



**SUPREME COURT OF CANADA**

**CITATION:** Dow Chemical  
Canada ULC v. Canada, 2024  
SCC 23

**APPEAL HEARD:** November 9,  
2023

**JUDGMENT RENDERED:** June 28,  
2024

**DOCKET:** 40276

**BETWEEN:**

**Dow Chemical Canada ULC**  
Appellant

and

**His Majesty The King**  
Respondent

**CORAM:** Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal and O’Bonsawin JJ.

**REASONS FOR** Kasirer J. (Martin, Jamal and O’Bonsawin JJ. concurring)  
**JUDGMENT:**  
(paras. 1 to 122)

**DISSENTING** Côté J. (Karakatsanis and Rowe JJ. concurring)  
**REASONS:**  
(paras. 123 to 224)

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**Dow Chemical Canada ULC**

*Appellant*

v.

**His Majesty The King**

*Respondent*

**Indexed as: Dow Chemical Canada ULC v. Canada**

**2024 SCC 23**

File No.: 40276.

2023: November 9; 2024: June 28.

Present: Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal and O’Bonsawin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Courts — Jurisdiction — Taxation — Income tax — Downward transfer pricing adjustment — Taxpayer reporting taxable income — Taxpayer including income earned and deducting interest expenses incurred under loan agreement with related foreign company — Minister reassessing and applying transfer pricing rules to income earned resulting in increased amount of taxable income — Minister declining to exercise discretion to make downward transfer pricing adjustment in respect of interest expenses — Taxpayer applying to Federal Court for judicial review of*

*Minister's decision denying downward adjustment and appealing reassessment to Tax Court of Canada — Whether decision by Minister exercising discretion to deny taxpayer's request for downward transfer pricing adjustment falls outside exclusive original jurisdiction of Tax Court to determine appeals of assessments — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 169, 247(2), 247(10) — Federal Courts Act, R.S.C. 1985, c. F-7, ss. 18.1, 18.5.*

Dow Chemical Canada ULC, a Canadian resident corporation, entered into, as a borrower, a non-arm's length revolving loan agreement with a related Swiss company as the lender. As a result of this loan agreement, Dow incurred interest expenses for its 2006 and 2007 taxation years. It also reported income for the 2006 taxation year in respect of toll manufacturing services provided to the Swiss company. Following a review of the transactions between Dow and the Swiss company, the Minister reassessed Dow for its 2006 taxation year, applying transfer pricing rules set out in s. 247(2) of the *Income Tax Act* ("ITA"). Under s. 247(2), where a taxpayer is dealing with a non-resident person with whom it is not at arm's length, the amounts in a given transaction will be adjusted to reflect what would have been agreed to had the persons been dealing with one another at arm's length. The application of s. 247(2) resulted in a significant increase in Dow's income in the 2006 taxation year.

Dow believed that its income should be decreased to reflect an amount of interest that would have been paid had the parties been at arm's length. Where an amount is identified that would decrease the taxpayer's income, s. 247(10) of the *ITA*

provides that a downward adjustment is not to be made unless, in the opinion of the Minister, the circumstances are such that it would be appropriate that the adjustment be made. Dow requested that the Minister exercise her discretion under s. 247(10) and make a downward transfer pricing adjustment, but the Minister refused. Dow sought judicial review in the Federal Court of the Minister's discretionary decision. It also objected to the reassessment for the 2006 taxation year and eventually appealed the reassessment to the Tax Court.

In the context of the appeal of the reassessment, the parties referred a question of law to the Tax Court, asking it to determine whether, where the Minister has exercised her discretion pursuant to s. 247(10) of the *ITA* to deny a taxpayer's request for a downward transfer pricing adjustment, the decision by the Minister falls outside the exclusive original jurisdiction of the Tax Court. The Tax Court held that the Minister's discretionary decision under s. 247(10) is an essential component of the taxpayer's assessment and goes to the correctness of that assessment, and may therefore be reviewed by the Tax Court under its exclusive appellate jurisdiction to determine the correctness of the assessment. The Federal Court of Appeal allowed the Minister's appeal and held that the Federal Court has exclusive jurisdiction to judicially review discretionary decisions by the Minister under s. 247(10).

*Held* (Karakatsanis, Côté and Rowe JJ. dissenting): The appeal should be dismissed.

*Per* Martin, **Kasirer**, Jamal and O’Bonsawin JJ.: When the Minister has exercised her discretion under s. 247(10) of the *ITA* to deny a taxpayer’s request for a downward pricing adjustment, that decision falls outside of the jurisdiction of the Tax Court in respect of an appeal of the taxpayer’s assessment. The Minister’s discretionary decision is not part of the assessment. The meaning of “assessment” is settled in law, and the Minister’s opinion formed under s. 247(10) is qualitatively distinct from that concept. As there is no express right of appeal to the Tax Court, the proper forum to challenge the Minister’s discretionary decision under s. 247(10) is the Federal Court, pursuant to its exclusive jurisdiction in judicial review under s. 18(1) of the *Federal Courts Act*. Only the Federal Court has the jurisdiction to apply the appropriate standard of review and access to an appropriate range of administrative law remedies.

Both the Federal Court and the Tax Court are creatures of statute. The Federal Court has exclusive statutory jurisdiction to grant relief in relation to federal ministerial decisions under s. 18(1) of the *Federal Courts Act*. Section 18.5 of that Act allows for this jurisdiction to be ousted where a federal statute expressly provides for an appeal to another body, including the Tax Court. Pursuant to s. 12 of the *Tax Court of Canada Act* and s. 169 of the *ITA*, the Tax Court has exclusive jurisdiction to hear appeals seeking to vary or vacate income tax assessments. This jurisdiction is limited to reviewing the correctness of assessments. As confirmed in the Court’s jurisprudence, a tax assessment is a purely non-discretionary determination of the taxpayer’s tax liability for a particular taxation year. The amount of tax owing is the product of the process of determining tax liability and it flows from the *ITA* itself. In preparing an

assessment, the Minister's role is simply to determine what the law requires the taxpayer to pay by applying a fixed statutory formula to taxable income. The Minister does not exercise any discretion.

Unlike the non-discretionary determinations that make up an assessment, the *ITA* empowers the Minister to exercise discretion in some matters, including over whether to issue downward transfer pricing adjustments under s. 247(10). These discretionary decisions are not assessments nor are they part of assessments. Section 247(10) empowers the Minister to base her decision on policy considerations rather than the strict application of the law to the facts. When the Minister makes discretionary decisions, she provides her opinion, guided by policy considerations. This is a fundamentally different task than preparing an assessment. Section 247(10) must be understood alongside the non-discretionary rule in s. 247(2) that the Minister must issue an upward adjustment of income to reflect amounts that would have been determined if the parties to the transaction had been dealing at arm's length. In contrast, taxpayers have no entitlement to a downward adjustment and it cannot be said that the Minister must exercise her discretion under s. 247(10) in order for tax liability to be calculated correctly. A challenge to a policy-based decision under s. 247(10) should therefore proceed separately from an appeal of the non-discretionary assessment.

The definition of "assessment" should not be expanded to include discretionary decisions said to be directly affected by or inextricably linked to assessments. The Minister's conduct is not at issue in an assessment and taxpayers

cannot object to the underlying process or motivations for the issuing of an assessment before the Tax Court. Reviews of conduct by the executive proceed by way of judicial review before the Federal Court. If a discretionary decision made under s. 247(10) is quashed, it does not automatically follow that the tax liability is wrong and the assessment is incorrect, since it is open to the Minister to make the same decision upon reconsideration. By contrast, whenever a non-discretionary determination is found to have been made in error, the Minister has no choice but to make the correct determination. Furthermore, the fact of the Minister's opinion must not be confused with the basis for it. It is only the outcome of the Minister's exercise of discretion that may be a fact relevant to the correctness of the assessment, not the appropriateness of that outcome. A discretionary decision under s. 247(10) will not always result in an assessment being issued and decisions under s. 247(10) may be made after an assessment has been issued. It cannot be said in these circumstances that an initial assessment was incorrect. If Parliament had wished that the Minister would issue a new assessment in every circumstance that s. 247(10) discretion were exercised, it would have provided for this in the *ITA*. Changing the nature of the s. 247(10) decision or otherwise assimilating it to the assessment would require a legislative amendment.

Holding that assessments may include decisions of the Minister pursuant to provisions like s. 247(10) by necessary implication would be inconsistent with distinct routes of appeal to the Tax Court from other decisions that are set out expressly in the *ITA*. Where Parliament provides for recourse from a ministerial decision to the Tax Court, it has created an express right to appeal; this shows that ministerial decisions



are understood as distinct from the tax assessment even where they may directly affect it. To hold that the Tax Court could have implicit jurisdiction over the Minister's decision under s. 247(10) on an assessment appeal would be inconsistent with this established method. Nor does the jurisdiction of the former Exchequer Court of Canada support the view that decisions under s. 247(10) form part of an assessment. The Exchequer Court had a broader grant of jurisdiction and access to administrative law remedies, unlike the modern Tax Court. The historical jurisdiction of the Exchequer Court is therefore of limited relevance.

To depart from the settled meaning of “assessment” also has potential implications beyond the matter in issue. Moreover, adopting Dow's theory would unsettle the Court's jurisprudence on the standard of review set forth in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653. When a taxpayer challenges an assessment, the Tax Court will conduct a *de novo* review of that assessment. If a discretionary decision under s. 247(10) were part of an assessment, it would thus be reviewed *de novo*. However, absent legislative direction, this would be inappropriate. *Vavilov* emphasized that the fact that the legislature has chosen to delegate authority justifies a default position of reasonableness review. The Federal Court is the only court that has jurisdiction to review a discretionary decision under s. 247(10) on a reasonableness standard. Further, applying appellate standards of review to a decision appealed to the Tax Court through s. 169 of the *ITA* would be inconsistent with the *de novo* standard of review before the Tax Court and it is not at all clear how the single appellate mechanism under s. 169 can provide at once for *de*

*de novo* review for some parts of the assessment and for appellate review of decisions that are said to be inextricably linked to that same assessment. Importing a new standard of review into an appeal to the Tax Court from an assessment would directly contradict Parliament's intent on how the Tax Court should decide if an assessment is correct. The statutory *de novo* review in the Tax Court does not contemplate deference other than placing an evidentiary burden of proof on the taxpayer. Holding that a standard other than reasonableness applies to exercises of the Minister's discretion under s. 247(10) would undercut the certainty and predictability that *Vavilov* brought.

Moreover, treating the Minister's decision under s. 247(10) as part of an assessment for the purposes of an appeal to the Tax Court would result in bifurcated streams of review and give rise to issues regarding the Federal Court's jurisdiction. A decision under s. 247(10) can be made without an assessment being issued or after the time limit for objections and appeal. This might result in challenges to discretionary decisions being statute-barred. The argument that, if the Minister does not issue an assessment after she makes a discretionary decision, then the decision can be challenged by way of judicial review in the Federal Court proposes an untenable solution in which the Federal Court would retain its judicial review jurisdiction over discretionary decisions by the Minister as a general rule, but lose its jurisdiction to conduct judicial review of those same discretionary decisions if they are followed by assessments. Moreover, such an approach would enlarge the Tax Court's jurisdiction beyond the correctness of assessments to other related ministerial decisions. This is also inconsistent with the principles of statutory interpretation. Section 18.5 of the

*Federal Courts Act* states that only an express ouster of the Federal Court's jurisdiction will have such an effect. Extending the jurisdiction of the Tax Court to the exclusion of the jurisdiction of the Federal Court by necessary implication rather than by express statutory language ought to be rejected.

Only the Federal Court can grant an appropriate remedy for a challenge to the s. 247(10) decision. If the Tax Court determines that an assessment is incorrect, it may vacate the assessment, vary it, or refer it back to the Minister for reconsideration and reassessment. If the Tax Court issues an order for reconsideration and reassessment, the Minister will simply be required to issue a reassessment that correctly reflects the decision that the taxpayer sought to challenge since that decision would not have been quashed. An order for reconsideration and reassessment cannot compel the Minister to reconsider her discretionary decision. If Parliament had sought to confer power to grant relief from a s. 247(10) opinion on the Tax Court, it would have to have done so by statute. The Tax Court does not have the remedial tools necessary to address a s. 247(10) decision. The Federal Court has the power to quash the Minister's discretionary decision, which would require her to reconsider it. The Tax Court may intervene only after the Federal Court has quashed the Minister's decision, after the Minister made a new decision, after that new decision results in a change in the taxpayer's tax liability, and if the Minister fails to issue a reassessment to reflect a change in tax liability.

Parliament intentionally divided jurisdiction over tax matters between the Federal Court and the Tax Court. The Tax Court has never been a single forum for all tax litigation. Parliament has set up a complex structure to deal with a multitude of tax-related claims. Making a change to that complex structure without a thoughtful, comprehensive reform that can only be achieved by Parliament would be imprudent, particularly if doing so would directly contradict the wording of the applicable statutes and Parliament's intent. It falls to Parliament to respond to concerns about the jurisdiction of the Tax Court.

Deciding that the Tax Court has jurisdiction to review decisions under s. 247(10) will not enhance access to justice. This provision is relevant mainly to multinational corporate taxpayers carrying out non-arm's length transactions with related entities. If the Tax Court were to have jurisdiction to review the Minister's exercise of discretion pursuant to s. 247(10), the Federal Court's ability to conduct judicial review of those decisions would be ousted under s. 18.5 of the *Federal Courts Act* but the Tax Court would have no ability to provide recourse if the Minister conducted herself unreasonably in coming to her decision because it does not have remedial power to quash the Minister's decision. Expanding the jurisdiction of the Tax Court beyond what is provided for in legislation could have far-reaching implications in respect of the jurisdiction of the Federal Court to conduct judicial review of ministerial decisions in other settings. Important aspects of tax and administrative law in Canada should not be undermined in order to pursue access to justice benefits that have not been made out.

*Per* Karakatsanis, Côté and Rowe JJ. (dissenting): The appeal should be allowed and Dow's challenge regarding the Minister's discretionary decision to deny downward transfer pricing adjustments under s. 247(10) of the *ITA* should proceed before the Tax Court. Unlike other discretionary powers in the *ITA*, the power that the Minister has under s. 247(10) is not permissive. The Minister is obliged to exercise this power in order to determine a taxpayer's liability. Parliament has ensured that the correctness or validity of a taxpayer's assessment falls squarely within the jurisdiction of the Tax Court, to the exclusion of the Federal Court's supervisory jurisdiction. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax assessments and appeals established by Parliament. Because it goes directly to the correctness of a taxpayer's assessment, a decision by the Minister to deny a downward transfer pricing adjustment under s. 247(10) is within the scope of the Tax Court's appellate jurisdiction. Such a decision is inextricably linked to the assessment because it directly impacts the amount of a taxpayer's income and taxable income and it necessarily precedes the determination of the ultimate amount of tax owing. This conclusion is consistent with the comprehensive legislative schemes establishing the respective jurisdiction of the Federal Court and the Tax Court and with the important objectives of avoiding a multiplicity of proceedings and of promoting efficiency and access to justice.

Statutory courts such as the Federal Court and the Tax Court derive their existence, jurisdiction, and powers solely from their enabling statutes. Section 18(1) of the *Federal Courts Act* grants the Federal Court supervisory jurisdiction over decisions

of a federal board, commission or other tribunal. However, s. 18.5 of the *Federal Courts Act* ousts the Federal Court's jurisdiction to grant such remedies where a federal statute expressly provides for a right of appeal to the Tax Court. Concerns for good tax administration, access to justice and efficiency animate Parliament's choice to prioritize the Tax Court's jurisdiction in tax matters where a right of appeal is expressly provided. Pursuant to ss. 165 and 169 of the *ITA*, the Tax Court has exclusive jurisdiction to review the validity and correctness of assessments.

The Minister's decision to either allow or deny a downward transfer pricing adjustment under s. 247(10) is based on whether, in her opinion, the circumstances are such that it would be appropriate that the adjustment be made. Section 247(10) does not define those circumstances or provide any guidance as to what they may be. The Minister is given wide discretion to make her decision, based on her own assessment of the circumstances, policy considerations and the applicable legislation. Contrary to other provisions of the *ITA* that give the Minister a discretion that affects the amount of a taxpayer's income or taxable income, s. 247(10) is not permissive. Although a taxpayer is not entitled to a downward adjustment in all circumstances, a taxpayer is entitled to the Minister's opinion as to whether the downward adjustment is appropriate when one is sought and/or established. Section 247(2) provides that upward and downward adjustments shall be made when the conditions prescribed in that provision are met. Section 247(10) is an exception to the general rule in s. 247(2), which mandates adjustments where necessary to reflect the amounts that would have been agreed to had the parties been dealing with each

other at arm's length. It places a limitation on any downward transfer pricing adjustment by subjecting such an adjustment to the Minister's discretion. Read together, s. 247(2) and 247(10) require the Minister to form an opinion as to whether a downward adjustment is appropriate when the requisite conditions are met.

The settled meaning of an "assessment" for the purposes of s. 169 of the *ITA* is not in dispute. At issue on appeal from an assessment is the amount of tax owed by the taxpayer. In this case, the question is whether a decision that the Minister must make before the amount of tax liability can be determined is within the scope of an appeal from an assessment provided for in s. 169. The Minister's exercise of discretion in this context is inextricably linked to the correctness of the assessment and is an essential component of the assessment as a matter of fact and law. The discretion under s. 247(10) is of a different character than a discretion that is entirely permissive and need not be exercised until after tax, interest and penalties have been assessed. A decision to deny a downward transfer pricing adjustment is a fact on which the application of the relevant statutory provisions necessarily rests. If the discretion is not exercised or properly exercised, the resulting assessment cannot be correct. The right of appeal provided for in s. 169 in these circumstances arises from the assessment, not from the exercise of discretion *per se*; the amount of tax assessed is the direct result of the Minister's decision under s. 247(10). This finding does not create any legal uncertainty, nor does it expand the settled meaning of an assessment or alter the nature of the right of appeal provided for in s. 169. Indeed, in objecting to an assessment that results from the Minister's exercise of discretion under s. 247(10), a taxpayer is

concerned with the amount of tax owing, not merely with the propriety of the Minister's exercise of discretion.

The Tax Court's remedial powers under s. 171 of the *ITA* allow it to deal with discretionary decisions going to the correctness of an assessment. Section 171(1)(b)(iii) sets out that the Tax Court may refer the assessment back to the Minister for reconsideration and reassessment. These words imply that the Tax Court may, in referring the assessment back for reconsideration and reassessment, remit the matter of the downward pricing adjustment to the Minister as part of a reconsideration. In contrast, on judicial review, the Federal Court cannot deal with the assessment. An assessment remains valid and binding unless and until it is varied or vacated by the Tax Court or the Minister issues a reassessment, even where a decision under s. 247(10) has been quashed by the Federal Court. Section 171(1)(b)(iii) is better suited to the real substance of the issue to be determined, which is the correct amount of tax owing.

A deferential standard of appellate review applies when the Tax Court is dealing with the Minister's discretionary decisions under s. 247(10). This is because the Tax Court cannot substitute its opinion for that of the Minister or prevent her from arriving at the same decision upon reconsideration, following a proper exercise of her discretion. It is clear from the language in s. 247(10) that Parliament intended to confer upon the Minister a broad discretion in reaching a decision regarding a downward transfer pricing adjustment. In challenging the Minister's decision under s. 247(10), a taxpayer must establish a factual foundation to support the submission that the decision



was wrong in principle, ignored relevant evidence or was based on irrelevant evidence, and the focus is on whether the exercise of discretion remains a valid fact on which to rest the correctness of the assessment. The Tax Court, as a specialized court, is well placed to rule on whether the discretion under s. 247(10) was properly exercised

### **Cases Cited**

By Kasirer J.

**Applied:** *Okalta Oils Ltd. v. Minister of National Revenue*, [1955] S.C.R. 824; **referred to:** *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Main Rehabilitation Co. v. Canada*, 2004 FCA 403, 247 D.L.R. (4th) 597; *Canada v. Anchor Pointe Energy Ltd.*, 2007 FCA 188, [2008] 1 F.C.R. 839; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Walker v. Canada Customs and Revenue Agency*, 2005 FCA 393, 344 N.R. 169; *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26; *The Queen v. Wesbrook Management Ltd.*, 96 DTC 6590; *Addison & Leyen Ltd. v. Canada*, 2006 FCA 107, [2006] 4 F.C.R. 532, rev'd 2007 SCC 33, [2007] 2 S.C.R. 793; *Ereiser v. Minister of National Revenue*, 2013 FCA 20, 444 N.R. 64; *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557; *Ludmer v. Canada*, [1995] 2 F.C. 3; *Fazal v. R.*, 2020 TCC 137, [2021] G.S.T.C. 5; *Azzopardi v. The King*, 2023 TCC 51, [2023] 4 C.T.C. 2049; *Callahan v. The King*, 2023 TCC 172, [2024] 2 C.T.C. 2001; *Iris Technologies Inc. v. Canada (Attorney General)*, 2024 SCC 24; *Canada (Attorney General) v. Iris Technologies Inc.*, 2022

FCA 101, [2022] 1 F.C.R. 401; *Canada v. Consumers' Gas Co.*, [1987] 2 F.C. 60; *Roitman v. Canada*, 2006 FCA 266, 353 N.R. 75; *Johnson v. Minister of National Revenue*, 2015 FCA 52, 470 N.R. 183; *9162-4676 Québec Inc. v. Canada*, 2016 FCA 112, 2017 DTC 5074; *Webster v. Canada (Attorney General)*, 2003 FCA 388, 312 N.R. 235; *Ghazi v. Canada (National Revenue)*, 2019 FC 860, 70 Admin. L.R. (6th) 216; *Newave Consulting Inc. v. Canada (National Revenue)*, 2021 FC 1203; *Chad v. Canada (National Revenue)*, 2023 FC 1481, [2024] 1 C.T.C. 63; *Nicholson Ltd. v. Minister of National Revenue*, [1945] Ex. C.R. 191; *Canada (National Revenue) v. ConocoPhillips Canada Resources Corp.*, 2017 FCA 243, 2017 DTC 5135; *Interior Savings Credit Union v. R.*, 2007 FCA 151, [2007] 4 C.T.C. 55; *Pure Spring Co. v. Minister of National Revenue*, [1946] Ex. C.R. 471; *Johnston v. Minister of National Revenue*, [1948] S.C.R. 486; *Canada (Attorney General) v. Buchanan*, 2002 FCA 231, 2002 DTC 7397; *Campbell v. Minister of National Revenue*, [1953] 1 S.C.R. 3; *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8; *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48; *Southwind v. Canada*, 2021 SCC 28, [2021] 2 S.C.R. 450; *Bozzer v. Canada (National Revenue)*, 2011 FCA 186, [2013] 1 F.C.R. 242; *Jewett v. Canada (Attorney General)*, 2020 FCA 187, [2021] 4 C.T.C. 1; *Shaw Estate v. Canada (Attorney General)*, 2021 FC 576; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21; *Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *Sifto Canada Corp. v. Minister of National Revenue*, 2014 FCA 140, 461 N.R. 184; *Maverick Oilfield Services Ltd. v. Canada*

*(Attorney General)*, 2023 FC 1728, [2024] 2 C.T.C. 67.

