Federal Court  Cour fédérale

Date: 20160127

Docket: T-1811-12

Citation: 2016 FC 98

Ottawa, Ontario, January 27, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

CONOCOPHILLIPS CANADA RESOURCES CORP.

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, ConocoPhillips Canada Resources Corp. [ConocoPhillips], brings this application for judicial review to determine whether the Minister of National Revenue has jurisdiction under subsection 220 (2.1) of the *Income Tax Act* R.S.C. 1985 c.1 [*ITA*] to waive the requirement that a taxpayer must file a timely notice of objection in order to obtain a reassessment of income tax payable by a taxpayer.

[2] After being advised in April 2010 of a reassessment that had occurred in 2008 of the tax payable for its 2000 income tax year, ConocoPhillips filed a late notice of objection, which the Minister rejected as invalid. This rejection prompted ConocoPhillips to apply to this Court for judicial review of the Minister's decision that she could not reassess the 2000 tax year (see: *ConocoPhillips Canada Resources Corp. v The Minister of National Revenue*, 2013 FC 1192, 235 ACWS (3d) 94). Ultimately, that application resulted in a decision by the Federal Court of Appeal on December 15, 2014 (*ConocoPhillips Canada Resources Corp. v The Minister of National Revenue*, 2014 FCA 297, 247 ACWS (3d) 717 [*ConocoPhillips FCA*], leave to appeal to SCC denied on October 8, 2015, Docket #36304); the Court of Appeal determined that ConocoPhillips' proper recourse was to commence an appeal to the Tax Court of Canada under paragraph 169(1)(b) of the *ITA* and to establish in that appeal that its notice of objection was filed in a timely manner.

[3] Meanwhile, ConocoPhillips requested that the Minister, under subsection 220(2.1) of the *ITA*, waive the requirement to file a notice of objection in respect of its 2000 tax year. The Minister's delegate denied this request in a letter dated August 29, 2012, concluding that "the Minister does not have the discretion under subsection 220(2.1) of the *Act* to waive the obligation to serve a notice of objection." ConocoPhillips challenges this determination, asking the Court to set it aside and refer the matter back to the Minister for a determination. It also requests a writ of mandamus for the Minister to redetermine the request for a waiver with such directions as the Court considers appropriate.

II. Facts

[4] ConocoPhillips' request that the Minister waive the requirement to file a notice of objection arises out of its participation in the Syncrude Oil Sands project. ConocoPhillips objected to the Minister's calculations of amounts remitted under the Minister's Syncrude Remission Order for the 2000 tax year. It and other participants in the Syncrude Oil Sands project, including Imperial Oil Resources Limited, filed applications for judicial review challenging the correctness of the Minister's calculations [collectively, the Imperial litigation]. Because ConocoPhillips refused to provide a waiver for its 2000 tax year in respect of adjustments that would occur if the Imperial litigation was resolved in favour of the Syncrude participants, the Minister reassessed ConocoPhillips for its 2000 tax year on the basis of potential, additional remission income. This reassessment increased ConocoPhillips' taxable income for 2000 by approximately $17,000,000, and ConocoPhillips served a timely notice of objection to this reassessment in 2006. ConocoPhillips characterizes this reassessment as a "protective assessment" inasmuch as it was based on possible extra remission amounts flowing to ConocoPhillips if the Imperial litigation was resolved in favour of the Syncrude participants.

[5] As matters turned out, ConocoPhillips did not receive any further amounts of remission income following final resolution of the Imperial litigation on May 13, 2010. ConocoPhillips alleges that once the Imperial litigation was resolved in the Crown's favour, it asked the Minister to reassess its 2000 taxation year but the Minister refused to do so. ConocoPhillips further alleges that both parties had clearly understood that the Minister would reassess once the Imperial litigation had been resolved.

[6] On April 14, 2010, ConocoPhillips learned that a second reassessment for its 2000 tax year had been issued on November 7, 2008, in respect of a matter unrelated to the potential remission income. This second reassessment nullified the first reassessment and the related notice of objection (which had been served in a timely manner) pertaining to such potential income. ConocoPhillips alleges it did not receive a copy of this second reassessment until May 2010 and hence did not file a notice of objection to this second reassessment within the applicable time limit. The Minister says the notice was mailed out on November 7, 2008. The copy of the notice of reassessment provided to ConocoPhillips in May 2010 was dated April 26, 2010, and was a reproduction of the one allegedly sent out in 2008.

[7] Upon receiving the second notice of reassessment in May 2010, ConocoPhillips attempted to serve a second notice of objection on June 7, 2010; the Minister rejected this notice of objection on September 15, 2010, stating that it was invalid because it had not been served in a timely manner and the time for requesting an extension of time to serve an objection had expired. This prompted ConocoPhillips to apply to this Court for judicial review of the Minister's decision that she could not reassess the 2000 tax year. That application, as noted at the outset of these reasons, eventually resulted in the decision of the Federal Court of Appeal finding that ConocoPhillips' proper recourse was to commence an appeal to the Tax Court of Canada under paragraph 169(1)(b) of the *ITA*.

