or participates in, assents to or acquiesces in the making of) in the course of an excluded activity.

False statements in respect of a particular arrangement

(8) For the purpose of applying this section (other than subsections (4) and (5)),

- (*a*) where a person makes or furnishes, participates in the making of or causes another person to make or furnish two or more false statements, the false statements are deemed to be one false statement if the statements are made or furnished in the course of
  - (i) one or more planning activities that are in respect of a particular arrangement, entity, plan, property or scheme, or
  - (ii) a valuation activity that is in respect of a particular property or service; and
- (*b*) for greater certainty, a particular arrangement, entity, plan, property or scheme includes an arrangement, an entity, a plan, a property or a scheme in respect of which
  - (i) an interest is required to have, or has, an identification number issued under section 237.1 that is the same number as the number that applies to each other interest in the property,
  - (ii) a selling instrument in respect of flow-through shares is required to be filed with the Minister because of subsection 66(12.68), or
  - (iii) one of the main purposes for a person's participation in the arrangement, entity, plan or scheme, or a person's acquisition of the property, is to obtain a tax benefit.

Application du paragraphe (6)

(7) Le paragraphe (6) ne s'applique pas à l'énoncé qu'un conseiller fait, ou auquel il participe, consent ou acquiesce, dans le cadre d'une activité exclue.

Faux énoncés relatifs à un arrangement

(8) Les règles suivantes s'appliquent dans le cadre du présent article, sauf les paragraphes (4) et (5):

- *a*) lorsqu'une personne fait ou présente, ou fait faire ou présenter par une autre personne, plusieurs faux énoncés, ou y participe, ceux-ci sont réputés être un seul faux énoncé s'ils ont été faits ou présentés dans le cadre des activités suivantes :
  - (i) une ou plusieurs activités de planification qui se rapportent à une entité donnée ou à un arrangement, bien, mécanisme, plan ou régime donné,
  - (ii) une activité d'évaluation qui se rapporte à un bien ou service donné;
- *b*) il est entendu qu'une entité donnée ou un arrangement, bien, mécanisme, plan ou régime donné comprend une entité, un arrangement, un bien, un mécanisme, un plan ou un régime relativement auquel, selon le cas :
  - (i) un droit a ou doit avoir un numéro d'inscription attribué en vertu de l'article 237.1 qui est le même numéro que celui qui s'applique à chacun des autres droits dans le bien,
  - (ii) un avis d'émission visant des actions accréditives doit être présenté au ministre par l'effet du

Clerical services

(9) For the purposes of this section, a person is not considered to have made or furnished, or participated in, assented to or acquiesced in the making of, a false statement solely because the person provided clerical services (other than bookkeeping services) or secretarial services with respect to the statement.

Valuations

(10) Notwithstanding subsections (6) and 163(3), a statement as to the value of a property or a service (which value is in this subsection referred to as the "stated value"), made by the person who opined on the stated value or by a person in the course of an excluded activity is deemed to be a statement that the person would reasonably be expected to know, but for circumstances amounting to culpable conduct, is a false statement if the stated value is

- (*a*) less than the product obtained when the prescribed percentage for the property or service is multiplied by the fair market value of the property or service; or
- (*b*) greater than the product obtained when the prescribed percentage for the property or service is multiplied by the fair market value of the property or service.

Exception

(11) Subsection (10) does not apply to a person in respect of a statement as to the

paragraphe 66(12.68),

- (iii) l'un des principaux objets de la participation d'une personne à l'entité, à l'arrangement, au mécanisme, au plan ou au régime, ou de l'acquisition du bien par une personne, est l'obtention d'un avantage fiscal.

Services de bureau

(9) Pour l'application du présent article, une personne n'est pas considérée comme ayant fait ou présenté un faux énoncé, ou comme y ayant participé, consenti ou acquiescé, du seul fait qu'elle a rendu des services de bureau (sauf la tenue de la comptabilité) ou des services de secrétariat relativement à l'énoncé.

Évaluations

(10) Malgré les paragraphes (6) et 163(3), l'énoncé quant à la valeur d'un bien ou d'un service (appelée « valeur attribuée » au présent paragraphe) fait par la personne qui a opiné sur la valeur attribuée ou par une personne dans le cours de l'exercice d'une activité exclue est réputé être un énoncé dont elle aurait vraisemblablement su, n'eût été de circonstances équivalant à une conduite coupable, qu'il constitue un faux énoncé, si la valeur attribuée est :

- *a*) soit inférieure au produit de la multiplication du pourcentage fixé par règlement pour le bien ou le service par la juste valeur marchande du bien ou du service;
- *b*) soit supérieure au produit de la multiplication du pourcentage fixé par règlement pour le bien ou le service par la juste valeur marchande du bien ou du service.

