Citation: 2012 TCC 287
Date: 20121**16**
Docket: 2009-3368(IT)G

BETWEEN:

JULIE GUINDON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Bédard J.

[1] The participants in a donation program (the "Program") were to acquire timeshare units as beneficiaries of a trust for a fraction of their value and donate them to a charity in exchange for tax receipts for the actual value of the units. No donation ever took place as the timeshare units never existed and no trust was settled. The Minister of National Revenue (the "Minister"), on the basis that the Appellant made, participated in, assented to or acquiesced in the making of 135 tax receipts that she knew, or would reasonably be expected to have known, constituted false statements that could be used by the participants to claim an unwarranted tax credit under the *Income Tax Act* (the "*Act*"), assessed against the Appellant on August 1, 2008 penalties under section 163.2 of the *Act* in the amount of $546,747 in respect of false statements made in the context of that donation program. The Appellant appealed the assessment.

[2] I would point out immediately that the Minister admitted he was wrong in assessing the third party penalty against the Appellant in respect of the tax receipt that was issued in her name. The penalty associated with that tax receipt should have

been assessed under subsection 163(2) of the *Act* and not under subsection 163.2(4) of the *Act*.

[3] The parties submitted in evidence the following Agreed Statement of Fact:

> 1. The appellant is a Canadian resident.
>
> 2. The appellant is a lawyer practising in Ontario since 1991.
>
> 3. While she did some real estate law when she first started her practice, the appellant's main fields of practice were and remain family law and wills/estates law.
>
> 4. Aside from the legal opinion involved in this appeal, the appellant has not practiced nor does she have any expertise in income tax law.
>
> 5. Starting in May 2001, the appellant had various meetings with Lee Goudie, the representative of Tropical Development Ltd. ("TDL"), a company incorporated and established under the laws of Turks and Caicos Islands, and Richard St-Denis and Glen Ploughman, representatives of KGR Tax Services Ltd. ("KGR"). Goodie [*sic*], St-Denis and Ploughman are referred to collectively in this document as the "Principals".
>
> 6. In some documents TDL is also referred to as Tropical Amusement Inc., Tropical Development International Inc. and Tropical Development International Ltd.
>
> 7. St-Denis is the appellant's cousin and was the appellant's financial advisor from 1991 to 2002.
>
> 8. The appellant was asked by the Principals to prepare a legal opinion (by reviewing a similar opinion on a different program) on a program involving a tax reduction through a leveraged donation structure which was called The Global Trust Charitable Donation Program (the "Program").
>
> 9. The Program was planned by the Principals.
>
> 10. During the appellant's discussions with the Principals, which discussions started in May 2001, the Program was verbally relayed to the appellant and outlined as follows:
>
> > a. Gordon Kerr, a lawyer and resident of Turks and Caicos Island [*sic*] (the "Settlor") had agreed to be the settlor of a trust in Ontario called the Global Trust of Canada (the "Trust");
> >
> > b. The Trust was for the benefit of a class of individuals who were both residents and non-residents of Canada and who had indicated a willingness to support charitable organizations;

c. KGR had agreed to be the Trustee of the Trust;

d. The Settlor was going to acquire timeshare units called Biennial Vacation Ownership Weeks ("VOWs") from TDL, which held the property of Hawkes Nest Plantation Resort/Arawak Inn in Turks and Caicos Island [*sic*];

e. After acquiring the VOWs the Settlor would gift the VOWs to the Trustee, who in turn would exchange the VOWs to the beneficiaries of the Trust, in return for the payment of a vendor take-back charge;

f. The amount of the vendor take-back charge that was to be paid by beneficiaries of the Trust was $3,248 per VOW;

g. It was anticipated that the beneficiaries would donate the VOWs to a registered Canadian charitable organization for a receipt for the fair market value of the donated VOWs; and

h. The VOWs were valued at $10,825 per VOW.

11. In a letter dated July 10, 2001 addressed to Goudie, the appellant accepted a retainer of one thousand dollars ($1,000) to prepare the opinion letter and confirmed *inter alia* that:

a. The area of tax law did not fall within her field of expertise and therefore recommended that the representative of TDL have a tax lawyer and an accountant review her opinion to ensure its accuracy;

b. That Gordon Kerr had accepted to be the settler [*sic*] of the Trust; and

c. That the appellant was waiting to review the documents establishing the Program in order to prepare her opinion.

12. In a letter dated July 11, 2001 addressed to KGR, the appellant provided her first draft opinion on the tax consequences on [*sic*] the donation of VOWs by an individual Canadian taxpayer to a registered charitable organization.

13. Except for the removal of one paragraph that was initially in the July 11, 2001 version (top of p. 9 "In other words…"), additional versions of the draft opinion containing minor changes were issued by the appellant in July, August and September 2001.

14. Pressures [*sic*] were made by the Principals to have the appellant sign her legal opinion as soon as possible as they wanted to proceed with the Program in time for the 2001 taxation year.

15. The appellant decided to provide KGR with an executed version of her legal opinion on September 19, 2001 (the "legal opinion") without having reviewed the documents listed on page 2 (the "Documents") which related to the creation of various aspects of the Program, the existence of the VOWs and the donation of the same to a registered charity.

16. Despite the appellant's recommendation stated in a separate letter dated July 10, 2001 to have her legal opinion reviewed by a tax lawyer and an accountant, she knew that the opinion could be used by the Principals and understood that potential participants in the Program could see it.

17. A promotional package, including the appellant's legal opinion, was provided to potential participants in the Program in November and December of 2001.

18. In the event, as no VOWs were created and no trust settled, no VOWs were donated to the Charity in 2001.

Tax Receipts

19. From 1999 to 2004, the appellant was also the President of *Les Guides Franco-Canadiennes District d'Ottawa* (the "Charity"), a charity registered under the *Income Tax Act*.

20. In August 2001, the idea of involving the Charity as the potential recipient of the donated VOWs came up for the first time.

21. In October 2001, St-Denis and Ploughman discussed formally with the appellant their desire to involve the Charity as the potential recipient of the donated VOWs.

22. On information provided by the appellant during a meeting of the Charity's board of directors in October, a resolution was adopted in favour of the Charity participating in the Program.

23. On November 21, 2001, TDL launched the Program involving the Charity.

24. No other charities were involved in the Program.

25. On November 22, 2001, the Charity entered into an agreement with TDL to engage the services of TDL to market and sell all donated VOWs on behalf of the Charity for cash proceeds. The Charity was to receive a minimum return of $500 per unit sold.

26. The creation and sale of VOWs to various individuals was to be handled by the Principals of the Program.

27. Prior to signing charitable donation tax receipts, the representatives of the Charity, including the appellant, were informed verbally by the Principals that the VOWs had been properly created and that the documentation effecting a gift of the VOWs from the ostensible donors to the Charity had been completed. In fact, no such documentation ever existed.

28. The appellant had general authority to sign tax receipts on behalf of the Charity.

29. On December 31, 2001, 135 tax receipts acknowledging the ostensible donation of VOWs were issued by the Charity in the amounts listed in Appendix A attached.

30. The information on the tax receipts were [*sic*] entered by St-Denis and Ploughman at KGR's place of business. Subsequently, the charity was asked to sign the tax receipts.

31. The appellant, with the help of Micheline Roy-Lane, Treasurer of the Charity, came to KGR's place of business, reviewed the tax receipts by cross-checking them with a list of information provided by St-Denis and Ploughman and took turns in signing the tax receipts.

32. The parties were only able to positively identify the signature of the appellant on certain of the tax receipts as shown in Appendix A.

Hawkes Nest Plantation Project

33. At the time, the Principals were also involved in a development project known as the Hawkes Nest Plantation Resort/Arawak Inn in Turks and Caicos Island [*sic*] (the "Project") and owned by TDL.

34. St-Denis and Ploughman were tasked with seeking loans to assist in financing the Project.

35. On July 20, 2001, the appellant lent money to TDL in the context of the Project in the amount of $20,000 USD.

36. The next day, on July 21, 2001, the appellant transferred her $20,000 USD promissory note to her parents for no consideration.

37. Friends and family members of the appellant and St-Denis who participated in the Program were at the time also involved in the Project as follows:

NAME	RELATIONSHIP	DATE	AMOUNT LENT FOR THE PROJECT
Armand and Jeannine Guindon	Father and mother Of the Appellant	June 25, 2001	$50,000 USD

	Aunt and Uncle of Richard St-Denis		
Chantal Perrier	Friend	June 28, 2001	$ 20,000 USD
Monique Trudel & André Henri	Monique is related by marriage to the Appellant's sister	June 29, 2001	$ 50,000 USD
Laurette Charlebois	Aunt to both the Appellant and Richard St-Denis	July 3, 2001	$ 30,000 USD
Luc & Hélène Boileau	Cousins to both the Appellant and Richard St-Denis	July 5, 2001	$ 50,000 USD
Jean-Marc Gaumond	Friend of Jacques Charlebois	July 6, 2001	$ 50,000 USD
Noël & Réjeanne Boileau	Uncle and aunt to both the Appellant and Richard St-Denis	July 16, 2001	$ 10,000 USD
Jacinthe Guindon and Jeannot Trudel	Sister and brother-in-law of the Appellant	July 20, 2001 September 21, 2001	$ 60,000 USD $ 40,000 USD
Jacques & Diane Charlebois	Cousins to both the Appellant and Richard St-Denis	July 27, 2001	$ 90,000 USD
TOTAL			**$450,000 USD**

38. As an incentive to encourage these individuals to cash in their RRSPs to loan monies for the Project, the Principals represented that they would also be allowed to participate in the Program which would provide them with generous tax refunds.

39. Their participation in the Program was as follows:

NAME	RELATIONSHIP	# OF VOWs	TAKE-BACK CHARGE
Armand and Jeannine Guindon	Father and mother of the Appellant Aunt and Uncle of Richard St-Denis	3	$ 9,744
Chantal Perrier	Friend	4	$ 12,992
Monique Trudel & André Henri	Monique is related by marriage to the Appellant's sister	4	$ 12,992
Laurette Charlebois	Aunt to both the Appellant and Richard St-Denis	1	$ 3,248
Luc & Hélène Boileau	Cousins	6	$ 19,488
Jean-Marc Gaumond	Friend of Jacques Charlebois	2	$ 6,496
Noël & Réjeanne Boileau	Uncle and aunt to both the Appellant and Richard St-Denis	4	$ 12,992
Jacinthe Guindon and Jeannot Trudel	Sister and brother-in-law of the Appellant	15	$ 48,720
Jacques & Diane Charlebois	Cousins to both the Appellant and Richard St-Denis	4	$ 12,992
TOTAL			**$139,664**

40. Other friends and family members of the appellant who did not lend money to the Project participated in the Program as follows:

NAME	RELATIONSHIP	#OF VOWs	TAKE-BACK CHARGE
Jacques Ferragne	Richard St-Denis' nephew by marriage	5	$16,240
Denise Guibord	Richard St-Denis' sister and cousin of the appellant	2	$6,496
Nathalie Lefebvre	Richard St-Denis' nephew's wife	4	$12,992
Raymond Perrier	Friend of the Appellant	1	$ 3,248
François St-Denis	Richard St-Denis' son	1	$ 3,248
Jérôme St-Denis	Richard St-Denis' son	2	$ 6,496
TOTAL			**$48,720**

41. Part of the appellant's reasons for her involvement in the Program was that she wanted to help her cousin Richard St-Denis, who was her financial advisor. She also wanted to help friends and family members in saving money.

