Federal Court of Appeal  Cour d'appel fédérale

Date: 20131024

Docket: A-532-12

Citation: 2013 FCA 250

CORAM: **SHARLOW J.A.**
STRATAS J.A.
NEAR J.A.

BETWEEN:

THE MINISTER OF NATIONAL REVENUE AND CANADA REVENUE AGENCY

Appellants

and

JP MORGAN ASSET MANAGEMENT (CANADA) INC.

Respondent

Heard at Toronto, Ontario, on September 18, 2013.

Judgment delivered at Ottawa, Ontario, on October 24, 2013.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: SHARLOW J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] In this appeal, the Minister of National Revenue renews her attempt to strike out the application for judicial review brought by JP Morgan Asset Management (Canada) Inc. in the Federal Court.

[2] In that application for judicial review, JP Morgan alleges that the Minister departed from an administrative policy when she assessed it for tax under Part XIII of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) for 2002, 2003 and 2004. This, JP Morgan says, was an improper exercise of discretion. The Minister counters that, in reality, JP Morgan is challenging the validity of the assessments, a matter that is within the exclusive jurisdiction of the Tax Court of Canada.

[3] Prothonotary Aalto dismissed the Minister's motion to strike: 2012 FC 651. In his view, the application raised an independent administrative law ground of review and was properly in the Federal Court. Mandamin J. declined to quash the Prothonotary's decision, finding no clear error on the part of the Prothonotary: 2012 FC 1366.

[4] For the reasons below, I would allow the Minister's appeal, set aside the orders below and strike out JP Morgan's application.

[5] JP Morgan's application fails to state a cognizable administrative law claim. Further, in reality it is a challenge to the assessment for which recourse can be obtained only in the Tax Court. Finally, the relief being sought is the setting aside or vacating of the Minister's assessments, a remedy the Federal Court cannot grant.

A. The basic facts

[6] JP Morgan is a Canadian corporation resident in Canada for the purposes of the *Income Tax Act*. It provides investment advice to Canadian clients. It also markets the selection of international stock by foreign related entities.

[7] JP Morgan's clients pay fees to it based on the value of assets they invest. In turn, to compensate the foreign related entities for their services, JP Morgan pays them fees.

[8] The Minister has assessed JP Morgan under Part XIII of the *Income Tax Act* concerning the fees paid by it to JF Asset Management Limited, a private Hong Kong corporation, for all periods ending December 31, 2002 to December 31, 2008, inclusive.

[9] Part XIII applies where certain amounts are paid or credited by a resident of Canada to a person who is not a resident of Canada. The resident of Canada must withhold a tax of 25% on those amounts and if it does not do so, it is itself liable for that tax (subsections 212(1), 215(1) and 215(6)). Under subsection 227(10), the Minister "may at any time" assess the resident of Canada for those amounts.

[10] Following the assessments, JP Morgan applied to the Federal Court for judicial review. The precise nature of its application for judicial review will be considered below. It seeks the quashing of the decision of the Minister to issue assessments for the periods ending December 31, 2002 to December 31, 2004, inclusive.

[11] JP Morgan alleges that the Minister abused her discretion by issuing assessments for Part XIII tax for so many years. It says she did not consider or sufficiently consider policies that would have limited the number of years subject to assessment.

[12] The Crown moved to strike JP Morgan's application. As mentioned, it has been unsuccessful before the Prothonotary and the Federal Court. It now appeals to this Court.

B. Relevant legislative provisions

[13] Various provisions of the *Income Tax Act* give the Minister the power to assess, additionally assess, or reassess tax. Also the Minister has many wide powers to administer, investigate, enforce and collect.

(1) The Minister's regime

[14] Subsection 152(1) of the *Income Tax Act* sets out the Minister's obligation to assess tax:

152. (1) The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine	**152.** (1) Le ministre, avec diligence, examine la déclaration de revenu d'un contribuable pour une année d'imposition, fixe l'impôt pour l'année, ainsi que les intérêts et les pénalités éventuels payables et détermine :
(*a*) the amount of refund, if any, to which the taxpayer may be	*a*) le montant du remboursement éventuel auquel il a droit en

entitled by virtue of section 129, 131, 132 or 133 for the year; or	vertu des articles 129, 131, 132 ou 133, pour l'année;
(*b*) the amount of tax, if any, deemed by subsection 120(2) or (2.2), 122.5(3),122.51(2), 122.7(2) or (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year.	*b*) le montant d'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 122.7(2) ou (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année.

[15] Subsection 152(4) of the *Income Tax Act* empowers the Minister to assess, reassess, or additionally assess tax for a taxation year, along with any interest and penalties:

152. (4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if: [list of exceptions omitted].	**152.** (4) Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants : [le liste des exceptions est omise]

[16] Subsection 152(8) deems assessments to be binding until varied, vacated or replaced by a reassessment, notwithstanding any error, defect or omission in their making:

152. (8) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.	**152.** (8) Sous réserve des modifications qui peuvent y être apportées ou de son annulation lors d'une opposition ou d'un appel fait en vertu de la présente partie et sous réserve d'une nouvelle cotisation, une cotisation est réputée être valide et exécutoire malgré toute erreur, tout vice de forme ou toute omission dans cette cotisation ou dans toute procédure s'y rattachant en vertu de la présente loi.

[17] The assessments issued against JP Morgan are based on certain liability provisions in Part XIII of the *Income Tax Act*: paragraph 212(1(a) and subsections 215(1) and 215(6).

[18] Paragraph 212(1)(*a*) of the *Income Tax Act* obligates a non-resident person, here JF Asset Management Limited, to pay a tax on certain fees received from a resident of Canada, here J.P. Morgan:

212. (1) Every non-resident person shall pay an income tax of 25% on every amount that a person resident in Canada pays or credits, or is deemed by Part I to pay or credit, to the non-resident person as, on account or in lieu of payment of, or in satisfaction of,	**212.** (1) Toute personne non-résidente doit payer un impôt sur le revenu de 25 % sur toute somme qu'une personne résidant au Canada lui paie ou porte à son crédit, ou est réputée en vertu de la partie I lui payer ou porter à son crédit, au titre ou en paiement intégral ou partiel :
(*a*) a management or administration fee or charge;	*a*) des honoraires ou frais de gestion ou d'administration;

The Minister alleges that the fees in issue are within the scope of this provision.

[19] Subsection 215(1) of the *Income Tax Act* obligates a resident of Canada, here JP Morgan, to withhold from the fees paid the tax payable under paragraph 212(1)(*a*) and remit it to the Crown:

215. (1) When a person pays, credits or provides, or is deemed to have paid, credited or provided, an amount on which an income tax is payable under this Part, or would be so payable if this Act were read without reference to subparagraph 94(3)(*a*)(viii) and to subsection 216.1(1), the person shall, notwithstanding any agreement or law to the contrary, deduct or withhold from it the amount of the tax and forthwith remit that amount to the Receiver General on behalf of the non-resident person on account of the tax and shall submit with the remittance a statement in prescribed form.	**215.** (1) La personne qui verse, crédite ou fournit une somme sur laquelle un impôt sur le revenu est exigible en vertu de la présente partie, ou le serait s'il n'était pas tenu compte du sous-alinéa 94(3)*a*)(viii) ni du paragraphe 216.1(1), ou qui est réputée avoir versé, crédité ou fourni une telle somme, doit, malgré toute disposition contraire d'une convention ou d'une loi, en déduire ou en retenir l'impôt applicable et le remettre sans délai au receveur général au nom de la personne non-résidente, à valoir sur l'impôt, et l'accompagner d'un état selon le formulaire prescrit.

