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2022 FCA 70

Her Majesty the Queen (*Appellant/Respondent on cross-appeal*)

v.

Dow Chemical Canada ULC (*Respondent/Appellant on cross-appeal*)

INDEXED AS: CANADA V. DOW CHEMICAL CANADA ULC

Federal Court of Appeal, Webb, Rennie and Locke JJ.A.—By videoconference, February 15; Ottawa, April 26, 2022.

Income Tax — Practice — Appeal, cross--appeal from Tax Court of Canada decision determining that decision by Minister of National Revenue (Minister) to deny taxpayer's request for downward transfer pricing adjustment not outside exclusive original jurisdiction granted to Tax Court under Tax Court of Canada Act, s. 12, Income Tax Act (ITA), s. 171 — Minister reassessed respondent's 2006 taxation year by increasing respondent's income — Reassessment reflected Minister's decision not to allow reduction in income for 2006 based on increased interest expense — Reassessment for respondent's 2007 taxation year reflected reduction in income based on increased interest expense — Minister denied respondent's request to reduce its income by the increased interest expense for its 2006 taxation year — None of the reassessments included additional interest expense for 2006 — Tax Court rejected respondent's submissions that provisions of ITA, s. 247(11) resulted in Minister's decision under s. 247(10) having same objection, appeal rights that apply when an assessment is issued — Tax Court concluded that on appeal of resulting assessment, Tax Court both permitted, required to review manner in which Minister came to her determination under s. 247(10) — Tax Court noting that determination under s. 247(10) not made with respect to particular amount — Rather, discretionary decision whether appropriate that taxpayer's income be reduced by amount that has been identified as downward adjustment under ITA, s. 247(2) of the ITA — Whether Minister's decision under s. 247(10) outside exclusive jurisdiction granted to Tax Court — Opinion rendered by Minister under subsection 247(10) outside exclusive jurisdiction of Tax Court — Resolution of this appeal turned on different remedies that may be granted by Tax Court, Federal Court — Remedies available to Tax Court may not be adequate — S. 247(10) imposing condition on adjustment that would otherwise be required to be made under s. 247(2) — Only condition resulting in downward adjustment being made to respondent's income was favourable opinion of Minister that circumstances were such that it would be appropriate to make adjustment — Tax Court having only three options available to it under ITA, s.171(1), i.e.

vacate, vary, or refer assessment back to Minister — Only remedies warranting consideration were right to vary assessment or refer assessment back to Minister for reconsideration, reassessment — Determination whether appropriate that downward adjustment be made delegated by Parliament to Minister — In order for Tax Court to vary or set aside product of assessment, opinion rendered by Minister would have to be changed from an unfavourable opinion to one that is favourable to respondent — Remedies granted to Tax Court under s. 171(1) not extending to power to vary opinion of Minister rendered under s. 247(10) or to quash this opinion — No inherent jurisdiction allowing Tax Court to vary or quash Minister's opinion — Only jurisdiction conferred on Tax Court by ITA is jurisdiction to provide remedy directly impacting assessment — Not necessary for Tax Court to have power to quash Minister's opinion rendered under subsection 247(10) — Parliament chose Minister, not Tax Court to determine if circumstances such that it is appropriate that downward adjustment be made — As a result, validity of opinion more properly matter for judicial review in Federal Court, which has power to quash opinion — Assessment correct — Tax Court cannot grant mandatory order that opinion of Minister to be favourable opinion under s. 247(10) — Cross--appeal raising hypothetical question not based on facts as presented to Court — Not proper cross--appeal — Order granted by Tax Court set aside — Appeal allowed; cross--appeal dismissed.

Federal Court Jurisdiction — Tax Court of Canada determining that decision by Minister of National Revenue (Minister) to deny taxpayer's request for downward transfer pricing adjustment not outside exclusive original jurisdiction granted to Tax Court under Tax Court of Canada Act, s. 12, Income Tax Act (ITA), s. 171 — Minister denied respondent's request to reduce its income by the increased interest expense for its 2006 taxation year — Tax Court concluded, in considering its appellate jurisdiction, that on appeal of resulting assessment, under its appellate jurisdiction, Tax Court both permitted, required to review manner in which Minister came to her determination under ITA, s. 247(10) — Tax Court Ddistinguishinged discretionary decisions of Minister to waive tax, interest or penalties from opinion rendered under s. 247(10) — Whether Minister's decision under s. 247(10) outside exclusive jurisdiction granted to Tax Court — Tax Court rejected respondent's submissions that provisions of ITA, s. 247(11) resulted in Minister's decision under s. 247(10) having same objection, appeal rights that apply when an assessment is issued — Tax Court concluded that on appeal of resulting assessment, Tax Court both permitted, required to review manner in which Minister came to her determination under s. 247(10) — Whether Minister's decision under s. 247(10) outside exclusive jurisdiction granted to Tax Court — Opinion rendered by Minister under ITA, s.subsection 247(10) outside exclusive jurisdiction of Tax Court — Resolution of this appeal turned on different remedies that may be granted by Tax Court, Federal Court — Tax Court having only three options available to it under ITA, s.171(1) if appeal to Tax Court allowed, i.e. vacate, vary, or refer assessment back to Minister — Remedies granted to Tax Court under s. 171(1) not extending to power to vary opinion of Minister rendered under s. 247(10) or to quash this opinion — Tax Court not having power granted to Federal Court under Federal Courts Act, s. 18.1(3) on application for judicial review to quash decision of Minister — Validity of opinion more properly matter for judicial review in Federal Court, which has power to quash opinion.

This was an appeal and cross-appeal from a Tax Court of Canada decision. The Tax Court had been asked to determine the following question:

> Where the Minister of National Revenue has exercised her discretion pursuant to subsection 247(10) of the *Income Tax Act* ("ITA") to deny a taxpayer's request for a downward transfer pricing adjustment, is that a decision falling outside the exclusive original jurisdiction granted to the Tax Court of Canada under section 12 of the *Tax Court of Canada Act* and section 171 of the ITA?

The Tax Court determined that such a decision by the Minister is not outside the exclusive original jurisdiction granted to the Tax Court under section 12 of the *Tax Court of Canada Act* and section 171 of the *Income Tax Act* (ITA). In the present appeal, the Crown was asking that the question as

posed by the parties be answered in the affirmative.