[8] In addition to attempting to serve a second notice of objection with respect to the second reassessment, ConocoPhillips also requested on August 15, 2011, that the Minister, under subsection 220(2.1) of the *ITA*, waive the obligation to serve a notice of objection. However, as

noted above, the Minister denied this request, stating that "the scope of the Minister's authority under subsection 220(2.1) does not extend to objections to assessments." The Minister provided three reasons for this decision:

- First, the objection and appeals provisions are in Part I of the *ITA* and, in the Minister's view, constitute a complete code.
- Second, subsection 220(2.1) is a general provision and does not override the specific provisions in subsections 165(1) and 166.1(7) of the *ITA*.
- Third, the use of the word "serve" in subsection 165(1) of the *ITA* and the word "file" in subsection 220(2.1), as well as the words "may" in subsection 165(1) and "requires" in subsection 220(2.1), are intended to be distinguished.

[9] ConocoPhillips now seeks judicial review of the Minister's refusal under subsection 220(2.1) of the *ITA* to waive the obligation to serve a notice of objection.

III. Issues

[10] The Applicant raises two issues which can be rephrased as the following questions:

1. Did the Minister err in law in deciding she did not have authority under subsection 220(2.1) of the *ITA* to waive service of a notice of objection?
2. If so, did the Minister fail to observe natural justice and procedural fairness in refusing to waive service of a notice of objection?

[11] The Respondent asserts that the only question or issue is: does the Minister have jurisdiction under subsection 220(2.1) to waive the requirement to serve a notice of objection as required by subsections 165(1) and 165(1.1) of the *ITA*?

[12] Prior to addressing these issues, it is first necessary to address a preliminary question as to whether this matter is properly before this Court, and then to consider the applicable standard of review.

A. *Is the matter properly before the Federal Court?*

[13] Subsection 12(1) of the *Tax Court of Canada Act* empowers the Tax Court with "exclusive original jurisdiction to hear and determine references and appeals… on matters arising under… the Income Tax Act…" (R.S.C. 1985 c. T-2 [*TCCA*]). All appeals from the Minister's decisions regarding notices of objection are to the Tax Court. That court also has exclusive original jurisdiction to hear and determine questions referred to it under ss. 173 or 174 of the *ITA* (*TCCA* ss. 12(3)) as well as applications for extensions of time under sections 166.2 or 167 of the *ITA* (*TCCA* ss. 12(4)).

[14] The primary issue raised by this application for judicial review does not fall within one of the specifically enumerated bases of the Tax Court's jurisdiction and powers in sections 12 and 13 of the *TCCA*; nor is this application a specific appeal on an issue arising under the *ITA*. Rather, ConocoPhillips comes to this Court alleging that, contrary to the Minister's interpretation of subsection 220 (2.1) of the *ITA*, the Minister does have jurisdiction and authority to waive the requirement that a taxpayer must serve a timely notice of objection in order to question a

reassessment of income tax payable by a taxpayer. This, in turn, raises the question of whether ConocoPhillips' application for judicial review states a cognizable administrative law claim which can be brought in this Court.

[15] The Federal Court has broad powers with respect to judicial review, but it cannot deal with matters which are properly appealed to the Tax Court (see: *JP Morgan Asset Management (Canada) Inc. v MNR*, 2013 FCA 250 at para 27, [2013] FCJ No 1155 [*JP Morgan*]; *Federal Courts Act*, R.S.C. 1985, c. F-7, section 18.5 [*FCA*]). Specifically, this Court has jurisdiction over judicial review of decisions made by federal boards, commissions, and tribunals, including the Minister (*JP Morgan* at para 25). To be in Federal Court an applicant must: (1) show that judicial review is available under sections 18 and 18.1 of the *FCA*; and (2) "state a ground of review that is known to administrative law or that could be recognized in administrative law" (*JP Morgan* at paras 68-70). In *JP Morgan*, the Federal Court of Appeal identified (at para 70) three grounds of judicial review known to administrative law, namely: (a) lack of vires, (b) procedural unacceptability, and (c) substantive unacceptability (i.e., a decision that is not reasonable).

[16] Sections 18 and 18.1 of the *FCA* focus on the Federal Court's jurisdiction and the timelines and available remedies with respect to an application for judicial review. In this case, ConocoPhillips has met the appropriate timelines for its judicial review application and is requesting remedies which are clearly within this Court's jurisdiction. Consequently, its application for judicial review satisfies the first requirement emanating from *JP Morgan* (at paras 68-69; *Air Canada v Toronto Port Authority*, 2011 FCA 347 at paras 24-29, 211 ACWS (3d) 254).

[17] The second prong of the *JP Morgan* test asks whether the application states a ground of review known to administrative law or one which could be recognized in administrative law. In this case, ConocoPhillips raises a question as to whether it is within the Minister's jurisdiction to waive the requirement that a taxpayer must serve a timely notice of objection in order to request a reassessment of income tax payable by a taxpayer. This question, in turn, involves an issue of substantive unacceptability; namely, is the Minister's interpretation as to the scope of her authority reasonable? ConocoPhillips also raises a question of procedural fairness or procedural unacceptability, asserting that the Minister's refusal to grant the requested waiver breaches natural justice and procedural fairness. In my view, these questions underlie a cognizable administrative law claim.