By Côté J. (dissenting)

*Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793; *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26; *Minister of National Revenue v. General Electric Capital Canada Inc.*, 2010 FCA 344, 414 N.R. 304; *Canada v. Cameco Corporation*, 2020 FCA 112, [2020] 4 F.C.R. 104; *Canada v. GlaxoSmithKline Inc.*, 2012 SCC 52, [2012] 3 S.C.R. 3; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Ereiser v. Minister of National Revenue*, 2013 FCA 20, 444 N.R. 64; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617; *Roberts v. Canada*, [1989] 1 S.C.R. 322; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *Walker v. Canada Customs and Revenue Agency*, 2005 FCA 393, 344 N.R. 169; *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557; *Campbell v. Minister of National Revenue*, [1953] 1 S.C.R. 3; *Johnston v. Minister of National Revenue*, [1948] S.C.R. 486; *Okalta Oils Ltd. v. Minister of National Revenue*, [1955] S.C.R. 824; *Canada v. Consumers' Gas Co.*, [1987] 2 F.C. 60; *Main Rehabilitation Co. v. Canada*, 2004 FCA 403, 247 D.L.R. (4th) 597; *Canada v. Anchor Pointe Energy Ltd.*, 2007 FCA 188, [2008] 1 F.C.R. 839; *Hunt v. The Queen*, 2018 TCC 193, 2018 D.T.C. 1139; *Nicholson Ltd. v. Minister of*

*National Revenue*, [1945] Ex. C.R. 191; *Pure Spring Co. v. Minister of National Revenue*, [1946] Ex. C.R. 471; *Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63, [2019] 4 S.C.R. 559; *Domtar Inc. v. Canada*, 2009 FCA 218, [2009] 6 C.T.C. 61; *Sifto Canada Corp. v. Minister of National Revenue*, 2014 FCA 140, 461 N.R. 184; *Wenham v. Canada (Attorney General)*, 2018 FCA 199, 429 D.L.R. (4th) 166; *International Air Transport Association v. Canadian Transportation Agency*, 2022 FCA 211; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Pioneer Laundry and Dry Cleaners, Ltd. v. Minister of National Revenue*, [1940] A.C. 127; *Minister of National Revenue v. Wrights' Canadian Ropes, Ltd.*, [1947] A.C. 109; *Anger v. M.N.R.*, 49 DTC 65; *MacDonald Estate v. M.N.R.*, 50 DTC 109; *Buehler v. M.N.R.*, 50 DTC 119; *Williamson v. M.N.R.*, 50 DTC 147; *Minister of National Revenue v. Parsons*, [1984] 2 F.C. 331; *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46, [2008] 2 S.C.R. 643; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Reza v. Canada*, [1994] 2 S.C.R. 394; *Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205; *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48; *Canada (Attorney General) v. Jencan Ltd.*, [1998] 1 F.C. 187; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, 428 N.R. 297; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin. L.R. (5th) 301; *Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149.

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APPEAL from a judgment of the Federal Court of Appeal (Webb, Rennie and Locke JJ.A.), 2022 FCA 70, [2022] 5 C.T.C. 1, 2022 DTC 5050, [2022] F.C.J. No. 565 (Lexis), 2022 CarswellNat 1109 (WL), setting aside a decision of Monaghan J., 2020 TCC 139, [2021] 2 C.T.C. 2063, 2021 DTC 1001, [2020] T.C.J. No. 114 (Lexis), 2020 CarswellNat 5538 (WL). Appeal dismissed, Karakatsanis, Côté and Rowe JJ. dissenting.

*Daniel Sandler, Osnat Nemetz and Laura Jochimski*, for the appellant.

*Daniel Bourgeois, Christa Akey and Justine Malone*, for the respondent.

The judgment of Martin, Kasirer, Jamal and O’Bonsawin JJ. was delivered  
by

KASIRER J. —

## I. Overview

[1] This appeal concerns the jurisdiction of the Tax Court of Canada, sitting in appeal of a taxpayer’s assessment, to review the Minister of National Revenue’s

decisions under s. 247(10) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”). Parliament has conferred on the Minister discretionary authority to decide whether “the circumstances are such that it would be appropriate” to make a downward transfer pricing adjustment. A downward adjustment can only be made in accordance with the *ITA* where the Minister has come to the opinion that it is appropriate. When the taxpayer seeks to challenge the Minister’s discretionary decision, should that challenge be brought by an appeal to the Tax Court, pursuant to that court’s exclusive statutory jurisdiction to decide on the correctness of the taxpayer’s income tax assessment? Or should the taxpayer’s challenge be brought instead before the Federal Court of Canada, pursuant to that court’s exclusive statutory jurisdiction over judicial review, proceeding on the presumptively applicable standard of reasonableness?

[2] Dow Chemical Canada ULC argues that a review of the Minister’s decision under s. 247(10) of the *ITA* falls within the exclusive jurisdiction assigned to the Tax Court because that decision directly affects or is inextricably linked to the assessment of tax liability. Dow says its position advances the cause of fairness and convenience for all taxpayers, including multinational corporations like itself, that might benefit from one-stop judicial shopping in the Tax Court. Accordingly, Dow asks this Court to enlarge the statutory jurisdiction of the Tax Court on appeal by providing it with a new power to conduct what amounts to judicial review of the Minister’s decision on a reasonableness standard.



[3] I have had the advantage of reading the reasons prepared by my colleague Côté J. in which she proposes to allow Dow's appeal. I agree with her that the Federal Court has exclusive statutory jurisdiction to grant relief in relation to federal ministerial decisions under s. 18(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. We share the view that s. 18.5 of that Act allows for this jurisdiction to be ousted where a federal statute, such as the *ITA*, expressly provides for an appeal to another body, including the Tax Court. I agree as well that the Tax Court has exclusive jurisdiction to hear appeals seeking to vary or vacate income tax assessments pursuant to s. 12 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, and s. 169 of the *ITA*. For both of us, the central question before the Court is whether the Minister's decision under s. 247(10) is part of an assessment, and thus subject to the jurisdiction of the Tax Court, or whether as a separate exercise of ministerial discretion it should be subject to judicial review, on the standard of reasonableness, before the Federal Court.

[4] With the utmost respect, however, I am unable to agree with the view that the Minister's decision under s. 247(10) can be appealed as part of an assessment to the Tax Court. Allowing this matter to be heard on appeal in the Tax Court as part of an assessment would require this Court to accept Dow's expansive jurisdictional theory, based not on an express provision of an act of Parliament as s. 18.5 of the *Federal Courts Act* requires, but on what Dow claims is fair and best for access to justice. In my view, ousting the Federal Court's jurisdiction in the absence of express direction by statute and enlarging the Tax Court's review function would prompt new controversy over jurisdictional boundaries, all in service of supposed benefits for

access to justice that strike me as largely illusory. Parliament plainly did not intend for the Tax Court to serve as an exclusive forum for taxation matters; it expressly granted by statute some jurisdiction over taxation matters to the Federal Court, some to the Tax Court, and even some original jurisdiction in taxation matters to the Federal Court of Appeal.

[5] Dow's submissions, if accepted, would disturb settled jurisprudence, including this Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, by changing rules on standard of review, in particular for the "appeal" before the Tax Court pursuant to s. 169(1) of the *ITA*. Further, Dow's position would upset Parliament's choice to leave judicial review of discretionary administrative acts to the Federal Court, where an appropriate standard of reasonableness review may be applied and where the proper administrative law remedies are available. Dow's theory would lead to a significant erosion of the statutory jurisdiction of the Federal Court, in tax law and potentially in other areas, where judicial review is available to supervise discretionary authority that Parliament has conferred on the executive branch of government.

[6] Importantly, Dow seeks to undermine Parliament's design of limiting the Tax Court's appeal jurisdiction to reviewing the correctness of assessments by changing the foundational notion of an assessment in tax law. In arguing that the s. 247(10) decision is inextricably linked to an assessment and subject to a single recourse before the Tax Court, Dow relies on a changed understanding of an

“assessment” that is entirely out of step with settled law. Dow would transform the very foundation of the Tax Court’s statutory mandate to hear appeals by departing from a long-settled precedent of this Court defining an assessment in *Okalta Oils Ltd. v. Minister of National Revenue*, [1955] S.C.R. 824, a leading case that Dow did not cite in its argument before us. Dow’s reformulation of the concept of an “assessment” is also inconsistent with the understanding of a tax assessment as a “product” and not a “process”, a well-established principle in the jurisprudence of the Federal Court of Appeal (see, e.g., *Main Rehabilitation Co. v. Canada*, 2004 FCA 403, 247 D.L.R. (4th) 597; *Canada v. Anchor Pointe Energy Ltd.*, 2007 FCA 188, [2008] 1 F.C.R. 839, cited in C.A. reasons, 2022 FCA 70, [2022] 5 C.T.C. 1, at paras. 72-74). As Webb J.A. explained in this case, the Minister’s “opinion” in s. 247(10) of the *ITA* may directly affect a tax assessment where one is issued, but that does not make it part of the assessment. In s. 247(10), Parliament has delegated to the Minister — not to the Tax Court — the authority to make a discretionary determination about whether in the circumstances it is appropriate that the downward adjustment be made. I agree with the view that this is a separate decision that stands apart from the assessment. In order to vacate or vary the assessment on appeal in a manner that would impact a denial of a downward transfer pricing adjustment, the Tax Court would have to quash the decision and substitute its opinion for that of the Minister, authority the Tax Court does not have on an assessment appeal.

[7] By empowering the Minister to weigh her “opinion” of whether circumstances are such that it would be appropriate to depart from the ordinary rule

and permit a downward adjustment, Parliament has conferred on the Minister, by s. 247(10), a policy-based discretionary decision-making power that is distinct from an assessment. This is no less true by reason of the fact that the Minister's decision directly affects tax liability and the fact that the Minister's decision will sometimes be reflected in an assessment, although a new assessment is not always issued after the Minister makes her decision. With due regard to the essential nature of Dow's claim — which questions whether the exercise of ministerial discretion was reasonable — its grievance is one of administrative law that has been reframed as an appeal to the Tax Court relating to amounts owing in the assessment. It would appear that Dow sensed this when it started this litigation in Federal Court with an application for judicial review within the applicable limitation period after the Minister's decision was made in 2013, four years before its appeal to the Tax Court following a reassessment in 2017.

[8] The foundational principles of administrative law set forth by this Court in *Vavilov* dictate that the Minister's discretionary decision, the authorization for which was conferred by statute, is presumptively subject to judicial review on the standard of reasonableness. Dow argues that this decision can be reviewed before the Tax Court as part of an appeal from an assessment and that in this context a reasonableness standard applies. Indeed, Dow goes as far as to assert that “[t]he description by this Honourable Court in *Vavilov* of a ‘reasonableness review’ is equally apposite to the review that the Tax Court would undertake in an appeal of an assessment based on the Minister's exercise of discretion under a provision like s. 247(10)” (A.F., at para. 97, citing *Vavilov*, at para. 15; see also transcript, at pp. 10-15). This directly contradicts the

principle, made clear in *Vavilov*, at para. 37, that the availability of a recourse other than judicial review indicates that the legislature intends for the reasonableness standard to be displaced. In the case of “appeals” of assessments to the Tax Court under s. 169(1) of the *ITA*, Parliament has put in place a *de novo* review process which is in the nature of a trial, in which both sides adduce evidence and make submissions and in which the Tax Court decides factual questions on the balance of probabilities. A review of ministerial decisions for reasonableness has no place in the context of Tax Court “appeals”. Accepting Dow’s approach would give the Tax Court the power to review not just the application of *tax law* to the facts, but the power to review discretionary *tax policy* decisions of the Minister.

[9] In service of its view of the Tax Court’s appeal jurisdiction founded on this expanded notion of assessment, Dow advances a framework of analysis where deference to the Minister based on reasonableness or another deferential standard would apply to the s. 247(10) decision. This cannot be reconciled with the principle from *Vavilov* that the appeal mechanism the legislature has crafted — here the *de novo* process under s. 169(1) of the *ITA* — determines the applicable standards of review (paras. 36 et seq.). Whether the applicable standards for the review of the s. 247(10) discretionary decision are those in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, or some other appellate standard developed for reviewing administrative action by analogy to the exercise of judicial discretion raises issues of broad significance for the applicable standard of review in administrative law. The Tax Court judge also proposed a different standard from that in *Vavilov* and that associated with the *de novo* appeal

proceeding under s. 169(1). She said the Minister must form her opinion “judicially” or “properly” and, if this was not done, it could be corrected by the Tax Court rather than on a reasonableness standard upon judicial review to the Federal Court (2020 TCC 139, [2021] 2 C.T.C. 2063, at paras. 142-44 and 165). I respectfully disagree with these characterizations of the applicable standard of review which I see as errors of law.

[10] Equally problematic is Dow’s position on available remedies which, in the end, invites this Court to expand the Tax Court’s powers by giving “guidance . . . as to whether the Tax Court has the ability to substitute its opinion . . . for that of the Minister” under s. 247(10) (A.F., at para. 101). In ruling on the assessment, the Tax Court cannot quash a discretionary decision of the Minister and cannot substitute its own opinion for that of the Minister acting under her delegated statutory authority. It bears recalling too that the remedies provided for in the *Federal Courts Act* may only be obtained on an application for judicial review to the Federal Court.

[11] These are all signs, I fear, that an embrace of Dow’s position would undermine basic administrative law principles on standard of review and remedy and leave the dividing line between the Federal Court and the Tax Court’s respective jurisdictions in disarray. These complications are avoided if it is recognized, contrary to Dow’s argument, that this distinct, discretionary decision-making power of the Minister, conferred upon her by Parliament in s. 247(10) of the *ITA*, is subject to judicial review in the Federal Court on a reasonableness standard, where there is an appropriate set of available statutory remedies, pursuant to the *Federal Courts Act*.

[12] Dow’s position also puts in jeopardy settled principles governing the jurisdiction of the Federal Court which, like the Tax Court, is a creature of statute. The Federal Court’s exclusive jurisdiction to conduct judicial review of federal administrative action — such as the Minister’s discretionary decisions under s. 247(10) — can only be excluded where there is an “express” statutory appeal mechanism in accordance with s. 18.5 of the *Federal Courts Act* that ousts the supervisory jurisdiction of the Federal Court. By setting the high bar that the route of appeal must be provided for expressly, Parliament ensured that exceptions to the Federal Court’s jurisdiction would flow from considered legislative direction rather than *ad hoc* development in the courts. Dow’s argument that jurisdiction can be conferred on the Tax Court by “necessary implication” rather than by “express” legislative provision ought to be rejected as being plainly inconsistent with the language, context, and purpose of s. 18.5. Dow’s theory would lower this bar by interpreting s. 18.5 to exclude the Federal Court’s jurisdiction not just where a decision is subject to an express statutory appeal, but also where it is merely captured by an appeal provision by implication. Beyond its significant encroachment on the Federal Court’s jurisdiction in tax law, Dow’s theory is likely to provoke litigation about which discretionary decisions are caught, implicitly, by statutory appeal provisions in other settings. This does not appear consonant with the aspirations for efficient access to justice.

[13] Dow nevertheless says it advances its theory in service of the public good of access to justice, invoking the advantages its proposed innovation would achieve for unrepresented litigants before the Tax Court. This Court must of course always be

mindful of the challenges to access to justice in the matters before it. It is trite law in this field that “parallel proceedings” are to be avoided and that the statutory rules should, insofar as possible, be interpreted accordingly (*Walker v. Canada Customs and Revenue Agency*, 2005 FCA 393, 344 N.R. 169, at para. 11). And judicial review is of course an avenue of last resort in our law. But as important as it is, access to justice cannot displace settled understandings of Parliament’s intended division of jurisdiction between the Tax Court and the Federal Court that have meaningful purpose. Here, the proceedings challenge a decision of the Minister in a way that the Tax Court is neither charged nor equipped to undertake. “One-stop shopping” at the Tax Court would come at the expense of the remedies the taxpayer can find in the Federal Court based on considerations of relief available on judicial review, including quashing a ministerial decision. By proceeding to the Tax Court as a single venue, the taxpayer would find no redress and lose the opportunity to ask a competent court to supervise the Minister’s exercise of statutory power to ensure that the administrative actor did not overstep their legal authority in arriving at the discretionary decision. Moreover, even on Dow’s expansive view of the assessment, in circumstances in which the Minister’s decision under s. 247(10) leads to no assessment, the Tax Court has no power whatsoever to do the work that rightly should be done by the Federal Court. Respectfully stated, I am unmoved by Dow’s claim that it is before us to fight the fight of the unrepresented litigant who would benefit from the simplified procedure before the Tax Court. It is indeed those taxpayers who, in many circumstances, need the protection that judicial review and judicial review alone can provide against the wayward exercise of ministerial discretion.



[14] It is plainly in the legislative branch where far-reaching considerations related to the jurisdictional divide between the Federal Court and the Tax Court should be studied and considered. It has been usefully suggested that Parliament is the proper forum for achieving certain changes to s. 247 (see D. Sandler and L. Watzinger, “Disputing Denied Downward Transfer-Pricing Adjustments” (2019), 67 *Can. Tax J.* 281, at pp. 307-8). Others have decried the *ad hoc* character of the development of the law in this area and have called for a “comprehensive” exercise of law reform (M. H. Lubetsky, “The Fractured Jurisdiction of the Courts in Income Tax Disputes”, in P. Mihailovich and J. Sorensen, eds., *Tax Disputes in Canada: The Path Forward* (2022), 63, at p. 65). The courts, including this Court, are not institutionally designed to undertake such tasks and must be mindful of unanticipated consequences of changing jurisdictional boundaries between courts.

[15] When asked at the hearing what the effect of recognizing a jurisdiction for the Tax Court to review discretionary decisions of the Minister would be, counsel for Dow acknowledged that it would be “a bit of a revolution” (transcript, at p. 85). But, he said, that was why Dow brought the case to the Supreme Court. In my view, this Court should decline this invitation and leave the matter to Parliament and its informed measure of the public policy implications of any such change to the Tax Court’s and the Federal Court’s respective jurisdictions.

[16] Applying the settled principles that govern the nature of a tax assessment, the divided statutory jurisdiction between the Federal Court and the Tax Court in

income tax matters, and the standard of review and remedial relief associated with general principles of judicial review in administrative law, I conclude that the challenge to a decision of the Minister under s. 247(10) is outside the appellate jurisdiction of the Tax Court. It is the proper and exclusive subject matter of judicial review before the Federal Court. I would therefore propose to dismiss the appeal.

## II. Background

[17] Dow's appeal to this Court follows the divergent answers provided by the Tax Court and the Federal Court of Appeal to the following question, presented under s. 58 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a:

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

(T.C.C. reasons, at para. 21)

[18] The question came to the Tax Court as a result of a denial by the Minister for a downward pricing adjustment relating to interest paid by Dow to a related Swiss company. I take due note of the background facts summarized by the Tax Court and the Federal Court of Appeal. The material facts are listed in the Statement of Agreed Facts filed by the parties in the Tax Court.

[19] Transfer pricing rules are set out in s. 247 of the *ITA*. Where a taxpayer (in this case Dow) is dealing with a non-resident person with whom it is not at arm's length (here, the related Swiss company), s. 247(2) of the *ITA* provides that the amounts in a given transaction will be adjusted to reflect what would have been agreed to had the persons been dealing with one another at arm's length. The application of s. 247(2) resulted in a significant increase in Dow's income in the 2006 taxation year.

[20] Dow believed that its income should be decreased to reflect an amount of interest that would have been paid in the circumstances. Where an amount is identified that would decrease the taxpayer's income, s. 247(10) provides that a downward adjustment is not to be made unless, "in the opinion of the Minister", the circumstances are such that it would be appropriate that the adjustment be made:

**(10)** An adjustment (other than an adjustment that results in or increases a transfer pricing capital adjustment or a transfer pricing income adjustment of a taxpayer for a taxation year) shall not be made under subsection 247(2) unless, in the opinion of the Minister, the circumstances are such that it would be appropriate that the adjustment be made.

[21] In 2013, Dow requested that the Minister make a downward transfer pricing adjustment under s. 247(10). The Minister advised Dow by letter that she would not exercise her discretion to make the downward adjustment. Within the applicable 30-day limitation period, Dow sought judicial review in the Federal Court of the Minister's discretionary decision to deny the transfer pricing adjustment under s. 247(10).

[22] Dow also objected to the Notice of Reassessment, dated December 12, 2012, for the 2006 taxation year. The Minister issued another reassessment for the 2006 taxation year in 2015, and again in 2017. Dow appealed the 2017 reassessment to the Tax Court, which is the proceeding in which the s. 58 question was referred to the Tax Court. Dow’s 2013 application for judicial review was stayed pending a determination of the jurisdiction of the Tax Court.

### III. Judicial History

#### A. *Tax Court of Canada, 2020 TCC 139, [2021] 2 C.T.C. 2063 (Monaghan J.)*

[23] The Tax Court judge held that the Minister’s discretionary decision under s. 247(10) of the *ITA* is an “essential component” of the taxpayer’s assessment and “goes to the correctness of [that] assessment” (para. 29). The Minister’s decision may therefore be reviewed by the Tax Court under its “exclusive appellate jurisdiction to determine the correctness of the assessment (i.e., whether the assessment is supported by the facts and applicable law)” (*ibid.*). The judge declined to express a view whether the Tax Court may substitute its own decision for that of the Minister under s. 247(10).

[24] She observed that the Federal Court has jurisdiction to judicially review the Minister exercising powers under statute “unless an Act of Parliament expressly provides for an appeal to another court or body”, citing s. 18.5 of the *Federal Courts Act* (para. 89). She wrote that the question before her was whether the Minister’s decision under s. 247(10) “is one from which the *ITA* provides for an appeal to the Tax

Court” (para. 94). “If it does”, she continued, “the Federal Court has no jurisdiction” (*ibid.*). Noting the Tax Court’s jurisdiction to hear appeals from assessments is part of Parliament’s objective of avoiding parallel proceedings between the two courts, the Tax Court judge stated that the issue is whether a challenge to the Minister’s decision under s. 247(10) is “an attack on the correctness of the resulting assessment (either in fact or law) and therefore is a matter for the Tax Court” (para. 99).

