
The Jurisdiction of the Tax Court: A Tax Practitioner's Guide to the Jurisdictional Galaxy of Constitutional Challenges

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PRÉCIS

L'une des dernières questions pertinentes concernant la compétence exclusive de la Cour canadienne de l'impôt porte sur les contestations constitutionnelles des dispositions fiscales, en particulier les dispositions d'assujettissement. Bien qu'il soit clair que la Cour canadienne de l'impôt peut examiner la constitutionnalité d'une disposition d'assujettissement qui entre en jeu dans une cotisation, l'étendue de la compétence exclusive de la Cour pour rendre une décision sur la constitutionnalité d'une telle disposition, en excluant les autres cours supérieures, est moins claire.

Cette question a été soulevée dans la décision relative à l'arrêt *Canada c. Domtar Inc.* Bien que cette cause portait sur la disposition d'assujettissement de la Loi de 2006 sur les droits d'exportation de produits de bois d'œuvre, la décision a une incidence importante sur tous les appels fédéraux en matière fiscale qui sont assujettis à la compétence exclusive de la Cour canadienne de l'impôt en vertu de l'article 12 de la Loi sur la Cour canadienne de l'impôt. Le présent article part de la décision dans *Domtar* pour explorer la possibilité de contestations constitutionnelles de la législation fiscale dans les cours autres que la Cour canadienne de l'impôt. Ce faisant, il examine l'incidence des décisions récentes de la Cour suprême du Canada en ce qui a trait à la concurrence entre les systèmes juridictionnels dans un contexte autre que fiscal, dont certaines traitent en particulier de la compétence « résiduelle » des cours supérieures pour entendre les requêtes constitutionnelles. L'article tente de réconcilier la notion de compétence exclusive de la Cour canadienne de l'impôt en ce qui a trait aux appels en matière fiscale

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avec l'autorité traditionnelle de la Cour fédérale et des cours supérieures provinciales pour juger les requêtes constitutionnelles. L'article conclut que la question de la constitutionnalité d'une disposition d'assujettissement doit généralement être résolue par la Cour canadienne de l'impôt en excluant ces autres cours supérieures, et que toute compétence résiduelle des cours supérieures provinciales touchant cette question doit, au mieux, être interprétée de façon très restreinte.

ABSTRACT

One of the remaining live issues relating to the Tax Court of Canada's exclusive jurisdiction concerns constitutional challenges of taxing provisions, particularly charging provisions. While it is clear that the Tax Court can consider the constitutionality of a charging provision brought into play within an assessment, the extent of the court's exclusive jurisdiction to rule on the constitutionality of such a provision, to the exclusion of other superior courts, is less clear.

This issue was addressed in the decision in *Canada v. Domtar Inc.* While the context in that case was the charging provision of the Softwood Lumber Products Export Charge Act, 2006, the decision has a broad impact on any federal tax appeals that are subject to the Tax Court's exclusive jurisdiction under section 12 of the Tax Court of Canada Act. This article uses the *Domtar* decision as a starting point to explore the possibility of constitutional challenges of taxing legislation in courts other than the Tax Court. In so doing, it considers the impact of recent decisions of the Supreme Court of Canada relating to competing jurisdictional schemes outside the tax context, some of which specifically address the "residual" jurisdiction of superior courts to hear constitutional claims. The article attempts to reconcile the notion of the Tax Court's exclusive jurisdiction over tax appeals with the traditional authority of the Federal Court and the provincial superior courts to adjudicate constitutional claims. It concludes that the issue of the constitutionality of a charging provision must generally be resolved by the Tax Court to the exclusion of these other superior courts, and that any residual jurisdiction of provincial superior courts over such a question ought to be, at best, very narrowly construed.

KEYWORDS: JURISDICTION ■ TAX COURT OF CANADA ■ CONSTITUTIONAL LAW ■ APPEALS ■ FEDERAL COURT ■ PROVINCIAL

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INTRODUCTION

This article explores the question, in what court and context can the constitutionality of a federal tax charging provision be tested? I previously addressed the parameters of the Tax Court's exclusive jurisdiction over tax matters as compared with the jurisdiction of other superior courts in an article published in this journal in 2008.¹ That article comprehensively reviewed the history of the tax appeal framework, the jurisprudence, and relevant statutory provisions, in order to identify the jurisdictional boundaries between the Tax Court and other superior courts in respect of federal tax matters. However, one complex issue was left largely unaddressed—constitutional challenges of federal taxing provisions, particularly charging provisions. This article attempts to extend that same boundary-seeking mission to this complex area. While the issue has been addressed before in the context of challenges under the Canadian Charter of Rights and Freedoms,² more recent jurisprudence challenges the notion that a constitutional challenge of any income tax provision can necessarily be commenced in the Federal Court.³ The issue therefore requires a fuller and updated consideration in light of the development of constitutional and tax-related jurisprudence over the last several years.

1 David Jacyk, "The Dividing Line Between the Jurisdictions of the Tax Court of Canada and Other Superior Courts" (2008) 56:3 *Canadian Tax Journal* 661-707.

2 Part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c. 11 (herein referred to as "the Charter").

3 See, for example, Alison Scott Butler, "Making Charter Arguments in Civil Tax Cases: Can the Courts Help Taxpayers?" (1993) 41:5 *Canadian Tax Journal* 847-80, at 866.

Clearly, the Tax Court can consider the constitutionality of a charging provision within a tax appeal from an assessment. However, the extent to which the Tax Court's jurisdiction precludes constitutional actions in other superior courts is less clear. It is generally accepted that provincial superior courts, as descendants of the Royal Courts of Justice, cannot be denied the ability to review the constitutionality of legislation and to issue declarations that any legislative provision is *ultra vires*. Comparatively, statutory courts such as the Tax Court, established under section 101 of the Constitution Act, 1867,⁴ have a more restricted jurisdiction, being limited to that which is prescribed by their enacting statutes. Nevertheless, section 12 of the Tax Court of Canada Act⁵ ("the TCCA") has established the Tax Court's exclusive jurisdiction over tax appeals. Could this jurisdictional grant effectively oust the jurisdiction of a superior court in respect of a constitutional question that relates to a charging provision?

In *Canada v. Domtar Inc.*,⁶ the Federal Court of Appeal struck out an action seeking a declaration that the charging provision of the Softwood Lumber Products Export Charge Act, 2006⁷ ("the SLPECA") was *ultra vires*, finding that the Federal Court had no jurisdiction. While the context in that case was an appeal of softwood lumber charges, the decision applies equally to cases involving any federal tax legislation within the Tax Court's exclusive jurisdiction under section 12 of the TCCA. That is because the appeal process adopted within the SLPECA, like appeals relating to income tax and goods and services tax (GST), is subject to the Tax Court's exclusive jurisdiction.

It is within this legal context that this article attempts to reconcile the concept of the Tax Court's exclusive jurisdiction over tax appeals with the traditional authority of the other superior courts to adjudicate constitutional claims. It explores the *Domtar* decision as a starting point, carefully considering the court's specific findings and that decision's impact on the possibility of constitutional challenges of a charging provision in federal tax legislation in any court other than the Tax Court. The article next considers the impact of certain decisions of the Supreme Court of Canada relating to competing jurisdictional schemes outside the tax context, and the concept of the "residual" jurisdiction of superior courts to hear constitutional claims. Ultimately, the article identifies established legal principles that, when considered together, demonstrate that constitutional challenges of tax liability provisions generally must be made within appeals to the Tax Court of Canada, and not within actions or other proceedings in any other superior court.

4 Constitution Act, 1867 (UK), 30 & 31 Vict., c. 3.

5 RSC 1985, c. T-2, as amended.

6 2009 FCA 218.

7 Softwood Lumber Products Export Charge Act, 2006, SC 2006, c. 13, as amended.

JURISDICTIONAL PARAMETERS OF THE TAX COURT

Overview of the Parameters of the Court's Exclusive Jurisdiction

As set out extensively in my previous article,⁸ the basics of Tax Court jurisdiction are well established. The statutory scheme for the appeal of income tax assessments under the Income Tax Act⁹ (“the ITA”) constitutes a complete code.¹⁰ The statutory regime for tax appeals established a specialized and exclusive appeal system, even before the Tax Court became the only court with tax appeal jurisdiction in 1991 through the enactment of section 12 of the TCCA. Section 12, however, reinforces, in clear and explicit language, the Tax Court’s exclusive jurisdiction over tax appeals.

Specific federal taxing legislation such as the ITA and the Excise Tax Act¹¹ (“the ETA”) operate collaboratively with section 12 by establishing complete codes for appealing from an assessment of tax and thus determining a person’s tax liability. Subsections 152(8) of the ITA and 299(4) of the ETA deem assessments to be valid and binding unless set aside under the appeal process within the Tax Court’s exclusive jurisdiction. These sections ensure that tax assessments cannot be redetermined other than through the appeal process within the Tax Court’s exclusive jurisdiction.

Recent appellate decisions concerning section 12 of the TCCA confirm that other superior courts cannot determine a claim that directly or indirectly questions a tax liability as confirmed by (or left unchallenged in) Tax Court proceedings, even if the action is couched within a claim for damages.¹² Similarly, although the Federal Court holds exclusive original jurisdiction to grant prerogative relief within a judicial review of decisions of federal bodies under section 18.1 of the Federal Courts Act¹³ (“the FCA”), this does not extend to tax assessments or to the decisions made within the assessment and objection process. Section 18.5 of the FCA establishes that to the extent that an act of Parliament provides for an appeal from the impugned decision, the Federal Court’s jurisdiction cedes to the other statutory process.¹⁴ Section 18.5 thus imposes a limitation on the jurisdiction of the Federal

8 Supra note 1.

9 RSC 1985, c. 1 (5th Supp.), as amended.

10 See, for example, *Water’s Edge Village Estates (Phase II) Ltd. v. The Queen*, 94 DTC 6284, at 6285 (FCTD).

11 RSC 1985, c. E-15, as amended.

12 *Canada v. Roitman*, 2006 FCA 266, at paragraphs 19-20; *Smith et al. v. Canada (Attorney General) et al.*, 2006 BCCA 407; *Sorbara v. Canada (Attorney General)*, 2009 ONCA 506; and *Re Sentinel Hill No. 29 Limited Partnership v. Canada (Attorney General)*, 2008 ONCA 132. Leave to appeal to the Supreme Court of Canada was denied in all four cases: see infra note 79.

13 Federal Courts Act, RSC 1985, c. F-7, as amended.

14 FCA section 18.5 provides, “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

Court in respect of tax liability matters by precluding judicial review of a tax assessment.¹⁵ At least one case has applied the words in section 18.5 to restrict the Federal Court's jurisdiction to entertain an action that overlaps with the subject matter of a tax appeal.¹⁶

When considering the overall jurisdictional parameters of the Tax Court as compared with those of other superior courts, one can identify a few basic principles:¹⁷

- The Tax Court of Canada has exclusive jurisdiction to determine a person's liability for tax pursuant to section 12 of the TCCA (for taxes assessed in respect of the taxing statutes listed in section 12).
- Collection matters (where the amount assessed is not at issue) do not fall within the Tax Court's jurisdiction and must be addressed in the Federal Court¹⁸ or superior courts of the provinces.
- Superior courts of the provinces cannot redetermine a tax liability but can deal only with matters that are ancillary to a tax assessment. Even where the general subject matter and the procedure would normally fall within the superior court's jurisdiction, the superior court cannot purport to determine the issue if the decision or the relief sought would effectively redetermine the quantum of the tax liability.
- Superior courts can entertain actions that address tortious conduct arising from abuses within the process for determining a tax liability, but not the substance or merits of the assessment. An action against the Crown alleging an abuse of process must necessarily accept any assessment as lawful and correct, and must therefore establish the elements of tort law or contract law in relation to some matter of process.

In short, an action cannot indirectly challenge a tax liability established under the provisions of taxing legislation, because the quantum of tax liability is a matter that is

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.”

15 See, for example, *MNR v. Parsons et al.*, 84 DTC 6345 (FCA).

16 See *Albion Transportation Research Corp. v. Canada*, [1998] 1 FC 78 (TD). Whether or not the reasoning was technically correct, it demonstrates the court's disapproval of the possibility of using an action for damages as an end run around a statutory appeal process that was intended to operate as a complete code.

