Federal Court  Cour fédérale

Date: 20190606

Docket: T-219-18

Citation: 2019 FC 785

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, June 6, 2019

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

9027-4218 QUÉBEC INC.
and
3087-1883 QUÉBEC INC.

Applicants

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

[1] The applicants, 9027-4218 Québec Inc. (9027) and 3087-1883 Québec Inc. (3087), are seeking judicial review of a decision issued by the respondent, the Minister of National Revenue. On behalf of the Minister, Mr. Ahmed El Haial, auditor at the Canada Revenue Agency (the CRA), refused to reassess, and thus to issue notices of reassessment to the applicants, for the

taxation year ending September 30, 2012. The applicants are asking the Court to set aside the Minister's decisions and to order her to issue the reassessments in question.

[2] The application for judicial review is dismissed for the reasons that follow.

[3] As a preliminary matter, the Court accedes to the initial respondents' request, the CRA and the Minister, that only the Minister of National Revenue should be the respondent and that the style of cause be amended so as to remove the reference to the CRA. The style of cause has been amended accordingly.

I. The Facts

[4] This application involves three interrelated companies: the applicants and Constant d'Amérique Inc. (CAI). The companies are administered primarily by Mr. Jim Constantacos. The applicants were owners of lands on rue Chabot in Montréal. On April 26, 2011, the Ministère des Transports du Québec (the MTQ) served the applicants with a notice of expropriation in order for it to be able to perform work on a section of the Turcot interchange. The lands subject to the notice of expropriation had previously been leased by the applicants to CAI, which is in the business of producing cleaning products. The two commercial leases, having been signed in January 2007, provided that each of the applicants was to pay CAI a penalty of $3 million, in addition to relocation expenses, in the event that the leased premises were repossessed by the applicants before the end of the lease (such as in the case of an expropriation).

[5] On June 10, 2011, the MTQ offered the applicants the sum of $8.7 million as payment for the expropriation. The compensation for the expropriation included the sum of $870,000 (10% of the compensation), retained by the MTQ until the premises were vacated by the applicants. In October 2011, the applicants accepted the MTQ's offer. Cheques were distributed to 9027, in the amount of $3,189,942, and to 3087, in the amount of $4,640,058, by Maître Roger Gosselin, notary. On August 29, 2014, the MTQ paid the remaining $870,000 to 9027 following the vacation of the premises by the applicants. Later, in December 2011, the MTQ and the applicants agreed on a declaration of out-of-court settlement that broke down the elements of the expropriation compensation as follows:

Principal compensation:	
land	$930,838
Ancillary hardship compensation:	
Land outside the right-of-way	$507,841
Building(s) outside the right-of-way	$1,811,221
Commercial damages	$796,220
Relocation expenses	$4,407,990
Hardship	$245,790

[6] The applicants paid CAI a total amount of approximately $5.45 million for the latter three compensation expenses (commercial damages, relocation expenses, and hardship).

[7] The applicants purchased new lands from the City of LaSalle as co-owners. On December 13, 2012, the applicants signed a new lease with CAI under which the latter was to make leasehold improvements and purchase new rental properties.

[8] On March 14, 2013, the applicants and CAI filed their income tax returns for the 2012 taxation year with the following breakdown of compensation for expropriation:

9027 (proceeds of disposition)	$930,838
3087 (proceeds of disposition)	$2,319,162
CAI (inducement)	$5,450,000
Total	**$8,700,000**

[9] On February 6, 2014, CAI filed an amended income tax return for the 2012 taxation year and filed a first adjustment request with the Minister. That request is provided for under subsection 13 (7.4) of the *Income Tax Act*, RSC 1985, c 1 (5th Sup.) (the Act) in order to reduce the capital costs of certain replacement properties acquired by CAI during the fiscal period ending September 30, 2013. CAI submitted that it had used $1,109,400 of the relocation expenses to make improvements, as provided for in the new lease. Accordingly, it contended that its net income for the 2012 taxation year should be reduced by that amount by operation of subsection 13(7.4) of the Act.

[10] In May 2014, the CRA designated an auditor, Mr. Siradiou Barry, to review CAI's tax returns. On August 11, 2014, he asked CAI to provide him with the contract entered into with the MTQ and supporting documentation showing the acquisitions and disposals that CAI included in its amended tax return, a request with which CAI complied a few days later.

[11] In a letter dated December 8, 2014, Mr. Barry, on behalf of the Minister, denied the adjustment request, adopting the conclusions of an internal memorandum. According to the letter of refusal, the portion of the compensation for expropriation paid to CAI by the applicants was not eligible for the choices provided for in subsection 13(7.4) of the Act because it constituted business income pursuant to section 9 of the Act, and not an inducement payment pursuant to paragraph 12 (1)(x) of the Act.

[12] On December 9, 2014, the applicants' accountant contacted Mr. Barry in order to notify him that he wished to make submissions in that regard. Mr. Barry granted him until January 8, 2015 to make submissions. That date was subsequently extended until January 23, 2015.

[13] It was from that moment that the versions of the two parties began to diverge.

[14] According to the applicants, on January 9, 2015, the applicants and CAI agreed not to challenge the Minister's refusal to accept adjustments to CAI's income. They believed that they would have an opportunity to file amended tax returns, that the Minister would issue reassessments to the applicants for the 2012 taxation year, and that the amounts received by the applicants from the MTQ would be considered to be a capital gain in their hands.

[15] A letter dated March 23, 2017 by one of the applicants' accountants, Mr. Alain Roy from the BCGO S.E.N.C.R.L. firm, addressed to their counsel, presented their version of the story. Mr. Roy declared that, during a meeting with Mr. Barry that took place between mid-October 2014 and mid-January 2015, Mr. Barry had verbally confirmed that the compensation from the MTQ would be considered to be a capital gain in the hands of the applicants. The letter declares that prior to the filing of their adjustment request on February 4, 2015, another accountant from the same firm, Mr. Benoît Vincent, telephoned Mr. Barry. He did so in order for Mr. Barry to [TRANSLATION] "reconfirm that the treatment of the capital gain is adequate" and Mr. Barry did indeed confirm the treatment. Mr. Barry asked that the letter that was to be sent with the

amended tax returns be addressed to him so that the applicants' and CAI's files be transferred to him.

[16] However, at paragraphs 26 and 27 of his affidavit, Mr. Barry stated that on January 20, 2015, Mr. Vincent contacted him in order to discuss the CRA's position declining the choice presented by CAI, according to subsection 13 (7.4) of the Act, in its amended 2012 income tax return. Mr. Vincent inquired as to whether he should amend the applicants' income tax returns to include compensation for expropriation as a capital gain and exclude from CAI's income the amount of $5.2 million declared as other income. Mr. Barry replied that the decision was for Mr. Vincent to make. Mr. Barry also mentioned that any adjustment request would be examined as long as it was submitted within the normal reassessment period set out at subsection 152 (3.1) of the Act. To that effect, Mr. Barry stated:

> [TRANSLATION]
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> 27. During the telephone conversation on January 20, 2015, I never told Mr. Vincent that the amended income tax returns of the [applicants], and CAI would be accepted by [the CRA].