[18] Indeed, in *JP Morgan* the Court of Appeal noted (at paras 71-73) that an abuse of discretion by the Minister, including the Minister fettering her discretion (something which ConocoPhillips argues in this case), is suitable for judicial review and should be regarded as a matter of substantive unacceptability. In addition, my conclusion that the present application is properly before this Court is reinforced by the following observation of Mr. Justice Stratas in *JP Morgan*:

> [90] …The Minister's section 220 decision is subject to judicial review in the Federal Court on administrative law principles. If the Minister approached the issue of fairness relief with a closed mind or makes a decision that is substantively unacceptable or procedurally unacceptable in administrative law, her decision is liable to be quashed [citations omitted].

[19] Unlike the applicant in *JP Morgan*, ConocoPhillips is requesting relief that can be granted by the Federal Court and has raised a question recognized by administrative law. It

argues that the Minister has improperly fettered her discretion based upon an erroneous interpretation of subsection 220(2.1) of the *ITA*. There is no specific appeal to the Tax Court for this type of matter and section 18.5 of the *FCA* is not applicable.

[20] Furthermore, this application is not a case where an applicant is using the Federal Court to review an assessment in an attempt to circumvent the Tax Court's jurisdiction. It is unlike the case in *ConocoPhillips FCA*, where the Court of Appeal held that the Tax Court was the proper forum for challenging the Minister's decision not to consider the late-filed notice of objection because there is a specific provision in paragraph 169(1)(b) of the *ITA* to appeal to the Tax Court. In this case, the impugned decision of the Minister is confined solely to an issue of the Minister's jurisdiction under subsection 220(2.1) of the *ITA*. The decision being questioned in this case is not whether a waiver under subsection 220(2.1) should or should not be granted. On the contrary, the question being raised by this application for judicial review is whether it is even within the Minister's jurisdiction under subsection 220(2.1) of the *ITA* to waive the requirement that a taxpayer must serve a timely notice of objection in order to question a reassessment of income tax payable.

B. *What is the Appropriate Standard of Review?*

[21] The parties submit that the question of the Minister's jurisdiction under subsection 220(2.1) of the *ITA* is a question of law and, consequently, one that should be reviewed on a standard of correctness.

[22] However, the Supreme Court of Canada has stated in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers*], that cases dealing with true issues of jurisdiction are exceptional. The majority decision of the Supreme Court in *Alberta Teachers* (per Rothstein, J.) offers the following guidance:

> [34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[23] More recently, the Supreme Court has reiterated the exceptional nature of truly jurisdictional questions in *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] AWLD 3680, a ratemaking case where Mr. Justice Rothstein, speaking for the Court, stated as follows:

> [27] …This Court's recent jurisprudence has emphasized that true questions of jurisdiction, if they exist as a category at all, an issue yet unresolved by the Court, are rare and exceptional: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 34. …

> [28] To the extent that an appeal also turns on the Commission's interpretation of its home statutes, a standard of reasonableness also presumptively applies: *Alberta Teachers' Association*, at para. 30. The presumption is not rebutted in this case.

[24] In this case, the Minister has interpreted a provision of the statute that grants her jurisdiction and authority to apply and administer the *ITA*. This, in my view, is similar to a tribunal interpreting its home statute. The Minister is, therefore, presumed to be familiar with her home statute. Accordingly, in view of *Alberta Teachers*, a deferential reasonableness standard of review, rather than a standard of correctness, should be adopted in reviewing the Minister's interpretation of subsection 220(2.1) of the *ITA*.

[25] As to the Applicant's question whether the Minister failed to observe natural justice or procedural fairness in refusing the requested waiver, the applicable standard of review is one of correctness: see *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3.

C. *Did the Minister err in law in deciding she did not have authority under subsections 220(2.1) of the ITA to waive service of a notice of objection?*

[26] In addressing this question, it is helpful at this point to set out the relevant provisions of the *ITA* which bear upon determining whether the Minister's interpretation of subsection 220(2.1), in the circumstances of this case, was reasonable:

PART I
INCOME TAX
DIVISION I
RETURNS, ASSESSMENTS, PAYMENT AND APPEALS

PARTIE I
IMPÔT SUR LE REVENU
SECTION I
DÉCLARATIONS, COTISATIONS, PAIEMENT ET APPELS

165. (1) A taxpayer who objects to an assessment under this Part may serve on the Minister a notice of objection, in writing, setting out the reasons for the objection and all relevant facts,

165. (1) Le contribuable qui s'oppose à une cotisation prévue par la présente partie peut signifier au ministre, par écrit, un avis d'opposition exposant les motifs de son opposition et tous les faits pertinents, dans les délais suivants :

(*a*) If the assessment is in respect of the taxpayer for a taxation year and the taxpayer is an individual (other than a trust) or a graduated rate estate for the year, on or before the later of

a) s'il s'agit d'une cotisation, pour une année d'imposition, relative à un contribuable qui est un particulier (sauf une fiducie) ou une succession assujettie à l'imposition à taux progressifs pour l'année, au plus tard au dernier en date des jours suivants :

(i) The day that is one year after the taxpayer's filing-due date for the year, and

(i) le jour qui tombe un an après la date d'échéance de production qui est applicable au contribuable pour l'année,

(ii) The day that is 90 days after the day of sending of the notice of the assessment; and

(ii) le quatre-vingt-dixième jour suivant la date d'envoi de l'avis de cotisation;

(*b*) In any other case, on or before the day that is 90 days after the day of sending of the notice of assessment.

b) dans les autres cas, au plus tard le quatre-vingt-dixième jour suivant la date d'envoi de l'avis de cotisation

…

…

166.1 (1) Where no notice of objection to an assessment has been served under section 165,

166.1 (1) Le contribuable qui n'a pas signifié d'avis d'opposition à une cotisation

nor any request under subsection 245(6) made, within the time limited by those provisions for doing so, the taxpayer may apply to the Minister to extend the time for serving the notice of objection or making the request.

en application de l'article 165 ni présenté de requête en application du paragraphe 245(6) dans le délai imparti peut demander au ministre de proroger le délai pour signifier l'avis ou présenter la requête.