[20] The Minister alleges that JP Morgan did not withhold and remit the tax under paragraph 212(1)(*a*) of the *Income Tax Act* as it was required to do and so it is liable for the tax under subsection 215(6):

215. (6) Where a person has failed to deduct or withhold any amount as required by this section from an amount paid or credited or deemed to have been paid or credited to a non-resident person, that person is liable to pay as tax under this Part on behalf of the non-resident person the whole of the amount that should have been deducted or withheld, and is entitled to deduct or withhold from any amount paid or credited by that	**215.** (6) Lorsqu'une personne a omis de déduire ou de retenir, comme l'exige le présent article, une somme sur un montant payé à une personne non-résidente ou porté à son crédit ou réputé avoir été payé à une personne non-résidente ou porté à son crédit, cette personne est tenue de verser à titre d'impôt sous le régime de la présente partie, au nom de la personne non-résidente, la totalité de la somme qui aurait dû

person to the non-resident person or otherwise recover from the non-resident person any amount paid by that person as tax under this Part on behalf thereof.	être déduite ou retenue, et elle a le droit de déduire ou de retenir sur tout montant payé par elle à la personne non-résidente ou portée à son crédit, ou par ailleurs de recouvrer de cette personne non-résidente toute somme qu'elle a versée pour le compte de cette dernière à titre d'impôt sous le régime de la présente partie.

[21] The Minister has assessed JP Morgan for the tax under subsection 215(6) of the *Income Tax Act*. The Minister's power to assess is found in subsection 227(10) of the *Income Tax Act*:

227. (10) The Minister may at any time assess any amount payable under	**227.** (10) Le ministre peut, en tout temps, établir une cotisation pour les montants suivants :
(*a*) subsection 227(8), 227(8.1), 227(8.2), 227(8.3) or 227(8.4) or 224(4) or 224(4.1) or section 227.1 or 235 by a person,	*a*) un montant payable par une personne en vertu des paragraphes (8), (8.1), (8.2), (8.3) ou (8.4) ou 224(4) ou (4.1) ou des articles 227.1 ou 235;
(*b*) subsection 237.1(7.4) or (7.5) or 237.3(8) by a person or partnership,	*b*) un montant payable par une personne ou une société de personnes en vertu des paragraphes 237.1(7.4) ou (7.5) ou 237.3(8);
(*c*) subsection 227(10.2) by a person as a consequence of a failure of a non-resident person to deduct or withhold any amount, or	*c*) un montant payable par une personne en vertu du paragraphe (10.2) pour défaut par une personne non-résidente d'effectuer une déduction ou une retenue;
(*d*) Part XIII by a person resident in Canada,	*d*) un montant payable en vertu de la partie XIII par une personne qui réside au Canada.
and, where the Minister sends a notice of assessment to that person or partnership, Divisions I and J of Part	Les sections I et J de la partie I s'appliquent, avec les modifications

I apply with any modifications that the circumstances require.

nécessaires, à tout avis de cotisation que le ministre envoie à la personne ou à la société de personnes.

(2) The Tax Court regime

[22] The closing words of subsection 227(10) give an assessed taxpayer the right to object to the assessment under section 165 and to appeal to the Tax Court under subsection 169(1). JP Morgan has objected to all of the assessments under section 165. If its objections are unsuccessful, JP Morgan will be able to appeal to the Tax Court under subsection 169(1). This subsection provides as follows:

169. (1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either

(*a*) the Minister has confirmed the assessment or reassessed, or

(*b*) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,

but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been sent to the taxpayer

169. (1) Lorsqu'un contribuable a signifié un avis d'opposition à une cotisation, prévu à l'article 165, il peut interjeter appel auprès de la Cour canadienne de l'impôt pour faire annuler ou modifier la cotisation :

a) après que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation;

b) après l'expiration des 90 jours qui suivent la signification de l'avis d'opposition sans que le ministre ait notifié au contribuable le fait qu'il a annulé ou ratifié la cotisation ou procédé à une nouvelle cotisation;

toutefois, nul appel prévu au présent article ne peut être interjeté après l'expiration des 90 jours qui suivent la date où avis a été envoyé

under section 165 that the Minister has confirmed the assessment or reassessed.	au contribuable, en vertu de l'article 165, portant que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation.

[23] In an appeal, the Tax Court has specific powers concerning assessments:

171. (1) The Tax Court of Canada may dispose of an appeal by	**171.** (1) La Cour canadienne de l'impôt peut statuer sur un appel :
(a) dismissing it; or	*a*) en le rejetant;
(b) allowing it and	*b*) en l'admettant et en :
(i) vacating the assessment,	(i) annulant la cotisation,
(ii) varying the assessment, or	(ii) modifiant la cotisation,
(iii) referring the assessment back to the Minister for reconsideration and reassessment.	(iii) déférant la cotisation au ministre pour nouvel examen et nouvelle cotisation.

[24] Parliament has declared the Tax Court's powers concerning assessments to be exclusive:

12. (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under…the *Income Tax Act*…when references or appeals to the Court are provided for in those Acts.	**12.** (1) La Cour a compétence exclusive pour entendre les renvois et les appels portés devant elle sur les questions découlant de l'application…de la *Loi de l'impôt sur le revenu*…dans la mesure où ces lois prévoient un droit de renvoi ou d'appel devant elle.

(*Tax Court of Canada Act*, R.S.C. 1985, c. T-2, subsection 12(1).)

(3) The Federal Court's judicial review authority

[25] The Federal Court determines judicial reviews from "federal board[s], commission[s] or other tribunal[s]." The Minister is a "federal board, commission or other tribunal" and, in appropriate circumstances, her decisions can be reviewed:

2. (1) In this Act,	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.
"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament…	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale…

[26] When a judicial review is properly before it, the Federal Court has wide powers:

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	**18.** (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and	*a*) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;
(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain	*b*) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

relief against a federal board, commission or other tribunal.

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d'*habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*.

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

18.1. (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

18.1. (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

(3) On an application for judicial review, the Federal Court may

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or

(*f*) acted in any other way that was contrary to law.

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(*a*) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(*b*) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

(4) A limitation on the Federal Court's judicial review authority

[27] Despite the broad powers the Federal Court has under the foregoing provisions, Parliament has forbidden it from dealing with matters that can be appealed to the Tax Court:

18.5. Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to…the Tax Court of Canada…from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings

18.5. Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant… la Cour canadienne de l'impôt…d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des

before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.	procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

(*Federal Courts Act*, R.S.C. 1985, c. F-7, section 18.5.)