[17] That excerpt is essentially reproduced in Mr. Barry's contemporaneous "Memo to file" dated January 20, 2015.

[18] In his affidavit, Mr. Barry stated that he had never met with Mr. Roy during the period between mid-October 2014 and mid-January 2015. During the cross-examination on his affidavit, he stated that he had only had one discussion over the telephone with Mr. Roy on September 29, 2014, and one conversation on January 20, 2015 with Mr. Vincent.

[19] Mr. Barry further stated that on January 23, 2015, Mr. Vincent had contacted him requesting that he close CAI's file. On cross-examination, Mr. Barry acknowledged that he understood that Mr. Vincent was to carry out an adjustment request for the applicants.

[20] On February 4, 2015, Mr. Vincent sent a letter to the CRA to formally request that the applicants' reassessments for the 2012 taxation year and CAI's reassessments for the 2012 and 2013 taxation years be issued. The applicants' and CAI's amended tax returns were attached to the letter. In effect, the applicants were asking that the CRA review the amended income tax returns and that the Minister issue reassessments for the 2012 taxation year, dividing up the $8.7 million in compensation as follows:

> 1. 9027: Consider the sum of $4,064,197 to represent a portion of the total compensation for expropriation and include it in the income of 9027 as proceeds of disposition for the land disposition du terrain (capital gains);
>
> 2. 3087: Consider the sum $4,635,803 to represent a portion of the total compensation for expropriation and include in the income of 3087 as proceeds of disposition for the land (capital gains).

[21] In the letter, the accountant requested that the applicants' and CAI's amended tax returns be handled by Mr. Barry. A copy of the letter was also addressed to Mr. Barry. On cross-examination, Mr. Barry stated that he had received this letter. However, he indicated that he "had not done anything with" the letter because the file had to be assigned to him according to administrative procedures.

[22] The applicants forwarded the adjustment request on June 22, 2016, to the new auditor on the file, Ms. Sirivanh Vannareth. Shortly thereafter, their accountants, Mr. Roy and Mr. Joël

Dubé, attempted to contact Ms. Vannareth by leaving weekly messages on her voicemail between August and October 2016 but failed to receive a response. Ultimately, Mr. Dubé contacted the CRA's Ombudsman about the matter seeking his intervention.

[23] In November 2016, Mr. El Haial, the CRA's auditor, intervened in the matter to process the adjustment requests dated February 4, 2015. The Minister acknowledged that the CRA agreed to consider the adjustment requests and that Mr. El Haial would carry out an audit to consider those requests.

[24] On March 16, 2017, Mr. El Haial sent three letters with the results of his audit of the applicants' and CAI's adjustment requests. The Minister upheld the applicants' initial assessments for the 2012 taxation year. He explained that the adjustments sought by the applicants had been denied because the sum of $5,450,000 remained included in CAI's income for the 2012 taxation year.

[25] In his affidavit, Mr. El Haial affirmed that the Minister had not made the reassessments with respect to the applicants for the 2012 taxation year. As for CAI, the Minister made a reassessment for the taxation year 2013, in order to grant it a capital cost allowance deduction of $116,509 and to overturn the $870,000 in compensation set aside, which had been added to the income of 9027 in 2014.

[26] On December 8, 2017, the applicants' counsel, Maître Richard Généreux, sent a legal notice to Maître Nathalie Labbé, counsel for the Department of Justice of Canada, asking that notices of reassessment be sent to the applicants for the 2012 taxation year.

[27] On January 9, 2018, counsel for the Minister sent the following reply:

> [TRANSLATION]
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> "The Canada Revenue Agency (Agency) confirms receipt of the notice that you sent to the Department of Justice on or about December 8, 2017.
>
> The Agency will not be taking a position with regard to the said legal notice.
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> Please consider this letter as a courtesy response."

II. Avis de application for judicial review

[28] The applicants filed the present notice of application for judicial review on February 6, 2018. The applicants are seeking judicial review of the Minister's refusal to issue the notices of reassessment for the 2012 taxation year, communicated by letter from its counsel on January 9, 2018. In their notice of application they argued that the refusal is contrary to the Minister's duty to act fairly and, furthermore, that the Minister failed to uphold a principle procedural fairness. The applicants are asking the Court to set aside the decision.

[29] The applicants are also asking the Court to order the Minister [TRANSLATION] "to provide notices of reassessment to the applicants for the 2012 taxation year so as to allow them to challenge the said assessments pursuant to the [Act]".

III. Issues

[30] Having reviewed the parties' written and oral arguments, I will address the following issues:

1. What is the decision that is the subject of the application for judicial review?
2. Was the application for judicial review filed after the 30-day period provided for at subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7 (FCA)?
3. Did the Minister have a legal duty to issue the notices of reassessment to the applicants – following the adjustment request dated February 4, 2015 – opening the door to the issuance of a *mandamus* order?
4. Were the Minister's decisions dated March 16, 2017, unreasonable or did they otherwise breach the applicants' right to procedural fairness

IV. Analysis

[31] In order to properly understand the position of the applicants, it should first be noted that their arguments are based on the Minister's refusal to issue notices of reassessment. They do not focus on the substantive decision to uphold the initial assessments for the 2012 taxation year; they maintain that this decision must be certified by notices of reassessment and not by means of letters from the Minister. In the applicants' view, since they failed to receive the reassessments, they had no other means to challenge the Minister's substantive decision or appeal to the Tax

Court of Canada (TCC). Accordingly, they found themselves in a legal vacuum that was attributable to the Minister's breach of their right to procedural fairness.

(1) The decision that is the subject of the application for judicial review

Parties' Arguments

[32] The parties disagree as to the date of the Minister's decision refusing to carry out the reassessments and issue notices of reassessment to the applicants for the 2012 taxation year.

[33] In their notice of application for judicial review, the applicants base their arguments on the letter dated January 9, 2018. The first purpose of their application to the Court is the following:

> [TRANSLATION]
>
> **DECLARE** that the Respondents' refusal to provide notices of reassessments to applicants for the 2012 taxation year, communicated by letter of their counsel dated January 9, 2018, is contrary to their duty to act fairly.

[34] In addition, in their Memorandum of fact and law, the applicants declare:

> [TRANSLATION]
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> 43. By means of a letter dated January 9, 2018, counsel for the Respondents communicated the decision of the Respondents to the effect that no position would be taken with respect to the legal notice. In the circumstances, the Respondents formally refused on January 9, 2018 to provide the notices of reassessment to the applicants for the 2012 taxation year…;
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> [Emphasis added.]

[35] It is clear from the applicants' written submissions, and the date on which they filed their notice of application, that their application for judicial review is based on the letter of January 9, 2018, drafted by the Minister's counsel. At the hearing before the Court, the applicants presented a two-pronged, nuanced argument. First, they claimed that the letters of March 16, 2017, were not administrative decisions subject to the Federal Court's jurisdiction, while the letter of January 9, 2018, was a reviewable decision. According to the applicants, if they filed a notice of application for judicial review with the Court in March or April 2017, the Minister would have filed a motion to strike which the Court would have allowed pursuant to section 18.5 of the FCA.