By way of background, the Minister reassessed the respondent's 2006 taxation year by adding approximately $307 million to its income, as a result of certain transfer pricing adjustments made under section 247 of the ITA in relation to intercompany transactions. Following the filing by the respondent of its notice of objection, the Minister proposed, in a letter dated March 9, 2012, an increase to the interest expense claimed by the respondent for 2006 and 2007 in relation to amounts that it had borrowed. The parties agreed that the respondent's 2006 taxation year was reassessed on December 12, 2012. This reassessment reflected the Minister's decision not to allow the reduction in income for 2006 based on the increased interest expense. The reassessment issued on December 12, 2012, for the respondent's 2007 taxation year reflected the reduction in income based on the increased interest expense. In 2013, the Minister denied the respondent's request to reduce its income by the increased interest expense for its 2006 taxation year. The respondent was subsequently reassessed in 2015 and in 2017 for its 2006 taxation year. None of the reassessments included the additional interest expense for 2006 that was identified in the March 9, 2012, letter. The Tax Court concluded, in considering its appellate jurisdiction, that on an appeal of the resulting assessment, under its appellate jurisdiction, the Tax Court is both permitted and required to review the manner in which the Minister came to her determination under subsection 247(10). The Tax Court distinguished the discretionary decisions of the Minister to waive tax, interest or penalties from the opinion rendered under subsection 247(10), on the basis that the Minister's discretion to waive tax, interest or penalties is only exercised after a correct assessment is made. The Tax Court also noted that the determination under subsection 247(10) is not made with respect to a particular amount. Rather, the discretionary decision is whether it is appropriate that the taxpayer's income be reduced by the amount that has been identified as a downward adjustment under subsection 247(2) of the ITA.

At issue was whether the Minister's decision under subsection 247(10) of the ITA is outside the exclusive jurisdiction granted to the Tax Court.

Held, the appeal should be allowed and the cross-appeal dismissed.

The opinion rendered by the Minister under subsection 247(10) of the ITA is outside the exclusive jurisdiction of the Tax Court. The resolution of this appeal turned on the different remedies that may be granted by the Tax Court and the Federal Court. The Tax Court found that it could review the Minister's opinion and, if it should find that this opinion is not valid, it could then grant the remedies available to it under section 171 of the ITA. However, the remedies available to the Tax Court may not be adequate. Subsection 247(10) of the ITA is unique. It imposes a condition on an adjustment that would otherwise be required to be made under subsection 247(2) of the ITA, if that adjustment would reduce the income of a taxpayer. The only condition that would have resulted in the downward adjustment being made to the respondent's income was the favourable opinion of the Minister that the circumstances were such that it would be appropriate to make the adjustment. The Tax Court only has three options available to it under subsection 171(1) of the ITA if the appeal to the Tax Court is allowed. It can vacate the assessment, vary the assessment, or refer the assessment back to the Minister. Vacating the entire reassessment to only address the one issue concerning this downward adjustment was not a viable option. The only remedies that warranted consideration were the right to vary the assessment or refer the assessment back to the Minister for reconsideration and reassessment. The remedies are directed at the assessment. The determination of whether in the circumstances it was appropriate that the downward adjustment be made was delegated by Parliament to the Minister. The Minister's opinion under subsection 247(10) of the ITA is a separate decision of the Minister that precludes the reduction in income unless the opinion is that the circumstances are such that it is appropriate to allow the downward adjustment. In order for the Tax Court to vary or set aside the product of the assessment, i.e. the amount of taxes payable by the respondent for 2006, the opinion rendered by the Minister would have to be changed from an

unfavourable opinion to one that is favourable to the respondent. The requirement of a favourable opinion before the downward adjustment can be made distinguishes this provision from other provisions of the ITA where amounts claimed by taxpayers can be adjusted to amounts that are reasonable in the circumstances. The remedies granted to the Tax Court under subsection 171(1) of the ITA do not extend to the power to vary the opinion of the Minister rendered under subsection 247(10) or to quash this opinion. The Tax Court can only vacate, vary or refer an assessment back to the Minister. The opinion rendered by the Minister under subsection 247(10) is not an assessment, although it will affect an assessment. The Tax Court does not have the power that is granted to the Federal Court under subsection 18.1(3) of the Federal Courts Act on an application for judicial review to quash a decision of the Minister. There is no inherent jurisdiction that would allow the Tax Court to vary or quash the Minister's opinion. The power conferred by Parliament on the Tax Court to determine the correctness of an assessment does not, by implication, include the power to vary or quash the opinion rendered by the Minister under subsection 247(10). The only jurisdiction conferred on the Tax Court by the ITA is the jurisdiction to provide a remedy that directly impacts the assessment. The Tax Court can vacate an assessment, vary an assessment or refer the assessment back to the Minister. All of the remedies apply only to the assessment. It is also not necessary that the Tax Court have the power to quash the opinion rendered by the Minister under subsection 247(10) of the ITA, as the Federal Court is granted the power to quash a decision of the Minister under subsection 18.1(3) of the *Federal Courts Act*. Since Parliament delegated the authority to render this opinion to the Minister, the Minister has the jurisdiction to render this opinion. Parliament chose the Minister and not the Tax Court as the person who would determine if the circumstances are such that it is appropriate that the downward adjustment be made. As a result, the validity of the opinion is more properly a matter for judicial review in the Federal Court, which has the power to quash the opinion, if appropriate. Since the Tax Court does not have the power to quash an opinion rendered under subsection 247(10) of the Act, it will remain valid, unless it is quashed by the Federal Court on judicial review. Without the opinion of the Minister that it was appropriate to make the downward adjustment, the assessment (which does not reflect this downward adjustment) was correct. The Tax Court cannot grant a mandatory order (*mandamus*) that the opinion of the Minister is to be a favourable opinion under subsection 247(10) of the ITA, with the result that the downward adjustment should be made to the respondent's income for its 2006 taxation year.

In the cross-appeal, the respondent sought a variation in the Order that was granted by the Tax Court. The respondent was seeking to expand the situations in which the finding by the Tax Court would apply to include a scenario that was not present in the facts as submitted to the Tax Court. Since the cross-appeal only raised a hypothetical question that was not based on the facts as presented to the Court herein, it was not a proper cross-appeal. In any event, since the Minister's opinion rendered under subsection 247(10) of the ITA was not within the exclusive jurisdiction of the Tax Court, the requested variation was moot.

The order granted by the Tax Court was set aside, and the question as posed by the parties was answered in the affirmative.

STATUTES AND REGULATIONS CITED

Employment Insurance Act, S.C. 1996, c. 23, s. 5(3)(b).

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 18(1),(3), 18.1(1),(3), 18.5.

Income Tax Act, R.S.C., 1985 (5th Supp.), c. 1, ss. 67, 123(1), 165(1.2), 169, 171, 220(3.1), 247.

Income War Tax Act, R.S.C., 1927, c. 97, s. 6(2).

Tax Court of Canada Act, R.S.C., 1985, c. T-2, s. 12.

Tax Court of Canada Rules (General Procedure), SOR/90-688a, r. 58.

Unemployment Insurance Act, R.S.C., 1985, c. U--1, ss. 3(2)(c)(ii), 61, 70.

CASES CITED

APPLIED

Windsor (City) v. Canadian Transit Co., 2016 SCC 54, [2016] 2 S.C.R. 617.

DISTINGUISHED:

Minister of National Revenue v. Wrights' Canadian Ropes Ltd. (1946), [1947] A.C. 109, [1947] 1 D.L.R. 721 (P.C.).

