In Defence of the Federal Court's Jurisdiction over Judicial Review of Tax Matters

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I. INTRODUCTION

When most Canadian lawyers think of tax disputes, their minds typically turn to the Tax Court of Canada (the "Tax Court"). Members of the profession are satisfied that the mysterious world of tax dispute resolution is walled off in a special judicial world. The Tax Court, however, has only existed since 1983 — and its exclusive original jurisdiction to hear appeals of tax assessments only since 1991.[1] Prior to 1991, it shared this jurisdiction with the Federal Court Trial Division.[2] A legacy of this history[3] that often surprises lawyers is that while the Tax Court enjoys exclusive jurisdiction to hear appeals of a variety of tax and federal benefit appeals,[4] the Federal Court has exclusive jurisdiction over judicial reviews of discretionary decisions made by the Minister of National Revenue.

This curious — and, as we shall see, controversial — institutional arrangement is an arrangement that I will defend in this paper. I first review the source of the Federal Court of Canada's (the "Federal Court") judicial review jurisdiction and contexts in which this arises in tax matters. I then discuss the critiques of the current institutional arrangement. I conclude by offering two defences of the status quo: first, that siphoning off judicial review jurisdiction to a specialist court would undermine the principle emanating from *Reference re Code of Civil Procedure (Que.), art. 35* that "the superior courts are in the best position to preserve the various facets of the rule of law";[5] and second, that principles of judicial review need to be consistent, and balkanizing jurisdiction over a particular administrative

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1 *Tax Court of Canada Act*, S.C. 1980-82-82, c. 158.

2 Ian Macgregor *et al.*, "The Development of the Tax Court of Canada: Status, Jurisdiction, and Stature" (2010) 58 Canadian Tax Journal 87 at 23.

3 For a comprehensive history of tax appeals in Canada, overviewing the evolution of Canada's system of tax dispute resolution from its humble administrative beginnings, see Robert McMechan & Gordon Bourgard, "The History of Tax Appeals" in *Tax Court Practice* (Toronto: Carswell) (looseleaf).

4 *Tax Court of Canada Act*, S.C. 1980-82-82, s. 12(1).

5 *Reference re Code of Civil Procedure (Que.), art. 35*, [2021] S.C.J. No. 27, 2021 SCC 27 at para. 49 (S.C.C.) [hereinafter "*Reference re Code of Civil Procedure*"].

actor risks the development of inconsistent parallel approaches to policing the boundaries of administrative bodies, due to the general problems associated with specialist courts.

II. THE FEDERAL COURT'S JUDICIAL REVIEW JURISDICTION OVER TAX MATTERS

When it comes to the Federal Court's jurisdiction over tax matters, I start, perhaps unsurprisingly, with the *Federal Courts Act*.[6] Section 18 empowers the Federal Court with "exclusive original jurisdiction . . . to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal".[7] In other words, the statute clearly stipulates that the Federal Court is where those who seek a judicial review of a federal administrative actor need to turn to.

Relevant for our purposes is that the Canada Revenue Agency ("CRA") is — at least in context of federal judicial review — an administrative actor just like any other. As Stratas J.A. noted in *JP Morgan Asset Management (Canada) Inc. v. Canada (Minister of National Revenue)*, "[t]he Minister [of National Revenue] is a 'federal board, commission or other tribunal' and, in appropriate circumstances, her decisions can be reviewed."[8] So the CRA is thus subject to judicial review just as any other administrative decision-maker is, subject to certain important limitations. These limitations in a tax context are primarily set out in section 18.5 of the Act, which stipulates that "if an Act of Parliament expressly provides for an appeal to the . . . Tax Court of Canada [then] that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with."[9] So where a specific revenue statute provides explicitly for an appeal to the Tax Court.[10] then judicial review before the Federal Court is unavailable. It is from this that the current bifurcated institutional arrangement for tax disputes emerges: appeals of tax assessments go to the Tax Court, whereas judicial review of discretionary decisions of the CRA go to the Federal Court. This is a well-settled line of demarcation. As David Jacyk notes, "[t]here is little, if any, overlap between the jurisdiction of the Tax Court and the Federal Court or other superior courts. If the Tax Court of Canada has jurisdiction to deal with the issue, then a different superior court generally does not, and vice versa."[11]

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[6] *Federal Courts Act*, R.S.C. 1985, c. F-7.