42. On March 17, 2002, the appellant met with St-Denis and Ploughman. The appellant was advised that the legal title deeds to the timeshares had not been finalized. Consequently, the purported Settlor had not acquired the deeds to the VOWs of the property held by TDL.

43. As of March 17, 2002, the appellant knew with certainty that no transfer of deeds had taken place on December 31, 2001 from the participants in the Program to the Charity as the participants did not have legal title of [*sic*] the VOWs.

44. In a letter dated March 18, 2002, addressed to all Global Trust of Canada 2001 Charitable Donors, the appellant and Ploughman signed a letter which:

a. Stated 'the legal "deeded" title has not yet been finalized' for the VOWs;

b. Recommended a delay in the filing of the charitable donation receipts until the issue could be resolved because the claim would be disallowed by the Canada Revenue Agency ("CRA");

c. A recommendation to file a T1-adjustment form to eliminate the claim of donation receipts if they had already filed their 2001 tax returns.

45. In a letter dated April 5, 2002, addressed to all Global Trust of Canada Beneficiaries for Tax Year 2001, Ploughman without the consent or the involvement of the appellant, informed the beneficiaries that Kerr, legal counsel to TDL would personally ensure that all the steps that had to be taken to resolve the issue with the title would be completed prior to April 30, 2002. Ploughman also advised the participants that he felt comfortable enough with the progress made to recommend that the beneficiaries go ahead and submit their charitable donation receipt with their 2001 tax returns.

46. As a participant in the Program, the appellant received the letter dated April 5, 2002 from Ploughman.

47. On May 13, 2002, the appellant filed her 2001 tax return and submitted a charitable donation receipt for her ostensible donation of VOWs to the Charity.

48. By July 9, 2002, at the latest, the appellant knew that the charitable donations associated with the program would not be accepted by the CRA.

49. On June 12, 2003, the appellant made representations to the CRA in respect of her claim for a donation of VOWs to the Charity in respect of her 2001 taxation year.

50. Except for four participants whose donations were missed by the CRA officer who conducted the audit of the donation claims, the charitable donation tax credits that were claimed as a result of the receipts issued for the ostensible donations of VOWs were entirely disallowed.

51. No participants were assessed for penalties under subsection 163(2) of the Act, for making false statements in their 2001 income tax returns.

52. On August 1, 2008, the Minister assessed the appellant for penalties under s. 163.2 of the Act, in the amount of $546,747 in respect of false statements made in the context of a charitable donation arrangement.

53. The parties are in agreement with the information contained in Appendix A.

54. On July 28, 2009 the Minister confirmed the assessment.

APPENDIX A - HAWKES NEST TIME SHARE DONATION PROGRAM - 2001
PENALTY CALCULATION UNDER S. 163.2(5)

Line #	NAME	SIGNED BY JULIE GUINDON	# OF VOWs	AMOUNT RECEIPTED	VENDOR TAKE-BACK CHARGE FOR VOWs	AMOUNT REASSESSED	AMOUNT OF TAX AVOIDED	CALCULATION OF 163(2) PENALTY	163.2(5) PENALTY	
1	Archambault, Gilles	NO	2	21,650	6,496	32,475	9,410	4,705	4,705	
2	Archambault, Rita	unknown	1	10,825	3,248		-	-	-	claimed by spouse Line #1
3	Audet, Wilda	unknown	3	32,475	9,744	32,475	9,403	4,702	4,702	
4	Beaudoin, Suzanne J.	See #74	spouse #74 was participant			10,825	3,140	1,570	1,570	
5	Bernard, Joan	YES	4	43,300	12,992	43,300	12,554	6,277	6,277	
6	Bolleau, Helene	unknown	3	32,475	9,744	32,475	9,392	4,696	4,696	
7	Boileau, Luc	NO	3	32,475	9,744	32,475	9,417	4,709	4,709	
8	Boileau, Noel	unknown	4	43,300	12,992	43,300	12,534	6,267	6,267	
9	Boles, Sandra	YES	1	10,825	3,248	10,825	3,139	1,569	1,569	
10	Bonnah, John	YES	2	21,650	6,496	21,650	6,248	3,124	3,124	
11	Bourret, Marc	unknown	10	108,250	32,480	108,250	31,370	15,685	15,685	
12	Bray, Rheal	unknown	3	32,475	9,744	32,475	9,392	4,696	4,696	
13	Bray-Duhamel, Christine	unknown	4	43,300	12,992	43,300	12,555	6,277	6,277	
14	Buchanan, Kevin Harold	NO	5	54,125	16,240	54,125	15,690	7,845	7,845	
15	Cantlie, James	YES	1	10,825	3,248	10,825	3,139	1,570	1,570	
16	Castonguay, Manon	YES	2	21,650	6,496	21,650	6,278	3,139	3,139	
17	Chaif, Louise	unknown	3	32,475	9,744	32,475	9,391	4,695	4,695	
18	Charebois, Diane	unknown	1	10,825	3,248	10,825	3,119	1,559	1,559	
19	Charebois, Jacques	unknown	4	43,300	12,992	43,300	12,544	6,272	6,272	
20	Cockerill, Terence	YES	2	21,650	6,496	21,650	6,279	3,140	3,140	
21	Corbel, Suzanne	unknown	1	10,825	3,248	10,825	3,140	1,570	1,570	
22	Dallaire, Stephane	unknown	5	54,125	16,240		15,685	7,843	7,843	donation not audited
23	D'Aoust, Carmen	unknown	2	21,650	6,496	21,650	6,279	3,140	3,140	
24	D'Aoust, Jean-Marc	unknown	2	21,650	6,496	21,650	6,253	3,127	3,127	
25	Demers, Michele	YES	4	43,300	12,992	43,300	12,543	6,272	6,272	
26	Demers-Rheault, Andree	unknown	1	10,825	3,248	N/A	-	-	-	claimed by spouse Line #104
27	Dicker, John	unknown	1	10,825	3,248	10,825	3,140	1,570	1,570	
28	Diotte, Michel	YES	1	10,825	3,248	10,825	3,114	1,557	1,557	
29	Diotte, Sylviane	YES	1	10,825	3,248	10,825	3,120	1,560	1,560	
30	Douglas, Ian	unknown	4	43,300	12,992	43,300	12,559	6,279	6,279	
31	Dowd, Christian	unknown	1	10,825	3,248	10,825	3,115	1,558	1,558	
32	Dowd, Gary	unknown	5	54,125	16,240	54,125	15,697	7,849	7,849	
33	Dowd, Mechthilde	YES	1	10,825	3,248	10,825	3,140	1,570	1,570	
34	Dowd, P.Owen	unknown	1	10,825	3,248	10,825	3,139	1,569	1,569	
35	Dube, Eugene	unknown	5	54,125	16,240	54,125	15,450	7,725	7,725	
36	Dube, Heather	unknown	1	10,825	3,248	10,825	3,139	1,570	1,570	

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Line #	NAME	SIGNED BY JULIE GUINDON	# OF VOWs	AMOUNT RECEIPTED	VENDOR TAKE-BACK CHARGE FOR VOWs	AMOUNT REASSESSED	AMOUNT OF TAX AVOIDED	CALCULATION OF 163(2) PENALTY	163.2(5) PENALTY	
37	Duhamel, Henriette	unknown	1	10,825	3,248	10,825	3,137	1,569	1,569	
38	Feeley, James	YES	4	43,300	12,992	43,300	12,532	6,266	6,266	
39	Ferragne, Jacques	unknown	5	54,125	16,240	54,125	15,673	7,837	7,837	
40	Ferragne, Normand	unknown	2	21,650	6,496	21,650	6,276	3,138	3,138	
41	Gandhi, Devinder	unknown	2	21,650	6,496	-	-	-	-	missed by third party penalty audit
42	Gaumond, Jean-Marc	NO	2	21,650	6,496	21,650	6,252	3,126	3,126	
43	Girard, Mario	YES	1	10,825	3,248	21,650	6,279	3,140	3,140	
44	Girard, Olivette	YES	1	10,825	3,248	-	-	-	-	claimed by spouse Line #43
45	Godbout, Lise	YES	2	21,650	6,496	21,650	6,279	3,139	3,139	
46	Gow, Garnett R.	YES	1	10,825	3,248	10,825	3,139	1,570	1,570	
47	Gravelle, Suzanne	YES	3	32,475	9,744	32,475	9,416	4,708	4,708	
48	Grayson, Reginald Edmund	NO	5	54,125	16,240	54,125	15,698	7,849	7,849	
49	Grenier, Daniel	YES	3	32,475	9,744	32,475	9,392	4,696	4,696	
50	Grenier, Jean	unknown	1	10,825	3,248	10,825	3,139	1,570	1,570	
51	Grenier, Luc	unknown	2	21,650	6,496	21,650	6,274	3,137	3,137	
52	Grove, Richard	NO	10	108,250	32,480	108,250	31,395	15,697	15,697	
53	Gschwind, Margaret	unknown	2	21,650	6,496	21,650	6,251	3,126	3,126	
54	Guibord, Denise	unknown	2	21,650	6,496	21,650	6,253	3,126	3,126	
55	Guibord, Martin	See #76	spouse #76 was participant			7,800	2,236	1,118	1,118	
56	Guindon, Armand L.	unknown	3	32,475	9,744	3,885	1,101	550	1,000	163.2(5)(a)
57	Guindon, Jacinthe	YES	4	43,300	12,992	24,266	7,011	3,505	3,505	
58	Guindon, Jeannine	See #56	spouse #56 was participant			28,640	8,278	4,139	4,139	
59	Guindon, Julie	NO	2	21,650	6,496	21,650	6,279	3,140	3,140	
60	Haley, Gerald	NO	1	10,825	3,248	10,825	3,139	1,569	1,569	
61	Hawco, Alphonsus J.	unknown	2	21,650	6,496	19,650	5,673	2,837	2,837	
62	Hawco, Joan	See #61	spouse #61 was participant			2,000	580	290	1,000	163.2(5)(a)
63	Henri, Andre	unknown	4	43,300	12,992	29,270	8,199	4,099	4,099	
64	Houle, Nathalie	YES	2	21,650	6,496	21,650	6,260	3,130	3,130	
65	Hutton, M.N. Geoffrey	unknown	1	10,825	3,248	10,825	3,140	1,570	1,570	
66	Jamieson, James	YES	7	75,775	22,736	86,600	25,114	12,557	12,557	
67	Jamieson, Mary E.	YES	1	10,825	3,248	N/A	-	-	-	claimed by spouse Line #66
68	Kahn, Michel	NO	2	21,650	6,496	21,650	6,254	3,127	3,127	
69	Kennedy, James L.	unknown	1	10,825	3,248	10,825	3,139	1,569	1,569	
70	Khandelwal, Sabita	unknown	1	10,825	3,248	10,825	2,413	1,206	1,206	
71	Khandelwal, Suresh	unknown	2	21,650	6,496	21,650	6,279	3,139	3,139	
72	Lachapelle, Mary-Ellen	unknown	2	21,650	6,496	21,650	6,276	3,138	3,138	