CONSIDERED:

Pure Spring Co. Ltd. v. Minister of National Revenue, [1946] Ex. C.R. 471, [1947] 1 D.L.R. 501; *Tignish Auto Parts Inc. v. Minister of National Revenue* (1994),185 N.R. 73, [1994] 3 F.C. D-54, (C.A.); *Valente v. Canada (Minister of National Revenue)*, 2003 FCA 132, [2003] F.C.J. No. 418; *Main Rehabilitation Co. v. Canada*, 2004 FCA 403, 247 D.L.R. (4th) 597; *Canada v. Anchor Pointe Energy Ltd.*, 2007 FCA 188, [2008] 1 F.C.R. 839; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *ATCO Gas &and Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626; *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557.

REFERRED TO:

Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235; *Nicholson Ltd. v. Minister of National Revenue*, [1945] Ex. C.R. 191, [1945] 4 D.L.R. 683; *Bélanger v. Canada (Minister of National Revenue)*, 2003 FCA 455; *Quigley Electric Ltd. v. Canada (Minister of National Revenue)*, 2003 FCA 461; *Denis v. Canada (Minister of National Revenue)*, 2004 FCA 26; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14; *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55.

APPEAL AND CROSS-APPEAL from a Tax Court of Canada decision (2020 TCC 139) determining that the decision by the Minister of National Revenue to deny a taxpayer's request for a downward transfer pricing adjustment is not outside the exclusive original jurisdiction granted to the Tax Court under section 12 of the *Tax Court of Canada Act* and section 171 of the *Income Tax Act*. Appeal allowed; cross-appeal dismissed.

APPEARANCES

Samantha Hurst, *Aleksandrs Zemdegs* and *Jesse Epp-Fransen* for appellant.

Daniel Sandler, *Osnat Nemetz* and *Laura Jochimski* for respondent.

SOLICITORS OF RECORD

Deputy Attorney General of Canada for appellant.

EY Law LLP, Toronto, for respondent.

The following are the reasons for judgment and judgment rendered in English by

WEBB J.A.:

[1] This appeal and cross-appeal arise as a result of the response provided by the Tax Court of Canada to a question submitted under rule 58 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a. The question was:

> Where the Minister of National Revenue has exercised her discretion pursuant to subsection 247(10) of the *Income Tax Act* ("ITA") to deny a taxpayer's request for a downward transfer pricing adjustment, is that a decision falling outside the exclusive original jurisdiction granted to the Tax Court of Canada under section 12 of the *Tax Court of Canada Act* and section 171 of the ITA?

[2] This question arose in the context of the appeal commenced by Dow Chemical Canada ULC (Dow) in relation to the reassessment of its 2006 taxation year.

[3] The Tax Court (2020 TCC 139) provided the following answer to this question:

> The Court has determined that where the Minister has decided, pursuant to subsection 247(10) of the *Income Tax Act (Canada)* [the *ITA*], to deny a taxpayer's request for a downward transfer pricing adjustment, that decision is not outside the exclusive original jurisdiction granted to the Court under section 12 of the *Tax Court of Canada Act* and section 171 of the *ITA* provided that the assessment resulting from that decision has been properly appealed to the Court…

[4] The Crown, in its appeal to this Court, is asking that the question as posed by the parties be answered in the affirmative. In its cross-appeal, Dow is seeking an amended response. In Dow's view, the decision of the Minister of National Revenue (the Minister) under subsection 247(10) of the *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1 (the ITA) is within the exclusive jurisdiction of the Tax Court of Canada, regardless of whether an assessment has been issued.

[5] For the reasons that follow, I would allow the appeal and answer the question as originally posed under rule 58 in the affirmative, as the Federal Court has the jurisdiction to judicially review the Minister's opinion rendered under subsection 247(10) of the ITA. I would dismiss the cross-appeal.

I. Background

[6] The parties submitted a Statement of Agreed Facts to the Tax Court for the purposes of the rule 58 proceeding.

[7] On December 14, 2011, the Minister reassessed Dow's 2006 taxation year by adding approximately $307 million to its income, as a result of certain transfer pricing adjustments made under section 247 of the ITA in relation to intercompany transactions involving Dow and Dow Europe GmbH (DowEur), a Swiss operating company with whom Dow was not dealing at arm's length.

[8] Dow served a notice of objection to the reassessment that included the additional amounts in its income. Following the filing of the notice of objection, the Minister sent a proposal letter, dated March 9, 2012, which included a proposed increase to the interest expense claimed by Dow for 2006 and 2007 in relation to amounts that it had borrowed from DowEur.

[9] Paragraphs 17 to 19 of the Statement of Agreed Facts stipulate:

> On December 11, 2012, the Minister issued another proposal letter to [Dow], in which the Minister advised that its previous proposal to increase the interest expense taken with respect to the DowEur Loan Amounts for [Dow's] 2006 taxation year would not be made due to the application of the limitation period in the Canada-Switzerland Tax Treaty.
>
> By that same letter, the Minister advised [Dow] that the proposed downward transfer pricing adjustment in respect of the interest expense taken with respect to the DowEur Loan Amounts for [Dow's] 2007 taxation year would be implemented.
>
> By Notices of Reassessment dated December 12, 2012, [Dow's] 2006 and 2007 taxation years were reassessed as outlined in the letter of December 11, 2012.

[10] Although the Crown submitted, at the hearing of this appeal, that the reassessments issued on December 12, 2012, did not reflect what was stated in the letter dated December 11, 2012, this is contrary to the facts that the parties had agreed upon. The parties agreed that Dow's 2006 taxation year was reassessed on December 12, 2012, as outlined in the letter dated the previous day. Therefore, this reassessment reflected the Minister's decision to not allow the reduction in income for 2006 based on the increased interest expense. The reassessment issued on December 12, 2012, for Dow's 2007 taxation year reflected the reduction in income based on the increased interest expense.

[11] On January 14, 2013, Dow submitted a request to the Minister to reduce its income by the increased interest expense that had been identified in the letter dated March 9, 2012, for its 2006 taxation year. The Minister, by a letter dated February 11, 2013, denied this request. On March 11, 2013, Dow sought judicial review of this decision in the Federal Court.

[12] Dow also objected to the reassessment dated December 12, 2012, respecting its 2006 taxation year. Dow was subsequently reassessed on December 14, 2015, and again on April 13, 2017, for its 2006 taxation year. None of the reassessments included the additional interest expense for 2006 that was identified in the letter dated March 9, 2012. The reassessment dated April 13, 2017, is the reassessment that is the subject of the appeal to the Tax Court.

II. Decision of the Tax Court

[13] The Tax Court Judge addressed a number of arguments that the parties had raised. The first argument was whether there was a right of appeal from the Minister's decision under subsection 247(10) of the ITA, as a result of the application of subsection 247(11) of the ITA. The Tax Court Judge rejected Dow's submissions that the provisions of subsection 247(11) of the ITA resulted in the Minister's decision under subsection 247(10) of the ITA having the same objection and appeal rights that apply when an assessment is issued.