C. An introduction to the analysis

[28] Before considering this case, some opening observations are warranted.

[29] Time and time again, this Court strikes out taxpayers' applications for judicial review. What explains the flow of unmeritorious applications for judicial review in the area of tax?

[30] One reason, perhaps, is the Supreme Court's leading decision in this area: *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793. In the course of finding that the taxpayer's application for judicial review must fail in that case, the Supreme Court confirmed that in appropriate circumstances "[j]udicial review is available" but "[r]eviewing courts should be very cautious in authorizing judicial review" (at paragraphs 8 and 11). Undoubtedly both propositions are correct on administrative law principles. However, in its brief reasons, the Supreme Court did not identify those principles.

[31] In legal submissions, commentaries and conferences, some tax counsel have viewed the Supreme Court's words in *Addison & Leyen* in isolation, divorced from administrative law

principles. To them, the Supreme Court's words welcome taxpayers, albeit cautiously, to seek refuge in the Federal Court from the Minister's harsh or unfair treatment. Taxpayers also see cases that, on occasion, provide redress for "unfairness," "unreasonableness" and "abuses of discretion" – colloquially understood, more words of welcome. On this optimistic basis, some launch applications for judicial review. However, such a hopeful interpretation of *Addison & Layen* is based on a lack of awareness or misunderstanding of administrative law principles.

[32] Almost always, applications for judicial review of administrative actions by the Minister in connection with assessments fail, especially in this Court. The failure rate now has led some to conclude that the judiciary "is simply not fulfilling" the responsibility of "controlling, through administrative law procedures, the [Minister's] exercise of government powers and…protecting common citizens from abuses" in the exercise of tax audit and assessment powers: Guy Du Pont and Michael H. Lubetsky, "The Power to Audit is the Power to Destroy: Judicial Supervision of the Exercise of Audit Powers" (2013), 61 Can. Tax J. 103 at page 120.

[33] In another scholarly article, a lawyer notes a parade of "somewhat redundant" decisions and suggests the reasons prompting the lines drawn in the jurisprudence can be hard to discern or understand: David Jacyk, "The Dividing Line Between the Jurisdictions of the Tax Court of Canada and Other Superior Courts" (2008), 56 Can. Tax J. 661 at 707; see also David Sherman, Annotation to *Pine Valley Enterprises Inc. v. R.*, 2010 TCC 324 (in *Taxnet Pro*) (online).

[34] Administrative law has many moving parts, the interrelationship of which often is not understood. Collectively, these moving parts are what Du Pont and Lubetsky call "administrative

law procedures." They say administrative law procedures control government powers and protect citizens from abuses. That is partly true.

[35] But administrative law procedures also protect the ability of administrative decision-makers' to exercise the powers given to them by law. Sometimes that law sets out when and how those exercises of powers can be challenged. Absent a constitutional challenge or the need for review based on the constitutional principle of the rule of law (*Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220), courts must follow this legislation according to its terms. After all, the supremacy of laws passed by Parliament – a constitutional principle itself – forms part of the bedrock of administrative law.

[36] Broadly writ, administrative law courts enforce these and other principles and, when they clash, mediate them: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 27-30 (noting the tension between the rule of law and Parliamentary supremacy). Administrative law courts mediate the clashes by applying doctrines founded upon decades of well-considered solutions to practical problems – a mountain of decided cases. And in applying these doctrines, administrative law courts follow practices and procedures designed for this area of law.

[37] To deal with the appeal before us and to offer wider guidance, I begin with the practices and procedures governing notices of application for judicial review and motions to strike them. Then I shall turn to the doctrines underpinning judicial reviews in the area of tax.

D. Practice and procedure: notices of application for judicial review and motions to strike them

(1) Notices of application for judicial review: pleading requirements

[38] In a notice of application for judicial review, an applicant must set out a "precise" statement of the relief sought and a "complete" and "concise" statement of the grounds intended to be argued: *Federal Courts Rules*, SOR/98-106, Rules 301(d) and (e).

[39] A "complete" statement of grounds means all the legal bases and material facts that, if taken as true, will support granting the relief sought.

[40] A "concise" statement of grounds must include the material facts necessary to show that the Court can and should grant the relief sought. It does not include the evidence by which those facts are to be proved.

[41] The evidence is supplied in the parties' affidavits at a later stage in the proceedings: Rules 306 and 307, subject to restrictions in the case law (see, *e.g.*, *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297).

(2) The grounds stated in the notice of application for judicial review

[42] While the grounds in a notice of application for judicial review are supposed to be "concise," they should not be bald. Applicants who have some evidence to support a ground can state the ground with some particularity. Applicants without any evidence, who are just fishing for something, cannot.

[43] Thus, for example, it is not enough to say that an administrative decision-maker "abused her discretion." The applicant must go further and say what the discretion was and how it was abused. For example, the applicant should plead that "the decision-maker fettered her discretion by blindly following the administrative policy on reconsiderations rather than considering all the circumstances, as section Y of statute X requires her to do."

[44] The statement of grounds in a notice of application for judicial review is not a list of categories of evidence the applicant hopes to find during the evidentiary stages of the application. Before a party can state a ground, the party must have some evidence to support it.

[45] It is an abuse of process to start proceedings and make entirely unsupported allegations in the hope that something will later turn up. See generally *Merchant Law Group v. Canada (Revenue Agency)*, 2010 FCA 184 at paragraph 34; *AstraZeneca Canada Inc. v. Novopharm Ltd.*, 2010 FCA 112 at paragraph 5. Abuses of process can be redressed in many ways, such as adverse cost awards against parties, their counsel or both: Rules 401 and 404.

[46] Sometimes evidence that could support an application for judicial review is found after the deadline for starting an application for judicial review: *Federal Courts Act*, *supra*, subsection 18.1(2) (thirty days). For example, a taxpayer might obtain evidence during Tax Court proceedings or as a result of information requests made under the *Access to Information Act*, R.S.C. 1985, c. A-1. In appropriate circumstances, the Court can grant an extension of time: *Federal Courts Act*, *supra*, subsection 18.1(2).

(3) Motions to strike notices of application for judicial review

[47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf.*. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[48] There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the Rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, *supra* at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal*

Courts Act, *supra*, subsection 18.1(2) and section 18.4. An unmeritorious motion – one that raises matters that should be advanced at the hearing on the merits – frustrates that objective.

(4) Scrutinizing the notice of application for judicial review

[49] Armed with sophisticated wordsmithing tools and cunning minds, skilful pleaders can make Tax Court matters sound like administrative law matters when they are nothing of the sort. When those pleaders illegitimately succeed, they frustrate Parliament's intention to have the Tax Court exclusively decide Tax Court matters. Therefore, in considering a motion to strike, the Court must read the notice of application with a view to understanding the real essence of the application.

[50] The Court must gain "a realistic appreciation" of the application's "essential character" by reading it holistically and practically without fastening onto matters of form: *Canada v. Domtar Inc.*, 2009 FCA 218 at paragraph 28; *Canada v. Roitman*, 2006 FCA 266 at paragraph 16; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 at paragraph 78.