…

…

(7) No application shall be granted under this section unless

(7) Il n'est fait droit à la demande que si les conditions suivantes sont réunies :

(*a*) the application is made within one year after the expiration of the time otherwise limited by this Act for serving a notice of objection or making a request, as the case may be; and

a) la demande est présentée dans l'année suivant l'expiration du délai par ailleurs imparti pour signifier un avis d'opposition ou présenter une requête;

(*b*) the taxpayer demonstrates that

b) le contribuable démontre ce qui suit :

(i) within the time otherwise limited by this Act for serving such a notice or making such a request, as the case may be, the taxpayer

(i) dans le délai par ailleurs imparti pour signifier l'avis ou présenter la requête, il n'a pu ni agir ni charger quelqu'un d'agir en son nom, ou il avait véritablement l'intention de faire opposition à la cotisation ou de présenter la requête,

(A) was unable to act or to instruct another to act in the taxpayer's name, or

(B) had a bona fide intention to object to the assessment or make the request,

(ii) given the reasons set out in the application and the circumstances of the case, it would be just and equitable to grant the application, and

(ii) compte tenu des raisons indiquées dans la demande et des circonstances de l'espèce, il est juste et équitable de faire droit à la demande,

(iii) the application was made as soon as circumstances permitted.

(iii) la demande a été présentée dès que les circonstances le permettaient.

…

…

PART XV
ADMINISTRATION AND ENFORCEMENT

PARTIE XV
APPLICATION ET EXÉCUTION

ADMINISTRATION

APPLICATION

Minister's duty

Fonctions du ministre

220. (1) The Minister shall administer and enforce this Act and the Commissioner of Revenue may exercise all the powers and perform the duties of the Minister under this Act.

220. (1) Le ministre assure l'application et l'exécution de la présente loi. Le commissaire du revenu peut exercer les pouvoirs et fonctions conférés au ministre en vertu de la présente loi.

…

…

Waiver of filing of documents

Renonciation

(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.

(2.1) Le ministre peut renoncer à exiger qu'une personne produise un formulaire prescrit, un reçu ou autre document ou fournisse des renseignements prescrits, aux termes d'une disposition de la présente loi ou de son règlement d'application. La personne est néanmoins tenue de fournir le document ou les renseignements à la demande du ministre.

Exception

Exception

(2.2) Subsection (2.1) does not apply in respect of a prescribed form, receipt or document, or prescribed information, that is filed with the Minister on or

(2.2) Le paragraphe (2.1) ne s'applique pas au formulaire prescrit, au reçu ou au document, ni aux renseignements prescrits, qui

after the day specified, in respect of the form, receipt, document or information, in subsection 37(11) or paragraph (m) of the definition "investment tax credit" in subsection 127(9).	sont présentés au ministre à l'expiration du délai fixé au paragraphe 37(11) ou à l'alinéa m) de la définition de « crédit d'impôt à l'investissement » au paragraphe 127(9), ou par la suite, relativement aux formulaire, reçu, document ou renseignements.

(1) ConocoPhillips' Submissions

[27] ConocoPhillips argues that subsection 220(2.1) provides the Minister with broad discretion to waive any filing requirement under any provision of the *ITA*. It points out that this provision is in Part XV of the *ITA* and sits above all other parts of the *ITA*. In support of its position, it cites *Melanson v Canada*, 2011 TCC 569, at para 21, 212 ACWS (3d) 585 [*Melanson*], where Justice Hershfield of the Tax Court stated that subsection 220(2.1) "can be, and has been, interpreted as allowing the Minister the power to extend the deadline for filing a document, as the Minister can waive the requirement for a document but subsequently request it." ConocoPhillips argues that the Minister's decision was therefore incorrect in law.

[28] ConocoPhillips further argues that the Minister's exercise of her discretion is to be reviewed on a standard of reasonableness, and it is unreasonable for the Minister in this situation to deny the requested waiver because her decision is indefensible having regard to the law and the facts before her. According to ConocoPhillips, both parties clearly understood that the adjustments made in 2006 would be modified depending on the outcome of the Imperial litigation - in this case, reversed, because no further remission amounts were paid to ConocoPhillips. If the waiver were granted, ConocoPhillips argues that the Minister would then

be able to demand a new notice of objection and reassess its 2000 income in line with the outcome of the Imperial litigation.

[29] ConocoPhillips asserts that the Minister is required to consider a waiver under subsection 220(2.1) in order to avoid unfairness to it. In this regard, ConocoPhillips relies on *Guest v The Queen*, 2010 TCC 336, 191 ACWS (3d) 320, where the Tax Court held (at paras 17-18) that the Minister should have considered a waiver for the taxpayer to file a notification of the change of marital status before the Minister disallowed child tax benefits.