Exception

value of a property or a service if the person establishes that the stated value was reasonable in the circumstances and that the statement was made in good faith and, where applicable, was not based on one or more assumptions that the person knew or would reasonably be expected to know, but for circumstances amounting to culpable conduct, were unreasonable or misleading in the circumstances.

Special rules

(12) For the purpose of applying this section,

- (*a*) where a person is assessed a penalty that is referred to in subsection (2) the amount of which is based on the person's gross entitlements at any time in respect of a planning activity or a valuation activity and another assessment of the penalty is made at a later time,
  - (i) if the person's gross entitlements in respect of the activity are greater at that later time, the assessment of the penalty made at that later time is deemed to be an assessment of a separate penalty, and
  - (ii) in any other case, the notice of assessment of the penalty sent before that later time is deemed not to have been sent;
- (*b*) a person's gross entitlements at any time in respect of a planning activity or a valuation activity, in the course of which the person makes or furnishes, participates in the making of or causes another person to make or furnish a false statement, shall exclude the total of all amounts each of which is the amount of a penalty (other than a penalty the assessment of which is void because of

(11) Le paragraphe (10) ne s'applique pas à une personne relativement à un énoncé quant à la valeur d'un bien ou d'un service si la personne établit que la valeur attribuée était raisonnable dans les circonstances et que l'énoncé a été fait de bonne foi et, le cas échéant, n'était pas fondé sur une ou plusieurs hypothèses dont la personne savait ou aurait vraisemblablement su, n'eût été de circonstances équivalant à une conduite coupable, qu'elles étaient déraisonnables ou trompeuses dans les circonstances.

Règles spéciales

(12) Les règles suivantes s'appliquent dans le cadre du présent article :

- *a*) lorsqu'est établie à l'égard d'une personne une cotisation concernant une pénalité prévue au paragraphe (2) dont le montant est fondé sur les droits à paiement de la personne à un moment donné relativement à une activité de planification ou une activité d'évaluation et qu'une autre cotisation concernant la pénalité est établie à un moment ultérieur, les présomptions suivantes s'appliquent :
  - (i) si les droits à paiement de la personne relativement à l'activité sont plus élevés au moment ultérieur, la cotisation concernant la pénalité établie à ce moment est réputée être une cotisation concernant une pénalité distincte,
  - (ii) dans les autres cas, l'avis de cotisation concernant la pénalité qui a été envoyé avant le moment ultérieur est réputé ne pas avoir été envoyé;
- *b*) est exclu des droits à paiement d'une personne à un moment donné relativement à une activité de planification, ou une activité

subsection (13)) determined under paragraph (3)(*a*) in respect of the false statement for which notice of the assessment was sent to the person before that time; and

- (*c*) where a person is assessed a penalty that is referred to in subsection (4), the person's gross compensation at any time in respect of the false statement that could be used by or on behalf of the other person shall exclude the total of all amounts each of which is the amount of a penalty (other than a penalty the assessment of which is void because of subsection (13)) determined under subsection (5) to the extent that the false statement was used by or on behalf of that other person and for which notice of the assessment was sent to the person before that time.

Assessment void

(13) For the purposes of this Act, if an assessment of a penalty that is referred to in subsection (2) or (4) is vacated, the assessment is deemed to be void.

Maximum penalty

(14) A person who is liable at any time to a penalty under both subsections (2) and (4) in respect of the same false statement is liable to pay a penalty that is not more than the greater of

- (*a*) the total amount of the penalties to which the person is liable at that time under subsection (2) in respect of the

d'évaluation, dans le cadre de laquelle elle fait ou présente, ou fait faire ou présenter par une autre personne, un faux énoncé, ou y participe, le total des montants représentant chacun le montant d'une pénalité (sauf celle dont la cotisation est nulle par l'effet du paragraphe (13)) déterminée selon l'alinéa (3)*a*) relativement au faux énoncé et concernant laquelle un avis de cotisation a été envoyé à la personne avant ce moment;

- *c*) lorsqu'est établie à l'égard d'une personne une cotisation concernant une pénalité prévue au paragraphe (4), est exclu de la rétribution brute de la personne, à un moment donné, relativement au faux énoncé qui pourrait être utilisé par l'autre personne ou pour son compte, le total des montants représentant chacun le montant d'une pénalité (sauf celle dont la cotisation est nulle par l'effet du paragraphe (13)) déterminée selon le paragraphe (5), dans la mesure où cet énoncé a été utilisé par cette autre personne ou pour son compte, et concernant laquelle un avis de cotisation a été envoyé à la personne avant ce moment.

