



**SUPREME COURT OF CANADA**

**CITATION:** Guindon v. Canada, 2015 SCC 41

**DATE:** 20150731

**DOCKET:** 35519

**BETWEEN:**

**Julie Guindon**

Appellant

and

**Her Majesty The Queen**

Respondent

- and -

**Attorney General of Ontario, Attorney General of Quebec, Chartered  
Professional Accountants Canada and Canadian Constitution Foundation**  
Interveners

**CORAM:** Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and  
Gascon JJ.

**JOINT REASONS FOR JUDGMENT:** Rothstein and Cromwell JJ. (Moldaver and Gascon JJ.  
(paras. 1 to 91) concurring)

**JOINT REASONS CONCURRING** Abella and Wagner JJ. (Karakatsanis J. concurring)  
**THAT THE APPEAL BE DISMISSED**  
**BUT DISSENTING AS TO WHETHER**  
**THE COURT SHOULD EXERCISE ITS**  
**DISCRETION TO ADDRESS THE**  
**MERITS OF THE CONSTITUTIONAL**  
**ISSUE:**  
(paras. 92 to 142)

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GUINDON v. CANADA

**Julie Guindon**

*Appellant*

v.

**Her Majesty The Queen**

*Respondent*

and

**Attorney General of Ontario,  
Attorney General of Quebec,  
Chartered Professional Accountants Canada and  
Canadian Constitution Foundation**

*Interveners*

**Indexed as: Guindon v. Canada**

**2015 SCC 41**

File No.: 35519.

2014: December 5; 2015: July 31.

Present: Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Constitutional law — Charter of Rights — Income tax — Penalty for misrepresentation — Individual assessed for penalties under s. 163.2 of Income Tax Act, which imposes monetary penalties on every person who makes false statement that could be used by another person for purpose of Act — Whether proceeding under s. 163.2 is criminal in nature or leads to imposition of true penal consequences — Whether individual assessed for penalties is person “charged with an offence” within meaning of s. 11 of Canadian Charter of Rights and Freedoms — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 163.2.*

*Constitutional law — Courts — Procedure — Notice of constitutional question given to attorneys general in this Court but not in courts below — Whether this Court should exercise its discretion to address merits of constitutional issue — Tax Court of Canada Act, R.S.C. 1985, c. T-2, s. 19.2.*

The Minister of National Revenue assessed G for penalties under s. 163.2 of the *Income Tax Act* for statements she made in donation receipts issued on behalf of a charity, which she knew or would reasonably be expected to have known could be used by taxpayers to claim an unwarranted tax credit. G appealed the Minister’s assessment to the Tax Court of Canada. In her oral submissions, she argued that the penalties imposed under s. 163.2 are criminal and that she is therefore a person “charged with an offence” who is entitled to the procedural safeguards of s. 11 of the *Charter*. In her notice of appeal, however, she did not raise any *Charter* issue and did not provide notice of a constitutional question to the attorneys general as required by

s. 19.2 of the *Tax Court of Canada Act*. The Tax Court accepted G's argument and vacated the penalty assessment. The Federal Court of Appeal set aside that decision and restored the assessment against G.

*Held:* The appeal should be dismissed.

*Per Rothstein, Cromwell, Moldaver and Gascon JJ.:* This Court has a well-established discretion, albeit one that is narrow and should be exercised sparingly, to address the merits of a constitutional issue when proper notice of constitutional questions has been given in this Court, even though the issue was not properly raised in the courts below. That discretion should be exercised, taking into account all of the circumstances including the state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision and the broader interests of the administration of justice. The burden is on the appellant to persuade the Court, that in light of all of the circumstances, it should exercise its discretion.

This is a case in which this Court's discretion ought to be exercised. The issue raised is important to the administration of the *Income Tax Act* and it is in the public interest to decide it. All attorneys general were given notice of constitutional questions in this Court. Two intervened, the attorneys general of Ontario and Quebec. No provincial or territorial attorney general suggested that he or she was deprived of the opportunity to adduce evidence or was prejudiced in any other way. No one has suggested that any additional evidence is required let alone requested permission to

supplement the record. The attorneys general of Ontario and of Quebec addressed the merits of the constitutional argument. This Court also has the benefit of fully developed reasons for judgment on the constitutional point in both of the courts below. Finally, there was no deliberate flouting of the notice requirement: G had advanced an arguable, although not ultimately successful, position that notice was not required in the circumstances of this case.

As for the merits, or the constitutional issue itself, it should be decided in favour of the respondent. Proceedings under s. 163.2 of the *Income Tax Act* are of an administrative nature. They are not criminal in nature and do not lead to the imposition of true penal consequences. Therefore, G is not a person “charged with an offence” and accordingly, the protections under s. 11 of the *Charter* do not apply.

A proceeding is criminal in nature when it is aimed at promoting public order and welfare within a public sphere of activity. Proceedings of an administrative nature, on the other hand, are primarily intended to maintain compliance or to regulate conduct within a limited sphere of activity. The focus of the inquiry is not on the nature of the act which is the subject of the proceedings, but on the nature of the proceedings themselves, taking into account their purpose as well as their procedure.

The purpose of the proceedings in issue is to promote honesty and deter gross negligence, or worse, on the part of the preparers. Enacted in 2000, s. 163.2 contains two administrative penalties: the “planner penalty” in subsection (2) and the “preparer penalty” in subsection (4). The planner penalty is not at issue in this appeal.

The preparer penalty is intended to apply when an individual has made, participated in, assented to, or acquiesced in the making of a false statement. The preparer penalty is narrow: the false statement must be made knowingly or in circumstances amounting to culpable conduct. Culpable conduct is defined in s. 163.2(1) as “conduct, whether an act or a failure to act, that (a) is tantamount to intentional conduct; (b) shows an indifference as to whether this Act is complied with; or (c) shows a wilful, reckless or wanton disregard of the law”. While there has been debate as to the scope of “culpable conduct”, the standard must be at least as high as gross negligence. The third party penalties are meant to capture serious conduct, not ordinary negligence or simple mistakes on the part of a tax preparer or planner.

With respect to the process itself, the analysis is concerned with the extent to which it bears the traditional hallmarks of a criminal proceeding. Here, the Canada Revenue Agency auditors conduct a penalty audit, advise the preparer or planner in writing of the audit, and consider any representation that the individual chooses to make before imposing the penalty. This administrative process can be contrasted with the process which applies to criminal offences. No one is charged. No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the administrative proceeding is complete and all appeals are exhausted, if the penalty is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of a civil action.

In addition to not being criminal in nature, the process under s. 163.2 of the *Income Tax Act* does not lead to the imposition of any “true penal consequence”. A true penal consequence is imprisonment or a fine which, having regard to its magnitude and other relevant factors, is imposed to redress the wrong done to society at large rather than simply to secure compliance. A monetary penalty may or may not be a true penal consequence. It will be so when it is, in purpose or effect, punitive. Whether this is the case is assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty.

In this case, the penalties assessed against G do not impose a true penal consequence — the magnitude reflects the objective of deterring conduct of the type she engaged in. The Tax Court found that G wrote and endorsed a legal opinion that she knew was flawed and misleading: in the opinion, she stated that she had reviewed supporting material which had in fact never been provided to her. Later, when she signed charitable tax receipts as part of the program, she chose to rely on her own legal opinion which she knew to be incomplete. In short, the Tax Court found that G’s conduct was indicative either of complete disregard of the law and whether it was complied with or not or of wilful blindness.

*Per Abella, Karakatsanis and Wagner JJ.:* There is no ambiguity in the text of s. 19.2 of the *Tax Court of Canada Act*. It explicitly states that the court shall

not adjudge a law to be invalid, inapplicable or inoperative unless the notice requirements are satisfied. Because G failed to satisfy those requirements, the Tax Court judge was not entitled to deal with the constitutional issue. This Court, however, has the discretion to entertain new issues. The question in this case, therefore, is how that discretion should be exercised when the new issue raised is a constitutional one which was subject to a mandatory notice requirement in the court or tribunal of first instance. The existence of such a notice requirement argues for the discretion being a very narrow one which should only sparingly be exercised to avoid the practice and perception that such mandatory provisions can be circumvented by raising constitutional arguments as new issues and giving notice for the first time in this Court.

As this Court explained in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, provisions that require litigants to file notice of a constitutional question serve two central purposes: extending a full opportunity to governments to defend their legislation and ensuring that an evidentiary record that is the result of thorough examination is before the court.

*Eaton* remains the only case in which this Court has explicitly and fully considered the policy and evidentiary consequences of the failure to give the requisite notice of a constitutional issue in the court or tribunal where it was required. With the exception of cases where *de facto* notice was given or the Attorney(s) General consented to proceeding in the absence of notice, the Court concluded that such



notice provisions were mandatory and failure to give the notice invalidates a decision made in its absence. There was, the Court held, no need to show actual prejudice since absence of notice is in itself prejudicial to the public interest. Prejudice is assumed from the failure to give notice since it means that a party entitled to make representations has been denied the opportunity to do so.

In *Eaton*, this Court declined to hear the constitutional issue because the required notice had not been given in previous proceedings. There is no suggestion in any subsequent decision of this Court that the notice issue was wrongly decided in *Eaton*. As a result, as *Eaton* directs, the mandatory language of s. 19.2 of the *Tax Court of Canada Act* and its underlying policy rationales support the conclusion that this Court should not, absent exceptional circumstances, adjudicate the constitutionality of s. 163.2 of the *Income Tax Act* in the absence of notice in the Tax Court.

Notice provisions play a particularly crucial role in *Charter* litigation, where, if an applicant successfully establishes a violation of an enumerated right, the burden shifts to the government to demonstrate on a balance of probabilities that the legislation in question is justified under s. 1 of the *Charter*. Notice provisions therefore protect the public interest by giving Attorneys General an opportunity to present evidence so that a court can assess the constitutionality of the law fully and fairly. Bypassing this crucial evidentiary step in a first instance forum where the evidence can be properly tested and challenged, erodes not only the credibility of the

outcome, but also public confidence that *Charter* compliance will be robustly reviewed. And notice is essential not just for the Attorney General whose legislation is being challenged, but also for the other Attorneys General whose legislation may be incidentally affected by the outcome of the case and who, as a result, may wish to intervene. Prejudice to the public is presumed from the failure to have full *Charter* scrutiny when it is first required. The central role notice provisions play in our constitutional democracy is reflected in the fact that every province and territory has a law requiring that notice of a constitutional question be served on the provincial and territorial Attorney(s) General, and, at times, also requiring that the Attorney General of Canada be served.

The failure to notify Attorneys General in the forum where notice is required and doing so only for the first time in *this* Court undermines the purposes underlying the notice provisions. Most significantly, it undermines public confidence because it extinguishes the legislative assurances that this Court will have the benefit of a complete and tested record when scrutinizing the constitutionality of legislation.

Moreover, if this Court arrogates to itself a broad authority to retroactively remedy a failure to give notice in the Tax Court where it is required, the mandatory character of s. 19.2 is eroded. Permitting the artifice of notice at this Court to replace notice in the forum from which an appeal is taken would, in effect, permit parties to do an “end run” around these mandatory notice provisions. Such an approach would have the effect of replacing *Eaton*’s presumption of prejudice with an

assumption of no prejudice if notice is *eventually* given in this Court. Not only does this send the message that compliance with mandatory notice provisions is merely optional, it also has the effect of making them essentially discretionary.

The mandatory wording of the *Tax Court of Canada Act* and the policy reasons underlying notice provisions therefore lead to the conclusion that, in addition to the two exceptions set out in *Eaton* — *de facto* notice and the consent of the Attorneys General — absent exceptional circumstances, this Court should not entertain a constitutional argument where notice was not properly provided in the court or tribunal of first instance. Exceptional circumstances include those where the constitutional issue has an overwhelming urgency or public importance that justifies hearing it in this Court, or where the party bringing the constitutional challenge had little choice but to raise it for the first time in this Court.

