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JP MORGAN — A ROAD MAP LEADING IN THE WRONG DIRECTION?

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It's important not to lie to others; it's more important not to lie to yourself. So let's be honest: when the Prothonotary's office of the Federal Court ("FC") released its decision in *JP Morgan*,[1] I thought it was wrong and I told everyone who wanted to discuss it that I thought so. When the FC upheld the Prothonotary's decision,[2] everyone smirked and said to me, "Told you so". So when the Federal Court of Appeal ("FCA") reversed the FC,[3] I took great satisfaction in smirking and telling everyone, "Told you so".

But now, on reflection, I think I was wrong: the Prothonotary was right and the FCA was wrong. Or at least its reasoning was wrong, although it may have reached the right result. Or maybe not. Perhaps I should start from the beginning.

In *JP Morgan*, the taxpayer was a Canadian corporation that apparently paid management or administrative fees to an affiliated company in Hong Kong.[4] The Minister of National Revenue assessed the taxpayer under paragraph 227(10)(*d*) in Part XIII of the *Income Tax Act*[5] for 2002 to 2008. Under that paragraph, the Minister "may" at any time assess for a failure to withhold tax on amounts paid to non-Canadian residents. In this case, the Minister took the position (which I understand is disputed by the taxpayer) that the Hong Kong affiliate was subject to tax on the fees under paragraph 212(1)(*a*) and, therefore, the taxpayer was required to withhold under subsections 215(1) and (6).

The taxpayer felt that assessing from 2002 to 2004 was contrary to the Minister's previously announced policy in respect of how far back a taxpayer would be assessed for a failure to withhold. The taxpayer applied for judicial review to quash the Minister's decision to assess for 2002 to 2004. That, however, is not a completely accurate way of stating the relief that the taxpayer was seeking. The actual relief sought in the application for judicial review was for the assessments for those years to be vacated.

The FCA issued a long, detailed set of reasons discussing applications for judicial review in tax matters. In essence, the same reasons are a road map leading through the landmines that may derail a judicial review application. The essence of the reasons was that where section 18.5 of the *Federal Courts Act*[6] applies, no judicial review is available. That section says that where a federal tribunal's decision may be appealed on its merits to a court, then that decision cannot be the subject of judicial review. The purpose of this provision, in my opinion, is to say that in such situations Parliament has decided that the merits take precedence over the process: if the decision is correct, then how the tribunal got to the decision is irrelevant; if the decision is wrong, then the court will say so on appeal, and so no harm comes from the method by which the tribunal got to the decision, no matter how bad its methodology may have been. This point was stated clearly and succinctly in *Webster*,[7] where the Court said:

> [21] I would add that the right to appeal an income tax assessment to the Tax Court is a substantial one. The mandate of the Tax Court is to decide, on the basis of a trial at which both parties will have the opportunity to present documentary and oral evidence, whether the assessments under appeal are correct in law, or not. If the assessments are incorrect as a matter of law, it will not matter whether the objection process was flawed. If they are correct, they must stand even if the objection process was flawed.

On paper, this would seem to be a complete answer to JP Morgan's judicial review application. However, as I said earlier, now I am not so sure, for four reasons.

Minister Had Discretion

The FCA held that the Minister had no discretion in assessing all the years in issue:

> [109] In my view, in these circumstances, the Minister did not exercise any discretion independent of the assessment. Therefore, there was no discretion that could be abused. The word "may" in subsection 227(10), the authority for the assessment here, does not vest the Minister with a general, sweeping discretion not to assess tax. Rather, it allows the Minister to forego making a formal assessment of Part XIII tax in situations where the tax was properly withheld and remitted.

This, with respect, is clearly wrong: the word "may" is defined in the *Interpretation Act*[8] as being permissive, not mandatory. Even if, in the context of paragraph 227(10)(*d*), the word "may" is imperative (highly unlikely, but I suppose not impossible), the Minister still had discretion. In *Distribution Canada Inc. v. Minister of National Revenue*,[9] a group of Canadian retailers applied to the FC for an order forcing the Minister to enforce the *Customs Act* and Customs Tariff by charging tariffs to the last dollar on all items purchased by Canadian shoppers going across the US border, buying gas, food, or other items, and coming back into Canada. The Minister had been operating under a policy of not charging duties on these items, so as not to cause a huge lineup at border crossings. The retailers felt this was hurting their businesses and applied to force the Minister to charge duties. The legislation in question was worded so as to require the shoppers to pay duty — there was no discretion involved.