[7] *Federal Courts Act,* R.S.C. 1985, c. F-7, s. 18(1).

[8] *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, [2013] F.C.J. No. 1155, 2013 FCA 250 at para. 25 (F.C.A.) [hereinafter "*JP Morgan*"].

[9] *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.5.

[10] Most broadly, for instance, at s. 169(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[11] David Jacyk, "The Dividing Line Between the Jurisdictions of the Tax Court of Canada

What, then, are some of the sorts of discretionary powers that the *Income Tax Act*[12] extends to the Minister of National Revenue? There are multiple provisions of the Act that allow for exercises of discretionary power. Examples include section 231.6(1), which states that the Minister "may" require persons to disclose "any foreign-based information or document"[13] that "may be relevant to the administration or enforcement"[14] of the Act. The Minister's discretionary ability to refuse to refund an amount he considers not owed to a taxpayer based on his own interpretation of the Act has also been at-issue in judicial review.[15] Judicial reviews also transpire in *Excise Tax Act*[16] context.[17] By far the most common circumstance in which a judicial review of a tax matter arises in Canada, however, is when a taxpayer's request for relief of a penalty and/or interest is denied by the Minister, pursuant to section 220(3.1) of the *Income Tax Act*.[18] This provision, in essence, permits the Minister at his or her discretion to waive any penalty and/or interest charged to a taxpayer pursuant to the Act. Given the myriad of ways a taxpayer might wind up facing a penalty under the Act,[19] taxpayers frequently apply to the Minister for such relief and — when that relief is denied — seek judicial review of the decision to deny their application in the Federal Court.

III. CRITIQUES OF THE CURRENT ARRANGEMENT

This institutional arrangement has been the subject of criticism, primarily from the tax bar and the broader professional tax community.[20] These critiques are frequently couched in terms of a proposed reform or recommendation to transfer the Federal Court's jurisdiction over judicial review to the Tax Court. An example of this sort of recommendation from the broader legal profession is a 2008 open letter to then Minister of Justice Robert Nicholson from the Canadian Bar Association

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and Other Superior Courts" (2008) 56 Canadian Tax Journal 661 at 705.

[12] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[13] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 231.6(2).

[14] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 231.6(2).

[15] *Harrison v. Canada (Minister of National Revenue)*, [2020] F.C.J. No. 933, 2020 FC 772 (F.C.).

[16] *Excise Tax Act*, R.S.C. 1985, c. E-15.

[17] *Denso Manufacturing Canada Inc. v. Canada (Minister of National Revenue)*, [2020] F.C.J. No. 335, 2020 FC 360 (F.C.).

[18] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 220(3.1).

[19] See, for instance: *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), ss. 162(5), (6), (7), (7.01), (7.02), 163(2).

[20] Tax, of course, being a field of practice in which lawyers share space with other professionals, primarily accountants and economists. Indeed, the right of the former to represent and advocate for taxpayers in administrative disputes with the CRA (and other tax authorities) has been upheld by the Supreme Court of Canada. See *Barreau du Québec v. Quebec (Attorney General)*, [2017] S.C.J. No. 56, 2017 SCC 56 (S.C.C.).