[25] The Tax Court judge considered jurisprudence from the former Exchequer Court of Canada, which had both appellate jurisdiction over tax assessments and judicial review jurisdiction over decisions of the Minister. She noted that, for disputes under the former *Income War Tax Act*, R.S.C. 1927, c. 97 (“*IWTA*”), “where the taxpayer’s complaint about an assessment under the *IWTA* was grounded in the Minister’s exercise of a discretion bestowed on him in the *IWTA*, the Exchequer Court’s appellate jurisdiction under the *IWTA* was engaged, rather than the Exchequer Court’s [judicial review] jurisdiction” (para. 105).

[26] Drawing in part on this historical analysis, the Tax Court judge wrote that if the Minister failed to exercise her discretion under s. 247(10) “judicially”, or “in accordance with proper legal principles”, the resulting assessment would be incorrect (paras. 142 and 144). The Minister’s s. 247(10) decision must be made before any assessment of taxes and in accordance with proper legal principles. Thus, on appeal of an assessment, the Tax Court is “both permitted and required to review the manner in which the Minister came to her determination under subsection 247(10)” (para. 144).

[27] She also held that the rules on an assessment appeal “do not preclude a conclusion that the Tax Court’s appellate jurisdiction permits it to review the Minister’s decision” (para. 159). In considering the remedies available in the two courts, the Tax Court judge wrote that when a taxpayer disagrees with the Minister’s decision under s. 247(10), “the ‘essential character’ of the relief sought is the setting aside of an assessment, and that is beyond the powers of the Federal Court” (para. 167). She rejected the argument that a review of the Minister’s discretionary decision-making must take place in the Federal Court, holding that decisions that relate to computations of income, taxable income or tax go to the correctness of the assessment and fall within the jurisdiction of the Tax Court (para. 173).

[28] The Tax Court judge concluded on an appeal of an assessment, the appeal may be allowed “on the basis that the Minister did not exercise her power under subsection 247(10) correctly” (para. 213). That is, “[w]here the Minister did not exercise the discretion at all, or exercised it on incorrect principles, the assessment cannot be said to be correct” (*ibid.*).

B. *Federal Court of Appeal, 2022 FCA 70, [2022] 5 C.T.C. 1 (Webb J.A., Rennie and Locke J.J.A. concurring)*

[29] The Federal Court of Appeal allowed the appeal and set aside the order of the Tax Court. It decided that the Federal Court has exclusive jurisdiction to judicially review the discretionary decisions by the Minister under s. 247(10).

[30] After reviewing the relevant provisions of the *Federal Courts Act* and the *ITA*, Webb J.A. wrote that “if the *ITA* does not expressly provide for an appeal of that opinion to the Tax Court, the Federal Court would retain jurisdiction to judicially review that opinion” (para. 34).

[31] According to Webb J.A., “the resolution of this appeal turns on the different remedies that may be granted by the Tax Court and the Federal Court” (para. 64). The remedies in the Tax Court all relate to assessments. While it might be recorded in an assessment, the Minister’s decision is not itself an assessment because an assessment is “the product of the process of determining a taxpayer’s liability under the *ITA* and not the process itself” (para. 74).

[32] The Minister’s opinion regarding the appropriateness of a downward adjustment will certainly have a “direct impact” on Dow’s taxable income and its tax liability (para. 75). But Webb J.A. observed that “the determination of whether in the circumstances it is appropriate that the downward adjustment be made was delegated by Parliament to the Minister” (*ibid.*). As such, it is a “separate decision” of the Minister that precludes the reduction of income unless the Minister is of the opinion that a downward adjustment is appropriate (*ibid.*). Since Parliament delegated the authority to render this opinion to the Minister, and not to the Tax Court, the validity of the opinion “is more properly a matter for judicial review in the Federal Court, which has the power to quash the opinion, if appropriate” (para. 83).

[33] Webb J.A. concluded that, “[s]ince the Tax Court does not have the power to quash an opinion rendered under subsection 247(10) of the [ITA], it will remain valid, unless it is quashed by the Federal Court on judicial review” (para. 84). Only after the Federal Court has quashed the decision can the Tax Court order a reassessment. For this reason, Webb J.A. observed that “the remedies available to both courts may be required if Dow is to succeed” (para. 91).

#### IV. Issues

[34] This appeal requires this Court to answer the question of law put to the Tax Court by the parties.

[35] The parties agree on many key aspects of the jurisdictional question, including the fact that both the Federal Court and the Tax Court are creatures of statute. They agree that the challenge to a decision of the Minister is of a kind that would ordinarily fall within the Federal Court’s exclusive original jurisdiction under s. 18(1) of the *Federal Courts Act* (A.F., at para. 52; R.F., at paras. 30-31). They also agree that this exclusive jurisdiction would be ousted to the extent there is an express statutory appeal to the Tax Court from the decision, pursuant to s. 18.5 of the *Federal Courts Act* (A.F., at para. 53; R.F., at para. 39). Finally, they agree that the *ITA* includes an express “appeal” to the Tax Court to have a tax assessment “vacated or varied” (A.F., at para. 42; R.F., at para. 29).



[36] The point of disagreement is whether the appeal to the Tax Court from the assessment should also be interpreted, by “necessary implication”, to include appeals from other decisions of the Minister, in particular decisions made under s. 247(10), such that the Federal Court’s jurisdiction over a challenge to that discretion is ousted by s. 18.5 of the *Federal Courts Act*.

[37] Dow advances three core submissions in support of its position that the appeal of an assessment amounts to an express statutory appeal of the Minister’s decision under s. 247(10). First, it argues that the Minister’s decision is “inextricably linked” to an assessment and may therefore be challenged as part of the assessment (A.F., at paras. 86 and 92). Second, Dow says that the Tax Court, as a court specialized in tax matters, is the only forum able to provide it with the appropriate remedy, and would do so through procedures that would be desirable from an access to justice perspective (paras. 60, 75 and 80). Third, it argues that the historical evolution of the Tax Court’s appellate jurisdiction demonstrates that the Tax Court can hear appeals from assessments that reflect the Minister’s discretionary decision (para. 126).

[38] In answer, the Crown submits three broad arguments in support of its view that only the Federal Court can provide relief in respect of the Minister’s discretionary decision under s. 247(10).

[39] First, the statutory delegation of authority to the Minister signals Parliament’s intention that the s. 247(10) determination be separate from the Minister’s assessment of tax (R.F., at para. 65). As an assessor of tax, the Minister has no choice

but to strictly adhere to the provisions of the *ITA*. This is a qualitatively different task from exercising discretion in measuring the appropriateness of a downward adjustment in the circumstances, pursuant to s. 247(10). The opinion of the Minister under s. 247(10) is informed by policy considerations rather than whether the assessment is well founded in fact and in law. Second, the Federal Court's exclusive jurisdiction to review the exercise of ministerial powers under s. 247(10) has not been ousted by an express statutory provision as s. 18.5 of the *Federal Courts Act* requires (para. 40). Third, the nature of an appeal from an "assessment", as defined in the jurisprudence, and the limited remedies available to the Tax Court further confirm Parliament's intention to grant exclusive jurisdiction to judicially review the discretionary decision of the Minister to the Federal Court (paras. 40 and 45). The essential character of Dow's claim is to challenge the Minister's discretionary decision, which results from the delegation of authority to her by statute and which must be reviewed pursuant to administrative law principles.

## V. Analysis

[40] For the reasons that follow, I would decline to give effect to Dow's arguments, which are inconsistent with the settled meaning of "assessment" in law and the scope of the statutory grant of jurisdiction to the Tax Court. Challenges to discretionary decisions under s. 247(10) must instead be reviewed by the Federal Court, which is the only court that has the jurisdiction to apply the appropriate standard of review and access to the appropriate range of administrative law remedies.

A. *A Decision Under Section 247(10) Is Distinct From an Assessment*

[41] A central premise of Dow’s argument is that the Minister’s s. 247(10) discretionary decision is so inextricably linked to an assessment of tax — assuming that one is even issued following that decision — that it can be challenged through an appellate procedure that only expressly applies to assessments.

[42] I respectfully disagree that the Minister’s discretionary decision is part of the assessment. The meaning of “assessment” is settled in law, and the Minister’s opinion formed under s. 247(10) is qualitatively distinct from that concept. This Court’s settled interpretation of “assessment” aligns with the internal context of the statute, which provides separate appeal routes from ministerial decisions where this is intended, and nothing in the historical jurisprudence requires us to depart therefrom.

(1) The Settled Meaning of an Assessment Under the *Income Tax Act*

[43] A tax assessment is, as this Court’s jurisprudence confirms, a purely non-discretionary determination by the Minister of the taxpayer’s tax liability for a particular taxation year (*Okalta Oils*, at pp. 825-26; see also C. Campbell, *Administration of Income Tax 2023* (2023), at pp. 405-8 and 414; *Anchor Pointe Energy*, at para. 33). This definition of “assessment” is consonant with the *ITA* itself (see ss. 152(1) and 248(1)) and amply reflected in the jurisprudence of the Federal Court of Appeal. This meaning of “assessment” was confirmed by this Court as recently as 2022 (see *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC

26, at paras. 25-26). The amount of tax owing — the product of the process of determining a taxpayer’s tax liability for the relevant taxation year — “flows from the *Income Tax Act* itself” (*The Queen v. Wesbrook Management Ltd.*, 96 DTC 6590 (F.C.A.), at p. 6591). Section 152(3) of the *ITA* makes explicit that tax liability is unaffected even if the assessment is incorrect, incomplete or has not been made at all.

[44] In *Okalta Oils*, this Court did not hold that anything at all that is “ultimately related to an amount claimed” is part of an assessment (p. 826). Instead, Fauteux J., as he then was, wrote for the Court that an assessment is the amount of tax at issue, not the process that resulted in the determination of that amount:

It is the contention of the respondent that, construed as it should be, the word “assessment”, in sections 69*a* and 69*b* [of the *IWTA*], means the actual amount of tax which the taxpayer is called upon to pay by the decision of the Minister, and not the method by which the assessed tax is arrived at; with the result that if no amount of tax is claimed, there being no assessment within the meaning of the sections, there is therefore no right of appeal from the decision of the Minister to the Income Tax Appeal Board.

In *Commissioners for General Purposes of Income Tax for City of London and Gibbs and Others*, [[1942] A.C. 402 (H.L.),] Viscount Simon L.C., in reference to the word “assessment” said, at page 406: —

The word “assessment” is used in our income tax code in more than one sense. Sometimes, by “assessment” is meant the fixing of the sum taken to represent the actual profit for the purpose of charging tax on it, but in another context the “assessment” may mean the actual sum in tax which the taxpayer is liable to pay on his profits.

That the latter meaning attached to the word “assessment”, under the Act as it stood before the establishment of the Income Tax Appeal Board and the enactment of Part VIIIA — wherein the above sections are to be found — in substitution to Part VIII, is made clear by the wording of section 58(1) of the latter Part, reading: —

58(1). Any person who objects to the *amount* at which he is assessed . . .

Under these provisions, there was no assessment if there was no tax claimed. Any other objection but one ultimately related to an amount claimed was lacking the object giving rise to the right of appeal from the decision of the Minister to the Board. [Underlining added; pp. 825-26.]

[45] In preparing an assessment, the Minister's role is simply to determine what the law requires the taxpayer to pay "by applying a fixed statutory formula to the amount of the person's taxable income for that year, and the amount of a person's taxable income is a function of the events that occurred before the end of that year" (*Addison & Leyen Ltd. v. Canada*, 2006 FCA 107, [2006] 4 F.C.R. 532, at para. 38, rev'd on other grounds 2007 SCC 33, [2007] 2 S.C.R. 793 ("*Addison SCC*"); see also *Anchor Pointe Energy*, at para. 33, cited by Webb J.A., at para. 74). In other words, the tax owing is understood as resulting from rules in the *ITA* by operation of law (see *Ereiser v. Minister of National Revenue*, 2013 FCA 20, 444 N.R. 64, at para. 31; *Main Rehabilitation*, at para. 8). This is in keeping with the Court's judgment in *Okalta Oils*.

[46] Plainly, when preparing an assessment, the Minister does not exercise any discretion. As Stratas J.A. explained, "[w]here the facts and the law demonstrate liability for tax, the Minister must issue an assessment" (*JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557, at para. 77; see also *Ludmer v. Canada*, [1995] 2 F.C. 3 (C.A.), at p. 17). As Professor Annick Provencher has observed, "a discretionary decision of the minister could undergo judicial review. However, assessments do not generally require such

discretion” (“Fifty Years of Taxation at the Federal Court of Appeal and the Federal Court”, in M. Valois et al., eds., *The Federal Court of Appeal and the Federal Court: 50 Years of History* (2021), 543, at p. 551). Indeed, this Court has confirmed that the Minister’s preparation of an assessment is not an exercise of discretion because “taxpayers should have confidence that the Minister is administering and enforcing the same tax laws in the same way for everyone” (*Collins Family Trust*, at para. 25). While the *ITA* empowers the Minister to exercise discretion in some matters, including over whether to issue downward transfer pricing adjustments under s. 247(10), these discretionary decisions are not assessments nor are they part of assessments. When the Minister makes discretionary decisions, she provides her opinion, guided by policy considerations. This is a task that is fundamentally different than the non-discretionary act of preparing an assessment. Accordingly, when a court reviews the Minister’s opinion reflecting these policy considerations, it should do so on the basis of reasonableness rather than the statutory standard of *de novo* correctness that applies to assessments.

[47] The Tax Court’s jurisdiction under s. 169 of the *ITA* is thus limited to reviewing the correctness of assessments, which as I will explain, it does through a statutory *de novo* review process. Since assessments are non-discretionary acts by the Minister, “[i]t is trite to say . . . that [the Tax Court] is not a court of equity with jurisdiction to review the Minister’s discretionary decisions” (*Fazal v. R.*, 2020 TCC 137, [2021] G.S.T.C. 5, at para. 30; see also *Azzopardi v. The King*, 2023 TCC 51, [2023] 4 C.T.C. 2049, at para. 33; *Callahan v. The King*, 2023 TCC 172, [2024] 2

C.T.C. 2001, at para. 27). The question on an appeal of an assessment to the Tax Court is not about the conduct of the Minister in preparing the assessment, but rather about the correctness of the Minister's determination of the amount of tax owing, applying the rules in the *ITA* to the facts as she finds them.

[48] The Tax Court's jurisdiction over the correctness of assessments includes matters such as the validity of assessments and the admissibility of evidence in support of assessments. While the Tax Court's jurisdiction is limited to reviewing the correctness of the product of the assessments, certain procedural defects — those that result only in an incorrect assessment — can be “cured” because the Tax Court will perform a *de novo* review of the assessment. This led Stratas J.A. to observe that “[t]o the extent the Minister ignored, disregarded, suppressed or misapprehended evidence, an appeal under the general procedure in the Tax Court is an adequate, curative remedy” (*JP Morgan*, at para. 82). But he recalled that “[t]he Tax Court does not have jurisdiction on an appeal to set aside an assessment on the basis of reprehensible conduct by the Minister leading up to the assessment, such as abuse of power or unfairness”, therefore in such a circumstance, “the bar in section 18.5 of the *Federal Courts Act* against judicial review in the Federal Court does not apply” (para. 83). Stratas J.A.'s view is reflected in this Court's reasons in *Addison SCC*, at para. 8:

It is not disputed that the Minister belongs to the class of persons and entities that fall within the Federal Court's jurisdiction under s. 18.5. Judicial review is available, provided the matter is not otherwise appealable. It is also available to control abuses of power, including abusive delay. Fact-specific remedies may be crafted to address the wrongs or problems raised by a particular case. [Emphasis added.]

[49] In *Iris Technologies Inc. v. Canada (Attorney General)*, 2024 SCC 24, a case argued before this Court on the same day as this appeal, the Federal Court of Appeal helpfully explained that the Tax Court does not have jurisdiction where the true purpose of an application for judicial review is to “seek practical relief against the exercise of a discretion” by the Minister (*Canada (Attorney General) v. Iris Technologies Inc.*, 2022 FCA 101, [2022] 1 F.C.R. 401, at para. 13). Accordingly, the Federal Court of Appeal held in *Iris* that in respect of the exercise of ministerial discretion, the statutory rule ousting Federal Court jurisdiction in judicial review in favour of the Tax Court does not apply. This explains, as Rennie J.A. observed, why the outcome of the Federal Court of Appeal’s decision in the case at bar was favourable to the Federal Court’s jurisdiction where the discretionary ministerial decision under s. 247(10) of the *ITA* was at the centre of the jurisdictional debate (*ibid.*).

[50] Unlike the non-discretionary determinations that make up an assessment, s. 247(10) empowers the Minister to play a fundamentally different role, which does not require her to apply the facts and the law in exactly the same way to every taxpayer. Her decision is based on policy considerations rather than the strict application of the law to the facts. The character of her discretionary decision-making is, in this way, fundamentally different from the exercise of assessing tax liability.

[51] Section 247(10) provides that certain transfer pricing adjustments shall not be made unless “in the opinion of the Minister, the circumstances are such that it would be appropriate that the adjustment be made”. The subsection makes clear that the



opinion of the Minister is a condition that may be relevant to the calculation of the transfer pricing adjustment and may in turn affect tax liability. Indeed, s. 247(10) has been described as “a strange statutory rule” that “operates to increase or decrease income” based on “the discretion of the government”, that is, the Minister’s opinion as to the appropriateness of the adjustment (N. Boidman, “Recent Developments in Canadian Transfer Pricing” (2003), 55 *Tax Exec.* 208, at p. 210; see also M. Przynski, “Transfer Pricing Legislation in Canada” (2005), 7:3 *Corp. Bus. Tax’n Monthly* 23, at p. 26; F. Vincent and I. M. Freedman, “Transfer Pricing in Canada: The Arm’s-Length Principle and the New Rules” (1997), 45 *Can. Tax J.* 1213, at p. 1234).

[52] Section 247(10) must be understood alongside the non-discretionary rule in s. 247(2) of the *ITA*. When the conditions of s. 247(2) are met, the Minister must issue an upward adjustment of the taxpayer’s income to reflect “. . . the amounts that would have been determined if the parties to the transaction had been dealing at arm’s length” (F. Vincent and M. Ranger, *Transfer Pricing in Canada* (2018), at p. 320). These upward adjustments “are not discretionary” (*ibid.*). By contrast, s. 247(10) allows the Minister, in her discretion, to decide whether a downward adjustment is appropriate in the circumstances, which is “an exception to the mandatory character of subsection 247(2)” (*ibid.*). The Minister may make her decision under s. 247(10) before or after an assessment is issued. In addition, the Minister might decide not to exercise her discretion under s. 247(10) at all. If the Minister refuses to exercise her discretion, “there is virtually no recourse for the taxpayer, short of obtaining a writ of *mandamus*” in the Federal Court (p. 326).

[53] It cannot be said that the Minister must exercise discretion under s. 247(10) in order for tax liability to be calculated correctly under the *ITA*. The general non-discretionary rule, which the Crown accurately characterizes as the “default position”, is that a downward transfer pricing adjustment, according to the text of s. 247(10), “shall not be made under s. 247(2)” (R.F., at para. 112). Properly interpreted, the words “shall not” (in French, “*ne peut être*”) are to be construed as prohibitive. The Court of Appeal was right to say that if s. 247(2) would result in a downward transfer pricing adjustment, the general rule in s. 247(10) provides that the adjustment is not to be made (para. 24). Only when the Minister has formed the opinion that the adjustment is appropriate will the general prohibitive rule be displaced and the downward transfer pricing adjustment be made (s. 247(10) *ITA*). If the Minister has not exercised the discretion afforded under s. 247(10), she is not of the opinion that an adjustment is appropriate, and the general rule therefore applies. If the Minister has been asked to exercise her discretion and has concluded that the adjustment is not appropriate, the general rule continues to apply. In my view, it would be wrong to ignore the clear statutory default rule in s. 247(10) that tax liability must be calculated without making downward transfer pricing adjustments. Section 247(10) prohibits downward adjustments, subject to the discretion of the Minister. In keeping with Parliament’s design “[t]axpayers have no entitlement to a downward adjustment” (R.F., at para. 107). It is only when the Minister is of the opinion that the adjustment is appropriate that the default statutory rule ceases to apply. Said respectfully, the Tax Court judge therefore erred in characterizing the discretion in s. 247(10) as one that had to be exercised in order to calculate tax liability correctly (paras. 182, 196 and 199).

This interpretation overlooks the default rule put in place by Parliament and imposes a new burden on the Minister to fully consider the appropriateness of downward adjustments even where no request has been made by the taxpayer.

[54] Recognizing this interpretive error is especially important because, according to the Tax Court judge, “[a]lthough the *ITA* contains very few provisions that give the Minister a discretion that affects the amount of a taxpayer’s income or taxable income, subsection 247(10) is not the only provision of that nature” (para. 192). The Tax Court judge cited examples such as ss. 91(2), 111(1.1)(c) and 125(7) of the *ITA*, but did not propose an exhaustive list as, she said, only s. 247(10) was at issue (para. 196). The Tax Court judge would have left additional jurisdictional questions about these similar exercises of discretion unresolved (paras. 195-96). If this Court were to adopt the Tax Court judge’s erroneous characterization of s. 247(10) it would be both imprudent and likely prompt future litigation about such provisions, whether in the *ITA* or other tax legislation.

[55] With this in mind, under s. 247(10), it is for the Minister to come to the “opinion” that (in French, “*si le ministre estime que*”) the circumstances are appropriate for an adjustment based on policy considerations that she considers to be appropriate (see generally Vincent and Ranger, at pp. 321-22). The question put to the Tax Court itself demonstrates Dow’s understanding that the decision is discretionary. It states: “Where the Minister of National Revenue has exercised her discretion pursuant to subsection 247(10) . . .” (emphasis added). This language stands in contrast with the

non-discretionary rule for transfer pricing adjustments in s. 247(2) that applies in the absence of ministerial discretion. I agree with the Crown that s. 247(10) is a delegated decision-making power that allows the Minister to come to her opinion based on “policy considerations, including considerations of fairness” (R.F., at para. 61). The Crown further explains that the relevant circumstances alluded to in s. 247(10) include such policy considerations as possible international double taxation, or double non-taxation based on the tax treatment in a foreign jurisdiction (para. 118; see also Vincent and Ranger, at p. 16).