(5) The admissibility of affidavits on a motion to strike

[51] As a general rule, affidavits are not admissible in support of motions to strike applications for judicial review.

[52] This general rule is justified by several considerations:

- Affidavits have the potential to trigger cross-examinations and refused questions and, thus, can delay applications for judicial review. This is contrary to Parliament's requirement that applications for judicial review proceed "without delay" and be heard "in a summary way."

- A respondent bringing a motion to strike a notice of application does not need to file an affidavit. In its motion, it must identify an obvious and fatal flaw in the notice of application, *i.e.*, one apparent on the face of it. A flaw that can be shown only with the assistance of an affidavit is not obvious. A respondent's inability to file evidence does not normally prejudice it. It can file evidence later on the merits of the review, subject to certain limitations, and often the merits can be heard within a few months. If an application has no merit, it will be dismissed soon enough. And if there is some need for faster determination of the merits, a respondent can always move for an order expediting the application.

- As for an applicant responding to a motion to strike an application, the starting point is that in such a motion the facts alleged in the notice of application are taken to be true: *Chrysler Canada Inc. v. Canada*, 2008 FC 727 at paragraph 20, aff'd on appeal, 2008 FC 1049. This obviates the need for an affidavit supplying facts. Further, an applicant must state "complete" grounds in its notice of application. Both the Court and opposing parties are entitled to assume that the notice of application

> includes everything substantial that is required to grant the relief sought. An affidavit cannot be admitted to supplement or buttress the notice of application.

[53] Exceptions to the rule against admitting affidavits on motions to strike should be permitted only where the justifications for the general rule of inadmissibility are not undercut, and the exception is in the interests of justice.

[54] For example, one exception, relevant in this case, is where a document is referred to and incorporated by reference in a notice of application. A party may file an affidavit merely appending the document, nothing more, for the assistance of the Court.

[55] In this case, before the Prothonotary, both parties filed evidence on the motion to strike.

[56] The Minister filed a short affidavit of an official who maintains records at the Canada Revenue Agency. The affidavit appends the assessments for Part XIII tax made against JP Morgan for the 2002, 2003 and 2004 taxation years – the documents under attack in the notice of application. The affidavit does not offer any editorial commentary or supplementary information concerning the assessments.

[57] The affidavit filed by the Minister is unobjectionable, as it merely appends a document referred to and incorporated by reference in a notice of application.

[58] JP Morgan filed an affidavit of its executive director responsible for managing its financial affairs. The affidavit offers evidence concerning JP Morgan, the nature of its business and considerable information about the Minister's audit and her shift to earlier taxation years. It appends letters sent by the Minister during the audit, an audit report, JP Morgan's notices of objection to the assessment for the 2002 taxation year, and the facts and reasons for the notices of objection.

[59] Before the Prothonotary, the Minister sought to strike JP Morgan's affidavit. The Prothonotary declined to strike the affidavit.

[60] The Prothonotary correctly observed (at paragraph 24) that "in the ordinary course affidavit evidence is not permitted on motions to strike" and "notices of application must be accepted on [their] face." However, the Prothonotary considered the affidavit proper, as it "goes to the issues of why this Court has jurisdiction to deal with the decision by way of judicial review" and "does not contain information which is unknown to the [Minister]" (at paragraph 24).

[61] In the end, the Prothonotary's admissibility ruling was of no consequence. JP Morgan's affidavit does not appear to have factored significantly into the Prothonotary's decision and the Federal Court did not refer to it when reviewing the Prothonotary's decision. Finally, in her notice of appeal to this Court, the Minister has not challenged the Prothonotary's admissibility ruling. Therefore, it is not necessary to consider the matter further.

[62] For the benefit of future cases, however, I will offer some brief guidance.

[63] In the circumstances of this case, I disagree with the Prothonotary's view that the affidavit tendered by JP Morgan was admissible because the Court's jurisdiction was in issue. In drafting the grounds in support of their notices of application, applicants should plead the reasons why the Court has jurisdiction. After all, the Court's jurisdiction is statutory, the Court must have jurisdiction to entertain the application and grant the relief sought, and Rule 301(e) requires relevant statutory provisions to be pleaded.

[64] In my view, the affidavit tendered by JP Morgan is admissible only to the extent it describes, in an uncontroversial way, the policies mentioned in the notice of application which, on a fair reading, are incorporated into the notice of application by reference. The remainder of the affidavit, however, is either irrelevant or adds information not included in the grounds offered in support of the application. Regardless of whether this additional information in the affidavit was known to the Minister, it should not have been before the Court on the motion to strike.

(6) Procedures after an unsuccessful motion to strike

[65] If a motion to strike fails, the judicial review proceeds according to Rules 306-319. The judicial review does not necessarily stop the Minister's pre-assessment or post-assessment processes or the Tax Court's appeal processes. The Minister and the Tax Court may continue with their respective processes unless the Federal Court issues a stay under the test in *RJR–MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

E. General principles governing when notices of application for judicial review in tax matters should be struck

[66] Administrative law authorities from this Court and the Supreme Court of Canada – including the Supreme Court's decision in *Addison & Leyen, supra* – show that any of the following qualifies as an obvious, fatal flaw warranting the striking out of a notice of application:

(1) the notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court;

(2) the Federal Court is not able to deal with the administrative law claim by virtue of section 18.5 of the *Federal Courts Act* or some other legal principle; or

(3) the Federal Court cannot grant the relief sought.

I shall examine each of these objections in turn.

(1) The notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court

[67] Cognizable administrative law claims satisfy two requirements.

[68] First, the judicial review must be available under the *Federal Courts Act*. There are certain basic prerequisites imposed by sections 18 and 18.1 of the *Federal Courts Act*: *Air Canada v*.

Toronto Port Authority, 2011 FCA 347 (summary of many, but not necessarily all, of the relevant prerequisites).

[69] Overall, there is no doubt that, subject to the limitations discussed below, the Federal Court can review the Minister's actions under section 18 of the *Federal Courts Act* in certain situations: *Markevich v. Canada,* 2003 SCC 9, [2003] 1 S.C.R. 94; *Addison & Leyen*, *supra* at paragraph 8. Behind section 18 stands the Court's plenary "superintending power over the Minister's actions in administering and enforcing the Act": *M.N.R. v. Derakhshani*, 2009 FCA 190 at paragraphs 10-11 and *RBC Life Insurance Company*, *supra* at paragraph 35, interpreting and applying *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at paragraphs 33. 36. 38 and 39.

[70] Second, the application must state a ground of review that is known to administrative law or that could be recognized in administrative law. Grounds known to administrative law include the following:

- *Lack of vires.* Administrative action must be based on or find its source in legislation, express or implied: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 S.C.R. 513 at paragraph 16. Administrative action cannot be unconstitutional in itself, be authorized by unconstitutional legislation or be taken under subordinate legislation that is not authorized by its governing statute. These are often called issues of *vires*.

- *Procedural unacceptability*. Most administrative action must be taken in a procedurally fair manner. On the threshold issue whether obligations of procedural fairness are owed, see *Canada (Minister of National Revenue) v. Coopers & Lybrand*, [1979] 1 S.C.R. 495; *Martineau v. Matsqui Inmate Disciplinary Board*, [1980] 1 S.C.R. 602; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643. Where procedural fairness obligations are owed, the level of procedural fairness can be dictated by statute or, in the absence of statutory dictation, varies according to a common law test: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 21-28.