[30] ConocoPhillips submits that, because the Minister's discretion under subsection 220(2.1) is broad, her refusal to waive the requirement for a notice of objection in this case is an improper fettering of her discretion. In this regard, it relies upon *Alex Parallel Computers Research Inc. v Canada*, [1998] F.C.J. No. 1742, 157 FTR 247 [*Alex Parallel*], where the Federal Court determined that the Minister had improperly fettered her discretion by confining the application of subsection 220(2.1) to electronically filed documents. Furthermore, in view of this Court's decision in *Bul River Mineral Corporation Ltd. v Canada (Minister of National Revenue)*, 2006 FC 41, 145 ACWS (3d) 951 [*Bul River*], ConocoPhillips says the Minister's discretion under subsection 220(2.1) should not be fettered by legislative provisions unless clearly stated.

[31] According to ConocoPhillips, a notice of objection is of central and fundamental importance since it allows for an appeal and submissions. Because the second notice of assessment in 2008 did not deal with adjustments relating to remission income, ConocoPhillips contends it was unreasonable for the Minister to refuse to waive the requirement for a notice of

objection when any new notice of objection would contain the exact information already filed in its original notice of objection which was served in a timely manner in 2006.

[32] In view of the Supreme Court's decision in *Canada v Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 SCR 793, ConocoPhillips states that since the Minister owes a duty of fairness to taxpayers, this Court has jurisdiction to review Ministerial decisions that cannot be appealed to the Tax Court or that deal with abuse of the Minister's powers. Following *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504, ConocoPhillips further states that fairness is of fundamental importance, particularly for there to be fair and just exercises of a discretionary power. According to ConocoPhillips, the over-assessment of tax in this case occurred on the basis that it would be reversed if no further remission amounts were allowed and, consequently, it would now be a violation of procedural fairness for the Minister to deny the requested waiver.

[33] Furthermore, ConocoPhillips submits that the Minister's failure to correct the assessment in respect of its 2000 income is unreasonable because there are no grounds in the *ITA* or in the Minister's administrative practices to conduct a "protective" assessment. Protective assessments are illegitimate, ConocoPhillips says, and a failure to correct the assessment in question would be a breach of the Minister's duty to exercise her powers lawfully and fairly. Relying on *CIBC World Markets Inc. v Canada*, 2012 FCA 3, [2012] FCJ No 30, ConocoPhillips states that "the Minister cannot agree to an assessment that is indefensible on the facts and the law" (at para 24), and that the assessment in this case was indefensible. In ConocoPhillips' view, it is unreasonable for the Minister to rely on a technicality in order to keep the overpayment of tax.

(2) The Minister's Submissions

[34] The Minister argues ConocoPhillips' position is untenable as it would read out the provision in subsection 165(1) that explicitly requires a taxpayer to serve a notice of objection. Absent a valid notice of objection, the Minister says she does not have jurisdiction to reconsider an assessment under subsection 165(3) of the *ITA*, nor can the Tax Court hear an appeal of the same. Under the interpretation advanced by ConocoPhillips, there would be no remedy available for a taxpayer because, if the Minister waived the requirement for a notice of objection, the Minister could not reassess, nor could the Tax Court hear an appeal, due to the lack of a notice. This interpretation, the Minister argues, is therefore flawed and inconsistent with *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54, at para 10, [2005] 2 SCR 601, which requires that statutory interpretation finds a meaning that is harmonious with the entire statute.

[35] The Minister further argues that the *ITA* provides a complete framework for disputing assessments through sections 165 to 169 and 171. The Minister relies upon *Ballantyne v Canada*, 2013 FCA 30, at para 4, [2013] 3 CTC 11, for the proposition that service of a notice of objection is a precondition to an appeal to the Tax Court. Furthermore, as the Minister points out, there are limitation periods in subsections 165(1) and 169(1) for objections and appeals, and the *ITA* contains specific provisions to extend time. According to the Minister, extensions of time cannot go beyond these limitation periods lest the finality and fiscal certainty principles underlying these time periods be defeated and administration of the *ITA* becomes chaotic. The Minister argues that ConocoPhillips' position conflicts with the clear limitation periods stated in the *ITA*.

[36] The Minister asserts that, if Parliament had intended the Minister to have the ability to waive the requirement for a notice of objection, the *ITA* would expressly say so, particularly in light of the clear wording of sections 165 to 169 and 171. Furthermore, adopting ConocoPhillips' interpretation of subsection 220(2.1) would produce absurd results, the Minister says, in that the specific restrictions on large corporations, such as those found in subsection 165(1.11), would not apply if a waiver from the requirement for a notice of objection was granted under subsection 220(2.1).

[37] In the Minister's view, subsection 220(2.1) can apply when an individual must *file* a prescribed form. A notice of objection, however, must be *served*, and therefore is not covered under subsection 220(2.1). The Minister submits that these differing word choices, "file" and "serve", must be assumed to mean something different. The Minister argues that documents are served in order to give official notice and trigger a limitation period, whereas filing generally does not deal with tax disputes and is used to inform the Minister of a change. In this regard, the Minister cites *The Plan Group v Bell Canada*, 2009 ONCA 548, [2009] OJ No 2829, where the Ontario Court of Appeal held that there are distinctions between serving and filing.