In this case, G failed to serve notice of a constitutional question before the Tax Court. She once again failed to serve the notice required by s. 57 of the *Federal Courts Act* in proceedings before the Federal Court of Appeal. Before this Court, G filed notice for the first time. She attempted to bring her case outside the scope of s. 19.2 by arguing that she was merely asserting her *Charter* rights, as opposed to seeking a declaration of invalidity, inapplicability or inoperability. Having raised a constitutional argument, however, G was bound by the notice requirements that govern its determination. The protections set out in s. 11 of the *Charter* cannot simply be read into the regulatory scheme without rendering s. 163.2 invalid,

inapplicable or inoperative. The *Income Tax Act* provides a set of procedures and processes that are distinct from those set out in the *Criminal Code*. Section 34(2) of the *Interpretation Act*, as a result, does not apply.

Neither exception from *Eaton* applies in this case. Nor are there any exceptional circumstances: there is no particular urgency or overwhelming public importance that distinguishes this case from other constitutional cases, and there is virtually no explanation for why notice was not given where required in the prior proceedings.

At the Tax Court, the Attorney General of Canada objected to G's constitutional argument, arguing that notice was required. Neither the Attorney General of Canada, nor the provincial Attorneys General whose own regulatory schemes could clearly be affected by the outcome, had the opportunity to fully participate in building the necessary evidentiary record before the Tax Court. And two of the three Attorneys General who participated in this Court objected to the failure to provide notice at the Tax Court. Far from conceding that there was no prejudice, the Attorney General of Canada in fact insisted that there *was* prejudice to the public from the failure to provide notice. The burden of showing the contrary is on G, not on the Attorneys General. Moreover, it is impossible in the absence of a full evidentiary record and argument, to conclude that this Court has the benefit of full developed reasons for judgment on the constitutional point from both of the courts below.

To consider the constitutional issue in this case, as the majority does, essentially means that it could be exercised in any case where the Court is sufficiently attracted by the constitutional issue, notwithstanding the public importance of notice provisions, the wording of s. 19.2, and the binding precedent of *Eaton*. G knew that the Attorney General of Canada had objected to her failure to file notice before the Tax Court when she made her closing argument, yet even in the Federal Court of Appeal, she failed to file the required notice. Essentially, she took the risk of gambling with public resources, rather than simply complying with plain statutory requirements.

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By Rothstein and Cromwell JJ.

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D.L.R. (4th) 334; *Tseshaht v. British Columbia*, S.C.C., No. 23234, May 2, 1994 (*Bulletin of Proceedings of the Supreme Court of Canada*, 1994, p. 756), notice of discontinuance, [1995] 1 S.C.R. xi; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498, rev'g (2001), 158 C.C.C. (3d) 325; *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528, rev'g 2002 CanLII 16257; *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302; *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53, rev'g on other grounds 2011 NLCA 42, 308 Nfld. & P.E.I.R. 1; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *R. v. Shubley*, [1990] 1 S.C.R. 3; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627; *Venne v. The Queen*, [1984] C.T.C. 223; *Sirois (L.C.) v. Canada*, 1995 CarswellNat 555 (WL Can.); *Keller v. Canada*, 1995 CarswellNat 569 (WL Can.); *Sidhu v. R.*, 2004 TCC 174, [2004] 2 C.T.C. 3167; *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176, 333 D.L.R. (4th) 1; *Rowan v. Ontario Securities Commission*, 2012 ONCA 208, 110 O.R. (3d) 492; *Lavallee v. Alberta Securities Commission*, 2010 ABCA 48, 474 A.R. 295; *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2013 ONSC 5315, 288 C.R.R. (2d) 297.

By Abella and Wagner JJ.

**Applied:** *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; **referred to:** *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357; *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115; *Bekker v. Minister of National Revenue*, 2004 FCA 186, 323 N.R. 195; *B.C.T.F. v. British Columbia (Attorney General)*, 2009 BCSC 436, 94 B.C.L.R. (4th) 267; *Paluska v. Cava* (2002), 59 O.R. (3d) 469; *Maurice v. Crédit Trans Canada Ltée*, [1996] R.J.Q. 894; *R. v. Nome*, 2010 SKCA 147, 362 Sask. R. 241; *D.N. v. New Brunswick (Minister of Health and Community Services)* (1992), 127 N.B.R. (2d) 383; *Gitksan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135; *Mercier v. Canada (Correctional Service)*, 2010 FCA 167, [2012] 1 F.C.R. 72; *R. v. Lord*, 2011 BCCA 295, 307 B.C.A.C. 285; *Ardoch Algonquin First Nation v. Canada (Attorney General)*, 2003 FCA 473, [2004] 2 F.C.R. 108; *R. v. Brown*, [1993] 2 S.C.R. 918; *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Re:Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38, [2012] 2 S.C.R. 376; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Morine v. Parker (L & J) Equipment Inc.*, 2001 NSCA 53, 193 N.S.R. (2d) 51; *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302; *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498; *Pinet v. St. Thomas Psychiatric*

*Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528; *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53.

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*Canadian Charter of Rights and Freedoms*, ss. 1, 11, 15, 25.

*Code of Civil Procedure*, CQLR, c. C-25, art. 95.

*Competition Act*, R.S.C. 1985, c. C-34, s. 36, Part VI.

*Constitution Act, 1867*, s. 92(15).

*Constitutional Question Act*, R.S.B.C. 1996, c. 68, s. 8.

*Constitutional Questions Act, 2012*, S.S. 2012, c. C-29.01, s. 13.

*Constitutional Questions Act*, C.C.S.M., c. C180, s. 7(2).

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*Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 109.

*Criminal Code*, R.S.C. 1985, c. C-46.

*Federal Courts Act*, R.S.C. 1985, c. F-7, s. 57(1).

*Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), Part I, Division I, ss. 163(2), 163.2, 165, 169, Part XV, ss. 220(3.1), 238, 239, 244.

*Interpretation Act*, R.S.C. 1985, c. I-21, s. 34(2).

*Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.).

*Judicature Act*, R.S.A. 2000, c. J-2, s. 24(1).



*Judicature Act*, R.S.N.B. 1973, c. J-2, s. 22(3).

*Judicature Act*, R.S.N.L. 1990, c. J-4, s. 57.

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*Adam Aptowitz, Alexandra Tzannidakis, Arthur B. C. Drache, Q.C., and Kenneth Jull*, for the appellant.

*Gordon Bourgard and Eric Noble*, for the respondent.

*S. Zachary Green*, for the intervener the Attorney General of Ontario.

Written submissions only by *Abdou Thiaw*, for the intervener the Attorney General of Quebec.

*Dominic C. Belley and Vincent Dionne*, for the intervener Chartered Professional Accountants Canada.

Written submissions only by *Darryl Cruz, Brandon Kain and Kate Findlay*, for the intervener the Canadian Constitution Foundation.

The judgment of Rothstein, Cromwell, Moldaver and Gascon JJ. was delivered by

ROTHSTEIN AND CROMWELL JJ. —

I. Introduction

[1] Income tax law is notoriously complex and many taxpayers rely on tax advisors to help them comply. Given the important role played by tax advisors and other individuals involved in transactions affected by income tax considerations, Parliament enacted s. 163.2 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (*ITA*), which imposes monetary penalties on every person who makes a false statement that could be used by another person for the purpose of the Act.

[2] Julie Guindon, the appellant, was assessed penalties under s. 163.2(4) totalling \$546,747 in respect of false statements made by her in donation receipts issued by her on behalf of a charity which, it is alleged, she knew or would reasonably be expected to have known could be used by taxpayers to claim an unwarranted tax credit.

[3] Ms. Guindon says that the penalty imposed under s. 163.2(4) is criminal and that she is therefore a person “charged with an offence” who is entitled to the

procedural safeguards provided for in s. 11 of the *Canadian Charter of Rights and Freedoms*. Accordingly, she argues that the matter should not have proceeded in the Tax Court of Canada and that the penalty against her should be vacated.

[4] She was successful in the Tax Court of Canada but the Federal Court of Appeal set that decision aside. Her final appeal to this Court raises two issues, one procedural and one substantive. The procedural issue concerns the consequences of Ms. Guindon's failure in the courts below to give the required notice of constitutional questions in relation to her claims under s. 11 of the *Charter*. Proper notice has been given in this Court. The substantive issue is whether 163.2(4) creates a true criminal offence and therefore engages the protections provided for under s. 11.

[5] In our view, this Court has a well-established discretion, albeit one that is narrow and should be exercised sparingly, to address the merits of the constitutional issue when proper notice of constitutional questions has been given in this Court, even though the issue was not properly raised in the courts below. We would exercise that discretion in this case. However, we would decide the substantive issue in favour of the respondent. In our view, proceedings under s. 163.2 are of an administrative nature. Ms. Guindon therefore is not a person "charged with an offence" and accordingly the protections under s. 11 of the *Charter* do not apply. In the result, we would dismiss the appeal.

## II. Facts and Judicial History

[6] Julie Guindon is a lawyer, practising mainly in the area of family law and wills and estates; she has no expertise in income tax law. In May 2001, she was approached by promoters of a leveraged donation program. Each participant in the program would acquire timeshare units of a resort in the Turks and Caicos Islands. The participants would donate these units to a charity at a fair market value greater than their cash payment for the timeshares. Ms. Guindon agreed, for a fee of \$1,000, to provide an opinion letter on the tax consequences of this program on the basis of a precedent provided by the promoters. She recommended that the promoters have a tax lawyer and an accountant review her opinion to ensure its accuracy, as the opinion did not fall within her field of expertise, but nonetheless provided the letter knowing that it was intended to be part of the promotional package for the scheme. She wrote that the transactions would be implemented based on supporting documents that she had been provided with and had reviewed. She had not reviewed the supporting documents.

[7] Ms. Guindon was also the president and administrator of a registered charity, Les Guides Franco-Canadiennes District d'Ottawa. In November 2001, this charity agreed to become the recipient of the donated timeshares. The promoters would then sell the timeshares on behalf of the charity which would receive a minimum of \$500 per unit sold.

[8] The scheme was a sham: no timeshare units were created and no transfers from the donors to the charity occurred. The promoters prepared 135 tax receipts,

which were issued by the charity and signed by Ms. Guindon and the treasurer of the charity. The total receipted amount was \$3,972,775. The Minister of National Revenue disallowed the charitable donation tax credits claimed by the donors. On August 1, 2008, the Minister assessed Ms. Guindon for penalties under s. 163.2 of the *ITA* for each of the tax receipts issued on the basis that she knew, or would have known but for wilful disregard of the *ITA*, that the tax receipts constituted false statements.

[9] Ms. Guindon appealed this assessment to the Tax Court of Canada. Her counsel, for the first time, relied on s. 11 of the *Charter* during his oral submissions. It was submitted that s. 163.2 created a criminal offence and that, as a result, Ms. Guindon was a person “charged with an offence” entitled to the protections of s. 11 of the *Charter*. Her notice of appeal to the Tax Court did not raise any *Charter* issue and she did not provide notice of a constitutional question to the Attorney General of Canada and the provincial attorneys general as required by s. 19.2 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2. The respondent objected to the *Charter* point being raised, but was overruled.

[10] The Tax Court found that Ms. Guindon’s conduct was culpable within the meaning of s. 163.2 of the *ITA*, but vacated the penalty assessment, ruling that the provision is both “by its very nature a criminal proceeding” and “involves a sanction that is a true penal consequence”: 2012 TCC 287, 2012 DTC 1283, at para. 53.

However, the Tax Court also found that, if the penalty were a civil one, it would be applicable to Ms. Guindon, as she engaged in culpable conduct.

[11] Before the Federal Court of Appeal, Ms. Guindon failed to give notice of a constitutional question to the provincial and federal attorneys general. She argued that no notice of constitutional question was required as she was not questioning the “constitutional validity, applicability or operability” of s. 163.2 of the *ITA: Tax Court of Canada Act*, s. 19.2. Instead, she claimed that s. 34(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21, operates such that s. 163.2 of the *ITA* can be interpreted in a constitutionally compliant manner. Section 34(2) reads:

All the provisions of the *Criminal Code* [R.S.C. 1985, c. C-46] relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

By applying *Criminal Code* procedures to the penalty instead of the administrative procedures provided for in the *ITA*, the penalty in s. 163.2 can be preserved as a criminal offence.