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Line #	NAME	SIGNED BY JULIE GUINDON	# OF VOWs	AMOUNT RECEIPTED	VENDOR TAKE-BACK CHARGE FOR VOWs	AMOUNT REASSESSED	AMOUNT OF TAX AVOIDED	CALCULATION OF 163(2) PENALTY	163.2(5) PENALTY	
73	Lachapelle, Ronald	unknown	1	10,825	3,248	10,825	3,138	1,569	1,569	
74	Laplante, Normand	unknown	1	10,825	3,248	-	-	-	-	claimed by spouse Line #4
75	Larose, Nicole	NO	1	10,825	3,248	10,825	3,113	1,556	1,556	
76	Lefebvre, Nathalie	unknown	4	43,300	12,992	35,500	10,272	5,136	5,136	portion claimed by spouse Line #55
77	Le Guellec, Serge	NO	9	97,425	29,232	97,425	28,228	14,114	14,114	
78	Le Touzel, Mark D.	NO	1	10,825	3,248	10,825	2,872	1,436	1,436	
79	Lum, Fay	NO	1	10,825	3,248	10,825	3,114	1,557	1,557	
80	MacNamara, Mark A.	unknown	1	10,825	3,248	10,825	2,741	1,371	1,371	
81	Manning, Yves M.	unknown	10	108,250	32,480	108,250	30,247	15,123	15,123	
82	Meignan, Gordon	unknown	2	21,650	6,496	21,650	6,281	3,141	3,141	
83	Meignan, Sean A.	unknown	1	10,825	3,248	10,825	3,129	1,565	1,565	
84	Mikesons, Peter	unknown	2	21,650	6,496	21,650	6,278	3,139	3,139	
85	Moyles, Desmond	unknown	1	10,825	3,248	10,825	1,440	720	1,000	163.2(5)(a)
86	Mueller, Karl	unknown	2	21,650	6,496	21,650	6,277	3,139	3,139	
87	Murphy, Reginald	YES	1	10,825	3,248	10,825	3,138	1,569	1,569	
88	Nicholson, Patrick	unknown	1	10,825	3,248	10,825	3,138	1,569	1,569	
89	Nixon, John W.	YES	1	10,825	3,248	10,825	3,135	1,567	1,567	
90	Ouimet, Guylaine	unknown	2	21,650	6,496	21,650	6,255	3,127	3,127	
91	Ouimet, Marc	unknown	2	21,650	6,496	21,650	6,253	3,127	3,127	
92	Paddock, Lila	YES	1	10,825	3,248	10,825	3,140	1,570	1,570	
93	Paddock, Ronald	unknown	1	10,825	3,248	10,825	3,128	1,564	1,564	
94	Parker, Kevin R.	NO	7	75,775	22,736	75,775	21,955	10,978	10,978	
95	Payer, Daniel G.	unknown	3	32,475	9,744	32,475	9,394	4,697	4,697	
96	Payer, Paul	unknown	2	21,650	6,496	21,650	6,253	3,127	3,127	
97	Perras, Andre	NO	2	21,650	6,496	21,650	6,273	3,136	3,136	
98	Perras, Serge	NO	13	140,725	-	-	-	-	-	not claimed
99	Perrier, Chantal	NO	4	43,300	12,992	43,300	12,246	6,123	6,123	
100	Perrier, Raymond	unknown	1	10,825	3,248	10,825	3,139	1,570	1,570	
101	Pinsent, Andrew L.	unknown	2	21,650	6,496	21,650	3,848	1,924	1,924	
102	Piret, Nadine	unknown	1	10,825	3,248		3,113	1,557	1,557	donation not audited
103	Poth, Gordon	unknown	4	43,300	12,992	43,300	12,557	6,278	6,278	
104	Rheault, Alain	unknown	1	10,825	3,248	21,650	6,280	3,140	3,140	
105	Richards, Ronald	unknown	1	10,825	3,248	10,825	3,125	1,563	1,563	
106	Roy, Marcel	NO	1	10,825	3,248	10,825	3,139	1,569	1,569	
107	Seguin, Andre	YES	1	10,825	3,248	10,825	3,139	1,569	1,569	
108	Sellars, Shawn	YES	8	86,600	25,984	86,600	25,087	12,544	12,544	

APPENDIX A - HAWKES NEST TIME SHARE DONATION PROGRAM - 2001
PENALTY CALCULATION UNDER S. 163.2(5)

Line #	NAME	SIGNED BY JULIE GUINDON	# OF VOWs	AMOUNT RECEIPTED	VENDOR TAKE-BACK CHARGE FOR VOWs	AMOUNT REASSESSED	AMOUNT OF TAX AVOIDED	CALCULATION OF 163(2) PENALTY	163.2(5) PENALTY	
109	Senechal, Bona	YES	3	32,475	9,744	32,475	9,418	4,709	4,709	
110	Shelcrick, Mark	unknown	2	21,650	6,496	21,550	6,253	3,127	3,127	
111	Siew, Andrea Louise	unknown	3	32,475	9,744	32,475	9,392	4,696	4,696	
112	Siew, Anne Louisa	unknown	1	10,825	3,248	10,825	3,128	1,564	1,564	
113	Siew, Peter	unknown	5	54,125	16,240	54,125	14,816	7,408	7,408	
114	Sloane, John	YES	1	10,825	3,248	10,825	3,115	1,557	1,557	
115	Smith, Paul	YES	1	10,825	3,248	10,825	3,127	1,564	1,564	
116	Smulski, Dennis	unknown	5	54,125	16,240	54,125	15,697	7,848	7,848	
117	Smulski, Julie	unknown	1	10,825	3,248	10,825	3,112	1,556	1,556	
118	Spike, Fred	NO	3	32,475	9,744	32,475	9,418	4,709	4,709	
119	St. Denis, Francois	unknown	1	10,825	3,248	10,825	3,113	1,556	1,556	
120	St. Denis, Jerome	unknown	2	21,650	6,496	21,650	5,661	2,830	2,830	
121	St. Pierre, David	YES	1	10,825	3,248	10,825	3,137	1,569	1,569	
122	Stevens, Willis	unknown	2	21,650	6,496	21,650	5,271	2,635	2,635	
123	Stewart, Ronald F.	unknown	3	32,475	9,744	32,475	9,418	4,709	4,709	
124	Stock, Julie	unknown	1	10,825	3,248	10,825	3,132	1,566	1,566	
125	Suzuki, Kenji	YES	16	173,200	51,968	173,200	50,227	25,114	25,114	
126	Tallentire, Una Jane	unknown	1	10,825	3,248	10,825	3,140	1,570	1,570	
127	Taylor, Gerald	unknown	1	10,825	3,248	10,825	3,113	1,556	1,556	
128	Tipman, Michael	YES	1	10,825	3,248	10,825	3,140	1,570	1,570	
129	Tipman, Steven J.	unknown	1	10,825	3,248		3,113	1,557	1,557	donation not audited
130	Tomlin, Stephen	unknown	5	54,125	16,240	54,125	15,689	7,845	7,845	
131	Tourigny, Josee	unknown	2	21,650	6,496	21,650	6,258	3,129	3,129	
132	Trepanier, Susan	unknown	4	43,300	12,992	43,300	12,533	6,266	6,266	
133	Trudel, Jeannot	NO	11	119,075	35,728	138,369	40,125	20,063	20,063	used portion of spouse #57's receipt
134	Trudel, Monique	See #63	spouse #63 was participant			14,030	4,043	2,021	2,021	used portion of spouse #63's receipt
135	Vance, Deidre	unknown	1	10,825	3,248	10,825	3,116	1,558	1,558	
136	Vance, Jonathan	unknown	1	10,825	3,248	10,825	3,139	1,570	1,570	
137	Walkey, James	unknown	1	10,825	3,248	-	-	-	-	not claimed
138	Watson, Benton H.	unknown	7	75,775	22,736	75,775	21,948	10,974	10,974	
139	Woods, Dan L.	unknown	1	10,825	3,248	10,825	3,140	1,570	1,570	
140	Wooner, A. Stewart	YES	4	43,300	12,992	43,300	12,556	6,278	6,278	
	TOTAL			**3,972,775**	**1,149,792**	**3,724,110**	**1,090,616**	**545,308**	**546,747**	

135 receipts listed on the Charity's list. Out of 140 names, five shared one receipt with the spouse (Lines #: 4, 55, 56, 62, 134).

Issues

[4] Two main issues emerge from the facts of this case and from the assessment.

[5] The first issue is whether the third party penalty imposed under section 163.2 of the *Act* involves by its very nature a criminal proceeding. Such a finding would entail far-reaching consequences. In fact, if it is found that section 163.2 of the *Act* leads to a true penal consequence, then the protection of section 11 of the *Canadian Charter of Rights and Freedoms*[1] (the "*Charter*") will apply to guarantee fundamental substantive and procedural legal rights to any individual charged with an offence under section 163.2. Notably, the right to be presumed innocent[2] would raise the burden of proof from that of proof on a balance of probabilities to proof beyond a reasonable doubt.[3]

[6] Furthermore, if this Court finds that section 163.2 of the *Act* creates an offence, that offence would, pursuant to subsection 34(2) of the *Interpretation Act*, [4] need to be prosecuted in provincial court under the criminal procedure provided for in the *Criminal Code*. [5]

[7] If the penalty under section 163.2 of the *Act* is a civil penalty, a second issue arises as to whether the Appellant should be found liable to a third party penalty pursuant to subsection 163.2(4) of the *Act* in respect of false statements — i.e., the tax receipts — made in the context of the Program. In other words, did the Appellant know, or would she reasonably have been expected to know but for circumstances amounting to culpable conduct, that the VOWs and the Trust did not exist.

