Docket: 2015-1917(IT)G

BETWEEN:

SPE VALEUR ASSURABLE INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent,

Docket: 2015-1921(IT)G

BETWEEN:

ROBERT PLANTE,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion heard by videoconference on April 28, 2023,
at Ottawa, Canada.

Before: The Honourable Justice Dominique Lafleur

Appearances:

Counsel for the Appellants:	Gabriel Dumais Francis Fortin
Counsel for the Respondent:	Vlad Zolia

ORDER

UPON reading the appellants' Notice of Motion (the Motion) dated January 26, 2023, asking the Court to allow the appeals filed by the appellants and vacate the reassessments made by the Minister of National Revenue under the *Income Tax Act*, namely:

(i) In the docket involving Robert Plante (No. 2015-1921(IT)G): the reassessments in respect of the 2003, 2004, 2005, 2006, 2007 and 2008 taxation years;

(ii) In the docket involving SPE Valeur Assurable Inc. (No. 2015-1917(IT)G): the reassessments in respect of the 2005, 2006, 2007, 2008 and 2009 taxation years;

UPON reading the documents filed in this matter, including Robert Plante's affidavit dated January 24, 2023;

AND UPON reading the parties' written submissions;

AND AFTER hearing the submissions of the parties;

FOR THE FOLLOWING REASONS, THE COURT ORDERS AS FOLLOWS:

1. The motion is dismissed with costs to the respondent;

2. Judgment on the merits of these appeals must be rendered on the basis of the records;

3. If the parties wish to make additional submissions regarding the issues in dispute in these appeals, they should contact the Hearings Coordinator no later than June 15, 2023, to advise the Court and, in such case:

   (i) The parties must file their written submissions no later than September 29, 2023;

   (ii) The oral submissions of the parties will be heard during a hearing lasting no more than two (2) consecutive days which must be held in October or November 2023; the parties must notify the Court of their joint availability no later than June 15, 2023, for such a hearing; and

4. The Court reserves the right to recall any witness who testified during the hearing held in October and November 2017.

Signed at Ottawa, Canada, this 1st day of June 2023.

"Dominique Lafleur"

Lafleur J.

Citation: 2023 TCC 79
Date: 2023061
Docket: 2015-1917(IT)G

BETWEEN:

SPE VALEUR ASSURABLE INC.,

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Docket: 2015-1921(IT)G

BETWEEN:

ROBERT PLANTE,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Lafleur J.

I. THE MOTION

[1] The appellants (to be referred to collectively as the applicants in these reasons) brought a motion (the Motion), notice of which is dated January 26, 2023, including Robert Plante's affidavit dated January 24, 2023, asking the Court to allow the appeals filed by the applicants and vacate the reassessments made by the Minister of National Revenue (the Minister) under the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.) (the Act), namely:

- In the docket involving Robert Plante (Mr. Plant)(No. 2015-1921(IT)G): the reassessments in respect of the 2003, 2004, 2005, 2006, 2007 and 2008 taxation years;

– In the docket involving SPE Valeur Assurable Inc. (SPE) (No. 2015-1917(IT)G): the reassessments in respect of the 2005, 2006, 2007, 2008 and 2009 taxation years;

[2] In support of their motions, the applicants claim that the delays incurred in these cases following the trial held in the fall of 2017 without a decision having been rendered by the Court to date, and the options that they were given by the Court, either to hold a new trial before a new judge or to have a new judge render judgment on the basis of the records, would result in an abuse of process because there is either a breach of procedural fairness or inordinate judicial delay. According to the applicants, as a remedy for this abuse of process, the Court should allow the applicants' appeals and vacate the reassessments.

[3] Alternatively, the applicants argue that holding a new trial would violate the rights of Mr. Plant guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11 (the Charter).

II. CONCLUSION

[4] For the following reasons, the appeal is dismissed with costs to the respondent.

[5] The Court orders that a judgment on the merits of these appeals be rendered on the basis of the records; If the parties wish to make additional submissions regarding the issues in dispute in these appeals, they should contact the Hearings Coordinator no later than June 15, 2023 to notify the Court and, in such case:

(i) The parties must file their written submissions no later than September 29, 2023;

(ii) The oral submissions of the parties will be heard during a hearing lasting no more than two (2) consecutive days which must be held in October or November 2023; the parties must notify the Court of their joint availability no later than June 15, 2023, for such a hearing.

The Court reserves the right to recall any witness who testified during the hearing held in October and November 2017.

III. APPEALS BEFORE THE COURT

With respect to SPE:

[6] The appeal concerns the 2005 to 2009 taxation years. Under the reassessments made by the Minister outside the normal reassessment period, deductions totalling $1,089,129 claimed in computing SPE's income as business expenses were disallowed under paragraph 18(1)(a) of the Act. The Minister argued that SPE claimed false marketing expenses, commission fees and prepaid U.S. marketing expenses with respect to six purported U.S. marketing companies. In addition, penalties were assessed under subsection 163(2) of the Act for all taxation years.