- *Substantive unacceptability*. Depending on which standard of review applies, administrative action must either be correct or fall within a range of outcomes that are acceptable or defensible on the facts and the law (*i.e.*, "reasonable"): *Dunsmuir*, *supra*; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654. In the case of reasonableness, the range can be narrow or broad depending on the circumstances: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraphs 17-18 and 23; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59; *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paragraphs 13-14. "Reasonableness" is a term of art defined by the cases – it does not carry its colloquial meaning.

[71] In many judicial reviews of decisions by the Minister, parties allege that the Minister "abused her discretion." The Supreme Court in *Addison & Layen, supra* at paragraph 8 contemplated that sometimes such abuses can form the basis of an application for judicial review.

[72] Two of the most noteworthy, recognized examples of abuse include:

- Pursuit of an improper purpose or bad faith decision-making – that is, decision-making for a purpose not authorized by the statute: *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1977), 14 O.R. (2d) 49 (C.A.); *Doctors Hospital v. Minister of Health et al.* (1976), 12 O.R. (2d) 164 (Div. Ct.); *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.); and see also *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

- Fettering of discretion or acting under the dictation of someone not authorized to make the decision: *e.g., Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R. 2; *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 (tax context).

(See generally David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 100-13.)

[73] For the purposes of the above taxonomy, these two types of abuse of discretion are best regarded as matters of substantive unacceptability. Some analyze these as independent nominate

grounds of automatic review – if decision-makers do these things, their decisions are automatically invalid: see *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385. Others view these as examples of decisions that are outside the *Dunsmuir* range of acceptability or defensibility: *Stemijon Investments Ltd., supra* at paragraphs 20-24. Regardless of how these are analyzed, they are claims that sound in administrative law.

[74] At one time, the taking into account of irrelevant considerations and the failure to take into account relevant considerations were nominate grounds of review – if they happened, an abuse of discretion automatically was present. However, over time, calls arose for decision-makers to be given some leeway to determine whether or not a consideration is relevant: see, *e.g., Baker, supra* at paragraph 55; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at paragraph 24. Today, the evolution is complete: courts must defer to decision-makers' interpretations of statutes they commonly use, including a decision-maker's assessment of what is relevant or irrelevant under those statutes: *Dunsmuir, supra* at paragraph 54; *Alberta Teachers' Association, supra* at paragraph 34. Accordingly, the current view is that these are not nominate categories of review, but rather matters falling for consideration under *Dunsmuir* reasonableness review: see *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paragraphs 53-54.

[75] Some matters by themselves, without more, do not constitute an abuse of discretion, *i.e.*, they are not substantively unreasonable under *Dunsmuir*. Here are two examples:

- *Expectations of a substantive outcome.* Sometimes an administrative decision-maker may lead one to believe that a particular substantive decision will be made but then fails to make it. Even though the person has a legitimate expectation that a particular substantive outcome will be reached, that expectation is not enforceable: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraph 97; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211, *per* Rand J., at page 220 ("there can be no estoppel in the face of an express provision of a statute"); *The King v. Dominion of Canada Postage Stamp Vending Co.*, [1930] S.C.R. 500; *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at paragraph 79. In the tax context, see *M.N.R. v. Inland Industries*, [1974] S.C.R. 514; *Louis Sheff (1984) Inc. v. The Queen*, 2003 TCC 589 at paragraph 45 ("an estoppel cannot override the law of the land and…the Crown is not bound by the errors or omissions of its servants"); *Gibbon v. The Queen*, [1978] 1 F.C. 247 (T.D.).

- *Departures from policies.* Changes in policies or departures from policies, by themselves, do not constitute an abuse of discretion or make a decision unreasonable: *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12. Administrative decision-makers are bound to apply the law of the land, not their administrative policies, to the facts before them. For example, in the tax context, information bulletins do not create estoppels:

Vaillancourt v. Deputy M.N.R., [1991] 3 F.C. 663 at page 674 (C.A.); *Stickel v. Minister of National Revenue*, [1972] F.C. 672 at page 685 (T.D.).

[76] *Addison & Leyen, supra* was a case where the taxpayer failed to state a cognizable administrative law claim. The taxpayer alleged that the Minister had abused his discretion by delaying too long in assessing the taxpayer. The Supreme Court found that this, in itself, was not an established ground of review, because of statutory language allowing the Minister to assess "at any time" (at paragraph 10):

> The Minister is granted the discretion to assess a taxpayer at any time. This does not mean that the exercise of this discretion is never reviewable. However, in light of the words "at any time" used by Parliament in s. 160 [of the *Income Tax Act*], the length of the delay before a decision on assessing a taxpayer is made does not suffice as a ground for judicial review, except, perhaps, inasmuch as it allows for a remedy like mandamus to prod the Minister to act with due diligence once a notice of objection has been filed.

[77] On occasion in the tax context, parties have alleged that the Minister abused her discretion in making an assessment. To date, all such claims have been dismissed as not being cognizable because in assessing the tax liability of a taxpayer, the Minister generally has no discretion to exercise and, indeed, no discretion to abuse. Where the facts and the law demonstrate liability for tax, the Minister must issue an assessment: *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600 at page 602 (C.A.) ("the Minister has a statutory duty to assess the amount of tax payable on the facts as he finds them in accordance with the law as he understands it").

[78] In this regard, as far as the assessments of a taxpayer's own liability are concerned, the Minister does not have "any discretion whatever in the way in which [she] must apply the *Income Tax Act*" and must "follow it absolutely": *Ludmer v. Canada*, [1995] 2 F.C. 3 at page 17 (C.A.); *Harris v. Canada*, [2000] 4 F.C. 37 at paragraph 36 (C.A.). This Court cannot stop the Minister from carrying out this duty: *Tele-Mobile Co. Partnership v. Canada (Revenue Agency)*, 2011 FCA 89 at paragraph 5 (in the context of the *Excise Tax Act*, R.S.C. 1985, c. E-15); *Ludmer*, *supra*, at page 9.

[79] This is supported by the principle that the Minister has no discretion to compromise a tax liability, *i.e.*, by issuing, pursuant to a settlement agreement, an assessment that is not supported by the facts and the law: *Galway*, *supra*; *Cohen v. The Queen*, [1980] C.T.C. 318, 80 D.T.C. 6250 (F.C.A.); *Harris*, *supra* at paragraph 37; *CIBC World Markets Inc. v. Canada*, 2012 FCA 3; *Longley v. Minister of National Revenue* (1992), 66 B.C.L.R. (2d) 238 at paragraph 19 (C.A.).

[80] In this section of the reasons, I have not tried to identify all claims that do or do not sound in administrative law. The key point, for present purposes, is that to survive a motion to strike, the applicant will have to point to some law capable of supporting the existence of a cognizable administrative law claim in the circumstances.