17 As set out in Jacyk, *supra* note 1, at 705-7.

18 Lest there be any doubt about this, although the Federal Court would have jurisdiction in certain collection matters properly initiated in that court, the Federal Court of Appeal would not have jurisdiction in respect of collection matters raised within an appeal from the decision of the Tax Court. See *Alciné v. Canada*, 2010 FCA 325.

subject only to the tax appeal provisions. A key authority that illustrates the jurisdictional dividing line is the decision in *Canada v. Roitman*.¹⁹ In that case, the taxpayer attempted to bring a class action in the Federal Court. The statement of claim alleged that the Canada Revenue Agency (CRA) had engaged in misfeasance of office, negligence, and abuse of process by developing and following a policy that putatively ignored a decision of the Federal Court of Appeal relating to adjustments to shareholder loan accounts.²⁰ Although the action was founded on the application of that policy in assessing specific taxpayers, the statement of claim was framed in terms of an abuse of process based on the creation and application of the “illegal” policy, and not as a challenge to the assessment.²¹

The Federal Court of Appeal overturned the Federal Court decision and struck the action for an absence of jurisdiction. Although the Tax Court could not grant relief such as damages, the court determined that it must look beyond the plaintiffs’ claim for relief and decipher the essential nature of the dispute,²² stating:

A statement of claim is not to be blindly read at its face meaning. The judge has to look beyond the words used, the facts alleged and the remedy sought and ensure himself that the statement of claim is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court.²³

Parameters of a Constitutional Challenge of Charging Provisions

The *Roitman* decision therefore clarified that a taxpayer cannot simply reframe a dispute over a tax liability, which is ordinarily resolved in the context of a tax appeal, as a claim for damages within an action. However, the decision did not address an action based solely on a constitutional challenge of a taxing provision.

In the 2007 decision in *Kingstreet Investments Ltd. v. New Brunswick (Finance)*,²⁴ the Supreme Court of Canada found that a taxpayer was entitled to recovery of a tax

19 *Roitman*, supra note 12. I served as one of the counsel representing the federal Crown in this case.

20 The court noted, *ibid.*, at paragraph 17, that the statement of claim alleged that the minister had deliberately misapplied the law expressed in the decision of *The Queen v. Franklin*, 2002 DTC 6803 (FCA). In *Franklin*, the Federal Court of Appeal dismissed the Crown’s appeal from the decision of the Tax Court of Canada (2000 DTC 2456), finding, “Normally, it is for the trier of fact to determine whether a benefit is conferred for purposes of subsection 15(1). . . . Beaubier, J.T.C.C. concluded that what occurred here was a series of bookkeeping errors but that the respondent received no benefit. I am unable to find any palpable or overriding errors in his assessment of the facts that would justify this Court interfering with his decision.” *Franklin* (FCA), supra, at paragraph 6.

21 *Roitman*, supra note 12, at paragraph 17, referring to portions of the statement of claim, and paragraph 25.

22 *Ibid.*, at paragraph 16. See also *Domtar*, supra note 6, at paragraph 28, which also describes the approach in *Roitman*.

23 *Roitman*, supra note 12, at paragraph 16.

24 2007 SCC 1.

that was later found to be unconstitutional.²⁵ The case concerned an action by certain owners for the recovery of a liquor tax paid to the Nova Scotia government and subsequently found to be *ultra vires* the powers of the province. While saying nothing about the Tax Court's exclusive jurisdiction over federal tax appeals, the *Kingstreet* decision established that payments made under a tax statute that is found to be *ultra vires* are recoverable based on constitutional principles.²⁶ Notably, the proceeding initiated for the recovery of the *ultra vires* tax in *Kingstreet* was an action.²⁷

The unanimous decision of the Supreme Court focused on constitutional principles rather than principles of restitution or unjust enrichment. The court emphatically rejected the prospect of a government retaining an illegally collected tax based on some principle of Crown immunity, fiscal inefficiency, or other general policy basis:

This case is about the consequences of the injustice created where a government attempts to retain unconstitutionally collected taxes. Because of the constitutional rule at play, the claim can be dealt with more simply than one for unjust enrichment in the private domain. Taxes were illegally collected. Taxes must be returned subject to limitation periods and remedial legislation, when such a measure is deemed appropriate. . . .

The Court's central concern must be to guarantee respect for constitutional principles. One such principle is that the Crown may not levy a tax except with authority of the Parliament or the legislature: *Constitution Act, 1867*, ss. 53 and 90. This principle of "no taxation without representation" is central to our conception of democracy and the rule of law. . . .

When the government collects and retains taxes pursuant to *ultra vires* legislation, it undermines the rule of law. To permit the Crown to retain an *ultra vires* tax would condone a breach of this most fundamental constitutional principle.²⁸

Given that the *Kingstreet* decision has cast the issue of recovery of an *ultra vires* tax as a constitutional issue, it would be easy to overstate the principle in that case. After all, *Kingstreet* stands as an example of the use of an action to recover an unconstitutional tax; consequently, taxpayers have cited it to argue that a constitutional challenge of a tax can be brought in the form of an action in a superior court other than the Tax Court.²⁹ But read carefully, the *Kingstreet* decision does not resolve the

25 Applying the general rule in *Amax Potash Ltd. etc. v. The Government of Saskatchewan*, [1977] 2 SCR 576, and rejecting the "passing on" defence/bar against recovery of *ultra vires* tax. See also *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184, at paragraph 20.

26 According to the Ontario Court of Appeal in *Sorbara*, supra note 12, at paragraph 4, constitutional principles and not private-law unjust enrichment concepts must control the taxpayer's right to recover tax monies paid under an unconstitutional taxing provision.

27 However, since the action in *Kingstreet* concerned the recovery of a tax already found to be *ultra vires*, it appears that the determination that the legislation was *ultra vires* had been previously made in another process.

28 *Kingstreet*, supra note 24, at paragraphs 13-15.

29 *Merchant Law Group v. Canada (Revenue Agency)*, 2009 FC 755; and *Sorbara*, supra note 12.

issue of whether a superior court other than the Tax Court can or should issue a declaration regarding the constitutional validity of a taxing provision falling within the exclusive jurisdiction of the Tax Court. That was the question that arose in *Domtar*.

Context of the Constitutional Challenge in Domtar

The plaintiff in *Domtar* filed an action in the Federal Court seeking a declaration that the charging provision of the SLPECA (section 18) was ultra vires, and an order requiring the return of monies paid pursuant to that section.³⁰ The jurisdictional dispute involved the interpretation of this new legislation, as opposed to the income tax appeal scheme considered in cases like *Roitman*. However, an understanding of the background of the dispute and the legislative framework illustrates why the decision would have an impact on any tax case that engages the Tax Court's jurisdiction, as discussed below.

*A Familiar Legislative Scheme with a Unique Background: Appeals, Refunds, and Exclusive Jurisdiction Under the SLPECA*³¹

Section 12 of the TCCA was amended in 2006 to include references and appeals to the Tax Court on matters arising under the SLPECA. The background of the SLPECA is Canada's infamous trade dispute with the United States over anti-dumping and countervailing duties imposed on Canadian exports of softwood lumber to the United States.³² This ongoing political dispute included multiple disputes within international tribunals and in the US domestic courts, until the softwood lumber agreement ("the SLA") entered into force on October 12, 2006.³³ Under the SLA, the United States agreed to refund approximately US\$5.4 billion in duties collected between 2002 and the date of the SLA, while Canada agreed to remit US\$1 billion of this amount to US interests. Canada's obligations under the SLA were implemented by the passing of the SLPECA, which imposed a charge on exports of certain softwood lumber products to the United States and on refunds of duty deposits paid to the United States.

The unique subject matter underlying the dispute in *Domtar*, however, does not detract from its general applicability to other tax cases. While the liability was obviously quite different from income tax and GST liability, the claim in *Domtar* was a constitutional challenge of a charging provision falling within the same statutory

30 Supra note 6, at paragraph 20.

31 The relevant provisions of the SLPECA are described only briefly here. The reader should consult the legislation directly.

32 The background presented here is drawn from the decision in *Domtar*, supra note 6, at paragraphs 4-9.

33 Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America, signed at Ottawa on September 12, 2006.

appeal scheme that is found in the ITA and the ETA, and is subject to the Tax Court's exclusive jurisdiction. The object of the constitutional challenge in *Domtar*, section 18 of the SLPECA, imposes an 18 percent charge on the refunds of duty deposits that the US government returned to exporters. It creates a liability that applies to all exporters entitled to a return of duty deposits,³⁴ and in that sense, is like any charging provision in tax legislation.

Indeed, the administration and enforcement system required to ensure the recovery of the charge created by section 18 adopted many of the same features of the income tax and GST systems, and of the dispute resolution process applicable to the ITA and the ETA. Exporters file a return under section 26 of the SLPECA after collecting any refunds from the US government, and remit the 18 percent charge to the CRA with the return. The processes of assessment and of objection and appeal from an assessment³⁵ generally replicate those under the ITA and the ETA. Ultimately, an appeal from any assessment under the SLPECA may be made to the Tax Court of Canada under section 57 of that statute.

The Tax Court appeal process under the SLPECA applies equally to the process for seeking refunds of amounts remitted to the CRA (as distinct from the supplier's initial application for a refund of duty deposits from the US government). This refund system is similar to that established under the ETA³⁶ in that it requires the filing of an application in a prescribed form, within two years.³⁷ Section 39 precludes the recovery of monies paid on account of an amount payable under the SLPECA by any other process or court action.³⁸ The process requires the minister to consider a refund

34 SLPECA section 18 is the primary mechanism for implementing Canada's monetary commitment under the SLA. In essence, the legislative scheme contemplates that suppliers in Canada would either assign their right to a portion of the refund to the Canadian government (via the Export Development Corp.) and receive the balance of 82 percent of the refund owed by the US government, or alternatively, claim a full refund of all duty deposits paid to the United States directly from the US government and remit the 18 percent charge to the minister of national revenue. SLPECA section 18 applies broadly to all those receiving duty deposit refunds, whether or not they have voluntarily relinquished an amount to Canada. Section 18(3) provides, "Every specified person in respect of whom a covered entry is to be liquidated as a result of a revocation shall pay to Her Majesty in Right of Canada a charge at the specified rate on the amount of any duty deposit refund that relates to the covered entry."

35 SLPECA sections 50 through 61.

36 See *infra* note 67.

37 SLPECA section 41(3) provides that a refund shall not be paid absent "an application . . . in prescribed form . . . within two years." Under section 41(1), the mechanism for the refund is specific to an amount "as or on account of, or that was taken into account as, a charge, a penalty, interest or other obligation under this Act in circumstances where the amount was not payable by the person."

38 With the exception of the Financial Administration Act. SLPECA section 39 provides, "Except as specifically provided under this Act or the *Financial Administration Act*, no person has a right to recover any money paid to Her Majesty in right of Canada as or on account of, or that has been taken into account by Her Majesty in right of Canada as, an amount payable under this Act."

application and assess the amount of the refund (if any).³⁹ Any assessment arising from the minister's review under section 51 is then, like an assessment for a return under section 50, subject to the typical tax objection and appeal process.

Therefore, whether a person disagrees with the assessment of the return, or with the minister's treatment of the refund request, a dispute under the SLPECA is routed through the same process as a dispute over income tax or GST: the objection stage and then, if necessary, an appeal to the Tax Court of Canada.⁴⁰ Consequently, the Tax Court's jurisdiction in respect of appeals arising from the assessment of returns and refunds under the SLPECA is similarly defined, and the attendant appeal system would operate as a complete code like that found under the ETA or the ITA.⁴¹

A Claim Attacking the Liability Created by the Charging Provision

The facts underlying the action in *Domtar* were simple. After collecting its refund from the US government, the plaintiff remitted the appropriate monies to the Crown with its return,⁴² though explicitly "under protest."⁴³ The plaintiff sought to recover that money,⁴⁴ but had not sought a refund from the CRA under the SLPECA.⁴⁵ The statement of claim filed in the Federal Court sought a declaration that section 18 of the SLPECA was ultra vires and contrary to law on a number of grounds.⁴⁶ The plaintiff's primary allegation was that the federal government lacked the constitutional power to enact section 18 because that provision concerned, in pith and substance, property and civil rights, and thus fell under the provincial head of power under section 92(13) of the Constitution Act, 1867.⁴⁷

The Crown sought to strike the claim as an abuse of process, asserting that the Federal Court had no jurisdiction to adjudicate a matter involving the plaintiff's liability for amounts owing under the SLPECA, even if based on a constitutional challenge. According to the Crown, section 39 of the SLPECA and the relevant refund and appeal provisions of that statute, combined with section 12 of the TCCA, had given exclusive jurisdiction to the Tax Court of Canada over the plaintiff's liability under the SLPECA. The challenge of the plaintiff's underlying liability was

39 SLPECA section 51.

40 SLPECA sections 54 and 57. It should be noted, however, that SLPECA section 57(1)(b) provides for a direct appeal to the Tax Court if no decision has been rendered within 180 days after the filing of the notice of objection. This provision is similar to ITA paragraph 169(1)(b) (permitting a direct appeal after 90 days from the date of filing).