[7] Further, the Minister argued that SPE made a misrepresentation attributable to neglect, carelessness or wilful default or committed a fraud in filing its returns or in supplying any information for the 2005 to 2009 taxation years, and that it knowingly, or under circumstances, amounting to gross negligence, made a false statement or omission in the income tax returns it filed for the 2005 to 2009 taxation years.

[8] For its part, SPE claimed that these marketing, commission and release expenses were incurred in order to market SPE's product, i.e. the asset management software, in a genuine business operations context. Also, reassessing outside the normal reassessment period or assessing penalties under subsection 163(2) of the Act is not warranted because SPE acted in good faith.

With respect to Mr. Plante:

[9] The appeal concerns the 2003 to 2008 taxation years. Under the reassessments made by the Minister outside the normal reassessment period, amounts totalling $1,526,144 were added to Mr. Plante's income as indirect payments under subsection 56(2) of the Act for the 2004 to 2008 taxation years, and expenses totalling $13,128 were disallowed for the 2003 taxation year. The amounts so added to Mr. Plante's income represent the marketing expenses that SPE claimed as a deduction but were disallowed. In addition, penalties were assessed under subsection 163(2) of the Act for all taxation years.

[10] The Minister argued that, following Mr. Plante's instructions, SPE transferred the above amounts from his bank account to the bank accounts of purported U.S. marketing companies so that Mr. Plante could appropriate these funds for his personal benefit and to benefit certain acquaintances. He further argued that if SPE

had paid these amounts directly to Mr. Plante, he should have included these amounts in computing his income under subsection 15(1) of the Act.

[11] Furthermore, the Minister argued that Mr. Plant made a misrepresentation attributable to neglect, carelessness or wilful default or committed a fraud in filing his returns or in supplying any information for the 2003 to 2008 taxation years, and that he knowingly, or under circumstances, amounting to gross negligence, made a false statement or omission in the income tax returns he filed for the 2003 to 2008 taxation years.

[12] For his part, Mr. Plante argued that the reassessments should be vacated because he had always acted in good faith. He further argued that the amounts added to his income should not be included in his income because they represented expenses incurred to meet the commitments that SPE made to various U.S. commercial agents, in a genuine business operations context, and that the funds received were promissory notes for loans.

IV. CHRONOLOGY

[13] The applicants' files are part of a group of seventeen (17) files, most of which have been suspended pending a decision in the applicants' cases.

[14] The chronology is as follows:

> April 29, 2015: filing of notices of appeal by the applicants;
>
> July 22, 2016: joint applications by the parties to schedule the hearing of the appeals;
>
> December 12, 2016: Court order fixing the hearing of these appeals on Monday, October 30, 2017 for a period of five days;
>
> October 26, 2017: letter from the applicants asking the Court for leave to hold a preliminary hearing on the admissibility of certain documents in evidence during the hearing scheduled to begin on October 30, 2017;
>
> October 30 and 31, 2017, and November 1, 2, 3, 6, 7 and 9, 2017, (eight days): hearing of appeals;
>
> November 9, 2017: the presiding trial judge (the presiding judge) reserved her decision on the cases, subject to a motion, to be presented by the appellants,

i.e. the applicants in this case, to exclude certain evidence obtained by the Canada Revenue Agency (CRA) during a search and filed in evidence at the hearing;

March 19, 2018: the motion for exclusion of certain evidence obtained by the CRA during a search pursuant to sections 8 and 24(2) of the Charter was filed with the Court by the applicants (motion for exclusion of evidence);

February 11, 2019: the motion for exclusion of evidence was heard by the presiding judge;

August 27, 2019: the presiding judge dismissed the motion for exclusion of evidence according to the reasons given in 2019 TCC 174;

October 11, 2019: the applicants brought an appeal before the Federal Court of Appeal against the decision of this Court dismissing the motion for exclusion of evidence;

October 22, 2019: the registry of the Federal Court of Appeal notified the Clerk of this Court that an appeal had been filed in the applicants' records;

January 20, 2020: the Federal Court of Appeal made an order staying the proceedings before it without dismissing the appeal and held that the applicants could appeal the decision on the admissibility of evidence in the context of the appeal, if any, of the decision on the merits (Docket No. A-391-19);

July 23 and 26, 2021: the respondent contacted the Court to inquire about the status of the decision on the merits of the appeals heard by the Court in October and November 2017;

July 27, 2021: the Court docket recorded the order of the Federal Court of Appeal dated January 20, 2020;

August 5, 2021: the presiding judge held a hearing management conference in which she advised the parties that the Federal Court of Appeal's January 20, 2020, order had not been brought to her attention and recorded in the Court docket until July 27, 2021, and that she would render her decision on the merits before the end of September 2021;