(2) The Federal Court is barred from dealing with the administrative law claim by section 18.5 of the *Federal Courts Act* or some other legal principle

[81] *Addison & Leyen*, *supra* aptly illustrates this objection. The essential character of the taxpayer's application for judicial review was a challenge to the validity of the Minister's

assessment of a person's liability under section 160 of the *Income Tax Act*. The taxpayer had adequate, effective recourse elsewhere: a Tax Court appeal. Applying section 18.5 of the *Federal Courts Act*, the Supreme Court found that judicial review did not lie (at paragraph 11):

> The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context.

Elsewhere, the Supreme Court explained that judicial review "is available, provided the matter is not otherwise appealable" in the Tax Court or will not be cured by way of appeal to the Tax Court: *Addison & Leyen*, *supra* at paragraph 8.

[82] In each of the following situations, an appeal to the Tax Court is available, adequate and effective in giving the taxpayer the relief sought, and so judicial review to the Federal Court is not available:

- *Validity of assessments.* The Tax Court has exclusive jurisdiction to review the correctness of assessments by way of appeal to that Court. Sections 165 and 169 of the *Income Tax Act* constitute a complete appeal procedure that allows taxpayers to raise in the Tax Court all issues relating to the correctness of the assessments, *i.e.*, whether the assessment is supported by the facts of the case and the applicable law: *Minister of National Revenue v. Parsons*, [1984] 2 F.C. 331

(C.A.); *Khan v. M.N.R.*, [1985] 1 C.T.C. 192, 85 D.T.C. 5140 (F.C.A.); *Bechthold Resources Limited v. Canada (M.N.R.)*, [1986] 3 F.C. 116 at page 122 (T.D.); *Optical Recording Corp. v. Canada*, [1991] 1 F.C. 309 at pages 320-321 (C.A.); *Brydges et al. v. Canada* (1992), 61 F.T.R. 240 (C.A.); *M.N.R. v. Devor* (1993), 60 F.T.R. 321 (C.A.); *Water's Edge Village Estates (Phase II) Ltd. v. The Queen* (1994), 74 F.T.R. 197 (T.D.); *Webster v. Canada*, 2003 FCA 388; *Walker v. Canada*, 2005 FCA 393 at paragraph 15; *Sokolowska v. The Queen*, 2005 FCA 29; *Angell v. Canada (M.N.R.)*, 2005 FC 782; *Heckendorn v. Canada*, 2005 FC 802; *Walsh v. Canada (M.N.R.)*, 2006 FC 56; *Roitman, supra* at paragraph 20; *Smith v. Canada (Attorney General)*, 2006 BCCA 237. Therefore, it is not possible to bring a judicial review in the Federal Court raising the substantive acceptability of an assessment.

- *The admissibility of evidence supporting an assessment*. On an appeal, the Tax Court can consider the admissibility of evidence before it. To the extent that the conduct of the Minister is alleged to affect the admissibility of evidence, that must be litigated in the Tax Court, not in Federal Court by way of judicial review: *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46, [2008] 2 S.C.R. 643 at paragraph 28 ("[w]here a taxpayer has concerns regarding certain evidence being used against him for the purposes of reassessment, the proper venue to challenge its admissibility is the Tax Court of Canada"). For example, the Tax Court is an adequate alternative forum for a ruling on the admissibility of

the evidence obtained by the Minister as a result of a violation of the Charter: *O'Neill Motors Ltd. v. Canada*, [1998] 4 F.C. 180 (C.A.).

- *Abuses of the Tax Court's own processes*. The Tax Court has jurisdiction to enforce its own rules, insist on standards of fairness, and prevent an abuse of its process: *Yacyshyn v. Canada*, [1999] 1 C.T.C. 139, 99 D.T.C. 5133 (F.C.A.); *Canada v. Guindon*, 2013 FCA 153 at paragraph 55. That Court also has a plenary jurisdiction to take necessary steps to ensure the fairness of proceedings before it and, further, to restrain any abuses of its process: *RBC Life Insurance Company, supra* at paragraph 35. Misconduct within the Tax Court's appeal process that can be dealt with by the Tax Court as part of its jurisdiction over its own processes must be litigated in the Tax Court, not in the Federal Court by way of judicial review. The availability of these remedies in the Tax Court limits the availability of a judicial review in the Federal Court on the basis of the acceptability of the Tax Court's procedure.

- *Inadequate procedures followed by the Minister in making the assessment*. Procedural defects committed by the Minister in making the assessment are not, themselves, grounds for setting aside the assessment: *Main Rehabilitation Co v Canada*, 2004 FCA 403 at paragraph 7; *Webster, supra* at paragraph 20; *Queen v. The Consumers' Gas Company Ltd.*, [1987] 2 F.C. 60 at page 67 (C.A.). To the extent the Minister ignored, disregarded, suppressed or misapprehended evidence, an appeal under the General Procedure in the Tax Court is an adequate, curative

> remedy. In the Tax Court appeal, the parties will have the opportunity to discover and present documentary and oral evidence, and make submissions. Procedural rights available later can cure earlier procedural defects: *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330; *King v. University of Saskatchewan*, [1969] S.C.R. 678 at page 689; *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97 at paragraph 28; *Histed v. Law Society of Manitoba*, 2006 MBCA 89, 274 D.L.R. (4th) 326; *McNamara v. Ontario (Racing Commission)* (1998), 164 D.L.R. (4th) 99, 111 O.A.C. 375 (C.A.).

[83] The Tax Court does not have jurisdiction on an appeal to set aside an assessment on the basis of reprehensible conduct by the Minister leading up to the assessment, such as abuse of power or unfairness: *Ereiser v. Canada*, 2013 FCA 20 at paragraph 38; *Roitman*, *supra* at paragraph 21; *Main Rehabilitation Co. Ltd.*, *supra* at paragraph 6; *Bolton v. Canada*, [1996] 3 C.T.C. 3, 96 D.T.C. 6413 (F.C.A.); *Ginsberg v. Canada*, [1996] 3 F.C. 334 (C.A.); *Burrows v. Canada*, 2005 TCC 761; *Hardtke v. Canada*, 2005 TCC 263. If an assessment is correct on the facts and the law, the taxpayer is liable for the tax. To the extent the Tax Court cannot deal with the Minister's reprehensible conduct on appeal, the bar in section 18.5 of the Federal Courts Act against judicial review in the Federal Court does not apply. Does this mean that the taxpayer can proceed to Federal Court?

[84] Not necessarily. Another legal principle may stand in the way. A judicial review brought in the face of adequate, effective recourse elsewhere or at another time cannot be entertained: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929;

Peepeekisis Band v. Canada, 2013 FCA 191 at paragraphs 59-62; *Association des compagnies de téléphone du Québec Inc. v. Canada (Attorney General)*, 2012 FCA 203 at paragraph 26; *Buenaventura v. Telecommunications Workers Union*, 2012 FCA 69 at paragraphs 22-41. This is subject to unusual or exceptional circumstances supportable in the case law: see, *e.g.*, *C.B. Powell Ltd. v. Canada*, 2010 FCA 61, *supra* at paragraphs 30, 31 and 33 and authorities cited thereto.