[38] The Minister argues that the sole issue is whether there is legislative authority for the Minister under s 220(2.1) to waive the requirement for a notice of objection. As a result, the Minister argues that, if this Court decides the Minister does have such authority, the matter should be returned to the Minister for determination.

(3) Analysis

(a) *General Principles of Statutory Interpretation*

[39] In addressing the question of whether the Minister's interpretation of her authority under subsection 220(2.1) of the *ITA* is reasonable, I begin by noting that it is trite law that statutes should be read according to Driedger's modern rule of statutory interpretation, namely that:

> …the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> as cited in Ruth Sullivan, *Statutory Interpretation*, 2ed edition (Toronto: Irwin Law, 2007) at41 [Sullivan]. Also see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 154 DLR (4th) 193 at para 21.

[40] The *ITA*, like any other federal statute, must also be read in view of section 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21, such that subsection 220(2.1) must be "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." In addition, the Supreme Court has specifically stated in *Stubart Investments Ltd. v Canada*, [1984] 1 SCR 536, [1984] CTC 294 at paras 57-61, that, in tax cases, the modern rule of statutory interpretation should be followed rather than the traditional strict approach to statutory interpretation (see also: David G Duff et al., *Canadian Income Tax Law*, 5th ed (Lexis Nexis: Markham, 2015) [Duff] at 107, 116-117).

(b) *Ordinary and Bilingual Meaning*

[41] The English and French versions of subsection 220(2.1) have equal authority and both should be considered. Subsection 220(2.1) reads as follows:

Waiver of filing of documents	Renonciation
(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.	(2.1) Le ministre peut renoncer à exiger qu'une personne produise un formulaire prescrit, un reçu ou autre document ou fournisse des renseignements prescrits, aux termes d'une disposition de la présente loi ou de son règlement d'application. La personne est néanmoins tenue de fournir le document ou les renseignements à la demande du ministre.

[42] Although neither party raised an argument concerning differences between the French and English versions of the subsection in question, they must still be considered and there appears to be a subtle difference between the two versions. This difference, however, does not affect the reasonableness or unreasonableness of the Minister's interpretation of subsection 220(2.1). The difference arises in the arrangement of the clauses between the English and French versions of subsection 220(2.1).

[43] In the English version, the initial portion of the sentence indicates that the prescribed forms, etc. are those as contained in the current *ITA* and regulations. In the French version, however, the comma before « aux termes d'une disposition » raises two possibilities: (1) that « aux termes d'une disposition de la présente loi ou de son règlement d'application », modifies

« un formulaire prescrit, un recu ou autre document », such that the relevant documents are those defined by the current *ITA* and regulations; or (2) that, « aux termes d'une disposition de la présente loi ou de son règlement d'application », modifies « Le ministre peut renoncer à exiger qu'une personne produise », such that it is instead a limit on the Minister's discretion. In other words, in the second interpretation, the Minister can only renounce demanding certain documents (i.e., grant a waiver) in line with the current *ITA* and associated regulations. Such a limitation would potentially make a difference due to subsection 165(3) of the *ITA* which reads as follows:

Duties of Minister	Obligations du minister
(3) On receipt of a notice of objection under this section, the Minister shall, with all due dispatch, reconsider the assessment and vacate, confirm or vary the assessment or reassess, and shall thereupon notify the taxpayer in writing of the Minister's action.	(3) Sur réception de l'avis d'opposition, le ministre, avec diligence, examine de nouveau la cotisation et l'annule, la ratifie ou la modifie ou établit une nouvelle cotisation. Dès lors, il avise le contribuable de sa décision par écrit.

[44] In the Minister's view, under subsection 165(3), she can only reconsider an assessment once a notice of objection is received. The Minister argues that sections 165 and 167 to 171 create a complete code, and that there must be a notice of objection before an assessment can be reconsidered. If this is the case, then on the second interpretation of the French version of subsection 220(2.1), there is a specific provision requiring the Minister to have a notice of objection before reassessing; this interpretation would lend weight to the Minister's argument that she cannot waive the requirement for a notice of objection since that would not be a discretion in accord with the current law and regulations. This argument is largely academic,

however, in view of the two-step test in *R. v. Daoust*, 2004 SCC 6, at paras 27 to 31, [2004] 1 SCR 217 [*Daoust*] to reconcile differences between the English and French versions of a statutory provision.

[45] Under the *Daoust* approach, the first step is to determine whether there is discordance between the English and French versions of the provision in question. The second step is to determine whether the common or dominant meaning is, according to the ordinary rules of statutory interpretation, consistent with Parliament's intent. *Daoust* further states (at para 28) that if there is ambiguity in one version but not the other, the court must look for the meaning common to both versions. If the first interpretation of the French version of subsection 220(2.1) above is used, there is a common meaning between the English and French versions. The shared meaning, as put forward in the English version of the provision, which is not ambiguous, is clearly consistent with Parliament's intent to define the forms, receipts, and other documents, the filing of which can be waived by the Minister.

[46] Accordingly, since only the French version is ambiguous, the French interpretation that fits with the English interpretation, namely, the first French interpretation above, should be adopted. Pursuant to the shared meaning rule, this common meaning is presumed to be the meaning intended by the legislature (Sullivan, at 85).