March 30, 2022: during a case management conference held by the Court before the Honourable Mr. Justice Boyle, on behalf of the Chief Justice, the

parties were advised that the presiding judge had retired for medical reasons on April 4, 2022, without any decision on the merits having been rendered in their cases. The Court gave the parties two options: it could either order a new trial before a judge to be appointed by the Chief Justice, or have a judge appointed by the Chief Justice render judgment on the basis of the records (transcripts and documents filed in evidence during the hearing of the appeals) and according to the terms and conditions to be determined by the new judge. If the parties decided that a new trial was required, that trial would be scheduled before a new judge. If the parties consented to having a judge render judgment on the basis of the records, the Court indicated that this judge would communicate with the parties to inform them of what he would need to render judgment in terms of additional submissions or any other terms and conditions. The parties were required to announce their choices if there was an agreement between them no later than April 15, 2022, or, in the event of a disagreement between them, the parties were required submit written submissions to the Chief Justice no later than April 29, 2022;

April 29, 2022: the applicants indicated to the Chief Justice that they reached an agreement with the respondent and chose to proceed as follows:

> [TRANSLATION]
> In this regard, we propose that all the testimonial and documentary evidence adduced in the first trial be similarly adduced for the purposes of the new hearing (taking into account the objections made by the parties). This second trial would be limited to a review of the evidence by the parties, and to the arguments, which would be repeated in their entirety. This procedure would not take as long and would allow the parties, among other things, to inform the Court of the material evidence and answer questions that could be raised by the new judge assigned to the case.

May 31, 2022: the Court held another case management conference before Boyle J., on behalf of the Chief Justice: the Court noted the parties' choice as described in their April 29, 2022, letter, i.e. that a hearing was scheduled to allow the parties to review the evidence and present their submissions. Thus, the hearing was scheduled to be held in Québec during the months of June 2023, or thereafter, depending on how long the parties wanted the hearing to last (three days). The parties indicated that they could possibly make themselves available for a hearing to be held in Montreal during the winter of 2023. The parties were advised that the next step would probably be a hearing management conference chaired by the judge appointed by the Chief Justice to render judgment on these cases;

October 21, 2022: the applicants indicated that they were not available on the dates proposed by the Court for hearing these cases and asked to have a management conference scheduled;

November 10, 2022: having been appointed by the Chief Justice to rule on these cases, I held a hearing management conference. The applicants then advised the Court that they wished to present a motion prior to the hearing to argue that the appeals should be allowed and the reassessments vacated in both of the applicants' cases, on the grounds of breach of the principles of procedural fairness. Therefore, no hearing date was set because the applicants rejected their own proposal, as described in the April 29, 2022, letter;

January 9, 2023: the Court held a new case management conference before Boyle J., on behalf of the Chief Justice. The Court reminded the parties of the two options available to them for continuing the case: either a new trial could be held or a judge appointed by the Chief Justice could render judgment on the basis of the records, according to the terms and conditions to be determined by that judge. The applicants again asked for leave to present a preliminary motion. The Court granted the applicants leave to file the preliminary motion no later than January 24, 2023. No hearing date was set at that time;

January 24, 2023: I held a new hearing management conference during which I reminded the parties that the options given by the Court were either to hold a new trial before a new judge appointed by the Chief Justice, or that a new judge appointed by the Chief Justice render judgment on the basis of the records, according to the terms and conditions to be determined by this judge, if applicable. The applicants claimed that they refused to proceed with either of the options given by the Court or in the manner described in the April 29, 2022, letter, given the time that had elapsed since that date. They also indicated that they were prepared to file the preliminary motion referred to last November.

V. POSITIONS OF THE PARTIES

The applicants:

[15] The applicants do not dispute the power of the Chief Justice of the Court to reassign cases to another judge of the Court. However, the applicants argue that the process put in place by the Court is not fair to the applicants and results in an abuse of process, as this doctrine is known and applied in the context of administrative law.

[16] According to the applicants, the two options proposed by the Court after the departure of the presiding judge—either a new trial or a judgment rendered on the basis of the records (according to terms and conditions to be determined by a new judge)—result in an abuse of process, given the lack of procedural fairness for the applicants under either option given to the parties. Even if the Court finds that there is no breach of procedural fairness, there would be abuse of process resulting from the judicial delays in these cases for which the applicants are not responsible.

[17] According to the applicants, since the concept of abuse of process in administrative law is very flexible, it must be applied because it is not limited to the administrative decision maker and must be interpreted broadly. Abuse of process is applicable in various contexts and particularly in these cases.

[18] The applicants agree that this motion is unusual and that the issues raised by the motion have never been considered by the Court. According to the applicants, the Court has jurisdiction to grant the relief sought by the applicants, i.e. to allow the appeals in these cases and vacate the reassessments on the grounds of abuse of process by the Court. According to the applicants, the cases of Mr. Plante and SPE are exceptional cases requiring extraordinary intervention by the Court.