[8] However, even if I do find that the penalties set out in section 163.2 of the *Act* amount to genuine criminal consequences within the contemplation of section 11 of the *Charter*, I will still make a determination on the second issue.

Arguments

[9] Pursuant to subsection 163(3) of the *Act*, the burden of establishing the facts justifying the assessment of the penalty is on the Minister. Therefore, the

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[2] *Charter*, *supra* note 1, para. 11(*d*).
[3] John Sopinka, *The Law of Evidence in Canada*, 2 ed. (Toronto: Butterworths, 1999), at p. 154, para. 5.42.
[4] R.S.C. 1985, c. I-21.
[5] R.S.C. 1985, c. C-46.

Respondent's arguments in respect of both issues as previously described will be presented first, followed by the Appellant's.

[10] The Respondent argues that section 163.2 of the *Act* creates a civil penalty which should be applied when a person is found liable on a balance of probabilities. That section was enacted in response to the Report of the Technical Committee on Business Taxation[6] (the "Mintz Report"), which noted that the imposition of broader civil penalties was justified to defend the integrity of the tax system by holding third parties accountable for obviously faulty advice.[7]

[11] In addition, the concept of "culpable conduct" under section 163.2 was intended to be similar to if not the same as, "gross negligence" under subsection 163(2) of the *Act*.[8] The enacted version of the penalty provision substituted the words "culpable conduct" for "gross negligence" because concerns were expressed by professional bodies that the penalty could apply in cases where a tax professional made an honest error of judgment or where there was an honest difference of opinion.[9] Parliament defined "culpable conduct" by reference to the types of conduct to which the courts have, in the past, applied a civil penalty under the tax law.

[12] The recommendation of the Mintz Report and the legislative intent as to the meaning of "culpable conduct" are evidence of the civil nature of the penalty.

[13] Furthermore, on the basis of the Federal Court of Appeal's decision in *Martineau v. M.N.R.*,[10] the Respondent contends that penalties imposed in fiscal matters are, in a system of voluntary reporting, designed to govern the conduct of taxpayers with a view to preventively ensuring compliance with the tax legislation and are civil, not criminal, penalties.[11] This rationale has been applied by the Tax Court of Canada in cases where it was asked to determine whether subsection 163(2) of the *Act* entailed genuine criminal consequences.[12]

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[6] Canada, *Report of the Technical Committee on Business Taxation* (Ottawa: Department of Finance, December 1997).
[7] Respondent's Supplementary Written Submissions, paras. 5-6.
[8] Respondent's Supplementary Written Submissions, para. 15.
[9] Respondent's Supplementary Written Submissions, paras. 8-9.
[10] Martineau, 2003 FCA 176, aff'd. 2004 SCC 81.
[11] Respondent's Supplementary Written Submissions, para. 22.
[12] Namely, in *Bisaillon v. The Queen*., 2005 TCC 17, and *Besner v. The Queen*, 2008 TCC 404, aff'd. 2009 FCA 331; Respondent's Supplementary Written Submissions, paras. 24-25.

[14] Like the penalty prescribed in subsection 163(2) of the *Act*, the third party penalty under section 163.2 of the *Act* was designed to safeguard the integrity of the tax system.[13] It does not purport to punish the offender but rather is intended to maintain internal discipline within the sphere of the *Act*.[14]

[15] The Respondent argues that the Appellant should be liable to a penalty under subsection 163.2(4) of the *Act* for each of the 134 tax receipts other than her own because:[15]

> a. The appellant made, participated in, assented to and acquiesced in the making of all 134 tax receipts.
>
> b. Each tax receipt reflected the donation of a property that did not exist.
>
> c. Once issued, each tax receipt could be used by another person to claim unwarranted non-refundable tax credits.

[16] The Appellant knew with certainty as of March 17, 2002 that the participants did not have legal title to the VOWs on December 31, 2001.[16] Also, by July 9, 2002, she knew that the tax receipts would not be accepted by the CRA and therefore knew that the recommendation made by Glenn Ploughman in April 2002 to go ahead and submit the tax receipts to the CRA was incorrect.[17] Despite what she knew, the Appellant did not inform the other participants of the situation and even attempted to convince the CRA that her own donation was valid.[18]

[17] If in fact the Appellant did not know the true state of affairs, it is reasonable to expect that she would have known that the VOWs and Trust did not exist had she compelled the Principals to provide her with the documents listed on page 2 of her legal opinion[19] as a precondition for the release either of that opinion or of the tax receipts.[20] Also, when Ploughman stated in his letter of April 2002 that the title issues had been resolved, the Appellant could have demanded that she be provided with supporting evidence.[21]

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[13] Respondent's Supplementary Written Submissions, para. 27.
[14] Respondent's Supplementary Written Submissions, para. 30.
[15] Respondent's Written Submissions, para. 6.
[16] Respondent's Written Submissions, para. 9.
[17] Respondent's Written Submissions, para. 11.
[18] Respondent's Written Submissions, para. 12.
[19] Joint Book of Documents, Tab 11.
[20] Respondent's Written Submissions, para. 13.
[21] Respondent's Written Submissions, para. 17*c*).

[18] In this case, the Appellant was not only the president of the Charity but also the lawyer who signed the misleading opinion. She knew that no supporting documents were ever provided by the Principals and, thus, that she could not rely on the legal opinion.[22] Her responsibilities as an officer of a charity did not cease to exist at the time the legal opinion was signed or the tax receipts issued.[23] On the contrary, the Appellant had ongoing responsibilities which required that proper actions be taken to disclose to the participants and to the CRA any false statement those documents may have contained.

[19] In these circumstances, the Respondent argues, the Appellant was wilfully blind [24] and her conduct clearly showed indifference as to whether the *Act* was complied with.[25] The Appellant's conduct was that of a person showing a wilful, reckless or, at least, a wanton disregard of the law.[26]

The Appellant

First Issue

[20] The Appellant submits that section 163.2 of the *Act* is a provision with true penal consequences and thus falls within the ambit of section 11 of the *Charter*. In *R. v. Wigglesworth*, [27] the Supreme Court of Canada held that proceedings will be subject to section 11 protection where the consequences include "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 [*sic*] the maintenance of internal discipline within the limited sphere of activity."[28] Following this rationale, the Appellant argues that section 163.2 of the *Act* attracts the protection of section 11 by its unlimited terms as regards both the magnitude of the punishment and the time limit in which it can be imposed.[29] The Appellant further argues that the wrong done to society contemplated by the *Wigglesworth* test does not require harm to the fisc.[30] In the context of section 163.2 of the *Act*, the harm contemplated is aid given by one person to a taxpayer which damages the integrity of our system of honest self-reporting.

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[22] Respondent's Written Submissions, para. 20.
[23] Respondent's Written Submissions, para. 27.
[24] Respondent's Written Submissions, para. 21.
[25] Respondent's Written Submissions, para. 22.
[26] Respondent's Written Submissions, para. 23.
[27] [1987] 2 S.C.R. 541 (*Wigglesworth)*.
[28] *Ibid*., p. 561 (Lexum para. 24); Appellant's Supplementary Written Submissions, para. 13.
[29] Appellant's Supplementary Written Submissions, para. 14.
[30] Appellant's Supplementary Written Submissions, para. 38.

[21] Again relying on *Wigglesworth*, the Appellant notes that section 11 of the ***Charter*** would apply to a matter where it is "intended to promote public order and welfare within a public sphere of activity."[31] Indeed, the Appellant agrees with the Respondent's characterization of the Canadian tax collection system as one of honest self-reporting, one which involves a relationship between the taxpayer and the Crown to the exclusion of all others. Consequently, penalties assessed against a taxpayer for misrepresentation in his or her return are of a private nature.[32] However, third parties are not part of that private relationship and so, by default, they form part of the public, to which measures intended to promote public order and welfare within a public sphere of activity apply.[33] By expanding liability beyond the taxpayer to third parties, Parliament sought to denounce, punish and deter wrongdoers and would-be wrongdoers.[34] These are principles of sentencing that apply to criminal and quasi-criminal penalties, not to matters that are merely civil or administrative in nature.

[22] Finally, a penalty imposed under section 163.2 of the *Act* can burden the third party with the weight of a significant stigma. Specifically, in the case at bar, a finding under section 163.2 of the *Act* against the Appellant could form the basis for professional sanctions, including disciplinary proceedings.[35] Even in the absence of formal sanctions, unlike penalties under subsection 163(2) of the *Act*, penalties under section 163.2 will entail grave damage to the professional character and reputation of a professional found to have engaged in the conduct covered by this section.[36]

<u>Second issue</u>

[23] The Appellant divided her argument into three points:[37]

a. The issuance of the charitable donation tax receipts by the Charity.

b. The issuance of the March 18th letter.

c. The time period after Mr. Ploughman sent the letter of April 5th.

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[31] *Wigglesworth*, *supra* note 27, p. 560 (Lexum para. 23); Appellant's Supplementary Written Submissions, para. 10.
[32] Appellant's Supplementary Written Submissions, para. 35
[33] Appellant's Supplementary Written Submissions, para. 36.
[34] Appellant's Supplementary Written Submissions, paras. 49-51.
[35] Appellant's Supplementary Written Submissions, para. 59.
[36] Appellant's Supplementary Written Submissions, para. 61.
[37] Appellant's Memorandum of Fact and Law, para. 3.

[24] With respect to the issuance of the charitable donation tax receipts, the Appellant argues that the evidence shows that, at the time the receipts were issued, the Appellant was informed by her advisors that the property had been properly created and that the documentation effecting a gift of the VOWs had been completed.[38] It was beyond the Appellant's ability to conduct an investigation regarding the underlying title to the property in the Turks and Caicos Islands. Thus, she had no choice but to rely on her advisors with regard to the underlying title and was reasonably entitled to do so.

[25] In fact, the Appellant submits that the case law on gross negligence indicates that if a subject matter is such that it is beyond the ability of the taxpayer to properly prepare statements for the purpose of the *Act*, he or she is mandated to retain an advisor.[39] The taxpayer is then entitled to rely on this advisor, except where the advisor's advice would be, subject to the taxpayer's own understanding and intellect, readily apparent.

[26] The Appellant argues that she should not be held to a standard which requires the signatories of charitable donation tax receipts to review legal documents to ensure that legal structures are properly created.[40] This is especially true in cases, like this one, where there is reliance on professional advice indicating that the property existed and had been transferred.

[27] With respect to the letter of March 18, 2002, the Appellant argues that her belief that the defect respecting the gift could have been remedied retroactively was an error of law rather than an error of fact.[41] Despite her being a lawyer, the Appellant maintains an error of law does not rise to the level of culpable conduct within the meaning of section 163.2 of the *Act*.

