Federal Court of Appeal | Cour d'appel fédérale

Date: 20170428

Docket: A-473-15

Citation: 2017 FCA 88

CORAM: **PELLETIER J.A.**
STRATAS J.A.
WEBB J.A.

BETWEEN:

HIGH-CREST ENTERPRISES LIMITED

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Halifax, Nova Scotia, on November 9, 2016.

Judgment delivered at Ottawa, Ontario, on April 28, 2017.

REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	PELLETIER J.A.
DISSENTING REASONS BY:	STRATAS J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from a judgment rendered by a judge of the Tax Court of Canada who did not hear the appeal before that Court. The appeal in this case was heard on February 26, 2014 by a particular judge of the Tax Court and judgment was rendered on September 30, 2015 by a different judge of that Court (2015 TCC 230).

[2] For the reasons that follow, in my view, the judgment rendered on September 30, 2015 is a nullity and the matter should be remitted back to the Tax Court Judge who heard the appeal to render judgment.

[3] As a preliminary matter, in the notice of appeal High-Crest indicated that the respondent was the Attorney General of Canada. Since High-Crest was intending to appeal a judgment of the Tax Court of Canada the respondent should have been Her Majesty the Queen. The style of cause is amended to reflect the correct respondent.

I. Background – Assessment in Issue

[4] The Province of Nova Scotia (the Province) issued a request for proposals to increase the number of nursing home beds and residential care facility beds in the province and to provide the necessary services related thereto. High-Crest Enterprises Limited (High-Crest) was one of the successful bidders. Its proposal was to construct a 20-bed addition to its existing nursing home facility in Springhill, Nova Scotia.

[5] As a successful bidder, High-Crest entered into agreements with the Province. Under these agreements High-Crest had to obtain mortgage financing for the construction at the rate fixed by the Nova Scotia Housing Development Corporation. The mortgage amount included an amount for the HST paid by High-Crest to construct the addition. The per diem amount that High-Crest could charge for the occupancy of a bed in the nursing home was fixed by the

Province. There are two components of this amount as identified by the Appellants – accommodation costs and health care costs.

[6] There is no dispute that the accommodation costs component included an amount to repay the mortgage that was obtained to construct the addition. Therefore, High-Crest would eventually be reimbursed for the HST that it paid in relation to the construction of the addition through the per diem amounts that it would be receiving for the occupancy of the beds. High-Crest also claimed input tax credits for the HST paid in relation to the construction of the addition (Appellant's Memorandum of Fact and Law, paragraph 17). The Appellant acknowledges in paragraph 67 of its Memorandum of Fact and Law that "[t]he accommodation costs are paid for by a combination of the resident and the Province, based on a formula which takes into account the resident's ability to pay".

[7] When the addition was completed and it was first occupied, the self-supply rule under subsection 191(4) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the ETA) resulted in a deemed supply of the addition. But for section 191.1 of the ETA, High-Crest would be deemed to have collected HST based on the fair market value of the addition. However, in this case, the fair market value of the addition was less than the cost of the addition and the Canada Revenue Agency determined that section 191.1 was applicable. As a result, an assessment was issued under the ETA dated July 16, 2010 for the reporting period from January 1, 2010 to March 31, 2010 assessing HST based on the amount of HST paid in relation to the cost of the addition and not on the fair market value of the addition. The parties agree that if section 191.1 of the ETA was not applicable, the HST payable would be $350,000 (based on the fair market of the

addition) and, if section 191.1 of the ETA was applicable, the HST payable would be $646,304 (based on the cost of the addition).

[8] The issue before the Tax Court was whether section 191.1 of the ETA was applicable.

II. Procedural Background

[9] The matter was heard on February 26, 2014 by a judge of the Tax Court. On June 23, 2015 a Post-Hearing Discussion Conference Call was held. The Chief Justice of the Tax Court and counsel for the parties participated in this call. The Chief Justice began the conference call with the following statements (which are reproduced below as they appear in the copy of the transcript of this conference call that was included in the appeal book):

> I have a situation where I must remove the appeal file from the presiding judge of this appeal for the purpose of having a judgement rendered on this appeal as soon as possible.
>
> I have taken the file from Justice … for determination.
>
> The appeal decision may be rendered in one of two ways.
>
> Number one, with the consent of the parties via their counsel, the appeal can be assigned to a judge of the Tax Court of Canada chosen by the Chief Justice, and that judge would render a decision based upon the transcript of the appeal, the transcript has been completed.
>
> Or number two, have a conduct of a complete new appeal, new trial altogether with a new a judge assigned by the Chief Justice.
>
> I realize this is an unusual situation but the circumstances are such that this is the course of action I've decided to take as Chief Justice of the Tax Court of Canada.
>
> The litigants are entitled to have their dispute resolved in a timely, efficient and effective fashion.

> The Tax Court of Canada has failed in this regard in this appeal to the detriment of all involved.
>
> As Chief Justice, I apologize to the litigants for the circumstances under which this has occurred to date.
>
> What I need to know now is what the parties want to do with the choices that I have presented.
>
> I will give you 10 days to decide.

[10] On July 3, 2015 counsel for the Crown wrote a letter to the Registrar of the Tax Court. After noting that cases are generally reassigned only if the presiding judge is unable to continue as a result of death, incapacity, conflict of interest or apprehension of bias and noting that the presiding judge in this case "continues to be assigned cases", counsel for the Crown proposed a third option of allowing the presiding judge more time to complete the judgment.

[11] Following the letter of July 3, 2015, a second conference call was held on July 14, 2015. The Chief Justice began this conference call with the following statements (which are reproduced below as they appear in the copy of the transcript of this conference call that was included in the appeal book):

> Thank you very much for coming on this conference call.
>
> On June 23rd, 2015 at 3:15 p.m. we had a conference call, and at that time I stated in part as follows:
>
> Basically I said that I have a situation where I must remove the appeal file from the presiding judge for the purpose of having a judgement rendered in this appeal.
>
> I have taken the file from Justice … for determination. The appeal decision may be rendered in one of two ways, and I stated that there was basically two options.