[56] I note in passing that the interpretation of s. 247(10) advanced by the Crown is consistent with guidance produced by the Canada Revenue Agency after the Court of Appeal released its judgment in this case (*TPM-03R: Downward Transfer Pricing Adjustments*, June 21, 2022 (online)). Section 247(10) is said to place “a limitation on any downward transfer pricing adjustment”, which conditions that adjustment on the favourable opinion of the Minister (para. 7). Downward transfer pricing adjustments “are only available in limited circumstances” and “are not intended to serve as a vehicle for taxpayers to implement retroactive tax planning” (paras. 29-30). This guidance further highlights that the Minister’s decision is exceptional, discretionary and based in broad considerations of tax policy (para. 9). Challenging this policy-based decision should proceed separately from an appeal of the non-discretionary assessment.

[57] I would respectfully decline Dow’s call to depart from this Court’s settled jurisprudence by expanding the definition of “assessment” to include discretionary decisions that it claims are directly affected by or inextricably linked to assessments. With respect, under Dow’s theory, the meaning of “assessment” would be expanded well beyond discretionary decisions of the Minister. For example, challenges to the conduct of the Minister rather than the product of the assessment itself can also be said to be inextricably linked to the assessments since alleged misconduct by the Minister may impact the result of the assessment. But the jurisprudence establishes that the Minister’s conduct is not at issue in an assessment and that taxpayers cannot object to the underlying process or motivations for the issuing of an assessment before the Tax Court (see *Okalta Oils*; *Canada v. Consumers’ Gas Co.*, [1987] 2 F.C. 60 (C.A.); *Main Rehabilitation*, at paras. 6-8; *Roitman v. Canada*, 2006 FCA 266, 353 N.R. 75, at para. 21; *Ereiser*; *Johnson v. Minister of National Revenue*, 2015 FCA 52, 470 N.R. 183, at para. 4; *9162-4676 Québec Inc. v. Canada*, 2016 FCA 112, 2017 DTC 5074, at para. 2). Before the Tax Court, if the final result of the assessment is correct, the assessment will be upheld even if the process that led to the assessment was flawed or abusive (see *Webster v. Canada (Attorney General)*, 2003 FCA 388, 312 N.R. 235, at para. 21; *Ghazi v. Canada (National Revenue)*, 2019 FC 860, 70 Admin. L.R. (6th) 216, at para. 30; *Newave Consulting Inc. v. Canada (National Revenue)*, 2021 FC 1203, at para. 139 (CanLII); *Chad v. Canada (National Revenue)*, 2023 FC 1481, [2024] 1 C.T.C. 63, at para. 28). To quote Professor Provencher once more, the Tax Court “does not . . . have the power to vacate assessments on the basis of the wrongdoing of the

minister” (p. 552). Reviews of that kind of conduct by the executive proceed by way of judicial review before the Federal Court.

[58] The Minister’s opinion may well be a relevant consideration informing the correct computation of tax liability under the *ITA*. In correctly assessing tax liability, the Minister must take into account the opinion she has come to under s. 247(10), as this affects the calculation of the transfer pricing adjustment applied by operation of law. Therefore, it is true that, if the Minister’s decision is followed by an assessment, that assessment will reflect the Minister’s decision. However, this cannot be the basis to conclude that the Minister’s decision is itself an assessment or part of one. Dow’s new criterion of “directly affecting” or “inextricably linked” for redefining an assessment in law is overreach and ignores the principled basis upon which the case law has used the settled definition to fix the jurisdictional contours of an appeal before the Tax Court.

[59] In my view, the “inextricably linked” argument loses much of its persuasive force when one considers what happens with the taxpayer’s assessment should a discretionary decision made under s. 247(10) be found to have been made improperly. When that decision is quashed, it does not automatically follow that the tax liability is wrong and that the assessment is incorrect, since it is open to the Minister to make the same decision upon reconsideration. By contrast, whenever a non-discretionary determination is found to have been made in error, the Minister has no choice but to make the correct determination; she cannot make the same determination

that has been found to be incorrect by the Tax Court. When the rectification implies a change in the tax liability, it then automatically follows that the assessment is incorrect. In other words, as soon as a non-discretionary determination is found to have been made in error, it is possible to know whether the assessment remains correct or not. The same cannot be said when a discretionary decision is found to have been made in error. I conclude that while discretionary decisions under s. 247(10) may well “directly affect” the product of the assessment, they cannot be considered to be “inextricably linked” to it the same way as non-discretionary determinations.

[60] We must be careful not to confuse the fact of the Minister’s opinion with the basis for it. My conclusion does not mean that in making the assessment, the Minister must scrutinize the basis underlying the s. 247(10) opinion. It is the mere existence of the Minister’s opinion that is relevant to “[the] product [of] the amount of the tax owing” (*Anchor Pointe Energy*, at para. 33). Thus, as Thorson P. wrote, “[a] clear distinction must be drawn between the Minister’s determination and the assessment; they are not the same” (*Nicholson Ltd. v. Minister of National Revenue*, [1945] Ex. C.R. 191, at p. 202). I agree with the Crown that, given the statutory scheme, it is only the *outcome* of the Minister’s exercise of discretion that may be a fact relevant to the correctness of the assessment here, not the appropriateness of that outcome (R.F., at paras. 104-5). Facts underlying the Minister’s exercise of discretion are unconnected to the correctness of the assessment (para. 104). With the utmost respect, I disagree with the Tax Court judge’s view that an improper exercise of this discretion, or a failure to exercise this discretion, renders the assessment incorrect (T.C.C. reasons, at para.

213). This is incompatible with the statutory scheme which directs in s. 247(10) that the default statutory rule — i.e., no downward transfer pricing adjustment — applies unless the Minister comes to the opinion that an adjustment is appropriate. Whether the Minister’s opinion reflects proper policy considerations is not a relevant fact that feeds into the assessment in any way.

[61] Indeed, when the Minister makes a discretionary decision under s. 247(10), she will not always issue an assessment to reflect her decision, as Dow readily acknowledged at the hearing (transcript, at pp. 15 and 24-25). This happens when in the opinion of the Minister it is not appropriate to adjust the taxpayer’s income, as there is no departure in that case from the default rule that the adjustment shall not be made. Further, decisions under s. 247(10) may be made after an assessment has been issued, such as when a taxpayer makes a request for a downward adjustment.

[62] With this in mind, and said respectfully, the Tax Court judge erred in law by stating that “the determination under subsection 247(10) . . . must be made before a correct assessment can be issued” (para. 191 (emphasis deleted)). Indeed, the Minister will often exercise her discretion under s. 247(10) after an initial assessment is issued. As the facts of this case illustrate, taxpayers will often request downward adjustments after they have been assessed (see statement of agreed facts, at para. 17, reproduced in A.R., at p. 170). If a taxpayer asks the Minister to make a downward adjustment after an assessment has been issued — as was done in this case — it cannot be said that the initial assessment is incorrect because the Minister refused to issue a downward



adjustment that was requested later. When, as in this case, the taxpayer makes a request under s. 247(10) and the Minister declines it, “presumably the minister will issue a letter denying the downward adjustment request but will not issue a notice of assessment” (Sandler and Watzinger, at p. 285).

[63] Neither party asked this Court to change the law of transfer pricing by holding that the Minister must always exercise her discretion under s. 247(10) before assessments are issued or that the Minister’s decision must be recorded in an assessment even if the Minister denies the taxpayer’s request for a downward adjustment. On the contrary, both parties agreed at the hearing that the Minister may make her decision after an assessment is issued and that, should she deny the taxpayer’s request for a downward adjustment, often no assessment will be issued to reflect that (see transcript, at pp. 23 and 56-57). Dow rightly acknowledged that the only avenue to challenge the decision where there is no assessment issued is an application for judicial review in Federal Court, undercutting the one-stop shop jurisdictional argument (pp. 15 and 24-25).

[64] The Minister’s assessment and the Minister’s decision under s. 247(10) reflect two different statutory roles that are qualitatively and practically distinct. Dow’s position would disrupt the settled meaning of an assessment in order to expand the Tax Court’s jurisdiction far beyond what is conferred upon it by statute. If Parliament had wished that the Minister would issue a new assessment in every circumstance that s. 247(10) discretion were exercised, even in the context of a denial of a request for a

downward adjustment, it would have provided for this in the *ITA*. To the extent it would be appropriate to change the nature of the s. 247(10) decision or otherwise assimilate it to the assessment, that would require a legislative amendment.

(2) The Tax Court's Jurisdiction Cannot Be Enlarged "By Necessary Implication"

[65] Dow suggests that the power of the Tax Court to hear appeals of assessments may include decisions of the Minister pursuant to provisions like s. 247(10) "by necessary implication" (A.F., at para. 107). With respect, this is inconsistent with the distinct routes of appeal to the Tax Court from other decisions of the Minister that are set out expressly in the *ITA*.

[66] Where Parliament provided for recourse from a ministerial decision to the Tax Court, it did not rely on an implicit connection to the assessment, but rather created an express right to appeal that decision. Express appeal routes would not be necessary if these decisions could be appealed to the Tax Court as part of the assessment.

[67] For example, if the Minister refuses to grant a taxpayer an extension of the timeline to file a notice of objection, "the taxpayer may apply further to the Tax Court for an extension of time pursuant to subsection 166.2(1) of the [*ITA*]" (*Canada (National Revenue) v. ConocoPhillips Canada Resources Corp.*, 2017 FCA 243, 2017 DTC 5135, at para. 44). Parliament provided the Tax Court with a special set of remedies to address these challenges (s. 166.2(4)). It did not rely on the appeal of the

assessment to which the objection relates for jurisdiction to challenge the Minister's refusal.

[68] Decisions affecting tax liability are also subject to explicit routes of appeal to the Tax Court, where appropriate. For example, the *ITA* provides the federal Minister of the Environment with the power to determine the fair market value of ecological gifts (s. 118.1(10.2) to (10.5)). This fair market value could affect a tax assessment through its impact on the corresponding tax benefits. Challenges to the Minister of the Environment's determination is through a separate route of appeal to the Tax Court, directly from the determination of fair market value (s. 169(1.1); see Lubetsky (2022), at pp. 66-67). The Tax Court is provided with specifically tailored powers to dispose of those appeals (s. 171(1.1)). In other words, where Parliament seeks to oust Federal Court jurisdiction as s. 18.5 of the *Federal Courts Act* permits, it has done so, as that provision directs, by way of an "express" rule in the *ITA* and not by "necessary implication".

[69] Further, the *ITA* gives the Minister the power to determine a taxpayer's losses in prescribed circumstances, which can bind both the Minister and the taxpayer for the purpose of calculating tax in any taxation year (s. 152(1.1) and (1.3); see *Interior Savings Credit Union v. R.*, 2007 FCA 151, [2007] 4 C.T.C. 55, at para. 20). Parliament provides a route to challenge that determination directly to the Tax Court, on a separate and explicit statutory basis distinct from a challenge to the assessment (s. 152(1.2) and (1.3); R.F., at para. 43). The Tax Court has held that challenging the determination in

later years through an appeal of the assessment is an impermissible collateral attack on the Minister's decision (M. H. Lubetsky, "Income Tax Disputes Involving Loss Years: Pitfalls, Foibles, and Possible Reforms" (2019), 67 *Can. Tax J.* 499, at pp. 516-17).

[70] This statutory context shows that ministerial decisions are understood as distinct from the tax assessment even where they may directly affect it. If Parliament wishes for the Tax Court to have jurisdiction to review a Minister's decision that may impact liability under the *ITA*, it says so explicitly and provides the Tax Court with an appropriate range of remedies. To hold that the Tax Court could have implicit jurisdiction over the Minister's decision under s. 247(10) on an assessment appeal would be inconsistent with this established method.

(3) The Historical Jurisdiction of the Exchequer Court of Canada Does Not Support Dow's Position

[71] Finally, I disagree with Dow that the jurisdiction of the former Exchequer Court of Canada supports the view that decisions by the Minister under s. 247(10) of the *ITA* form part of an assessment.

[72] It is true that the Exchequer Court had jurisdiction over exercises of discretion by the Minister under the former *IWTA*. Dow is right to say that "the Exchequer Court exercised their appellate jurisdiction in appeals from assessments that involved the Minister's exercise of discretion" (A.F., at para. 122) before Parliament established the modern Federal Court and the Tax Court. And it is true, as Dow notes, that the Exchequer Court had access to similar remedies as the modern Tax Court in

taxation matters (at para. 125), specifically the power to dispose of appeals from assessments by vacating or varying them, or referring the assessment back to the Minister for further consideration and reassessment (see Lubetsky (2022), at p. 114).

[73] Importantly, however, in addition to this power, the Exchequer Court had other broad sources of jurisdiction under the *IWTA* that supported its review of ministerial discretion. As Dow notes, s. 66 of the former *IWTA* provided the Exchequer Court “exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act and in delivering judgment may make any order as to payment of any tax, interest or penalty . . . as to the said Court may seem right and proper” (see A.F., at para. 119 (emphasis added)). I agree with the Crown that this grant of jurisdiction to the former Exchequer Court is broader than the grant of jurisdiction to the current Tax Court related to the assessment.

[74] The Exchequer Court also had access to administrative law remedies, unlike the modern Tax Court (see, e.g., *Pure Spring Co. v. Minister of National Revenue*, [1946] Ex. C.R. 471, at p. 487). The Exchequer Court’s jurisdiction over “the minister’s discretion engaged what are now often referred to as the rules of ‘natural justice’” (C. Campbell and R. Raizenne, *A History of Canadian Income Tax*, vol. 1, *The Income War Tax Act, 1917-1948* (2022), at p. 403). It is therefore unsurprising that, in the historical cases on which Dow relies, the jurisdiction of the Exchequer Court was not challenged.

[75] Further, as the Crown notes, the Exchequer Court cases on which Dow relies did not grapple with divided statutory grants of authority between two courts. Instead, the decisions articulate principles by which courts review ministerial discretion. I agree with the Crown that these principles have since evolved in fundamental ways. This is another reason to be cautious before applying their reasoning to the jurisdiction of the modern Tax Court.

[76] When determining whether the historical principles developed in the context of the Exchequer Court apply to the Tax Court, parallels drawn between their remedial powers must be understood in their full context. Despite having powers related to assessments that bear resemblance to those of today's Tax Court, the Exchequer Court exercised those powers as part of a broader jurisdictional grant conferring on it the ability to review ministerial discretion. I acknowledge that these Exchequer Court decisions were later followed by the Income Tax Appeal Board in its early years as a transitional matter (Lubetsky (2022), at pp. 79 and 114), but this does not change the fact that they were developed in the unique context of the historical Exchequer Court. In my respectful view, this provides no basis to apply these principles to the Tax Court, constituted decades later.

[77] I agree that the historical jurisdiction of the Exchequer Court is of limited relevance to the question at hand because “[t]he issue in this appeal relates to the jurisdiction of the Tax Court and the Federal Court, not the jurisdiction of the Exchequer Court as it related to appeals under the *Income War Tax Act*” (C.A. reasons,

at para. 50). Given the differences between the jurisdiction of the Exchequer Court and the modern Tax Court, the Crown is right to say that “[i]t is an overreach to apply [historical jurisprudence] to the Tax Court under modern-day legislation” (R.F., at para. 97).

B. *Accepting Dow’s Call to Depart From the Settled Meaning of “Assessment” Would Create Significant Legal Uncertainty*

[78] In my view, Dow’s jurisdictional theory has potential implications beyond the matter in issue. In particular, it would unsettle this Court’s jurisprudence on the standard of review set forth in *Vavilov*. It would also bring about broader uncertainty regarding the Federal Court’s jurisdiction.

(1) Accepting Dow’s Theory Would Create Uncertainty in the Law Governing Standard of Review

[79] As noted above, when a taxpayer challenges an assessment under s. 169 of the *ITA*, the Tax Court will conduct a *de novo* review of that assessment. The Tax Court is not limited to the record before the Minister when considering the correctness of the assessment and does not ask whether the Minister’s assessment was reasonable (see generally D. Jacyk, “The Dividing Line Between the Jurisdictions of the Tax Court of Canada and Other Superior Courts” (2008), 56 *Can. Tax J.* 661, at p. 667, citing *Johnston v. Minister of National Revenue*, [1948] S.C.R. 486, at p. 489, and *Canada (Attorney General) v. Buchanan*, 2002 FCA 231, 2002 DTC 7397, at para. 18, per Rothstein J.A.). Unlike typical statutory appeals of administrative action in which

courts apply the appellate standards of review and judicial review matters in which courts presumptively apply reasonableness review, an appeal to the Tax Court involves “non-deferential, de novo review” (Lubetsky (2022), at p. 65). The Tax Court reviews the correctness of assessments through “trial[s] in which both sides adduce evidence on issues of fact and make submissions on issues of law” (J. Li, J. Magee and J. S. Wilkie, *Principles of Canadian Income Tax Law* (10th ed. 2022), at p. 483; see also *Campbell v. Minister of National Revenue*, [1953] 1 S.C.R. 3, at p. 4; *JP Morgan*, at para. 82; A. Provencher and P. Dupuis, *Aspects juridiques de la fiscalité canadienne des particuliers* (5th ed. 2023), at pp. 180-81).

[80] If a discretionary decision under s. 247(10) were part of an assessment, it would thus be reviewed *de novo* by the Tax Court like any other part of that same assessment. However, absent legislative direction, it would be inappropriate for the Tax Court to review the Minister’s decision *de novo*. It is, as this Court emphasized in *Vavilov*, “the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review” (para. 30 (emphasis in original)). Dow seems to recognize this by arguing that rather than performing a *de novo* review of a discretionary decision made under s. 247(10), the Tax Court should review these decisions for reasonableness in accordance with *Vavilov* (A.F., at para. 74) in a way that is not “more or less deferential than the standard of review that the Federal Court would apply in the same circumstances” (transcript, at p. 15). Dow insists that “it’s called judicial review when it is before the Federal Court, but that same sort of standard can be applied by [the] Tax Court” (*ibid.*). Dow is, in effect, asking this Court to grant



judicial review jurisdiction to the Tax Court. With respect, since Parliament has not created an exception to the rule that assessments are subject to *de novo* review in the Tax Court, Dow cannot argue, on one hand, that a discretionary decision under s. 247(10) is part of an assessment and that, on the other hand, it is not subject to *de novo* review. If the Minister's decision is truly part of an assessment, the only option allowed by statute would be for the Tax Court to review it *de novo* for correctness. The Tax Court cannot apply a deferential standard of review such as reasonableness to part of an assessment. Accordingly, the Federal Court is the only court that has jurisdiction to undertake this review on reasonableness.

[81] Indeed, the Tax Court does not have the jurisdiction to conduct judicial review, which is reserved for the Federal Court by ss. 18 and 18.1 of the *Federal Courts Act* for federal administrative actors like the Minister (see *Addison SCC*, at paras. 8 and 11). This Court cannot confer jurisdiction to conduct judicial review on the Tax Court; only Parliament can do this. As Dow acknowledges, the Tax Court's jurisdiction is limited to reviewing the correctness of assessments (transcript, at p. 26). But Dow's argument that the Tax Court has jurisdiction is based on a claim that Parliament has ousted the judicial review jurisdiction of the Federal Court under s. 18.5 of the *Federal Courts Act* by providing a statutory appeal mechanism to the Tax Court.

[82] In effect, Dow has asked this Court to extend, by judicial fiat, the jurisdiction of the Tax Court by providing it with original jurisdiction to undertake judicial review of the Minister's decision under s. 247(10). I recall that the Tax Court,

like the Federal Court, is a statutory court, with its authority fixed by the legislature. Parliament has assigned original jurisdiction for judicial review against any federal board (to which the Minister is assimilated) to the Federal Court in the *Federal Courts Act*, not to the Tax Court (see in particular ss. 18(1), 18(3), 18.1 and 18.5). Parliament has directed, in the same statute, that the remedies under s. 18(1) can only be obtained by filing an application for judicial review in the Federal Court, which can provide the remedies necessary to provide relief for this kind of wrongful administrative conduct (s. 18.1(3)). The Tax Court has no statutory authority to undertake such a review, much less provide adequate remedies where relief is called for. I recall what this Court wrote in *Vavilov*, at para. 82:

Reasonableness review aims to give effect to the legislature’s intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir [v. New Brunswick]*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 27-28 and 48; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 10; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 10.

[83] If Parliament had provided a statutory appeal mechanism through which one could challenge discretionary decisions made under s. 247(10) of the *ITA*, the presumptive reasonableness standard in *Vavilov* would not apply. Instead, the Tax Court would ordinarily need to apply the appellate standards of review such as those set out in this Court’s decision in *Housen* (see *Vavilov*, at para. 37; see also *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8, at para. 48). This is understood to give effect to the legislature’s design choices in crafting the statutory appeal mechanism at issue,

and the legislature is therefore free to direct another standard of review should it “intend that a different standard of review apply” (*Vavilov*, at para. 37).

[84] Dow cannot say, in the same breath, that a s. 247(10) discretionary decision is an assessment or part of one such that it is subject to appeal under the *ITA* but that it also is to be reviewed on the standard of reasonableness. To say so, in my respectful view, would be wholly inconsistent with fundamental administrative law principles settled in *Vavilov*. In response to direct questions about the standard of review at the hearing, Dow provided no basis to reconcile its theory with these key administrative law principles (transcript, at pp. 10-15).

[85] Further, applying the appellate standards of review to a decision appealed to the Tax Court through s. 169 would be inconsistent with the settled nature of this appeal provision. Here, the parties agree that the appeal mechanism Parliament has created in s. 169 of the *ITA* subjects the Minister’s assessment to *de novo* correctness review before the Tax Court, through a trial procedure, though with the burden of proof on the taxpayer to overturn the Minister’s assumptions of fact. Dow rightly referred to this at the hearing as “a modified *de novo* review, in the sense that there are assumed facts” (transcript, at p. 13). This specific right of appeal from a tax assessment has consistently been interpreted as less deferential than typical statutory appeals, given that it permits the Tax Court to carry out a *de novo* review of the assessment through a trial procedure (see generally *Campbell*, at p. 4; *Jacyk*, at p. 667, citing *Johnston*, at p. 489; *Buchanan*, at para. 18, per Rothstein J.A.; *Lubetsky* (2022), at p. 65; *Li*, Magee

and Wilkie, at p. 483; *JP Morgan*, at para. 82). *Vavilov* suggests that the nature of the statutory mechanism by which a decision is challenged is relevant to determining the legislature's intention regarding the standard of review (para. 36). It is not at all clear how the single appellate mechanism at issue here could provide at once for *de novo* review for some parts of the assessment and for appellate review of decisions that are said to be inextricably linked to that same assessment, nor how that bifurcation would be reconciled with *Vavilov*.