Yet the FCA held that the Minister did have a discretion:

> [29] With regard to the appellant's argument that the integrity of the revenue collection must be maintained and that a system of voluntary assessment might be established, there is evidence that the respondent is conscious of his responsibilities under the *Customs Act*. The difficulties he faces in the implementation of the Act represent valid considerations to be resolved if the enforcement is to be proceeded with. In a meeting held with the president of the appellant, in December 1989, the respondent indicated he was considering means to enable his officials to collect small amounts of duties without, at the same time, causing unreasonable border delay. The respondent is limited in his operations by such elements as budget constraints, limited facilities, personnel requirements, etc. To compel him to proceed the way the appellant is asking this court to direct him would be to enter into an area where <u>the respondent, by necessity, must be the only one to manoeuvre</u>. A voluntary assessment, as suggested by the appellant, with no reasonable means of checking its accuracy, might have the contrary effect of belittling the assessment process. It might provide very little encouragement to the taxpayer who would be given no receipt as evidence of duty paid by him. Protective measures may be necessary to ensure the integrity of the monies collected, the costs of which are unknown at present.
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> [30] The result, in my view, becomes obvious. Only he who is charged with such public duty can determine how to utilize his resources. This is not a case where the Minister has turned his back on his duties, or where negligence or bad faith has been demonstrated. It is a case where the Minister has established difficulties in implementation and <u>where he enjoys a discretion with which the law will not interfere</u>. [emphasis added]

It is clear to me, therefore, that the Minister did have discretion under paragraph 227(10)(*d*) as to which years to assess.

JP Morgan Had a Legitimate Expectation

The law says that when the government announces that it will follow a particular process in reaching a decision, then that creates a "legitimate expectation" that it will follow that process, and it is subject to an application for judicial review if it does not. At least so far, and contrary to the law in the United Kingdom, that doctrine does not apply to the substance of the decision itself, but does apply to the process. The Supreme Court of Canada recently summarized the doctrine of legitimate expectations as follows:[10]

> [94] The particular face of procedural fairness at issue in this appeal is the doctrine of legitimate expectations. This doctrine was given a strong foundation in Canadian administrative law in *Baker*, in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness. If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.
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> . . .
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> [97] An important limit on the doctrine of legitimate expectations is that it cannot give rise to substantive rights (*Baker*, at para. 26; Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525, at p. 557). In other words, "[w]here the conditions for its application are satisfied, the Court may [only] grant appropriate procedural remedies to respond to the 'legitimate' expectation" . . . [emphasis added]

JP Morgan alleged (there was no proof at this point) that the Minister had a published policy of not assessing for more than four years previous to the date of assessment (or in this case, not before 2004). Assuming that is true, it seems clear that there could have been a legitimate expectation that the Minister would not assess 2002 to 2004, and so the application for judicial review was brought properly.

The FCA said the doctrine did not apply because JP Morgan was arguing for a particular substantive result rather than the process by which it was reached. I disagree. It was asking for the assessments to be quashed or vacated, or whatever word you want to use (see below) because the policy was not followed, but it wasn't arguing about the merits of the assessments themselves. If the Minister says, "I won't assess you for certain years in such and such a situation", it is hard to see how that does not create a legitimate expectation that the Minister will follow that promise, regardless of the merits of the assessment.

What about Section 18.5?

As I started out saying, my initial feeling on reading this case was that section 18.5 of the *Federal Courts Act* was a complete and simple basis for dismissing the application. But now I have changed my mind.