> I stated I realize this is an unusual situation, but the circumstance is such this is the course of action I just stated that I decided to take as Chief Justice of the Tax Court of Canada.
>
> Litigants are entitled to have the dispute resolved in a timely, efficient and effective fashion.
>
> The Tax Court of Canada has failed in this regard in this appeal to the detriment of all involved, and I apologize to the litigants for the circumstances of what has occurred in this particular matter.
>
> What I need to know is what the parties want to do with the choices that I have presented.
>
> And then I will give you 10 days to decide.
>
> If it's option number one, I require an agreement in writing signed by counsel for the parties agreeing to have the appeal decided by a judge appointed by the Chief Justice based the trial record and the transcript.
>
> If there's no agreement between the parties then a new trial will be set down as soon as possible and the matter will be re-tried.
>
> That's what I stated on June 23rd, 2015.
>
> Subsequent to that, I got a letter from the respondent.
>
> I'm not sure what the respondent did not understand. I thought I was pretty clear in the choices that were given. There is no third choice here. There is choice one or choice two.
>
> I have made a determination that this file will be taken from Justice … and that the matter will be decided – determined by someone else.

[12] The only explanation for the removal of the file from the presiding judge that was provided in either conference call was that the file had to be removed "from the presiding judge for the purpose of having a judgment rendered in this appeal". Since there is also a reference to matters being resolved in a timely way, presumably the significant delay from the date of the hearing without a decision having been rendered was the motivation for this decision.

[13] Counsel for the parties subsequently submitted a joint letter dated July 14, 2015 indicating that they were choosing the first option – to have the matter determined by another judge based on the record and transcripts.

[14] As a result, a decision dated September 30, 2015 was rendered by another judge of the Tax Court. The second judge dismissed High-Crest's appeal and High-Crest then appealed this decision.

III. Issues

[15] The main issue in this appeal is whether the Chief Justice had the power to remove this file from the presiding judge and assign it to another judge and therefore, whether the second judge had the authority to render judgment in this matter. The parties, at the hearing of this appeal, also requested that if it was determined that the second judge did not have the authority to render judgment, that this court express its views on the applicability of section 191.1 of the ETA in the circumstances of this case.

IV. Standard of Review

[16] The questions of whether the Chief Justice had the power to remove this file from the presiding judge and assign it to another judge and the interpretation of section 191.1 of the ETA are questions of law and therefore the applicable standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8).

V. Analysis

[17] The Respondent argues that the Chief Justice did have the authority to remove the file from the presiding judge and assign it to another judge as a result of the provisions of subsections 8(1) and (2) of the *Courts Administration Service Act*, S.C. 2002, c. 8 and subsection 14(2) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2. These provisions outline the powers granted to the Chief Justice of the Tax Court in relation to the assignment of cases and are as follows:

Courts Administration Service Act:

8 (1) The Chief Justices of the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court and the Tax Court of Canada are responsible for the judicial functions of their courts, including the direction and supervision over court sittings and the assignment of judicial duties.	8 (1) Les juges en chef de la Cour d'appel fédérale, de la Cour fédérale, de la Cour d'appel de la cour martiale et de la Cour canadienne de l'impôt ont autorité sur tout ce qui touche les fonctions judiciaires de leur tribunal respectif, notamment la direction et la surveillance des séances et l'assignation de fonctions aux juges.
(2) The direction and supervision over court sittings and the assignment of judicial duties include, without restricting the generality of those terms, the power to:	(2) Font partie de ces attributions les pouvoirs suivants :
(*a*) determine the sittings of the court;	*a*) fixer les séances du tribunal;
(*b*) assign judges to sittings;	*b*) affecter des juges aux séances;
(*c*) assign cases and other judicial duties to judges;	*c*) assigner des causes et d'autres fonctions judiciaires à chacun des juges;
(*d*) determine the sitting schedules and places of sittings for judges;	*d*) fixer le calendrier des sessions et les lieux où chaque juge doit siéger;

(*e*) determine the total annual, monthly and weekly work load of judges; and	*e*) déterminer la charge annuelle, mensuelle et hebdomadaire totale de travail de chacun des juges;
(*f*) prepare hearing lists and assign courtrooms.	*f*) préparer les rôles et affecter les salles d'audience.

Tax Court of Canada Act:

14(2) Subject to the rules of Court, all arrangements that may be necessary or proper for the transaction of the business of the Court and the assignment from time to time of judges to transact that business shall be made by the Chief Justice.	14(2) Sous réserve des règles de la Cour, toutes les dispositions qu'il peut être nécessaire ou utile de prendre pour l'expédition des affaires de la Cour, notamment à l'égard de l'affectation de juges à l'expédition de ces affaires, doivent être prises par le juge en chef.

[18] In addition to the above provisions of the *Courts Administration Service Act* and the *Tax Court of Canada Act*, subsection 31(3) of the *Interpretation Act*, R.S.C. 1985, c. I-21, provides that:

(3) Where a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires.	(3) Les pouvoirs conférés peuvent s'exercer, et les obligations imposées sont à exécuter, en tant que de besoin.

[19] In *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, 142 D.L.R. (4th) 193, the Supreme Court of Canada found that applying this provision of the *Interpretation Act* would require a determination of whether Parliament intended the power to be a continuing power or a single use power. The power in question in this case is the power to assign judges to cases as provided in section 8 of the *Courts Administration Act* and subsection 14(2) of the *Tax Court of Canada Act*.

[20] The power to assign judges to cases is a continuing power that would allow the Chief Justice to assign and reassign a case before it is heard. However, once a judge has started to hear a case, in my view, that judge would then be seized with the matter. It does not seem to me that Parliament would have intended to grant the Chief Justice the power to remove a case from a judge who has been seized with that matter. Otherwise, the Chief Justice would have the power to temporarily assign a judge to cover a presiding judge's occasional absences during a lengthy trial. In my view, reassigning a case that has not been heard is not the same as removing a judge who is seized with a case from that case. As a result, these provisions would not allow a Chief Justice to unilaterally remove a case from a judge who is seized with that case.