[85] This principle is justified by the fact that judicial review remedies are remedies of last resort: *Addison & Leyen*, *supra* at paragraph 11; *Cheyenne Realty Ltd. v. Thompson*, [1975] 1 S.C.R. 87 at page 90; *Eli Lilly & Co. v. Apotex Inc.* (2000), 266 N.R. 339 (F.C.A.) at paragraph 9; *Kingsbury v. Heighton*, 2003 NSCA 80 at paragraph 102; Lord Woolf, "Judicial Review: A Possible Programme for Reform," [1992] P.L. 221 at page 235. Further, improper or premature recourse to judicial review can frustrate specialized schemes set up by Parliament and cause delay: *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 at paragraph 36; *C.B. Powell*, *supra* at paragraphs 28 and 32; *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541 at paragraph 68 and 69; Mullan, *supra* at page 489.

[86] Administrative law cases and textbooks express this principle in many different ways: adequate alternative forum, the doctrine of exhaustion, the doctrine against fragmentation or bifurcation of proceedings, the rule against interlocutory judicial reviews and the rule against premature judicial reviews. They all address the same idea: someone has rushed off to a judicial review court when adequate, effective recourse exists elsewhere or at another time.

[87] *Harelkin, supra* illustrates how an adequate, effective recourse elsewhere can bar a judicial review. Harelkin believed that a university committee made a procedurally unfair decision. He could have appealed that decision to the university's senate. But, instead, he launched a judicial review. The Supreme Court held that he should have pursued his appeal to the university senate. That body's rehearing of the matter could have cured any procedural unfairness. The judicial review was dismissed. To similar effect is *Weber, supra*: a statutory grievance process capable of providing adequate redress cannot be circumvented by judicial review.

[88] The existence of adequate, effective recourse in the forum where litigation is already taking place can bar a judicial review. *C.B. Powell, supra*, is a good example of this. There, a party to proceedings in the Canadian International Trade Tribunal started a judicial review during those proceedings. The party wanted the judicial review court to resolve an issue of statutory interpretation that it said was "jurisdictional." This Court held that CITT had the power to interpret the statute and was available to do so. That was an adequate recourse. Judicial review could be had only if necessary at the end of the CITT's proceedings.

[89] In the tax context, to the extent that the Minister has engaged in reprehensible conduct that is beyond the reach of the Tax Court's powers, adequate and effective recourses may be available by means other than an application for judicial review in the Federal Court: *Tele-Mobile, supra*; *Ereiser, supra* at paragraph 38. For example, breaches of agreements, careless, malicious or fraudulent actions, inexcusable delay, and abuses of process may be redressed by way of actions for breach of contract, regulatory negligence, negligent misrepresentation, fraud, abuse of process, or misfeasance in public office: in the tax context see, *e.g.*, *Swift v. The Queen*, 2004 FCA 316; *Leroux*

v. Canada Revenue Agency, 2012 BCCA 63 at paragraph 22; *Gardner v. Canada (Attorney General)*, 2012 ONSC 1837, rev'd on another point 2013 ONCA 423; *McCreight v. Canada (Attorney General)*, 2013 ONCA 483. Whether these actually constitute adequate, effective recourses depends upon the circumstances of the particular case.

[90] In some circumstances, discretionary relief elsewhere in the *Income Tax Act* may provide an adequate, effective recourse. For example, under subsection 220(3.1) of the *Income Tax Act*, a taxpayer may obtain fairness relief against assessments of penalties and interest that are, in the circumstances, unfair. In some circumstances, this can address substandard conduct leading up to the assessment: *Hillier v. Canada (Attorney General)*, 2001 FCA 197 (undue delay in making the assessment could trigger fairness relief). It is true that the Minister who made the assessment also decides whether fairness relief should be granted under section 220. But the criteria underlying the two decisions are different. The Minister's section 220 decision is subject to judicial review in the Federal Court on administrative law principles. If the Minister approaches the issue of fairness relief with a closed mind or makes a decision that is substantively unacceptable or procedurally unacceptable in administrative law, her decision is liable to be quashed: *Guindon*, *supra* at paragraphs 56-59; *Stemijon Investments Ltd.*, *supra* (the Minister must have an open mind and cannot fetter her discretion).

[91] Consistent with *David Bull*, *supra* and the need for an obvious, fatal flaw, a notice of application for judicial review should not be brought on the basis of this objection unless the matter is clear. If, after discerning the true character of the application, the Court is not certain whether

section 18.5 of the *Federal Courts Act* applies to bar the judicial review or if the Court is not certain whether:

- there is recourse elsewhere, now or later;
- the recourse is adequate and effective; or
- the circumstances pleaded are the sort of unusual or exceptional circumstances recognized by the case law or analogous thereto;

then the Court cannot strike the notice of application for judicial review.

(3) The Federal Court cannot grant the relief sought

[92] The third basis for striking out a notice of application for judicial review in the Federal Court is the inability of the Court to grant the relief sought. The Federal Court is limited to the remedies in the *Federal Courts Act*, *supra*, subsection 18.1(3) and any remedies associated with its plenary power (discussed in *Canadian Liberty Net*, *supra* and *RBC Life Insurance Company*, *supra*). The remedy must also be one that is not otherwise barred by statute or inconsistent with statute. If a notice of application seeks only remedies that cannot be granted, it must be struck.

[93] In the tax context, the Federal Court is not allowed to vary, set aside or vacate assessments: *Income Tax Act*, *supra*, subsection 152(8); *Redeemer Foundation*, *supra* at paragraphs 28 and 58;

Optical Recording Corp., *supra* at pages 320-321; *Rusnak v. Canada*, 2011 FCA 181 at paragraphs 2 and 3. Under subsection 152(8) of the *Income Tax Act*, an assessment is deemed by subsection 152(8) to be valid, subject only to a reassessment or variation or vacation by a successful objection (subsections 165(1) and 165(2)) or by a successful appeal of the assessment brought to the Tax Court (section 169). The assessments stand until varied or vacated by the Tax Court: *Optical Recording Corp.*, *supra* at pages 320-21. If the "essential character" of the relief sought is the setting aside of an assessment, it must be struck.

[94] In *Addison & Leyen*, the Supreme Court of Canada observed, at paragraph 8, that "[f]act-specific remedies may be crafted to address the wrongs or problems raised by a particular case." In this regard, in appropriate circumstances, the Federal Court can issue *mandamus* compelling the Minister to exercise her powers under the Act: *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55 (prerequisites for *mandamus*). Another possible remedy is injunction or prohibition. However, these remedies cannot be used to make the Minister act contrary to statute or to refrain from acting under statute where she must act: *Novopharm Ltd. v. Eli Lilly and Co.*, [1999] 1 F.C. 515 (T.D.).

[95] It must be recalled, however, that even though the Federal Court may have the ability to issue these remedies, a notice of application may still be struck if either of the first two objections are made out.

(4) Concluding comments: what's left?