41 See, for example, *Water's Edge Village Estates*, supra note 10, at 6285.

42 *Domtar*, supra note 6, at paragraph 15.

43 *Domtar Inc. v. Canada*, 2008 FC 1057, at paragraphs 4 and 96.

44 *Domtar*, supra note 6, at paragraph 1.

45 *Ibid.*, at paragraphs 13 and 19.

46 *Domtar*, supra note 43, at paragraphs 21-23.

47 *Ibid.*, at paragraph 21.

merely grounded on an allegation of constitutional invalidity. In that sense, the declaratory relief sought was inextricably bound up with the recovery of monies.

In dismissing the Crown's motion to strike, the motions judge determined that it was not plain and obvious that the Tax Court had exclusive jurisdiction:

It is not plain and obvious that the assessment, objection and appeal processes provided under the SLPECA are engaged. In my view, in describing the Plaintiffs' action as one for the recovery of money, the Defendants are mischaracterizing the claim set out in the Amended Statement of Claim.

The Plaintiffs are challenging the constitutionality of section 18 of the Act. If successful, it would appear that the monies paid under protest could be returned. However, the Plaintiffs are not basing this action on a claim for the return of money paid, *per se*.⁴⁸

The Federal Court of Appeal overturned the decision of the Federal Court and struck out the action in its entirety. While fairly cursory in its reasoning, the decision ultimately reinforces and confirms several key principles that would naturally apply to any tax cases with similar statutory schemes for appeals. I will next address those principles, while referencing other tax and non-tax cases that, though not mentioned in the decision, provide collateral support for the Federal Court of Appeal's approach. A review of that jurisprudence also assists in identifying the potential parameters of the *Domtar* decision.

Key Principles Articulated in the *Domtar* Decision

*Characterization of the Essential Nature of the Claim*⁴⁹

As a starting point for analysis, the Federal Court of Appeal, like the motion judge, sought to define the essential nature of the claim. The claim sought a general declaration that a provision was constitutionally invalid, which the Tax Court could not grant. However, in defining the essential nature of the dispute, the Court of Appeal adopted the approach in *Roitman*, determining that it must look beyond the plaintiff's request for a declaration as one of the forms of relief in the statement of claim.⁵⁰ Although the plaintiff sought a declaration, it was in the context of an action that sought the return of any monies paid under section 18 of the SLPECA. The court therefore determined that the essential nature of the dispute was indeed the recovery of money, even if based on constitutional grounds.⁵¹

On this point, the reasoning of the Federal Court of Appeal was not unlike that of the Supreme Court of Canada in an analogous situation involving competing

48 Ibid., at paragraphs 95-96.

49 I thank my colleague Graeme King for his insight on the relevance of the Supreme Court of Canada authority here.

50 *Domtar*, supra note 6, at paragraph 28.

51 Ibid., at paragraph 30.

jurisdictional schemes. The decision in *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*⁵² addressed a jurisdictional issue in relation to administrative tribunals. In that case, the court was faced with a situation where a certain class of persons had lost an income security benefit as a result of a change in legislation. The plaintiff sought to have the benefit reinstated under an administrative scheme. However, the plaintiff had not exercised the statutory right to review by the Commission des affaires sociales (CAS), the tribunal with jurisdiction over disputes concerning ministerial decisions regarding a person's benefits. The plaintiff instead filed a complaint with Quebec's Human Rights Commission. The complaint alleged breaches of sections 10 and 12 of the Quebec Charter of Human Rights and Freedoms.⁵³

The Supreme Court of Canada emphasized the importance of the proper characterization of the claim. Would the characterization of the action—and consequently the appropriate jurisdiction—change simply because the claim sought a declaration that a legislative provision was of no force or effect? In applying this crucial initial step of characterizing the action, the court confirmed that it must carefully differentiate the grounds for the complaint from the essential nature of the dispute. As Binnie J stated in separate reasons (with Fish J),

[a]s the present Chief Justice wrote in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at para. 49, “one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute.” Here the “wrong” can be characterized as the subject matter of a *Charter* complaint but the “facts giving rise to the dispute” are the Minister's discontinuance of an income security benefit, and Ms. Charette's claim to get it back under an administrative scheme that the legislature in plain words has channelled directly to the CAS (now the Administrative Tribunal of Québec (“ATQ”)).⁵⁴

Although the Federal Court of Appeal in *Domtar* did not refer to *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, as noted above its reasoning paralleled that of the Supreme Court in the latter case. Given that the Supreme Court of Canada has found that certain principles of constitutional jurisdiction for administrative tribunals apply equally to courts,⁵⁵ there is no reason to believe that the reasoning in *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)* would be any less applicable in respect of jurisdictional schemes for statutory courts.

52 2004 SCC 40.

53 RSQ, c. C-12.

54 *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, supra note 52, at paragraph 37. See also the reasons of Bastarache J, *ibid.*, at paragraphs 23 and 27. Contra (in the result) see McLachlin CJ, *ibid.*, at paragraphs 11-18.

55 See, for example, *R v. Conway*, 2010 SCC 22, at paragraph 40, where, in a unanimous decision, the Supreme Court of Canada found that the *Mills* test relating to the jurisdiction of an administrative tribunal over section 24(1) Charter relief applies equally to courts (*Mills v. The Queen*, [1986] 1 SCR 863).

*Nature of the Grant of Jurisdiction*⁵⁶

A second key principle was the court's focus on the grant of jurisdiction, in this case the interaction between section 12 of the TCCA and section 17 of the FCA. This principle is important for two reasons. First, this aspect of the decision applies specifically to the jurisdiction of the Federal Court only, and not to that of provincial superior courts.⁵⁷ Second, it explains why the reasoning in *Domtar* is not compromised by the later decisions of the Supreme Court of Canada in the so-called *TeleZone Six* cases.⁵⁸

Section 17(1) of the FCA establishes the scope of the Federal Court's jurisdiction to hear actions against the Crown:

Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

As the Federal Court of Appeal found, the effect of section 17(1) is that the Federal Court's jurisdiction may be ousted by other federal statutes.⁵⁹ The jurisdiction of the Federal Court under section 17(1) therefore necessarily cedes in the face of an exclusive jurisdiction established by federal statute, like the one in section 12 of the TCCA. This is precisely the case in respect of the SLPECA,⁶⁰ since Parliament has specifically and unambiguously granted exclusive jurisdiction to the Tax Court for all appeals thereunder, whether arising in respect of an assessment of a return or in respect of a request for a refund.

The specific interaction of section 17 of the FCA with section 12 of the TCCA serves as a contrast to the interaction between sections 17 and 18 of the FCA addressed more recently in the *TeleZone Six* cases. The Supreme Court of Canada there rejected the argument that the exclusive jurisdiction of the Federal Court over judicial review of decisions of federal tribunals under section 18 of the FCA precluded certain actions against the Crown. A closer look, however, reveals that those decisions ought not to affect the Tax Court's exclusive jurisdiction, given the difference between section 18 of the FCA and section 12 of the TCCA.

56 I again thank my colleague Graeme King for his valuable contribution in the development of this point.

57 Though this article contends that the decision at least informs the analysis of the jurisdiction of provincial superior courts.

58 *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, and five other decisions released on the same day.

59 *Domtar*, supra note 6, at paragraph 31(a).

60 *Ibid.*, at paragraph 31(b). TCCA section 12 provides, "The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the . . . the *Income Tax Act*, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act* and the *Softwood Lumber Products Export Charge Act, 2006* when references or appeals to the Court are provided for in those Acts" (emphasis added).

In the *TeleZone Six* cases, the Supreme Court considered the overlap of the process of judicial review of government decision making with tort or contract actions against the government in relation to a specific decision. The court found that the claims asserted in those actions, some of which were filed in provincial superior courts, were not precluded by section 18 of the FCA, since they did not transgress into the Federal Court's exclusive jurisdiction over judicial review of decisions of federal tribunals under section 18 of the FCA. In so finding, the court placed considerable emphasis on the explicit grant of concurrent jurisdiction in section 17, and the absence of express statutory language in section 18 that was sufficient "to oust the jurisdiction of the provincial superior courts."⁶¹ As Rothstein J stated in *Nu-Pharm Inc. v. Canada (Attorney General)*,

Section 17 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, gives the Federal Court concurrent jurisdiction over claims for damages against the Crown. Section 18 of the *Federal Courts Act* does not derogate from this concurrent jurisdiction. There is nothing in ss. 17 or 18 that requires Nu-Pharm to be successful on judicial review before bringing its claim for damages against the Crown.⁶²

This passage illustrates why the outcome in the *TeleZone Six* cases does not detract from the reasoning in *Domtar* as it applies to liability for tax under tax legislation. There is no such concurrent jurisdiction as between the Tax Court and other courts in respect of tax appeals, and the wording found in section 12 of the TCCA and subsection 152(8) of the ITA (and subsection 299(3) of the ETA) is clear in this regard. Unlike the wording in section 18 of the FCA, section 12 of the TCCA provides for the clear and explicit exclusive jurisdiction of the Tax Court over tax appeals (as opposed to the more restrictive exclusivity of the Federal Court's jurisdiction over specific remedies—prerogative relief—protected under section 18 of the FCA). Subsections 152(8) of the ITA and 299(3) of the ETA ensure that the ultimate tax assessment cannot be undermined by a collateral attack via a tort action, by providing that the assessment is valid and binding unless set aside within the appeal process under the Tax Court's exclusive jurisdiction.⁶³

The Court's Disapproval of Parallel Proceedings Related to Tax Liability

The *Domtar* decision, like many others in the long chain of cases relating to the Tax Court's exclusive jurisdiction,⁶⁴ rejected the prospect of an alternative process for

61 See, in particular, *TeleZone Inc.*, supra note 58, at paragraph 6; see also paragraphs 5 and 80.

62 2010 SCC 65, at paragraph 17. Nearly identical language is found in *Parrish & Heimbecker Ltd. v. Canada (Agriculture and Agri-Food)*, 2010 SCC 64, at paragraph 18. See also *TeleZone Inc.*, supra note 58, at paragraph 3, where Binnie J noted that Tax Court decisions are carved out of the section 18 regime and were not relevant to the appeals.

63 There is no equivalent deeming provision under the SLPECA.

64 See *Roitman*, supra note 12; *Parsons*, supra note 15; *Optical Recording Corp. v. Canada*, [1991] 1 FC 309 (CA); and *Main Rehabilitation Co. v. Canada*, 2004 FCA 403, to name a few.

the taxpayer to challenge a liability. The main difference between *Domtar* and many of these other cases is that the ground for the action was not the miscalculation of the amount owing, but rather that the charging provision was ultra vires the federal government.

Despite this distinction, the Federal Court of Appeal in *Domtar* found that the plaintiff was limited by the statutory recovery avenues provided in the SLPECA. The Federal Court of Appeal agreed that the language in section 41(1) of the SLPECA was broad enough to encompass a claim that the amount was not payable because the charging section was unconstitutional.⁶⁵ The refund provisions in the SLPECA were clear, providing the only avenue of appeal in respect of a liability under the SLPECA.

This reasoning applies equally to other tax legislation with exclusive appeal provisions, particularly refund provisions that establish exclusive mechanisms for the return of monies.⁶⁶ For example, sections 39 and 41 of the SLPECA are quite similar to the refund provisions under the ETA, previously considered by the Federal Court,⁶⁷ which have also been found to constitute a complete code for the recovery of amounts paid as tax to the Crown.⁶⁸ As a further example, the appeal provisions relating to an alleged overpayment of withholding tax under part XIII of the ITA have been found to constitute “a complete procedural code for the return of non-resident withholding taxes,”⁶⁹ thus precluding an action framed in unjust enrichment. A taxpayer cannot circumvent these statutory processes by choosing to launch an action instead. As previously mentioned, the decision in *Kingstreet*⁷⁰ provides no assistance

65 *Domtar*, supra note 6, at paragraph 34.