("CBA").[21] Citing the Tax Court's accessibility and specialist expertise as reasons for an expansion of the Court's jurisdiction,[22] the CBA proposed that

> . . . the Tax Court be given exclusive original jurisdiction to exercise judicial review powers with respect to the Minister [of National Revenue]. Given the specialised nature of the Tax Court, and its familiarity with the CRA and the methods and aims of tax administration, it is in the best position to exercise an oversight role. Furthermore, this would be a convenience for taxpayers, since it would enable them to seek judicial review remedies in the same court that hears income tax and GST appeals.[23]

The Tax Court's relevant specialist knowledge, the CBA argues, stems from its "day-to-day exposure to the substantive provisions of tax legislation [which] provides a context for making decisions in connection with the procedural provisions of the legislation and for judicial review of CRA actions".[24] The Tax Court's detailed knowledge of tax law, in other words, should sustain and inform its adjudication of judicial reviews of discretionary decisions of the CRA — a process typically informed by general principles of *administrative* law.

The CBA is not the only one to criticize the current institutional arrangement. In a "fireside chat" published in the Canadian Tax Journal, former Tax Court Chief Justice Bowman similarly concluded — toward the end of his time on the bench — that judicial review jurisdiction ought to be transferred from the Federal Court to the court over which he presided. When asked whether he agreed with the CBA's recommendations on such a transfer, he responded that

> I think it's high time. . . . Now I'm hoping that the Tax Court will acquire jurisdiction in these other areas that affect or are part of a tax adjudication. I would prefer not to have to tell a taxpayer who comes before me asking for a certain type of relief that only the Federal Court can give it, and have to say, "Sorry, we do not have jurisdiction. You had better go down the street to talk to the Federal Court, and if you can manage to get your documents filed, maybe they will hear you."[25]

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[21] Canadian Bar Association, Taxation Law Section. "Tax Court Jurisdiction" (March 13, 2008), online: <https://www.cba.org/Our-Work/Submissions-(1)/Submissions/2008/Tax-Court-Jurisdiction>.

[22] Canadian Bar Association, Taxation Law Section, "Tax Court Jurisdiction" (March 13, 2008), online: https://www.cba.org/Our-Work/Submissions-(1)/Submissions/2008/Tax-Court-Jurisdiction at 2.

[23] Canadian Bar Association, Taxation Law Section, "Tax Court Jurisdiction" (March 13, 2008), online: <https://www.cba.org/Our-Work/Submissions-(1)/Submissions/2008/Tax-Court-Jurisdiction> Appendix A at 2.

[24] Canadian Bar Association, Taxation Law Section, "Tax Court Jurisdiction" (March 13, 2008), online: <https://www.cba.org/Our-Work/Submissions-(1)/Submissions/2008/Tax-Court-Jurisdiction> at 2.

[25] Hon. D. Bowman, "A Fireside Chat with the Chief Justice of the Tax Court of Canada" (2010) 58 Canadian Tax Journal 29 at 31.

In rare situations where uncertainty arises in the *Income Tax Act* as to whether the Tax Court or the Federal Court is the correct forum for dispute resolution, the tax profession can be inclined to favour the former. For example, pursuant to subsection 247(10) of the Act, the Minister enjoys discretion to come up with a determination of an accurate downward adjustment of a taxpayer's transfer pricing arrangement.[26] But subsection 247(11) of the Act goes on to stipulate that the provisions of the Act conferring exclusive jurisdiction over appeals to the Tax Court apply to the entirety of section 247.[27] Daniel Sandler and Lisa Watzinger have argued that disputes arising from the Minister's discretionary adjustments pursuant to subsection 247(1) of the Act should be adjudicated by the Tax Court,[28] and even propose amending the language of the Act's transfer pricing provisions to ensure such disputes stay away from the Federal Court.[29] So not only has the current institutional arrangement been criticized by the tax profession, but where the lines may blur in the arrangement, the tax profession is inclined toward the Tax Court.

Similarly — and more recently — Michael Lubetsky has argued that "the Tax Court could review and decide just as effectively as the Federal Court and the superior courts . . . the following: relief of interest and penalties, extensions of filing deadlines, entitlements to refunds . . . and remedies for taxpayers who reasonable rely on incorrect CRA advice".[30] Lubetsky argues that such reforms to the current institutional arrangement are necessary to "[ensure] that taxpayers can obtain the benefit of accessible, effective, and independent dispute resolution as Parliament intended".[31]

But there are good reasons to maintain the status quo. It is to a defence of the Federal Court's jurisdiction over judicial review of tax matters that I now turn.