It is true that JP Morgan could appeal the assessments to the Tax Court of Canada ("TCC"). It is also true that the FCA said that it had no jurisdiction to vacate the assessments.[11] But JP Morgan wasn't asking the Court to vacate the assessments; it was asking the Court to quash the assessments. A distinction without a difference? Maybe. I don't think so. Vacating an assessment means to dismiss it on its merits. Quashing it means to dismiss it on the basis that it was issued illegitimately in the first place. While subsection 152(8) of the Act deems an assessment to be valid unless overturned on objection or appeal, that cannot protect an assessment from being quashed if the Minister breached a legitimate expectation that the assessment would not be issued at all. It means simply that if the assessment is challenged on its merits, there is a presumption that it is correct and the onus is on the taxpayer to show otherwise.

What about *Addison & Leyen*?

In *Addison & Leyen*,[12] the Court refused an application for judicial review of the Minister's decision to assess under section 160. In the course of that refusal, the Court left the door open for judicial review even in cases where section 18.5 of the *Federal Courts Act* appeared to apply:

> [8] We need not engage in a lengthy theoretical discussion on whether s. 18.5 can be used to review the exercise of ministerial discretion. It is not disputed that the Minister belongs to the class of persons and entities that fall within the Federal Court's jurisdiction under s. 18.5. Judicial review is available, provided the matter is not otherwise appealable. It is also available to control abuses of power, including abusive delay. Fact-specific remedies may be crafted to address the wrongs or problems raised by a particular case.

> [9] Nevertheless, we find that judicial review was not available <u>on the facts of this case</u>. As Rothstein, J.A. pointed out, the interpretation of s. 160 by the majority of the Federal Court of Appeal amounted to reading into that provision a limitation period that was simply not there. The Minister can reassess a taxpayer at any time. In the words of Rothstein, J.A.:
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> > While in the sense identified by the majority, subsection 160(1) may be considered a harsh collection remedy, it is also narrowly targeted. It only affects transfers of property to persons in specified relationships or capacities and only when the transfer is for less than fair market value. Having regard to the application of subsection 160(1) in specific and limited circumstances, Parliament's intent is not obscure. Parliament intended that the Minister be able to recover amounts transferred in these limited circumstances for the purpose of satisfying the tax liability of the primary taxpayer transferor. The circumstances of such transactions mak[e] it clear that Parliament intended that there be no applicable limitation period and no other condition on when the Minister might assess. [para. 92]
>
> [10] The Minister is granted the discretion to reassess a taxpayer at any time. <u>This does not mean that the exercise of this discretion is never reviewable.</u> However, in light of the words "at any time" used by Parliament in s. 160 ITA, the length of the delay before a decision on assessing a taxpayer is made does not suffice as a ground for judicial review, except, perhaps, inasmuch as it allows for a remedy like *mandamus* to prod the Minister to act with due diligence once a notice of objection has been filed. Moreover, in the case at bar, the allegations of fact in the statement of claim do not disclose any reason why it would have been impossible to deal with the tax liability issues relating to either the underlying tax assessment against York or the assessments against the respondents through the regular appeal process.
>
> [11] Reviewing courts should be <u>very cautious</u> in authorizing judicial review in such circumstances. 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 <u>should remain a remedy of last resort in this context</u>. [emphasis added]

So it is clear that while judicial review of a decision to assess is a remedy of last resort, and that courts should be cautious in applying it, and that it could not be applied in that case because of the wording of section 160, the Court is very clear in saying that an abuse of power (and presumably other things, like ignoring one's own policy on what years would be assessed) could be a basis for judicial review, even if the matter is otherwise appealable to the TCC. That is what the word "also" means in paragraph 8 of *Addison*.

Nowhere in the FCA's long and detailed reasons in *JP Morgan* does the Court explain what these words in *Addison* mean or why they did not apply to the allegations raised in that case. The FCA virtually ignores these words.

JP Morgan may be contrasted with two even more recent cases: *Conocophillips Canada Resources Corp. v. Canada (National Revenue)*,[13] which distinguished it, and *Szymczyk v. Canada (National Revenue)*,[14] which applied it.

In *Conocophillips*, the taxpayer brought an application for judicial review in respect of the Minister's decision that a Notice of Objection (the "Objection") was filed after the deadline for doing so. The taxpayer took the position that the Minister never mailed the Notice of Assessment, so the Objection was not late.