[21] In *R. v. MacDougall*, [1998] 3 S.C.R. 45, 165 D.L.R. (4th) 193, the Supreme Court of Canada noted the significance of a judge being seized of a matter:

> 50 The Crown's duty to ensure that trial proceedings are not delayed may require the Crown to apply to have a judge removed and replaced when a judge falls ill in the course of a trial. There is no set time period after the onset of illness when the Crown must apply to have the judge removed and replaced. Whether and when the Crown should act depends on what is reasonable in the circumstances of the case.
>
> 51 It can safely be said that the Crown should bring an application to replace the judge when it is clear that the judge will not recover or return to judicial duties. However, where the expectation is that a judge seized of the case will recover and return, the matter is more difficult. In such a case, the Crown must balance two factors. On the one hand, the Crown must consider the fact that a judge who has heard evidence in a case is seized of the case. This means that the task of deciding all the issues on the case, including sentencing, falls to that judge and no other. The removal of a judge from an unconcluded case has the potential to interfere with the independence of the judiciary and the right of an accused to a fair trial. Absent compelling reasons, it would be improper for Crown counsel to apply to remove a judge seized of the case. To do so might create a perception that the Crown was interfering with the right of the judge to independently judge all the issues in the case. It might also create a perception of unfairness to the accused. For example, a trial judge may make comments in the course of a trial

> that lead the Crown to speculate that he or she is sympathetic to the accused. If the Crown were to apply to have the judge removed prior to sentence absent a compelling reason, the perception might be that the Crown did so to obtain a judge less sympathetic to the accused. Where a judge falls ill and the expectation is that he or she will return to judicial duties, the Crown must bear these considerations in mind in deciding whether it is reasonable to bring an application to have the judge removed. On the other side of the balance, the Crown must consider the accused's right to a prompt trial under s. 11(b) and the prejudice the accused may suffer as a result of the delay.
>
> (emphasis added)

[22] Also in *R. v. Gallant*, [1998] 3 S.C.R. 80, 165 D.L.R. (4th) 219, the Supreme Court of Canada noted that:

> 14 When Judge Plamondon fell ill, the expectation was that he would soon return to his judicial duties. On the justifiable assumption that Judge Plamondon would return, the Crown proceeded in accordance with the general rule that an accused should be sentenced by the judge who took the plea or presided at the conviction phase of the trial. The Crown was required to proceed cautiously in moving to replace Judge Plamondon. Against this I balance the right of the accused to be tried within a reasonable time and ask whether the circumstances required departure from the usual rule that the judge seized of the case retains jurisdiction over it until its conclusion. The Crown had no information suggesting that Judge Plamondon would not be returning, nor that his absence would be unduly lengthy. It became apparent that he would not return only upon the announcement of his retirement. The delay in question was 10 months long. However, it occurred in the post-conviction phase of proceedings when the interests engaged by s. 11(b) were more attenuated, in the circumstances, than in the pre-conviction phase. Furthermore, there was no indication that the delay would cause the accused any significant prejudice. In these circumstances, I cannot conclude that the Crown erred in not moving prior to Judge Plamondon's resignation to remove and replace him. Crown delay is therefore not established.
>
> (emphasis added)

[23] The general rule, as noted by the Supreme Court, is that a judge who is seized of a matter is the one who has the jurisdiction to continue with that matter. In my view, if Parliament intended to alter this rule to provide the Chief Justice with the power to remove a file from a

judge who was seized of this matter, clearer language would be required. The power to assign cases would still be applicable to assign or reassign cases before a hearing has commenced. However, once a judge is seized with a case, the powers as set out above in the *Courts Administration Services Act* and the *Tax Court of Canada Act* cannot be used by the Chief Justice to unilaterally remove that case from that judge, even with the application of the *Interpretation Act*.

[24] In other jurisdictions, the Chief Justice is given the power to assign judicial duties. For example, section 14 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 provides that:

> 14 (1) The Chief Justice of the Superior Court of Justice shall direct and supervise the sittings of the Superior Court of Justice and the assignment of its judicial duties.

[25] Section 79 of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F provides that "[p]owers that are conferred on a person may be exercised… whenever the occasion requires".

[26] Yet, despite these provisions which are similar to those contained in the *Courts Administration Service Act*, the *Tax Court of Canada Act*, and the *Interpretation Act*, the *Courts of Justice Act* specifically addresses the powers of the Chief Justice if a particular judge becomes incapacitated (subsection 123(4)) or does not provide a decision within the time limits as set out in subsection 123(5) of that Act. If the Chief Justice, in exercising his power to assign judicial duties could simply reassign cases regardless of whether a judge is seized of the matter, there would be no need for section 123 of that Act.

[27] There are not many cases where a Chief Justice has removed a file from a sitting judge who has heard a case. In *Ramsey v. R.*, (1972), 4 N.B.R. (2d) 809, 8 C.C.C. (2d) 188 the Chief Judge attempted to have a case continued by another judge. In *Ramsey* the parties agreed that the evidence of certain witnesses admitted in the trial of one accused would be admitted into evidence in the subsequent trials of two other accused. When the first accused was acquitted, the Crown requested that the judge who heard the first trial surrender jurisdiction in relation to the trials of the two other accused on the basis that he was biased. Although the judge did not accept that he was biased, he signed a form that had been sent to him by the Chief Judge waiving jurisdiction in favour of the Chief Judge.

[28] The Supreme Court of New Brunswick, Appeal Division, found that the allegation of bias was unfounded and noted that:

> **13** Section 499 (1) provides for a transfer of jurisdiction where the magistrate "dies or is for any reason unable to continue". Such a reason could be illness, absence, disqualification or other justifiable cause. The order or request of the Chief Judge does not constitute such a reason. The Chief Judge, appointed by the Province, has administrative duties and functions. He should not and cannot interfere with the judicial discretion of a provincial judge acting as a magistrate under the Criminal Code.
>
> …
>
> **20** There was therefore no reason for the proceedings being continued before the Chief Judge of the Provincial Court. The Deputy Judge having commenced the trial was obligated under the circumstances to continue the trial until its conclusion. He was without jurisdiction to transfer jurisdiction to another magistrate and the Chief Judge had no jurisdiction to direct him to transfer jurisdiction and had no right to assume jurisdiction over the trial of the accused Ramsey.
>
> (emphasis added)

[29] Absent any of the circumstances listed in subsection 499(1) of the *Criminal Code*, the Chief Judge did not have the authority to transfer jurisdiction from one judge to another.

[30] In the civil law context, all of the reported cases that were found that related to the reassignment of a case from a judge who was seized of a matter arose following the death or incapacity of the presiding judge.

[31] In *Clarke v. Trask* 1 O.L.R. 207 (H.C.), [1901] O.J. No. 42; *Coleshill v. Manchester Corporation*, [1928] 1 K.B. 776, 97 L.J.K.B. 229 (C.A.); *Re Application of British Reinforced Concrete Engineering Co. Limited* (1929), 45 T.L.R. 186, 20 Ry. & Can. Tr. Cas. 78 (Railway and Canal Commission), and *Royal Bank of Canada v. Nichols*, 56 Nfld. & P.E.I.R. 340, 36 A.C.W.S. (2d) 165 (P.E.I.S.C.) the judge died after a trial had commenced and before judgment was rendered. In *Clarke* and *Nichols*, a new trial was ordered and in the other two cases, the cases were allowed to continue with another judge. In each of these cases the file was removed from the judge as a result of the death of the particular judge.