IV. SPECIALIST COURT JUDICIAL REVIEW UNDERMINES THE PRINCIPLES EMANATING FROM *REFERENCE RE CODE OF CIVIL PROCEDURE*

It is worth pausing here to remind ourselves of the purpose of judicial review in

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[26] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 247(10).

[27] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 247(11).

[28] For the moment, however, this issue has been settled in favour jurisdictionally of the Federal Court. In *Canada v. Dow Chemical Canada ULC*, [2022] F.C.J. No. 565, 2022 FCA 70 (F.C.A.), the Federal Court of Appeal — reversing a decision of the Tax Court — confirmed that the Federal Court is the correct forum in which the Minister's downward pricing discretion is to be reviewed.

[29] Daniel Sandler & Lisa Watzinger, "Disputing Denied Downward Transfer-Pricing Adjustments" (2019) 67:2 Canadian Tax Journal 281.

[30] Michael Lubetsky, "The Fractured Jurisdiction of the Courts in Income Tax Disputes" in Pooja Mikhailovich & John Sorenson, eds., *Tax Disputes in Canada: The Path Forward* (Toronto: Canadian Tax Foundation, 2022) at 49.

[31] Michael Lubetsky, "The Fractured Jurisdiction of the Courts in Income Tax Disputes" in Pooja Mikhailovich & John Sorenson, eds., *Tax Disputes in Canada: The Path Forward* (Toronto: Canadian Tax Foundation, 2022) at 3.

the Anglo-Canadian legal tradition. The overarching purpose of judicial review in a public law context is to allow persons impacted by state decisions to test the lawfulness of those decisions when they are made by public bodies. Judicial review also requires that state action not only be lawful, but reasonable: a court tasked with reviewing the conduct of a public authority is tasked with ensuring that it "must specify the spheres of autonomy of equal citizens in a reasonable, as opposed to the one correct, way. Thus, a person's constitutional rights will be violated if a policy which imposes a burden on her cannot be defended as reasonable."[32] This understanding of judicial review does not require one to "believe that the main function of the courts is to 'control' government . . . [while] an important task of the courts is to place limits upon governmental activity, this serves to legitimate government as well as to control it".[33]

Mark Mancini has overviewed the specific purpose of judicial review in the administrative law context. Noting that mere enunciation of the requirement that state decisions be lawful is insufficient to uphold the rule of law, he writes that "for the relationship between individual and state to be regulated, it is not permissible for the legislature to insulate its law-making creations from scrutiny . . . For the law to be 'supreme', it must be enforced not only against legislative organs, but against all ancillary organs of the state."[34] As a result, the decisions of administrative agencies like the CRA are not sheltered from the scope of a court's judicial review powers merely because their dictates are not primary legislation.

In Canada, the superior courts have long been entrusted with the responsibility for conducting judicial review. *Roncarelli v. Duplessis*[35] is typically held up as a landmark decision in this tradition, and Rand J.'s commentary in this decision remains relevant:

> That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.[36]

But the most relevant — and much more recent — commentary from Canada's

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[32] Kai Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012) at 133.

[33] John Alder, "The Purpose of Judicial Review in English Law" (1990) 22 Bracton L.J. 37 at 41.

[34] Mark P. Mancini, "The Rule of Law in Judicial Review Today" (2022) 105 S.C.L.R. (2d) 95 at 111.

[35] *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121 (S.C.C.).