[86] I add that, to the extent it would be appropriate to apply an appellate standard of review other than those set out in *Housen*, I would be hesitant to rely on this Court's approach to standard of review applicable to judicial discretion. Judicial discretion and administrative discretion in transfer pricing are worlds apart; the parties did not suggest the approach to reviewing judicial discretion in cases like *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48, should be applied to inform the standard of review by administrative actors. *Carroll-Byrne* is not a case about the review of administrative discretion, and applying it to the review of the s. 247(10) decision, even by analogy, would in my respectful view be inappropriate. This would be equivalent to transplanting the standards associated with the appellate review of discretionary criminal sentencing undertaken by judges, or of judicial discretion in case management matters, to the review of administrative decision-makers such as the Minister opining under s. 247(10) of the *ITA*. I note in passing that this Court has applied the *Housen* standards to other decisions it describes as discretionary (see, e.g., *Southwind v. Canada*, 2021 SCC 28, [2021] 2 S.C.R. 450, at paras. 85 and 123). As I

conclude that the s. 247(10) decision is not part of an assessment, and is therefore reviewable only in Federal Court on a reasonableness standard, I do not need to decide what principles govern the appellate standards of review where they are applicable.

[87] I recognize that the Tax Court judge proposed applying a novel standard, distinct from reasonableness, to the review of the discretionary ministerial decision under s. 247(10). She described a “principle of law”, applicable in this context, that “a discretion must be exercised judicially, [meaning] fairly and honestly and in accordance with sound and fundamental [legal] principles” (para. 142). If the Minister fails to do so, she “has not exercised the discretion at all and the resulting assessment is not correct in law” (*ibid.*). On this basis, the Tax Court judge reasoned that where the Minister fails to exercise her discretion “judicially” when denying a downward adjustment, “on an appeal of the resulting assessment, . . . the Tax Court is both permitted and required to review the manner in which the Minister came to her determination under subsection 247(10)” (para. 144).

[88] With respect for the Tax Court judge’s view, I disagree with this approach. The exercise of discretion in s. 247(10) reflects an administrative decision, not a judicial one. The authority on which the Tax Court judge relies in developing this standard is a pre-*Vavilov* decision concluding that the failure to apply proper principles means a statutory power was not exercised at all (T.C.C. reasons, at paras. 140-41, citing *Pure Spring*). This is not how administrative discretion is analyzed under the *Vavilov* framework; courts now defer to statutory decision-makers by presumptively

applying reasonableness review. The standard of review that the Tax Court judge proposed for the review of the Minister's discretionary decision departs from the presumptive standard of reasonableness in *Vavilov* and does not do so in the manner the Court directed for statutory appeals in para. 37 of its reasons in that case. I recall that in referencing the usually applicable standards of appellate review set out in *Housen*, the Court in *Vavilov* said that a legislature is free, by statute, to fix another standard: "Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute" (*ibid.*). One might well argue that, for the appeal of assessments set forth by Parliament in s. 169(1) of the *ITA*, Parliament has created a *de novo* procedure where the parties proceed to a trial of the matter and where Parliament has set rules on the burden of proof. To import a new standard of review into that appeal would, in my respectful view, directly contradict Parliament's intent on how the Tax Court should decide if the assessment is correct.

[89] The statutory *de novo* review in the Tax Court does not contemplate deference to the assessment other than placing the evidentiary burden of proof on the taxpayer (see *Provencher and Dupuis*, at pp. 180-81). It requires all aspects of the assessment, fact and law, to be scrutinized for correctness. Any approach that purports to apply a deferential standard of review in this context would change the Tax Court's settled role. What applying *de novo* review would actually require would be for the Tax Court to substitute its opinion on the appropriateness of the downward adjustment for that of the Minister. In so doing, it would be coming to a conclusion as to appropriate

tax policy, when its role has always been to apply tax law as set out by Parliament. Again, I do not have to decide whether and how *de novo* review would apply to the s. 247(10) decision, given it is not part of the assessment that is subject to *de novo* review in the first place.

[90] In sum, this is not an appeal in which we are well placed to create a novel standard of review in order to avoid fundamental defects in Dow's theory. Doing so in the absence of adequate argument by the parties and analysis in the courts below could give rise to unintended consequences. Parliament did not provide any basis in the *ITA* to depart from the presumptive standard of reasonableness (*Vavilov*, at para. 25), because discretionary decisions are not assessments nor part of assessments. As I have said, assessments are to be reviewed by the Tax Court *de novo* in accordance with the settled nature of a tax appeal. In this case, holding that any standard other than reasonableness applies to exercises of the Minister's discretion under s. 247(10) would undercut the certainty and predictability that *Vavilov* brought to this Court's jurisprudence on the standard of review.

[91] In my view, the complication regarding the applicable standard of review flows directly from Dow's attempt to challenge s. 247(10) through an appeal provision that was never intended to apply to that discretionary decision. This complication falls away completely once one accepts that these claims were intended to be heard in the Federal Court on a standard of reasonableness, consonant with *Vavilov*.

(2) Dow's Approach Would Cause Uncertainty Regarding the Federal Court's Jurisdiction

[92] Treating the Minister's decision as part of an assessment for the purposes of the appeal provision would in practice result in new bifurcated streams of review and give rise to new issues regarding the Federal Court's jurisdiction that could well provoke further litigation.

[93] All agree that the Minister's decision under s. 247(10) can be made without an assessment being issued, as was done in Dow's case. If this Court were to conclude that this decision is part of an assessment, this could prejudice a taxpayer's ability to object to such decisions. In the case of corporations, the time limit to object to an assessment is generally 90 days from the sending of the notice of assessment (s. 165(1)(b) *ITA*). If the Minister's decision under s. 247(10) is made after the time limit for objections and appeals and no subsequent assessment is issued, the ability to challenge it may be statute-barred (s. 169(1) *ITA*).

[94] Dow seeks to avoid this difficulty by arguing that, if the Minister does not issue an assessment after she makes a discretionary decision under s. 247(10), the Minister's decision can be challenged by way of judicial review in the Federal Court (transcript, at p. 24).

[95] With respect, Dow proposes an untenable solution in which the Federal Court would retain its judicial review jurisdiction over discretionary decisions by the



Minister as a general rule, but it would lose its jurisdiction to conduct judicial review of those same discretionary decisions if they are followed by assessments. Dow's solution raises the difficulty of there being two different courts — applying two different standards of review — with jurisdiction to review discretionary decisions under s. 247(10), depending on whether or not an assessment is issued after the decision is made.

[96] Moreover, Dow's approach concerns not only s. 247(10), but seeks to enlarge the Tax Court's jurisdiction beyond the correctness of assessments to other related Ministerial decisions. The Federal Court exercises jurisdiction over many taxation matters, including jurisdiction to review discretionary decisions of the Minister (see, e.g., *Bozzer v. Canada (National Revenue)*, 2011 FCA 186, [2013] 1 F.C.R. 242; *Jewett v. Canada (Attorney General)*, 2020 FCA 187, [2021] 4 C.T.C. 1; *Shaw Estate v. Canada (Attorney General)*, 2021 FC 576). When asked at the hearing whether Dow's position is that "the discretion in 247(10) of the Minister . . . is properly a matter for the Tax Court", counsel replied that he "[does not] think that goes far enough" because the Tax Court should have jurisdiction "any time the Minister exercises a discretion" (transcript, at pp. 3-4).

[97] Dow's invitation to expand the jurisdiction of the Tax Court to include judicial review of discretionary decisions under s. 247(10) may, as it conceded at the hearing, be extended to "a myriad of other provisions" that will impact "millions of taxpayers" (transcript, at p. 2). Even if this Court seeks to limit its conclusions to the

downward pricing context, the expanded nature of an “assessment” it would embrace could have unwitting consequences in other settings. In many contexts in which the Minister exercises discretion — which, in addition to s. 247(10), includes the discretion to waive tax, interest or penalties — it can be said that her discretion will have an impact on the amount of tax owing. If, for example, the Minister decides to waive a tax, the taxpayer’s tax liability will change. Dow’s argument, if accepted, would by its own admission extend to a “myriad” of other contexts in which the Minister exercises discretion (*ibid.*). It is unclear which of these provisions will be affected and therefore the extent to which the jurisdiction of the Tax Court will be expanded at the expense of the Federal Court.

[98] Since the Federal Court and the Tax Court do not have concurrent jurisdiction — the jurisdiction of the Federal Court is ousted whenever the Tax Court has jurisdiction — this uncertainty will likely lead to more litigation. A challenge to the Minister’s decision brought in the wrong court must be struck. A taxpayer may bring a challenge to a discretionary decision by the Minister to either the Tax Court or the Federal Court only to be faced with a jurisdictional challenge based on uncertainty created by Dow’s theory. If their challenge is struck in one court, they may be statute-barred from bringing a claim in the other court, unless they initiated proceedings in both courts within the applicable limitation periods. Far from improving access to justice, Dow’s theory would cement the need for taxpayers to initiate parallel proceedings. Large multinational corporate taxpayers like Dow may be able to bear the costs associated with navigating the jurisdictional uncertainty that its position would

generate, but other taxpayers — especially the individuals and small businesses that Dow claims that it is attempting to help — will be left in a much more vulnerable position.

[99] I add that this could have jurisdictional consequences even outside the confines of the *ITA*. I recall that the jurisdictional dispute turns around s. 18.5 of the *Federal Courts Act*, which excludes the exclusive jurisdiction of the Federal Court over this type of claim where a federal statute “expressly provides” for an appeal to other courts. By accepting Dow’s position that an express appeal provision that permits an appeal from one decision also, implicitly, allows an appeal from distinct but related decisions, this Court would be opening the door to jurisdictional controversy in other statutory contexts where s. 18.5 is also at issue. Rather than insisting on Parliament expressly providing for an appeal to deprive the Federal Court of jurisdiction, we would be interpreting s. 18.5 to cover decisions that are only implicitly captured by statutory appeal provisions. This raises questions about which decisions are sufficiently connected to the decisions that are expressly subject to an appeal to benefit from this expanded notion of s. 18.5.

[100] The imprecise definition of which discretionary decisions are “inextricably linked” to assessments is exemplified by the shifting terminology in Dow’s written and oral arguments. It is described variously as requiring that the decision “directly affects” or “directly impacts” that assessment (A.F., at para. 107; transcript, at p. 6), forms an

“essential componen[t]” of the amount of tax payable (A.F., at para. 92), or is “reflect[ed]” in the assessment (A.F., at paras. 95 and 99; transcript, at p. 4).

[101] Moreover, Dow’s proposed approach to s. 18.5 of the *Federal Courts Act* is inconsistent with the principles of statutory interpretation. The modern approach requires courts to “[read] the words of an Act . . . in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, cited with approval in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26). This approach “focusses on the text, context, and purpose of the statutory provision” (*Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, at para. 69). And as this Court held recently in the taxation context, “[w]here the words of a statute are ‘precise and unequivocal’, their ordinary meaning will play a dominant role” (*Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51, at para. 41, citing *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). Professors Pierre-André Côté and Mathieu Devinat observed that this Court’s jurisprudence indicates that [TRANSLATION] “legislative purpose alone cannot justify a departure from the express language of a provision” (*Interprétation des lois* (5th ed. 2021), at para. 1366). While purpose is an important factor in statutory interpretation, its [TRANSLATION] “weight may vary, particularly when it is at odds with the text itself” (para. 1345). Section 18.5 states that only an “express” ouster of the Federal Court’s jurisdiction will have such an effect. Dow’s call to extend the

jurisdiction of the Tax Court, to the exclusion of the jurisdiction of the Federal Court, by “necessary implication” rather than by express statutory language ought to be rejected. The Minister’s decision may well feed into the tax assessment. But the relevant provisions of the *Federal Courts Act* and the *ITA*, when interpreted with a view to their text, context and purpose, do not support the ouster of the Federal Court’s jurisdiction.

C. *Challenges to the Minister’s Discretionary Decisions Must Be Heard in the Federal Court*

[102] Dow argues that the Tax Court is the superior venue in which to challenge the s. 247(10) decision, given its remedial powers and procedural particularities. I respectfully disagree. In my view, only the Federal Court can grant an appropriate remedy for a challenge to the s. 247(10) decision. Moreover, the Tax Court has never been, and was never intended by Parliament to be, an exclusive forum for taxation matters. Attempting to achieve that result without a comprehensive reform that only Parliament can bring about would not enhance access to justice as Dow claims.

(1) Only the Federal Court Can Provide the Remedy Sought

[103] It is true that, in form, Dow is seeking an order for reconsideration and reassessment from the Tax Court. Dow rightly recalls that “[i]n *Windsor [(City) v. Canadian Transit Co.]*, 2016 SCC 54, [2016] 2 S.C.R. 617, this Honourable Court held that the first step in considering a jurisdictional dispute is to ‘determine the essential

nature or character of that claim” (A.F., at para. 69). While it is relevant to consider the remedies sought when determining the essential nature of the claim, I disagree with Dow that “the Appellant seeks a remedy that may be provided only by the Tax Court — the referral of an assessment back to the Minister for reconsideration and reassessment” (para. 70).

[104] If the Tax Court determines that an assessment is incorrect, Dow is right to say that the Tax Court may vacate the assessment, vary it, or refer it back to the Minister for reconsideration and reassessment. However, Dow argues that, as part of its power to refer the assessment back to the Minister for reconsideration and reassessment, “the Tax Court can order the Minister to reconsider the decision to deny the downward adjustment under s. 247(10)” (A.F., at para. 64).

[105] I respectfully disagree. As I have emphasized, it is only the Minister’s opinion that the downward transfer pricing adjustment is appropriate under s. 247(10) that is relevant to the correctness of an assessment, not the facts that underlie that opinion. If the Tax Court issues an order for reconsideration and reassessment, the Minister will simply be required to issue a reassessment that correctly reflects the very decision that the taxpayer sought to challenge since that decision would not have been quashed. Moreover, an order for reconsideration and reassessment cannot compel the Minister to reconsider her discretionary decision under s. 247(10) because such a decision is not an assessment nor part of one. I agree with Webb J.A. that “the remedies granted to the Tax Court . . . do not extend to the power to vary the opinion of the

Minister rendered under subsection 247(10) of the ITA or to quash this opinion” (para. 77). I recall that where Parliament has created express recourse to the Tax Court from decisions of the Minister, it has also prescribed powers allowing that court to effectively dispose of those matters (see, e.g., s. 166.2(4) *ITA*). If Parliament had sought to confer power to grant relief from the s. 247(10) opinion on the Tax Court, it would have to have done so by statute. One could argue that such powers could be a suitable consideration in comprehensive legislative reform addressing the jurisdiction of the Tax Court. For example, author Lubetsky has suggested that “[t]o preserve the independence and effectiveness of the Tax Court, the court should have a broader equitable jurisdiction to revise discretionary ministerial decisions de novo, potentially similar to the jurisdiction set out in . . . section 166.2 (with regard to the late-filing of objections)” (Lubetsky (2022), at p. 112). Given the language of the current *ITA*, however, Webb J.A. is right to say the Tax Court does not have the remedial tools necessary to address the s. 247(10) decision.

[106] As Webb J.A. correctly observed, the Federal Court has the power to quash the Minister’s discretionary decision, which would require her to reconsider it (para. 77). While “the Federal Court is not allowed to vary, set aside or vacate assessments” (*JP Morgan*, at para. 93), it has access to administrative law remedies that are appropriate for discretionary decisions by the Minister, which as I have emphasized, are not assessments. I recall that “while it is true that the Federal Court cannot invalidate an assessment . . . the Federal Court may grant a declaration based on administrative law principles” in tax matters (*Sifto Canada Corp. v. Minister of National Revenue*,

2014 FCA 140, 461 N.R. 184, at para. 25; see also *Maverick Oilfield Services Ltd. v. Canada (Attorney General)*, 2023 FC 1728, [2024] 2 C.T.C. 67). In this context, should the Federal Court quash a decision made under s. 247(10) on administrative law grounds and the Minister issue a new decision that affects the amount of tax owing, the assessment will be incorrect if it does not accurately reflect the new opinion. At that point, the Tax Court may intervene, but only after the Federal Court has quashed the Minister's decision, after the Minister made a new decision, after that new decision results in a change in the taxpayer's tax liability, and if the Minister fails to issue a reassessment to reflect a change in tax liability.

[107] In this light, Webb J.A. correctly observed that “[s]ince the Tax Court does not have the power to quash an opinion rendered under subsection 247(10) of the [ITA], it will remain valid, unless it is quashed by the Federal Court on judicial review” (para. 84). If the Federal Court quashes the Minister's decision under s. 247(10), the Minister will have the opportunity to reconsider it, which may result in the issuance of a reassessment. At that point — if the reassessment is alleged to be incorrect — the taxpayer may challenge it by way of an appeal to the Tax Court. Therefore, I respectfully disagree with Dow that “[a]n application for judicial review to the Federal Court cannot achieve” a reassessment (A.F., at para. 70). Of course, because the decision is discretionary, it is possible that the Minister arrives at the same opinion following the quashing of her previous decision, in which case the tax liability would not change and no reassessment would issue.



[108] In sum, I agree that reconsideration and reassessment is not an appropriate remedy. Since the Tax Court cannot avail itself of administrative law remedies, and since the Federal Court does not have jurisdiction to hear appeals of the correctness of assessments, Webb J.A. was right to conclude that “the remedies available to both courts may be required if Dow is to succeed” (para. 91).

(2) The Tax Court Is Not an Exclusive Forum for Tax Litigation

[109] Dow argues that the Tax Court should have jurisdiction to review discretionary decisions of the Minister because the Tax Court is “meant to provide an accessible and credible forum for taxpayers to resolve disputes with the government over their tax liabilities” and “provide[s] a convenient method for taxpayers to obtain judicial decisions in disputed income tax matters” (A.F., at paras. 33 and 75). According to Dow, “arbitrary fetters [have been] placed on the Tax Court over the years by judicial decisions relating to assessments that are based on the exercise of Ministerial discretion [that] have prevented the Tax Court from fulfilling its mission” (para. 79).

[110] I agree that Parliament created the Tax Court to provide an accessible forum for taxpayers to challenge the correctness of assessments. But Parliament intentionally divided jurisdiction over tax matters between the Federal Court and the Tax Court. The Tax Court has never been a single forum for all tax litigation (see *Sifto*, at para. 26). Indeed, several provisions of the *ITA* expressly provide jurisdiction to the Federal Court or the Federal Court of Appeal over tax matters (see ss. 172(3),

204.81(9), 222 to 223 and 231), including provisions that provide jurisdiction to the Minister to make discretionary decisions (see ss. 220(3.1), 220(3.2) and 152(4.2)).

[111] The parties agree that s. 18.1 of the *Federal Courts Act* provides jurisdiction to the Federal Court to conduct judicial review of decisions made by federal administrative actors, including the Minister of National Revenue (*Addison SCC*, at para. 8). Judicial review of federal administrative action sits at the core of the mandate of the Federal Court. According to Prof. Craig Forcese, judicial supervision of administrative action is “anchored” in the Federal Court (“The Trials and Tribulations of the Federal Courts’ Jurisdiction”, in Valois et al., eds., 73, at p. 79). As “the administrative apparatus of government had grown enormously”, Parliament granted “exclusive original jurisdiction in administrative law proceedings against federal [administrative actors]” to the Federal Court in 1970 (*ibid.*). Parliament has provided [TRANSLATION] “a single court with the power to review the legality of acts of the federal public administration to ensure that there is a consistent and uniform body of case law across the country that provides a framework for federal government action” (B. Letarte et al., *Recours et procédure devant les Cours fédérales* (2013), at pp. 43-44).

[112] Specifically, the Federal Court retains exclusive jurisdiction over the Minister’s decisions that are not subject to an appeal to the Tax Court. As Professor Provencher observed, “[a] Canada Revenue Agency assessment is a decision of a federal board and could be subject to judicial review under [section 18.1] if not for

section 18.5” (pp. 548-49). Stratas J.A. explained helpfully that “[t]here 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 [and] assessments that are purely discretionary” (*JP Morgan*, at para. 96).

[113] Some have suggested that the shared jurisdiction over tax matters between the Tax Court and the Federal Court “raises a significant policy issue” because “there seems little justification for bifurcating the tax jurisdiction” and that Parliament should therefore expand the jurisdiction of the Tax Court “by statutory grant” (Campbell, at p. 618). In fact, some have argued that s. 247(11) of the *ITA* should be amended in order to ensure that the Tax Court will have jurisdiction over decisions made under s. 247(10) (see Sandler and Watzinger, at p. 307). It has also been suggested that Parliament’s grant of jurisdiction to the Tax Court in s. 166.2 of the *ITA* may be a model for further amendments that would expand the Tax Court’s jurisdiction to include the jurisdiction to conduct judicial review in taxation matters. In doing so, Parliament would provide the Tax Court with “statutory guidelines for decision making or a broader, equitable jurisdiction” that would be appropriate if it were to have jurisdiction to review discretionary decisions (Lubetsky (2022), at p. 66). Indeed, if today’s jurisdictional difficulties are “primarily the result of ad hoc, unplanned, organic evolution over the last 75 years” and the appropriate solution is “a comprehensive review and overhaul of jurisdiction among the Tax Court, the Federal Court, and the superior courts with respect to income tax matters”, it falls to Parliament to conduct such a review (pp. 65 and 115). As this Court has recognized, “Parliament has set up a

complex structure to deal with a multitude of tax-related claims” (*Addison SCC*, at para. 11). Making a change to that complex structure — which divides jurisdiction over taxation matters between three different federal courts — without a thoughtful, comprehensive reform that can only be achieved by Parliament would be imprudent, particularly if doing so would directly contradict the wording of the applicable statutes and Parliament’s intent. A patchwork judicial solution to this complex matter could increase uncertainty, cause further litigation over jurisdictional issues, and ultimately undermine access to justice.

[114] Parliament has turned its mind to the difficulties that arise from the fractured jurisdiction of the Tax Court and the Federal Court over tax matters. After doing so, it did not act to expand the jurisdiction of the Tax Court. For example, in 1997, the Auditor General recommended that the Federal Court and the Tax Court be merged. The Auditor General observed that members of the tax bar and several Tax Court judges “noted that certain current procedural difficulties would be eliminated by having taxation issues dealt with by judges of a superior court” (*Report on the Federal Court of Canada and the Tax Court of Canada*, at para. 209). Nevertheless, the Auditor General reported that “[t]he majority of judges of the Tax Court are strongly opposed to a merger of the courts” (para. 205). In the end, as Lubetsky notes, “Parliament elected not to merge the Tax Court and Federal Court but, rather, to merge their registry services” and to make no changes to “the actual jurisdiction of the Tax Court” (Lubetsky (2022), at pp. 107-8). In 2011, when presented with a proposal to expand the

jurisdiction of the Tax Court to include all tax matters, the Minister of Justice declined to propose amendments to the relevant legislation (see p. 110).