[32] In *Bolton v. Bolton*, [1949] 2 All E.R. 908, 47 L.G.R. 730 (H.C.) a second judge was allowed to continue a hearing following the incapacity of the judge who had commenced the hearing. Although the particular incapacity is not specifically identified, Lord Merriman, after referring to *Coleshill* (where the judge had died) noted that "[i]t is manifestly an immaterial circumstance whether the change in the tribunal is brought about by death or illness" suggesting that it was an illness that caused the change in magistrate in *Bolton*.

[33] In *Liszkay v. Robinson*, 2003 BCCA 506, 232 D.L.R. (4th) 276 and *D'Amico v. Wiemken*, 2010 ABQB 785, 497 A.R. 360 the judge who heard a case had to recuse himself before judgment could be rendered. In each case the matter was reassigned to another judge to continue the matter.

[34] In *Liszkay* the British Columbia Court of Appeal found that:

> [71]…it was necessary for the trial judge to withdraw from the proceedings on the basis of a reasonable apprehension of bias. As a result, it was "impossible" for the trial judge to continue with the proceedings and the Chief Justice had jurisdiction to make the order he did under Rule 64(10) and (11) of the Rules of Court.

[35] The trial judge withdrew himself from the matter. He was not removed unilaterally by the Chief Justice.

[36] The issue in *D'Amico* was not whether the case could be reassigned to another judge but how the matter should proceed – either based on the transcripts or as a new trial. P.R. Jeffrey J. found authority in the applicable Rules to continue the matter even if the parties did not consent. This was also not a case where the Chief Justice unilaterally removed a file from a judge who was seized of the matter but rather a case where the judge had to recuse himself.

[37] With respect to the situations where a judge can remove himself or herself from a matter, the Ontario Court of Appeal in *R. v. Lochard* (1973), 12 C.C.C. (2d) 445 at 446-448, 22 C.R.N.S. 196 found that an excessive workload was not considered to be a valid reason for a judge to

abdicate jurisdiction and have another judge continue with the case under the applicable provision of the *Criminal Code*.

[38] Any removal by the Chief Justice of a judge who is seized of a matter would also conflict with the principle that the person who decides a case must be the same person who hears the case (*Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69 et al.*, [1990] 1 S.C.R. 282 at 329, 68 D.L.R. (4th) 524; *Doyle v. Restrictive Trade Practices Commission*, [1985] 1 F.C. 362, 21 D.L.R. (4^{th}) 366 (C.A.)).

[39] In my view, the removal could also not be justified under the implied jurisdiction of the Tax Court to carry out its functions as a court. In *R. v. Cunningham*, 2010 SCC 10 at para. 19, [2010] 1 S.C.R. 331, the Supreme Court of Canada confirmed that statutory courts have an implied jurisdiction by necessary implication to carry out the functions of a court. However, this implied jurisdiction does not give the Chief Justice the power to unilaterally remove a case from a judge who has heard the matter and therefore is seized with the matter and who is not incapacitated. There was no indication in this case that the removal of the judge from this matter was necessary.

[40] There was no indication in this case of any incapacity of the judge who heard the appeal in this case. In my view, the Chief Justice of the Tax Court did not have the power to unilaterally remove the judge from the case with which he was seized. As a result, that judge is still seized with the matter and all of the proceedings that have occurred after the file was removed, are a

nullity. Since the decision rendered by the second judge is a nullity, I would refer the matter back to the judge who heard the case to render a decision.

VI. Interpretation of the ETA

[41] The parties have requested that we provide our comments on the interpretation of the ETA in any event. Given the amount of time that has passed since the matter was heard by the presiding Judge, the parties indicated that any insight that we may provide to the interpretation of the relevant provisions could assist the parties in reaching a settlement of this matter. Since the matter has not been properly adjudicated by the judge who is seized with the matter, it would not be appropriate to provide our interpretation of the provisions. However, there are some matters that should be addressed by the presiding judge in deciding how to interpret the provisions.

[42] The ETA provides that generally a builder of an addition to a residential complex is deemed to have made a self-supply of that addition when the conditions as set out in paragraphs 191(4)(*a*) to (*c*) of the ETA are satisfied. This occurs when the addition is substantially completed and any individual first occupies any residential unit that is a part of such addition as a place of residence. The builder, subject to certain exceptions, is deemed to have collected tax on the supply based on the fair market value of the addition.

[43] Section 191.1 of the ETA provides an exception to this general rule. If the conditions as set out in subsection 191.1(2) of the ETA are satisfied, the amount of the tax that the builder will be deemed to have collected as a result of the self-supply of the addition will be the greater of the tax based on the fair market value of the addition and the tax payable by the builder in relation to

the construction of the addition (including any tax payable in relation to the acquisition of any real property for the addition). Since the fair market value of the addition in this case was less than the cost of construction, if the general rule under subsection 191(4) of the ETA is applicable, the amount of HST that High-Crest will be deemed to have collected as a result of the application of the self-supply rule will be significantly less that the HST it paid in relation to the construction of the addition.

[44] The only condition of subsection 191.1(2) of the ETA that is in dispute in this case is the condition in paragraph (*c*) thereof:

(*c*) except where the builder is a government or a municipality, the builder, at or before that time, has received or can reasonably expect to receive government funding in respect of the complex,	*c*) le constructeur, sauf s'il est un gouvernement ou une municipalité, a reçu ou peut raisonnablement s'attendre à recevoir, au moment donné ou antérieurement, une subvention relativement à l'immeuble d'habitation,

[45] "Government funding / subvention" is defined in subsection 191.1(1) of the *ETA*:

government funding, in respect of a residential complex, means an amount of money (including a forgivable loan but not including any other loan or a refund or rebate of, or credit in respect of, taxes, duties or fees imposed under any statute) paid or payable by	***subvention*** Quant à un immeuble d'habitation, somme d'argent (y compris un prêt à remboursement conditionnel mais à l'exclusion de tout autre prêt et des remboursements ou crédits au titre des frais, droits ou taxes imposés par une loi) payée ou payable par l'une des personnes suivantes au constructeur de l'immeuble ou d'une adjonction à celui-ci pour que des habitations de l'immeuble soient mises à la disposition de personnes visées à l'alinéa (2)*b*) :
(*a*) a grantor, or	*a*) un subventionneur;

(*b*) an organization that received the amount from a grantor or another organization that received the amount from a grantor,	*b*) une organisation qui a reçu la somme d'un subventionneur ou d'une autre organisation qui a reçu la somme d'un subventionneur.

to a builder of the complex or of an addition thereto for the purpose of making residential units in the complex available to individuals referred to in paragraph (2)(*b*).