The Crown argued, on the basis of *JP Morgan*, that the Court had no jurisdiction to review the Minister's decision to reject the Objection. According to the Crown, what was at issue was the legal efficacy of the assessment, and hence, only the TCC had jurisdiction. The taxpayer argued that was wrong; because no appeal could be brought under paragraph 169(1)(*b*) to the TCC to have it determine the issue, the FC had jurisdiction.

Somewhat surprisingly, the Court agreed with the taxpayer. With respect, the Court was clearly wrong. If more than 90 days had elapsed since the Objection was filed with no response by the Minister and the taxpayer had filed a Notice of Appeal in the Tax Court, then the Minister's Reply would have asserted that the Tax Court had no jurisdiction to hear the appeal because no valid Objection had been filed. The Tax Court clearly would have had the jurisdiction to decide that issue. *JP Morgan* should have been applied to deny jurisdiction to the FC.

In *Szymczyk*, the Minister had for many years applied a particular formula in calculating the employee benefits arising to employees of General Motors for the use of company automobiles. In 2012, the Minister reassessed all the employees back to 2008 using a less advantageous formula. The Company and the employees brought an application for judicial review to quash the reassessments.

The Court, correctly, in my view, applied *JP Morgan* to quash the judicial review application. There was no evidence that the Minister had ever created any legitimate expectation that she would not revoke the earlier formula or use any process for moving to a new formula, so there was no basis to get around the rule in section 18.5 of the *Federal Courts Act* that the reassessments had to be appealed to the TCC.

Conclusion

On balance, I think I was wrong in thinking the FCA in *JP Morgan* was right. I now think I am right in thinking it was wrong. Only the Supreme Court of Canada in some future case (as JP Morgan is not seeking leave) will be able to say if I was right, or wrong, or both, but at least I'm being honest.

A number of tax lawyers from Dentons Canada LLP write commentary for CCH's Canadian Tax Reporter *and sit on its Editorial Board as well as on the Editorial Board for CCH's Canadian* Income Tax Act with Regulations, Annotated. *Dentons Canada lawyers also write the commentary for CCH's* Federal Tax Practice *reporter and the summaries for CCH's* Window on Canadian Tax. *Dentons Canada lawyers wrote the commentary for* Canada–U.S. Tax Treaty: A Practical Interpretation *and have authored other books published by CCH:* Canadian Transfer Pricing *(2nd Edition, 2011);* Federal Tax Practice; Charities, Non-Profits, and Philanthropy Under the Income Tax Act; *and* Corporation Capital Tax in Canada. *Tony Schweitzer, a Tax Partner with the Toronto office of Denton's Canada LLP and a member of the Editorial Board of CCH's* Canadian Tax Reporter*, is the editor of the firm's regular monthly feature articles appearing in* Tax Topics.

For more insight from the tax practitioners at Dentons Canada LLP on the latest developments in tax litigation, visit the firm's Tax Litigation blog at http://www.canadiantaxlitigation.com/.

Notes:

[1] 2012 DTC 5120 (FC) (K.R. Aalto, Esquire, Case Management Judge).

[2] 2012 FC 1366.

[3] 2014 DTC 5001 (FCA).

[4] Before the coming into force of the *Canada-Hong Kong Tax Treaty*.

[5] RSC 1985, c. 1 (5th Supp.), as amended (the "Act").

[6] RSC 1985, c. F-7, as amended.

[7] *Webster v. Canada*, 2003 DTC 5701 (FCA).

[8] RSC, 1985, c. I-21, as amended, section 11.

[9] [1993] 2 FC 26 (CA).

[10] *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36.

[11] Under section 12 of the *Tax Court of Canada Act*, RSC, 1985, c. T-2, as amended, only the TCC can vacate an assessment.

[12] *Addison & Leyen v. Canada*, 2007 DTC 5365 (SCC).

[13] 2013 FC 1192.

[14] 2013 FC 1219.