66 However, the fact that the *Domtar* case concerned a refund, as opposed to an amount that was actually owed, should not limit the application of the decision in the latter context. An entitlement to a refund is simply the flip side of a tax liability. The calculation of a refund itself requires a determination of the person's tax liability.

67 See, for example, *Federated Co-operatives Ltd. v. Canada*, 1999 CanLII 8383 (FC). Dubé J concluded that the ETA refund provisions established a complete code, and dismissed an action for recovery based on unjust enrichment. The decision was affirmed by the Federal Court of Appeal, but on different grounds: *Federated Co-operatives Ltd. v. Canada*, 2001 FCA 23. The provisions at issue in that case were very similar to SLPECA sections 39 and 41. At that time, ETA sections 68 and 71 provided:

68. Where a person, otherwise than pursuant to an assessment, has paid any moneys in error, whether by reason of mistake of fact or law or otherwise, and the moneys have been taken into account as taxes, penalties, interest or other sums under this Act, an amount equal to the amount of those moneys shall, subject to this Part, be paid to that person if he applies therefor within two years after the payment of the moneys. . . .

71. Except as provided in this or any other Act of Parliament, no person has a right of action against Her Majesty for the recovery of any moneys paid to Her Majesty that are taken into account by Her Majesty as taxes, penalties, interest or other sums under this Act.

68 *Michelin Tires (Canada) Ltd. v. Canada*, 1998 CanLII 8708 (FC); aff'd. 2001 FCA 145; and *British Columbia Ferry Corp v. Canada*, 2001 FCA 146, at paragraphs 42-43.

69 *Sentinel Hill No. 29 Limited Partnership*, supra note 12, at paragraph 14.

70 Supra note 24.

on this issue, since the court did not in its decision specifically address the process of recovery within an exclusive jurisdiction regime.

The Court of Appeal also held that it made no difference that there was no assessment of the refund in the *Domtar* case. Although section 12 of the TCCA refers only to the exclusive jurisdiction to hear and adjudicate “references and appeals,” the initiating application for a refund is necessarily part of the appeal process.⁷¹ The plaintiff in *Domtar* had not applied for a refund, and therefore had not commenced the refund and appeal process established in the SLPECA. The absence of any assessment by the minister was therefore simply a function of the plaintiff’s failure to engage the appeal process by initiating the refund application. The Federal Court of Appeal concluded that the plaintiff could not sidestep the SLPECA provisions by simply ignoring the refund and appeal process in that statute, and launching an action in the Federal Court that was explicitly precluded by section 39.⁷² In short, a person’s failure to engage the statutory appeal process cannot immunize a case from the implications of section 12 of the TCCA.⁷³

Although anchored in the wording found in section 17(1) of the FCA, the court’s disapproval of parallel proceedings in *Domtar* is consistent with the previous decisions of the Supreme Court of Canada in *Canada v. Addison & Leyen Ltd.*⁷⁴ and the Federal Court of Appeal in *Roitman*.⁷⁵ In *Addison & Leyen*, the court was alert to the prospect of litigation that purported to circumvent the exclusive jurisdiction of the Tax Court:

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.⁷⁶

71 *Riverside Concrete Ltd. Canada v. Canada*, [1995] 2 FC 309, at 327 (TD), where Rothstein J, as he then was, noted, “Parliament has established a process under the *Excise Tax Act* for taxpayers to claim refunds. That process commences with an application for refund. . . . Once a person makes the application envisaged by section 68, the Minister must consider it, and either accept or reject it in whole or in part. . . . However, if it is rejected, the applicant has available to it the review and appeal procedures to which I have referred.”

72 *Domtar*, supra note 6, at paragraph 35. This general approach finds support in the reasons of Binnie J in *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, supra note 52, where he concluded, at paragraph 41, that the plaintiff could not sidestep the exclusive jurisdiction of a decision-making body “by failing to ask the Minister for reconsideration or failing to exercise her right of administrative appeal.”

73 See also *Sorbara v. Canada (Attorney General)*, 2008 CanLII 61246, at paragraphs 17–20 (Ont. SCJ).

74 2007 SCC 33, at paragraph 11.

75 *Roitman*, supra note 12, at paragraph 22.

76 *Addison & Leyen*, supra note 74, at paragraph 11. Although the court made these remarks in addressing the judicial review process, its views on the integrity of the tax appeal process seem equally relevant to actions that substitute for a tax appeal, either in whole or in part.

Furthermore, in *Roitman*, the court struck an action for damages that encroached on the tax liability issue for the Tax Court,⁷⁷ explicitly disapproving of “parallel proceedings in the Federal Court and the Tax Court of Canada in respect of substantially the same underlying issue.”⁷⁸ The fact that the Supreme Court of Canada denied leave to appeal in *Roitman*,⁷⁹ considered together with its remarks in *Addison & Leyen*, suggests that the uniform jurisprudence confirming the Tax Court’s exclusive jurisdiction does not present an issue of public importance requiring the intervention of the Supreme Court.⁸⁰

Could the Same Result Arise Within Provincial Superior Courts?

In one sense, the decision in *Domtar* said nothing new. Section 12 of the TCCA establishes the Tax Court’s exclusive jurisdiction to hear and adjudicate the subject matter of charges and other amounts under the SLPECA. The exclusive jurisdiction of the Tax Court in such matters is analogous to its exclusive jurisdiction in respect of the liability for income tax, confirmed repeatedly by the court. Challenges to the basis of the liability can only be reviewed by the Tax Court within that appeal process. The decision in *Domtar* simply confirms that a challenge to the lawfulness of an assessment based on constitutional grounds is no different in this respect.⁸¹

There is nothing in the words of the relevant legislation that suggests that the Tax Court’s exclusive jurisdiction should be restricted when the issue concerns the constitutionality of the SLPECA itself. Indeed, the Tax Court can consider the constitutional invalidity, inoperability, or inapplicability of a charging provision in the context of a tax appeal, provided that the taxpayer complies with the requirement for constitutional notice,⁸² and that the challenge affects the validity of the assessment.⁸³

However, one cannot ignore the fact that one of the key principles in the *Domtar* reasoning was the exclusion of the Federal Court’s jurisdiction established by the words in section 17 of the FCA. As a court created by statute pursuant to section 101 of the Constitution Act, 1867, the Federal Court is subject to the express limitations within its enacting statute. Accordingly, section 17 can oust the jurisdiction of the Federal Court in respect of actions that encroach on the subject matter of tax

77 *Roitman*, supra note 12, at paragraphs 22-24.

78 *Ibid.*, at paragraph 22, quoting the decision in *Walker v. Canada*, 2005 FCA 393, at 13.

79 *Julius Roitman v. The Queen*, 2006 CanLII 41274 (SCC). As noted earlier (supra note 12), leave was also refused in three similar cases: see *Smith v. Canada (Attorney General)*, [2006] 2 SCR xii; *Sentinel Hill No. 29 Limited Partnership v. Canada (Attorney General)*, [2008] 2 SCR xi; and *Sorbara v. Attorney General of Canada*, [2009] 3 SCR x.

80 Unlike the issues arising in the more recent *TeleZone Six* cases. See further the comment of Binnie J in *TeleZone Inc.* quoted supra note 62.

81 *Domtar*, supra note 6, at paragraph 38.

82 TCCA section 19.2. See, for example, *Canada (Attorney General) v. Campbell*, 2005 FCA 420; and *Pilette v. Canada*, 2009 FCA 367.

83 *Pine Valley Enterprises Inc. v. The Queen*, 2010 TCC 324, at paragraphs 23 and 31; and *Faber v. The Queen*, 2007 TCC 177, at paragraph 17.

appeals.⁸⁴ However, section 17 of the FCA circumscribes only the jurisdiction of the Federal Court, and not that of provincial superior courts (judges of which are appointed under section 96 of the Constitution Act, 1867).

This leads to the next question: Is section 12 of the TCCA sufficient to effectively oust the jurisdiction of superior courts of the provinces to determine the constitutionality of federal tax charging provisions? If not, a plaintiff could potentially circumvent the federal court system entirely and bring a direct constitutional challenge of a charging provision in a civil proceeding in a provincial superior court. I would suggest that there is no clear policy reason to restrict the Tax Court's exclusive jurisdiction in respect of constitutional grounds, given that section 12 of the TCCA and the substantive taxing legislation do not purport to close all avenues of constitutional challenge. However, this assertion might be considered controversial by some constitutional experts. In order to explore this further, I next consider the impact of general constitutional jurisprudence.

CONSTITUTIONAL CHALLENGES, COMPETING JURISDICTIONAL SCHEMES, AND PROVINCIAL SUPERIOR COURTS

Unfortunately, transposing the reasoning articulated in *Domtar* to provincial superior courts is a complicated matter. Undoubtedly some would suggest that the decision would not apply at all to provincial superior courts, concluding that provincial superior courts can always entertain a constitutional challenge, whether or not the challenge relates to a tax liability. Historically, it seems that the provincial superior courts might agree. The general inclination of superior courts of the provinces to assume jurisdiction in a constitutional challenge of a tax provision⁸⁵ is illustrated by the majority decision of the BC Court of Appeal in *Longley v. Canada (Revenue)*.⁸⁶ The majority found that an application for a declaration that section 245 of the ITA (the general anti-avoidance rule, or GAAR) was constitutionally invalid could be heard in the BC Supreme Court.⁸⁷

84 Similarly, FCA section 18.5 provides that the Federal Court's jurisdiction over judicial review of decisions of federal boards cedes to that of a court that exercises jurisdiction over appeals provided under other federal statutes (such as TCCA section 12).

85 See, for example, Butler, supra note 3, at 869.

86 1992 CanLII 5961 (BCCA), cited with approval in *783783 Alberta Ltd. v. Canada (Attorney General)*, 2010 ABCA 226, at paragraph 26, on the broader and less contentious point of the provincial superior courts' ability to interpret federal legislation.

87 The majority decision held that the court had the jurisdiction to grant a declaration sought in a statement of claim filed in the BC Supreme Court that the new GAAR provision in ITA section 245 was of no force and effect because it allegedly breached the Charter. In dissent, though agreeing that the court could grant such a declaration, Southin JA held that the court should refuse to do so as a matter of judicial comity, given the Federal Court's special expertise in matters of federal taxation. See *Longley*, supra note 86, at paragraph 26. The *Longley* decision appears to have been tacitly approved in obiter dicta in *American Express Bank Ltd. v. The Queen*, 1995 CanLII 2579, at paragraph 31 (BCCA).

However, the *Longley* case was decided in 1992, and did not appear to fully consider all of the law surrounding the issue of the Tax Court's exclusive jurisdiction that had developed up to that point, or the effect of section 12 of the TCCA. In any event, the application of the decision may well be limited. The underlying issue in *Longley* did not appear to come within the Tax Court's jurisdiction at all: the action related to an allegation of misfeasance of office, where, unlike the situation in *Domtar*, there was no potential for any assessment from which the plaintiff could appeal.⁸⁸ Furthermore, it is significant that the more recent constitutional challenge to GAAR was advanced in the context of an assessment against specific taxpayers.⁸⁹ This seems entirely appropriate. As one superior court judge has noted, provincial superior courts are not in the business of granting declarations for the purpose of giving opinions or deciding issues solely in order to instruct other courts.⁹⁰ Any notion that a taxpayer must obtain a declaration from another court and then return to the Tax Court with that declaration⁹¹ in order to challenge an assessment seems unrealistic, and as discussed later in this article, unnecessary,⁹² given the Tax Court's jurisdiction.

While some might argue that the inherent jurisdiction of provincial superior courts necessarily permits those courts to determine the constitutionality of any federal taxing statutes,⁹³ it is worth testing that assertion in light of the decisions of the Supreme Court of Canada that consider other competing jurisdictional schemes.

Supreme Court of Canada Decisions on Competing Jurisdictional Schemes and Constitutional Challenges

The approach of the Supreme Court in considering the exclusive jurisdiction of tribunals provides a good starting point. In *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, Bastarache J stated (in separate reasons) that the exclusiveness of a tribunal's jurisdiction does not necessarily end simply because a party seeks a declaration that a legislative provision is of no force or effect:

88 There was no potential for assessment because it appears that the taxpayer was seeking a written confirmation that his proposed tax plan did not breach the ITA. He complained, among other things, that the minister had not formally assessed certain individuals to disallow certain deductions, thus precluding any tax appeal avenue. See *Longley v. The Queen*, 99 DTC 5549 (BCSC).