[14] The Tax Court Judge then considered the Tax Court's appellate jurisdiction. As part of this analysis, the Tax Court Judge considered various decisions from the Exchequer Court of Canada and the Privy Council addressing appeals under the *Income War Tax Act*, R.S.C. 1927, c. 97. Under that statute, there were provisions that granted the Minister the discretion to make certain decisions that would have a direct impact on the income of taxpayers. The Tax Court Judge, in paragraph 144 of her reasons, set out her conclusions based on her review of the Exchequer Court and Privy Council decisions under the *Income War Tax Act* [at paragraph 144]:

> A review of the jurisprudence leads me to conclude that, where a taxpayer claims an entitlement to a downward transfer pricing adjustment, the Minister's decision under subsection 247(10), like the decisions the Minister was required to make under the *IWTA*, has to be made by the Minister before any assessment of a taxpayer's taxes can be made. That decision must be made judicially, i.e., in accordance with proper legal principles. If it is not, then the resulting assessment is incorrect. Thus, on an appeal of the resulting assessment, under its appellate jurisdiction, the Tax Court is both permitted and required to review the manner in which the Minister came to her determination under subsection 247(10).

[15] The Tax Court Judge also considered the provisions of the *Employment Insurance Act*, S.C. 1996, c. 23 (the EI Act) related to appeals from a ruling on insurability. She found (at paragraph 152 of her reasons) that the appeal rights under the EI Act are consistent with the scope of the Tax Court's appellate jurisdiction over an assessment, as interpreted by the Exchequer Court and the Privy Council.

[16] Furthermore, the Tax Court Judge compared the remedies that would be available to the Tax Court and the Federal Court and determined that [at paragraph 167]:

> Where a taxpayer disagrees with the Minister's decision under subsection 247(10), "the 'essential character' of the relief sought is the setting aside of an assessment", and that is beyond the powers of the Federal Court. [Footnote reference omitted.]

[17] The Tax Court Judge acknowledged that the Federal Court has judicial review jurisdiction to review decisions of the Minister related to the waiver or cancellation of penalties or interest under subsection 220(3.1) of the ITA. As noted by the Tax Court Judge, subsection 165(1.2) of the ITA provides that no objection may be made by a taxpayer to an assessment made under subsection 220(3.1) of the ITA, and hence no appeal would lie to the Tax Court in relation to such assessment.

[18] The Tax Court Judge noted, in paragraphs 183 and 184 of her reasons, that there are other Parts of the ITA that include provisions granting the Minister the discretion to waive or cancel tax that would otherwise be imposed. Subsection 165(1.2) of the ITA (which prohibits a taxpayer from making an objection to an assessment issued under subsection 220(3.1) of the ITA) does not include a reference to any assessment arising under these other provisions. However, as noted by the Tax Court Judge, many cases related to the exercise of the Minister's discretion under these other provisions have proceeded to the Federal Court by way of judicial review. Since these provisions were not part of the rule 58 question, the Tax Court Judge did not comment on the jurisdiction of the Tax Court in relation to these other provisions.

[19] In any event, the Tax Court Judge distinguished the discretionary decisions of the Minister to waive tax, interest or penalties (including subsection 220(3.1) and the other provisions referenced at paragraphs 183 and 184 of her reasons) from the opinion rendered under subsection 247(10) of the ITA, on the basis that the Minister's discretion to waive tax, interest or penalties is only exercised after a correct assessment is made. In her view, "where a taxpayer claims and establishes a downward transfer pricing adjustment, the determination under subsection 247(10) is not permissive – it must be made and it must be made before a correct assessment can be issued" (paragraph 191 of her reasons, emphasis added by the Tax Court Judge).

[20] The Tax Court Judge also noted that the determination under subsection 247(10) of the ITA is not made with respect to a particular amount. Rather, the discretionary decision is whether it is appropriate that the taxpayer's income be reduced by the amount that has been identified as a downward adjustment under subsection 247(2) of the ITA. The discretionary decision does not relate to the actual amount of such adjustment. As she noted in paragraph 208:

> … But, that discretion must be exercised on proper grounds before a correct assessment can be made. As a result, the manner in which that discretion is exercised is reviewable on an appeal of the resulting assessment. The amount of the downward transfer pricing adjustment is not something the Minister determines but that does not remove the matter from the Tax Court's jurisdiction. [Emphasis added by the Tax Court Judge.]

[21] As a result, the Tax Court Judge provided the modified response to the rule 58 question as indicated above.

III. Issue and Standard of Review

[22] The question as posed is a question of law. The question seeks to delineate the exclusive jurisdiction of the Tax Court, and, in particular, whether the Minister's decision under subsection 247(10) of the ITA is outside the exclusive jurisdiction granted to the Tax Court. Since this is a question of law, the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

IV. Analysis

[23] The transfer pricing rules are set out in section 247 of the ITA. One component of these rules is the adjustment made to certain amounts where a taxpayer and a non-resident person, who are not dealing with each other at arm's length, have agreed upon terms and conditions that differ from the terms and conditions that would have been agreed upon by persons dealing with each other at arm's length. Paragraph 247(2)(c) of the ITA provides that the amounts will be adjusted to reflect the terms and conditions that would have been agreed upon by persons dealing with each other at arm's length. As noted above, the application of the transfer pricing rules in subsection 247(2) of the ITA in this case resulted in a significant increase in Dow's income for 2006.

[24] However, the application of the same rules, i.e. the determination of what terms and conditions would have been reached between persons dealing with each other at arm's length, would, in this matter, also result in a decrease in Dow's income for 2006, as an additional amount that would have been paid as interest was identified. Subsection 247(2) of the ITA does not distinguish between an adjustment that would increase income and one that would decrease income. If, as in this case, an amount is identified that would decrease the income of the taxpayer, subsection 247(10) of the ITA provides that this downward adjustment is not to be made "unless, in the opinion of the Minister, the circumstances are such that it would be appropriate that the adjustment be made":

> **247 (1) …**
>
> **No adjustment unless appropriate**
>
> **(10)** An adjustment (other than an adjustment that results in or increases a transfer pricing capital adjustment or a transfer pricing income adjustment of a taxpayer for a taxation year) shall not be made under subsection 247(2) unless, in the opinion of the Minister, the circumstances are such that it would be appropriate that the adjustment be made.

[25] The Minister's opinion in this case is that the circumstances are not such that it would be appropriate to reduce Dow's income for 2006 by the amount of the additional interest expense that was identified as a downward adjustment under subsection 247(2) of the ITA.

[26] The issue in this appeal is not the appropriateness of this opinion, but whether this opinion is outside the exclusive jurisdiction of the Tax Court. The opinion will be outside the exclusive jurisdiction of the Tax Court if the Federal Court has the jurisdiction to judicially review the Minister's opinion.

A. *Relevant Statutory Provisions*

[27] Section 12 of the *Tax Court of Canada Act*, R.S.C., 1985, c. T-2, sets out the exclusive jurisdiction granted to the Tax Court. While the Tax Court is granted exclusive original jurisdiction in relation to a number of statutes, the only statute that is relevant in this appeal is the ITA. Subsection 12(1) of the *Tax Court of Canada Act* grants the Tax Court the following exclusive original jurisdiction to the Tax Court on matters arising under the ITA:

Jurisdiction

12 (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under … the *Income Tax Act* … when references or appeals to the Court are provided for in [that Act].