[28] Moreover, the fact that the Appellant co-signed a letter to each of the participants in the Program advising them not to use the charitable donation receipts is evidence that she was neither indifferent as to whether the *Act* was complied with nor acting with reckless disregard of the law.[42] The letter itself could not be used by any third party for a purpose of the *Act.* Since the letter advised participants not to

[38] Appellant's Memorandum of Fact and Law, para. 4.
[39] Appellant's Memorandum of Fact and Law, para. 38.
[40] Appellant's Memorandum of Fact and Law, para. 59.
[41] Appellant's Memorandum of Fact and Law, para. 5.
[42] Appellant's Memorandum of Fact and Law, para. 5.

use the receipts, there can be no liability of the Appellant under subsection 163.2(4) of the *Act* in respect of statements intended to help maintain the integrity of the *Act*.

[29] Finally, with respect to the letter of April 5, 2002, the Appellant argues that any communication from her contradicting that letter would necessarily have been in the nature of legal advice to correct the previous error of law conveyed in the March letter.[43] The Appellant asserts that she cannot be mandated to provide unsolicited legal advice by virtue of the *Act*. The Appellant says that she misunderstood the law and believed that the defect respecting the gift could be remedied. Absent any evidence of fraud, of which the Appellant contends there is none, the Appellant can be taken not to have known of the errors of law and fact contained in the April letter. The Appellant relied on the opinion of Ploughman, her advisor, that the receipts could be properly submitted.

[30] Finally, the Appellant submits that she cannot be required to know every element of the law and that it was up to each individual participant to review the matters discussed in the April letter with his or her own advisor.

Standard of Proof

[31] Along the lines of her previous arguments, the Appellant submits that the burden to be met by the Respondent is that of proof beyond a reasonable doubt rather than proof on the balance of probabilities.[44] This change in the burden of proof results from the application of the protection of the *Charter*, specifically under paragraph 11(*d*), to a provision which is, the Appellant submits, by its nature a penal provision.

[32] Additionally, even if this Court chooses not to apply the standard of proof beyond reasonable doubt, the applicable standard is at least higher than that of proof on the balance of probabilities.[45]

[43] Appellant's Memorandum of Fact and Law, para. 6.
[44] Appellant's Memorandum of Fact and Law, para. 9.
[45] Appellant's Memorandum of Fact and Law, para. 18.

Analysis

Does section 163.2 of the Act create a criminal offence?

Legislative Intent

[33] The third party penalty under section 163.2 of the *Act* was enacted following the Mintz Report recommendation to add a new civil penalty provision that would expand the scope of the provisions contained in subsection 163(2) of the *Act*.[46] The report emphasized the gap existing between the criminal liability under subsection 239(1) of the *Act*, to which could be subject any number of persons who participate in the offence, and the civil penalties contained in section 163 of the *Act*, which only apply to a taxpayer whose liabilities or entitlements under the *Act* are affected by the improper conduct. Thus, it was suggested that a new penalty be created, one that would apply to third parties who knowingly, or under circumstances amounting to gross negligence, participate in, promote or assist conduct that results in the making of a false statement or omission in a return. The Committee that produced the report explained its recommendation as follows:

> It is the Committee's view that the imposition of broader civil penalties is justified to defend the integrity of the tax system. Such penalties would aim to deter transactions, arrangements and methods of reporting that do not genuinely yield the result claimed by a taxpayer, and would hold advisors and promoters accountable for obviously faulty advice.
>
> [Emphasis added.]

[34] The Respondent submits that the comments in the report are indicative of the civil nature of the penalty. However, important discrepancies can be seen between the recommendation of the Mintz Report and the third party penalty enacted in section 163.2 of the *Act*. As will be discussed below, the penalty under section 163.2 of the *Act* appears to be much broader than that originally recommended by the Committee. For example, some are of the opinion that it was clear from a reading of the Committee's recommendation and comments that, in order for the penalty to apply, the false statement or omission needed to be one that affected a taxpayer's "liabilities or entitlements" under the *Act*.[47] This does not appear to be the case under

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[46] Mintz Report, *supra* note 6, p. 10.12.

[47] William I. Innes and Brian J. Burke, "Adviser Penalties: How Will the Courts Construe Section 163.2?" *Report of Proceedings of the Fiffty-Third Tax Conference*, 2001 Conference Report (Toronto: Canadian Tax Foundation, 2002), pp. 37:4-5 (Innes).

section 163.2 of the *Act*. The discrepancy between the report's recommendation and the enacted version of the third party penalty will be elaborated upon below and it will be demonstrated why the Committee's recommendation to create a civil penalty should not be taken as evidence that the actual penalty is of that same nature.

[35] Furthermore, in enacting the penalty, Parliament substituted the concept of "culpable conduct" for "gross negligence". This substitution was intended to address concerns expressed by professional bodies on behalf of their members that the proposed civil penalty might apply in cases where tax professionals made an honest error of judgment or where there were an honest differences of opinion.[48] In the technical notes of December 7, 1999, it is stated:

> … The gross negligence standard has been used elsewhere in the tax law and has been judicially interpreted in a number of cases. In the government's view there is a great deal of difference between "ordinary" negligence and "gross" negligence. It is not the government's policy intent to apply a third party penalty under new section 163.2 in cases of conduct that is an honest error of judgment, or an honest difference of opinion. Rather the gross negligence standard was selected because it addresses this legitimate concern while ensuring that participants in otherwise culpable activity do not escape liability.
>
> Nevertheless, in response to representations of professional bodies, section 163.2 substitutes for "gross negligence" the concept "culpable conduct" which is defined with reference to the types of conduct to which the courts have, in the past, applied a civil penalty under the tax law.[49]

[36] In other words, through the concept of "culpable conduct" it was sought to fix a higher standard of culpability and to counteract a tendency of court decisions to lower the requirements under the gross negligence test.[50] Thus, "culpable conduct" was defined by reference to the type of conduct to which the courts had, in the past, applied a civil penalty under the *Act*.[51] More precisely, "culpable conduct" was defined as conduct that is tantamount to intentional conduct, or that shows an indifference as to whether the *Act* is complied with, or that shows a wilful, reckless or wanton disregard of the law.[52]

[37] By explaining its intention of assimilating the concept of "culpable conduct" to the concept of "gross negligence," Parliament attempts to emphasize that section 163.2 of the *Act* introduces a "civil" penalty. Also, section 163.2 is included

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[48] Department of Finance, Technical Notes, s. 163.2, Dec. 7, 1999 (budget).
[49] *Ibid*.
[50] Innes, *supra* note 47, pp. 37:6-7.
[51] Technical Notes, supra note 48.
[52] *Act*, subs. 163.2(1), "culpable conduct".

with the other clearly civil penalties of section 163 of the *Act*. Clearly, Parliament intended to create a civil penalty comparable to that under subsection 163(2) of the *Act*, but applicable to third parties.

[38] Nevertheless, taking into account Parliament's intention with regard to section 163.2 of the *Act* is insufficient to eliminate the possibility of the third party penalty being penal in nature. To come to a conclusion on this issue, other compelling arguments should be taken into consideration, such as the unlimited terms in which both the magnitude of the punishment and the time limit in which the penalty can be imposed are set out. Both of these aspects will be addressed later on.

Case Law on Penal Sanctions in the *Act*

[39] Although cases such as *Martineau*[53] have concluded that the penalty under subsection 163(2) of the *Act* is not penal in nature, there have been many judgments affirming the penal nature of provisions using the expression "knowingly or under circumstances amounting to gross negligence." These cases are worth mentioning given that section 163.2 of the *Act* sets an even higher standard by substituting "culpable conduct" for the terms "gross negligence".

[40] First, the Supreme Court of Canada recognized in *The Queen v. Sault Ste-Marie (City)*[54] three categories of offences. The first category consists of "[o]ffences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence."[55] The Court then added that offences which are criminal in the true sense fall in this category.[56]

[41] Second, in *Udell v. M.N.R.*,[57] the Exchequer Court of Canada wrote in respect to subsection 56(2), which preceded subsection 163(2): "There is no doubt that section 56(2) is a penal section."[58]

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[53] *Martineau*, *supra* note 10.
[54] [1978] 2 S.C.R. 1299.
[55] *Ibid*., p. 1325.
[56] *Ibid*., p. 1326.
[57] 70 DTC 6019 (U*dell)*.
[58] *Ibid*., p. 6025.

[42] Third, in *Boileau v. M.N.R.*,[59] Judge Lamarre Proulx of this Court referred to the statement of the Exchequer Court in *Udell* and applied it directly to subsection 163(2): "… I believe that a proceeding under subsection 163(2) is of a penal nature. This aspect has already been discussed by Mr. Justice Cattanach in *Udell v. M.N.R.* …"[60]

[43] The last and most interesting case, is this Court's decision in *Colangelo Estate v. R.*[61] In that case, the Court was asked to determine whether subsections 163(2) and 110.6(6) applied. Each provision applied in cases where the taxpayer had "knowingly or under circumstances amounting to gross negligence" carried out the actions described therein. The Court wrote:

> It is trite, of course, that ignorance of a penal law does not excuse the breach of it. The mental element is directed to the doing of the act; it does not require knowledge of the law that is being breached. Although the provisions in issue here are penal in their nature, I am not persuaded that Parliament intended them to apply in such a way that a person who fails to report a gain because of ignorance of the requirement in the *Act* to do so must in every case suffer the penal consequences.[62]

Comparison with section 239

[44] The infractions and penalties in section 163.2 of the *Act* share some similarities with the criminal offences and punishments found in section 239 of the *Act*. Section 239 states the following:

> *Other offences and punishment*
>
> **239.** (1) Every person who has
>
> (*a*) made, or participated in, assented to or acquiesced in the making of, false or deceptive statements in a return, certificate, statement or answer filed or made as required by or under this Act or a regulation,
>
> (*b*) to evade payment of a tax imposed by this Act, destroyed, altered, mutilated, secreted or otherwise disposed of the records or books of account of a taxpayer,
>
> (*c*) made, or assented to or acquiesced in the making of, false or deceptive entries, or omitted, or assented to or acquiesced in the omission, to enter a material particular, in records or books of account of a taxpayer,

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[59] 89 DTC 247 (*Boileau)*.
[60] *Ibid*., p. 250.
[61] [1998] 2 C.T.C. 2823.
[62] *Ibid*,, para. 11.