Cotisation nulle

(13) Pour l'application de la présente loi, la cotisation concernant une pénalité prévue aux paragraphes (2) ou (4) est réputée nulle si elle a été annulée.

Pénalité maximale

(14) La personne qui est passible, à un moment donné, d'une pénalité selon les paragraphes (2) et (4) relativement au même faux énoncé est passible d'une pénalité n'excédant pas le plus élevé des montants suivants :

- *a*) le total des pénalités dont elle est

statement, and

- (*b*) the total amount of the penalties to which the person is liable at that time under subsection (4) in respect of the statement.

Employees

(15) Where an employee (other than a specified employee or an employee engaged in an excluded activity) is employed by the other person referred to in subsections (2) and (4),

- (*a*) subsections (2) to (5) do not apply to the employee to the extent that the false statement could be used by or on behalf of the other person for a purpose of this Act; and
- (*b*) the conduct of the employee is deemed to be that of the other person for the purposes of applying subsection 163(2) to the other person.

passible à ce moment selon le paragraphe (2) relativement à l'énoncé;

- *b*) le total des pénalités dont elle est passible à ce moment selon le paragraphe (4) relativement à l'énoncé.

Employés

(15) Les règles suivantes s'appliquent à l'égard d'un employé (sauf un employé déterminé ou un employé exerçant une activité exclue) de l'autre personne visée aux paragraphes (2) et (4):

- *a*) les paragraphes (2) à (5) ne s'appliquent pas à lui dans la mesure où le faux énoncé pourrait être utilisé par l'autre personne, ou pour son compte, pour l'application de la présente loi;
- *b*) sa conduite est réputée être celle de l'autre personne pour l'application du paragraphe 163(2) à celle-ci.

CANADA

CONSOLIDATION

CODIFICATION

Supreme Court Act

Loi sur la Cour suprême

R.S.C., 1985, c. S-26

L.R.C. (1985), ch. S-26

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Remand of case

(1.1) Notwithstanding subsection (1), the Court may, in its discretion, remand the whole or any part of the case to the court appealed from or the court of original jurisdiction and order any further proceedings that would be just in the circumstances.

Mandatory oral hearing

(1.2) On the request of the applicant, an oral hearing shall be ordered to determine an application for leave to appeal to the Court from a judgment of a court of appeal setting aside an acquittal of an indictable offence and ordering a new trial if there is no right of appeal on a question of law on which a judge of the court of appeal dissents.

Time for oral hearing

(2) Where the court makes an order for an oral hearing, the oral hearing shall be held within thirty days after the date of the order or such further time as the Court determines.

Quorum

(3) Any three judges of the Court constitute a quorum for the consideration and determination of an application for leave to appeal, whether or not an oral hearing is ordered.

Exception

(4) Notwithstanding subsection (3), five judges of the Court constitute a quorum in the case of an application for leave to appeal from a judgment of a court

(*a*) quashing a conviction of an offence punishable by death; or

(*b*) dismissing an appeal against an acquittal of an offence punishable by death, including an acquittal in respect of a principal offence where the accused has been convicted of an offence included in the principal offence.

R.S., 1985, c. S-26, s. 43; R.S., 1985, c. 34 (3rd Supp.), s. 4; 1990, c. 8, s. 38; 1994, c. 44, s. 98; 1997, c. 18, s. 138.

JUDGMENTS

Quashing proceedings in certain cases

44. The Court may quash proceedings in cases brought before it in which an appeal does not lie, or whenever such proceedings are taken against good faith.

R.S., c. S-19, s. 46.

Appeal may be dismissed or judgment given

45. The Court may dismiss an appeal or give the judgment and award the process or other proceedings that the court whose decision is appealed against should have given or awarded.

R.S., c. S-19, s. 47.

Renvoi d'une affaire

(1.1) Malgré le paragraphe (1), la Cour peut renvoyer une affaire en tout ou en partie à la juridiction inférieure ou à celle de première instance et ordonner les mesures qui lui semblent appropriées.