(c) *"File" versus "Serve"*

[47] The Minister points out that subsection 165(1) of the *ITA* calls on a taxpayer to "serve" a notice of objection, whereas subsection 220(2.1) specifically refers to documents that are "filed."

The French version of these provisions similarly uses different words. Under the ordinary meaning rule, the legislature is presumed to have intended to use words in their ordinary meaning (Sullivan, above at 42-3). On a straight, ordinary meaning analysis, the two words are undeniably different. However, Driedger's rule (as quoted above) requires that the ordinary meaning must be tested against the context of the provision, including the purpose of the legislation and the intentions evinced by the legislature (Sullivan, above at 50).

[48] The Minister advances a purposive argument, arguing that the differences in word choice are supported by the fact that the word "serve" is used when notice must be given to a party and a limitation period is triggered, while the word "file" is used simply to inform a party of facts that may have tax consequences. The Minister also argues that subsection 220(2.1) deals with documents that are *required* to be filed, while under section 165 a notice of objection *may* be served.

[49] The Minister's arguments as to differences between the use of the word "file" and "serve" are not persuasive. The fact a notice of objection may be served should not prevent subsection 220(2.1) from applying to notices of objection. As the Tax Court stated in *Petratos v R*, 2013 TCC 240, 231 ACWS (3d) 830 (at footnote 3) [*Petratos*]:

> … Subsection 220(2.1) allows the Minister to waive the timing for virtually anything *required* to be filed. That the *ITA* provides that an objection *may* be filed should not be fatal to the operation of that provision. … [emphasis in original]

Furthermore, subsection 220(2.1) has been found in cases other than *Petratos* to apply to notices of objection despite such differences in wording.

[50] For instance, in *Melanson*, Justice Hershfield of the Tax Court had occasion to comment upon subsection 220(2.1), stating:

> [21] A plain reading of this provision [i.e. subsection 220(2.1)] suggests that the Minister has the power to accept the June 17, 2009 letter – the one sent just two days after the expiration of the 90 day period to file an objection – as constituting a valid notice of objection in more than one way. First, it suggests that the Minister could waive the requirements of section 166.1 to file an application for an extension as a prerequisite to granting the extension. Second it can be, and has been, interpreted as allowing the Minister the power to extend the deadline for filing a document, as the Minister can waive the requirement for a document but subsequently request it. Under either of these approaches, the June 17, 2009 letter could be accepted by the Minister as an objection.

[51] Also, in *Poulin v Canada*, 2013 TCC 104, 227 ACWS (3d) 1209, a case involving an applicant who sought an extension of time to file a notice of objection to a reassessment, Justice Hershfield commented as follows:

> [33] … I note again that the Minister has been empowered by Parliament to waive certain statutory requirements.[Footnote omitted] In addition to subsections 165(6) and 166.1(4), there is a broader, more general, discretionary provision, namely subsection 220(2.1) which empowers the Minister to waive the filing of a notice of objection or in effect to waive statutory deadlines.
>
> …
>
> [37] … the Minister should not resist utilizing her administrative powers when a potential unfairness is brought to her attention from any credible source. If the exercise of that power does not recognize that the circumstances being reviewed merit a reassessment or a waiver of a filing requirement, only the Federal Court has jurisdiction to conduct a judicial review.

[52] In *Alex Parallel*, this Court determined that the Minister had improperly fettered her discretion by confining the application of subsection 220(2.1) to electronically filed documents. Justice Pinard stated the following:

> [13] … the wording of subsection 220(2.1) of the Income Tax Act does not in any way limit the exercise of the Minister's discretion to waive the requirement to file a prescribed form or other document solely to cases in which the taxpayer electronically files prescribed forms or other documents.

[53] In *Dorothea Knitting Mills Ltd. v. Canada (Minister of National Revenue)*, 2005 FC 318, [2005] FCJ No 394, the Minister's delegate had refused to exercise his discretion under subsection 220(2.1) to reinstate a taxpayer's claim for a tax credit. Justice Mactavish of this Court found this refusal to be an error (at para 25) because the Minister's administrative criteria for extensions of time could not limit the discretionary power conferred on the Minister by subsection 220(2.1).

[54] In *Bul River*, the applicants had failed to file certain documents in connection with a mining exploration tax credit within the applicable time limit and requested a waiver. This Court observed as follows with respect to subsection 220(2.1):

> [20] …Section 25.1(7) of the BCITA is not a limitation period regarding entitlement but rather stipulates a requirement as to when information and records regarding a METC application have to be filed. It is thus a filing requirement regarding documents and information. <u>This is precisely the type of requirement that can be waived under s. 220(2.1) of the ITA</u> and which was specifically incorporated into the BCITA under s. 47(1). Thus it is a requirement that could be waived. [emphasis added]

[55] Although the Minister's interpretation of subsection 220(2.1) is entitled to deference because she was interpreting her home statute, her interpretation in this case was not reasonable because, in view of the foregoing comments as to the scope and breadth of the Minister's discretionary powers under this subsection, it should be read and interpreted in a large and liberal manner rather than in a narrow and restrictive way.

[56] I agree with ConocoPhillips that the purpose of subsection 220(2.1) is to blunt the unfairness that sometimes arises by strict application of the filing and notice requirements in the *ITA*. The Minister's discretionary power under subsection 220(2.1) should not be unduly limited or fettered through an unduly narrow interpretation which the Minister unreasonably adopted and applied in this case.