[36] *Roncarelli v Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121 at para. 142 (S.C.C.).

apex court for our purposes comes from its decision in *Reference re Code of Civil Procedure*. That case concerned the Quebec legislature's proposal to confer exclusive jurisdiction over civil claims under the amount of $85,000 to the Court of Quebec, and thus completely remove any jurisdiction of the Quebec superior courts over such matters. The Court found that this move was unconstitutional "because it impermissibly infringes on the superior courts' general private law jurisdiction".[37] The Court made several insights in reaching this conclusion that are helpful for our purposes. Critically, the Court reiterated that in Canada "the superior courts' role as the cornerstone of Canada's judicial system is based on two key principles: national unity and the rule of law".[38] One of the rationales behind the superior courts' special role in protecting the rule of law in the Canadian legal order is that they are "courts of original *general* jurisdiction",[39] and in turn "the existence of this general jurisdiction requires a broad subject-matter jurisdiction".[40]

The nature of the superior courts as generalist courts was expounded in detail by the Court:

> A court of original general jurisdiction is the antithesis of a specialized tribunal. A specialized tribunal draws legal conclusions based on a limited number of principles and rules falling within its area of expertise, whereas a court of original general jurisdiction considers and interprets many principles and general rules that may apply in a number of fields of law. In giving the superior courts this breadth of perspective, the framers of the Constitution intended them to ensure the maintenance and coherent development of an actual order of positive laws.[41]

The *Reference re Code of Civil Procedure* thus stands as authority that "the superior courts are in the best position to preserve the various facets of the rule of law".[42] This positioning is due at least in part to their nature as generalist courts adjudicating claims arising from many different fields of law. The Supreme Court of Canada's decision in *Reference re Code of Civil Procedure* is thus obviously relevant to proposals to confer judicial review power over the CRA to the Tax Court.

One might counter that the Federal Court is not a superior court of original

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[37] *Reference re Code of Civil Procedure (Que.), art. 35*, [2021] S.C.J. No. 27, 2021 SCC 27 at para. 71 (S.C.C.).

[38] *Reference re Code of Civil Procedure (Que.), art. 35*, [2021] S.C.J. No. 27, 2021 SCC 27 at para. 42 (S.C.C.).

[39] *Reference re Code of Civil Procedure (Que.), art. 35*, [2021] S.C.J. No. 27, 2021 SCC 27 at para. 51 (S.C.C.) (emphasis added).

[40] *Reference re Code of Civil Procedure (Que.), art. 35*, [2021] S.C.J. No. 27, 2021 SCC 27 at para. 82 (S.C.C.).

[41] *Reference re Code of Civil Procedure (Que.), art. 35*, [2021] S.C.J. No. 27, 2021 SCC 27 at para. 85 (S.C.C.).

[42] *Reference re Code of Civil Procedure (Que.), art. 35*, [2021] S.C.J. No. 27, 2021 SCC 27 at para. 49 (S.C.C.).

jurisdiction constituted and protected by section 96 of the *Constitution Act, 1867*.[43] The Court's concern in *Reference re Code of Civil Procedure* was to safeguard the constitutionally protected jurisdiction of the section 96 superior courts — the transfer of powers between section 101[44] courts created by the federal Parliament was not the concern of the decision. But this is to miss forest through the trees. *Reference re Code of Civil Procedure* explicitly stated that superior courts are best positioned to preserve the rule of law, and the availability of judicial review is a core component of the rule of law in Canada. One of the reasons given in *Reference re Code of Civil Procedure* for the superior courts' special role is their nature as generalist courts, which the Court acknowledges provide the benefit of a "breadth of perspective".[45] If generalist courts are best placed to protect the rule of law, and if judicial review is a critical component of the rule of law, then it follows that generalist courts should be charged with engaging in judicial review of state conduct.