DEPARTMENT OF FINANCE RELEASES DRAFT TECHNICAL LEGISLATIVE PROPOSALS

On January 9, 2014, the Department of Finance's Tax Policy Branch announced it was inviting comments on draft legislative proposals to require certain financial intermediaries to report to the CRA international electronic funds transfers of $10,000 or more. The reporting requirements, to be required beginning in 2015, are designed to combat international tax evasion and to address international aggressive tax avoidance. The request for comment is in conjunction with Finance Canada's release of its document "Explanatory Notes — Reporting of International Electronic Funds Transfers". The closing date for comment on the draft legislation is February 10, 2014, and input can be submitted via email to IEFT-TI@fin.gc.ca; in writing to: Tax Policy Branch, Department of Finance, 140 O'Connor Street, Ottawa, Canada, K1A 0G5; or by fax to 613-992-2036.

TAX PROTOCOL BETWEEN CANADA AND FRANCE ENTERS INTO FORCE

On December 30, 2013, the Protocol between the Government of Canada and the Government of the French Republic, Amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital (the "Protocol") entered into force. Signed on February 2, 2010, the Protocol has effect in accordance with the provisions of its Article III.

RECENT CASES

Father not primarily responsible for care of daughter, did not qualify for CCTBs

The taxpayer was appealing a determination that he was not eligible for the Canada Child Tax Benefits ("CCTBs") and Goods and Services Tax Credit ("GSTC") with respect to his daughter from January to July 2011. The taxpayer and his wife separated in 2009 and divorced in 2012. Child care provisions set out in a court order of 2010 stated the daughter was to live primarily with her mother, but gave the taxpayer generous access. Until July 2011, the CCTBs could only be claimed by one parent, while the parents could select who would receive the GSTC. The rules changed effective July 2011 to allow CCTBs to be split between the parents if the shared custody criteria are met. The taxpayer and his former wife did not agree about who qualified for the benefits and both applied. The Canada Revenue Agency initially ruled in the taxpayer's favour and then reversed its decision.

The taxpayer's appeal was dismissed. For the taxpayer to be eligible for the CCTBs and GSTC from January to June 2011, he must be the person primarily fulfilling the responsibility for the care and upbringing of his daughter. One of the prescribed factors to consider was the existence of a court order. By the terms of the court order, it was clear that the taxpayer spent much less time with his daughter than his former wife, which is strong evidence that his former wife was the one primarily responsible for their daughter's care and upbringing. The taxpayer was flexible with his time and was available to look after his daughter during the day more readily than his former wife, but not to the extent of being the primary caregiver. For July 2011, the shared custody rules would apply if the daughter resided on an equal or near equal basis with each of her parents, which was not the case here. The taxpayer argued it was a financial hardship for him to repay the benefits he had initially received as he had locked the funds away. While the circumstances were sympathetic, that cannot be a factor in determining the appeal. The taxpayer failed to meet the criteria to qualify as the eligible individual.

¶48,622, *Hrushka*, 2013 DTC 1254

Relocating expenses not eligible as taxpayer still worked for same employer at same location

The taxpayer claimed moving expenses of $8,502 in 2010 under subsection 62(1) of the *Income Tax Act*. She sold her home and moved 70 kilometres to Edmonton to keep her job with her employer and continue to earn employment income. The Minister disallowed the claim because the taxpayer did not move to earn income from employment at a new work location.

The taxpayer's appeal was dismissed. There was no evidence that the taxpayer's physical work location had changed or that there was an "eligible relocation" because she performed new duties with the same employer at the same business location.

¶48,624, *Langelier*, 2013 DTC 1256

Application to extend time to file appeal denied; appeal had no chance of success

The taxpayer brought an application for an order extending the time to file an appeal. She was employed by the Government of Canada as a claims adjudicator for Employment Insurance. In 2008, her employer failed to take source deductions, which was not noticed by the taxpayer until she received her T4. When she informed her employer, it admitted to making a clerical error. The taxpayer filed a notice of objection in September 2009, which the Canada Revenue Agency ("CRA") said was not a notice of objection as it dealt with source deductions and not the amount of tax assessed. The CRA indicated to the taxpayer that it would forward the document to the appropriate department, which it failed to do and then told the taxpayer to apply to the Tax Court for recourse. In her notice of appeal, the taxpayer argued that the amount of taxes owing should be written off as she did not receive fair treatment and she was not given sufficient information. She argued that she should not be responsible for the taxes that should have been withheld by her employer.