> (*d*) wilfully, in any manner, evaded or attempted to evade compliance with this Act or payment of taxes imposed by this Act, or
>
> (*e*) conspired with any person to commit an offence described in paragraphs 239(1)(*a*) to 239(1)(*d*),
>
> is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to
>
> (*f*) a fine of not less than 50%, and not more than 200%, of the amount of the tax that was sought to be evaded, or
>
> (*g*) both the fine described in paragraph 239(1)(*f*) and imprisonment for a term not exceeding 2 years.

[45] The conduct referred to in section 239 of the *Act*, and especially in paragraph 239(1)(*a*), is strikingly similar to the conduct described in section 163.2 of the *Act*. Although section 239 may be much broader in scope than section 163.2, Warren J. A. Mitchell notes the following:

> In both sections 163.2 and 239 the basis of the charge is the making of false statements; in both the standard is culpability, either by way of "culpable conduct" or "evasion," and in both the charge can be invoked not only for falsely reporting one's own income, but also for third-party misfeasance.[63]

[46] In this context and because of the similarities between the two sections, the author says that one suspects that section 163.2 of the *Act* was enacted as an alternative to section 239, which has proven to be cumbersome for the Crown.[64] Indeed, section 239 of the *Act* requires proof beyond a reasonable doubt at trial as well as strict observation of the *Charter* provisions when conducting the investigation that leads up to the imposition of the prescribed penalty.

[47] However, while section 239 of the *Act* can clearly be described as creating a criminal offence, and section 163.2 as providing for a civil penalty, it is worth noting that the fine imposed by section 239 of the *Act* can potentially be lower than the penalty under section 163.2 of the *Act*. In fact, under section 239, the fine may vary from 50% to 200% of the amount of tax that is sought to be evaded, whereas section 163.2 of the *Act* sets the penalty at an invariable at 100% of the amount specified. Thus, there is a possibility of the amount of penalty assessed under

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[63] Warren J.A Mitchell, "Civil Penalties: A Wolf in Sheep's Clothing?", *Report of Proceedings of the Fifty-Second Tax Conference*, 2000 Tax Conference Report (Toronto: Canadian Tax Foundation, 2001), 16:7, (Warren).
[64] *Ibid*.

section 163.2 of the *Act* being higher than under section 239, but without the third party concerned being able to benefit from the protection of the *Charter*.

[48] Section 239 of the *Act* is clearly identified as being penal in nature, which is not the case with section 163.2 of the *Act*. However, such a characterization is inconclusive in itself. As stated by Sopinka J. in *Baron v. Canada*:[65]

> The point is that the characterization of certain offences and statutory schemes as "regulatory" or "criminal", although a useful factor, is not the last word for the purpose of Charter analysis. In *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, a case in which the false/misleading advertising offence in the *Competition Act*, R.S.C. 1970, c. C-23, as amended, was attacked under ss. 7 and 11(*d*) of the Charter, Justice La Forest said at 209 that "what is ultimately important are not labels (though these are undoubtedly useful), but the values at stake in the particular context", and held that the potential five-year prison term upon conviction of the offence was a deprivation of liberty requiring much greater safeguards to conform with section 7 or 11(*d*) than the provisions at issue in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425.
>
> [Emphasis added.]

[49] This excerpts summarizes well the idea that legislative intent as stated in technical notes, the grouping of the third party penalty with other civil penalties, and the absence of a label indicating a criminal offence are useful elements to consider but are not sufficiently conclusive.

[50] Having said all that, I turn now to the decision of the Supreme Court of Canada in *Wigglesworth*, which provides practical guidance to help determine the true nature of section 163.2 of the *Act*.

Application of the *Wigglesworth* test

[51] Section 163.2 of the *Act* contains two distinct penalties known as the "planner penalty" [66] (subsection 163.2(2) of the *Act*) and the "preparer penalty",[67] (subsection 163.2(4) of the *Act*). In the case at bar, the Minister assessed the Appellant on the basis of subsection 163.2(4) of the *Act* and applied the penalty prescribed in subsection 163.2(5) of the *Act*. Since both penalties are similar in many ways and because the differences between them have no impact on the analysis that

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[65] [1993] 1 S.C.R. 416, p. 444; [1993] 1 C.T.C. 111, p. 124.
[66] *Information Circular* 01-1, "Third-Party Civil Penalties", September 18, 2001, para. 7.
[67] *Ibid*, para 9.

follows, the focus hereunder will be on subsections (4) and (5). These subsections read as follows:

> *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 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.

[52] The Appellant argues that the magnitude of the penalty and the unlimited time span contemplated by section 163.2 of the *Act* attract the protection of section 11 of the *Charter* and give the penalty under section 163.2 of the *Act* the character of a criminal sanction rather than a civil penalty. In *Wigglesworth*, the Supreme Court considered the application of the legal rights enumerated in section 11 of the *Charter* to non-criminal proceedings. That case confirmed that section 11 did not apply exclusively to criminal proceedings:

> While it is easy to state that those involved in a criminal or penal matter are to enjoy the rights guaranteed by s. 11, it is difficult to formulate a precise test to be applied in determining whether specific proceedings are proceedings in respect of a criminal or penal matter so as to fall within the ambit of the section. The phrase "criminal and penal matters" which appears in the marginal note would seem to suggest that a matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in

> respect of the offence may lead to a true penal consequence. I believe that a matter could fall within s. 11 under either branch.[68]
>
> [Emphasis added.]

[53] Thus, the Supreme Court determined that a matter could fall within the ambit of section 11 in two cases, namely: where the matter is by its very nature a criminal proceeding or where the offence involves a sanction that is a true penal consequence. I am of the opinion that section 163.2 of the *Act* attracts the protection of section 11 for both reasons.

The Nature of the Matter

[54] First, although some offences are clearly criminal in nature, the Supreme Court added the following:

> . . . if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matter which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited . . . sphere of activity.[69]

[55] The Court tells us to look at the nature of the matter involved, that is whether it is of a public nature or, rather, a private, domestic or disciplinary matter. Invoking the Federal Court of Appeal's decision in *Martineau*, the Respondent argues that penalties imposed in fiscal matters are, in a system of voluntary reporting, designed to govern the conduct of taxpayers with a view to preventively ensuring compliance with the tax legislation.[70] The proceedings are administrative in nature and therefore not the kind of "offence" to which section 11 of the *Charter* applies.

[56] While this proposition undoubtedly applies to a penalty under subsection 163(2) of the *Act*, the penalty under section 163.2 of the *Act* differs from the former in that its purpose goes beyond being a sanction in administrative proceedings. Subsection 163.2(4) requires that the false statement *could* be used by or on behalf of another person for a purpose of the *Act*. The use of the verb "could" indicates that this provision would allow a penalty to be assessed in respect of a false statement that was never acted upon and even in circumstances where that statement

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[68] *Wigglesworth*, *supra* note 27, p. 559 (LEXUM para. 21).
[69] *Ibid*., p. 560 (LEXUM para. 23).
[70] *Martineau*, *supra* note 10, para. 9.

was never intended to be acted upon.[71] This is a clear deviation from the Mintz Report recommendation and from the nature of the penalty under subsection 163(2) of the *Act*. In this sense, section 163.2 of the *Act* serves a purpose beyond the deterrent effect necessary in a self-reporting system. How can the third party penalty be said to apply to preventively ensure compliance with the tax legislation when an individual can be held liable for a false statement that was never acted upon or that may never be acted upon? On this point, Brian Nichols wrote the following:[72]

> In my view, subsection 163.2(4) is seriously flawed because it imposes a statutory duty of care on every person with respect to the taxes of every other person. Every person means every person. The consequences of this can be harsh, inappropriate and in some cases absurd.

[57] As the Appellant submitted, section 163.2 of the *Act* goes beyond the private, domestic or disciplinary matters contemplated in *Wigglesworth* and partakes more of a matter intended to promote public order and welfare within a public sphere of activity. The individual against whom a third party penalty is assessed is not one who himself or herself made a misrepresentation in his or her return. Rather, section 163.2 of the *Act* contemplates the harm that may be done by aid given by a person to a taxpayer which could damage the integrity of the system of honest self-reporting. In *Knox Contracting Ltd. v. Canada*, [73] Cory J. stated:

> . . . The *Income Tax Act*, for example, to the extent it creates a regulatory scheme for the calculation and payment of taxes by taxpayers and authorizes spot audits to ensure that voluntary compliance is working, is not criminal law. It is clearly tax law. But to the extent the legislation makes the filing of a fraudulent and dishonest return an offence punishable by fine or imprisonment, it just as clearly appears to be legislation in relation to criminal law. Those provisions recognize that not all taxpayers can be trusted to report their incomes accurately and that the self-reporting and self-assessing system has to have some teeth in it in order to deal with miscreants. While it is, of course, possible to view these provisions as part of administration or regulation in that they may have a deterrent effect on those disposed in the future to stray from the straight and narrow path, they are more than that. They deal with deliberate misconduct that has already taken place by characterizing it as an offence punishable on summary conviction or by indictment. They are aimed at the suppression of an evil and an injury to the public interest. In that sense they are quintessential criminal law. There is, in my view, nothing unusual or inconsistent about an otherwise predominantly regulatory piece of legislation containing criminal prohibitions and sanctions and a challenge to specific provisions

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[71] *Innes, supra* note 47, p. 37:13.
[72] Brian Nichols, "Civil Penalties for Third Parties", *1999 Ontario Tax Conference (Toronto: Canadian Tax Foundation, 1999)* Tab 1, p. 36.
[73] [1990] 2 S.C.R. 338, [1990] 2 C.T.C. 262.

> in the statute under the division of powers must, in my view, be directed at the challenged provisions, not at the statute as a whole.[74]

[58] I believe these comments are applicable to section 163.2 of the *Act*. Section 163.2 applies to third parties who, by making a false statement, could have led another person to use that statement for a purpose of the *Act*. The third party is not the person considered to have acted upon the false statement and, as mentioned earlier, section 163.2 of the *Act* takes aim even at situations where the false statement has not been acted upon by another person. For these reasons, the argument that section 163.2 prescribed a civil penalty as part of a regulatory scheme designed to ensure compliance with the *Act* is unpersuasive.

[59] Nonetheless, the context of the *Act* is such that it balances provisions of a regulatory or administrative nature needed to ensure compliance with the *Act* in a self-reporting system and provisions that create criminal offences and that are intended to punish tax evasion. Therefore, the line between private and public matters is one that is difficult to draw. For this reason, I turn to the second test stated in *Wigglesworth*. This second test involves determining whether the penalty applied under section 163.2 of the *Act* constitutes a true penal consequence.

True Penal Consequences

[60] In *Wigglesworth*, the Supreme Court stated that proceedings will benefit from section 11 protection where the consequences include "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 [*sic*] the maintenance of internal discipline within the limited sphere of activity."[75] Again, the potential magnitude of the third party penalty clearly sets section 163.2 of the *Act* apart from subsection 163(2) of the *Act*.