[46] The Province is a "grantor / subventionneur" as defined in subsection 191.1(1) of the *ETA*.

[47] The Tax Court Judge who wrote the reasons analyzed the various agreements between the Province and High-Crest and the components of the per diem amount that High-Crest could charge for the residential units. He concluded that the primary purpose of the payments by the Province was to make residential units available to seniors.

[48] In *Canada Trustco Mortgage Co. v. The Queen*, 2005 SCC 54, [2005] 2 S.C.R. 601, the Supreme Court of Canada confirmed that in interpreting legislation (including a taxing statute), a textual, contextual and purposive approach is to be applied.

[49] In determining whether, in any particular case, there is an amount that the builder can reasonably expect to receive from a grantor for the purpose of making residential units available to the individuals referred to in paragraph 191.1(2)(b) of the ETA, one question that should be addressed is whether it is necessary to determine the primary purpose of the total amount that a builder may reasonably expect to receive from a grantor or whether it is only necessary that the

builder may reasonably expect to receive an amount (which could be part of a larger payment) from a grantor and that amount is for the required purpose.

[50] For example, assume that a law firm has been retained to provide legal services in relation to a reassessment under the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.). Assume that there are several issues and that one minor issue relates to the fair market value of vacant land. Once the matter is concluded assume the law firm sends a bill to the client for $25,000 for legal fees, $1,000 for disbursements ($600 for the cost of the appraisal of the vacant land and $400 for other disbursements) and HST at 15% ($3,900) for a total bill of $29,900. Assume the client makes one payment of $29,900. Has the law firm has received an amount of money from the client for the purpose of obtaining the appraisal of the real property even though the amount for the appraisal is a minor part of the total amount paid?

[51] Also paragraph 191.1(2)(c) of the ETA is a condition that, if satisfied, will result in certain consequences under the ETA. As acknowledged by the Appellant, the amount of tax payable under the ETA is not affected by the amount of the funding that is provided or that is expected to be provided by the grantor. The same result will arise under the ETA whether the government funding is $1,000 or $1,000,000 (or any other amount) or whether it is 1% or 100% (or any other percentage) of the cost of construction. This could also raise the question of whether it is necessary to determine the primary purpose of any expected payments or whether it is only necessary to determine if any expected payments will include an amount for the designated purpose.

VII. Conclusion

[52] As a result, I would allow the appeal, set aside the judgment that was rendered and refer the matter back to the Tax Court Judge who heard the tax appeal to render judgment. Given the circumstances of this case, I would not award costs.

"Wyman W. Webb"
J.A.

"I agree
J.D. Denis Pelletier J.A."

STRATAS J.A. (Dissenting Reasons)

[53] I agree with Justice Webb's account of the facts and the background in this appeal. However, following a different analytical approach, I propose a different disposition for the appeal.

[54] To recap, a judge of the Tax Court of Canada was assigned to hear this case, heard it, and reserved his judgment on it. The judge did not render judgment for some time. The Chief Justice of the Tax Court of Canada (*per* Rossiter C.J.) summoned the parties to a conference call, told them that the case had not been "resolved in a timely, efficient and effective fashion," and announced that he was reassigning the case to another judge.

[55] The new judge has now rendered judgment in the case. The appeal before us is from that judgment.

[56] For the purposes of these reasons, the power the Chief Justice exercised shall be called the "power to reassign" and what the Chief Justice did shall be called a "reassignment."

[57] The Chief Justice's reassignment raises three issues:

(A) *Jurisdiction*. In the abstract, looking at the statutory powers given to the Chief Justice, does he have a power to reassign?

(B) *Discretion*. Assuming the Chief Justice has a power to reassign, he is not forced to exercise it. He can decide not to. He has a discretion. What factors guide his discretion?

(C) *Procedural fairness*. The exercise of a power to reassign affects the legal and practical interests of the parties. What steps should the Chief Justice take to ensure procedural fairness to the parties?

[58] These three issues must be broken out and considered separately because different considerations apply to each. As well, in this case, the appellant did not object to the reassignment until after it had lost in the Tax Court. The appellant's silence has different ramifications depending on the issue we are dealing with.

A. Jurisdiction

[59] In the abstract, looking at the statutory powers given to the Chief Justice, does he have a power to reassign? In my view, yes.

[60] Two provisions give the Chief Justice the power to reassign: the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s. 14 and the *Courts Administration Service Act*, S.C. 2002, c. 8, s. 8. In substance, these provisions are alike or substantially similar to those governing Chief Justices in all Canadian jurisdictions.

(1) Section 14 of the Tax Court of Canada Act

[61] Section 14 of the *Tax Court of Canada Act* provides that a judge of the Tax Court sits as "the Court" for the purposes of the Act and that the Chief Justice shall make "assignment[s] from time to time of judges" to transact the business of the Court.

[62] What does "from time to time" mean? The accepted definition of this phrase, applied in a number of Canadian cases, is found in *Lawrie v. Lees* (1881), 51 L.J. Ch. 209, 7 A.C. 19. There, the House of Lords held that "from time to time" means that after the power has been exercised once, it may be exercised again in order to "reverse altogether" the first exercise of the power (at p. 29):

> ...the words "from time to time" are words which are constantly introduced where it is intended to protect a person who is empowered to act from the risk of having completely discharged his duty when he has once acted, and therefore not being able to act again in the same direction. The meaning of the words "from time to time" is that after he has made one order he may make a fresh order to add something to it, or take something from it, *or reverse it altogether*.... [my emphasis]

[63] Thus, just looking in the abstract at the text of section 14 of the *Tax Court of Canada Act*, the Chief Justice has the power to reassign a case heard by a judge. The section contains no words of qualification.

[64] Even where, as here, the text of a section is clear, we must still examine its context and purpose. Sometimes this examination can reveal ambiguities in the meaning of the text or change our understanding of it: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2

S.C.R. 601; and see, *e.g.*, *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 and *BP Canada v. Canada (Minister of National Revenue)*, 2017 FCA 61.

[65] In this case, the context and purpose of section 14 of the *Tax Court of Canada Act* confirms our understanding of the text: the Chief Justice has the power to reassign.