[115] In my view, it falls to Parliament to respond, if appropriate, to the concerns of those who suggest that the jurisdiction of the Tax Court should be rethought to include the jurisdiction to conduct judicial review in taxation matters.

(3) Dow's Approach Will Not Enhance Access to Justice

[116] Dow encourages this Court to consider the jurisdiction of the Tax Court “from an access to justice perspective”, noting that “small taxpayers or self-represented litigants are disadvantaged when forced to commence an application for judicial review in the Federal Court with respect to a discretionary decision” (A.F., at para. 80). Dow points to procedural rules that are currently in place in the Tax Court that make the Tax Court more accessible to “disadvantaged” taxpayers, such as the informal procedure, that are not currently available in the Federal Court (paras. 75-80). Moreover, Dow argues that “if the FCA Decision is correct”, taxpayers may be required to commence parallel proceedings in the Tax Court and the Federal Court in order to obtain certain types of relief (para. 59).

[117] I disagree that access to justice will be enhanced for “millions of taxpayers” (transcript, at p. 2) by this Court deciding that the Tax Court has jurisdiction to review discretionary decisions of the Minister under s. 247(10). This provision is relevant

mainly to multinational corporate taxpayers carrying out non-arm's length transactions with related entities.

[118] Nor would access to justice be enhanced for large multinational corporate taxpayers such as Dow. If the Tax Court were to have jurisdiction to review the Minister's exercise of discretion pursuant to s. 247(10), the Federal Court's ability to conduct judicial review of those decisions would be ousted under s. 18.5 of the *Federal Courts Act*. When the s. 247(10) decision is followed by an assessment, the Tax Court would have exclusive jurisdiction to review the Minister's exercise of discretion, but no ability to provide recourse if the Minister conducted herself unreasonably in coming to her decision. This is because the Tax Court does not have remedial power to quash the Minister's decision. If the quantum is correct, the Tax Court must confirm the Minister's assessment regardless of whether her decision under s. 247(10) is reasonable; so long as assessments "are correct, they must stand even if the objection process was flawed" (*Webster*, at para. 21; *Ereiser*, at para. 31; *Main Rehabilitation*, at para. 8; see also *Chad*, at para. 28).

[119] Dow's plea to expand the jurisdiction of the Tax Court beyond what is provided for in legislation for the purpose of enhancing access to justice is ultimately unconvincing. Not only will Dow's proposed approach not enhance access to justice, but it is likely to have broad unintended consequences that reach far beyond the taxation context. Dow ostensibly asks the Court to adopt a wholly novel interpretation of an assessment under the *ITA* in order to provide the Tax Court with implicit jurisdiction

that would oust judicial review before the Federal Court. As explained above, this could have far-reaching implications in respect of the jurisdiction of the Federal Court to conduct judicial review of ministerial decisions in other settings, pursuant to ss. 18, 18.1, and 18.5 of the *Federal Courts Act*.

[120] Dow has pleaded this as a tax case without due regard to the broader implications in administrative law and without proper consideration for judicial review of ministerial discretion by the Federal Court in other areas. This Court should not undermine important aspects of tax and administrative law in Canada in order to pursue access to justice benefits that have not been made out.

## VI. Conclusion

[121] In answer to the question posed under s. 58, I conclude that when the Minister has exercised her discretion under s. 247(10) of the *ITA* to deny a taxpayer's request for a downward pricing adjustment, that decision falls outside of the jurisdiction of the Tax Court in respect of an appeal, under statute, of the taxpayer's assessment. As there is no express right of appeal from this decision to the Tax Court, the proper forum to challenge the Minister's decision is the Federal Court, pursuant to its exclusive jurisdiction in judicial review under its home statute. The Federal Court of Appeal was therefore right to allow the appeal from the Tax Court, to set aside the order granted by that court and, in granting the order the Tax Court should have issued, to answer the question in the affirmative.

[122] For the foregoing reasons, I would dismiss the appeal with costs.

The reasons of Karakatsanis, Côté and Rowe JJ. were delivered by

CÔTÉ J. —

## I. Introduction

[123] At the heart of this appeal lies a question of jurisdiction over tax matters. The core issue is whether it is the Tax Court of Canada or the Federal Court of Canada that has jurisdiction to review a discretionary decision of the Minister of National Revenue (“Minister”) to deny a downward transfer pricing adjustment under s. 247(10) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”).

[124] The confusion concerning the jurisdictional boundaries between the Tax Court and the Federal Court in respect of tax matters has resulted in a lack of predictability, certainty and fairness in an area of the law where these principles are most important. Indeed, the shortcomings of the Tax Court’s jurisdiction and the need for reform to reduce the number of jurisdictional disputes in tax matters are well recognized (see D. Jacyk, “The Dividing Line Between the Jurisdictions of the Tax Court of Canada and Other Superior Courts” (2008), 56 *Can. Tax J.* 661; D. Jacyk, “The Jurisdiction of the Tax Court: A Tax Practitioner’s Guide to the Jurisdictional Galaxy of Constitutional Challenges” (2012), 60 *Can. Tax J.* 55; G. Du Pont and M. H. Lubetsky, “The Power To Audit Is the Power To Destroy: Judicial Supervision



of the Exercise of Audit Powers” (2013), 61 (Supp.) *Can. Tax J.* 103; M. H. Lubetsky, “The Fractured Jurisdiction of the Courts in Income Tax Disputes”, in P. Mihailovich and J. Sorensen, eds., *Tax Disputes in Canada: The Path Forward* (2022), 63).

[125] Although the scope of the appellant’s submissions in the present case is broad enough to allow our Court to resolve some of the jurisdictional issues plaguing good tax administration, the present appeal is limited to the context of s. 247(10) of the *ITA*. Indeed, the appellant invites us to determine whether all exercises of ministerial discretion affecting tax liability, interest or penalties fall within the Tax Court’s appellate jurisdiction over an assessment made against a taxpayer, to the exclusion of the Federal Court’s supervisory jurisdiction. In this case, neither the Tax Court nor the Federal Court ruled on the matter.

[126] In my view, there is no need to rule on all exercises of ministerial discretion to dispose of the present appeal. The issue here is whether a decision under s. 247(10) of the *ITA*, which the Minister *must* make in certain circumstances in order for the amount of tax owing to be determined, is within the scope of an appeal from an assessment.<sup>1</sup> Unlike other discretionary powers that the Minister has under the *ITA*, the power that the Minister has under s. 247(10) is not permissive. As I explain in these

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<sup>1</sup> In these reasons, as the Tax Court did, I use the terms “assessment” and “reassessment” interchangeably, which is consistent with the definition of “assessment” in the *ITA* (s. 248(1)).

reasons, the Minister is obliged to exercise this power in order to determine a taxpayer's liability.

[127] Therefore, the scope of the present appeal is quite narrow. Our Court must determine whether Parliament intended the review of the Minister's exercise of discretion under s. 247(10) to fall within the jurisdiction of the Tax Court or of the Federal Court, in particular when a downward adjustment is sought and/or established. This question must be resolved first and foremost through an examination of each court's enabling statute, having regard to the particular circumstances of this appeal.

[128] In circumstances such as those of the present case, the exercise of discretion under s. 247(10) involves two elements that are relevant to the jurisdiction of the Federal Court and of the Tax Court, respectively: the exercise of ministerial discretion to deny a taxpayer's request for a downward transfer pricing adjustment and an assessment. While the provisions of the *Federal Courts Act*, R.S.C. 1985, c. F-7, give the Federal Court exclusive supervisory jurisdiction over decisions of federal boards, commissions or other tribunals, Parliament has ensured that the correctness or validity of a taxpayer's assessment is a matter that falls squarely within the jurisdiction of the Tax Court pursuant to s. 12 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2 ("*TCCA*"), and s. 169 of the *ITA*.

[129] Importantly, the Tax Court's appellate jurisdiction over an assessment has been granted by Parliament to the exclusion of the Federal Court's supervisory jurisdiction (*Federal Courts Act*, s. 18.5). In *Canada v. Addison & Leyen Ltd.*, 2007

SCC 33, [2007] 2 S.C.R. 793, at para. 11, our Court cautioned against judicial review being used to develop a new form of incidental litigation designed to circumvent the system of tax assessments and appeals established by Parliament:

The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context. [Emphasis added.]

[130] The issue is therefore whether a decision under s. 247(10) of the *ITA*, which the Minister *must* make to determine the amount of tax owing when a downward adjustment is sought and/or established, is within the scope of an appeal from an assessment. Although our Court has said that the Minister generally has no discretion in fulfilling her statutory duty to make an assessment, it has never had to decide whether a discretionary power that the Minister *must* exercise for the amount of tax owing to be determined is subject to the right of appeal provided for in s. 169 of the *ITA* (see *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26, at paras. 25-26).

[131] For the reasons that follow, I am of the view that since it goes directly to the correctness of a taxpayer's assessment, a decision by the Minister to deny a downward transfer pricing adjustment under s. 247(10) is within the scope of the Tax Court's appellate jurisdiction over an assessment under s. 169 of the *ITA*. With all due respect for the opposite view, the Minister's opinion under s. 247(10) cannot be

seen as separate from the assessment. While the Minister *generally* has no discretion in determining a taxpayer's liability, s. 247(10) of the *ITA* creates an exception. Unlike other discretionary powers that the Minister has under the *ITA*, the exercise of the power the Minister has under s. 247(10) is not permissive when a downward adjustment is sought and/or established. This power *must* be exercised in order to determine the amount of tax liability. Since a decision under s. 247(10) directly impacts the amount of income and taxable income and precedes the determination of the ultimate amount of tax owing, such a decision is inextricably linked to the assessment. Therefore, in its essential nature, a taxpayer's objection to the Minister's decision to deny a downward transfer pricing adjustment pertains to the amount of tax owing.

[132] The remedies available in the Federal Court and the Tax Court further support the conclusion that a taxpayer's objection regarding the denial of a downward transfer pricing adjustment is concerned with the correctness of an assessment, i.e., the amount of tax owing, the determination of which involves the Minister's exercise of discretion under s. 247(10). Only the Tax Court has the appropriate remedial powers to deal with such decisions. In allowing an appeal from an assessment, the Tax Court may, under s. 171(1)(b) of the *ITA*, (i) vacate the assessment, (ii) vary the assessment or (iii) refer the assessment back to the Minister for reconsideration and reassessment. Under s. 171(1)(b)(iii), the Tax Court can order the Minister to reconsider the decision to deny the downward adjustment under s. 247(10) as reflected in the assessment under appeal, and to reassess. The Federal Court does not have the same remedial powers to vacate or vary an assessment.

[133] This conclusion is consistent with the comprehensive legislative schemes establishing the respective jurisdiction of each court and with the important objectives of avoiding a multiplicity of proceedings and of promoting efficiency and access to justice. While it is true, as my colleague Kasirer J. says, that in this case this question of statutory interpretation arises as part of a claim brought forward by a multinational corporation, this should have no bearing on, and is irrelevant to, the interpretive exercise. That Dow Chemical's argument serves only to benefit a small number of corporate taxpayers is not at all determinative of the issue before the Court.

## II. Background

[134] The appellant, Dow Chemical Canada ULC ("Dow Chemical"), a Canadian resident corporation, entered into, as borrower, a non-arm's length revolving loan agreement dated February 17, 2009, effective January 1, 2004, with Dow Europe GmbH ("DowEur"), a Swiss company, as lender. As a result of this loan agreement, Dow Chemical incurred interest expenses in the amounts of \$15,279,034 and \$6,694,341 for the 2006 and 2007 taxation years, respectively. Incidentally, for the 2006 taxation year, Dow Chemical also reported \$5,930,155 in income in respect of toll manufacturing services provided to DowEur.

[135] Following a review of the transactions between Dow Chemical and DowEur, the Minister reassessed Dow Chemical for its 2006 taxation year and issued a notice to that effect on December 14, 2011.

[136] The reassessment was made pursuant to the transfer pricing rules set out in s. 247 of the *ITA*. This provision appears in Part XVI.1 of the *ITA*, directly after Part XVI, which establishes anti-avoidance rules. Similarly, the purpose of s. 247 is “to prevent the avoidance of tax resulting from price distortions which can arise in the context of non-arm’s length relationships by reason of the community of interest shared by related parties” (*Minister of National Revenue v. General Electric Capital Canada Inc.*, 2010 FCA 344, 414 N.R. 304, at para. 55). By enacting the transfer pricing rules in s. 247, “Parliament has chosen to indirectly address the issue of a Canadian taxpayer shifting profits to a non-arm’s length person located in another jurisdiction” (*Canada v. Cameco Corporation*, 2020 FCA 112, [2020] 4 F.C.R. 104, at para. 81).

[137] Accordingly, under s. 247(2) of the *ITA*, the income of a taxpayer resulting from transactions between the taxpayer and a non-arm’s length non-resident must be adjusted by the Minister where the terms and conditions of those transactions differ from those that would have been agreed to by parties dealing at arm’s length (see, e.g., *Canada v. GlaxoSmithKline Inc.*, 2012 SCC 52, [2012] 3 S.C.R. 3, at para. 2). The adjustment to the taxpayer’s income may be upward (where the taxpayer benefited from the transaction) or downward (to reduce the taxpayer’s income or increase the taxpayer’s loss or expenditures), resulting in a corresponding increase or decrease in tax liability.

[138] It is not disputed that in this case the Minister determined that the transactions between Dow Chemical and DowEur were non-arm’s length transactions.

As directed by s. 247(2) of the *ITA*, the Minister made an upward adjustment in respect of Dow Chemical's manufacturing services by increasing its 2006 income, adding \$307,234,104 to its total.

[139] The Minister's reassessment did not include a downward adjustment relating to the interest expenses Dow Chemical would have incurred had the parties been dealing at arm's length. Although s. 247(2) contemplates downward adjustments pertaining to non-arm's length transactions, s. 247(10) expressly precludes any downward adjustment unless, "in the opinion of the Minister, the circumstances are such that it would be appropriate that the adjustment be made". As I explain below, these two provisions interact with one another where a downward adjustment is sought and/or established.

[140] Following two objections to the reassessments and extensive correspondence over the course of several years, Dow Chemical was reassessed for its 2006 taxation year on December 14, 2015, and again on April 13, 2017. Although Dow Chemical's grievances regarding the upward adjustment were resolved, neither of the reassessments included the downward adjustment requested by Dow Chemical, which remains in dispute.

[141] Dow Chemical appealed the reassessment dated April 13, 2017, to the Tax Court, challenging the Minister's decision to deny the downward adjustment under s. 247(10). However, given that the proper forum for the review of that decision — the Tax Court or the Federal Court — was unclear, the parties submitted a question of law

to the Tax Court to have the jurisdictional issue determined before the hearing of the appeal.

### III. Judicial History

[142] At first instance, the Tax Court judge determined that the Tax Court has jurisdiction over a decision by the Minister under s. 247(10) since such a decision goes directly to the correctness of a taxpayer's assessment (2020 TCC 139, [2021] 2 C.T.C. 2063). At its core, a decision by the Minister under s. 247(10) determines a taxpayer's income for a given year and serves as "an essential component of the assessment" (para. 29). While no standalone right of appeal to the Tax Court exists for a decision made under s. 247(10), a reading of s. 247(2) and (10) of the *ITA* together with s. 12(1) of the *TCCA* and s. 169(1) of the *ITA* leads to the conclusion that such a decision is subject to an express statutory right of appeal. By virtue of s. 18.5 of the *Federal Courts Act*, it is the Tax Court and not the Federal Court that has jurisdiction.

[143] Throughout her reasons, the Tax Court judge emphasized the fact that s. 247(10) imposes an obligation on the Minister to determine whether a downward transfer pricing adjustment, once established, is appropriate in the circumstances. The Tax Court judge accepted the view that such a discretionary power, in circumstances such as those in the present case, *must* be exercised before income and resulting tax liability can be assessed and that an assessment can be issued only after the Minister's opinion is formed. Where the Minister did not exercise the discretionary power at all, or exercised it on incorrect principles, the assessment cannot be said to be correct.



[144] Despite this reasoning, the Tax Court judge cautioned that her reasons should not be interpreted as granting taxpayers a right of appeal to challenge other types of discretionary decisions the Minister *may* make. In other words, the power conferred by s. 247(10) is unlike other discretionary powers granted to the Minister under the *ITA* in that it is not permissive and is directly related to the computation of income or taxable income.

[145] The Tax Court judge also did not opine as to whether the Tax Court is permitted to substitute its own decision for that of the Minister when reviewing a decision by the Minister under s. 247(10). Rather, she emphasized that this determination must be made in light of our Court's ruling in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653.

[146] The Tax Court judge's opinion on the question of law was appealed to the Federal Court of Appeal, which rejected the Tax Court judge's approach regarding whether a decision by the Minister under s. 247(10) of the *ITA* falls within the scope of an appeal under s. 12 of the *TCCA* (2022 FCA 70, [2022] 5 C.T.C. 1). The Court of Appeal reasoned that, given that the *ITA* does not expressly exclude the Federal Court's jurisdiction by providing for a right of appeal, as specified in s. 18.5 of the *Federal Courts Act*, the Federal Court has jurisdiction to review discretionary decisions made under s. 247(10) of the *ITA*.

[147] In the Court of Appeal's view, the resolution of the issue turned on the remedies available to the Tax Court and the Federal Court. Writing for the court,

Webb J.A. noted that varying an assessment following a decision by the Minister under s. 247(10) necessarily varies the decision itself, which is part of the *process* of determining a taxpayer's liability. A decision by the Tax Court to vary the assessment would therefore require it to quash the Minister's decision or make an order in the nature of mandamus — powers that are granted only to the Federal Court under ss. 18.1(3) and 18(1)(a), respectively, of the *Federal Courts Act*.

[148] Pursuant to ss. 169 and 171 of the *ITA*, the Tax Court's statutory powers on appeal relate to the assessment, which is a *product* of the process; that product is separate from the *process* leading to the assessment. The process of issuing the assessment is not part of the assessment. Thus, the remedial measures available to the Tax Court under the *ITA* do not include an ability to vary or quash the Minister's decision. Again, such powers belong solely to the Federal Court. The Minister's decision is reviewable by the Federal Court only.

#### IV. Issue

[149] Under s. 58 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, the parties sought an order for the determination of the following question of law:

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

Tax Court of Canada under section 12 of the *Tax Court of Canada Act* and section 171 of the ITA?

(T.C.C. reasons, at para. 21)

## V. Analysis

[150] In my view, on a proper interpretation of the comprehensive legislative scheme established by Parliament for determining whether the Federal Court or the Tax Court has jurisdiction over a given tax dispute, and on a review of the factual circumstances of this case, Dow Chemical's challenge to the Minister's exercise of discretion should proceed before the Tax Court as part of the appeal from the assessment. Indeed, on appeal from an assessment, the Tax Court has the jurisdiction to review the Minister's exercise of discretion under s. 247(10) when it results in an assessment (as in the present case). This exercise of discretion is inextricably linked to a taxpayer's assessment, and the taxpayer's challenge is directed at the assessment itself, not merely at the manner in which the Minister exercised her discretion. An assessment is "correct" where the amount of tax assessed is properly based on the applicable provisions of the *ITA* (*Ereiser v. Minister of National Revenue*, 2013 FCA 20, 444 N.R. 64, at para. 21).

### A. *The Respective Jurisdictions of the Federal Court and The Tax Court*

[151] To answer the question at the heart of this appeal, our Court must pay close attention to the contours of each court's jurisdiction as outlined in its enabling statute.

It is thus necessary to briefly describe the jurisdiction of both the Federal Court and the Tax Court.

[152] Under s. 101 of the *Constitution Act, 1867*, Parliament has the authority to provide for the constitution of statutory courts “for the better Administration of the Laws of Canada”. Unlike courts with inherent jurisdiction, such as the provincial superior courts (see *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 17-18), statutory courts derive their existence, jurisdiction and powers solely from their enabling statute.

[153] In *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617, at para. 33, our Court held that the Federal Court has only the jurisdiction conferred upon it by statute; it is without any inherent jurisdiction, unlike the provincial superior courts. The Federal Court can act only within the confines of its statutory powers. The language found in the *Federal Courts Act* is “completely determinative” of the scope of the Federal Court’s jurisdiction (see *Roberts v. Canada*, [1989] 1 S.C.R. 322, at p. 331). The same is true of the Tax Court, which has, under s. 12 of the *TCCA*, exclusive jurisdiction over matters in respect of which a reference or appeal to it is provided for. Any issue regarding the jurisdictional boundaries of the Federal Court and the Tax Court in respect of tax matters must therefore be resolved in accordance with each court’s enabling statute. In this respect, the words of each statute are to be read “in their entire context and in their grammatical and ordinary sense harmoniously

with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26).

[154] The *Federal Courts Act* establishes a comprehensive statutory scheme for determining whether the Federal Court has jurisdiction over a given matter. The analysis begins with s. 18(1) of the *Federal Courts Act*, which grants the Federal Court supervisory jurisdiction over decisions of “a federal board, commission or other tribunal”. For the purposes of this provision, it is well established that the Minister is considered a “federal board” (see *Addison & Leyen*, at para. 8; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, at paras. 3 and 50). Under the *Federal Courts Act*, the Federal Court has exclusive original jurisdiction to grant certain remedies on an application for judicial review of a federal administrative decision (ss. 18(1), 18(3) and 18.1). The following remedies are within the exclusive original jurisdiction of the Federal Court:

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

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[155] However, s. 18.5 of the *Federal Courts Act* limits and ousts the Federal Court's exclusive original jurisdiction to grant such remedies where a federal statute expressly provides for a right of appeal to the Tax Court:

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

[156] The purpose of the limitation set out in s. 18.5 of the *Federal Courts Act* has been interpreted as being to prevent parallel proceedings in the Federal Court and the Tax Court in respect of tax matters. In *Walker v. Canada Customs and Revenue Agency*, 2005 FCA 393, 344 N.R. 169, at para. 13, the Federal Court of Appeal made this clear when it found that s. 18.5 should be interpreted “as far as possible, to preclude parallel proceedings in the Federal Court and the Tax Court of Canada in respect of substantially the same underlying issue”. Likewise, in *Addison & Leyen*, our Court emphasized that judicial review should not be used to circumvent the system of tax assessments and appeals established by Parliament.