89 *Mathew et al. v. The Queen*, 2002 DTC 1637 (TCC). Although the case eventually went to the Supreme Court of Canada, the constitutional challenge to section 245 was not pursued beyond the Federal Court of Appeal.

90 See, for example, *Felsen Foundation v. Jabs Construction Ltd. et al.*, 98 DTC 6454 (BCSC).

91 See, for example, Butler, supra note 3, at 868.

92 Moreover, such a system could promote forum shopping and lead to an undesirable patchwork of inconsistent decisions from province to province, in an area of law that requires uniformity.

93 See, for example, Butler, supra note 3, at 866-70.

Jurisdictional issues must be decided in accordance with the legislative scheme governing the parties. In the case at bar, the Quebec legislature did not give the Tribunal exclusive jurisdiction to decide human rights issues. The legislature's intention to give the CAS exclusive jurisdiction is, however, explicit. I am therefore of the opinion that where there is a comprehensive administrative scheme, such as the one established by the *CAS Act* and the *Income Security Act*, that gives a specialized administrative body and that body alone the jurisdiction to apply and interpret that scheme, this administrative body will not lose its exclusive jurisdiction simply because a case raises a human rights issue or involves declaring a legislative provision to be of no force or effect.⁹⁴

These comments provide some support for the notion that the exclusivity of the Tax Court's jurisdiction does not end simply because the issue concerns the constitutional validity or applicability of a taxing provision. As the constitutional notice provisions in the TCCA clarify,⁹⁵ the Tax Court can "judge" a provision to be invalid, inoperable, or inapplicable and vacate the assessment accordingly, even if it cannot issue a declaration. Section 12 therefore could not be said to immunize tax legislation from constitutional challenges; it simply prescribes the forum and procedure for challenging a charging provision.

The Supreme Court's decision in *Kingstreet* itself recognized that while a person can seek the recovery of tax collected under a statute determined to be ultra vires, the form of proceeding of the constitutional attack can still be subject to legislative restrictions such as limitations legislation.⁹⁶ If a plaintiff can be barred from recovering an ultra vires tax by provincial limitations legislation, why should a grant of exclusive jurisdiction by Parliament not prescribe the forum in which a constitutional challenge must be made? A legislative scheme that routes constitutional challenges through the Tax Court does not violate the principle that legislation cannot purport to immunize itself by blocking all avenues of constitutional attacks established by the jurisprudence.⁹⁷

The notion that a constitutional challenge must adhere to the requirements of the applicable appeal procedure therefore does not appear to offend any constitutional principle, and indeed was recently reinforced by a decision of the Federal Court of Appeal in a tax collection context.⁹⁸ Furthermore, the Supreme Court of

94 *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, supra note 52, at paragraph 33.

95 TCCA section 19.2.

96 *Kingstreet*, supra note 24, at paragraphs 59-61.

97 See, for example, *Amax Potash Ltd.*, supra note 25; *Thorson v. Attorney General of Canada*, [1975] 1 SCR 138; and *Air Canada v. BC (AG)*, [1986] 2 SCR 539.

98 *Tennina v. Canada (National Revenue)*, 2010 FCA 25. In that case, the minister sought to quash the appellants' notice of appeal in respect of Federal Court "jeopardy orders" rendered under ITA subsections 225.2(1) and (2). In quashing the order, the court commented, *ibid.*, at paragraph 12, "[W]hile it is unquestionably open to litigants to challenge the constitutionality of a statute or the provisions of a particular enactment, characterizing an argument as one of constitutional invalidity does not create a right of appeal, where none otherwise exists."

Canada has recently confirmed the principle that tribunals with jurisdiction should decide all matters whose essential character falls within the tribunal's specialized statutory jurisdiction,⁹⁹ a principle that seems logically applicable to a statutory court such as the Tax Court.

So it is natural to next consider whether or not the reasoning in *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)* can be applied to the Tax Court's exclusive jurisdiction, so as to cover situations that involve a determination that a charging provision is of no force or effect, to the exclusion of provincial superior courts. In addressing this question, it is helpful to first consider the case law considering the Federal Court's exclusive jurisdiction to hear constitutional challenges to federal legislation. Given that the Tax Court is, like the Federal Court, a statutory court, this jurisprudence is a logical point of comparison.

Analogy to the Exclusive Jurisdiction of the Federal Court

A key decision on the jurisdiction of provincial superior courts with respect to constitutional challenges of federal legislation is *AG Can. v. Law Society of BC*¹⁰⁰ (herein referred to as "*Jabour*"). In *Jabour*, the Supreme Court of Canada found that the exclusive jurisdiction of the Federal Court under section 18 of the Federal Courts Act could not be construed as removing the ability of provincial superior courts to determine the constitutional validity of federal legislation based on a division-of-powers issue. A closer review of the reasoning exposes the difficulties of applying the decision to challenges to the constitutionality of a charging provision, particularly when considered against the subsequent decisions of the Supreme Court concerning the jurisdiction of specialized tribunals over constitutional issues.

The court in *Jabour* considered the issue in the context of a lawyer facing disciplinary action by the Law Society of British Columbia ("the law society") for advertising his services in a manner that allegedly constituted "conduct unbecoming a member" contrary to the Legal Professions Act. The applicant challenged the rulings of the law society in the Supreme Court of British Columbia, seeking a declaration that the rulings breached the federal Combines Investigation Act ("the CIA"). In response to an investigation of the alleged breach of the CIA, the law society launched its own action challenging both the applicability and the constitutional validity of the CIA.¹⁰¹ This gave rise to the issue of whether or not the Federal Court had exclusive jurisdiction to grant declaratory or injunctive relief against the Crown (and Crown bodies) in relation to the constitutionality of a federal statute.¹⁰²

99 *Conway*, supra note 55, at paragraph 30.

100 [1982] 2 SCR 307. See also *Canada Labour Relations Board et al. v. Paul L'Anglais Inc. et al.*, [1983] 1 SCR 147.

101 *Jabour*, supra note 100, at 320.

102 *Ibid.*, at 313.

The Supreme Court of Canada found that the BC Supreme Court had concurrent jurisdiction for two main reasons. First, denying the provincial superior courts of the ability to determine the validity of federal legislation would strip those courts of a judicial power fundamental to the constitution:

The Federal Court, as the successor to the Exchequer Court of Canada which was first established by Parliament in 1875, was established pursuant to the authority of s. 101 of the *Constitution Act* which provides “for the Establishment of any additional Courts for the better Administration of the Laws of Canada.” The expression “laws of Canada” has been settled as meaning the laws enacted by the Parliament of Canada, at least for the purposes of this appeal: *Thomas Fuller, supra, per Pigeon J.* at p. 707. It is difficult to see how an argument can be advanced that a statute adopted by Parliament for the establishment of a court for the better administration of the laws of Canada can at the same time include a provision that the provincial superior courts may no longer declare a statute enacted by Parliament to be beyond the constitutional authority of Parliament. Sections 17 and 18 of the *Federal Court Act* must, in the view of the appellants, be so construed. In my view Parliament lacks the constitutional authority to so provide. To do so would strip the basic constitutional concepts of judicature of this country, namely the superior courts of the provinces, of a judicial power fundamental to a federal system as described in the *Constitution Act*.¹⁰³

Second, and as a “more fundamental reason,” Estey J held that a finding otherwise would leave provincial superior courts in the position of applying federal laws without being able “to discriminate between valid and invalid federal statutes so as to refuse to ‘execute’ the invalid statutes.”¹⁰⁴ Shortly after rendering the decision in *Jabour*, the Supreme Court of Canada extended the same principles articulated therein to the context of a division-of-powers issue involving only the constitutional applicability of a statute, as distinct from its validity.¹⁰⁵ Ultimately, the same principles were applied again, though perhaps more controversially,¹⁰⁶ in the context of statutes challenged as breaching the Charter.¹⁰⁷

At first blush, it appears that the rationale articulated in *Jabour* would be applicable to cases otherwise falling under the exclusive jurisdiction of the Tax Court. After all, the Federal Court is, like the Tax Court, a statutory court subject to a legislative grant of power. Conversely, provincial superior courts are the “descendants of the Royal Courts of Justice as courts of general jurisdiction.”¹⁰⁸ Given this distinction,

103 Ibid., at 328, per Estey J.

104 Ibid.

105 See also *Paul L'Anglais Inc.*, supra note 100.

106 See, for example, Harry J. Wruck, “Federal Court Jurisdiction: Will the Bleeding Ever Stop?” (2008) 66:5 *The Advocate* 721.

107 *L.H. Lavers v. British Columbia*, [1990] 1 CTC 265 (BCCA).

108 *Jabour*, supra note 100, at 327, per Estey J.

could a plaintiff circumvent the Tax Court system entirely and bring a direct constitutional challenge of a charging provision to a provincial superior court?

I suggest not, for two different reasons. First, the application of the reasoning in *Jabour* must be considered in light of the relevant tax appeal context and subsequent decisions of the Supreme Court concerning the jurisdiction of specialized tribunals over constitutional issues. Second, the procedural aspects of tax cases are such that the constitutionality of a charging provision should not arise in civil proceedings before provincial superior courts, for practical reasons. These two aspects are explored in turn below.

Jurisdiction of Specialized Tribunals over Constitutional Claims and the Residual Jurisdiction of Provincial Superior Courts

The Concept of Narrow Residual Jurisdiction of Provincial Superior Courts

Dealing first with the general tax appeal context and the possible application of Supreme Court jurisprudence on the jurisdiction of specialized tribunals, I start by suggesting that the jurisdiction of superior courts can be limited in constitutional cases. One must remember that the purpose of section 12 of the TCCA is to ensure that tax appeals are to be resolved by the Tax Court as a specialized court (which was derived from a specialized tribunal),¹⁰⁹ and not by provincial superior courts. If a taxpayer were required to refer all non-constitutional issues to the Tax Court, but were then free to choose a provincial superior court to bring a constitutional challenge of the charging provision, the taxpayer would be given the option of bifurcating tax appeal proceedings. The Supreme Court of Canada has disapproved of interpretations of jurisdictional schemes that favour bifurcating claims in respect of constitutional issues.¹¹⁰ Indeed, the Supreme Court has recognized a tribunal's ability and authority to resolve constitutional issues linked to the matter before it.¹¹¹

Applying this approach to a constitutional challenge of a charging provision in a tax case, can the jurisdiction of a provincial superior court be restricted in respect of the constitutionality of a statute? The Supreme Court's reasoning in *Okwuobi v. Lester B. Pearson School Board*¹¹² suggests so. While far removed from any tax issues, the *Okwuobi* decision provides meaningful guidance in its refined articulation of the principles relevant to the scope of the jurisdiction of superior courts.

In the *Okwuobi* case, the court considered the claims of several plaintiffs launched in the Superior Court of Quebec, each seeking a constitutional declaration. Each of the plaintiffs was a parent of children affected by a decision regarding the child's right to minority language education. Each child had been denied eligibility for an

109 See, for example, Jacyk, *supra* note 1, at 665-66.

110 *Conway*, *supra* note 55, at paragraph 79.

111 *Ibid.*, at paragraph 78.

112 2005 SCC 16. I thank my colleague Alan Prefontaine for drawing my attention to this decision.

English-language program on the basis that the major part of the child's instruction in Canada had not been in English, a requirement of section 73(2) of the Charter of the French Language.¹¹³ The plaintiffs decided to apply directly to the Superior Court of Quebec for a general declaration that section 73(2) was invalid as violating section 23(2) of the Canadian Charter of Rights and Freedoms, rather than to pursue the available administrative appeals to the Administrative Tribunal of Quebec (ATQ).