[36] As a subsidiary matter, the applicants submitted at the hearing that the Minister never issued an administrative decision subject to the Federal Court's jurisdiction. Nevertheless, they argue that the Minister has a legal obligation to issue notices of reassessment for the 2012 taxation year in order for the applicants to have an opportunity to challenge the decision under section 165 of the Act and, ultimately, to appeal it to the TCC. Even if the letter of January 9, 2018, is not a decision, the Court should order the Minister to issue the notices.

[37] In contrast, the Minister submits that the decisions in issue were made on March 16, 2017, when the Minister exercised her discretion under subsection 152(4) of the Act, refusing the adjustment requests filed by the applicants on February 4, 2015, and upholding the initial assessments for the 2012 taxation year. In her view, the letter of January 9, 2018, constitutes a mere courtesy response. The letter was not a re-evaluation of the decisions made on March 16, 2017, and cannot otherwise constitute an administrative decision. The application for

judicial review was therefore filed outside of the 30-day period provided for at subsection 18.1(2) of the FCA. According to the Minister, the applicants had until April 15, 2017 at the latest to file the notice of application for judicial review, which they only filed on February 6, 2018. Furthermore, the applicants did not file an application for an extension of time or submit evidence or arguments justifying their delay.

Analysis of the letter dated January 9, 2018, and of the letters dated March 16, 2017

[38] After having considered the applicants' arguments regarding the decision in issue, I find that the letter dated January 9, 2018, is not an administrative decision reviewable by the Federal Court. In my view, the Minister's decision refusing to carry out reassessments was taken on March 16, 2017. That is the date on which the applicants received the Minister's decision. Their argument according to which the letter of January 9, 2018, from the Minister's counsel amounted to an initial communication of the refusal is unconvincing.

[39] In the context of a letter or document that confirms or makes reference to an earlier decision, the new letter or new document must have the attributes of a decision that affects the rights of a citizen in order for it to be considered a decision. In other words, there must be a new exercise of discretion by the federal board, commission or other tribunal. If it does not make reference to new facts or arguments, or does not re-examine the original decision, it is not a reviewable decision (*Brar v Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 5685 (FC), 140 FTR 163 at paras. 7-9). Such a letter or document does not represent a decision, order, act or proceeding of a federal board, commission or other tribunal within the meaning of paragraph 18.1(3)(*b*) of the FCA.

[40] The Court has previously addressed issues of letters of courtesy. In *Philipps v Librarian and Archivist of Canada*, 2006 FC 1378 at paragraph 32, Justice Noël stated as follows:

> [32] … this Court has clearly held that a courtesy letter written in reply to an application for review or reconsideration is not a decision or an order within the meaning of the *Federal Courts Act*, R.S.C. 1985, c F-7, and thus cannot be challenged by way of a judicial review application (*Dhaliwal v. Canada (M.C.I.)*, [1995] F.C.J. No. 982; *Moresby Explorers v. Gwaii Haanas National Park Reserve*, [2000] A.C.F. no. 1944; *Hughes v. Canada*, 2004 FC 1055 (CanLII, para. 6). In fact, in *Moresby* Mr. Justice Pelletier (as he then was) made the following comment (*Moresby Explorers, supra*, at paragraph 12):
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> > In *Dumbrava v. Canada (Minister of Citizenship and Immigration)*, (1995), 101 F.T.R. 230, [1995] F.C.J. No. 1238, Noel J. (as he then was) reviewed a series of cases dealing with the effect of correspondence with a decision maker after a decision has been made. In those cases, the Court held that a "courtesy response" does not create a new decision from which judicial review may be taken. As it was put by McKeown J. in *Dhaliwal v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 982 ". . . counsel cannot extend the date of decision by writing a letter with the intention of provoking a reply." Before there is a new decision, subject to judicial review, there must be a fresh exercise of discretion such as a reconsideration of a prior decision on the basis of new facts.
> >
> > [Emphasis added.]

[41] The letter of January 9, 2018, reads as follows: "[The CRA] will not be taking a position with regard to the said legal notice" (*see*: paragraph 30 of this judgment for the complete letter). In my view, this does not constitute a decision within the meaning of the FCA. It does not reflect a fresh exercise of discretion or a re-examination of the refusal of March 16, 2017. Rather, the letter represents a correspondence with the Minister following a decision having been made. I

also note that the letter was written by the Minister's two counsel, and not by an auditor authorized to make a decision for the Minister (*Toronto Coalition to Stop the War v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 957 at para. 137). I this regard, I agree with the argument of the Minister; such a "courtesy response" is not a new decision opening the door to judicial review.

[42] However, the letters dated March 16, 2017, addressed to the applicants, do possess the attributes of a decision. The two letters are identical. They state that the CRA has reviewed the adjustment request dated February 4, 2015, and decided to uphold the applicants' initial assessments for the 2012 taxation year. In the letters, Mr. El Haial explains that the amount of $5,450,000 should be included in CAI's income pursuant to subsection 9(1) of the Act.

[43] The letters dated March 16, 2017, constitute decisions by the Minister under subsection 152(4) of the Act. On that date, she refused to carry out the reassessments with regard to the applicants for the 2012 taxation year. The wording in the letters indicates that the Minister decided in a definitive manner to uphold the applicants' initial assessments and therefore not to issue notices of reassessment.

Federal Court's Jurisdiction

[44] The applicants argue that the decisions dated March 16, 2017, are not subject to the Federal Court's jurisdiction because they raise no questions of administrative law and that the essential nature of those decisions should fall under the TCC's jurisdiction under section 18.5 of the FCA.

[45] When I examine an application for judicial review of issues in relation to the Act, I must be satisfied that judicial review is possible under sections 18 and 18.1 of the FCA and that the jurisdiction of this Court is not excluded under section 18.5. Furthermore, the application must state "a ground of review that is known to administrative law or that could be recognized in administrative law." (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at paras. 66, 70 (*JP Morgan*)).

[46] Section 18.5 of the FCA provides that a decision cannot be subject to judicial review if it can be appealed before, *inter alia*, the TCC:

Exception to sections 18 and 18.1	**Dérogation aux art. 18 et 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	**18.5** Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf

otherwise dealt with, except in accordance with that Act.	en conformité avec cette loi.

[47] Appeals relating to assessments of income tax and the accuracy of such assessments are reserved exclusively to the TCC under the *Tax Court of Canada Act*, RSC 1985, c T-2 (specifically section 12), and under the Act. The Federal Court does not have the jurisdiction to hear and decide such matters (*JP Morgan* at para. 27). In *Canada v Addison & Leyen Ltd.*, 2007 SCC 33, the Supreme Court of Canada noted that a reviewing court must be prudent when undertaking a judicial review in circumstances that relate to the system of tax appeals established by Parliament (at para. 11).