The mere fact that the Federal Court is a creature of statute does not detract from its nature as a generalist court. In other words, although the Federal Court is not a section 96 generalist superior court, it is still nevertheless a generalist court. The Federal Court itself notes that almost 100 statutes confer jurisdiction to it, and that its subject matter includes administrative law, Aboriginal law, maritime and admiralty law, intellectual property law, national security law, immigration law, issues related to certain class proceedings,[46] and — as outlined earlier — facets of tax law. Many of these subfields themselves require knowledge and consideration of broader areas of private and public law. The Federal Court's original jurisdiction over all cases involving claims arising out of contract with the Crown[47] further necessitates a bench with broad general knowledge of commercial law issues. Justice Stratas has made a similar point in his writing on the nature of the Federal Court. He has noted that the *Federal Courts Act* clearly "establishes courts at the federal level to regulate matters that provinces alone cannot regulate and to harmonize the interpretation and application of federal laws".[48] The pluralization here is important: the court is charged with the maintenance and development of a broad swath of law, as opposed to a single body of law. The Federal Court surely ought to be characterized as a generalist court: the fact that the *Federal Courts Act*

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[43] *Constitution Act, 1867*, 30 & 31 Vict., c. 3.

[44] *Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 101.

[45] *Reference re Code of Civil Procedure (Que.), art. 35*, [2021] S.C.J. No. 27, 2021 SCC 27 at para. 85 (S.C.C.).

[46] Federal Court of Canada, "Jurisdiction", online: <https://www.fct-cf.gc.ca/en/pages/about-the-court/jurisdiction>.

[47] *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 17(2)(b).

[48] David Stratas, "A Judiciary Cleaved: Superior Courts, Statutory Courts and the Illogic of Difference", (September 1, 2017), online: SSRN: <https://ssrn.com/abstract=3057037 or http://dx.doi.org/10.2139/ssrn.3057037>.

jurisdictional section makes reference to the Federal Court's "original jurisdiction" five times only further evinces this.

The current institutional arrangement is thus one in which a generalist court enjoys the power of judicial review over all federal state actors, including the CRA. Given the centrality of judicial review to the rule of law, this is an institutional arrangement that is congruent with a core principle emanating from the *Reference re Code of Civil Procedure*: generalist courts are best positioned to uphold the rule of law. Proposals to balkanize judicial review functions to a specialist court thus deserve more scrutiny.

V. BALKANIZATION OF JUDICIAL REVIEW RISKS INCONSISTENCY IN POLICING ADMINISTRATIVE ACTORS

In *Reference re Code of Civil Procedure*, the Supreme Court of Canada noted that the framers of the Constitution thought that a benefit of ensuring that the superior courts were generalist courts was that this would "ensure the maintenance and coherent development of an actual order of positive laws".[49] The Court here thus alludes to the broader importance of consistency and coherence in the development of law.[50] The importance of consistency crystallizes in the context of judicial review: persons subject to the coercive power of the state should not face a conflicting myriad of approaches to reviewing the lawfulness of state conduct based solely on which particular administrative actor they are dealing with.

In Lubetsky's recent article, discussed earlier, he rightfully notes that the "a key driver of the transformation of the Exchequer Court into the Federal Court was the growth of the federal administrative state, which, in turn, fostered a perceived need to create a uniform body of law to review administrative action".[51] A core rationale behind the Federal Court's genesis is the need to ensure uniformity in judicial review. This suggests — contrary to Lubetsky's assertions otherwise[52] — that Parliament has never intended or desired a balkanized approach to judicial review of federal administrative actors.

Chad Oldfather addresses this concern over inconsistency arising from balkanization when he writes:

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[49] *Reference re Code of Civil Procedure (Que.), art. 35*, [2021] S.C.J. No. 27, 2021 SCC 27 at para. 85 (S.C.C.).

[50] See also Lon L. Fuller, *The Morality of Law* (New Haven, Conn.: Yale University Press, 1964) at 85.

[51] Michael Lubetsky, "The Fractured Jurisdiction of the Courts in Income Tax Disputes" in Pooja Mikhailovich & John Sorenson, eds., *Tax Disputes in Canada: The Path Forward* (Toronto: Canadian Tax Foundation, 2022) at 26.