Audience

(1.2) Sur demande du requérant, la Cour ordonne la tenue d'une audience pour décider d'une demande d'autorisation d'appel dans le cas où la Cour d'appel a annulé un acquittement à l'égard d'un acte criminel et ordonné un nouveau procès, s'il n'y a pas de droit d'appel sur une question de droit au sujet de laquelle un juge de Cour d'appel est dissident.

Délai

(2) Dans le cas où la Cour ordonne la tenue d'une audience, celle-ci doit être tenue dans les trente jours suivant la date de l'ordonnance ou dans le délai supplémentaire fixé par la Cour.

Quorum

(3) Trois juges constituent le quorum pour l'application du paragraphe (1) même si la Cour tient audience.

Exception au quorum

(4) Le quorum est porté à cinq juges lorsque la demande d'autorisation d'appel concerne des jugements :

a) annulant la déclaration de culpabilité, dans le cas d'une infraction punissable de mort;

b) rejetant l'appel d'un acquittement rendu dans le cas d'une infraction punissable de mort, y compris d'un acquittement à l'égard d'une infraction principale dans le cadre de laquelle l'accusé a été déclaré coupable d'une infraction incluse dans l'infraction principale.

L.R. (1985), ch. S-26, art. 43; L.R. (1985), ch. 34 (3e suppl.), art. 4; 1990, ch. 8, art. 38; 1994, ch. 44, art. 98; 1997, ch. 18, art. 138.

JUGEMENTS

Cassation des procédures en certains cas

44. La Cour peut casser les procédures dans les causes portées devant elle qui ne peuvent faire l'objet d'appel ou quand les procédures sont entachées de mauvaise foi.

S.R., ch. S-19, art. 46.

Rejet de l'appel ou prononcé d'un jugement

45. La Cour peut rejeter l'appel ou se substituer à la juridiction inférieure pour le prononcé du jugement et l'engagement des moyens de contrainte ou autres procédures.

S.R., ch. S-19, art. 47.

CONSOLIDATION

CODIFICATION

Tax Court of Canada Act

Loi sur la Cour canadienne de l'impôt

R.S.C., 1985, c. T-2

L.R.C. (1985), ch. T-2

Current to September 15, 2014

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administer oaths and to take and receive affidavits, declarations and solemn affirmations in or concerning any proceeding had or to be had in the Court.

R.S., 1985, c. T-2, s. 19; 2002, c. 8, s. 81(E).

l'étranger, les serments, affidavits, affirmations solennelles ou autres déclarations, relatifs à une procédure engagée ou à engager devant la Cour.

L.R. (1985), ch. T-2, art. 19; 2002, ch. 8, art. 81(A).

GENERAL

Vexatious proceedings

19.1 (1) If the Court is satisfied, on application, that a person has persistently instituted vexatious proceedings or has conducted a proceeding in a vexatious manner, it may order that no further proceedings be instituted by the person in the Court or that a proceeding previously instituted by the person in the Court not be continued, except by leave of the Court, and may award costs against the person in accordance with the rules of the Court.

Attorney General of Canada

(2) An application under subsection (1) may be made only with the consent of the Attorney General of Canada, who is entitled to be heard on the application and on any application made under subsection (3).

Application for rescission or leave to proceed

(3) A person against whom the Court has made an order under subsection (1) may apply to the Court for rescission of the order or for leave to institute or continue a proceeding.

Court may grant leave

(4) If an application is made to the Court under subsection (3) for leave to institute or continue a proceeding, the Court may grant leave if it is satisfied that the proceeding is not an abuse of process and that there are reasonable grounds for the proceeding.

No appeal

(5) A decision of the Court under subsection (4) is final and is not subject to appeal.

2002, c. 8, s. 77.

Constitutional questions

19.2 (1) If the constitutional validity, applicability or operability of an Act of Parliament or its regulations is in question before the Court, the Act or regulations shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).

Time of notice

(2) The notice must be served at least 10 days before the day on which the constitutional

DISPOSITIONS GÉNÉRALES

Poursuites vexatoires

19.1 (1) La Cour peut, si elle est convaincue par suite d'une requête qu'une personne a de façon persistante introduit des instances vexatoires devant elle ou y a agi de façon vexatoire au cours d'une instance, lui interdire d'engager d'autres instances devant elle ou de continuer devant elle une instance déjà engagée, sauf avec son autorisation; elle peut condamner la personne en cause aux frais et dépens en conformité avec les règles de la Cour.

Procureur général du Canada

(2) La présentation de la requête nécessite le consentement du procureur général du Canada, lequel a le droit d'être entendu à cette occasion de même que lors de toute contestation portant sur l'objet de la requête.