[19] First of all, the option of holding a new trial would be acceptable in principle to the applicants, but they cannot acquiesce in it. Holding a new trial would tarnish the image of justice because there could be no guarantee that a new trial would ensure procedural fairness, which would result in an abuse of process. The applicants cite the time that has elapsed since 2017, the difficulty of finding certain witnesses, the failing memory of the witnesses as well as the hardship Mr. Plante and SPE would suffer it they had to obtain legal services given the estimated professional fees for representation in a new trial (paragraphs 38 to 39).

[20] Alternatively, the applicants argue that holding a new trial would infringe Mr. Plante’s rights under section 7 of the Charter. In this case, Mr. Plante’s security and psychological integrity would be compromised by holding a new trial (Mr. Plante’s affidavit, paragraph 40).

[21] The second option given by the Court, that a judge render judgment on the basis of the record, is also unacceptable to the applicants. The principle that it is the judge who presided over the trial who renders judgment is based on the rule that the parties have the right to be heard. In the event that another judge renders judgment, this rule is not followed and consequently, procedural fairness is not observed. However, the applicants agree that the availability of the audio recordings of the

hearing reduces the scope of this argument, but does not completely eliminate it. Also, the records are very extensive. Several documents were introduced in evidence and some documents were produced on computer media.

[22] In addition, the judge who must rule on the case is bound by all decisions made by the presiding judge during the trial. According to the applicants, the Court cannot order such a mode of operation without consent of the parties.

[23] For these reasons, the applicants cannot accede to the Court's request, and ask that the appeals be allowed and the reassessments vacated.

The respondent:

[24] According to the respondent, since the Court is a judicial tribunal, the doctrine of abuse of process in administrative law cannot apply to decisions or orders of the Court relating to its own process. Also, the Court likely lacks jurisdiction to allow appeals and vacate reassessments on the grounds of abuse of process, as this doctrine is known in administrative law. For these above reasons, this motion should be dismissed.

[25] Even if the doctrine of abuse of process in administrative law were applicable in this case, which the respondent disputes, although the 26-month delay or the eight months since the presiding judge reserved judgment was considerable, the delay was not excessive. The starting point of the delay was either January 20, 2020, (order of the Federal Court of Appeal on the motion for exclusion of evidence), or July 27, 2021, (entry of the Federal Court of Appeal's order in the Court's docket) and ends in March 2022, when the Court notified the parties of the presiding judge's departure. Therefore, allowing the appeals and vacating the reassessments on this ground would not be warranted. In this case, the interests of justice require that a decision be rendered by the Court in a trial that has been completed. It is the absence of a decision on the merits that would constitute a denial of justice, and not the contrary.

[26] Pursuant to the application of the doctrine of jurisdiction by necessary implication, a judge of the Court appointed by the Chief Justice to continue the applicants' cases may decide the process to be followed by ensuring that the parties have a fair trial, which could be either to render judgment on the basis of the records or to order that a new trial be held, even without the agreement of the parties (*D'Amico v. Wiemken*, 2010 ABQB 785 [*D'Amico*], at paragraph 44).

[27] Finally, according to the respondent, the applicants' argument concerning section 7 of the Charter cannot be accepted, since court orders are not subject to the Charter (section 32 of the Charter; see also *RWDSU v. Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573 [*RWDSU*], at paragraphs 34 and 36 and *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at paragraphs 157 and 158). Also, it is well established that economic rights are not covered by section 7 of the Charter, which includes tax assessments (*Gratl v. Canada*, 2012 FCA 88, at paragraph 8). It therefore follows that the delay in obtaining a decision involving a right not covered by the Charter cannot be protected by the Charter.

[28] According to the respondent, the following factors weigh in favour of the option of rendering judgment on the record: the evidence is in, the pleadings are closed, the cross-examinations have been completed to the satisfaction of the parties, and the Court not only has access to the transcripts, but to the audio recording of the hearing. Moreover, Mr. Plante's affidavit documents real hardship if a new trial were ordered.

VI. DISCUSSION

THE MOTION

[29] This motion is dismissed for the following reasons.

[30] First, the Court lacks jurisdiction to allow the appeals and vacate the reassessments on the grounds that the Court would be abusing its own processes.

[31] Also, the concept of abuse of process in administrative law cannot apply to decisions or orders of the Court relating to its own processes, since the Court is a judicial tribunal. However, even if the concept of abuse of process in administrative law were applicable, the Court finds that neither option given to the parties to continue the cases breaches procedural fairness. The Court also finds that the judicial delay in these cases is not excessive.