[52] "Parliament did not anticipate that the Federal Court's revamped judicial review jurisdiction would be applied often (or at all) in income tax matters": Michael Lubetsky, "The Fractured Jurisdiction of the Courts in Income Tax Disputes" in Pooja Mikhailovich & John Sorenson, eds., *Tax Disputes in Canada: The Path Forward* (Toronto: Canadian Tax Foundation, 2022) at 30.

> The generalist judiciary can further these goals [of consistency] not only by preventing the sort of balkanization that is likely to occur if separate judiciaries have responsibility for their own areas of law, but also by serving as a more general barrier to needless technicality and complexity in the law. The presence of the generalist effectively requires specialist lawyers to translate their arguments into the common language of the generalist, which in turn facilitates the generality of law.[53]

Much of a Federal Court's judge's docket is compromised of judicial review applications of a discretionary decision of a federal administrative actor. They develop and apply a consistent administrative law jurisprudence across all ambits of the federal government's reach. This includes applying general principles of Canadian administrative law to the CRA as to any other federal administrative actor. As *JP Morgan* made clear, the CRA is ultimately just another administrative agency and ought to be subject to the same consistent standard of judicial policing as any other agency.

A generalist court such as the Federal Court is best placed for such a role, as our current institutional arrangement provides. Justice Diane Wood of the United States Court of Appeals for the Seventh Circuit has made similar arguments in favour of generalist judiciaries over specialist courts in the past. Given judicial review's importance in holding state actors accountable, her comments seem particularly apt:

> [T]he strongest [argument for generalist courts] relates to the accountability of the courts to the rest of society. Generalist judges cannot become technocrats; they cannot hide behind specialized vocabulary and "insider" concerns. The need to explain even the most complex area to the generalist judge (and often to a jury as well) forces the bar to demystify legal doctrine and to make the law comprehensible.[54]

Tax law is already widely derided for its complexity and inaccessibility. The notion that handing such a critical power as judicial review over to specialist tax judges would benefit taxpayers or inject any clarity into the law is a dubious one.

Justice Wood's comments on the generalist judge's ability to maintain consistency are also relevant to our purposes. She writes:

> [T]he generalist perspective reveals that many seemingly different areas of the law give rise to legal issues that do not vary by the area. Due process may be the paradigmatic example. The way we think about due process should be a constant, whether we are talking about criminal procedure, deprivations of governmental benefits, or court procedure. Applications will vary . . . but the principle does not. We are able to resist unwarranted claims for special treatment when we have the full

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[53] Chad M. Oldfather, "Judging, Expertise, and the Rule of Law" (2012) 89:5 Washington University L. Rev., Marquette Law School Legal Studies Paper No. 11-07 at 897.

[54] Diane P. Wood, "Generalist Judges in a Specialized World" (1997) 50:5 SMU L. Rev. at 1767.

> picture of litigated cases in front of us, and we are able to recognize the special case for what it is.[55]

Similarly, the way that a judge applies Canadian administrative law principles — such as the *Vavilov*[56] standard of review analysis, application of reasonableness, the *Baker*[57] procedural fairness test, and so on — should not vary across federal agencies, and certainly should not vary merely because the administrative-decision maker is a tax authority. Tax law's complexity does not make tax law unique.

The current institutional arrangement guards against this kind of balkanization of judicial review, which would risk inconsistency in the application of administrative law principles to federal state actors. The United States Court of Appeals for the Sixth Circuit very recently mused that "taxes may well be 'what we pay for civilized society,' . . . but that doesn't mean the tax collector is above the law."[58] This is certainly true in Canada no less than in the United States. But being subject to the law must mean being subject to a law that is consistently applied. Entrusting the power of judicial review — a power so core to the rule of law — over Canada's tax authority to the Federal Court serves this aim well. Proposals to balkanize this core power should be rejected.

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[55] Diane P. Wood, "Generalist Judges in a Specialized World" (1997) 50:5 SMU L. Rev. at 1767-1768.

[56] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.).

[57] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.).

[58] *Eaton Corporation and Subsidiaries v. Commissioner of Internal Revenue* No. 21-1569 (6th Cir. 2022).