(d) *Is there a remedy?*

[57] The Minister raises the point that allowing a waiver of a notice of objection under subsection 220(2.1) would not allow an assessment to occur. According to the Minister, subsection 165(3) explicitly requires a notice of objection before there can be a reassessment, and no other provision requires the Minister to reassess. The Minister also cites case law stating that under subsection 165(3) a notice of objection is a condition precedent to an appeal to the Tax Court. In the context of the entire *ITA*, the Minister says that a discretion under subsection 220(2.1) to waive a notice of objection is nonsensical because, even if there was a waiver, nothing further would happen unless the Minister requested a notice of objection; if the Minister did not make such a request ConocoPhillips would effectively be left with no remedy.

[58] As acknowledged by ConocoPhillips, the Minister's obligation to reassess or the ability to appeal to the Tax Court only arises with a notice of objection. However, I disagree with the Minister's argument that the discretion to waive a notice of objection under subsection 220(2.1) would be nonsensical due to lack of a remedy. Under subsection 165(3), on receipt of a notice of objection, the Minister "shall" reconsider the assessment. Subsection 165(3) does not state that without a notice of objection, the Minister shall not or cannot reconsider an assessment, and there are situations under the *ITA* where the Minister is explicitly given the power to reassess without a notice of objection. For example, under subsections 152(4) and 152(4.2) the Minister has the power to reassess in certain specific situations, although there is no obligation upon the Minister under those two subsections, as there is under subsection 165(3), to reassess.

[59] Moreover, subsection 220(2.1) specifically enables the Minister to request a document that has been waived. If the Minister does waive the requirement for a notice of objection, a notice of objection could subsequently be requested by the Minister and a reassessment could occur. Of course, even if the requirement to serve a notice of objection is waived, the Minister might still decline to exercise her discretion to request a notice of objection, an outcome whereby ConocoPhillips would be unable to advance the matter further. Nevertheless, the Minister's decision to exercise or a failure to exercise a discretion open to her would then be open to judicial review. Consequently, should the Minister in this case unreasonably refuse to exercise her jurisdiction and authority to waive the requirement for a notice of objection, ConocoPhillips could then challenge that refusal by way of judicial review in this Court.

[60] In summary, therefore, it was not reasonable for the Minister to determine she did not have authority or jurisdiction under subsection 220(2.1) of the *ITA* to waive service of a notice of objection. It was not reasonable because a notice of objection is, without a doubt, an "other document" contemplated by subsection 220(2.1). Both this Court and the Tax Court have viewed the Minister's discretionary power under this subsection broadly and it can and should be used to waive the requirement to file a document such as a notice of objection.

D. *Did the Minister fail to observe natural justice and procedural fairness in refusing to waive service of a notice of objection?*

[61] Although ConocoPhillips did not address this issue at the hearing of this matter, it did so in its written submissions where it argues that the Minister owes a duty of fairness to all taxpayers, and in this case the Minister breached that duty. Because the Minister's decision was an administrative one affecting its interests, ConocoPhillips says this duty is triggered (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 20, [1999] SCJ No 39).

[62] ConocoPhillips contends it was unfair for the Minister not to exercise her discretion under subsection 220(2.1) to waive the requirement for a notice of objection. This contention, however, presupposes the answer to the very question or issue raised and determined by this application: that is, that the Minister has such jurisdiction and a corresponding discretion. In her decision, the Minister did not refuse to exercise her discretion. On the contrary, her determination was that she did not have the jurisdiction under subsection 220(2.1) to waive the requirement for a notice of objection for three reasons as stated above. The Minister's decision is

limited solely to the extent of her jurisdiction under subsection 220(2.1); it does not state that, should the Minister have the jurisdiction, the Minister refuses to exercise it.

[63] That being said, ConocoPhillips argues that the situation is extremely unfair to it - the Minister reassessed its income for its 2000 income tax year, it properly served a notice of objection in 2006, and then, on the basis of a second reassessment it allegedly did not receive, the Minister declined to even consider either notice of objection. According to ConocoPhillips, this is particularly egregious in light of the fact that the Minister has not disputed that the original notice of objection was properly served, such that the Minister was well aware of ConocoPhillips' intent to object and the grounds upon which it intended to do so.

[64] However, in view of my determination with respect to the issue of whether the Minister has the jurisdiction and discretion under subsection 220(2.1) to waive service of a notice of objection, it is unnecessary to consider further the issue of fairness or whether a waiver should or should not be granted in the circumstances of this case.

IV. Conclusion

[65] In conclusion, I find that the Minister does have the jurisdiction under subsection 220(2.1) of the *ITA* to waive the requirement for a notice of objection and her determination to the contrary in this case cannot be justified and was therefore unreasonable. Accordingly, this matter should be returned to the Minister for consideration of the requested waiver. It is not the role or function of this Court to determine whether such a waiver should or should not be granted; that determination must be made by the Minister one way or the other.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; and the Applicant's request by letter dated August 15, 2011, for the Respondent to waive the obligation to serve a notice of objection under subsection 220(2.1) of the *Income Tax Act* in respect of the Applicant's 2000 income tax year, is remitted for consideration and determination by the Respondent.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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