[66] One of the purposes of section 14 is to allow the Chief Justice to ensure that all cases that come before the Court are determined at some point by a judge. Every case must be decided. But section 14 exists within the real-life context of the frailties of judges: some die and some lose the mental or physical capacity to function. If section 14 is to fulfil its purpose, it cannot be just a power to assign a judge to a case and then the power is spent. Section 14 must also include the power to reassign.

[67] Section 14 also sits within a larger context. The Chief Justice is the head of the Tax Court. Like all Chief Justices of all other courts across Canada, the Chief Justice is to do what he can to ensure that his part of the judicial branch fulfils its mission. The mission is to dispense justice with integrity, fairness and efficiency, to improve the reputation of the administration of justice and to win the confidence of the public.

[68] In recent years, parts of this mission have assumed greater urgency and importance. For example, timely, cost-effective access to justice has become a practical necessity, sometimes even a constitutional imperative: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Trial*

Lawyers Association of British Columbia v. British Columbia (Attorney General), 2014 SCC 59, [2014] 3 S.C.R. 31; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631. And the mission is increasingly beset by increasingly difficult challenges in an increasingly complex world.

[69] Absent wording to the contrary—and there is none here—statutory provisions that give powers to Chief Justices must be interpreted in a way that allows them to advance their courts' missions. Doing anything less fails to carry out the accepted approach to statutory interpretation. Doing anything less violates Parliament's instruction that statutory provisions "be given such fair, large and liberal construction and interpretation as best ensures the attainment of [their] objects": *Interpretation Act*, R.S.C. 1985, c I-21, s. 12.

[70] I would have thought that it was beyond doubt that section 14 gives the Chief Justice the power to reassign when the original judge is dead or incapacitated by ill-health or an ethical issue such as a conflict of interest. But in this case, the original judge is alive and there is no evidence of incapacity. All we know is that the judge had reserved his judgment on the case for a long time.

[71] Thus, we arrive at the central question in this case: does the Chief Justice's power to reassign potentially extend to situations beyond the death or incapacity of the original judge assigned to determine the case?

[72] I say yes. The power to reassign is coextensive with the need to advance the mission of the courts. Situations beyond death and incapacity can undercut the mission of the courts. Consistent with its purpose, the power to reassign must extend to those situations.

[73] This can be demonstrated by looking at two situations, one extreme, one benign.

[74] Suppose that a judge seized of a matter is alive and has absolutely no physical or mental impairment. But for whatever reason—perhaps a bad attitude or a crippling workload—the judge does not decide a matter in a timely way. Two years go by and still there is no decision. The parties write, begging for a decision and the judge does not respond. More and more time goes by and the inaction continues.

[75] Is the Chief Justice powerless? Despite the breadth of the wording of section 14 of the *Tax Court of Canada Act*, the Chief Justice's position as head of the court, his obligation to use his powers to advance the court's mission, and the importance of the court's mission itself, is the Chief Justice forced to wait as more and more months and years go by until the judge dies, resigns, becomes incapable or is removed by the Governor General on address of the Senate and House of Commons?

[76] I think not. Provided the reassignment furthers the mission of the court, the Chief Justice has the power to reassign.

[77] At a benign, less dramatic level, sometimes stuff happens: judges assigned to a case get ill, have to attend suddenly to family obligations, get bogged down with a series of very tough reserves, and so on. To advance the court's mission—to ensure that cases are heard and decided, not adjourned or subject to lengthy reserve times—Chief Justices often reassign judges before hearings. Surely they have that statutory power, in this case section 14 of the *Tax Court of Canada Act*.

[78] Remember that we are dealing here with just the opening, jurisdictional question: can the Chief Justice potentially reassign? To say that the Chief Justice can reassign does not mean that he always should. This is the focus of the second question: what factors govern the Chief Justice's discretion? Before examining this, I wish to examine the other source of the Chief Justice's power to reassign, section 8 of the *Courts Administration Service Act*.

(2) Section 8 of the *Courts Administration Service Act*

[79] This provision gives the Chief Justice the same broad power to reassign that is found in section 14 of the *Tax Court of Canada Act*.

[80] Under section 8 of the *Courts Administration Service Act*, the Chief Justice of the Tax Court is responsible for the "assignment of judicial duties" (subsection 8(1)). This includes "the power...to assign judges to sittings" (subsection 8(2)). Section 8 says nothing about reassignment. But subsection 31(3) of the *Interpretation Act*, R.S.C. 1985, c. I-21, in conjunction

with section 8 of the *Courts Administration Service Act*, makes it clear that the Chief Justice has the power to assign.

[81] Subsection 31(3) of the *Interpretation Act* provides that "[w]here a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires." The power to assign a particular case to a particular judge in subsection 8(2) of the *Courts Administration Service Act* can be re-exercised or, in the words of the subsection, "performed from time to time as occasion requires." The meaning of "from time to time" is governed by the House of Lords decision in *Lawrie v. Lees*, above.

[82] In *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, 142 D.L.R. (4th) 193, the Supreme Court placed restrictions on the use of subsection 31(3) of the *Interpretation Act*. It held that one must first interpret the provision that gives the power in question, here subsection 8(2) of the *Courts Administration Service Act*. If the provision, properly interpreted, allows the power to be exercised once and only once, subsection 31(3) of the *Interpretation Act* does not apply. For example, where a provision grants an adjudicator a power to adjudicate a dispute and the provision, properly interpreted, is intended to finally settle the parties' rights—in other words, where the power is intended to be a single-use power—subsection 31(3) of the *Interpretation Act* has no room to operate: see the discussion in Sir William Wade and Christopher Forsyth, *Administrative Law*, 7th ed. (Oxford, Clarendon Press, 1994) at pp. 261-62.

[83] Properly interpreted, subsection 8(2) of the *Courts Administration Service Act* is not a single-use power: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193. For this, I repeat my analysis of context and purpose above. This analysis confirms that a Chief Justice has the power to reassign to further the mission of the court.

[84] Before leaving the issue of the Chief Justice's power to reassign, it is worth underscoring that this is a question of subject-matter jurisdiction. The Court must deal with this question whether or not the parties have ever raised it: *P.E.I. (Provincial Secretary) v. Egan*, [1941] S.C.R. 396, 3 D.L.R. 305. The parties' consent to or non-contestation of a question of subject-matter jurisdiction cannot give a court a subject-matter jurisdiction or power it does not have: *Canadian National Railway v. BNSF Railway Company*, 2016 FCA 284 at para. 23; *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 218 at paras. 6-7; *Brooke v. Toronto Belt Line Railway Company* (1891), 21 O.R. 401; *C.N.R. v. Lewis*, [1930] Ex. C.R. 145, 4 D.L.R. 537. In this case, until the matter reached our court, no one raised the Chief Justice's power to reassign. But it is still incumbent upon us to consider it.