[61] If an individual is found liable under subsection 163.2(4) of the *Act*, the penalty is calculated under subsection 163.2(5). This subsection provides that a third party will be held liable for an amount equivalent to "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."[76]

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[74] *Ibid*., p. 355 (C.T.C. pp. 270-71).
[75] *Wigglesworth*, *supra* note 27, p. 561 (LEXUM para. 24).
[76] *Act*, subpara. 163.2(5)(*b*)(i).

[62] In the case at bar, the Appellant was assessed a penalty in the amount of $546,747. This amount was calculated by adding up the amounts of the penalties under subsection 163(2) of the *Act* to which each of the 134 other donors would have been liable. The penalty under subsection 163.2(5) thus has the potential of increasing *ad infinitum* depending on the number of "other persons" involved. As the Appellant submitted, where the penalty is unlimited and is imposed on a third party, it seems evident that its purpose is to redress a wrong done to society and consequently ceases to be a purely administrative matter or one of internal discipline.

[63] The conclusion would be different if Parliament had capped the penalty amount. Oddly enough, subsection 163.2(5) of the *Act* reads as though there could be an upper limit to the penalty amount:

> (5) The penalty to which a person is 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.

[64] Because the penalty to which every other person would be liable is calculated individually, subparagraph 163.2(5)(*b*)(i) of the *Act* will often result in a lower amount than the $100,000 plus gross compensation of subparagraph 163.2(5)(*b*)(ii). It should be noted that if the amount referred to in subparagraph 163.2(5)(*b*)(i) were calculated with reference to all of the other persons, there would be a better chance of the penalty being capped at $100,000 plus gross compensation received. Supporting this possibility is subsection 33(2) of the *Interpretation Act*, which states that "[w]ords in the singular include the plural, and words in the plural include the singular."

[65] As Pierre-André Côté explains in *Interprétation des lois*,[77] the general practice is for legislation to be written in the singular form.[78] However, one should not

[77] Pierre-André Côté, *Interprétation des lois*, 3rd ed. (Montreal: Les Éditions Thémis, 1999).
[78] *Ibid*., p. 92.

automatically conclude that there was an intention to exclude the plural form. Only by analyzing the context of each provision can it conclusively be determined whether the use of one form or the other was intended to be significant. This approach is also confirmed in subsection 3(1) of the *Interpretation Act*, which states that "[e]very provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act."[79]

[66] Section 163.2 of the *Act* was initially enacted to broaden the scope of the existent civil penalty under section 163 of the *Act*, which applies to individuals who have made, participated in, assented to or acquiesced in the making of a false statement. Therefore, section 163.2 of the *Act* was a reaction to cases in which individuals had made or been involved in making a false statement as a result of following the faulty advice of a third party. This appears to support the idea that the "other person" referred to in subsection 163.2(4) of the *Act* was intended to mean a single other person. On that basis, the penalty under subsection 163.2(5) would apply with reference to one other person at a time and not to the multitude of other persons involved.

[67] Thus, the context in which the third party penalty exists and the legislative intent behind the enactment of section 163.2 of the *Act* indicates that "other person" was intended to be interpreted as being singular and not as being either singular or plural. Consequently, I am of the opinion that "other person" should be interpreted as singular only.

[68] Yet that is how the Respondent interpreted subsection 163.2(5) of the *Act*. Consequently, the penalty the Appellant was assessed amounted to $546,747. Given the absence of a specified maximum amount, the penalty could potentially reach higher amounts depending on how many "other persons" were involved and the penalty amount they would each be assessed under subsection 163(2) of the *Act*. Consequently, the gravity of the punishment may well bring down on a third party found liable a stigma that cannot be ignored. I agree with the Appellant's submissions that the professional damage, the damage to reputation and, I should add, the personal damage occasioned by a penalty under section 163.2 of the *Act* is undeniable. In the case at bar, a penalty in the amount assessed could affect the Appellant's life for years to come.

[69] The Respondent submits that it is not the penalty that would stigmatize the Appellant but rather her unlawful conduct and the professional sanctions that could

[79] *Interpretation Act*, subs. 3(1).

result from it. What the Respondent fails to recognize is that this judgment, when rendered, will be public. That professional sanctions may be imposed subsequently does not alter the fact that there will be a public document setting out all the details of the Appellant's conduct, whether that conduct was found to qualify as culpable conduct or not, and indicating the amount of the penalty that she is being assessed. This constitutes a form of stigma which one should not fail to consider.

[70] In conclusion, applying the rationale enunciated in *Wigglesworth*, section 163.2 of the *Act* should be considered as creating a criminal offence because it is so far-reaching and broad in scope that its intent is to promote public order and protect the public at large rather than to deter specific behaviour and ensure compliance with the regulatory scheme of the *Act*. Furthermore, the substantial penalty imposed on the third party — a penalty which can potentially be even greater than the fine imposed under the criminal provisions of section 239 of the *Act*, without the third party even benefiting from the protection of the *Charter* —qualifies as a true penal consequence.

Second Issue

[71] For a person to be held liable under subsection 163.2(4) of the *Act*, that person must have made, participated in, assented to or acquiesced in the making of a statement to, by or on behalf of another person (the "other person"). In addition, it must also be the case that the person knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, that the statement is false and that it could be used by or on behalf of the other person for a purpose of the *Act*.

Making a False Statement

[72] The Respondent submits that, in the case at bar, the false statements consist of the charitable donation tax receipts issued by the Charity in exchange for VOW donations. Responding to this submission, the Appellant puts forward two alternative arguments to be considered should this Court find the Appellant liable pursuant to section 163.2 of the *Act*.

[73] First, because she was one of two authorized representatives of the Charity who signed the receipts, the Appellant's liability should only be joint liability with the other directors for the entire penalty.[80] Second, if this Court should find that the

[80] Amended Amended Notice of Appeal, para. 62.

penalty applies because the Appellant issued donation receipts, she should only be liable for the receipts she actually signed.[81]

[74] Moreover, the Appellant's submissions also suggest that the false statement could have resulted from an error of law found either in the letter of March 18, 2002 addressed to the participants in the Program or in Ploughman's April letter.[82] This error of law happened when the Appellant mistakenly indicated in her March letter that the defect in title could be remedied retroactively to perfect the donation.

[75] Neither party argued that the false statement could have been the Appellant's legal opinion. Nevertheless, in the document containing her legal opinion, the Appellant specifically lists a number of important documents and confirms having reviewed them.[83] It is a known fact, however, that the Appellant only had the opportunity of reviewing the draft documents and never reviewed the final versions.

[76] These considerations need not to be discussed any further, however, since both parties agree that, by issuing the charitable donation tax receipts, the Appellant made a false statement.

[77] Another of the requirements necessary for the application of the penalty is the possibility of the false statement being used for a purpose of the *Act*. This requirement is undoubtedly met with the tax receipts, which can be used to obtain a tax benefit under the *Act*. For these reasons, the false statements in the case at bar consist of the tax receipts.

[78] Returning briefly to the Appellant's two alternative arguments, I am of the opinion of that subsection 163.2(4) of the *Act* is not written nor does it apply in such a way that a group of individuals can be held jointly liable. The focus in subsection 163.2(4) is on punishing a third party for knowingly making a false statement, and this case is centered on the Appellant's conduct, not the conduct of the treasurer of the Charity.

[79] Additionally, the Appellant can surely be held to have made a false statement in the case of the tax receipts she personally signed. With respect to the tax receipts she did not sign, the Appellant can nevertheless be held to have participated, assented

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[81] Amended Amended Notice of Appeal, para. 63.
[82] Appellant's Memorandum of Fact and Law, paras. 5-6.
[83] Joint Book of Documents, Tab 11, appellant's legal opinion dated September 19, 2001, p. 2.

to, or even acquiesced in the making of the false statement because all the receipts were signed at the same time by the Appellant and the treasurer together. [84]

[80] The question that now begs an answer is whether the Appellant knew, or would reasonably be expected to have known but for circumstances amounting to culpable conduct, that the statement was false. On this issue, the *Act* states that a "'false statement' includes a statement that is misleading because of an omission from the statement."[85]

Knowingly or Culpable Conduct

[81] The evidence presented by the parties strongly suggests that the Appellant did not know she was making a false statement when she was issuing the tax receipts on or around December 31, 2001. Although the receipts were signed without the Appellant having ever reviewed the final supporting documents she wrongly stated, in her legal opinion, that she had reviewed, there is no strong evidence that would allow one to say with conviction that the Appellant knew, when signing the receipts, that the title deeds to the timeshares had not been finalized. In fact, the evidence indicates that it was only on March 17, 2002 that the Appellant met with St-Denis and Ploughman and was advised of the title issues.

[82] Consequently, if the Appellant did not know the statement was false when she made it or participated in its making, subsection 163.2(4) requires alternatively, that we verify whether the Appellant would reasonably be expected to have known but for circumstances amounting to culpable conduct that the statement was false.

[83] Before determining whether the Appellant's conduct may be described as culpable conduct, there is a timing issue which needs to be addressed.

[84] When describing the circumstances which allegedly amount to culpable conduct,[86] the Respondent writes that the Appellant's responsibilities as an officer of the Charity did not cease to exist at the time the tax receipts were issued.[87] Instead, these responsibilities were ongoing and required that proper actions be taken to disclose to the participants and to the CRA any false statement the receipts may have contained. The Respondent adds:

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[84] Agreed Statement of Fact, para. 31.
[85] Subs. 163.2(1) "false statement".
[86] Respondent's Written Submissions, paras. 14-29.
[87] Respondent's Written Submissions, para. 27.

> . . . But more importantly for our case, she was grossly negligent in fulfilling her responsibilities as an officer of a charity to all participants in the Program and to CRA by providing false statements to 134 taxpayers and allowing the use of such statements under the Act, and by trying to support what she knew was false.[88]

[85] The Appellant, for her part, submits that the fact that she co-signed a letter to each of the participants in the Program advising them not to use the charitable donation receipts is evidence that she was neither indifferent as to whether the *Act* was complied with nor acting with reckless disregard of the law.[89]

[86] Both parties present facts which occurred after the tax receipts were issued as evidence of culpable conduct or absence thereof. I am of the opinion that the Appellant's alleged ongoing responsibilities as an officer of the Charity and her attempt to make the false statement known to the participants in the Program are both irrelevant considerations in determining whether the penalty should apply to the Appellant.

[87] It is clear from the wording of subsection 163.2(4) of the *Act* that its intent is to penalize third parties who either knew a statement was false when making it or engaged in culpable conduct prior to making the statement such that they are subject to the same consequences as they would have been if they had known the statement was false. Both situations (either knowing a statement was false or engaging in culpable conduct) must be considered in relation to the same time frame because there is nothing to indicate that it should be otherwise.