Jurisdiction of the Court and doctrine of jurisdiction by necessary implication:

[32] For the following reasons, neither the powers conferred by statute nor the powers necessarily inferred from the power to constitute a court of justice (by application of the doctrine of jurisdiction by necessary implication) enable the Court

to allow the appeals and vacate the reassessments on the grounds that the Court would be abusing its own processes.

[33] The applicants did not cite any case law on the application of the doctrine of jurisdiction by necessary implication that would otherwise give the Court inherent power to remedy an abuse of its own processes by allowing the appeals and vacating the reassessments. At the hearing, both parties indicated that they could not find any decisions dealing with this issue. The reason is quite simple. The Court simply does not have this power.

[34] The jurisdiction of the Court is determined by the *Tax Court of Canada Act* (RSC (1985), c. T-2, as amended, at section 12) and is limited to:

> "determin[ing] the validity and correctness of the assessment based on the relevant provisions of the *Income Tax Act* and the facts giving rise to the taxpayer's statutory liability" (*Ereiser v. Canada*, 2013 FCA 20, at paragraph 31).

[35] Section 171 of the Act sets out the powers of the Court on an appeal of an assessment under the Act:

> "The Tax Court of Canada may dispose of an appeal by
> (a) dismissing it; or
> (b) allowing it and
> (i) vacating the assessment,
> (ii) varying the assessment, or
> (iii) referring the assessment back to the Minister for reconsideration and reassessment."

[36] It is also well established in the jurisprudence that the Court does not have jurisdiction to vacate an assessment on the basis of an abuse of power or unfairness that gave rise to making the assessment (*Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, at paragraph 83).

[37] In *Main Rehabilitation Co. v. Canada*, 2004 FCA 403 [*Main Rehabilitation*], at paragraph 6, the Federal Court of Appeal held that it was "plain and obvious that the Tax Court does not have the jurisdiction to set aside an assessment on the basis of an abuse of process at common law or in breach of section 7 of the *Charter*." As indicated by the Federal Court of Appeal, this is because the appeal filed under section 169 of the Act challenges the validity of the assessment and not the process by which it is established (at paragraph 8).

[38] In addition to jurisdiction fixed by statute, the Court, like any other court, possesses all powers determined by the application of the doctrine of jurisdiction by necessary implication. In *R. v. Cunningham*, 2010 SCC 10 [*Cunningham*], the Supreme Court of Canada stated the following:

> [19] Likewise in the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a "doctrine of jurisdiction by necessary implication" when determining the powers of a statutory tribunal:
>
> > . . . the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime. . .
>
> (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51)
>
> Although Bastarache J. was referring to an administrative tribunal, the same rule of jurisdiction, by necessary implication, would apply to statutory courts.
>
> (Emphasis added)

[39] The Federal Court of Appeal recently affirmed this principle in *High-Crest Enterprises Limited v. Canada*, 2017 FCA 88 [*High-Crest*] (at paragraph 39).

[40] This jurisdiction by necessary implication allows the Chief Justice of the Court to reassign a case to another judge of the Court when a judge has ceased to hold office (*High-Crest*, at paragraphs 17 to 40), which the applicants recognized at the hearing and do not dispute.

[41] As the respondent indicated, pursuant to the application of the doctrine of jurisdiction by necessary implication, a judge of the Court appointed by the Chief Justice to continue the applicants' cases may decide the process to be followed by ensuring that the parties have a fair trial, which could be to render judgment on the basis of the records or order that a new trial be held, even without the agreement of the parties (*D'Amico*, at paragraph 44).

[42] By application of the doctrine of jurisdiction by necessary implication, the judges of the Court have the authority to control the Court's process and oversee the conduct of counsel. This authority is necessarily implied in the grant of power to function as a court of law (*Cunningham*, at paragraph 19).

[43] The Supreme Court of Canada stated the following:

> 35 Judges have an inherent and residual discretion to prevent an abuse of the court's process (. . .)

[44] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 [*City of Toronto*], the Supreme Court of Canada defined the concept of abuse of process at common law as proceedings unfair to the point that they are contrary to the interests of justice and as oppressive treatment and indicated that its primary focus is to preserve the integrity of the adjudicative functions of courts (*City of Toronto*, at paragraphs 35 and 43). More specifically, the concept of abuse of process at common law was described therein as follows:

> 37 (. . .) Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
>
> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. (See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347, at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> (Emphasis added)

[45] Thus, the Court may take all the measures it deems necessary and appropriate to control the Court's process when a party abuses it, but not when a party claims that it is the Court itself that abuses its own process. For instance, in *Yacyshyn v. Canada* (1999), 99 D.T.C. 5133, the Federal Court of Appeal determined that there had been an abuse of process by the Court because the appellant had not met its obligations with respect to examinations for discovery, and accordingly the Court had the power to strike out certain parts of the allegations in the Notice of Appeal (see also *Main Rehabilitation*, at paragraph 7).

[46] The Court would also be permitted to terminate litigation in the event that an issue had already been decided beforehand (for example, if there was a *res judicata*).