The court found that the ATQ had jurisdiction over all questions of law, including constitutional issues, and that Parliament had clearly intended that this exclusive jurisdiction would include issues relating to the Canadian Charter.¹¹⁴ The court furthermore rejected the appellants' argument that they should be able to proceed in the Superior Court of Quebec simply because the tribunal in question could not grant injunctive relief or a formal declaration of invalidity. The ATQ could still determine the invalidity of legislation and rule on the individual claim. Furthermore, given that such a ruling would be subject to an appeal to a superior court, a full declaration of invalidity could be sought at that stage in any event.¹¹⁵ In so finding, the court concluded:

We are therefore of the view that the appellants did not have the right to bypass the ATQ by seeking injunctive and declaratory relief in the Superior Court. The ATQ clearly has jurisdiction to hear appeals from decisions of the designated person and, in the instant cases, from the review committee in respect of entitlement to minority language education. Moreover, the Quebec legislature intended this jurisdiction to be exclusive. Aside from certain specific exceptions to be discussed below, this Court, and all courts, should respect the clear intent of the legislature.¹¹⁶

The case involved a jurisdictional scheme where the superior court had the ability to consider the constitutional issue as the appellate court reviewing the tribunal decision. Nevertheless, the approach of the Supreme Court of Canada suggests that the exceptions to this type of exclusive jurisdiction were fairly narrowly defined. While the jurisdiction of the provincial superior courts over constitutional challenges cannot be eliminated, that jurisdiction may be very restricted in situations where a legislative scheme grants exclusive jurisdiction to an administrative tribunal or, presumably, a statutory court. To that end, the court stated:

113 RSQ, c. C-11.

114 *Okwuobi*, supra note 112, at paragraphs 37-40.

115 Could the same not be said of the Federal Court of Appeal hearing an appeal from the Tax Court? While FCA section 52(c)(i) limits the jurisdiction of the Federal Court of Appeal to dismissing an appeal or giving the decision that "should have been given" by the Tax Court, the notice provisions under section 57(1) of the same statute references the Federal Court of Appeal's ability to "judge" an act to be invalid. This constitutional notice provision is the same one that governs the process for the Federal Court, which, most would agree, can give declaratory relief relating to constitutional issues.

116 *Okwuobi*, supra note 112, at paragraph 38.

Superior courts may also retain residual jurisdiction to hear direct constitutional challenges to a legislative scheme, should the proper circumstances arise. Such a challenge would have to be distinguishable from the facts of the cases at bar in which the appellants have, in effect, attempted to obtain relief (the right to minority language education) by circumventing the administrative process and bringing their claims directly to the Superior Court. That said, the residual jurisdiction of superior courts cannot be entirely ousted by the legislature, in particular where recourse to such courts is necessary to obtain an appropriate and just remedy.¹¹⁷

The general approach of the Supreme Court of Canada in *Okwuobi* is not unlike that applied by the courts when addressing the issue of jurisdiction in tax cases, where they note the lack of overlap in the jurisdictions of the Tax Court with other courts.¹¹⁸ The reasoning in the *Okwuobi* case seems no less applicable in relation to the grant of exclusive jurisdiction to the Tax Court. The Supreme Court's treatment of the *Okwuobi* decision in a more recent case¹¹⁹ suggests that *Okwuobi* would not be distinguished where the exclusive jurisdiction in question is that of statutory court as opposed to a tribunal.¹²⁰

Constitutional Challenges of Charging Provisions in Provincial Superior Court: Unfinished Business?

The reasoning in the *Okwuobi* decision challenges the notion that provincial superior courts must always assume jurisdiction over any constitutional challenge of a statute, subject only to the ordinary requirements such as a proper factual context and standing on the part of the litigant making the constitutional challenge.¹²¹ Any inclination of the provincial superior courts to automatically assume jurisdiction to resolve such issues in a tax context, as exemplified in the *Longley* case, must be reconsidered.

117 Ibid., at paragraph 54.

118 See, for example, *Addison & Leyen*, supra note 74, at paragraph 11; see also *Main Rehabilitation*, supra note 64.

119 *Conway*, supra note 55, at paragraphs 30 and 76-79. Here again I emphasize the court's confirmation, *ibid.*, at paragraph 40, that the *Mills* test for constitutional jurisdiction of administrative tribunals was equally applicable to courts (see supra note 55).

120 However, one should note that *Okwuobi* is a Charter case that does not address the role of the superior court in respect of a division-of-powers argument as addressed in *Jabour*. While the courts have applied the reasoning in *Jabour* where the issue of constitutional validity arises from a challenge under the Charter, as opposed to an issue of division of powers, this application of the *Jabour* principle is not without controversy; see, for example, *Wruck*, supra note 106. Therefore, one cannot necessarily assume that the decision in *Okwuobi* would have been the same had the constitutional issue involved the division of powers as opposed to a Charter issue.

121 The requirement for standing is addressed in cases such as *Smith v. The Attorney General of Ontario*, [1924] SCR 331; *Minister of Justice (Can.) v. Borowski*, [1981] 2 SCR 575; and *Hy & Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 SCR 675. The requirement for a factual context is articulated in cases such as *MacKay v. Manitoba*, [1989] 2 SCR 357, at 361-62; *Danson v. Ontario (Attorney General)*, [1990] 2 SCR 1086, at 1101; and *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, at paragraph 28.

One must recall the specific rationale of the Supreme Court in *Jabour*—that the provincial superior courts could not be tasked with applying federal statutes that are constitutionally invalid. Yet the more recent *Kingstreet* decision contemplated the possible denial of an individual’s right of recovery of unconstitutional taxes for procedural reasons, such as a statutory limitation period. The Supreme Court therefore seems to accept circumstances where a provincial superior court will “enforce” a taxing statute,¹²² even if it is ultra vires the legislative competence of the enacting government, as long as avenues for constitutional challenges are not entirely blocked by the impugned legislation. Therefore, the reasoning underlying the *Jabour* decision may not necessarily provide a full answer to the issue of the jurisdiction of a provincial superior court in a tax context, where the constitutionality of a charging provision is at issue.

The Supreme Court of Canada has not yet resolved the issue of the Tax Court’s exclusive jurisdiction over any constitutional challenges, and it is hard to predict how the court will approach the topic. It is worth noting that the Supreme Court recently affirmed the *Jabour* principles in *Canada (Attorney General) v. McArthur*¹²³ (one of the *TeleZone Six* cases). In that decision, Binnie J stated:

This Court concluded that Parliament could not, by giving exclusive jurisdiction to the Federal Court over federal officials, deny the provincial superior courts their traditional subject matter jurisdiction over constitutional issues. In my opinion, the *Federal Courts Act* equally cannot operate to prevent provincial superior court scrutiny of the constitutionality of the conduct of federal officials. Section 101 of the *Constitution Act, 1867*, authorizes the creation of “additional Courts for the better Administration of the Laws of Canada.” The provincial superior courts retain their historic jurisdiction over the Constitution. This does not preclude concurrent jurisdiction over constitutional subject matters in the Federal Court, of course, but it is not and cannot be made exclusive. Accordingly, quite apart from s. 17 of the *Federal Courts Act*, the Ontario Superior Court had jurisdiction to deal with Mr. McArthur’s *Charter* claim.¹²⁴

While the *McArthur* decision, like the other *TeleZone Six* decisions, was not a tax case, it is difficult to find a clear rationale for distinguishing this passage as it relates to the Tax Court’s exclusive jurisdiction, given the categorical articulation of the constitutional principles. Furthermore, in the *TeleZone Inc.* decision, the Supreme Court reinforced the notion that Parliament’s ability to transfer jurisdiction by statute is subject to “constitutional limitations.”¹²⁵ Nevertheless, the approach in *Okwuobi* fits best the issue of the Tax Court’s jurisdiction over constitutional challenges of charging provisions, since it would not eliminate the “residual jurisdiction” of a superior

122 In the sense that the court will not require the reversal of the payment of tax where the person misses a limitation period for launching an action for recovery.

123 2010 SCC 63.

124 *Ibid.*, at paragraph 14.

125 *TeleZone Inc.*, supra note 58, at paragraph 45.

court, but would restrict the scope of its jurisdiction to what is absolutely necessary. The reasoning in *Okwuobi* is perhaps a signal to focus on practical considerations, rather than considering the issue in terms of the strict and broad constitutional principles reinforced in the *McArthur* decision.

Practical Limitations to the Residual Jurisdiction of Provincial Superior Courts

The second reason for suggesting that the constitutionality of a charging provision should not arise in civil proceedings in a provincial superior court is founded in the practicalities or procedural requirements of constitutional challenges as they relate to tax cases. As much as the *Okwuobi* decision supports a narrowing of the residual jurisdiction of provincial superior courts, there are also certain practicalities in tax cases that limit the easy application of the *Jabour* rationale to the question of the exclusivity of the Tax Court's jurisdiction over the constitutionality of a charging provision. At the very least, these practicalities should provide provincial superior courts with reasons to regularly decline to exercise a general jurisdiction over constitutional matters arising from their status as "descendants of the Royal Courts of Justice." Here I will analyze three related factors that serve to limit the residual jurisdiction of provincial superior courts: first, the courts' lack of opportunity to apply charging provisions; second, the issue of standing to raise constitutional challenges; and third, the possible requirement of a personal remedy in actions that seek declarations of constitutional invalidity.

Charging Provisions Are Generally Not Applied by Provincial Superior Courts

There are indeed reasons why, in a practical sense, a constitutional challenge of a tax charging provision should not generally arise in a provincial superior court. First and foremost, apart from criminal prosecutions for tax-related charges such as evasion, when would a provincial superior court be required, or permitted, to apply a charging provision under federal tax legislation such as the ITA or the ETA to determine a tax liability? The concern in the *Jabour* case regarding the court's enforcement of invalid federal legislation seems unfounded in this situation.

It is important here to distinguish charging provisions from other administrative or collection provisions in tax legislation.¹²⁶ Charging provisions that establish the initial tax liability of a person, whether constitutional or not, are not generally applied by the provincial superior courts in civil cases, at least not directly. A provincial superior court may, however, be called upon to consider the constitutional validity of other types of provisions in federal taxing legislation to enforce recovery of tax in provincial superior courts. A good example would be the deemed trust provisions

126 This distinction has not always been made in earlier attempts to address this issue, likely because the case law concerning the parameters of the Tax Court's exclusive jurisdiction was not fully developed at that time. See, for example, Butler, *supra* note 3, at 867.

under subsections 227(4) and (4.1) of the ITA, which grant the minister a “super-priority” for the recovery of payroll source deductions over all other creditors, including secured creditors. The constitutional validity of these provisions has been challenged in provincial superior courts, and such challenges have included arguments that are based on the division of powers.¹²⁷ Of course, the deemed trust provisions are directed at the collection of an amount already determined to be owing, and not the calculation of that liability.¹²⁸

In suggesting that provincial superior courts would rarely have occasion to enforce a tax charging provision, I must here distinguish criminal cases. One could envision a situation where a person charged with tax evasion accepts the penal provision as valid but seeks to challenge the validity of the charging provision establishing the liability that he or she is said to have evaded. In such a case, the criminal court is, in a sense, applying a charging provision in entering a conviction.¹²⁹ Criminal-law jurisprudence has long recognized a principle that the supremacy of the constitution dictates that no person can be convicted of a law that is unconstitutional.¹³⁰

One prominent case that requires closer attention in this regard is the *Lavers* decision.¹³¹ This was a civil case where the court addressed the constitutionality of a penalty provision, but in the context of certain criminal proceedings. In *Lavers*, the BC Court of Appeal considered the jurisdiction of the BC Supreme Court to grant a declaration that assessments for penalties following a conviction for tax evasion and the imposition of a criminal fine constituted a violation of the Charter. It was not, strictly speaking, a criminal proceeding. The Court of Appeal ultimately agreed with the lower court ruling¹³² on the jurisdiction issue, finding that the BC Supreme Court had jurisdiction to hear the petition (and presumably to grant the declaration sought).¹³³

This was an unusual case, however, and one that, for several reasons, has very limited application.

127 See, for example, *The Queen v. TransGas Limited et al.*, 93 DTC 5391 (Sask. CA); aff'd. [1994] 3 SCR 753.

128 The forum for enforcing deemed trust claims is often an insolvency proceeding or an interpleader or other proceeding properly filed in a provincial superior court.

129 There may be other unusual situations where a charging provision comes into play in a criminal proceeding. In *R v. Yung*, 2010 BCSC 1023, the accused challenged the constitutionality of the GST in the prosecution itself, alleging that the application of the tax to criminal defence services breached the Charter rights ensuring the fairness of a criminal trial. In this scenario, the alleged impact of the tax on the ability of the defendant's right to counsel and fair trial was raised as an application within the criminal proceeding before the BC Supreme Court. Irrespective of its relative merit, such a challenge was necessarily before the superior court of the province, falling within its jurisdiction over criminal proceedings.

130 See, for example, *R v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295.

131 *Supra* note 107.