B. Discretion

[85] Assuming the Chief Justice has a power to reassign, he is not forced to exercise it. He can decide not to. He has a discretion. What factors guide his discretion?

[86] This question is distinct from the question of jurisdiction. A statutory provision may have given a public official a very broad power to exercise, perhaps even one that can be said to

appear to be untrammelled. But that does not mean that the public official can always exercise the power in every circumstance.

[87] The potential power to do something is one thing; the discretion to exercise it is another: *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304 at para. 21. In other words,

> …there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute….[T]here is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is…objectionable….

(*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140; see also *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.).)

[88] In my view, in enacting section 14 of the *Tax Court of Canada Act* and section 8 of the *Courts Administration Service Act*, Parliament did not give the Chief Justice a blank cheque. Instead, Parliament intended that the Chief Justice should exercise the power to reassign only after carefully considering all of the circumstances, both for and against reassignment.

[89] Though the power to reassign can be exercised to advance the mission of the court, in certain circumstances countervailing considerations must be considered. Indeed, sometimes the countervailing considerations are so weighty that the power to reassign cannot be exercised.

[90] The precise circumstances matter. To take just one example, much may depend on when the power to reassign is exercised. Absent bad faith and before matters are heard, a Chief Justice may shift judicial assignments from one judge to another for administrative reasons. But after the judge has heard the matter and is writing reasons—when the judge is protected by the fundamental principle of adjudicative independence—a Chief Justice will be much more constrained.

[91] Under this fundamental principle, a judge must be allowed to decide a case without any interference, even interference by a Chief Justice: see, *e.g.*, *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, 61 D.L.R. (4th) 688. Associated with this is the principle that "she or he who heard must decide," a century-old idea lying at the core of fundamental fairness and natural justice.

[92] These principles are as weighty as they come. But like most principles, they are not absolute. There are circumstances—surely most rare—where the need to protect the mission of the court must prevail. Perhaps one circumstance is the example in paragraphs 74-75, above, of a judge's multi-year delay.

[93] Before us is a case of first principle. Given the uncertainty, it would be a mistake for us to say much more. It is best that the jurisprudence develop case-by-case. This much is certain: reassignment can never be prompted by the Chief Justice's personal views about the result the judge should reach in a case.

[94] In this case, the parties have not challenged the Chief Justice's exercise of discretion. In our Court, the appellant says that the Chief Justice does not have the power to reassign and, further, that he did not exercise it in accordance with procedural fairness. But it does not invite us to quash the Chief Justice's exercise of discretion. In these circumstances, are we bound to deal with that issue? In my view, no. This goes to how a power was exercised, not whether a power exists. This is not a question of subject-matter jurisdiction.

[95] In another case, a party dissatisfied with a reassignment may object to the new judge. If the dissatisfied party does not object to the new judge and only raises the issue on appeal, the issue will be regarded as a new issue, one that is fact-based. The Court is very reluctant to entertain new, fact-based issues on appeal: *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678.

[96] Sometimes a dissatisfied party is unable to challenge the Chief Justice's exercise of discretion because the Chief Justice has not disclosed the reasons why reassignment is warranted. As will be seen in the next section of these reasons, in some circumstances the refusal of the Chief Justice to disclose the reasons is a breach of procedural fairness. Provided the dissatisfied party objects to that—and objects in a timely way—relief may be granted on that ground alone.

C. Procedural fairness

[97] In circumstances where it is impossible for a case to continue with the original judge—for example, situations of death or incapacity—there are no procedural fairness obligations owed, other than notification to the parties that a reassignment has happened and the reasons for it. In those situations, reassignment must happen and the submissions of the parties will not alter that fact.

[98] In other circumstances—expected to be most rare (see paragraph 92, above)—the decision to reassign can significantly affect the legal and practical interests of the parties. Obligations of procedural fairness arise.

[99] As was the case for the Chief Justice's exercise of discretion, I do not wish to say much about the level of procedural fairness that must be accorded. We all know that procedural fairness obligations vary according to the circumstances and circumstances can vary greatly. The jurisprudence in this area is best worked out in response to particular situations.

[100] Depending on the circumstances, a Chief Justice might consider disclosing to the parties the problem affecting the judge, review with the parties the considerations for and against reassignment, canvass whether there are any further considerations that bear upon the issue, and then invite submissions on whether reassignment should take place. Where assignment of the matter to a new judge is warranted and this is done over the objection of a party, a Chief Justice

should consider offering brief reasons out of fairness and to facilitate later appellate review of the matter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869.

[101] Following reassignment, the new judge is in charge of the case. It is for that judge, not the Chief Justice, to receive submissions from the parties concerning how the case should proceed, for example whether the case should be reheard or whether existing material (including transcripts) should be used in whole or in part: *D'Amico v. Wiemken*, 2010 ABQB 785, 47 Alta. L.R. (5th) 414; *Parmar v. Bayley*, 2001 BCSC 1394, 19 C.P.C. (5th) 366.

[102] A dissatisfied party must object to a procedural flaw as soon as possible and must maintain that objection, otherwise the party will be taken to have waived the concern: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488 at para. 48; *Johnson v. Canada (Attorney General)*, 2011 FCA 76, 414 N.R. 321 at para. 25; *Telus Communications Inc. v. Telecommunications Workers Union*, 2005 FCA 262, 257 D.L.R. (4th) 19 at paras. 43-49; *Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equicap Limited Partnership*, 2008 ONCA 463, 90 O.R. (3d) 561.

[103] This means that to the extent the Chief Justice confers with the parties, as happened here, a party should register any procedural fairness objection at that time. This gives the Chief Justice a chance to remedy any procedural deficiency. A dissatisfied party can also register the procedural fairness objection before the new judge. If the dissatisfied party does none of these things and registers the objection only in the appellate court, the dissatisfied party will likely be taken to have waived the procedural deficiency.

D. Application of these principles to this case

[104] In this Court, the appellant raises the issue of jurisdiction, the first of the three issues. It submits that the Chief Justice does not have the power to reassign the case to a new judge: appellant's memorandum of fact and law, paras. 80-82. The appellant did not raise this below. But that does not matter because this concerns subject-matter jurisdiction: see para. 84, above. It can raise this here.

[105] However, I reject the appellant's submission. For the reasons set out above, the Chief Justice did have the power to reassign.