[47] More recently, the Federal Court of Appeal affirmed the power of the Court to prevent and control an abuse of its process by awarding costs and expenses against one of the parties (*Fournier v. Canada*, 2005 FCA 131, at paragraph 11).

[48] The Court is also allowed to terminate litigation where the evidence in support of the assessment made outside the normal reassessment period was obtained in

violation of section 8 of the Charter (*Canada v. O'Neill Motors Ltd.* [1998] 4 F.C. 180 (C.A.)).

Abuse of process due to inordinate delay in the administrative context

[49] The applicants asked the Court to apply the doctrine of abuse of process in the event of inordinate delay in the administrative context with regard to the processes put in place by the Court itself to continue the applicants' cases, and not in relation to the conduct of the other parties to the dispute. In the context of this motion, the applicants did not raise any abusive or vexatious conduct by the respondent or the CRA, or any other abuse of process on the part of the other party to the dispute. Rather, the applicants cited the time it took the Court to manage the deliberations, which, according to them, would result in an abuse of process due to excessive delay, as this doctrine is applied in an administrative context.

[50] To support their arguments, the applicants relied on *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*], in which the Supreme Court of Canada ruled that unreasonable delay causing serious prejudice could constitute an abuse of process. They also cited the recent judgment of the Supreme Court of Canada in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 [*Abrametz*], in which the Supreme Court of Canada once again addressed the concept of abuse of process in the event of inordinate delay in the administrative context (at paragraphs 33 to 34).

[51] According to the Supreme Court of Canada, there are two situations in which a delay may constitute an abuse of process in an administrative context: (i) if the fairness of the hearing is compromised by the delay (where delay impairs a party's ability to answer a complaint because, for example, memories have faded, essential witnesses are no longer available, or evidence has been lost) (*Blencoe*, at paragraphs 101 to 102); and (ii) in cases where there is no prejudice to hearing fairness, if significant prejudice has been caused due to inordinate delay (*Blencoe*, at paragraphs 122 and 132).

[52] When an abuse of process is noted, the courts must determine the appropriate remedies, which take various forms up to and including a stay of proceedings in the most obvious cases of abuse (*Abrametz*, at paragraphs 74 to 76; 83 to 85.

[53] According to the Court, the Court's power to remedy an abuse of process cannot allow the Court to vacate reassessments and allow appeals on the basis of the time it takes a Court to manage deliberations. In interests of justice, a decision must

be rendered on these appeals. As the respondent argued, if the Court were to agree to allow the applicants' appeals and vacate the reassessments, it would shock society's sense of fairness and decency, and undermine public confidence in the administration of justice (*Abrametz*, at paragraph 76 and *Canada (Minister of Citizenship and Immigration) v. Tobiass* [1997] 3 S.C.R. 391, at paragraph 96).

[54] In addition, the Court is a judicial decision maker and not an administrative decision maker and is not a party to the dispute. Therefore, the concept of abuse of process due to delay in an administrative context is not applicable. The decisions cited by the applicants to support their arguments cannot be applied, because they all refer to the concept of abuse of process in an administrative context (*City of Toronto, Blencoe* and *Abrametz*).

[55] The Court concurs with the comments of the Court in *Lassonde v. The Queen*, 2003 TCC 715 at paragraphs 133, 134 and 141, upheld on appeal by the Federal Court of Appeal (*Lassonde v. Canada*, 2005 FCA 323). In that case, the Court dismissed the taxpayer's motion to have his appeal allowed and the assessments vacated for oppression and unreasonable delay by the Minister in making the assessment. The Court distinguished the principles set out in *Blencoe* and indicated:

> [133] An assessment under the Act is not a complaint or an accusation. It is simply an act determining a taxpayer's debt under the Act, within a self-assessment system.
>
> [134] In the issue dealt with in this motion, there is a portion that I feel is administrative law and another that is civil procedure. The administrative law portion is that which goes from the income tax return to the assessment. From the moment when an appeal of the assessment is instituted before this Court, which is a court of justice or civil court, it is no longer administrative law, but civil law.
>
> (. . .)
>
> [141] As we have just seen, an assessment cannot be vacated for lack of diligence in processing an assessment. Once proceedings have begun before this Court, it is the responsibility of the Appellant to request that the case be heard.
>
> (Emphasis added)

[56] However, even if the Court had held that the concept of abuse of process due to delay in an administrative context was applicable to our Court, the delays incurred in the context of the applicants' cases do not give rise to the application of this concept, nor to the remedy sought by the applicants. Indeed, the Court found that if it ordered a new trial, the delay incurred in these cases would not affect the fairness of the hearing. The Court also found that the time that elapsed since judgment was

reserved on these appeals was not excessive. The particular circumstances of these appeals must be taken into account in this case to assess this delay.