[157] Concerns for good tax administration, access to justice and efficiency underlie Parliament's choice to prioritize the Tax Court's jurisdiction over the Federal Court's supervisory jurisdiction where a right of appeal is expressly provided for. Indeed, Parliament established the Tax Court and its predecessors to deal

specifically with taxation matters, providing an accessible and credible forum for taxpayers to resolve disputes with the government (see G. Bourgard and R. McMechan, *Tax Court Practice* (loose-leaf), at pp. 22-7 and 22-8). In the same spirit, Parliament established simplified procedures for taxpayer appeals in which the amount of tax in dispute falls under an enumerated threshold (*Tax Court of Canada Rules (Informal Procedure)*, SOR/90-688b). Courts must be careful not to frustrate Parliament's intention to have the Tax Court deal with tax matters that fall within its exclusive jurisdiction.

[158] Given this clear limitation on the Federal Court's jurisdiction, the relevant question for the purposes of this appeal becomes whether an express right of appeal provided for by Parliament precludes the Federal Court from having jurisdiction over a discretionary decision by the Minister under s. 247(10). In answering this question, it is important to bear in mind, as the Tax Court judge did at first instance, the historical evolution of the Tax Court's appellate jurisdiction, which is a direct continuation of the appellate jurisdiction of the Exchequer Court, the Income Tax Appeal Board and the Tax Appeal Board.

[159] Sections 165 and 169, found in Divisions I and J, respectively, of Part I of the *ITA*, provide for appeals to the Tax Court. In *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557, the Federal Court of Appeal wrote that, under ss. 165 and 169 of the *ITA*, the Tax Court has exclusive jurisdiction to review the validity and correctness of assessments. Writing

for a unanimous court, Stratas J.A. held that these provisions constitute “a complete appeal procedure that allows taxpayers to raise in the Tax Court all issues relating to the correctness of the assessments, i.e. whether the assessment is supported by the facts of the case and the applicable law” (para. 82).

[160] Section 169(1) of the *ITA* provides taxpayers with a right of appeal to have an assessment vacated or varied:

**169 (1)** Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either

(a) the Minister has confirmed the assessment or reassessed, or

(b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,

but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been sent to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.

[161] Once an objection to an assessment has been raised in the manner and within the timeframe specified in s. 165(1) of the *ITA* and the conditions in s. 169 have been met, an appeal is instituted. Proceedings before the Tax Court differ from ordinary appeals in that “the hearings are in the nature of a trial in which both parties are entitled to call evidence” (*Campbell v. Minister of National Revenue*, [1953] 1 S.C.R. 3, at p. 4). Under s. 169 of the *ITA*, the Tax Court is tasked with determining the taxpayer’s tax liability *de novo*, regardless of whether the evidence adduced before the court was properly before the Minister at the time of the assessment. The scope of the appeal with



respect to factual matters is determined by the pleadings, and especially by the assumptions of fact relied on by the Minister in making the assessment. Under both the informal procedure and the general procedure, the parties can lead evidence to support findings of fact different than those on which the assessment was based, and the burden of proof is on the party alleging different or new facts, on a balance of probabilities (*Johnston v. Minister of National Revenue*, [1948] S.C.R. 486; see also Jacyk (2008), at p. 667).

[162] Given the Tax Court's exclusive jurisdiction over the validity and correctness of an assessment under s. 169 of the *ITA*, the question at the heart of this appeal is whether the scope of the express right of appeal provided for by Parliament extends to the review of the Minister's decision under s. 247(10), thereby precluding the Federal Court from having jurisdiction under s. 18.5 of the *Federal Courts Act*.

B. *The Scope of the Right of Appeal Under Section 169 Extends to Decisions Under Section 247(10) Resulting in an Assessment*

[163] In oral argument before our Court, counsel for Dow Chemical contended that the Tax Court should be recognized as having jurisdiction over any exercise of ministerial discretion that relates to an assessment. In this respect, he likened s. 247(10) to other provisions of the *ITA* under which the Minister has discretion to waive the tax, interest or penalties assessed. However, in its written submissions, Dow Chemical conceded that neither the Tax Court nor the Federal Court of Appeal below ruled on such other discretionary provisions (A.F., at para. 105). While doing so might be

salutary from the perspective of access to justice, it is not for the courts to remedy the shortcomings that exist in the Tax Court's jurisdiction. Parliament is free to amend the relevant statutes as it deems necessary.

[164] In my view, and to reiterate, the question is whether the scope of the express right of appeal from an assessment provided for in s. 169 of the *ITA* extends to the review of a discretionary decision by the Minister to deny a taxpayer's request for a downward transfer pricing adjustment. To answer this question, it is necessary to determine the nature of the objections Parliament intended to place within the Tax Court's jurisdiction on appeal from an assessment under s. 169 of the *ITA*.

[165] Therefore, it is essential that the circumstances in which the appeal arises first be clearly defined. The decision we are concerned with is the Minister's decision to either allow or deny a downward transfer pricing adjustment under s. 247(10) based on whether, in her opinion, "the circumstances are such that it would be appropriate that the adjustment be made". Section 247(10) does not define those circumstances or provide any guidance as to what they may be. The Minister is given wide discretion to make her decision based on her own assessment of the circumstances, policy considerations (as discussed later in these reasons) and the applicable legislation. The Minister's decision to allow or deny a downward transfer pricing adjustment will usually be reflected in the taxpayer's assessment, as it affects the amount of income or taxable income and, consequently, the amount of tax owing.

[166] The Canada Revenue Agency has indicated that a downward transfer pricing adjustment involving either a treaty or non-treaty country can be the result of:

- A. A taxpayer request independent of a transfer pricing audit;
- B. A taxpayer request as a result of an upward adjustment initiated by a foreign tax authority;
- C. A taxpayer request during the course of a transfer pricing audit; or
- D. An adjustment initiated by a CRA auditor during the course of a transfer pricing audit.

(*TPM-03R: Downward Transfer Pricing Adjustments*, June 21, 2022 (online), at para. 9; see also D. Sandler and L. Watzinger, “Disputing Denied Downward Transfer-Pricing Adjustments” (2019), 67 *Can. Tax J.* 281, at pp. 284-86.)

[167] Contrary to other provisions that give the Minister a discretion that affects the amount of a taxpayer’s income or taxable income, like ss. 91(2), 111(1.1)(c) and 125(7) of the *ITA*, s. 247(10) is not permissive.

[168] It is not disputed that s. 247(10) is an exception to the general rule in s. 247(2), which mandates upward and downward adjustments where necessary to reflect the amounts that would have been agreed to had the parties been dealing with each other at arm’s length (F. Vincent and M. Ranger, *Transfer Pricing in Canada* (2018), at p. 320; *TPM-03R*, at paras. 5-6). However, s. 247(10) places a limitation on any downward transfer pricing adjustment by subjecting such an adjustment to the Minister’s discretion (*TPM-03R*, at para. 7).

[169] Although, because of s. 247(10), a taxpayer is not entitled to a downward adjustment in all circumstances, I am of the view that a taxpayer is entitled to the Minister's opinion as to whether a downward adjustment is appropriate in the circumstances. This is because, as noted by both the Tax Court judge and the Federal Court of Appeal, s. 247(2) does not differentiate between upward and downward adjustments (T.C.C. reasons, at paras. 7-10; C.A. reasons, at paras. 23-24). Parliament's drafting choice here is important. Section 247(2) provides that upward and downward adjustments "shall be" made when the conditions prescribed in that provision are met. The expression "shall not be made . . . unless", found in s. 247(10), creates a narrow exception that must be read together with s. 247(2). Read together, ss. 247(2) and 247(10) require the Minister to form an opinion as to whether a downward adjustment is appropriate when one is sought and/or established. Either the Minister will be of the opinion that the downward adjustment is appropriate under the circumstances and will allow it, or she will be of the opinion that it is not appropriate and will deny it. The Tax Court judge was correct to determine that these provisions establish a rule that must be applied to compute income or taxable income and thus tax under Part I of the *ITA* (para. 10).

[170] Adopting the view that s. 247(10) can be ignored even when a downward adjustment is sought and/or established, as the Crown invites us to do, would insulate the Minister from any oversight (R.F., at para. 112). This interpretation would, for example, allow the Minister *to never exercise her discretion* as an indirect way of denying a downward adjustment, instead of *actually* denying it. It would lead to the

conclusion that Parliament intended taxpayers to seek a writ of mandamus before the Federal Court every time a downward adjustment is sought and/or established in order to ensure that the Minister exercises her discretion under s. 247(10). As Vincent and Ranger point out, this is surely not what Parliament intended (see p. 324). And I add that it is doubtful, on the basis of such an interpretation, that a writ of mandamus could be granted, leaving the taxpayer without any recourse.

[171] This is not to say that the Minister has a general duty to consider the appropriateness of downward adjustments before making an assessment. However, when s. 247(2) is engaged, the Minister is obliged to form an opinion as to a downward adjustment. Such a duty may arise in the circumstances described in para. 164 of these reasons (although I would be careful not to limit this duty to these circumstances). In the present case, the Minister acknowledged that s. 247(2) was engaged and that it would be natural, given her audit position, to allow a downward adjustment; but the Minister nonetheless declined to do so, which resulted in the reassessment under appeal. The Tax Court judge's conclusion that s. 247(10) is not permissive must be understood in light of these circumstances (paras. 182, 191, 196 and 199).

[172] My colleague states that the right of appeal provided for in s. 169 of the *ITA* cannot extend to discretionary decisions under s. 247(10) resulting in an assessment because such an interpretation would be inconsistent with the settled meaning of "assessment" for the purposes of s. 169 of the *ITA*. He relies primarily on

this Court's decision in *Okalta Oils Ltd. v. Minister of National Revenue*, [1955] S.C.R. 824.

[173] No one disputes that *Okalta Oils* remains a binding precedent of our Court as to the meaning of "assessment". In that case, a corporation had originally received an assessment in the amount of \$1,000 for a given taxation year. The corporation served a notice of objection to the assessment, and the Minister, upon reconsideration, reassessed the corporation at nil dollars. On appeal from the reassessment, the corporation argued that it had the right to claim further deductions with respect to drilling and exploration costs. Fauteux J., as he then was, determined that, under the provisions of the *Income War Tax Act*, R.S.C. 1927, c. 97 ("*IWTA*"), there was no assessment if no tax had been claimed: "Any other objection but one ultimately related to an amount claimed was lacking the object giving rise to the right of appeal from the decision of the Minister to the Board" (p. 826 (emphasis added)).

[174] In *Canada v. Consumers' Gas Co.*, [1987] 2 F.C. 60, the Federal Court of Appeal adopted a similar interpretation of the word "assessment" in the context of the right of appeal provided for in the *ITA*, reaffirming the principle that a taxpayer cannot appeal from a nil assessment:

What is put in issue on an appeal to the courts under the *Income Tax Act* is the Minister's assessment. While the word "assessment" can bear two constructions, as being either the process by which tax is assessed or the product of that assessment, it seems to me clear, from a reading of sections 152 to 177 of the *Income Tax Act*, that the word is there employed in the second sense only. This conclusion flows in particular from subsection 165(1) and from the well established principle that a taxpayer

can neither object to nor appeal from a nil assessment. [Emphasis added; p. 67.]

[175] This reasoning was relied upon in *Main Rehabilitation Co. v. Canada*, 2004 FCA 403, 247 D.L.R. (4th) 597, at para. 8, and *Canada v. Anchor Pointe Energy Ltd.*, 2007 FCA 188, [2008] 1 F.C.R. 839, at paras. 32-33, for the proposition that an appeal under s. 169 pertains to an objection as to the amount of tax owing. It is worth noting that neither of these cases cited or placed any reliance on *Okalta Oils*. These decisions cannot and should not be read as departing from our Court's pronouncement in that case that the right of appeal under s. 169 of the *ITA* is "ultimately related to an amount claimed". In fact, in *Main Rehabilitation*, the Federal Court of Appeal similarly held that the question on appeal from an assessment is "whether the amounts assessed can be shown to be properly owing" (para. 8). In my view, the distinction established in these decisions simply means that what is at issue on appeal from an assessment is the amount of tax owed by the taxpayer, and not merely the conduct of the Minister in making the assessment or the purpose for which she made it. This is consistent with the text of s. 169, which provides that a taxpayer may appeal to the Tax Court to have "the assessment vacated or varied".

[176] In the present case, the Federal Court of Appeal held that the right of appeal from an assessment provided for in s. 169 does not extend the Tax Court's jurisdiction to the Minister's discretionary decisions under s. 247(10) of the *ITA*. That conclusion was premised in great part on the "limited" remedial powers of the Tax Court. In the view of Webb J.A., decisions under s. 247(10) are part of the process of determining a

taxpayer's liability and, accordingly, do not fall within the scope of the Tax Court's appellate jurisdiction over an assessment or within its remedial powers (paras. 62 and 72-77). My colleague is of the same view.

[177] While I recognize the jurisprudence upon which the Federal Court of Appeal's reasoning is based, in the instant case this Court is concerned not with a nil assessment or with allegations pertaining to the underlying process, but rather with a quantum directly affected by a discretion the Minister is required to exercise. No one is disputing that the amount of tax liability arises from the application of the relevant statutory provisions to the facts, nor is anyone suggesting that the Minister *generally* has any discretion in fulfilling her statutory duty to assess. These reasons should not be read as stating that *any* discretionary decision that the Minister *may* make in tax matters — such as the ones contemplated by the fairness provisions — falls within the jurisdiction of the Tax Court. This notion was expressly rejected at first instance, since “provisions that provide for a waiver or cancellation of tax otherwise payable only are activated once the tax liability is established” (para. 190 (emphasis added), citing *Hunt v. The Queen*, 2018 TCC 193, 2018 DTC 1139, at para. 29).

[178] At issue is whether a decision under s. 247(10) of the *ITA*, which the Minister *must* make before the amount of tax liability can be determined, is within the scope of an appeal from an assessment. This is not a permissive provision; rather, it “mandates the Minister to form an opinion as to whether the taxpayer should be assessed with or without the benefit of that adjustment” (T.C.C. reasons, at para. 210



(emphasis added)). The question is whether, as a result, challenges to the Minister's exercise of discretion under s. 247(10) can properly be characterized as being "ultimately related to an amount claimed" as part of an assessment so as to fall within the right of appeal provided for in s. 169 of the *ITA*.

[179] In the *ITA*, Parliament has expressly placed some limitations on a taxpayer's right to object to and appeal from assessments resulting from certain discretionary decisions made by the Minister (see ss. 165(1.1) and 169(1)). It is noteworthy that no such provision precludes an appeal from an assessment resulting from a decision by the Minister under s. 247(10) of the *ITA*. I would therefore be careful not to narrowly construe the scope of s. 169 of the *ITA* by reference to other provisions that Parliament has used to broaden the Tax Court's jurisdiction (see, e.g., ss. 152(1.2), 152(1.3), 166.2(2) and 169(1.1)).

[180] The scope of s. 169 of the *ITA* must now be examined. I note at the outset that considerations regarding the applicable standard of review are irrelevant to the determination of which court has jurisdiction when the correctness of an assessment is in issue. These considerations are relevant only once jurisdiction has been established. In my view, the right of appeal provided for in s. 169 of the *ITA* extends to the Minister's decisions under s. 247(10) of the *ITA*. A taxpayer's objection to a decision of the Minister under s. 247(10), which *must* be made before an assessment can be issued, is directed at the amount of tax owing. The Minister's exercise of discretion in this context is inextricably linked to the correctness of the assessment (T.C.C. reasons,

at paras. 171-73). An objection to that decision is “ultimately related to an amount claimed” (*Okalta Oils*, at p. 826). Let me explain.

[181] Three steps must be taken for the purposes of issuing an assessment. First, in our self-reporting system of taxation, the Minister must make certain assumptions of fact. Second, the Minister has to interpret the provisions of the relevant legislation and apply them to the assumed facts. Third, under the transfer pricing provisions, the Minister has to determine whether or not a downward adjustment is appropriate in the circumstances, a determination that directly impacts the amount of income and taxable income. Each of these steps affects the amount of tax payable and is directly reflected in the amount of a taxpayer’s liability. They are inextricably linked to the correctness of the assessment.

[182] Since s. 169 of the *ITA* grants the Tax Court exclusive jurisdiction over the correctness of the assessment, the same court must also have jurisdiction to review each of these three steps, as part of a *de novo* review process. The outcome of the Minister’s exercise of discretion under s. 247(10) is a fact inextricably linked to the correctness of the resulting assessment. What places the matter before the Tax Court is the question of whether the Minister’s exercise of discretion is an essential component of the assessment as a matter of fact and law. This is not an expansion of the Tax Court’s jurisdiction “by necessary implication”, but merely an application of s. 169 of the *ITA*.

[183] It is helpful to keep in mind that, as I explained above, s. 247(2) of the *ITA* requires the Minister to adjust transfer prices where necessary to ensure that they reflect

the prices that would have been determined if the parties had been dealing at arm's length. This particular provision concerns the correctness of transfer prices and, as a result, the correctness of the computation of a taxpayer's income and taxable income. However, s. 247(10) requires that a downward adjustment be made only where, "in the opinion of the Minister, the circumstances are such that it would be appropriate that the adjustment be made". In this respect, I fully agree with the Tax Court judge's finding that the Minister's discretion under s. 247(10), "being one that must (not may) be exercised before income and resulting tax liability can be assessed in compliance with the transfer pricing provisions, is of a different character than a discretion that is entirely permissive and need not be exercised until after tax, interest and penalties have been assessed in accordance with the provisions of the *ITA*" (para. 196 (first emphasis added; second and third emphases in original)).

[184] I also agree with the Tax Court judge that while the Minister *generally* has no discretion to exercise in assessing a taxpayer's tax liability, the discretion granted under s. 247(10) is an exception. It is one that the Minister *must* exercise where s. 247(2) is engaged, i.e., when a downward adjustment is established in the course of a transfer pricing audit or when a taxpayer requests a downward adjustment (para. 199).

[185] The Minister's decision to deny a downward transfer pricing adjustment that would otherwise be mandated by s. 247(2) is inextricably linked to the correctness of the resulting assessment. That decision relates to the computation of a taxpayer's income or taxable income and directly affects the amount of tax payable for a taxation

year. It is a fact on which the application of the relevant statutory provisions necessarily rests and which results in the assessment. In circumstances such as those in the instant appeal, it is clear that the amount of tax assessed as being payable can be determined only once the Minister has made her decision regarding the requested downward pricing adjustment.

[186] As a result, if the discretion under s. 247(10) is not exercised or not properly exercised, the resulting assessment cannot be correct, because the decision necessarily has an impact on the computation of tax liability (T.C.C. reasons, at paras. 197 and 213). In such a situation, the Minister has not fulfilled her statutory responsibilities; the resulting assessment is incorrect because of an improper exercise of discretion. As Thorson P. wrote in *Nicholson Ltd. v. Minister of National Revenue*, [1945] Ex. C.R. 191, at p. 205, if the Minister has not acted properly in exercising her discretion, “[s]he has not exercised the discretion required by the section at all, and if h[er] determination so made is included in an assessment[,] the assessment is, to such extent, incorrect”. On appeal from an assessment that results from a decision made under s. 247(10), “the interference by the Court is not really interference with the exercise of the discretion, but rather a finding that it has not been exercised” (p. 208; see also *Pure Spring Co. v. Minister of National Revenue*, [1946] Ex. C.R. 471, at pp. 503-4).

[187] In other words, the fact that the Minister initially exercised her discretion *improperly*, but later reached the same conclusion by exercising her discretion *properly*

after having been ordered to reconsider and reassess, does not mean that the Tax Court's intervention was not justified in the first place. Instead, the initial assessment would be incorrect as matter of fact and law because of an improper exercise of discretion; the new assessment would be correct and no objection on this basis could be raised. An objection to the assessment resulting from such a decision gives rise to a right of appeal. Such an objection is "ultimately related to an amount claimed" as part of an assessment, which Parliament has placed within the exclusive jurisdiction of the Tax Court under s. 169 of the *ITA* (*Okalta Oils*, at p. 826).

[188] The foregoing is also consistent with the general principle that deciding whether a court has jurisdiction over a claim requires a determination of the essential nature or true character of the claim (*Windsor (City)*, at para. 25; *Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63, [2019] 4 S.C.R. 559, at paras. 36-37; *Domtar Inc. v. Canada*, 2009 FCA 218, [2009] 6 C.T.C. 61, at para. 28; *JP Morgan*, at para. 50; *Sifto Canada Corp. v. Minister of National Revenue*, 2014 FCA 140, 461 N.R. 184, at para. 25; *Wenham v. Canada (Attorney General)*, 2018 FCA 199, 429 D.L.R. (4th) 166; *International Air Transport Association v. Canadian Transportation Agency*, 2022 FCA 211, at para. 26 (CanLII)). This is especially true in tax matters so as to not frustrate Parliament's intention that assessments be dealt with exclusively by the Tax Court, a specialized court (*Addison & Lyeen*, at para. 11). In objecting to an assessment that results from the Minister's exercise of discretion under s. 247(10), a taxpayer is concerned with the amount of tax owing, not merely with the propriety of the Minister's exercise of discretion.

[189] The right of appeal provided for in s. 169 of the *ITA* extends to the Minister's decision under s. 247(10) of the *ITA*. Again, that right of appeal arises from the assessment, not from the exercise of discretion *per se*; the amount of tax assessed must be the direct result of the Minister's decision under s. 247(10) in order for a right of appeal to arise. There is no right of appeal to the Tax Court to challenge purely administrative decisions or other decisions that the Minister *may* make relating to an amount after tax liability has been established, as was determined by the Tax Court judge (paras. 168-91). Where the result was a nil assessment or where the exercise of discretion by the Minister under s. 247(10) had no impact on the amount of tax liability for the taxation year under appeal (requiring, for example, the taxpayer to wait until a taxation year in which the amount is relevant), such an exercise of discretion cannot be challenged before the Tax Court.

[190] I fully agree with the Tax Court judge's finding that in the present case, the Minister's decision to deny the downward adjustment under s. 247(10) is "an essential component of [an income tax] assessment, goes to the correctness of the assessment, and accordingly may be reviewed by the Tax Court under its exclusive appellate jurisdiction to determine the correctness of the assessment" (para. 29). In my view, this finding does not create any legal uncertainty, nor does it expand the settled meaning of "assessment" or alter the nature of the right of appeal provided for in s. 169 of the *ITA*.

