

# Judicial Review in Tax Cases - JP Morgan Asset Management

## When is Judicial Review Available in Tax Cases?

*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, [2013 FCA 250](#)

In this decision, the FCA provides a detailed and clear analysis of the question of when judicial review at the Federal Court is available in tax cases. The decision was prompted by the FCA's displeasure at the "flow of unmeritorious applications for judicial review in the area of tax" (para 29). Judicial review is available in tax cases (para 30), but the availability must be considered in light of administrative law principles (para 31) that exist to both (1) protect citizens from governmental abuse, AND (2) to protect the ability of decision makers to exercise the power they are given by law (para 34-35). In some cases the law sets out WHEN and HOW these powers can be challenged, and where specified the procedure set out by law must be followed (absent a constitutional or rule of law challenge) (para 35).

The FCA provided guidance to prevent future circumstances where "[a]rmed with sophisticated wordsmithing tools and cunning minds, skillful pleaders can make Tax matters sound like administrative law matters when they are not of the sort" (para 49). In seeking to vindicate clients' rights, counsel must select the appropriate forum.

## FACTS

This was an appeal by the MNR to renew its attempt to strike out an application for judicial review by JP Morgan. In bringing the application JP Morgan claimed that the MNR improperly exercised its discretion by departing from its own policies. The Prothonotary and the FCTD dismissed the MNR's motion to strike the application. The FCA, in this decision, granted the MNR's appeal and struck the application.

## ANALYSIS

The FCA reviewed the powers and limits thereof of the MNR, the TCC, and the FCTD, and provided guidance as to how properly to plead in an application for judicial review (as well as the proper use of affidavit evidence in motions to strike). See the decision at paragraphs 39-64 for the details.

In dealing with notices to strike an application for judicial review in tax matter, the FCA stated that the application ought to be struck where:

- no cognizable administrative law claim is stated;
- the Federal Court cannot deal with the administrative law claim due to section 18.5 (Federal Courts Act) or some other rule of law; or
- the Federal Court cannot grant the relief sought.

1) In order for there to be a cognizable administrative law claim, two criteria must be satisfied:

(a) Judicial review must be available under the Federal Courts Act, and (b) the application must state a ground of review known to, or recognizable at, administrative law. (para 68-70). Recognizable claims include lack of vires, procedural unacceptability, substantive unacceptability. Abuse of discretion may come under these three heads either as improper purpose, bad faith, fettering of discretion, and lack of discretion. However, some matter alone are not an abuse of discretion, including: (i) creating expectation of substantive outcomes, but not delivering; and (ii) departing from stated policy. The FCA noted that the MNR, in determining the tax liability of the taxpayer, has no discretion and therefore cannot be said to have abused his/her discretion.

2) An application for judicial review will be barred by section 18.5 of the Federal Courts Act where another Act of Parliament has granted authority to another court of body to deal with a particular subject or matter. In tax cases, a challenge to the assessment, additional assessment or reassessment is barred by 18.5 as the TCC has exclusive jurisdiction to deal with this issue. The FCA stated that judicial review is a matter of last resort, or available where no other mechanism of appeal is available or where the mechanism is inadequate (cannot provide an adequate remedy). In tax matters, the TCC is an adequate alternative when the issue is (i) the validity of assessments, (ii) the admissibility of evidence supporting an assessment, (iii) an abuse of the TCC process, or (iv) inadequate procedure used by the MNR in making the assessment. However, where the TCC does not have power to set aside an assessment, for example due to MNR's reprehensible conduct leading up to the assessment, then section 18.5 does not apply. Despite s 18.5 not applying, Judicial review may not be available where there is an adequate alternative remedy, including an action for breach of contract, regulatory negligence, negligent misrepresentation, etc (depending on the facts - see paragraph 89).

3) Where the judicial review is in character or outcome an attack on the assessment - thus where the remedy sought is setting aside the assessment, the application must be struck because this power lies exclusively with the TCC.

The FCA recognizes that this decision appears to severely limit the availability of judicial review in tax cases. In light of this the FCA notes that judicial review is available in tax cases where the decision is one of pure discretion by the MNR (eg granting or denying an application under the fairness provisions, etc), or where it relates to conduct in collection of tax debts.

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