[28] The jurisdictional question in this appeal does not relate to a reference to the Tax Court. Therefore, the relevant part of subsection 12(1) of the *Tax Court of Canada Act* is the jurisdiction granted to the Tax Court to hear and determine appeals. Section 12 limits the right to hear and determine appeals to only those appeals to the Tax Court provided in the ITA.

[29] In the question as posed, the parties referred to section 171 of the ITA. However, this section sets out the remedies the Tax Court may grant on hearing an appeal. Section 169 of the ITA is the section that provides for an appeal to the Tax Court where a taxpayer has served a notice of objection to an assessment. The appeal granted by subsection 169(1) of the ITA is an "appeal to the Tax Court of Canada to have the assessment vacated or varied".

[30] The limited remedies that the Tax Court may grant in disposing of an appeal are set out in subsection 171(1) of the ITA:

Disposal of Appeal

171 (1) The Tax Court of Canada may dispose of an appeal by

(a) dismissing it; or

(b) allowing it and

(i) vacating the assessment,

(ii) varying the assessment, or

(iii) referring the assessment back to the Minister for reconsideration and reassessment.

[31] The Federal Court is also granted exclusive original jurisdiction under subsection 18(1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7, to grant certain remedies:

Extraordinary remedies, federal tribunals

18 (1) Subject to section 28, the Federal Court has exclusive original 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.

[32] The remedies contemplated by this subsection "may be obtained only on an application for judicial review made under section 18.1" (subsection 18(3) of the *Federal Courts Act*). Subsection 18.1(1) of the *Federal Courts Act* provides "[a]n application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought" and subsection 18.1(3) of that Act sets out the powers granted to the Federal Court on an application for judicial review:

> **18 (1) …**
>
> **Remedies to be obtained on application**
>
> **(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.

[33] Section 18.5 of the *Federal Courts Act* provides a limitation on the jurisdiction of the Federal Court when a right of appeal is expressly granted by another Act of Parliament:

> **Exception to sections 18 and 18.1**
>
> **18.5** Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act. [Emphasis added.]

[34] The result of these provisions is that if the ITA expressly provides for an appeal from the opinion of the Minister rendered under subsection 247(10) of the ITA, that appeal would be within the exclusive jurisdiction of the Tax Court. However, if the ITA does not expressly provide for an appeal of that opinion to the Tax Court, the Federal Court would retain jurisdiction to judicially review that opinion.

B. *Subsection 247(11) of the ITA*

[35] Dow argued that subsection 247(11) of the ITA provides for a separate right of appeal from the Minister's opinion rendered under subsection 247(10) of the ITA.

[36] Subsection 247(11) of the ITA stipulates:

> **247 (1) …**

Provisions applicable to Part

(11) Sections 152, 158, 159, 162 to 167 and Division J of Part I apply to this Part, with such modifications as the circumstances require.

[37] The sections listed in subsection 247(11) of the ITA include the sections related to the assessment of tax, objections and appeals to the Tax Court.

[38] The opinion in question is not, in and of itself, an assessment, although the opinion, if favourable to the taxpayer, would result in a reduction in income and hence a reduction in the tax payable by that taxpayer.

[39] I agree with the Tax Court Judge, generally for the reasons that she gave, that subsection 247(11) of the ITA does not provide for a separate right of appeal from this opinion.

[40] The determination that this opinion does not give rise to a separate right of appeal leads to the conclusion that the ITA does not expressly provide an appeal of this decision. Since section 18.5 of the *Federal Courts Act* only excludes the Federal Court from reviewing a decision when another Act expressly provides a right of appeal, this determination would lead to the finding that section 18.5 of the *Federal Courts Act* is not a bar to the Federal Court judicially reviewing this decision of the Minister.

C. *The Decisions of the Exchequer Court and the Privy Council*

[41] The Tax Court Judge completed a detailed review of certain decisions of the Exchequer Court of Canada and the Privy Council. These decisions arose under the *Income War Tax Act*. In these decisions, the Courts were not considering the different jurisdiction of the Federal Court and the Tax Court that exists today.

[42] In any event, two cases of note are *Pure Spring Co. Ltd. v. Minister of National Revenue*, [1946] Ex. C.R. 471, [1947] 1 D.L.R. 501 (a decision of the Exchequer Court) and *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.* (1946), [1947] A.C. 109, [1947] 1 D.L.R. 721 (a decision of the Privy Council) [*Wrights' Ropes*].

[43] The appeals in both cases arose as a result of a disallowance of an expense by the Minister under what was then subsection 6(2) of the *Income War Tax Act*:

6 (1) …

Limitation of expenses

6(2) The Minister may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income.

[44] In *Pure Spring*, Thorson, P. referred to an earlier decision that he had rendered in *Nicholson Ltd. v. Minister of National Revenue*, [1945] Ex. C.R. 191, [1945] 4 D.L.R.

683, and summarized his finding, at pages 524–525 [of the D.L.R. and at page 496 of the Ex. C.R.], as follows:

> After a review of the provisions of the Act relating to appeals the Court held that the appeal provided by the Income War Tax Act is not an appeal from any decision of the Minister but an appeal from the assessment made by him in the course of his functions in respect thereof; and that the right of appeal to the Court conferred by the Act does not carry with it any right of appeal from the Minister's determination in his discretion under section 6 (2). …

[45] Thorson, P. then referred to a decision from the Supreme Court of New South Wales that was cited by counsel for Pure Spring in which that Court reviewed the opinion of the Commissioner and allowed an appeal on the basis that the Court did not agree with the opinion expressed by the Commissioner.

[46] However, as noted by Thorson, P., the Australian statute provided not only a right of appeal from any assessment, but also an appeal from any opinion, decision or determination of the Commissioner under certain sections (including the one in issue in that case), whether in the exercise of discretion conferred upon the Commissioner or otherwise. This specific right of appeal from any underlying decision was not present in the *Income War Tax Act*, nor is it present in the ITA.

[47] Thorson, P. reiterated, at page 529 [of the D.L.R. and at page 501 of the Ex. C.R.], his conclusion that there is no right of appeal from the Minister's determination that was made in his discretion:

> In my opinion, it is quite clear that, under the Income War Tax Act as it stands, there is no right of appeal to the Court from the Minister's determination in his discretion under s. 6 (2).

[48] By contrast, in the subsequent decision of the Privy Council in *Wrights' Ropes*, the Privy Council did substitute its opinion for that of the Minister. The Minister had exercised his discretion to deny certain amounts claimed as commission expenses. The Privy Council considered the language of subsection 6(2) of the *Income War Tax Act* and the right of appeal to the Exchequer Court. The Privy Council noted that under subsection 6(2) of the *Income War Tax Act*, the Minister was the judge of what was reasonable or normal. The Privy Council found that the right of appeal to the Exchequer Court must have been intended to be an effective right and that the Court could, within certain limits, review the decision of the Minister and determine whether that decision was appropriate.

[49] Based on the evidence that was presented to the Court, the Privy Council found that there was no basis to justify the denial of the expense by the Minister. In determining the terms of the order that would be granted, the Privy Council referred to the inherent jurisdiction of the Court to grant an order compelling the Minister to reassess to allow the particular deduction.