[48] However, both this Court and the Federal Court of Appeal have recognized that the exercise of discretion by the Minister may give rise to an application for judicial review (*JP Morgan* at paras. 90, 96-98; *Revera Long Term Care Inc. v Canada (National Revenue)*, 2019 FC 239). In this regard, Justice Stratas wrote (*JP Morgan* at para. 96):

> [96] There are areas, well-recognized in the case law, where judicial review may potentially be had in tax matters. Examples include discretionary decisions under the fairness provisions, assessments that are purely discretionary (such as the assessment under subsection 152(4.2) at issue in *Abraham v. Canada (Attorney General)*, 2012 FCA 266, 440 N.R. 201, revg 2011 FC 638, 391 F.T.R. 1), and conduct during collection matters that is not acceptable or defensible on the facts and the law (*Walker*, *supra*; *Pintendre Autos Inc. v. The Queen*, 2003 TCC 818).

[49] In addition, in *Abakhan & Associates Inc. v Canada (Attorney General)*, 2007 FC 1327 (*Abakhan*), the taxpayer's bankruptcy trustee filed an application for judicial review of the Minister's decision refusing to carry out a reassessment after the normal reassessment period

under subparagraph 152(4)(a)(i) of the Act (misrepresentation of facts). The Minister maintained that judicial review amounted to a parallel challenge to the TCC's jurisdiction, and was therefore prohibited under section 18.5 of the FCA. The Court dismissed that argument. Justice O'Reilly made a distinction between a reassessment and a refusal to carry out a reassessment. A taxpayer cannot appeal a refusal to carry out a reassessment to the TCC, therefore judicial review remains the only adequate alternative means of challenging the decision (*Abakhan* at para. 8):

> [8] However, the decision under review here is neither an assessment nor a reassessment; it is a refusal to carry out a reassessment. From this decision, I see no appeal under the *Income Tax Act*. Had the Minister agreed to perform a reassessment, Abakhan could have appealed the reassessment if it was dissatisfied with the result. But there is no appeal from a decision not to conduct a reassessment. Accordingly, s. 18.5 of the *Federal Courts Act* does not prevent an application for judicial review of a decision under s. 152(4)(*a*)(i) of the *Income Tax Act* nor, obviously, does the *Income Tax Act* provide any adequate alternative remedy to Abakhan. Therefore, Abakhan's application for judicial review cannot be dismissed on this basis.

[50] In *AFD Petroleum Ltd. v Canada (Attorney General),* 2016 FC 547 (*AFD Petroleum*), the applicant challenged a decision by the Minister refusing an adjustment request filed in order to claim a tax credit for Scientific Research and Experimental Development expenditures. The Minister refused to carry out a reassessment because the applicant failed to complete most of the pages of the applicable form. The Court declared (*AFD Petroleum* at para. 11):

> [11] To properly 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).

[51] The Court found that the applicant had raised claims that were cognizable in administrative law: it had raised issues of procedural and substantive unacceptability. Furthermore, the Court noted that there was no appeal to the TCC available to the applicant (*AFD Petroleum* at para. 17).

[52] I find that the Court has jurisdiction to hear and decide the applicants' application for judicial review. The Minister's refusal to carry out a reassessment for a taxation year in application of subsection 152(4) of the Act is a discretionary decision. The discretionary character of such a decision is no different from that of a decision issued by the Minister under section 152(4.2) of the Act (*JP Morgan* at para. 96). Without making any determinations as to the correct or validity of the assessment, the Court could find the refusal to be either procedurally (in breach of procedural fairness rights) or substantively (unreasonable) unacceptable.

[53] The Minister recognizes the jurisdiction of this Court in his Memorandum:

> [TRANSLATION]
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> 29. The applicants correctly treat as a decision within the meaning of subsection 18.1(2) of the *Federal Courts Act* the Minister's refusal to grant the adjustments requested and to carry out the reassessments accordingly. This, in effect, is a decision given that it affects the rights of the applicants, which renders the *certiorari* available in principle and allows for the breach of principles of natural justice to be invoked.

[54] I further note that the applicants point out that the letter dated January 9, 2018, is subject to judicial review by the Court because it represents the first communication of the Minister's refusal, but they provide no explanation as to the distinction between this letter and the letters dated March 16, 2017, vis-à-vis the Court's jurisdiction. The letter dated January 9, 2018, and

the letters dated March 16, 2017, relate to the Minister's refusal to carry out the reassessments under subsection 152(4) of the Act. If the letter of January 9 constituted a re-examination of the refusal, and not a courtesy letter, and if the applicants claim that this letter is properly before the Court for judicial review, their argument that the letters dated March 16, 2017, were not subject to judicial review makes no sense.

[55] The letters dated March 16, 2017, are decisions issued by the Minister in the exercise of her discretion pursuant to subsection 152(4) of the Act. The applicants' application raises issues of procedural fairness and unreasonableness of the Minister's refusal. Accordingly, they are subject to judicial review by this Court and the Court may grant the *certiorari* and *mandamus* measures sought by the applicants (*JP Morgan* at para. 66). Otherwise, taxpayers faced with such a refusal would find themselves without a remedy: the legal vacuum invoked by the applicants.

(2) Was the application for judicial review filed after the 30-day period provided for at subsection 18.1(2) of the FCA?

Letters dated March 16, 2017

[56] The applicants filed their application under section 18.1 of the FCA. Subsection 18.1(2) of the FCA provides that an application for judicial review must be filed within 30 days after the decision or order was first communicated to the party:

18.1(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	**18.1(2)** Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

[57] In light of my finding that the only decisions that are subject to judicial review are the Minister's two refusals dated March 16, 2017, it is clear that the applicants filed their application for judicial review outside the period provided for at subsection 18.1(2) of the FCA. The decisions in issue were communicated to the applicants on March 16, 2017. The notice of application for judicial review was filed on February 6, 2018, more than 10 months after the decisions had been communicated to the applicants.

[58] The applicants did not request an extension of time and the Minister contends that their application for judicial review must therefore be dismissed. Despite the lack of arguments to this effect, I reviewed the issue of an extension with respect to the criteria set out by the Federal Court of Appeal in *Canada (Attorney General) v Hennelly*, [1999] FCJ No 846 (QL),1999 CanLII 8190 at para. 3 (*Hennelly*) (*see also*: *Sauvé v Canada*, 2018 FCA 98 at para. 8). A person

who requires an extension of time must demonstrate (i) that there is a continuing intention to pursue the underlying proceeding; (ii) that the proceeding has some merit; (iii) that no prejudice to the respondent arises from the delay in carrying out the proceeding; and (iv) that a reasonable explanation for the delay exists. These criteria, which are neither cumulative nor exhaustive, in sum help determine whether the granting of an extension of time is in the interests of justice *(Canada (Attorney General) v Larkman*, 2012 FCA 204 at paras. 61-62; *Grewal v Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263 (C.A.) (*Grewal*)).