[88] The Respondent did not argue that the Appellant should fall within the ambit of subsection 163.2(4) of the *Act* because she knew, after the tax receipts were issued, that the statement she had already made was now false. For the same reason, the Respondent should not rely on facts or events which occurred after the false statement was made in order to establish the Appellant's culpable conduct. Similarly, the Appellant should not rely on actions she took after the tax receipts were issued to support the absence of culpable conduct. Indeed, the train of events following a false statement can do no more than help support the third party's credibility and character. It can contribute to either aggravating or mitigating what is determined to be the third party's conduct leading up to the false statement.

[89] The need to focus on events prior to the Appellant making the false statement when determining whether there was culpable conduct is also emphasized by the

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[88] Respondent's Written Submissions, para. 28.
[89] Appellant's Memorandum of Fact and Law, para. 5(d).

purpose of subsection 163.2(4) of the *Act*. This point will be further developed in the following section, however, it may simply be said here that subsection 163.2(4) aims at penalizing individuals who have intentionally made a false statement or whose conduct was so reckless that intention may be imputed to those individuals with respect to their actions.

[90] We must now evaluate the Appellant's conduct prior to the false statement and determine whether it qualifies as "culpable conduct" thus triggering the application of the penalty prescribed in subsection 163.2(4) of the *Act*.

The Notion of Culpable Conduct

[91] As previously explained, Parliament initially used in subsection 163.2(4) of the *Act* the words "gross negligence" rather than "culpable conduct". It was only after professional bodies expressed their concerns about "gross negligence" resulting in a lower standard of fault being applied by the courts that Parliament agreed to substitute for those words the phrase "culpable conduct". Since this phrase was being used in the *Act* for the first time, a definition was provided in subsection 163.2(1) of the *Act*, which reads as follows:

> "culpable conduct" means conduct, whether an act or a failure to act, that
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> (*a*) is tantamount to intentional conduct;
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> (*b*) shows an indifference as to whether this Act is complied with; or
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> (*c*) shows a wilful, reckless or wanton disregard of the law.

[92] The conduct described in the definition refers to types of conduct the case law had previously associated with gross negligence. For this reason, the Respondent argues that the two should not be differentiated.[90]

[93] I disagree with the Respondent on this issue. Although "culpable conduct" may not differ greatly from "gross negligence", it must be acknowledged that Parliament chose to use different words. One phrase simply cannot be identified with the other otherwise Parliament's words would be rendered meaningless.

[94] However the two phrases are not completely different either. In light of the technical notes referred to earlier, it appears Parliament chose the terms "culpable conduct" to express conduct which had previously been described in the strongest

[90] Respondent's Supplementary Written Submissions, paras. 7-16.

cases of gross negligence. In those cases, the courts have held that gross negligence required evidence of *mens rea*. Because "culpable conduct" should only be found to exist in strong cases of gross negligence, I am of the opinion that evidence of *mens rea* is necessary in order to make a finding of "culpable conduct." Furthermore, the courts should be looking in such cases to find conclusive proof of culpable conduct.

Proving Mens Rea or Intention

[95] In *Boileau*,[91] this Court stated in the following terms the required standards in applying subsection 163(2) of the *Act*:

> . . . I believe that a proceeding under subsection 163(2) is of a penal nature. This aspect has already been discussed by Mr. Justice Cattanach in *Udell v. M.N.R.* [citation omitted]: "There is no doubt that subsection 56(2) [now s. 163(2)] is a penal section." It is true that by virtue of subsection 163(2), there is no accused nor is there a criminal charge. It would thus appear that it is not, as such, a criminal proceeding and that it remains a civil proceeding. However, the application of that subsection requires the evidence of *mens rea* or culpable conduct . . .

[96] In light of these words, Parliament's use of the phrase "culpable conduct" confirms the necessity of finding evidence of the third party's *mens rea* or intention. The Court also confirmed this idea in *Maltais (R.O.F.J.) v. M.N.R.*[92] In that case (at page 2653), this Court commented as follows, in *obiter*, on subsections 163(1) and (2): "These provisions require a *mens rea* of intent or of recklessness". This comment was later adopted in *Dunleavy (F.) v. Canada*.[93]

[97] Proving *mens rea* does not exclude establishing an act, or a failure to act, that is tantamount to intentional conduct. For example, wilful blindness describes a type of conduct which is assimilated to having knowledge. As the Ontario Superior Court of Justice explained in *R. v. Chahine-Badr*,[94] "wilful blindness is not an alternative theory of culpability. It is inherent in the concept of knowledge."[95] The Court added, by referring to the Ontario Court of Appeal decision in *R. v. Harding*:[96]

> . . . "Criminal law treats wilful blindness as equivalent to actual knowledge because the accused 'knew or strongly suspected' that inquiry on his part respecting the consequences of his acts would fix him with the actual knowledge he wished to

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[91] *Boileau*, *supra* note 59, p. 250.
[92] [1991] 2 C.T.C. 2651 (T.C.C.).
[93] [1993] 1 C.T.C. 2648 (T.C.C.).
[94] [2006] 2 C.T.C. 243 (Ont. S.C.) (*Chahine*).
[95] *Ibid*., *supra*, para. 29.
[96] (2001), 160 C.C.C. (3d) 225, para. 66.

> avoid." Thus the requisite knowledge of wrongdoing can be either actual or inferred through wilful blindness.[97]

Burden of Proof

[98] Pursuant to subsection 163(3) of the *Act*, the burden of establishing the facts justifying the assessment of the penalty rests on the shoulders of the Minister. The Minister needs to prove on a balance of probabilities that the penalty should be assessed against the third party.

[99] The evidence submitted may very well be circumstantial evidence, however, it should be clear and convincing.[98] Furthermore, the Minister must be careful not to shift the burden of proof to the appellant. In other words, the Minister's evidence must show more than an absence of a rational explanation for the appellant's conduct.

[100] The courts have been clear in ruling that leaving the appellant to bring forward a rational explanation for his or her conduct is tantamount to shifting the burden of proof onto the appellant. That is contrary to subsection 163(3) of the *Act*. As explained by the Federal Court of Appeal in *Findlay v. The Queen*:[99]

> [27] . . . Subsection 163(2) imposes that burden on the Minister; but the Tax Court Judge based his conclusion as to liability not on a proof by the respondent of gross negligence on a balance of probabilities, but on the absence of a reasonable explanation by the appellant or the tax preparer. This is, as I have already said, contrary to the provisions of subsection 163(2) of the Act.[100]

[101] In other words, the application of a penalty "must be reserved to situations where the facts do not allow for a rational interpretation favorable to the taxpayer."[101]

Does the Appellant's Conduct Qualify as "Culpable Conduct"?

[102] The evidence submitted and the facts established by the Minister conclusively demonstrate the Appellant's culpable conduct.

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[97] *Chahine*, *supra* note 94, para. 29.
[98] *Boileau*, *supra* note 59, p. 250.
[99] 2000 DTC 6345.
[100] *Ibid*., para. 27.
[101] *Baynham et al. v. The Queen*, 98 DTC 6648 (F.C.A.), para. 4.

[103] The Appellant submitted that she could not be required to know every element of the law. It was beyond her ability to conduct an investigation of the underlying title to the property located in Turks and Caicos Islands when she issued the tax receipts. She relied on professional advice that the property existed and submits that she was entitled to do so.

[104] Subsection 163.2(4) of the *Act* does not create an obligation for administrators of a charity to do checks on property that is donated to them, and professionals are indeed fully entitled to rely on another professional's advice. However, the Appellant's situation is different. The Appellant was both the legal professional responsible for the legal opinion concerning the Program and the administrator of the Charity who got the Charity involved in the Program and signed the charitable donation tax receipts.

[105] The Appellant wrote and endorsed a legal opinion regarding the Program, an opinion which she knew would be part of a promotional package intended for potential participants in the Program. Her legal opinion clearly states that she reviewed the principal documents relating to the Program when these documents had in fact never been provided to her. She knew, therefore, that her legal opinion was flawed and misleading.

[106] The Appellant chose to rely on the Program's Principals. They pressured her into providing them with an executed version of the legal opinion without providing her with the supporting documents on which to found her opinion. Yet her legal opinion does not reflect this reality. Rather, it indicates that the documents were reviewed.

[107] When the Appellant chose to involve the Charity in the Program and, later, to sign the tax receipts, she knew she could not rely on her legal opinion. She again decided to rely on the Principals. However, the Principals had relied on the Appellant to attest the legality of the Program. The Appellant knew her legal opinion could not be relied on and, for that reason, she could not be entitled to blindly rely on the Principals. In other words, the Appellant would have been entitled to rely on the Principals if a different professional had signed the legal opinion. She could not, however, rely on her own legal opinion which she knew to be incomplete.

[108] Her conduct is indicative either of complete disregard of the law and whether it was complied with or not or of wilful blindness. The Appellant should have refrained from involving the Charity and signing the tax receipts until she had either reviewed the documents herself or had another professional approve the Program's

activities. When the Appellant issued the tax receipts, she could have reasonably been expected to know that those receipts were tainted by an omission, namely, that no professional had ever verified the legal basis of the Program.

[109] The Appellant cannot agree to endorse a legal opinion and then justify her wrongful conduct by saying she did not have the necessary knowledge — either of tax law or of foreign law — to write that opinion.

[110] Moreover, the Appellant's conduct after the tax receipts were signed negatively affects her credibility and reflects badly on her character. When the Appellant was informed, after the tax receipts had been issued, that the legal titles were not in order, she co-signed a letter informing the participants of the situation. At that point, the Appellant knew she could not rely on the Principals — the same individuals who had never provided her with the documents she was supposed to review and the same individuals she had trusted in signing the tax receipts. Yet when Ploughman sent out a letter, days before the end of the fiscal year, stating that all was in order and that the participants could submit their receipts, the Appellant blindly relied on him again, without asking any further questions.

[111] And finally, the facts established show that by July 9, 2002, at the latest, the Appellant knew that the charitable donations associated with the Program would not be accepted by the CRA. Yet, on June 12, 2003, the Appellant made representations to the CRA regarding her claim in respect of a donation of VOWs to the Charity in her 2001 taxation year. The Appellant lied to the authorities. This conduct reflects negatively on the Appellant's character.

[112] For these reasons, the Appellant's culpable conduct leads me to conclude that she would reasonably be expected to have known that the tax receipts were false statements. The penalty would therefore be applicable if that penalty were a civil one.

[113] For these reasons, the appeal is allowed and the assessment is vacated.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated October 2nd, 2012.

Signed at Ottawa, Canada, this **16th** day of October 2012.

"Paul Bédard"

Bédard J.

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