[12] The Federal Court of Appeal allowed the appeal, set aside the judgment of the Tax Court, and restored the assessment against Ms. Guindon: 2013 FCA 153, 360 D.L.R. (4th) 515. Stratas J.A., writing for the court, found that Ms. Guindon’s failure to serve notice of a constitutional question was fatal to the Tax Court’s jurisdiction. He noted, however, that the Tax Court and the Federal Court of Appeal,

if asked to do so, could have exercised their discretion to adjourn the appeal to allow a notice to be served to address that matter. Ms. Guindon did not make that request in either of the courts below. The Federal Court of Appeal nonetheless went on to address the substantive issue and concluded that s. 163.2 of the *ITA* is not a criminal offence and therefore does not engage s. 11 of the *Charter*.

[13] The Chief Justice stated the following constitutional questions:

1. Does s. 163.2 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), infringe s. 11 of the *Canadian Charter of Rights and Freedoms*?
2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

[14] The result is that the Attorney General of Canada and all provincial and territorial attorneys general have been given formal notice of the constitutional issue which the appellant seeks to raise in this Court.

### III. Analysis

#### A. *Notice*

[15] The first issue concerns the impact on this appeal of Ms. Guindon's failure to give notice, in the courts below, of the constitutional issue that she raised. We agree with the Court of Appeal and our colleagues, Abella and Wagner JJ., that



notice was required in this case. We also agree with our colleagues that, proper notice having now been given in this Court, we have a discretion to consider and decide the constitutional issue. We part company with our colleagues, however, on the question of whether we should exercise that discretion in this case. In our view, this is a compelling case to do so in light of an analysis and weighing of the relevant considerations that we will discuss in detail.

[16] To begin, we read *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, differently than do our colleagues. *Eaton* was a case in which no notice or any equivalent had been given and the respondents had specifically disavowed the intention to raise the constitutionality of any provision. The Attorney General of Ontario relied on this position and made no submissions on the constitutionality of the statute in question and had no opportunity to adduce evidence or make submissions on this point. The Court of Appeal addressed the question *ex proprio motu*. In short, *Eaton* was a case of actual prejudice to the Attorney General and was expressly decided on that basis.

[17] The main legal debate in *Eaton* concerned conflicting authority about whether the absence of notice makes the decision invalid, as one strand of authority held, or whether the absence of notice makes the decision voidable upon a showing of prejudice, as held by the other strand. Sopinka J., writing for the Court on this point, expressly declined to decide between these two competing strands of authority. In

other words, he did not foreclose the possibility that the constitutional issue could be decided even in the absence of notice. He wrote:

It is not, however, necessary to express a final opinion on these questions in that I am satisfied that under either strand of authority the decision of the Court of Appeal is invalid. No notice or any equivalent was given in this case and in fact the Attorney General and the courts had no reason to believe that the Act was under attack. Clearly [the notice requirement] was not complied with and the Attorney General was seriously prejudiced by the absence of notice. [Emphasis added; para. 54.]

[18] Justices Abella and Wagner do not explain how a notice provision like the one in issue here can be mandatory, as they say that it is, and yet also be subject to exceptions that have no basis in the statutory language. In our respectful view, *Eaton* does not support our colleague's approach.

[19] Before turning to the other points, we should be clear what the issue is and what it is not. The issue is not whether this Court (or for that matter the courts below) can proceed to adjudicate a constitutional question without notice ever having been given to the attorneys general. Notice requirements serve a vital purpose in ensuring that courts have a full evidentiary record before invalidating legislation and that governments are given the fullest opportunity to support the validity of legislation: see *Eaton*, at para. 48. Notice has now been given in this case. The question is one of whether this Court should address the matter now that notice has been given, not whether this or any other Court can proceed in the absence of notice: see, e.g., *Morine v. Parker (L & J) Equipment Inc.*, 2001 NSCA 53, 193 N.S.R. (2d)

51; *Mohr v. North American Life Assurance Co.*, [1941] 1 D.L.R. 427 (Sask. C.A.); *Citation Industries Ltd. v. C.J.A., Loc. 1928* (1988), 53 D.L.R. (4th) 360 (B.C.C.A.).

[20] The principles that must be applied here are essentially those that govern whether this is a suitable case to hear a constitutional issue that is properly before the court for the first time on appeal. The issue is “new” in the sense that the constitutional issue, by virtue of the absence of notice, was not properly raised before either of the courts below. Whether to hear and decide a constitutional issue when it has not been properly raised in the courts below is a matter for the Court’s discretion, taking into account all of the circumstances including the state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision and the broader interests of the administration of justice.

[21] The Court has many times affirmed that it may, in appropriate circumstances, allow parties to raise on appeal an argument, even a new constitutional argument, that was not raised, or was not properly raised in the courts below: see, e.g., *R. v. Brown*, [1993] 2 S.C.R. 918; *Corporation professionnelle des médecins du Québec v. Thibault*, [1988] 1 S.C.R. 1033; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678. The Court has even done so of its own motion, as we shall see.

[22] The test for whether new issues should be considered is a stringent one. As Binnie J. put it in *Sylvan Lake*, “The Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing

party and where the refusal to do so would risk an injustice”: para. 33. While this Court can hear and decide new issues, this discretion is not exercised routinely or lightly.

[23] New constitutional issues engage additional concerns beyond those that are considered in relation to new issues generally. In the case of a constitutional issue properly raised in this Court for the first time, the special role of the attorneys general in constitutional litigation — reflected in the notice provisions — and the unique role of this Court as the final court of appeal for Canada must also be carefully considered. The Court must be sure that no attorney general has been denied the opportunity to address the constitutional question and that it is appropriate for decision by this Court. The burden is on the appellant to persuade the Court, that in light of all of the circumstances, it should exercise its discretion to hear and decide the issue. There is no assumption of an absence of prejudice. The Court’s discretion to hear and decide new issues should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties.

[24] There are many examples of the Court’s practice reflecting this approach both before and after *Eaton*.

[25] The Court has adjudicated a constitutional issue despite notice not having been served at the court of first instance. For example, in *Bank of Montreal v. Hall* (1985), 46 Sask. R. 182, the Saskatchewan Court of Queen’s Bench found that:

. . . the question as to the constitutional validity of s. 178(3) of the [*Banks and Banking Law Revision Act, 1980*, S.C. 1980-81-82-83, c. 40] and the question as to whether the relevant provisions of [*The Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16] are *ultra vires* insofar as they might purport to affect chartered banks, are not questions which have been properly brought into issue in this case.

On appeal to this Court, despite the lack of notice of this constitutional question before the Court of Queen's Bench, this Court stated constitutional questions and decided the constitutionality of s. 178(3) of the *Banks and Banking Law Revision Act, 1980* and the related provisions of *The Limitation of Civil Rights Act*, [1990] 1 S.C.R. 121, at pp.152-53.

[26] In *Artell Developments Ltd. v. 677950 Ontario Ltd.*, [1993] 2 S.C.R. 443, Lamer C.J. stated a constitutional question and this Court went on to answer that question, despite the fact that the Ontario Court of Appeal had not considered any constitutional issues in its decision: (1992), 93 D.L.R. (4th) 334.

[27] In *Tseshah v. British Columbia*, S.C.C., No. 23234, May 2, 1994 (S.C.C. Bulletin, 1994, at p. 756), the Court stated a constitutional question with respect to an issue not raised in the courts below and granted both parties *proprio motu* leave to adduce new evidence.<sup>1</sup>

[28] In the companion cases of *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, 2004 SCC 20, [2004] 1 S.C.R. 498, and *Pinet v. St.*

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<sup>1</sup> The appeal was discontinued on March 21, 1995, and thus no judgment rendered: [1995] 1 S.C.R. xi.

*Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528, the Chief Justice stated constitutional questions and gave the parties leave to file supplementary evidence on legislative facts relevant to those questions even though the Ontario Court of Appeal's decisions in these matters had not dealt with constitutional issues: see (2001), 158 C.C.C. (3d) 325, and 2002 CanLII 16257.

[29] In *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302, as the respondent had not raised the constitutional question before the Federal Court of Appeal, the parties were informed that they may apply to adduce additional evidence in this Court: August 12, 2004, Doc. 29956.

[30] Recently, in *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53, this Court considered the constitutional applicability and operability of Newfoundland and Labrador's *Workplace Health, Safety and Compensation Act*, R.S.N.L. 1990, c. W-11. Notice of the constitutional issue had not been given to the Attorney General of Newfoundland and Labrador either at the hearing before the Workplace Health, Safety and Compensation Commission or in the trial court. Section 57 of the *Judicature Act*, R.S.N.L. 1990, c. J-4, provides that a constitutional challenge "shall not be heard until notice has been given to the Attorney General for Canada and to the Attorney General for the province". The Court of Appeal for Newfoundland and Labrador determined that notice of the constitutional question should have been provided under s. 57, but that "failure to give the requisite notice in this case does not result in the court having to declare all

previous proceedings a nullity because there is no prejudice to the Crown in proceeding to hear the appeal”: 2011 NLCA 42, 308 Nfld. & P.E.I.R. 1, at para. 23. We also note that, in that case, the Court of Appeal expressed the view that this Court’s decision in *Eaton* did not definitively decide the issue of the legal effect of failure to give notice: para. 45. In the end, the fact that there was no notice at first instance did not prevent this Court from stating constitutional questions and deciding them on the merits.

[31] Justices Abella and Wagner are of the view that *Penetanguishene*, *Pinet*, *Kirkbi*, and *Ryan Estate* are not authoritative on the issue of notice given that these cases are silent on why *Eaton* was not “followed”. In our view, the absence of any reference to *Eaton* in these cases is explained by the fact that *Eaton*, as we have explained, does not stand for the proposition that this Court cannot consider a constitutional issue unless it was properly raised in courts below. There was no need to consider, distinguish, or reverse *Eaton* in these cases.

[32] Further, the approach adopted by Abella and Wagner JJ. risks putting appellants at a disadvantage vis-à-vis respondents, given that the Court has previously held that respondents can raise and the Court can address on appeal new constitutional issues requiring notice. In *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, the respondents proposed a constitutional question that was not adjudicated in the courts below. Iacobucci J. found that wide latitude in formulating constitutional questions “is especially appropriate in a case

like the present, where the motion to state constitutional questions was brought by the respondents: generally, a respondent may advance any argument on appeal that would support the judgment below” (para. 58 (citations omitted)). However, Iacobucci J. noted that this general rule is subject to the same limitation that applies to all new issues on appeal: “A respondent, like any other party, cannot rely upon an entirely new argument that would have required additional evidence to be adduced at trial” (*ibid.* (citations omitted)). Thus, this Court may answer a constitutional question that was not even considered in the courts below. However, Abella and Wagner JJ. would prevent this Court from considering constitutional issues even where these issues *were* considered and extensively discussed by the courts below, as they were in this case.

[33] Beyond new constitutional questions proposed by parties, this Court has occasionally asked parties, prior to hearing an appeal, to address new constitutional issues. *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, is an example. In the lower courts, the case had been argued on the basis of ss. 15(1) and 25 of the *Charter*; the prosecution did not attempt to defend the law on the basis of s. 15(2). After leave was granted but before factums were filed, the Supreme Court asked that ss. 15(1), 15(2), and 25 be “fully canvassed” in written and oral submissions: December 15, 2006, Doc. 31603. The Court ultimately found that s. 15(2) of the *Charter* protected the impugned communal fishing license program: see H. S. Brown, *Supreme Court of Canada Practice 2015* (15th ed. 2014), at pp. 374-75. While here s. 15(2) could presumably only be used to support the validity of legislation, this case demonstrates



that this Court has taken the opportunity to raise constitutional issues notwithstanding that they were not raised in the courts below.

[34] In our view, this is a case in which our discretion to hear and decide the constitutional issue ought to be exercised in light of an analysis and weighing of a number of considerations.