[59] The applicants have not demonstrated that their request meets the criteria established in *Hennelly*. Their actions since the receipt of the decisions do not show a continuing intention to pursue the application for judicial review of the decisions dated March 16, 2017. At the hearing, the applicants' counsel pointed out the importance of Quebec's new *Code of Civil Procedure*, CQLR c C-25.01, which requires parties to consider private modes of prevention and settling their dispute before turning to the courts. In my view, an obligation to attempt to resolve disputes without the intervention of the courts – which falls under Quebec's civil law – did not prevent the applicants from protecting their right to seek judicial review of the Minister's refusal in March or April 2017, while at the same time pursuing theirs efforts to seek a settlement.

[60] The applicants argue that, following the decisions of March 2017, they had hoped that the Minister would amend her refusal. However, the letters dated March 16, 2017 are not ambiguous. It is up to the applicants to protect theirs rights formally; this is notwithstanding their informal intervention on 13 October 2017, and their letter of legal notice in December 2017.

[61] As for the fourth criterion, although the applicants could argue that their mistaken belief that the Minister's decisions in March 2017 were not subject to judicial review explains their delay, this argument is unconvincing, given their contradictory arguments regarding the nature of the letters dated January 9, 2018, and March 16, 2017.

[62] In conclusion, the applicants' application for judicial review, filed on February 6, 2018, must be dismissed. The applicants filed it well after the 30-day limit set out in subsection 18.1(2) of the FCA. In light of the lengthy delay on the part of the applicants, the absence of a persuasive explanation for the delay, and the principle of finality of administrative decisions that underlies the time limit imposed to challenge such decisions, I am not convinced that the interests of justice require that an extension of time be granted (*Grewal*, above).

[63] That said, I will address the merits of the applicants' arguments (the second criterion) in the sections to follow. However, in short, I find that the Minister was not obliged to carry out the reassessments or issue notices of reassessment to the applicants for the 2012 taxation year. Moreover, the Minister's refusal to carry out the reassessments was reasonable. The applicants have not demonstrated that their application for judicial review is well founded.

5. (3) Did the Minister have a legal duty to issue the notices of reassessment to the applicants – following the adjustment request dated February 4, 2015 – opening the door to the issuance of a mandamus order?

[64] The applicants submit that, notwithstanding the late filing of their notice of application for judicial review, the Court should issue a *mandamus* order. They claim that the Minister had a legal duty to issue the notices of reassessment even if, after Mr. El Haial's audit, the Minister had

determined that no amendments should be made to the initial assessments for the 2012 taxation year. According to the applicants, if the Court found that the letter dated January 9, 2018 was not a decision, the Court should nonetheless order the Minister to comply and issue the notices in order for the applicants to mount a challenge under section 165 of the Act. They argue that the existence of a reviewable administrative decision is not necessary to issue a *mandamus* order in cases in which there is a failure to comply with a public legal duty to act.

[65] A *mandamus* order is a fairness relief remedy that compels the performance of a public legal duty by a public authority who refuses or neglects to carry out the duty when called upon to do so. The parties agree that the criteria for the issuance of a *mandamus* order were set out in *Apotex Inc. c Canada (Attorney General)*, [1994] 1 FC 742, 1993 CanLII 3004 (FCA) (*Apotex*):

> 1. there must be a public legal duty to act;
>
> 2. the duty must be owed to the applicant;
>
> 3. there must be a clear right to performance of that duty, in particular:
>
> (a) the applicant has satisfied all conditions precedent giving rise to the duty,
>
> b) there was: (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;
>
> 4. where the duty sought to be enforced is discretionary, … [some of the] following rules apply;
>
> 5. no other adequate remedy is available to the applicant;
>
> 6. the order sought will be of some practical value or effect;
>
> 7. there is no equitable bar to the relief sought; and
>
> 8. on a balance of convenience, an order of mandamus should (or should not) issue.

[66] The requirements for obtaining a *mandamus* order are cumulative and must be met by the party seeking the order.

[67] In this case, it is sufficient to note that the applicants have not met the first condition required for the issuance of a *mandamus* order. As it will be explained in the following part of this judgment, the Minister was under no legal obligation to issue the applicants the notices of reassessment for the 2012 taxation year under subsection 152(4) of the Act. The Minister received the applicants' financial statements and adjustment requests and reviewed these in comparison to the initial assessments for that year. She concluded that no revisions were necessary and issued decisions to this effect on March 16, 2017. In so doing, the Minister fulfilled her duties under the Act and no longer had any the duty to provide the notices or "pieces of paper" to which the applicants referred at the hearing. Indeed, the applicants are asking the Court to compel the Minister to issue a decision, but the decision has already been issued.

Parties' Arguments

[68] The applicants submit that the Minister had a legal duty to issue notices of reassessment for the 2012 taxation year under subsection 152(4) of the Act following their adjustment request on February 4, 2015. In arguing that the Minister was under this legal obligation, the applicants argue that she should have: considered their adjustment request, with the amended income tax returns included with it; carry out reassessments; and, issue notices of reassessment.

[69] The Minister argues that the decision to carry out a reassessment under subsection 152(4) of the Act is discretionary and subject to a reasonableness standard of review. She exercised that

discretion in refusing to carry out the reassessments on March 16, 2017. The Minister submits that there is a distinction between her obligations under subsection 152(1) (initial assessment) and subsection 152(4) (reassessment) of the Act. According to the Minister, she is required to act with diligence when reviewing a taxpayer's income tax return and in carrying out an initial assessment under subsection 152(1). She fulfilled this initial obligation by relying on the information, including the breakdown of the compensation for expropriation from the MTQ, provided by the applicants in their initial income tax returns, and assessed these accordingly. The Minister argues that she has no duty to issue a notice of reassessment following the adjustment request made by the applicants on February 4, 2015. The Minister stated:

> [TRANSLATION]
>
> "In this case, when the amended income tax returns were produced, the Minister was required to review the said returns and had discretion as to whether or not to carry out the reassessments with respect to the applicants and CAI."

[70] I note that the parties discussed whether the Minister had addressed the adjustment request within the normal reassessment period under subsection 152 (3.1) of the Act. The applicants contend that their request was sent within the normal reassessment period provided for in subsection 152 (3.1). They further note that Mr. Barry had acknowledged that, if the adjustment requests were made within the normal reassessment period, they would be examined. In addition, the applicants argue that their request on February 4, 2015 amounts to a waiver of the normal three-year assessment period, under subparagraph 152(4)(*a*)ii) of the Act.

[71] Ultimately, the applicants' adjustment request was considered by the Minister on its merits under subsection 152(4) and the decisions were issued on March 16, 2017. Following the

applicants' filing of the amended tax returns and the letter dated February 4, 2015, the Minister had the authority to carry out the reassessments, even beyond the normal reassessment period.