[57] The applicants submitted that deliberations were not suspended on November 9, 2017, and that they were not responsible for the 26-month delay between November 2017 and January 2020, because the appeal before the Federal Court of Appeal in October 2019 was filed preemptively. According to the applicants, 53 months elapsed between November 2017 when the judge reserved judgment on the cases and the moment the parties were notified of the departure of the presiding judge, i.e. in March 2022.

[58] The Court cannot accept the way the applicants calculated the delays. First of all, deliberations did not start on November 9, 2017. The presiding judge stated at the end of the hearing of the appeals that she was reserving judgment on these cases, subject to the motion for exclusion of evidence to be brought by the appellants, who are the applicants in this case:

> [TRANSLATION]
> *"(. . .) thank you, and it behoves me to reserve judgment on this. Not only that, one way or another, I must wait until we proceed with the motion." (transcripts, November 9, 2017, at page 233, lines 7 to 10).*

[59] At the opening of the trial on Monday, October 30, 2017, the presiding judge expressed her displeasure with the applicants for the way they notified the Court of their intention to bring such a preliminary motion for exclusion of certain evidence, by simply sending the Court Registry a letter on Thursday, October 26, 2017, without following the Court's rules of procedure. Lengthy discussions continued on the morning of October 30, 2017, on how to proceed. They could either adjourn the hearing of the appeals scheduled for two weeks to allow the applicants to file a formal application, with affidavit and written submissions. Alternatively, they could proceed with the hearing of the appeals, subject to the applicants' objection to the respondent's filing the evidence obtained by the CRA in connection with the search, it being understood that this motion would be presented and heard at a time to be determined by the Court, depending on the availability of the parties, after the hearing of the appeals. As the presiding judge indicated:

> [TRANSLATION]
> *"This is why it's very unfortunate, but we're going about this the wrong way. But as I say, it's either that or we adjourn everything and come back next year" (transcripts, October 30, 2017, at page 74, lines 7 to 10).*

[60] The applicants agreed at trial that the hearing of the appeals should be held as scheduled and that they would present their motion subsequently. It is therefore highly inappropriate for the applicants to complain about these delays today.

[61] The presiding judge's decision on the motion to exclude evidence, heard in February 2019, was rendered on August 29, 2019, and appealed by the applicants in October 2019. The order of the Federal Court of Appeal was made on January 20, 2020, but registered at the Court Registry only at the end of July 2021. It should be noted that the order of the Federal Court of Appeal specified that no exceptional circumstances warranted immediate intervention of the Federal Court of Appeal in the applicants' cases, contrary to their claims. The Federal Court of Appeal also indicated in the order that it [TRANSLATION] "*(. . .) would be particularly inappropriate in this case to further delay the delivery of the Tax Court of Canada's (TCC) judgment on the merits, especially since this judgment has been long awaited.*"

[62] Approximately 10 months had elapsed between December 2016 when the appeals were scheduled for hearing and the start of the hearing of the appeals on October 30, 2017. However, the applicants sent a letter to the registry only two days prior to the start of the trial to indicate that they intended to present a preliminary motion for exclusion of evidence.

[63] In view of the foregoing, the applicants can hardly complain of the time elapsed between November 2017 and January 2020.

[64] Also, the Court finds that 18 months must be subtracted from the applicants' calculation of the delay, i.e. the delay between January 2020 (order of the Federal Court of Appeal) and July 2021 (when the order of the Federal Court of Appeal was registered in the Court docket). Between January 2020 and July 2021, the applicants should have contacted the Court when they noticed that the order of the Federal Court of Appeal had not been entered in the Court docket. However, the respondent looked after this at the end of July 2021 in order to enquire about the judgment on the merits of these appeals.

[65] When all the circumstances are taken into consideration, it is quite astonishing that the applicants maintain that they are not responsible for the delays incurred in their cases.

[66] Because the presiding judge left the Court eight (8) months after the order of the Federal Court of Appeal was entered in the Court docket, the Court finds that

this delay cannot be characterized as inordinate, as understood by the concept of abuse of process in an administrative context.

[67] In making this assessment, the Court took into account the *Ethical Principles for Judges* developed by the Canadian Judicial Council. Section 3.B.2 stipulates that reserved judgments should be delivered within six month after hearings, except in special circumstances.

PROCEDURE TO BE FOLLOWED FOR THE NEXT STEPS

[68] As the Federal Court of Appeal indicated in *High-Crest*, the new judge hearing the case will determine the procedure to be followed:

> [101] Following reassignment, the new judge is in charge of the case. It is for that judge, not the Chief Justice, to receive submissions from the parties concerning how the case should proceed, for example whether the case should be reheard or whether existing material (including transcripts) should be used in whole or in part: *D'Amico v. Wiemken*, 2010 ABQB 785, 47 Alta. L.R. (5th) 414; *Parmar v. Bayley*, 2001 BCSC 1394, 19 C.P.C. (5th) 366.