132 *L.H. Lavers et al. v. Min. of Finance (BC) et al.*, [1985] 2 CTC 19 (BCSC).

133 *Lavers*, *supra* note 107, at 270-71 and 283.

First, as much as the *Lavers* case concerned a civil action in which the applicant sought a declaration that the civil penalty assessments provision was constitutionally inapplicable, the action was brought in a predominantly criminal context. The only Charter right that was allegedly breached by the penalty assessment was section 11(h)—the right not to be tried or punished for an offence for which one has previously been punished (so-called double jeopardy). The very matter at issue in *Lavers* was whether a penalty assessment was, by its nature, a form of criminal punishment that followed a previous criminal conviction. Furthermore, the court was required to consider, by extension, a recent trio of decisions from three different appellate courts in criminal cases¹³⁴ that had decided the question in reverse, holding that a criminal prosecution was not precluded by the previous imposition of a penalty assessment. There could be no question of the courts' jurisdiction in these other three cases, since the issue arose within criminal proceedings. It is therefore not surprising that the BC Court of Appeal in *Lavers* entertained the question, since the constitutional issue was so intricately linked to the criminal prosecution and the question of double jeopardy.

It is also worth noting that the *Lavers* decision was rendered prior to the enactment of the TCCA and specifically section 12. One might expect that with the advent of section 12 of the TCCA, a provincial superior court might distinguish *Lavers* and look intently at the issue of the court's jurisdiction in similar circumstances. As mentioned earlier, any suggestion that a taxpayer must first seek a declaration from a provincial superior court, which it must then bring to the Tax Court,¹³⁵ would invoke the type of artificial process previously rejected by the courts,¹³⁶ and would, in any event, promote bifurcation of proceedings.

Having made the distinction between charging provisions and other provisions in tax legislation, one can see that the caution in the *Jabour* case—that superior courts cannot be tasked with applying unconstitutional statutes—is generally not warranted in the case of charging provisions found in tax legislation with a self-contained appeal system. To the extent that the TCCA places limitations on the venue for constitutional challenges of charging provisions, it does not, in a practical sense, truly strip superior court judges of any fundamental power.

Constitutional Challenges of Charging Provisions Would Require Standing

The second practicality that operates against a constitutional challenge in a provincial superior court in a tax case is the element of standing. There is no reason to

134 *The Queen v. Ferreira*, [1988] OJ no. 2258 (CA); *Yes Holdings Ltd. and Yesmaniski v. R* (1987), 57 Alta. LR (2d) 227 (CA); 48 DLR (4th) 642; and *R v. George's Contracting Ltd. and Cloarec* (1988), 24 BCLR (2d) 175 (CA).

135 See, for example, Butler, *supra* note 3, at 868, focusing on the remedial limitations of the Tax Court.

136 See, for example, *Felsen Foundation v. Jabs Construction Limited*, *supra* note 90.

think that the ordinary requirements of standing to make a constitutional challenge would be excused in a tax case.¹³⁷ Accordingly, a person attempting to launch a constitutional challenge of a charging provision in tax legislation, for which appeals are covered by section 12 the TCCA, must first establish the standing to challenge that provision.

When considered in these terms, the issue of the Tax Court's exclusive jurisdiction comes into clearer focus. There is an automatic conundrum that precludes a constitutional challenge of a charging provision from reaching a court other than the Tax Court in a civil context. If the individual litigant cannot meet the standing requirement, that person cannot advance the constitutional argument in any court. Conversely, if the taxpayer's own tax liability is affected by the challenged provision, the taxpayer will likely have the standing to launch a constitutional attack on the charging provision.¹³⁸ However, a taxpayer having such standing would, by definition, almost certainly have an avenue for appealing an assessment, or initiating a refund process, where that charging provision was brought into play. This would compel the taxpayer to proceed with a tax appeal in the Tax Court. The taxpayer could not seek to challenge the provision after failing to avail itself of an appeal of the assessment, or "sidestepping"¹³⁹ the objection and appeal process altogether. The jurisdiction of a superior court would not expand simply because the taxpayer had not availed itself of an appeal process in another court.¹⁴⁰

Constitutional Challenges of Charging Provisions May Require a Personal Remedy

A third practicality operating against a constitutional challenge in a provincial superior court in a tax case, related to the issue of standing, is the requirement of a personal remedy. Recent jurisprudence suggests that a litigant bringing a constitutional challenge may need to demonstrate an entitlement to a personal remedy. As mentioned earlier, the Supreme Court of Canada confirmed in *Kingstreet* that personal relief such as restitution or damages, which effectively translated to the recovery of ultra vires taxes, could properly be struck out as a personal remedy if barred by limitations legislation. Consequently, it may not be open to a litigant to bring an action for a general declaration regarding the constitutionality of a charging provision

137 See *Stanley J. Tessmer Law Corporation v. The Queen*, 2009 TCC 104. There may be some question as to whether or not a taxpayer would be entitled to challenge a charging provision on the basis that it constituted a breach of the Charter rights of third parties. This was the issue in *Stanley J. Tessmer*. An appeal from this decision has been filed to the Federal Court of Appeal.

138 See *Stanley J. Tessmer*, *ibid.*

139 The description used by Binnie J in *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, supra note 52, at paragraph 41, and similar to that used in *Domtar*, supra note 6, at paragraph 35.

140 *Roitman*, supra note 12, at paragraph 26; *Domtar*, supra note 6, at paragraph 35; and *Merchant Law Group*, supra note 29, at paragraph 47. This also seems to be the general sentiment of the decision of the Supreme Court of Canada in *Okwuobi*, supra note 112.

where there is no prospect of personal relief to that litigant. This is particularly significant for a tax case since, logically, the personal remedy or practical effect to the plaintiff would relate to a tax liability.

Once again, it is useful to look outside the realm of tax law to put this point into clearer focus. The Supreme Court of Canada's decision in *Ravndabl v. Saskatchewan*,¹⁴¹ while not directly on point, demonstrates that one cannot assume that personal relief in the form of the return of ultra vires taxes would automatically follow a declaration that a charging provision under which that tax was paid was ultra vires.¹⁴² The *Ravndabl* decision clarified that an action for a declaration could survive on its own, even if personal remedies were barred, but only if the declaration itself could result in a practical effect to the plaintiff. The *Ravndabl* decision also illustrates that a person launching a constitutional challenge may be required to demonstrate that he or she would be entitled to a personal remedy as a result of such a challenge.

In *Ravndabl*, the Supreme Court considered the action of a widow who had lost her pension benefit upon remarriage. While remedial legislation had been enacted to protect benefits in such cases (thus presumably bringing the legislation in line with equality rights under section 15 of the Charter), the plaintiff was not covered by that remedial legislation because she had remarried prior to the date on which the equality provisions of the Charter came into force. The plaintiff claimed that her exclusion from the remedial legislation itself breached her section 15 rights, and initiated an action challenging the amending legislation. She also sought a declaration that the limitations legislation was "constitutionally inapplicable to [her] claims for personal relief,"¹⁴³ in that it precluded her from obtaining relief in respect of allegedly invalid legislation, and thus breached her section 15 rights. In addition to the declaration of constitutional invalidity, she sought an order reinstating the benefits and awarding damages and interest.¹⁴⁴ The action was struck out by the lower court.

On appeal to the Court of Appeal of Saskatchewan, the majority allowed the appeal but ordered the reinstatement of only the claim for declaratory relief under section 52 of the Constitution Act, 1982, finding that the claims for personal relief were barred. The Supreme Court of Canada agreed that the request for relief of damages and reinstatement were properly struck out as personal remedies that were barred. However, it agreed with the Saskatchewan Court of Appeal that the entire action ought not to be struck out. The court left the trial judge to determine what

141 2009 SCC 7.

142 I thank Graeme King for his thoughts in this regard.

143 *Ravndabl*, supra note 141, at paragraph 2.

144 The declarations sought were that the pension benefits legislation was "of no force or effect to the extent that it breaches [the plaintiff's] rights under the *Canadian Charter of Rights and Freedoms*" and that the limitations legislation was "constitutionally inapplicable to the appellant's claims for personal relief, including damages, reinstatement and other monetary remedies." *Ibid*.

other relief flowing from section 52 of the Charter could be awarded that might “benefit” the plaintiff.¹⁴⁵

What lessons can be learned from this decision? The approach in *Ravndabl* seems to suggest that the court is unlikely to allow an action to proceed where it puts only the constitutionality of that provision at issue, unless there is some potential effect on the specific litigant. If the rationale in the *Ravndabl* case were to be applied to a tax context, the likely result would be the dismissal of the entire action. Since *Ravndabl* involved the application of the Charter in a non-tax situation, there was a myriad of remedies that could flow from section 52 or 24 of the Charter. The action in *Ravndabl* was therefore salvaged by the possibility of a Charter remedy under section 24 that might benefit the plaintiff. The Supreme Court highlighted the plaintiff’s argument that the amending legislation was “underinclusive.”¹⁴⁶ If the trial judge were to issue a declaration stating that the remedial legislation was unconstitutional as underinclusive, and requiring that the legislation be read more broadly to conform with the Charter, the court could conceivably read in words to make the legislation Charter-compliant in a manner that would effectively include the plaintiff. This was left to the trial judge to sort out. Therefore, given the nature of the legislation at issue and the specific declaration sought by the plaintiff in *Ravndabl*, it was still possible that the declaration itself could result in a practical effect to the plaintiff, even if the personal remedies were barred.

Conversely, in a tax case, the only relief flowing from a declaration that a tax is unconstitutional is the return of the taxes paid.¹⁴⁷ For example, the plaintiff in *Domtar* sought a declaration that section 18 of the SLPECA was ultra vires. The only possible personal relief that could benefit the plaintiff was a return of the monies. Therefore, in contrast to the situation in *Ravndabl*, the only relief flowing from the declaration sought in *Domtar* was a form of personal relief that was otherwise precluded by the legislative bar in section 39 of the SLPECA.¹⁴⁸ The action in *Domtar* therefore could

145 Ibid., at paragraph 26. It is doubtful that the Supreme Court meant that the plaintiff could potentially share in other monetary awards that might be fashioned under section 24 of the Charter, such as a collective damage award or an order requiring the government to return all money to all those ever affected under the applicable statute. These could also be forms of “personal relief” that should otherwise be subject to the legislative bar affecting the specific claim of the plaintiff. That result could contradict the reasoning in *Kingstreet*, or at least render meaningless the application of limitations legislation in *Kingstreet*.

146 *Ravndabl*, supra note 141, at paragraph 27.

147 *Canada (Attorney General) v. Hislop*, 2007 SCC 10. Lebel and Rothstein JJ for the majority of the court observed, *ibid.*, at paragraph 108, that where the Crown had collected ultra vires taxes, “there can only be one possible remedy: restitution to the taxpayer.”

148 The availability of personal relief appears to be what the Federal Court of Appeal was alluding to in *Domtar*, supra note 6, at paragraph 30, when it emphasized that the plaintiff’s main objective was to recover the money, and that there was no reason to believe that the plaintiff would have pursued the claim if there were no prospect of recovery. Considered in isolation, this observation might seem strange. The “motive” of the taxpayer in bringing an action ought not to affect the court’s jurisdiction. However, the significance of this point is that the only possible personal relief that could benefit the plaintiff (and the only one that was sought) was a return of the monies if SLPECA section 18 was declared ultra vires.

not proceed at all. Before the plaintiff could proceed with a cause of action for the return of purportedly unauthorized taxes, it would have to first establish that the tax was indeed unauthorized, a matter that is still subject to section 12 of the TCCA.¹⁴⁹

The Limited Remedial Scope of the Tax Court: A Factor in Constitutional Cases?

Given that the availability of a personal remedy (or a personal “effect” to the challenging party) may be a required component of a constitutional challenge, the scope of the Tax Court’s remedial regime must be considered next. Can a taxpayer be forced to proceed to the Tax Court, which cannot grant a constitutional remedy if a charging provision is indeed *ultra vires*, and yet be foreclosed from declaratory relief from another court if he or she does not proceed to the Tax Court?