Analysis

[72] The relevant provisions of the Act applicable to assessments are the following:

Assessment	**Cotisation**
152(1) The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine (a) the amount of refund, if any, to which the taxpayer may be entitled by virtue of section 129, 131, 132 or 133 for the year; or (b) the amount of tax, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year.	**152(1)** Le ministre, avec diligence, examine la déclaration de revenu d'un contribuable pour une année d'imposition, fixe l'impôt pour l'année, ainsi que les intérêts et les pénalités éventuels payables et détermine : *a*) le montant du remboursement éventuel auquel il a droit en vertu des articles 129, 131, 132 ou 133, pour l'année; *b*) le montant d'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 122.7(2) ou (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année.
152(2) After examination of a return, the Minister shall provide a notice of assessment	**152(2)** Après examen d'une déclaration, le ministre envoie un avis de cotisation à la

to the person by whom the return was filed.	personne qui a produit la déclaration.
152 (4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if (*a*) the taxpayer or person filing the return (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or (ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year;	**152 (4)** Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants : *a*) le contribuable ou la personne produisant la déclaration : (i) soit a fait une présentation erronée des faits, par négligence, inattention ou omission volontaire, ou a commis quelque fraude en produisant la déclaration ou en fournissant quelque renseignement sous le régime de la présente loi,

	(ii) soit a présenté au ministre une renonciation, selon le formulaire prescrit, au cours de la période normale de nouvelle cotisation applicable au contribuable pour l'année;
152 (4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining – at any time after the end of the normal reassessment period, of a taxpayer who is an individual (other than a trust) or a graduated rate estate, in respect of a taxation year – the amount of any refund to which the taxpayer is entitled at that time for the year, or a reduction of an amount payable under this Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is 10 calendar years after the end of that taxation year, (a) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year; and (b) redetermine the amount, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 122.8(2) or (3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the	**152(4.2)** Malgré les paragraphes (4), (4.1) et (5), pour déterminer, à un moment donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable – particulier (sauf une fiducie) ou succession assujettie à l'imposition à taux progressifs – pour une année d'imposition, le remboursement auquel le contribuable a droit à ce moment pour l'année ou la réduction d'un montant payable par le contribuable pour l'année en vertu de la présente partie, le ministre peut, si le contribuable demande pareille détermination au plus tard le jour qui suit de dix années civiles la fin de cette année d'imposition, à la fois : *a)* établir de nouvelles cotisations concernant l'impôt, les intérêts ou les pénalités payables par le contribuable pour l'année en vertu de la présente partie; *b)* déterminer de nouveau l'impôt qui est réputé, par les

taxpayer's tax payable under this Part for the year or deemed by subsection 122.61(1) to be an overpayment on account of the taxpayer's liability under this Part for the year.	paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 122.7(2) ou (3), 122.8(2) ou (3), 127.1(1), 127.41(3), ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année ou qui est réputé, par le paragraphe 122.61(1), être un paiement en trop au titre des sommes dont le contribuable est redevable en vertu de la présente partie pour l'année.

[73] The issue here may be stated simply: following a taxpayer's request for an adjustment and examination of the initial assessment for a taxation year in accordance with subsection 152(4) of the Act, if the Minister finds that no adjustment of the initial assessment is needed, is the Minister obliged to issue a notice of reassessment?

[74] Given the wording of subsection 152(4) in the context of section 152 of the Act and the case law of the Federal Court of Appeal and this Court, I find, first, that the Minister has no duty to carry out a reassessment under this subsection after having received an adjustment request from a taxpayer. Furthermore, in the circumstances in which he or she refuses such an adjustment request and upholds the results of his or her initial assessment, I find that the Minister is under no obligation to issue a notice of reassessment to the taxpayer. The decision of the Minister as to whether or not to carry out a reassessment under subsection 152(4) of the Act is

discretionary. The Minister commits no reviewable error if he or she communicates his or her refusal in the form of a letter of refusal, as in this case.

[75] To properly understand this conclusion, it is helpful to examine the provisions of section 152 of the Act following an interpretative contextual approach (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 RCS 27 at para. 21). Subsection 152(1) provides that the Minister has a legal duty to carry out an initial assessment for a taxation year after examining the initial income tax return filed by a taxpayer. The Minister had no discretion in that regard (subsections 152(1) and 152(2) of the Act). Both sections require that: "The Minister shall, with all due dispatch, examine a taxpayer's return of income…, assess the tax for the year, … and determine…" (subsection 152(1)), and "After examination of a return, the Minister shall send a notice of assessment…" (subsection 152(2)).

[76] As for a reassessment regarding "any person who files an income tax return for a taxation year, subsection 152(4) of the Act states that the Minister "may at any time make an assessment, reassessment…". In my view, the use of the word "may" denotes a discretionary power of the Minister which is in sharp contrast to the mandatory requirements in subsections 152(1) and (2) of the Act (*see also*, subsection 152(6), "the Minister shall reassess the taxpayer's tax". In this regard, the Minister's duty under subsection 152(4) of the Act is analogous to that in subsection 152(4.2): "the Minister may, … (*a*) reassess tax…". Both provisions contain permissive wording according to which the Minister may or may not carry out reassessments in the specific circumstances set out in each provision.

[77] A number of tax judgments have adopted this interpretation of subsection 152(4) of the Act by studying the scope of the duty to carry out a reassessment following an adjustment request from a taxpayer. In *Armstrong v Canada*, 2006 FCA 119 (*Armstrong*), the Federal Court of Appeal explained the principle in the following words (at para. 8):

> An amended return for a taxation year that has already been the subject of a notice of assessment does not trigger the Minister's obligation to assess with all due dispatch … An amended income tax return is simply a request that the Minister reassess for that year.

[78] The applicants pointed out at the hearing that the Court of Appeal's comments in *Armstrong* had been made in the context of a waiver filed by an individual (as opposed to corporate) taxpayer after the normal reassessment period for a notice of determination of loss under subsection 152 (1.1) of the Act. In addition, the Court of Appeal made reference to subsection 152(4.2) of the Act. However, the applicants filed their adjustment request and their amended income tax returns during the normal reassessment period.

[79] Having noted these factual distinctions, I disagree with the applicants' reasoning according to which *Armstrong* and the case at bar should be distinguished. The principle is applicable, regardless of the fact that the adjustment request was filed during the normal reassessment period (subsection 152(4)) or not (subsection 152(4.2)). As I noted above, the Minister has a similar discretionary authority under subsections 152(4) and (4.2) of the Act in light of the same wording used in both subsections ("the Minister may… make a reassessment").

[80] The discretionary character of subsection 152(4) of the Act was addressed in detail in *Rio Tinto Alcan Inc. v The Queen*, 2017 TCC 67 at paragraphs 149-174. In particular, the TCC discussed the difference between subsections 152(1) and 152(4) of the Act (at paras. 166-167):

> [166] The language in subsection 152(4) of the ITA is completely different. Under this subsection, the Minister may make a reassessment. Nothing in the wording of the subsection requires the Minister to make a reassessment. The Minister's authority under this subsection is discretionary.
>
> [167] Thus, I do not agree with [Rio Tinto Alcan] when it argues that subsection 152(4) of the ITA does not give the Minister the authority to make reassessments and that subsection 152(4)'s sole object is to restrict the Minister's authority in time. The language of subsection 152(4) is clear; it gives the Minister the authority to make assessments, reassessments or additional assessments.