The taxpayer's appeal was dismissed. The Court's jurisdiction is limited to determining whether the Minister correctly determined the amount of taxes payable by the taxpayer. Writing off a tax debt does not fall within the Tax Court's jurisdiction, and the Court cannot grant relief on grounds of fairness. The taxpayer's liability to pay taxes on her income is not negated by her employer's failure to make appropriate withholdings. While the taxpayer's circumstances were sympathetic, her application cannot be granted as her appeal will clearly not succeed.

¶48,626, *Stein*, 2013 DTC 1258

Land acquired and sold determined to be on income account; partnership in business of buying and selling real property

The taxpayer was a member of a limited partnership that purchased 350 acres of land between 1990 and 1995 in the City of Kanata (now a suburb of Ottawa). The partnership sold a portion of these lands in 2007. The primary issue on appeal was whether the gain from that sale was on income or capital account. The taxpayer argued that the property was on capital account because it was held long-term for the development of rentals. Both the taxpayer and the Minister argued that the intention of the limited partnership had to be determined at the time the property was acquired.

The taxpayer's appeal was dismissed with costs. The testimony of the chief witness for the taxpayer was not credible. With respect to the relevant factors, it was the taxpayer's intention to resell the property once the appropriate permits were obtained from the city. The evidence that rental units were to be built on the property was unpersuasive, and the Court determined that the partnership was carrying on a business of buying and selling land.

¶48,630, *Karam*, 2013 DTC 1264

Taxpayer's application to extend time for obtaining *certiorari* challenging his commitment for trial on income tax-related charges dismissed

The taxpayer, who was self-represented, was charged with making false or deceptive statements in tax returns contrary to paragraph 239(1)(*a*) of the *Income Tax Act*; fraud over $5,000 contrary to subsection 380(1) of the *Criminal Code* (the "Code"); making a false document contrary to paragraph 268(1)(*b*) of the Code; and theft over $5,000 contrary to section 334 of the Code. Prior to his trial, he applied to the Alberta Court of Queen's Bench for an extension of time to file an application for *certiorari* challenging his committal for trial based on alleged errors made by Judge Ogle, who had conducted the preliminary inquiry.

The taxpayer's application was dismissed. The view seemed to be that the general provisions of Rule 13.5 of the *Alberta Rules of Court* permit the discretionary extension of the six-month limitation period for *certiorari* applications set out in Rule 830. Whether such discretion should be exercised, however, depended on (a) whether the taxpayer had a *bona fide* intention to appeal; (b) whether his delay in applying for *certiorari* could be excused; (c) whether he was taking any benefit from Judge Ogle's decision; and (d) whether his application had any reasonable chance of success. The Crown agreed that the criteria in (a) and (c) had been met. The taxpayer was unfamiliar with the court process and had relied on Judge Ogle's erroneous representation to him that he had a general right to appeal his committal for trial, even though no such general right exists at law. In addition, there was some uncertainty on the part of the various court registry staff members on this issue. His delay in bringing his extension application, therefore, was understandable, could be accounted for, and did not prejudice the Crown. That said, his *certiorari* application had no reasonable chance of success, as it was based on allegations that Judge Ogle lacked jurisdiction to hold the preliminary inquiry; the Crown was wrongly permitted to make a second opening statement and to call a witness out of order; Judge Ogle improperly admitted certain evidence; Judge Ogle erred in wrongly assisting the Crown to establish continuity in its evidence by suggesting that it call an additional witness; and Judge Ogle erred in refusing to permit the cross-examination of a certain witness, even though that witness's testimony was not contentious and did not form the Crown's entire case. This lack of any reasonable chance of success meant that the taxpayer's application could not succeed.

¶48,631, *Gerlitz*, 2013 DTC 5168

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