[35] The issue raised on appeal is important to the administration of the *ITA* and it is in the public interest to decide it. There is no indication that any attorney general has suffered prejudice by having the question of the constitutionality of s. 163.2 of the *ITA* decided. The Attorney General of Canada does not assert that it would have adduced different evidence before the Tax Court had it received notice of the constitutional question in that court. In this Court, counsel for the respondent invoked Sopinka J.'s *obiter* remarks in *Eaton* that the absence of notice is inherently prejudicial in order to submit that, in the current case, there is prejudice to the public interest. As we have explained, the proper approach to the exercise of this Court's discretion is that if the challenger can demonstrate the absence of prejudice, it may, in appropriate circumstances, consider the new constitutional issue. On this point, counsel for the respondent candidly conceded that he could point to no actual prejudice in this case resulting from the absence of notice: transcript, at p. 48. All attorneys general were given notice of constitutional question in this Court. Two intervened, the attorneys general of Ontario and Quebec. Only the Attorney General of Quebec addressed the notice requirement, stating that the Tax Court of Canada

should not have pronounced on the constitutional question, without commenting on this Court's jurisdiction to hear the matter: see I.F., at para. 10. No provincial or territorial attorney general suggested that he or she was deprived of the opportunity to adduce evidence or was prejudiced in any other way. No one has suggested that any additional evidence is required let alone requested permission to supplement the record. The attorneys general of Ontario and of Quebec addressed the merits of the constitutional argument. We also have the benefit of fully developed reasons for judgment on the constitutional point in both of the courts below. Finally, there was no deliberate flouting of the notice requirement: the appellant advanced an arguable, although not ultimately successful, position that notice was not required in the circumstances of this case.

[36] We are struck by the enormous waste of judicial resources that would result from this Court declining to hear and decide the merits. As the Court pointed out in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 24, “undue process . . . with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes”. Insisting on the notice provision in the lower courts where, as here, it would serve no purpose to do so constitutes “undue process” and refusing to address the merits leaves the main issue unresolved after the expense and time devoted to it through three levels of court.

[37] We must respectfully indicate our disagreement with two specific contentions of Abella and Wagner JJ. They assert that since all constitutional issues

are important, our approach would lead “essentially to entertaining all constitutional arguments raised in this Court for the first time”: para. 137. This is not the case: it ignores the other considerations relevant to the exercise of this Court’s discretion. History shows that this Court has only agreed to consider new constitutional issues in rare cases. While we agree that urgency may be a factor in deciding to hear a constitutional issue in this Court where no notice was served below, it is not the only consideration. The point is that all relevant considerations should be taken into account.

[38] Our colleagues also maintain, without any factual basis in the record and without any submission of this nature having been made, that Ms. Guindon failed to file notice “without explanation”, and sought to “evade” “the statutory obligation . . . by advancing the excuse” of her notice argument by employing “linguistic tactics at the expense of the public interest”: paras. 94, 96, 97 and 136.

[39] Ms. Guindon did not fail to explain why she did not give notice. She advanced the argument that notice was not required and the Tax Court judge decided that issue. Bédard J. did not require notice of constitutional question to be served because he did not issue a declaration of invalidity following his conclusion that s. 163.2 constituted a criminal offence. Instead, he allowed the appeal and vacated the assessment. The learned Tax Court judge did not dismiss Ms. Guindon’s argument on the basis of “semantics”. The Federal Court of Appeal did not accept Ms. Guindon’s position on this point. But it devoted several paragraphs of its judgment to the issue

and did not characterize Ms. Guindon’s position as merely “linguistic” or as an attempt to “evade” the notice requirement. No party or intervener at any point has advanced the interpretation of Ms. Guindon’s conduct on which our colleagues rely and there is no support for it — none — in the record.

[40] We will now proceed to address the constitutional issue.

B. *Merits*

(1) Overview

[41] The substantive issue in this appeal is whether Ms. Guindon, by virtue of having been assessed a penalty under s. 163.2 of the *ITA*, is a “person charged with an offence” within the meaning of s. 11 of the *Charter*. If she is, then either she is entitled to the numerous protections accorded by that section or, if s. 163.2 cannot be read as providing for those protections, it would be constitutionally invalid. The basic question is whether, as Ms. Guindon submits, s. 163.2 creates “an offence” for the purposes of s. 11 and the answer depends, as we shall explain, on whether s. 163.2 is criminal in nature or provides for true penal consequences. In our view, neither is the case and s. 11 does not apply to these proceedings.

[42] We will first set out a brief overview of the legal principles, consider and reject some criticisms of this framework and then apply the principles to s. 163.2.

(2) Wigglesworth and Martineau Set Out the Tests to Determine Whether Section 11 of the Charter Is Engaged

[43] Section 11 of the *Charter* provides:

**11.** Any person charged with an offence has the right

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

(b) to be tried within a reasonable time;

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

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

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

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

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

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

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

[44] This Court has deliberately adopted a “somewhat narrow definition of the opening words of s. 11” in order to avoid having to craft differing levels of protection under s. 11 for different sorts of proceedings: *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at p. 558. The Court has also acknowledged the difficulty in formulating a precise test to identify particular proceedings which give rise to s. 11 protections: see p. 559. Section 11 protections are available to those charged with criminal offences, not those subject to administrative sanctions: see *Wigglesworth*, at p. 554; *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737, at para. 19. The two parts test for determining which statutory infractions are criminal offences and which are administrative penalties was set out in *Wigglesworth*, at pp. 559-62. Additional analytical criteria were subsequently elaborated in *Martineau*, at paras. 19-24 and 57. As will be explained, an individual is entitled to the procedural protections of s. 11 of the *Charter* where the proceeding is, by its very nature, criminal, or where a “true penal consequence” flows from the sanction.

[45] A proceeding is criminal by its very nature when it is aimed at promoting public order and welfare within a public sphere of activity. Proceedings of an administrative nature, on the other hand, are primarily intended to maintain compliance or to regulate conduct within a limited sphere of activity: see *Martineau*, at paras. 21-22; *Wigglesworth*, at p. 560. The focus of the inquiry is not on the nature of the act which is the subject of the proceedings, but on the nature of the proceedings themselves, taking into account their purpose as well as their procedure: *Martineau*, at paras. 24 and 28-32; *R. v. Shubley*, [1990] 1 S.C.R. 3, at pp. 18-19. Proceedings

have a criminal purpose when they seek to bring the subject of the proceedings “to account to society” for conduct “violating the public interest”: *Shubley*, at p. 20.

[46] A “true penal consequence” is “imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within [a] limited sphere of activity”: *Wigglesworth*, at p. 561; see also *Martineau*, at para. 57. There is inevitably some overlap between the analysis of the purpose of the scheme and the purpose of the sanction, but the jurisprudence has looked at both separately to the extent that is possible, recognizing that the proceeding will be an offence for s. 11 purposes if it meets either branch of the test, and that situations in which a proceeding meets one but not both branches will be rare: *ibid.*

[47] We will elaborate these principles further as we apply them to the provision in issue here. But first we turn to consider some of the criticisms of this approach to the analysis.

### (3) Criticisms of the *Wigglesworth/Martineau* Tests

[48] The *Wigglesworth/Martineau* tests have been subject to criticism. It has been said that the distinction between the criminal in nature and true penal consequence tests is unclear, the reasoning is circular, or the tests cannot properly account for the particular context of modern administrative monetary penalties. (See, e.g., D. McLeod, “Facing the Consequences: Should the *Charter* Apply to

Administrative Proceedings Involving Monetary Penalties?” (2012), 30 N.J.C.L. 59; factum of the intervener the Canadian Constitution Foundation; S. Aylward and L. Ritacca, “In Defence of Administrative Law: Procedural Fairness for Administrative Monetary Penalties” (2015), 28 *C.J.A.L.P.* 35.)

[49] When the criminal in nature test is understood as considering only the nature of the proceedings, the independent value of each test becomes clear. The criminal in nature test identifies provisions that are criminal because Parliament or the legislature has provided for proceedings whose attributes and purpose show that the penalty is to be imposed via criminal proceedings. The true penal consequence test, on the other hand, looks at whether an ostensibly administrative or regulatory provision nonetheless engages s. 11 of the *Charter* because it may result in punitive consequences. While there is inevitably some overlap in the analysis, the important thing is to consider all relevant factors, acknowledging that only rarely, as in *Wigglesworth*, will the two branches of the test lead to different conclusions.

[50] Moreover, the analysis is not circular: both tests ask distinct questions that evaluate the two different ways in which a provision could be a criminal offence for the purpose of s. 11. The criminal in nature test focuses on the process while the penal consequences test focuses on its potential impact on the person subject to the proceeding.

(4) Is the Proceeding Under Section 163.2 “Criminal in Nature”?



(a) *Principles*

[51] The criminal in nature test asks whether the proceedings by which a penalty is imposed are criminal. The test is not concerned with the nature of the underlying act. As Wilson J. stated in *Wigglesworth*, the test is whether a matter “fall[s] within s. 11 . . . because by its very nature it is a criminal proceeding”: p. 559 (emphasis added). This was confirmed in *Shubley*, at pp. 18-19, where McLachlin J. (as she then was) stated explicitly: “The question of whether proceedings are criminal in nature is concerned not with the nature of the act which gave rise to the proceedings, but the nature of the proceedings themselves” (emphasis added). Fish J., writing for the Court in *Martineau*, reaffirmed the conclusion in *Shubley* that the criminal in nature test is concerned solely with the proceedings themselves: see paras. 18-19. The text of s. 11 supports this conclusion. As Wilson J. noted in *Wigglesworth*,

Section 11 contains terms which are classically associated with criminal proceedings: “tried”, “presumed innocent until proven guilty”, “reasonable bail”, “punishment for the offence”, “acquitted of the offence” and “found guilty of the offence”. Indeed, some of the rights guaranteed in s. 11 would seem to have no meaning outside the criminal or quasi-criminal context. [p. 555]

[52] Various indicia are useful in determining whether the proceedings are criminal in nature. Fish J., in finding that the civil forfeiture provision at issue in *Martineau* was not criminal in nature, observed that three criteria may be helpful in reviewing the case law in relation to the nature of the proceeding: the objectives of the legislation, the objectives of the sanction and the process leading to the imposition

of the sanction (para. 24). This case deals with an administrative monetary penalty, not a civil collection mechanism as was the case in *Martineau* and the analysis of the objectives of the sanction must be undertaken as part of considering whether the sanction is a true penal consequence. In order to avoid unnecessary repetition, we find it convenient to consider the first and last of these criteria here but leave consideration of the objectives of the sanction until we address the question of whether the sanction is a true penal consequence. We will look at how these criteria relate to the proceeding under s. 163.2 in turn.

(b) *Application*

(i) The Legislative Scheme and the Provision in Issue

[53] The question is whether the objectives of the proceedings, examined in their full legislative context, have a regulatory or a penal purpose. As Wilson J. put it in *Wigglesworth*, “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”: p. 560. She noted, by way of example, that proceedings of an “administrative nature instituted for the protection of the public in accordance with the policy of a statute” or which impose disqualifications “as part of a scheme for regulating an activity in order to protect the public” are generally not the sort of proceedings that engage s. 11: *ibid.*

[54] The *ITA* is “a self-reporting and self-assessing [scheme] which depends upon the honesty and integrity of the taxpayers for its success” in order to carry out its ultimate purpose, the raising of government revenues: *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at p. 636. Nonetheless, it contains a number of enforcement measures, including both civil and criminal penalties. Civil penalties are found in Part I, Division I, of the *ITA*, “Returns, Assessments, Payment and Appeals” and are assessed by the Canada Revenue Agency (CRA). Criminal offences, on the other hand, are found in Part XV of the *ITA*, “Administration and Enforcement” and are prosecuted before a court of criminal jurisdiction.

[55] This appeal focuses on s. 163.2 of the *ITA*. Enacted in 2000, it contains two administrative penalties: the “planner penalty” in subsection (2) and the “preparer penalty” in subsection (4). The planner penalty is not at issue in this appeal. The preparer penalty reads:

(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.