[81] The filing of an amended tax return therefore does not compel the Minister to automatically carry out a reassessment. In accordance with subsection 152(4), upon receiving an adjustment request within the normal reassessment period, the Minister is required to examine the amended tax returns and issue a reasonable decision. Obviously, if the Minister determines that adjustments are necessary and carries out a reassessment, it would be open to the taxpayer to challenge it (section 165 of the Act), and in that case, to file an appeal the assessment to the TCC (section 169 of the Act).

[82] The applicants filed their initial tax returns for the 2012 taxation year in March 2013. In accordance with subsections 152(1) and 152(2) of the Act, the Minister carried out initial assessments that were substantially in agreement with the returns. The applicants never objected to the initial assessments issued by the Minister. The applicants do not dispute these facts. Subsequently, the applicants filed their adjustment request with the Minister on February 4,

2015, wherein they asked the Minister to carry out the reassessments in order to change the taxation level of the compensation paid by the MTQ.

[83] The applicants argue that the Minister cannot make a decision under subsection 152(4) of the Act other than by issuing a notice of reassessment, even of the Minister is of the view that no adjustment to the taxpayer's initial assessment is necessary. The applicants contend that the Minister's refusal must be communicated through a notice and not by a letter of refusal in order to protect the taxpayer's right to challenge the decision. However, the applicants could cite no authority, legislative or in the case law, that would support their argument. Moreover, as i indicated earlier, the Minister's use of a letter communicate her refusal to carry out a reassessment under subsection 152(4) of the Act is subject to review by the Court. The applicants are not victims of an injustice and contrary to the contentions of their counsel, there is no legal vacuum that the Minister had to fill by issuing the notices of reassessment.

Did the Minister enter into an agreement with the applicants or otherwise create legitimate expectations that the reassessments would be issued?

[84] Notwithstanding my conclusion that subsection 152(4) of the Act does not require the Minister to carry out a reassessment following an adjustment request, the Minister could be required to carry out a reassessment if an agreement to that effect was entered into with the taxpayer (*Mitchell c Canada*, 2002 FCA 407).

[85] The applicants submit that Mr. Barry, CAI's auditor, had promised them that he would treat the amount of $5.45 million as a capital gain taxable in their hands. The only evidence to

support the applicants' argument is the letter that their accountant, Mr. Roy, sent to their counsel, dated March 23, 2017. The letter explains his version if the record of communications of the accountants with officers of the CRA. In this letter, Mr. Roy states that, during a meeting between mid-October 2014 and mid-January 2015:

> [TRANSLATION]
>
> "Mr. Barry, the auditor, confirmed to us that the choice of section 13 (7.4) [of the Act] cannot apply, as the amount received from [MTQ] is not an inducement according to section 12 (1) [of the Act], but must be taxed as business income according to section 9 (1) [of the Act]. During the meeting, he verbally confirmed to Mr. Roy that the compensation must be taxed as a capital gain in the companies [applicants], as the cheques had been issued in the name of the [applicants]."

[86] The letter states that Mr. Barry confirmed this point during a call with Mr. Vincent, Mr. Roy's colleague, and that Mr. Barry asked him to send the adjustment requests to him with the amended income tax returns so that the files of the three cases involving the applicants and CAI be transferred to him.

[87] However, in his affidavit, Mr. Barry stated the opposite:

> [TRANSLATION]
>
> 26. On January 20, 2015, [the accountant] Mr. Benoît Vincent of the BCGO firm, representative of CAI, contacted me to the CRA's position refusing the choice presented by CAI, pursuant to subsection 13(7.4) of the Act, in its amended income tax return for 2012. On that occasion, Mr. Vincent asked me if he should amend the [applicants'] income tax returns to include compensation for expropriation as a capital gain realized by [the applicants] and exclude from CAI's income the amount of $5.2 million declared as other income. I answered Mr. Vincent by telling him that I could not answer that question and that the decision was his to make. I also mentioned to him that any adjustment request would be

> examined provided that it was filed within the normal reassessment period set out in subsection 152(3.1) of the Act.
>
> 27. During this telephone conversation on January 20, 2015, I never told Mr. Vincent that the [applicants'], and CAI's amended income tax returns would be accepted [the CRA].

[88] It is important to note that Mr. Barry's statements in his affidavit are consistent with his contemporaneous notes. In addition, aside from Mr. Roy's letter of March 23, 2017, neither Mr. Roy, nor Mr. Vincent filed any sworn statements in this judicial review.

[89] I therefore find that, based on the evidence, the applicants have not established that they had entered into an agreement with the Minister to the effect that reassessments would be carried out for the 2012 taxation year; an agreement that would have imposed a public legal duty on the Minister to comply and to issue notices of reassessment.

Conclusion

[90] Furthermore, the applicants had expectations that their adjustment request would be considered as was confirmed by Mr. Barry. The Minister followed the expected process and considered the adjustment request of February 4, 2015. Her representative, Mr. El Haial, drafted a detailed audit report for each of the applicants and for CAI. Following this process, the Minister decided to uphold the applicants' initial assessments des applicants without issuing reassessments to them in accordance with her obligations under subsection 152(4) of the Act. The Minister had no legal duty to carry out the reassessments for the 2012 taxation year for the applicants, or to issue notices of reassessment reflecting her refusal. Accordingly, the applicants have not met the first test for a *mandamus* order to be issued.

(4) Were the Minister's decisions dated March 16, 2017, unreasonable or did they otherwise breach the applicants' right to procedural fairness?

[91] During my assessment of the criteria set out in *Hennelly* with respect to the issue of an extension of time provided for at subsection 18.1(2) of the FCA for the filing of an application for judicial review of the decisions dated March 16, 2017, I considered the of the application: namely, whether the Minister's decisions to uphold the applicants' initial assessments des applicants for the 2012 taxation year and not to issue notices of reassessment were reasonable.

[92] The decisions on March 16, 2017 involve the exercise of discretionary authority by the Minister's delegate and address questions of mixed fact and law. Consequently, they must be reviewed on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9; *Abakhan* at para. 14). Although the applicants make reference to breaches of their rights to procedural fairness, their arguments are based on the concept of fairness in general and not on specific breaches of procedural fairness by the Minister.

[93] The applicants did not address this issue in their Memorandum because, according to them, the Minister's letters of March 16, 2017 were not administrative decisions subject to the Federal Court's jurisdiction. At the hearing, the applicants argued that the decisions were unreasonable in light of the findings of Mr. Barry during the audit of CAI following its adjustment request on February 6, 2014. In addition, the applicants refer to a number of arguments about the consequences resulting from the Minister's refusal to issue notices of reassessment and submit that this has cause them hardship and injustice.