[69] To decide on the procedure to be followed, the Court must ensure that the parties get a fair trial that promotes [TRANSLATION] "sound management of the case by applying proper, efficient procedures through fair, simple, proportionate and economical application of the proceedings" (*Schwimmer c. Gaudreault-Martel*, 2022 QCCQ 1631 [*Gaudreault-Martel*], at paragraph 52) while respecting the principle of proportionality (*Gaudreault-Martel*, at paragraph 53) (written submissions of the respondent, at paragraphs 50 to 52). The Court, like any other court, must respect the principles of natural justice and ensure procedural fairness.

[70] For the following reasons, the Court orders that a judgment on the merits of these appeals be rendered on the basis of the records. If they wish, the parties may submit additional oral and written submissions with respect to the issues in dispute in these appeals. The Court also reserves the right to recall any witness.

[71] First, the Court finds that holding a new trial would likely be unfair to the applicants, since Mr. Plante stated that he could not afford his counsel's estimated legal fees for preparing for and conducting a new trial (Mr. Plante's affidavit, at paragraphs 38 and 39). This finding alone is decisive in ruling out the option of holding a new trial. In addition, the Court took into account that recalling all the witnesses to testify again in a second trial would not be proper or proportionate. Since the Court is not ordering a new trial, it will not examine the applicants'

arguments that Mr. Plante's rights protected by section 7 of the Charter will be violated by holding a new trial.

[72] During the hearing of the motion, the applicants acknowledged that they had no complaints about the process followed during the trial held in October and November 2017, since it was a fair process. The applicants also agreed that the examinations and cross-examinations conducted during the hearing of the appeals in 2017 were thorough (transcripts, April 28, 2023, at page 23 (lines 17 to 28) and at page 24 (lines 1 to 11)).

[73] The Court records are therefore complete, which reduces any unfairness: the evidence is in to the satisfaction of the parties (transcripts, November 3, 2017, at page 182, lines 19 to 21 for the applicants, and transcripts, November 7, 2017, at page 178, lines 9 and 10 for the respondent), and the pleadings are closed. Also, the Court has access to the written and audio transcripts of the hearings, which is a factor that will encourage the Court to render judgment on the basis of the records (*D'Amico*, at paragraphs 55 and 62).

[74] According to the applicants, the appeals filed by the applicants require that a judge gauge the credibility of the witnesses because this assessment is essential in deciding the issues in dispute in these cases. The new judge who would render judgment on the basis of the records could not assess the witnesses' body language. It follows that this mode of operation cannot replace the first trial.

[75] The applicants referred to *Singh v. Minister of Employment and Immigration* [1985] 1 S.C.R. 177:

> 59. I should note, however, that even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person: see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at pp. 806-08, (*per* Ritchie J.). I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.
>
> (Emphasis added)

[76] These comments from the Supreme Court of Canada were made in 1985 and do not take into account the availability of audio recordings of the hearings, which are available in this case. Although it is preferable for a judge to see a witness, it is well established that the credibility of witnesses is not assessed solely by evaluating the witnesses' body language. It can be assessed by examining the witness's oral testimony (*Francis v. The Queen*, 2007 TCC 323, at paragraph 15; *Nichols v. The Queen*, 2009 TCC 334, at paragraph 23; *D'Amico*, at paragraphs 61 and 62).

[77] In order to assess the credibility of testimony, the Court may, among other things, consider the following:

i) inconsistencies or weaknesses in this testimony – for example, whether the testimony changed during the trial or if it diverges from testimony provided by other witness or differs from the documentary evidence;

ii) prior contradictory statements and inconsistencies;

iii) the motives for which the witness might fabricate evidence or mislead the Court;

iv) the overall sense of the evidence: that is, when the Court applies common sense to the testimony, does it suggest that the evidence is impossible or highly improbable?

[78] Also, the Court adopts the comments made by the Honourable Mr. Justice Stratas in *High-Crest*:

> [116] Much also depends on the context in which the cases are decided and the nature of the cases themselves. Cases where the liberty of the subject is at stake, such as criminal cases, cases where there is substantial oral evidence and significant credibility issues such that a rerun of the case might be unfair, and cases where the validity of a public administrative decision is in issue may call for more caution when a Chief Justice is considering whether to reassign.
>
> (Emphasis added)

[79] The applicants also noted that the presiding judge had said it was difficult and complicated to get through the documentary evidence. They pointed out that asking another judge to understand all the evidence and render judgment on the basis of the records was a perilous exercise that could lead to injustice for the parties. The Court cannot accept the applicant's argument because a careful review of the transcripts will allow the Court to correctly assess the evidence presented at the hearing held in October and November 2017 and to render judgment on this basis.

Signed at Ottawa, Canada, this 1st day of June 2023.

“Dominique Lafleur"

Lafleur J.

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