[50] The decision of the Privy Council would appear to support the finding of the Tax Court Judge in this case. However, this decision was rendered in relation to the right of appeal to the Exchequer Court and not the right of appeal to the Tax Court. The issue in

this appeal relates to the jurisdiction of the Tax Court and the Federal Court, not the jurisdiction of the Exchequer Court as it related to appeals under the *Income War Tax Act*.

D. *The EI Act*

[51] The Tax Court Judge referred to appeals under the EI Act as support for her finding that the Minister's opinion rendered under subsection 247(10) of the ITA is within the exclusive jurisdiction of the Tax Court.

[52] Under the EI Act, if an employer and employee are related (within the meaning of the ITA), that employment will not be insurable employment unless the Minister "is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length" (paragraph 5(3)(b)).

[53] The same provision was also in the predecessor statute—the *Unemployment Insurance Act*, R.S.C., 1985, c. U-1, subparagraph 3(2)(c)(ii) (the UI Act).

[54] Therefore, the Minister under the UI Act had (and under the EI Act has) the discretion to determine if the employment of a particular person by another person with whom the employee is not dealing at arm's length is nonetheless insurable employment.

[55] The Tax Court Judge referred to a number of decisions of this Court that addressed the scope of the Tax Court's appellate jurisdiction when determining an appeal to that Court arising as a result of a determination made by the Minister concerning the insurability of certain employment. In particular, the Tax Court quoted the following passage from paragraph 18 of *Tignish Auto Parts Inc. v. Minister of National Revenue* (1994), 185 N.R. 73, [1994] 3 F.C. D-54 (C.A.):

> Once the Tax Court is of the view that the Minister's determination cannot stand, its power to "vary" under subsection 70(2) of the **Act** implies it can exercise fully the powers given to the Minister by the **Act**. There is, in my view, no reason to distinguish between a quasi-judicial decision rendered by the Minister … and a discretionary one. … [emphasis added by the Tax Court Judge]

[56] *Tignish Auto Parts* arose under the UI Act. All of the other cases cited by the Tax Court Judge (except *Valente v. Canada (Minister of National Revenue)*, 2003 FCA 132) also arose under the UI Act. *Valente* is a brief one paragraph decision of this Court which referred to earlier decisions arising under the UI Act. There are also other decisions of this Court under the EI Act (that were not cited by the Tax Court Judge) but which continue to rely on the decisions rendered under the UI Act (e.g. *Bélanger v. Canada (Minister of National Revenue),* 2003 FCA 455, *Quigley Electric Ltd. v. Canada (Minister of National Revenue)*, 2003 FCA 461, and *Denis v. Canada (Minister of National Revenue)*, 2004 FCA 26).

[57] Since the Tax Court Judge relied on *Tignish Auto Parts* for the proposition that the Tax Court could vary the decision made by the Minister concerning whether employment by a related person is insurable employment, the applicable provisions of the UI Act will be examined and compared to the provisions of the ITA setting out the rights of appeal to the Tax Court and the powers granted to the Tax Court under the ITA.

[58] Section 61 of the UI Act addressed the determination of questions arising under that statute. In particular, subsections 61(1), (3) and (6) of the UI Act provided as follows:

> **Determination of questions**
>
> 61 (1) Where any question arises under this Act as to whether a person is required to make a payment of an employee's premium, or an employer's premium, or as to the amount of any such premium, in a year,
>
> *(a)* the person concerned may, on or before April 30 in the immediately following year, apply to the Minister to determine the question; or
>
> (*b*) the Minister on his own initiative may at any time determine the question.
>
> ….
>
> **Question re insurable employment**
>
> (3) Where there arises in relation to a claim for benefit under this Act any question concerning
>
> (*a*) whether a person is or was employed in insurable employment,
>
> ….
>
> an application to the Minister for determination of the question may be made by the Commission at any time and by that person or the employer or purported employer of that person within ninety days after being notified of the decision of the Commission.
>
> ….
>
> **Decision**
>
> (6) On an application or an appeal under this section, the Minister shall, with all due despatch, determine the question raised by the application or vacate, confirm or vary the assessment, or reassess, and he shall thereupon notify any person affected.

[59] The question of whether certain employment was insurable employment could have arisen either indirectly under paragraph 61(1)(a), in relation to whether the employer or the employee was required to pay the applicable premium, or directly under paragraph 61(3)(a). In either case, the determination of the question was to be made by the Minister. The question of whether the employment of a person by a related person was insurable employment would depend on whether the Minister was satisfied that,

having regard to all the circumstances of employment, they would have entered into a similar contract of employment if they were dealing with each other at arm's length.

[60] An appeal from the determination or the decision of the Minister could have been made to the Tax Court under section 70 of the UI Act:

> **70** (1) The Commission or a person affected by a determination by, or a decision on an appeal to, the Minister under section 61 may, within ninety days after the determination or decision is communicated to him, or within such longer time as the Tax Court of Canada on application made to it within those ninety days may allow, appeal from the determination or decision to that Court in the manner prescribed.
>
> **Communication of determination or decision**
>
> (1.1) For the purpose of subsection (1), the determination of the time at which a decision on an appeal to, or a determination by, the Minister under section 61 is communicated to the Commission or to a person shall be made in accordance with the rule, if any, made under paragraph 20(1.1)(*h*.1) of the *Tax Court of Canada Act*.
>
> **Decision**
>
> (2) On an appeal under this section, the Tax Court of Canada may reverse, affirm or vary the determination, may vacate, confirm or vary the assessment or may refer the matter back to the Minister for reconsideration and reassessment, and shall thereupon in writing notify the parties to the appeal of its decision and the reasons therefor.

[61] The remedies granted to the Tax Court included the remedy to vary the determination made by the Minister under Section 61 of the UI Act. This presumably would include the right to vary the determination of insurability made by the Minister, which, for related persons, would include the determination of whether in all the circumstances they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[62] In contrast, under the ITA the appeal right granted under section 169 of the ITA is the right to "appeal to the Tax Court of Canada to have the assessment vacated or varied". The only remedial powers granted to the Tax Court under section 171 of the ITA are to vacate the assessment, vary the assessment, or refer the assessment back to the Minister for reconsideration and reassessment. The assessment, as noted below, is the product of the process of determining a taxpayer's liability under the ITA and not the process itself. As discussed further below, the powers granted to the Tax Court under the ITA would not include the power to vary the Minister's opinion or to compel the Minister to provide a certain opinion under subsection 247(10) of the ITA.

[63] As a result, the decisions decided under the UI Act do not support a finding that the Tax Court can review (and, if appropriate, set aside or vary) an opinion rendered by the Minister under subsection 247(10) of the ITA.