[106] I turn now to the second question, the Chief Justice's exercise of discretion to reassign. The appellant does not challenge this: see para. 94 above. Thus, we need not consider this. I would simply note, without commenting one way or the other, that the Chief Justice appeared to be concerned about the time that had elapsed and, perhaps mindful of the mission of his Court, expressed regret to the parties that the Court had "failed" them.

[107] In this Court, the appellant raises the third question, procedural fairness. It says that the Chief Justice acted in a procedurally unfair manner: appellant's memorandum of fact and law, paras. 33(c) and 35.

[108] The issue of the content of procedural fairness in this sort of situation is one of first impression. However, I agree with the appellant that there was procedural unfairness in this case.

[109] The Chief Justice was not forced to reassign due to the original judge's death. And there is no evidence of incapacity. There is only delay. This was a situation where the Chief Justice had a discretion to exercise. The exercise of discretion mattered to the parties: they had already argued the case before the original judge and justifiably expected it would be decided by that judge. They should have been asked to make submissions.

[110] But the Chief Justice did not ask for submissions. Instead, he summoned the parties to a conference call and simply announced his decision to reassign. The only hint as to a reason was the Chief Justice's comment that the case had not been "resolved in a timely, efficient and effective fashion." Had the parties been invited to make submissions, they might have wanted the original judge continuing notwithstanding the delay. That would have been something significant for the Chief Justice to consider.

[111] There was further unfairness. The Chief Justice announced two options to the parties concerning how the new judge would go about deciding the case. He did not invite submissions. And this was a matter for the new judge, not the Chief Justice, to consider. Later, the respondent wrote, wanting to explore another option. In response, the Chief Justice held a second conference call. He shut the respondent down without inviting any submissions.

[112] Despite the procedural unfairness, the appellant does not succeed. The appellant did not object in a timely way. In fact, after the Chief Justice announced that a new judge would decide the case, the appellant said he was fine with that. Only after the new judge decided the case against the appellant did it object.

[113] This is too late. This is a textbook case of waiver: see the authorities at para. 102 above.

E. Postscript

[114] I wish to offer some brief comments on some aspects of my colleague's reasons.

[115] My colleague refers to a number of cases from other jurisdictions where the issue of reassignment has arisen, using them as solid precedents against the Chief Justice's decision to reassign. These cases are of limited value. While they might be of use in identifying criteria that might bear upon the exercise of discretion to reassign, the weight to be accorded to the various criteria depends on the precise circumstances of each case.

[116] Much also depends on the context in which the cases are decided and the nature of the cases themselves. Cases where the liberty of the subject is at stake, such as criminal cases, cases where there is substantial oral evidence and significant credibility issues such that a rerun of the case might be unfair, and cases where the validity of a public administrative decision is in issue may call for more caution when a Chief Justice is considering whether to reassign.

[117] The same can be said for the legislative provisions in other jurisdictions. They speak only to the law in those jurisdictions and shed no light on the jurisdiction of a Chief Justice of the Tax Court.

[118] Even if I were to agree with my colleague's reasoning and conclusions concerning the Chief Justice's decision to reassign the case to a new judge, I must disagree with his proposed disposition of the appeal.

[119] My colleague proposes that the original judge assigned to this matter render judgment in it. But the circumstances in which the case was taken away from the original judge are not known to us. Was there more going on than delay? We do not know whether the original judge is in fact able to render judgment. And after so much time has gone by, we do not know if he will remember the submissions and the evidence.

[120] Instead, had I agreed with my colleague's analysis, I would have remitted the matter to the Chief Justice for assignment of a judge to this case in accordance with the principles in these reasons.

[121] One last thing. My colleague has found that the Chief Justice had no power to reassign the case and so the judge who rendered judgment had no jurisdiction to decide the matter. The judgment he rendered is a nullity. This matter must go back to the original judge because he alone is to decide the case: identify the law, find the facts and then apply the law to the facts. But then my colleague goes further and offers views on the law (at paragraphs 41-51), views that will bind the original judge. This places this Court in the invidious position of saying one thing and doing another. Further, after the original judge has decided the matter, there may be an appeal to this Court. We should not gratuitously pronounce law at this time and tie the hands of a future panel of this Court that may consider this same case.

F. Proposed disposition

[122] Accordingly, I conclude that the Chief Justice's decision to reassign the case to the new judge should stand.

[123] Were I writing in this case for a majority of this Court, I would now go on to deal with the substantive merits of the appeal. As I have mentioned above, I do not consider this advisable.

[124] If leave to appeal to the Supreme Court from our Court's decision is sought and granted and if the Supreme Court agrees with my proposed disposition of the appeal, it may wish to consider whether the merits of the appeal are most efficiently determined by this Court by way of remand: *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 46.1.

G. Conclusion

[125] The appellant was happy with the reassignment of its case to the new judge—that is, until the new judge dismissed its case. Only then did the appellant object. Now the appellant leaves this Court, its tactical objection effectively and practically upheld and its case assured of a do-over in the Tax Court. The mission of the Tax Court is to dispense justice with integrity, fairness and efficiency, to improve the reputation of the administration of justice, to grant timely, cost-effective access to justice to all, and to earn the confidence of the public it serves. That mission is served by broad powers Parliament has given to the Chief Justice, including the power to reassign. But now that power has been made subject to inflexible, judicially-constructed limits.

[126] If the law drives us to this result, so be it. But it does not. As far as I am concerned, the appellant made its bed in this case and ought to lie in it. And the Chief Justice can exercise his power to reassign—granted by unrestricted legislative wording—to further the court's mission as long as he abides by two limits. First, the Chief Justice must carefully consider his discretion: there are occasions where, on balance, the circumstances are against reassignment, sometimes very strongly so, even conclusively so. And second, the Chief Justice must act in a procedurally fair way. This result places the Chief Justice in the same position as all public officials to whom Parliament has entrusted broad powers—Ministers, chairs of tribunals, heads of investigative bodies, and so on. Absent some basis in the legislation—and there is none here—the Chief Justice should not be treated differently.

[127] Therefore, I respectfully dissent.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED SEPTEMBER 30, 2015 NO. 2012-3027(GST)G

DOCKET:	A-473-15
STYLE OF CAUSE:	HIGH-CREST ENTERPRISES LIMITED V. HER MAJESTY THE QUEEN
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	NOVEMBER 9, 2016
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	PELLETIER J.A.
DISSENTING REASONS BY:	STRATAS J.A.
DATED:	APRIL 28, 2017

APPEARANCES:

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