[191] It is not disputed that when the application of s. 247(2) results in an upward adjustment to a taxpayer's income and the Minister assesses the taxpayer accordingly,

the taxpayer has a right to appeal that assessment to the Tax Court (see, e.g., *Cameco*). I agree with Dow Chemical that the same right of appeal to the Tax Court should exist where the application of s. 247(2) results in a downward adjustment to the taxpayer's income, but the Minister makes a decision under s. 247(10) to deny the downward adjustment and assesses the tax payable accordingly (A.F., at para. 130). To conclude otherwise would lead to absurd results. For example, a taxpayer objecting to an assessment that reflects both upward and downward adjustments would have to go before the Federal Court to challenge the Minister's decision to deny the downward adjustment, all the while appealing to the Tax Court to challenge the upward adjustment.

[192] With respect, I am of the view that the Federal Court of Appeal erred in holding that the Minister's decisions under s. 247(10) are not within the Tax Court's exclusive appellate jurisdiction over assessments. The scope of the right of appeal provided for in s. 169 extends to a decision by the Minister under s. 247(10) since this decision goes to the correctness of an assessment. In this respect, I agree with the Tax Court judge that "[b]ecause the exercise of ministerial discretion under [s.] 247(10) is subject to appeal to the Tax Court, it is not subject to judicial review by the Federal Court, although the Tax Court's decision on the appeal of the assessment may be appealed to the Federal Court of Appeal" (para. 215).

C. *The Tax Court's Remedial Powers Under Section 171 of the ITA Allow It to Deal With Discretionary Decisions Going to the Correctness of an Assessment*

[193] The core of the case that the Crown has made against the Tax Court's jurisdiction to review discretionary decisions by the Minister under s. 247(10) lies in the remedies that may be granted in disposing of an appeal from an assessment under s. 171 of the *ITA*. Given that it is a statutory court, the Tax Court may only grant remedies in accordance with the powers conferred by its enabling statute, which are construed to "include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime" (*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 19; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51).

[194] According to the Federal Court of Appeal below, the Tax Court does not have the authority to review the Minister's discretionary decisions under s. 247(10) since only an *assessment* can be vacated, varied or referred back to the Minister, not a decision that leads to an assessment (para. 77). The Federal Court of Appeal's determination was premised on the notion that a decision by the Minister under s. 247(10) — as part of the *process* of determining the amount of a taxpayer's liability — is *necessarily* distinct from the assessment itself, as opposed to inextricably linked to it.

[195] With great respect, I am of the view that this premise does not withstand scrutiny. As explained above, the express right of appeal provided for in s. 169 of the *ITA* extends to the Minister's exercise of discretion under s. 247(10) because this



exercise of discretion goes to the correctness of a taxpayer's assessment for the purposes of the *ITA*. The Minister's decision is thus inextricably linked to the assessment.

[196] The Crown argues that even if it is assumed that the Tax Court has jurisdiction to review the Minister's exercise of discretion under s. 247(10) as part of an appeal from an assessment, no adequate remedies are available to the Tax Court given that it lacks the power to vary the Minister's opinion or substitute its own opinion for that of the Minister. Therefore, says the Crown, the limitation on the Federal Court's jurisdiction found in s. 18.5 of the *Federal Courts Act* should not apply (R.F., at para. 52).

[197] I acknowledge that parallel proceedings may be inevitable for a taxpayer seeking to obtain a reassessment reflecting a downward adjustment if the Tax Court has no appropriate remedial powers to deal with such decisions by the Minister. However, s. 18.5 of the *Federal Courts Act* states that where a statute expressly provides for a right of appeal from a decision or order, "that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance" with that statute. A decision by the Minister under s. 247(10) of the *ITA* — because it goes to the correctness of an assessment — is subject to the Tax Court's appellate jurisdiction over an assessment under s. 169 of the *ITA*. Such a decision must first and foremost be dealt

with under s. 171 of the *ITA*, not through the exercise of the Federal Court’s remedial powers.

[198] Section 171 of the *ITA* outlines the Tax Court’s ability to dispose of an appeal from an assessment as follows:

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

- (a) dismissing it; or
- (b) allowing it and
  - (i) vacating the assessment,
  - (ii) varying the assessment, or
  - (iii) referring the assessment back to the Minister for reconsideration and reassessment.

**171 (1)** La Cour canadienne de l’impôt peut statuer sur un appel :

- a) en le rejetant;
- b) en l’admettant et en :
  - (i) annulant la cotisation,
  - (ii) modifiant la cotisation,
  - (iii) déférant la cotisation au ministre pour nouvel examen et nouvelle cotisation.

I acknowledge that s. 171 of the *ITA* refers to “the assessment” in delineating the Tax Court’s powers, and not expressly to a “decision” of the Minister. As I explained above, however, it must be kept in mind that the scope of an appeal from an assessment under s. 169 of the *ITA* extends to the Minister’s exercise of discretion under s. 247(10) because it is inextricably linked to the assessment.

[199] It is true that, as the Federal Court of Appeal concluded, the Tax Court cannot deal with a decision by the Minister under s. 247(10) by granting either of the first two remedies available to it when an appeal is allowed. Vacating the entire

assessment under s. 171(1)(b)(i) would not be an adequate remedy where the only issue is the Minister's exercise of discretion to deny a downward pricing adjustment. Moreover, varying the assessment under s. 171(1)(b)(ii) would necessarily involve varying the Minister's decision under s. 247(10), but the Tax Court does not have the power to substitute its opinion for that of the Minister. However, this does not lead to the conclusion that the Tax Court has no remedial powers under s. 171 of the *ITA* to deal with such a decision.

[200] In fact, on a careful reading of s. 171(1)(b)(iii) of the *ITA*, I reach the opposite conclusion, namely that s. 171 does indeed provide the Tax Court with powers to deal with such a decision. Under this provision, the Tax Court can order the Minister to reconsider a decision to deny a downward adjustment under s. 247(10) and to reassess — in French, to carry out a “*nouvel examen et nouvelle cotisation*”. The reassessment may or may not reflect a change in the Minister's decision under s. 247(10). What these words imply is that the Tax Court may, in referring the assessment back for reconsideration and reassessment, remit the matter of the downward pricing adjustment to the Minister as part of a “reconsideration”, or “*nouvel examen*”.

[201] This power is necessary for the accomplishment of the object intended to be secured by the complete appeal procedure established by Parliament under ss. 165 and 169 of the *ITA*, namely to allow taxpayers to raise in the Tax Court, a specialized court, all issues relating to the correctness of an assessment. I reiterate that a

discretionary decision under s. 247(10) is inextricably linked to an assessment. The Tax Court's order obliges the Minister to reconsider the assessment or reassessment under appeal, including her decision under s. 247(10). Again, the question of which remedies could be available in the Federal Court is irrelevant when the Minister's exercise of discretion under s. 247(10) can be reviewed in the context of an appeal under s. 169 of the *ITA*, to the exclusion of the Federal Court's jurisdiction (*Federal Courts Act*, s. 18.5).

[202] Given my finding on this point, it is not necessary to engage in a lengthy discussion of the line of cases under the *IWTA*, supporting the view that, as part of its appellate jurisdiction, the Tax Court has an implied jurisdiction to remit discretionary decisions of the Minister that are inextricably linked to an assessment (see H. H. Stikeman, "Taxation Law: 1923-1947" (1948), 26 *Can. Bar Rev.* 308, at pp. 328-30; Sandler and Watzinger, at pp. 302-5; Lubetsky, at pp. 78-81 and 113-15). However, I would like to make a few remarks about this.

[203] It is true that the Exchequer Court's jurisdiction was stated in broader terms under s. 66 of the *IWTA* than the Tax Court's jurisdiction is under s. 169 of the *ITA* — a fact that, I hasten to add, has no bearing on the scope of the Tax Court's current remedial powers. It is nonetheless helpful to keep in mind that, under the *IWTA*, the Exchequer Court had, as part of its appellate jurisdiction over assessments, *precisely* the same remedial powers to dispose of appeals that the Tax Court currently does under s. 171 of the *ITA* — powers limited to vacating the assessment, varying the assessment

or referring the assessment back to the Minister for reconsideration and reassessment (*IWTA*, Sch. 4, s. 3(4) (added by S.C. 1946, c. 55, s. 22)).

[204] Prior to 1949, the Exchequer Court regularly reviewed the exercise of the Minister's discretionary powers as part of its appellate jurisdiction over assessments. At the time, numerous provisions of the *IWTA* required the Minister to exercise discretion in the computation of a taxpayer's income and therefore in the determination of the taxpayer's liability (Lubetsky, at p. 76). In *Pioneer Laundry and Dry Cleaners, Ltd. v. Minister of National Revenue*, [1940] A.C. 127 (P.C.), and *Minister of National Revenue v. Wrights' Canadian Ropes, Ltd.*, [1947] A.C. 109 (P.C.), the Minister's exercise of discretion under such provisions was reviewed on appeal. The decisions of the Privy Council in these cases suggest that the Exchequer Court's powers to dispose of an appeal from an assessment included, at the very least, the authority to remit the matter for reconsideration and reassessment.

[205] As part of the reform of the *IWTA* and its transformation into the *ITA* in 1948, almost all of the provisions setting out the Minister's discretionary powers in the determination of tax were repealed and replaced by provisions that set out standards (see, e.g., s. 67 of the *ITA*, which replaced s. 6(2) of the *IWTA*; see also Lubetsky, at p. 79). However, on a transitional basis, the newly constituted Income Tax Appeal Board continued to review, for appeals related to taxation years before 1948, the Minister's discretionary decisions on the same principles (*ibid.*; see, e.g., *Anger v.*

*M.N.R.*, 49 DTC 65; *MacDonald Estate v. M.N.R.*, 50 DTC 109; *Buehler v. M.N.R.*, 50 DTC 119; *Williamson v. M.N.R.*, 50 DTC 147).

[206] It must be emphasized that in both *Pioneer Laundry* and *Wrights' Canadian Ropes*, the remedy granted on appeal from the assessment was to refer the matter, including the discretionary decision and the resulting assessment, back to the Minister. While the taxation years at issue in those cases preceded the enactment of s. 3(4) of the 4th Schedule of the *IWTA*, there is no suggestion that s. 3(4) altered the scope of the Exchequer Court's remedial powers on appeal from an assessment (Lubetsky, at p. 76). In fact, Parliament must have intended to confirm the powers that had previously been deemed to be implicitly granted. The only purpose for the Tax Court's power to refer an assessment back to the Minister for reconsideration and reassessment is to deal with decisions that are inextricably linked to the assessment.

[207] There is no reason to think that Parliament intended to reduce the scope of the Tax Court's remedial powers while granting it, under s. 171 of the *ITA*, precisely the same powers to dispose of appeals from assessments as those held by the Exchequer Court, the Income Tax Appeal Board and later the Tax Appeal Board. On the contrary, one must have regard to the fact that Parliament has granted the Tax Court the same power to refer an assessment back to the Minister for reconsideration and reassessment. Like its predecessors, the Tax Court has the power to remit a decision that is inextricably linked to an assessment, as part of its power to refer the assessment back for reconsideration and reassessment under s. 171(1)(b)(iii). The Tax Court's action in

referring the matter back to the Minister on the ground that she exercised her discretion improperly cannot be regarded as interference with that discretion, “for it is no such thing” (*Pure Spring*, at pp. 503-4; see also *Nicholson*, at p. 205). In my respectful view, the Federal Court of Appeal could not disregard this body of case law after acknowledging that it “would appear to support” the Tax Court judge’s finding at first instance (para. 50).

[208] I add that the remedies available to both courts support the conclusion that the Federal Court is not the proper forum to hear a taxpayer’s objection to a decision by the Minister under s. 247(10) of the *ITA*. A taxpayer seeking a reassessment that will reflect a downward transfer pricing adjustment is concerned with the amount of tax owing, not merely with the propriety of the Minister’s exercise of discretion. Because of the limitation in s. 18.5 of the *Federal Courts Act*, only the Tax Court can vacate the assessment, vary the assessment or refer the assessment back to the Minister for reconsideration and reassessment under s. 171 of the *ITA*. On judicial review, the Federal Court cannot deal with the assessment (*Minister of National Revenue v. Parsons*, [1984] 2 F.C. 331 (C.A.); *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46, [2008] 2 S.C.R. 643, at para. 28).

[209] In this context, the only remedy that could be granted by the Federal Court would be an order quashing the decision (it is not clear that mandamus would be an appropriate remedy). Yet an assessment remains valid and binding on the taxpayer unless and until it is varied or vacated by the Tax Court or the Minister issues a

reassessment (*ITA*, s. 152(8)). This continues to be the case even where a decision under s. 247(10) has been quashed by the Federal Court. Section 171(1)(b)(iii) of the *ITA* — which allows the matter to be referred back to the Minister for reconsideration and reassessment — is better suited to the real substance of the issue to be determined, i.e., the correct amount of tax owing.

[210] On appeal from an assessment, the Tax Court must address all challenges to the correctness of the assessment, including an allegation that the assessment is incorrect because the Minister did not properly exercise her discretion under s. 247(10). Referral back to the Minister for reconsideration and reassessment is an adequate remedy for taxpayers challenging the Minister's exercise of discretion under s. 247(10) of the *ITA* as part of an appeal from an assessment. Indeed, the Tax Court's conclusion in this case regarding the validity of the decision to deny the downward adjustment necessarily means that the Minister must either reconsider the decision under s. 247(10) or appeal to the Federal Court of Appeal. It must be emphasized that in remitting the matter for reconsideration and reassessment, the Tax Court cannot substitute its own decision for that of the Minister.

#### D. *Standard of Review in the Tax Court*

[211] Having reached this conclusion, this leaves only the delicate question of the appropriate standard of review to be applied when the Tax Court, dealing with a challenge to the Minister's exercise of discretion under s. 247(10) of the *ITA* as part of an appeal from an assessment, has to decide whether it will refer the matter back to the



Minister for reconsideration and reassessment. The Tax Court judge did not rule on this question, although she did refer to *Vavilov* (T.C.C. reasons, at para. 30).

[212] Nothing in these reasons should be taken as circumventing or modifying the system of administrative law as outlined in *Vavilov*. While our Court indicated in that case that the presumptive standard of review is reasonableness, it also determined that where there is a right of appeal from an administrative decision, it can be inferred that the legislature instead intended the appellate standard of review to apply (paras. 30 and 37). Indeed, the presumption of reasonableness review is clearly rebutted where the legislature provides a right of appeal (para. 17). As explained above, the right of appeal under s. 169 of the *ITA* extends to the exercise of discretion under s. 247(10) where that decision results in an assessment. The standard applicable to the review of the Minister's decision under s. 247(10) must therefore be determined with reference to the nature of the question and to our Court's jurisprudence on appellate standards of review (para. 37). This Court's decision in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, is an essential part of this jurisprudence. But it must also be recognized that the appellate standards of review identified in that case are ill suited to deal with discretionary decisions in general, such as those contemplated by s. 247(10).

[213] It is clear from the language of s. 247(10) that Parliament intended to confer upon the Minister a broad discretion in reaching a decision regarding a downward transfer pricing adjustment. By providing that the Minister can allow or deny a transfer pricing adjustment based on "the circumstances" and not on specific

considerations, Parliament gave the Minister a wide discretion to decide whether or not to allow a downward adjustment. To the extent that the Minister comes to a decision and that her decision considers “the circumstances”, the Minister is acting within the discretion Parliament conferred upon her. In exercising her discretion under this provision, the Minister is not simply applying the law to the facts to determine the correct amount payable under the *ITA*, but is in fact exercising a policy function.

[214] In *Pure Spring*, Thorson P. wrote the following regarding the Minister’s discretion to disallow excessive expenses under s. 6(2) of the *IWTA*:

When the Minister makes his discretionary determination that an expense is to be disallowed as excessive he does an administrative act, but, in my view, his determination is more than that. He is acting in respect of a policy which Parliament has indicated but not defined. It has left the limits of the field in which he is to operate to be defined by him in his discretion; the Minister’s determination is thus really a definition of policy. The effect is that his determination renders the expense which he disallows subject to tax, which otherwise would be deductible and free from tax. Parliament has thus, in effect, conferred a power of tax imposition upon the Minister. This makes his determination not only an administrative act but also a quasi-legislative one. This must not be overlooked in considering the Court’s duty of supervision over it. [p. 479]

[215] This rationale holds true for the downward pricing adjustments contemplated by s. 247(10) of the *ITA*. It is clear that the Minister, in determining whether “the circumstances are such that it would be appropriate that the adjustment be made”, can consider factors that are extraneous to, and distinct from, the computation of a taxpayer’s income. As the Crown points out, the relevant circumstances can include considerations such as tax treatment in a foreign jurisdiction,

domestic tax avoidance and domestic compliance (R.F., at para. 64). Regarding tax treatment in a foreign jurisdiction, the Minister may want to avoid a situation where the failure to recognize a downward adjustment or the possibility of a corresponding upward adjustment in a foreign jurisdiction would result in either double taxation or double non-taxation. With respect to domestic tax avoidance, the Minister may want to ensure that a downward adjustment will not facilitate improper retroactive tax planning. As to domestic compliance, the Minister may simply not be able to reliably verify the amount of the proposed downward adjustment.

[216] I should add, however, that such a policy function has no bearing on whether a decision by the Minister under s. 247(10) resulting in an assessment can be reviewed in the Tax Court, contrary to the Crown's argument (R.F., at para. 61). It informs only the manner in which the review can be conducted.

[217] Likewise, the *de novo* nature of an appeal in the Tax Court is not determinative of the standard of review, nor does it constitute one. Instead, the remedies available under s. 171 shed light on how the Tax Court must conduct its review of the decision under appeal. It cannot be said that the only option allowed under the *ITA* is for the Tax Court to review the decision itself for correctness. In fact, the statute precludes such an approach. The question on appeal is whether the assessment is incorrect because the Minister exercised her discretion improperly. If a decision to deny a downward transfer pricing adjustment results from an improper exercise of discretion, the assessment is incorrect as a matter of fact and law. The appropriate remedy for

dealing with an assessment that is incorrect because of an improper exercise of discretion under s. 247(10) is to refer the matter back to the Minister for reconsideration and reassessment under s. 171(1)(b)(iii).

[218] The Minister, in exercising her broad discretion under s. 247(10) of the *ITA*, is therefore entitled to considerable deference from the Tax Court. However, as Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, “there is no such thing as absolute and untrammelled ‘discretion’” (see also *Vavilov*, at para. 108). Under appellate standards of review, the exercise of discretion has always attracted a high degree of deference: appellate reviewers must defer, unless of course “the discretion has been exercised on a wrong principle, or on the basis of irrelevant or erroneous considerations”, or unless the decision “fails to set out the reasoning process leading to the result” or “does not reflect a proper consideration of the main relevant factors” (J. Sopinka, M. A. Gelowitz and W. D. Rankin, *Sopinka, Gelowitz and Rankin on the Conduct of an Appeal* (5th ed. 2022), at ¶¶2.70-2.73; see also *Reza v. Canada*, [1994] 2 S.C.R. 394, at p. 404; *Canada (Attorney General) v. Fontaine*, 2017 SCC 47, [2017] 2 S.C.R. 205, at para. 36; *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48, at para. 41). In my view, the same approach is applicable to the review of discretionary decisions under s. 247(10).

[219] The *de novo* nature of an appeal to the Tax Court is consistent with a review of a decision by the Minister under s. 247(10) of the *ITA*. On appeal to the Tax Court, either party can raise new grounds or new facts to challenge the factual basis for an

assessment, including the Minister's decision under s. 247(10) of the *ITA*. The Tax Court is not limited to the facts relied upon by the Minister in exercising her discretion (see *Canada (Attorney General) v. Jencan Ltd.*, [1998] 1 F.C. 187 (C.A.), at para. 42). This type of evidence would not normally be available to the Federal Court on judicial review (*Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, 428 N.R. 297, at para. 17; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin. L.R. (5th) 301, at para. 42; *Namgis First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 149, at para. 7 (CanLII)).

[220] In challenging the Minister's decision under s. 247(10) of the *ITA*, a taxpayer must establish a factual foundation to support the submission that the decision was wrong in principle, that it ignored relevant evidence or that it was based on irrelevant evidence. The focus is not necessarily on whether the exercise of discretion was reasonable at the time the Minister formed her opinion (as would be the case on judicial review), but rather on whether the exercise of discretion remains a valid fact on which to rest the correctness of the assessment in view of the evidence before the Tax Court. For example, there may be new evidence presented by the taxpayer (such as a subsequent tax assessment by a foreign jurisdiction) or by the Minister (such as evidence that tax was not assessed in the foreign jurisdiction). Or the interpretation of the provisions of Canada's tax treaties on the basis of which the Minister made her decision may be in dispute.

[221] There is no suggestion that the Tax Court is institutionally ill-equipped to deal with such matters. This much was conceded by the Crown during the hearing before our Court (transcript, at p. 74). Indeed, ruling on these matters is perfectly in line with the task and jurisdiction of the Tax Court. The Tax Court, as a specialized court, is well placed to rule on the proper application of the transfer pricing provisions, including whether the discretion under s. 247(10) was properly exercised.

[222] A deferential standard of appellate review applies when the Tax Court is dealing with the Minister's discretionary decisions under s. 247(10) on appeal from an assessment. The Tax Court cannot substitute its opinion for that of the Minister or prevent her from arriving at the same decision, upon reconsideration, following a proper exercise of her discretion. That being said, this deference should apply only to the discretionary portion of the assessment. Again, I want to reiterate the following, as stated by the Tax Court judge: “[b]ecause the exercise of ministerial discretion under [s.] 247(10) is subject to appeal to the Tax Court, it is not subject to judicial review by the Federal Court, although the Tax Court's decision on the appeal of the assessment may be appealed to the Federal Court of Appeal” (para. 215).

## VI. Conclusion

[223] The Minister's decision to deny the downward pricing adjustment requested by Dow Chemical resulted in reassessments for the 2006 taxation year. Dow Chemical objected to those reassessments and appealed the latest reassessment to the Tax Court. In my view, the Minister's decision was inextricably linked to the

correctness of that reassessment. The amount of tax owing could only be determined once the Minister made the decision to allow or deny the downward pricing adjustment. Dow Chemical had the right to challenge the Minister's decision in an appeal to the Tax Court.

[224] For these reasons, I would allow the appeal, with costs. The stated question is answered as follows: Dow Chemical's challenge regarding the Minister's decision under s. 247(10) of the *ITA* should proceed before the Tax Court.

*Appeal dismissed with costs, KARAKATSANIS, CÔTÉ and ROWE JJ. dissenting.*

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