[56] The CRA explains that the preparer penalty is intended to apply when an individual has made, participated in, assented to, or acquiesced in the making of a false statement. A specific person who could use the false statement must be

identified (the provision uses the term “the other person”). According to the CRA, the penalty could apply, for example, to an individual preparing a fraudulent tax return for or providing deceptive tax advice to a specific taxpayer. (See CRA’s information circular IC 01-1, “Third-Party Civil Penalties” (September 18, 2001 (online)), at paras. 6, 7 and 9.)

[57] The preparer penalty is narrow: the false statement must be made knowingly or in circumstances amounting to culpable conduct. Culpable conduct is defined in s. 163.2(1) as

conduct, whether an act or a failure to act, that

(a) is tantamount to intentional conduct;

(b) shows an indifference as to whether this Act is complied with; or

(c) shows a wilful, reckless or wanton disregard of the law.

[58] This is clearly a high standard. “[W]ilful, reckless or wanton disregard of the law” refers to concepts well-known to the law, commonly encountered as degrees of *mens rea* in criminal law: see, e.g., K. Roach, *Criminal Law* (5th ed. 2012), at pp. 180-84 and 191-92. The use of such terms evinces a clear intention that “culpable conduct” be a more exacting standard than simple negligence.

[59] The expressions “shows an indifference as to whether this Act is complied with” and “tantamount to intentional conduct” originated in the

jurisprudence on the gross negligence penalty applicable directly to taxpayers in s. 163(2) of the *ITA*, which states:

(2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a “return”) filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of . . . . [Penalty calculations omitted.]

[60] The Minister states in her factum that “culpable conduct” in s. 163.2 of the *ITA* “was not intended to be different from the gross negligence standard in s. 163(2)”: para. 79. The Federal Court in *Venne v. The Queen*, [1984] C.T.C. 223 (T.D.), in the context of a s. 163(2) penalty, explained that “an indifference as to whether the law is complied with” is more than simple carelessness or negligence; it involves “a high degree of negligence tantamount to intentional acting”: p. 234. It is akin to burying one’s head in the sand: *Sirois (L.C.) v. Canada*, 1995 CarswellNat 555 (WL Can.) (T.C.C.), at para. 13; *Keller v. Canada*, 1995 CarswellNat 569 (WL Can.) (T.C.C.). The Tax Court in *Sidhu v. R.*, 2004 TCC 174, [2004] 2 C.T.C. 3167, explaining the decision in *Venne*, elaborated on expressions “tantamount to intentional conduct” and “shows an indifference as to whether this Act is complied with”:

Actions “tantamount” to intentional actions are actions from which an imputed intention can be found such as actions demonstrating “an indifference as to whether the law is complied with or not”. . . . The burden here is not to prove, beyond a reasonable doubt, *mens rea* to evade taxes. The burden is to prove on a balance of probability such an

indifference to appropriate and reasonable diligence in a self-assessing system as belies or offends common sense. [para. 23]

[61] Therefore, while there has been debate as to the scope of “culpable conduct” (as argued before the Tax Court in this matter), the standard must be at least as high as gross negligence under s. 163(2) of the *ITA*. The third party penalties are meant to capture serious conduct, not ordinary negligence or simple mistakes on the part of a tax preparer or planner.

[62] We can conclude that the purpose of this proceeding is to promote honesty and deter gross negligence, or worse, on the part of preparers, qualities that are essential to the self-reporting system of income taxation assessment.

(ii) The Process

[63] With respect to the process, the heart of the analysis is concerned with the extent to which it bears the traditional hallmarks of a criminal proceeding. Fish J. referred to some of the relevant considerations in *Martineau*, including whether the process involved the laying of a charge, an arrest, a summons to appear before a court of criminal jurisdiction, and whether a finding of responsibility leads to a criminal record: para. 45. The use of words traditionally associated with the criminal process, such as “guilt”, “acquittal”, “indictment”, “summary conviction”, “prosecution”, and “accused”, can be a helpful indication as to whether a provision refers to criminal proceedings.

[64] The fact that the penalty is imposed by a judge in a criminal court is, of course, another sign that the offence is criminal in nature. But whether a proceeding is criminal by nature does not depend on the actual penalty imposed. For example, parking tickets can involve relatively small fines, but where they are imposed in conformity with the general criminal process (e.g. pleading guilty or contesting the fine before a judge, prosecution by a Crown attorney), s. 11 rights apply: *Wigglesworth*, at para. 559. Offences in the *Criminal Code*, the *Youth Criminal Justice Act*, S.C. 2002, c. 1, the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and quasi-criminal offences under provincial legislation are the type of proceedings which are criminal in nature: see the *Constitution Act, 1867*, s. 92(15); *Wigglesworth*, at p. 560; *Martineau*, at para. 21.

[65] If, considering all of these factors, the process is criminal in nature, it engages s. 11 of the *Charter*.

[66] The process leading to the imposition of the penalty is described in the CRA's IC 01-1, at paras. 79-89. CRA auditors conduct a penalty audit, advise the preparer or planner in writing of the audit, and consider any representation that the individual chooses to make before making a recommendation to the Third-Party Penalty Review Committee. If this Committee agrees with the recommendation to impose the penalty, it will give the planner or preparer another opportunity to make representations before making its decision.

[67] This administrative process can be contrasted with the process which applies to criminal offences in the *ITA*: ss. 238 and 239. Unlike the administrative penalties in s. 163.2, the criminal sanctions are imposed by a court of criminal jurisdiction after the laying of an information or complaint: see s. 244. For ease of reference, we repeat the criteria from *Martineau*. Just as in that case, in the context of s. 163.2:

No one is charged . . . . No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the administrative proceeding is complete and all appeals are exhausted, if the [penalty] is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of a civil action. [para. 45]

Similarly, under s. 163.2(4), if the assessment is upheld and payment is not made, the Minister may only invoke civil collection procedures under the *ITA*.

[68] Ms. Guindon submits that where the same conduct can lead to either an administrative monetary penalty or a criminal sanction, the proceedings will be criminal in nature. Here, conduct which may form the basis of an administrative penalty under s. 163.2 could also be the basis for criminal prosecution under s. 239 of the *ITA*: see the Tax Court's reasons, at paras. 44-50. However, the same act could have more than one aspect. It follows that the fact that the same conduct which could form the basis of an administrative penalty could also lead to a criminal conviction is irrelevant to the characterization of the administrative penalty. As explained earlier, the test is that set out in *Wigglesworth* and *Martineau*.



[69] Should an individual be assessed an administrative monetary penalty and subsequently face criminal prosecution for the same conduct (or vice versa), that individual may argue that bringing the second proceedings in the particular circumstances is an abuse of process.<sup>2</sup> As nothing in the record before this Court indicates that Ms. Guindon is facing criminal prosecution, that issue is not before us.

[70] Ms. Guindon argues that s. 163.2(4) is not an administrative offence because it is not restricted to the regulated class in the *ITA* (taxpayers) and departs from the general purpose of the Act: the collection of tax. While the individuals targeted by s. 163.2(4) of the *ITA* are not the taxpayers themselves, this does not detract from the provision's administrative nature. The *ITA* regulatory scheme encompasses more than those who pay taxes: employers, banks, brokers, charities, and other entities are required to file information returns and to produce information in order to verify taxpayer compliance. Provisions, such as administrative monetary penalties, that encourage compliance by these non-taxpayers are integral to the *ITA*'s regulatory regime and are not criminal in nature simply because the target is not the taxpayer.

[71] Ms. Guindon also submits that the use of the term "culpable conduct" in s. 163.2(4) indicates a *mens rea* requirement, which is classically criminal in nature. This is irrelevant to the analysis because, as discussed, the criminal in nature analysis is concerned with the process, not the conduct. The simple fact that there is a mental

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<sup>2</sup> It should be noted that in the *ITA*, ss. 238(3) and 239(3) prevent an individual from being liable for any penalty assessed under the administrative monetary penalty provisions after the individual is convicted of an offence under the Act for the same conduct.

element that must be present in order for the penalty to be imposed does not render the provision criminal. For example, intentional torts require proof of intention, commonly understood as a subjective desire to cause the consequence of one's action: see P. H. Osborne, *The Law of Torts* (4th ed. 2011), at p. 251. In addition, some non-criminal statutory causes of action include mental elements such as recklessness or knowledge. For example, the statutory cause of action in s. 134(4) of Ontario's *Securities Act*, R.S.O. 1990, c. S.5, includes a knowledge requirement. Also, s. 36 of the *Competition Act*, R.S.C. 1985, c. C-34, creates a cause of action for those who have suffered loss or damage as a result of conduct contrary to Part VI, which contains the Act's criminal offences. Given that these are criminal offences, all contain a *mens rea* element, but that does not render s. 36 proceedings criminal.

[72] While some regulatory penalties are imposed without consideration of the person's state of mind, in other cases it is rational that the state would only wish to impose a penalty on those who engage in misconduct knowingly, recklessly, or with a particular intention. Providing a due diligence defence or including a mental element as a component of the penalty does not detract from the administrative nature of the penalty. (See the Federal Court of Appeal's reasons, at para. 48.)

(c) *Conclusion on the "Criminal in Nature" Test*

[73] We conclude that the s. 163.2 process is not criminal in nature.

(5) The True Penal Consequence Test

(a) *Introduction*

[74] As we have explained, the preparer penalty is designed to apply when an individual engages in conduct such as preparing a fraudulent tax return, conduct which undermines the self-reporting and self-assessing scheme which depends on honesty and diligence of taxpayers and those whom they engage to assist them. For the reasons that follow, we conclude that the penalty is not a true penal consequence.

(b) *Principles*

[75] Administrative monetary penalties are designed as sanctions to be imposed through an administrative process. They are not imposed in a criminal proceeding. Thus, the issue of whether a person who is the subject of an ostensibly administrative regime is in reality “charged with an offence” is addressed by the second *Wigglesworth/Martineau* test: does the sanction impose a true penal consequence? *Wigglesworth* teaches that a true penal consequence is imprisonment or a fine which, having regard to its magnitude and other relevant factors, is imposed to redress the wrong done to society at large rather than simply to secure compliance: see p. 561.

[76] Imprisonment is always a true penal consequence. A provision that includes the possibility of imprisonment will be criminal no matter the actual sanction imposed: see *Wigglesworth*, at p. 562. A monetary penalty may or may not be a true penal consequence. It will be so when it is, in purpose or effect, punitive. Whether

this is the case is assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty: see, e.g., *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176, 333 D.L.R. (4th) 1, at paras. 76-77.

[77] The magnitude of the sanction on its own is not determinative. However, if the amount at issue is out of proportion to the amount required to achieve regulatory purposes, this consideration suggests that it will constitute a true penal consequence and that the provision will attract the protection of s. 11 of the *Charter*. This is not to say that very large penalties cannot be imposed under administrative monetary penalty regimes. Sometimes significant penalties are necessary in order to deter non-compliance with an administrative scheme: see *Rowan v. Ontario Securities Commission*, 2012 ONCA 208, 110 O.R. (3d) 492, at para. 49. The amount of the penalty should reflect the objective of deterring non-compliance with the administrative or regulatory scheme.

(c) *An Upper Limit on Administrative Penalties?*

[78] Ms. Guindon and the intervener the Canadian Constitution Foundation suggest that there should be an upper limit on the amount of an administrative monetary penalty. Citing the Ontario Court of Appeal decision in *Rowan*, at para. 54, which considered the imposition of an administrative penalty under the Ontario *Securities Act*, Ms. Guindon submits that the maximum amount that can be imposed

under an administrative monetary penalty should be one fifth of the penalty which can be imposed by criminal prosecution. The CCF submits that there should be a monetary threshold beyond which administrative penalties are presumed to be criminal, suggesting \$10,000 for an individual and \$100,000 for a corporation: I.F., at para. 32.

[79] We cannot agree with these approaches. First, the one-to-five ratio suggested by Ms. Guindon is not a general standard. She derives the proposed rule from the Ontario Court of Appeal's decision in *Rowan*, yet in that decision, the court merely recognized the ratio between a particular administrative monetary penalty in the Ontario *Securities Act* and the maximum criminal penalty that could apply for the same misconduct: see *Securities Act*, ss. 122(1), 127(1)9; *Rowan*, at para. 54. The Court of Appeal did not find that this was a general rule applicable to all administrative monetary penalties or that this was the only relevant consideration. Second, and most fundamentally, an arbitrary upper limit on administrative monetary penalties could undermine their goal: to deter actions which do not comply with the administrative regime. The analysis must ask whether the amount of the penalty, considered with the other relevant factors, is in keeping with the nature of the misconduct and the penalty necessary to serve regulatory purposes, such as promoting compliance and deterring non-compliance, not focus on an arbitrary threshold which may bear no relation to the particular administrative regime and policy goals: see *United States Steel Corp.*, at para. 74.

[80] Some statutes prescribe very high administrative monetary penalties, at times over a million dollars, and these have been upheld where it is demonstrated that the penalty serves regulatory purposes. In some cases, sizable penalties are necessary so the penalty is not simply considered a cost of doing business: see the Federal Court of Appeal's reasons, at para. 47. For example, an administrative penalty of \$1 million per infraction in the *Alberta Securities Act*, R.S.A. 2000, c. S-4, was upheld in *Lavallee v. Alberta Securities Commission*, 2010 ABCA 48, 474 A.R. 295. The Federal Court of Appeal upheld a provision of the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.), which allowed for penalties of up to \$10,000 per day for failure to comply with a ministerial directive: see *United States Steel Corp.* The Ontario Superior Court found that a \$10 million administrative monetary penalty in the *Competition Act* for deceptive marketing practices did not engage s. 11 of the *Charter: Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2013 ONSC 5315, 288 C.R.R. (2d) 297. The Ontario Court of Appeal in *Rowan*, noting that the amount of the penalty is determined by regulatory considerations distinct from the principles of criminal liability and sentencing, that no criminal record results and the proceeds are used for the benefit of third parties, stated that

[p]enalties of up to \$1 million per infraction are, in my view, entirely in keeping with the Commission's mandate to regulate the capital markets where enormous sums of money are involved and where substantial penalties are necessary to remove economic incentives for non-compliance with market rules. [para. 49]

[81] In all of these cases, the courts found that high administrative monetary penalties were required to encourage compliance with the administrative regime. The relevant question is not the amount of the penalty in absolute terms, it is whether the amount serves regulatory rather than penal purposes.

(d) *Application*

[82] Section 163.2 of the *ITA* does not impose any “true penal consequence”.

[83] Considering first the purpose of the penalty, s. 163.2 was enacted in 2000 to discourage individuals from making false statements on behalf of others or from counselling others to make false statements: see the Tax Court’s reasons, at paras. 36-37. Thus its purpose is to promote compliance with the scheme. The fact that the penalty is intended to have a deterrent effect does not take it out of the realm of administrative penalties. As Fish J. pointed out in *Martineau*, penalties which are clearly not penal in nature, such as damages imposed in relation to civil liability and penalties imposed in disciplinary proceedings, have deterrent aspects: see para. 38.

[84] The magnitude of penalties under s. 163.2(4) is directly tied to the objective of deterring non-compliance with the *ITA*. The amount is calculated pursuant to s. 163.2(5) and takes into account the penalty to which the other person (for whom or to whom the violator has made the false statement) would be liable in addition to the violator’s gross compensation in respect of the false statement. These factors speak to the magnitude of the tax that could potentially be avoided and the

violator's personal gain, both of which are relevant in deterring such misconduct. The amount is fixed without regard to other general criminal sentencing principles and no stigma comparable to that attached to a criminal conviction flows from the imposition of the penalty.

[85] Ms. Guindon was assessed a penalty of \$546,747. This amount is very high for an individual. However, in the circumstances it does not constitute a true penal consequence: the Tax Court found that there were 135 violations (see paras. 1 and 112). In addition, that court found that Ms. Guindon was dishonest in her initial legal opinion when she stated that she had reviewed the supporting documents. She then compounded this dishonesty by signing charitable receipts that she should reasonably have known were tainted by her own failure to verify the legal basis of the program: paras. 107-9. Such dishonesty cannot be countenanced in a self-reporting system. As noted by the Federal Court of Appeal, “[s]ometimes administrative penalties must be large in order to deter conduct detrimental to the administrative scheme and the policies furthered by it”: para. 46.

[86] The Tax Court found that Ms. Guindon wrote and endorsed a legal opinion that she knew was “flawed and misleading”: in the opinion, she stated that she had reviewed supporting material which had in fact never been provided to her (para. 105). Later, when she signed charitable tax receipts as part of the program, she chose to “rely on her own legal opinion which she knew to be incomplete”: para. 107. The Tax Court found that Ms. Guindon's conduct was “indicative either of complete



disregard of the law and whether it was complied with or not or of wilful blindness”: para. 108.

[87] We agree with the Court of Appeal that a maximum penalty for a person making a false statement of \$100,000 plus the person’s gross compensation in relation to that statement

does not demonstrate a purpose extending beyond deterrence to denunciation and punishment of the offender for the “wrong done to society”: *Wigglesworth, supra*, at page 561. Rather, in light of the possibility of false statements going undetected, penalties of such magnitude are necessary to prevent them from being regarded as just “another cost of doing business”: *United States Steel Corp., supra*, at paragraph 77. [para. 47]

[88] In this case, the penalty of \$546,747 assessed against Ms. Guindon does not impose a true penal consequence — the magnitude reflects the objective of deterring conduct of the type she engaged in. Although the penalty is paid ultimately into the Consolidated Revenue Fund, none of the other relevant considerations supports the view that this penalty is a true penal consequence.

(6) Conclusion

[89] We conclude that the proceeding under s. 163.2 is not criminal in nature and does not lead to the imposition of true penal consequences. We agree with Stratas J.A., writing for the Federal Court of Appeal, that “the assessment of a penalty under

s. 163.2 is not the equivalent of being ‘charged with a [criminal] offence.’ Accordingly, none of the s. 11 rights apply in s. 163.2 proceedings”: para. 37.

[90] Finally, we note that even though s. 11 of the *Charter* is not engaged by s. 163.2 of the *ITA*, those against whom penalties are assessed are not left without recourse or protection. They have a full right of appeal to the Tax Court of Canada and, as the respondent pointed out in her factum, have access to other administrative remedies: R.F., at para. 99; see, e.g., *ITA*, s. 220(3.1).

#### IV. Proposed Disposition

[91] We would dismiss the appeal with costs.

The reasons of Abella, Karakatsanis and Wagner JJ. were delivered by

ABELLA AND WAGNER JJ.

[92] Legislatures across Canada have enacted mandatory provisions that require litigants who wish to challenge the constitutionality of a piece of legislation to give notice to the Attorneys General. This notice gives governments an opportunity to present evidence justifying the constitutionality of the law and permits all parties to

challenge that evidence. The goal is for the court, in the public interest, to have the fullest and best evidence possible before deciding the issue so that a tested and thorough evidentiary record is available.

[93] The indispensable evidentiary role governments play in constitutional challenges was trenchantly described by Sopinka J. in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241:

In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the *Charter* and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to the act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but to the people. [para. 48]

[94] This appeal addresses the effect of the failure — without explanation, without the consent of the Attorneys General entitled to notice, and without exceptional circumstances — to provide such notice in the court or tribunal where the legislation requires that it be given. Under s. 19.2 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, the Tax Court “shall not” find a provision of any Act or regulation of Parliament to be unconstitutional unless notice has been served on the Attorney General of Canada and each province.

[95] The wording of the provision is clear: notice must be given. Transforming a mandatory provision into a discretionary one not only represents the judicial

rewriting of unambiguous statutory language, it also contradicts the express purpose behind it, namely, ensuring that constitutional challenges get the fulsome review their significance warrants. There is virtually no prejudice to a litigant in requiring adherence to these notice provisions. On the other hand, deciding a constitutional issue in the absence of notice — and therefore the absence of parties who have exclusive control of key evidentiary facts and arguments — has serious consequences for the integrity and credibility of the outcome in constitutional cases.

[96] In this case, a litigant sought to avoid the statutory obligation to provide the required notice by advancing the excuse that seeking the benefit of s. 11 of the *Canadian Charter of Rights and Freedoms* was not a constitutional argument requiring notice since she was not seeking to strike down the applicable provision. Only in the proceedings in this Court did she decide for the first time to give notice of a constitutional question.

[97] Of the three Attorneys General who responded to the notice, two objected to the constitutional argument being raised in the absence of notice in the prior proceedings. In our view, permitting the litigant to by-pass the notice requirement in those earlier proceedings based on an argument that being entitled to the protection of s. 11 of the *Charter* was not a constitutional issue, permits a party to evade the notice requirements based on semantics. Since the purpose of notice in constitutional cases is to permit the fullest possible evidentiary record before deciding cases of such importance, allowing a party unilaterally to make an end-run around notice

requirements by claiming that demonstrably constitutional arguments are not in fact constitutional arguments, rewards linguistic tactics at the expense of the public interest.

### Background

[98] Julie Guindon is a lawyer practising mostly family and estate law. On September 19, 2001, she gave a legal opinion about the Global Trust Charitable Donation Program. At the time Ms. Guindon signed the opinion, she had not reviewed the documents she said she had relied on.

[99] The Program ostensibly consisted of a tax reduction scheme that involved the donation of Vacation Ownership Weeks (VOWs) in a timeshare. The taxpayers would donate the undervalued VOWs to a registered charity and, in return, receive charitable tax receipts in the amount of the fair market value of the VOWs. As was later discovered, the Program was a sham — no timeshare units were ever legally created and, consequently, no VOWs were actually donated to charity.

[100] The only charity to become involved in the program was Les Guides Franco-Canadiennes District d'Ottawa, a registered charity under the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.). Ms. Guindon was the President of this charity from 1999 to 2004. On December 31, 2001, 135 tax receipts were issued by Ms. Guindon's charity, acknowledging the ostensible donation of the VOWs. The receipts were signed by Ms. Guindon and the charity's Treasurer.

[101] The Minister of National Revenue assessed a penalty against Ms. Guindon under s. 163.2(4) of the *Income Tax Act*, which states:

(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.

[102] The Minister argued that Ms. Guindon had participated or acquiesced in, or assented to, the making of 135 tax receipts she knew, or would reasonably have been expected to have known, constituted false statements that could be used by participants to claim an unwarranted tax credit under the *Income Tax Act*.

[103] The penalty assessed against Ms. Guindon totalled \$546,747. It was calculated pursuant to s. 163.2(5), which quantifies the penalty as 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.

Ms. Guindon's fine was based on the calculation in subpara. (b)(i), undertaken separately for each of the 135 tax receipts. Ms. Guindon appealed the assessment.

### Prior Proceedings

[104] In her closing arguments before the Tax Court of Canada, Ms. Guindon raised a constitutional argument by alleging that the penalty was criminal in nature and that, as a result, her rights under s. 11 of the *Charter* had been violated. The Crown objected, noting that Ms. Guindon had not filed notice of a constitutional question as required by s. 19.2 of the *Tax Court of Canada Act*. Despite the lack of notice, Bédard J. undertook an analysis of s. 163.2 of the *Income Tax Act* to determine whether it was constitutionally compliant. He concluded that both because of “its very nature [as] a criminal proceeding” and because it involved a sanction that was “a true penal consequence” as described by *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, s. 163.2 of the *Income Tax Act* attracted the protection of s. 11 of the *Charter*. However, rather than find the provision to be constitutionally invalid, he found that s. 34(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21, applied. That section states:

(2) All the provisions of the *Criminal Code* relating to indictable offences apply to indictable offences created by an enactment, and all the provisions of that Code relating to summary conviction offences apply to all other offences created by an enactment, except to the extent that the enactment otherwise provides.

As a result, he held that prosecutions under the *Income Tax Act* were to take place in provincial court and in accordance with the *Criminal Code*, R.S.C. 1985, c. C-46.

[105] His alternative conclusion was that if he was wrong and the proceedings under s. 163.2 were civil, not criminal in nature, Ms. Guindon would have been found to be in breach of the provision.

[106] On appeal, Stratas J.A., writing for a unanimous court, overturned the decision. He began by finding that the Tax Court lacked jurisdiction to address the constitutionality of s. 163.2 of the *Income Tax Act* since no notice of a constitutional question had been served. Section 19.2 of the *Tax Court of Canada Act* requires that notice be served on the federal and provincial Attorneys General before a provision can be judged to be invalid, inapplicable or inoperable. Because no notice was served, Stratas J.A. concluded that the Tax Court was prohibited from entertaining the question of whether s. 163.2 of the *Income Tax Act* created an offence for the purposes of s. 11 of the *Charter*.

[107] Stratas J.A. rejected the argument that, by operation of s. 34(2) of the *Interpretation Act*, s. 11 of the *Charter* would apply to s. 163.2 of the *Income Tax Act* without undermining its validity, applicability or operability. Instead, he concluded that the *Income Tax Act* provided specific administrative procedures to be followed in the assessment — and any subsequent appeal — of the penalty. As a result s. 34(2) could not operate to import the procedures of the *Criminal Code* into s. 163.2 because the *Income Tax Act* provided otherwise. He concluded that since Ms. Guindon was effectively using the *Interpretation Act* in support of the argument that s. 163.2



should be found invalid, inapplicable or inoperative, a notice of constitutional question had to have been served. His words bear repeating:

Ms. Guindon was obligated to serve [a notice of constitutional question] on the federal and provincial Attorneys General if she sought a finding that a section of the Act was invalid, inoperative or inapplicable . . . .

In substance, Ms. Guindon sought that very thing in the Tax Court and seeks that very thing here.

She contends that section 11 of the Charter applies to penalty proceedings under section 163.2 of the Act. If her contention is accepted, section 11 of the Charter renders the scheme of section 163.2 and related procedural sections invalid, inoperative or inapplicable. Section 11 of the Charter requires that a penalty can only be imposed until after charges are laid and a fair trial is conducted before an independent and impartial tribunal. Section 163.2 and related procedural sections do something quite different: under them, a person can be assessed a penalty and the assessment is binding unless it is varied or overturned by way of reconsideration or in an appeal to the Tax Court. Only in the Tax Court, after liability has been found, is there something akin to an independent and impartial trial of the matter.

In her memorandum of fact and law filed in this Court, Ms. Guindon submitted that, once section 163.2 of the *Income Tax Act* is regarded as an offence provision, subsection 34(2) of the *Interpretation Act* . . . kicks in. That subsection requires that *Criminal Code* procedures be followed instead of *Income Tax Act* procedures. In her view, then, finding section 163.2 is an offence under section 11 of the Charter does not make any procedures in the *Income Tax Act* invalid, inoperative, or inapplicable.

I disagree. This submission overlooks the language of subsection 34(2), which imposes the procedures of the *Criminal Code* to any offence, “except to the extent that [another] enactment otherwise provides.” The *Income Tax Act* otherwise provides. It provides for the assessment of a penalty under section 163.2, a reconsideration procedure and an appeal to the Tax Court.

Therefore, I conclude that in these circumstances, Ms. Guindon was seeking the invalidity, inoperability or inapplicability of sections of the *Income Tax Act*. A notice of constitutional question had to be served.

The failure to serve a notice of constitutional question took away the Tax Court's jurisdiction to consider whether section 163.2 of the Act creates a criminal offence, triggering Ms. Guindon's section 11 rights. [Citations omitted; paras. 22-28.]

[108] In the event that his conclusion that notice was required was found not to be legally justified, Stratas J.A. went on to consider the merits. He concluded that s. 163.2 of the *Income Tax Act* did not run afoul of either branch of the two-pronged test developed in *Wigglesworth*. First, he found that the penalty was intended to encourage compliance within an administrative scheme, as opposed to redressing a wrong done to society. It was not, as a result, "by its very nature" criminal. Nor did it meet the second prong of the test since it did not amount to a true penal consequence. Substantial monetary penalties may be imposed to deter conduct that undermines the administrative scheme and policy, but that does not make them "penal". And, significantly, the term "culpable conduct" has a defined meaning in the *Income Tax Act* that does not import the notion of "guilt" or of criminal conduct.

[109] For the reasons that follow, in our view, Ms. Guindon's failure to provide the requisite notice in the Tax Court should result in this Court refusing to entertain her constitutional argument.

### Analysis

[110] This appeal raises the question of whether the failure to provide notice of a constitutional question before the Tax Court of Canada, as required by s. 19.2(1) of

the *Tax Court of Canada Act*, should prevent this Court from considering whether s. 163.2 of the *Income Tax Act* violates s. 11 of the *Charter*. Section 19.2 states:

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

[111] As this Court explained in *Eaton*, provisions that require litigants to file notice of a constitutional question serve two central purposes: extending a full opportunity to governments to defend their legislation and ensuring that an evidentiary record that is the result of thorough examination is before the court: para. 48.

[112] Notice provisions play a particularly crucial role in *Charter* litigation, where, if an applicant successfully establishes a violation of an enumerated right, the burden shifts to the government to demonstrate on a balance of probabilities that the legislation in question is justified under s. 1 of the *Charter*. The s. 1 inquiry is fact-based. It turns on whether evidence adduced by the government demonstrates that the legislation has a pressing and substantial objective that is being pursued in a manner that is rational, minimally impairing of the affected right, and proportionate.

[113] Notice provisions therefore protect the public interest by giving Attorneys General an opportunity to present evidence so that a court can assess the

constitutionality of the law fully and fairly. By-passing this crucial evidentiary step in a first instance forum where the evidence can be properly tested and challenged erodes not only the credibility of the outcome, but also public confidence that *Charter* compliance will be robustly reviewed.

[114] Notice is essential not just for the Attorney General whose legislation is being challenged, but also for the other Attorneys General whose legislation may be incidentally affected by the outcome of the case and who, as a result, may wish to intervene: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 49. The provision being challenged in this appeal, for example, creates an administrative monetary penalty that is assessed against individuals who fail to comply with a regulatory provision in the *Income Tax Act*. Every province has regulatory schemes that rely on similar administrative monetary penalties, and a finding that the impugned provision is unconstitutional because it fails to provide the procedural rights set out in s. 11 of the *Charter* may have ramifications for a number of these schemes. That is why it was essential in this case that the Attorneys General of these provinces be afforded the earliest opportunity to adduce their own evidence, test and rebut other evidence, and make submissions in respect of the constitutional question at issue.

[115] Notice provisions also ensure that appellate courts have the benefit of a full and rigorously tested evidentiary record. As this Court acknowledged in *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101,

The trial judge is charged with the responsibility of establishing the record on which subsequent appeals are founded. . . . This division of labour is basic to our court system. The first instance judge determines the facts; appeal courts review the decision for correctness in law or palpable and overriding error in fact. [para. 49]

[116] The importance of a full evidentiary record when resolving constitutional questions was considered in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at p. 361, where Cory J. emphasized that “*Charter* decisions should not and must not be made in a factual vacuum.” And Dickson J. in *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115, writing for a unanimous Court, declined to resolve a constitutional question relating to the Canada Labour Relations Board’s jurisdiction, because the challenge had not been made first at the Board and the record accordingly failed to establish the facts necessary to reach a conclusion on the constitutional issue: pp. 139-41.

[117] The central role notice provisions play in our constitutional democracy is reflected in the fact that every province and territory has a law requiring that notice of a constitutional question be served on the provincial Attorneys General, and, at times, also requiring that the Attorney General of Canada be served: *Judicature Act*, R.S.A. 2000, c. J-2, s. 24(1); *Constitutional Question Act*, R.S.B.C. 1996, c. 68, s. 8; *The Constitutional Questions Act*, C.C.S.M., c. C180, s. 7(2); *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 22(3); *Judicature Act*, R.S.N.L. 1990, c. J-4, s. 57(1); *Constitutional Questions Act*, R.S.N.S. 1989, c. 89, s. 10(2); *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 109; *Judicature Act*, S.P.E.I. 2008, c. J-2.1, s. 49(1); *Code of Civil*

*Procedure*, CQLR, c. C-25, art. 95; *The Constitutional Questions Act, 2012*, S.S. 2012, c. C-29.01, s. 13; *Judicature Act*, R.S.N.W.T. 1988, c. J-1, s. 59(2); *Judicature Act*, S.N.W.T. (Nu.) 1998, c. 34, s. 58(1); *Constitutional Questions Act*, R.S.Y. 2002, c. 39, s. 2(1). There is also a similar notice provision in the *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 57(1).

[118] The weight of judicial authority interpreting these provisions is to treat them as mandatory. In *Bekker v. Minister of National Revenue*, 323 N.R. 195 (F.C.A.), the issue was the application of s. 57 of the *Federal Courts Act*, which substantively mirrors s. 19.2 of the *Tax Court of Canada Act* and states:

**57.** (1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province . . . .

Létourneau J.A. confirmed that the court would

not entertain a constitutional challenge in the absence of a Notice being served . . . Notice must be given in every case in which the constitutional validity or applicability of a law is brought in question . . . including proceedings before the Tax Court . . . . [para. 8]

See also: *B.C.T.F. v. British Columbia (Attorney General)*, 94 B.C.L.R. (4th) 267 (S.C.), at para. 41; *Paluska v. Cava* (2002), 59 O.R. (3d) 469 (C.A.), at para. 24;

*Maurice v. Crédit Trans Canada Ltée*, [1996] R.J.Q. 894 (C.A.), at p. 898; *R. v. Nome*, 362 Sask. R. 241 (C.A.), at para. 40; *D.N. v. New Brunswick (Minister of Health and Community Services)* (1992), 127 N.B.R. (2d) 383 (C.A.), at para. 5.

[119] The wording and purpose of s. 19.2(1) of the *Tax Court of Canada Act* align with these statutory provisions. It explicitly states that the court *shall not* adjudge a law to be invalid, inapplicable or inoperative unless the notice requirements are satisfied. There is no ambiguity in the text of the provision.

[120] This brings us to the effect of a failure to comply with a mandatory notice provision at the court or tribunal where it is required. *Eaton* remains the only case in which this Court has explicitly and fully considered the policy and evidentiary consequences of the failure to give the requisite notice of a constitutional issue. With the exception of cases where *de facto* notice was given or the Attorneys General consent to proceed in the absence of notice (*Eaton*, at para. 54), the Court concluded that such notice provisions were “mandatory and failure to give the notice invalidates a decision made in its absence”: *Eaton*, at para. 53. There was, the Court held, no need to show actual prejudice since Sopinka J. concluded that the “absence of notice is in itself prejudicial to the public interest”: *Eaton*, at para. 53. Prejudice is assumed from the failure to give notice since it means that a party entitled to make representations has been denied the opportunity to do so. In other words, the issue is not whether a party can establish *actual* prejudice; prejudice to the public is presumed from the failure to have full *Charter* scrutiny when it is first required. That is why a

lack of notice is not merely a technical defect: *Eaton*, at para. 55. As the Federal Court of Appeal noted in *Bekker*, “[s]uch Notice is not a mere formality or technicality that can be ignored or that the Court can relieve a party of the obligation to comply with”: para. 8.

[121] This position was also adopted by Rothstein J.A. in *Gitksan Treaty Society v. Hospital Employees’ Union*, [2000] 1 F.C. 135, at para. 10, where he concluded that the requirement to give notice under s. 57(1) of the *Federal Courts Act* is “mandatory” and that “the presence or absence of prejudice is irrelevant”. Most appellate courts have followed this approach: see e.g. *Paluska*, at paras. 21-24; *Mercier v. Canada (Correctional Service)*, [2012] 1 F.C.R. 72 (C.A.); *Nome*; *R v. Lord*, 307 B.C.A.C. 285, at para. 27; *Ardoch Algonquin First Nation v. Canada (Attorney General)*, [2004] 2 F.C.R. 108 (C.A.) (“*Misquadis*”), at para. 50.

[122] Given that the notice provision is mandatory in the Tax Court, we agree with Stratas J.A. that the Tax Court judge was not entitled to deal with the constitutional issue without notice. This Court, however, has the discretion to entertain new issues: *R v. Brown*, [1993] 2 S.C.R. 918; *Quan v. Cusson*, [2009] 3 S.C.R. 712. The issue in this case, therefore, is how that discretion should be exercised when the new issue raised is a constitutional one which was subject to a mandatory notice requirement in the court or tribunal of first instance. The existence of such a notice requirement argues for the discretion being a very narrow one which should only sparingly be exercised to avoid the practice and perception that such



mandatory provisions can be circumvented by raising constitutional arguments as new issues and giving notice for the first time in this Court.

[123] In *Eaton*, this Court declined to hear the constitutional issue where the required notice had not been given in previous proceedings. In our view, this should be the operative presumption. There is no suggestion in any subsequent decision of this Court that the notice issue was wrongly decided in *Eaton*. As a result, as *Eaton* directs, the mandatory language of s. 19.2 and its underlying policy rationales support the conclusion that this Court should not, absent exceptional circumstances, adjudicate the constitutionality of s. 163.2 of the *Income Tax Act* in the absence of notice in the Tax Court.

[124] The failure to notify Attorneys General in the forum where notice is required and doing so only for the first time in *this* Court undermines the purposes underlying the notice provisions. Most significantly, it undermines public confidence because it extinguishes the legislative assurances that this Court will have the benefit of a complete and tested record when scrutinizing the constitutionality of legislation.

[125] If this Court arrogates to itself a broad authority to retroactively remedy a failure to give notice in the Tax Court where it is required, the mandatory character of s. 19.2 is eroded. Not only does this send the message that compliance with mandatory notice provisions is merely optional, it also has the effect of making them essentially discretionary. This would contradict Rothstein J.A.'s admonition that courts "cannot deal with constitutional arguments raised in a random and unstructured

manner. The legislation creates procedures which must be followed by a party attacking the constitutionality of a statute”: *Misquadis*, at para. 50.

[126] Given the wording of s. 19.2, it is difficult to see how Parliament could have telegraphed its intent that the provision be treated as mandatory in more unequivocal terms. As LeBel J. observed in *Re:Sound v. Motion Picture Theatre Associations of Canada*, “[a]lthough statutes may be interpreted purposively, the interpretation must nevertheless be consistent with the words chosen by Parliament”: [2012] 2 S.C.R. 376, at para. 33. Here, both the purpose and the wording of the provision trumpet that notice is mandatory. To nonetheless read in a broad discretion for this Court to ignore the failure to give notice in prior proceedings amounts to judicial redrafting in the face of an unambiguous statutory provision. With respect, such an approach has an unfortunate resonance with the history of the interpretive acrobatics used to avoid the effect of privative clauses by “brand[ing] as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so”: *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at p. 233. It also imposes an insurmountable drafting obstacle for governments who would otherwise be inclined to seek to rectify the uncertainty created by this interpretive reformulation, since it is difficult to conceive of how they could provide a clearer statutory direction than they already have.

[127] The fact that the Chief Justice may have stated a constitutional question in this Court at the request of Ms. Guindon, does not disturb this conclusion. A motion to state a constitutional question before this Court is almost always granted where requested. It was never intended to replace or by-pass mandatory notice provisions in other statutes. In *Eaton*, for example, Lamer C.J. certified the constitutional questions that were raised by the appellants in that case. But in deciding not to address them because of the absence of notice in the court where it was first required, Sopinka J. confirmed that, “[t]he order stating constitutional questions did not purport to resolve the question as to whether the decision of the Court of Appeal to raise them was valid in the absence of notice or whether this Court would entertain them”: para. 47. Moreover, he noted, “[t]he fact that constitutional questions are stated does not oblige the Court to deal with them”: para. 47.

[128] While this is not a jurisdictional issue, permitting the artifice of notice at this Court to replace notice in the forum from which an appeal is taken would, in effect, permit parties to do an “end run” around these mandatory notice provisions. Such an approach would have the effect of replacing *Eaton*’s presumption of prejudice with an assumption of no prejudice if notice is given eventually in this Court. The harmful effect of the absence of notice on a court’s ability to provide rigorous and credible scrutiny of constitutional challenges is no less significant at this Court than in other adjudicative forums.

[129] The approach taken in *Eaton* was confirmed in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, decided around the same time. In that case, Lamer C.J. declined to answer the constitutional questions because the complainants failed to raise the constitutionality of the impugned provisions at trial. He concluded that it was not appropriate for the superior court judge to proceed on his own initiative, without the benefit of submissions and without giving the required notice to the Attorney General of the province, to consider their constitutionality, let alone make declarations of invalidity: paras. 263-64.

[130] The mandatory wording of the statute and the policy reasons underlying notice provisions therefore lead us to the conclusion that, in addition to the two exceptions set out in *Eaton* — *de facto* notice and the consent of the Attorneys General — absent exceptional circumstances, this Court should not entertain a constitutional argument where notice was not properly provided in the court or tribunal of first instance. Exceptional circumstances include those where the constitutional issue has an overwhelming urgency or public importance that justifies hearing it in this Court, or where the party bringing the constitutional challenge had little choice but to raise it for the first time in this Court. This, in our view, is the approach that best aligns with the principles set out in *Eaton*, the language of s. 19.2 and the basic purposes of mandatory notice provisions.

[131] There is no danger that an approach that gives effect to the plain language of s. 19.2 of the *Tax Court of Canada Act* will irremediably block otherwise meritorious constitutional challenges. Trial courts can always adjourn the proceedings in order to allow the required notice to be served: see e.g. *Paluska*, at para. 27; *Nome*, at para. 37. Appellate courts can also, if they deem it advisable, remand a constitutional challenge improperly raised before them: see e.g. *Morine v. Parker (L & J) Equipment Inc.*, 193 N.S.R. (2d) 51 (C.A.), at para. 58. And of course, this Court, where it is of the view that the circumstances require it, can preferably remand the case back to the original court or tribunal where the necessary notice can be given and a full evidentiary record created: s. 43(1.1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26.

[132] In support of their argument that this Court should have a broader discretion to hear constitutional issues in the absence of the required notice at the court or tribunal of first instance, our colleagues cite four cases decided after *Eaton* where this Court has entertained new constitutional issues on appeal: *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] 3 S.C.R. 302; the companion cases of *Penetanguishene Mental Health Centre v. Ontario (Attorney General)*, [2004] 1 S.C.R. 498; and *Pinet v. St. Thomas Psychiatric Hospital*, [2004] 1 S.C.R. 528; and *Marine Services International Ltd. v. Ryan Estate*, [2013] 3 S.C.R. 53. There is no explanation in those cases for why *Eaton* was not followed, nor was there any explanation for why these new issues were entertained at all. *Eaton* is a clear and recent precedent of this Court and we see no reason to depart from it. Accordingly, in the absence the consent

of the Attorneys General, *de facto* notice, or exceptional circumstances, this Court should not consider a constitutional argument made in the absence of a required notice of a constitutional question.

[133] In this case, Ms. Guindon failed to serve notice of a constitutional question before the Tax Court. She once again failed to serve the notice required by s. 57 of the *Federal Courts Act* in proceedings before the Federal Court of Appeal. Before this Court, Ms. Guindon filed notice for the first time.

[134] While we are not troubled by Stratas J.A.'s alternative conclusion on the merits of the *Charter* issue, since notice under s. 19.2 of the *Tax Court of Canada Act* is mandatory, the Tax Court should not have entertained the constitutional arguments in its absence. Ms. Guindon attempted to bring her case outside the scope of s. 19.2 by arguing that she was merely asserting her *Charter* rights, as opposed to seeking a declaration of invalidity, inapplicability or inoperability. This represents an attempt to circumvent the notice requirement under the guise of seeking an interpretation reconciling the provision with the *Charter*. Having raised a constitutional argument, however, Ms. Guindon was bound by the procedural requirements that govern its determination and cannot avoid them by suggesting that her goal is otherwise.

[135] The protections set out in s. 11 of the *Charter* cannot simply be read into the regulatory scheme without rendering s. 163.2 invalid, inapplicable or inoperative. The *Income Tax Act* provides a set of procedures and processes that are distinct from those set out in the *Criminal Code*. Section 163.2(2) provides the authority for the

assessment and levying of the penalty. The procedures to be followed by a taxpayer who objects to an assessment under Part I of the *Income Tax Act*, which includes s. 163.2, are set out in s. 165. Pursuant to that section, the Minister will reassess or make an additional assessment in respect of the amount that was raised in the taxpayer's notice of objection. If the taxpayer is still not satisfied, he or she may appeal in accordance with s. 169 of the *Income Tax Act*. Section 34(2) of the *Interpretation Act*, as a result, does not apply.

[136] Neither exception from *Eaton* applies in this case. Nor are there any exceptional circumstances: there is no particular urgency or overwhelming public importance that distinguishes this case from other constitutional cases, and there is virtually no explanation for why notice was not given in the prior proceedings.

[137] Our colleagues would nonetheless consider Ms. Guindon's constitutional argument because "the issue raised on appeal is important" and "it is in the public interest to decide" it: para. 35. *All* constitutional issues are important, however. That is why the notice provisions exist, namely to ensure that given the importance of constitutional issues, the public interest is protected by ensuring that they are decided on a full evidentiary record. But simply to point to the importance of constitutional issues as overriding the notice requirements, leads essentially to entertaining all constitutional arguments raised in this Court for the first time.

[138] Our colleagues also conclude there would be no prejudice from considering the issue in the absence of notice. Ms. Guindon first raised the

constitutional challenge in her closing arguments at the Tax Court. The Attorney General of Canada objected, arguing that notice was required. Neither the Attorney General of Canada, nor the provincial Attorneys General whose own regulatory schemes could clearly be affected by the outcome, had the opportunity to fully participate in building the necessary evidentiary record before the Tax Court. And two of the three Attorneys General who participated in this Court objected to the failure to provide notice at the Tax Court. Far from conceding that there was no prejudice in this case as our colleagues suggest, the Attorney General of Canada in fact insisted that there *was* prejudice *to the public* from the failure to provide notice: transcript, at p. 49. As this Court said in *Eaton*, prejudice is *assumed* from the absence of notice: para. 53. The burden of showing the contrary is on Ms. Guindon, not on the Attorneys General.

[139] Finally, it is impossible in the absence of a full evidentiary record and argument, to conclude, as our colleagues do, that this Court has “the benefit of fully developed reasons for judgment on the constitutional point in both of the courts below”: para. 35. We cannot know what reasons would have been formulated had Ms. Guindon provided proper notice, allowing the Attorneys General from across Canada to adduce evidence and make arguments at the Tax Court and Court of Appeal about the impact of her s. 11 argument on their respective statutory schemes.

[140] As a result, to consider the constitutional issue in this case, as our colleagues would, essentially means that it could be exercised in *any* case where the



Court is sufficiently attracted by the constitutional issue, notwithstanding the public importance of notice provisions, the wording of s. 19.2, and the binding precedent of *Eaton*. Ms. Guindon knew that the Attorney General of Canada had objected to her failure to file notice before the Tax Court when she made her closing argument, yet even in the Federal Court of Appeal, she failed to file the required notice. Essentially, she took the risk of gambling with public resources, rather than simply complying with plain statutory requirements. Entertaining her constitutional argument in these circumstances would sanction and encourage this tactic, allowing for the genuine possibility that cases would wind their way through the process, only to be rejected at this Court because the record is inadequate. While our colleagues focus on the judicial resources that went into *this* case, we are concerned about the resources that would be wasted in the many cases that follow. A narrower discretion not only better responds to the mandatory language of the statute and the purpose of notice provisions, it also sends a clear message not to waste resources by gambling on the beneficence of this Court.

[141] Accordingly, in the absence of giving the Attorneys General the required notice to enable them, if they so choose, to present evidence and arguments, Bédard J. should not have addressed the constitutionality of s. 163.2 of the *Income Tax Act*. This Court too, in accordance with its precedent in *Eaton* and in the absence of any exceptional circumstances, should refrain from entertaining the issue.

[142] We would dismiss the appeal with costs throughout.

*Appeal dismissed with costs.*

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