Requête en levée de l'interdiction ou en autorisation

(3) Toute personne visée par une ordonnance rendue aux termes du paragraphe (1) peut, par requête à la Cour, demander soit la levée de l'interdiction qui la frappe, soit l'autorisation d'engager ou de continuer une instance devant la Cour.

Pouvoirs de la Cour

(4) Sur présentation de la requête prévue au paragraphe (3), la Cour peut, si elle est convaincue que l'instance que l'on cherche à engager ou à continuer ne constitue pas un abus de procédure et est fondée sur des motifs valables, autoriser son introduction ou sa continuation.

Décision définitive et sans appel

(5) La décision rendue par la Cour aux termes du paragraphe (4) est définitive et sans appel.

2002, ch. 8, art. 77.

Questions constitutionnelles

19.2 (1) Les lois fédérales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour ne peuvent être déclarés invalides, inapplicables ou sans effet, que si le procureur général du Canada et ceux des provinces ont été avisés conformément au paragraphe (2).

Formule et délai de l'avis

(2) L'avis est, sauf ordonnance contraire de la Cour, signifié au moins dix jours avant la

question is to be argued, unless the Court orders otherwise.

Notice of appeal

(3) The Attorney General of Canada and the attorney general of each province are entitled to notice of any appeal made in respect of the constitutional question.

Right to be heard

(4) The Attorney General of Canada and the attorney general of each province are entitled to adduce evidence and make submissions to the Court in respect of the constitutional question.

Appeal

(5) If the Attorney General of Canada or the attorney general of a province makes submissions, that attorney general is deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question.

2002, c. 8, s. 77; 2006, c. 11, s. 34(E).

RULES

Rules

20. (1) Subject to the approval of the Governor in Council, rules for regulating the pleadings, practice and procedure in the Court shall be made by the rules committee.

Idem

(1.1) Without limiting the generality of the foregoing, the rules committee may make rules

(*a*) for oral examinations for discovery of officers of Her Majesty in right of Canada;

(*b*) for discovery and production, and supplying of copies, of documents by Her Majesty in right of Canada;

(*c*) respecting the taking of evidence before a judge or any other qualified person, inside or outside Canada, before or during a proceeding before the Court, and on commission or otherwise, of any person;

(*d*) providing for the reference of any question of fact for inquiry and report by a judge or other person as referee;

(*e*) for the fixing of fees to be paid by a party to the Registry of the Court for payment into the Consolidated Revenue Fund in respect of a proceeding before the Court;

(*f*) providing for the procedure that applies in respect of an appeal that was commenced according to one procedure and becomes an appeal in respect of which the other procedure applies;

(*g*) providing for pre-trial conferences;

date à laquelle la question constitutionnelle qui en fait l'objet doit être débattue.

Appel et contrôle judiciaire

(3) Les avis d'appel portant sur une question constitutionnelle sont à signifier au procureur général du Canada et à ceux des provinces.

Droit des procureurs généraux d'être entendus

(4) Le procureur général à qui un avis visé aux paragraphes (1) ou (3) est signifié peut présenter une preuve et des observations à la Cour à l'égard de la question constitutionnelle en litige.

Droit d'appel

(5) Le procureur général qui présente des observations est réputé partie à l'instance aux fins d'un appel portant sur la question constitutionnelle.

2002, ch. 8, art. 77; 2006, ch. 11, art. 34(A).

RÈGLES

Règles

20. (1) Sous réserve de leur approbation par le gouverneur en conseil, les règles concernant la pratique et la procédure devant la Cour sont établies par le comité des règles.

Idem

(1.1) Sans qu'il soit porté atteinte à l'application générale de ce qui précède, le comité des règles peut prendre des règles sur les objets suivants :

a) les interrogatoires préalables oraux des agents de Sa Majesté du chef du Canada;

b) la production de documents, la communication de leur teneur ainsi que la fourniture de copies de documents, par Sa Majesté du chef du Canada;

c) la prise de témoignages par un juge ou une autre personne qualifiée, au Canada ou à l'étranger, avant que des procédures ne soient engagées devant la Cour ou pendant que celle-ci en est saisie, notamment par commission;

d) le renvoi d'une question de fait pour enquête ou rapport devant un juge ou une autre personne agissant en qualité d'arbitre;

e) l'établissement des droits payables au greffe de la Cour par une partie, relativement à toute procédure, pour versement au Trésor;

f) la procédure applicable à un appel interjeté sous le régime de la procédure informelle,