Despite the limited remedial capacity of the Tax Court, I suggest that this is so. A few observations about the Tax Court remedial capacity are in order. While Tax Court judges have occasionally questioned whether or not the Tax Court has the jurisdiction to formally issue a declaration under section 52 of the Constitution Act,¹⁵⁰ it is doubtful that it does. The remedies available to the Tax Court in an appeal are carefully prescribed in the tax legislation,¹⁵¹ and are limited to vacating or varying¹⁵² specific assessments or referring the assessment back to the minister for reconsideration. Furthermore, the constitutional notice provision in the TCCA does not contemplate a request for a constitutional remedy, a component that is contemplated in other constitutional questions legislation.¹⁵³ Given this legislative circumscription, the Tax Court’s remedial scope is unlikely to be expanded by case law.¹⁵⁴ This is so despite the fact that the Supreme Court of Canada has recently recognized and reinforced the ability of tribunals (and thus, logically, specialized courts) to grant remedies under section 24 of the Charter.¹⁵⁵

The Tax Court has the basic power to issue procedural remedies such as the exclusion of evidence based on a Charter breach,¹⁵⁶ even though that remedy may

149 *Sorbara*, supra note 73, at paragraphs 40-42 and 48; appeal dismissed, supra note 12.

150 See, for example, *Chevalier v. The Queen*, 2008 TCC 11, at paragraph 79.

151 ITA subsection 171(1); ETA subsection 309(1); and SLPECA section 61.

152 The term “varying” is used only in ITA subsection 171(1).

153 See, for example, BC and Manitoba legislation: Constitutional Question Act, RSBC 1996, c. 68, sections 8(1) and (2)(b); Constitutional Questions Act, CCSM, c. C180, sections 7(1) and (2).

By way of comparison, FCA section 57 also makes no reference to a request for a constitutional remedy, and yet the Federal Court would not be as restricted in terms of remedies as the Tax Court.

154 See, for example, *L. Lamash Estate v. MNR*, [1990] 2 CTC 2534, at 2544-45 (TCC).

155 *Conway*, supra note 55, at paragraphs 81, 82, and 103.

156 The Tax Court can order the exclusion of evidence in a non-Charter context: see *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46, at paragraphs 28 and 58. Given that finding, it appears that the section 24(2) remedy is one exception to the rule. See also *O’Neil Motors Ltd. v. R*, [1996] 1 CTC 2714 (TCC), where Bowman J vacated an assessment on the basis that the evidence obtained in breach of section 8 of the Charter was necessary to the Crown’s position.

be of limited significance.¹⁵⁷ However, remedies beyond those that are specific to either the assessment or the procedural aspects of the tax appeal itself would likely not be the kind of remedy that would fit within the statutory framework of the Tax Court, an important factor in determining the extent of a tribunal's powers over constitutional relief.¹⁵⁸ In discerning the legislative intent with respect to Charter remedies, an exercise required by the court,¹⁵⁹ the legislative circumscription of remedies seems determinative.

Yet the Tax Court's inability to specifically grant other forms of Charter relief is beside the point. The Tax Court certainly has the ability to consider a constitutional issue, including whether or not a charging section is invalid on the basis of the Charter, or on the basis of the division of powers. It can then set aside an assessment on the ground that the charging provision is invalid, inoperable, or inapplicable,¹⁶⁰ thus granting a remedy that fits within its statutory scheme.¹⁶¹

There may be some concern where the challenge is not to a charging provision but rather to a credit provision (such as the child tax benefit) that is attacked as underinclusive. This type of challenge requires the scrutinizing court to determine whether the legislation should extend the benefit in order to accord with the Charter, highlighting the Tax Court's limited remedial scope. This issue has led some to the conclusion that the Federal Court is the more appropriate venue,¹⁶² since it has the ability to "read in,"¹⁶³ where it is the omission in the legislation that breaches the Charter. Whether or not this nuance may require differentiation between different

157 In the *O'Neil Motors* case, supra note 156, the minister bore the burden of establishing the validity of reassessments that had been issued beyond the ordinary statute-barred date. Both the Tax Court and the Federal Court of Appeal noted the Crown's apparent admission that excluding the evidence in that case was effectively fatal to its ability to meet the minister's burden. See *O'Neil Motors Ltd. v. R.*, [1998] 3 CTC 385, at paragraphs 8 and 10-11 (FCA). However, the exclusion of evidence may have a limited effect in most cases, where the taxpayer bears the burden of disproving the assessment. Indeed, both courts were emphatic in noting that the remedy of vacating the assessment would be extreme.

158 *Conway*, supra note 55, at paragraphs 82 and 85. It should be noted that in *O'Neil Motors*, the trial judge specially noted that the "Charter relief" ultimately granted—vacating the assessments—was specifically authorized under the ITA: *O'Neil Motors Ltd.*, supra note 156, at 2732, quoted by the Federal Court of Appeal in *O'Neil Motors Ltd.*, supra note 157, at paragraph 10.

159 See *Conway*, supra note 55, at paragraph 82.

160 *Campbell*, supra note 82, at paragraph 23; and *Domtar*, supra note 6, at paragraph 38.

161 *Conway*, supra note 55, at paragraphs 82 and 85. See also *Mercier v. MNR*, 92 DTC 1693 (TCC), where the Tax Court judge "read out" the offending portion of the legislation in allowing the appeal. However, the decision was overturned on appeal on the substantive constitutional issue itself: *The Queen v. Mercier*, 97 DTC 5081 (FCTD).

162 See Butler, supra note 3, at 863-65.

163 See, for example, *Schachter v. Canada*, [1992] 2 SCR 679. See *Flint v. MNR*, [1991] 1 CTC 2365, at 2370-71 (TCC), expressing doubt about the Tax Court's ability in this regard, and compare *Rosenberg et al. v. Canada (Attorney General)*, 98 DTC 6286, at 6293 (Ont. CA), where the Ontario Court of Appeal applied the "reading in" approach.

types of constitutional challenges is an interesting point. However, the distinction between a challenge to the vires of a charging provision and a challenge to a credit provision that is underinclusive did not seem to concern the Federal Court of Appeal in a recent case concerning the extent of the personal tax credit.¹⁶⁴ In dismissing the challenge, the court noted that the taxpayer was “not entitled to the [tax credit] which she was denied.”¹⁶⁵ This hinted at the potential remedy had the challenge been successful—that is, vacating or setting aside the assessment to the extent of the disallowance of the credit.

In any event, cases where legislation is attacked as underinclusive are tricky, since they bring into question the extent to which the court can effectively legislate in place of Parliament, a serious intrusion into the purview of the legislative branch of government.¹⁶⁶ This is a fine line for any court reviewing a constitutional challenge in any circumstances. The fact that this type of challenge would test a court’s limits to grant remedial relief is therefore a problem that is not unique to the Tax Court.

Ultimately, the Tax Court’s limited remedial capacity does not itself present a real problem for its jurisdiction over constitutional challenges of charging provisions. True, if the Tax Court were to find that any provision were invalid or inoperable without a declaration, it would arguably leave the legislative provision intact, to be potentially applied to other taxpayers. However, it is unlikely that the government would continue to issue and defend assessments under a charging provision judged to be constitutionally invalid within a specific tax appeal, after having exhausted the avenues for resolving the issue in a higher court. After all, even a declaration does not actually order a government defendant to do anything; yet it is normally obeyed when it identifies a default of the government’s duties under the Charter.¹⁶⁷

However, even if the Crown technically could or did continue to apply the provision judged to be invalid or inoperable by the Tax Court, this is perhaps the type of situation contemplated by the Supreme Court in the *Okwuobi* case, where the residual discretion of another superior court to grant declaratory relief might come into play. An attempt to continue to apply a tax that has been conclusively and finally determined to be ultra vires might come within the court’s words in *Okwuobi* with reference to the role of superior courts, “where recourse to such courts is necessary to obtain an appropriate and just remedy.”¹⁶⁸ Ultimately, the Tax Court’s limited remedial capacity ought not to overshadow the more important aspects of constitutional challenges, such as the requirements of standing and personal remedy or effect.

164 *Pilette*, supra note 82.

165 *Ibid.*, at paragraph 3.

166 Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell) (looseleaf), vol. 2, at 40-17.

167 *Ibid.*, at 40-37.

168 *Okwuobi*, supra note 112, at paragraph 54.

CONCLUSION: THE FUTURE AND GENERAL PRINCIPLES

Putting the criminal context aside, there is little room for provincial superior courts in determining the constitutionality of a charging provision in civil proceedings where section 12 of the TCCA is engaged. The issue has not yet been the subject of focused analysis by the courts.

The Ontario Court of Appeal recently had occasion to make passing commentary on the superior court's ability to consider the constitutionality of a taxing provision affecting the taxpayer's liability (though not a charging provision per se) in its 2009 decision in *Sorbara v. Canada (Attorney General)*.¹⁶⁹ In striking the action, the court found that there was no constitutional claim underlying the action, and thus no dispute that the "unchallenged authority of the provincial Superior Court to adjudicate constitutional claims" was both imprecise in scope (understandably so) and in obiter.¹⁷⁰ Given that this was the same court that determined that the Ontario Superior Court had no jurisdiction to entertain an action seeking the return of withholding tax paid in error,¹⁷¹ these comments in *Sorbara* suggest that the provincial superior courts still distinguish between "ordinary" tax cases and those where a constitutional issue has been raised.

The Federal Court of Appeal made similar allusions in addressing the *Kingstreet* decision in *Merchant Law Group v. Canada Revenue Agency*.¹⁷² While striking the actions filed in the Federal Court and rejecting the submission that *Kingstreet* created a new, sweeping constitutional remedy, the Federal Court of Appeal stated that *Kingstreet* did not apply to permit the action because the claim did not "seek the recovery of GST under an *ultra vires* provision."¹⁷³ Once again, this seems to demonstrate an instinctive tendency to treat constitutional tax cases differently.

Of course, the courts in *Sorbara* and *Merchant Law Group*, having both struck the actions, had no reason to consider the detailed remarks of the Supreme Court of Canada in *Okwuobi* concerning the more restrictive concept of the superior courts' "residual" jurisdiction over constitutional issues when there are competing jurisdictional schemes at play. So it is difficult to anticipate where the courts will end up on this issue. However, on the basis of the analysis of the jurisprudence and relevant principles, one can draw the following conclusions:

1. There is a strong argument that superior courts other than the Tax Court have a very limited jurisdiction to resolve an issue of the constitutionality of a charging provision within tax legislation that provides for a tax appeal system that is subject to the Tax Court's exclusive jurisdiction. Any residual

169 *Sorbara*, supra note 12.

170 *Ibid.*, at paragraph 5.

171 *Sentinel Hill No. 29 Limited Partnership*, supra note 12.

172 *Merchant Law Group*, supra note 25.

173 *Ibid.*, at paragraph 22.

jurisdiction of provincial superior courts in this regard should be narrowly defined. The reasoning in the *Jabour* case would not dictate that provincial superior courts can hear constitutional challenges of charging provisions. The legislative provisions establishing the Tax Court's exclusive jurisdiction do not preclude avenues for constitutional challenge but, at most, prescribe the proper avenue for such challenges.

2. A constitutional challenge to a charging provision requires the availability of a personal remedy for the plaintiff, as well as standing to raise the constitutional challenge. The practical implications in tax cases are such that even if superior courts other than the Tax Court were inclined to both find and exercise a jurisdiction to consider the constitutionality of a charging provision in a civil proceeding, it is unlikely that there would be many occasions, if any, for such courts to do so.
3. Given the dynamics of tax appeals, there are convincing reasons for superior courts to decline any residual jurisdiction they may find in civil matters where a charging provision from tax legislation that is subject to section 12 of the TCCA is being challenged on a constitutional basis.
4. The Tax Court appeal provides an adequate avenue for the resolution of the constitutionality of a charging provision. While the remedies that the Tax Court can grant are limited, the remedies available to the Tax Court are relevant to and adequate for its mandate, which is to determine a tax liability within appeals from assessments and references.
5. There is no need, or arguably even room, to expand the Tax Court's remedial scope to include constitutional remedies such as declarations under section 52 of the Charter or other remedies under section 24 of the Charter, other than procedural ones such as the exclusion of evidence. While the Tax Court can vary an assessment on the basis that a provision is ultra vires and thus void and of no effect, the Tax Court would not have the ability to render a declaration to that effect. However, the residual jurisdiction of other superior courts would ensure that a charging provision that is conclusively and finally judged to be ultra vires could not be continuously applied for the ongoing recovery of an illegal tax.

It should not be surprising that a constitutional challenge of charging provisions in tax legislation would proceed in a manner different from constitutional challenges of other statutes. That is the very nature of any tax litigation in Canada, which has long been recognized as an area of the law requiring a specialized court.