[94] The Minister argues that her decisions on March 16, 2017 were reasonable. The Minister diligently carried out the initial assessments for the 2012 year for the applicants based on the income tax returns prepared by the applicants. The CRA auditor, Mr. El Haial, examined the adjustments sought by the applicants and, in refusing to carry out the reassessments, determined that the adjustments did not match the reality of the breakdown of the compensation for expropriation. The Minister submits that the applicants adduced no evidence that would establish that she acted unreasonably or in breach of their rights to procedural fairness. On the contrary, the applicants rely on logic and on fairness, considerations that are irrelevant to judicial review or to carrying out assessments.

[95] In the letter dated December 8, 2014, Mr. Barry explained his findings during his audit of CAI's adjustment request. Mr. Barry was not the auditor of the applicants. He was examining a separate issue centered on subsection 13(7.4) of the Act.

[96] Mr. Barry makes reference to compensation for expropriation. He notes that 9027 had received the amount of $8,700,000 for the expropriation. He further indicated in his letter that the amount of $8,700,000 should be treated as proceeds of the disposition of the lands and buildings expropriated. However, that letter had been sent to CAI solely in response to its initial adjustment request. The letter notified CAI that its adjustment request on February 6, 2014 had been refused. The objective of this application is to apply subsection 13(7.4) of the Act to the replacement property acquired for the period ending September 30, 2013. Moreover, the ultimate outcome of the decision, namely that the amount of $5.45 million paid to CAI qualifies

as business income under subsection 9(1) of the Act, is consistent with the decisions of March 16, 2017.

[97] It is clear from Mr. Barry's affidavit and from the correspondence of the applicants' accountants that an independent review of the appropriate characterisation of the expropriation funds was needed. In January 2015, Mr. Barry notified Mr. Vincent that, if the applicants and CAI decided to file another adjustment request, the request would be examined by the Minister. Later, on February 4, 2015, the accountants filed the applicants' adjustment request for the 2012 taxation year. In my view, the audit of this request carried out by Mr. El Haial and the conclusions of the Minister following his audit are determinative of the issue as to whether the Minister's decisions of March 16, 2017 were reasonable.

[98] Mr. El Haial examined the adjustment request; the applicants' amended tax returns for the 2012 taxation year; the corporate structure of CAI, the applicants and the other inter-related companies; corporate documents; the history of the expropriation and breakdown of compensation; CAI's initial adjustment request and the conclusion of the CRA's technical division that the amount of $5,450,000 qualified as CAI income under subsection 9(1) of the Act; and the accountants' submissions. Mr. El Haial prepared detailed audit reports for each of the applicants and for CAI. In his affidavit, Mr. El Haial explained his finding:

> [TRANSLATION]
>
> "Upholding the tax treatment of the initial income tax returns of the applicants and of Constant Amériques Inc., which represents the fiscal reality of the distribution of the compensation for expropriation."

[99] The applicants adduced no other evidence that would tend to contradict Mr. El Haial's findings or the Minister's decision to uphold the applicants' initial assessments for the 2012 taxation year. On the contrary, their adjustment request submits that errors had been made by the applicants in their initial tax returns. The applicants are essentially relying on the same documentation submitted to the Minister when they were initially assessed. They present new fiscal arguments claiming that the amount of $5.45 million should be reassessed as a capital gain in their hands rather than CAI income under subsection 9(1) of the Act.

[100] Having considered the audit reports, Mr. El Haial's contemporaneous notes, the documentation before the Court and the arguments submitted in support of the adjustment request, I find that the audit performed by Mr. El Haial, his finding with regard to the appropriate treatment of the compensation for expropriation, and the Minister's decisions of March 16, 2017 are reasonable. The Minister was under no obligation to agree to the changes sought by the applicants or to issue notices of reassessment in order to provide the applicants to challenge the decisions, with a view to appealing the reassessments to the TCC.

[101] The applicants put forth a number of arguments to the effect that the refusal to issue a reassessment carried consequences that they characterize as unjust and illogical. The applicants remark that Revenu Québec had issued reassessments for the 2012 taxation year further to an adjustment request submitted at the same time as their request to the CRA. They further note the fact that a reassessment had been issued to CAI 2012 year. The applicants believe that the reassessments are necessary in order to [TRANSLATION] "reconcile everything".

[102] With respect, such considerations do not adversely affect the issue as to whether the decisions made in March 2017 by the Minister are reasonable. The Minister is not bound by assessments carried out by a provincial tax authority province (*Hsu v The Queen*, 2006 TCC 304 at para. 16).

[103] The fact that the Minister carried out reassessments with respect to CAI in order to withdraw the amount of compensation set aside ($870,000) in 2012, to add the amount of $870,000 to the income of 9027 for the taxation year 2014, and to allow a capital cost allowance for CAI ($116,509) in 2013, cannot create a general obligation to assess the applicants for the 2012 taxation year. The issuing of notices of reassessment to CAI for the 2012 and 2013 taxation years for specific reasons does not render the decisions of March 16, 2017 unreasonable.

V. Conclusion

[104] The letters dated March 16, 2017, constitute decisions of the Minister under subsection 152(4) of the Act. On that date, she refused to carry out reassessments for the applicants for the 2012 taxation year. These decisions are properly the decisions in issue before the Court.

[105] The Minister's decision as to whether or not to carry out a reassessment for a taxation year under subsection 152(4) of the Act is a discretionary decision. The Court has jurisdiction to hear and determine the application for judicial review of the Minister's decisions in that regard.

[106] The applicants filed their application for judicial review well after the time period set out in subsection 18.1(2) of the FCA. The decisions in issue were communicated to the applicants on

March 16, 2017, and the application for judicial review was filed on February 6, 2018. The applicants did not meet the criteria established in *Hennelly* and I am not convinced that the interests of justice require that an extension of time be granted.

[107] In any event, despite the applicants' arguments, the Minister had no legal duty to carry out the reassessments for the 2012 taxation year, or to issue the notices of reassessment, following her audit of the applicants' adjustment request on February 4, 2015. As a result, the applicants failed to meet the first test for the issuance of a *mandamus* order. In addition, the applicants have not demonstrated how the Minister's decisions of March 16, 2017 were unreasonable or otherwise breached their right to procedural fairness.

JUDGMENT in Docket T-219-18

THE COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The applicants are ordered to pay to the Minister the sum of $2,100 in costs, including disbursements and taxes.

3. The Style of Cause of this application is amended to remove the reference to the CRA.

"Elizabeth Walker"
Judge

Translation certified true
on this 22nd day of July 2019

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-219-18
STYLE OF CAUSE:	3087-1883 QUÉBEC INC AND 9027-4218 QUÉBEC INC v MINISTER OF NATIONAL REVENUE AND CANADA REVENUE AGENCY
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING :	JANUARY 16, 2019
JUDGMENT AND REASONS:	WALKER J.
DATED:	JUNE 6 2019

APPEARANCES:

Me Richard Généreux	FOR THE APPLICANTS
Me Nathalie Labbé Me Ian Demers	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Services Juridiques Evolex Inc. Montréal, Quebec	FOR THE APPLICANTS
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT