By *Peter Aprile and James Roberts, Counter Tax Lawyers*

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Overview

Judicial review addresses the balance between legislative supremacy and the rule of law.[1] On the one hand, legislative supremacy allows Parliament to establish administrative bodies and give these administrative bodies authority over specific matters. Such authority is exclusive to the administrative bodies and is not subject to provincial or federal court action. The administrative bodies' exercise of these powers is referred to as **administrative action**. On the other hand, the rule of law mandates that courts have the power to review administrative action to ensure the public bodies act within their legal authority. This review is referred to as **judicial review**. The Supreme Court of Canada summarized the function of judicial review as ensuring "the legality, reasonableness and fairness of the administrative process and its outcomes".[2]

In the *Income Tax Act* [*ITA*], Parliament has given the Minister of National Revenue (Minister) the following powers: (1) assess, reassess, and collect tax; (2) investigate taxpayers; (3) consider cancelling interest or penalties or providing other substantive relief; and (4) administer the Minister's policies and procedures. The Minister created the Canada Revenue Agency (CRA) to carry out the Minister's powers and duties under the *ITA*. However, under the rule of law, the Minister's exercise of powers, through CRA, is subject to the Federal Court's judicial review. The extent of the Federal Court's review, and the deference the Federal Court affords to the Minister, will vary depending on the nature of ministerial power under review.

Legislative Provisions and Case Law related to Judicial Review

Jurisdiction

The courts' jurisdiction to review administrative action is rooted in the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*.[3] Initially, this review focused on ensuring that the administrative action did not exceed the powers the legislation afforded to it.[4] Before 1970, the jurisdiction to review decisions of both provincial and federal boards belonged to provincial courts.[5] However, in 1970, Parliament passed the *Federal Court Act*[6] (now the *Federal Courts Act*[7]), which created the Federal Court and bestowed on the Federal Court the authority to review federal administrative action. The new Federal Court and its power to review federal administrative action provided for more consistency than had been in place when various provincial courts reviewed federal administrative action.

The *Federal Courts Act*, at subs. 18(1), gives the Federal Court jurisdiction to provide relief against the Minister and CRA. However, s. 18.5 of the *Federal Courts Act* limits the Federal Court's jurisdiction to tax matters for which the *ITA* does not provide a specific appeal procedure. In other words, if the *ITA* or any other legislation sets out an appeal procedure for certain disputes, the Federal Court does not have jurisdiction over those types of disputes. As a result, in tax matters, the Federal Court's jurisdiction is limited to ensuring that the Minister, through CRA, carried out the Minister's powers and duties under the *ITA*. The Federal Court does not have jurisdiction to determine the correctness of an assessment or reassessment of tax or penalties under the *ITA*.

Federal Courts Act

Subsection 18(1) of the *Federal Courts Act* provides the Federal Court with "exclusive original jurisdiction" to review and provide relief from the decisions or actions of federal boards, commissions, and other tribunals. In particular, subs. 18(1) provides that the Federal Court has the jurisdiction:

> (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
>
> (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 relief against a federal board, commission or other tribunal.[8]

The phrase "federal board, commission or other tribunal" is a defined term in the *Federal Courts Act*. Specifically, s. 2 of the *Federal Courts Act* defines federal board, commission or other tribunal as "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament".[9] The *ITA* is an Act of Parliament act, and, therefore, when CRA exercises its jurisdiction and powers under the *ITA*, CRA is a "federal board, commission or other tribunal" under the *Federal Courts Act*.[10]

The Federal Court's jurisdiction extends to all federal boards, commissions, and other tribunals except those specifically identified in s. 28 of the *Federal Courts Act*. Jurisdiction over the federal boards, commissions, and other tribunals specifically identified in s. 28 of the *Federal Courts Act* rests with the Federal Court of Appeal. The Minister and CRA are not specifically identified in s. 28 of the *Federal Courts Act*, and, therefore, the Federal Court (as opposed to the Federal Court of Appeal) has jurisdiction over CRA's exercise of powers under the *ITA*.

However, the Federal Court's jurisdiction over CRA's exercise of its powers is not absolute. Section 18.5 of the *Federal Courts Act* sets out that the Federal Court does not have jurisdiction over matters for which "an Act of Parliament expressly provides for an appeal to" various courts, including the Tax Court of Canada and the Federal Court of Appeal.[11] Stated simply, **where the *ITA* has established an appeal procedure to the Tax Court or the Federal Court of Appeal for a specific dispute, the Tax Court or Federal Court of Appeal, as the case may be, has exclusive jurisdiction over the dispute**. In these circumstances, the Federal Court's jurisdiction is limited to all other disputes arising out of CRA's exercise of its powers under the *ITA*. Under s. 18.5, the Federal Court will strike out any application for judicial review if the taxpayer has a right—and an obligation—under the *ITA* to dispute the tax matter in the Tax Court.[12]

Tax Court of Canada Act

Subsection 12(1) of the *Tax Court of Canada Act* [*TCCA*][13] provides that the Tax Court of Canada "has exclusive original jurisdiction to hear and determine references and appeals ... on matters arising under the ... *Income Tax Act* [and other acts]... when references or appeals to the Court are provided for in those Acts". Moreover, subs. 12(3) provides the Tax Court with the same "exclusive original jurisdiction to hear and determine questions referred to it under ... section 173 or 174 of the *Income Tax Act*".

In these circumstances, the *TCCA* establishes that the Tax Court, not the Federal Court, has jurisdiction over (1) all tax disputes for which the *ITA* sets out an appeal procedure, and (2) references under ss. 173 and 174 of the *ITA*.

Appeal Procedure under the *ITA*

The *ITA*, at s. 169, sets out that taxpayers must appeal to the Tax Court of Canada to dispute an assessment or reassessment. Also, ss. 173 and 174 of the *ITA* provide that the Tax Court has jurisdiction to hear questions of law; fact or mixed law; and fact related to assessments, reassessments, and proposed assessments. Stated simply, **any dispute related to the correctness of an assessment or reassessment falls within the Tax Court's jurisdiction**. The correctness of the assessment includes disputes related to tax, the imposition of penalties, and the effective interest date.

Subsection 172(3) of the *ITA* provides that a taxpayer must appeal directly to the Federal Court of Appeal to dispute the (1) CRA's refusal to register the taxpayer as a charity, or (2) CRA's revocation of a taxpayer's charitable registration.

The Federal Court has jurisdiction over all other tax disputes. The most common tax disputes for which the Federal Court has jurisdiction are judicial review determinations related to (1) whether CRA exercised its discretion properly when making discretionary decisions, and (2) whether CRA complied with its obligations under the *ITA*. However, the only limit on the Federal Court's jurisdiction is whether some other appeal or dispute process exists to address the specific tax matter. In *Minister of National Revenue and Canada Revenue Agency v. JP Morgan Asset Management (Canada) Inc.*,[14] after the Federal Court of Appeal conducted an extensive analysis related to the Federal Court's jurisdiction over tax matters, the Federal Court of Appeal held that "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".

Case Law Related to the Federal Court's Jurisdiction over Tax Matters

In *Canada v. Addison & Leyen Ltd. et al.*,[15] the Supreme Court of Canada cautioned that that reviewing courts should be wary of authorizing judicial review in the wrong circumstances to preserve the "integrity and efficacy of the system of tax assessments and appeals" that Parliament created and established in the *ITA*.[16] In particular, the Supreme Court held as follows:

(1) "Parliament has set up a complex structure to deal with a multitude of tax-related claims and the structure relies on an independent and specialized court, the Tax Court of Canada".

(2) "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".

(3) "Judicial review should remain a remedy of last resort in this context".[17]

The Federal Court of Appeal followed the Supreme Court's caution when it conducted a complete analysis of the Federal Court's jurisdiction over tax matters in *JP Morgan*.[18] The relevant facts in *JP Morgan* follow.[19]

JP Morgan was a Canadian corporation that earned revenue providing Canadians with investment advice. JP Morgan, in turn, paid fees to a related corporation resident in Hong Kong, JF Asset Management Limited, for services that JF Asset Management provided to JP Morgan. Pursuant to Part XIII of the *ITA*—specifically subs. 212(1), 215(1), and 215(6)—JP Morgan was required to withhold and remit to the government tax equal to 25

per cent of JP Morgan's payments to JF Asset Management and, if JP Morgan failed to withhold, JP Morgan was liable for tax not withheld.

JP Morgan did not withhold tax, and the Minister assessed JP Morgan under Part XIII of the *ITA* related to JP Morgan's 2002-2008 fiscal years. The Minister relied on subs. 227(10) of the *ITA* to support the proposition that the Minister could assess JP Morgan at any time. In other words, there was no limitation period that restricted the Minister from assessing JP Morgan for all years. JP Morgan applied to the Federal Court for judicial review of the Minister's decision to assess the 2002-2004 fiscal years. In particular, JP Morgan alleged that the Minister "abused her discretion by issuing assessments for Part XIII tax for so many years. [JP Morgan] says she did not consider or sufficiently consider policies that would have limited the number of years subject to assessment".[20] The Minister moved to strike JP Morgan's application for judicial review on the basis that the Federal Court did not have jurisdiction. A Prothonotary dismissed the Minister's motion. The Minister appealed the Prothonotary's decision. A Federal Court Judge dismissed the Minister's appeal. The Minister appealed to the Federal Court of Appeal. The Federal Court of Appeal allowed the Minister's appeal and struck JP Morgan's application. In a lengthy decision, the Federal Court of Appeal conducted a thorough analysis related to the Federal Court's jurisdiction and the elements required for an application for judicial review of tax matters.

JP Morgan, at para. 66, sets out that an application for judicial review must have the following three elements:

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

(2) *section 18.5 of the* Federal Courts Act *or some other legal principle does not apply to eliminate the Federal Court's ability to review the claim; and*

(3) *the relief sought must be something the Federal Court can grant.*

If any of these three elements is missing, the application for judicial review has a "fatal flaw" and the Federal Court should strike out the application.

A Cognizable Administrative Law Claim

There are two required elements for a cognizable administrative law claim: (1) *Federal Courts Act* must allow for judicial review; and (2) the ground for review must be known to administrative law or be recognized in administrative law.[21]

Parliament has legislated the first element in ss. 18 and 18.1 of the *Federal Courts Act*: the Federal Court has the power to review the decisions of federal administrative bodies.[22] The second element—that the ground for review be known or recognized in administrative law—is more complex. In *JP Morgan*, Justice Stratas identified three categories of grounds for review that are known to administrative law: (1) lack of *vires*, (2) procedural unacceptability, and (3) substantive unacceptability.[23]

Lack of *vires* relates to whether the administrative body is acting within the powers granted to it by the legislation.

Procedural unacceptability relates to a breach of the duty of fairness that the administrative decision maker owes to the public. The duty of procedural fairness can be set out in the enabling legislation but, if not, the

common law doctrine of procedural fairness will apply.[24] The Supreme Court of Canada set out the common law doctrine of procedural fairness in administrative law in *Baker v. Canada (Minister of Citizenship and Immigration)*.[25] Substantive unacceptability relates to a decision that is incorrect in law or is unreasonable (i.e., a decision that cannot be supported by the facts and law).

It is insufficient for an applicant to state simply that the Minister abused his or her discretion. The alleged abuse of discretion must be something that falls within a recognized administrative law ground, i.e., the abuse of discretion must be due to a lack of *vires*, must be procedurally unacceptable, or must be substantively unacceptable. The following two examples illustrate the distinction between an alleged abuse of discretion that falls within a recognized administrative law ground and an alleged abuse of discretion that does not.

> **Example 1**. The Minister issues a derivative assessment under s. 160 of the *ITA* 12 years after the underlying transaction. The taxpayer alleges that the Minister abused the Minister's discretion in delaying too long before issuing the derivative assessment. However, s. 160 of the *ITA* provides that the Minister may assess "at any time" and, therefore, the Minister's assessment does not suffer from a lack of *vires*, is not procedurally unacceptable in that it does not breach any duty of fairness, and is not substantively unacceptable because it is not incorrect in law and is not an unreasonable exercise of the Minister's ability to issue the assessment. In these circumstances, the allegation that the Minister abused the Minister's discretion is not a valid ground for judicial review.[26]
>
> **Example 2**. The taxpayer requests that the Minister cancel interest that accrued as a result of the Minister's delay in processing a request for loss carryback. The Minister rejects the taxpayer's request on the basis that the Minister believes that she processed the request for loss carryback within a reasonable time. The taxpayer alleges that the Minister erred in fact in holding that the Minister did not delay. Setting aside whether the Minister processed the request for loss carryback within a reasonable time, the taxpayer's allegation that the Minister delayed and the delay caused interested to accrue falls within the substantive unacceptability ground for review and, therefore, is a valid ground for judicial review.

Section 18.5 Does Not Apply

In *JP Morgan*, at paras. 81-91, the Federal Court of Appeal set out the tax matters for which an appeal to the Tax Court is available, and, therefore, the Federal Court has no jurisdiction under s. 18.5 of the *Federal Courts Act*. In 2019, the Supreme Court of Canada ("SCC") cited *JP Morgan* in *Canada (Attorney General) v. British Columbia Investment Management Corp.,* confirming that "[a]ny challenge to the correctness of a tax assessment under the [*Excise Tax Act*] falls within the exclusive jurisdiction of the Tax Court".[27]

In particular, the Tax Court has exclusive jurisdiction over the following:

(1) whether an assessment is valid,

(2) the admissibility of evidence supporting an assessment,

(3) abuse of the Tax Court process, and

(4) whether the Minister's procedure in issuing an assessment is inadequate.[28]

In these circumstances, the Tax Court has exclusive jurisdiction over these issues, and, therefore, judicial review in the Federal Court is not available.[29]

Also, the Federal Court of Appeal echoed the Supreme Court's direction that judicial review is method of last resort and should not be available when there is "adequate, effective recourse elsewhere or at another time".[30] Instead, the Federal Court of Appeal provided the following comments on the type of circumstances for which the Federal Court would have jurisdiction:

> 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 . . . . 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. . . . Whether these actually constitute adequate, effective recourses depends upon the circumstances of the particular case.[31] [Emphasis added]

A taxpayer seeking to dispute CRA's actions related to one of these situations cannot apply to the Federal Court for judicial review. Instead, the taxpayer must appeal to the Tax Court of Canada because, as the Supreme Court instructed,

> [t]he 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.[32]

Relief Sought

The Federal Court's ability to grant relief is limited to the relief set out in subs. 18.3(3) of the *Federal Courts Act*. The Federal Court cannot vacate or vary an assessment or reassessment of tax. If the relief sought is, in effect, asking the Federal Court to vacate or vary the assessment or reassessment regardless of how the relief sought is phrased, the Federal Court does not have jurisdiction to grant the relief requested. In *JP Morgan* at para. 93, the Federal Court of Appeal held that a court must look at the "essential character of the relief sought", not just at the language of the relief sought. In other words, notwithstanding that a notice of application uses administrative law parlance such as "substantively unacceptable", "procedurally unacceptable", or request relief such as "set aside the Minister's decision", if the actual relief requested will result in vacating or varying the assessment or reassessment of tax, the Federal Court lacks the jurisdiction to grant the relief.

Standard of Review

Standard of Review versus Ground for Review

The standard of review and the ground for review are two important but distinct elements in judicial review. The ground (or grounds) for review relates to the improper action, inaction, procedure, or other element of the administrative action that the application alleges to have occurred that warrants Federal Court judicial review. For example, the decision maker made an error of law or an erroneous finding of fact, or the decision maker's procedure for reaching the decision was unfair. Subsection 18.1(4) of the *Federal Courts Act* sets out the specific grounds for review that are available in the Federal Court.

The standard of review relates to the amount of deference the Federal Court affords the administrative decision maker. Since the Supreme Court of Canada's decision in *Dunsmuir*, there have been two standards of review: correctness and reasonableness. As the names suggest, reasonableness is the more deferential standard of review. However, the amount of deference can vary depending on the nature of the decision. The correctness standard allows the Federal Court to substitute its judgment for that of the decision maker; under the reasonableness standard, the Federal Court must defer to the decision maker unless the decision maker's process itself was flawed.

Determining the appropriate standard and how to apply each standard has proved difficult and has been the subject of much judicial and academic scrutiny. In 2019, the Supreme Court of Canada, in *Vavilov v. The Queen*,[33] created a much-needed test and guidance to identify the correct standard of review. Nevertheless, the case law discussing the standard of review is complex and continues to evolve.

Federal Court Will Determine the Appropriate Standard of Review in All Applications

The standard of review is a question of law. In these circumstances, the reviewing court will always determine the appropriate standard of review, even if the parties agree on the appropriate standard.[34] For example, in an application for judicial review to the Federal Court, each of the applicant and the respondent will submit a memorandum of fact and law.. If both parties submit the standard of review is reasonableness, the Federal Court judge is still required to make their own determination of the appropriate standard of review. In essence, the parties cannot "*contract out* of the appropriate standard of review".[35]

The Standards of Review since *Dunsmuir*

Prior to *Dunsmuir* in 2008, there were three standards of review: correctness, reasonableness *simpliciter*, and patent unreasonableness. The idea behind the three standards of review—and the two different reasonableness standards of review—was that a judge would know how much deference was appropriate after the judge selected the appropriate standard of review. Patent unreasonableness provided more deference to the decision maker than did reasonableness *simpliciter*. Under the patent unreasonableness standard, a reviewing court would interfere only if the decision had a defect that was immediately apparent; under the reasonableness *simpliciter* standard, a reviewing court could probe further into the decision to find a defect.[36] However, the Supreme Court noted that lower courts had difficulty distinguishing between reasonableness *simpliciter* and patent unreasonableness, which led to courts having difficulty selecting the appropriate standard of review. Moreover, the Supreme Court found that courts improperly applied the patent unreasonableness standard.[37]

In *Dunsmuir*, the Supreme Court of Canada collapsed reasonableness *simpliciter* and patent unreasonableness into a single reasonableness standard to clarify and simplify the standard of review in judicial review. After *Dunsmuir*, the standards of review are reasonableness and correctness.

In 2019, the Supreme Court further clarified the standard of review analysis in *Vavilov*. In particular, the Supreme Court adopted a revised framework that begins with a presumption of the reasonableness standard of review.

The Reasonableness Standard

Reasonableness is a deferential standard. In *Vavilov*, the Supreme Court provided the following comments when defining how to interpret the reasonableness standard:

> Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.[38]

Further, in *Vavilov*, the Supreme Court stated that in conducting a reasonableness review,

> a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.[39]

The Supreme Court also offered the following guidance to reviewing Courts conducting a reasonableness review:

(1) A reviewing Court should consider whether both the rationale for the decision and the outcome to which the rationale led was unreasonable. Specifically, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies."[40]

(2) The reasonableness standard remains a single standard, and instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. [41]

(3) Although the exercise of public power must be justified, intelligible and transparent, "a reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection."[42]

(4) There are two general types of fundamental flaws that would render a decision unreasonable. First, a decision that is not based on reasoning that is both rational and logical. Second, a decision that is untenable considering the relevant factual and legal constraints that bear on it.[43] However, there is no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other.[44]

(5) When an administrative decision does not provided reasons – and reasons are not required - "the analysis will then focus on the outcome rather than on the decision maker's reasoning process".[45]

The Correctness Standard

Under the correctness standard, the reviewing court considers the questions and issues that were before the decision maker and undertakes its own analysis of the questions and issues. In undertaking its analysis, the reviewing court does not show any deference to the decision maker's process or reasons. If the reviewing court determines that the correct answer to the question is different than the decision maker's answer, the reviewing court will substitute its judgment for that of the decision-maker.[46]

How to Determine the Appropriate Standard of Review, The Revised Framework - *Vavilov*

Presumption of Reasonableness

In *Vavilov,* the Supreme Court stated that "whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness."[47]
In other words, in all judicial review matters, the starting point is the deferential standard of reasonableness. However, the Supreme Court stated that a reviewing Court could rebut the presumption for two reasons.

Two Reasons to Rebut the Presumption of Reasonableness

Legislature Indicates a Different Standard of Review

The first basis in which the Supreme Court instructs a reviewing Court to rebut the reasonableness standard of review, is where a legislature has indicated that a standard of review other than reasonableness should apply.

The Supreme Court gave two instances of where the legislature has indicated that a different standard should apply:

(1) where there is legislated standard of review; and

(2) where there is a statutory appeal mechanisms from an administrative decision to a court.[48]

Legislated Standards of Review

Where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied.[49]

For example, in British Columbia, the legislature has established the applicable standard of review applicable to decisions on questions of statutory interpretation by the B.C. Human Rights Tribunal is to be correctness.[50]

Statutory Appeal Mechanisms

The second indication that a standard of review, other than reasonableness, should apply, is when the legislation includes the presence of a statutory appeal mechanism from an administrative decision to a court, and that court is to perform an appellate function with respect to that decision.[51]

Where a legislature has stated that parties can appeal an administrative decision to a court, the blanket presumption of the reasonableness is rebutted, and the reviewing courts must apply **appellate standards** (i.e., correctness or palpable and overriding error) of review to the administrative decision. The appellate standards of review are determined with reference to the nature of the question (in accordance with *Housen v. Nikolaisen, 2002 SCC 33).*[52]

The Supreme Court clarified three points related to rebutting the presumption of reasonableness based on the existence of a statutory appeal mechanism:

(1) Whether an applicant has the ability to appeal as of right, or only with leave of the court, does not change that the statutory appeal mechanism will rebut the presumed reasonableness standard of review.[53]

(2) If a legislative provisions does not provide a right of appeal, and simply address procedural or other similar aspects of judicial review in a particular context the provisions do not rebut the presumed reasonableness standard of review.[54]

(3) In some legislation (i.e., the *Income Tax Act*), a party's right to appeal may be limited by specific types of questions or decisions. If the statutory appeal mechanisms do not apply to questions or decisions subject to judicial review applications, the presumption of reasonableness will not be rebutted.[55]

Rule of Law

The second reason for which the Supreme Court directs a reviewing Court to deviate the presumption of the reasonableness is where the rule of law requires the court to apply the standard of correctness for certain types of legal questions, including the following:

(1) Constitutional questions,

(2) General questions of law of central importance to the legal system as a whole,

(3) Questions regarding the jurisdictional boundaries between two or more administrative bodies.[56]

The Final Conclusion on Administrative Law Standards of Review?

In their concurring decision to *Vavilov*, Justices Abella and Karakatsanis, emphasizes that the majority's new standard of review framework ignores the specialized expertise of administrative decision-makers and contradicts the administrative law philosophy that has guided the Court's jurisprudence for the last 40 years.[57]

In particular, the minority decision believes that the majority's new framework is much less deferential towards administrative decision-makers than *Dunsmuir.* They believe it unjustifiably expands the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis. It believes that the majority's decision *reverses* the decades of progress that create the necessary relationship between the administrative bodies and the judiciary.[58]

The concurring decision leaves room for further clarification and discussion. However, two years later, the SCC has only cited *Vavilov* once – in *Northern Regional Health Authority v. Horrocks* – which does not do more than restate the principles.[59]

Grounds for Review

The grounds for review relate to the improper action, inaction, procedure, or other element of the administrative action that warrants the judicial review. Parliament has legislated specific grounds for review in subs. 18.1(4) of the *Federal Courts Act*. For the Federal Court to have jurisdiction to review administrative action, an applicant should identify that the decision maker made an error that falls within one or more of the grounds enumerated in subs. 18.1(4).

Subsection 18.1(4) of the *Federal Courts Act* reads as follows:

> The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
>
> a. acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
>
> b. failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> c. erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> 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;
>
> 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.

It is important that an applicant understands in what circumstance each of the six enumerated grounds for review will apply. A proper understanding of when each enumerated ground for review applies will allow the applicant to shape the position and argument in judicial review. However, the enumerated grounds do not operate in isolation. Notwithstanding that an applicant has alleged that the Minister made an error that falls within one of the enumerated grounds for review in subs. 18.1(4), the reviewing court must confirm the appropriate standard of review for each alleged error.

18.1(4)(a) Jurisdictional Error

Jurisdictional error relates to the administrative body (1) acting beyond its legislative power, or (2) failing to act in a circumstance in which the administrative body is required to act. Where the *ITA* provides that the Minister has a duty to issue an assessment of tax or take any other action and the Minister fails to discharge the duty, the Minister has refused to exercise its jurisdiction and a taxpayer can apply for judicial review citing para. 18.1(4)(a) as the grounds for judicial review. For example, if a taxpayer applies to the Minister to cancel penalties and interest and the Minister fails to consider the taxpayer's application, the Minister has refused to exercise her jurisdiction.

Jurisdictional questions are subject to judicial review under the correctness standard.[60] Stated simply, the Federal Court should not show any deference to the question of whether the administrative body acted beyond the scope of its powers or failed to exercise jurisdiction that the legislation required it to exercise.

18.1(4)(b) Procedural Fairness and Natural Justice

Procedural fairness relates to a breach of the basic principles of natural justice, procedural fairness, or any other procedure CRA is required to follow.

In determining whether the Minister breached the duty of procedural fairness, the reviewing court will seek to determine whether the decision was fair, arbitrary, or made in bad faith. The reviewing court will examine the Minister's process behind the decision and review whether that process created a legitimate expectation.[61] For example, the court has stated that (1) there is a legitimate expectation at the second level administrative review stage that the Minister will assign a different official to make the decision and (2) having the same official involved in the first and second level review stages is a breach of procedural fairness.[62]

Another example of the Minister breaching the duty of procedural fairness is where the decision maker failed to communicate the specific reasons for behind the decision. By denying the taxpayer the opportunity to respond to the decision maker's specific reasons, the Federal Court held that the Minister breached the duty of procedural fairness.[63]

The relevant jurisprudence suggests that procedural rights include the right to be able to respond fairly and make arguments to the CRA when the taxpayer does not agree with a decision. The Minister's or CRA's actions that obstruct this ability have routinely labeled as procedurally unfair.

However, in *Baker*, the Supreme Court of Canada stated that the substantive content varies depending on the nature of the decision under review.[64] The Federal Court stated that the criteria governing the exercise of discretion under specific sections of the *ITA* are strict and narrow, and the rights involved are minimal.[65] Although taxpayers are afforded procedural fairness rights when dealing with the CRA, these procedural rights are limited.

The CRA's failure to proceed with a prescribed route of action after communicating the route of action to the taxpayer has been found to be a breach of procedural fairness upon judicial review.[66]

In assessing procedural fairness, the Court assesses whether the procedure leading to the decision was fair in all of the circumstances. In *Schillaci v. Canada*, the Federal Court confirms that deciding whether there was procedural fairness is "best reflected in the correctness standard".[67]

The *ITA* grants the Minister discretion to ensure that taxpayers comply with the *ITA* and provide relief in appropriate cases. Although the nature of the procedural rights is limited, the Federal Court has recognized that these rights must be respected.

If the taxpayer alleges that the Minister has breached procedural fairness, the taxpayer has the burden of proof.

18.1(4)(c) Error of Law

An error of law is an erroneous reliance on non-legal rules or guidelines, an error in interpreting and applying legislation or the common law, or an error in applying the legislation or common law. Most alleged errors of law are reviewable on the correctness standard. However, the Minister's interpretation of the home statute or enabling legislation attracts the more deferential reasonableness standard or review.[68]

In *Spence v. Canada Revenue Agency*,[69] the Minister declined to cancel penalties and interest citing in the decision letter that "[t]he Taxpayer Relief provisions do not allow for the cancellation of penalties and interest in these types of situations".[70] The Minister's delegate based the decision and the statement on the non-legal guidelines contained in the *Income Tax Information Circular No. IC07-1*, rather than the *ITA*. Reviewing the alleged error of law on the correctness standard, the Federal Court held that the Minister made an error of law—namely, relying on the non-legal guidelines for the position that the Minister did not have legal bases to cancel the penalties and interest, because subs. 220(3.1) of the *ITA* did not restrict the Minister from cancelling the penalties and interest in the current situation. As such, any reliance on non-legal rules that leads a decision maker to come to a decision that is contrary to the legislative authority is an error of law. The Federal Court specifically stated that reliance on strict non-legal rules and guidelines can lead to an error of law.

An allegation that the Minister failed to interpret legislation properly is also an error of law. However, as set out above, interpreting legislation is sometimes reviewed on the correctness standard and sometimes reviewed on the reasonableness standard. When the Minister interprets the provision that provides the Ministerial authority for administrative action (i.e., the home statute), reasonableness is the appropriate standard of review. When the Minister interprets any other legislation, correctness is the appropriate standard of review. The Federal Court's recent decision in *ConocoPhillips v. Canada (National Revenue)* [71] provides an example of an error of law reviewable on the reasonableness standard.

In *ConocoPhillips*, the taxpayer requested that the Minister waive the requirement to serve a notice of objection under subs. 165(1) of the *ITA* to dispute a reassessment. The taxpayer relied on subs. 220(2.1) of the *ITA*, which provides that the Minister may waive a requirement under the *ITA* "to file a prescribed form, receipt, or other document". The Minister determined that her authority to waive a filing requirement did not extend to the requirement in subs. 165(1) of the *ITA* to serve a notice of objection. The Federal Court held, at para. 24, that the Minister's interpretation of subs. 220(2.1) of the *ITA*—the provision that grants the Minister the "jurisdiction and authority to apply and administer the ITA"—is akin to a tribunal interpreting its home statute.[72] In these circumstances, the Federal Court held that the standard of review related to the Minister's interpretation of subs. 220(2.1) was reasonableness and therefore, it was required to give deference to the Minister's interpretation. The Federal Court held that the Minister's interpretation of subs.220(2.1) was unreasonable and the Minister's interpretation was unduly narrow. [73]

However, the Federal Court of Appeal overturned the Federal Court's decision that the Minister's interpretation was too narrow. The FCA decided that the appeal did not depend on the standard of review because the Minister's initial decision was reasonable and correct.[74] In particular, the FCA determined that the Federal Court did not read subs. 220(2.1) in accordance "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" as required by Driedger's modern rule of statutory interpretation.[75] In performing the appropriate statutory interpretation analysis, the FCA concluded that subs. 220(2.1) does not apply to notices of objection, and the Minister's decision was reasonable and correct.

An allegation that the Minister fettered discretion is a vague allegation that can fall under several grounds for review, including an error of law. The Minister's fettering of discretion as an error of law arises when the Minister

places strict reliance on non-legal guidelines or improperly interprets legislation (i.e., the types of errors set out in this section). When a taxpayer alleges that the Minister committed an error of law in the context of fettering discretion, the taxpayer often refers to the Minister's error as an unlawful fettering of discretion. Unlawful fettering of discretion includes the Minister taking the position that the Minister does not have power to act when, in fact, she does have the power to act.

18.1(4)(d) Erroneous in Finding of Fact

An error of fact relates to a decision based on an erroneous finding of fact the Minister made in a perverse or capricious manner or without regard to the material before the Minister's decision maker. An allegation that the Minister made an erroneous finding of fact is presumed to be reviewable on a reasonableness standard of review.[76]

However, not every factual error warrants judicial intervention; only factual errors made in a perverse or capricious manner or without regard to the material before the Minister's decision maker. An error of fact that did not influence the decision does not warrant judicial intervention.

In *Finanders v. Canada (Attorney General)*,[77] the Federal Court held that the Minister had made an erroneous finding of fact that was unsupported and indefensible based on the information before the decision maker. Specifically, the decision maker mistakenly held that the applicant had received long-term disability payments in prior years and reported them for tax purposes. However, the facts before the decision maker showed that the applicant had received short-term, not long-term, disability payments in prior years and had reported them for tax purposes and that, when the applicant disability changed from short-term payments to long-term payments, a third party advised the applicant that the long-term payments were not taxable, and accordingly, that the applicant was not required to report them for tax purposes. In these circumstances, the Minister's decision to refuse to exercise her discretion to cancel penalties and interest was based on the erroneous finding of fact and the Federal Court allowed the applicant's judicial review application.[78]

In order to succeed in an application for judicial review on the basis that the Minister made an erroneous finding of fact, the applicant must (1) point to a specific factual error, (2) show how the Minister's finding of fact was incorrect based on the material before the Minister, and (3) show that the error had a material impact on the Minister's decision. If the applicant is unable to satisfy the criteria, the Federal Court is unlikely to interfere with the Minister's finding of fact.

18.1(4)(e) Fraud or Perjured Evidence

Fraud or perjured evidence relates to whether the Minister's decision maker committed fraud or falsified evidence to support the Minister's decision, or whether the Minister's decision relies on fraudulent or perjured evidence from a third party. In *Khosa*, the Supreme Court states that if an applicant can prove that the Minister has committed fraud or has falsified evidence, the reviewing court should overturn the Minister's decision.[79]

Although para. 18.1(4)(e) of the *Federal Courts* Act provides fraud or perjured evidence as a ground for review, the Federal Court has not decided any cases that allege this ground for review. In any event, the broad wording of this section provides the opportunity for taxpayers to advance novel arguments. For example, taxpayers

might rely on subs. 18.1(4)(e) of the *Federal Courts Act* to support allegations that the Minister destroyed or fabricated evidence to support a decision to deny relief, and cases where a third party supplied the Minister with falsified documents and the Minister relied on that evidence to deny the taxpayers request.

18.1(4)(f) Any other Act Contrary to Law

This ground is a catchall provision that provides the Federal Court with the legislative authority to review administrative action pursuant to the rule of law.

The Federal Court has clarified that this ground for review does not limit the Federal Court to reviewing a Ministerial decision in the strict sense but also applies to any unlawful situation or refusal by the administrative authority to fulfill a mandatory act.[80]

Relief Available in Judicial Review

Subsection 18.1(3) provides that a Federal Court may grant two types of relief in a successful application for judicial review.

> 18.1(3) On an application for judicial review, the Federal Court may
>
> (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
>
> (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.

The first type of relief—ordering the administrative body to do something that it *unlawfully* failed or refused to do—arises if the Federal Court determined the question on a correctness standard of review. If the Federal Court determined that the appropriate standard of review was correctness and that the administrative either failed to exercise jurisdiction or acted in a way that is contrary to law, the Federal Court has the power to order the CRA to act in accordance with the law.

The second type of relief—quashing or setting aside the Minister's decision and referring it back for redetermination with appropriate directions—relates to decisions that are reviewable on a reasonableness standard of review, or that are procedurally unacceptable. This is the most common form of relief granted by the Federal Court. In this circumstance, the reviewing court will not substitute its judgment. Instead, the Federal Court will set out the error in the Minister's decision and direct the Minister to re-determine the issue after rectifying the error. After rectifying the error, the Minister may reach the same decision and, therefore, the Federal Court's decision to grant a judicial review application will not automatically lead to the applicant achieving the ultimate desired result.

Relief under Judicial Review in Income Tax Matters

The Federal Court cannot vacate or quash an assessment or reassessment, and cannot order that the Minister issue specific reassessments, i.e., only the Tax Court of Canada has the jurisdiction to deliver these remedies in appropriate cases. The most common type of relief in judicial review applications related to tax matters is for

the Federal Court to set aside the Minister's decision and refer the question back to the Minister for re-determination. Often, the Federal Court will provide instructions to the Minister designed to cause the Minister to correct the reviewable error as part of the re-determination.

Simply put, the Federal Court will intervene to identify the Minister's error and provide instructions to ensure that the Minister does not make the same error, but will leave the substantive analysis related to re-determining the question to the Minister's decision maker.

Federal Court's Directions to the Minister

Paragraph 18.1(3)(b) provides that, although the Federal Court cannot substitute its own judgment for the decision maker, the Federal Court can provide directions to the Minister. In cases where the Court determines that guidance is appropriate, the Court will provide the Minister with orders to take into account specific facts or to do something that the Minister has failed to do.

The Court can order the Minister to take facts into account, and in *Addison & Leyen*, the Supreme Court of Canada stated that in appropriate circumstances, the Federal Court could issue a *mandamus* order compelling the Minister to exercise powers under the *ITA*.[81]

However, a *mandamus* order is unlikely in tax cases. More typically, when the Federal Court finds that the Minister's decision was unreasonable, the Federal Court will identify how the Minister's decision is unreasonable to ensure that the Minister does not make the same error on re-determination. The Federal Court of Appeal's decision in *Canada Revenue Agency v. Slau Limited*[82] provides a concrete example of the scope of the Court's directions to the Minister when the Minister's decision is unreasonable.

In *Slau*, the Federal Court held that the Minister's decision not to cancel interest that accrued as a result of the Minister's delay was unreasonable.[83] At para. 53, the Federal Court set aside the Minister's decision and referred the matter back to the Minister "to waive or cancel all interest that accrued under the [*ITA*] after December 1, 1996 and declare that the reasonable amount owing by the applicant as of December 1, 1996 was $71,195.44".[84] The Federal Court of Appeal agreed that the Minister's decision was unreasonable, but held that the Federal Court's order that the Minister cancel the interest after December 1, 1996 was a direction that the Minister exercise discretion in a specific way and, therefore, exceeded the Federal Court's jurisdiction under subs. 18.1(3) of the *Federal Courts Act*.[85] Instead, the Federal Court of Appeal ordered that the Minister re-determine Slau Limited's request for interest relief "in accordance with these reasons".[86] At paras. 36-39, the Federal Court of Appeal sets out the reasons that the Minister's decision was unreasonable: the decision was based on finding of fact that was found to be faulty and "a decision based upon such an important factual premise cannot be said to be 'justifiable' or 'intelligible', as contemplated by *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, where that factual premise has been found to be false".[87]

Slau FCA stands for the principle that the reviewing court can identify the Minister's error and direct that the Minister not make the same error on re-determination. However, the reviewing court cannot direct the Minister to exercise discretion in a specific way.

Decision Unreasonable but not Set Aside

Surprisingly, the Federal Court may find a tribunal's decision unreasonable, but choose not to send the matter back for re-determination because the probability that the result will change is very low.[88] In this circumstance,

the Federal Court will grant the application for judicial review but the applicant will not receive the relief. Simply put, the applicant has won the battle and lost the war.

For example, in *Stemijon Investments Ltd. v. Canada (Attorney General)*,[89] the Federal Court held that the Minister's decision was unreasonable but did not send the matter back for redetermination. In relying on the Supreme Court's decision in *MiningWatch*, the Federal Court held that although the Minister's exercise of discretion under subs. 220(3.1) of the *ITA* was unreasonable, the taxpayer had no chance of success on re-determination. In these circumstances, the Federal Court determined that intervention was unwarranted.

Income Tax Act Provisions Subject to the Judicial Review Regime

At times in the analyses related to jurisdiction, standard of review, grounds for review, and relief available, this Practical Insight has referred to the Minister's duties, actions, discretion, and decisions related to tax matters. This section focuses on tax matters for which taxpayers can seek judicial review. In particular, this section discusses:

1. taxpayer requests that the Minister exercise her discretion to grant certain relief;
2. the Minister's duty to issue assessments and reassessments;
3. the Minister's actions related to collecting taxes; and
4. possible other matters subject to judicial review.

Taxpayer Requests for Ministerial Discretion

The *ITA* grants the Minister with certain discretion related to enforcing and applying the *ITA*. In particular, the Minister has discretion (1) to waive or cancel penalties and interest (subs. 220(3.1)); (2) to accept late-filed elections or allow amendments to elections (subs. 220(3.2)); (3) to re-open statute-barred years (subs. 152(4.2)); and (4) to waive the requirement to file a prescribed form or other document (subs. 220(2.1)).

If a taxpayer disagrees with the Minister's decision related to the exercise of the Minister's discretion under any of these provisions, the taxpayer must apply to the Federal Court for judicial review of the Minister's discretionary decision. The taxpayer cannot appeal a discretionary decision to the Tax Court of Canada.[90]

Request for Penalty and Interest Relief

The Minister has discretion under subs. 220(3.1) of the *ITA* to grant relief in part, or in full, of any penalties and interest assessed under the *ITA*.

220 (3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.

The Minister has established two distinct programs to administer the Minister's discretion to waive or cancel penalties and interest. First, a taxpayer can apply for penalty and interest relief under the Voluntary Disclosures Program. The Minister has established a policy that a taxpayer's disclosure must satisfy four criteria to qualify for the Voluntary Disclosures Program: the disclosure must be voluntary, the disclosure must be complete, there must be a penalty or potential application of a penalty, and the information disclosed must be at least one year overdue. If the taxpayer's disclosure satisfies these criteria, the Minister will cancel all penalties and will waive a portion of the interest.[91]

Second, a taxpayer can request that the Minister cancel penalties and interest under the Taxpayer Relief Program. The Minister established the Taxpayer Relief Program to set out clearly the circumstances in which the Minister will consider exercising its discretion to waive and cancel penalties and interest.[92]

If the Minister denies a taxpayer's application for relief under either the Voluntary Disclosures Program or the Taxpayer Relief Program, the taxpayer can apply to the Federal Court for judicial review Minister's decision. However, since the legislation provides the Minister's decision is discretionary, the Federal Court will show considerable deference to the Minister's decision unless a taxpayer can show that the Minister acted beyond her jurisdiction or breached the duty of procedural fairness.[93]

Accepting Late-Filed Elections

Subsection 220(3.2) of the *ITA* gives the Minister discretion to (1) extend the filing-due date for certain elections, and (2) allow taxpayers to amend or revoke elections previously made.

220 (3.2) The Minister may extend the time for making an election or grant permission to amend or revoke an election if

(a) the election was otherwise required to be made by a taxpayer or by a partnership, under a prescribed provision, on or before a day in a taxation year of the taxpayer (or in the case of a partnership, a fiscal period of the partnership); and

(b) the taxpayer or the partnership applies, on or before the day that is ten calendar years after the end of the taxation year or the fiscal period, to the Minister for that extension or permission.

Again, although judicial review of the Minister's decision to accept a late-filed or amended election is available, the Federal Court provides a high degree of deference to the Minister due to the discretionary nature of the decision. The Minister and CRA are presumed to have expertise in interpreting and administering the *ITA* and, therefore, the Federal Court has held that the Minister is better placed to understand the importance and consequences of allowing or denying the request and, therefore, can establish its policies and procedures for granting this relief.[94]

Opening Statute-Barred Years

Subsection 152(4.2) of the *ITA* provides the Minister the discretion to consider an individual taxpayer's request that the Minister issue a reassessment or redetermination after the normal reassessment period has expired. An individual taxpayer will make such a request if the individual determines that he or she has a refund or has overpaid tax. *Nota bene*: this relief is available to individuals and not to corporations.

> 152 (4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining—at any time after the end of the normal reassessment period, of a taxpayer who is an individual (other than a trust) or a graduated rate estate, in respect of a taxation year—the amount of any refund to which the taxpayer is entitled at that time for the year, or a reduction of an amount payable under this Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is 10 calendar years after the end of that taxation year,
>
> (a) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year; and
>
> (b) redetermine the amount, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 122.8(2) or (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 or deemed by subsection 122.61(1) to be an overpayment on account of the taxpayer's liability under this Part for the year.

The Federal Court of Appeal confirmed the discretionary nature of power granted to the Minister under this section in the decision for *Canada (Attorney General) v. Abraham*.[95] In these circumstances, a reviewing court will afford considerable deference to the Minister's decisions absent a lack of jurisdiction.

Waiving the Requirement to File a Form

Subsection 220(2.1) of the *ITA* grants the Minister discretion to waive requirements in other sections of the *ITA* that require a taxpayer file a specific form or other document.

> 220(2.1) Where any provision of this Act or a regulation requires a person to file a prescribed form, receipt or other document, or to provide prescribed information, the Minister may waive the requirement, but the person shall provide the document or information at the Minister's request.

Once again, due to the language of the provision—stating that the Minister "may" waive the requirement—the Minister's decision is discretionary and, therefore, the Federal Court will afford a significant degree of deference to the Minister's decision.

As discussed, in *ConocoPhillips*,[96] the Federal Court of Appeal recently upheld the Minister's decision that it did not have the authority to waive the taxpayer's requirement to serve a notice of objection. The Federal Court found that the Minister's interpretation of subs. 220(2.1) was reasonable based on the principals of statutory interpretation.

The Minister's Duty to Issue Assessments and Reassessments

Subsection 152(1) of the *ITA* provides that the "Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year" and assess the taxpayer. The *ITA* does not define "with all due dispatch" and, therefore, the Minister is not required to issue an assessment within a certain period. Instead, the Minister has the discretion to take time and consider the information in the return provided that the Minister's considerations are "reasonable and for a proper purpose of ascertaining and fixing the liability of the taxpayer".[97]

In *Ficek v. Canada (Attorney General)*[98] and *McNally v. Minister of National Revenue*,[99] the Federal Court considered whether the Minister failed to comply with the duty to issue an assessment with all due dispatch. *Ficek* and *McNally* are similar: in both cases, the taxpayers participated in tax shelter programs, and the Minister chose not to issue assessments until after the Minister completed its audit of the tax shelters as a way of deterring taxpayers from participating in tax shelters. In *Ficek*, the Minister's new policy was a pilot project at the Winnipeg Tax Centre; in *McNally*, the Minister's had adopted the policy nationally.[100]

In *Ficek*, the Minister informed Ms. Ficek that the Minister intended to hold assessment until after CRA audited the tax shelter. However, the evidence in the Federal Court was that the Minister's was holding the assessment to deter taxpayers from participating in tax shelter programs. The Federal Court held that the Minister's decision to withhold the assessment was based not on examining the return or ascertaining the liability but on an attempt to deter participation in tax shelters and that this was an improper consideration because it departed from the Minister's national policy.[101] The Court held that the Minister breached its duty to assess with all due dispatch and issued a *mandamus* order requiring the Minister to assess Ms. Ficek. The Minister did not appeal *Ficek*.

In *McNally*, the Minister adopted nationally the policy to hold reassessments *for the purpose of deterring participation in tax shelters*, and the Minister alleged that this was a valid motive and that the resulting delay in issuing the assessment did not violate the Minister's duty to assess with all due dispatch in subs. 152(1) of the *ITA*.[102] The Federal Court disagreed with the Minister's position and issued a *mandamus* order requiring the Minister to assess Mr. McNally. The Federal Court held that, as in *Ficek*, deterring taxpayers from participating in tax shelters is not a proper consideration and, although the Minister can hold an assessment to conduct an audit, "the decision to audit is so tainted by the real reason for the [National Tax Shelter Program and Policy] that the audit is an excuse for delay, not a reason for delay".[103]

The Minister complied with the Federal Court's *mandamus* order to issue the assessment. However, the Minister proceeded to appeal the Federal Court's decision in *McNally.* The Federal Court of Appeal refused to consider the Minister's appeal because the appeal was moot.[104]

It appears that the Minister's position is that she has wide discretion to delay issuing an assessment. To date, the Federal Court has not shared the Minister's view. The authors believe that the Minister will continue to pursue its position and that it is simply a matter of time before Federal Court of Appeal hears the Minister's appeal.

Interestingly, in both *Ficek* and *McNally*, the Federal Court declined to determine the standard of review when interpreting "with all due dispatch" in subs. 152(1). *McNally* did not discuss the standard of review at all. In *Ficek*, the Federal Court commented that "the standard of review is not particularly determinative in this case. The standard of review is either correctness because improper purpose goes to jurisdiction or irrelevant considerations, arbitrariness and improper purpose make a decision unreasonable".[105]

The Minister's Actions Related to Collecting Taxes and Issuing Refunds

The Federal Court has jurisdiction to review the Minister's collection actions to ensure that the actions are within the boundaries of the law.[106] Sections 222 to 229.1 of the *ITA* set out the Minister's rights and restrictions related to collecting tax debts. If a taxpayer believes that the Minister has taken action that is not in accordance with ss. 222-229.1 of the *ITA*, the taxpayer can bring an application for judicial review. However, the taxpayer's application must be clear in that it alleges that the Minister breached its legal duties or restrictions related to collecting tax under the *ITA* and that the application for judicial review is not a collateral attack on the correctness of the assessment of tax. See *Johnson v. Minister of National Revenue*[107] for the Federal Court of Appeal's analysis regarding the validity of the Minister's collection action related to Requirements to Pay.

Also, the Federal Court has jurisdiction to review whether the Minister issued refunds in accordance with the *ITA*. Section 164 of the *ITA* governs refunds. A taxpayer can request that the Minister refund an overpayment of tax. "Overpayment" is defined in subs. 164(7) of the *ITA*. If the Minister denies the taxpayer's refund request on the basis that the Minister disagrees that the taxpayer made any overpayment of tax, it is likely, although not entirely clear, that the Federal Court has jurisdiction to determine whether the Minister erred in refusing the taxpayer's application.

In *FMC Technologies Co. v. MNR*,[108] the Federal Court held that it did not have jurisdiction to review the Minister's decision because the taxpayer was, in fact, challenging that the withholding tax another person remitted should have been credited to the taxpayer's account.[109] On appeal to the Federal Court of Appeal,[110] the taxpayer argued that the Federal Court's decision was incorrect. The Federal Court of Appeal found it unnecessary to comment on jurisdiction or standard of review because the Federal Court of Appeal determined that that Minister's decision to deny the refund was correct.[111]

Recently, in *Imperial Oil Resources Limited v. Attorney General of Canada*,[112] the Federal Court of Appeal had another opportunity to consider the "overpayment" definition in subsection 164(7) of the *ITA*. In this case, the question was whether a remission of a tax debt as a result of the operation of the *Syncrude Remission Order* [*SRO*][113] could create an "overpayment" as defined in the *ITA*. At para. 48, the Federal Court of Appeal held the interpretation of the *SRO* and *ITA* is a question of law and is reviewable on the correctness standard. It is clear that the standard of review is correctness when interpreting whether a remission of tax under the *SRO* creates an overpayment under the *ITA*. However, it is unclear whether an interpretation of the overpayment definition on its own or any other part of s. 164 of the *ITA* is on the correctness or reasonableness standard.

Possible Other Matters Subject to Judicial Review—Failure to Perform Duty Required under the Income Tax Act

As discussed above, in *JP Morgan*, the FCA confirmed that the Federal Court does not have jurisdiction: when there is "adequate, effective recourse elsewhere or at another time".[114] A side effect of defining the Federal Court's jurisdiction using this negative boundary is that there may be matters under the *ITA* properly the subject of judicial review that have not been litigated. In *JP Morgan*, the Federal Court made this point explicitly when it stated that the Federal Court's jurisdiction to review the Minister's administrative action "should be left for development, case-by-case" using the principles set out in *JP Morgan*.

With this in mind, when a taxpayer disputes a Minister's decision, action, inaction, assessment, or any other exercise of Ministerial duty, the taxpayer must canvass the *ITA* to determine whether the *ITA* provides an appeal or other type of dispute resolution procedure. If the *ITA* is silent, then taxpayers have recourse for judicial review.

In addition to novel matters that may be the subject of judicial review, the *ITA* provides that the Minister has the discretion to make certain decisions related to specific matters in ss. 206.4 and 207.06 and subs. 85(7.1), 122.62(2), 204.1(4), 204.91(2) of the *ITA*. The legislation provides that the Minister has discretion in each instance, and, therefore, the Federal Court will review the Minister's decision on a reasonableness standard.

Special Considerations

Administrative Action before Judicial Review

Since judicial review is the Federal Court's review of the Minister's administrative action, there must exist a Ministerial action (or inaction) before a taxpayer can apply to the Federal Court for judicial review. As set out above, there are several types of Ministerial action under the *ITA* subject to judicial review.[115] Some involve a taxpayer making a request that the Minister take certain action or exercise discretion to grant relief under the *ITA*; others involve the Minister enforcing the *ITA* (e.g., issuing assessments and reassessments, or taking collection action to enforce payment of tax).

However, only one type of ministerial action sets out a clear administrative procedure a taxpayer must follow before a taxpayer can apply for judicial review: requests that the Minister exercise discretion to grant certain relief. The Minister sets out the administrative procedure for requesting penalty and interest relief under the Voluntary Disclosures Program and the Taxpayer Relief Program.

Under the Voluntary Disclosures Program, the Minister's policy is set out in Information Circular IC00-R4, at paras. 43-62. Specifically, it sets out (1) that a taxpayer must initiate a request for penalty and interest relief under the Voluntary Disclosures Program by sending a written request to the Minister; (2) that if the Minister denies the taxpayer's request and the taxpayer believes the Minister's decision is incorrect, the taxpayer must submit a request for second administrative review; and (3) that if the Minister denies the taxpayer's second administrative review request and the taxpayer disagrees with the Minister's decision, the taxpayer's recourse is to apply to the Federal Court for judicial review of the Minister's decision.

Under the Taxpayer Relief Program, the Minister sets out a similar administrative process, including a first written request, a second administrative review, and an application to the Federal Court for judicial review if the taxpayer does not believe the Minister exercised discretion properly.[116]

Note that under subs. 18.1(2) of the *Federal Courts Act*, a taxpayer must file a notice of application for judicial review within 30 days of the Minister's decision. The deadline is 30 days from the date set out in the Minister's decision letter, not 30 days from the date the taxpayer receives the Minister's decision.

For the other *ITA* administrative action subject to judicial review, the Minister has not explicitly set out a procedure for submitting a second administrative review. However, in practice, it may be useful for practitioners to adopt the same approach and submit a request for second administrative review in every case in which the practitioner believes that judicial review is the appropriate forum. The benefit of adopting the two-level administrative action procedure before applying for judicial review is that it gives the taxpayer two opportunities to present facts, evidence, and arguments to support the taxpayer's position. A taxpayer is restricted from presenting new facts, evidence, and arguments at the judicial review stage.[117]

Setting up the Factual and Evidentiary Record before Judicial Review

Perhaps the most important element of a judicial review application is that **a taxpayer cannot submit in the judicial review any facts or evidence that was not already before the Minister's decision maker, subject to a few limited exceptions**. The exceptions are (1) evidence that supports an allegation that there was no evidence to support the Minister's finding of fact; (2) evidence that establishes an insufficient basis for the administrative

action taken; and (3) evidence of a breach of the duty of fairness.

In this section, we examine how a taxpayer can use the initial request (First-Level Request), the information gained as a result of the Minister's denial of the First-Level Request, and the request for second administrative review to set up a factual and evidentiary record that will put the taxpayer in the best position to succeed in a judicial review application.

The First-Level Request

A detailed review of a taxpayer's First-Level Request that the Minister exercise discretion or comply with a Ministerial duty under the *ITA* is beyond the scope of this Practical Insight. However, in judicial review matters, the initial request is important in two ways. First, it is the taxpayer's first opportunity to provide the facts, evidence, and arguments to support the taxpayer's request. Second, when the Minister communicates the Minister's decision to the taxpayer, the taxpayer can identify, with specificity, the reasons the Minister denied the taxpayer's request. A taxpayer can use the information gained at the First-Level Request to increase the prospect of success at the second administrative review, and establish the factual and evidentiary record for the judicial review.

The Minister's Reasons for Denying the First-Level Request

The Minister typically communicates with taxpayers in writing. This also applies to communicating decisions related to ministerial administrative action. When the Minister communicates her decision, the Minister usually provides reasons upon which the Minister based the decision. It is these reasons that provide the taxpayer with the basis for filling in the factual, evidentiary, and even argument gaps at the second administrative review. Consider the following basic example. A taxpayer requests that the Minister exercise discretion to waive and cancel penalties, based on financial hardship (e.g., after paying for the individual's family's basic living expenses, the amount the individual can pay towards the tax, interest, and penalties, is very low). However, the Minister denies the individual's request because, although the individual's income is limited, the individual has significant equity in a property. The Minister's basis for denying the request for relief is that the individual has sufficient equity in the property to pay the tax, interest, and penalties in full. The individual knows that she is unable to withdraw any equity out of her property because banks and other lenders will not extend her a mortgage due to her low income. In this example, the individual knows the additional facts and evidence she needs to provide as part of the second administrative review: proof that banks and other lenders will not extend her a mortgage.

Upon receiving the Minister's decision letter denying the taxpayer's request for relief, the taxpayer should carefully read the Minister's reasons for denial. If the taxpayer has facts or evidence to disprove the facts upon which the Minister based the decision, or if the taxpayer believes that the Minister's review was improper, the taxpayer should address these issues explicitly in the taxpayer's written submissions at the second administrative review.

Additional Steps a Taxpayer Should Take to Determine the Minister's Reasons before Initiating the Request for Second Administrative Review

As discussed, the second administrative review is the taxpayer's last opportunity to present facts, evidence, and arguments to support the taxpayer's request for relief. In these circumstances, it is imperative that the taxpayer submits all documents to the Minister at the second administrative review stage.[118] Note that neither the *ITA* nor the Minister's Information Circulars or other published documents sets a limitation period within which a

taxpayer must file the second administrative review. Consequently, practitioners can take as much time as necessary to ensure that they have all relevant information to prepare persuasive submissions and evidence, and establish complete judicial review record.

Whether or not the Minister's decision letter communicates details reasons, prudent taxpayers and practitioners will take the following three steps before submitting a request for second administrative review:

1. submit an Access to Information and Privacy Request related to the First-Level Review to gain access to the Minister's internal files (the ATIP Request);

2. call the Minister's decision maker to discuss the decision and the reasons behind the decision (the Why Call); and

3. send a letter to the Minister's decision maker requesting that the decision maker provide, in writing, the Minister's complete basis for denying the taxpayer's request for relief (the Why Letter).

A taxpayer can take all three actions immediately after receiving the Minister's decision letter.

The ATIP Request

The ATIP Request is an effective tool in allowing the taxpayer to access the Minister's decision maker's internal files. The decision maker's internal files often contain more information than the Minister's decision letter and, therefore, are valuable in providing the taxpayer with information behind the Minister's decision that the taxpayer would not otherwise have. The purpose of the ATIP Request is to allow the taxpayer to determine what the Minister's decision maker believed to be deficiencies in the taxpayer's request so that the taxpayer can address the alleged deficiencies either by sending additional documents or making additional arguments. CRA typically takes three to six months to provide the documents requested in the ATIP Request, but because there is no limitation periods for a taxpayer initiate a second administrative review, there is no downside to making the ATIP Request and waiting for the ATIP Disclosure.

The Why Call

A practitioner should make the Why Call before sending the Why Letter. This way, the practitioner has the option to incorporate the Why Call discussion into the Why Letter. At the outset of the Why Call, the practitioner should make it clear that the practitioner is not calling to dispute the Minister's decision, but simply to get more information about the reasons for the Minister's decision. The Why Call should not be an argument or an attack on the Minister's decision maker; instead, it should be a fact-gathering mission. A simple telephone call can be informative and allow the taxpayer to get first-hand knowledge regarding the facts on which the decision turned. There is no authority requiring the Minister's decision maker to speak to the taxpayer. However, the attempt is worth the effort and, at a minimum, the discussion (or the refusal to discuss) is more evidence to support the application for second-level administrative review.

The Why Letter

Similar to the Why Call, the Why Letter should state explicitly that the Why Letter does not intend to dispute the Minister's decision or to initiate a second administrative review but to better understand the Minister's First-Level Decision. The Why Letter should ask that the Minister respond in writing so that there is a written record of the Minister's response. A non-exhaustive list of types of information the Why Letter includes as follows:

1. a list of facts, documents, and other evidence the decision maker relied on in reaching the decision;

2. on which facts, if any, the decision maker placed significant weight in reaching the decision and the reasons for doing so;

3. which facts, if any, the decision maker disregarded and the reasons for doing so;

4. the arguments the decision maker considered;

5. the decision maker's complete reasons for denying each argument considered;

6. if there are any other reasons, not communicated to the taxpayer, that would have caused the Minister to have denied the taxpayer's request; and

7. any other consideration that impacted the decision.

Stated simply, the purpose of the ATIP Request, the Why Call, and the Why Letter are to identify all possible bases for denying the First-Level Request so that that taxpayer can remedy the taxpayer's factual and evidentiary case, and make all possible arguments in the second administrative review stage. This way, the taxpayer can uncover the complete factual and evidentiary record for the judicial review application and is not precluded from entering evidence in the Federal Court or from making arguments based on certain facts, documents, or evidence that were not before the Minister's decision maker at either the First-Level Review or the second administrative review.

The Second Administrative Review

A detailed review of a taxpayer's second administrative review is beyond the scope of this Practical Insight. However, the taxpayer should initiate the request for second administrative review only after the taxpayer has received and reviewed the ATIP Disclosure, has conducted (or attempted to conduct) the Why Call and has documented the Minister's reasons set out in the Why Call, and has received and reviewed the Minister's written response to the Why Letter. It is only after taking these additional steps that the taxpayer will have sufficient information to be able to establish the necessary record to have all arguments available in Federal Court at the judicial review stage.

Initiating an Application for Judicial Review

Subsection 18(3) of the *Federal Courts Act* requires that a taxpayer seeking the remedies available in subs. 18(1) file an application for judicial review as set out under s. 18.1 of the *Federal Courts Act*.

30-Day Limitation Period

Section 18.1(2) of the *Federal Courts Act* sets out a 30-day limitation period within which the taxpayer must bring an application for judicial review.

> 18.1(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

The language regarding when the 30-day limitation period starts is not clear. The legislation provides that the 30-day limitation period starts at "the time the decision or order was first communicated by the federal board, commission or other tribunal ... to the party directly affected by it". One can interpret the 30-day period to start on either the date of the Minister's written decision or the date the taxpayer received the Minister's written decision. However, the Federal Court recently held that the proper interpretation is the former: the 30-day limitation period starts from the date of the Minister's letter setting out the Minister's decision.[119] In practice, because the Minister sends the decision by mail, a taxpayer receives the Minister's letter several days after the Minister dated and issued the letter. In these circumstances, a taxpayer has less than 30 days to file the application for judicial review (typically, 22-26 days). Therefore, it is recommended that taxpayers register for the CRA's online "My Account" services so they can receive their decisions immediately and without the mail delay.

It is important to file the application for judicial review within the 30-day limitation period. If the taxpayer files an application for judicial review after the 30-day limitation period has expired—without submitting a request for an extension of time—the Minister will initiate a motion to strike out the taxpayer's application. If the Minister does not bring a motion to strike out the application for judicial review, the Federal Court will still be unable to grant the relief requested and will likely dismiss the applications for lack of jurisdiction due to the expiry of the limitation period. The limitation period applies, even if a taxpayer believes there is recourse in another court (e.g., Tax Court) or through another dispute resolution mechanism. If the taxpayer's recourse is in the Federal Court, the 30-day limitation period applies notwithstanding that the taxpayer sought recourse elsewhere and treated the Federal Court as a court of last resort.[120]

However, a failure to file a judicial review application within the 30-day limitation period does not definitively extinguish the taxpayer's ability to file an application for judicial review. If a taxpayer recognizes that the 30-day limitation period expired, the taxpayer can request that the Federal Court grant leave for the taxpayer to late-file the application for judicial review. This extension is rooted in subs. 18.1(2), which provides that the applicant must bring an application for an extension of time within 30 days "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".

Grewal v. Canada is the leading authority related to the extension of time to file an application for judicial review.[121] In *Grewal*, the Federal Court held that the Federal Court's primary consideration in exercising

discretion over whether to grant a request for an extension to submit an application for judicial review is "to do justice between the parties". As part of its analysis, the Court identified the following considerations for determining justice between the parties:

1. whether the applicant intended to bring the judicial review within the period allowed for bringing the application and whether that intention was continuous thereafter,

2. the length of the period of the extension,

3. prejudice to the opposing party,

4. the explanation for the delay, and

5. whether there is an arguable case for quashing the order the applicant wishes to challenge on judicial review.[122]

Again, practitioners should note that there is no limitation period within which a taxpayer must initiate a second administrative review and should leverage the time to build strong and complete submissions. Moreover, practitioners should anticipate a potential judicial review and plan early to meet the 30-day limitation period for filing the application for judicial review.

What Must Be Included in the Notice of Application

Sections 301-319 of the *Federal Courts Rules* set out the procedural steps, rules, and time periods for judicial review applications.[123] Section 301 sets out what a taxpayer must include in the Notice of Application to initiate the judicial review application.

> 301 An application shall be commenced by a notice of application in Form 301, setting out
> (a) the name of the court to which the application is addressed;
> (b) the names of the applicant and respondent;
> (c) where the application is an application for judicial review,
> (i) the tribunal in respect of which the application is made, and
> (ii) the date and details of any order in respect of which judicial review is sought and the date on which it was first communicated to the applicant;
> (d) a precise statement of the relief sought;
> (e) a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on; and
> (f) a list of the documentary evidence to be used at the hearing of the application.

As set out above, in *JP Morgan*, the Federal Court of Appeal provides guidance to applicants regarding the substantive requirements for a judicial review application.[124] The Federal Court highlighted the following three considerations for taxpayers

> [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.
>
> ...
>
> [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".

As set out above in the section entitled "Jurisdiction", the Federal Court of Appeal and the Supreme Court of Canada have stated that any of three deficiencies in a notice of application qualifies as an obvious, fatal flaw warranting the striking out of that 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 the *Federal Courts Act* or some other legal principle; or

3. the Federal Court cannot grant the relief sought.[125]

See the section entitled "Jurisdiction" for a detailed analysis about these three factors.

Judicial Review Procedure

The *Federal Courts Rules*, at ss. 301-314, provide strict time periods for the completion of the steps before a hearing. See below the chart describing each step in a judicial review application, which party must take each step, the relevant section of the *Federal Courts Rules*, and the deadline for completing each step.[126]

Step Description	Party	*FCR*	Deadline

File notice of application in Form 301	**Applicant**	**301**	**30 days after the date of the Minister's decision letter**
Serve and file a notice of appearance in Form 305	**Respondent**	**305**	**10 days after the Federal Court Registrar serves the notice of application on the Minister**
Serve and file written request for tribunal material (if not included in the notice of application)	**Applicant**	**317**	**No deadline, but an applicant should include it in the notice of application to ensure timely receipt of the tribunal material**
Serve the requested tribunal material to the Applicant	**Respondent**	**318**	**20 days after the Applicant's request for the tribunal material**
Serve and file supporting affidavits and documentary exhibits	**Applicant**	**306**	**30 days after the Applicant files the notice of application for judicial review.**
Serve and file supporting affidavits and documentary exhibits	**Respondent**	**307**	**30 days after the Applicant served the Applicant's supporting affidavits**
Complete cross-examinations on the affidavits	**Applicant and Respondent**	**308**	**20 days after the Respondent filed the Respondent's supporting affidavit or the expiration of the time for doing so**
Serve and file the Applicant's Record (including the Applicant's Memorandum of Fact and Law).	**Applicant**	**309**	**20 days after the completion of cross-examinations or the expiration of the time for doing so**
Serve and file the Respondent's Record (including the Respondent's Memorandum of Fact and Law)	**Respondent**	**310**	**20 days after the Applicant serves the Applicant's Record**
Serve and file requisition for hearing in form 314	**Applicant**	**314**	**10 days after the Respondent serves the Respondent's Record or the expiration of the time for doing so**

Section 7 of the *Federal Courts Rules* provides that the parties can agree to extend the deadlines for completing the steps but that any such extension is limited to half of the original period. In other words, if the *Federal Courts Rules* provide that a deadline for a specific step is 30 days after the previous step, the parties can agree

to extend the deadline by up to an additional 15 days. The parties must record their agreement in writing (usually by way of written consent) and file proof of the parties-agreement in the Federal Court.

Tips and Traps

Factual and Evidentiary Restrictions

Witnesses do not give testimony at the hearing of a judicial review application. Instead, all evidence before the Federal Court is affidavit evidence. Each affiant is subject to cross-examination on the affiant's affidavit (if the opposing party chooses to conduct a cross-examination), and the transcript of the cross-examinations become part of the court record. Both parties can rely on the cross-examination transcripts in attempting to make their case.

As set out above in the section entitled "Setting up the Factual and Evidentiary Record before Judicial Review", a taxpayer cannot submit or rely on any facts or evidence that was not already before the Minister's decision maker.[127] In these circumstances, it is essential that the taxpayer disclose all facts and submit all documents and other evidence at the second administrative review. For specific strategies to gain access to all relevant documents and information before the second administrative review to ensure that the factual and evidentiary record is as robust as possible, please see the section above entitled "Additional Steps a Taxpayer Should Take to Determine the Minister's Reasons before Initiation the Request for Second Administrative Review".

The factual and evidentiary restrictions apply to both parties. The Minister cannot introduce new evidence in the judicial review procedure, which was not before the decision maker.[128] In *Spidel v. Canada*,[129] the Minister filed an affidavit to support the Minister's decision that was under review. The affidavit contained evidence that had not been before the decision maker. The Federal Court refused to consider the new evidence because the new evidence appeared "to be an attempt by the respondent to 'shore-up' the Assistant Commissioner's decision".[130]

Cross-Examination on the Affidavit Evidence

In most cases, the Minister's affiant will be the Minister's decision maker. For example, in a request for penalty and interest relief, the CRA officer that made the decision at the second administrative review stage will be the Minister's affiant. This is logical because the Federal Court's judicial review examines the Minister's decision at the second administrative review. Practitioners should exercise the right to cross-examine the Minister's affiant because the cross-examination is the only opportunity the practitioner has to expand on, or expose, the reviewable factual or legal errors in the Minister's decision.

In Discretionary Decisions the Minister's Decision, Not the Taxpayer's Knowledge, Is under Review

When a taxpayer requests that the Minister exercise discretion (e.g., to waive and cancel interest or penalties, waive a requirement to file a form, or any other discretionary decision), the Federal Court will review the Minister's decision maker's decision. The taxpayer's evidence or knowledge is irrelevant at the judicial review stage. Instead, the relevant items in this type of judicial review are (1) the facts and evidence that were before the Minister's decision maker; and (2) the decision maker's analysis of the facts and evidence, interpretation and

application of legislation and case law, and conclusions. In these circumstances, Minister is not entitled to elicit new facts or evidence from the taxpayer at the judicial review stage to support the Minister's decision. Instead, the Minister can only support the Minister's decision with the factual and evidentiary record that was before the decision maker.

Due to these restrictions, the authors' position is that the taxpayer does not need to swear the affidavit to support the application for judicial review. Instead, any person that has knowledge of the record that was before the Minister's decision maker can swear the affidavit to support the Applicant's judicial review application. Unless the Applicant alleges that the Minister's decision was procedurally unfair, the sole purpose of the Applicant's affidavit is to put before the Federal Court the record that was before the decision maker.

Often an employee of the law firm or accounting firm that acted for the Applicant during the administrative action can swear the affidavit and put the record before the court because the employee can confirm the documents that were sent to the Minister's decision maker during the administrative action. Again, the basis for the authors' position is that the Applicant's supporting affidavit is limited to the record that was before the decision maker.

Department of Justice (the Minister's counsel) has taken a different position. The Department of Justice has alleged that when the Applicant herself does not swear the supporting affidavit and the Department of Justice does not have the opportunity to cross-examine the Applicant, the Applicant is hiding, and the Federal Court should draw an adverse inference from the Applicant's failure to expose herself to cross-examination. The Department of Justice's position does not seem to have any basis and, in fact, is contrary to the Federal Court's comments in *Spidel*[131] and in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*.[132]

Settlement Considerations—Instructions to a New Decision Maker

In some cases, the Department of Justice will agree to send the matter back to the Minister for re-determination. In this situation, the parties will typically execute Minutes of Settlement to confirm the parties' agreement, and either the Applicant files a notice of discontinuance to withdraw the application for judicial review or the Respondent consents to the Federal Court issuing an order allowing the application for judicial review. In either case, the contents of the Minutes of Settlement will dictate the parties' agreement, including the parties' rights and obligations on re-determination.

When negotiating Minutes of Settlement, practitioners should insist that the Minutes of Settlement contain the same information that would be in a Federal Court order setting aside the Minister's decision and sending the matter back for re-determination. As set out in the section entitled "Relief Available in Judicial Review", the Federal Court identifies the Minister's error and provides instructions to ensure that the Minister does not make the same error. In *Slau FCA*, the Federal Court of Appeal confirmed that the Federal Court cannot the issue an order directing the Minister to exercise discretion in a specific way. However, an order can contain sufficient directions to ensure that the Minister is aware of the error and will not make the same error.

The authors' experience is that the Department of Justice is, at best, reluctant to identify the Minister's error or provide any specific instructions to the new decision maker in the Minutes of Settlement. However, without such information, it is possible that the Minister will make the same decision and will base the decision on the same error. In these circumstances, the authors' view is that practitioners would be well served to insist that the Minutes of Settlement include the same type of identification and direction that a court reasons and order

would contain. For example, in *Slau FCA*, the Federal Court of Appeal held that the Minister based her decision on an erroneous fact and, on that basis, the Minister's decision was unreasonable because it was based on the erroneous fact.[133] Minutes of Settlement should identify what part of the Minister's decision was unreasonable or incorrect and why it is unreasonable or incorrect.

Also, practitioners should consider whether they can increase the chance of success on re-determination if they have the opportunity to make additional written submissions and produce new documents and evidence at the re-determination level. If so, they should push to include this language in the Minutes of Settlement.

Finally, Minutes of Settlement should prevent the Minister from reversing on the re-determination any relief the Minister granted in the Minister's previous decision. For example, consider the following facts: (1) the Minister cancelled interest related to the 2010 and 2011 taxation years but refused to cancel interest related to the 2012 and 2013 taxation years; (2) the taxpayer applied for judicial review of the Minister's decision not to cancel interest related to the 2012 and 2013 taxation years; and (3) the Minister agreed to settle the matter and send it back to for re-determination. The Minutes of Settlement should set out that the question for re-determination is the Minister's decision not to cancel interest related to the 2012 and 2013 taxation years, and that the Minister **cannot reconsider its previous decision to cancel interest related to the 2010 and 2011 taxation years.**

Case Study

The case study is designed to illustrate how to use the Tips & Traps to navigate, and win, an application for judicial review.

Salient Facts

The taxpayers' tax knowledge was limited and relied on professionals to comply with the *ITA*, meet deadlines, and act with diligence.

The taxpayers sold multiple real estate properties in the 1987-1989 taxation years. The accountant treated these sales as capital gains, but the CRA issued notices of reassessments on the basis that the sales were business income. The taxpayers did not agree with the CRA's position and purported tax payable. The taxpayers instructed their accountant to file notices of objection to dispute the notices of reassessments.

The accountant, failing to effectively take steps to object to the reassessments and in an attempt to hide his failures from the taxpayers, suggested a different remedy. The accountant filed a loss carryback request to apply the losses that the taxpayers suffered in the 1990 taxation year to the three previous years to offset the additional tax due on the reassessments. The CRA lost the request for loss carryback and never processed. In the interim, interest continued to accrue to the tax debt, and the original accountant died.

A new accountant began to pursue the matter. The CRA located the missing files and agreed to fix the matter as at the date that the taxpayers filed the request for loss carryback. However, again, the CRA lost the files. The new accountant worked to cause the CRA to process the request for loss carryback. The CRA located the files (for the second time) 12 years after the original request for loss carryback. Again, the CRA promised to process the request for loss carryback as at the date of the original filing and cancel the accrued interest. Although the CRA processed the request for loss carryback as at the date of the original filing, the CRA did not cancel a significant portion of the interest that accrued during the 12-year period.

The Request for Interest Relief

The taxpayers requested discretionary relief under subs. 220(3.1) of the *ITA* to cancel all interest that accrued during the 12-year period. The CRA denied the request and advised the taxpayers that they could file an application for judicial review to dispute the Minister's decision.

The taxpayers retained counsel and filed an application for judicial review to meet the 30-day limitation period. At the same time, the taxpayers filed a request under the *Access to Information Act* to track and establish every request that the taxpayers submitted related to the request for loss carryback over the 12-year period in an attempt to reopen the second administrative review stage. The taxpayers presented the Minister with the complete timeline and argument that the Minister did not provide the taxpayers with the opportunity to deliver submissions at the second administrative review stage. The CRA accepted the taxpayers' position and agreed to provide the taxpayers with the opportunity to provide new submissions at the second administrative review stage.

The taxpayers supplied new arguments and evidence to support the cancellation of interest at the second administrative review stage. Again, the Minister granted partial relief and cited the original decision maker's reasons to deny exercising discretion to cancel the majority of the interest.

Judicial Review

The taxpayers filed a second application for judicial review, and the Minister offered to settle the application on the basis that the Minister's decision was unreasonable; the Minister offered to send the matter back for another redetermination. The taxpayers requested—as part of the Minutes of Settlement—that the parties agree to the specific reasons that the Minister decision maker's decision was unreasonable, i.e., the taxpayers' position was that the Minutes of Settlement ought to provide the new decision maker with reasons and context. The Minister opposed the request on the basis that the reasons and context were an attempt to cause the Federal Court to issue a "directed verdict" that would compel the decision maker to cancel the interest. The Minister refused to add reasons and context to the Minutes of Settlement, and threatened costs.

The taxpayers requested a settlement conference. The Prothonotary issued a Direction that allowed the taxpayers to submit submissions to provide the new decision maker with reasons and context and instructed the Minister to use its best efforts to issue its decision within eight months.

The Minister assigned a new decision maker. The taxpayers filed submissions to provide reasons and context. The Minister canceled all remaining interest.

Government Publications

Information Circulars

Information Circular 07-1R1: Taxpayer Relief Provisions

Information Circular 00-1R6: Voluntary Disclosure Program

Information Circular 98-1R7: Tax Collection Policies

Guides and Manuals

2015-03: CRA Appeals Manual

2018-08: Taxpayer Relief Procedures Manual

2021-08: Voluntary Disclosure Program (VDP) Operations Manual (v 4.0)

CRA Guide RC17(E) Rev. 20: Taxpayer Bill of Rights Guide: Understanding Your Rights as a Taxpayer

CRA's Audit Manual, Chapter 3.0, 11.6.6, and Appendix A-11.2.24

canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/complaints-disputes/judicial-review.html [CRA Judicial Review]

CRA Views Documents

1994-9421446: Reassessment to Reduce Penalty under Fairness Legislation

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2 *Dunsmuir*, *ibid*, at para. 28, citing *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, p. 234 [*Crevier*]; and citing *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, para. 21 [*Dr. Q.*].
3 *Dunsmuir*, *ibid*, para. 31.
4 See *Crevier*, pp. 237 and 238, where Laskin C.J. stated "[i]t cannot be left to a provincial statutory tribunal, in the face of s. 96 [of the *Constitution Act, 1867*], to determine the limits of its own jurisdiction without appeal or review".
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31 *JP Morgan*, *supra* note 12, para. 81.
32 *Addison & Leyen*, *supra* note 15, para. 11.
33 *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 [*Vavilov*].
34 *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54; applied recently in *Wilson v. Atomic Energy of Canada*, 2015 FCA 17, para. 43 (reversed at S.C.C. on other grounds).
35 *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, para. 33.
36 *Dunsmuir*, *supra* note 1, para. 37.
37 *Ibid*, para. 38.
38 *Ibid* at para. 13.
39 *Ibid* at para 15.
40 *Ibid* at para. 86.
41 *Ibid* at para. 89.
42 *Ibid* at para. 91.
43 *Ibid* at paras. 105 to 135 contains a discussion of potential legal and factual constraints.
44 *Ibid* at para. 101.

[45] *Ibid* at para. 138.
[46] *Ibid* at para. 50.
[47] *Vavilov, supra* note 33 at paras. 16 and 25.
[48] *Ibid*, at para. 17.
[49] *Ibid,* at paras. 34 and 35.
[50] *Ibid.*
[51] *Ibid,* at para. 36.
[52] *Housen v. Nikolaisen,* 2002 SCC 33.
[53] *Vaviolov, supra* note 32 at para. 50.
[54] *Ibid,* at para 51.
[55] *Ibid,* at para 52.
[56] *Ibid,* at para 53.
[57] *Ibid,* at para. 198.
[58] *Ibid* at paras. 199 to 201
[59] *Northern Regional Health Authority v. Horrocks,* 2021 SCC 42, citing *Vavilov* at paras. 7 to 8 and 31.
[60] *Canada (Citizenship and Immigration) v. Khosa,* [2009] 1 S.C.R. 5 [Khosa] atIbid*,* at para 63.
[61] *Edison v. The Queen*, [2001] 3 C.T.C. 233, paras. 24-25 (F.C.).
[62] *Ibid*, para. 29; see also *Robertson v. Minister of National Revenue*, 2001 FCT 876 (F.C.).
[63] *Adams v. Canada Revenue Agency*, 2009 FC 995, para. 12.
[64] *Williams v. Minister of National Revenue*, 2011 FC 766, para. 24.
[65] *Ibid*, para. 31.
[66] *Kerr v. Canada (Attorney General)*, 2008 FC 1073, paras. 52-53.
[67] *Schillaci v. Canada*, 2021 FC 22 [*Schillaci*], at para 18 citing Canadian Pacific Railway v. Canada (Attorney General), 2018 FCA 69.
[68] *Ibid*, para. 44.
[69] *Spence v. Canada Revenue Agency*, 2010 FC 52.
[70] *Ibid*, para. 22.
[71] *ConocoPhillips Canada Resources Corp. v. Canada (National Revenue)*, 2017 FCA 243 [*ConocoPhillips FCA*].
[72] *CoconoPhillips Canada Resources Corp. v. Minister of National Revenue,* 2016 FC 98 at para. 24.
[73] *Ibid*, paras. 55 and 56.
[74] *ConocoPhillips FCA, supra* note 71, para. 34
[75] *Ibid,* para 37.
[76] *Vavilov* supra 32.
[77] *Finanders v. Canada (Attorney General),* 2015 FC 448.
[78] *Ibid*, para. 35.
[79] *Khosa*, *supra* note 60, para. 47.
[80] *Montréal (Ville) c. Société Radio-Canada*, 2006 FC 113, para. 19.
[81] *Addison & Leyen*, *supra* note 15, para. 10.
[82] 2009 FCA 270 [*Slau FCA*].
[83] *Slau Limited v. Canada Revenue Agency*, 2008 FC 1142 [*Slau FC*].
[84] *Ibid*, para. 53.
[85] *Slau FCA*, *supra* note 82, paras. 40-41.
[86] *Ibid*, para. 43.
[87] *Ibid*, para. 39.
[88] *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2.
[89] *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299.
[90] See the section above, entitled “Jurisdiction”.
[91] See Information Circular IC00-R4 for details related to the Minister’s Voluntary Disclosures Program.
[92] See Information Circular IC07-1, specifically paras. 19-44, for details related to the Minister’s Policy regarding waiving and cancelling penalties and interest.
[93] See *Lanno v. Canada (Customs & Revenue Agency)*, 2005 FCA 153; *Comeau c. Canada (Agence des Douanes & du Revenu)*, 2005 CAF 271 (F.C.A.); *Vitellaro v. Canada (Customs & Revenue Agency)*, 2005 FCA 166; *Canada Revenue Agency v. Telfer*, 2009 FCA 23.
[94] *Sharma v. Canada (Customs & Revenue Agency)*, 2001 FCT 584, para. 23 (F.C.T.D.).
[95] 2012 FCA 266.
[96] *CoconoPhillips FCA, supra* note 71.

[97] *J. Stoller Construction Ltd. v. M.N.R.*, [1989] 1 C.T.C. 2171, para. 21 (T.C.C.).
[98] 2013 FC 502 [*Ficek*].
[99] 2015 FC 767 *[McNally*].
[100] *Ibid*, paras. 28-29.
[101] *Ficek*, *supra* note 98, para. 35.
[102] *McNally*, *supra* note 99, paras. 3 and 9.
[103] *Ibid*, para. 40.
[104] *Minister of National Revenue v. McNally*, 2015 FCA 248.
[105] *Ficek*, *supra* note 98, para. 18.
[106] *Walker v. The Queen*, 2005 FCA 393, para. 15; *JP Morgan*, *supra* note 12, para. 96.
[107] 2015 FCA 51; leave to appeal to S.C.C. dismissed.
[108] *FMC Technologies Co. v. Minister of National Revenue*, 2008 FC 871.
[109] *Ibid*, para. 49.
[110] *FMC Technologies Co. v. MNR*, 2009 FCA 217, leave to appeal to S.C.C. dismissed.
[111] *Ibid*, para. 9.
[112] 2016 FCA 139, para. 48 [*Imperial Oil*].
[113] C.R.C., c. 794.
[114] *JP Morgan*, *supra* note 12, para. 84, citing *Harelkin*, *supra* note 30.
[115] See the section above entitled "*Income Tax Act* Provisions Subject to the Judicial Review Regime" for analysis Minister's actions under the *ITA* that are subject to judicial review.
[116] Information Circular IC07-1, paras. 103-108.
[117] Subject to limited exceptions—see the section entitled "Setting up the Factual and Evidentiary Record before Judicial Review" below.
[118] The authors have been known to submit full Access to Information and Privacy (ATIP) Disclosures to the Minister as part of a second administrative review, including on one occasion a 6,000 ATIP Disclosure simply to ensure that all documents were before the Minister's decision maker in a request for the cancellation of interest.
[119] *R & S Industries Inc. v. Minister of National Revenue*, 2016 FC 275.
[120] *Imperial Oil*, *supra* note 112.
[121] *Grewal v. Minister of Employment and Immigration*, [1985] 2 FC 263.
[122] *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture & Agri-Food)*, 2007 FC 789.
[123] SOR/98-106 [*Federal Courts Rules*].
[124] *JP Morgan*, *supra* note 12, paras. 38-46.
[125] *Ibid*, para. 66.
[126] Saunders, Brian J., Donald J. Rennie, and Graham Garton, *Federal Courts Practice* (Toronto: Carswell, 2009).
[127] Subject to the exceptions set out in the section entitled "Setting up the Factual and Evidentiary Record before Judicial Review".
[128] *Ibid*.
[129] 2012 FC 958 [*Spidel*].
[130] *Ibid*, para. 79. More generally, see *Spidel*, paras. 77-79.
[131] *Ibid*, *supra* note 139, paras. 77-79.
[132] 2012 FCA 22, paras. 14-19.
[133] *Slau FCA*, *supra* note 82, para. 39.