E. *The Remedies that may be Granted by the Tax Court versus the Federal Court*

[64] In my view, the resolution of this appeal turns on the different remedies that may be granted by the Tax Court and the Federal Court. At the conclusion of her reasons, the Tax Court Judge stated [at paragraphs 213–214]:

> The *ITA* provides a right to appeal an assessment. On the appeal of an assessment, can the appeal be allowed on the basis that the Minister did not exercise her power under subsection 247(10) correctly? I conclude that the answer is yes. Where the Minister did not exercise the discretion at all, or exercised it on incorrect principles, the assessment cannot be said to be correct. Consideration of the correctness of an assessment is within the exclusive jurisdiction of the Tax Court.
>
> This conclusion is consistent with prior jurisprudence on the scope of appellate jurisdiction on the appeal of an assessment. It also accords with the desirability of avoiding parallel proceedings in the Tax Court and the Federal Court. The Tax Court will address all challenges to the correctness of the assessment made after the transfer pricing provisions have been applied, including whether the conditions for their application are met, the amount of any adjustments, the liability for penalties and whether the Minister exercised her discretion properly. Once the Tax Court decides to allow an appeal of an assessment on the basis that the Minister did not act properly in exercising her discretion, the powers available to it under section 171 provide it with the relevant remedies. [Footnote reference omitted.]

[65] The Tax Court Judge found that the Tax Court could review the Minister's opinion and, if the Tax Court should find that this opinion is not valid (based on the applicable standard of review), the Tax Court could then grant the remedies available to the Tax Court under section 171 of the ITA, which the Tax Court Judge described as the "relevant remedies".

[66] However, the remedies available to the Tax Court may not be adequate. Dow's ultimate objective in this matter is to have a reassessment based on a reduction in income that reflects the downward adjustment. The question is what remedies may be required to achieve this objective, assuming that Dow is successful in establishing that this result is warranted in this case?

[67] The parties agree that subsection 247(10) of the ITA is unique. This subsection imposes a condition on an adjustment that would otherwise be required to be made under subsection 247(2) of the ITA, if that adjustment would reduce the income of a taxpayer. This downward adjustment to the income of the taxpayer can only be made if, "in the opinion of the Minister, the circumstances are such that it would be appropriate that the adjustment be made". It is therefore a condition that this opinion of the Minister be obtained in order for the adjustment to be made.

[68] Since a downward adjustment can only be made under subsection 247(2) of the ITA if the Minister provides the appropriate opinion, either:

(a) the absence of an opinion; or

(b) an opinion that the circumstances are such that it would not be appropriate to make the adjustment

would result in the downward adjustment not being made. The only condition that would result in the downward adjustment being made to Dow's income is the favourable opinion of the Minister that the circumstances are such that it would be appropriate to make the adjustment.

[69] The Tax Court only has three options available to it under subsection 171(1) of the ITA if the appeal to the Tax Court is allowed:

(a) vacate the assessment;

(b) vary the assessment; or

(c) refer the assessment back to the Minister for reconsideration and reassessment.

[70] The reassessment under appeal includes various adjustments made to Dow's income. For the purposes of this rule 58 question, the only focus is on the downward adjustment. Vacating the entire reassessment (which may include other adjustments that are valid) to only address the one issue concerning this downward adjustment is not a viable option.

[71] The only remedies that warrant consideration are the right to vary the assessment or refer the assessment back to the Minister for reconsideration and reassessment.

(1) The Minister's Opinion is not an Assessment

[72] The remedies are directed at the assessment. In *Main Rehabilitation Co. v. Canada*, 2004 FCA 403, 247 D.L.R. (4th) 597, this Court described what is in issue in an appeal to the Tax Court [at paragraph 8]:

> This is because what is in issue in an appeal pursuant to section 169 is the validity of the assessment and not the process by which it is established (see for instance [*The*] *Queen v.* [*The*] *Consumers' Gas Company Ltd.* 87 D.T.C. 5008 (F.C.A.) at p. 5012). Put another way, the question is not whether the CCRA officials exercised their powers properly, but whether the amounts assessed can be shown to be properly owing under the Act (*Ludco Enterprises Ltd. v. R.* [1996] 3 C.T.C. 74 (F.C.A.) at p. 84).

[73] In *Main Rehabilitation*, the taxpayer claimed in its pleadings that the assessment should be stayed as an abuse of process as a result of an alleged faulty audit conducted by the then Canada Customs and Revenue Agency (CCRA). Subsection 247(10) of the Act was not in issue in *Main Rehabilitation*. Therefore, the reference to the question of whether the officials of the CCRA exercised their powers properly does not necessarily mean that this comment was directed at the exercise by the Minister of his or her power to grant the opinion contemplated by subsection 247(10) of the ITA.

[74] In the subsequent case of *Canada v. Anchor Pointe Energy Ltd.*, 2007 FCA 188, [2008] 1 F.C.R. 839, at paragraphs 32–33, this Court found that what is under appeal to

the Tax Court is the product of the process of determining a taxpayer's liability under the ITA and not the process itself.

[75] In order to calculate the amount of tax owing by Dow for its 2006 taxation year, it is necessary to first determine its taxable income for that year, since the taxes payable are based on the amount of taxable income (subsection 123(1) of the ITA). Allowing the downward adjustment or not allowing the downward adjustment will have a direct impact on Dow's taxable income and, hence, its tax liability. However, the determination of whether in the circumstances it is appropriate that the downward adjustment be made was delegated by Parliament to the Minister. The Minister's opinion under subsection 247(10) of the ITA is a separate decision of the Minister that precludes the reduction in income unless the opinion is that the circumstances are such that it is appropriate to allow the downward adjustment. In order for the Tax Court to vary or set aside the product of the assessment, i.e. the amount of taxes payable by Dow for 2006, the opinion rendered by the Minister would have to be changed from an unfavourable opinion to one that is favourable to Dow.

[76] The requirement of a favourable opinion before the downward adjustment can be made distinguishes this provision from other provisions of the ITA where amounts claimed by taxpayers can be adjusted to amounts that are reasonable in the circumstances. For example, section 67 of the ITA limits expenses to the amounts that are "reasonable in the circumstances". Because the restriction set out in section 67 of the ITA is based on what is reasonable in the circumstances (and not what, in the opinion of the Minister, is reasonable in the circumstances), the issue of what is reasonable in the circumstances is a matter for determination by the Tax Court on an appeal from an assessment that reflects an adjustment under section 67 of the ITA to amounts claimed by a taxpayer.

[77] In my view, the remedies granted to the Tax Court under subsection 171(1) of the ITA do not extend to the power to vary the opinion of the Minister rendered under subsection 247(10) of the ITA or to quash this opinion. The Tax Court can only vacate, vary or refer an assessment back to the Minister. The opinion rendered by the Minister under subsection 247(10) of the ITA is not an assessment, although it will affect an assessment. The Tax Court does not have the power that is granted to the Federal Court under subsection 18.1(3) of the *Federal Courts Act* on an application for judicial review to quash a decision of the Minister.

(2) Inherent Jurisdiction and Implied Jurisdiction

[78] Since the Tax Court does not have the explicit authority to vary or quash the opinion, if the Tax Court has such authority it must be implicit.