[96] There are areas, well-recognized in the case law, where judicial review may potentially be had in tax matters. Examples include discretionary decisions under the fairness provisions, assessments that are purely discretionary (such as the assessment under subsection 152(4.2) at issue in *Abraham v. Canada (Attorney General)*, 2012 FCA 266, 440 N.R. 201, revg 2011 FC 638, 391 F.T.R. 1), and conduct during collection matters that is not acceptable or defensible on the facts and the law (*Walker*, *supra*; *Pintendre Autos Inc. v. The Queen*, 2003 TCC 818).

[97] As for other areas, it is unwise at this point to delineate for all time the circumstances in the tax area in which a judicial review may be brought. This should be left for development, case-by-case, on the basis of the above principles.

[98] Nevertheless, even at this juncture, one can imagine examples of judicial reviews that might avoid the three objections to judicial review. Suppose that the Minister launches aggressive methods of investigation against members of a political party because of hostility to that political party in circumstances where immediate, effective relief is required. Suppose that the Minister could issue an assessment under section 160 of the *Income Tax Act* against any one of the five directors of a corporation for the corporation's tax liability. Only one of the directors is a person of colour. The Minister issues an assessment only against that director, and only because of the colour of his skin, in circumstances where immediate, effective relief is required.

[99] After all, there must always be some forum where rights can be vindicated when they need vindication. In the words of McLachlin J. (as she then was), "if the rule of law is not to be reduced to a patchwork, sometime thing, there must be a body to which disputants may turn where statutes and statutory schemes offer no relief": *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd*, [1996] 2 S.C.R. 495 at pages 501-502.

[100] Therefore, for taxpayers and their counsel, the question is not whether their clients' rights can be fully vindicated. They can. The question is how to do it consistent with proper practices and procedures, when to do it, in what forum, and by what means.

[101] For some, judicial review inthe Federal Court is a preferred tool of first resort. They are wrong. It is a tool of last resort, available only when a cognizable administrative law claim exists, all other routes of redress now or later are foreclosed, ineffective or inadequate, and the Federal Court has the power to grant the relief sought.

F. Applying the principles to this case

(1) The notice of application for judicial review

[102] As mentioned in paragraph 50, above, the first step is to gain "a realistic appreciation" of the "essential character" of the notice of application by reading it holistically and practically without fastening onto matters of form.

[103] JP Morgan pleads that at first the Minister audited its 2007 and 2008 taxation years with a view to imposing Part XIII tax upon it only for those years. But after the Minister completed her audit, she decided to expand it to include several earlier years. In the end, the Minister assessed JP Morgan Part XIII tax for all periods from 2002 through 2008. JP Morgan pleads that this was an improper exercise of discretion because it was contrary to the Minister's own administrative policies which, it says, would have limited the assessments to the two immediately preceding years:

> (k) By doing so, CRA improperly exercised its discretion and the decision [to assess Part XIII tax for certain taxation years] ought to be set aside. Amongst other things, CRA did not consider, or sufficiently consider, CRA's own policies, guidelines, bulletins, internal communiqués and practices which would otherwise have limited assessments to the current tax year and the two (2) immediately preceding years. CRA thus acted arbitrarily, unfairly, contrary to the rules of natural justice and in a manner inconsistent with CRA's treatment of other taxpayers.

(Notice of application for judicial review, grounds of review, paragraph (k).)

[104] The notice of application asserts that the Minister's failure to follow policies is an abuse of discretion or a violation of natural justice. In essence, this is an allegation that the Minister can assess for certain periods and not others. Paragraph (l) of the notice of application recognizes this: "[t]he issue in this judicial review application therefore is the number of years for which CRA will assess JP Morgan for Part XIII tax." Simply put, was the Minister legally entitled to assess Part XIII tax for the years in question? The essential character of the notice of application is an attack on the legal validity of the assessment.

[105] The Prothonotary (at paragraph 27) attached importance to the particular form of the notice of application – a judicial review of the decision to assess – rather than its essential character. This is a clear error that affected his analysis and prevented him from examining and applying certain

objections to judicial review. The Federal Court did not detect that error. On appeal, this Court can intervene.

(2) Should the notice of application for judicial review be struck?

[106] In this case, all three objections to the notice of application are present. Any one of these objections would warrant striking it out.

(a) Has the applicant failed to state a cognizable administrative law claim?

[107] Yes. JP Morgan has not offered any authority in support of the proposition that a failure to follow policies is, by itself, an abuse of discretion. The Court is unaware of any such authority.

[108] Indeed, there is ample authority to the contrary. Policies do not have the force of law and administrative decision-makers can depart from them: *Pinto v. Canada (Minister of Employment & Immigration)*, [1991] 1 F.C. 619 (T.D.); *Bajwa v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 864 at paragraphs 44-45; and see authorities in paragraph 75, above. Substantive expectations created by policies are unenforceable: see authorities in paragraph 75, above. Indeed, an administrative decision-maker who follows policies blindly commits an abuse of discretion: see authorities in paragraph 72, above.

[109] In my view, in these circumstances, the Minister did not exercise any discretion independent of the assessment. Therefore, there was no discretion that could be abused. The word "may" in

subsection 227(10), the authority for the assessment here, does not vest the Minister with a general, sweeping discretion not to assess tax. Rather, it allows the Minister to forego making a formal assessment of Part XIII tax in situations where the tax was properly withheld and remitted.

(b) Is the application for judicial review barred by section 18.5 of the *Federal Courts Act* or some other legal principle?

[110] Yes. The Tax Court can consider the question whether the Minister was legally entitled to assess Part XIII tax for the years in question: see authorities in paragraph 83, above; see also *Income Tax Act*, *supra*, sections 165, 169 and 171; *Tax Court of Canada Act*, *supra*, subsection 12(1); *Federal Courts Act*, *supra*, section 18.5. As was the case in *Addison & Leyen*, *supra*, in this case there is no "reason why it would have been impossible to deal with the tax liability issues relating to…the assessments …through the regular appeal process" in the Tax Court (at paragraph 10).

(c) Is the Federal Court unable to grant the relief sought?

[111] Yes. JP Morgan seeks *certiorari*, setting aside (or vacating) certain of the assessments. Only the Tax Court can grant this relief: subsection 152(8) of the *Income Tax Act*; and see paragraph 93, above.

(d) Conclusion

[112] JP Morgan's notice of application for judicial review is fatally flawed within the meaning of *David Bull*, *supra*. Accordingly, it should have been struck out.

G. Proposed disposition

[113] Therefore, for the foregoing reasons, I would allow the appeal, set aside the order of the Federal Court dated November 26, 2012, grant the Minister's motion to quash the order of the Federal Court dated May 28, 2012, and grant the Minister's motion to strike the notice of application for judicial review, with costs to the Minister throughout.

"David Stratas"

J.A.

"I agree
K. Sharlow J.A."

"I agree
D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-532-12

APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE MANDAMIN DATED NOVEMBER 26, 2012, NO. T-1278-11

STYLE OF CAUSE:	THE MINISTER OF NATIONAL REVENUE AND CANADA REVENUE AGENCY v. JP MORGAN ASSET MANAGEMENT (CANADA) INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 18, 2013
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	SHARLOW AND NEAR JJ.A.
DATED:	OCTOBER 24, 2013

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