[79] In *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617, at paragraph 33, the Supreme Court of Canada found that the Federal Court does not have any inherent jurisdiction, but rather only the jurisdiction conferred on it by statute. Since the Tax Court is also a statutory court, this finding applies equally to the Tax

Court. Therefore, there is no inherent jurisdiction that would allow the Tax Court to vary or quash the Minister's opinion.

[80] Although the Tax Court does not have any inherent jurisdiction, it does have an implied jurisdiction by necessary implication. In *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at paragraph 19, the Supreme Court of Canada confirmed that statutory courts have an implied jurisdiction by necessary implication to carry out the functions of a court. Since the Tax Court is a statutory court, it also has this implied jurisdiction. Therefore, "… the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime …" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at paragraph 51).

[81] However, in my view, the power conferred by Parliament on the Tax Court to determine the correctness of an assessment does not, by implication, include the power to vary or quash the opinion rendered by the Minister under subsection 247(10) of the ITA. The only jurisdiction conferred on the Tax Court by the ITA is the jurisdiction to provide a remedy that directly impacts the assessment. The Tax Court can vacate an assessment, vary an assessment or refer the assessment back to the Minister. All of the remedies apply only to the assessment.

[82] It is also not necessary that the Tax Court have the power to quash the opinion rendered by the Minister under subsection 247(10) of the ITA, as the Federal Court is granted the power to quash a decision of the Minister under subsection 18.1(3) of the *Federal Courts Act*. While it may be more convenient if the Tax Court could quash the opinion of the Minister (as the Tax Court will be addressing the appeal of the assessment that would be varied if the opinion is changed) it is not necessary that it have this power.

(3) Can the Tax Court Refer an Assessment Back to the Minister Without Quashing the Minister's Opinion?

[83] Since Parliament delegated the authority to render this opinion to the Minister, the Minister has the jurisdiction to render this opinion. Parliament chose the Minister and not the Tax Court as the person who would determine if the circumstances are such that it is appropriate that the downward adjustment be made. As a result, the validity of the opinion is more properly a matter for judicial review in the Federal Court, which has the power to quash the opinion, if appropriate.

[84] Since the Tax Court does not have the power to quash an opinion rendered under subsection 247(10) of the Act, it will remain valid, unless it is quashed by the Federal Court on judicial review (*Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14, at pages 583–584).

[85] The Supreme Court of Canada, in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 and *Canada (Attorney General) v. McArthur*, 2010

SCC 63, [2010] 3 S.C.R. 626, acknowledged that the Ontario Superior Court could not quash a decision of a federal tribunal. However, the Supreme Court held that the Ontario Superior Court could hear a claim for damages arising as a result of a decision of a federal tribunal, without first having that decision quashed by the Federal Court.

[86] However, in both *TeleZone* and *McArthur*, the plaintiffs were not seeking to set aside the decision of the applicable federal tribunal. As noted by the Supreme Court in paragraph 79, “TeleZone’s causes of action in contract, tort and equity are predicated on the finality of that decision”. While in *McArthur* the validity of the decision that Mr. McArthur be confined to solitary confinement would have been relevant to his claim for damages, he was not seeking to set this decision aside as he had completed his time in prison before he commenced his action.

[87] In this case, the barrier to having a reassessment that reflects the downward adjustment to Dow’s income is the absence of a favourable opinion of the Minister under subsection 247(10) of the ITA. Even if the Tax Court could review the opinion without quashing it, since the existing opinion would remain in place (and therefore there would not be an opinion of the Minister that it would be appropriate to make the downward adjustment), on what basis could the assessment be referred back to the Minister? Without the opinion of the Minister that it is appropriate to make the downward adjustment, the assessment (which does not reflect this downward adjustment) is correct.

(4) Directed Verdict

[88] There is another remedy that is only available to the Federal Court that is a relevant consideration—the power to grant a directed verdict, i.e. the power to substitute its opinion for the opinion of the Minister.

[89] If it should turn out that this is one of those rare cases where ultimately a directed verdict should be rendered by a court (and there is nothing in the record to suggest that this is the case or would be the case), the authority to render a directed verdict is part of the general law of *mandamus* (*Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55, at paragraph 13). The Federal Court (*per* subsection 18(1) of the *Federal Courts Act*) has the exclusive original jurisdiction to issue a writ of *mandamus*. The Tax Court cannot grant a mandatory order (*mandamus*) that the opinion of the Minister is to be a favourable opinion under subsection 247(10) of the ITA, with the result that the downward adjustment should be made to Dow’s income for its 2006 taxation year.

(5) Conclusion on Remedies

[90] As noted by Justice Stratas in *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557, a judicial review application can be made to the Federal Court when that Court can provide the remedy that is being sought (which would include *mandamus*). The remedy being sought in this

appeal consists of two components—a favourable opinion concerning the availability of the downward adjustment and a reassessment that reflects this downward adjustment.

[91] Since:

(a) the Federal Court is the only court that can quash the Minister's opinion and, if necessary, compel the Minister to render the opinion that the circumstances are such that it is appropriate to reduce Dow's income by the downward adjustment; and

(b) the Tax Court is the only court that can vary an assessment or refer an assessment back to the Minister for reconsideration and reassessment;

the remedies available to both courts may be required if Dow is to succeed.

[92] As a result, the opinion rendered by the Minister under subsection 247(10) of the ITA is outside the exclusive jurisdiction of the Tax Court.

V. Cross-appeal

[93] In the cross-appeal, Dow is seeking a variation in the Order that was granted by the Tax Court. The variation that is sought is that the opinion rendered by the Minister under subsection 247(10) of the ITA is not outside the exclusive jurisdiction of the Tax Court:

> a. if an assessment resulting from that decision has been properly appealed to the Tax Court; or
>
> b. if there is no assessment resulting from that decision, on the basis that references to "assessment" or "notice of assessment" in sections 165, 166.1 to 167 and Part J of the *ITA* refer to "the Minister's decision pursuant to subsection 247(10)", in accordance with subsection 247(11) of the *ITA*.

[94] Since Dow has appealed the assessment of its 2006 taxation year to the Tax Court, Dow, in the cross-appeal, is seeking to expand the situations in which the finding by the Tax Court would apply to include a scenario, as outlined in paragraph (b) above, that was not present in the facts as submitted to the Tax Court.

[95] Rule 58 is intended to allow the Tax Court to determine questions that "may dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs". It is not intended to be used to pose hypothetical questions that do not arise from the facts as presented to the Court. Since the cross-appeal only raised a hypothetical question that was not based on the facts as presented to the Court, in my view, it is not a proper cross-appeal.

[96] In any event, since I have concluded that the Minister's opinion rendered under subsection 247(10) of the ITA is not within the exclusive jurisdiction of the Tax Court, the requested variation is moot.

VI. Conclusion

[97] As a result, I would allow the appeal and dismiss the cross-appeal. I would set aside the Order granted by the Tax Court. Granting the Order that the Tax Court should have issued, I would answer the question as posed by the parties in the affirmative. I would award costs to the Crown in relation to this appeal and not award any costs in relation to the rule 58 proceeding in the Tax Court.

Rennie J.A.: I agree.

Locke J.A.: I agree.